



keynote: The Hon. Justice Thomas A. well (right), Lisa Teryl (left)

A restorative adjudication process shows promise

Nova Scotia is the first province in Canada to integrate restorative justice principles into an administrative agency – the Nova Scotia Human Rights Commission. In 2012, one of the administrative agency’s reforms created an option for restorative procedures for human rights hearings, in an effort to improve access to justice. The reforms focused on fairness, supporting people and their relationships. To date, Nova Scotia has six adjudicated decisions using restorative procedures.¹ This innovation is another indication of the province’s global leadership in restorative justice and illustrates how restorative principles can be applied to administrative hearings.²

IMPROVED ACCESS TO JUSTICE

When restorative principles guided the agency’s changes, access to justice increased dramatically through significant cost savings and time efficiencies.³ Investigation time was reduced 83 per cent (from three years to six months) and hearing times were also reduced by more than 80 per cent (from five days to one day). By incorporating restorative

principles, resolutions became collaborative, more meaningful and, as one adjudicator wrote, “as efficient and as cost effect...[tive] as possible.”⁴

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THE PROCESS: ESTABLISHING VALUES UP FRONT

Restorative conflict resolutions begin by initially asking the parties what values they hold. These questions include asking what is fair; what would make things right? These values guide the process and become the standards to which the parties hold themselves responsible. There is an effort to resolve the conflict based on the parties’ values and sense of fairness, rather than an adjudicator-imposed decision.

CLARIFYING HARMS AND RESPONSIBILITIES

The parties are then asked to clarify harms and responsibilities. In cases where harms were agreed, the person who created them acknowledges and rectifies it. This process often left both parties feeling they had achieved just outcomes. By addressing the needs caused from the harms in meaningful ways, the person who was harmed felt restored, as did the person who did the wrong.

The program assumed that if respondents agreed they had created harm, the best way to take responsibility and make amends is to empower them to do so. In order to face the consequences inherent in trying to repair harms they created, the respondents had to feel safe. The program’s stated principle of avoiding further harms to either party or their relationship supported a safe way to make amends. Furthermore, articulating restorative principles allowed participants to hold the agency to these standards, as well.

1 Canada’s first restorative Board of Inquiry was *Hewey and 634623 NB Ltd*, 2013 CanLII 91794 (NS HRC) (Chair: Nelson Blackburn). Four decisions are found on the Commission’s website <http://humanrights.gov.ns.ca>: *Gilpin and Alehouse*, June 2013, (Chair: Walter Thompson); *Gregory and Central Hair*, May 2013 (Chair Peter Nathanson); *Tanner and Alumitech Distributions Centre Limited*, March 2015 (Chair: Gail Gatchalian); *Clattenburg-Pace, Clattenburg v. Boutilier’s Glen Campground*, August 2015 (Chair: Walter Thompson). One decision is pending: *Fraser and Dragon Buffet King*, February 2015 (Chair: Lynn Connors).

2 Nova Scotia was the first jurisdiction in the world to integrate restorative justice processes into its formal youth criminal justice system (Source: Professor Jennifer Llewellyn). In Canada, retired Chief Justice, Yukon Territorial Court Judge Barry Stuart, pioneered the use of restorative justice in sentencing circles. Professor Jennifer Llewellyn articulates these principles in an unpublished working paper, 2014. Examples of restorative principles are: relationship-focused, forward-focused, comprehensive/holistic, dialogical/communicative, democratic, transparent, and solution-focused.

3 The average cost for two traditional hearings (adjudicator, court clerk and hearing space costs) with an average of six witnesses was \$52,000 and lasted, on average, 10 days. The averages for the two restorative hearings were: five witnesses, hearing costs of \$7,300 and the hearing lasted three quarters of a day.

4 Ibid footnote 1, *Gilpin and Alehouse*, June 2013, p.14.



RESTORATIVE HEARINGS

A hearing is required if parties cannot agree on whether harm was created or how it should be rectified.⁵ Although contested, these hearings are not adversarial. They are collaborative and highly transparent.⁶ Rather than using a traditional cross-examination approach, the adjudicator takes the lead in questioning parties and witnesses. There is no formal opening and closing of a case. All relevant parties to the issue are brought together in the same conversation to provide their evidence.

One of the benefits of incorporating these changes into the hearing process was to maximize participation of parties and witnesses. They were able to add information/evidence into the conversation as often as they wished after listening to everyone else's comments. As one Board Chair wrote, it can allow the parties to have a "better and somewhat more sympathetic understanding of each other's point of view." It can also help the adjudicator gain a robust understanding through a less rigid and "perhaps more self-revelatory restorative process."⁷ This group discussion removed the high-stakes litigation format where the witnesses lose their chance to speak as soon as they leave the witness chair.

This form of adjudicator-led questioning created more candid discussion about what happened and how participants were impacted by it. For example, in *Gilpin*,⁸ the parties had opportunities to discuss the impact of the events in question. They had the satisfaction of being heard by the rest of the participants in a facilitated discussion. There also appeared to be a greater coherency to the information when not orchestrated through direct and cross-examination.

Another change in the hearing was to incorporate a restorative sensibility into the manner the decision was rendered. In *Hewey*, for example, adjudicator Nelson Blackburn found liability.⁹ Although the respondent was not happy with the finding, the respondent benefitted from Blackburn rendering the decision in person immediately after the listening to the evidence. Blackburn acknowledged the manager had done well in other areas and had good intentions behind various actions. He then advised him that, despite these intentions, a greater duty of accommodation was required of the complainant's disability. Therefore the complaint was upheld.


In a supportive environment, the manager had an opportunity to consider how the decision would impact him. In this way, the process was concerned not just for the person who was harmed, but also for the person who did the harm. The principle of mitigating harms for all parties was adhered to. Typically the relationships between the complainants and respondents remained strained after these decisions; however, the process increased mutual understanding in a collaborative context and as a result did not harm their relationships further.

Another benefit of incorporating a restorative sensibility into the way decisions are made can be found in *Gregory*.¹⁰ The remedy was

unequivocally affirmed by the parties to be fair. They had presented Chair Peter Nathanson with a partial plan that acknowledged discrimination. The Chair was then asked to help determine how wage losses should be paid. The complainant wanted a lump sum; the respondent, monthly instalments over a few years.

As part of the discussion, Nathanson masterfully asked the parties to explain the other person's reasons for their position. These questions led them to gain greater appreciation of the other's concerns. Having developed a shared understanding regarding each other's perspectives on just outcomes, he was able to render a decision they were both more willing to accept. He compassionately articulated both of their heartfelt concerns and upheld them in the way he crafted the remedy. Later with the restorative facilitator, they expressed feeling heard and their values affirmed. Visibly moved, the parties were relieved and satisfied with the decision.

A WAY FORWARD

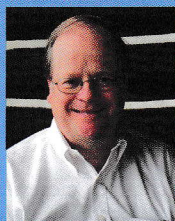
A restorative adjudication process shows promise in supporting principles of access to justice: low reliance on lawyers/technical procedures and quick, fair, proportional and cost-effective adjudications.¹¹ Perhaps this collaborative, relational approach can inform and enhance access to justice in civil, criminal and family courts, as well. 

Lisa Teryl is a restorative facilitator and litigator with Teryl Scott, Lawyers Inc. Her firm recently launched Divorcing Well®, based on restorative and access to justice principles.

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See the Nova Scotia Provincial Access to Justice Tribunal Committee's recently articulated principles <https://www.facebook.com/TribunalAccessToJustice>.

KUDOS FOR NSBS: 'STANDOUT NATIONAL LEADERSHIP'



A full-beyond-capacity keynote talk in Pictou focused on the Honourable Justice Thomas Cromwell's optimism for creating better access to justice in Canada. At the September 2015 dinner hosted by the Pictou County Barristers' Society, Justice Cromwell praised Nova Scotia's work, stating the Nova Scotia Barristers' Society is providing standout national leadership on access to justice. He further clarified the Society's access to justice plan is punching significantly over its weight.

The Supreme Court of Canada judge's optimism stems from a growing recognition within the profession that solutions must be systemic and collaborative – and entail a culture shift.

He quoted the Court's recent 2014 decision, *Hyrniak v. Mauldin*, in support of this need for a culture shift: "A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can

5 Commission approval is required for a hearing.

6 See the Nova Scotia Human Rights Commission's website for the restorative hearing framework: <http://humanrights.gov.ns.ca> and supporting legal brief: <https://www.facebook.com/TribunalAccessToJustice>.