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R. v. Moses

Regina

v.

Moses

[1992] 3 [C.N.L.R.](#) 116

Yukon Territorial Court
Stuart J.

January 9, 1992

D.L.M. Sylvain and J. Bowers, for the Crown.
G.R. Coffin, for the defence.

The twenty-six year accused, a member of the Na-cho-Ny'ak Dun First Nation, was found guilty of carrying a weapon for the purpose of assaulting a police officer and of theft. He pled guilty to breach of probation.

In early childhood the accused suffered abuse and neglect at home and was cared for, from age ten to sixteen, in a series of foster homes, group homes and juvenile centres. Within this care he was physically and sexually abused. He did not advance past elementary school; he has therefore been unable to find employment. He has a criminal record of 43 convictions and has been sentenced to a total of eight years in jail. In each assessment since 1980, the accused has been described as someone who needs extensive personal counselling and who needs to bond with an important helping person who can offer one to one counselling. This has never been provided. The accused has grown increasingly dysfunctional and more involved in increasingly violent crime.

Held: Appropriate sentence was time served and two years probation with conditions. Court to review progress.

1. The process used in sentencing influences what matters are addressed, how they are addressed, who participates and what impact they have. In this case the process was changed to permit community involvement. Before the sentencing hearing, the probation officer met with the chief and other First Nations members, as well as the accused and his family, to encourage their participation in breaking

this cycle. The Crown counsel visited the community to become familiar with it and its concerns.

2. For this hearing the physical arrangement of the courtroom was changed to a circle seating thirty people, with an outer circle provided for latecomers. Defence counsel sat beside the accused and his family, the Crown sat immediately across the circle to the judge's right. First Nations officials and members, the police, probation officer and others chose places around the circle.
3. After opening remarks by the judge and counsel, the formal process became an informal discussion of what might best protect the community and take the accused away from alcohol and crime.
4. 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.
5. Care was taken to ensure that the individual's rights were protected within the circle. Court remained open to the public. A transcript was kept. Based on Crown and defence submissions an upper limit was set for the offence. The offender had an opportunity to speak. The traditional and essential functions of Crown and defence counsel were maintained. Disputed facts were proven in the customary manner.
6. The elements which improved the offender's prospects for rehabilitation were: his own involvement in constructing the sentence as part of the circle; the indication of genuine family support; the First Nation community's willingness to accept the offender and take a fundamental role in healing and helping him as a community member. The focus of the sentence therefore shifted from punishment to rehabilitation.
7. The three months spent in remand awaiting trial was enough punishment. A suspended sentence coupled with a two year probation order provided the legal packaging for a three-part sentencing plan. For the first part the offender was required to live with his family on their trapline sixty miles out of town. His family would ensure that a family member stayed with him. For the second part of the plan he was attend a two month residential program for Native alcoholics in southern British Columbia. For the third part of the plan he was to be

brought back to his family who would provide an alcohol-free home, and the First Nation would provide a support program to help him upgrade life and employment skills. The First Nation would also provide continued substance abuse counselling. He would also be counselled by his probation officer and would receive assistance in finding a job. At each stage a court review would be held in the circle to fine tune the plan and offer further support.

REASONS FOR SENTENCING

SUMMARY OF MAIN POINTS

Process: Use of Circle to Involve Community in Sentencing
Protecting Community: Rehabilitation or Jail
Relevance of Criminal Record

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STUART J.— The reasons for this sentence will take us on an unusual journey. Unusual, because the process was as influential in moulding the final decision as any substantive factors. Consequently, this judgment examines the process as well as the traditional stuffings of sentences, mitigating and aggravating circumstances.

Many might debate the extent any decision-making process shapes the result, but indisputably process can be as determinative as content. In sentencing, process profoundly influences the result. The process influences, not just what, and how matters

are addressed, but who participates and what impact each person has in shaping the final decision.

In this case, by changing the process, the primary issues changed, and consequently, the decision was substantially different from what might have been decided had the usual process been followed.

The justice system rules and procedures provide a comfortable barrier for justice professionals from fully confronting the futility, destruction, and injustice left behind in the wake of circuit courts. For those who dared in this case to step outside this comfortable barrier, I hope these reasons capture their input and courage.

PART 1 - PROCESS

A) OVERVIEW

Rising crime rates, especially for violent offences, alarming recidivist rates and escalating costs in monetary and human terms have forced societies the world over to search for alternatives to their malfunctioning justice systems. In the western world much of the energy expended in this search has focused on sentencing. While the underlying problems of crime and the gross inadequacies of the justice system stem from much broader, deeper ills within society, significant immediate improvement within the court process can be achieved by changing the sentencing process.

Currently the search for improving sentencing process champions a greater role for victims of crime, reconciliation, restraint in the use of incarceration, and a broadening of sentencing alternatives that involves less government expenditure and more community participation. As many studies expose the imprudence of excessive reliance upon punishment as the central objective in sentencing, rehabilitation and reconciliation are properly accorded greater emphasis. All these changes call upon communities to become more actively involved and to assume more responsibility for resolving conflict. To engage meaningful community participation, the sentence decision-making process must be altered to share power with the community, and where appropriate, communities must be empowered to resolve many conflicts now processed through criminal courts.

An important step towards constructive community involvement must involve significant changes to the sentencing process, before, during and after sentencing.

B) BEFORE SENTENCING

The court circuit flew to Mayo for a special one day circuit to deal with several charges against Philip Moses.

He was found guilty of carrying a weapon, a baseball bat, for the purpose of committing an assault on Constable Alderston. Philip picked up a baseball bat to confront Constable Alderston who was standing by his vehicle behind an open car door. Despite several

warnings from the Constable to stop, Philip continued to approach in a menacing and angry manner. Philip did not know that behind the vehicle door, the Constable had drawn his revolver. The situation was extremely dangerous. At the last moment, the Constable leapt into his vehicle and sped off. By seeking a less dangerous manner of arresting Philip, the Constable avoided potentially disastrous consequences. Within the hour, the Constable arrested Philip without incident. The prudence, and courage of Constable Alderston averted a violent showdown.

Philip was also found guilty of theft. Philip had stolen clothes from a home within Mayo. Philip pled guilty to a breach of probation.

By evening all trials were completed. A brief adjournment was called to enable counsel and the court to review pre-sentence reports, psychiatric and alcohol assessments that had been before the court in 1989. These documents described an incredible life history.

Philip, a 26 year old member of the Na-cho Ny'ak Dun First Nation of Mayo, Yukon, is the third youngest in Tommy Moses and Catherine Germaine's family of four sons and five daughters. Tommy Moses, a respected member of the First Nation, works full-time as a heavy equipment operator and spends all of his spare time pursuing a traditional lifestyle through trapping, hunting and fishing. He suffers from the adverse health ramifications of a survivor from long standing problems of alcohol abuse. Catherine works as a Native culture instructor in the Mayo school. A source of strength and stability in the family, she has been sober for eight years. All of Philip's brothers have suffered from substance abuse, and all but one have long criminal records. Philip's sisters survived an early childhood amid extreme alcohol abuse and now raise their own families. Philip has a six year old son, whom he rarely sees and plays no part in parenting.

The litany of desperate, destructive circumstances engulfing Philip's early childhood are sadly typical of families caught in the turmoil of alcohol abuse and poverty. Abuse, and neglect within his home launched Philip from age ten until he was 16 into a series of foster homes, group homes, and ultimately into juvenile centres. Along this painful, destructive road of State imposed care, Philip was physically and sexually abused.

Any hope for a formal education was lost through placements in a series of juvenile facilities. Unable to advance past elementary school, Philip functions at approximately a grade six level. Handicapped by extremely poor reading and writing skills, he encounters severe difficulty with basic literacy and other educational courses.

His limited education frustrates attempts to find gainful employment. With virtually no marketable work skills or work experience, without money or a sober home, without a positive personal support system, and with ready access to others addicted to drugs or alcohol, Philip, once out of jail, quickly drifts into the maelstrom of poverty, substance abuse and crime. He commits crimes while impaired by alcohol or drugs, or to support his addictions.

These circumstances explain the short turnaround time from the street back to jail. With such grim prospects on the street, jail continues to be his primary home. His criminal record of 43 convictions, has imposed jail sentences totalling almost eight years. Jail, as did long stints in juvenile facilities, destroys his self-image, what little there may be, and induces severe depression and suicidal tendencies.

Since 1980, each indepth assessment has described Philip as extremely sensitive, lacking the ability to trust, and suffering from numerous personal problems with significant dysfunctional coping skills. In each assessment, the same theme is repeated: Philip needs "extensive personal counselling, needs to bond with an important helping person who can offer one to one counselling." This has never been provided. Most treatment recommendations have not been carried out. Philip's distrust, anger, lack of discipline, ability to disappear into the street, and poor self-image partially explain why prescribed treatment has not been employed to release Philip from his severe personal problems. However, the absence of suitable resources continues to be the primary reason identified treatment needs have not been addressed.

His life has so far involved a vicious circle of criminal behaviour, alcohol abuse and deteriorating self-esteem and general psychological health which will likely lead to a worsening and perhaps tragic outcome if *major interventions are not employed*. (Psychiatric Assessment, September 25, 1989) (emphasis added)

Without this intervention, Philip, as predicted by earlier assessments, has grown increasingly dysfunctional, committing crimes more frequently, with greater violence and with less regard for any consequences to himself. He has extremely poor insight into his behaviour and demonstrates neither the judgment nor perspective to adopt a sensible or realistic course of action.

Against this abjectly dark picture, given his extensive criminal record, and a sentence of 15 months imposed at his last appearance in 1989, common practice marked out a simple task for counsel and judge. How much jail time would be appropriate? Had Mr. Moses now proven by his criminal conduct that a sentence of two years was warranted; a sentence which would send this relatively young Aboriginal person out of the Territory to a federal penitentiary!

The court was being asked once more to remove this violent offender from the community, to again demonstrate the power of society to punish those who break "our" laws.

It was late in the evening, everyone was tired. The police plane waited to return Mr. Moses to jail. The charter plane waited to return the court circuit to Whitehorse. Everyone - including myself - expected the sentencing hearing would be short, directed only to the question of how much time in excess of the last sentence of 15 months would be imposed. Numerous factors which never appear in sentencing decisions but often

affect sentencing, pressed the court to "get on with it." We didn't. Somehow the pernicious cycle plaguing the life of Mr. Moses, had to be broken before he tragically destroys himself or someone else.

Insidiously and predictably, Mr. Moses had for ten years travelled from alcohol abuse, to crime, and then to jail. Each time emerging from jail, angrier, more dysfunctional, and more deeply entrenched in a marginal existence that featured alcohol abuse and crime, which inescapably closed the circuit back to jail. His long history with the criminal justice system had proven two unmistakable conclusions.

First, the criminal justice system had miserably failed the community of Mayo. Born and raised in Mayo, his family in Mayo, Philip instinctively returned to Mayo after each of the previous seven jail sentences. He would again return after any further jail sentences; each time returning, less capable of controlling either his anger or alcohol abuse; more dangerous to the community and to himself. The criminal justice system had not protected, but had endangered the community.

Secondly, the criminal justice system had failed Mr. Moses. After ten years, after expending in excess of a quarter of a million dollars on Mr. Moses,¹ the justice system continues to spew back into the community a person whose prospects, hopes and abilities were dramatically worse than when the system first encountered Philip as a wild, undisciplined youth with significant emotional and general life skill handicaps. His childhood had destined him for crime, and the criminal justice system had competently nurtured and assured that destiny.

Note 1: Estimate based on six years of foster care and juvenile offences and on 43 adult convictions over ten years excluding social costs, focusing only on justice system costs of police, legal aid, Crown, court, jail, probation and assessments.

If the criminal justice system had failed, what could the community do? It was hardly the model case to experiment with community alternatives. What could be lost in trying! Court was adjourned for three weeks. The probation officer was asked to enquire if the First Nation and Philip's family wished to become involved. The local RCMP Corporal was asked to enlist other community involvement. Crown and defence counsel were asked to consider what else might be done in addition to incarceration to break the vicious cycle that had inextricably captured Philip.

Another special circuit to Mayo was set for on January 9 to sentence Philip and to thereafter hold an open community meeting to discuss how the community, especially the First Nation might constructively participate in the justice system.

Parts of the plan to involve the community were not pursued. However, the crucial parts were implemented. The probation officer met with the Chief and other members of the

First Nation. They would assist in searching for a solution. Equally important, the probation officer met with Philip and his family to encourage their participation. A visit to Mayo two days before the sentencing hearing by Crown counsel and the senior Crown, enhanced their knowledge about the community and its concerns. Their time with the local RCMP, the First Nation, the probation officer and others within the community contributed to the collective search for a solution to a difficult case. The successful use of sentencing remedies primarily depends upon the work invested by counsel, probation officers and the community in exploring and developing proposals for sentencing before a sentencing hearing.

C) SENTENCE HEARING

In any decision-making process, power, control, the overall atmosphere and dynamics are significantly influenced by the physical setting, and especially by the places accorded to participants. Those who wish to create a particular atmosphere, or especially to manipulate a decision-making process to their advantage, have from time immemorial astutely controlled the physical setting of the decision-making forum. Among the great predator groups in the animal kingdom, often the place secured by each member in the site they rest or hunt, significantly influences their ability to control group decisions. In the criminal justice process (arguably one of contemporary society's great predators) the physical arrangement in a courtroom profoundly affects who participates and how they participate. The organization of the courtroom influences the content, scope and importance of information provided to the court. The rules governing the court hearing reinforce the allocation of power and influence fostered by the physical setting.

The combined effect of the rules and the courtroom arrangements entrench the adversarial nature of the process. The judge, defence and Crown counsel, fortified by their prominent places in the courtroom and by the rules, own and control the process and no one in a courtroom can have any doubt about that.

For centuries, the basic organization of the court has not changed. Nothing has been done to encourage meaningful participation by the accused, the victim, or by the community; remarkable, considering how the location of a meeting, the design of the room, furniture arrangements, and the seating of participants are so meticulously considered in most decision-making processes to ensure the setting reinforces the objective of the process. If the objective of the sentencing process is now to enhance sentencing options, to afford greater concern to the impact on victims, to shift focus from punishment to rehabilitation, and to meaningfully engage communities in sharing responsibility for sentencing decisions, it may be advantageous for the justice system to examine how court procedures and the physical arrangements within courtrooms militate against these new objectives. It was in this case. In this case, a change in the physical arrangement of the courtroom produced a major change in the process.

1) Physical Setting

For court, a circle to seat thirty people was arranged as tightly as numbers allowed. When all seats were occupied, additional seating was provided in an outer circle for persons arriving after the "hearing" had commenced.

Defence sat beside the accused and his family. The Crown sat immediately across the circle from defence counsel to the right of the judge. Officials and members from the First Nation, the RCMP officers, the probation officer and others were left to find their own "comfortable" place within the circle.

2) Dynamics of the Circle

By arranging the court in a circle without desks or tables, with all participants facing each other, with equal access and equal exposure to each other, the dynamics of the decision-making process were profoundly changed.

Everyone in turn around the circle introduced themselves. Everyone remained seated when speaking. After opening remarks from the judge, and counsel, the formal process dissolved into an informal, but intense discussion of what might best protect the community and extract Philip from the grip of alcohol and crime.

The tone was tempered by the close proximity of all participants. For the most part, participants referred to each other by name, not by title. While disagreements and arguments were provoked by most topics, posturing, pontification, and the well worn platitudes, commonly characteristic of courtroom speeches by counsel and judges were gratefully absent.

The circle setting dramatically changed the roles of all participants, as well as the focus, tone, content and scope of discussions. The following observations denote the more obvious benefits generated by the circle setting.

i) Challenges monopoly of professionals

The foreboding courtroom setting discourages meaningful participation beyond lawyers and judges. The judge presiding on high, robed to emphasize his authoritative dominance, armed with the power to control the process, is rarely challenged. Lawyers, by their deference, and by standing when addressing the judge, reinforce to the community the judge's pivotal importance. All of this combines to encourage the community to believe judges uniquely and exclusively possess the wisdom and resources to develop a just and viable result. They are so grievously wrong.

Counsel, due to the rules, and their prominent place in the court, control the input of information. Their ease with the rules, their facility with the peculiar legal language, exudes a confidence and skill that lay people commonly perceive as a prerequisite to participate.

The community relegated to the back of the room, is separated from counsel and the judge either by an actual bar or by placing their seats at a distinct distance behind counsel tables. The interplay between lawyers and the judge creates the perception of a ritualistic play. The set, as well as the performance, discourages anyone else from participating.

The circle significantly breaks down the dominance that traditional courtrooms accord lawyers and judges. In a circle, the ability to contribute, the importance and credibility of any input is not defined by seating arrangements. The audience is changed. All persons within the circle must be addressed. Equally, anyone in the circle may ask a direct question to anyone. Questions about the community and the accused force discussions into a level of detail usually avoided in the courtroom by sweeping assumptions and broiler plate platitudes. In the courtroom, reliance upon technical legal language imbues the process with the air of resolutely addressing difficult issues. In fact, behind the facade of legalise, many crucial considerations are either ignored or superficially considered. The circle denies the comfort of evading difficult issues through the use of obtuse, complex technical language.

ii) Encourages lay participation

The circle setting drew everyone into the discussion. Unlike the courtroom, where the setting facilitates participation only by counsel and the judge, the circle prompted a natural rhythm of discussion.

The physical proximity of all participants, the ability to see the face of the person speaking, the conversational tone, the absence of incomprehensible rituals, and the intermingling of professionals and lay members of the community during breaks, all a consequence of the circle, broke down many barriers to participation.

The highly defined roles imposed upon professionals by the formal justice process creates barriers to communication. The circle drew out the person buried behind their role, and encouraged a more personal and less professional contribution. The circle, in revealing the person behind the professional facade fostered a greater sense of equality between lay and professional participants in the circle. This sense of equality and the discovery of significant common concerns and objectives is essential to sustain an effective partnership between the community and the justice system.

iii) Enhances information

The justice system rarely acquires adequate information to competently target the sentencing process on the underlying causes of criminal behaviour. Too often courts are forced to precariously rely upon bare bones information, usually based on second or third hand sources. Consequently sentencing, guided by very incomplete information, places too much reliance upon mythological understandings about deterrence and punishment, and upon stereo-typical categories used to describe the crime and the offender.

The rituals and specialized language of the sentencing process produce an aura of competence. Rising crime rates (especially rising recidivism) despite staggering increases in expenditures, debunk this illusory aura. Sentencing could be vastly improved by enhancing the quantity and quality of information.

The paucity and stagnancy of sentencing information severely handicaps any endeavour to purposefully employ sentencing remedies. Very little is known in sentencing about offenders, victims, the crucial underlying factors causing the criminal behaviour, or about the larger context of the home and community, and almost nothing is known about how the court process affects the conflict or upon the persons involved. Acting on a woefully incomplete understanding of either the larger circumstances, or of the specific life circumstances of those directly affected by crime, the court rarely appreciates whether the sentence resolves or exacerbates the fundamental problems promoting crime.

Of course, all judges and counsel know these circumstances exist, but the courtroom setting, and emphasis on getting through the docket, of processing cases as any good bureaucracy might process licence applications, encourages wilful blindness about many relevant circumstances in sentencing. The sentencing process in searching for an effective sentence to fit the specific needs in each case, is analogous to a "fast forwarded" game of Pin the Tail on the Donkey.

Community involvement through the circle generates not only new information, but information not normally available to the court. Through the circle, participants can respond to concerns, fill in gaps, and ensure each new sentencing option is measured against a broader, more detailed base of information. In the circle, the flow of information is alive, flexible and more readily capable of assessing and responding to new ideas.

Despite psychiatric and alcohol assessments, and an extensive and exceptionally researched pre-sentence report, the circle in this case provided additional relevant and particularly valuable information to probe and assess each new creative option.

Documents, files, reports, and assessments help introduce the offender to the court, but often present a lifeless portrayal which can be easily misconstrued. The circle, by enabling Philip to speak for himself, and by enabling others who have known him all his life to share their knowledge, substantially improved the court's perception.

Courtroom procedures and rules often preclude or discourage many sources from contributing crucial information. The circle removes or reduces many of the impediments blocking the flow of essential information into court.

iv) Creative search for new options

Public censure often focuses on the differences in sentences meted out for the same crime. There should be more, not fewer differences in sentences. If the reason for the differences stem from personal attitudes of judges, the inadequacy of information, an

inability to appreciate the remedial impact of various sentencing options, an absence of commonly accepted objectives, or ignorance of the impact of crime on victims, then public concern is warranted. The reasons for the differences, not simply the differences themselves, determine whether the differences are laudable or condemnable.

In a multi-cultural society, where gross inequities in opportunities, social resources, and social conditions abound, just sentencing cannot be monolithic or measured against any standard national "typical sentence". If the predominate objectives in sentencing are protection of the community, rehabilitation of the offender, minimizing adverse impacts on victims, and particularly greater community involvement, then even greater differences in sentencing for the same crime should be expected and welcomed. In at least two significant ways, the circle will accentuate differences in sentences for the same crime. The circle, by enhancing community participation, generates a richer range of sentencing options. Secondly, the circle by improving the quality and quantity of information provides the ability to refine and focus the use of sentencing options to meet the particular needs in each case.

In this case the circle promoted among all participants a desire to find an appropriate sentence that best served all of the above objectives. Their creative search produced a sentence markedly different from customary sentences for such crimes, and radically departed from the pattern of sentences previously imposed upon Philip for similar offences. The circle forged a collective desire for something different, something unlike the sentences imposed in the past ten years, something everyone could support, something they believed would work. Fuelled by the expanded and responsive flow of information, the circle participants worked towards a consensus, towards a unique response to a problem that had plagued the community for ten years and had stolen ten years of productive life from Philip.

I was surprised by the result, but the new information and the option provided by the community rendered the final sentence obvious and compelling. The combination of new information and an array of new sentencing options can dramatically change sentencing dispositions from those based on information normally available and dependant upon the limited range of conventional sentencing remedies.

v) Promotes a sharing of responsibility

In traditional courtroom settings, all inputs, all representations are directed to the judge. Not surprisingly, all participants, including the community, expect the judge after hearing all submissions to be responsible for rendering a sage and definitive edict. The circle redirected the flow of discussion from a single channel leading to the judge to a flow that followed the natural rhythms of interest around the circle. This in turn redirected expectations over responsibility for developing a workable solution. The circle by engaging everyone in the discussion, engaged everyone in the responsibility for finding an answer. The final sentence evolved from the input of everyone in the circle. The consensus-based approach fostered not just shared responsibility, but instilled a shared concern to ensure the sentence was successfully implemented. Time will tell how much

each participant, especially the offender, will continue to act upon their obligation to the circle and to the decision collectively developed.

This was a first run at a new process. Failures must not daunt further attempts. It may take time for the feelings of shared responsibility inspired by the circle to be translated into concerted and sustained action. There are many well-entrenched bad habits to break. The indolence, apathy and easy but imprudent reliance upon professionals, characteristic of most communities, will not be easily overcome in developing proactive community involvement. Current community leaders now strained beyond normal breaking points cannot be stretched to provide the input necessary to assume meaningful responsibility for community justice. Other community members must be inspired and encouraged to become involved.

However difficult inspiring citizens to become involved may be, the most difficult task will be breaking down the monopoly over conflict resolution tenaciously held by professionals within the justice system. Forging new and meaningful partnerships between professionals and communities will not be easy, we are the professionals after all, we know what to do, we have the power, we know what is best. To many, the existing criminal justice system is sacrosanct. Tampering with its rituals is tantamount to heresy.

The circle provided an important opportunity for both citizens and professionals to put into practice an emerging desire to work together in responding to crime.

vi) Encouraging the offender's participation

Philip Moses, as is typical of most offenders, had not significantly participated in any of the previous seven sentencing hearings which had instrumentally shaped his life. Most offenders, during formal court proceedings, sit with head bowed, sometimes in fear, more often in anger as incomprehensible discussions ramble on about their life, crimes, and about how communities must be protected from such hardened criminals.

Circuit lawyers, usually different each time, carry the primary responsibility to speak on behalf of offenders such as Philip. Their knowledge of the offender is derived from a few brief interviews, police reports, criminal records and sometimes from pre-sentence reports.

However well intentioned they might be, circuit counsel can never know Philip as well as his family or others within his community. Nor can any counsel fully reflect the offender's pain, suffering, or desperate search for help. Equally, the anger, resentment and hostility of many offenders is rarely expressed, as competent counsel manage to ensure a properly contrite, dutiful face masks any burning feelings which may, if revealed, provoke a harsher sentence. Consequently the court sentences in blissful ignorance, missing the opportunity to constructively appreciate perceptions and feelings that may perpetually frustrate rehabilitative plans.

In the circle, the police, mother, brother, Chief of the First Nation, the probation officer, and other community members expressed constructive concern about Philip. They repeatedly spoke of the need to "reintegrate" Philip with his family and his First Nation.

This was the first time Philip heard anyone from his community, or from his First Nation offer support. He could no longer believe that the police and the community were solely interested in removing him from their midst. These comments within the circle drew Philip into the discussion. His eloquence, passion, and pain riveted everyone's attention. His contribution moved the search for an effective sentence past several concerns shared around the circle. No, he did not convince everyone, nor did he ultimately secure what he sought, but his passion and candour significantly contributed to constructing the sentence.

vii) Involving victims in sentencing

Many offenders perceive only the State as the aggrieved party. They fail to appreciate the very human pain and suffering they cause. Absent an appreciation of the victim's suffering, offenders fail to understand their sentence except as the intrusion of an insensitive, oppressive State bent on punishment. An offender's remorse is more likely to be prompted by a desire to seek mercy from the State or by a recognition that they have been "bad". Only when an offender's pain caused by the oppression of the criminal justice system is confronted by the pain that victims experience from crime, can most offenders gain a proper perspective of their behaviour. Without this perspective, the motivation to successfully pursue rehabilitation lacks an important and often essential ingredient.

Much work remains to find an appropriate means of including the victim, or in the very least, including the impact on the victim in the sentencing process. The circle affords an important opportunity to explore the potential of productively incorporating the impact upon victims in sentencing.

viii) Creates constructive environment

The courtroom, ideally suited to meting out punishment with its potentates on raised podiums, appropriately robed in black, retains its historic function as a degradation ceremony. This atmosphere is counter-productive to developing a constructive rehabilitative plan or to genuinely inspiring offenders (except out of fear) to pursue rehabilitation.

Punishment, if required, can be imposed in a circle as readily as in a courtroom. It is not the trappings surrounding the announcement of punishment, but who imposes, and what is imposed that engages the benefits (if any) of punishment. There is a significantly different sting to a punishment imposed by a community, than to a similar sentence imposed by a circuit court judge. The circuit court judge is a stranger, in town only for the court circuit. The shame and embarrassment of the few moments of sentencing by the judge quickly dissipates.

Punished by a community the offender must face his sentencers daily. Punished by a court the offender confronts the disapproval of a stranger, enforcing strange laws whose punishment carries the authority of the State. Punished by the community the offender faces the disapproval of his neighbours, friends, and of those within his most immediate environment whose punishment carries the authority of a consensus within the community.

For purely punitive sanctions, particularly where jail sentences in excess of two years are expected, the circle may be inappropriate. In all other cases where the primary objective is rehabilitation, or reconciliation, the circle in contrast to the courtroom creates a more constructive atmosphere. Whatever sentence is imposed, whether it is purely designed for rehabilitation or punishment or a combination of both, the degrading courtroom ceremony proclaiming the moral inferiority of the offender serves little constructive purpose in achieving contemporary sentencing objectives.

ix) Greater understanding of justice system limitations

Despite the appalling track record in either stemming the rising tide of crime or in rehabilitating offenders, communities persist in placing excessive reliance upon the justice system. Many conflicts currently channelled into the justice system could be far better processed within the community. For far less money, communities could achieve far better results. Support for families in stress, timely interventions in the budding criminal lives of young offenders, help desperately needed to maintain positive momentum for people faced with crippling pressures that often lead to crime, community involvement in all of these matters could often be more effective than the existing justice system.

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. 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.

The circle discussions highlighted the severe limitations of the justice system and the consequent value and necessity of community members assuming responsibility for community well-being. These discussions can promote a recognition that many community objectives in sentencing can either best be or only be carried out by the community. The information shared in the circle, particularly about the underlying causes of criminal behaviour, convinced everyone within the circle that in addition to any formal sentencing remedies to protect the community and rehabilitate Philip, community resources must also be utilized.

x) Extending the focus of the criminal justice system

Our criminal justice process has an obdurately narrow focus. Too much attention, too much blame and too much responsibility is placed upon the offender. The court's process, often pre-occupied with the administration of the law, is not sufficiently alive to the reality of what happens in the community before and after a sentence is imposed. Within the community lies many answers to what causes crime, what will prevent crime and what can be done to rehabilitate offenders. The circle, by injecting an awareness of the larger community environment engulfing the offence, can immeasurably improve the utility of the sentencing process.

The circle discussions force community members to see beyond the offender, and to explore the causes of crime. This search inevitably leads to assess what characteristics in the community precipitate crime, what should be done to prevent crime, and what could be done to rehabilitate offenders.

xi) Mobilizing community resources

After several offenders have been processed through the circle, circumstances within the community that directly or indirectly influence criminal behaviour will become patently obvious. For example, inadequate recreational activities for teenagers may be a significant part of the reasons they resort to drinking, drug abuse and ultimately to crime to find excitement or the funds to sponsor their expensive substance abuse. Dropping out of school, indolence, unemployment, and strained relationships within the family are only the first ripple of adverse ramifications emanating from early teenage substance abuse. Circle participants, in gaining an appreciation of factors contributing to crime, may exert pressure to realign community expenditures from new roads to new recreational initiatives, and may stimulate local businesses to recognize their best interests are served by developing community based alternatives to prevent crime.

Similarly the circle may discover why, despite heroic efforts to control or cure their substance abuse, anger or other personal problems, some offenders relapse into crime. Circle discussions with repeat offenders may reveal what community based support systems are necessary to reinforce and sustain courageous struggles against substance abuse or other personal difficulties.

Most importantly, the circle stimulates the community to be proactive. Circle discussions generate a collective will to constructively intervene to help individuals or families obviously in trouble. Community support can be more purposefully employed before rather than after crime.

Since the Archambault Report of 1938, all subsequent major reports on sentencing have stressed the need for community alternatives.² Until communities keenly appreciate the limits of the formal system, and the corresponding need for their involvement to achieve society's objectives in responding to crime, they will not be sufficiently motivated to invest their time and resources in providing community based alternatives and their misplaced excessive reliance on the formal justice system will persist. Further, they must be directly involved in planning and implementing community alternatives. If simply

imposed upon communities by the justice system, community alternatives will fail. The circle provides an opportunity to directly appreciate the need for alternatives and to work with the justice system in developing alternatives.

Note 2: See A. Doob, "Community Sanctions and Imprisonment; Hoping For A Miracle But Not Bothering Even To Pray For It" (1990 July) Canadian Journal of Criminology 415.

In many communities adequate resources currently exist to significantly reduce many elements influencing criminal behaviour. The awareness generated in the circle can help mobilize existing resources in ways that improve the community by reducing the waste in human and monetary terms produced by crime. Broadening participation in solving the problem, broadens the creative energy, resources and range of solutions engaged in resolving the complex, difficult and diverse causes of crime which permeate all aspects of community life.

Probation officers in their vital capacity as officers of the court have the stature, local knowledge and widespread trust to invite, support and maintain effective community participation. As in this case, their skill and knowledge can be instrumental in merging the resources of community and the justice system. No court genuinely interested in developing and using effective community based alternatives could do so without their help.

xii) Merging values; First Nation and western governments

Because Aboriginal peoples use the same language, engage in similar play and work, western society assumes similar underlying values govern and motivate their conduct. Particularly within the justice system, this widely spread erroneous assumption has had a disastrous impact on Aboriginal people and their communities.³

Note 3: See: House of Commons, Report of the Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (Ottawa : Queen's Printer, 1983) (Chairman: Keith Penner); "Native Offenders' Perception of the Canadian Justice System" (Research Paper, Canadian Sentencing Commission, 1988); Hylton, J., "The Native Offender in Saskatchewan" (1982) 24 Canadian Journal of Criminology 127.

Much of the systemic discrimination against Aboriginal people within the justice system stems from a failure to recognize the fundamental differences between Aboriginal and western cultures. Aboriginal culture does not place as high a premium on individual responsibility or approach conflict in the direct confrontational manner championed by our adversarial process. Aboriginal people see value in avoiding confrontation and in

refraining from speaking publicly against each other. In dealing with conflict, emphasis is placed on reconciliation, the restoration of harmony and the removal of underlying pressures generating conflict.

After extensive exposure to the justice system it has been assumed too readily that Aboriginal people have adjusted to our adversarial process with its obsession on individual rights and individual responsibility, another tragically wrong assumption. Similarly, we have erroneously assumed by inviting their involvement in our system they will be willing and eager participants. If we genuinely seek their partnership in resolving crime, a process that fairly accommodates both value systems must emerge.

The circle has the potential to accord greater recognition to Aboriginal values, and to create a less confrontational, less adversarial means of processing conflict. Yet the circle retains the primary principles and protections inherent to the justice system. The circle contributes the basis for developing a genuine partnership between Aboriginal communities and the justice system by according the flexibility for both sets of values to influence the decision making process in sentencing.

3) Safeguards: Protecting Individual Rights in Merging the Community and Justice System in the Circle

Courage, patience, and tolerance must accompany all participants in the search for a productive partnership between communities and the justice system. The search need not be foolhardy. Many safeguards can be adapted to protect individual rights while opening the process to community involvement. In this experiment with the circle the following safeguards were used to cushion any adverse impact on individual rights. Within the justice system a critical assessment must be made about what is truly inviolable and what has by convention been presumed to be. Many conventions have survived long past the justification for their original creation.

i) Open court

The courtroom remained the same, only the furniture was rearranged. The door was open, the public retained free access to the room. The long standing reasons for open court may not be as persuasive in some sentencing hearings where privacy may be essential to precipitate frank exchanges which reveal extremely sensitive family or personal information. Normally such information, vital to competently employing any sentencing option, is rarely available as participants are understandably reluctant to share intimate circumstances of their life in an open public courtroom, especially in small communities where anonymity is impossible.

In most cases there will be no need to limit access. However, where clear advantages flow from a closed session, the long standing reasons for open court must be dusted off and reexamined in light of the advantages derived from acquiring extremely sensitive and personal information from offenders, victims or their families and friends.

ii) Transcripts

The court reporter remained a part of the circle. In some cases there are good reasons to question why a transcript embracing all circle discussions is necessary. Some aspects of the discussion may be best excluded from the transcript, or where the circle is closed to the public, the transcript retained in a confidential manner, available only if required by a court of appeal.

To establish appropriate guidelines in assessing the competing values of an open versus a closed process on a case by case basis, some of the ancient icons of criminal procedures need an airing and reassessment.

The tradition of a circle - "what comes out in a circle, stays in a circle" - runs counter to the justice tradition requiring both an open court and transcripts. A more flexible set of rules for exceptions must be fashioned to establish a balance in merging First Nation, community, and justice system values in the circle.

iii) Upper limits to sentence

The circle is designed to explore and develop viable sentencing options drawing upon, whenever possible, community based resources. The circle is not designed to extract reasons to increase the severity of punishment. Accordingly at the outset of the circle process, Crown and defence counsel were called upon to make their customary sentencing submissions. Based on these submissions I indicated the upper limit sentence for the offence.

By stating at the outset an upper limit to the sentence based on conventional sentencing principles and remedies, the offender enters the circle without fearing a harsher jail sentence provoked by candour or anger within the circle. This constitutes an important basis to encourage offenders to participate.

The upper limit also provides a basis for the circle to appreciate what will happen in the absence of community alternatives. The utility of the upper limit sentence can be measured against any new information shared in the circle. Any community based alternative developed by the circle may be substituted for part or all of this sentence.

iv) Opportunity for offender to speak

The Criminal Code ensures the offender has an opportunity to speak in his own words before a sentence is imposed.⁴ This opportunity is generally offered after all submissions have been made and the court has all but formally concluded what the sentence will be. It is generally a perfunctory step in the process, rarely used and generally of little effect.

Defence counsel bears the primary and often exclusive responsibility to represent the offender's interest. How far we have come from the time when lawyers were banned and offenders left to make their own submissions. Somewhere on this journey from exclusive reliance upon the offender to essentially exclusive reliance upon defence counsel, we passed a more fitting balance in the participatory roles of counsel and offender. It may be too cute to suggest courts currently sentence defence counsel not offenders, but the thought does highlight how much sentencing depends upon the work, competence, knowledge, and eloquence of defence counsel.

The inequities in proceeding without counsel are staggering. Similarly the involvement of communities creates its own inequities within the circle. In a very unequal world no justice system can create equality, or for that matter render perfect justice. The circle improves the offender's ability to participate and thereby reduces the obvious inequities in the process that minimizes participation by the very person who is the primary focus of the process. More thought, more innovation must be invested to extract the best from the existing justice process and from the circle to create a viable balance between individual rights and community involvement.

v) Crown and defence counsel

The traditional and essential functions of Crown and defence counsel are not excluded by the circle. The Crown at the outset placed before the circle the interests of the State in sentencing the offender. The Crown's participation through questions, and by engaging in the discussions retains the circle's awareness of the larger interests of the State. Aware of community-provided alternatives, having acquired first hand knowledge of a broad spectrum of community concerns and armed with detailed information about the offender, the Crown at the end of the circle discussions can more competently assess how the interests of the State and the interests of the community are best addressed in sentencing. Especially on circuit, the Crown is forced to make assumptions about what sentences protect the community. Through the circle, these assumptions are examined by members of the very community Crown submissions are designed to protect.

Defence counsel, knowing that at worst the offender faces a conventional sentence presaged at the outset of the hearing, can constructively use the circle to develop a sentencing plan to advance the immediate and long term interests of his client. Community support generated by the circle, as it did in this case, creates viable alternatives to jail.

vi) Disputed facts

Any disputed fact must be proven in the customary manner. Proof of a disputed fact can be carried out in the circle by the examination of witnesses under oath. Alternatively,

during a break in the circle discussions, court can be resumed and all the traditional trappings of the courtroom engaged to resolve a disputed fact.

The circle moves along a different road to consensus than the adversarial character of the formal courtroom hearings. The process in a circle can either resolve disputes in a less adversarial manner, or render the disputed fact irrelevant or unimportant by evolving a sentencing disposition principally relevant upon community based alternatives. However, the formal court process provides a "safe guard" to be called upon by either counsel at any time a matter in the circle necessitates formal proof.

4) Summary: The Circle

These changes to the sentencing process are not the makings of a panacea. They are relatively small steps in a very long journey to move the criminal justice system from its destructive impact on people and communities to doing what it should - working closely with communities to prevent crime, protect society, rehabilitate offenders and process conflict in a manner that builds not undermines a sense of community.

Although the circle does not achieve a "truly new direction"⁵ in sentencing, it may stimulate discussions at the community level that ultimately generate a different conception of the purpose and function of sentencing. To date decades of discussions on "new directions in sentencing" have been confined to conferences, professional publications, Law Reform Commissions and to the legal community. These discussions are vibrant but bear little fruit. The circle provides the information, insight, and hopefully the motivation for the community to develop and press for "truly new directions".

Note 5: J.W. Mohr, "New Directions in Sentencing" in *New Directions in Sentencing*, ed, Brian A. Grosman (Toronto: Butterworths, 1980) at 26.

The circle may not be appropriate for all crimes or all offenders. Experience will explore and test the utility of each new initiative. We must, however, continue to search for a less expensive, more purposeful, more humane manner to respond to crime. The current thrust to involve communities in processing and resolving conflict and crime within the community is essential and unavoidable. Costs in monetary and human terms allow no alternative.

Even if funds were unlimited, crime cannot be resolved solely by hiring legions of professionals. This lesson has been repeatedly and expensively learned by many communities who tried to buy their way out of crime. The greater the reliance upon professionals, the less communities become involved, the faster community well-being deteriorates. The criminal justice system exemplifies the worst case of excessive reliance upon professionals.

A struggle for a safe community must be led by the community. They, not the justice system, must be in the front line of defence against crime. All members of the community must appreciate and accept responsibility to carry their share of the burden in establishing and maintaining a safe community. The safety and overall health of each community is directly related to the extent each citizen participates. This is a fact of family well-being as much as it is of community well-being. The twentieth century is replete with examples of the demise of communities and families that failed to accord the time and take the responsibility to process conflict in a constructive manner. Conflict will always be a part of community life. Creating constructive processes for dealing with conflict is the primary challenge facing society and the criminal justice system.

The current justice system is a very expensive failure, and in many respects undermines the very objectives it champions. There is an increasing recognition within and without the legal community that something more than mere tinkering must be done to create a criminal justice system that is just and offers genuine protection to the community. The existing system notoriously does neither. Sufficient good ideas exist and have existed since the 1938 Archambault Report to evolve a better process. In the pioneering work that must be done we must not cling tenaciously to ancient ideas, or regard any existing practices as sacrosanct. We have much to learn and the communities have much to teach us. The communities equally have much to learn. They must begin to appreciate not only do they have a responsibility to directly participate in preventing crime and processing crime, most importantly they must learn that in many respects they are better suited to successfully achieve the primary objectives of the justice system.

PART 2 - PRIMARY SENTENCING CONSIDERATIONS

A) CRIMINAL RECORD

Philip began his criminal record as an adult in 1982 with two minor offences. A decade later Philip had amassed a criminal record comprising 43 offences, over eight years of jail sentences, and numerous probation orders. In the past three years his criminal behaviour has significantly intensified (27 offences). The State, despite spending at least a quarter of a million dollars on Philip in the past ten years, has worsened his chances for rehabilitation and lessened public security.

Philip's criminal record sadly evidences the need both to improve the existing system and to search for a dramatically different and constructive alternative. Society can no longer afford to waste scarce public funds on ill conceived, expensive justice services that arguably do more to exacerbate than reduce social problems.

Long and intensive records of criminal activity such as Philip's, provide relevant sentencing information, but are often accorded too much weight and may induce erroneous assumptions and practices in sentencing.

i) **Duration of Criminal Activity:** The duration of criminal conduct may indicate either a long standing immersion in substance abuse, a personality disorder, a mental illness, a

conscious choice to live off the avails of crime or many other causes not apparent on the face of the record. Neither the duration nor the intensity of criminal activity can by themselves do more than raise the need to probe further to understand the reasons for persistent criminal activity.

ii) Kinds of Offences: In a criminal record, the kinds of offences committed, and particularly the sanctions imposed are more indicative of a danger to the public than the length of the record. A record comprising process violations, minor thefts, nuisance offences, and petty offences incidental to a life immersed in poverty or substance abuse, despite its length, is not a significant aggravating factor. It is the weight of the criminal record not its size that is crucial.⁶

Note 6: *R. v. MacKenzie*, [1952] 6 W.W.R. 192 (Sask. C.A.).

iii) Evaluation and Utility of Previous Sentencing Remedies: A long record provides an invaluable history of sentencing dispositions. As any competent doctor would, the court must explore why past remedies have failed and dig deeper into the circumstances of the offender to ascertain what is required to improve the prospects of rehabilitation.

iv) Relapse or Persistent Criminal Behaviour: When faced with a long record and recent genuine rehabilitative attempts by the offender to resolve long standing personal problems, care must be taken to determine if the new offence is a deliberate return to crime, or an unfortunate but reasonably anticipated byproduct of a relapse into the perils of an acute chronic mental disorder or addiction.⁷

Note 7: *R. v. Lesage* (1975), 26 C.C.C. 388 (Ont..C.A.); *R. v. Evans* (1975), 24 C.C.C. (2d) 300 (N.S.C.A.).

The duration of Philip's record reaffirms psychological assessments dating back to 1982 when his criminal record commenced. Philip is not a hardened, habitual criminal, he is an emotionally disturbed, severely handicapped sexual abuse survivor with no skills or support system to escape repeatedly tumbling into substance abuse and crime. Regardless of the record, the offence before the court, and its particular circumstances, not a lengthy criminal record, should primarily determine whether a severe sentence is warranted.⁸

Note 8: *R. v. Kavanaugh* (1960), 128 C.C.C. 267 (N.B.C.A.).

B) APPROPRIATENESS OF JAIL

Jail is an undeniably important part of the numerous options required to competently address the infinite variety of offenders and offences. In Philip's case, as with many others, jail sentences are unfortunately not simply the last resort, but the most expedient means of sweeping out of the community, off the court docket, a difficult problem. Crime will mysteriously disappear, society naively presumes, if criminals are sent away to jail. Sweeping offenders into the hands of prison officials simply moves the problem from one incompetent process to another. The dust bins of society, the jails, are so overwhelmed that prison officials struggle with maintaining security and desperately attempt against impossible overcrowding to provide more than an expensive method of warehousing offenders. An undue reliance upon jail sentences, creates an intolerable task for prison officials. Despite resourceful, imaginative, and dedicated efforts by many prison officials, overall their efforts do little to rectify the problems dumped upon them by the courts.

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

Public protection is diminished when we throw away the key and return offenders to the street unreformed and unsupervised. Lengthy sentences employed to punish offenders increase the chance the offender will offend again.⁹

Note 9: Canada, Department of Justice, *Framework for Sentencing: Directions for Reform*. (1990).

Courts call upon ancient incantations to bless the process of sending offenders to jail: "The public must be protected"; "A clear denunciatory sentence must be imposed to send a clear message to others and to reaffirm society's values"; "Only jail can rehabilitate the offender, all else has failed".

For many years experiences in countries the world over have debunked these reverently expressed ancient myths.¹⁰ The legal community, and particularly the courtroom, can no longer comfortably hide behind principles and practices universally questioned by other

disciplines. The intended purpose of jail sentences must be subject to the scrutiny of what actually takes place in jail and of what objectives jail can realistically achieve.

Note 10: H. Packer, *The Limits of the Criminal Sanction* (Stanford, California: Stanford University Press, 1968); Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) (Chairman: Mr. Justice Roger Ouimet) at 185; J. Hogarth, "The Principles of Sentencing: Ouimet Revisited" in *Sentencing*, ed. Hélène Dumont (Cowansville, Quebec: Les Éditions Yvon Blais Inc, 1987) at 27.

The public, and all justice officials, who cling to the hope that punishment and particularly incarceration constructively serve the objectives of the justice system must answer the irrepressible questions poignantly raised by Lorraine Berzins in her paper "Is Legal Punishment Right?"¹¹

Note 11: Lorraine Berzins, "Is Legal Punishment Right?" presented at the National Associations Active in Criminal Justice Conference, October 9, 1991, Victoria, B.C.

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?¹²

Note 12: *Ibid.*, Berzins, "Is Legal Punishment Right?", at 10.

From whence comes, then, the strange belief in criminal law as a kind of penal magic, as if violence could produce non-violence?¹³

Note 13: *Ibid.*, at 19.

Punishment is, by definition, the deliberate infliction of suffering; it is justified violence and as it stands now, the State has the monopoly on violence. Prison is the only satisfaction people can get. Violence justified for the State, but not for anyone else, in order to prevent violence! Why hurt people who hurt people to show that hurting people is wrong?¹⁴

Note 14: *Ibid.*

...empirical knowledge about the actual deterrent impact of penalties is not

available, and Mathiesen's comprehensive review of the research corroborates this. Yet this unsubstantiated belief in punishment's preventative effect still prevails as its lingering justification: the burden of proof is placed on those who would cast doubt on it!¹⁵

Note 15: *Ibid.*

These questions penetrate the core of the challenge facing the court in sentencing Philip. His record demonstrates at best the ineffectiveness of jail in fostering law abiding conduct, at worst the record confirms that those who reoffend the most are those who have been punished the most.¹⁶

Note 16: *Ibid.*

The criminal record, the information shared by Philip in the circle about his experiences in jail, and the singularly constant theme in all professional assessments, provide compelling reasons to conclude that further punishment, particularly incarceration, would continue to lock Philip into a life of crime and self-destruction. For any prospect of rehabilitation, something other than punishment, something other than jail must be used.

Philip's life of crime, exemplifies in human terms the futility and destructive potential of unnecessarily long and too frequently employed jail sentences. All major studies of incarceration have echoed the same messages; "jail must be a last resort", "all other alternatives must be explored", "much greater restraint must be exercised in the use of jail sentences".¹⁷

Note 17: See: *Struggle for Justice, a Report on Crime and Punishment in America* (New York: Hill and Wang, 1971) at 150; *Sentencing Reform: A Canadian Approach* (Report of Canadian Sentencing Commission, 1987); *Conditional Release and Related Aspects of Corrections* (Standing Committee Report, 1988); *Canadian Bar Association Report Directions for Reform* (1991), at 43; *Australian Law Reform Commission, 1988 Sentencing Report No.44; Crime, Justice, and Protecting the Public: Proposals for Legislation* (London, England: 1989).

To properly employ any sentencing option, especially jail, the courts must not only be open to disciplines outside the legal community, but must eagerly and aggressively seek their involvement. The justice system's current monopoly over sentencing offenders must be shattered. The court's complex rules, authoritative practices, and overwhelming power has for too long kept communities and other disciplines at a distance. The circle

provides one means of opening the process to the community, and, as in this case, can improve the input and assessment in determining what best protects the community.

C) JAIL: UNIQUE CIRCUMSTANCES OF EACH OFFENDER

The impact of jail is different for each offender. In each case the specific impact of incarceration must be considered.¹⁸ Especially when imposing jail sentences that remove offenders long distances from their community and family support systems, or that expose offenders to dramatically different cultural environments, much greater efforts must be invested in gathering the evidence necessary to assess the specific impact of incarceration.

Note 18: *R. v. Wallace* (1973), 11 C.C.C. (2d) 95 (Ont. C.A.), *R. v. Fireman* (1971), 4 C.C.C. (2d) 82, [1971] 3 O.R. 380 (Ont. C.A.).

In this case, the evidence revealed the particularly harsh and destructive impact of jail on Philip. The prison system expressed as much trouble with Philip as he did with it. Degradation, depression and suicidal tendencies provoked by jail, bitterly flowed through Philip's story of his life as a "dog" in jail. Previous psychiatric assessments and pre-sentence reports indicated why jail was particularly difficult and potentially destructive for Philip.

If jail worsens emotional or mental problems then incarceration should be avoided or shortened, and other remedies used that redress personal problems causing criminal behaviour.¹⁹ No significant weight should be accorded to specific and general deterrence if the offender suffers from a significant mental disorder.²⁰

Note 19: *R. v. Stark* (1981), 64 C.C.C. (2d) 231; *R. v. D.* (1971), 5 C.C.C. (2d) 366 (Ont. C.A.); *R. v. Akilak*, [1983] 43 A.R. 368 (N.W.T.T.C.); *R. v. Connors* (1976), 18 Crim. L.Q. 290 (Ont. C.A.).

Note 20: *R. v. Anderson*, 1990, Aust. Crim R. 379; *R. v. Robinson* (1974), 19 C.C.C. (2d) 173.

Substance abuse, criminal activities, and the chronic failure to cope with the demands and discipline of a self-reliant existence are symptoms of Philip's struggle with the curse of fetal alcohol syndrome. Jail compounds the difficulties in successfully resolving his problems. To break the vicious cycle consisting of jail, substance abuse, crime and jail that has repeatedly denied his prospects for a positive life and repeatedly threatened his community, something other than jail must be tried.²¹

Anyone reading Philip's personal history would simply not believe someone could be subjected to such abuse and survive. Conversely, most justice professionals who read such personal histories, having been conditioned by reading so many similar stories, tend to discount its significance in affecting the offender's ability to function within society.

The standard measure of what offenders can or ought to do is based upon western middle class values, opportunities and lifestyles which bear little relevance to evaluating either Philip's past or what he can do in the future. There is simply no appropriate basis within the justice system to properly consider the devastating impact a life like Philip's can have on the ability to function, least of all, avoid criminal behaviour. Failing to take properly into account the cultural or personal life circumstances of offenders may help explain why we repeatedly err, repeatedly increase the prospect that the very thing we so religiously strive to prevent will happen again. Each time we punish Philip with jail, and the more severe the sentence, the sooner once on the street, Philip returns to crime. Perhaps if we knew more about Philip's personal circumstances, then if protecting society and rehabilitating Philip were our primary goals punishment would not be our primary remedy.

D) REHABILITATION: A NEW DIRECTION

The probation officer vividly described why, despite a commonly shared perception that Philip had been given many chances for rehabilitation in the past, that Philip persisted in believing that he had never been given a chance. Most of Philip's chances were incorporated in a probation order that came into play upon the termination of a lengthy jail sentence. Philip's bona fide intentions to change his life at the time of sentencing were obliterated by jail. His self image, courage and will to change were drained by his experience in jail. Upon his release the "good times" of "bad company" and substance abuse easily recaptured a despondent, defeated, and angry Philip whose self image had once again been severely damaged by jail.

Would probation work without jail? No, that too had a tract record of a dismal failure. If not jail, if not probation, then what?

The justice system's repertoire of resources for rehabilitation has been proven to be abysmally inadequate. Like many repeat offenders, the circumstances perpetuating Philip's life of crime stem not just from substance abuse but from his overall life situation. Any successful rehabilitative investment must embrace much more than simply substance abuse. The offender's entire life circumstances must be addressed.

Although offenders such as Philip must actively take charge of their rehabilitation they cannot do it alone. It is patently hypocritical to recognize the underlying causes of a repeat offender's crimes and then require him to cure himself.²² The justice system expects offenders with fragile self images, overwhelmed by personal problems, lacking

any significant personal support system, without financial or personal resources to function independently, to miraculously gain control over their life. When they fail (most treatment specialists predict a relapse or failure at least once), the justice system too readily closes the door on further rehabilitation and opens the door to jail. Rehabilitation is a sentencing option with many immediate risks and problems. Jail poses an immediate simple solution without risks or problems. In the long term, an investment in rehabilitation has a much higher prospect of a positive return. Jail, in the long run, as evidenced by Philip's history, has a much higher prospect of very negative consequences.

Note 22: C. Ruby, *Sentencing*, 3d ed. (Toronto: Butterworths, 1987) at 19.

Rehabilitation from extensive substance abuse and tragic personal problems will take time, patience and perseverance. Each set-back must not be the end of trying. Each failure must not be seen as justification for punishment. As long as there is a genuine on-going struggle by Philip against his life long demons, encouragement and help must be offered.

With the help of his family and First Nation Philip has a chance. Alone Philip has no chance. His impoverished, socially deprived lifestyle precludes him from effectively utilizing justice or community resources.²³

Note 23: See R. Watts, "Systemic Discrimination in Sentencing" (July 1989) [Conference Paper].

In the past, the lack of effective community based resources to treat substance abuse, upgrade life skills, and treat other personal problems forced Philip out of his community to secure appropriate help. Outside his community he is deprived of a personal support system comprising his family, friends and First Nation.

Society must invest enough resources into rehabilitation to make it work. If society invested in rehabilitation as much as it presently invests in incarceration, then perhaps the escalating costs and de-escalating success of our justice system might be reversed and communities might finally be protected. With more than token investments in rehabilitative resources the focus in sentencing could be less concerned with finding the right sentence within legally fixed ranges, and more concerned with finding the right sentence for each offender; a sentence that affords genuine prospects for rehabilitation and community protection.²⁴

Note 24: A. Mason, "Sentencing" (1981) 7 *Queens L.J.* 181.

However, even adequate public expenditures on rehabilitation will not suffice. There must be more than just State provided, professionally run programs. The primary rehabilitative resources must be extracted from the primary sources of the problem, the immediate environment of the offender. In most cases, family, friends and community must be engaged in any successful rehabilitative program.

Unfortunately, his family, friends and First Nation have been conditioned to rely upon the justice system to resolve Philip's problems. It may be possible for community and personal support systems to rehabilitate offenders without the justice system, it is rarely possible to succeed without the community; Philip's criminal record unequivocally proves that.

The polarizing effect of extended imprisonment and isolation from community and personal support systems increases the risk of further crime, and decreases the prospects for rehabilitation.²⁵ The question can no longer be - should the community become involved, but how can the community become involved.

Note 25: See: S. Colon and L. Taylor, *Psychological Survival: The Experience of Long Term Imprisonment* (Harmondsworth: Penguin Books, 1972); K. Jobson, "Reforming Sentencing Laws: The Canadian Perspective" in *New Directions in Sentencing*, ed. Brian A. Grosman (Toronto: Butterworths, 1980) at 76.

E) FIRST NATION INVOLVEMENT

In First Nation communities, the first challenge in exercising control over their future must be in healing and rehabilitating their members. The impact of incarcerating so many of their members adversely affects the community's ability to function.²⁶ First Nations have the best knowledge and ability to prevent and resolve the long list of tragedies plaguing their communities.

Note 26: See Professor Michael Jackson, *Locking Up Natives in Canada: A Report of the Canadian Bar Association on Imprisonment and Release* (Ottawa: Canadian Bar Association, 1988).

Philip's First Nation and his family responded to the challenge. Their involvement was the singularly most important reason for focusing the sentence on rehabilitation. Without their involvement the destructive cycle would be sustained as the justice system could only turn once again to jail.

For offenders such as Philip, the community must take the initiative to provide rehabilitative programs. This initiative would signify that they care enough to find a positive means of reintegrating Philip into their community. By itself, this sends a positive, supportive signal to an offender as it did to Philip. Until the circle, Philip had good reason to believe his conduct had alienated his family and community. In the circle, his family, First Nation, and community moved beyond their frustration, beyond seeing Philip as a problem, beyond relying on the justice system for answers and began to recognize their responsibility and fundamental role in healing and helping a member of their community. From this recognition grew a sentencing disposition focused on rehabilitation and mainly reliant upon family and community resources.

Currently, there is a growing recognition that government and the justice system must support and encourage community involvement.²⁷

Note 27: See: Jackson, *ibid.*; *Nova Scotia Royal Commission on the Donald Marshall, Jr. Prosecution* (Halifax, 1989) (Chairman: T. Alexander Hickman); *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991) (Commissioners: A.C. Hamilton, C.M. Sinclair).

F) NEW FACTORS: NEW INFLUENCES

In using the circle as part of this sentencing process several new elements emerged which markedly improve Philip's prospects for rehabilitation.

For the first time Philip will be carrying out a sentence that he played a significant part in constructing. Accordingly, he has a significant new reason for making something he helped build be successful. As a part of the circle that created the sentence, Philip carries a responsibility to the circle and especially to First Nation and family to prove that their care and time has not been unwisely invested.

For the first time the family openly discussed their concerns and contributed important parts of the sentencing plan. Philip knows by their words and actions that he has genuine family support.

For the first time the Chief and other First Nation members offered their time and resources to reintegrate Philip into their First Nation. This aggressively positive expression from all First Nation participants unequivocally said to Philip - "you belong - we want you to be a positive part of our First Nation - to help us build our community". Philip knows he belongs, knows his First Nation desires his involvement. Knowing this changed his self image. Knowing this drained away much of the hostility, anger, resentment and insecurity derived from believing as he had for many years that the community wanted him to leave, to take his troubles to another town.

For the first time Philip heard directly from those affected by his crimes. The circle included the father of a victim, and a police officer, the victim of an assault. Based on Philip's ten years of extensive criminal activity, mostly in Mayo, the entire community could unquestionably be viewed as a victim.

The combined effort of all these new factors reinforces the prudence of investing in rehabilitation. Philip's participation in the circle generated the commitment of many others to help. After ten years of failures, Philip now has a chance to finally emerge from the insidious trap of alcohol, crime, and jail. The experience of the circle will remain with him as will the support of many others.

PART 3 - SENTENCING PLAN

A) OVERVIEW

By the end of the circle discussion the search for an appropriate sentence had shifted from punishment to rehabilitation. The resources contributed by Philip's family, his First Nation and his community created a practical, realistic alternative to incarceration. Without this investment, despite the obvious need for rehabilitation, jail once again would have been the only option.

It is frightening to contemplate how many offenders are routed to jail simply because community and family resources cannot be marshalled to offer a better alternative. Frightening to realize, before the circle discussions, the principal task in sentencing Philip had been to determine whether more jail time than the 15 months imposed in 1989 was warranted.

The new information and additional resources generated by discussions within the circle have created Philip's first reasonable chance to escape a self-destructive lifestyle.

The Crown, while supportive to the need to rehabilitate Philip, stressed the importance of punishing criminal behaviour. The justice system's stock-in-trade has been punishment. While filling our jails at rates among the highest in the western world we have not succeeded in deterring crime. In repeatedly punishing Philip we have not succeeded in stopping his criminal activity. There is a growing recognition that no one learns anything by punishment.²⁸ Whatever constructive purpose punishment continues to serve in the criminal justice system, at this juncture for Philip, nothing can be gained by further punishment. Philip, awaiting trial for these offences, spent three months in remand, which is equivalent to a sentence of at least six months; that is enough punishment.

Note 28: See Berzins, *supra*, note 11 at 19.

The Crown, in challenging the sincerity of Philip's interest in rehabilitation, reported that Philip had remarked immediately after court in December that "I just want to go to jail, I

don't want any of this treatment". Not a surprising reaction to a system whose primary discourse with Philip has been centred around punishment. How could anything called treatment be seen by Philip as anything but further punishment in a new disguise.

This challenge by Crown provoked a riveting response from Philip which successfully removed any of my lingering doubts.

The leaders of the community where Philip will live out his life are willing to risk their safety in a rehabilitative program, his family and First Nation are willing to invest in Philip. After many years of counselling Philip, the local probation officer, a long time resident of Mayo, believes Philip deserves an opportunity to try and believes he can succeed. Philip recognizes all of this support and spoke eloquently of his motivation to try to change his life. In the face of all of these compelling grounds for a rehabilitation sentence, neither the offences before the court, nor his criminal record deny taking a risk. What risk could there be. We knew the risks of jail (further offences)! "Neither a trial judge nor an appellate court should hesitate to take a calculated risk when satisfied by so doing there is a reasonable possibility that the offender may change his life."²⁹

Note 29: The Hon. E.M. Culliton, Sask. C.A., in *New Directions in Sentencing*, ed. Brain A. Grosman (Toronto: Butterworths, 1980) at 299.

The doubts properly raised and fairly expressed by Crown counsel were simply not enough to offset the support of the community for Philip and for the plan that had evolved. The Crown and judge who do not live in the community and are not familiar with the community must be cautious in opposing, on the basis of a need to "protect the public", a rehabilitative plan developed by the community.

B) THE PLAN

A suspended sentence coupled with a two year probation order provides the legal packaging for the sentencing plan that contains three distinct parts.

The first part commences Philip's rehabilitation by immediately calling upon his family to reintegrate him into their family and lifestyle. Foster homes, juvenile facilities and eight years of jail sentences removed Philip from any positive interaction with his family and directed his life into an urban context. Consequently, he lost contact with the culture and practices of his family. Philip is required to reside with his family on the trapline located 60 miles outside Mayo. His family will ensure a member of the family will stay with Philip.

The plan's second part sends Philip from the trapline to a two month residential program for Native alcoholics in southern British Columbia. Other members of his First Nation have benefited from this program. His brother may attend with him and in the very least,

his family, First Nation and the probation officer will maintain regular contact. Unfortunately, as yet, no such program exists in the Yukon. [A local program, reliant upon local resources, constructively engaging local community and family support systems, would significantly increase the likelihood of success at significantly less cost per patient.]

The plan's third part brings Philip back to Mayo where his family will provide an alcohol free home. The First Nation will develop a support program for Philip to upgrade life and employment skills, and provide continuing counselling for substance abuse. The probation officer will add additional support and counselling services. All efforts will be made within the community to help Philip acquire gainful employment.

At each stage, a court review will be held in the circle to fine tune the plan and offer whatever further support may be required. The plan depends upon a concerted investment from Philip, his family, his First Nation, his community and from government. Combining all of these resources created for the first time a viable alternative to jail, and incorporates the values and concerns of the First Nation, the justice system, and most importantly, Philip.

PART 4 - CONCLUSION

In the justice system, too much is made of "professional objectivity". We are not processing agents solely worried about backlogs and budgets. Crimes expose conflicts that cut to the heart of families and communities. If we insulate ourselves with procedures and rules that afford a comfortable, objective, professional shield from the pain, tragedy and desperateness inherent in all of these conflicts, we will forever fail. We cannot succumb to simply doing "our jobs" passing criminals, victims, and communities from one part of our truncated system to another. Send into our midst, those with the compassion, courage and perseverance of probation officers such as Sue Davies. Send so many that the objective aloofness, the resignation to highly segregated roles, the ready acceptance of the limitations of our system, are no longer commonplace; but what becomes commonplace is a willingness to deal with human problems, genuine human feelings and an irrepressible yearning to find "a better way". Sue Davies' persistence may not save Philip from a life of self-destruction, but her persistence and others like her may save the justice system from its persistent destructive impact on offenders, victims, the community, and upon those who work within it.

We must move beyond the self-defeating notion that the justice system can "only do so much". Participation from families like Philip's, from Chiefs like Robert Hager, his councillors and from the community create an opportunity to resolve conflict in a meaningful manner, and prove that through collective efforts that more than "only so much" can be done.

Philip's road to recovery will be tougher than most people appreciate, tougher than I can fathom. How can he ever comprehend a justice system, that after fifteen years of degrading, destructive punishment, wants to say, "We were wrong. Now if you succeed

with this different plan, we will not punish you any more". He knows our power, knows our short attention span, and equally our limited tolerance. He handles us and our punishment with anger. He will probably test our new approach, prepared for our predictable response with his predictable anger. We must not be quick to punish his failure, and must persevere until we can convince Philip that our interest is genuinely focused on his rehabilitation; not on his destruction; and that we have far nobler, far more compassionate objectives than punishment.

Without extensive treatment, without long term one to one counselling, without skill upgrading in almost every aspect of his life, and without a durable, persistent, personal support system, Philip hasn't a chance. His first 26 years of life have stolen even the most minimal advantages others enjoy. It is a miracle that despite so much destruction, so much pain, with so little to work with, Philip still clings to the hope he can survive, that he can prevail. Courage and the ability to persevere must be measured in the context of each person's overall life circumstance. Given Philip's personal problems, viciously destructive childhood, criminal record, and severe substance abuse, his very survival manifests a formidable will and prodigious courage to prevail.

As someone said in the circle, "Thank you, Philip for sharing your pain with us, I have learned so much that I did not know before".

Philip, his family, his community, and all of us in the justice system need to say, "Thank you Sue Davies for having the courage to reach beyond the sterile, professionally structured role of a probation officer and follow your instincts and compassion. I hope others, as I did, learned and will act upon something 'I did not know before'."

Finally, no one can contend "circuit courts work"; no one can deny that the system squanders money and lives unnecessarily with dubious success in either protecting or improving the community; no one can be content to simply press on; no one can ignore the need to change what circuit courts do; - and equally, no one person, no one agency, no one government can make a change. Yes, change we must. Yes, work together we must. The circle creates a starting point to work constructively with communities and to empower communities to resolve their own problems.

Tragically, Philip's is not a unique story. There are many other victims of the current justice system and will be many more if we irresponsibly believe simply keeping the current machinery of justice in gear defines the parameters of our "professional" responsibility. Unless the system is changed the community will be victimized by the very system charged with the responsibility of protecting it. We must find a way to change. We must find communities, First Nations, professionals and lay people willing to work together to explore "truly new ways". We will; we have no choice. In making the circle work, the Na-cho Ny'ak Dun First Nation took an important first step. Can we follow?