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CECM

CANADIAN COLLABORATIVE FOR
ENGAGEMENT & CONFLICT MANAGEMENT

Volume 2
(August 2021 – July 2022)

SHADOW OF THE LAW PUBLICATIONS

Volume Two

Made in Canada

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EDITOR'S NOTE

Welcome to the second volume of the Journal of the Canadian Collaborative for Engagement & Conflict Management (JCECM)!

As our journal continues to develop and evolve, it has tightened its grip on the value of collaboration and bringing together academic considerations of conflict management and practical, real-life implementations thereof. It is at this intersection that the Canadian Collaborative for Engagement & Conflict Management is situated and where all involved in the initiative offer a unique value proposition.

The free circulation of the submissions contained herein and related embrace of CanLII's Creative Commons licence are essential components of fulfilling the goal of this publication - sharing the tremendous insights of our contributors with the world. It is thanks to the tireless efforts of our seemingly endlessly available peer reviewers that we proudly offer quality material and timely circulation.

An aspect of this journal's content that continues to flourish is both personally gratifying to see and significantly important to publicly circulate in this day and age. Following the lead of Dan Couturier in Volume 001, we have again included Indigenous considerations in the scope of our volume, both in consideration of restoration and in underlying the importance of decision makers not only commanding respect but offering it to all who come before them in service of the provision of justice. While we continue to aspire to offer an outlet of inclusion for Indigenous and other voices, there are widespread applications for the approaches to conflict utilized on these lands well before contact in contemporary times.

We certainly are in the midst of interesting times in the field and appreciate having the opportunity to share insight of interest. We welcome you to share this volume with anyone and everyone you feel may benefit from coming across it.

Thanks to all who contributed to this volume, both on the pages that follow and behind them.

Marc Bhalla, Editor-in-Chief

VOLUME EDITORIAL BOARD

The Canadian Collaborative for Engagement & Conflict Management (CECM) would like to thank members of this volume's editorial board for their dedication. This peer-reviewed journal cannot operate without the time volunteered by Editorial Board members to review submissions.

CECM would also like to thank the authors of all submissions to this Journal, both those that were accepted for publication and those that did not make this volume, for their effort, support and talent.

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THE JUSTICE CRISIS BOOK REVIEW

Marc Bhalla
LL.M. (DR), C.Med, Q.Arb, MCIArb

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ABSTRACT

Marc Bhalla reviews a book about Canada's access to justice crisis featuring contributions by The Honourable Thomas A. Cromwell, Trevor C.W. Farrow, Lesley A. Jacobs, Michael Trebilcock, Moktar Lamari, Pierre Noreau, Marylène Leduc, Lisa Moore, Mitchell Perlmutter, Ab Currie, Matthew Dylag, Jennifer Koshan, Janet Mosher, Wanda Wiegers, David Wiseman, Carolyn Carter, Catherine Piché, The Honourable Justice Lorne Sossin, Devon Kapoor, M. Jerry McHale, QC, Herbert M. Kritzer, Michaela Keet, Heather Heavin and Noel Semple.

ABOUT THE AUTHOR

Marc Bhalla, LL.M. (DR), C.Med, Q.Arb, MCIArb (he/him) [biracial] is a mediator, arbitrator and lecturer based in Toronto, who practices online. He has been involved in dispute resolution professionally for almost two decades.

Marc earned a Master of Laws in Dispute Resolution from Osgoode Hall Law School. He has an Executive Certificate in Conflict Management from the University of Windsor's Faculty of Law, an E-Commerce Certificate from New York University and an honour's undergraduate degree from the University of Toronto's prestigious Trinity College.

Marc holds the Chartered Mediator designation of the ADR Institute of Canada, along with domestic and international arbitrator designations.

Marc has presented from coast-to-coast in Canada on a variety of conflict management issues. He has had over 100 articles published, including academic journal contributions to the McGill Journal of Dispute Resolution, the Journal of Arbitration and Mediation, the Canadian Arbitration and Mediation Journal and this publication. His book, *The Art of Role Play in Dispute Resolution Training*, was released last year.

Marc guest lectures at the Faculty of Law at Queen's University, the Faculty of Law at the University of Calgary and Osgoode Hall Law School. He serves as faculty of the Canadian Collaborative for Engagement & Conflict Management, where he teaches about online dispute resolution and arbitration. Marc is accredited as a trainer by the ADR Institute of Canada and the Law Society of Ontario.

In 2020, Marc was presented with a STAR Award by the ADR Institute of Ontario for his leadership, dedication and contribution to the dispute resolution field.

For more about Marc, please visit 456dr.ca.

BOOK REVIEW

Trevor C.W. Farrow & Lesley A. Jacobs, eds, *The Justice Crisis – The Cost and Value of Accessing Law* (Canada: UBC Press, 2020).

ISBN: 978-0-7748635-8-2

I first came across Professor Farrow's research on Canada's access to justice crisis early on in my Master's studies at Osgoode Hall Law School. The justice system's lack of accessibility was of specific interest to me, as I focused my research on online dispute resolution and the opportunities it offers to overcome traditional obstacles. The *Everyday Legal Problems and the Cost of Justice in Canada - Overview Report*, published in 2016 by the Farrow-chaired Canadian Forum on Civil Justice, offered a glimpse into the reality of the failings of our system. Farrow's team helped inspire much of my work, so it was with great interest that I took notice of *The Justice Crisis – The Cost and Value of Accessing Law*, released last September.

When I visited the UBC Press website to order it the $89.95 price tag (before taxes and shipping) gave me pause. Like many academic publications, I felt the cost was too steep for casual reading… and even pondered if the book on access to justice might itself be inaccessible as a result. (There were digital versions available at lesser cost to make the text accessible upon release; it is simply my personal preference to hold books of this nature in hand.) When I learned that a more affordable paperback version was released earlier this year, I rushed to order my copy. Flipping though the Contents page, I was impressed to see an all-star list of contributors to the 345-page book edited by Farrow and Lesley Jacobs. It was like an assembly of the Avengers!

The Justice Crisis is divided into four sections – Part 1: Understanding the Access to Justice Crisis, Part 2: Experiencing Everyday Legal Problems, Part 3: Legal Services and Paths to Justice and Part 4: The Legal Profession and Meaningful Access to Justice. The text is full of figures, charts and statistics from many research studies featured, including several which were the first of their kind in Canada. The chapters range from philosophical considerations around accessing justice - including the different waves of views and prospective solutions offered over the years - to narrow focuses specific to the Indigenous community, domestic violence, landlord-tenant conflicts and class actions.

While Canadian in its focus, references to successes, failures and innovations of other countries are also shared, for both domestic comparison purposes and idea generation. The chapters are presented in a traditional academic manner, with repetition in the introduction and conclusion to ensure the reader is clear of the objective of each.

While I expected to take the book in slowly, reading a chapter at a time here and there, I found myself captivated and unable to put it down. I may have been easier to hook because of my personal interest in the subject matter, but I believe my captivation was also attributable to how well organized the book is. There is a natural flow between the many topics addressed at great depth by some of our brightest legal academic minds. The chapters are impressively connected as the contributors seem well versed in one another's work.

What I like most about The Justice Crisis is its honesty - various authors are open about the challenges and limitations of their research. An example is Ab Currie's chapter which speaks of the costs of everyday legal problems beyond money. Currie examines the additional burden placed upon such programs as employment assistance, social assistance and health care directly attributable to unresolved legal problems. While the dollar figures connected to a lack of justice access seem astronomical, Currie explains that they are actually small in comparison to the overall operating cost of these programs. This helps readers better understand the context and confines of these issues.

The challenges make sense. How can you count the number of people who do not have access to something? Particularly when it comes to justice, when one may not even be aware they have a legal issue and lack basic information about how to effectively address it. While this leaves the reader unable to put their finger on the complete reach of the crisis, the sheer volume of empirical research and consideration given to many of the presented obstacles leave no doubt that we have a significant problem on our hands.

A criticism I have is that there is only one, short, passing reference to British Columbia's Civil Resolution Tribunal (CRT). While a chapter by Lorne Sossin and Devon Kapoor acknowledges that online tribunals offer innovative approaches that can help overcome the lack of access to justice, The Justice Crisis does not give the depth of analysis of online options to improve access to justice that it gives to other considerations, such as the regulation of paralegals in Ontario. I expect this is due to a lack of time to delve as deeply into Canada's online administrative tribunals. The CRT launched in 2016 and

the Condominium Authority Tribunal of Ontario in 2017, while the analysis of other methods of improving access to justice go back at least a decade. Still, Canada's online tribunals' innovative platforms offer practical ways to address many historic access to justice issues. Perhaps the second edition of The Justice Crisis can include a chapter on this important topic.

I recommend The Justice Crisis. It has something for everyone. While it may seem of obvious interest to legal academics and those directly involved in addressing our access to justice issues, I think it has potential for wider appeal, including to those interested in or involved in the justice system and also private conflict resolution service providers. Judges, arbitrators, adjudicators, mediators and other conflict resolution professionals, along with legal advocates, can reflect on their role in offering access and consider how to improve their service offerings. I believe this book will give all who read it something important to think about.

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FROM RETRIBUTION TO RESTORATION:

EMOTIONALLY INTELLIGENT APPROACHES TO THE LAW

Vanessa Slater
Q.Med, LL.M. (C)

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ABSTRACT

The retributive focus of the colonial legal system results in much trauma, particularly with respect to criminal justice. The enlightenment that comes with becoming trauma-informed can assist lawyers, decision makers and others involved in addressing conflict to overcome deep-rooted systemic hurdles. Viewing conflict through a relational lens which embraces principles of restorative justice supports relinquishing control over the achievement of "justice" and instead focusing on restoration. This paper considers the relevancy, advantages and challenges of shifting Canada's criminal justice system toward emotionally intelligent approaches.

ABOUT THE AUTHOR

After over two decades of providing system navigation in the non-profit sector for a diverse range of populations, Vanessa Slater became a mediator and restorative justice practitioner. As an ally and passionate advocate for access to justice issues, Vanessa continues to seek creative solutions for inclusion and conflict. She completed her certificate in Restorative Justice at Simon Fraser University and is currently completing a Masters of Laws, specializing in dispute resolution at York/Osgoode Hall PD. When she's not in her pottery studio, you can find Vanessa in the Durham Forest with her dog.

INTRODUCTION

The impacts of traumatic experiences affect individuals in a wide range of ways. There is no doubt that the universal experience of trauma comes with a profound societal cost. Understanding the effects of criminality through a trauma-informed lens offers a significant shift in understanding and enhanced ability to effectively serve those who have experienced trauma. Nowhere is the need for a trauma-informed approach greater than in our existing retributive criminal justice system. An overhaul of institutionalized thinking for lawyers, police, correctional officers, juries, and judges through institution-specific, trauma-informed practices must be widely applied for any hope of change to be realised.

The status quo is an antiquated system and has an established record of denying our most vulnerable citizens facilitated and supported opportunities for personal change. Through a comprehensive, culturally informed understanding of trauma and all its ancillary outcomes, parties will undoubtably sustain less psychological trauma as a result of their participation in, or work-related exposure to, the criminal justice process. This fundamental paradigm shift is only possible if those supporting the existing colonial framework acknowledge that the current system requires a seismic shift from the top down. A more relational approach to the law is one which will reap significant, measurable social and economic benefits.

By adopting a relational lens (one that acknowledges the interconnectedness of us all) and employing the philosophies of restorative justice (RJ) to our legal framework, a shift towards an emotionally intelligent form of justice could transpire, thereby shifting from the systemic harm which “doing justice” inevitably causes in its current state. By returning control of the conflict to its rightful owners, and focusing on the harms and needs of both the person who has offended and the victim, these (and other) key stakeholders are afforded the right to become invested in moving beyond retribution and towards repair. In this way, a trauma-informed legal system would be one in which the effects of harm are acknowledged and even mitigated through agile, and case-specific supports. In order to demonstrate how our criminal justice system would benefit from such a refurbishment, preliminary consideration of four fundamental areas is paramount:

1. Who is affected by trauma within the legal system?
2. Why is trauma relevant when considering criminal behaviour?
3. What do restorative justice approaches offer?
4. Where do obstacles to implementation lie?

A broad overview of these areas is an inaugural exploration when contemplating a paradigm shift in one of society's most revered institutions.

WHO IS AFFECTED BY TRAUMA WITHIN THE LEGAL SYSTEM?

The term "trauma" has recently become colloquialized in our mainstream parlance. This is evidence of a general acceptance of, and an attempt to, understand causes of trauma and the effects of its symptoms. A traumatic event, as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM), is that which involves "actual or threatened death or serious injury, or a threat to the physical integrity of the self or others, with a response of intense fear, helplessness, or horror."[1] This definition is all-encompassing and opens the door to subjective experiences, which can be difficult to quantify. What is traumatic for one person may not be harmful to another; the mercurial nature of people's reactions to harm is as unique as the individuals themselves. Resilience, social status, and socioeconomics undoubtably play a role in how and if trauma manifests in people. The empirical study of trauma is here to stay. This reflects a more inclusive and humanitarian approach to those who deserve compassion as they navigate the myriad complexities associated with trauma. As one humanitarian noted, "In compassion when we feel with the other, we dethrone ourselves from the centre of our world and we put another person there."[2] When considering "the slings and arrows of outrageous fortune"[3] which so many have endured, offering a compassionate lens is unlikely to inflict more harm.

Though the majority of trauma research in recent decades has focused on the symptoms of Post-Traumatic Stress Disorder in war veterans and domestic violence survivor-victims, trauma predominately affects the general population. This includes not only people who have offended who find themselves navigating the criminal justice system, but also professionals who have been impacted by distressing cases and evidence such as lawyers, judges, and juries. Trauma does not discriminate between Crown counsel or criminal, juror or judiciary: it affects everyone to varying degrees. Therefore, a trauma-informed approach, rooted in compassion, is critical to mitigate the damage caused and to prevent further harm.

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[1] Foreman, Hoffman, et al. (2016) *Correlates of Lifetime Exposure to One or More Potentially Traumatic Events*, CBHSQ Data Review.
[2] Armstrong, K. (2008*) Charter for Compassion* [Video], TED Conferences.
[3] Shakespeare, W. (1600) *Hamlet* III. I, Public domain.

Regrettably, as evidenced in the criminalization of such common trauma symptoms as aggression and drug use, our retributive legal system is not well suited to recognizing trauma or addressing the needs of those affected. A large majority of people who find themselves involved in criminal activity have experienced trauma as children.[4] So great are the numbers of children adversely affected by trauma, that the term "Developmental Trauma Disorder" has been coined. Childhood trauma such as chronic forms of abuse, neglect, or other cruel conditions contribute significantly to poorer social determinates of health, as revealed by Canadian pediatrician Nadine Burke Harris: "In high doses, childhood trauma affects brain development, the immune system, hormonal systems, and even the way our DNA is read and transcribed. Folks who are exposed in very high doses have triple the lifetime risk of heart disease and lung cancer, and a twenty-year difference in life expectancy."[5] American researcher and clinician Vicky Kelly puts it more bluntly, "Childhood trauma is so profoundly different. It happens in the crucible of those early critical relationships and can have devastating effect on a person's development. It has been called the single most public health crisis in our country".[6] It is no great stretch to conceive that a child growing up with trauma and all its accompanying cronies of mistrust, confusion, anger, abandonment, and shame would detrimentally combine to form an adult lacking the psychological building blocks of security, interconnectedness, and a sense of self-worth in the world.

The tragic reality is that most people who cause harm have themselves been harmed. The notion of people who offend as victims is not a popular sentiment, yet "rarely, if ever, do prison programs address what other people did to the individual along the way to his or her prison sentence…you are either a victim or offender and never the twain shall meet."[7] Even when people who have offended have not reported as being directly traumatized, they are still likely to identify as a victim. Our retributive system does not address the original reasons or motivations for criminal behavior, but instead merely attempts to suppress the behaviour with punitive measures. By viewing criminal behaviour as an act for which responsibility lies only at the

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[4] Foreman, Hoffman, et al. (2016) *Correlates of Lifetime Exposure to One or More Potentially Traumatic Events,* CBHSQ Data Review.
[5] Burke-Harris, N. (2015) *How Childhood Trauma Affects Health Across a Lifetime* [Video]. TED Conferences at 3:00.
[6] Kelly, V. (2014) *The Paradox of Trauma Informed Care* [Video]. TED Conferences at 10:33.
[7] Elliot, Elizabeth M. (2001) *Security with Care Restorative Justice and Healthy Societies.* p.78. [*Elliot*]

individualistic level, our current justice system falls prey to the common fundamental attribution error by placing undue prominence on internal characteristics of an individual to explain one's behavior in a given situation, rather than the situation's external factors which contributed to it. When considering the impacts of trauma on an Indigenous person who had offended and had been exposed to a lifetime of trauma, during sentencing, Madame Justice Greckol acknowledged that "few mortals could withstand such a childhood and youth without becoming seriously troubled".[8] Plainly stated, our retributive justice system punishes people for being victims of trauma — all in the name of "doing justice". When considering changes to our legal system and sentencing for offences, we must consider the ramifications adversity has had on an individual's development.

Indeed, there are examples of institutionalized, legally holistic approaches which serve unique populations who have been impacted by trauma. A number of specialized courts have been created outside of the regular court system. The objective of these more trauma-informed courts is to provide better long-term outcomes for both people who have offended who have been exposed to specific circumstances, and for society as a whole. These specialized courts include Gladue Courts, Domestic Violence Courts, Toronto Mental Health Court, and Drug Treatment Courts[9].

The Gladue courts are of special interest as they focus on addressing the disproportionate numbers of Indigenous people in Canadian prisons. According to Justice Barry Stuart, "Our criminal justice process has an obdurately narrow focus. Too much attention, too much blame and too much responsibility is placed upon the offender."[10] Gladue Courts attempt to redress the impacts of colonialism and the intergenerational trauma associated with survivors of residential schools by applying a trauma-informed context for judges to consider. Like traditional courts, Gladue Courts include a judge, duty counsel, Crown, and the defence lawyers, but most of the professionals involved have a deep comprehension of the cultural and systemic issues pertinent to the people who have offended. Case workers prepare reports of the person's life circumstances, which may be considered by the judge during sentencing. Judges are not beholden to the Gladue reports, yet they offer a foundational basis of understanding for the marginalization which has typified an offender's path to their courtroom. The correlation between economic adversity and criminality are often intrinsically

[8] R v Skani. [2002] AJ No 1579, 2002 ABQB 1097, 331 AR 50, 56 WCB (2d) 434 at para. 60.
[9] Fairlie, J and Sworden, P. (2019) *Introduction to Law in Canada.* p. 349.
[10] R v Moses, [1992] 3 CNLR 116.

linked, as there is little doubt that poverty is a factor in the staggering over-representation of Indigenous people in prisons. Perhaps American social justice advocate and lawyer Bryan Stevenson said it best: “The opposite of poverty is not wealth. In too many places, the opposite of poverty is justice.”[11]

LEGAL PROFESSIONALS: TRAUMA AND TRAINING

Legal professionals such as lawyers, judges, court officers, juries, bailiffs, and court stenographers are exposed to difficult evidence through images, victim impact statements, and testimony throughout their careers. Justice Barry Stuart aptly remarked that “the justice system is as hard on the people who run it as it is on the people we run through it”.[12] There is an expectation that courtrooms are intense and, at times, adversarial environments, but when a trial is particularly emotionally difficult or gruesome, legal professionals are exposed to extra stress in the form of vicarious trauma. The term “**vicarious traumatization”** was coined to describe the profound shift in worldview that occurs in helping professionals when they work with individuals who have experienced trauma: helpers notice that their fundamental beliefs about the world are altered and possibly damaged by being repeatedly exposed to traumatic material.”[13] This type of exposure, especially over the span of a career, can have devastating consequences on legal professionals, their families, and the clients they serve. As with first-hand experiential trauma, vicarious trauma often manifests through avoidance, self-medication, mental health issues, burn-out, and even workaholism. The notoriously punishing hours to which (particularly new) lawyers are subjected does not help with psychological recovery and self-care. As in many highly emotionally demanding professions, lawyers can often suffer the effects of vicarious trauma without even understanding its presence or, worse, carrying the burden of it in silence. As C.S. Lewis astutely wrote, “I have learned now that while those who speak about one's miseries usually hurt, those who keep silence hurt more.”[14] There is, however, evidence to suggest that many legal professionals wish to see changes in their professional culture and in how they are trained. As Métis-Cree lawyer Myrna McCallum posits in the opening preamble to her podcast *The Trauma Informed Lawye*r,

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[11] Stevenson, Bryan (2012) We need To Talk About an Injustice [Video] at 17:00.
[12] Stuart, B. (2016) *Toward a Culture of Just Relationships* [Video] at 9:00. [*Stuart]*
[13] Mathieu, Francoise (2012) *Defining Vicarious Trauma and Secondary Traumatic Stress*, material. https://www.tendacademy.ca/resources/defining-vicarious-trauma-and-secondary-traumatic-stress/ [perma.cc/U88U-LBAL].
[14] Lewis, C.S. (2004) *The Collected letters of C.S. Lewis Series, Vol. I* p. 879. Harper Collins.

> *I believe that law schools and bar courses are missing a critical competency requirement in their curriculum: trauma-informed lawyering. Becoming a trauma-informed lawyer will, among other things, challenge you to critically reflect on your personal behaviours, beliefs and biases. It will call you to positively transform the way you approach advocacy, guide your practice to avoid doing further harm to others and ask that you commit to remaining open to learn new and old knowledge you didn't know you needed before beginning your career*.[15]

Lawyers require a more robust, well-rounded education, including thoughtfully executed curriculum focused on the psychological needs of their clients and themselves. Emerging lawyers spend years in law school focused on their technical studies but, as Macfarlane notes, "clients are rarely, if ever, mentioned in law school classrooms".[16] It is no wonder that lawyers often miss the mark when dealing with the emotional needs of their clients. Perhaps there is entrenched resistance to changing the culture as she contends, "the widespread resistance to the interventions of emotional issues into the management of a file is epitomized by the quip, "The only thing I don't like about the legal practice is the clients." Like most enduring jokes, this comment is not without truth."[17] Indeed, the majority of clients who have found themselves requiring a legal professional, especially within the realm of criminal law, have likely experienced some degree of trauma. This makes things overly complicated for lawyers who simply want to provide the legal service they were trained to provide. According to psychologists Haskell and Randall, "although the law is deeply involved with regulating and responding to human behaviour, legal professionals are virtually never exposed to formal or informed psychological literature, research, or professional knowledge about human behaviour in their legal education or ongoing professional development".[18]

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[15] McCallum, M. (2021) *Trauma and Transformation in the Judiciary* (No.21) [Audio podcast episode] at.0.49. [*McCallum*]
[16] Macfarlane, J (2008) *The New Lawyer.* Vancouver BC, UBC Press. p.62. [*Macfarlane*]
[17] *Ibid* p.62.
[18] Haskell and Randall (2013) "*Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping".* Dalhousie Law Journal. p.501. [*Haskell and Randall*]

Lawyers are trained in law; is it reasonable to also expect them to also possess the "relational skills" of supporting the emotional needs of their clients? I contend that this is a reasonable expectation, and that becoming trained in a trauma-informed manner will not only benefit their clients but themselves as well. Macfarlane suggests that a shift in thinking is required: "In the hierarchy of effective communication skills, the pinnacle has traditionally been courtroom eloquence – the persuasive making of substantive legal arguments. For the new lawyer a different type of eloquence is necessary...the new lawyer offers a participatory model of compassionate, client centered professional service instead of the traditional "trust me" detachment of the old lawyer."[19] This "new lawyer" model is unquestionably a move in the right direction, both for lawyer and client. By learning to provide trauma-informed service, lawyers can mitigate their own exposure to the risks associated with vicarious trauma inherent in this demanding profession. Educating lawyers to address vicarious trauma firsthand would create more compassionate, and therefore less damaging, experiences for everyone exposed to the legal process. These effects of unchecked trauma manifest in both clients and legal professionals with serious costs. As McCallum states,

> *Many of us are just kind of going through the motions, holding up the status quo without questioning: is there a better way? It's time to plant some seeds to get people to think about how their work is impacting them mentally, spiritually, emotionally etc. I think being trauma-informed and actually applying trauma-informed principals are one of the better ways we could do this. I see when folks are traumatized, whether it's directly or vicariously through their work. I see how that shows up on the bench, I've seen how it shows up in opposing counsel and I've definitely seen how it shows up in myself. I can't help wonder how many really good people are driven out of this profession because of the mental health risks. There needs to be a better way.*[20]

Law schools train students in the techniques of interviewing clients, gathering sensitive information, generating timelines, preparing clients for cross-examination, and so forth. All of these techniques could be taught through a trauma-informed lens without a disruptive overhaul of the existing legal curriculum. It would simply require that legal scholars and professors become

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[19] Macfarlane, *Supra* note 16, p. 36.
[20] McCallum, *Supra* note 15, at 11:00.

trauma-informed themselves, so that they may begin to start weaving trauma-informed examples and language into their courses. This top-down approach is what is required to start training law professionals who will eventually possess greater legal and interpersonal skills. Acknowledging trauma in clients will deepen the communication between client and lawyer, creating new opportunities for understanding, context, and professional advocacy.

Trauma affects everyone, including those on the bench. For judges who have been exposed to trauma either personally or vicariously, its impact may serve them professionally. Reflecting on trauma may even offer an advantage, as Manitoba Provincial Court Judge Kael McKenzie noted in a recent interview:

> *If we're experiencing trauma, does that make us less capable? I think no. I think in fact, recognizing that makes us more capable more able to do our job and to understand the people coming into our court room. People come into the courtroom with trauma…and big trauma. With big things that have happened in their lives, systemic things. …and that's why we have to be trauma-informed. We have to be.*[21]

Because we are all impacted by trauma, we are all paying the cost, both personally and as a society. We help people heal when we promote collaboration with each other, thereby creating connection back to community. The constraints of our existing legal system make it extremely difficult to cultivate creative, inclusive solutions to improve conflict even for the most collaboratively-minded lawyers; as Ippolito notes:

> *Despite our best efforts to get away from traditional top-down organizational structures and right-based legal culture, our systems are still set up to default to those hierarchies in times of crisis and problems. Learning to operate in a non-hierarchical collaboration is essential to breaking those default frames and excelling in achieving goals that rely on the ability to leverage the talents of others reciprocally and to creatively and effectively engage with them.*[22]

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[21] McCallum, *Supra* note 15, at 23:00.

[22] Ippolito, L. (2019) *Music, Leadership and Conflict: The art of ensemble negotiation and problem-solving.* p. 193.

An exploration of the elements contributing to the failures of our current system is required if there is any hope of changing the ways law is taught and administered.

CONSIDERING TRAUMA AND CRIMINAL BEHAVIOUR

> *Michael Ignatieff was staring right at the Prime Minister. "I worked in a prison when I was a younger graduate student. I worked with lifers. I'm utterly unsentimental about criminals, but I know one thing about prison: It's that prison makes almost everybody worse who's in there…it's high time for an 'adult solution'".*[23]

These words were said by Ignatieff over a decade ago during a televised leader's debate in an attempt to raise awareness and challenge the way Correction Services Canada operated prisons. Seemingly, nothing came of it, and Canada's prison system is more deeply flawed today than ever before.

The sad intersections between violence, poverty, abuse, criminal behaviour, and trauma are widely accepted as contributors to anti-social behaviour. This does not mean that people who have broken the law can simply blame their actions by saying "I had a bad childhood so it's not my fault", yet it bears attempting to contextualize the underlying causes which precipitated the criminal behaviour through a trauma-informed lens. As one researcher observed, "child abuse, and neglect, poverty, sexual molestation, and witnessing violence are, among others, the most common risk factors for post traumatic reactions, aggression and antisocial behaviour."[24] It is unavoidable that some inmates must be incarcerated to protect public safety; that is what prisons were originally intended to do. Approximately eight hundred Canadian inmates are currently designated as "dangerous offenders," meaning they cannot be released. Fortunately, these cases are the exception, not the rule. According to Ling, "more than thirty per cent of the population is incarcerated on non-violent offences, mostly drug and property crimes. Critics have wondered for years: Why do they need to be in the violent confines of federal prison, counting down days at the expense of the Canadian government?"[25]

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[23] Ling, Justin (2021) *Houses of Hate: How Canada's Prison System is Broken*. Macleans [online] https://www.macleans.ca/news/canada/houses-of-hate-how-canadas-prison-system-is-broken/ [perma.cc/K5VA-AYQG].

[24] Vittoria, A. (2012) *Offending Behaviour: the role of trauma and PTSD*, European Journal of Psychotraumatology, 3:1. [*Vittoria*]

[25] Ling, Justin (2021) *Houses of Hate: how Canada's prison system is broken*. Macleans.

Most people in our carceral settings are eventually paroled and return to a community. Understandably, these people are even more traumatized than they were before their incarceration. Exposure to the constant threat of violence and stress wreaks havoc on an individual's overall well-being. It remains unlikely that any mental health and/or addiction issues were treated inside; in fact, it is more likely that individuals emerge (usually unsupported) from prison with increased mental health, trauma, and addiction issues. Public protection is diminished when we return people who have offended to the street unrehabilitated, unreformed, and unsupervised. Simply put, the prison system is failing everyone; as Ling laments:

> *Canada's prisons are antiquated, inhumane, violent, and expensive. They don't even work. Two decades ago, researchers from the University of New Brunswick did a meta-analysis of 50 studies on incarceration, spanning a half-century. They could not find "any evidence that prison sentences reduce recidivism" and that "prisons should not be used with the expectation of reducing criminal behaviour." They revisited the study two years later, looking at 100,000 inmates. They found the same result: prisons do not reduce crime, they increase it.*[26]

Even if trauma-informed sentencing judges and lawyers wanted to invoke or suggest an alternative to incarceration, they are thwarted by the constraints of the justice system available to them. The frustration imbued in the following comments by Justice Barry Stuart reveal the degree to which our prison system is failing everyone:

> *Judges and prison officials elude responsibility for the abysmal failures of incarceration by shifting blame to the "system". This is partly true. The absence of reasonable alternatives creates a difficult choice. Faced with the prospect of leaving an offender in the community without any programs offering a reasonable prospect of rehabilitation, or sending the offender to jail, where at least any question of control is resolved, begrudgingly, often in frustration, jail is chosen. The tenaciously held belief against overwhelming evidence to the contrary that jail can rehabilitate provides an illusory solace for the court, and enables communities and courts to avoid confronting reality. The destructive impact on offenders and ultimately future victims, and*

[26] *Ibid.*

> *the squandering of scarce public resources is reason enough to exercise restraint in relying upon punishment and especially upon jail to protect the public.*[27]

The need for alternatives to prison is glaringly evident. The outcomes associated with incarceration are truly bleak. Berzins asks, "Knowing how much damage it does and the lack of evidence for its usefulness, can we really continue to found the entire justice policy of a civilized society on the mere assumption that legal punishment is right?"[28] Our retributive system simply does not address the underlying issues of poverty, abuse, and systemic barriers which lead individuals to commit offences in the first place. When we are not connected with intimate, safe relationships with each other and our communities, we are forced into a dangerous state of mind. When people experience a lack of agency in their lives, as well as the sense that they do not matter, anti-social behaviour and all its accompanying issues can trample in like an uninvited guest. Moving from retribution to rehabilitation and repair through restorative approaches is well worth expanding to a broader audience within our current framework. What we have been engaged in for so very long is suspiciously ineffective, as a Cree Elder remarked to a settler during a workshop on restorative justice, "You have a *legal* system, we're just not sure it's a *justice* system".[29] Western civilization's age-old societal "eye for an eye" thinking is outdated and desperately in need of revision. As one mother (of a sexual assault survivor) who supported her daughter through an eight-hour restorative circle process said, "We cannot break cycles of dehumanization by responding to violence with dehumanization. We must strive to make justice and healing synonymous".[30] One solution to work towards the intersection of justice and healing is restorative justice (RJ). RJ is an agile, trauma-informed, and inclusive approach to redressing harm. It focuses on the needs of the survivor-victim, but also on the underlying needs of the person who has offended. RJ attempts to right the wrongs, to the extent possible, by addressing the obligations the person who has offended has created as a result of their actions. Perhaps in part, RJ is the "adult solution" Ignatieff was envisioning a decade ago.

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[27] *R v Moses*, [1992] 3 CNLR 116 p.24 note B. [*Moses*]
[28] *Ibid* at note 11.
[29] Elliot, *Supra* note 7 at p.40.
[30] Essler, K (2020) *Cross Examination Is Brutal*: *Is it time to consider restorative justice in sexual assault cases?*

WHAT DOES RESTORATIVE JUSTICE (RJ) OFFER?

> *The restorative model of justice should not be understood as a new gimmicky, untried, 'new agey' idea. It is a very old idea that has been with us since the beginning of human community life, since our first thoughts about criminal justice. The return to elements of restorative justice is a return to the roots of justice. It's not a new and untried solution, it's a badly needed recalibration of our criminal justice system.*[31]

RJ is a multi-party process which necessitates authenticity, remorse, and the desire for change in order to ensure a transformative, durable, and long-term outcome. Emotional restoration is the cornerstone of restorative justice practices. It must be noted here that not all criminal acts are appropriate for RJ for a variety of reasons, including public interest and the psychological safety of those who have experienced harm. With certain harm inflicted, "many crime victims will find such intimate contact with their offenders utterly traumatic".[32] RJ is only to be considered carefully on a case-by-case basis for those victims and people who have offended who are ready to authentically engage in the process and have realistic expectations about what they might gain from the experience.

In common dispute resolution jargon, RJ attempts to "fit the forum to the fuss" with agility, in a way that retributive justice simply cannot. Retributive justice seeks to isolate those who have caused harm from the community where as RJ strives to discover ways to restore the community and heal connections as much as is possible. In a retributive justice system, judges and lawyers do all the talking while victims and people who have offended have only a chance to speak in an extremely limited and controlled context, as opposed to RJ where the voices of the victim and people who have offended are central to the process. In RJ practices, such as sentencing circles, displaying emotions is encouraged, whereas in a court, the sterile and foreboding setting discourages emotional expression. There is, however, a key area where these two paradigms merge, as noted by RJ pioneer Howard Zehr: "Both the philosophy of retribution and the philosophy of restoration have a lot in common. They both say that the victim is owed something, they both say that the offender owes something, they both say there ought to be proportionality

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[31] McLaughlin, B. (2015) *Evolution of Restorative Justice within Canadian Justice System* at 45 min. [Video].
[32] Radzik, L. (2003) *Do Wrongdoers Have a Right to Make Amends?* p.327.

between the two. What they differ on is the currency that will right that balance."[33]

At the risk of being perceived as possessing a Pollyanna-like view on this nuanced subject, I contend that empathy has never caused more harm. Empathy is extended freely to survivors of violence and rarely afforded to those who have caused the harm. If we can find it in ourselves to extend empathy to people who have offended and are involved in an RJ process, this maybe be an important pathway towards unlocking the possibility of reparation.

> *...it is often empathy that leads to the emotions of remorse, guilt, and shame. As a consequence, it is crucial to activate the potential for compassion in the offender. This can only happen in a situation wherein the offender him - or herself experiences respect and empathy. This is one of the major strengths of good conferencing, in comparison with traditional court proceedings.*[34]

In an RJ conference or sentencing circle, communication between people who have offended and victims often follows a structured script and is facilitated carefully with a trauma-informed approach at the fore. This effective methodology affords individuals the opportunity to regain control and agency through the expression of their needs, and it offers the person who has offended the opportunity to fulfill obligations they have created. Justice Barry Stuart succinctly outlines the typical objectives of a sentencing circle:

> *The effect of the circle was to: challenge the monopoly of professionals, encourage lay participation, enhance information, create a search for new options, promote the sharing of responsibility, encourage the offender's participation, involve victims in sentencing, create a constructive environment, provide a greater understanding of the justice system's limits, extend the focus of the criminal justice system, mobilize community resources, and merge First Nation's and Western government's values.*[35]

Most victims of crime do not have the opportunity to meet with the person(s) who caused them harm in order ask the persistent, lingering questions (such

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[33] Zehr, H. *(2012) Restorative Justice is the Law*, [Video].
[34] Harris, N. et al. (2004) *Emotional Dynamics in Restorative Conferences*. p.202.
[35] Moses, *Supra* note 27 at note 27. #4.

as “Why me?”) which are often an impediment to their healing. In an RJ context, these emotionally charged questions can be addressed, which often affords both parties greater ease. As Zehr explains, “They want answers that are as multi-layered as real life, not the simplistic, binary answers that emerge from the legal process.”[36] The relational focus of restorative justice leads to such practices being particularly suited for the task of healing trauma — particularly that which is experienced through the violence of other human beings. Crucial to restorative justice is the belief that responses to crime must be focused upon the reparation of broken relationships, and these relationships are best repaired not through punishment and fear, delivered by an impersonal state-based system, but through human dialogue occurring within a safe, secure, and trusting environment.

In order for RJ to truly affect the person who caused the harm, this respectful setting must be created if any hope of a return to right relations can occur. Our emotionally restrained court system does not support this kind of emotionally safe environment for people who have offended and, consequently, they may not be fully aware of the effects of their crimes. Canadian lawyer Rupert Ross suggests “an offender cannot even *know* what he did until he begins to learn, first hand and in a feeling way, how people were affected by it”.[37] Healing the trauma of harm inflicted by other human beings requires the reparation of trust in others that the harm originally done to them will not be repeated — a goal which RJ, with its focus on accountability, respect, inclusion, and fulfilling obligations, is particularly well positioned to deliver.

RJ RETURNS CONFLICT TO ITS RIGHTFUL OWNERS

> *Conflict is an incredible opportunity and we ought not to let the professionals steal it from us. Process is product; the process we choose is going to determine what the outcomes are*.[38]

RJ relies on the person who has offended and their ability to authentically participate, thereby reducing the obvious inequities in the retributive legal system, which virtually eliminates participation of the very person who is the primary focus of the process. RJ challenges the monopoly of lawyers and returns ownership to those affected by the harm, to its rightful stakeholders.

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[36] Zehr, H. (2001) *Transcending – Reflection of Crime Victims.* Intercourse, PA: Good Books.
[37] Karp, D. (2015) *The Little Book of Restorative Justice for Colleges and Universities.* p 39.
[38] Stuart, *Supra* note 12 at 4:00 [Video].

Within restorative approaches such as victim-offender mediation and community sentencing circles lies the knowledge that the individuals affected by the conflict or crime inherently know what they need and how to fulfill those needs. “For far too long the expensive, formal, slow, and blunt instruments of the justice system have been employed for too many conflicts within communities. In effect, conflicts are stolen from the community by the justice system”.[39] According to criminologist Nil Christie, “Lawyers are particularly good at stealing conflicts, they are trained for it”.[40] This may be a dim view of lawyers, yet it remains relevant for consideration in the exploration of restorative approaches to conflict. “Properly processed, conflict is an essential element in building the foundation of community spirit and pride, and most importantly in building the ability to co-operatively develop community-based solutions to social problems.”[41] These community-specific solutions to social problems are also significant contributors to determining how to best protect the community in the future.

Our current legal system would benefit from some hybrid model which includes RJ for certain cases. Exploring an expanded complement of options for crime would be a benefit to society overall. Ancient Indigenous practices from all over the world, such as sentencing circles, have proven instrumental as a form of reconciliation, re-integration, and prevention. When appropriate, restorative practices should be considered first (before courts) to determine if the harm caused could be better addressed directly by those impacted. As Justice Barry Stuart expressed, “We have to think about circles not as an alternative process, but the first order process to turn to. The courts ought to be the very, very last process that we do when the communities can’t handle it, then we to turn to the courts as the alternative process”.[42]

The retention of ownership of conflict through RJ practices ensures participants possess autonomy and control in the difficult process of addressing harm. The circle process can inject a valuable awareness of larger, systemic community issues which may have contributed to the original offence. RJ offers a wider view of our innate interconnections through its trauma-informed approach, as noted by psychologists Haskell and Randall: “The philosophical orientation embodied in a trauma-informed approach can apply to work with victims, offenders, and all those affected by traumatic events, including the broader communities in which victims and offenders

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[39] Moses, *Supra* note 27 at note 35.
[40] Christie, N. (1977*) Conflicts as Property.* p. 4.
[41] *Vittoria, Supra* note 24. Similar to the advantageous outcome possibilities of mediation.
[42] Stuart, B. (2016) *Toward A Culture of Just Relationships* [Video] at 10:00.

live".[43] By returning the conflict and its resolution to the rightful owners, victims, people who have offended, and the community can address needs and obligations through consensus, something which can rarely be actualized in a legal context.

CHALLENGES AND OBSTACLES TO CHANGE

The prime obstacle to changing the legal system are those who work within it. The rigorous training required to become a lawyer is extraordinarily demanding and requires a degree of assimilation into the culture of law. Expecting existing lawyers to adopt RJ options into their practices might be a tall order because "to many, the existing criminal system is sacrosanct. Tampering with its rituals is tantamount to heresy".[44] Social justice-based lawyers and judges are the exception when it comes to exploring alternatives or hybrid solutions to address harm. Many are simply unaware of trauma-informed approaches and RJ practices. Lawyers need relevant education which reflects the diversity of clients' needs and experiences. Only then will RJ be viewed as an option in the legal toolkit to redress harm and restore relationships.

The general public's perception of what justice looks like is another barrier to implementing a more trauma-informed approach to the law. Considering changes to one of the most hallowed institutions in our society is something most people simply do not have any interest in contemplating. The notion of restorative approaches for criminals is often viewed as being "soft on crime". There is also a perception that people who have offended may use RJ to their own advantage in hopes of securing a lighter sentence, thereby participating in the process without genuine integrity and accountability. Critics of Gladue Courts certainly have raised this as a possibility, yet one must consider if those critics' agendas are permeated by dated colonialist thinking about Indigenous people. Some victims and advocates react negatively to RJ because they are under the misapprehension that the goal of RJ is to achieve forgiveness and reconciliation. While it is true that RJ can provide a context in which one or both of these may occur, this is an experience that varies from participant to participant. There is no pressure in an RJ process for either forgiveness or reconciliation to be a prerequisite for a successful outcome. RJ focuses on moving towards healthier relationships and gaining a new sense of identity.

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[43] Haskell and Randall, *Supra* note 18.
[44] Stuart. *Supra* note 27 part 4.

Yet another significant challenge is time. RJ practices take much longer to facilitate than a typical sentencing hearing. The preparation to ensure that an RJ process is ready to proceed can take months alone. Having various parties come together with a trauma-informed RJ facilitator over many hours or weeks is expensive and can pose technical issues such as travel costs, space availability, and scheduling challenges. Critics will undoubtedly ask, "Who is going to pay for all this?" Sadly, the number of legal influencers and advocates capable of projecting the long-term fiscal benefits of investing in rehabilitation and a return to community is infinitesimal. A restorative practice costs much less (and has better outcomes) than incarcerating someone for even a short period of time. The long-term benefits of reintegration into community with accountability and support will be better for families because the devastating ancillary effects of incarceration exist long after the person who has offended is released. Asking people to consider a hybrid version of our criminal justice system to include RJ cases will be an uphill battle, to say the least. In order for RJ to be accepted more widely into our retributive model, legal professionals (including police) need to be trained in restorative practices from the beginning of their educational paths. Change is slow; however, we have a collective duty to continue to strive towards a less expensive, more productive, more trauma-informed response to crime.

CONCLUSION

This is a critical time as the effects of COVID-19 have brought racial, gender, and socio-economic disparities into sharp focus. We know that we must do more to respond to these inequities. Trauma-informed RJ practices allow us to reimagine systems and communities in a way that focuses on participation, repair, and inclusion. Canada's constitution provides a framework which grounds all legislation and criminal justice policy in human rights. In many cases, restorative justice initiatives could meet human rights obligations and satisfy the objectives of sentencing through collaborative non-retributive processes. Even if a small minority of police and lawyers became advocates for RJ practices, it could make a significant impact by actually supporting the existing rule of law, as asserted by Sherman and Strang: "By providing more opportunities for questions and answers, face-to-face or otherwise, it may actually make the law far more accessible to the people. The evidence of satisfaction with RJ suggests that it may reinforce the rule of law. There is no evidence that the wider use of RJ would undermine the rule of law". [45] The

[45] Elliot, *Supra* note 7 at p. 90.

current system has a long road ahead as former Chief Justice Beverley McLaughlin noted during an impassioned speech in which she extolled the virtues of RJ:

> *We have not done enough. We have some restorative justice; we have some mechanisms that allow us to introduce elements of it into our process. Occasionally we see it applied in its full force to even serious offences. But the task of reconciling RJ goals with the retributive justice system that dominates our society that is deeply rooted in our culture is a difficult one. It will be a long work of progress but we must not give up. I believe that we must work whenever we can as judges, as lawyers, as community workers to introduce the attitudes of responsibility, conversation, discussion and healing into criminal law and into criminal sentencing and incarceration.*

Finally, a trauma-informed approach such as RJ strives to provide interventions and unique sentencing options in a way that reduces further harm and victimization. Given the criminal justice system's dismal record of addressing harm with state-sanctioned harm, there exists a desire for change in this broken system. A trauma-informed justice system will be a step in the right direction to offer more transformative interventions for those affected by trauma and crime.

Volume 2
(August 2021 – July 2022)

POWER

(FROM A REALISTC© FRAMEWORK FOR ENHANCING COMMUNICATION, RELATIONSHIP-BUILDING & DE-ESCALATION SKILLS)

Richard Moore
LL.B, C.MED, CFM, C.MED-ARB, C.ARB

Shadow of the Law Publications

Volume Two

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CONTENTS

ABSTRACT

Presented is Chapter 6 of Richard Moore's book, *A REALISTC © Framework for Enhancing Communication, Relationship-building & De-escalation Skills* (2021, Shadow of the Law Publications), which considers power and dynamics when police officers interact with citizens.

ABOUT THE AUTHOR

Richard Moore started his career practicing law before shifting his focus to mediation, conflict management and conflict transformation. He has mediated and consulted broadly and provided expert advice regarding many conflict management programs. He has taught negotiation, mediation, and other conflict management skills to human resource professionals, judges, lawyers, police officers, social workers, conflict management professionals, and labour relations and union representatives. He holds an undergraduate degree in political science from Carleton University, a law degree from Queen's University at Kingston, and Chartered Mediator, Chartered Med-Arbitrator and Chartered Arbitrator designations from the ADR Institute of Canada and is a founding member of the Canadian Collaborative for Engagement and Conflict Management.

REAL-LIFE SCENARIO

“There were two police cars on each side of the road with sirens on. It was foggy and nighttime which makes it a bit hard to get a perfect vision of what's happening and the reason why they are stopped on the side of the street. I started slowing down way before getting close to their vehicles. As I was getting closer I start to notice flashlights held by a female cop so I really slowed down... At that time, I had stopped completely. As she approached my car, looking so furious and violent, I tried to ask what's the reason for stopping me, she started shouting out very loudly at me and verbally abusing me with her unpleasant, unprofessional words. She was trying to accuse me of nearly hitting her partner, which does not make any sense considering I slowed down completely and there were absolutely no officers who were trying to cross the road in front of me.

She said the following in her own words in a very rude abusing matter “are you f…. stupid, you stupid idiot you almost ran my partner over, you stupid bitch” and she kept insulting me without giving me the chance to talk and every time I tried to defend myself she would tell me to “shut the f… up” and before leaving my vehicle she threatened me by saying "watch what's gonna happen to you" and that it's because of people like me people are dying out there.

At that moment I felt betrayed by the only system that should make you feel safe. By a system that I once thought no one is above the law. I really felt scared, ashamed and truly betrayed. As she was walking away from my vehicle, I heard them laugh and giggle right behind my car.

*Less than a minute later I noticed a male police officer approaching my car again with anger. He also verbally abused me and threatened me by saying the following “are you f****** stupid you stupid idiot, give me your license now and watch what's gonna happen to you.” Again I tried to defend myself by trying to tell him that “you’re accusing me of something I did not commit”. He got more angry and again shouting at me loud and threatening… He told me that he's gonna give me the biggest ticket and it will teach me a lesson.*

As I arrived home with disappointing tears and so disappointed of our system of justice I was and still am certain that that night I was verbally abused and threatened by the only people who I thought there is to protect us not to makes feel scared, ashamed, and abused, I was and still am traumatized and it felt like a nightmare.”

CONTEMPLATION QUESTIONS

How did the officers use their power in this scenario?

How was the citizen affected?

What might cause the officers to behave this way?

ANALYSIS

The *Approach/Inhibition Theory of Power* was developed by Dacher Keltner in 2003. It states that the presence or absence of power (or perceived power) psychologically transforms people and affects their behaviour.

Power activates people by increasing their drive, energy, and emotion. More power leads to *approach behaviours* (action, seeking rewards, an increase in physical energy, and self-promotion). Less power leads to *inhibitive behaviours* (reaction, self-protection, avoiding threats and danger, vigilance, lower motivation, and less activity). A lower sense of power explains why people who feel stereotyped have *inhibitive behaviours*. It doesn't matter if their stigma is visible (e.g., skin colour), less obvious (e.g., sexual orientation), or even completely invisible.

More detailed information which reviews empirical advances made between 2003-2020 regarding Keltner's Approach/Inhibition Theory of Power can be found in the article of Kleef and Cheng reported in Current Opinion in Psychology 2020, 33:196-200.

Understanding how power, or its absence, affects people can help officers to think about how they can better manage power dynamics to create safer and more stable outcomes when interacting with citizens. One exercise that can lead to interesting results is for officers to analyze their own power behaviour in officer-citizen encounters, taking into account that they have "elevated power" compared to citizens who have "reduced power".

Typically, officers with elevated power

- are more optimistic when they assess risk (e.g., they have a high belief that they will win and a lower belief that they will lose); when judging time requirements (e.g., they tend to underestimate the time it takes to

complete tasks, also known as the *planning fallacy*); and, when making decisions (e.g., they can be overconfident).

- are more likely to see citizens as a means to their own ends.
- are more likely to dehumanize citizens; engage in distant and cold decision - making; and, sacrifice citizens' welfare.
- are more likely to prioritize their self-interest above that of others.
- rely more heavily on mental shortcuts, or rules of thumb (*heuristics*) to help solve problems and make judgments quickly and efficiently. In this way, they risk making mistakes based on narrow perspectives and stereotyping.
- are more focused on their own view (rather than adjusting to the perspectives of others). This makes them more vulnerable to under-estimating how long tasks will take because their planning ignores relevant information.
- are more likely to have unconscious *bias* (e.g., be more positive towards white faces and negative towards black faces) in *Implicit Association Tests.*
- are more likely to hold onto initial judgments and discount other's advice.
- are more prone to risky behaviour.
- are more prone to aggression when they feel incompetent.
- are stricter judges of the moral wrongdoing of others than their own (moral hypocrisy).

And at the same time, citizens with reduced power

- are more likely to have negative emotions.
- have mindsets oriented to threats.

In summary, law enforcement officers have vast power when dealing with people. This elevated power can negatively affect their judgment and influence their behaviour. It can make officers more prone to risky decision-making, de-humanizing behaviour, the use of negative stereotypes, violence, and judging others more harshly than themselves. At the same time, citizens will often have, or think they have, reduced power. This makes them more prone to negativity, seeing things as threats, as well as reduced self-restraint, emotional control, and problem-solving abilities. Unless these power differentials are sensitively handled, officers will end up causing lower citizen satisfaction and cooperation.

One way to combat the negative effects of *increased power* is to re-think what power is. We often understand power as *power over* others. This conceptualization of power is built on force, coercion, domination, and control. It is founded on a belief that power is a finite resource which some people have, and others do not.

Other ways of understanding power, include *power within*, *power to*, and *power with*. These recognize that power is not owned by any one person or group. Power is fluid and ever-changing, present in all relationships.

Power within draws on our individual senses of self-worth and self-knowledge, as well as our ability to recognize and respect people's individual differences. If we can formulate power as *power within,* we are able to recognize that we have *power to* and *power with,* and that we can use them to make a positive difference in people's lives.

Power to avoids domination and control. It is built on the idea that we can all act to make positive differences with people to improve lives and relationships.

Power with is a shared power that grows out of collaboration and relationship building. It is built on respect, support, influence, shared power (empowerment), and shared decision-making. *Power with* helps to build bridges with individuals and groups, across differences such as gender, class, and culture. Rather than using the domination and control of the *power over* mindset, a *power within* mindset leads to collective decisions and actions, and more enduring outcomes.

Officers should not be trying to increase their *power over* citizens. Wherever possible, they should find ways of sharing power. Starting conversations with a *power within* mindset, and only moving to *power over* if necessary, helps to de-escalate situations and gain citizen cooperation.

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THE IMPORTANCE OF DECISION MAKER EMPATHY & RESPECT

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CONTENTS

ABSTRACT

The way that decision makers treat those who appear before them influence perceptions of the delivery of justice. This paper considers the impact of the mispronunciation of an Indigenous Nation by the Supreme Court of Canada and applies both John Travolta's famous mispronunciation at the Academy Awards and the John Wayne worldview to call on adjudicators at all levels to consider the procedural experience of those they offer justice to.

ABOUT THE AUTHOR

Marc Bhalla, LL.M. (DR), C.Med, C.Arb (he/him) [biracial] offers this short paper inspired by his involvement as a non-Indigenous academic partner of *The Authentic Allyship Project (www.authenticallyship.ca)* and preparations for the forthcoming ALDR 6305: In Search of Reconciliation Through Dispute Resolution post-graduate law course that he co-presents at Osgoode Hall Law School.

Marc is accredited as a trainer by the ADR Institute of Canada and the Law Society of Ontario, is faculty of the Canadian Collaborative for Engagement & Conflict Management and has lectured at Queen's University, the University of Alberta and the University of Saskatchewan. He also lectured at many of Osgoode Hall Law School's professional development, post-graduate and undergraduate dispute resolution programs, including ADLR 6300: Introduction to Dispute Resolution, ALDR 6299: Teaching, Training and Coaching in Conflict Analysis and Dispute Resolution, ADLR 6303: Dispute Resolution in the Digital Age, The Osgoode PD Certificate in Online Dispute Resolution, The Advanced Certificate in Adjudication for Administrative Agencies, Boards & Tribunals and the Osgoode Mediation Clinical Program.

Marc has been widely published. Beyond this journal, he has contributed to the McGill Journal of Dispute Resolution, the Journal of Arbitration and Mediation, the Canadian Arbitration and Mediation Journal and has written two books – *The Art of Role Play in Dispute Resolution Training* (2020) and *ODR: Yesterday. Today. Tomorrow.* (2022).

Marc applies practical experience as a mediator and arbitrator to his academic research and teaching. His passions include access to justice, inclusion and authentic reconciliation efforts.

For more about Marc, please visit www.456dr.ca.

INTRODUCTION

To someone pursuing justice, their outcome will be of primary interest; however, experiencing justice involves more than receiving appropriate closure.[1] Research has found that parties to adversarial proceedings are more likely to accept their outcome, even if it is unfavourable, if they feel heard and that the process was fair.[2,3] This suggests that one's experience participating in justice-seeking impacts their perceptions of if they receive justice.[4]

From the demeanour of intake clerks to the tone of opposing counsel, the decision maker alone does not impact the justice-seeking experience; yet, the behaviour of the adjudicator is clearly significant. This extends beyond the rendering of the decision in an efficient, unbiased and appropriate manner. It includes how adjudicators treat parties appearing before them. Being rude, disrespectful or disinterested should not be within the common behaviour patterns of contemporary decision makers. Adjudicators should demonstrate empathy and respect in offering justice.

THE KTUNAXA NATION EXAMPLE

On December 1, 2016, the Supreme Court of Canada heard the case of *Ktunaxa Nation Council and Kathryn Teneese, on their own behalf and on behalf of all citizens of the Ktunaxa Nation v. Minister of Forests, Lands and Natural Resource Operations, et al.*[5]

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[1] John C. Kleefeld et al, ed, *Dispute Resolution: Readings and Case Studies*, 4th ed (Toronto: Emond Montgomery Publications Limited, 2016) at 703. "[P]rocedural justice refers to the perceived fairness of procedures and/or processes."

[2] Julie Macfarlane, *The New Lawyer: How Clients Are Transforming The Practice of Law*, 2nd ed (Vancouver: UBC Press, 2017) at 60. "[T]he experience of *how* a result is reached is often as, or even more, important than the substantive "rightness" of the outcome itself in fostering a sense of fairness or justice amongst participants." [emphasis in original].

[3] Colin Rule, "Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit for Investing in Dispute Resolution" (2012) 34 UALR L. Rev. 767 at 772-775.

[4] Ronald W. Staudt & Paula L. Hannaford, "Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers" (2002), 52 Syracuse L. Rev. 1017 at 1018.

[5] Supreme Court of Canada, *Ktunaxa Nation Council and Kathryn Teneese, on their own behalf and on behalf of all citizens of the Ktunaxa Nation v. Minister of Forests, Lands and Natural Resource Operations, et al.* (British Columbia) (Civil) (By Leave) 36664, 01 December 2016, online: <https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=36664&id=2016/2016-12-01--36664&date=2016-12-01&fp=n&audio=n>.

Thirty-five seconds into the video feed, the fourth word spoken by Chief Justice Beverley McLachlin starts to introduce the case. The Chief Justice pronounces the Indigenous Nation involved in the case, Ktunaxa Nation, as *kut-an-axe-ah*. That is nowhere close to how Ktunaxa Nation is pronounced, *k-too-nah-ha*.

What message is sent by the mispronunciation?

Does it matter that Ktunaxa Nation has occupied the lands adjacent to the Kootenay and Columbia Rivers and the Arrow Lakes of British Columbia for more than 10,000 years?[6]

JOHN TRAVOLTA

A more famous example of botched pronunciation occurred beyond the court room. At the 2014 Academy Awards, John Travolta was tasked with introducing Idina Menzel. Travolta introduced her as "Adele Dazeem", getting both Menzel's first and last names very wrong. This incident went viral, inspiring the term *"Travoltify"* and the creation of a widget in which you could enter your name to find out how John Travolta would mispronounce it.[7,8] Given Idina Menzel's popularity at the time, it was difficult to comprehend how Travolta was both unfamiliar with how to pronounce her name and unable to easily learn how to pronounce it.[9] The incident reflected a lack of courtesy and effort.

Superficially, Chief Justice McLachlin's mispronunciation of Ktunaxa Nation may not seem like a big deal. Many coming across the Nation's name for the first time may sound it out the same way. It possibly might not even offend some within the Ktunaxa Nation to have their name mispronounced by a non-Indigenous person. That is not the point. The point is that a person's procedural experience is impacted by how the decision maker treats them.

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[6] Ktunaxa Nation, "Who We Are", online: <https://www.ktunaxa.org/who-we-are/> [perma.cc/9DRB-PS3X].
[7] Ann Oldenburg, "Try the John Travolta name generator" *USA Today*. 2014 March 04, online: <https://www.usatoday.com/story/life/people/2014/03/04/try-the-john-travolta-name-generator/6010799/> [perma.cc/T4WP-8B4E].
[8] Jim Festante and Chris Kirk, "The Adele Dazeem Name Generator - Use our widget to Travoltify your own name" *Slate*. 2014 March 03, online: <http://www.slate.com/articles/arts/low_concept/2014/03/john_travolta_called_idina_menzel_adele_dazeem_what_s_your_travolta_name.html> [perma.cc/A5G6-XMAP].
[9] Based on the popularity of the film *Frozen* that she starred in following great success on Broadway.

At one minute and nineteen seconds into the webcast, Chief Justice McLachlin completes naming several legal representatives involved in the hearing. She then states that she apologizes ***if*** she mispronounced any names.[10] Her statement seems to be directed at legal counsel. It is also stated after Chief Justice McLachlin mispronounced Ktunaxa Nation a second time, not even one and a half minutes into the proceeding.

In a diverse nation, many people of different cultures can be expected to find themselves seeking justice. It is unfair to expect an adjudicator to be familiar with how to pronounce the names of all who appear before them. That does not mean that decision makers cannot ask or acknowledge the limits of their knowledge. Intentionally or not, the lack of care given to the proper pronunciation of Ktunaxa Nation spoke volumes.[11]

JOHN WAYNE

"You know in all those movies you never saw John Wayne's teeth?
Not once, I think there's something wrong when you don't see a guy's teeth"
– Victor Joseph (Smoke Signals)

There is a classic scene in the award winning 1998 film *Smoke Signals* in which the two primary characters, who are Indigenous, discuss western films on a bus, after being relocated from their seats by racists.[12] They debate if cowboys always win in western movies and focus on John Wayne, the "toughest cowboy of them all". It is suggested that John Wayne would never show his teeth, "[h]e could never smile because smiling for him was a sign of weakness".[13]

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[10] Michael Franck, "Toward a Bias-Free Justice System" (1990) 69 Mich. B.J. 366 at 366.
[11] nupqu ʔa·kɬaṁ (@Skink00ts), "Truth be told, former Supreme Court of Canada Chief Justice Beverly McLachlin is no friend or symbol of truth for Ktunaxa. I was in her court when she wouldn't pronounce Ktunaxa correctly & her ruling justified the destruction of our sacred site as something we would get over." 2020 September 24. 7:50pm. Tweet. Online: <https://twitter.com/Skink00ts/status/1309279049181614080> [perma.cc/4VAS-XVR7].
[12] Joanna Hearn, John Wayne's Teeth: Speech, Sound and Representation in "Smoke Signals" and "Imagining Indians" *Western Folklore*, Summer - Fall, 2005, Vol. 64, No. 3/4, Film and Folklore (Summer - Fall, 2005), pp. 189-208, online: <https://www.jstor.org/stable/25474748?mag=what-smoke-signals-means-20-years-later&seq=1> [perma.cc/D3QP-X2DN].
[13] Monica Reiser, "John Wayne's Teeth" Grinds Up Eurocentrism in a Brotherhood Movie." *ENGL 359: Gender and Diversity in Film*. Xavier University. (Fall 2016), online: <https://xuengl359.wordpress.com/home/film-analysis-blog-posts/john-waynes-teeth-grinds-up-eurocentrism-in-a-brotherhood-movie-by-monica-reiser/> [perma.cc/XLK7-NM3H].

The symbolism around John Wayne's teeth demonstrates "toxic masculinity" – a macho worldview of toughness as power and meanness embedded within authority.[14] Caring is displaying susceptibility, kindness is weakness and "pride" prevents one from asking for direction.[15] In this worldview, there is hesitancy to acknowledge the limits of one's knowledge. Never expose your vulnerability by expressing self-awareness of your limits.

For generations, the prevailing sentiment was that decision makers had free rein to be rude. Adding anxiety to appearing before an adjudicator was the risk of harsh treatment, including finding yourself on the receiving end of what is known as a "judge slap".[16] Judicial bullying and intimidation tactics were excused as a means to maintain the integrity of the justice system and to ensure matters before the court or tribunal were considered seriously.

Glimpses of a shift have appeared more recently, including a judge's attempt to humiliate a lawyer backfiring in Saskatchewan and an Alberta judge not being re-appointed because of the way they treated people in court.[17,18] It is not appropriate for decision makers to "show their teeth" through verbal abuse or disrespectful behaviour.

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[14] One powerful exploration of this concept is offered in the song *Johnny's Teeth*, by the Indigenous hip hop artists known as Snotty Nose Rez Kids. While the reader is warned that the song contains explicit lyrics, it highlights social activism within Indigenous Communities. The song can be found with an Internet search of its title/artist and on popular music streaming services.

[15] There is also potential application of other Academy Awards incidents to this discussion that extend beyond the focus of this paper, including the John Wayne-Sacheen Littlefeather incident of 1973 show and the Will Smith-Chris Rock incident of 2022.

[16] A decision maker mocking, negatively commenting or otherwise putting down an advocate or party to a proceeding. The kind of behaviour that made Judge Judy famous.

[17] Marc A Bhalla, Contemporary Considerations of Decision Maker Bias, 2020 1 *Journal of the Canadian Collaborative for Engagement & Conflict Management* 77, 2020 CanLIIDocs 3642 at 90-91, online: <https://canlii.ca/t/t2rp> [perma.cc/NP3N-K72L]. Saskatchewan Justice Danyliuk's 2021 viral incident stemming from misinformation giving rise to inappropriate behaviour.

[18] Jonny Wakefield, Former Hinton Judge Let Go Over 'Rude and Bullying' Behaviour Loses Bid For Reappointment, *Edmonton Journal*. 2021 June 26, online: <https://edmontonjournal.com/news/local-news/judge-denied-attempt-at-reappointment> [perma.cc/XZ4H-RB5U].

CONCLUSION

"Sometimes I think people fail to realize a judge is literally just some guy."[19]
– Muna Mire

We should not lose sight of the importance of the humanity of decision makers. Adjudicators should not be expected to know how to pronounce the names of all who appear before them, or not to get frustrated by the antics of some parties. No decision maker is all knowing and it is unfair to expect them to present themselves as Oz, the Great and Powerful.

On May 20, 2021, the Council of Canadian Administrative Tribunals presented a webinar on practical steps for *Advancing Truth and Reconciliation in The Tribunal Context*. Consideration was given to actions that adjudicators could implement in support of inclusion. Many insights were shared that apply to interactions with both members of Indigenous Communities and other cultures. Chief Halie (Kwanxwa'logwa) Bruce, J.D. stated:

"Cultural competency is not just discrete skills or knowledge. We need to be self-aware… The expectation is that you would be open and willing to learn and ask for help from Indigenous Communities if you don't know."[20]

This speaks to the importance of inclusion, proactivity and involving Indigenous Peoples in efforts related to reconciliation. Applying this message to the delivery of justice, decision makers at all levels - in both the public justice system and private practice arbitration - must take greater care to consider the experience of those appearing before them in appreciation of the fact that how they treat parties will impact their service of justice. Adjudicators must be open to accepting insight on how to treat those appearing before them appropriately. It is not a sign of weakness, ignorance or vulnerability to make an effort to get it right; to move beyond conditional apologies and to prioritize empathy and respect.

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[19] muna (Muna_Mire), "Sometimes I think people fail to realize a judge is literally just some guy." 2021 November 11. Tweet. Online: <https://twitter.com/muna_mire/status/1458791744942792704> [https://perma.cc/7QV2-PGUW]. In no way if the "some guy" reference intended by the author to suggest that all judges should present as male.

[20] Myrna McCallum, Chief Halie (Kwanxwa'logwa) Bruce, J.D., Harry LaForme, Sarah Morales & Amber Prince, *Advancing Truth and Reconciliation in the Tribunal Context: Practical Steps*. 2021 May 20. Zoom at 30:04, online: <https://www.youtube.com/watch?v=xBWKfKgtuyw>.