From Punishment to Healing

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The *Gladue* decision has been discussed quite frequently during this conference. This case is significant for a number of reasons. One of its most important aspects is that the Supreme Court of Canada has finally answered the question "Does restorative justice have a place in the criminal justice system," with a clear and resounding yes. A series of other questions of course, fall from this conclusion. Among them: What place does restorative justice have in the system? And how does restorative justice find its way into institutions that were not necessarily designed for such approaches? These are the questions I would like to look at today.

Restorative justice is not something you pull down from your shelf like the most recent copy of Martins' Criminal Code. You do not transform a place that engages in retributive justice on a daily basis into a welcoming home for restorative justice by uttering a few words from the bench or changing the way the chairs are set up in the courtroom. I am not suggesting that judges should not be involved or engaged in restorative justice. But I think we have to realistically examine what can be accomplished in the court and the prison setting in the area of restorative justice and be willing to look at other settings that may perhaps be better equiped to deal with matters in a restorative fashion. In order put these issues in some context, I would like to briefly talk about the Community Council Program at Aboriginal Legal Services of Toronto. I hope by contrasting the Community Council with the mainstream justice system, I might be able to illustrate how a restorative justice approach differs from more established (at least in the Western world) notions of justice. In

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particular I want to focus on how decisions are reached, rather than the actual decisions themselves—because the process is crucial to understanding restorative justice. For example, is an order from the court that an individual perform community service an example of restorative justice. In and of itself, I do not think it is. If the Community Council comes to the same decision, is that an example of restorative justice—I think it is.

The reason that I will use the Community Council as an example is not because it is the only restorative justice program around or because it is the program everyone should follow. I use the Community Council as an example because it is the program I know best.

The Community Council is an adult criminal diversion program that heard its first case in February, 1992. The program takes Aboriginal offenders out of the criminal justice system. And when I say we take them out of the system, that is what I mean. Clients who come into our program have their charges withdrawn by the Crown at the outset. Individuals do not come back into the system if they fail to comply with their Council decision. If they do not comply we deal with them our way—but they do not go back to court. Once the door opens to let a person into the Community Council from the mainstream justice system the door closes and is not re-opened. What that means is that individuals who follow through with their Community Council decisions do so without coercion. They do not have to fear that if they do not comply with their Council decision that they will be back before the court. If they choose to come to the Council and say "Screw you guys I'm not doing anything," there will be no immediate legal consequences.

Our program is open to all Aboriginal offenders (status and non-status Indians, Inuit and Metis) and to almost all criminal offences. Over three-quarters of the people who come into our program have prior convictions, and over half have been in jail. We deal with clients who would, if they were not in our program, be going to jail for their offence.

When we started the program we had no models to rely on, we really were not sure what we were going to do with those people we diverted. We were not in that position very long however. The way we determined what the program would look like—and the way we deal with all important issues regarding the program—was to go to elders and traditional teachers. We spent three days talking about this issue on Manitoulin Island. I do not have the time to talk about everything we

discussed there, but I would like to highlight a couple of things to contrast our process with the court process.

First, when we asked the elders and traditional teachers what we should look for in Council members, all of whom are volunteers, we were told look for people who treat victims and offenders with kindness and respect. We were told that if you treat people with kindness and respect you can do a lot—and that is certainly what we found. If you treat people with kindness and respect they will talk to you, they will open up to you. Treating people with kindness and respect also means sharing your experiences with them. I know things about the lives of people who are Community Council members that I would never have known otherwise, because they shared that information when they were talking with clients. Our clients are generally totally estranged from the Aboriginal community. We are therefore not engaged in reintegrative work because most of our clients have never been integrated into anything—or they have not been integrated into anything worthwhile in any event.

We also asked the elders and teachers "What sorts of things should the Council consider when they craft a decision in a case?" And the elders and teachers said, "You want to come to a decision that the person can do—something that helps them start their healing path. You do not set goals for them that they cannot meet. There is no point setting out a decision that will only lead to the person feeling that they are failures yet again. They have heard that enough in their lives. So as you craft a decision make sure it is something they can do because if they reoffend and come back into the program [and we do take people back], they will come back feeling proud that they accomplished something and also a bit of shame because they are back. And that is not a bad thing."

So I just want to take those two things and contrast it for a moment with the criminal justice system. Let us start with kindness and respect. If you are looking for two words to describe the criminal justice system, I do not think that the first two words that would leap into your mind are kindness and respect. And if the word 'respect' does come up it is a one-way respect. Respect in the courts is directed towards the bench. Accused people are reminded over and over again how little respect the system accords them. All you have to do is go to a first appearance or a remand court and watch what happens from the perspective of the accused. First of all, before the judge comes in, all the lawyers are at the front of the room, in front of the little railing separating the lawyers and court staff

from everyone else, and they are joking and laughing with each other, and by the way, some accused persons become a little ticked off when they see their lawyer laughing and joking with the Crown. I realise it may be good business, but the appearance of conviviality and congeniality often strikes an accused person as slightly odd.

And then there is the issue of the court docket. In Toronto, at Old City Hall, at 111 Court, there are often over 200 names on the docket. Assume someone arrives at court and they look at the docket and say, "Oh good, I'm number one, that's really good because you know, I have things to do, I have taken time off work," or "I'm tired of wearing this suit" or whatever. So they go into court ready to be called and what do they discover? Well the first person to be called is number 14 and 15 and then number 46 and 47, and then numbers 112 through 123 and they do not understand what is going on until they realize that the order of names on the docket means nothing—if you have a lawyer with you then you go first. Now there is nothing inherently wrong with this practice, it is very practical, we pay lawyers a lot money and we want them out of court first. But this practice is rarely explained to the accused people waiting in court. There is no respect for the individual who foolishly thinks that because he or she is number one on the list that they are going to be heard first. No, the message is quite clear, if you do not have a lawyer you wait—in some case three or four hours. Kindness and respect do not reign in the court.

Nor is the court a place where people talk meaningfully about their lives. You can go through the entire criminal justice process as an accused and never say a word. "How does the accused plead?" "Your honour my client pleads guilty," "My client pleads not guilty." "Here are the facts. Are those facts correct?" The lawyer then leans over and whispers to the client who whispers back, and there may be a brief hushed conversation, and then the lawyer says, "Yes your honour those facts are basically correct." Through the entire process you may never hear directly from the accused at all.

Perhaps a pre-sentence report was prepared which means the accused person may have spoken to someone at Probation and Parole, but maybe not. And then, at the end of the day the judge is going to craft a sentence. How is a judge going to craft a sentence and take into account restorative justice principles if he or she has not heard in the entire process from the accused? I think that is a difficult challenge.

The next problem with the court process, in particular sentencing, is that the court room is not a place where people share experiences or

where we can assume an accused person actually hears, or understands, the sentence handed down by the court. Please understand, I have a great deal of respect for judges who sentence offenders, I know it must be one of the most difficult things to do. And I understand how decisions are crafted. Most decisions are written or spoken essentially as a narrative—a story which has an ending and at the ending is the climax—and the climax is the revealing of what the sentence will actually be in the case. Judges rarely start out their decision by saying "Nine months and now I will explain why." Judges start by explaining how they get to the nine months. Sometimes they do it right after submissions on sentence, sometimes they go away and take their time at looking at the issue.

But at the end of the day, what does the accused hear when a sentence is pronounced? We are in a coercive process here. A coercive process in the sense that the judge has the power and the accused has none. The accused's concern is "What is going to happen to me? Am I going to go to jail? Am I not going to go to jail?" And if the accused person expects to go to jail, the concern is "How long am I going to go to jail for?" That is what they are listening for. That is what they are hearing. They want to know "What's going to happen to me?" So as the judge starts to give her or his reasons, the accused—although hanging on to every word—is doing so in order to listen for clues as to the ultimate disposition of the case. What does it mean, "This has been a very difficult decision for me to come to." The client thinks, "Does that mean I am going to jail or am I not going to jail?" So as it goes on, although the judge is often carefully trying to send a message deliberately to the accused, the accused is not listening to the message because that is not what he or she is interested in. They want to know "Am I going to jail or not?" So as much as the judge may wish to convey information to the accused about how they can change their behaviour or their lives, the accused is not listening to that message.

I do not blame accused persons for this by the way. Lawyers are guilty of this as well. We were very fortunate at Aboriginal Legal Services of Toronto to have intervened in four cases in the last couple of years before the Supreme Court of Canada, one of those cases being *Gladue*. The day that Gladue was released I spent the morning checking the University of Montreal website where the decisions are posted every five minutes to see if the decision was there. Once the decision was posted, I immediately read it, not to savour every paragraph of the Supreme Court's decision but to see if the Court accepted our arguments.

Did we win? And that is, I think, what most lawyers do in similar situations. Now the advantage that lawyers have is that we get to calm down after. I get to read the decision four or five more times and I can now speak knowledgeably about *Gladue* and act as though I actually absorbed the decision that way when it came down. But that is not how I heard it, that is not how I absorbed it, and that is not how I dealt with it, and why would we expect that someone who is in a situation where their liberty is at stake would react any differently.

The point then is that the court setting is not one, it seems to me, in which we can expect restorative justice to be done. It was never set up that way, it is not administered that way and you cannot turn it into that for five or ten minutes or ½ hour or 3/4 of an hour in the course of the day. That is not what it is meant to do.

And we have similar situations in the prisons. I did not have the good fortune to go to see the Maple Creek institution before the Conference began, but the reality of the prison setting in general is that it is not conducive to restorative justice practices There was a man who used to work as a Native Inmate Liaison Worker for us at Guelph Correctional Centre outside Toronto, a medium/maximum provincial institution. Because he had a lot of wisdom and teachings, Aboriginal inmates would go to him and seek counselling while they were inside. And on many occasions they would begin talking about an issue and he would say to them; We are not talking about this now. I know you want to deal with this issue, I know it's important for your healing, but we can't talk about it here because I only have a certain amount of time for you. We're in a jail and you have to be back in your cell in time for the count and I have to make sure you go back into that cell ready to deal with the world of jail. You can't go back as an open wound, because if you do that you aren't going to survive in the system. So we're going to have to put that issue on hold because we can't deal with it in this setting because this setting is not appropriate for those discussions."

And again like the courts, more than the courts in fact, jails are fundamentally coercive. While we can make them as humane as possible, and that is an important thing to do, they are nevertheless fundamentally coercive. One person has power over others and in a setting like that it is very difficult, if not impossible to engage in restorative justice practices.

Does this mean that there is no role at all for restorative justice in the courts and prisons and that judges should just go back to doing judging as it was always done and forget about restorative justice? Should the

courts ignore the *Gladue* decision? I do not believe that they should, but I think we should look seriously at how to put restorative justice processes into the criminal justice system. One important way to address this issue is to first of all take a whole bunch of stuff out of the system altogether. As I mentioned earlier, the cases we deal with at the Community Council do not ever go back into the system. We deal with them and we are able to achieve successes that the court system is not able to achieve largely because we are based, I think, on restorative justice practices. There are many cases that go through the system that need not go through it. Restorative justice programs are often restricted to taking minor offences committed by first offenders, and this is clearly a waste of a very valuable resource. We should not assume that restorative approaches are only to be used with the cases that would never take up much of the court's time in any event.

Where it is not possible to take a matter out of the court system and where there is a need to get information about accused people to the court, we should think creatively about how best that information can be gathered. This morning the Saskatoon Aboriginal justice project described a circle sentencing that was totally ruined by lawyers and judges who could not relinquish their positions of power. There is a misapprehension that the use of circles to develop responses to crime must always take place with judges and lawyers present. A number of communities have developed programs where this activity takes place without participation from representatives of the formal legal system. People can talk more freely in these circles and be frank about what has transpired. And that information, and the conclusion reached by the circle, can be reported back to the judge as, "This is what happened, this is what we think is right," and then the judge can rely upon those recommendations, as he or she relies upon a pre-sentence report, and say, "While I was not there, I see that this disposition makes sense and that will be my decision." In such a case the accused person will likely be better able to really hear in the circle, in the less coercive location, the real feelings of those affected by his or her actions. The accused will have an understanding of the impact of his or her behaviour that would not be possible listening to the judge pass sentence in court.

It is also important to remember that restorative justice initiatives may be completely divorced from criminal justice processes and that sometimes we try to force the two things together when they do not fit. I think that this was one of the key messages I took away from the play that was performed last night by the group from Stoney Mountain Penitentiary. During the discussion following the play, one of the actors—a person who was the victim of a crime, who had a loved one killed—spoke of the fact that her participation in a restorative justice program came years after the person who killed her relative had been sentenced. She said that she would not have been ready for a meeting with the offender before that time. But, sometimes we try and force these things to happen before the time is right. Victim-offender reconciliations do not have to occur before sentencing. Sometimes defence lawyers would like to see these meetings happen then so they can take advantage of a favourable meeting to reduce the sentence their client might otherwise receive. But do we want the sentence that the offender faces to be based on the reaction of the victim? Maybe the victim does not want to participate at that time. Maybe it is not the right time. We have to be careful that we are not forcing people into doing things just because they happen to fit particular time agendas. Such a process will do an injustice to people and might well re-victimize the victim.

I think a decision to move toward more restorative justice approaches presents a much greater challenge to the criminal justice system than we realise. And the more I think about the *Gladue* decision, the more challenges I see. It would be a shame if, for reasons of expedience or speed, we lose the opportunity to think clearly about what we might be able to accomplish by bringing restorative justice into the criminal justice system. It would also be a shame if we failed to recognize that the two processes sometimes cannot be married and that maybe sometimes we may have to make choices between retributive criminal justice responses on the one hand and restorative justice on the other.