A Greater Involvement ... A Curb in Crime

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The title of this conference "Justice to order/Justice à la carte" applies especially to what I feel should be done in Aboriginal justice. Justice à la carte, for me, means a justice of quality, a justice so well designed for certain groups that it will fulfil their needs and make them happier and healthier.

I have sat during many years in the Quebec Arctic with Inuit, and with Cree communities. I still sit, at the moment, in Northern Quebec in Innu communities spreading from Seven-Island to the Labrador border, as well as in other reserves situated some 350 miles of Seven-Island, in Schefferville, and in Kawawachikamach, a Naskapi reserve.

It is not because of a punishment from my chief judge that I go North in Inuit villages where I have to stay in Coop hotels where no food is supplied, and where I have to prepare the meals with other members of the Court, and most of the time, serve them. And although, sometimes, I wonder what I am doing there washing the dishes of a defence attorney with whom I may have gotten into an argument, at Court, during the day, I am there at my own request, because I like to exercise that kind of justice, a hands on type of justice which is more satisfying and rewarding to me, especially in the social sense.

We, the Judges sitting in reservations and in Aboriginal Northern communities are frequently asked how the cost of crime, human, social and financial in the administration of justice in those Northern and Aboriginal areas could be reduced.

I always tell them that there is only one way to achieve this and that is to incite the Aboriginals and the Inuit to take more and more responsibilities and to become active inside our criminal justice system. For them, as it is for most Canadians, the most important decision is the sentence given by a Judge.

A sentence could be the beginning of a whole process of rehabilitation but it could also be the beginning of the disintegration of an individual. Through my experience, I found out that the Natives do not show too much interest in our decision of guiltiness or non-guiltiness. Generally, they look at the ultimate end of a case, which is the sentencing.

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The desire of the Inuit to have their say in the sentencing process was expressed clearly in the Report of the *Inuit Justice Task Force*, issued in 1993. I cite briefly :

> [...] *The present Court system must provide full community participation and involvement in the sentencing process.*[1]

This is again expressed in the report "Justice for and by the Aboriginals," presided by Judge J.C. Coutu. All Aboriginal communities wish that the Judge considers their opinion before handing down certain sentences.

More recently, the members of the Royal Commission on Aboriginal peoples, in their final report, in 1996, said :

> *The notion of obtaining community input to the sentencing process spread from the far North to other areas of Canada as well. The offender responds more deeply to concerns and suggestions expressed by members of the community than by a Judge who is removed in all ways from the offender's world.*[2]

Many other commissions or committees are of the same opinion. As an example, I cite the Reports of the *Aboriginal Justice Inquiry of Manitoba*,[3] the Report the *Saskatchewan Indian Justice Review Committee*[4] and the Report of the *Cariboo-Chilcotin Aboriginal Justice Inquiry*,[5] in British-Columbia. The well known author, Rupert Ross, in his books also describes this desire of the Aboriginals.

Defence lawyers have realized that they open a box of surprise when they decide to bring a defence or a denial to the evidence brought by the Crown, and it is probably the reason why most of the accused plead guilty to the accusation. Aboriginals have a different conception of the truth. For them, the truth is the real truth. It is simple and direct, to the great despair of some defence lawyers.

Let me give you an example of a case I have heard, not long ago. A young woman who was rather intoxicated left the bar where she had spent a part of the evening. As she was walking away, she was abducted by the accused and brought to an apartment where she was ultimately raped.

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1. *Inuit Justice Task Force*, 1993 at 121.
2. Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System* (Ottawa : Supply & Services Canada, 1993).
3. *Report of the Aboriginal Justice Inquiry of Manitoba* by M. Sinclair & A.C. Hamilton (Winnipeg : Government of Manitoba, 1991).
4. *Report of the Saskatchewan Indian Justice Review Committee* (Saskatoon, January 1992).
5. *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria : The Inquiry, 1993).

The next day, she went to the police, related that she was kidnapped and raped but, because of her drunkenness, she was unable to identify and point to her aggressor. However, she said to the police officer that in her head the name of someone was always ringing, even if she could not relate him to the facts of the previous night.

The individual was accused, and his lawyer pleaded not guilty to the charge. At trial, the victim was heard in Court, related what she remembered of her experience, that she was raped in the bedroom of the apartment, but could not identify the accused.

I felt that there was no case against the accused, but his lawyer insisted on presenting a defence. I really could not understand him, but it was his wish. He called his client, the accused, in the witness box, who said spontaneously that he raped the victim, but not in the bedroom, but on a couch.

The Inuit, in their language, the Inuktituk, have no word to identify a lawyer. Consequently, as for most of the things brought by the white people, they have to name the lawyer by defining his functions. The Defence lawyer is called, in their language : "The one who lies for you" and the Prosecutor as "the one who wants to send you to jail."

Going back to the participation of the Aboriginals in our justice system, I see it, for the moment, at the sentence level. Sentencing circles have been held now in almost all provinces of Canada. They had their start in Yukon with our colleague, Judge Barry Stuart and quite a number of judges have followed this initiative.

In my Province, I have held some in the Nunavik, with the Inuit. The comments were that this way of determining a sentence was as close as it could be to their traditional justice system, when every one in the community could say his word for the well being of the community. It seems that with the Circle, they could express their values and philosophy, which is totally different from ours.

In a circle I held in the Naappaluk case cited in CR., an elder said spontaneously :

> *We want to help him. It will be easier now to help somebody because we can take part in the sentencing, and also because Jusipi has decided to talk to us.*[6]

Circles move responsibility and authority back to community members, especially the victim and the offender. Having a say in a decision which will affect your life is the essence of democracy.

In the Native system, reconciliation, honesty, forgiveness and reintegration in the community are paramount. This is why deciding the sentence with them meets their conception of resolving disputes with their ancestral values.

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6. *R.* v. *Naappaluk* (1993), 25 C.R. (4th) 220 at 229 (C.Q.).

I think that the sentencing circles have an enormous value for the Native. All those who have participated in a sentencing circle will tell you that they felt different afterwards. The circle brought them a sense of responsibility towards their fellow citizens, a certain well being which could be assimilated to a certain kind of spirituality. With a follow-up of the defendant by his fellow citizen, it could be a very valuable tool to curb crimes. It is however very time consuming for a travelling Court, as all the members of the Court are either participants or are unable to leave before the circle is over.

We must understand that, in the Inuit country, all the Court members travel from one village to the other in the same chartered plane. One day, I had a circle that lasted close to five hours and finished at 1 o'clock in the morning. Then, we had to fly over 100 miles to go to another community where we were scheduled to sleep and start Court the next morning at 9:30.

The situation is different in other areas than it is in the Yukon where I have been sitting, for a few years, as Deputy Territorial Judge. In the Yukon, a whole organisation is in place to prepare the circles and to pursue the follow-ups. Generally, the communities are accessible by road and a circle can mobilize only those who have to be there.

As an example, I cite the community of Kwanlin Dun, where we can schedule a circle at any appropriate moment, as it is only a 15 minute drive from the Court House in Whitehorse.

The ideal situation, in Northern Quebec, would be to schedule the sentencing circles during the weeks when we don't regularly sit. We would have to figure out the extra costs. However, I think that those costs would be recovered shortly and that, after a certain time, our dockets would become lighter because of a permanent curb in the crime rate. Then, the savings would be valuable.

Another way to permit the Aboriginals to be really present in the sentencing process would be to help them create justice committees and to collaborate with them. I would like to illustrate what I say by explaining the situation in a Naskapi reserve in Kawawachikamach, Northern Quebec.

With the collaboration of the Crown Prosecutor and the defence counsels, we called a meeting of the population. One evening, I explained to them what a justice committee was : its goals, its function, its responsibility and its purpose. Many questions were asked and we left, telling them we could meet again, on another evening during that week, should they need more information or should they decide to constitute such a committee.

In the event, we met them three days later. They formed a committee of ten people by proposals and chose a president from among them. The president could communicate with anyone as he speaks excellent English. The Committee is formed of four elders, men and women, and six other members of the reservation.

The following is how the committee proceeds. The dialogue and the communications between the Crown Prosecutor and the members of the committee are excellent. The members of the committee meet on a regular basis, when the Court is not in the reserve, to follow-up on certain individuals and to examine various community projects.

As an example this year, the members succeeded in taking possession of an isolated fishing camp where they send young offenders or "would be" young offenders with elders. This camp, as well as another one, may also be used as a retreat for adult offenders wanting to turn their life around.

The Court goes to this village one week every three months and schedules also, once or twice a year, a special one week session, if we come to the conclusion that we are too far behind in our cases. Two weeks before the session of the Court, a copy of the docket is sent to the President. He calls a meeting of his members, studies the docket, and discusses the individuals whose names appear on the docket.

It may happen then that an accused goes to see the committee and seeks help, telling the members that he would plead guilty to the charge. They listen to him, judge if he is sincere or not when he tells them that he is contrite and wants to change his life around. Amongst themselves, they may form an opinion, recall the accused, make suggestions to him and take the necessary steps to help him, such as opening the door for future therapy in relation to drugs and/or alcohol.

No promise of any kind is made to him regarding the sentence, but they can advise him that they may assist him in Court, telling the Judge their findings and opinions. They may suggest various options to the Court, including adjourn to the next session, so that he can go into therapy, or pay reparations, in a case where damage to property is involved.

They understand that the Judge cannot be bound by their suggestions. This was explained by the Judge and the Crown Prosecutor at the two previous meetings and I must say that I have never felt any hostile feeling on their part when I could not accept their proposal. However, it practically never happens, as their suggestions are generally reasonable and in tune with the actual case.

On the other hand, I am conscious that if I don’t generally follow the suggestions of the committee, there will not be any more suggestions, and the Committee will become useless. If, for a particular reason, I don’t follow their suggestions, I will explicitly explain the reasons that guide me. This, I have promised them.

We have explained to them, extensively, about conflict of interest. I have had to sentence the nephew of the President of the Committee to a term of detention. It was a case of drug trafficking and I had previously explained, in other cases, that it was of great importance that drugs not be tolerated in their community, as this was one of the main causes of their problems. The President of the Committee stood and said that he understood, and congratulated me for doing so. I have also sentenced the brother of one of the members of the Committee.

When the Court arrives in a community, many accused, accompanied by their lawyer, may meet the Committee, requesting their help. In some instances, the members may come to the conclusion that the accused is sincere, and via the President may make suggestions to the Court.

In other instances, I have noticed that the President, or another member of the Committee was reluctant to confirm to the Court, without any doubt, that the accused was acting in good faith. There was a doubt in their mind and I could understand that they preferred not to intervene for him at that moment.

Let us bear in mind that I have cautioned them not to accept cases that could be too difficult for them to dispose of. Cases such as sexual assault on children, for example, generally need the advice of experts and are out of the range of their expertise.

In the last few years, I have not imposed any fines on Aboriginal offenders, except those that are compulsory under the law. Instead of fines, I sentence them, with their consent, to make donations to various community organisations. The donations vary depending on the time of the year. For example, at certain times, the donation will be made to the recreation committee to help young hockey players buy equipment for the winter season. In other instances, it will be made to the shelter for the victims of family violence to help keep it open. Money has been given to the corps of cadets, to the Girl Guides, to the local community radio station, which helps the Court quite often, and to many other community organisations that are in need of money.

The donations are always paid, even if sometimes the offenders have to be called and reminded of their obligations. I have realized that they feel better when they pay a donation instead of a fine. They probably feel that their wrong behaviour could be, in a certain way, forgiven by their fellow citizens. Anyway, in our Northern Aboriginal communities, everything is lacking and I prefer to impose donations that will help the community organisations than to send money to the Government.

The Committee makes many suggestions to the Court when it comes to imposing community work rather than sentences. Instead of sentencing a member of the community to hours of community work without explaining what the community work will be, I prefer to qualify and explain the community work to them, making the payment of their debt to society more real for them.

For example, I have imposed on young offenders the obligation to chop and haul a few cords of firewood for an elderly widow who was in need of it. I have sent some other people in the bush to hunt and give the product of their hunt to the band council, to be distributed to poor families of the community. Some others had to paint the cadet locals.

I ordered another individual, who was particularly gifted in languages, to translate, from English to Naskapi, various documents for the members of the Justice Committee who do not read or speak English. It would be too long to enumerate the duties imposed on offenders. Let us say, however, that if this kind of sentence was helpful to the members of the community, it benefited the offenders even more, as it brings with it a certain healing power.

The President or a member of the Justice Committee generally supervises the community work, is in touch with the person who has to perform it and reports to the Court. I have seen them try to support an accused who was sentenced to a term of detention by saying to the Court that they would keep in touch with him while he served his sentence and that they would be waiting to see and help him upon his return to the community. I think that there is no better way to start rehabilitation.

I see no illegality in this process. The President of the Justice Committee is in continual contact with the probation officer, by phone of course, because he resides generally over 300 miles away. He reports to him, makes the regular follow-up which the probation officer could not make because of the distance or the costs. Furthermore, as I said before, the suggestions of the President of the Justice Committee are only a recommendation or a suggestion to the Court, such as those we see very often in probation reports.

I would like to see everyone practice this kind of justice. However, it's not easy to induce judges and lawyers who lead our justice system to change their way of thinking and to follow a path different from the one that has been followed for so long.

The Canadian system is based on Common Law, as in England. Common Law is based on traditions anchored deeply in the European-British system. Things change eventually, but it takes time. At the moment, some organisations, like the Aboriginal Justice Learning Network, constitute vehicles for the development, evaluation, communication and education to various members of the justice system in order to bring back to the Aboriginals this restorative justice process that is consistent with their values and traditions.

Wanting to spread those values, the AJLN people have held some ten work sessions all over Canada, during the last two years. I have had the privilege of being a guest speaker at a number of these sessions. In Vancouver, I addressed defence attorneys, suggesting to them to be more inventive in their recommendations of sentencing. In Winnipeg, I spoke to Crown prosecutors, inciting them to be more lenient sometimes, and to consider that detention is not a panacea for all crimes, that sometimes there is place for rebuilding in the life of an offender.

In Montreal, I spoke to judges sitting in Aboriginal communities, explaining that they may be, sometimes, too professional, and that they may look also to new avenues, particularly in the sentencing process. In Calgary and Quebec City, I congratulated police officers for their new positive approach in Aboriginal communities of the North.

At the invitation of Mr. Ovide Mercredi, I have addressed a meeting of First Nations Peoples urging them to request, firmly if necessary, more understanding from our Courts. To Aboriginal women, I have said that they could denounce before our Courts the abuses they have suffered and still suffer.

I hope that the message to all those participants was well understood. We are beginning to see some changes and an organisation like the AJLN should receive credit for those changes. The AJLN is still alive, is a good tool and should continue its work.

What is the realistic result of this way of proceeding? We feel now a difference in various communities. In Kawawachikamach, for example, a year ago the officer in charge of Quebec Provincial Police wrote me that he saw a change, especially about violence. When he compared 1995 and 1996, he saw a general decrease of 26% in criminality and a decrease of 53% in violence and assault. He attributes this situation in part to the attitude taken by our Court in applying a certain community justice. The report of this year shows another curve in crime. Assaults and mischiefs are down by 5 and 42%, breach of probation and undertakings by 25%. In general, this year, the criminality is down by 10% compared to last year. If we consider that the previous year, the criminality in general was down by 26%, and now, by an additional 10% for last year, I may think that the trend continues and is the result of the efforts of everyone who feels that community justice and alternative sentencing pays, not in the future, but immediately.

I have had many discussions with the Department of Justice representatives. Now, our government realizes that the creation of a justice committee in each community is a good thing and favours it. We are now walking in new avenues. I hope that this road will lead us to a "Justice à la Carte," especially fit for the Aboriginals who need it.