TRANSFORMING POLICE-COMMUNITY RELATIONS: THE APPLICATION OF RESTORATIVE JUSTICE PRINCIPLES TO PUBLIC COMPLAINTS AGAINST THE HALIFAX REGIONAL POLICE

by

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ABSTRACT

This thesis aims to respond to the question raised by a recent Nova Scotia Human Rights Board of Inquiry: could restorative justice offer more comprehensive and responsive outcomes than the present public complaints process of the Halifax Regional Police? As community policing theories have noted, the police and their communities are in a sensitive and important relationship. This relationship can be deeply harmed by police wrongdoing. Restorative justice, understood as a theory of justice which aims to restore relationships, could enable an exploration of contextual and systemic issues underlying allegations of police wrongdoing, and could address the associated relational breakdowns between the police and the public. Drawing upon the comprehensive Nova Scotia restorative justice program model, this thesis identifies opportunities and limitations within, and proposes modifications to, present frameworks for complaints against the Halifax Regional Police to allow for restorative justice processes – restoring relationships damaged by police wrongdoing.

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CHAPTER 1 *Extending Restorative Justice Practice to Police Complaints in Nova Scotia*

A recent Human Rights Board of Inquiry appointed under the Nova Scotia *Human Rights Act*[1] questions whether the Halifax Regional Police's "informal resolution" process adequately addresses public complaints, or whether restorative justice could offer more comprehensive and responsive outcomes.[2] This decision, which considers allegations of racial profiling in policing, suggests that the proposal should be tenable in Nova Scotia:

> Nova Scotia has developed one of the most reputable and comprehensive restorative justice programs in the world, and the police in Nova Scotia participate in it regularly in their law enforcement capacity. There is no reason that the police complaints process could not be infused with restorative justice principles, which would focus in a much more responsive and empowering way on the complainant's real concerns.[3]

The decision accurately observes that Nova Scotia enjoys a highly advanced restorative justice program which operates in the context of criminal justice. Further, it perceptively notes that there is potential for adopting elements of restorative justice in police accountability frameworks. This thesis aims to respond to the challenge presented by the decision in the *Johnson Inquiry* in assessing the applicability and appropriateness of restorative justice to the framework for complaints against the Halifax Regional Police.

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[1] *Human Rights Act*, R.S.N.S. 1989, c. 214.
[2] *Kirk Johnson v. Michael Sanford and the Halifax Regional Police Service* (22 December 2003) Nova Scotia Human Rights Commission Board of Inquiry, online: <http://www.gov.ns.ca/humanrights/publications/KJdecision.pdf>, [*Johnson Inquiry*].
[3] *Johnson Inquiry, ibid.* at 43.

Often called a "new paradigm,"[4] restorative justice reflects a fundamental shift away from adversarial responses to wrongdoing. Expanding upon Howard Zehr's assertion that restorative justice represents an entirely new paradigm, a new lens through which to view justice generally,[5] Jennifer Llewellyn and Robert Howse present restorative justice as a theory of justice.[6] Justice, they suggest, is "a response to a powerful moral intuition that 'something must be done,' that something (someone) has disturbed the way things ought to be and something must be done to right the wrong, to make things right."[7] They argue restorative justice is,

> fundamentally concerned with restoring social relations, with establishing or re-establishing social equality in relationships – that is, relationships in which each person's rights to equal dignity, concern and respect are satisfied...[and thus restorative justice] must be concerned with the discrete wrong and its relevant context and causes.[8]

Daniel Van Ness, Allison Morris and Gabrielle Maxwell have supported this approach, suggesting that restorative justice is "a new paradigm or... a new pattern of thinking."[9] They add, "It poses new questions for societies to ask and answer in responding to crime."[10]

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[4] Howard Zehr popularized the call for a new paradigm in Howard Zehr, *Changing Lenses: A new focus for crime and justice* (Scottdale, Herald Press: 1990) at 184.
[5] *Ibid.* at 184.
[6] Jennifer J. Llewellyn and Robert Howse, *Restorative Justice – A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998) at 15.
[7] *Ibid.* at 19.
[8] *Ibid.* at 15.
[9] Allison Morris and Gabrielle Maxwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart Publishing, 2001) at 1. Although their work appears to limit restorative justice to the criminal realm, many of the insights they offer have broader applicability and can guide restorative justice theorists in identifying challenges and advancing proposals. Llewellyn and Howse, *supra* note 6, present restorative justice as a much broader theory of justice.
[10] Morris and Maxwell, *supra* note 9 at 1.

To restore relationships, restorative justice processes must necessarily address a context which is much broader than the individual incident of wrongdoing. As a result, processes must be inclusive, involving anyone who is harmed by the wrongdoing. Victims are harmed by wrongdoing and thus restorative justice demands their involvement.[11] Restorative justice reflects the recognition that the harm resulting from wrongdoing also impacts the wrongdoer and the community, affecting the relationships within and between them.[12] Addressing the damage requires the involvement of all who are harmed.[13] In practice, restorative justice requires that the victim, wrongdoer and community, all of whom are acknowledged to be harmed by wrongdoing,[14] meet face-to-face.[15] Guided by a facilitator, parties share perspectives on the wrongdoing and ultimately work together to create a plan for restoration.[16]

Llewellyn and Howse have suggested that restorative justice should "be premised on and involve truth-telling,"[17] which requires that the wrongdoer acknowledge responsibility.[18] This truth-telling continues through a meeting, or an "encounter"[19] in which the victim and wrongdoer meet together with the community. A facilitator is

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[11] See generally Heather Strang, "The Crime Victim Movement as a Force in Civil Society" in Heather Strang & John Braithwaite, eds., *Restorative Justice and Civil Society* Cambridge: Cambridge University Press, 2001 at 69.
[12] Llewellyn and Howse, *supra* note 6 at 43.
[13] *Ibid.* at 45.
[14] *Ibid.* at 43.
[15] *Ibid.* at 45.
[16] *Ibid.* at 73. They refer to this as the "agreement".
[17] *Ibid.* at 57.
[18] The nature of such acknowledgment may differ for different programs and communities. As John Braithwaite and Christine Parker have noted, New Zealand has a different formal threshold for access to restorative justice ("declining to deny") rather than a straightforward admission of responsibility. John Braithwaite and Christine Parker, "Restorative Justice is Republican Justice" in Gordon Bazemore and Lode Walgrave, eds., *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Monsey: Criminal Justice Press, 1999) at 107.
[19] Llewellyn and Howse, *supra* note 6, call this meeting an encounter.

present to ensure dialogue takes place. This encounter, suggest Llewellyn and Howse, provides an opportunity for parties to "confront and challenge one another's stories of the event"[20] and come to understand harms and how they might be addressed in a manner that carries them toward restoring relationships. The work of restorative justice does not end at the adjournment of the encounter; it carries on through a plan, or agreement[21] for follow-up initiatives, which are agreed upon during the encounter.

As a theory, restorative justice is not restricted to the criminal justice realm but has much broader applicability.[22] As its aim is the restoration of relationships in response to wrongdoing, its potential is wider and is thus transferable to other contexts. Howard Zehr asserts, "Crime is a result of a legal system which makes arbitrary distinctions between various harms and conflicts...It separates them from other harms and violations and thereby obscures the real meaning of the experience."[23] This point is drawn out by Llewellyn and Howse who provide, "Once one understands...that restorative justice is concerned with the restoration of relationships, it becomes impossible to justify limiting this approach only to those conflicts defined as criminal."[24] There are many restorative justice theorists who view restorative justice as an approach to criminal justice[25] -- and the practice of restorative justice in Nova Scotia is limited to the criminal justice system. However, it is clear that the potential of restorative justice is broader than a criminal context and so it can offer an effective response to a wide range of wrongdoing, or

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[20] *Ibid.* at 59.
[21] *Ibid.* at 73.
[22] *Ibid.* at 42. Acknowledging its wider potential, Llewellyn and Howse describe restorative justice as a response to "wrongdoing".
[23] Zehr, *supra* note 4 at 183.
[24] Llewellyn and Howse, *supra* note 6 at 75.
[25] See, for example, Morris and Maxwell, *supra* note 9.

allegations of wrongdoing including those contemplated through police complaints processes.[26]

The term "restorative justice" is loosely used for diverse informal practices even when they do not in fact aim to restore relationships.[27] There is, indeed, considerable debate about what constitutes restorative justice. Bruce Archibald has succinctly identified the challenge this presents, noting, "defining restorative justice is a controversial undertaking".[28] It is widely acknowledged that there are many differing conceptions of restorative justice ranging from practice-based diversions from the criminal justice system to a broader theory of justice, and practice differs greatly depending on one's conception.[29] However, while these may reflect some elements of restorative justice,

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[26] John Braithwaite has examined the applicability of restorative justice to corporate Regulation. See, for example, John Braithwaite, "Restorative justice and corporate regulation" in Elmar G.M. Weitekamp & Hans-Jürgen Kerner, eds., *Restorative Justice in Context: International practice and directions* (Portland: Willan Publishing, 2003) at 161. See also Braithwaite, *infra* note 235.

[27] Some practices may be given the title to reflect their status as alternative processes without suggesting that they have a different purpose or goal. For example, Mark Umbreit's characterization of restorative justice is manifested as "victim-offender mediation" which he suggests is "[t]he clearest expression of restorative justice theory." See Mark Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (Monsey: Willow Tree Press, Inc., 1994) at p. 5. This conception, however, does not necessarily contemplate meaningful involvement of the community as a party, nor does it necessarily have, as an aim, the restoration of relationships, but rather, constitutes a conflict resolution process.

[28] Bruce P. Archibald, "Citizen Participation in Canadian Criminal Justice: The Emergence of 'Inclusionary Adversarial' and 'Restorative' Models" in Stephen G. Coughlan and Dawn Russell, *Citizenship and Citizen Participation in the Administration of Justice* (Montreal: Canadian Institute for the Administration of Justice, 2001) 148 at 173, footnote 134.

[29] Daniel Van Ness and Karen Heetderks Strong trace a number of different approaches under the informal justice movement in *Restoring Justice*, 2nd ed. (Cincinnati: Anderson Publishing, 2002). See also Paul McCold, "Researcher's New Theoretical Framework Assesses Degree to which Practices meet Standards of Restorative Justice," (2000) 8 Real Justice Forum 3. Notably, some initiatives identified as restorative justice do not offer or reflect a clear sense of what restorative justice is beyond a label for an alternative practice and they are often without concrete theoretical bases. They may simply replicate informal resolution approaches or may reflect a conception of restorative justice that is descriptive of practice with no theory behind it.

unless they challenge the underlying approach to justice that has been identified as problematic,[30] they do not comport with the parameters and theoretical foundations of restorative justice understood as a relational theory of justice. It is this conception that animates and guides the analysis in this thesis.

In Nova Scotia, restorative justice is presently one of the responses to wrongdoing offered through the criminal justice system. The police are often involved in restorative justice processes in Nova Scotia pursuant to their roles in investigating and responding to crime. The Nova Scotia restorative justice program is arguably one of the best in the world[31] and thus offers a rich template from which ideas can be drawn. The practice of restorative justice takes many forms,[32] and so countless models could have been selected for this case study. The Nova Scotia restorative justice program offers an excellent model in terms of implementing practice that reflects the conception of restorative justice as a relational theory of justice; it is this conception in which this thesis is grounded. Its founding principles include: "Holding offenders accountable in a more

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[30] See generally Jennifer Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR and Restorative Justice" (2002), 52 University of Toronto Law Journal 253. In the context of harms resulting from abuse in residential schools, she suggests, at p. 253, that the adversarial legal system is inappropriate for many reasons in the context of abuse of aboriginal children in the residential school system, including the fact that it conceives of the concerns as private disputes, restricts the opportunities for participation, cannot provide appropriate remedies, and has high costs associated with accessing the formal system.

[31] The program is institutionalized by government and thus enjoys a relatively high degree of stability. It is standardized across the province in terms of general operational guidance and oversight; however, each locally-based agency enjoys the autonomy to create whatever process is deemed most appropriate in that community context. The foundational documentation for the program include the program authorization and protocols. See Nova Scotia, Department of Justice, *Restorative Justice Program: Program Authorization* (Halifax, 11 August 1999); Nova Scotia, Department of Justice, *Restorative Justice Program Pre-charge / Post-charge Protocol* (17 May, 2000); Nova Scotia, Department of Justice, *Restorative Justice Program Protocol* (16 September 2005).

[32] Some discussion of various forms of restorative justice practice is found in Chapter 3, below.

meaningful way, and giving victims and communities a voice in the response to crime will result in a decrease in recidivism rates, and an increase in victim satisfaction."[33] Further, it aims to be flexible in order to meet the needs of offenders, victims and communities.[34] In addition to being designed pursuant to the theoretical foundations adopted for this thesis, it is well established, and the physical proximity of its administration (the program's coordinator is based at the provincial Department of Justice building in Halifax) offers the opportunity for this thesis to consider structures, processes and challenges unique to the program – and how they might be useful guides for police complaints.

Because of its strong theoretical foundation, the Nova Scotia restorative justice program offers a rich model from which to assess or contemplate the transferability of practice elements to police accountability processes. This project explores a different application of restorative justice by considering how it can be applied when the wrongdoing in question is alleged to have been committed *by* the police. Restorative justice processes, in response to certain types of allegations against the Halifax Regional Police, could enable an exploration of contextual and systemic issues underlying allegations of police wrongdoing,[35] and could encourage action to restore the harm caused by the wrong, and address the associated relational breakdowns between the police and the public.

The Police and their Communities: Strained Relations

The value of restorative justice for police complaints may be elucidated through some examples of strained police-community relations. On April 12, 1998, Kirk Johnson and

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[33] Nova Scotia Department of Justice, *Restorative Justice Framework,* online: <http://www.gov.ns.ca/just/rj/rj-framework.htm>

[34] *Ibid.*

[35] This may best respond to certain types of wrongdoing, which are discussed in further detail in subsequent chapters.

Earl Fraser were stopped by Constable Michael Sanford of the Halifax Regional Police. Johnson's valid Texas registration and insurance documents were inspected and rejected, and his car was ticketed and towed. Mr. Johnson alleged that actions and omissions during the course of this interaction reflected racial discrimination on the part of Constable Sanford and the Halifax Regional Police.[36]

The Board of Inquiry found that many aspects of the complaint did, in fact, constitute discrimination contrary to the *Human Rights Act*.[37] The decision alludes, throughout, to the implications of the incident for the broader relationship between the Halifax Regional Police and the black community in the municipality, and the history of this relationship. At one point, the volatility of the situation – and potential impact of an individual incident on public perceptions of the police – is expressly noted: "If the police had tried to arrest Kirk Johnson that evening for stealing his own vehicle there is no doubt in my mind that a 'race riot' of some kind would have ensued."[38]

A consultant report[39] commissioned pursuant to the *Johnson Inquiry* supports the idea

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[36] Mr. Johnson testified that he had been stopped 28 times during his visits to Nova Scotia over the previous five years; visits which amounted to a total of three months. Although evidence of 21 such stops was made available during the inquiry, the board found it inappropriate to consider this evidence in examining the actions of one individual officer. See *Johnson Inquiry*, *supra* note 2 at 17. These numbers could, however, raise concerns about systemic discrimination affecting their perceptions of the police generally.

[37] *Human Rights Act*, *supra* note 1. See also *Johnson Inquiry, supra* note 2 at 34.

[38] *Johnson Inquiry*, *supra* note 2 at 31. Jeffrey Ross suggests that riots may be influenced by media, in Jeffrey Ian Ross, *Making News of Police Violence: A Comparative Study of Toronto and New York City* (Westport: Praeger Publishers, 2000) at p.2. Given Kirk Johnson's status as a well known boxer as acknowledged at p. 2 of the *Johnson Inquiry*, *supra* note 2, this comment reflects the likelihood of broader community support for his position.

[39] Perivale and Taylor, *Excellence Though Diversity – A Report On the Education and Training Needs in Diversity of the Halifax Regional Police* (Halifax: Perivale and Taylor, 2005), online: <http://www.police.halifax.ns.ca/WhatsNew/attachments/perivale%20+%20taylor%20Final%20Report.pdf>.

that there is a negative relationship between the Halifax Regional Police and the African Nova Scotian community, providing,

> The relationship between the African Nova Scotian community and the Halifax Regional Police is dysfunctional. At best, the relationship is severely strained and, at worst, irreconcilably estranged. There are also tensions between the police and members of other diverse racial, ethnic, cultural and religious communities within the Region.[40]

Police officers hold broad, potentially coercive powers, and serve as representatives of the state. Gabriella Pedicelli has commented on the powers held by the police:

> As with the military, the police engage in more acts of coercion than most other government agencies, the most controversial of which takes the form of physical violence which may be fatal to its victims. In fact, the mandate to use force, including deadly force, stands at the core of the police raison d'être and is perceived as a normal and acceptable aspect of policing. It is one of the few organizations whose mandate allows for the legally sanctioned killing of people. Policing is defined by the potential for violence which it possesses and requires to defend society against wrong-doers.[41]

In exercising this coercive authority, the potential for abuse of power – or perceptions of such abuse – is high. Incidents or reports of police wrongdoing can taint the sense of safety among the public generally leading to fear of, and hostility toward, the police. A pressing contemporary challenge is presented by strained relations between officers and communities that they police.[42] Tension between the police and their respective communities is not unique to Halifax. Media reports of police misconduct are commonplace, and the past several years have seen many reports and inquiries examining police action or inaction.[43] This wrongdoing is highly damaging for the

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[40] *Ibid.* at 4. It should be noted that, while the focus of the *Johnson Inquiry, supra* note 2, related to the relationship of the police with a minority community, the discussion in this thesis is not particular to strained relationships between the police and minority communities.

[41] Gabriella Pedicelli, *When Police Kill: Police Use of Force in Montreal and Toronto* (Montreal: Véhicule Press, 1998) at 19.

[42] See generally *infra* notes 45 through 69.

[43] *Ibid.*

victims, but it also extends much more broadly to affect the relationship between the police and the community, undermining faith in the administration of justice generally.

There have been numerous high-profile cases in Canada which have reflected and exacerbated strained relations between law enforcement officials and the public.[44] An exploration of a few specific incidents and their responses provides a snapshot of breakdowns in police-public relations. The outcomes of these investigations and inquiries include calls for mechanisms to improve such relations. The mechanism used to respond, then, should be grounded in an approach which has a focus on restoring relationships.

Perhaps one of the most high-profile problematic incidents in Canadian policing involved a protest in Vancouver, British Columbia in November 1997 during the Asia Pacific Economic Cooperation Conference. This resulted in clashes between protestors and the police. The Commission for Public Complaints against the RCMP held a lengthy public hearing to examine allegations of RCMP wrongdoing including unlawful and inappropriate assault by pepper spray upon protesters. Among the many recommendations resulting from this process were mechanisms to improve relations between the police and public:

> Recommendation 31.1.9 Relations with protesters
> The RCMP should continue to follow, and enhance where appropriate, its existing open door policy of meeting and working with the leadership of protest groups, well in advance of a planned public order event, with a view to both police and protesters achieving their objectives in an environment that avoids unnecessary confrontation.[45]

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[44] *Ibid.*

[45] *APEC Interim Report* (31 July 31 2001), Commission for Public Complaints against the RCMP, online: <http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.aspx?articleid=234#31_1_9>. The Commission Chair, Shirley Heafey, added a comment in the final report: "The development of cooperative relationships between police and peaceful protesters at major public order events is a key to minimizing conflict. Our efforts in

Racial profiling, one of the issues discussed at length in the *Johnson Inquiry*, has also received a great deal of attention in recent years, particularly in the province of Ontario. The *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*[46] and a more recent report by the Ontario Human Rights Commission[47] broadly examine concerns relating to differential policing based on race. The Kingston Regional Police, in conjunction with the Centre for Criminology at the University of Toronto, recently participated in a research study examining police-public contact to assess the potential for racial profiling.[48] In explaining his decision to participate, the Chief of Police has stated,

> It was our opinion that police services across Canada have chosen to refrain from examining themselves in a methodical or measurable manner to determine if they were in fact engaging in bias free policing or, conversely, bias-based policing. Similarly, there has been minimal discussion and therefore little action regarding the monitoring of police interactions with citizens with a view to exploring shortfalls in standard practices or identifying trends that might be counterproductive to police–community relations.[49]

Some were surprised by the preliminary results which suggest that a significant degree of racial profiling is taking place.[50]

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contacting protesters in advance to discuss security issues with them are aimed at the development of an atmosphere of collaboration between police and protesters. We want to work cooperatively with protesters to find ways to protect all participants, while ensuring the right to peaceful protest." *APEC Final Report* (25 March 2002), online:<http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.aspx?ArticleID=374>.

[46] Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) at 40-1.

[47] Ontario, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003), online: <http://www.ohrc.on.ca/english/consultations/racial-profiling-report.shtml>. See also The Honourable George Ferguson, Q.C., *Review and Recommendations Concerning Various Aspects of Police Misconduct* (Toronto: Toronto Police Services, 2003), online: <http://www.torontopoliceboard.on.ca/Board%20Policies/ferguson_vol1.pdf>.

[48] William J. Closs, *The Kingston Police Data Collection Project: A Preliminary Report to the Kingston Police Services Board* (Kingston: Kingston Police, 2005), online: <http://www.police.kingston.on.ca/Bias%20Free%20Policing.pdf>.

[49] *Ibid.* at 2.

[50] Scot Wortley, *Bias Free Policing: The Kingston Data Collection Project Preliminary Results* (Toronto: Centre of Criminology, University of Toronto, 2005), online: <http://www.police.kingston.on.ca/Professor%20Wortley%20Report.Kingston.pdf>. See

It has long been acknowledged that the Canadian justice system generally has a horrendous track record in its dealings with Aboriginal Canadians. This fact was documented in the *Royal Commission on the Donald Marshall, Jr., Prosecution*,[51] which found generally that "[t]he criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983...[the fact that those in the system] did not [act competently and professionally] is due, in part at least, to the fact that Donald Marshall, Jr. is a Native."[52] The more recent *Royal Commission Report on Aboriginal Peoples* confirmed, at the national level, the differential access to justice experienced by Aboriginal Canadians.[53] The 1995 shooting death by police of an unarmed Aboriginal man, Dudley George, in Ipperwash, Ontario, has received international scrutiny.[54] After years of criticism for a lack of formal response, an inquiry was finally called into this matter in 2003 by the government of Ontario.[55] Another inquiry exploring the issue of relations between the police and Aboriginal Canadians was

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also CBC News Online, "Police stop more blacks, Ont. Study finds" (27 May 2005), online: <http://www.cbc.ca/story/canada/national/2005/05/26/race050526.html>.

[51] Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: the Commission, 1989). This is comprised of a seven-volume report. Of particular note are volumes two, three and four: "Public Policing in Nova Scotia" (vol. 2); "The Mi'kmaq and Criminal Justice in Nova Scotia" (vol.3); "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System: a research study" (vol. 4).

[52] *Ibid.* at 1.

[53] Canada, *Royal Commission Report on Aboriginal Peoples* (Ottawa: Canada Communication Group - Publishing, 1996), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ch/rcap/index_e.html>.

[54] Concern about this incident – and the lack of investigation -- has been expressed by the United Nations Human Rights Committee: "The Committee is deeply concerned that the State party so far has failed to hold a thorough public inquiry into the death of an aboriginal activist who was shot dead by provincial police during a peaceful demonstration regarding land claims in September 1995, in Ipperwash. The Committee strongly urges the State party to establish a public inquiry into all aspects of this matter, including the role and responsibility of public officials." UN HCHR UN Doc. CCPR/C/79/Add.105 (1999). See also Amnesty International, "Canada: Why there must be a public inquiry into the police killing of Dudley George," online: <http://www.amnesty.ca/ canada/amr200203.php>

[55] Ontario, *Ipperwash Inquiry*, online: <http://www.ipperwashinquiry.ca/>

recently completed.[56] The *Inquiry into the Death of Neil Stonechild*[57] reviewed the freezing death of Neil Stonechild, an Aboriginal teenager, on the outskirts of Saskatoon following contact with the city police department.[58] A number of other similar deaths of Aboriginal men caused public scrutiny of the Saskatoon police, but only the case of Neil Stonechild was found to warrant an inquiry.[59] Mr. Justice David H. Wright, Inquiry Commissioner, provides in his report,

> As I reviewed the evidence in this Inquiry, I was reminded, again and again, of the chasm that separates Aboriginal and non-Aboriginal people in this city and province. Our two communities do not know each other and do not seem to want to. The void is emphasized by the interaction of an essentially non-Aboriginal police force and the Aboriginal community.[60]

He illustrates the degree to which Aboriginals are alienated from the police in Saskatchewan by referring to testimony from an Aboriginal and a non-Aboriginal witness regarding their willingness to contact the police in an emergency. Whereas the non-Aboriginal person claims to contact the police without hesitation, the Aboriginal person indicates extreme resistance to raise a concern with police. He concludes that the police have not addressed this relational chasm: "I cannot leave this area without noting that the Saskatoon Police Service's submissions regarding the improvements to the Service did not contain any reference at all to attempts to improve the Service's interaction with

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[56] Saskatchewan, *Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Regina, Queen's Printer, 2004), online: <http://www.stonechildinquiry.ca/>, [*Stonechild Inquiry*].

[57] *Ibid.*

[58] CBC News Online, "Who was Neil Stonechild?" (26 October 2004), online: <http://www.cbc.ca/news/background/stonechild/>.

[59] Several men were found frozen to death in early 2000 on the outskirts of Saskatoon and one man, Darryl Night, alleged that he had been picked up by the Saskatoon Police Services and dropped off on the outskirts of town in freezing temperatures. The Saskatoon Chief of Police approached the Minister of Justice to call for an RCMP investigation into the circumstances surrounding these deaths. Two officers were convicted of unlawful confinement of Mr. Night, and it was determined that no charges were warranted for the other incidents; however, there was evidence that Neil Stonechild had contact with the Saskatoon Police Services on the day he died and thus the Saskatchewan Minister of Justice called for an inquiry into his death. See online: <http://www.stonechildinquiry.ca/backgrounder.shtml>

[60] *Stonechild Inquiry*, *supra* note 56 at 208.

Aboriginals and other racial groups. This is an area that requires more emphasis and attention."[61]

Pedicelli comments generally on strained relations between the police and communities, noting that this breakdown *vis-à-vis* some racialized communities in particular, has become a self-perpetuating cycle:

> A relationship exists between police power and control and the need to maintain respect for their authority. Violence against visible minorities, primarily blacks and Hispanics, occurs most often when these groups demonstrate a lack of respect towards the police. However, this attitude is often the result of routine mistreatment by the police. Because of their actions the police are a symbol of all that is hated. It is a vicious cycle of police mistreatment of certain groups leading to distrust and a lack of respect which ultimately results in further mistreatment.[62]

Pedicelli focuses her analysis on Montreal and Toronto but her observations are applicable to the Canadian context generally and thus these concerns are relevant for Nova Scotia as well, particularly in light of manifold evidence of strained relations between the police and minority communities in this province.[63] The incidents described above illustrate deeper problems – and indeed, create deeper problems – between police and public relations than the isolated incident in question and thus need a process that can both address the relationship and the incident (i.e., enable a discussion of underlying context) and deal with the harm to the relationship (i.e., devise a plan for restoration).

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[61] *Ibid.* at 210.
[62] Pedicelli, *supra* note 41 at 20.
[63] Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: the Commission, 1989). See also *R. v. R.D.S.* [1997] 3 S.C.R. 484 and Richard Devlin, "We can't go on together with suspicious minds: Judicial Bias and Racialized Perspective," (1995) 18 Dalhousie Law Journal 408.

Significance of Police/Community Relationships

The police and the public, or more specifically, the communities in which they operate, are in a sensitive and important relationship. The police wield a high degree of power over the community – and yet they form part of the community. Perhaps more importantly, the police rely on the community to adhere to the law, prevent crime and report suspicious incidents and conduct. Further, the police rely on their own legitimacy with the community to be able to appropriately fulfill their duties. In order to maintain these balances, there must be a positive relationship between the police and community. While there may be widespread support for the police and their role in ensuring public safety and maintaining social order,[64] police wrongdoing – or allegations of police wrongdoing even if proven to be unfounded – can create difficult relationships between the police and their communities and undermine those which were previously positive. As such, the relationships become damaged.

One consultant report[65] commissioned pursuant to the recommendations in the *Johnson Inquiry*[66] comments on the necessity of positive police - community relations in the administration of justice:

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[64] Dennis Forcese, *Policing Canadian Society* (Scarborough: Prentice Hall, Inc., 1999) at 41. While he acknowledges that various factors influence one's impression of the police, he suggests, at p. 41, that the "prevalent Canadian stereotype...is romantic, the stuff of television and movies, the heir to the good guy-bad guy imagery of western movies."

[65] Hari Das, *Breaking Barriers to Excellence: A Report on the Education and Training Needs of the Halifax Regional Police Service in Diversity Management* (Halifax: Das Management and Educational Services, 2004), online: <http://www.police.halifax.ns.ca/WhatsNew/attachments/DAS%20management1.pdf>. Perivale and Taylor similarly note, "There are... many positive aspects to the police / community dynamic [in the Halifax Regional Municipality]. It is apparent that there is significant support within the Region for the policing services and recognition that maintaining safety and security is a very difficult task." Perivale and Taylor, *supra* note 39 at 4.

[66] The *Johnson Inquiry, supra* note 2 at 39, mandates the retention of two consultants to "conduct a needs assessment of [the Halifax Regional Police's] current policies and practices on anti-racism education and diversity training."

> Public trust in policing is essential. The effectiveness of police in creating public safety depends, to a great extent, on the willingness of the public to assist police in a number of ways, such as, reporting of crime, taking preventive action and helping to alleviate conditions that facilitate crime. Alleged arbitrary and abusive behaviour by police alienates the public and undercuts their willingness to assist police. Paradoxically, police can be critically influential in reducing the hatred and violence that arise in a multicultural milieu by being fair, effective and open in the way they discharge their core responsibilities, protecting lives and property.[67]

Jeffrey Ross argues that media portrayal of police action is an important factor in shaping these public perceptions.[68] Allegations of police wrongdoing may be broadcast almost instantaneously, causing severe damage to broader public perceptions of the police. As the recent riots in France have illustrated, a mere perception that police have been involved in wrongdoing (in this instance, civil unrest was sparked by the electrocution of two teenagers who were hiding in a power station because they believed they were being pursued by the police)[69] can cause great damage to the relationship between the police and their communities. By the time the events may be investigated, clarified, or contexualized (i.e., such allegations may be purely speculative or based on simple misunderstandings) there has already been damage to the relationship. Therefore, there is a need for some mechanism or process whereby this broader harm can be considered and addressed. Restorative justice can offer a process through which to respond to this harm.

Legal developments in the past few decades have broadened the implications of police wrongdoing, and have enhanced the significance of the relationship between the police and the public. The *Canadian Charter of Rights and Freedoms* entrenches the

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[67] Das, *supra* note 65 at 5.
[68] Jeffrey Ian Ross, *Making News of Police Violence: A Comparative Study of Toronto and New York City* (Westport: Praeger Publishers, 2000). He restricts his discussion to police violence; however, his analysis is useful in considering police wrongdoing generally.
[69] Christine Ollivier, "French President calls for calm, firm hand in riot-hit suburbs" *CBC World News* (7 Nov 2005), online: <http://www.cbc.ca/cp/world/051102/w110236.html>.

importance of faith in the administration of justice in the Canadian legal system.[70] This is considered so pressing that section 24(2) authorizes the exclusion of evidence when its admission "would bring the administration of justice into disrepute."[71] The *Charter* has introduced a mechanism through which the outcome of a matter considered through the criminal justice system can, itself, be impacted by the conduct of the police in the course of investigations,[72] and as such, formalizes the value of faith in the justice system. One way that the practice of policing has developed so as to ensure faith in the administration of justice has been through public participation in policing. The relationship between the police and the public, as a key component of policing itself, is a point that is drawn out in conceptions of community policing processes. There has been a strong recognition that links between democracy and participation are essential in government,[73] and the relationship between the police and the public is one manifestation of this.[74] Therefore these values should be reflected in any response to wrongdoing that flows from complaints against the police.

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[70] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [*Charter*]. Sections 7 through 14 outline legal rights in relation to the administration of justice.

[71] *Ibid.,* s. 24(2). The Supreme Court of Canada has considered this provision at length. For discussions relating to the allowable manner of obtaining evidence, see, for example, *R. v. Therens* [1985] 1 S.C.R. 613 and *R. v. Brydges* [1990] 1 S.C.R. 190. For a discussion of the nature of evidence which may be excluded, see *R.* v. *Stillman,* [1997] 1 S.C.R. 607 and *R. v. Feeney*, [1997] 2 S.C.R. 13.

[72] *Ibid.*

[73] Jürgen Habermas, "On the internal relationship between the rule of law and democracy" in Ciaran Cronin and Pablo De Greif, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: MIT Press, 1998) 253 at 259. See also Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996).

[74] See generally Gary W. Cordner and Robert Sheehan, *Police Administration* 4th ed., (Cincinnati: Anderson Publishing Co, 1998).

Community Policing

While public participation in policing may be considered a reflection of democratic principles, it has been noted that the fact of policing in democratic societies does not imply that the organizational structure of policing agencies is modeled upon such principles.[75] Peter Kratcoski and Wojciech Cebukak have advocated a more democratic approach to police work. They suggest,

> There is growing acknowledgement that police departments organized and administered along rigid, bureaucratic, militaristic lines are not conducive to effective policing in a complex, democratic society. In order to be effective, officers today must understand the law and its dynamics, interact effectively and fairly with the public, have the patience and training to handle the routine matters that make up much of the job's activity, and exercise their own judgment wisely in situations that demand police discretion.[76]

Expanding upon this notion, Gary Cordner and Robert Sheehan have suggested, "[i]n the modern era, the most promising and effective response to the difficult challenges of policing in a free society has been community policing." They note that this is "a different way of doing policing, [and] it may require a different approach to police administration – both a different approach to the internal role of running the police department and a different approach to the external role of dealing with the community and its problems."[77] This could have important implications for the perception of policing, because it redefines the relationship police have with their communities. Michael Cavanagh has succinctly articulated the implications of this redefined role:

> [O]fficers are more public as community police officers than they were in their previous assignments. Whatever they do or say will have ripple effects that, for better or worse, reach the farthest ends of the community...Officers should

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[75] Peter C. Kratcoski and Wojciech Cebulak, "Policing in Democratic Societies: An Historical Overview" in Dilip K. Das and Otwin Marenin, eds, *Challenges of Policing Democracies: A World Perspective* (Amsterdam: Gordon and Breach Publishers, 2000) 23 at 25.
[76] *Ibid.* at 25.
[77] Cordner and Sheehan, *supra* note 74.

> realize that both friendly and critical eyes are on them every second of the day, which is likely to have positive or negative repercussions at some future time.[78]

Police have a potentially coercive role and require a certain degree of authority so as to maintain order. Community policing initiatives promote a changing relationship between the police and their communities. Attempts have been made to bring the rhetoric of police-community partnerships into fruition through collaborative programs and outreach initiatives. This is certainly the case for the Halifax Regional Police, whose mission statement is, "[l]eading and partnering in our community to serve and protect."[79] The Halifax Regional Police assert that they implement a community policing philosophy in many ways including conducting "[p]ublic education through programs to inform and educate the public about problems in their neighbourhoods...encouraging community involvement with police... and problem solving hand-in-hand with the community to both prevent crime and advance community safety."[80] In a recent public statement, Chief Frank Beasley called upon the community to partake in opportunities for collaboration:

> Halifax Regional Police have re-dedicated themselves to the community. Community policing is nothing new. In our efforts to maintain strong two-way communication with the community, we hope this website and the services it provides will be helpful in our goal to make the community a safer place to live and work....We encourage you to get involved in your community and work hand-in-hand with police to initiate crime prevention programs to help maintain a high standard of living and safety that we can be proud of. [81]

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[78] Michael E. Cavanagh, *Policing within a Professional Framework* (Upper Saddle River: Pearson Education, Inc., 2004).
[79] Halifax Regional Police, online: <http://www.halifax.ca/Police/>.
[80] Halifax Regional Police: Mission, online: <http://www.halifax.ca/Police/About HRP/mission.html>.
[81] Halifax Regional Police: Chief's Message, online: <http://www.halifax.ca/police/Departments/chiefsmessage.html>. Don Clairmont has also published studies on community policing. See, for example, Don Clairmont, *The Active Police Organization: Community-Based Policing at Halton Regional* (Halifax: Atlantic Institute of Criminology, 1997).

The opportunities for community participation in the Halifax Regional Municipality include a "VIP: Volunteers in Policing" program with opportunities in block parenting, citizen patrol programs, neighborhood watch programs, and youth initiatives.[82]

Notably, the legislative framework in Nova Scotia, the *Police Act*[83] and its associated regulations,[84] acknowledges the importance of community input into policing.[85] Section 6(i) of the *Police Act* authorizes the Minister of Justice to "establish programs and methods designed to create between the public and the police a mutual understanding of police functions, duties and responsibilities and to promote police relationships with the news media and the community."[86] Moreover, the legislation mandates the consideration of community needs, values and expectations at an operational level. Every municipality with a municipal police department must establish a Municipal Board of Police Commissioners, pursuant to section 44(1) of the *Police Act.* The legislation outlines, at section 55(3), the obligations of these boards to communities, to:

> (c) ensure that community needs and values are reflected in policing priorities, objectives, goals, programs and strategies;
> (d) ensure that police services are delivered in a manner consistent with community values, needs and expectations;
> (e) act as a conduit between the community and the police service providers.

To ensure communities policed by RCMP or provincial police benefit from similar structures, the *Police Act* mandates the establishment of Police Advisory Boards.[87] These boards are responsible for providing advice on policing, subject to limitations

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[82] *Halifax Regional Police*, supra note 79.
[83] *Police Act,* S.N.S. 2004, c. 31.
[84] *Police Regulations,* N.S. Reg 230/2005, s. 24
[85] This *Police Act* was proclaimed in force January 1, 2006, effectively replacing the former legislation. The complaints framework is, in large part, similar to that under the old *Police Act,* R.S.N.S. 1989, c. 348 (repealed).
[86] *Police Act, supra* note 83, s. 6(i)
[87] *Ibid.*, s. 57(1).

relating to jurisdiction.[88] Further, subject to police contracts or policing agreements, these boards must ensure community needs, values and expectations are reflected in policing.[89] They are obliged to:

> (c) ensure that community needs and values are reflected in policing priorities, objectives, goals, programs and strategies;
> (d) ensure that police services are delivered in a manner consistent with community values, needs and expectations;
> (e) act as a conduit between the community and the police department.[90]

These examples suggest that the legislative framework for policing in Nova Scotia places increasing weight upon community relations, and moreover, considers communities to be valuable stakeholders in, and contributors to, policing in the province. Furthermore, the Halifax Regional Police have integrated community policing philosophies into day-to-day practice and have developed many initiatives aimed at ensuring the community can contribute meaningfully to their work.

This reflects a focus on the relationships at stake in the work that is done by the police. That is, community policing has, as a focal point, the relationship between the police and the community. This drive towards the implementation of community policing philosophies appears to be motivated by a recognition of the importance of this relationship, suggesting that divisive issues should be responded to in a way that restores that relationship. There is potential for restorative justice processes embedded

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[88] *Ibid.*, s. 68 (1). The function of an advisory board is to provide advice to the council in relation to the enforcement of law, the maintenance of law and order and the prevention of crime in the municipality, but the advisory board shall not exercise jurisdiction relating to complaints, discipline, personnel conduct or the internal management of the Royal Canadian Mounted Police. This illustrates the intent for community policing approaches to be consistently applied across the province.
[89] *Ibid.*, s. 68(3).
[90] *Ibid.*

in communities. There is also an institutional context for this, in mechanisms of civilian oversight.

Efforts to Improve Police-Community Relations through Civilian Oversight

In Canada, the most widespread institutional mechanism for addressing relational concerns between the police and community in response to allegations of police wrongdoing has been through the proliferation of civilian oversight agencies. Calls for improving the relationships between police and their communities is a theme that has emerged from ad hoc formal inquiries into police wrongdoing; such calls fall on the heels of informal demands from community groups.[91] A common theme in investigations and inquiries into police wrongdoing is the recognition that there is a need for institutional, procedural and administrative reform,[92] and this has led to public participation in complaints processes. In practice, this has meant that permanent agencies comprised of civilians will conduct arms-length investigations and address allegations of police wrongdoing.

In Canada there are several civilian oversight agencies tasked with ensuring independent responses to allegations of police wrongdoing.[93] A clear example of the establishment of a civilian oversight agency specifically in response to concerns about relations with the public is the Military Police Complaints Commission, whose

[91] While it is common for community groups to make calls for improved relations between the police and the public in response to specific incidents, some advocacy groups have organized specifically for this purpose. The Toronto Police Accountability Coalition, online: <http://www.tpac.ca/index.cfm> offers an example.
[92] Such changes may include the establishment of improved independent police complaints bodies, altered responses to complaints, and education/training for officers.
[93] A list of the civilian oversight agencies in Canada has been compiled by the Canadian Association for Civilian Oversight of Law Enforcement, online: <http://www.cacole.ca/resource_library/complaint_processes_can.html>.

establishment was called for in the *Report of the Somalia Commission of Inquiry*.[94] The Commission for Public Complaints against the RCMP is the civilian agency that oversees the national police force.[95] In Nova Scotia, the Complaints Commissioner is the civilian oversight authority designated to hear complaints about municipal police officers.[96]

An emphasis on civilian oversight of law enforcement is not unique to Canada, nor are the concerns leading to such action. For example, in considering the context of Northern Ireland, Shannon McNulty has suggested that civilian oversight of police accountability frameworks

> ...stems from distrust of the police's ability to investigate themselves. This distrust – and distrust of the police in general – is particularly prevalent in minority communities, where the people feel that they are not adequately represented among the police force, and that they are not sufficiently involved in police decision-making processes.[97]

Similarly, the Centre for Criminological Research of the University of Oxford has recently asserted, "[m]ost academic and official commentators have concluded that, in its practical operation, the [police complaints] system in England and Wales has failed to secure an adequate degree of public confidence."[98] This comes on the heels of numerous reports and inquiries aimed at examining police-community relations in

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[94] Canada, *Report of the Somalia Commission of Inquiry* (Ottawa: Minister of Public Works and Government Services Canada, 1997, online: <http://www.dnd.ca/somalia /somaliae.htm>. Chapter 39, in particular, discusses public relations and public accountability.
[95] Canada, Commission for Public Complaints against the RCMP, online: <www.cpc-cpp.gc.ca>.
[96] Nova Scotia Police Complaints Commissioner, online: <http://www.gov.ns.ca/just/ polcomm.htm>. This one-member body replaces the Police Commission.
[97] Shannon McNulty, "Building Trust in Northern Ireland: The Role of Civilian Review of the Police" (2002) 12 Indiana International and Comparative Law Review 219 at 219.
[98] Roderick Hill, Karen Cooper, Carolyn Hoyle and Richard Young, *Introducing Restorative Justice to the Police Complaints System: Close Encounters of the Rare Kind* (Oxford: University of Oxford, Centre for Criminological Research and Probation Studies Unit, 2003) at iii.

England.[99] The Independent Police Complaints Commission has recently been established with an objective of enhancing public confidence in the complaints process.[100]

While these mechanisms open the door for community involvement thus, perhaps, enhancing the public accountability of the complaints process, they retain an adversarial focus and do not have as their aim the restoration of relationships. As such, they may pay insufficient attention to the relational aspects of these incidents and thus their responses often fail to address relational breakdown, particularly with the broader community. This stymies the ability of these processes to understand broader harm, and eliminates altogether the unique contributions communities can make to restoration. Further, such initiatives contemplate only narrowly construed conceptions of the community (if any) and thus cannot contribute meaningfully to restoration. While the outcome of an investigation may include recommendations for various relationship-building initiatives, there is no opportunity for constructive engagement with communities in connection with specific harms *as part of responding to these harms.* For example, the *Johnson Inquiry* raised concerns about the adequacy of race-relations training.[101] While such initiatives may address a crucial component of proactive relationship-building, there remains a need for a mechanism to include discussion of relational matters as part of a

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[99] Philip Rawlings, *Policing: A Short History* (Devon: Willan Publishing, 2002) notes, at 200, that a Royal Commission on Police was appointed in 1960. See also U.K., *The Stephen Lawrence Inquiry Report* (London: Secretary of State for the Home Department, 1999), online: <http://www.archive.official-documents.co.uk/document/cm42 /4262/4262.htm>. The report examines the mishandling of the investigation of the racially-motivated murder of Stephen Lawrence, a black youth, and also considers broader resistance by minority communities in complaining to the police. The report notes, at Chapter 46.31, "The need to re-establish trust between minority ethnic communities and the police is paramount." Online: <http://www.archive.official-documents.co.uk/document/cm42/ 4262/sli-46.htm>.

[100] United Kingdom, Independent Police Complaints Commission, online: <www.ipcc.gov.uk>.

[101] See *Johnson Inquiry, supra* note 2 at 39.

response to allegations of wrongdoing. There seems to be wide consensus that there is a problem with relations between police and communities, but existing accountability frameworks are unable to fully comprehend or respond to this challenge.

Informal Resolution in Response to Police Complaints

Just as institutional structures relating to allegations of police wrongdoing have evolved to respond to articulated concerns, so too has process. Largely in response to concerns relating to the limits of formal adversarial complaints processes, there has been a move to informal processes. Collaborative and informal problem-solving initiatives are widely advocated by proponents of alternative dispute resolution (ADR), and appear motivated by a perception that they offer quicker and cheaper approaches, because the claims can be settled, or "gotten rid of" quickly.[102] Further, ADR enables parties to speak on their own behalf and thus it may offer a better opportunity to understand the nature of the complaint or incident than formal approaches. It is further advocated as being more likely to result in satisfaction, of all parties, with the process than adversarial responses.[103]

Informal resolution of public complaints made to administrative agencies is a growing trend,[104] and one which parallels the increasing acceptance by criminal justice systems of informal responses to crime.[105] An ADR-based approach has been embraced by agencies that engage in administrative review,[106] including complaints mechanisms

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[102] See generally, Leonard L. Riskin and James E. Westbrook, *Dispute Resolution and Lawyers*, 2nd ed. (St. Paul: West Group, 1998).
[103] *Ibid.*
[104] For example, the Nova Scotia Human Rights Commission and the Nova Scotia Office of the Ombudsman have invested in process modification to encourage, where possible, informal resolution of complaints.
[105] The *Youth Criminal Justice Act*, S.C. 2002, c. 1, mandates consideration of restorative justice in response to youth crime.
[106] The Nova Scotia Ombudsman, for example, has a strong focus on informally resolving concerns. Process details are outlined in a recent annual report, online:

administered both by policing agencies and civilian oversight agencies.[107] A recent annual report published by the Commission for Public Complaints against the RCMP explains some benefits of ADR in a police complaints context: "ADR is voluntary, creative, practical and timely. Normally such files are completed within a day or two, in contrast to formal complaint files that may take six to twelve months."[108] The benefits of informal processes for police complaints have been recognized in Nova Scotia as well. Municipal police agencies in Nova Scotia, including the Halifax Regional Police, are required, by law, to attempt to resolve complaints informally.[109] Indeed, informal resolution may be particularly well-suited to allegations of police wrongdoing because it may reduce officers' stress which in turn can have on impact on the way they carry out their work. Robert Loo has identified "relations with the public and community" as "major sources of stress when police believe that their efforts are not appreciated by the community they serve and that the public is apathetic about supporting the police. Complaints and assaults against police only reinforce the belief [by the police] that they stand alone".[110] Ironically, the stress of public complaints can result in further wrongdoing by officers. One writer has observed, "...the conduct of officers under enormous stress can produce immoral, unethical, and illegal conduct such as bribery,

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<http://www.gov.ns.ca/ombu/AnnualReport.pdf>. Similarly, the Nova Scotia Human Rights Commission aims to resolve matters informally. For a description of Commission process, see online: <http://www.gov.ns.ca/humanrights/PDFdocs/Complaint_Process_E.pdf>.

[107] See, for example, the *Police Act*, *supra* note 83.

[108] 2004-2005 Annual Report of the Commission for Public Complaints against the RCMP (Ottawa, Commission for Public Complaints against the RCMP, 2005), online: <http://www.cpc-cpp.gc.ca/DefaultSite/Reppub/index_e.aspx?articleid=778>. The Military Police Complaints Commission similarly encourages informal resolution. See online: <http://www.mpcc-cppm.gc.ca/200/210_e.html#informal>.

[109] *Police Act*, *supra* note 83, s. 71.

[110] Robert Loo, "A Psychosocial Process Model of Police Suicide" in Heith Copes, ed., *Policing and Stress* (New Jersey: Pearson Education, Inc., 2005) 103 at 103.

thievery, misuse of government property, graft, fraud, exploitation, misuse of deadly force, denial of due process, and police brutality."[111]

As these points illustrate, there are some aspects of ADR that are beneficial. However, the changes ADR brings are focused on process, and not to the purpose or aim of the process. It is not focused on reconceiving the requirements of justice. ADR has an aim of the settlement of disputes which are essentially considered to be private, or exclusive to the few parties who are included in the process.[112] As a result, the important relational issues that are identified in all of the inquiries discussed above are not able to be comprehensively considered in ADR processes. By virtue of adopting the aim and focus of mainstream processs (i.e., to settle complaints without inquiring into their nature and the related harm), ADR takes an extremely restricted view of who is impacted by wrongdoing and as a result, the relational harms are not able to be fully comprehended or addressed. Those who are included in an ADR process may be brought together for a discussion; however, the process may simply involve mediated correspondence without an actual meeting. The community is often missing and broader interests are not considered. Moreover, the parties who can be involved are restricted by the confidential nature of ADR-based initiatives. As such, the wider harm to the community cannot be comprehensively attended to, nor can the outcome reflect the contributions that the community brings to restorative justice processes.

As a result of the aim, in ADR, of settlement, any satisfaction reported following an ADR process may be more a result of having one's subjective demands met as opposed to outcomes that are objectively considered just or fair. As Jennifer Llewellyn explains:

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[111] Dennis J. Stevens, "Police Officer Stress and Occupational Stressors" in Heith Copes, ed., *Policing and Stress* (New Jersey: Pearson Education, Inc., 2005) 1 at 17.
[112] Llewellyn, *supra* note 30

> Mainstream ADR mechanisms share a common focus on settlement as their ultimate aim...The primary focus on settlement of the legal dispute often comes at the expense of dealing with other issues between the parties. Any deeper conflict is generally set aside unless it is material to settlement of the legal claim. This singular focus also creates the danger that so long as settlement is achieved, little or no attention will be paid to the way in which that settlement was reached. Settlement focuses on the individual dispute, not on the broader relationships at issue and the extent to which they might be made better or worse as a result of the means and method by which the dispute is settled. The problem, then, is not with settlement per se but, rather, with settlement as the primary or exclusive goal of dispute resolution processes. Settlement of any kind or at any cost can come at the expense of justice concerns."[113]

ADR does not aim to address relational breakdowns, particularly as they relate to the broader community. Indeed, ADR processes may cause further harm to the relationships at stake, particularly where broader community interests are impacted. For example, a negotiated settlement between an individual complainant and the police may be perceived by the community as a way of avoiding dealing with broader concerns, or of simply trying to make the problem go away, rather than offering a forum in which those who have a stake in the outcome can address the issue meaningfully. Moreover, it does not challenge the underlying conception of wrong and harm so is inadequately able to comprehend the harm to the relationship between the police and the public. Although ADR represents, for many reasons, improvements upon adversarial responses, it does little to address relational breakdowns between the police and public generally.[114]

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[113] *Ibid.*

[114] Graham Smith has considered existing trends in police complaints processes and proposes a new framework that shifts focus away from "the 'who investigates the police?' issue." See Graham Smith, "Rethinking Police Complaints" (2004) 44 British Journal of Criminology" 15 at 15.

Shifting Paradigms: Application of Restorative Justice

Restorative justice is aligned with ADR insofar as it has grown out of informal justice movements,[115] and both offer a better forum for clarification of issues. Also, ADR might offer better efficiency than mainstream or traditional adversarial responses to wrongdoing. However, restorative justice offers something more than this. Its aim is broader, and it can address relational harm in ways that ADR cannot.

Various developments in recent years appear to have been moving towards a recognition of the significance of relationships at stake surrounding policing and police wrongdoing. Community policing initiatives and the inclusion of the community in the complaints process through civilian oversight, as well as a shift from formal processes to ADR, appear to reflect an acknowledgement of the importance of positive relations between the police and their communities. However, these initiatives do not have, as their aim, the restoration of relationships and, as the discussion above has argued, they do not adequately respond to the relational harm caused by police wrongdoing. Restorative justice appears to offer promise in advancing this aim.

There has been some discussion in other countries of applying restorative justice to police accountability frameworks. England has arguably been at the forefront of this discussion, and a report on the issue was recently completed at Oxford University.[116] Drawing upon work in England, a New Zealand Review of the Police Complaints Authority report recommends incorporation of restorative justice principles, noting, "procedures...designed to maintain and restore appropriate relationships between

[115] For a discussion of restorative justice emerging from informal justice movements, see Van Ness and Heetderks Strong, *Restoring Justice,* 2nd ed. (Cincinnati: Anderson Publishing, 2002).

[116] Hill, Cooper, Hoyle and Young, *supra* note 98 at iii. Notably, this may be due in part to the fact that restorative justice is more often police-driven in the United Kingdom.

members of the public and the police should be promoted at every opportunity."[117] These projects accurately recognize the potential for restorative justice in addressing relational challenges between the police and the public; however, the model promulgated takes a narrow view of restorative justice and contemplates limited involvement of the community.[118] This restricts the potential of restorative justice by conflating its aims and practices with those of ADR. Therefore, while some aspects may offer insights for the analysis in this project, the approach to restorative justice is altogether different and more limiting in terms of addressing relational breakdowns between the police and the communities in which they operate.

Restorative justice practice grounded in a restorative theory of justice offers an opportunity to respond to police wrongdoing in a manner that aims to address the community dimension and full relational nature of the harm. It appropriately identifies the underlying issue as the relationship between the police and the community, and thus can offer a better response to associated harms. It enables an exploration of specific and systemic issues underlying police conduct and public complaints, and can address the associated harms to the relationship between the police and the public. Further, restorative justice allows for a wider range of outcomes, and since it responds to context, participants can work together to effect creative and specifically responsive agreements. It is through this broader approach that restorative justice can respond to the wrong itself, address the harm, explore contextual/systemic matters that led to the wrongdoing (and thus possibly prevent future wrongdoing), and facilitate action aimed at healing the harm experienced by individuals *and* by the community.

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[117] New Zealand, *Review of the Police Complaints Authority* (Wellington: Ministry of Justice, 2000), at 47, online: <http://www.justice.govt.nz/pubs/reports/2001/police_complaints/index.html>.

[118] For example, "community" may be considered to simply involve a local facilitator.

The remainder of this thesis will explore this possibility in the context of the Nova Scotia police complaints processes as applicable to the Halifax Regional Police and as recommended in the *Johnson Inquiry*. It will first examine the framework in Nova Scotia for police complaints. Second, it will introduce restorative justice theory and examine the present application of restorative justice theory in Nova Scotia. Third, it will consider the pertinence of restorative justice theory to police complaints generally. Finally, it will consider the application of restorative justice to the present police complaints framework in Nova Scotia, identify some limitations and opportunities in present frameworks for realizing or implementing restorative justice, and propose modifications to this framework to better enable such application.

CHAPTER 2 *Frameworks in Nova Scotia for Police Complaints*

As Chapter 1 has shown, there is a pressing need for a mechanism to respond to relational breakdowns between police and their communities in conjunction with allegations of police wrongdoing. Present adversarial and ADR-based approaches do not address this broader harm. Restorative justice, however, has as an aim the restoration of relationships and therefore may offer uniquely appropriate response mechanisms.

Setting out the policing authority and the police complaints frameworks in Nova Scotia as applicable to the Halifax Regional Police enables an analysis of where there is room – as well as how things would have to change – for the application of restorative justice. The emphasis on informal resolution in the *Police Act* and as established in practice, for example, can create a climate of acceptance for informal alternatives. An exploration of the police complaints process, however, also reveals some structures that limit the possibility for restorative justice to be applied.

Policing Authority

As indicated in Chapter 1, interaction with the police is perhaps the most common contact citizens have with the state and state authority. While the role of police officers is similar across the country (and indeed, the public may view "the police" as one entity that represents the state generally),[119] they operate under a variety of frameworks which

[119] For example, my own experience working with incarcerated youth frequently revealed difficulties, by the youth, identifying which force or detachment (e.g., RCMP or municipal police) had been involved in their arrests. This issue is highly significant in determining which public complaint process to follow.

establish roles and jurisdictions for police agencies. This thesis focuses on the Halifax Regional Police; however, it is useful to outline the policing context in which they operate. The authority for legislating criminal law and procedure in Canada, as a federal responsibility, is derived from section 91(27) of the *Constitution Act, 1867*.[120] Administration of criminal law is a provincially designated responsibility, pursuant to section 92(14). The Royal Canadian Mounted Police (RCMP) is Canada's federal police force, with exclusive jurisdiction for police services in the Yukon and Northwest Territories.[121] The RCMP is responsible for enforcing all federal statutes excluding the *Criminal Code*,[122] but where contracted by the provinces, will also provide provincial and municipal policing services.[123] All provinces except Ontario and Quebec have established agreements for provincial policing services by the RCMP, and under separate agreements, the RCMP provides municipal policing services to numerous municipalities.[124] Further, many Canadian cities have established independent municipal police forces. They enforce the *Criminal Code*, provincial legislation and municipal by-laws.[125] It is under this framework that the Halifax Regional Police operates as a municipal police force. Although the Halifax Regional Police and the RCMP share some operations out of one detachment located in Halifax -- and there is

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[120] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 2985, App. II, No. 5.
[121] *Criminal Code,* R.S.C. 1985, c. C-46.
[122] Royal Canadian Mounted Police, *Organization of the RCMP,* online: <http://www.rcmp-grc.gc.ca/html/organi_e.htm>.
[123] Ronald T. Stansfield, *Issues in Policing: A Canadian Perspective* (Toronto: Thompson Educational Publishing, Inc., 1996) at 15.
[124] *Ibid.* at 15. As noted in Chapter 1, complaints against the Royal Canadian Mounted Police are dealt with pursuant to the RCMP Act; the associated civilian oversight agency is the Commission for Public Complaints against the RCMP. For details see <www.cpc-cpp.gc.ca>.
[125] *Ibid.* at 15.

some collaboration on specific matters[126] -- the forces retain different respective jurisdictions.[127]

Frameworks for Allegations of Police Wrongdoing

The primary framework for allegations of police wrongdoing of municipal police in Nova Scotia – encompassing the Halifax Regional Police – is found in the Nova Scotia *Police Act* [128] and its associated regulations.[129] These documents establish authority for political responses to questions relating to the administration of justice. Further, they establish protocol relating to the conduct of police officers and set process parameters for responding to allegations, by other officers and members of the public, of police wrongdoing. Civilian oversight is provided by the Complaints Commissioner.

This thesis is exclusively interested in the police complaints process; however, it should be noted at this stage that responses to allegations of police wrongdoing pursuant to the *Police Act* are not the only recourse that complainants may have regarding police action generally, and which specifically applies to the Halifax Regional Police. The Nova Scotia Human Rights Commission and the Nova Scotia Office of the Ombudsman are impartial

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[126] Although the Halifax Regional Police and the RCMP are separate entities operating out of the same building, there is some intersection; for example there are a number of "Integrated Units" made up of both RCMP and Halifax Regional Police officers. See, for example, *Halifax Regional Police, Operations, Special Investigation Section,* online: <http://www.police.halifax.ns.ca/menu.asp>.

[127] The issue of police jurisdiction is of considerable interest in Canada, because municipal and provincial police officers are unable to exercise their authority outside their respective areas of appointment. This means their work is stymied *vis-à-vis* action that crosses a border. The Canadian Association of Chiefs of Police, Law Amendments Committee, has advocated legislative reform and policy frameworks to address this gap. See generally, Gord Schumacher, "Extra-provincial Police Jurisdiction" (presentation to the Canadian Association for Civilian Oversight of Law Enforcement, Banff, Alberta, October 2003) [unpublished].

[128] *Police Act*, *supra* note 83. This *Act* was recently proclaimed in force by the Nova Scotia legislature, and effectively replaces the former *Police Act,* R.S.N.S. 1989, c. 348 (repealed).

[129] *Police Regulations, supra* note 84.

organizations which offer public complaints processes that are applicable to this context; their respective jurisdictional frameworks may coincide with a response under the *Police Act*.[130] The Nova Scotia Human Rights Commission is a body mandated to ensure respect for human rights in this province; its enabling legislation prohibits discrimination[131] on a number of grounds,[132] and prohibits sexual harassment.[133] Discrimination is not prohibited in all areas of life but is limited to specific types of interaction, some of which may relate to policing.[134] The Nova Scotia Office of the Ombudsman is mandated to ensure fairness in provincial and municipal government services in the province.[135] The Halifax Regional Police, as a municipal entity, falls within this jurisdiction, as does the Nova Scotia Police Complaints Commissioner, a provincial entity.[136] An additional option of civil action may be pursued if an aggrieved party does not wish to address the matter (or address it exclusively) through a public complaints process.[137]

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[130] It would be interesting to consider how restorative justice may be applicable in these processes; however, this is beyond the scope of this thesis.
[131] Discrimination is defined in section 4 of the *Human Rights Act, supra* note 1, as "a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, [identified in the enumerated grounds] that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society."
[132] The protected grounds include age; race; colour; religion; creed; sex; sexual orientation; physical disability or mental disability; an irrational fear of contracting an illness or disease; ethnic, national or aboriginal origin; family status; marital status; source of income; political belief, affiliation or activity; individuals association with another individual or class of individuals having [these] characteristics. *Human Rights Act, ibid.*, ss. 5(1)(h) - (v).
[133] Further, sexual harassment is prohibited at s. 5(2) of the *Human Rights Act, ibid.*
[134] Protected areas include provision of or access to services or facilities; accommodation; the purchase or sale of property; employment; volunteer public service; a publication, broadcast or advertisement; membership in a professional association, business or trade association, employers' organization or employees' organization. *Human Rights Act, ibid.*, ss. 5(1) (a)-(g).
[135] *Ombudsman Act*, R.S.N.S. 1989, c-327 s. 11.
[136] *Ibid.*, s. 2
[137] There have been many cases in Canada in which complainants have successfully sued the police. One of the more notable cases in recent Canadian history is *Jane Doe*

These various grievance options are often exercised concurrent to the police complaints process or are accessed when a complainant is dissatisfied with the disposition of the matter by another body.[138] Their ability and/or discretion to become involved in a matter may be triggered by various stages in the police complaints process.[139]

Police Act Responses

There are a number of responses under the *Police Act* that may follow suspicions or allegations of police wrongdoing. The Minister of Justice is broadly authorized to order a review into any matter concerning policing and the administration of justice.[140] A process is in place for internal discipline, where a member of a police department alleges wrongdoing within that department.[141] A different process is designated for complaints made by members of the public. The situations in which the relationships between the police and public are most likely impacted by wrongdoing – and/or are

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v. Metropolitan Toronto (Municipality) Commissioners of Police, (1998) 160 D.L.R. (4th) 697 (Ont. Gen. Div.). Civil actions have the potential to award greater monetary compensation and may address a broader range of harm than the public processes identified above. However, in addition to the high financial cost of civil actions, like other adversarial processes and ADR-based informal resolution processes, they do not allow for meaningful consideration of systemic and contextual matters as outlined in Chapter 1, nor do they offer the same potential to restore relationships as this is not an aim, and arguably, is rarely an outcome. The option of pursuing a civil action against the police falls beyond the scope of this discussion and is thus not expanded upon in this project.

[138] It should be noted that if concerns are addressed meaningfully (and restorative justice offers this possibility), people might feel less compelled to access complaints processes offered by the Human Rights Commission and the Office of the Ombudsman.

[139] For example, section 14 of the *Ombudsman Act, supra* note 135, outlines the authority of the Ombudsman to refuse to investigate a matter in a number of circumstances including the existence of another appropriate avenue of recourse.

[140] *Police Act, supra* note 83, s. 7.

[141] Internal discipline can also trigger the labour relations regime of union grievances under the appropriate legislation. Notably, police in Nova Scotia no longer have the right to strike. The Halifax Regional Police are unionized under sections 41 through 43 of the *Trade Union Act,* R.S.N.S. 1989, c-475, as are many municipal police forces in Nova Scotia. That right has been replaced, at sections 52A through 52G, with compulsory interest arbitration. The RCMP has no union – a controversy which went to the Supreme Court of Canada which held that they have no right to organize. See *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989.

impacted by allegations of wrongdoing – fall under the Minister-initiated process (e.g. following public pressure) and through the public complaints process. This thesis only considers the process for public complaints, and therefore, the process for internal discipline will not be the focus of this discussion.

Ministerial Response

The widest scope for an examination of issues relating to policing is found in the authority granted to the Minister of Justice.[142] A response under this authority could address any question relating to the administration of justice:

> 7 (1) Notwithstanding anything contained in this Act, the Minister may order an investigation into any matter relating to policing and law enforcement in the Province, including an investigation respecting the operation and administration of a police department.
> (2) An investigation pursuant to subsection (1) shall be conducted by such person and in such manner as the Minister may specify in the order and that person shall provide the Minister with
> (a) a written report; and
> (b) recommendations, where appropriate,
> within the time frame specified by the Minister.
> (3) The Minister may appoint a person with technical or other specialized knowledge to assist the person conducting an investigation pursuant to subsection (1).
> (4) Upon receipt of a report pursuant to subsection (2), the Minister may take whatever action the Minister considers appropriate to implement any recommendations provided pursuant to clause (2)(b).
> (5) A person conducting an investigation authorized by this Section has all of the powers and immunities of a peace officer during the investigation and any proceedings relating to the matter under investigation.

[142] This is an authority separate from that under the *Public Inquiries Act* which authorizes the Governor in Council (the provincial government; in practice this involves the Lieutenant Governor acting on behalf of the Crown, upon the consent and advice of the Executive Council) to "cause inquiry to be made into and concerning any public matter in relation to which the Legislature may make laws." *Public Inquiries Act* c-372, R.S.N.S. 1989, s. 2. It is under the *Public Inquiries Act* that the Nunn Commission of Inquiry was recently called into the death of Theresa McEvoy in a car crash caused by a young person two days after his release from custody, online: <http://www.nunncommission .ca>

Because specific incidents of wrongdoing -- or allegations of wrongdoing -- are not a cited prerequisite for such a response, these provisions allow for proactive or preventative action. In other words, questions pertaining to the administration of justice are sufficiently broad to include policy and practice frameworks that may have adverse effects upon the public, and can motivate broad institutional change. However, this framework could also have wide applicability to questions pertaining to police conduct and offer a response to situations in which the Minister believes there is adequate public interest.[143] In practice, this means that lobbying or political pressure could invite a response to police wrongdoing[144] without the need for a public complaints process to be triggered. However, the public complaints process does not depend on the discretion of the Minister and is thus the much more widely accessible process.

Public Complaints

The *Police Act* and regulations outline the process to be followed when members of the public lodge complaints of wrongdoing against the police. The definition of wrongdoing is broadly construed in the regulations. The legislation and regulations outline to whom to make a complaint, who can review it, and various appeal processes. Complaints can be made against an entire force for the "failure of the department itself to meet public expectations"[145] or against one or more individual officers alleging "that a member of a department breached the code of conduct."[146]

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[143] It is also interesting to consider how these provisions could enable restorative justice processes in response to systemic justice-related concerns; however, this discussion falls beyond the scope of this thesis.

[144] Issues broader than wrongdoing also fall under this authority; however, the focus for this thesis is restricted to allegations of police wrongdoing.

[145] *Police Act*, *supra* note 83, s. 2(d).

[146] *Ibid.* Both types of complaints are significant for the discussion in subsequent chapters of the application of restorative justice, because restorative justice might take different forms depending on the scope of the allegation or issues.

Defining Wrongdoing: Thresholds for Response

The response options for complaints are assessed against the parameters for action considered to constitute wrongdoing by breaching the "Code of Conduct."[147] Such acts of wrongdoing are labeled as "disciplinary defaults."[148] These are defined in the regulations as situations in which an officer "engages in discreditable conduct," "is insubordinate," "neglects their duties," "is deceitful," "improperly discloses information," "engages in corrupt practice," "abuses their authority," "improperly uses a firearm or intermediate weapon," "damages property," or "consumes or uses liquor or drugs in a manner prejudicial to the carrying out of their duty."[149] While the regulations delineate in more detail the parameters of action considered to constitute wrongdoing under the headings noted above, it is clear that the scope of such action is quite broad, including conduct prohibited in human rights legislation[150] as well as ethical expectations of the profession as articulated in the Code of Conduct.

The complaints framework also contemplates responses to conduct considered by the state to be criminal. The regulations outline processes to be followed in instances in which criminal conduct is alleged. When there appears to have been a breach of criminal law, a mandatory stage in the process is the consideration of whether charges are appropriate.[151] If a matter referred to the Minister of Justice alleges "criminal misconduct on the part of the chief officer, or the chief officer and one or more

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[147] *Police Regulations, supra* note 84, s. 24.
[148] *Ibid.*
[149] *Ibid.*, s. 24(1)-(10).
[150] The *Police Act* considers a violation of a provincial statute as a disciplinary default and thus such an allegation enables a response under the *Police Act.* Section 24(1)(b) of the *Police Regulations, supra* note 84, identifies, as a disciplinary default, "contravening an enactment of the Province, a province or territory of Canada or the Government of Canada in a manner that is likely to bring discredit on the reputation of the police department".
[151] *Police Regulations, supra* note 84, s. 70(1).

members," the matter may be referred to the RCMP or another police force for investigation.[152] A criminal investigation does not preclude the complaint proceedings; however, the regulations mandate suspension of such proceedings pending the completion of the criminal investigation.[153]

Process for Complaints

A complaint must be made within six months of the date of the incident complained of.[154] Under section 28 of the regulations, complaints can be made on behalf of someone else with certain restrictions:

> Complaint made by third party
> 28 (1) A complaint made by a person who is not personally affected by the occurrence that gave rise to the complaint must not be proceeded with unless the person who is personally affected by the occurrence consents to the processing of the complaint by endorsing the complaint in writing at the time it is made.
> (2) Subsection (1) does not apply if the person who is personally affected by the occurrence that gave rise to the complaint is not competent to give consent.

Complainants have a few options when choosing to whom they wish to take their concerns about policing. These options for making complaints are articulated in section 27 of the regulations:

> 27 A complainant may be made to any of the following, as applicable:
> (a) for a complaint about a police department generally, the complaints officer of the police department or any other member of the police department;
> (b) for a complaint about a member, the complaints officer of the police department of which the member complained of is a member, or any other member of the police department;
> (c) for any complaint, the board or the Complaints Commissioner.

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[152] *Ibid.*, s.69.
[153] *Ibid.*, s. 70(3).
[154] *Ibid.* s. 29. This expands the allowable timeline afforded under the old legislation which provided that complaints regarding a member of the force should be made within thirty days of the incident; however, there was some discretion on these timelines provided the complaint was made within six months under section 8(2) of the former *Police Act Regulations,* N.S. Reg. 159/2003.

A public complaint can be taken (i.e., received) by any member of the same force; also, a "complaints officer" may be specifically designated for this role.[155] This means a complainant can take his or her complaint directly to the department complained of.

Halifax Regional Police: Professional Standards Office

Complaints against the Halifax Regional Police are administered pursuant to the framework outlined in the *Police Act* and associated regulations. This legislation allows each police force to retain some autonomy in terms of how the process is administered. Each chief of police has authority to design the details of the process to be followed within a particular detachment or force.[156] The Halifax Regional Police has developed a relatively comprehensive approach to administering complaints, with a specifically designated division, the Professional Standards Office based at its headquarters, mandated to deal with concerns. The stated mandate for the office is "timely and impartial investigation and resolution of complaints filed by the public or internally by police members."[157] It has developed a motto: "Integrity / Impartiality / Thoroughness".[158]

In keeping with these legislative obligations to attempt to resolve matters informally, the Professional Standards Office of the Halifax Regional Police notes that complaints may be resolved formally or informally. The informal resolution process is described as "mediation": "A face-to-face meeting is usually held between all parties involved under the guidance of a neutral party."[159] In practice, this meeting involves the complainant

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[155] Section 2(l) of the regulations provides, "[a] 'complaints officer' of a police department means the chief officer of the police department, or a member of the department designated by the chief officer as the complaints officer." *Police Regulations, supra* note 84, s. 2(l).
[156] *Police Act, supra* note 83, s. 71(3).
[157] Halifax Regional Police, *supra* note 79.
[158] *Ibid.*
[159] *Ibid.*

and the officer complained of, along with the Professional Standards Officer. Outcomes can range from the complaint being withdrawn to any result that is "mutually consented to."[160] In practice, however, the Professional Standards Office takes a flexible approach to conflict resolution both in process and outcome, structuring the informal process so as to address the allegation in whatever manner seems most efficient. The Professional Standards Office promotes this informal approach, asserting that the informal resolution process is more timely than a formal investigation, suggesting that formal responses may take at least 60 days for a decision to be made.[161]

Additional Police Act Avenues for Public Complaints

Another avenue for lodging a complaint is to the "board," the municipal board of police commissioners.[162] It is a board mandated to provide:

> 55(1)(a) civilian governance on behalf of the council in relation to the enforcement of law, the maintenance of law and order and the prevention of crime in the municipality; and
> (b) the administrative direction, organization and policy required to maintain an adequate, effective and efficient police department.[163]

Although the board is able to receive any complaints, it is only authorized to investigate complaints as they relate to the chief officer of a municipal police department.

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[160] *Ibid.*
[161] *Ibid.*
[162] *Police Act*, *supra* note 83, s. 2(b), and *Police Regulations, supra* note 84, s. 27(c). Under current legislation, meetings of the Municipal Board of Police Commissioners are open to the public. There is, however, discretion for the meetings to be private as they relate to "discipline, personnel conduct, contract negotiations and security of police operations" and "where the matter relates to a complaint against or the discipline of the chief officer, the chair may request that the chief not attend and the chief shall not attend." *Police Act*, s. 51.
[163] *Police Act*, *supra* note 83, s. 55(1).

The third avenue whereby a complaint against any officer or chief can be made is to the Nova Scotia Police Complaints Commissioner.[164] This one-person body is the provincial civilian oversight agency established by the *Police Act*.[165]

Process Details

The organization which receives the complaint does not necessarily deal with the matter. The regulations to the *Police Act* establish responsibility for investigating and/or resolving the complaint. Once a complaint is filed with any of the three bodies noted above, if the complaint is not against the chief, it will be referred to the police chief of the department complained of, who may delegate this authority. As noted earlier, the Halifax Regional Police have delegated this authority to the Professional Standards Officer.

Details relating to the complaints process are outlined in the *Police Act*:

> 71 (1) A complaint respecting the police department generally or the conduct of or the performance of a duty of a member of a municipal police department other than the chief officer shall be referred to the chief officer of that police department in accordance with the regulations.
> (2) Upon receiving a complaint, the chief officer shall attempt to resolve the matter in an informal manner.
> (3) The chief officer may delegate the chief officer's authority to a member of the municipal police department or may ask a member of another police department to investigate the complaint and report on the findings.
> (4) The chief officer shall report all complaints to the Complaints Commissioner at the time and in the manner prescribed by regulation.[166]

As mandated in subsection 71(2), above, there must be an attempt to resolve complaints informally. The regulations outline parameters and process for informal resolution. A matter is considered to be resolved if both parties (the complainant and the member of

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[164] *Ibid.*, s. 27(c)
[165] The Nova Scotia Police Complaints Commissioner is established pursuant to s.11 (1) of the *Police Act*, *supra* note 83. This role effectively replaces the Nova Scotia Police Commission which was established pursuant to s. 4(1) of the former *Police Act*.
[166] *Police Act*, *supra* note 83, s.71.

the police department complained of) agree with the resolution and sign a document to this effect. Each gets a copy of the document and a copy is also forwarded to the Complaints Commissioner.[167] The regulations further provide, at section 34(3), "A complaint that is resolved informally must not be processed further and, if the complaint is about a member, must not appear in the service record of the member."[168]

This suggests that informal resolution is exclusive to the complainant and the officer complained of, meaning that they are effectively the only parties considered to be involved in (and presumably, impacted by) the matter. The substantive content of the resolution appears to be limitless; that is, there are no parameters set in the legislation or regulations in terms of allowable outcomes from an informal resolution process. If a matter proceeds to an investigation, the regulations direct the process to be followed. The investigation must culminate in a report which states whether, in the opinion of the investigator, "the evidence proves that the member has committed a disciplinary default"[169] and further, whether there are any "organizational or administrative practices... that may have caused or contributed to the alleged disciplinary default."[170] The investigator's report, which can make a recommendation as to disciplinary measures, must be submitted to the disciplinary authority responsible for the matter.[171] The regulations also articulate the allowable penalties that can flow from this process.[172]

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[167] *Police Regulations, supra* note 84, s. 34.
[168] *Ibid.* s. 34.
[169] *Ibid.*, s. 42 (a).
[170] *Ibid.*, s. 42 (b).
[171] *Ibid.*, s. 42.
[172] *Ibid.*, s. 25 and s. 26.

Complaints against the chief follow a slightly different process. Complaints against a chief officer are to be referred to the Municipal Board of Police Commissioners,[173] which must "investigate...and attempt to resolve the complaint."[174] This appears to conflate the investigation and informal resolution processes into one continuum; that is, the delineation between "informal resolution" and "investigation" is not as clear as it is in the process for complaints against officers generally. As subsequent chapters will illustrate, this lack of distinction has implications for the possible applicability of restorative justice within this legislative framework.

Decisions by disciplinary authorities are reviewable by the Review Board. This is outlined in sections 81 and 82 of the *Police Act*:

> 81 After a disciplinary decision has been made in accordance with this Act and the regulations, a police officer who is the subject of the disciplinary decision may initiate a review of the decision by filing a notice of review with the Review Board in accordance with the regulations.
> 82 Upon receipt of a notice of review, the Review Board shall conduct a hearing.[175]

Complaints Commissioner

Although the initial avenues to be followed differ when a complaint is against a member of a police department as opposed to a complaint against a police chief, the processes merge if they are not able to be resolved at an earlier stage. The matter will be referred to the Complaints Commissioner if requested by the complainant or the member complained of.[176] Once the Complaints Commissioner receives the complaint, they

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[173] *Police Act*, *supra* note 83, s. 73.
[174] *Ibid.* s. 73(2).
[175] *Ibid.*, s. 81 and s. 82.
[176] *Ibid.*, s. 72.

"shall attempt to resolve the complaint."[177] As part of this process, the Complaints Commissioner is authorized to "investigate the complaint or designate another person to investigate the complaint and report to the Complaints Commissioner."[178]

If the Complaints Commissioner is unable to resolve the matter, they may refer it to the Nova Scotia Police Review Board[179] for a hearing unless the Complaints Commissioner believes that the complaint is "frivolous or vexatious".[180] The Review Board is a body mandated under section 18 of the *Police Act* to conduct investigations and inquiries, and to conduct hearings into matters that the Complaints Commissioner has referred to the Board.[181] The hearing is considered to be public "unless the Review Board is of the opinion that it is in the best interests of the public, the maintenance of order or the proper administration of justice to exclude members of the public for all or part of the proceedings."[182]

The regulations establish recourse when a matter is not referred by the Complaints Commissioner:

> 39(1) If the Complaints Commissioner does not refer a complaint to the Review Board for the reason that the complaint is frivolous or vexatious, without merit or an abuse of process, the Complaints Commissioner must notify the complainant, and the complainant may appeal to the Chair of the Review Board for a review of the record by filing a notice of appeal in the prescribed form no later than 20 days after the complainant is notified that the complaint has not been referred.
> (2) After receiving a record of a complaint for review, the Chair of the Review Board must do one of the following:

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[177] *Ibid.*, s. 74.
[178] *Ibid*, s. 74.
[179] *Ibid.*, s. 2(k).
[180] *Ibid.*, s. 74(4). This is similar to the process under the old *Police Act*; however, the former legislation made no provision for refusing complaints as frivolous or vexatious. See N.S. Reg. 159/2003, s. s. 14(10).
[181] *Police Act*, *supra* note 83, s. 18.
[182] *Ibid.*, s. 76.

> confirm the decision of the Complaints Commissioner to not refer the complaint to the Review Board; or
> order that the Complaints Commissioner refer the complaint to the Review Board.[183]

A Review Board hearing can have a variety of outcomes, including making findings of fact, dismissing the matter, making recommendations for remedial action, varying penalties previously imposed including dismissal or suspension of the member, affirming penalties previously imposed, substituting a finding, awarding or fixing costs, or superseding a disciplinary procedure/provision in a contract/collective agreement.[184] Decisions of the Review Board are final.[185]

Limitations of Present Framework for Restoring Relationships

While the present police complaints framework in Nova Scotia does offer potential for addressing individual relational breakdowns through the opportunity for a face-to-face meeting between the complainant and the officer complained of, it does not provide opportunities for restoring relationships between police and their communities. The harm flowing from police wrongdoing is much broader than that in a private dispute between two individuals, as outlined in Chapter 1. As noted in the *Johnson Inquiry*, the present "informal resolution" approach outlined at various stages in the process does not explicitly allow for meaningful restoration of relationships between the police and the community. Further, the process is frozen when there is an exploration of criminal justice implications. Coordination of the criminal justice process with a restorative justice process in this regard would enable the harm to the community to be contemplated in the outcome. The constant dialogue, in the present police complaints framework,

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[183] *Police Regulations, supra* note 84, s. 39.
[184] *Police Act, supra* note 83, s.79(1)(a)-(g).
[185] *Ibid.*, s. 79(3).

between informal and formal approaches, is problematic because it creates disincentives to full participation in the informal processes (that is, it is a disincentive to truth-telling as described in Chapter 1). Moreover, confidentiality arrangements which are set out in practice – though not legislated – for the processes create a barrier to inclusiveness (i.e., the community is not able to participate in the process and agreements). These challenges and others that emerge from restorative justice theory are discussed in greater detail in subsequent chapters.

CHAPTER 3 *Restorative Justice Theory and its Present Application in Nova Scotia*

The Nova Scotia restorative justice program has been selected as a model for this thesis not simply due to the convenient fact that it is currently operating in the province, but because it reflects comprehensive integration of restorative justice theory into practice. The Nova Scotia restorative justice program is founded upon a conception of restorative justice as a theory of justice which extends beyond the strictly-construed criminal justice realm (although it currently operates exclusively in that context), asserting that restorative justice represents "a new way of thinking about crime and conflict. It challenges us to look at how we restore the balance after a crime has been committed."[186] As a result, the Nova Scotia restorative justice program is a suitably adaptable model for this thesis. More importantly, it is examined in this thesis in order to draw out and explore some significant issues emerging from restorative justice theory – and to illustrate how these theoretical issues have been addressed in practice. This analysis offers some significant insights into the appropriateness and application of restorative justice principles in the police complaints process, and establishes a foundation upon which the applicability of restorative justice principles to a policing context can be elaborated.

In order to illustrate some ways in which the Nova Scotia restorative justice program is soundly based on theory – and thus offers an appropriate model in response to police complaints – this chapter explores some features of restorative justice theory that are

[186] *Restorative Justice: A Program for Nova Scotia* (Halifax: Nova Scotia Department of Justice, 1998).

particularly important in its implementation. The first area that will be discussed is social equality as an aim of restorative justice, and the ways in which current punitive approaches to criminal and administrative justice detract from this aim. The second area considered is the respective roles of state and community in the administration of restorative justice practice. The third area examined is community participation in the process. Fourth, situations in which restorative justice may be appropriate are contemplated, and the common practice prerequisite that the alleged wrongdoer must overtly acknowledge responsibility is challenged. Finally, the possibility for transformation through restorative justice processes is considered. The subsequent chapters will build upon this consideration of restorative justice theory and practice to explore the practical application of these issues to police complaints processes generally and to the Halifax Regional Police specifically.

Towards an Aim of Social Equality: Objectives and Outcomes

Because social equality is an aim of restorative justice,[187] it becomes an orienting goal for the entire process. The objectives and outcomes of restorative justice processes, then, are directed towards this broader aim. The plan for restoration, as articulated in the agreement, and the role of punishment, are two significant considerations in a process aimed at social equality.

Social Equality

The intent of the Nova Scotia restorative justice program is to establish balance or equality between the community, victim and the wrongdoer. This approach is strongly reflective of restorative justice theory. As Chapter 1 has observed, Llewellyn and Howse

[187] Llewellyn and Howse, *supra* note 6 at 39.

suggest that an aim of restorative justice is to achieve "social equality."[188] They explain this idea: "Social equality...means equality in relationship. Social equality exists when relationships are such that each party has their rights to dignity, equal concern and respect satisfied. Restorative justice aims to restore relations to this goal. As such, restorative justice is inherently relational."[189] They suggest that "human selves are inherently relational [and]... interdependent."[190] It is their contention that justice modeled upon relational approaches "would be concerned about creating or protecting human relationship. In other words, justice must take connection as its goal over alienation and separation."[191]

Llewellyn and Howse note that relational conceptions of justice have strong roots in feminist theory.[192] Feminist relational theory recognizes the inherently relational aspects of human experience, challenging liberal notions of autonomy.[193] For example, Robin West has argued, "Women are not essentially, necessarily, inevitably, invariably, always,

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[188] *Ibid.* at 39.
[189] *Ibid.* at 39.
[190] *Ibid.* at 39.
[191] *Ibid.* at 40.
[192] *Ibid.* at 39.
[193] Iris Marion Young has considered relational implications for social policy as it pertains to dependency. She has noted, "An important contribution of feminist moral theory has been to question the deeply held assumption that moral agency and full citizenship require that a person be autonomous and independent. Feminists have exposed this assumption as inappropriately individualistic and derived from a specifically male experience of social relations, which values competition and solitary achievement... Female experience of social relations, arising both from women's typical domestic care responsibilities and from the kinds of paid work that many women do, tends to recognize dependence as a basic human condition...Whereas on the autonomy model a just society would as much as possible give people the opportunity to be independent, the feminist model envisions justice as according respect and participation in decisionmaking to those who are dependent as well as to those who are independent." Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 55.

and forever separate from other human beings."[194] Christine Koggel has expanded this notion, offering a comprehensive survey of relational theory as it pertains to equality. She provides,

> By taking the sociality and interdependence of human beings as the starting point for theorizing about conditions for treating people with equal concern and respect, relational theory challenges traditional liberal conceptions of personhood and of what is needed to achieve equality...a relational approach to equality asks what moral persons embedded and interacting in relationships of interdependency need to flourish and develop.[195]

Restorative justice accommodates and nurtures this interdependence, inviting deeper examination of relational aspects of wrongdoing and of its harms and response. Insofar as parties are brought closer toward an aim of social equality, restorative justice can be fundamentally transformative of relationships.

Alternative to punishment

With social equality as an aim of restorative justice, punishment as a goal is not tenable.[196] The Nova Scotia restorative justice program reflects a non-punitive approach to justice. This is explicitly recognized through an assertion that punishment does not draw parties toward social equality but rather, deters wrongdoers from engaging in restoring the harm caused by their wrongdoing. The program materials explain this position:

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[194] Robin West, "Jurisprudence and Gender", 55 University of Chicago Law Review at 1 at 2.
[195] Christine M. Koggel, *Perspectives on Equality: Creating a Relational Theory* (Lanham: Rowman & Littlefield Publishers, 1998) at xi.
[196] Bruce Archibald has identified that while the Canadian criminal justice system incorporates punitive elements among others, punishment is not a goal, and in articulating the sentencing principles at section 718, the *Criminal Code* outlines its multiple objectives. See Bruce P. Archibald, "Coordinating Canada's Restorative and Inclusionary Models of Criminal Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law" (2005) 9 Canadian Criminal Law Review 216.

> In the conventional criminal justice system, offenders usually focus on avoiding punishment. The general fixation on punishment as the principal tool for correcting behaviour drives offender responsibility underground... It is socially more valuable to have offenders acknowledge the harm their actions have caused and right their wrong.[197]

The Nova Scotia restorative justice program appropriately implements restorative justice theory insofar as it acknowledges that punishment is associated with stigma and blame,[198] whereas responses through restorative justice can enable forward-looking problem-solving initiatives while ensuring the wrongdoer's dignity is preserved.[199] The plan for implementation, or the "agreement,"[200] is not predetermined because the measures needed to redress wrongdoing and preserve the wrongdoer's dignity will be different in every case. The focus, in the Nova Scotia restorative justice program, on reparation of harm, goes beyond the incident, encompassing reintegration of the wrongdoer into the community. The conception of restorative justice underlying the program promulgated by the province provides, "the long-term protection of the public mandates a focus on the methods of problem solving that include the reintegration of the

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[197] *Restorative Justice Framework, supra* note 33. See also online: <www.gov.ns.ca/just/rj/rj-background.htm>.

[198] The deterrent value of punishment, a frequently cited reason for punitive responses, is questionable. A meta-analysis was recently conducted to explore the value of punishment in reducing recidivism. The study concludes that, while one would expect research to establish that punishments of increasing severity are directly related to a reduction in recidivism – cited as a "punishment suppression effect," this is not the case. Paula Smith, Claire Goggin, Paul Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (2002: Public Works and Government Services Canada). This report reveals, at p. 2, its results: "A series of quantitative literature syntheses have recently summarized the results from such studies...which clearly did not favor a punishment hypothesis. Whether the studies involved comparisons of [different types of sanctions,] the results indicated more punishment was associated with either slight increases in recidivism...or no effect....".

[199] *Restorative Justice Framework*, *supra* note 33.

[200] Llewellyn and Howse, *supra* note 6 at 42.

offender into the community and the preservation of his/her dignity."[201] Other assertions illustrate how social equality is an aim:

> The [restorative justice] meeting concludes with an agreement outlining how the offender will make reparation. Reparation can include monetary payment, service to the victim, community service or any other outcome agreed upon in the process. Terms of the agreement can be personalized to take into consideration the individual circumstances of the offender.[202]

The program offers further examples of the broad possibilities in restoring relationships, suggesting that these "may include for example: community service work; restitution; personal service to the victim; specialized education programs, such as life skills; referral for counseling/treatment; [a] letter of apology; essay; or any other outcome agreed upon in the process."[203] These statements acknowledge the fact that restoration will require different responses in different contexts.

Restorative justice facilitates and encourages a broad range of plans for restoration, acknowledging that restoration will demand differing responses in each unique context. This means that restoration is driven by the actual harm caused by the wrongdoing. Unlike abstract and punitive responses that separate the wrongdoer from the harm caused by wrongdoing (and that inflict harm upon the wrongdoer without addressing the real harm experienced by the victim or others),[204] restorative justice fosters outcomes that are both effective and attainable.[205] Although the broad range of initiatives that could emerge from restorative justice processes may seem limitless, the process and

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[201] *Restorative Justice Framework*, *supra* note 33.
[202] *Ibid.*
[203] *Ibid.*
[204] Llewellyn and Howse, *supra* note 6 at 39.
[205] Nova Scotia, Department of Justice, *Restorative Justice Program Pre-charge / Post-charge Protocol* (17 May, 2000); revised through the latest draft: Nova Scotia, Department of Justice, *Restorative Justice Program Protocol* (16 September 2005). Notably these are very broad. The program further outlines mechanisms, at p.19 of the 2005 protocol, for supervision and completion of the agreement.

the agreement should not take punishment as a goal. Llewellyn and Howse have stated that restorative practices "must...not involve punishment,"[206] because punishment causes further harm and inequality precluding restoration. They explain, "[p]unishment is inherently isolating as it is by definition *imposed* on the individual. Punishment removes the wrongdoer from the relationship thereby precluding relationship altogether, let alone equality in relationship."[207] Punishment does not lead to an end of social equality but rather further detracts from that goal. Lode Walgrave has suggested that outcomes of restorative justice should be "socially constructive [which can]... contribute reasonably to the repair of the harm, suffering and social unrest caused by the crime."[208]

Some approaches to restorative justice consider punishment an appropriate goal.[209] Gerry Johnstone, for example, claims that pain is imposed through restorative justice and thus restorative justice is a different mechanism for meting out punishment.[210] Indeed, some poor practices of restorative justice – which do not pay adequate attention to the theory of restorative justice generally, and specifically to the fact that it requires that rights are protected – take punishment as an aim. Declan Roche has identified and criticized some specific restorative justice practices that he suggests are punitive in nature. He says, "For all its promise of promoting healing and harmony, restorative justice can deliver a justice as cruel and vengeful as any."[211] Roche expands upon his concerns:

> Notwithstanding the humane ideals of restorative justice, the unpalatable but inescapable fact is that restorative justice programmes are embedded in a

[206] Llewellyn and Howse, *supra* note 6 at 73.
[207] *Ibid.* at 37.
[208] Lode Walgrave, in Morris and Maxwell *supra* note 9 at 28.
[209] Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Portland: Willan Publishing, 2002) at 114.
[210] Johnstone, *Ibid.*
[211] Declan Roche, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003) at 1.

> contemporary cultural and political context where punitive and exclusionary punishment is dominant. One pertinent manifestation of this dominance is the widespread resurgence of shaming penalties. The precise form of these penalties varies...but the basic goal is the same: to subject an offender to extreme shame and humiliation. Though such penalties are grossly offensive to the overwhelming majority of restorative justice practitioners, to many citizens, they are not. [212]

This is a danger inherent in any informal process, and, as noted elsewhere in this thesis, restorative justice processes must take precautions in order to ensure that rights are protected. As Roche observes, however, most restorative justice practitioners do not subscribe to punitive and humiliating approaches.[213] These reflect poor practice rather than appropriate implementation of restorative justice theory.

It is important to distinguish punishment from burdens that may emerge from restorative justice processes as part of the agreement. As noted earlier, a plan for subsequent action[214] that is agreed upon during the encounter may entail any range of actions aimed at restoration. For example, an apology, restitution, or skills/sensitivity training are some outcomes that may result from a restorative justice experience. Lode Walgrave acknowledges that participating in restorative justice processes, and following through with agreements that are made in such processes, can be unpleasant. He resists, however, classifying this unpleasantness as punishment.[215] Walgrave suggests that punishment theory has required four features in punitive action: "coerciveness, the hard treatment inflicted, the intention to cause suffering, and the link between the infliction of pain and the wrong committed."[216] He claims that any suffering resulting from restorative

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[212] *Ibid.* at 18.
[213] *Ibid.* at 1.
[214] Llewellyn and Howse, *supra* note 6, refer to this as a "plan for the future".
[215] Lode Walgrave, in Morris and Maxwell *supra* note 9 at 19.
[216] *Ibid.*

justice "is only a possible side-effect of the restorative action."[217] Because suffering is not an objective of restorative justice,[218] the four criteria identified above are not met and thus he concludes that restorative justice is not punishment.

Given the aim, in restorative justice, of social equality, punishment is not a supportable goal. It is true that the agreement emerging from restorative justice practice may include a burden which is unpleasant. The goal, however, is restoration rather than punishment,[219] and this differs greatly from punishment as an objective or outcome.

Administration of Restorative Justice Practice

It is important to consider frameworks for administration of restorative justice practice in order to assess which models might best be able to guide practice towards the aim of social equality. In Nova Scotia, the restorative justice program design reflects the intent to carve out a collaborative partnership between the state and communities. Coordinated through the provincial Department of Justice, Court Services Division, the program is delivered across the province by locally-based agencies.[220] These community agencies are tasked with implementing restorative justice in context-specific ways, each with discretion to modify its practice to "meet the unique complexities of the community in which they serve."[221] Each locally-based agency contributes its unique expertise in order to deliver a program that is appropriate for

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[217] *Ibid.* at 23.
[218] It should be noted that suffering may be an effect or result, which some may argue limits retributivism but does not eliminate it entirely.
[219] Llewellyn and Howse, *supra* note 6 at 55.
[220] This service is delivered in Nova Scotia primarily through community justice agencies. For a description of this arrangement, see *supra* note 186. See also *Restorative Justice Framework*, *supra* note 33.
[221] *Ibid.*

that community.[222] The Nova Scotia restorative justice program structure enables context-responsive practice while ensuring some basic consistency across the province. The program encompasses three restorative justice models including "Victim-Offender Conferences", "Restorative Conferences" and "Sentencing Circles."[223] These different options are explained in the program's description, which provides that restorative justice "can come in many forms, depending on the circumstances of the case, the point in the system at which a restorative option is invoked, and the traditions and preferences of the communities that adopt restorative alternatives."[224] Because these generic models are adapted by each agency to meet their unique contexts, the exact role of the community representatives internal to the process may vary. Upon receiving a referral, the agency will approach all parties involved (victim, wrongdoer and communities) and determine the model best suited to the situation and the context.

The Nova Scotia government is in many ways a facilitator for the program in terms of funding, establishing a legal framework, garnering interest and support for restorative justice, promulgating standards and monitoring compliance.[225] The program promotes the idea that the provincial government is appropriately situated to empower, enrich and standardize practice:

> ...the role of Government in this Initiative should be that of facilitator, or overseer. Government should not become the de facto deliverer of restorative justice programs. Individual communities should be empowered to shape these programs and to deliver the service of restorative justice...Although Government has a leadership role to play in areas such as establishing a legal framework for the programs, enabling community-based

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[222] This model actually predates the restorative justice program, as agencies had developed expertise through historical involvement in its precursor, "alternative measures." See *Restorative Justice Framework*, *supra* note 33.
[223] *Restorative Justice Program Pre-charge / Post-charge Protocol*, *supra* note 205.
[224] Restorative Justice: A Program for Nova Scotia, *supra* note 186.
[225] *Ibid.*

> programs, initiating interest, setting standards, and monitoring progress, Government cannot create and run restorative justice programs in every community. The overwhelming consensus is that community ownership is essential to a successful restorative justice program.[226]

Much of the theory of restorative justice contemplates a community-based approach and some writers go so far as to reject outright or narrowly define allowable parameters of state involvement.[227] Practice, however, tells a different story, with programs being run by a wide assortment of entities ranging from government to arms-length justice agencies to communities.[228] Programs often receive referrals from the state,[229] and are in many instances, funded by the state;[230] indeed, much of restorative justice practice responds primarily to wrongdoing deemed, by the state, to be criminal thus entailing some state involvement throughout.

The role of the state in restorative justice is an important conceptual consideration; in fact, much of the early literature on restorative justice advocates this new paradigm as a means to circumvent state involvement in wrongdoing. This movement was catalyzed, in part, by Nils Christie who asserted that state responses to wrongdoing effectively "steal" conflicts from the parties most affected.[231] In describing his notion

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[226] *Ibid.* at 6.
[227] See, for example, Gordon Bazemore and Colleen McLeod, "Restorative justice and the future of diversion and informal social control" in Elmar G.M. Weitekamp & Hans-Juergen Kerner, eds., *Restorative Justice: Theoretical Foundations* (Devon: Willan Publishing, 2002) at 148.
[228] *Ibid.* See also generally Gordon Bazemore and Mara Schiff (eds.), *Restorative Community Justice* (Cincinnati: Anderson Publishing, 2001).
[229] The *Youth Criminal Justice Act, supra* note 105, contemplates a number of referral points from within the criminal justice system.
[230] In Nova Scotia, restorative justice is an integral component of the provincial Department of Justice.
[231] Nils Christie, "Conflict as Property" (1977) 17:1 *British Journal of Criminology* at 1.

of "conflicts as property,"[232] he suggests, "conflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people's property."[233] Restorative justice envisions a fundamentally different role for parties in conflict than that allowed under many criminal justice systems, and returns ownership of conflict back to affected parties.[234] The practice of restorative justice is proliferating worldwide, and although the format varies, it is rooted in an aim to allow those most affected by wrongdoing to participate in restoration.[235] This reflects, in large part, rejection of state appropriation of conflict or, more fittingly in this context, state appropriation of wrongdoing. This does not necessarily preclude any *involvement* of the state.

It is important that programs are appropriately reflective of (and responsive to) the unique context of each individual community. Because restorative justice is contextual in nature, communities must participate in the design and guidance of restorative justice practice so that it reflects and represents the affected communities.[236] Only the parties and the communities impacted by the wrongdoing have a true sense of what is required

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[232] *Ibid.* at 1.
[233] *Ibid.*
[234] See, for example, Anne Hayden and Peter Henderson, "Victims: the Invisible People" in Jim Consedine and Helen Bowen (eds.), *Restorative Justice: Contemporary Themes and Practice,* (Lyttleton: Ploughshares Publications, 1999). See also, Kay Pranis, "Restorative Justice, Social Justice and the Empowerment of Marginalized Populations" in Gordon Bazemore and Mara Schiff (eds.), *Restorative Community Justice* (Cincinnati: Anderson Publishing, 2001) at 287.
[235] John Braithwaite, "The Fall and Rise of Restorative Justice" in *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002) at 3. He notes, at p. 10, that "In New Zealand and Australia, the evidence is surprising on how supportive of restorative justice can be the police, the traditional ally of law-and-order politicians...At the same time, in both New Zealand and Canada, judicial leadership has been at the vanguard of restorative justice reform."
[236] See, for example, Adam Crawford and Todd R. Clear, "Community Justice: Transforming Communities Through Restorative Justice?" in Gordon Bazemore & Mara Schiff, *Restorative Community Justice: Repairing Harm & Transforming Communities* (Cincinnati: Anderson Publishing Co., 2001).

for restoration. Restorative justice offers an opportunity, and a forum, for communities to determine for themselves what is the most appropriate way to respond to wrongdoing. This is a notably widespread approach to restorative justice,[237] deriving in large part from its roots in informal justice movements which articulated commitments to reclaiming ownership of justice-oriented processes from the state.[238] Interestingly, restorative justice processes have, in many instances, been adopted and drawn out by the state to form a component of, or alternative to, traditionally state-run criminal justice systems. Because restorative justice has emerged from informal justice movements which, as noted above, aimed to "reclaim" ownership of conflict from the state, some argue against state involvement at all.[239]

In the context of security in weak or corrupt states, Clifford Shearing and Jennifer Wood have critiqued a "state-centred view of the governance of security,"[240] arguing instead that a focus on local capacities, which they term, "nodal governance", can be used to deepen democracy by enhancing political participation by marginalized communities in particular.[241] They describe the Zwelethemba model of peace communities which they say are "made up of local persons, to whom local community members bring interpersonal disputes."[242] This reflects a response that is facilitated not by the state, but by those most affected by the circumstances. Restorative justice has a similar approach

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[237] Braithwaite, *supra* note 235 at 3.
[238] Van Ness and Heetderks Strong, *supra* note 115.
[239] For examples, see generally Braithwaite, *supra* note 235.
[240] Clifford Shearing and Jennifer Wood, "Nodal Governance, Democracy, and the New 'Denizens'" (2003) 30:3 Journal of Law and Society 400 at 402.
[241] *Ibid.* at 416.
[242] *Ibid.* They state, at p. 416, that this model "seeks to shift both the steering and rowing of central governmental functions (such as child care, waste disposal, and health) to local persons through a market-like system of service delivery that channels tax resources to local people for future-focused solutions to governmental issues on an outcome-oriented basis."

insofar as it can enable those impacted by wrongdoing to contribute to the administration of a response.

As this discussion has shown, some conceptions of restorative justice, on a theoretical level, shun the involvement of the state. Concerns related to state involvement include suspicion that restorative justice could be used, by the state, to "widen the nets of social control,"[243] or to formalize the process (thus undermining the very nature of restorative justice which is premised on an informal discursive environment).[244] John Braithwaite has based his approach to restorative justice in republicanism which, as noted by Jürgen Habermas, prioritizes "the public autonomy of citizens."[245] Restorative justice offers the opportunity for deliberative consensus, and republican conceptions could not favor state administration or interference. Together with Philip Pettit, Braithwaite has advocated the "promotion of dominion,"[246] suggesting that, in the context of criminal justice, the prevention of interference with dominion should be a primary goal.[247] This conception would require restorative justice to be administered with a focus on public autonomy of

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[243] Bazemore and McLeod, *supra* note 227 at 148. This term has also been used by Ira M. Schwartz and Laura Preisser in "Diversion and Juvenile Justice: Can We Ever Get it Right?" in Heinz Messmer and Hans-Uwe Otto, *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation – International Research Perspectives,* (Dordrecht: Kluwer Academic Publishers, 1992). Similarly, George Pavlich has observed that "community justice advocates harbour a deep mistrust of the coercive controls used by the modern welfare state and its tenticular bureaucracies." See George Pavlich, "The Force of Community" in Heather Strang & John Braithwaite, eds., *Restorative Justice and Civil Society* Cambridge: Cambridge University Press, 2001 at 57.

[244] Roche, *supra* note 211 at 104.

[245] Jürgen Habermas, "On the internal relationship between the rule of law and democracy" in Ciaran Cronin and Pablo De Greif, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: MIT Press, 1998) 253 at 258.

[246] John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990) at 80. They define dominion, at p. 85, as "the social status you perfectly enjoy when you have no less a prospect of liberty than anyone else in your society and when it is common knowledge among you and others that this is so."

[247] Braithwaite and Pettit suggest that "the state should actively search for alternative ways of promoting dominion to such interventionist policies as criminal punishment." *Ibid.* at 80.

individuals,[248] which is more akin to a community-based process rather than one that is run by the state.

A process that is entirely community-based might respond to some of the concerns noted above, but it raises particular challenges. First, the question of funding becomes an issue. Absent government funding, restorative justice programming would be difficult to ensure. George Pavlich has suggested that some critique of restorative justice is rooted in a fear that it may simply be a way for the state to scale back funding, in keeping with various contemporary forms of privatization of services in welfare states.[249] The downloading of responsibility for matters traditionally administered by government becomes particularly worrisome when grassroots infrastructures do not have the capacity to assume such responsibility. The state is uniquely situated to empower restorative justice by providing necessary funding and additional supports for aspects internal to programming such as coordination and training. Further, the state can ensure that support services are adequate and accessible (e.g., residential care, addiction treatment, etc.) to respond to underlying issues and/or those that may arise during the course of the process. Absent state participation in terms of fiscal and substantive support, it becomes difficult to ensure that programs are able to be appropriately developed.

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[248] Braithwaite has, however, noted the importance of human rights protections in restorative justice. See for example, Braithwaite, *supra* note 235 at 13.
[249] George Pavlich, "The Force of Community" in Heather Strang & John Braithwaite, eds., *Restorative Justice and Civil Society* Cambridge: Cambridge University Press, 2001 at 56.

Protecting Rights

The other area where state involvement becomes significant for restorative justice relates to the protection of rights throughout the process.[250] Governments have various obligations to establish basic rights protections for their citizens under domestic constitutional and legislative frameworks and under international law. There is a strong tradition in Canada in ensuring the protection of rights through the Constitution as well as federal and provincial legislation.[251] Further, Canada has adopted various international human rights obligations through ratification of human rights treaties.[252]

Although existing legal obligations relating to rights protections have been developed in a legal context that is fundamentally different from the lens offered by restorative justice, it is imperative that the concerns which have led to formal articulation of rights are addressed in practice. These concerns have been contemplated by restorative justice theorists. For example, there have been calls for greater involvement of the state in restorative justice processes out of concern that the informal nature of restorative justice allows practice that falls outside the realm of formal procedural safeguards such that constitutionally protected rights may be disregarded.[253] Informal processes raise the danger of power imbalances and the

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[250] Christian Eliaerts & Els Dumortier, "Restorative justice for children: in need of procedural safeguards and standards" in Elmar G.M. Weitekamp & Hans-Juergen Kerner, eds., *Restorative Justice: Theoretical Foundations* (Devon: Willan Publishing, 2002) at 220.

[251] Human rights legislation is not restricted to state action and thus restorative justice practice absent state funding, actors, etc., is conceivably covered by human rights laws. For example, the Nova Scotia *Human Rights Act, supra* note 1, prohibits discrimination in a wide range of public interactions including work and volunteer arrangements, etc. See s. 5 of the *Act.*

[252] Van Ness and Heetderks Strong, *supra* note 115 at 166.

[253] Van Ness and Heetderks Strong, *ibid.* at 168, have elaborated how process rights are scrutinized *vis a vis* restorative justice, and responded to those concerns.

formal protections devised by the state are mechanisms to redress such imbalances.[254] State-run criminal justice systems, for example, make promises of impartiality, consistency, and protection of rights in their carriage of justice.[255] Whether they do this successfully is the source of widespread debate;[256] however, mechanisms aimed at redressing such imbalances have great importance in the justice and legal systems generally, and therefore cannot be ignored.[257] Further, with an aim of social equality, restorative justice demands that such imbalances are redressed.

In fact, rights protections are essential to the appropriate implementation of restorative justice theory. As noted earlier, restorative justice has an aim of social equality. Rights violations are a form of power imbalance that detract from this aim and thus any practice that allows or enables abuses to take place cannot draw parties towards the aim of restorative justice.[258] Because restorative justice does not have the same degree of formality and oversight as the traditional legal system, some concern has been raised that rights cannot be adequately protected in restorative justice practice.[259] These concerns highlight the importance of

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[254] It should be noted that power imbalances are necessarily addressed through restorative justice processes because the aim of social equality cannot be pursued in the context of imbalance.

[255] For a discussion of this in Nova Scotia, see *Restorative Justice Framework*, *supra* note 33.

[256] For some discussion of this debate in Nova Scotia, see Standing Committee on Public Accounts, Wednesday April 23, 2003, Halifax. Online: <http://www.gov.ns.ca/legislature/hansard/comm/pa/pa_2003apr23.htm>.

[257] This point is discussed in detail by Bruce P. Archibald. See *supra* note 196.

[258] A lack of protections can result in poor practice of restorative justice which enables discrimination and other rights violations to take place. Roche, *supra* note 211, criticizes practice that does not ensure appropriate safeguards.

[259] Chris Cunneen, "Restorative justice and the politics of decolonisation" in Elmar G.M. Weitekamp & Hans-Juergen Kerner, eds., *Restorative Justice: Theoretical Foundations* (Devon: Willan Publishing, 2002) at 38. Cunneen has identified, as a source of imbalance, the very access to restorative justice in a criminal context: "justice systems

safeguarding rights in the practice of restorative justice. The practice of restorative justice must ensure that rights protections are central.

Daniel Van Ness and Karen Heetderks-Strong have discussed at length the ambit of applicable rights protections to which the practice of restorative justice must be oriented. They are writing from within an American context; however, the principles they articulate are widely applicable to Canada as well. The collection of rights which they feel are most likely to be pertinent in restorative justice processes are identified as "due process" which they cite as including equal protection of the law;[260] protection from torture and cruel, inhuman and degrading treatment or punishment;[261] the right to be presumed innocent;[262] and the right to counsel.[263] These rights are widely acknowledged in modern constitutional frameworks and reflect international law. It is useful to note that while the protection of rights is often considered to apply exclusively to wrongdoers – and in particular, wrongdoers interacting with criminal justice systems – the relevance of rights protections to all parties (including victims and the communities involved) in

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may bifurcate along boundaries whereby the most marginalized get more punitive outcomes...so restorative justice practices legitimize existing inequalities."

[260] Van Ness and Heetderks Strong, *supra* note 115 at 169. In Canada, equality before and under the law is entrenched in section 15 of the *Charter*, *supra* note 70, which provides, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[261] Van Ness and Heetderks Strong, *ibid.* at 170. In Canada, this is entrenched in section 12 of the *Charter, supra* note 70, which provides, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

[262] Van Ness and Heetderks Strong, *ibid.* at 171. In Canada, this is entrenched in section 11(d) of the *Charter, supra* note 70, which provides, "Any person charged with an offence has the right... *d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

[263] Van Ness and Heetderks Strong, *ibid.* at 172. Lawyers should not represent parties in restorative justice as this would undermine its deliberative foundations, but there may be an important role for counsel in ensuring informed consent. In Canada, this is entrenched in section 10(b) of the *Charter*, *supra* note 70, which provides, "Everyone has the right on arrest or detention ... *b*) to retain and instruct counsel without delay and to be informed of that right..."

restorative justice processes is enhanced.[264] This is because of their direct involvement in the process. Protections in Canada are found under the *Charter* as well as human rights frameworks offered through federal and provincial human rights legislation.

Rights protections have been explicitly safeguarded for restorative justice practice in Canada generally. The *Criminal Code* provides parameters for the availability of such measures (e.g., when not inconsistent with the protection of society and the person has been advised of their right to counsel)[265] and further articulates the implications of participating in alternative measures *vis-à-vis* interaction with the traditional criminal justice system, providing that, while participating in restorative justice does not in itself bar proceedings against him or her, the court shall dismiss the charges if they have completely complied with the agreement, and has the discretion to dismiss the charges if the person has partially complied.[266] Similar protections are outlined in the *Youth Criminal Justice Act*.[267]

The Nova Scotia restorative justice program has devised some interesting mechanisms to enhance rights protections which impact both access to, and the structure of, restorative justice processes. The protocol for the Nova Scotia restorative justice program articulates commitments to reintegration, authorizing a compromise to be negotiated, and providing for supervision of the agreements.[268] The program has been designed by the province to ensure that offences considered to be more serious receive an increasing degree of scrutiny by the formal criminal justice system. There are four

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[264] Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, Toronto: University of Toronto Press: 1999) at 305.
[265] *Criminal Code, supra* note 121, s. 717 (1)
[266] *Ibid.,* s. 717 (4)
[267] *Youth Criminal Justice Act, supra* note 105, s. 10(5)
[268] See 2005 Protocol, *supra* note 205 at 11-13 and 14-18.

"entry points" – the police, the Crown prosecutor, the court, and corrections -- at which a matter may be referred to restorative justice. In practice, this means that offences considered by the province to be more serious can only be considered in a restorative justice process following varying degrees of engagement with the formal system.

In order to match the nature of the offence with the level at which the matter could be referred to restorative justice, offences have been categorized into four levels. Level One offences, which include provincial statute offences, minor property offences, disorderly conduct offences (i.e. loitering, vagrancy), assaults not resulting in bodily harm, and mischief are considered to be at the lowest level of seriousness.[269] Level Two offences encompass all other offences under the *Criminal Code* except those determined to be Level Three and Level Four offences. Level Three offences are more serious forms of wrongdoing, including fraud and more major theft-related offences, robbery, summary sexual offences aggravated assault, kidnapping, abduction and confinement, criminal negligence/dangerous driving causing death, manslaughter, spousal/partner violence offences, and impaired driving and related offences.[270] Finally, Level Four offences include murder and sexual offences proceeded with by indictment.[271]

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[269] Provincial statute offences, minor property offences, disorderly conduct offences (i.e. loitering, vagrancy), assaults not resulting in bodily harm, and mischief. See Restorative Justice Framework, *supra* note 33.

[270] See Restorative Justice Framework, *supra* note 33. Fraud and more major theft-related offences, robbery, summary sexual offences, aggravated assault, kidnapping, abduction and confinement, criminal negligence/dangerous driving causing death, manslaughter, spousal/partner violence offences, impaired driving and related offences.

[271] *Ibid.* There is also a restriction on applicability relating to motor vehicle offences. See *An Act to Amend Chapter 38 of the Acts of 2001, the Youth Justice Act, and Chapter 293 of the Revised Statutes,1989, of the Motor Vehicle Act,* S.N.S. 2005, c-32.

The level at which a wrongdoer may be referred initially to restorative justice is determined by the level of offence. A pre-charge referral may be made by the police for Level One and Level Two offences. A post-charge, pre-conviction referral may be made by the Crown for Level One and Level Two offences. A post-conviction, pre-sentence referral may be made by a court for Level One, Two and Three offences. A post-sentence referral may be made by corrections for all four levels. As an exception to the categories noted above, there is presently a moratorium on restorative justice for sexual offences and partner/spousal violence in keeping with a debate on this issue across the country. Offences of this nature can only be referred at court and corrections levels, out of concerns for potential power imbalances that relate to these types of offences and further, to respond to the status and stigma that are attached to the offence and conviction.[272] This continuum offers an increasing degree of scrutiny with a similar increasingly serious offence, which ostensibly aim to respond to public safety concerns. These structures allow for increasing interaction with the formal criminal justice system with its associated formal mechanisms aimed at protecting rights.[273]

The Nova Scotia restorative justice program offers an administration model that best enables appropriate implementation of restorative justice theory. Some central administration can empower programming through provision of funding, training and basic policy frameworks. The state is also appropriately situated to establish and enforce rights protection mechanisms. Restorative justice theory acknowledges the importance of rights protections and this necessarily impacts the role of the state in

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[272] *Restorative Justice Framework, supra* note 33. See also Pamela Rubin, primary author working in association with the Management Committee of restorative justice in Nova Scotia Restorative Justice in Nova Scotia: *Women's Experience and recommendations for positive policy development and implementation: Report and Recommendations*, March 2003.
[273] *Charter, supra* note 70.

its implementation to practice. The state can respond to the potential for power imbalances to be reflected in restorative justice practice. Llewellyn and Howse have observed some sources of power imbalance: "Power imbalances can exist for different reasons. They might exist owing to the nature of a previous relationship between the parties (i.e.: abusive spouse) or different social status (i.e.: wealth, age, sex, race)."[274] Rights protections are one means of protecting against the effects of power imbalances and thus rights violations must be safeguarded against to the extent possible.

There are important roles for the state in restorative justice practice (i.e., relating to the administration of practice and protection of rights) and community is essential in ensuring processes are appropriately context-responsive. The Nova Scotia restorative justice program has balanced these elements through a program model that is empowered by the provincial government and delivered by and within local communities.

Community Contributions

Community Involvement

One of the stated objectives of the Nova Scotia restorative justice initiative is to "strengthen communities."[275] Restorative justice practice in Nova Scotia is administered by community-based agencies. These agencies, which are backed by volunteers from the community, play an important role in drawing community

[274] Llewellyn and Howse, *supra* note 6 at 65.
[275] *Restorative Justice: A Program for Nova Scotia, supra* note 186.

members into the practice of restorative justice, fostering a climate of acceptance of restorative justice processes, and securing follow-up supports.[276]

There has been some research in Nova Scotia into the ways that community members ensure restorative justice processes are context-responsive.[277] As part of an evaluation of the program, the research has considered the ways that community members engage with restorative justice processes. The results suggest that community members may take broader contextual approaches to wrongdoing than those of people working within the criminal justice system, and may recognize broader barriers and implications relating to interaction of infrastructures: "[a]s a group [a number of surveyed community leaders] were much more likely than the [interviewees working within the criminal justice system] to explicitly refer to the need to deal with underlying social factors such as poor parenting, poverty and cultural patterns."[278]

The restorative justice agencies are expected to draw communities into the process. There are multiple communities that may be impacted by wrongdoing and the definition of "community" varies from context to context. The Nova Scotia restorative justice program explicitly acknowledges that communities are not necessarily determined by geographic boundaries, providing, "...communities are not limited to the residents in a particular neighbourhood, but includes the merchants, workers, visitors and friends."[279] As such, one component of the agencies' work is to identify

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[276] *Ibid.*
[277] Don Clairmont, *The Nova Scotia Restorative Justice Initiative: Year One Evaluation Report* (Bedford: Pilot Research, 2001).
[278] *Year One Evaluation Ibid.* at xiii.
[279] The Nova Scotia restorative justice program discusses the role of the community, online: <http://www.gov.ns.ca/just/Divisions/CourtServ/rj/community.asp>.

and locate representatives from the various communities that are pertinent to a restorative justice process. The degree to which this liaising role is successful is currently being researched.[280] The fact that various communities need to be served by -- and involved in -- restorative justice processes presents some challenges for delivery agencies, as some communities have been more successfully drawn into restorative justice processes than others.[281]

In examining the extent to which public confidence and strengthening of communities has been enhanced through the restorative justice program, Don Clairmont observes the range of community liaising:

> [s]ome agencies have made strong efforts to involve the community more and to communicate the results of their [restorative justice] programming [than under the former "alternative measures" model]. Other efforts to liaise with various subgroups (e.g. Afro-Nova Scotian communities) have been noted above. There has clearly been ... more extensive collaboration in most areas with community groups and also much use of church and school facilities for [restorative justice] conferences.[282]

In recent years, the program has received funding for "the challenge of more effective partnership with Afro-Canadian communities in order to improve [a restorative] response to the disproportionately high number of young black offenders."[283]

These points reinforce the notion that those from within particular communities are more sensitive to the issues raised by specific instances of wrongdoing and correspondingly,

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[280] Clairmont, *supra* note 277. Further, funding though the Social Sciences and Humanities Research Counsel has recently been granted to Dalhousie Law School for a comprehensive study into the Nova Scotia restorative justice program.
[281] *Ibid.* at xv.
[282] *Ibid.*
[283] Don Clairmont, "Restorative Justice in Nova Scotia", November 2005, online: <http://www.restorativejustice.org/editions/2005/nov05/novascotia>.

these individuals can contribute to more context-responsive processes which impact the degree to which restoration aims may be met. This is supported by restorative justice theory which broadly acknowledges that community is both essential and complex in restorative justice practice. Llewellyn and Howse have asserted, "For restorative justice, community is both subject and object; restorative justice is realized in community and, at the same time, is transformative of that very community."[284] Restorative justice theory recognizes that communities are negatively impacted by wrongdoing, and further, the involvement of community is necessary in order for restoration to occur.[285] Restorative justice processes require the involvement of community as well as that of the victim and wrongdoer. Lode Walgrave has suggested that "[t]he role of community is...very often not defined precisely and community as an extension [of the victim and offender], as a tool [to provide context], as a stakeholder, and as a goal [to create community through process] are mixed up without distinction."[286]

As the previous pages have shown, the practice of restorative justice should vary depending on its context in order to capture the particular set of relationships and harms at stake.[287] The contextual nature of restorative justice recognizes this multi-faceted relationship communities have with wrongdoing and restorative responses. This means that involvement of community is integral to restorative justice processes. Although

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[284] Jennifer J. Llewellyn & Robert Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission" (1999), 49 University of Toronto Law Journal 300 at 380.
[285] Llewellyn and Howse, *supra* note 6 at 43.
[286] Lode Walgrave, "From community to dominion: in search of social values for restorative justice" in Elmar G.M. Weitekamp & Hans-Juergen Kerner, eds., *Restorative Justice: Theoretical Foundations* (Devon: Willan Publishing, 2002) at 75.
[287] Llewellyn and Howse, *supra* note 6 at 55. Tony F. Marshall has defined restorative justice as: "a problem-solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies." He suggests that it is not any particular practice, but a set of *principles* which may orientate the general practice of any agency or group in relation to wrongdoing. "Restorative Justice: An Overview," online: <http://www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf.>

restorative justice recognizes that communities are harmed by wrongdoing[288] and can play important roles in articulating this harm, they must be seen as more than simply additional "parties" in the process (i.e., they are victims). Indeed, communities may also share responsibility for the wrongdoing by having created a climate in which wrongdoing was encouraged, or by failing to provide preventative supports. Communities are uniquely able to frame the context in which wrongdoing has occurred so that deliberations are more comprehensive and outcomes are more appropriately responsive. They contribute to restoration by identifying, creating and offering supports to reintegrate the wrongdoer and victim, and prevent further wrongdoing by that individual and others by playing both supervisory and support roles.[289] Finally, communities can be fundamentally transformed through restorative processes (e.g., by having an enhanced ability to prevent or respond to systemic issues). Because the substance of the contributions will differ by different communities, the exact format of restorative justice practice will necessarily differ. For this reason, taking into account contextual factors and the needs of other parties, practice details should be determined in and by each community.[290] This is why communities are key to restorative justice programs and processes.

Although it is generally accepted that the involvement of community is imperative in restorative justice, many programs claiming to offer restorative justice processes do not provide for community involvement in those processes in meaningful ways. For example, "Victim-Offender Mediation" is often considered to be restorative justice, but it is generally described to involve only the victim, offender and a mediator. Under this

[288] Llewellyn and Howse, *supra* note 6 at 43.
[289] Morris and Maxwell, *supra* note 9 at 273.
[290] See generally Kay Pranis, "Restorative Justice, Social Justice and the Empowerment of Marginalized Populations" in Gordon Bazemore and Mara Schiff (eds.), *Restorative Community Justice* (Cincinnati: Anderson Publishing, 2001) at 287.

model, the mediator is sometimes considered to be the "community representative."[291] Further, the fact that a process is physically situated in a community may be touted as a sufficient connection to that community.[292] These approaches, however, do not allow for meaningful contribution of the community toward a goal of restoration because the community is not able to share perspectives and is not able to engage with the process as a party.

In order for a restorative justice process to be context-responsive, the community should be involved. Nils Christie has commented on the importance of the community in dealing with conflict by describing a scenario in Tanzania in which the community represents "experts [on village matters;] on norms as well as actions." He adds that the process itself is used to clarify boundaries: "[the community] crystallized norms and clarified what had happened through participation in the procedure."[293] These points acknowledge the specific expertise that communities can bring to processes aimed at resolving conflict, and might imply that a random gathering of associated individuals would be appropriate. This is not the case. The individuals included in a restorative justice process as community representatives should not simply be a conglomeration of local people who would reflect – and reinforce – existing inequities in society. It has been observed that communities "[may] shun diversity...[and] are often hostile to minorities, dissenters, and outsiders."[294] Recalling the earlier discussion of power imbalances, these points illustrate the importance of rights protections as promulgated

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[291] See generally Umbreit, *supra* note 27.
[292] Mark Umbreit has worked extensively in the area of victim-offender mediation and regularly classifies this as restorative justice. See, for example, Gordon Bazemore and Mark Umbreit, "A Comparison of Four Restorative Conferencing Models by the Office of Juvenile Justice and Delinquency Prevention" in *Restorative Justice: Repairing Communities through Restorative Justice,* John G. Perry, Ed. (Lanham, MD: American Correctional Association, 2002) at 69. See also Umbreit, *supra* note 27.
[293] Christie, *supra* note 231 at 2.
[294] Crawford and Clear, *supra* note 236 at 136.

by the state, and prudent selection of the individuals who are included in restorative justice processes. Without careful attention to the composition of the participants in a restorative justice encounter, one writer notes, "restorative justice practice will be used to close, to limit and to exclude."[295] Pavlich has recommended a deconstructive approach to community for restorative justice which, he claims, "refuses to privilege unifying discursive strategies."[296] This, he suggests, retains respect for diversity by not focusing on a notion of community unity. The community in restorative justice practice should include individuals who are able to respect diversity and recognize dynamics that would detract from an aim of social equality, and address those dynamics when they are manifested in practice.[297] The state, again, can play an important administration role, in establishing standards to ensure such dynamics are addressed.

The Nova Scotia restorative justice program appropriately reflects restorative justice theory insofar as it enables meaningful community involvement in the design and implementation of restorative justice processes. Although challenges have been identified in ensuring appropriate representation from specific communities, these challenges relate to practice implementation rather than program design. The community justice agency structure enables liaising to draw various communities into the process. Moreover, the processes themselves contemplate community involvement, ensuring a multifaceted and complex relationship between communities and restorative justice practice in Nova Scotia.

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[295] Cunneen, *supra* note 259 at 40.
[296] Pavlich, *supra* note 249 at 63.
[297] Community members working in social justice or human rights fields, for example, may have enhanced skills in identifying such dynamics. It should be noted, however, that there should be other individuals as well, particularly those who may be transformed through the restorative justice process.

Confidentiality

The importance of community participation in restorative justice practice might imply that it is a public process in the sense that details of the process are widely disseminated. This is, however, not the case for the Nova Scotia restorative justice program which considers sessions to be confidential. The program's most recent protocol makes assertions about confidentiality protections, providing, "The facilitator shall inform those in attendance at the Restorative Justice Process, Accountability Session/Group Accountability Session that any and all information disclosed during the conference is considered confidential and shall not be discussed with, or relayed in any manner, to any other individual outside of the Restorative Justice conference."[298]

Although this might imply that there are formal restrictions on the release of information relating to or emerging from a restorative justice session, the recourse upon breach of such an arrangement is unclear. There are some confidentiality frameworks imposed upon the present practice of restorative justice in Nova Scotia as it applies to youth, because the youth justice system is obliged, in most instances, to protect the privacy of the young persons.[299] It is, however, unclear whether facilitators are entitled to offer such protections (i.e., whether there is a general legal basis for it outside the framework of youth justice legislation) and/or whether they should make such guarantees.

Restorative justice processes, in practice, take a broad range of approaches to confidentiality. Some are widely open to the public, whereas others are exclusive to the

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[298] *Restorative Justice Protocol, supra* note 205. See the version dated 16 September 2005 at p. 12. It is noted that this is subject to a "duty to report any information indicating that the young person is in need of protection" as defined in the *Children and Family Services Act,* S.N.S. 1990, c-5 at s. 23(1) and 24(2).

[299] *Youth Criminal Justice Act, supra* note 105.

parties and are considered to be confidential.[300] It appears that some restorative justice processes draw upon assumptions and approaches common to ADR practices, with participants being advised that the discussions are confidential.[301] Many ADR processes are considered confidential, and participants are advised of "ground rules" in this regard. Participants may be required to sign oaths of confidentiality; indeed, these processes are often promoted as being "without prejudice" so that any discussions emerging from the ADR process cannot be used in subsequent adversarial proceedings. Further, because of the interaction of many restorative justice programs with the criminal justice system, confidentiality assurances are made in an effort to secure "buy-in" to the process so that parties – perhaps most obviously, wrongdoers – feel confident that they will not be accountable in a separate process for information they share as part of a restorative justice process. Some programs have devised mechanisms to define which information may be considered privileged,[302] and some are explicit in advising participants of the limits of enforceability.[303]

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[300] The New Zealand Ministry of Justice has developed a manual on Best Practices for restorative justice. This document suggests that confidentiality is connected with the "emotional and physical safety" of the participants, noting that this includes protections for personal information. See New Zealand, Ministry of Justice, *Restorative Justice in New Zealand: Best Practice*, (Wellington: Ministry of Justice, 2004), at Part B, section 6. Online: <http://www.justice.govt.nz/restorative-justice/partb.html>.

[301] Information on the RCMP restorative justice program is available online: <http://www.rcmp.ca/ccaps/restjust_e.htm>.

[302] Mary Ellen Reimund has criticized, as insufficient, the various frameworks in the United States which have been designed in efforts to define parameters for information-sharing following informal practices. In the context of "victim-offender mediation," which she characterizes as a restorative justice process, she identifies the fact that protections differ from state to state. She notes, at p. 410, that in some states, for example, there are no protections if a participant expresses the intent to commit a crime, whereas there may be protections if one admits to other crimes that he or she has already committed. Further, she notes discrepancies relating to who is covered by confidentiality protection, as in at least one state, there is no statutory ban on disclosure by people other than the victim, wrongdoer and facilitator. Mary Ellen Reimund, "Confidentiality in Victim Offender Mediation: A False Promise?" 2004 Journal of Dispute Resolution 401.

[303] New Zealand Ministry of Justice, *supra* note 300.

As observed by Van Ness, there are some areas where restorative justice theory is broader than present practical implementation.[304] He explains the background behind Principle 13 of the United Nations *Basic Principles on the Use of Restorative Justice in Criminal Matters*, which, he notes, provides, "Discussion in restorative processes should be confidential and should not be disclosed subsequently, except with the agreement of the parties."[305] Van Ness suggests,

> The reason for confidentiality is to encourage the exchange of information among the parties. A major emphasis and benefit of restorative processes is that they allow the parties an opportunity to ask and answer questions that the other may have. In some instances those are questions that are not legally relevant, but are important to the party. In other instances they might be highly relevant – and incriminating – if revealed in a court setting. In an adversarial setting, there are no incentives for disclosing damaging information, and there are many incentives for hiding it. Restorative processes permit parties to disclose to the other party things they would be unwilling to disclose in court. But confidentiality is not limited here to use in subsequent legal proceedings. It also concerns disclosure to other individuals or to the community.[306]

In New Zealand, the protections for confidentiality appear to be lower, as the Best Practice Principles assert,

> Facilitators must make participants aware of the limits to confidentiality before a conference is held. For example, judges may refer to the conference report in open court and the disclosure of other offending may be reported to the Police. While there may be agreement before the conference to respect confidentiality, participants need to be aware that this agreement cannot be legally enforced.[307]

Restorative justice theory appears to still be developing in this area – and the theoretical discussions noted above appear driven by concerns relating to implementation, particularly within an otherwise adversarial context. Strict confidentiality protections,

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[304] Daniel Van Ness, "Proposing Basic Principles on the Use of Restorative Justice: Recognizing the Aims and Limits of Restorative Justice" online: Prison Fellowship International, UN Declaration Initiative <www.pficjr.org/programs/un/proposing>.
[305] *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).
[306] Van Ness, *supra* note 304 at 13.
[307] New Zealand Ministry of Justice, s*upra* note 300 at part B, section 6.

such as those in the United Nations *Basic Principles on the Use of Restorative Justice in Criminal Matters*, appear unsupportable under restorative justice as a relational theory of justice. Processes which are confidential cannot effectively restore relationships, particularly when the relationships at issue are with broader communities. Restorative justice recognizes that the harm of wrongdoing is broader than the parties as defined in traditional responses to wrongdoing. As such, it alters (i.e., extends) the breadth of the parties. This necessarily has implications for the sharing of information emerging from restorative justice processes, particularly as this information-sharing may be central to restoration. Therefore, information emerging from restorative justice processes – particularly information relating to the agreement or plan for restoration – should not be confidential because the potential for achieving the aim in restorative justice of social equality would be circumscribed. One of the ways that this is managed in New Zealand is by allowing the determination about release of information to be built into the process: "Information about what occurred during the restorative justice process may be disclosed to non-participants but only with [the] participants' consent."[308] Protections as they relate to evidentiary privilege, through the *Criminal Code,*[309] the *Youth Criminal Justice Act,*[310] and the protocol for Nova Scotia restorative justice program[311] fulfill this role, at least in part, in Nova Scotia.

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[308] *Ibid.* This, of course, is subject to an understanding that the agreement cannot be legally enforced, as noted at Part B, section 6.
[309] *Criminal Code, supra* note 121, s. 717.
[310] *Youth Criminal Justice Act, supra* note 105, s. 10.
[311] See 2005 Protocol, *supra* note 205, at 20-21.

Thresholds for Restorative Justice

Scope of Wrongdoing

As noted above, in Nova Scotia the restorative justice program is available through the criminal justice system. Within this framework, it is available for a wide range of criminal offences committed by young persons; in fact, the framework is designed to capture all provincial statute and *Criminal Code* offences. In practice there is presently a moratorium on restorative justice referrals for sexual assault and partner/spousal violence.[312] Although there has been little empirical evidence that restorative justice is an inappropriate response for such forms of wrongdoing, public and political pressure have prevailed in ensuring the moratorium is maintained.[313] The program does, however, offer opportunities for restorative justice processes in a manner that does not jeopardize public safety (i.e., post-conviction). Given the possibility for reducing recidivism and promoting restoration,[314] this moratorium is an unfortunate limitation. Despite the limitations currently imposed, it is notable that mechanisms are in place for restorative justice practice in response to all types of wrongdoing considered in the criminal justice system as they apply to all provincial statute and *Criminal Code* offences. This reflects a very wide ambit of applicability of restorative justice processes (albeit within the parameters of the criminal justice system).

Restorative justice theory has contemplated the link between the nature of the wrongdoing and restorative justice practice. There is some debate about the types of wrongdoing that may appropriately be addressed through restorative justice processes. Some have argued that more serious crimes, for example, should not be considered in

[312] Clairmont, *supra* note 277 at ii.
[313] Rubin, *supra* note 272.
[314] Morris and Maxwell, *supra* note 9.

informal processes.[315] On the other hand, in New Zealand it has been observed that the experience of restorative justice is most beneficial (i.e., can have the greatest impact) where the loss is more profound so is most appropriate for serious offences.[316] Further, greater public safety issues are presented by those who reoffend and/or commit more serious offences, and therefore such situations may be seen as more appropriate for restorative justice because of the involvement of the community.[317]

Llewellyn and Howse have pointed to the South African Truth and Reconciliation Commission to illustrate how restorative justice principles can appropriately respond to a very broad range of wrongdoing:

> The idea of justice as restorative opens up the possibility of a rich contextual exploration of what, at a given juncture in the evolution of society, both victims and perpetrators need for equality to be established or re-established in light of the offences that have occurred. The emphasis is on reintegrative measures that build or rebuild social bonds, as opposed to measures such as imprisonment and the death penalty that isolate and alienate the perpetrator from society.[318]

John Braithwaite has noted that restorative justice can be appropriate in circumstances beyond the context of criminal justice systems.[319] He discusses the value of restorative justice processes in regulatory contexts. In describing some of the ways in which he has

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[315] Rubin, *supra* note 272.
[316] Morris and Maxwell, "Family Group Conferences and Reoffending" in Allison Morris and Gabrielle Maxwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart Publishing, 2001) 243 at 246. In their study, they identified a number of factors that they say can contribute to a reduction in the chance of reoffending. They provide, at p. 261, that these include "having a conference that is memorable, not being made to feel a bad person, feeling involved in the conference decision-making, agreeing with the conference outcome, completing the tasks agreed to, feeling sorry for what they had done, meeting the victim and apologizing to him/her, and feeling that they had repaired the damage."
[317] Restorative Justice Framework, *supra* note 33.
[318] Llewellyn and Howse, *supra* note 284 at 355.
[319] See generally Braithwaite, *supra* note 235.

applied principles of restorative justice to other contexts, he cites nursing home regulation, occupational health and safety and environmental protection.[320]

These points suggest that the scope of wrongdoing that may be appropriately addressed through restorative justice processes is broad. The application of restorative justice ought not to be determined by the nature of the wrongdoing (i.e., the type or seriousness) itself. Rather, it ought to be determined by the harm to the relationship, and the capacity or willingness of parties to take part.

Acknowledgment of Responsibility

In keeping with the idea that willingness to take part is key for the active participation required by restorative justice, one of the minimum requirements for referral to restorative justice in Nova Scotia is the wrongdoer's acknowledgment of responsibility.[321] The program's protocol asserts that it is essential that "the Young Person accepts responsibility for his/her actions."[322] In practice, this means that there is acknowledgment of responsibility for the act which is prohibited by criminal legislation. If this does not take place, the matter is ineligible for restorative justice.

Restorative justice theory generally requires that responsibility is acknowledged by the wrongdoer as a threshold for entering a restorative justice process. In discussing the role of responsibility in restorative justice, Braithwaite and Roche have drawn upon

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[320] *Ibid.* at vii, Braithwaite argues that restorative justice processes could have implications for attaining peace and transforming the entire legal system. See also Braithwaite and Parker, *supra* note 18 at 107.
[321] *Restorative Justice Framework, supra* note 33. This is a legislative precondition. See *Criminal Code* s. 717, *supra* note 121, and *Youth Criminal Justice Act, supra* note 105, s. 10.
[322] Nova Scotia, Department of Justice, *Restorative Justice Program Protocol* (16 September 2005) at 6.

theories of passive responsibility which they suggest entails taking responsibility for past events, and active responsibility which they suggest is "seeking responsibility to repair harm, and especially to restore relationships".[323] It is their contention that the imposition, by courts, of criminal responsibility represents passive responsibility.[324] They suggest, "restorative justice uses passive responsibility to create a forum in which active responsibility can be fostered. Restorative justice, then, is about shifting the balance from passive responsibility toward active responsibility."[325] This means that they consider passive responsibility to be a minimum prerequisite for entering restorative justice processes.

Llewellyn and Howse offer a more purposive approach to the importance of acknowledgment of responsibility in restorative justice. They consider this one component of "truth telling" that they suggest is a necessary practice element.[326] They note,

> [o]ne way to ensure ...[voluntariness] is to require the perpetrator to acknowledge what happened at the outset....At first glance this may appear to be a huge limitation for a restorative approach, permitting restorative processes only in those cases where wrongdoers are willing to admit responsibility...However, a restorative system is not interested in establishing guilt with a view to punishment. Rather, it is interested in determining what happened in order to address the wrong.[327]

This approach considers "truth-telling" at the outset as a way of determining what has transpired and its implications. Part of this truth-telling is a discussion of responsibility

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[323] John Braithwaite and Declan Roche, "Responsibility and Restorative Justice" in Gordon Bazemore and Mara Schiff (eds.), *Restorative Community Justice* (Cincinnati: Anderson Publishing, 2001) at 64.
[324] *Ibid.* at 68. They argue, at p. 65, that "restorative justice reconceptualizes responsibility, so that when people claim that restorative justice offers *better* responsibility than traditional court sentencing...they are impliedly making a claim about what is accomplished by active responsibility."
[325] *Ibid.* at 64.
[326] Llewellyn and Howse, *supra* note 6 at 57.
[327] *Ibid.* at 58.

for the wrongdoing. Given the different aims in restorative justice (i.e., non-punishment), people are more likely to admit responsibility under restorative justice processes -- and the nature of that admission differs than in traditional responses to wrongdoing. There is some variation in the requirements for accessing restorative justice processes, allowing such access where the alleged wrongdoers have admitted responsibility but also for those who, at minimum, have not denied it.[328] Paul McCold has devised a framework to determine the degree to which disparate practices are restorative. He provides a range: "fully restorative," "mostly restorative" and "partly restorative."[329] Practices are, he suggests, appropriately categorized by the degree to which they adhere to his conception of restorative justice.[330] For example, while he considers mediation, conferences, and circles to be restorative practices, factors such as inclusion of affected parties or the community can impact the degree to which a practice is deemed to be restorative. Similarly, the range of acknowledgment of responsibility articulated in practice requirements above can have implications for the discursive interaction that forms an integral component of restorative justice practice.

Discursive Interaction

Restorative justice is discursive in nature. While there may be some flexibility in terms of acknowledgment of responsibility as a starting point for a restorative justice process, this must not be construed to suggest that restorative justice permits expressions of dishonesty or incomplete versions of events. The discursive nature of restorative justice

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[328] David B. Moore and John M. MacDonald, *Community Conferencing Kit*, Transformative Justice Australia (undated).
[329] Paul McCold, "Researcher's New Theoretical Framework Assesses Degree to which Practices meet Standards of Restorative Justice," (2000) 8 Real Justice Forum 3.
[330] Paul McCold, "Primary Restorative Justice Practices" in Morris and Maxwell, *supra* note 9. This, he suggests at p. 42, is to "involve victims and their offenders in face-to-face meetings and it is these participants (along with their respective communities of care) who determine how best to deal with the offence."

raises a number of issues including the importance and subjectivity of truth-telling, and the implications of consensus-building through deliberation.

Truth-telling

Unlike in adversarial responses to wrongdoing, restorative justice allows the sharing of *many* truths and creates space for alternative interpretations that are inclusive of perspectives and contexts. Restorative justice processes require people to speak on their own behalf. This idea is integrated into the Nova Scotia restorative justice program, which ensures that those affected – the victims, wrongdoers and communities – each speak on their own behalf and from their own perspective.[331] The program asserts, "During the course of [a restorative justice] meeting each party is given an opportunity to tell the story of the crime from their own perspective."[332] This reflects recognition that there may be a variety of "truths" surrounding the events in question, and further prevents these truths from becoming obscured through the legal system by, for example, lawyers speaking on behalf of their clients.

This approach is strongly supported by restorative justice theory, which endorses truth-telling (in terms of acknowledging responsibility) as an essential starting point for restorative justice,[333] and suggests that the sharing of truth is important throughout. As noted above, Llewellyn and Howse have indicated that restorative justice must "be premised on and involve truth-telling."[334] This is in direct contrast with adversarial responses to wrongdoing which are premised on a pre-existing set of norms guiding the

[331] *Restorative Justice Framework, supra* note 33.
[332] Nova Scotia, Department of Justice, *The Nova Scotia Program,* online: <http://www.gov.ns.ca/just/Divisions/CourtServ/rj/program.asp>
[333] Van Ness and Strong, *supra* note 115 at 71.
[334] Llewellyn and Howse, *supra* note 6 at 57.

significance of one's words. In other words, the information shared in adversarial processes is circumscribed and reframed in efforts to have it comport with precedents and legal parameters which are supportive of one's perspective or legal strategy.

Lise Gotell has highlighted the limitations inherent in that which is considered, in adversarial legal frameworks, to constitute "truth":

> It is, of course, well recognized that law as a discourse rests on the claim to 'Truth.' Law constitutes a powerful meta-narrative, assuming the guise of objectivity and promising to distinguish true from false. In this way, legal discourse is elevated above other discourses. The centrality of 'Truth' within legal discourse makes it resistant to complexity and contingency and responsive to demands that are both positivistic and categorical. This is because law rests on a version of the subject that is universal, rational, and knowing...."[335]

In advancing ostensibly objective versions of "truth," adversarial processes can limit information that is shared by screening out facts or perceptions that are not deemed to be legally relevant. These frameworks advanced by the legal system can create disincentives to truth-telling. When lawyers speak on behalf of their clients, they reframe experience to illustrate or contest legal significance. Christie has suggested, "We have to organize social systems so that conflicts are both nurtured and made visible and also see to it that professionals do not monopolise the handling of them."[336] He later notes,

> Lawyers are particularly good at stealing conflicts. They are trained for it... They are socialized into a sub-culture with a surprising high agreement concerning interpretation of norms, and regarding what sort of information can be accepted as relevant in each case. Most of us have, as laymen, experienced the sad moments of truth when our lawyers tell us that our best arguments in our fight

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[335] Lise Gotell, "Towards a Democratic Practice of Feminist Litigation? LEAF's Changing Approach to Charter Equality" in Radha Jhappan, ed., *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) at 136. She adds, at page 136-7, "While law seems to demand that feminists speak in the unambiguous tones of 'Truth' [as recognized by the legal system] in order to be heard, I suggest that a commitment to a democratic form of feminist politics demands that we relinquish such 'Truth' claims." Carol Smart elaborates a critique on what she terms "law's claim to truth" in *Feminism and the Power of Law* (London: Routledge, 1989).

[336] Christie, *supra* note 231 at 1. In describing the role of professionals in Tanzania, he says, at p. 2, "No reporters attended. They were all there".

> against our neighbour are without any legal relevance whatsoever and that we for God's sake ought to keep quiet about them in court. Instead they pick out arguments we might find irrelevant or even wrong to use.[337]

Restorative justice allows space for a variety of "truths"; as a deliberative process it contemplates the sharing of multiple perspectives. Roche has observed,

> One of the benefits of a restorative justice meeting is its flexibility in the way people are able to choose to communicate with each other. Because [adversarial legal systems]... often favour certain styles of communication over others, they work to exclude people who cannot express themselves in ways in line with the dominant modes.[338]

Not only are people excluded from adversarial processes, perspectives which may be key to restoration (if the goal is restoration of the relationship rather than affixing blame) are also excluded. This was illustrated in the report of the South African Truth and Reconciliation Commission.[339] In stating its recognition of different perspectives, the report provides, "[T]he telling of the truth about past gross human rights violations, as viewed from different perspectives, facilitates the process of understanding our divided pasts, whilst the public acknowledgement of untold suffering and injustice."[340] The notion of "truth", it is concluded, is not a unified concept but rather one which is rich with complexity. These nuances are acknowledged: "But what about truth – and whose truth? The complexity of this concept also emerged in the debates that took place before and during the life of the Commission, resulting in four notions of truth: factual or forensic truth; personal or narrative truth; social or 'dialogue' truth...and healing and restorative truth."[341] This illustrates the fact that differing perspectives may be key in

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[337] *Ibid.* at 4.
[338] Roche, *supra* note 211 at 141.
[339] Jennifer Llewellyn and Robert Howse have characterized the South African Truth and Reconciliation Commission as a restorative justice process in Llewellyn and Howse, *supra* note 284 at 355.
[340] *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Truth and Reconciliation Commission, 1998), vol.1, c.4.
[341] *Ibid.*, vol. 1, c. 5, pgph. 29.

moving towards a goal of restoration. This recognition of a broad spectrum of experience as constituting forms of truth represents a shift away from the binary-based adversarial responses to wrongdoing (e.g., guilty/not guilty). Restorative justice can widen the parameters of truth and experience that are considered relevant to the process thus enabling acknowledgment of a diversity of truths.

The implementation of this aspect of restorative justice theory into practice requires that there are opportunities for multiple perspectives to be shared. Practice that stymies the sharing of one's subjective assessment of the wrongdoing – such as that involving legal representatives in their traditional role – undermines the potential of the deliberative experience, and the aim of the proceeding is a disincentive to truth-telling. Over-professionalization of practice is problematic because the use of representatives to speak on behalf of the parties will necessarily entail some filtering of their words.[342] In other words, the potential contributions by lawyers or advocates are limited in restorative justice processes and indeed, can undermine the potential for restoration.

Deliberative Consensus-Building

The objective of sharing truths and perspectives is to reach some consensus, among participants, on the restoration requirements raised by a particular incident of wrongdoing. The Nova Scotia restorative justice program provides some interesting features which enhance opportunities for consensus-building through deliberative approaches. The opportunity provided by the program to design context-specific processes allows for careful selection of participants. Because each agency is community-based, they are more apt to be familiar with the local organizations and

[342] A survey of participants from a New Zealand Family Group Conference concluded that people who participate in professional capacities "tend to overtake, distort, and undermine proceedings." Roche, *supra* note 211 at 37.

individuals who are working on the issues which are likely to be discussed. This can enable a process to be structured so as to better examine differences between and among groups, and to have issues of inequality articulated in the sessions. This is particularly pertinent where issues relating to power imbalances emerge, and people who are well situated to identify and transform these imbalances are present. As Llewellyn and Howse have observed, "Power imbalances are often difficult to detect as very often the person most in need of protection feels silenced by the power difference."[343] For this reason, carefully comprised community representatives are essential.

The success of restorative justice relies on the deliberative nature of the process; unlike under formal, adversarial responses to wrongdoing, restorative justice opens discursive space enabling the victim, wrongdoer and community to participate in this process.[344] It is useful to recall that restorative justice is voluntary.[345] If people are coerced into restorative justice processes, they will not freely share information. Further, a process that is imposed upon unwilling participants cannot advance an aim of social equality. Therefore, restorative justice processes should not be attempted where one or more of the parties resist this approach.[346]

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[343] *Supra* note 6 at 65.
[344] Llewellyn and Howse, *supra* note 6 at 45.
[345] *Ibid.* at 58.
[346] It is conceivable that one of the parties may want a "day in court" or may feel concerned about process protections. If these concerns can be alleviated through clear explanation of restorative justice and implementation of rights-protection mechanism, the willingness of parties to voluntarily participate may be enhanced. For this reason, it is essential that participants are fully apprised of what restorative justice is, and how the process works, so that they may be able to make informed decisions about whether they wish to participate.

Bruce Archibald has commented on the evolution of participatory approaches in Canada, noting that, on the heels of decades of political pressures,

> [t]he 1990s has seen pressure for greater citizen access and fairness of treatment for visible minority and aboriginal communities in Canada. The interesting aspect of these political developments, also reflected to some measure through changes in citizen access to the criminal justice system, has been the shift away from simply thinking in terms of individual citizens' rights to a concomitant emphasis on the rights and participatory capacities of various groups of citizens who identify themselves as communities or persons with common interests.[347]

He adds that, in this regard,

> [t]heories of democracy are changing to adequately comprehend this complex new political reality in its various manifestations. Jürgen Habermas boldly attempts to bridge the gap between the normative, moral discourse of political philosophy and the empirical discourse of the social sciences in a theory of democracy based on the principles of communicative action.[348]

Restorative justice may be seen as consistent with the theory of deliberative democracy as promulgated by Jürgen Habermas.[349] Habermas has extensively considered the implications of a communicative process. He looks to "democratic procedure"[350] to find legitimacy in rule-making, suggesting, "a regulation may claim legitimacy only if all those possibly affected by it could consent to it after participating in rational discourses."[351] He bases this theory of democracy on his assertion that

> ...political philosophy has never really been able to strike a balance between popular sovereignty and human rights, or between the "freedom of the ancients" and the "freedom of the moderns". The political autonomy of citizens is supposed to be embodied in the self-organization of a community that gives itself its laws through the sovereign will of the people. The private autonomy of

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[347] Archibald, *supra* note 28 at 154.
[348] *Ibid.* at 155. Archibald notes, at p. 155, that Habermas "differentiates three dimensions of the 'self understanding of modernity' which he argues cannot be collapsed: cognitive, evaluative and normative validity."
[349] Habermas, *supra* note 245 at 259. See also Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996).
[350] Habermas, *supra* note 245 at 259.
[351] *Ibid.* See also Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996).

> citizens, on the other hand, is supposed to take the form of basic rights that guarantee the anonymous rule of law. Once the issue is set up in this way, either idea can be upheld only at the expense of the other. The intuitively plausible co-originality of both ideas falls by the wayside.[352]

Habermas has suggested that deliberative democracy is particularly useful and important in struggles of marginalized groups as it provides an opportunity to share perspectives and arrive at outcomes that are responsive to specific contexts. He has referred to what he calls "The Feminist Politics of Equality"[353] in illustrating how deliberative approaches to policy-making will yield outcomes that more accurately fulfill promulgated goals and respond to the needs of target beneficiaries. He notes that feminist critique has illustrated how attempts at formal equality have not been fruitful and further, have exacerbated harm including the "progressive feminization of poverty."[354] Habermas claims deliberative approaches can lead to substantive equality, in providing that radical feminist critique

> rightly insists that the appropriate interpretation of needs and criteria be a matter of public debate in the political public sphere. It is here that citizens must clarify the aspects that determine which differences between the experiences and living situations of (specific groups of) men and women are relevant for an equal opportunity to exercise individual liberties. Thus, this struggle for the equal status of women is a particularly good example of the need for a change of the legal paradigm.[355]

In a similar vein, Christine Koggel has suggested that social equality is achieved through discursive interaction: "Impartiality, in the sense of the ability to treat each person with equal concern and respect, is achieved not through the monological thinking of a solitary and isolated moral reasoner, but through a communicative process of an ongoing

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[352] Habermas, *supra* note 245 at 258.
[353] *Ibid.* at 262.
[354] *Ibid.* at 263.
[355] *Ibid.*

dialogue among different points of view."[356] This idea resonates with restorative justice theory insofar as it considers communicative processes as key to social equality.

This approach has not been without criticism. Melissa Williams has expressed unease with the potential for true consensus through deliberative democracy,[357] claiming that existing biases would necessarily be manifested in any deliberative setting.[358] She suggests that:

> Where relations of social and political inequality have long been structured along the lines of group identity, there is an inadequate foundation of trust between citizens who belong to marginalized groups and representatives who belong to privileged groups. Without this trust, the flow of communication which is a precondition of effective representation is unlikely to exist. Moreover, these groups' experience of marginalization yields an understanding of social practices and institutions which is not readily available to individuals who lack that experience.... Even if marginalized groups achieve self-representation in decision-making processes, however, their mere presence may do nothing to shape the outcomes of those processes.[359]

Williams acknowledges the appeal of discourse-based decision-making for those who have traditionally been excluded,[360] but she questions the degree to which marginalized groups' discourse will be accepted: "whether or not citizens will recognize others' reasons *as* reasons may be a socioculturally contingent matter. Moreover, it seems likely that the contingency of this recognition may tend to be resolved in a manner that

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[356] Koggel, *supra* note 195 at 5.
[357] Melissa S. Williams, "The Uneasy Alliance of Group Representation and Deliberative Democracy" in Will Klymicka & Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000).
[358] Similarly, Shane O'Neill has argued that Habermas presupposes equality among deliberative participants in "The Equalization of Effective Communicative Freedom: Democratic Justice in the Constitutional State and Beyond" (2004) 17 Canadian Journal of Law & Jurisprudence 83.
[359] Williams, *supra* note 357 at 124.
[360] *Ibid.* at 125.

systematically disadvantages the reasons of marginalized groups in a discursive exchange."[361] She is concerned that

> the judgement that another's arguments are reasonable is a much more contingent matter than deliberative theory suggests, and that the contingency of such judgement is strongly conditioned by membership in groups structured along the lines of social privilege and disadvantage. What deliberators could accept as reasons may turn out to depend importantly on who they are and on who is presenting the reasons to them. This unsettles the premises of deliberative democracy, which appears to contain an implicit supposition that the reasonableness or unreasonableness of others' arguments will be self-evident.[362]

It is her contention that the theory of deliberative democracy is incomplete insofar as it does not adequately address this challenge,[363] but she offers normative guidance on how this may be addressed: "It is only by making the unjust consequences of their power visible to privileged groups that marginalized-group perspectives can have any chance of transforming prevailing understandings of the requirements of justice."[364] She concludes that practice that enables discussion of – and response to – marginalization, that is "specifically responsive to group difference",[365] offers a means to achieve some impartiality. She suggests this is not enough; that it "must also be *transformative*; it must *correct* the past biases of social arrangements in ways that other models of deliberative democracy seldom contemplate."[366]

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[361] *Ibid.*
[362] *Ibid.* at 137.
[363] *Ibid.* at 126. Williams notes, at p. 139, "Habermas and Rawls have not overlooked this difficulty altogether in their accounts of political discourse, though they address it only obliquely and neither has offered a solution to it."
[364] *Ibid.* at 141.
[365] *Ibid.* at 142.
[366] *Ibid.* Williams identifies, at p. 143, two motivators for those with power to engage with and listen to those in less powerful situations: "the desire to be just" and "the need to stem conflict in order to avoid its costs." By examining some scenarios in which both are present, she concludes, at p. 143, "It is a threat to the interests of privileged groups that sometimes inclines them to be open to a redefinition of the requirements of justice."

Williams has identified an issue that lies at the very core of restorative justice. Restorative justice has the potential to be transformative; restoration will often necessarily demand that such group difference is examined. Further, as an aim of restorative justice is social equality,[367] factors that deter from such an aim should be addressed. Traditionally adversarial and many informal responses to wrongdoing do not allow for a discussion of group difference. Restorative justice, as a theory of justice, demands that existing imbalances, borne of differences being ignored or as sources of oppression, are addressed. Llewellyn and Howse acknowledge that restorative justice cannot necessarily redress all inequalities that impact upon the process; however, they observe its ability to identify inequality:

> The fact that [power imbalances] need to be addressed in the process, does not mean that the process itself can actually solve the imbalances themselves. The ideal goal of restorative justice may in fact imply important social transformations beyond what can be achieved in any process specific to those directly involved in the wrong.[368]

Llewellyn and Howse have suggested that restorative justice can more appropriately respond to challenges raised in diverse societies than traditional approaches, suggesting, "restorative justice may in fact address cultural differences better than other practices because it makes room within the process for different cultural expression. We have argued that one of the strengths of restorative justice mechanisms is their open texture."[369] Kathleen Daly agrees, and stresses that this must be part of broader political engagement (i.e. relating to race, culture and class).[370]

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[367] Llewellyn and Howse suggest, "In the bid to restore social equality, restorative processes must open the door for social dialogue about how such equality is best achieved. The dialogical nature of restorative processes make room for the expression of different perspectives in working towards restoration." Llewellyn and Howse, *supra* note 6 at 95.

[368] *Ibid.* at 66.

[369] *Ibid.* at 94.

[370] Kathleen Daly, "Restorative Justice in Diverse and Unequal Societies" (2000a) 17(1) Law in Context 1 at 17.

Processes that do not allow for discursive space in which to address imbalances of power or sources of inequality have little potential to be transformative. Processes that do not manifest the elements discussed above cannot claim to reflect a process contemplated by Habermas' theory of deliberative democracy while responding to the concerns articulated by Williams. For example, practices that are rigidly scripted (i.e., do not allow for open-ended questions, are not relevant to the complaint, etc.) or those that do not include wider communities are less likely to be transformative because discursive exchanges are necessarily limited.

Principles for Application to Policing Context

This chapter has explored restorative justice theory and its application in the context of the Nova Scotia restorative justice program, and has highlighted some factors that may be particularly pertinent when this practice applies to complaints against the police. Some general principles can been gleaned from this discussion. The goals of a restorative justice process differ from those in adversarial responses to allegations of police wrongdoing. While it may seem efficient for administration of the practice of restorative justice to be done through existing government frameworks, this idea is challenged by restorative justice theory which contemplates strong connections with the community. The communities involved in restorative justice practice must be carefully composed and the nature of obligations surrounding confidentially must be considered. The scope of wrongdoing considered appropriate for restorative justice, and the requirement that responsibility be acknowledged in advance, must be closely examined in light of the fact that restorative justice practice in Nova Scotia is currently restricted to matters considered criminal by the state and is available following acknowledgment, by the wrongdoer, of responsibility whereas disciplinary defaults under the *Police Act*

characterize a broader scope of action as constituting wrongdoing. Restorative justice processes require people to speak on their own behalf, and thus there may be implications when parties have legal representation.

The Nova Scotia restorative justice program speaks of "restorative" and "restoratively oriented" processes.[371] This chapter has outlined some aspects of restorative justice theory, but it should be acknowledged that not all practices are consistently able to embody all of the characteristics of restorative justice elaborated in its theory. These issues are considered in light of the unique context offered by the police complaints framework in Chapter 4, below.

[371] See 2005 Protocol, *supra* note 205 at 11.

CHAPTER 4 *Pertinence of Restorative Justice Theory to Police Complaints*

Chapter 3 has outlined some of the ways in which the Nova Scotia restorative justice program has implemented restorative justice theory into practice. This chapter considers how the same theoretical and practical considerations outlined above can apply to a police complaints context. As indicated at the outset of this thesis, restorative justice theory has particular pertinence to police complaints, because it has an aim of restoring relationships. Relational breakdowns between the police and communities resulting from police wrongdoing – or allegations of police wrongdoing – can impact the public's sense of security and faith in the administration of justice, and can also impact the ability of the police to effectively carry out their work, particularly in this era of community policing which demands community-police collaboration. Restorative justice also provides a forum in which to identify and address systemic concerns and issues that relate to the wider community.[372] These issues are particularly relevant in police accountability processes, as they are often called upon to consider issues that extend beyond the specific incident that lead to a complaint, and further, these processes have a preventative goal (i.e., to ensure such situations do not recur). Police accountability frameworks contemplate matters that are both within and outside the criminal realm and therefore the wide ambit offered by restorative justice can appropriately respond to this context.

[372] Llewellyn and Howse, *supra* note 6 at 73.

Types of Police Complaints Appropriate for Restorative Justice

It should be noted that, although relationships are at stake in all kinds of situations involving allegations of police wrongdoing, the ability for restorative justice processes to respond to all types of police-public relational breakdown may, in some cases, be circumscribed. Therefore, it is useful to consider the types of cases for which restorative justice is appropriate, noting those for which fully restorative justice may be possible, and identifying those for which it may not.

Restorative justice is highly suitable for some types of instances that fall within the police complaints process. When a police officer acknowledges responsibility for an incident alleged to have constituted wrongdoing, then full restorative justice is possible. As alluded to in previous chapters, the concept of "responsibility" is distinct from "guilt", which attaches a value to the action itself, and has specific legal meaning, as opposed to broader consideration of context as enabled in restorative justice processes. When responsibility (admitting the commission of a disciplinary default) is fully acknowledged, or responsibility but not guilt (e.g., the police officer agrees that a stop was made but does not agree that the stop was made for discriminatory purposes) is acknowledged, restorative justice can work particularly well. A second type of situation highly conducive to full restorative justice is when a false allegation is made against the police, and is proven or acknowledged to be false (responsibility for which is acknowledged by the alleger). In these instances, then the wrongdoing is against the police. It seems the bulk of cases may fall into these two types of situations, where it is acknowledged that an interaction between the police and the public has taken place but the meanings ascribed to the events differ to the different parties. Restorative justice offers a highly

appropriate mechanism when a process is required in order to determine *the meaning* of what has happened.[373]

The prospects for successful restoration are more circumscribed in situations in which an allegation is made, but there is no agreement on whether the events in fact took place. In other words, if there is no basic agreement on facts, it is difficult to conceive of how a restorative justice processes could contribute meaningfully to restoration. Further, there does not appear to be any way in which responsibility could be acknowledged if there is no basic agreement on what took place. It is unclear whether any type of restorative justice process could contribute to situations requiring a determination of *what* has happened; indeed, it may be that formal, adversarial processes are better suited for such instances.

The following pages will consider, in depth, the theoretical and practical considerations as discussed in Chapter 3 in light of their relevance to allegations of police wrongdoing. The first area discussed is the appropriateness of an aim of social equality in a policing context, raising critical issues relating to punishment of the police. The second area considered is the administration of restorative justice practice as it pertains to the police, identifying some problems with police-run restorative justice processes. The third area discussed is the role of community in restorative justice responses to police complaints,

[373] Braithwaite and Roche, *supra* note 323 at 63. Braithwaite and Roche have drawn upon concepts of "passive responsibility" and "active responsibility" to hypothesize, at p. 63, as to the "form of responsibility most likely to promote restoration – of victims, offenders, and communities." They generally accept, at p. 72, "passive responsibility" as a backward-looking approach to responsibility for wrongs in the past, and "active responsibility" as taking responsibility for the future, for repairing the harm. They argue at p. 68 that restorative justice processes "provide opportunities to nurture active responsibility," and suggest that active responsibility is necessary for drawing the parties towards a state of restoration. They caution, however, at p. 79, that responsibilitization can exacerbate power imbalances absent appropriate safeguards.

noting some ways in which such restoration may be limited through confidential processes. Fourth, some circumstances appropriate for restorative justice in response to police complaints, and some practice prerequisites, are outlined. Finally, some issues particular to policing that may impact a discursive process are raised.

Objectives and Outcomes

Social Equality

For circumstances in which restorative justice is determined to be a suitable response, the process should be structured in a manner that is mindful of the aims of restorative justice. Police and their communities are in a relationship, as suggested in community policing theories. As such, social equality seems to be an appropriate aim following allegations of police wrongdoing. Indeed, disrupted relations between the police and the various community contexts in which they operate would complicate the ability of the police to fulfill their stated missions and associated programs. Restorative justice can advance this aim in response to wrongdoing. Recalling that restorative justice does not aspire to the *status quo ante*,[374] the opportunities presented by restorative justice to achieve social equality through transformation can indeed better enable the police to attain their often-articulated community policing objectives because there may be relational challenges prior to an allegation of wrongdoing. In other words, the police *must aspire to* social equality if their community policing objectives are to be fulfilled; restorative justice is a means to achieve these goals.[375]

[374] Llewellyn and Howse, *supra* note 6.
[375] It is acknowledged that it is not possible to address all inequality in society through restorative justice processes. See *ibid.* at 95.

The police often make efforts to reflect a community policing approach, and run programs aimed at collaborative work within the community.[376] Restorative justice serves the same aspirations, and so addressing allegations of police wrongdoing through restorative justice is consistent with this philosophy. Furthermore, the transformative potential of restorative justice could better enable the police to fulfill these commitments by strengthening or building community through the process. A restorative justice process following allegations of police wrongdoing should be aimed at reparation and reintegration with an aim of social equality, further to the importance of community support in this context.

Alternative to punishment

Chapter 3 has outlined many reasons why punishment is not an aim of restorative justice. Punishment precludes restoration by further harming a relationship thus undermining the potential for social equality. This approach is taken by the Nova Scotia restorative justice program which adopts a forward-looking approach. This is designed to restore dignity in a way that captures social equality as an aim.

Because police officers are generally the first contact people have with the criminal justice system following wrongdoing, they are seen, by many, as agents of punishment. Further to the popular dismissal of restorative justice as a "soft option"[377] because it does not involve punishment, restorative justice might not seem satisfactory to communities that feel wronged by the police. As noted in Chapter 1, wrongdoing by police officers can be particularly harmful to communities due to their coercive power (i.e., it may raise

[376] Halifax Regional Police, *supra* note 79.
[377] For an overview of this concern as expressed in Nova Scotia, see Nova Scotia Standing Committee on Public Accounts (23 April 2003), online: <http://www.gov.ns.ca/legislature/hansard/comm/pa/pa_2003apr23.htm>.

concerns for safety and/or disrupt faith in the administration of justice generally). Restorative justice in response to such wrongdoing might be criticized as a way for the police to avoid punishment. In other words, it may be perceived as differential, "softer", responses to wrongdoing than they, as laypersons, would receive. However, as the previous chapter has noted, punishment is not an appropriate response for wrongdoing generally if the objective is the restoration of relationships.

There are a number of factors that demonstrate that this is true in a policing context. First, as observed above, punishment precludes social equality. Punishment can cause further harm to relationships and impede restoration, thus worsening the relationship between the police and their communities. In a policing context, particularly one in which community policing principles are espoused, restorative justice processes can result in agreements that are meaningful to the community, such as training for the police force and officers, and for the community on roles and responsibilities of the police.[378] Issues such as training deficiencies, community interaction and reparations are not meaningfully addressed in strictly punitive processes. Further, there is research suggesting that punishment does not successfully achieve its often-cited objective of deterrence[379] and therefore punitive approaches may not contribute to addressing future incidents relating to general or systemic problems.

[378] The range of possible outcomes in the Nova Scotia restorative justice program is broad, including restitution/financial compensation, community service work, personal service to the victim, community reconciliation, education programs, assessment, any other outcome agreed upon by the participants, or no further action. The protocol also notes that, when the process is a sentencing circle, the options outlined in the *Youth Criminal Justice Act* and the *Youth Justice Act* are possible. See 2005 Protocol, *supra* note 205 at 14-18.

[379] Smith, Goggin, and Gendreau, *supra* note 198.

While some conceptions of restorative justice may reflect punitive approaches, programs such as the one presently operating in Nova Scotia appropriately reject punishment, focusing instead on social equality as an aim of restorative justice processes. Challenges relating to a lack of public support for restorative justice as applied to police complaints may be best addressed by situating the process within a context with established restorative justice programming. Further, modeling a restorative justice police complaints process on a program which is currently in place will go far in mitigating potential criticisms that police officers could receive differential treatment through a rejection of traditionally punitive responses to wrongdoing. In keeping with current public education aimed at fostering a climate of public support for restorative justice,[380] ongoing dialogue with communities will better enable them to understand the value of restorative, rather than punitive, responses to police wrongdoing.

Administration of Restorative Justice Practice

Many elements of the Nova Scotia restorative justice program offer insight into how restorative justice might be appropriately operationalized in a police complaints context in this province. This model, and in particular, its administration by community-based agencies, mitigates some of the concerns relating to state administration of practice. The concerns relating to the state occupying the role of service deliverer for restorative justice practice are particularly pertinent when the beneficiaries of restorative justice include agents of the state. As community policing initiatives point out, the police form an integral part of the community;[381] however, the police are also agents of the state. Their relationship with the community, then, is multifaceted and complex.

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[380] See generally *supra* note 31 and note 205.
[381] Kratcoski and Cebulak, *supra* note 75 at 23.

Some might believe that it would be efficient and feasible for the police to run a restorative justice program and in fact, many successful programs (as part of the criminal justice system, and not in response to police wrongdoing) are run by policing agencies.[382] There has, however, been some criticism of police-run restorative justice initiatives presently operating in response to matters traditionally defined as criminal. Richard Young has examined such police-led restorative justice conferences. He has concluded: "empirically...police-led conferencing is prone to some distinctive pitfalls. Traditional police culture, and the authoritarian and questionable practices it can generate, present a significant obstacle to the successful implementation of restorative justice."[383]

The biggest police-run restorative justice program in Canada is the RCMP model. This program is historically significant because it helped legitimize and popularize restorative justice.[384] Because the RCMP had access to fiscal and human resources and specific expertise in the area of criminal justice, it developed pilot programming which arguably invited cross-sectoral support for restorative justice. However, its ability to secure real and perceived independence from the state generally, and the justice system specifically, is questionable. Although the facilitators are often community members, the

[382] Two programs broadly considered successful include the RCMP program and the Thames Valley Police program. These programs originated with the Wagga Wagga model from Australia. See Braithwaite, *supra* note 235 at 26. For a description of this police-facilitated model, see David B. Moore and Terry O'Connell, "Family Conferencing in Wagga Wagga: A Communitarian Model of Justice" in C. Adler and J. Wundersitz (eds.), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Canberra: Australian Institute of Criminology), online: <www.aic.gov.au/ publications/lcj/family/ch3.pdf>. This model has been supplanted by a more court-driven process. See Heather Strang, *Restorative justice programs in Australia : a report to the Criminology Research Council* (2001), online: < http://www.aic.gov.au/crc/reports/ strang/index.html>.

[383] Richard Young, "Just Cops Doing Shameful Business?: Police-Led Restorative Justice and the Lessons of Research" in Morris and Maxwell, *supra* note 9 at 220.

[384] More information on this program is available online: http://canada.justice.gc.ca /en/ps/voc/ rjpap.html#Part1>.

significant involvement of the RCMP in the process – both in design and implementation – makes it difficult to consider it a community-based process.[385] Moreover, the authority granted to police officers, both legally and socially, would necessarily offer them a high level of power over and within the process. Further, in the context of allegations of wrongdoing under the criminal justice system, they would have an ongoing role in related processes. This is a particularly important consideration when attempts at restorative justice are unsuccessful because the matter could then be returned to RCMP jurisdiction. If the process responded to complaints against the police themselves, this administrative framework would be even more problematic.

Roche argues that restorative justice meetings must be held in neutral locations and not police stations to enhance the perception of neutrality.[386] He has considered whether restorative justice generally in the context of wrongdoing defined as criminal offers a forum for examining police conduct (i.e., police interaction with the wrongdoer), suggesting that this point is debated. He notes that, by removing a situation from the formal court-based justice system, police can evade the kind of legal accountability and scrutiny that courts offer.[387] However, he observes the ways in which the deliberative forum offered in restorative justice widens discursive parameters potentially enhancing police accountability.[388] While this discussion is restricted to police conduct as *incidental* to a process considering a separate form of wrongdoing (i.e., a concern related to police wrongdoing in conjunction with the arrest or detention of the wrongdoer involved in the

[385] Although local Community Justice Facilitators are trained, the program does offer, in large measure, a "cookie-cutter" approach. The encounter is designed to follow scripted texts which provide the facilitator with a concise model to apply to processes. As such, it may not be appropriately responsive to the community in which it is practiced.
[386] Roche, *supra* note 211 at 159.
[387] *Ibid.* at 124.
[388] *Ibid.*

session), its analysis captures some questions as they pertain to the nature of police participation in restorative justice processes.

Police-run restorative justice processes are problematic, because it is difficult to ensure that they are – and are perceived to be – neutral.[389] The relationship at stake in a restorative justice process for police complaints is the relationship between the police and the community. If the police are responsible for organizing such processes – and in particular, if a police representative were to facilitate these processes – the opportunities for restoration of the relationship would be highly circumscribed. Further, concerns relating to state administration of restorative justice practice outlined in Chapter 3 would suggest that restorative justice practices should also not be administered by a government agency (i.e., one that is not independent and community based) such as the Nova Scotia Police Complaints Commissioner.

Restorative justice theory as discussed in Chapter 3 suggests that the optimal model for the administration of restorative justice practice draws upon the unique contributions offered both by the community and the state. A community-based entity would offer an appropriate connection with the community while avoiding the pitfalls of state-run institutional frameworks and more importantly, a lack of independence from police if programming were to be run exclusively by the police. Restorative justice processes aimed at responding to public complaints against the police should not be administered by the police force itself. There are, however, important roles for those presently administering the existing complaints process, as discussed in further detail below, and therefore collaboration is essential.

[389] Young, *supra* note 383 at 220.

Community Contributions

Community involvement

As Chapter 3 has illustrated, restorative justice processes for police complaints must include the community. This is not, however, a random gathering of participants based on demographics. Rather, the community members should be selected for particular awareness of the issues likely to emerge – or because they are directly or indirectly affected – and should be situated such that they can guide transformation towards an aim of social equality. This can offer some important insight into a restorative justice initiative aimed at responding to police complaints. While the involvement of community is important in any restorative justice process, this is particularly appropriate when police-community relations are at issue. Police officers are involved in intricate and complex relationships with their communities (recalling that these can include many multifaceted communities, such as communities of harm, support communities, and policing communities)[390] both as members of those communities and as peace enforcers. Further, as discussed in Chapter 1, the harm of police wrongdoing extends well beyond the incident leading to the complaint and the harm of wrongdoing by one officer can impact the public's faith in the police generally. Communities must, then, be offered meaningful opportunities for participation in restorative justice responses to allegations of police wrongdoing.

Keeping in mind the aim, in restorative justice, of social equality, participants in restorative justice processes for police complaints should reflect the diversity and

[390] The relationship between the police and their communities is discussed in greater detail in Chapter 1, and the intricacies as they relate to the concept of community are discussed in greater detail in Chapter 3.

interests at stake in the process. For example, a process considering allegations relating to racially-motivated actions could include both the victim and wrongdoer's communities of care, but also should include representatives of the minority group in question. Additional participants should be included in order to draw out issues that relate to the interests and issues raised by the wrongdoing. Representatives from advocacy groups or specialized agencies (e.g., NGOs, Human Rights Commissions) would be uniquely situated to speak to the harm to the broader community and may be best able to identify restorative responses. Additional participants could include those working on academic and policy initiatives which would position them to offer insight into the tensions which may have effected or affected the incident. Notably, community participants in such a process should not reflect a "snapshot" of the actual community based on demographics. This could simply replicate the inequalities inherent in society, and could reinforce the division between the police and public. As suggested by Pavlich, a notion of "community unity"[391] is not the aim; rather, the value of diversity leading to an aim of social equality should be central to the identification of appropriate community representatives. In this way, a community-based organization can structure representation of communities in the process.

Confidentiality

If the aim of restorative justice processes in relation to police complaints is to improve the relationship between the police and the public generally in response to specific allegations or suspicions of wrongdoing, it seems difficult to imagine how this relationship could be restored through a process that is confidential. In other words, if the relationship to be restored involves more people than could feasibly participate in a

[391] Pavlich, *supra* note 249 at 63.

restorative justice encounter (such as between the police and the African Nova Scotian community), there should be some avenue whereby the broader community is apprised of the process and agreement. As discussed above, it is important that the participants in restorative justice processes are carefully selected, and in this regard, the process should not be widely open to whomever wishes to participate unless they have some direct interest in the matter.[392] However, the process should not be closed to the public in the sense that they do not receive information about what transpires in the process, and do not receive information about the agreement that emerges from the process. Naturally, the degree to which the broader relationship between the police and the public is implicated would inform the general interest in a matter considered through a restorative justice process. However, the administration of restorative justice processes in a closed and confidential environment could undermine faith in the process and indeed further damage the police-community relationship.

In this context, a confidential process would undermine the significance of the involvement of the community. More importantly, it would create a barrier to the restoration of the relationship in terms of repairing the broader harm caused wrongdoing and/or allegations of wrongdoing. The very purpose of involving the community would be defeated. As noted in the previous chapter, there are, nonetheless, some practical justifications for parameters relating to confidentiality. Such concerns may relate to the ability to secure participation in the process generally, and considerations relating to subsequent use of the information emerging from this process. Police officers would likely have personal and professional reasons for wanting some parameters set in relation to information-sharing. As such, and particularly due to the fact that fall-back

[392] If, however, the public generally is impacted or implicated, the determination/selection of participants would necessarily be a complex process to be determined on a case-by-case basis and considering factors specific to the allegations.

processes (i.e., if restorative justice is unsuccessful) are adversarial, there may be some important practical justifications to impose some restrictions on information distribution. For example, it may be considered appropriate to delay dissemination of information relating to the process and agreement until it is clear that fall-back options will not be exercized.[393]

Thresholds for Restorative Justice

Scope of Wrongdoing

The scope of wrongdoing embraced by complaints frameworks under the *Police Act* is very broad. As this thesis has observed, although restorative justice practice in Nova Scotia is currently restricted to the criminal justice context, it has much broader applicability. Restorative justice theory has an aim of the restoration of relationships; with this in mind, relational breakdown resulting from wrongdoing could broadly be responded to with restorative justice processes. Therefore, the very wide scope of wrongdoing contemplated by the police accountability frameworks outlined above could all appropriately be captured through restorative justice processes. In other words, a restorative justice process aimed at addressing police complaints would not be barred by the nature of wrongdoing. The process itself, however, could be impacted by the nature of the wrongdoing. Recalling that the Nova Scotia restorative justice program has established different entry points so as to reflect increasing scrutiny and associated rights protections through the formal system, a similar model might be appropriate for police complaints as well.

[393] This is discussed in greater detail in Chapter 5, below.

Acknowledgment of Responsibility

Chapter 3 has illustrated that restorative justice generally requires that the wrongdoer acknowledge responsibility before a process can be entered. This is driven, in large part, by the need for free and truthful participation in order for social equality to be a realistic aim. Llewellyn and Howse have noted that the forward-looking nature of restorative justice -- with an aim not to punish but rather to correct -- could serve to encourage wrongdoers to acknowledge responsibility. Due to the unique role played by police, it is useful to dissect the meaning of acknowledgement of responsibility in this context and its implications for restorative justice processes.

The types of police complaints most conducive to restorative justice processes are those in which an officer accepts full responsibility for the act alleged to constitute wrongdoing. This would likely entail a confirmation, by the officer, of their presence for the alleged incident, and of their role in the act of wrongdoing. Acknowledging responsibility should not, however, automatically lead to a restorative justice process. As the previous chapters have outlined, voluntariness is essential. If a police officer feels coerced into participating in a restorative justice process, he or she will likely not freely share information. This may be particularly applicable for police officers against whom allegations have been made, due to the widespread personal and professional implications for them of such allegations and associated processes.

When an officer acknowledges responsibility for the wrongdoing, the process may have the capacity to be more fully restorative than a process that is begun or premised on something less than full acknowledgment of responsibility. While acknowledgement of responsibility by the wrongdoer is one of the minimum requirements for a matter to be referred to restorative justice in the Nova Scotia restorative justice program, other

restorative justice programs, most notably in New Zealand, have a differently articulated threshold for such acknowledgment.[394] Factors unique to the policing context (such as professional implications or union pressures) might deter officers from explicitly acknowledging responsibility if this is understood as admitting to having committed an act of wrongdoing.[395] For various reasons, the value-laden practice requirement for the Nova Scotia restorative justice program, that full responsibility be acknowledged (i.e. the officer acknowledges having committed the act alleged to constitute wrongdoing),[396] is not necessarily appropriate for a police complaints context.

It seems that fully restorative justice processes are possible, like in New Zealand, if an officer declines to deny responsibility[397] for the alleged act of wrongdoing. This formulation takes account of the fact that the officer may feel unable or unwilling to frame their involvement in the act in a manner similar to that in the criminal justice system (i.e., "pleading guilty"); however, it enables the officer to engage in a restorative justice process by asserting that they will not state outright that they did *not* commit an act of wrongdoing. In a policing context, the semantics of responsibility are significant. Roche comments on police officers' communication modes in the context of allegations of wrongdoing:

> Although police are practiced at conforming to [the modes of communication formally recognized as legally valid], they too may benefit from the opportunity to express themselves more freely. For instance, when an offender alleges that a police officer has used excessive force, the officer is able to give his side of the

[394] Braithwaite and Parker, *supra* note 18 at 107. As noted at *supra* note 18, restorative justice in New Zealand may be accessed by "declining to deny" rather than a straightforward admission of responsibility.
[395] For this reason, it is important to establish parameters for how the information is used if the restorative justice process is unsuccessful.
[396] This differs than a guilty plea through the criminal justice system but is more than "declining to deny".
[397] Braithwaite and Parker, *supra* note 18.

> story straight away, in a way that explains the pressures on police (of which the public is often unaware).[398]

In the example cited by Roche, there may be no denial that excessive force was used (and indeed, this constitutes an act of wrongdoing). If the officer in this example declines to deny responsibility, the officer's subjective views on the context in which the wrongdoing occurred (i.e., the pressures on the officer contributed to his or her use of excessive force) become relevant to their very assertion of their commission of the act. In this way, the officer has effectively – although implicitly – acknowledged that wrongdoing has occurred. This may be compared to Braithwaite's discussion of passive responsibility[399] as outlined in Chapter 3, and therefore restorative justice processes that are available when one declines to deny responsibility have the potential to be fully restorative.

It is likely that the bulk of police complaints fall into a category in which wrongdoing is perceived to have occurred but the interpretation of the incident (the meaning of the act) differs between the complainant and the officer complained of. This has implications for whether -- and the degree to which -- the officer is willing or able to acknowledge responsibility for the act. The nature of police work sometimes renders it difficult, both objectively and in the officer's subjective opinion, to assess whether wrongdoing has occurred. For example, factors taken into account by an officer in making a stop may be highly contentious. Writing on this issue, Roche draws upon David Bayley's observation that,

> Many complaints (about police) are matters of misunderstanding rather than real misconduct. They can be cleared up through frank discussions between police and citizens. Often citizens only want to express their point of view, to vent their

[398] Roche, *supra* note 211 at 141.
[399] Braithwaite and Roche, *supra* note 323 at 64.

> sense of grievance, while officers want citizens to know why they really had no choice and had to do what they did.[400]

Although Roche is alluding to discussions which may flow out of a restorative justice process involving a different wrongdoer (i.e. the discussion of perceptions of police wrongdoing would be incidental to a process considering a different case of wrongdoing), his observations illustrate how there could be value in restorative processes involving the police and community even where the fact of wrongdoing is not clear. In other words, the different perspectives of police officers and members of the public, particularly in the context of contentious interactions, create a climate ripe for misunderstanding and misinterpretation. Recalling the discussion in Chapter 3 of relational truth, this situation illustrates the great value in a process that can accept both perspectives. Therefore, it is useful to consider whether – and how – restorative justice principles could apply to police complaints when there is a lower threshold for acknowledging responsibility for the wrongdoing.

The jurisdictions which allow for restorative justice processes in circumstances in which the concept of "responsibility" does not necessarily ascribe "guilt" at the outset[401] have recognized the value of processes that embody elements of restorative justice as fact-finding exercises.[402] One of the reasons why "informal resolution" initiatives of various administrative agencies may be considered so widely successful is the fact that many complaints are the result of misunderstandings. Informal processes can enable a meaningful clarification of communication breakdowns. Expanding these processes to

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[400] Roche, *supra* note 211 at 130.
[401] *Supra* note 18.
[402] Braithwaite and Parker, *supra* note 18 at 107. As noted earlier, in New Zealand, restorative justice may be accessed by "declining to deny" rather than a straightforward admission of responsibility.

embrace principles of restorative justice, such as the inclusion of the community, can better offer context and improve responses to such instances.

There is a significant amount of value in drawing upon principles of restorative justice to address allegations of police wrongdoing when the acknowledgment of responsibility has a low threshold, such as a basic agreement of facts (e.g., acknowledging one's presence at the time of the alleged incidents), even if such processes are not able to be fully restorative. It is useful to recall from Chapter 1 that relational damage between police and communities can result from a perception of police wrongdoing, regardless of whether wrongdoing has, in fact, occurred. A simple dismissal of the complaint does not satisfy the complainant or his or her community/communities absent some opportunity to voice concerns. Therefore, processes that embody elements of restorative justice can be appropriately applied as exercises aimed at clarifying, understanding and interpreting facts, and can repair harm caused by perceptions of police wrongdoing in situations where wrongdoing is not acknowledged. Further, a discussion of the perception of wrongdoing, through a process incorporating elements of restorative justice, might confirm that wrongdoing has in fact occurred, and this can result in the acknowledgement, by the alleged wrongdoer, of responsibility. This can lead to a process that has the potential to be fully restorative. Alternatively, it may lead to a discovery that wrongdoing did not happen, possibly negating the need for further restorative justice processes.[403]

[403] As noted earlier, there may be circumstances in which harm to the relationship between the police and community has resulted from a perception that wrongdoing has occurred. Such situations may be addressed through processes structured upon restorative justice principles even if they do not constitute "fully" restorative processes.

What would be required to enter into a restoratively-oriented process in which the requirements are something less than full acknowledgement of responsibility? At minimum, it would require some basic consensus on facts. For example, both the police officer and the complainant would need to have been present at the event; otherwise it would be very difficult to find issues to deliberate. Restoratively-oriented processes, it seems, would work best where the facts are not in dispute but the interpretation of such facts is contentious. However, there would not need to be an absolute agreement on what happened. If there is no basic consensus on facts, then it is difficult to conceive of the value of restorative justice processes and it seems that a different process would be required in such circumstances.[404]

Out of recognition of the potential value that a restoratively-oriented process can bring to police-community relationships, it would be appropriate for the standard for acknowledgment of responsibility to be similar to one in which declining to deny responsibility suffices. As noted earlier, this still allows for fully restorative justice processes. Additionally, the unique context offered by policing would benefit from processes that may only partially be restorative, and it is possible to implement such processes with a lower degree of acknowledgment of responsibility (e.g., basic agreement on facts or acknowledgment of mutual presence during the incidents in question) than required by the Nova Scotia restorative justice program.

[404] In other words, it appears that situations in which there is no basic agreement on the facts and there has been no acknowledgment of responsibility would not be appropriate for a restorative justice process.

Discursive Interaction

Truth-telling

The discussion above relating to varying formulations of, and thresholds for, acknowledging responsibility should not be construed as permitting dishonesty. Restorative justice recognizes that a variety of "truths" may surround an event. This is particularly the case for issues raised in police complaints. As noted above, police officers may have entirely different perspectives on events than members of the public. In exercising discretion, they often factor in considerations relating to personal and public safety, and may have information that is not readily available to the public. For this reason, the interpretation of an incident may vary drastically between the police and the public. Therefore, a process that respects and accepts multiple perspectives on "truth" can be particularly beneficial in this context.

Police officers operate within a strictly regulated legal system and interface with lawyers regularly. However, as Chapter 3 has illustrated, restorative justice theory demands that participants speak on their own behalf. In addition to monitoring legal processes for compliance with rights protections, lawyers are responsible for ensuring that the versions of "truth" advanced by their clients are best framed to further their interests before the legal system. If lawyers were to speak on behalf of police officers during restorative justice processes, versions of events could be obscured (e.g., by omitting information or highlighting information). This impedes the ability of the process to be restorative, not only because it might obscure truth, but because it is not engaged in response to harm to relationships.[405] It is thus imperative that restorative justice processes aimed at responding to police complaints ensure that professionals do not speak on behalf of

[405] Again, the evidentiary privilege rule of s. 717 (4) of the *Criminal Code*, supra note 121, becomes an essential protection. See also *infra* note 414.

those affected by wrongdoing. While they may have some role in the process, it should be limited insofar as it interferes with discursive exchanges. Restorative justice demands free and open sharing of one's version of the events, and can accommodate a variety of "truths"; as such, it requires that parties speak on their own behalf.

Deliberative Consensus-Building

Similar to the approach taken in the Nova Scotia restorative justice program, the opportunity for transformation through discursive analysis of issues underlying police complaints can only be fulfilled with context-responsive processes. The transformative potential in a deliberative encounter examining allegations of police wrongdoing is enhanced by flexible structure. This includes specifically and explicitly selecting community members for their potential to promote social equality, and ensuring that the facilitator can identify areas of concern and appropriately guide the discussion within its context. A failure to include community members who are well-situated to identify important issues could serve to reinforce – or exacerbate – the strained relations between the police and the public. Further, a facilitator who adheres to general and closed scripts (and thus the process is not deliberative) cannot draw out the nuances raised by the incident and the process. Because the Nova Scotia restorative justice program is coordinated by the provincial Department of Justice, it offers opportunities for centralized training, which can enhance consistency in ensuring that facilitators are best equipped to encourage appropriate discursive exchanges.

As this discussion has shown, restorative justice is highly appropriate for the context of police complaints. The practice model promulgated by the Nova Scotia restorative justice program is generally conducive to police complaints. There are, however, some

issues unique to policing that demand a slightly varied model for practice. Chapter 5, below, examines these issues and considers the opportunities within, and challenges presented by, the present police complaints framework as articulated in the *Police Act* and associated regulations.

CHAPTER 5 *Application of Restorative Justice to Complaints Against Halifax Regional Police*

The previous chapter has illustrated how issues emerging from restorative justice theory could have an impact upon the various responses to breakdowns in relations between the police and the public generally. Drawing on that discussion, this chapter explores the applicability of these conceptual issues to complaints against the Halifax Regional Police pursuant to the *Police Act*. It examines the feasibility of implementing restorative justice processes within the current legislative framework for police complaints, identifying compatibilities and challenges, and proposing some modifications to this framework which could facilitate more restorative processes. Finally, it articulates the mechanism by which accountability for restorative justice processes in this context could be safeguarded.

Conceptual Applicability

As the *Johnson Inquiry* and associated reports have illustrated, the Halifax Regional Police have historically had a difficult relationship with one specific community, the African Nova Scotian community; such difficulties can be caused or exacerbated by instances and allegations of police wrongdoing. The Halifax Regional Police have expressly articulated a commitment to community policing objectives and, as illustrated above, social equality is an appropriate aim under this policing paradigm. Social equality, then, is not only compatible with, but beneficial to the work carried out by the Halifax Regional Police and as such, is a suitable objective of a process involving that force.

Recalling that restorative justice process structures are informed by its aim of social equality, it is useful to review parameters for appropriate outcomes. As previous chapters have noted, restorative justice processes must not take punishment as their goal. The fact that police operate in a generally punitive context does not diminish the importance of non-punishment in restorative justice processes involving them. There should be a broad range of (non-punitive) outcomes – indeed, the options should be limitless – because restoration in each unique circumstance will require different types of remedial action.

The existing framework for police complaints that applies to the Halifax Regional Police illustrates how the legislation provides for some responses that may be considered punitive in nature whereas others may be characterized, at least in part, as restorative. The allowable penalties for disciplinary defaults by a "member other than the chief officer" are outlined at section 25 of the regulations.[406] Section 25 provides an overview of such penalties, which include dismissal; an order to resign; reduction in rank, seniority or pay, suspension without pay; imposition of a fine; a period of close supervision; a reprimand; an order for counseling, treatment or training; or any other order that the chief deems appropriate.[407] These are quite broad and, as is apparent in the options for counseling, treatment or training, do not necessarily take punishment as their goal. Some of these outcomes may indeed reflect terms likely to emerge from restorative justice processes. However, they appear to be exhaustive insofar as the parties do not have the opportunity to devise their own unique and context-responsive agreements. The only avenues for additional outcomes are at the discretion of the chief (which could

[406] *Police Regulations, supra* note 84.
[407] *Ibid.*, s.25.

include a recommendation for a restorative justice process).[408] This is a limitation for restorative justice processes in a police complaints context. For a process to be fully restorative, the parties should have full discretion to determine the outcomes.[409]

Once it is clear what the objectives and outcomes should be in theory, in order to guide practice structure, then consideration must be given to practice administration. The Nova Scotia restorative justice program promulgates a community-based state-supported model for the administration of practice, a model which is strongly rooted in theory. Complaints against the police raise additional concerns relating to practice administration, because of the role frequently played by the police in the administration of restorative justice practice in a criminal justice context,[410] and because the police are agents of the state. These issues raise questions relating to the ability of the police to impartially administer restorative justice processes involving the police as wrongdoers.

The practice of restorative justice for complaints against the Halifax Regional Police, then, should be run by locally-based community justice agencies. Agencies similar to those presently administering the Nova Scotia restorative justice program could be developed pursuant to the model currently in place. Alternatively, the agencies which presently operate in the province pursuant to the criminal justice system could extend their mandates to consider allegations of wrongdoing pursuant to the *Police Act.* While it might seem efficient for restorative justice processes for complaints against the Halifax Regional Police to be administered by the Halifax Community Justice Agency, that agency has regular contact with the Halifax Regional Police through its current program

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[408] *Ibid.*, s. 25(i).
[409] Notably, these outcomes are outlined in the regulations rather than the legislation and are thus can more easily modified to offer non-exhaustive guidelines.
[410] For example, see programs described at *supra* note 382.

(i.e., through the youth criminal justice system) and thus raises the potential for conflicts of interest. Therefore, it may, at least in some circumstances, be considered appropriate for practice to be administered by another agency within the province but still involve members from the local community.

The community justice agency tasked with administering restorative justice practice in response to complaints against the Halifax Regional Police can ensure that appropriately comprised community representation is reflected in the process. As previous chapters have noted, there may be many different communities affected by instances and allegations of police wrongdoing and many communities may be important for restoration (including communities of care, geographically defined communities, etc.). In a policing context, support communities may include union representation. Complaints against the Halifax Regional Police might generally include the Professional Standards Office to ensure it is able to contribute its interests and perspectives (i.e., as they pertain to the resolution of conflict between the police and the community) to the process. Additionally, depending on the nature of the allegation, the Nova Scotia Human Rights Commission's proactive, educational division[411] may be able to offer significant contributions relating to consideration of whether an act may be considered "wrongdoing," and may further be able to offer input into potentially restorative agreements.

The inclusion of community, as well as the deliberative process and the agreements emerging from meetings, may challenge present frameworks for complaints against the Halifax Regional Police relating to confidentiality. The *Police Act* makes few assertions

[411] A dedicated section of the Nova Scotia Human Rights Commission, "Race Relations and Affirmative Action," provides policy and educational services in furtherance of the aims of the *Human Rights Act, supra* note 1.

about confidentiality and, although the processes described here are treated as though they are confidential, this is not legislatively mandated. Notably, there is no comment in the legislation or regulations relating to confidentiality during the process.[412] Section 51 of the *Police Act* provides that meetings of the Municipal Board of Police Commissioners are public but there is discretion for these meetings to be closed for some issues including discipline and personnel conduct. Under section 65, the same discretion applies to meetings of the Police Advisory Boards. Further, hearings of the police review boards may be closed to the public if the Review Board determines that exclusion is appropriate or if the hearing considers a matter relating to internal discipline.[413] Although the present legislative framework relating to confidentiality allows, theoretically, for information on a process under the *Act* to be released (excluding the point noted above), practice on this issue would need some consideration.

As discussed in previous chapters, restorative justice processes generally should not be confidential and this is particularly the case in a process aimed at restoring relations between the police and public. Indeed, accessibility to the broader community of such a process is an important component of its potential to be restorative. Therefore, to implement restorative justice in the context of a basically confidential framework requires some careful consideration of the ways that information may be used, particularly in the event that a restorative justice process is unsuccessful. Evidentiary privilege is one way of asserting some control on the way that information emerging from one process may impact upon another.[414] Furthermore, confidentiality parameters may be established by

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[412] This becomes notable because of the role the information may play at a further stage in the process.
[413] *Police Act*, *supra* note 83, s.76.
[414] The *Criminal Code*, *supra* note 121, at section 717(4) and sections 9 and 10 of the *Youth Criminal Justice Act, supra* note 105, establish that matters emerging from extrajudicial sanctions are inadmissible as evidence. There is also protection at common

the parties as part of a restorative justice process, enabling such protections to be determined in response to the particular context of that process.

What types of allegations against the Halifax Regional Police would be suitable for a response under restorative justice? Restorative justice can offer an appropriate response to all forms of wrongdoing contemplated by the *Police Act*. The apparently limitless range of formats for such "investigations" into any matter relating to the administration of justice ("in such manner as [the Minister] may specify")[415] is highly conducive to the application of restorative justice processes because it can respond to broad and systemic concerns. Further, members of the public can enter a complaints process by making allegations of police wrongdoing. The scope of wrongdoing considered to constitute "disciplinary defaults" under the *Police Act* is very comprehensive including ethical and professional standards, human rights obligations and matters contemplated by criminal legislation. Although there are presently restrictions on the complaints process when matters are considered through criminal processes (i.e., the complaints process is suspended), all of these issues could be considered in restorative justice processes.[416] Generally, restorative justice should be

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law protecting privilege in the context of dispute resolution. Sopinka, Lederman and Bryant have discussed "Communications in furtherance of settlement," noting, "the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement." They state, "the principle of exclusion was enunciated in two early Ontario cases," which they cite as *York (County) v. Toronto Gravel Road & Concrete Co.* (1882), 3 O.R. 584, and *Pirie v. Wyld*, (1886), 11 O.R. 422. See John Sopinka, Sidney N. Lederman, Q.C., Alan W. Bryant, *The Law of Evidence in Canada* (Toronto and Vancouver: Butterworths, 1992) at 719.

[415] *Police Act*, *supra* note 83, s. 7(2).

[416] The Supreme Court of Canada, in adopting a passage from the reasons of the Ontario Court of Appeal, has indicated that "A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime....it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers." The court determined that the prosecution of a police officer for a criminal offence does not preclude disciplinary proceedings as well, and thus does not

available for all types of instances and allegations of wrongdoing committed by the Halifax Regional Police including that emerging from Ministerial responses, all forms of disciplinary defaults under the *Police Act*, and issues considered under criminal legislation.

Although the range of wrongdoing that is identified in Chapter 3 as appropriate for restorative justice is very broad, it is important to recall that it may not be appropriate to consider every single allegation of wrongdoing in restorative justice processes. Some, for example, may offer no basis to proceed with a restorative process such as those in which there is no basic agreement on facts (e.g., the officer in question was not present for the event alleged, or refuses to acknowledge responsibility and/or wants his or her "day in court"). The Professional Standards Office could play an important initial screening function to assess and resolve or refer those for which restorative processes would be impossible or inappropriate.

The acknowledgment, by the wrongdoer, of responsibility is widely considered to be an important starting point for restorative justice processes; however, as Chapter 4 has observed, this should be flexible in a policing context. Previous chapters have illustrated how the ADR-based informal resolution approach taken by the Halifax Regional Police may allow for matters to be settled without the same truth-telling opportunities afforded in restorative justice processes; further, adversarial processes serve as incentives to circumscribe details of events and frame issues in ways that are legally relevant as

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violate constitutional protections under section 11(d) of the *Charter*, *supra* note 70, not to be tried twice for the same offence. *R. v. Wigglesworth* [1987] 2 S.C.R. 541. However, there is no reason why the different aspects of an act of wrongdoing could not be addressed in a restorative justice process. Indeed, restorative justice is particularly conducive to the exploration of the different types of harm that arise from wrongdoing. However, the Nova Scotia restorative justice program does not presently apply to adults involved in the criminal justice system.

opposed to presenting them as subjective experience. While the *Police Act* may contemplate opportunities for officers complained of to acknowledge responsibility for wrongdoing, it, too, allows for no such acknowledgment.[417] Further, the intersection of informal with adversarial processes has implications for truth-telling. If a restorative justice process is undertaken, but the parties are aware of the fact that the "fall-back" is adversarial, there may be barriers to the amount of information that is voluntarily shared.[418] While the "informal resolution" as described in the preceding chapters as facilitated by the Professional Standards Office often involves a "face-to-face meeting,"[419] this is not necessarily always the case. The subsequent stages in the complaints process do not provide for discursive interaction. Without clear parameters on how information emerging from a restorative justice process could later be used, there may be some hesitation -- particularly on the part of the alleged wrongdoer -- to fully engage in a restorative justice process (and correspondingly, to acknowledge responsibility) out of concern for how this information could impact subsequent disciplinary proceedings if restorative justice is unsuccessful.

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[417] For example, subsections 44(3), (4) and (5) of the regulations provide, "...If a disciplinary authority decides that the evidence gathered in an investigation discloses that the member may have committed a disciplinary default, the disciplinary authority must immediately serve a notice on the member in the prescribed form... they are to appear at a private meeting in which they ...must be given an opportunity to...hear the results of the investigation; and...admit or deny the allegation."

[418] This becomes particularly pertinent when confidentially parameters are unclear. Further, if subsequent to a restorative justice process, someone recants on what they shared (ostensibly as "truth") in that process, this may cause further damage to the relationship.

[419] *Halifax Regional Police*, *supra* note 79.

Framework for Implementation

Restorative Justice under Ministerial Directive

As Chapter 2 has noted, one way that allegations of police wrongdoing by the public could be addressed is under an order by the Minister of Justice. Pursuant to section 7(1) of the *Police Act*, "the Minister may order an investigation into any matter relating to policing and law enforcement in the Province, including an investigation respecting the operation and administration of a police department." While some parameters are set for such action, these are very broad and therefore it appears possible to implement restorative justice processes in two ways without the need for legislative changes.

The first way that restorative justice processes could be applied under these provisions would be to conduct the "investigation" pursuant to the principles of restorative justice. Because the format for this process is completely at the discretion of the Minister,[420] such an investigation could take any format.

The second way that restorative justice processes could be applied under these provisions would be to consider the "investigation" as authorized by the Minister to be a way of assessing appropriateness for restorative justice processes. For example, such an investigation could involve assessing relational damage caused by the situation in question, and considering whether there is some acknowledgment of responsibility for the incident. The Minister is authorized to take "whatever action the Minister considers appropriate"[421] to rectify deficiencies identified in the course of this investigation. Therefore, in instances where there appears to be damage to the relationship between

[420] *Police Act*, *supra* note 83, s. 7.
[421] *Ibid.*

the police and the community, and the circumstances appear otherwise conducive to restorative justice, the Minister can recommend a restorative justice process.

Naturally, as in other cases, the degree to which such a process could be restorative depends on many factors specific to the case, such as the degree to which responsibility is acknowledged (or denial is declined), and willingness of the parties to participate. The scope of such a process would depend on the scope of harm and so broader or systemic allegations of wrongdoing would likely require the involvement of more parties and more comprehensive deliberations.

Under each of these approaches, or a combination of both, there is the opportunity for fully restorative justice processes. These are possible under the current provisions in the *Police Act*. Further to discussions emerging from the previous chapter, this process would most appropriately be administered by a community justice agency.

Although these options are possible under the *Police Act* (and the authority is sufficiently broad to encompass allegations of all types of wrongdoing), their political accessibility and practical feasibility seem less clear. It seems unlikely that the Minister of Justice would call for such a review unless there were a broad public interest at stake and there were corresponding public or political pressures for a response. Section 7 of the *Police Act* would likely only be exercised in extraordinary situations in which the wrongdoing alleged is particularly egregious or systemic, and/or the relational damage is particularly severe; indeed, the apparent legislative intent for this authority to be restricted to more serious or systemic concerns would be undermined if it were used to replicate or replace the other police accountability frameworks. Finally, while this authority is perhaps the most compatible with the application of restorative justice processes because no

legislative changes would be required (i.e., because the processes flowing from such authority are not defined), it can only be called for by the Minister of Justice. That is, processes under this authority can only be initiated by the Minister. Therefore, although members of the public would be involved in such a restorative justice process, they have little control (aside from lobbying) over whether a matter would, in fact, be considered in this way.

Restorative Justice under Public Complaints Process

The public complaints process is an essential component of the police accountability framework, particularly where police – public relationships are concerned, because the process itself is initiated by the public. The complaints process outlined in the *Police Act* may be infused with restorative justice principles. Significantly, as seen by the fact that it is mandatory to attempt resolution, there is no legislated or institutional barrier to informal responses. Moreover, the format of the informal resolution process is not delineated and thus could be structured so as to reflect principles of restorative justice. In spite of these compatibilities, the possibility of such processes to be fully restorative is impeded by its present format.

To illustrate the challenges and opportunities inherent in the existing process, it is useful to recapitulate the path of a public complaint against a Halifax Regional Police officer (not including the chief) as it passes through this process. Although a complaint may be filed with a few different bodies, it will be referred to the Professional Standards Officer who will attempt to resolve the matter informally. If this is unsuccessful, a formal investigation is undertaken by the Professional Standards Officer. The outcome of this investigation may be appealed to the Nova Scotia Police Complaints Commissioner, who again must attempt to resolve the complaint – and this process may include an

investigation. If the matter is still not resolved, it may be referred to the Nova Scotia Police Review Board for a hearing.[422] This process illustrates that, at various stages, the *Police Act* mandates that attempts be made to resolve concerns informally. Where attempts at informal resolution are unsuccessful, they are followed by formal investigative responses.

Upon first glance, it may seem possible for restorative justice processes to be conducted at the various options for "informal resolution" through this process, particularly since informal resolution is not defined in the *Police Act*. That is, the informal response attempted by the Professional Standards Officer -- which is presently modeled on ADR approaches -- could be designed to reflect restoratively oriented or restorative justice processes. If unsuccessful, this could be followed by a formal investigation. An appeal of the outcome of this investigation could again result in a restorative justice process at the level of the Complaints Commissioner, which could, if unsuccessful, then be followed by another formal investigation. If that investigation is unsuccessful, it would then go to the Review Board for a hearing.

This structure, however, conceives of restorative justice as a simple process that could be inserted in the context of an adversarial framework, rather than a theory of justice. Restorative justice understood as a theory of justice informs the entire approach to, and conception of, justice itself. Justice as such is aimed at restoring relationships. Adversarial processes exacerbate the relational damage caused by wrongdoing. If the process which is intended to respond to allegations of wrongdoing (i.e., the "investigative" stages) causes harm to the relationship (e.g., through adversarial approaches and punitive outcomes), the potential for subsequent restorative justice

[422] The details of this path are discussed in greater detail in Chapter 2.

processes to restore the relationship is undermined. Although many successful restorative justice programs,[423] including the Nova Scotia restorative justice program, are situated an adversarial context (i.e., the traditional criminal justice system), the potential for full restoration may be circumscribed – particularly if the relationship to be restored is broad, as is the case following police wrongdoing.

The challenge in this context is to assess whether it is possible to respect the continuum of the process set out in the *Police Act* without allowing one stage to harm the relationship to such a degree as to render it incompatible with restorative justice at a later stage. The following pages provide a breakdown of the different avenues and stages in the complaints process, and identify opportunities within the current complaints framework for applying restorative justice processes. As noted earlier, the process for a complaint that is made against a police officer differs from one against the chief and therefore their opportunities for restorative justice are considered separately.

Complaints against a Police Officer

When a complaint is made against a Halifax Regional Police officer, it is referred by the receiving body to the Professional Standards Officer, who attempts to resolve the complaint in an informal manner. At present, this is an ADR or settlement-based approach and is considered to be confidential. A matter is considered resolved when a resolution to a complaint is proposed by one of the parties, and the complainant and the officer agree to the proposed resolution. While this process is similar to restorative justice insofar as the outcomes are not defined (in terms of developing a plan for resolution), the parties are generally restricted to the complainant and the officer complained of; the facilitator for this process is the Professional Standards Officer.

[423] See, for example, other programs, at *supra* note 382.

Previous chapters have articulated concerns relating to settlement (e.g., it may not enable the broader or systemic issues to be discussed meaningfully) and the importance, in restorative justice, of the involvement of the community. This structure is very limited in its opportunities to meaningfully address relational breakdowns between the police and the public generally.

There is some room for infusing restorative justice processes at this stage. The restrictions relating to confidentiality and participants (i.e., exclusion of the community)[424] are practice-driven or defined in the regulations rather than the legislation and it would seem feasible to modify these practices to be more restoratively-oriented, such as through broader inclusion in the process. Even if, however, this could be modified to enable a restorative justice process, there are concerns with its administration by the Professional Standards Office. As chapters 3 and 4 have argued, restorative justice practice, particularly in the context of police complaints, should not be run by policing or state agencies; rather, a community justice agency would offer an appropriate body to coordinate restorative justice practice in response to suitable situations.

The Professional Standards Office could, however, play an important screening function to assess appropriateness of situations for restorative justice processes, not unlike one of the options under a Ministerial response discussed above. Issues for evaluation could include, for example, an assessment of whether there is some acknowledgment of responsibility and whether the parties are willing and able to take part in restorative

[424] Notably, this delineation of the parties is drawn from the regulations and is thus more easily modifiable than if it had been outlined in the actual *Police Act*.

justice processes. Previous chapters have suggested that certain types of cases are more appropriate for restorative justice processes than others.[425]

Under the current framework, if a matter is not resolved through informal resolution, the Professional Standards Office is not authorized to refer it to another body such as a community justice agency but rather, must carry out an investigation into the matter. The Professional Standards Office could, however, facilitate an approach that reflects principles of restorative justice. Upon determining that a matter would be appropriately considered in a restorative justice process, the Professional Standards Office could facilitate an agreement between the complainant and the officer that they will participate in a restorative justice process. This option would allow the legislative parameters to be respected while offering the opportunity to have the matter considered in a restorative justice forum. The community justice agency would then undertake their own process. Such an agreement to participate in a restorative justice process would need, it seems, to have some monitoring mechanism to ensure that the parties do indeed participate. This could be done by the Professional Standards Office.

If a matter had not initially been referred to restorative justice (and/or had not otherwise been resolved), the Professional Standards Office would be required to proceed with its investigation.[426] The nature of such an investigation is not defined in the *Police Act* nor is it defined in the regulations, but the options for dealing with the matter are articulated.[427] Under the present process, if it is determined that the member may have

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[425] This is discussed in greater detail in Chapter 4.
[426] *Police Regulations, supra* note 84, s. 35.
[427] The Regulations, *ibid.,* provide, at s. 42(1)(a), that the investigator must submit a report to the disciplinary authority indicating "whether, in the investigator's opinion, the evidence proves that the member has committed a disciplinary default...[and] if applicable, any organizational or administrative practices of the police department that

committed a disciplinary default, a formal meeting with the disciplinary authority is mandated[428] at which point the officer complained of has the opportunity to admit or deny the allegations. If an officer acknowledges responsibility at this stage, the disciplinary authority is obliged to impose a penalty specified in section 25 of the *Act*. [429]

If wrongdoing is determined or acknowledged, section 25 of the regulations lists the penalties when the alleged wrongdoer is an officer (not the chief). As noted earlier in this chapter, while the penalty options do appear to contemplate some outcomes that are restorative rather than punitive, such as training or therapy, [430] this imposed and punitive approach is clearly incompatible with restorative justice. For these reasons, the investigation as outlined in the *Police Act* appears to allow little room to be structured as a restorative justice process. The process of investigation could incorporate some elements of restorative justice (e.g., as a deliberative fact-finding exercise), but the predetermination, and imposition, of outcomes undermines the objective in restorative justice to be context-responsive.

There is one way that this stage could lead to a restoratively-oriented process. Under the penalties articulated in section 25 of the regulations, the chief officer is authorized to make "any order not included in [the list of options for disposition of the matter] that the chief officer considers appropriate." Under this authority, the chief could refer the matter

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the investigator identifies as factors that may have caused or contributed to the alleged disciplinary default."

[428] *Police Act, supra* note 83, s. 44(1).

[429] *Police Regulations, supra* note 84, provide at s.25 (h) that a penalty can include "an order that the member undergo counselling, treatment or training acceptable to the chief officer, the expense of the counselling, treatment or training to be assumed by the police department."

[430] *Ibid.*

to a restorative justice process to be administered by a community justice agency. This would be similar to the option identified earlier whereby the Minister of Justice would call for a restorative justice process. As noted in that discussion, a restorative justice process would only be attempted if such prerequisites are met as some form of acknowledgment of responsibility and consent to participate.

Complaints against the Chief

Complaints against the chief of police are handled similarly; however, they are not reviewed by the Professional Standards Office. They are dealt with by the local Municipal Board of Police Commissioners. The board that reviews complaints against the chief of the Halifax Regional Police is the Halifax Regional Municipality Board of Police Commissioners.

Like in the process generally for complaints against police officers other than the chief, the investigative process as set out in the *Police Act* for complaints against the chief is adversarial and thus is not conducive to the application of restorative justice processes. Upon determination that a chief has committed a default, the options for penalties are listed at section 26 of the regulations. The imposition of a penalty upon the chief, however, is discretionary, whereas the imposition of a penalty upon a member other than the chief who is determined to having committed a disciplinary default is mandatory. Pursuant to section 26(f) of the regulations, the Board has discretion to impose "any order not included in [the list of options for disposition of the matter] that [it] considers appropriate." This, again, affords the opportunity to refer the matter to restorative justice processes.

Nova Scotia Police Complaints Commissioner

As Chapter 2 has explained, the Complaints Commissioner is the civilian oversight body that monitors the processes following complaints against officers or police chiefs, and offers external review of a matter that has not been resolved at an earlier stage and for which such review has been requested. In the event that there had been a restorative justice process that had been thought to be flawed or has failed, the Complaints Commissioner may infuse some elements of restorative justice into its efforts to resolve the matter. This is also possible where a previous adversarial process has been unsuccessful. The *Police Act* implies that, at this stage, the delineation between "informal resolution" and investigative response is less clear:

> 74 (1) Upon receipt of a complaint from the board or chief officer pursuant to [prior stages in the process], the Complaints Commissioner shall attempt to resolve the complaint.
> (2) In attempting to resolve the complaint, the Complaints Commissioner may investigate the complaint or designate another person to investigate the complaint and report to the Complaints Commissioner.[431]

The parameters for the investigative process are not rigidly defined and therefore could be designed to reflect elements of restorative justice.

At the outset of this thesis it was observed that one way that restorative justice could be used in the context of police complaints is in response to allegations acknowledged to be false. This situation causes harm to the relationship between the police and the public. While the Complaints Commissioner is unable to refer a matter to a review board in this situation, there does not appear to be an exclusion for the Complaints Commissioner to attempt to address a matter that is determined or to be frivolous or vexatious, pursuant

[431] *Police Act*, *supra* note 83.

to section 74(4).[432] It is noted that in such instances the Minister of Justice could also call for a restorative justice process.

Because the fall-back for the Complaints Commissioner process, a Review Board hearing, is adversarial, there must be very careful consideration of how information that may emerge from a restorative justice process could be used in subsequent processes. The challenges of confidential and "without prejudice" processes have been discussed at length in this thesis.[433] As noted earlier, however, it may be important to establish some parameters around the use of information that has come from a restoratively-oriented process at this stage. For example, it may be considered necessary to restrict information-sharing, such as to delay publication of information relating to the process until it is clear that the fall-back options will not be accessed. Otherwise, it would be a challenge to ensure the parties are truthfully engaging in a restorative justice process.

Complaints Process and Criminal Investigations

A further consideration of the applicability of restorative justice to these processes is as they relate to allegations of criminal wrongdoing. The *Police Act,* at section 70(3), mandates suspension of the complaints process pending a criminal investigation or proceeding. The *Police Act* complaints framework, then, does not allow for a complaints process to proceed if any of the alleged wrongdoing is considered through the criminal justice system. There is not presently a possibility for restorative justice processes to be

[432] *Ibid.* Section 74 (4) provides, "Where the Complaints Commissioner is unable to resolve the complaint, the complaint shall be referred to the Review Board in accordance with the regulations unless the Complaints Commissioner is satisfied that the complaint is frivolous or vexatious, and the Review Board shall conduct a hearing in respect of the complaint." This does not mandate dismissal and therefore it may be possible to consider a situation whereby the Complaints Commissioner could retain some authority over a matter to address it as a false complaint.

[433] This is discussed in greater detail in Chapter 1.

applied to wrongdoing alleged to be criminal outside the process described above because the program is restricted to youth and then, only after it has been considered by the criminal justice system.[434]

Fall-Backs when Restorative Justice is not Successful

It is important to consider the mechanisms for redress, or the "fall-back" options when restorative justice processes are unsuccessful. The Nova Scotia restorative justice program has, as its fall-back, the criminal justice system. Given that there are various referral stages for the Nova Scotia restorative justice program, the fall-back would return to the level from which the matter was referred. For example, if it was referred by the Crown, then a breakdown in restorative justice would result in the matter being returned to the Crown. The fall-back for restorative justice processes for police complaints at any of the levels articulated earlier would similarly depend on the level at which that process had been initiated. In other words, if restorative justice is initiated at the level of the Professional Standards Office, a breakdown would result in the matter being returned to the formal process at that level (i.e., to the Professional Standards Office). As the oversight body, the Complaints Commissioner would be a very important mechanism for ensuring that a matter is considered and reviewed at the appropriate level. If the breakdown happens at the level of the Complaints Commissioner, the fall-back would be to return it to that level, with the Review Board to follow. The issues discussed earlier relating to evidentiary privilege, to secure some control over the use of information from a restorative justice process in subsequent proceedings, becomes relevant at this stage in the process. While it might not be ideal, from a theoretical standpoint, to allow adversarial processes to precede or follow restorative justice processes due to their

[434] The limitation is due to the fact that there is restorative justice is not available for adults in Nova Scotia except through the RCMP process.

ability to exacerbate relational harm, restorative justice programs operating in the context of criminal justice systems, including the Nova Scotia restorative justice program, have successfully managed to mitigate challenges presented by this dialogue between formal and informal processes.[435]

Proposed Modifications to Current Frameworks

Legislative Amendment

The previous pages have illustrated opportunities within the existing frameworks to incorporate elements of restorative justice. There are, however, several limitations in establishing a process that has the potential to be fully restorative following public complaints. It appears that the preferable way for fully restorative justice processes to be available in response to police complaints would be through an amendment to the *Police Act* authorizing an alternative approach for matters considered appropriate for restorative justice. This could be similar to the statement of principles relating to extrajudicial measures found in the in the Nova Scotia *Youth Justice Act*[436] and the federal *Youth Criminal Justice Act.*[437] The *Youth Justice Act* acknowledges some advantages of such measures and states, at section 5(c), that such measures "should be used if they are adequate to hold a young person accountable for the young person's offending behaviour."[438]

Similarly, an amendment to the *Police Act* could simply assert that restorative justice processes can often provide an effective response to the allegations of police wrongdoing and thus can be exercised in place of the entire police complaints

[435] This is discussed in greater detail in Chapter 3.
[436] *Youth Justice Act,* S.N.S. 2001, c. 38.
[437] The *Youth Criminal Justice Act, supra* note 105, mandates consideration of restorative justice in response to youth crime.
[438] *Youth Justice Act, supra* note 436.

framework outlined in the legislation. This would enable the parties to directly access a restorative justice process (i.e., restorative justice would replace the various levels for the process in the current framework). Such a broad assertion would authorize the implementation of such processes while retaining flexibility in order for restorative justice processes to be designed in context-specific ways. A process developed following such an amendment would not be limited by the present parameters presented by the *Police Act* and in particular, by the issues which presently pose barriers to the development of restorative justice practice that reflects theory. By creating an option that fully removes a response from an adversarial context, the options to develop restorative justice practice that reflects theory are greatly enhanced.[439] The appropriate body for administering restorative justice practice would continue to be a community justice agency, which would customize practice and ensure that the community is constructed in a manner most conducive to restoration of the particular relational breakdowns.

A legislative amendment authorizing the process outlined in the *Police Act* to be circumvented would not mean, however, that all established frameworks are deemed irrelevant. The existing framework would remain available for situations that are not appropriate for restorative justice. Further, there are roles for those operating in the existing police complaints framework to engage with restorative justice processes in this context. For example, the Professional Standards Office would have a useful role to play in screening and referring, to the community justice agency, appropriate situations. Similarly, it would be highly appropriate for the Complaints Commissioner, as the position dedicated to civilian oversight, to be included as one component of community representation. Although it is clearly not possible (nor, perhaps, appropriate, as outlined in previous chapters) for unrestricted participation in restorative justice processes, the

[439] The matter would return to an adversarial process if it fails.

opportunity for certain community members to participate is key to its restorative potential.

As noted at the outset of this thesis, one of the strongest arguments for the application of restorative justice to the practice of police complaints is its potential to address the broader harm (i.e., to the relationship between the police and communities generally) following allegations of police wrongdoing. A legislative amendment authorizing the use of restorative justice in response to police complaints would allow for more comprehensive information-sharing with the community generally, recalling that restrictions on information available to the community regarding the process and agreement hinders the restorative potential of the outcome.

Authorization of Restorative Justice for Adult Offenders

Restorative justice processes are conducive to broad-reaching and contextual discussions and appropriately consider allegations of wrongdoing both within, and outside, the strictly defined criminal justice realm. There is no reason why there should be separate processes for allegations of wrongdoing defined as criminal and for those which are not. The model for restorative justice in the criminal justice context (i.e., the present Nova Scotia restorative justice program) is widely applicable to the issues likely to emerge through a *Police Act* process.

Although the Nova Scotia restorative justice program is currently restricted to youth involved in the criminal justice system, the framework is in place for restorative justice to apply to adults involved in the criminal justice system. The restorative justice program

was designed with section 717 of the *Criminal Code*[440] in mind, in order to serve as the "alternative measures" authorized by that section. Further, the RCMP presently uses "Community Justice Forums" for adults in Nova Scotia. Once the Nova Scotia restorative justice program has, in place, authorization for adult offenders, then where a matter is considered under the criminal justice system, the existing Nova Scotia restorative justice program could offer an appropriate forum in which to seek restorative responses. It is an excellent model for addressing allegations against police officers of wrongdoing falling under criminal legislation. Therefore, authorization of restorative justice for adult offenders would enable the issues raised through the police complaints process to be considered in tandem with those alleged to be criminal in nature. This would prevent the issues relating to broader relational breakdown from being superseded (and suspended) by the artificial and arbitrary distinction between action considered to be criminal and that which is not.

Accountability Safeguard: the Ombudsman

It is important that any process that responds to wrongdoing, particularly where the alleged wrongdoer is a representative of the state, has accountability safeguards in place. The Nova Scotia Office of the Ombudsman offers a uniquely appropriate body to oversee the practice of restorative justice in response to police complaints. The Ombudsman is mandated to ensure fairness in provincial and municipal government services in the province.[441] Section 11 of the *Ombudsman Act* outlines the scope of review for the Office, noting that the Ombudsman has authority to investigate the administration of a provincial or municipal body or officer.[442] The Ombudsman has

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[440] *Criminal Code, supra* note 121.
[441] *Ombudsman Act, supra* note 135, s. 11.
[442] *Ibid.*

authority to respond to a wide range of action or omissions.[443] As such, the Ombudsman is uniquely situated to ensure accountability in the administration of restorative justice processes.

It is unclear whether the restorative justice delivery agencies presently fall within the scope of the legislation[444] as provincial or municipal entities. A recent legislative amendment authorizes the Ombudsman to designate agencies as falling within the scope of the legislation. [445] Under this framework, the Governor in Council could add the various restorative justice delivery agencies to this list of agencies,[446] and could thus review the administration of practice at that level.

The fact that all the work of the Ombudsman is confidential may serve to relieve the concern identified above regarding the use of information shared through restorative justice processes in subsequent proceedings. Confidentiality is expressly mandated in the *Ombudsman Act*, which provides, at section 16(1), "Every investigation under this Act is to be conducted in private."[447] Further, all staff commit to the protection of this

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[443] *Ibid.* at s. 20.
[444] Jurisdictional agencies are defined in section 2(a) of the act as "an agency, board, commission, foundation or corporation established under an enactment that (i) is appointed or has a majority of its members appointed by the Governor in Council, a member of the Executive Council or the Province, or (ii) is supported by or directs the expenditure of public funds of the Province and is designated by the Governor in Council."
[445] Due to challenges posed by this restricted definition of "agency", an amendment was recently passed to the *Ombudsman A*ct to authorize the creation of Regulations to ensure the Ombudsman has jurisdiction over specific provincially or municipally regulated agencies. This amendment is found at section 28 of the *Ombudsman Act*: "28 (1) The Governor in Council may make Regulations designating an agency, board, commission, foundation or corporation for the purpose of clause (a) of Section 2." Regulations have been established to designate agencies as falling within the jurisdiction of the Ombudsman: made under Section 28 of the *Ombudsman Act* R.S.N.S. 1989, c. 327 O.I.C. 2004-521 (December 21, 2004), N.S. Reg. 253/2004
[446] *Ombudsman Act, supra* note 135, s. 2(a).
[447] *Ibid.* s. 16.

privacy through oaths of confidentiality.[448] Information provided to the Ombudsman in the context of an investigation is not compellable in court: "Except on the trial of a person for perjury, evidence given by any person in proceedings before the Ombudsman and evidence of any proceeding before the Ombudsman is not admissible against any person in any court or in any proceedings of a judicial nature."[449] The confidentiality of information within the Office of the Ombudsman has another strong protection through other legislation. There is a blanket exclusion on all the work of the office in the *Freedom of Information and Protection of Privacy Act*.[450] This means that there is no right of access by the public to Ombudsman documents.[451]

The potential range of recommendations made by the Ombudsman is limitless and therefore as a review mechanism for restorative justice processes, the opportunities for addressing identified deficiencies in the implementation of restorative justice processes are broad.[452] This is compatible with the context-specific and flexible nature of restorative justice and thus the Ombudsman has the potential, upon review of a restorative justice process or program, to contribute to administration in ways that are meaningful, relevant and applicable.

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[448] This mandated in the *Ombudsman Act*, *ibid.*, pursuant to ss. 3(5) and 7(2).
[449] *Ibid.*, s. 17(8).
[450] *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c-5, s. 4(2)(e).
[451] These informational parameters may warrant an exclusion from the proposed evidentiary privilege provisions described above in order for the Ombudsman to conduct a thorough review of the matter.
[452] *Ombudsman Act*, *supra* note 135. Subsections 20 (f) - (l) indicate that the range of recommendations which made by the Ombudsman is entirely within his or her discretion.

Summary of Implementation Feasibility

As this chapter has illustrated, there are some opportunities within the current police complaints framework in Nova Scotia for restorative justice to be applied. The opportunities for fully restorative justice, however, are circumscribed by some features inherent in this framework. The best way for the development of processes that may be fully restorative would be through an amendment to the *Police Act* authorizing the use of restorative justice in the context of police complaints. Under this revised framework, the fall-back to the existing police complaints process remains available. Review of the concerns relating to the process itself may be undertaken by the Nova Scotia Office of the Ombudsman.

CHAPTER 6 *Conclusion*

Restorative justice practices can offer a highly appropriate response to allegations of police wrongdoing. Such allegations often reflect – and create – harm to the relationship between police and their communities. This relationship is important in ensuring the public's sense of safety and faith in the administration of justice, and also advances the ability of the police to effectively carry out their work. Past incidents of police wrongdoing have led to calls to reform the police complaints processes. Recent years have seen a proliferation of civilian oversight agencies which aim to ensure some community representation in police accountability frameworks. Further, ADR initiatives have been widely applied to police complaints contexts and indeed, are mandated in Nova Scotia as one component of the complaints process. ADR may offer a less adversarial option than some formal processes; however, it does not provide for meaningful consideration of relational and systemic issues. Restorative justice does this; indeed, its very aim is the restoration of relationships.

A consideration of restorative justice theory as implemented through the Nova Scotia restorative justice program illustrates some guiding principles for the application of restorative justice to police complaints and particularly to the context of the Halifax Regional Police. Administration of restorative justice practice should not be undertaken by the state generally, nor, in particular, by a policing agency. In Nova Scotia, the community justice agencies are appropriate bodies to fulfill this function. Involvement of the community in restorative justice processes is essential but this should be comprised of a carefully selected group of individuals who are well-situated to contribute to an aim of social equality. Restorative justice processes should not be confidential and indeed,

restoration of the relationship between the police and the community requires information-sharing relating to restorative justice processes and agreements. Restorative justice offers an appropriate response to all types of wrongdoing and thus should be available for all types of disciplinary defaults under the *Police Act* and action considered by the state to be criminal. While restorative justice generally requires acknowledgment, by the wrongdoer, of responsibility, the unique nature of police work suggests that this concept should remain flexible. In other words, a basic agreement of facts or mutual presence for the incidents alleged might be sufficient; issues relating to interpretation of the incidents can be drawn out through the process itself. While this flexibility might result in a process that is just restoratively-oriented, it too could lead to a point where full responsibility for wrongdoing is acknowledged thus establishing a springboard for subsequent fully restorative processes. Restorative justice accepts experience as subjective (indeed, it requires elaboration of such subjectivity) and thus parties must speak on their own behalf. As the aim of restorative justice is social equality, a restorative justice process cannot have punishment as a goal. Punishment exacerbates relational damage and precludes restoration.

There are a few ways under the present police complaints framework in Nova Scotia that members of the public can access a process to consider allegations of police wrongdoing. The Minister of Justice is authorized to call for a review of any matter relating to policing or the administration of justice and thus the public may attempt to have concerns relating to police wrongdoing addressed through this political avenue. The second avenue by which the public may raise concerns is through the complaints process. This is comprised of a dialogue between formal and informal responses to allegations of police wrongdoing culminating, in some cases, with a Review Board hearing. This process provides for specific penalties upon determination or

acknowledgment of such wrongdoing, and is generally conducted in a confidential manner. The complaints process is suspended when a matter is being considered by the criminal justice system (i.e., the wrongdoing alleged is defined by the state as criminal).

It is very difficult to construe the police complaints processes as articulated in the *Police Act* as restorative justice processes. The interaction between informal and formal (and correspondingly, adversarial) processes can exacerbate relational damage and potentially deter participants from freely and truthfully participating in a restorative justice process. Further, the mandatory imposition of a penalty upon an acknowledgment or finding that wrongdoing has occurred does not allow for deliberative, context-responsive agreements. It is important to reiterate that, although restorative justice can be infused into the processes noted above, it cannot simply supplant – or replicate – the informal resolution options that are mandated at various stages in the frameworks. These options contemplate a settlement-oriented rather than restoration-oriented approach. Moreover, the informal resolution options as set out in the legislation are interspersed with investigation processes that may be adversarial. There are, however, a few windows in which restorative justice processes can be agreed to or recommended, and in such circumstances, a community justice agency would appropriately be able to administer such processes. One option for restorative justice process to be devised in this context would be pursuant to an order by the Minister of Justice.

A better way to establish fully restorative justice processes would be through an amendment to the *Police Act* allowing for restorative justice to supplant the existing process when circumstances warrant such a response. In particular, restorative justice is appropriate in cases where responsibility for the alleged incidents is, in some form,

acknowledged, or in cases where the allegations of wrongdoing are acknowledged to have been false. The circumstances of every situation will differ and therefore some processes may be more restoratively-oriented than others (e.g., where there is no acknowledgment of responsibility, the process is somewhat circumscribed). Recourse for concerns relating to the administration of restorative justice practice would be through the provincial Office of the Ombudsman.

The Halifax Regional Police have expressed repeated commitments to addressing the relationship with the community through community policing initiatives and have made efforts to implement recommendations emerging from the *Johnson Inquiry*. The circumstances leading to the *Johnson Inquiry* illustrate the pressing need for a mechanism to address relational breakdowns between the police and the communities in which they operate. Restorative justice processes are highly appropriate for addressing this need and the Nova Scotia restorative justice program offers an internationally-leading model to guide and administer practice.

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