Innovations in Mainstream Justice

The Honourable Judge L. P. DESHAYE*

I begin with a distinct advantage today. I have come completely unprepared, except by experience, 22 years as a Provincial Court Judge. Judge Fafard and I were both appointed to La Ronge in 1975, one month apart. Judge Ken Page of British Columbia was unable to be here today, and I am here in his place. So my remarks will be brief and are only a few personal impressions of where we are going in sentencing.

I thought I would address the question "who are the innovators in sentencing"?

A broad definition might be : "those who implement the process arriving at the sentence". Of course, there are several constituent components. I suggest to you that the Judges are not the only ones :

1. Parliament which creates the law;

2. The offender, who breaks the law;

3. Those who endure the consequences of the breach of the law (including the victim, the families of the victim and offender, and the society at large);

4. The prosecutor, representing the Crown;

5. The judge and all those who assist the judge. I include in this category all those upon whom the judge depends to administer a just sentence.

When I use the term "constituents" I do so advisedly, because the system we know best treats these components as a "constituent" element, each with its own interest to protect and nurture. Often the constituents are in conflict, one an adversary to the other. The efficacy of this system and its adversarial nature is under review. In some quarters it is under attack, especially in sentencing. So I will speak a little about efficacy.

As for the constituents, Parliament must be given credit for the statutory framework. Some may argue that whether by accident or design Parliament has created not so much the structure or guiding framework, but an "opportunity" for new ideas to emerge. It is not only politically correct but politically expedient to leave that role to the judges and their devices. And more than ever it is necessary. My colleague, Judge Fafard, would say that Parliament has forced the judicial innovators to be more imaginative and, God help us, more *effective* if we can.

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I believe my judicial colleagues are committed to their work and they take their role seriously. They want to do the "right" thing, but the questions is what is "right". My own concept of what is "right" is what "works". For whom it works is, of course, another question, and has many facets. Our objective should be to satisfy all the constituencies.

We who sentence daily seek an effective sentence. But before a sentence can be effective, it must be acceptable. I was privileged yesterday to meet with several people involved with the Aboriginal Justice Learning Network where these ideas of compartmentalizing the various roles came into serious questions. The new thinking, which need not be restricted to the Aboriginal community, advocates a holistic approach where all the constituents are partners. It is not yet an equal partnership, because ultimately the judge has the responsibility to render a fit sentence, and that is ultimately his/her responsibility alone. It advocates a partnership, nevertheless.

Circle Sentencing is a working example of this type of restorative thinking. And to put in two words what my Chief Justice, Judge Bayda, said this morning, it "makes sense". The innovation this concept speaks to is not really very difficult. It requires a "paradigm" shift — there is a word we hear a lot of these days. The paradigm requires a change of viewpoint only. From the judge saying "here is the sentence I impose" to "what sentence is acceptable"? When that second question is answered, then we will have an effective sentence. To be "acceptable", and therefore "effectual", the sentence has to reflect the views of the other constituents in some meaningful way. Consultation with the victim and family and the offender and family is, I think, vital. Consultative sentencing is not such an earth-shaking idea. We have a form of it already, with our traditional way of listening to the Crown and Defence before we sentence. All it really needs is some flexing and expansion. Maintenance of community supports (and they can be varied and several) is also vital. If we do not have these components, then we run the risk of this deplorable situation where even the Judges themselves lose faith in the efficacy of the sentence. Some of my judicial colleagues have done some very imaginative things — people like Claude Fafard and Linton Smith. In this respect I am merely one of Judge Fafard’s disciples. I too have met with Community Justice Committees, more than anything to demonstrate that I am open to new approaches and discussion of new alternatives. I believe that is part of our judicial role in the challenging times ahead.

I think our innovations have to demonstrate that our system of justice can adapt to and embrace restorative measures. In this respect, I do not wish to be misunderstood. We need not advocate the complete remaking of our system. But I do urge that it is a system which is increasingly less relevant to the problems for which we are supposed to be part of the solution.

"Innovation" is a word that has some immediacy. But it is no more demanding a word than "commitment". Ours is a game of inches and it will take time. It will also take commitment by Judges individually. If you think about it, it is something that can be accomplished with willingness.

I hope you will take a few of these hastily organized thoughts into your deliberations over the next few days and I am grateful for the opportunity to speak to you.