

A SMALL PATH TO RECONCILIATION

Justice Shaun Nakatsuru

"I'm no prophet. My job is making windows where there were once walls."

- Michel Foucault

"Conversation was never begun at once, nor in a hurried manner. No one was quick with a question, no matter how important, and no one was pressed for an answer. A pause giving time for thought was the truly courteous way of beginning and conducting a conversation. Silence was meaningful with the Lakota, and his granting a space of silence to the speech-maker and his own moment of silence before talking was done in the practice of true politeness and regard for the rule that thought comes before speech."

- Luther Standing Bear, Oglala Sioux Chief

How do I wish to begin?

With humility.

[1] My goal is a modest one. The conference is about Aboriginal peoples and the law. The theme is "We are all here to stay." I have been asked to present at the conference because of a decision that I wrote this year. *R. v. Jesse Armitage*.¹ I was the judge who sentenced Jesse Armitage, an Aboriginal offender, for a number of property offences. The case was not unusual. Sadly, both the profile of the offender and the type of offences committed by him are common across this country. What was unusual was the media coverage, both social media and conventional, the decision received.² More than a slight flush warmed my face when I learned it was being heralded as "inspiring" and "remarkable" in its use of plain language. The session in which I present is about innovations in the justice system. It is about ideas worth spreading. My goal is a modest one. It is hardly an innovation. But I hope it is an idea, however modest it might be, that is worth spreading.

[2] At its simplest, it is about the act of communication. Listening. Speaking. It is what I do each day in my job as a trial judge. On another level, the idea is about building bridges, forging a connection, between myself and the offender. It is about the construction of windows between the judge and the judged. On a more fundamental level, it involves the reconciliation between the Aboriginal offender and the criminal justice system.

[3] To present this, I will first address the context in which this communication takes place. Then I will give some of my thoughts about how I try to do this. Finally, I will leave you with a few final reflections. Throughout, I will try to walk the walk. To say it in “plain and simple” language.³

[4] Before starting, I would like to emphasize that I am talking about sentencing. Much of what I say may or may not apply to the trial- the truth-seeking process- where other considerations are important. In addition, these comments obviously may apply to the sentencing of other offenders. Not just Aboriginal offenders. However, I have tried to focus my ideas on the unique circumstances of the Aboriginal offender who finds herself in the criminal court. Finally, I bear no greater wisdom than my own personal circumstances warrant. What I say may not strike a chord in the mind or heart of the reader. For that I apologize. However, I am who I am – a single provincial court judge sitting in a criminal courtroom in downtown Toronto, often presiding in our Aboriginal or *Gladue* court- doing his best, daily, like my fellow judicial colleagues of all levels of court. I am merely sharing my experiences and reflections....for what they may be worth.

A. THE CONTEXT

[5] There are three contexts that I would like to explore: 1. The rate of literacy and level of communication ability amongst Aboriginal offenders; 2. The legal duty to give reasons; and 3. The alienation of Aboriginal peoples from the criminal justice system.

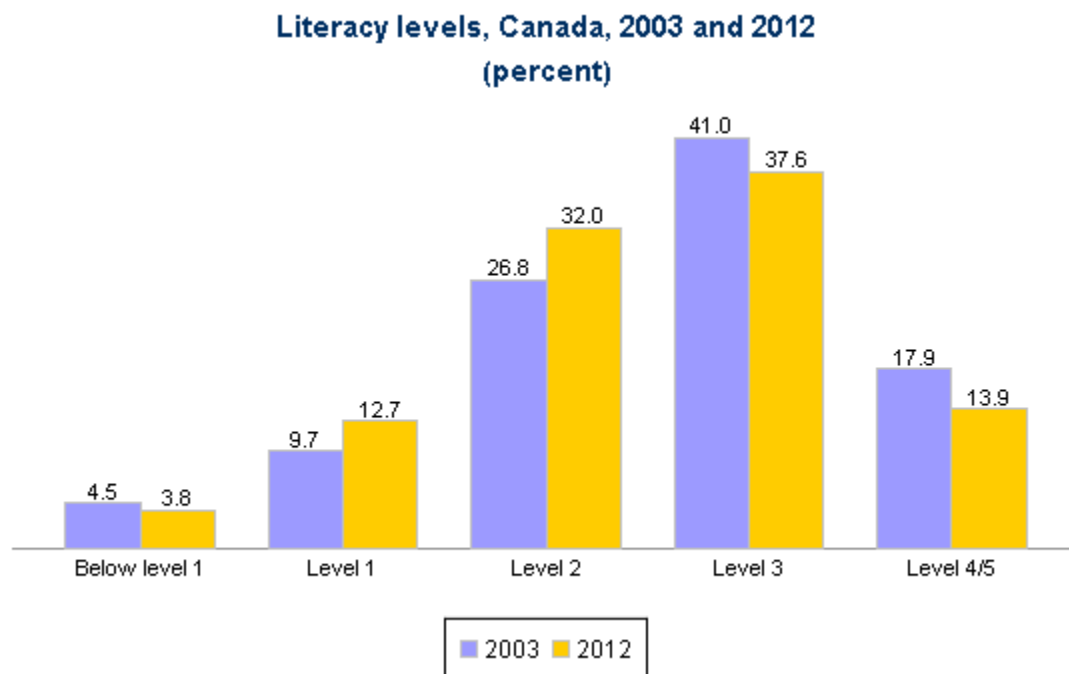
[6] Generally, illiteracy and low communication skills are problems in the Canadian population. It is therefore not a surprise that these problems affect the offender in the criminal courts. Information in modern society comes from many sources. That information is often presented in complex ways. The ability to understand and then use that information is an important skill for everyone. In the criminal sentencing process, for the offender who is potentially losing his freedom, it is critical. The problem is that his life may not have properly prepared him to easily understand what is happening at his sentencing.

[7] The data collected on our country’s literacy rates highlights the issue.⁴ This data identifies five different literacy levels. From lowest to highest they are:

- Level 1: The individual is unable to read a drug label in order to correctly determine the appropriate dose.
- Level 2: The individual has difficulty learning new occupational skills.
- Level 3: The individual is able to meet the demands of everyday life and perform work-related tasks (often associated with earning a secondary school diploma).
- Levels 4 and 5: The individual is able to process and analyze complex information (often associated with earning a bachelor’s or graduate degree).⁵

[8] In 2012, 48.5% of Canadians aged 16 to 65 had literacy scores in the Level 2 category or below. Therefore nearly one half of adults have low literacy scores. People who fall into the Level 2 category have the skills to get by on a day-to-day basis, but are likely unprepared for the challenges posed by a rapidly changing society.

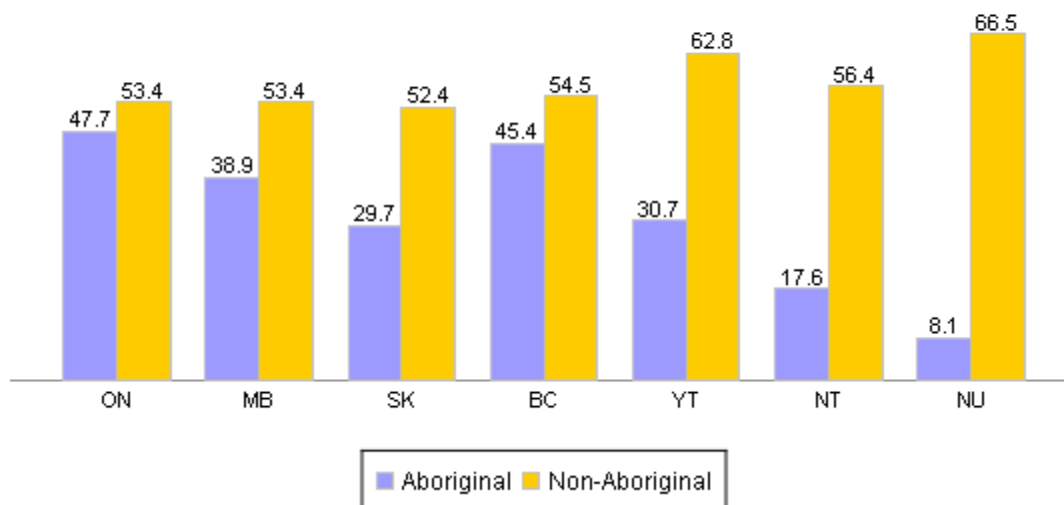
[9] The problem is not getting better. Comparing the results of the 2003 and the 2012 literacy surveys, the proportions of Canadians with literacy scores in Level 1 and 2 have increased. The proportions at the higher levels have decreased.



[10] Overall, literacy levels increase with education. Having a high school diploma is key. The biggest shift in the proportion of people with Level 3 literacy or above was seen between those who had completed high school and those with less than a high school education. 45.0% of those who had completed high school had scores in the Level 3 category or above. Only 22.0% of individuals who had not completed high school had scores of at least Level 3.

[11] More relevant to my paper is that in 2012, literacy scores were generally lower for Aboriginal populations than for non-Aboriginal populations.⁶

**Level 3 literacy or above, Aboriginal and non-Aboriginal populations,
oversampled populations, 2012
(percent)**



[12] This state of affairs is in part one of the sad legacies of the Aboriginal residential school system. This is what the Truth and Reconciliation Commission of Canada had to say:

It is not surprising that, faced with terrible conditions and mostly ineffective teaching, many students left school as soon as they could. A 2010 study of Aboriginal parents and children living off reserves found that the high school completion rate is lower for former residential school students (28%) than for those who did not attend (36%). Only 7% of the parents who attended residential school have obtained a university degree, compared with 10% for those Aboriginal parents who had never attended these institutions.

Although secondary school graduation rates for all Aboriginal people have improved since the closure of the schools, considerable gaps remain when compared with the rates for the non-Aboriginal population. For example, according to the 2006 census, 34% of Aboriginal adults had not graduated from high school, compared with only 15% of their non-Aboriginal counterparts. In the 2011 census, these numbers improved slightly, with 29% of Aboriginal people not graduating from high school, compared with 12% in the non-Aboriginal population.

It is significant that the lowest levels of educational success are in those communities with the highest percentages of descendants of residential school Survivors: First Nations people living on reserves, and Inuit. Both groups have a high school completion rate of 41% or less.

The statistics for First Nations people living off reserves and for Métis are somewhat better. More than 60% of First Nations people living off reserves and 65% to 75% of Métis people have graduated from high school (although these results are still below the national average).⁷

[13] The second context is the duty on the judge to give reasons. I give reasons, whether orally from the bench or in written decisions, all the time. Some reasons are better than others. That should not come as a surprise to anyone. Making judgment is not always easy. Saying it properly sometimes is even harder. However, whatever reasons I give, there are certain goals that I try to achieve. These have been laid out in a decision by the Supreme Court of Canada in a case called *R. v. R.E.M.*⁸:

- Reasons tell the parties affected by the decision why the decision was made.
- Reasons provide public accountability of the judicial decision; that justice is not only done, but is seen to be done.
- Reasons permit effective appellate review.
- Reasons help ensure fair and accurate decision making; the task of articulating the reasons directs the judge's attention to the relevant issues.

[14] The final context is the alienation of the Aboriginal offender from the criminal justice system. I recognize that this is a gross generalization. It does not apply to every Aboriginal person. Not every Aboriginal accused or offender may feel this way. However, this does not make the alienation any less real. It has historical roots. The justice system is perceived in this way by many, both Aboriginal and non-Aboriginal. It is viewed with suspicion by many Aboriginal persons and communities. The perception is real. This makes the alienation real. That is what matters. The Truth and Reconciliation Commission of Canada said this:

In Canada, law must cease to be a tool for the dispossession and dismantling of Aboriginal societies. It must dramatically change if it is going to have any legitimacy within First Nations, Inuit, and Métis communities. Until Canadian law becomes an instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force. A commitment to truth and reconciliation demands that Canada's legal system be transformed.....⁹

[15] These three contexts come together in the sentencing of the Aboriginal offender. The potential negative effects can be many. Among them: 1. Miscarriages of justice, large and small; 2. Reduced court efficiency and effectiveness; 3. Impairment of reducing repeat offending by the offender; and 4. Adding to systemic discrimination. Collectively they can contribute to the problem of the over-incarceration of Aboriginal offenders. In the celebrated case of *R. v. Gladue*¹⁰, the Supreme Court of Canada highlighted this starkly different treatment of Aboriginal offenders. The Court recognized that one fundamental reason for this failing was the fact that Aboriginal offenders felt no kinship with the criminal justice system:

[57] Aboriginal persons were sadly overrepresented indeed. Government figures from 1988 indicated that Aboriginal persons accounted for 10 percent of federal prison inmates, while making up only 2 percent of the national population. The figures were even more stark in the Prairie provinces, where Aboriginal persons accounted for 32 percent of prison inmates compared to 5 percent of the population. The situation was generally worse in provincial institutions. For example, Aboriginal persons accounted for fully 60 percent of the inmates detained in provincial jails in Saskatchewan (M. Jackson, "Locking Up Natives in Canada" (1989), 23 *U.B.C. L. Rev.* 215, at pp. 215-16). There was also evidence to indicate that this overrepresentation was on the rise. At Stony Mountain penitentiary, the only federal prison in Manitoba, the Aboriginal inmate population had been climbing steadily from 22 percent in 1965 to 33 percent in 1984, and up to 46 percent just five years later in 1989 (Commissioners A. C. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), at p. 394). The foregoing statistics led the Royal Commission on Aboriginal Peoples ("RCAP") to conclude, at p. 309 of its Report, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996):

The Canadian criminal justice system has failed the Aboriginal peoples of Canada — First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural — in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

[16] So let me now turn to the question of how these contexts come together in the simple but central act of communication, the giving of reasons for sentence.

B. LISTENING, DECIDING, AND GIVING REASONS

[17] My role in explaining the reasons for punishment is vital. If I discipline my child and she does not understand why, it is not only pointless but it also can lead to all kinds of future problems. More complicated is the fact that I do not know the offender like I know my child. I get only a glimpse into who the offender is and what she has done that makes her deserving of punishment. This veil of ignorance that I suffer from is deepened by the fact that the offender comes from a background very different from my own. The Chief Justice of Canada commented on this when she said:

In a world marked by pluralism, in communities where diversity is so prevalent, the judge must become the interpreter of difference. The judge must become the one who understands [and responds to] every voice.¹¹

[18] Judges are taught to better communicate to those who appear in front of them. It is not my intent to cover this topic in any detail. Some lessons in writing a decision are just common sense. Others are familiar to judges through education. We all try to put them into practice. I list some of these ways in this endnote.¹² I further note some valuable resources in this area.¹³

[19] Instead, I would like to share three more general ideas. Ideas that I feel are very important when sentencing the Aboriginal offender. Ideas that I believe can make a difference.

[20] **I must truly hear.** Before speaking, there must first come listening. It is my business to listen. Even when I can say that I am listening, there is a deeper question. Am I actually hearing? Am I hearing what I need to hear in order to make a difference?

[21] To begin with there is the question of who I am listening to. For me, it is crucial that I listen to the Aboriginal offender.¹⁴ Too often, only criminal justice professionals speak in court and are listened to. These are the lawyers. The Assistant Crown Attorney, the defence lawyer, or duty counsel. Of course, the law is that they must be listened to. They are also worth listening to. However, they often speak in a language that may as well be foreign to the offender. They are trained in the craft of legal rhetoric. They describe things in a way that may bear little resemblance to the “truth”.¹⁵ Frankly, I have never learned more about a person, whether offender, victim, family member etc. than when I have stopped listening to the professionals and when that person speaks to me. Speaks to me about who she is without the mediation and filtering through counsel. Therefore, with the cooperation of the lawyers, in Aboriginal Court, I will often bypass the lawyers and listen directly to the offender in sentencing. I recognize this practice has pitfalls. It does not sit well with the adversarial system. But when built upon trust... trust that only good motivates my actions... it is a practise that can provide great rewards.

[22] Then there is the question of how am I listening. The case of *Gladue* requires that I learn as much as I can about an offender’s Aboriginal past. Learn about how that past, specific to the offender and more broadly, has affected his personal circumstances and the offence. Sometimes, detailed and very helpful *Gladue* reports are prepared. But this cannot be done in every case. There is simply not enough money. Not enough people writing these reports. Not enough time in court. Sometimes counsel have little time or chance to get the information I need. Therefore, I must engage in active listening. In other words, I must listen by asking questions. Questions that are important. It is about getting the story of the offender and the offence out by my involvement in the process. Again, I would be foolish not to recognize there are limits to this. Not just legal ones. But even more importantly, limits imposed by respect for the offender and her privacy. Furthermore, there is a great power imbalance. The offender’s fate lies in my hand. It verges on abuse to allow active listening, even unintentionally, to become a tool that makes the offender feel small or unworthy. On the other hand, I would be naïve not to admit that some responses are ones given because the offender believes this is what I want to hear. Keeping in mind these cautions, in my experience, I have found much “truth” in the answers given. And there is more benefit. The process is valuable even beyond

the information gained. I have found that it provides a chance to build a bridge between the judge and the judged.

[23] This leads me to my next point. The act of listening should be part of a conversation or a dialogue. As a judge, I have much to learn from Aboriginal offenders. I have much to learn about Aboriginal ways. Each time I spend with an Aboriginal offender I learn something. It can be as much about how many are so disconnected from their Aboriginal community, practices, or identity as it is about how those communities live, what those practices are, or what being Aboriginal today in Canada means. That knowledge must inform my sentence. It must also inform my speech when I talk.

[24] Too often in our criminal sentencing courts, there is no conversation. No dialogue. It is only one way speech. The lawyers talk. The offender has a chance to say something. The judge then gives a decision. I cannot imagine anything more distancing. This model is all about everyone listening and speaking in their private little silos. With little chance of making a meaningful connection.

[25] The true conversation comes with time to think before speaking say the Lakota. Where there is listening and thought before speaking. Where there is respect. I agree. But I also know this is truly hard in the press of a busy courtroom. It is also not easy when the colonial design of the traditional courtroom does not accommodate equal conversation. It seems almost impossible in some remote areas of our country when there is a plane waiting at the local airstrip to fly the staff of the courtroom back to their homes. All that said, I know that if I feel I have engaged in a conversation with the offender before passing sentence, then I feel I have had some success.

[26] I view that I have had success because I hope the offender, who may not agree with my sentence...indeed, may be quite unhappy about it... will feel listened to. Will feel that she had a part in a conversation. A respectful conversation where I have listened. Where I have asked questions showing I am listening. I believe this can help in fostering mutual respect between the Aboriginal offender and me. Even keeping in mind the power imbalance that cannot be avoided.

[27] My final point is that beyond listening, I must hear. There are two parts to this. Firstly, sometimes things will be said but what needs to be said is left unsaid. Or it will be said but in a way that is unfamiliar. Or said in a way that I could easily miss all the various meanings in the words spoken.

[28] This may not make much sense. But I find that where I make the deepest connection or have the best understanding of the offender and offence, it is because I am most “tuned” into what is being said. It is when I truly “hear” what is being said. It is the difference between hearing canned music in an elevator and an orchestra in a concert hall. It is the difference between hearing counsel say that her client is an addict and the offender describing with great emotion, hands trembling as he reads a written statement which has obviously taken great

time and effort in his cell to prepare, how a recent sadness in his life brought him back to the bottle. From the lips of the lawyer, I hear in my mind the medical difficulty an addict has in not relapsing from time to time. From the latter, I hear in my heart the pain and suffering the offender has at this time in his life when he had recently felt hope and optimism and was let down...yet again.

[29] I have no greater claim to this ability to hear, to truly appreciate what is said, than others. Indeed, I will confess that I am by nurture and likely nature, less sensitive to these sorts of things. I can only say that it is important to strive to truly hear when I am listening in the sentencing process. In this way, the “truth” of the case can be known.

[30] The second part that is important, especially in the Aboriginal context, is to hear beyond the individual offender. It is not simply a matter of diagnosing the illness in the offender before me. I have to look beyond that to see and appreciate the larger illness in the community. A profound historical and present day injustice afflicts this nation’s Aboriginal peoples. This is what really brings many Aboriginal offenders into conflict with the criminal law. To return to the example of addiction, for the Aboriginal offender, it is not simply a matter of his own personal battles with substance abuse. It involves historical wrongs done by the colonial powers, the impact of the reserve system, the effects of Crown wardship on growing minds and bodies, the neglect of the treaties entered into, the legacy of the residential school system, the poverty, the overt and systemic discrimination suffered in all aspects of life by Aboriginal peoples and their communities. It can be overwhelming. But not to “hear” what is truly involved would in itself be a miscarriage of justice when sentencing the Aboriginal offender.

[31] **I must answer in an honest voice.** As individual human beings, every judge has a unique voice. That voice can be heard in the written decision or spoken in the courtroom. About this, I have two things to say. First, I cannot say with any certainty what my voice sounds like to the offender. As a lawyer, I have had the experience of hearing that voice spoken by judges in my time at the bar. Too often, to my ears, that voice sounded very impersonal. It sounded very similar to other judges’ voices. It was as if all judges were trained to speak in a judge’s voice.¹⁶ It sounded very “judge-like”. Second, as a judge, I have learned from others that my voice should be a “credible” voice. This is a voice that has respect for the needs of the listeners. It is a voice that shows that they have been listened to and the issues that needed to be resolved were done so fairly and impartially.

[32] In thinking about this, I feel that sometimes a credible voice is confused with power. Rather than showing that the listeners have been listened to, the credibility of a judge’s voice is about showing the listener that the judge must be listened to. That to be credible, it is the judge who must be respected. Or that it is the judge’s decision that must be respected. This is the wrong approach.

[33] In my experience, offenders do not need any lessons in knowing who has the power. They know all too well that I do. I do not need a credible voice to make this plain.

[34] I prefer to call it an “honest” voice or an “authentic” voice. It is about being honest in what I do and how I have gotten there. The law is that I must explain the **why** of my findings, the path taken to the decision. The law does not require me to explain the entire thought process or set out in detail the whole road map to my decision with every landmark along the way described.¹⁷ While this law is no doubt correct in principle, to achieve an authentic voice, I try my best to do more when more is required.

[35] What do I mean by this? I mean that I do reveal parts of my thought process in arriving at the sentence. I do highlight landmarks along the road to the end decision. Some of those landmarks may mean little in law. Some may be insignificant to readers trained in law. Indeed, the offender may also view it as unimportant. However, it was important to me. To present an authentic voice, I feel compelled to express it. For the offender, I hope by doing so, she can gain some insight in why I am doing what I do. Equally important, I will argue, the offender will learn a little about who I am.

[36] So if I am struggling with a decision, I say I struggled. If I am ignorant of the law or something, I will admit it. At times. For obviously, it is at a judge’s peril to make such admissions. However, like everyone else, I have my biases. I cannot know everything. I also may totally miss the mark. But I can acknowledge and appreciate my failings. In doing so, I believe I achieve a level of honesty in my voice. Furthermore, I believe that if there is something in my thought process that is worth expressing, even if it takes time and effort to express, then I should just say it. It is not just the decision that matters. It is the journey to that destination that counts. The journey itself can forge a meaningful connection to the offender.

[37] Let me give some examples from the case of *Armitage* to show what I mean. I said this in the decision as I started to outline my reasons for sentence:

15 So, as I told Jesse Armitage on his sentencing day, we started this journey together. It was not one without its bumps along the way. It was also long. There were a number of adjournments. There was much investigation. Throughout I tried to reach Jesse Armitage. Sometimes I felt I had some success. There was sometimes a smile of understanding on his face. Other times I just saw frustration in him. I know he did not fully agree with all the delay. I know he did not always agree with what was being done to fully be ready for the sentencing. Some days he just wanted to get on with it.

[38] Mr. Armitage is a quiet person. Nonetheless, I knew that he was upset because of how long this was all taking. This was so even though much of the delay was at the request of his lawyer. He was in custody much of the time. I wanted him to know that I understood this. That I had “heard” him even though he did not speak. Even though the defence did not object to the delay. I also wanted him to know that I saw him from where I sat. That I felt it important to understand him. That I “got” him. Finally, I wanted Mr. Armitage to know what I was trying to do. I was trying to get to know him better. I too was trying to reach him when so many had tried and failed. I used the term “journey” so that he understood that I viewed the sentencing

process as something that he and I were undertaking together. This was not just something he was doing alone.

[39] The ending to my decision provides another example. Before I released written reasons, Mr. Armitage had been charged again. He was brought back before me. I dealt with the new charges and the conditional sentence breach. Legally speaking, this should not have formed a part of my reasons for sentence. The events took place after I sentenced him. They were not relevant to my decision.

[40] But those events were important. Important to the overall journey he was taking. It was also important for me to give Mr. Armitage my final feelings about him and the case. When writing this, I knew I neither wanted to make it sound legal nor give actual reasons for why I made the decision on the conditional sentence breach. It was more valuable to tell him how I was feeling. I am not family or friend to Mr. Armitage. But I felt compelled to tell him what my hopes were for him in the future. I said:

67 There is a post-script to my decision. Mr. Armitage did not make it to his first attendance with me after his sentence. Within days he was again arrested for doing very much the same thing he has always done.

68 In writing this part of my decision, I first thought I would say that I was disappointed or that it was with sadness that I had to report this. However, I decided against writing this.

69 First of all, it was not unexpected to me. How could it be? I was only surprised how quickly this happened.

71 Mr. Armitage asked for this because I believe he knew that there was no other way for him to get healthy. I believe that he had come to a point in his life where he was ready. Ready for a chance to change.

72 When an offender has come to this point, no matter how long, tortuous, or difficult the path taken to get there, there cannot be sadness or disappointment. There can only be hope.

[41] Let me adopt and paraphrase what a witness before the Truth and Reconciliation Commission said when asked about what the definition of “truth” was. To speak truth from the bench is to speak from the heart when it is needed. I tried my best to do so on this occasion.

[42] **I must allow the offender to see into my world.** For many Aboriginal offenders, no doubt, a judge is a remote and distant symbol of power. A judge is a symbol of power of colonial and imperialist origin. That in itself contributes to the alienation felt by those offenders.

[43] Also, the life of a judge, professionally and personally, is almost certainly very unlike that of many Aboriginal offenders. I live a life of privilege at home. I enjoy respect from others simply by wearing judicial robes. I have received many opportunities, breaks, and help from others along the way. Many Aboriginal offenders live a life of poverty. Many Aboriginal offenders have seldom heard any words of encouragement or praise in their lives. Many Aboriginal offenders have had to face huge obstacles in their life: discrimination, family dysfunction, poor education, no good work to be had. The list goes on. It is not surprising that alienation from the judicial system exists amongst many Aboriginal offenders given this lack of connection between the judge and the judged.

[44] I concede that some of this cannot be avoided. It will be hard if not impossible to change many things in any meaningful way. There is much about life that is not equal. There is much that is not fair.

[45] What I can try to do in the very formalistic and artificial world of the courtroom is to break down some of the barriers that exist. Barriers that contribute to the alienation. To reduce the distance between judge and judged. I feel one way to do this is to allow the offender a chance to see into my world. To see who I am and where I come from. There is much in human experience that is shared. Despite differences in background, there are commonalities between myself and the offender. To allow the offender to witness some of those commonalities in the sentencing process is a positive step in promoting reconciliation.

[46] *Gladue* principles require me to look into the Aboriginal offender's past and present. I get to see into who the offender is, however imperfectly. A window into her past and present. However, I ask is there any need for that window to be one way window? Where the offender sees only an obscure mirrored reflection when she casts her view towards the judge. I can imagine that to be on her side of the window must make her feel small and powerless. I believe that window should be more transparent. I believe this will help in bridging the gap between my world and her world. I believe this will reduce in a small but meaningful way the alienation that is spoken of.

[47] I will not list the ways in which this can be done. To be blunt, this is still a work in progress for me. Nevertheless, in cases where it may be useful, there can be no harm but only benefit, in trying. I should speak with the offender about things from my past and present. These things can develop the meaning of the words I have chosen to say. They can demonstrate that I have truly heard the offender. They can show that I do understand her on a deeper level.

[48] I confess that this is not easy for me. I am an intensely private person. It does not come easy for me to share anything intimate about myself. I also can see why others many disagree with what I say here about this approach. Why some of my colleagues may even regard this as a bit unprofessional. Un-judge like. Indeed, I do not advocate taking this to an extreme. Sentencing is not psychotherapy. Even in psychotherapy, the therapist does not reveal much about themselves to the patient.

[49] I moreover recognize that this approach is not revolutionary. Indeed, it is far from novel. I know that some judges routinely reveal something from their experience in sentencing offenders for one purpose or another. These decisions are just not reported.

[50] What I do argue for is that for Aboriginal offenders, careful consideration be given to the creation of this window where once there was a wall because of its importance for the overall goal of reconciliation with the criminal justice system.¹⁸ What I do argue for is that what I reveal of my world be something honest and real. Not platitudes or stock stories of a judge's past that are designed to lecture the offender. Rather, a glimpse into my world where the experience shared with the offender is one that she can easily appreciate took true honesty on my part to reveal, some courage, and a commitment to self-awareness. As in any human interaction, it is this honest sharing of identity, of who one truly is, that can be so useful in forging a connection and trust. By daring to venture into a form of intimacy with the Aboriginal offender, I hope to create a space that is more welcoming for the offender to cross over. Cross over to a place where our two worlds need not be so far apart.

C. FINAL REFLECTIONS

[51] The sentencing of Aboriginal offenders happens many times every day in our country. I wish it was not so. Along with many others, I hope for a time where it becomes much more uncommon than it is today. The Supreme Court of Canada recognized that sentencing Aboriginal offenders differently will not solve all the ills Aboriginal people suffer from. The Court said this in *R. v. Ipeelee*¹⁹:

[61] It would have been naive to suggest that sentencing Aboriginal persons differently, without addressing the root causes of criminality, would eliminate their overrepresentation in the criminal justice system entirely. In *Gladue*, Cory and Iacobucci JJ. were mindful of this fact, yet retained a degree of optimism, stating, at para. 65:

It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the

treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

[52] Like *lpeelee*, other cases have addressed the substance of sentencing Aboriginal offenders. I wanted to address the **how** in this paper. To provide some of my thoughts. To get others thinking. The Truth and Reconciliation Commission wisely and pointedly said “Reconciliation begins with each and every one of us.”²⁰ I too must play my part as a judge.

[53] Each Aboriginal offender is a special human being. Each case is always important. But it remains only one case. Even with a number of years already spent as a judge and with a few more years to look forward to, I can only expect to deal with a relatively miniscule number of cases involving Aboriginal offenders. Looked at this way, it could be argued that the impact of my efforts to assist in reconciliation will be trivial. Furthermore, the approach I have advocated in this paper may seem pretty small peanuts. It is really just about being compassionate. Finally, my job itself is a minor one in the overall operation of the justice system. What I do in each case that appears in front of me is unlikely to be heard about by anyone beyond the confines of the courtroom. Most decisions and reasons I give on sentence are soon forgotten. They may as well be the morning mist; vanishing quickly in the heat of the rising sun.

[54] That said I hold fast to the proposition that small acts carefully thought out, mindfully, with sensitive reflection, can have broad and significant reverberations. A small act can be that stone cast into the pond that pushes out far-reaching ripples. Each time I speak with an Aboriginal offender when I sentence her, I am casting a stone into the pond. Each time I can make a connection, build a window, or make an honest and sincere effort to bridge the distance between her and myself, the wall of Aboriginal alienation is weakened. The wall is struck by the small wave or ripple I have made. In my hope for the future, I pray that over time, with the work of others, these small ripples either by its collective force that forms into a larger wave or through steady and unflinching erosion, will bring down, once and for all time, this wall of Aboriginal alienation from the criminal justice system. And bring us another step closer to national reconciliation.

[55] So, just as I have begun, I end with a quote that summarizes how I feel:

*"I am only one, but still I am one.
I cannot do everything, but still I can do something;
And because I cannot do everything
I will not refuse to do the something that I can do."*

-Helen Keller

¹ [2015] O.J. No. 705.

² See for examples: www.cbc.ca/.../i-am-writing-for-jesse-armitage-judge-says-in-rare-sentencing-report-1.2984316; www.thestar.com/.../judge-writes-simple-and-inspiring-legal-decision-for-repeat-offender.html; www.ctvnews.ca/.../transformative-decision-how-a-judge-s-decision-is-turning-legal-heads-1.2270358; www.lawtimesnews.com/.../editorial-a-remarkable-ruling.

³ In my decision of *Armitage* I called myself one of the worst offenders in not saying it in plain language. This was not an understatement. Any quick review of my written judgments will bear this out. Also, I understand that courts do write for different audiences. Many decisions are written mainly for legal audiences. It is necessary to explain cases and use legal analysis that may not be easily understood by the non-legal reader. This is especially so for appeal courts. In my opinion, this does not mean the judges who write these decisions do not try hard to write plainly and simply. They do. It is just that the nature of their work requires a different approach. By no means should I be taken as being critical of that.

⁴ The data collected is on literacy skills. This is not the same as an individual's ability to speak and understand oral communication. However, there is little statistical data on the latter. In addition, literacy levels are logically connected to the latter. Both depend on education level achieved.

⁵ The Organisation for Economic Co-operation and Development (OECD) and Statistics Canada.

⁶ It should be noted that this data assumes that literacy is in the English or French language. If a person speaks an aboriginal language, this will not be reflected in the data.

⁷ Pp. 193-194. "*Honouring the Truth, Reconciling the Future*" Summary of the Final Report of the Truth and Reconciliation Commission of Canada.

⁸ [2008] 3 S.C.R. 3.

⁹ P. 258. "*Honouring the Truth, Reconciling the Future*" Summary of the Final Report of the Truth and Reconciliation Commission of Canada.

¹⁰ [1999] 1 S.C.R. 688.

¹¹ Beverley McLachlin C.J. 2nd International Conference on the Training of the Judiciary, November 1, 2004.

¹² Far too often a judge's decision is like the celebration of Catholic mass in Latin. It looks and sounds impressive but the average parishioner has no clue as to what is being said. Judges should use plain language. This focuses on the needs of the reader or listener, not the writer or speaker. Offenders should be able to understand the decision without difficulty or without the help of someone trained in law like a lawyer. Some techniques are obvious: using short sentences and clear language; using the active voice; avoiding legalese and overly formal language. Obvious but not always easy to do. In addition, the structure of the decision is important. As Chief Justice McLachlin said in the quote, thought should be given before speaking. Thinking out loud is not communicating. Some ways of giving a decision structure can be: 1. Speak to the parties as human beings and focus on the losing party; 2. Introduction to the decision that gives a summary as to what the case is about; 3. The decision should have an issues driven structure where the judge focuses on the issues that need to be resolved; 4. A points first or context first structure before conclusion or analysis to provide further clarity; 5. Sign posting throughout the decision to give the reader or listener an idea where the judge is going or going next in the decision; 6. An effective conclusion. At the end of the day, it is about respect for the reader and listener.

¹³ Berry, Edward. *Writing Reasons: A Handbook for Judges*. 3rd ed. Peterborough, Ontario: E-M Press, 2007. Mailhot, Louise, and James D. Carnwath. *Decisions, Decisions*. Cowansville, Québec: Les Éditions Yvon Blais Inc., 1998.

¹⁴ It is of course important to listen to the victim if there is one. Others such as family members may also have important things to say.

¹⁵ I do not mean to say that lawyers lie or mislead the court. Rather, they take what they are given and through the skills and training they possess, they make the best of what they are given in order to advance their goals, whether it be the public or the client's. The "truth" that I speak of will become clearer later on.

¹⁶ This observation about the similarity in the way judges express themselves has not escaped the attention of the Supreme Court of Canada. It is not necessarily a negative thing. As explained in *Cojocar v. British Columbia Women's Hospital and Health Centre*, [2013] 2 SCR 357:

[32] ... The conventions surrounding many kinds of writing forbid plagiarism and copying without acknowledgement. Term papers, novels, essays, newspaper articles, biographical and historical tomes provide ready examples. In academic and journalistic writing, the writer is faced with the task of presenting original ideas for evaluation by an instructor or by peers, or of engaging in principled debate in the press. The task of judgment writing is much different. As Simon Stern puts it:

Judges are not selected, and are only rarely valued, because of their gift for original expression. Just as most lawyers would rather present their arguments as merely routine applications of settled doctrine, yielding the same legal results that other courts have delivered repeatedly, judges usually prefer to couch their innovations in familiar forms, borrowing well-worn phrases to help the new modifications go down smoothly.

The bland, repetitive, and often formulaic cadences of legal writing in general, and judicial writing in particular, can be explained in large part by a commitment to the neutral and consistent application of the law. . . . [T]he effort to demonstrate that similar cases are being treated alike often finds its rhetorical manifestation in a penchant for analyses that have a *déjà vu* quality — usually because the words *have* been read before. This tendency, though visible throughout the legal system, is most pronounced at the trial level.

¹⁷ *R. v. Boucher*, [2008] 3 S.C.R. 499 at para. 29; *R. v. R.E.M.*, *supra*, at para. 18, 30, 32, 64.

[18] Explaining the “why” and its logical link to the “what” does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict. Doherty J.A. in *Morrissey*, at p. 525, states:

A trial judge’s reasons cannot be read or analyzed as if they were an instruction to a jury. Instructions provide a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion. They are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict. [Emphasis added.]

¹⁸ “As Commissioners, we believe that reconciliation is about respect. That includes both self-respect for Aboriginal people and mutual respect among all Canadians.” p.239 *“Honouring the Truth, Reconciling the Future”* Summary of the Final Report of the Truth and Reconciliation Commission of Canada.

¹⁹ [2012] 1 SCR 433.

²⁰ p. 238.