

# Restorative justice in Canada

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I first used that term (Restorative Justice) in a judgement in August, 1995. I think I was one of the first or perhaps the first appellate judge in Canada to do so. On the Provincial Court level, there were any number of judges long before 1995 who were staunch proponents of the concept of restorative justice.

It has been something of a struggle in the judicial world to have the restorative justice approach recognized and accepted as a legitimate, let alone the principal approach to achieve fairness and dignity for all citizens and at the same time, protection for our society — all via the criminal justice system.

On April 23, 1999, the Supreme Court of Canada in a unanimous judgement in *Gladue*<sup>2</sup> affixed its imprimatur to the concept of restorative justice. The struggle for recognition — I emphasize for “recognition” — has been won. That's the first step.

From the judicial perspective there are at least three other major steps which need to be taken before one can say with some confidence that the notions of restorative justice have taken hold.

All of these steps derive in part from section 718.2(e) of the *Criminal Code*.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

This section was pivotal to the *Gladue* decision. The reasons for judgement in that case were written in the context of a fit sentence for an Aboriginal offender.

Given that fact, the further fact that I am a Saskatchewan judge where 72% of our provincial correctional inmates are Aboriginal and the fact

that within our criminal justice system it was the Aboriginal people who introduced and nurtured the notion of restorative justice, I feel most comfortable talking about restorative justice in the context of the Aboriginal offender.

It is important to remember that restorative justice is applicable not only to Aboriginal offenders, but can be adopted and equally administered to non-Aboriginal offenders by making appropriate changes to the requisite details. I think the Court in *Gladue* makes this reasonably clear.

To return to the reasons for judgement in *Gladue*, after quoting from Michael Jackson's work “Locking up Natives in Canada”, and from the Royal Commission on Aboriginal People and from Aboriginal Justice Inquiry in Manitoba, the Supreme Court said this:

These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic over-representation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out Aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

In paragraph 82, the Court said: “There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence.”

What does that mean for judges sentencing Aboriginal offenders? It is clear beyond a shadow of a doubt that now a sentencing judge cannot circumvent taking into account an offender's Aboriginal ancestry when fashioning a just and fit sentence

unless of course the offender waives that right. One of the first things a judge will have to establish is whether the offender before him or her is an Aboriginal person. Sometimes that is easy to do, sometimes it is not.

If the offender is Aboriginal, the judge will have to determine the unique circumstances that have played a part in bringing this offender before the courts. Where the offender is unrepresented, and this is often the case, the judge will have to talk to the offender, and ask the right questions. That means judges will need to learn to speak to Aboriginal offenders. It is not enough to know the language. One has to learn what questions to ask and how to ask them.

A Native Elder once sat with a judge on the bench at the sentencing hearing of a young Aboriginal offender convicted of a serious crime. The judge asked the usual questions about the young man's schooling, whether he used drugs, who his friends were, his job, if any — the sort of questions judges normally ask at these hearings. The Native Elder was silent through all this and then asked one incisive question: "How is your mother's health these days?" The kid's mother was not well. As a result the home was in turmoil. The kid was acting out.

So the first step is for the judges to learn to speak to Aboriginal offenders on their wavelength — not the judge's. Many judges will have a great deal of difficulty getting on that wavelength. The cultural communication divide must be bridged.

The second step is, now that the concept of restorative justice is judicially recognized and accepted, how do I, the sentencing judge, implement it? What tools do I have? Before restorative justice, my biggest tool was jail. But now parliament and the Supreme Court of Canada have spoken and said, 'jail is no longer your biggest tool.' You must change your focus. You can send offenders to jail, not as a matter of course, but only if it is absolutely necessary. What are my new tools?

Quite frankly, I don't know. No one has told me in cold, hard, specific terms what those tools are. Oh yes, those you ask use generic terms like "community based sanctions", "community based programs". I reply: Point to the community. Point to the sanction, point to the program. Let me digress briefly and talk about "community". Community at one time was relatively easy to pinpoint. When people, including the Aboriginal people, lived in small groupings, the term characterised a typical grouping that featured a dense network of personal relationships based heavily on kinship and on the direct, face to face contact that occurs in a small closed village. A German sociologist, Ferdinand Tönnies, had a

word for this "Gemeinschaft".<sup>3</sup> (We still have that today in some of our northern Aboriginal villages in Saskatchewan. We have it amongst our Hutterite and Amish people in large measure as well.) Norms were largely unwritten and individuals were bound to one another in a web of mutual interdependence that touched all aspects of life, from family, to work, to their few leisure activities.

Then the industrial revolution came along. We had a shift to what Tönnies, the sociologist, labelled "Gesellschaft". This concept involved groupings of people who lived according to a framework of laws and other formal regulations that characterised large industrial societies. Social relationships were more formalized and impersonal: individuals did not depend on one another nearly to the same extent and people were somehow less morally obligated to one another.<sup>4</sup>

Now the information age is here. And since the 1960s we have been slowly moving out of this "Gesellschaft" mould. We are evolving into something different. The impact on social values is proving to be, quite frankly, great. Where we are going to end up is difficult to predict. However, the following may cast some light on this new shift:

... "people continue to share norms and values in ways that constitute social capital, and they join groups and organizations in ever larger numbers. But the groups have shifted dramatically in kind. The authority of most large organizations has declined, and the importance in people's lives of a host of smaller associations has grown. Rather than taking pride in being a member of a powerful labor federation or working for a large corporation, or in having served in the military, people identify socially with a local aerobics class, a New Age sect, a co-dependent support group, or an Internet chat room. Rather than seeking authoritative values in a church that once shaped the society's culture, people are picking and choosing their values on an individual basis, in ways that link them with smaller communities of like-minded folk. The shift to smaller-radius groups is mirrored politically in the almost universal rise of interest groups at the expense of broad-based political parties".<sup>5</sup>

So today, how does a judge or anyone in the criminal justice system identify or define "community" in the phrase "community based sanction" or "community based program?" Frankly I don't know. Let us say tomorrow morning I have before me a 19 year old urban Aboriginal offender convicted of breaking and entering a commercial establishment and

committing theft. His record shows three previous B & E convictions as well as convictions for assault, impaired driving and breach of probation. It is clear to me from the pre-sentence report that the young man has no material assets and never has had any. His parents whom he hardly sees have no material assets to speak of and have never had any. He has little or no self-worth. The terms “honour” and “dignity” somehow seem out of place when applied to him as a possessor of those qualities. His life has been rudderless and totally lacking in motivation. Violence, confrontation and alcohol predominated in his early and later life. He is unemployed and uneducated. His chances of obtaining employment are, frankly speaking, nil or approaching nil. His previous sentences consisted of probation orders and terms of imprisonment. I think I have given sufficient details for you to draw in your own minds a profile of this offender. The Crown’s position is that he has been dealt with quite leniently in the past and has not responded. He is a repeat offender and must be sent to jail if he is to learn his lesson and the public is to be adequately protected.

The Supreme Court of Canada and Parliament have now in effect said to me — “you should try and keep him out of jail”. What do I do with him? I suppose I can give him a term of imprisonment of two years less one day and direct that the sentence be served in the community.

I then have to impose some conditions. So I direct that he abstain from alcohol and drugs and that he report regularly to a probation officer and do what the probation officer directs. I can direct some community service. That’s about where my options end unless I want to impose electronic monitoring. I suggest to you all that is rather meaningless when it comes to an Aboriginal offender. There is nothing in an order of that kind that addresses the offender’s Aboriginalness.

Quite frankly, there are very few or no programs out there designed by and intended for implementation by the Aboriginal community or a segment of that community. Yes we do hold the odd sentencing or healing circle, but that takes care of only a small proportion of the Aboriginal offenders appearing daily before the Courts.

Healing circles take a long time — often a day, sometimes two. They involve a segment of the community in a very intimate way and that is a big plus, but some communities, participating in healing circles, are getting burnt out. There are not enough willing and able participants to go around. Healing circles are a partial answer, but far from a complete answer.

There are Elders out there who could be a great beneficial influence on offenders living in the community. Interestingly, many of these Elders need the kind of assistance that many older people normally do. In a sense, Elders and offenders are a natural fit. But there are no programs or very few to connect the two, to monitor the relationship and to do whatever is necessary if the relationship does not work.

Creativity and resources — human and financial — are in great demand in this whole area of community based programs and sanctions. There has to be a serious look taken at re-allocating the money that is normally spent per year (\$52,000) on housing an offender in an institution, to spending it on restoring the offender to society by a process that keeps him outside the institution while the restoration is taking place.

Perhaps that Elder is entitled to some emolument. Perhaps that offender is entitled to have his board and room paid while he lives with the Elder. The state is paying for his board and room while he is in jail getting rehabilitated. Is it therefore so radical for the state to be paying his board and room while he is living with the Elder getting rehabilitated?

Engaging Elders will help to alleviate the problem but will hardly solve it. I heard an interesting statistic the other day. Only about 25% of the Aboriginal offenders show any interest in restorative measures with an Aboriginal component to them. What are we going to do with the other 75%?

It is important that all schemes for rehabilitation in the community and for healing the breached relationship be carefully and well planned. They are not to bear the appearance of a gimmick.

In the spirit of restorative justice, I ask should communities not have community centres, places at which offenders in need of instruction or support would be obliged to attend, either during the day or evening and during weekends if necessary? These centres would not eliminate jails but could go a long way towards diminishing their size. A corollary question is: should we not be building and staffing community centres instead of jails?

In the same spirit should not there be in place a scheme where certain offenders on probation are required to see and spend time with their probation officer every day instead of once a week, or once a month, or once every three or six months? In other words, instead of providing more correctional officers should we not be providing more probation officials?

These notions are all very much in an incipient, inchoate state in my mind. They need thinking through and crystallization. Judges will need much help from many quarters. This is true not just in respect of sentencing Aboriginal offenders but sentencing all offenders. Both Crown and defence counsel will need to change their focus when it comes to making sentencing submissions.

If the focus for serving a sentence is going to change from jail to the community, then perhaps Corrections Canada and the provincial corrections authorities will need to change their main focus from jail to the community.

Perhaps Corrections Canada should become the catalyst in creating community based programs. I realize that for a community based program to be successful, it must be the community's program and not Corrections Canada's, but before a program is put in place there must be a catalyst. That may be where Corrections Canada comes in.

If judges are going to have to look for the causes behind a criminal offence taking place, establishing why an offender ends up in court, and tailoring the sentence accordingly, then it won't be too long before there will occur a blurring between institutional sentences and non-institutional sentences. For example, if as a judge I conclude that an offender committed a crime because of long festering, pent up anger, and the best "cure" for him and the best protection for society is a series of programs designed to rid him of that anger, does it really matter where that series of programs is administered? It could be in a jail setting, a hospital setting or some other type of setting. What is important is administering those programs and having this offender exposed to them. It is not important where.

I understand some 20% of incarcerated offenders have mental disorders. We used to have what we called mental institutions or insane asylums. We decided that institutions were not the right place for these people so we closed them and put these

people out into "the community". What was the consequence? We criminalized many of the acts of the mentally disordered. We have put many of the mentally disordered back into institutions. But we have required them to first jump through the hoop of a criminal court case. If a judge establishes that the cause of a criminal offence was really a mentally disordered mind then the sentence should reflect that.

Someone is going to have to put together programs to be administered outside a correctional facility setting. I repeat a catalyst is in great demand.

If Corrections Canada takes the lead, the provincial counterparts will soon fall into line. Indeed I would not be too surprised if in the not too distant future another blurring will occur. I have in mind this notion of provincial time and federal time (two years less a day and two years plus.) If the trend is what I think it is there will be no practical need for the current distinction.

Let me move briefly to the last step that has to be taken.

All of this thinking still has to be sold to the politicians and the public. The public's psyche continues in the retributive mood as opposed to the restorative mood. Politicians, of course, pander to the public. Until the public is sold, many judges will have difficulty buying into the notion of sentences being served in the community — the notion of restorative justice. Judges will continue to sentence in a manner that they feel will not undermine the public's confidence in the administration of justice. Translated, that means they will continue sentencing offenders to jail if they (i.e. the judges) perceive that that is what the public wants.

These are three big hurdles from the judicial perspective. There are, no doubt, many more. Overcoming these three hurdles however will break the back of our traditional approach that jail is something akin to a magic bullet for all of our difficulties in the criminal justice system. ■

<sup>1</sup> Chief Justice of Saskatchewan, 2425 Victoria Avenue, Regina, Saskatchewan, S4P 3V7 Speech From Commissioner's Forum, Hobbema, Alberta, May 5-6, 1999.

<sup>2</sup> R. v. Gladue, [1999] 1 S.C.R.688.

<sup>3</sup> Francis Fukuyama, "The Great Disruption: Human Nature and the Reconstitution of Social Order", *The Atlantic Monthly*, May 1999, p. 55.

<sup>4</sup> Fukuyama, "The Great Disruption: Human Nature and the Reconstruction of Social Order". p. 56.

<sup>5</sup> Fukuyama, "The Great Disruption: Human Nature and the Reconstruction of Social Order". p. 71.