

# SPECTRUM

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## First Nations' View

### Alternative sentencing done out of necessity

THE CIRCLE/ *There's a sense of equality as all are equally exposed to one another.*

by Kathy Makela

On March 13, 1992, a trial judge of the Yukon Territory Territorial Court dared to do what no other Canadian judge has yet had the resolve to do: he incorporated the aboriginal concept of the "circle" into the sentence hearing of an aboriginal offender. This bold, innovative step could very well prove to be a practical and viable method of alternative sentencing aimed at rehabilitating aboriginal offenders such as Philip Moses. In *R. v. Moses* [(1992) 71 C.C.C. (3d) 347] the alternative sentencing was done out of necessity - the current system was simply not meeting its goals. At the same time, however, it can be conducted in acknowledgement of the legitimate cultural differences between aboriginal and non-aboriginal peoples.

The accused, Philip Moses, was a 26-year-old member of the Na-cho Ny'ak Dun First Nation with a 10-year criminal record comprised of 43 offences and over 8 years of jail sentences. His childhood had been spent amid alcohol abuse and poverty which led to him being placed from age 10 to 16 in a series of foster homes, group homes and, eventually, juvenile centers where he was physically and sexually abused. Lacking a stable home environment and being born with fetal alcohol syndrome, Philip never progressed past grade 6, resulting in him having no marketable skills nor work experience. In his psychiatric assessment of 1989, it was stated: *His life has so far involved a vicious cycle of criminal behavior, 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.*

The court estimated that, over the past 10 years, the government had spent more than \$250,000 on Philip, but each time he was charged, sentenced and later released from jail, he simply became more angry, more dysfunctional, more destructive towards his community and more likely to return to jail. In the eyes of Philip's probation officer and Justice Stuart, the criminal justice system had failed both Philip's home community of Mayo and Philip himself. The question before the court was all too clear: was there an alternative measure available to the court which would somehow halt, if not reverse, this downward spiral?

Philip's probation officer assessed the community's attitude towards their participation in the sentencing and after an open meeting it was agreed that the "circle" would be used, the participants being Philip and his family, concerned members of Philip's First Nation including Chief and Council, Crown and senior counsel, local R.C.M.P. and Philip's probation officer. In using the circle, the thinking of the court was directed towards having the community, including the offender, become more actively involved and assume greater responsibility for the resolution of conflict. Given the failure of the judicial system to date, it was now up to the community itself to see if it could do a better job - or at least do less harm. In order to facilitate meaningful community participation, it would be necessary to alter the sentence decision-making process so as to empower the community - such alteration was achieved through the circle.

To begin with, the physical set-up of the courtroom itself was changed by

having 30 seats arranged to form an inner circle (an outer circle was also formed for observers). Seated on one side was Philip, his family and counsel. Directly across from them sat the Crown, and to their right was the Justice Stuart. Dispensed amongst these participants were members of Na-cho Ny'ak Dun, the R.C.M.P. and all others.

Now when sitting in a circle, there's a sense of equality as all are equally exposed to one another, all are at eye level and all are at a close proximity to each other. Within the court system, what this means is that the community is no longer relegated to the back benches of the courthouse, separated from the judge and counsel by not only sheer distance but by actual dividers and expansive tables. Under this more formal method, the court room procedure has the appearance of being foreign and elitist for the judge sits elevated center stage, in control of the proceedings, while the lawyers take their turns spewing forth their legal mumbo-jumbo, leaving the accused and observers isolated and nothing more than passive spectators.

With the participants sitting in a circle, all of this was broken down and the resultant change in dynamics enabled the family and community members who best knew Philip to discuss, at a very personal level, common concerns and objectives. This not only

added to the sense of equality but also it created a sense of shared or community responsibility, for what eventually came forth within the circle was the collective desire to come up with a sentence that would address holistically all the facets to Philip's destructive behavior. *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.* (at 360)

By consensus, the participants including Philip, determined what they felt to be the most effective sentence and, perhaps more importantly, for Philip it was the first time he heard his family and community express their desire to have him 'reintegrate' with the Na-cho Ny'ak Dun First Nation. It also afforded him the opportunity to gain an appreciation of the human pain and suffering of the victims of his crimes. In so doing, the circle provides a more positive and constructive environment to pursue a rehabilitation plan for rather than degrade the offender, the circle seeks to reconcile the offender with his/her community and victims. This is not to say that punishment cannot be imposed through the circle as such punishment would in most cases be more effective: *It is not the trapings surrounding the announcement of punishment, but who imposes, and what is imposed that engages the ben-*

*efits (if any) of punishment. There is a significantly different sting to a punishment imposed by a community, than to a similar sentence by a circuit court judge... [for that] shame and embarrassment of the few moments with the judge quickly dissipates... Punished by the community, the offender must face his sentencers daily.* (at 363)

Building on the holistic solution to the problem, the circle participants were forced to also look beyond the offender and focus attention on the community itself. In this way, the participants were able to identify what factors within the community were conducive to criminal behavior and where community expenditures should be refocused to counter such factors. For example, the lack of recreational activities could potentially promote criminal behavior and/or the use of drugs by teenagers seeking 'excitement'.

In its final determination, the circle concluded that Philip Moses was to receive a suspended sentence coupled with a 2-year probation order made up of three stages. The 1st stage, which focused on the reintegration and acculturation of Philip, required him to live with his family on their trapline 60 miles from Mayo. This would work at rebuilding the broken family and cultural ties suffered from separation in state care and jails. Once ready, in the 2nd stage Philip was to attend a 2-

month residential program for native alcoholics in BC, a facility which had proven successful for other members of Na-cho Ny'ak Dun. For moral support, Philip's brother agreed to accompany him. In the 3rd stage, Philip would move back to Mayo to live with his family who would ensure an alcohol-free home. As for the community's role, Na-cho Ny'ak Dun First Nation agreed to develop a support program to both upgrade Philip's life and employment skills as well as provide him with ongoing counselling for substance abuse. To monitor Philip's rehabilitation, Justice Stuart provided for a court review at each stage of the probation.

While it will be some time before the success or failure of the use of the circle in alternative sentencing can be determined, I find this case to be very exciting and extremely significant as it appears to be the first time a Canadian court has sought to really incorporate aboriginal values within the existing legal structure, and in so doing, it is opening a door that has been nailed shut since the criminal justice system was imposed upon the First Nations of this land. What this decision says to me is that perhaps there can be a realization on the part of the court that the adversarial system does not really work for people whose worldview or philosophy is different than that of the dominant western society.

## The Black Triangle

### Watch out for those dangerous hetero women

STEROTYPING/ *Turning to women to get away from men does not make someone a lesbian.*

by Tristis Bhaired

Most of the time, the press, the entertainment industry, and our elders, warn young women to watch out for those deviant lesbos who will seduce us and steal our innocence away.

Nobody ever took the time to warn young lesbian women to regard straight women with a cautious eye. Most of us learned that on our own as we grew up. Not that I'm speaking from experience here, although there was one crush I held for a while, she was perfectly above board with her own feelings on the matter, so I never got entangled. But I have heard tales of woe from friends, and a lover of mine quickly became an ex-lover in the thrall of a "lady".

Sometimes the problem is simple: curiosity. Some straight women can't help themselves. After hearing (or figuring out) an acquaintance is lesbian, they've all of a sudden got to know what goes on, (and, I think, whether they are attractive to other women like they are attractive to men).

The curiosity of men plays no small part either. How often do you have to hear "What do you think it would be like, honey, if you and...?" before you give in to his fantasy (to be fair, many women never would, anyway). Porno flicks are full of that kind of thing, and they wouldn't be if it was the women who were interested.

Alas, curiosity is only that. There is no need for anyone to love, like or respect an object of curiosity. No emotion has to be felt, at least on the part of the experimenter. The stickiness of that problem rests with the object. After

all, you have to make her think you're interested. Chances are she's not in on the secret.

So all straight women who get connected with lesbians are nasty villains? Hardly. It's not the fault of individual women that our assorted cultures put such an enticing taboo on sexuality. And as much as I would like to blame some women for particular actions, I can't get inside their heads to figure out whether they intended to cause the damage they did. And sometimes it isn't so simple as curiosity.

Lots and lots of women are survivors of abusive childhoods, not always within their families, and not always in their youngest years, but abuse at some level, at some time. Getting scared, and staying scared can cause a girl to do any number of things: some gain lots of weight, some try to make their mind go numb with any substance they can find, some turn violent themselves, some run away from, or toward the gender that has caused them the pain. Some

women are setting up house with other women today because they can't bring themselves to be with men.

One of the questions that is asked most when I talk to classes as a member of the Gay and Lesbian speakers bureau is "What happened in your past that made you gay?" My answer is that nothing happened to me that was different or worse than what happens to thousands of straight women. Blaming an abusive childhood for a sexuality belittles the experiences of all the other sufferers of abuse whose sexuality is considered the norm. What is it? They weren't hit hard enough?

Besides all that, turning to women to get away from men does not make someone a lesbian. To be blunt, you have to like what you're doing.

Before I am accused of being judgmental, let me make it clear that I believe there is nothing wrong with finding solace in the arms of the "gentler sex", and nurturance is nothing to be sneered at. The only difficulty might

## Metanoia

### Listening and semper reformanda

CHANGE/ *It is constant in our lives and is sometimes seen as disturbing.*

by John Valk

If there is one thing that is constant in our lives it is change. Our way of being and existing today is not the same as yesterday, at least for the most part. Yet, some say that the more things change, the more they stay the same.

For the status quo, radical change is disturbing. Their comfort and security come through stability. But for those on the margins of power, prestige and

influence, there is a constant struggle for rights, freedoms, and some measure of comfort and security. The stuff of history (texts?) is the social, political, even religious, drama that ensues. Yet, in spite of the changes which do result, much remains the same. Humans, as brilliant, creative, and industrious as they may be, are nonetheless continually confronted with their own self-centredness, greed and belligerence.

In the West, few adhere to a "myth of the eternal return." That is, few feel that at the end of the day - the decade, one's life - nothing has really changed. Few affirm that life is really one big (vicious?) circle, that only brings us back where we started.

Rather, in the West we believe in some progressive sense of change. In spite of admitted setbacks, most feel

*Continued on page 10*

NOTE: Regular church services are now being offered for gay Christians. For information phone the gay-line.

(Ed Note: GALA upcoming events are in upcoming on page 27)