

Understanding restorative justice practice within the Aboriginal context

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Restorative Justice practices are becoming increasingly more popular as the guideposts to effective corrections policy, both inside prisons and within the wider community. Restorative Justice philosophy is based on the traditional practices of Indigenous Cultures around the world. It is founded on the belief that criminal behaviour is primarily caused by the alienation of certain members from society at large. Although it is the responsibility of every individual to make positive choices for their life, regardless of personal circumstances, Restorative Justice principles are based on the understanding of compassion, that no one is an island, and that everyone is an equal member of society and has a contribution to make to the greater good. Therefore, when a person becomes alienated or disconnected from that society, it is the responsibility of everyone in that society to bring the person back into a harmonious relationship with him/her "self", as well as with the rest of the community. This may mean that the society itself needs to take a long hard look at its own practices and systems which may be "contributing factors" to the person's alienation from it. The society may need to heal itself. The Gladue decision, which is based on section 718.2 of the *Criminal Code of Canada*, is a cornerstone for building Restorative Justice practices in Canada, and opens the door for the creation of alternative sentencing.

When imposing a sentence, Section 718.2 of the *Criminal Code of Canada* requires a court to consider the following principle: that

"(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".²

In lay person's terms, this means that incarceration or imprisonment is to be used only as a last resort for all Canadian offenders who come before a court, and in particular, for Aboriginal offenders. This section of the *Criminal Code* is significant because our prisons are currently overpopulated with Aboriginal offenders, — especially in the Western provinces, where in many instances, 60–80 % of the prison population is comprised of Aboriginal offenders.

"Although Aboriginal persons represent about 3% of the adult population in Canada, they represent 15% of provincial admissions to custody. Attempts to reduce the number of Aboriginal admissions at the federal level seem to have failed. In fact, the percentage of federal admissions that are Aboriginal continues to increase: it was 11% in 1991-1992, 15% in 1996-97 and 17% last year. Whether this is a problem for judges to resolve, as the much-criticized recent Supreme Court judgement suggests, is another question entirely."³

This over-representation of Aboriginal people in the correctional system is due in part to the historical relationship of Aboriginal people with Canada:

"In *Bridging the Cultural Divide*, p. 309, the Royal Commission on Aboriginal Peoples listed as its first "Major Findings and Conclusions" the following statement, "The Canadian criminal justice system has failed the Aboriginal peoples of Canada — First Nations, Inuit and Metis people, on-reserve and off-reserve, urban and rural — in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice."

"Far from being a Canadian anomaly, these conclusions are global. The failure of an imposed foreign criminal jurisdiction system over Indigenous nations has haunted each British colony's legal system. In recent decades, every Commonwealth country that has studied the problem has reached a similar conclusion: the British legal system is not succeeding with Aboriginal peoples. The failure is a function of relationships of force rather than justice."⁴

Therefore, it is imperative to change the dynamics of corrections from one of force, domination and control to more restorative methods for implementing accountability and a correctional plan that ensures lower incarceration rates and improved community dynamics. In correctional jargon, we talk about

providing “dynamic security” in our institutions, and most of those who work directly with offenders know that dynamic security is best created by building a rapport with an offender. Dynamic security is the use of relationships to build more secure prison environments. This concept, when extended to the community context, becomes what is also known as Restorative Justice practice.

Current trends in sentencing demonstrate a willingness to create options to incarceration, because prisons are expensive and overcrowded, and in the long term, everyone realizes today, that offenders will eventually return to their original communities — be they urban, rural, or remote locations. Ensuring that offenders return with a more positive state of mind rather than reinforced criminal ideals, is the responsibility of everyone. When creating a dynamic of respect and restoration, all community members are an integral part of the process from establishing sentencing alternatives to working directly with offenders to assist them on their healing path. Providing dynamic security in all situations becomes the overall goal for creating a corrections model that will help everyone involved take responsibility for the security of their environment, thereby reducing the repetition of criminogenic behaviour in the future. *How we do this — both in the community and within the prison walls, is the subject for the rest of this article.*

Thus, “the Gladue decision clearly endorsed the notion of restorative justice and a sentencing regime which pays fidelity to “healing” as a normative value. Healing is an Aboriginal justice principle which is slowly becoming merged into Canadian criminal law through the practice of circle sentencing and community based diversion programs.”⁵

The Gladue decision acknowledges that the underlying roots of discrimination must be addressed if we are to lower the over-representation of Aboriginal people within the correctional justice system. It also focuses on the overutilization of prisons as a sentencing tool for all Canadians, and requires that in future, judges consider prison sentences only as a last resort. Therefore, the Supreme Court decision on the *R. v Gladue* case is an historical achievement for all Canadians.

This decision opens the door for the use of sentencing alternatives. Restorative Justice practices within the Aboriginal context provide sentencing alternatives such as the use of Section 81 and Section 84 of the Corrections and Conditional Release Act (CCRA). As communities in both urban and reserve settings become aware of how these regulations can be implemented, sentencing alternatives will evolve.

Judges need to know that the facilities for best practices are in place before they can provide sentencing which is innovative and restorative.

Briefly, Section 81 (CCRA) provides General Custody Agreements for the transfer of an Aboriginal offender to an Aboriginal community in a non-institutional setting with supervision, treatment and programming provided under 24 hour supervision of community members. Three other types of arrangements are also possible under Section 81 to facilitate the transfer of an Aboriginal offender to a spiritual or Healing Lodge, or other treatment facility in an urban setting.

Section 84 (CCRA) provides Aboriginal communities with the opportunity to participate in an offender’s release plan from a penal institution. The release plan must address the concerns and needs of the community as well as those of the offender. Successful reintegration becomes part of the overall healing path for all involved: the community, the offender and the victim.

Restorative Justice practices look for ways to enable offenders to take responsibility for the harm they’ve done, and to correct their behaviour on a deeper and more meaningful level. It is based on the belief that offending is not the “decision of choice” if one is meaningfully connected to the society in which one lives. Therefore Restorative Justice and the Gladue decision is a way of creating a criminal justice system that restores the offender to himself, and thereby empowers him/her to make better choices in the future. In this way we are creating a dynamic within the society that restores the health of individuals while maintaining law and order, for the security of the community.

This change in the philosophy can also be seen inside the prisons where Aboriginal specific training programs are being developed and delivered to Aboriginal offenders. Elders and Native Liaison Workers provide healing circles, counselling, and personal growth opportunities which assist offenders to change their lifestyle once they are on parole. Likewise the prison culture itself is changing as Elders and Native Liaison Workers work with other prison staff to create more peaceful solutions to prison conflicts and develop innovative options for the practice of Restorative Justice.

As we all learn how to work together to create a leadership culture of respect, accountability, and trust, I am hopeful that the future of effective corrections will be based on restoring human relationships for the benefit of all people on the Circle of Life. ■

- ¹ 340 Laurier Avenue West, Ottawa, Ontario, K1A 0P9.
- ² *Pocket Criminal Code*, (Scarborough, ON: Carswell and Thomson, 1999): 490.
- ³ Julian V. Roberts, "Recent Correctional Trends", SENTENCING MATTERS; Newsletter 3:1 Autumn 1999. (865 Richmond Square, Montreal, QC, H3J 1V8).
- ⁴ James (Sa'ke'j) Youngblood Henderson, *Changing Punishment at the Turn of the Century: Finding Common Ground*; "Changing Punishment

for Aboriginal Peoples of Canada", Canadian Institute for the Administration of Justice Conference, Saskatoon, (September 1999) 2. Also see, Canada, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa, ON: Minister of Supply and Services Canada, 1996) 309.

- ⁵ Judge M.E. Turpel-Lafond, *Changing Punishment at the Turn of the Century. Finding Common Ground*, "Sentencing within a Restorative Justice Paradigm. Procedural Implications of R. v. Gladue. (1999) 2.

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