

# Innovations in Aboriginal Justice — Community Justice Update : Yukon

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The Honourable Judge Heino LILLES\*

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\* Yukon Territorial Court, Whitehorse, Yukon.



The purpose of this paper is to describe two community justice initiatives which have developed independently in the Yukon during the past decade. While both are based on First Nations culture, much of that culture is based on principles of family and community and the notion that social and economic factors, prior victimization and personal dysfunction such as alcoholism are the main causes of crime. These principles are relevant to non-aboriginal communities as well, and therefore their experience will be useful in other settings. The paper also draws on the Yukon experience to identify barriers to the development of community-based justice programs. And finally, this paper considers the new "conditional sentence of imprisonment" and its compatibility with existing programs.

## I. DEVELOPMENTS IN TESLIN

Teslin is a small community of 550 people, mostly of First Nation Tlingit ancestry. I have been the assigned judge in this community for 10 years, and since 1991, the five clan leaders began sitting with the Court to advise on sentencing.<sup>1</sup> This arrangement was one of mutual benefit, both to the Court and the community.

The community wanted to renew its traditional clan structure, one where clan leaders have considerable authority over its members including discipline.<sup>2</sup> Teslin was convinced that this was the only way to make their families and community healthy again. Through their participation in the court process, the clan leaders reinforced their status in the community. In particular, this had a considerable impact on the younger people in the community who had less knowledge of and commitment to the old traditions. Since the initiation of this community court procedure, I have never had occasion to deviate from the substance of the clan leaders recommendations.

At the same time, the court benefited as well. At sentencing, much more detailed information was available concerning the offender, his background, his family and his needs.<sup>3</sup> Through their participation, clan leaders and the community became aware of the causes of offending behaviour. They were able to identify community resources and services which were lacking and took political action to acquire them. And, after court was over, and the court party left, the clan leaders remained within the community. The clan leaders and the community retained "ownership" of the disposition which they developed and provided a supervisory presence in the community. Everyone who is sentenced knows that they will have to make one or more further appearances before the court and the clan

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1. The first case which relied on community representation for sentencing in Teslin was *R. v. P.(J.A.)*, [1991] 6 C.R. (4th) 126. It involved several familial sexual assaults. This case is discussed in the excellent publication by The Church Council on Justice and Corrections, *Satisfying Justice* (July, 1996) at 75. It is also commented on by R. Ross, *Returning to the Teachings, Exploring Aboriginal Justice* (New York : Penguin Books, 1996) at 16-19.
  2. A more detailed description of the Teslin community justice initiative can be found in H. Lilles, "A Plea for More Human Values in Our Justice System" (1992) 17 *Queen's Law Journal* 328 at 339. This article also sets out the disposition given in *R. v. P.(J.A.)*, *supra* note 1, and an excerpt from a subsequent review hearing.
  3. In turn, this has had an impact on the role of probation officers who normally provide the court with similar information through predisposition reports.

leaders for a review of their disposition and will have to account for their actions in a public forum in front of their community.<sup>4</sup>

The Teslin Clan Leader Model of community justice accommodates and does not exclude circle sentencing. Typically, the more serious offences are dealt with by a circle, but fortunately these serious cases now occur rarely in Teslin. *R. v. Porter*,<sup>5</sup> is the most recent, and as it illustrates several points about the Teslin program, I will summarize it briefly.

Ms. Porter was a 61 year old elder, without a criminal record, who was convicted after trial of wounding an adult male, some 20 years her junior, with a knife. The incident was totally unprovoked and unexplained and could only be accounted for by the high levels of intoxication of both the accused and the victim. Ms. Porter pleaded not guilty because she had no memory of the event, but was convicted after trial.

The consensus of the sentencing circle was that a community disposition was not appropriate for Ms. Porter, and she was sentenced to gaol for 6 months. An application for a conditional sentence was denied. The factors which led the Circle to this conclusion included the following :

1. For the 9 months prior to her sentencing, she made no effort to deal with her serious alcohol problem, through counseling or treatment;
2. She spent a good deal of this time outside the community of Teslin, and there was police information that she had been drinking, in direct violation of her undertaking;

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4. One of the statutory terms of a probation order, which is consistently overlooked, is to "appear before the court when required to do so by the court" : *Criminal Code*, s.732.1(2)(b). Relying on this provision, most probation orders made in the Yukon are directed to be returned to court for at least one review, and *all* dispositions based on community participation and recommendation will come back for several reviews. This process serves to empower the community, motivates the offender, sets deadlines for probation officers and other professionals who have responsibilities pursuant to the order, provides the judge with feedback on the available resources in the community, and reveals to the community what resources are missing. In summary, it is the strongest sentencing tool in the judge's arsenal.

5. *R. v. Porter* August 9, 1996, Y. Terr. Ct, [unreported].

3. The community concluded that she needed a period of enforced sobriety and that she must start her counseling and treatment in a structured environment;
4. The community needed time to develop a support plan to receive her back into the community.

This case illustrates that community dispositions can include periods of incarceration. The idea that community circles are incapable of recommending gaol is a myth, perpetuated by lack of information,<sup>6</sup> special interest group bias,<sup>7</sup> or by those who resist change in any form.<sup>8</sup> Where gaol is recommended, it is often for a shorter period than would be ordered in a formal court proceeding, in part because community input provides more and better information about the offender, his prospects and community resources. In circle sentencing, the offender will often have initiated or completed a counseling or treatment program and will have prepared a convincing long-term healing plan prior to sentencing. With community support and supervision, alternatives such as house detention or curfews, wilderness camps, abstention from alcohol and drugs, and community service become viable terms of a probation order, thus reducing the length of the custodial term.

But even when gaol is recommended, as in the case of Dolly Porter, its main objective is not punishment, but rehabilitation. The community knows that the offender will return to the community, and therefore healing, and strengthening ties to family and community must be the primary objectives. As with Ms. Porter, the offender is sent to gaol with community support, with plans to maintain contact and to arrange for a continuation of the rehabilitative program immediately upon release.<sup>9</sup>

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6. Notwithstanding the Yukon origins of Circle Sentencing, there continues to be considerable resistance to this community justice initiative. Without exception, the most vocal critics have never attended a Circle and base their objections on incorrect information as to what actually occurred in a particular case, on misconceptions as to the operation of Circle sentencing, or a lack of appreciation as to what would have happened in ordinary court had the case been dealt with there.
  7. In the Yukon, some of the strongest resistance to community justice initiatives has come from those employed to support victims. This is surprising because these individuals know how ineffective the formal justice system can be in dealing with victims, victims' needs and family violence. It is possible that the support groups that are created to assist victims early in the Circle Sentencing process are perceived as "competition" by the established victim services providers.
  8. The Yukon experience has been that the defence bar and probation services were quick to embrace community justice initiatives, that the Crown office has done so, but more slowly, and that the greatest resistance has and continues to be demonstrated by the Territorial Department of Justice, largely by way of inaction. Government bureaucracies tend to be controlling and slow changing at the best of times, and the fact that community justice was not developed by and cannot be directly controlled by the department may contribute to the continuing lack of support from that quarter.
  9. It has been reported to me that Dolly Porter did very well in custody. Upon the community's recommendation, she was immediately transferred out of the Whitehorse Correctional Centre to a small correctional facility very near Teslin where she could be closer to her family and community, to facilitate visits. She is teaching traditional language and crafts to other inmates

While criminologists and politicians prefer to focus on case outcomes or recidivism rates, measuring the impact of what happens to offenders misses the most significant contributions of community justice programs. As Judge Stuart states :

*The impact of community based initiatives upon victims, upon the self-esteem of others working in the Circle, on strengthening families, building connections within the community, on enforcing community values, on mobilizing community action to reduce factors causing crime, to prevent crime — and ultimately to make the community safer — while not readily visible these impacts are, in the long run significantly more important than the immediate impact on an offender's habits.*<sup>10</sup>

Similarly, the involvement of the Teslin clan leaders in the court process beginning in 1991 was part of a larger process of community development. Subsequently, there has been a noticeable increase in social services resources, counseling and activities for youth.<sup>11</sup> The size of the court dockets has decreased significantly, as has the time required to deal with the cases before the court. Trials are rare, as there is a much greater willingness for offenders to accept responsibility in a non-adversarial process which focuses on rehabilitation and not punishment. Guilty pleas are entered early, and in family violence cases, it is not unusual for the offender to have initiated formal counseling and treatment prior to sentencing.

There is no doubt that processing a case through a circle takes more time than a sentencing in formal court. Involving the clan leaders in the case of a simple impaired driving sentencing may turn a five-minute proceeding into a twenty-minute one. But in the longer term, the savings are significant. Court time spent in Teslin is now one half of what it used to be, due to fewer cases on the docket, less serious cases and fewer trials. There are corresponding benefits for other components of the justice system, including the police, probations, corrections and registry staff. And victims are spared the often humiliating, adversarial trial process.

As a result of working together in a community justice environment, mutual trust and confidence between the major players, the Crown, police and community, has increased. As an example, the Teslin Tlingit Council established a Peacemaker Court based on their clan system and in March 1996, the Crown signed a protocol which permits the diversion of offenders from the formal justice system to this community-based court.

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in the facility. As soon as she is released back into the community, there will be a full Court review of her probation order, which will necessarily include reports from the correctional facility, her plan to deal with her alcoholism and the community's plan to receive her back into the community and to support her.

10. B. Stuart, "Circle Sentencing in Canada : A Partnership of the Community and the Criminal Justice System" (1996) *International J. Comp. & App. Crim. Justice* 291 at 293-4.
11. Only several years ago the Court docket in Teslin was busy with young offenders whose main recreational activity seemed to be drinking. Their main complaint was always "There is nothing else to do!" Through the community court process, this message was heard and acted upon. Today, the situation has changed substantially. By way of contrast, there have been no youth on the docket in Teslin for the last four court circuits.

Although this program was started prior to proclamation of *Bill C-41*, it is a form of adult diversion now sanctioned by section 717 of the *Criminal Code*.

Within the Peacemaker Court process, individuals are accountable to their respective clan and the community at large. The behavior of a clan member is viewed as the behavior of the entire clan. Each clan and all members within each clan are held responsible for the conduct of their clan membership and it is the responsibility of the entire clan to resolve the wrongdoing of clan members. Conflict requiring resolution between members of the same clan is dealt with within the clan in question. Resolving conflict between two or more clans requires participation of the clans involved in the dispute.

A referral to the Peacemaker Court process can be made only if all parties involved consent, including the victim, offender and the Peacemaker Court itself. A diversion to the Peacemaker Court can occur at any of these stages :

1. Pre-charge, in which case the referrals will come from the police, victim or other community member;
2. Post-charge, with the agreement of the victim and the Crown; or
3. During court proceedings.

The current Protocol Agreement between Justice Canada and the Teslin Tribal Council allows for the diversion of *Criminal Code* summary conviction offences and more serious offences to which both parties agree. The Peacemaker Court then has the option of :

1. Informally resolving the incident;
2. Entering into a diversion agreement with the offenders;
3. Referring the matter to the police for formal charges.

The objectives of the Peacemaker Court are primarily rehabilitative and restorative :

1. Encourage healing and reparation for individuals in dispute or in conflict with the law;
2. Combine traditional and contemporary forms of justice to create a balanced system;
3. Educate and create awareness of the history, culture and traditions of Tlingit people relating to justice;
4. Hold Teslin Tlingit citizens accountable to their community and clan(s) in a way that is meaningful to them by practicing traditional justice.

These objectives are achieved by providing a forum (Peacemaker Court) for all involved parties, including the victim, offender and the Clan members at large, to be heard. Decisions are made in relation to reparation to the victim and/or the victim's clan. Case (treatment) plans developed by the Community Program Services Department are reviewed and approved for the accused and where appropriate and consented to, for the victim.<sup>12</sup> The Peacemaker Court will also conduct follow up reviews to monitor compliance with the case plan.

The Justice Coordinator is the point of entry in the Peacemaker process and is key to its smooth operation. Reports from citizens, and referrals from Crown and police are made to this office. The Justice Coordinator initiates the Peacemaker process, acts as liaison between clans, police, Crown, victims and support persons, sets Peacemaker Court hearings, notifies all relevant parties, and oversees the administration and record keeping. Where a case plan is imposed, the Justice Coordinator oversees the implementation of the plan to ensure the offender complies with it.

The role of the Teslin Tlingit Community Program Services Department in the Peacemaker Court process is critical. As the main focus of the Peacemaker Process is to promote mediation, resolution, responsibility and healing, it is necessary that the Community Program Services Department be involved throughout the Peacemaker process, and when appropriate, to provide case plans and intervention for both the victim and accused. It is in fact the social services arm of the community, responsible for counseling and referral to other helping agencies. Teslin provides an example of a community justice system where there is an effective integration of both justice and social services.

A steering committee with representation from the Crown, police and the community has also been established to oversee the operation of the Protocol which sets out the terms of referral to the Peacemaker Court.

It is of interest that the first cases that have been brought to the Peacemaker Court have involved family violence, (including a charge under section 267 of the *Criminal Code*) where alcohol has been a factor for both parties. Unlike the formal court process, the Peacemaker Court is able to focus on the needs and rehabilitation of both parties, the offender and the victim. And, because it is not primarily concerned with punishment, family victims are much more likely to make disclosures and seek help both for themselves and the offender.<sup>13</sup> While it is too early yet to measure the success of the Peacemaker Court in Teslin, those individuals referred to it are reportedly doing well, and of those charges that have been referred post-charge, some have already been stayed,

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12. One of the main weaknesses of the adversarial and punishment-oriented formal criminal justice system is that it cannot address the needs or in some instances, the dysfunction of the victim. In family situations, sending one spouse to an alcohol residential treatment centre is a waste of resources where that spouse then returns to a family where other members of the family continue to abuse alcohol. As a judge, I can order a battering husband to treatment, but I am powerless to provide counseling resources to the battered wife.
  13. Self-reporting studies indicate that more than 60% of all crime in our society does not get reported and that in the case of family violence, that figure is closer to 85%.

indicating that they have been dealt with by the Peacemaker Court to the satisfaction of the Crown.

## II. KWANLIN DUN UPDATE

Kwanlin Dun is a First Nations community within the municipal boundary of Whitehorse. In January of 1992, Kwanlin Dun became more involved with community justice issues. Due to a large number of Kwanlin Dun First Nation cases entering the formal justice system, it became increasingly evident that many Band members were re-committing offences with little or no community support in place for either offenders or victims. In response, the Kwanlin Dun First Nation leadership began a consultation process with justice officials to examine alternatives to the formal justice system. The community felt it would be important to implement alternatives that would focus on healing and wellness, and the motivation of the offender to become a healthy member of the community. It was recognized that these alternatives must deal with the problems and not just the symptoms, with the desired outcome to be a healthier community and therefore a reduction in Band members in trouble with the law.<sup>14</sup>

Kwanlin Dun Circle Court deals primarily with sentencing where a guilty plea has been entered. Offenders wishing their cases heard in the circle are now required to complete an application and develop an action plan (with the assistance of a support worker), which is reviewed by the Justice Committee.

When the offenders meet with the Justice Committee, they are encouraged to provide information about where they are on their healing path. They are also encouraged to bring along people from the community who are willing to support them and who believe they are motivated to make changes in their life.

The victim will be contacted to discuss the crime, any support or resources they need, how they feel about the offender applying for circle sentencing, and whether they would like to be part of the process. This information is discussed with the Justice Steering Committee.

Based on the information provided by the offender (particularly what steps they have taken on their action plan), their support worker, and the victim, the Justice Steering Committee and Elders will make a decision about approving the application.

If the application to circle court has been approved, the offender works closely with members of the Community Justice Program prior to their court appearance.

Guidelines do exist with regard to eligibility for circle sentencing. Kwanlin Dun has published the following in conjunction with their formal written application form :

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14. The rationale and procedure followed by Kwanlin Dun in their Community Justice Program is set out in a booklet entitled *Kwanlin Dun Community Justice : Circle Sentencing*. These procedures are set out and applied in the case of *R. v. Gingell* June 18, 1996 (Y. Terr. Ct.) [unreported].

**A. Qualifications to Apply**

1. Offender has pled or has been found guilty to all outstanding charges (preferences will be given to early pleas of guilt);
2. Adult or young offenders may apply;
3. If not a member of Kwanlin Dun, the offender must have at least two Kwanlin Dun members agree to support them (note : preference will be given to persons who reside in McIntyre Subdivision, and to members of the Kwanlin Dun First Nation);
4. Offender must be motivated and willing to commit a wellness or healing plan and to follow that plan. The offender must be willing to agree to all requirements of their Circle Sentence.

**B. Steps Required**

1. You must advise the Court as soon as possible of your intention to apply for Circle Sentencing. This may be through your lawyer or Court Worker;
2. Find at least two community members who are willing to support you in your healing, who will be available to attend Justice Committee meetings to answer questions, and who will attend Circle Court to support you. You need to discuss this with them and if they agree, they must sign your application form;
3. Make an offering to an elder and if he or she agrees to support you, have the elder sign your application form;
4. Complete and submit the Circle Sentencing Application as soon as possible to the Justice Committee at the Community Justice Office #7 O'Brien (note : applications must be received by the Justice Committee at least two weeks before your scheduled Court appearance downtown. This will ensure there is enough time to notify the Court if your application is approved);
5. Meet with a Community Justice Support Worker as soon as possible to discuss your application and to start putting together a healing plan.

As this is a court proceeding, the judge must ensure that the circle sentencing process meets the minimum requirements of the *Criminal Code* and of natural justice. When an application is made to the court for a circle sentencing in the Kwanlin Dun community, it must be made in open court, and the following additional requirements for eligibility must be met :

1. The offender must fully accept responsibility for his/her crimes before the Circle;
2. The offender must have significant support from the community, friends, or family;

3. The offender must complete all steps in the application process;
4. All steps necessary to formally accept a guilty plea must be followed.

The procedure for conducting circle courts is also set out in a circle sentencing booklet published by Kwanlin Dun.

### **C. Kwanlin Dun Circle Court**

Circle proceedings are conducted in the Kwanlin Dun First Nations Potlach House and all community members are encouraged to attend and participate. Chairs are arranged in a circle, and the Judge, removed of formal gown, is seated in the circle along with defence and Crown counsel, the offender, the victim, formal and community-based justice representatives, and community members.

The Keeper of the Circle welcomes participants and explains the purpose and guidelines of the Circle. All participants are introduced and then the charges are read, followed by Crown and defence counsel giving opening submissions. The Keeper of the Circle then invites community members to speak. This includes submissions from the victim or someone speaking on behalf of the victim. Elders provide knowledge and support within the circle. Honesty is a very important factor in the circle. It is essential that the positive and the negative (reality) are discussed so that the needs of the victim and offender can be met and solutions to the underlying conditions of the criminal behaviour are addressed. It is understood that the decisions that are made in the circle will affect the community as a whole.

After everyone has had an opportunity to speak, the Keeper of the Circle, Justice of the Peace or the Judge will address the circle to determine if a consensus has been reached about a sentencing plan. Once the circle process is complete, the sentence plan will be imposed. However, if the offender has not followed through on his\her action plan and/or met with the Justice Steering Committee, the circle may send the case downtown to the formal justice system for sentencing or the judge may sentence the offender in the circle, taking the lack of motivation into consideration.

In all circle sentencing cases, a community sentencing plan will involve commitments by the offender and the community. The sentencing plan will be supervised by a probation officer or a community support person.

The Court's own procedures supplement, and where there is a conflict, override the community guidelines :

1. Any criminal record or any other reports are received and marked as exhibits in the circle hearing process;
2. All proceedings are recorded;
3. A disputed fact is judicially determined in the usual manner through evidence heard under oath;

4. The circle hearing is open to the public;
5. All participants are given an opportunity to speak;
6. Crown and Defence are given the opportunity to participate and provide opening and closing remarks;
7. The circle attempts to work towards a consensus. If a consensus is reached, the Keeper, Judge or Justice of the Peace may summarize the consensus. The Judge or Justice of the Peace will set out those parts of the consensus that relate to the offender in a Sentence.

If a consensus is not reached, the Keeper and Judge or Justice of the Peace will summarize the matters agreed upon, and those not agreed. A Judge or Justice of the Peace will then impose a sentence based upon all evidence heard in the circle. All sentences are recorded in accord with the common practices of a criminal court.

The Kwanlin Dun document also sets out what may happen after the Court has imposed its sentence.

#### **D. After Court**

There is continued contact with the victim. This may be to advise them of the outcome of court, and/or offer support and/or continue resources. There is ongoing supervision of the offender to assist them in meeting the conditions of their probation and/or to assist them with the continuation of their healing plan. A failure to abide by the sentencing plan may cause a review in the circle, and in some cases may involve a breach and sentencing by the court.

The purpose of the sentence and the involvement of the community with the offender after court is to promote healing within the community, a positive reintegration of the offender into the community, and healing and support for the victim.

### **III. EVALUATION**

Over the past several decades, there have been quite a few community justice initiatives in Canada. The great majority have withered on the vine, due largely to lack of support, including lack of financial support from departments of justice. Under funded programs seldom have monies for evaluation, so it is not surprising that there is very little hard information as to how well these initiatives did, as compared to the formal justice system.

It is imperative that all new justice initiatives be evaluated properly. The introduction of conditional sentences in Canada marks a major change in sentencing in Canada. In six months, there have been thousands of conditional sentences imposed. I am not aware of any ongoing evaluations, although there are already criticisms surfacing in

the media. Without a formal evaluation it will not be possible to refute the critics or to improve the process.

Evaluations of justice system initiatives should compare the results with what the formal justice system would achieve with similar cases. Relative costs will be an important point of comparison. Both short-term and long-term benefits should be evaluated, as should secondary impacts, such as benefits to community development, health and education. In the longer term, the latter are more important than recidivism rates.

Most evaluations of justice system initiatives focus almost exclusively on recidivism rates. Involvement of the community in the justice system can produce additional and perhaps more important benefits which should also be evaluated :<sup>15</sup>

1. Empowering individuals and families to assume greater responsibility;
2. Reconnecting offenders to supportive families and communities;
3. Rebuilding a sense of community;
4. Redressing the underlying causes of crime;
5. Addressing the needs of victims;
6. Public legal and social education.

An informal evaluation of 65 subjects who have completed circle sentencing in Kwanlin Dun between 2 and 5 years ago is currently being conducted by my colleague, Judge Barry Stuart. At this time, I can provide some preliminary data, with a caution that any conclusions must be considered tentative.

On average, these subjects averaged 20 criminal convictions at the time of circle sentencing. All but one of the 65 subjects had a significant substance abuse history. Equal periods prior to and after circle sentencing were compared. An overall *decrease* in criminal convictions of 82% is observed. If process offences are excluded, the reduction in offending behaviour is closer to 90%. Almost one half of those who went through circle sentencing committed no further offences.

As the criminal records of the subjects who went through circle sentencing in Kwanlin Dun show, it is not a form of diversion for minor offences or first offenders. Because the process involves a significant time and emotional commitment from a large number of community and family members, it is reserved for serious cases where the individual demonstrates a sincere desire to change his or her lifestyle. In the Yukon, circle sentencing is most often used for persistent offenders who are also chronic substance abusers for whom the formal justice system has had little or no ameliorating effect.

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15. B. Stuart, *Building Community Justice Partnerships : Community Peacemaking Circles* (Ottawa) : Department of Justice, 1997) at 13.

There is no doubt that in a number of these cases, the motivation for change and for choosing circle sentencing was stimulated by the prospect of the offender going to jail for a lengthy period of time on the new offence. This is not a bad thing in itself. The issue is whether the threat of jail combined with family and community support, operates to change the behaviour of the offender for a lengthy period. Preliminary indications are that for some offenders, it can. This observation is consistent with accumulated experience in the area of alcohol and drug addictions. The positive indicators of successful treatment are :

1. Motivation;
2. Strong family support;
3. Employment or other positive activities.

The circle sentencing process, the family and community support during the lengthy probation period and professional counseling usually results in a period of sobriety, a new circle of friends, better relationships with spouse and family, and often a job. All this serves to reinforce and make permanent the change in lifestyle adopted during the circle sentencing.

#### **IV. MYTHICAL BARRIERS TO COMMUNITY JUSTICE<sup>16</sup>**

The most difficult barriers to establishing community justice systems are mythical ones. These myths are based on false or misleading information, perpetuated by media, politicians and special interest groups. They include :

1. The Justice System is "soft" on criminals. Fact : next to the United States, Canada has the most punitive justice system in the developed world;
2. Only punitive sanctions work. Fact : there is now an increasing body of evidence that establishes punitive sanctions increase, rather than decrease, recidivism rates;
3. Crime rates are rising, so we must get tougher. Fact : all the evidence indicates that crime rates are static, or moderating slightly;
4. Only professionals can solve our crime problems. Fact : an over-reliance on professionals has resulted in the demise of families and communities as the major elements of social control, and this is associated with increased criminal activity in our society;
5. There is nothing I can do. Fact : community justice initiatives rely on community members first, professionals secondly;
6. Community justice is only for small, aboriginal communities. Fact : community justice processes, whether circle sentencing, family group conferencing or other restorative programs apply to empower individuals, family and communities to take responsibilities for the causes of crime, regardless of ethnicity or community size.

#### **V. FEATURES OF SUCCESSFUL COMMUNITY JUSTICE INITIATIVES**

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16. See B. Stuart, *supra* note 10, Appendix B at 134.

Yukon communities have been experimenting with justice initiatives for about eight years. Some have been more successful than others. The more successful initiatives incorporate a number of common features.

#### **A. Development of a Community Justice Organization**

Communities with successful justice initiatives have established local justice committees, produced clear written procedures, and have obtained funding for a "manager" to undertake the extensive administrative work involved. While community volunteers are an essential part of a community justice system, they will quickly burn out or lose interest if overloaded with administrative responsibilities.

#### **B. Community Ownership**

Community justice initiatives often get started around or because of a particular issue or case which is of concern to a number of people in the community. It is important to expand the initiative beyond this one issue and to involve a larger segment of the community. Local or municipal political approval at an early stage provides visibility and credibility. Presentations to community organizations such as service clubs, church groups and trade unions can result in moral, organizational and financial support. The involvement and support of the local media will also prove invaluable in increasing community awareness and support.

And finally, it is imperative that those individuals involved in initiating the project give up control, share credit with others and constantly reinforce the initiative as one belonging to and involving the whole community. Volunteers must be treated in such a way as to maintain their motivation : this necessarily involves delegation of real responsibility. Effective and regular communication with volunteers, community groups, political leaders, and the community as a whole is necessary if community support is to be maintained.

Community justice programs emphasize restorative values and principles and are less concerned with punishment, which is the mainstay of our formal justice system. Community justice relies on a different process, but is also based on fundamentally different values. To be successful, there must be a significant investment in communicating information, public education, and training in order to alter the existing justice culture in the community. It requires a paradigm shift, a different way of thinking about "justice", not only by the system professionals but also by the general public.

#### **C. Obtain and Maintain Support of Justice System Professionals**

This is perhaps the greatest challenge facing the development of a community-based justice system. People are surprised to find that the "justice system" is not a system at all, but an aggregate of different components : Crown, defence lawyers, police, probation officers, victim workers and judges. These justice system professionals work independently of each other and have different values and objectives. Each component

must be approached and won over separately. The front-line police are essential to the success of any community-based program, but may be reluctant to get- involved because they see community justice as "social work". They are apprehensive about exercising discretion or doing something different for fear of adverse public and media reaction. Crown attorneys tend to believe in the efficacy of the adversarial punitive justice system in which they have significant power and control. Defence lawyers are apprehensive about change and worry that their role may be reduced or even eliminated in a community justice system. Victim workers may actively resist the reduction in the tension between victims and offenders which results from bringing victims and offenders together, because it erodes their power base. Departments of Justice, like any government bureaucracy, do not want to give up budgets, staff, control and their centralized policy-making role. And many judges, generally conservative by nature, find giving up control and decision-making to the community very difficult. And finally, in a society where fear of crime far exceeds reality, it is a brave Justice Minister who publicly states support for community justice initiatives which uninformed members of the public will view as being a soft response, mistakenly believing that crime is escalating in their community.

#### **D. Support for Volunteers**

The involvement of community members who actively participate in the work of the community justice initiative as volunteers is essential and critical to the success of any community justice initiative. Their role must be recognized by providing support, training and funding. Funding is important to provide a salary for a manager who is responsible for organizing meetings, communicating with interested parties and professionals and taking responsibility for the day-to-day administration. Modest funding should also be available to provide reimbursement for out-of-pocket expenses incurred by volunteers. Volunteers may reasonably be expected to give their time, but it is unreasonable to expect them to support the justice system financially out of their own pockets.

"Burn-out" is a fatal disease for any volunteer organization. It results in the loss of experience, continuity and commitment. It discourages others from volunteering. It results in a loss of credibility with formal justice agencies. It undermines essential community support.

Burn-out can be avoided by effective training, clear, written operational procedures and guidelines, matching volunteers' interests with assigned responsibilities, a genuine delegation of responsibility to volunteers, quick feedback and regular recognition of contributions made by volunteers. It can be avoided by having a broad roster of volunteers and a mechanism for providing immediate help and assistance when problems arise, perhaps by means of a mentoring program.

Burn-out can also be avoided by establishing effective screening procedures for offenders before being accepted into community justice programs. Screening out those individuals unlikely to successfully complete the community justice program will avoid unnecessary frustration which can lead to burn-out.

## VI. OTHER ISSUES

1. Lack of networking : A sense of ownership which is too strong can result in isolation and inhibit networking and partnership with other community and justice organizations. Effective networking and communication with other justice and community organizations is essential for the survival of a new community justice initiative;
2. Special interests : Individuals representing special interest groups can create divisiveness and frustration. Strong leadership and defined goals and objectives can avoid distractions within the organization;
3. Workload : Insufficient work for committee members can undermine commitment, as can lack of delegation. On the other hand, too much work can result in frustration and burn out;
4. Professional control : While involvement of justice system professionals is both necessary and helpful, care must be taken to prevent a takeover. For example, if the police voice becomes too strong, the initiative will become an extension of the police, not the community. It will lose credibility in the eyes of other players in the justice system.

## VII. IMPACT OF BILL C-41

The amendments to the *Criminal Code* brought about by *Bill C-41* can have a significant impact on maintaining and developing community justice programs across Canada. The following aspects impact on Yukon community justice programs.

1. Conditional Sentences : Are important to the Yukon community justice initiatives because they legitimize what our courts have already been doing with suspended sentences. In many community dispositions, after circle sentencing or community involvement, suspended sentences have been imposed, sometimes for very serious offences. Suspended sentences and probation have been used creatively to achieve the results desired by the community. For example, probation orders have included terms providing for house arrest, curfews, counseling and residential alcohol treatment, residence clauses, intensive supervision and lengthy firearms and alcohol prohibitions. Some of these earlier cases would have been better suited to a conditional sentence of imprisonment, because of the more effective mechanisms for accountability in the event of a breach;
2. The focus of community justice has always been the safety of the community, relying primarily on treatment, healing and change of lifestyle of the offenders. It has also been to heal victims, because in small communities it is well known that today's victims often become tomorrow's offenders. Safety of the community is also the principal factor to be considered on a conditional sentence application. As a result, conditional sentences, supported and supervised by the community, will fit in very well with community justice initiatives;

3. Objectives of Sentencing are Separate and Discrete : *Bill C-41* has performed a great service by adding clarity to the difficult task of sentencing. While we are all familiar with the main goals of retribution, deterrence, denunciation, incapacitation and rehabilitation, there has been considerable disagreement as to how these conflicting principles are to be applied in a given case. Judges believed that the *Criminal Code* required them to develop a sentence which met all these goals. As stated in one case :

*Actually, the real problem is created by the judiciary being placed in the position of serving these conflicting interests. Being required to be all things to all men, sentences vary widely and really serve no one interest adequately. Sentences bear the character of compromise and often hurt those they intended to serve.*<sup>17</sup>

Section 718 sets out the purpose of sentencing. In my view, this statement of purpose does more than merely codify the existing law. It makes clear that the sentencing judge need not craft a sentence which attempts to meet all of the purposes and objectives of sentencing. The new provision states that the sanction imposed may "have one or more of the following objectives". The sanction need not balance or compromise all of the purposes and principles. The sentencing judge can, in all of the circumstances, decide that the sentence should focus on rehabilitation, and not put any weight on denunciation or general deterrence. A judge who decides that a prison term is called for, need not pretend that it will also be rehabilitative;

4. Objects are Community-Based : Three of the six purposes set out in section 718 capture the essence of community or aboriginal justice :

*Section 718*

[d] *To assist in rehabilitating the offender;*

[e] *To provide reparations for harm done to victims or to the community; and*

[f] *To promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.*

These clearly stated purposes give validity to community-based justice initiatives. Unfortunately, the entire set of objectives are contradictory, and do not provide a clear direction to those involved in the justice system. As a result the participants will still be working inefficiently, and at cross purposes to one another;

5. The "Other Sentencing Principles", sections 718.2(d) and (e) direct that sanctions less restrictive than custody should be considered first, with particular attention to the circumstances of aboriginal offenders. Again, these principles are

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17. *R. v. Turner*, (1970) 1 C.C.C. (2d) 293 at 296 (Ont. C.A.).

totally consistent with the community justice initiatives in the Yukon, and also justify the conditional sentence of imprisonment which can be served in the community;

6. Alternative Measures for Adults : Section 717 establishes a framework for alternative measures for adults which closely parallels section 4 of the *Young Offenders Act*. It provides a mechanism for removing less serious cases from the formal justice system. It also provides authority for establishing aboriginal Peacemaker Courts, with the consent of the Crown, to deal with more serious cases, as has occurred in the Yukon community of Teslin. Alternative measures, while not a sentencing option, are part of the overall policy of minimizing the degree of intervention and penetration by the justice system in our society.

### VIII. POSTPONEMENT OF SENTENCING

In the Yukon, circle sentencing, and other court procedures involving participation by the community in the sentencing process, necessarily involve adjournments or postponements of sentencing. The first adjournment occurs early in the process, after one or two court appearances, when the accused indicates a guilty plea and asks for time to make an application to a community justice committee. This adjournment is usually for one, possibly two months. It usually involves the offender developing a plan for his personal healing and also for making things right for the victim. He has to identify a support group from the community. The justice committee will also contact and discuss the proposal with the victim.

If the application is sincere, the offender appears committed, and his plan is acceptable, a member of the justice committee will appear in court with the offender, and indicate that he has been accepted into the program. Members of his support group are usually present, as is his lawyer. If a guilty plea has not been entered previously, it is formally entered at this stage. At this point, a date is fixed for circle or community sentencing, requiring a further adjournment, usually between one and four months. The length of this adjournment will be dictated by what the community wants the offender to do prior to sentencing and court availability. These requirements are formalized as part of an undertaking, and quite often include terms such as abstaining from alcohol and drugs, regular meetings with counselors, attendance at A.A. meetings, complete a residential alcohol treatment program, participate in other programming or counseling, such as for anger management, family violence or sexual offending. The offender's performance prior to sentencing will be an important factor in determining the final disposition.

The final disposition always involves an extended period of probation, which addresses the offender's needs and attempts as well to restore the victim. Sometimes, it includes a period of incarceration, but usually for a shorter period than would have been imposed in the formal justice system.

Some offenders are not accepted into circle sentencing, because they do not display sufficient commitment to change their lifestyle or deal with their addictions. In that case, the offender will be sentenced in normal court, usually within three months of this first appearance.

Some offenders are accepted for a community disposition, but withdraw prior to sentencing. The usual reason for withdrawing is that the offender has not been able to maintain sobriety during the interval. On the other hand, because the screening of applicants prior to circle sentencing is strict, the great majority of persons sentenced successfully complete their probation terms.

In the result, prior to being sentenced in a community justice program, the offender will receive several adjournments or postponements, delaying sentencing for a total of three to eight months from first appearance. The reasons for the postponements, namely to start personal healing, initiate restitution, and demonstrate commitment to change, appear to be inconsistent with the directions given by the Courts of Appeal across Canada. These cases lay down the following guidelines for postponing sentencing :

1. Sentencing may be postponed to obtain a pre-sentence report, psychological assessment, or additional information concerning the offence, offender or victim.<sup>18</sup> Educational and work-related postponements have been allowed;<sup>19</sup>
2. Sentencing should not be postponed for a lengthy period simply for the purpose of determining whether the accused will behave himself during the period of postponement.<sup>20</sup> Other unacceptable reasons include waiting to see if the accused makes restitution, cooperates with police or aids in other investigations;<sup>21</sup>
3. In one case, a postponement of five months was found within, but at the outer limit of acceptable delay.<sup>22</sup> But a seven-month delay to see if the accused could get his drug habit under control was excessive.<sup>23</sup> And in a recent circle sentencing case in Saskatchewan, an adjournment for a year, involving banishment for purposes of punishment and rehabilitation, was considered excessive.<sup>24</sup>

A good review of the issues and principles can be found in *R. v. Cardin*.<sup>25</sup> In this case, the judge postponed imposition of sentencing for 26 months, while the accused remained in a residential treatment centre for drug abuse, then moved into a halfway house and was then reintegrated into society in the labour market. The judge then imposed a three year probation sentence. The Crown appealed, but the appeal was dismissed. But the Court of Appeal clearly indicated that what the trial judge did was wrong, and not authorized by the *Criminal Code*. At the same time, the Court of Appeal recognized the

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18. *R. v. Fuller* (1969), 3 C.C.C. 348 (Man. C.A.).

19. *Ibid.*

20. *R. v. Muise* (1975), 15 N.S.R. 10 (C.A.) and *R. v. Shea* (1980), 42 N.S.R. (2d) 218 (C.A.).

21. *R. v. Numner* (1976), 30 C.C.C. (2d) 199 (Ont. C.A.).

22. *Ibid.*

23. *R. v. Shea*, *supra* note 20.

24. *R. v. Taylor* (1995), 104 C.C.C. (3d) 346 (Sask. C.A.).

25. *R. v. Cardin* (1990), 58 C.C.C. (3d) 221 (Que.C.A.).

"astonishing results" achieved by this approach, of which the case at bar "is but one example".

## IX. BILL C-41 AND POSTPONING SENTENCES

### *Section 720*

*A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.*

This section is to be contrasted with section 570(1) of the *Criminal Code* which requires that on the acceptance of a plea of guilty or on a finding of guilt, the judge [...] shall endorse the information accordingly and shall sentence the accused [...].

In my opinion, *Bill C-41* has changed the law with respect to postponing sentencing :

1. Section 720 requires "sentencing" to take place "as soon as practicable", not immediately, as suggested by section 570(1) or by the reported cases. "As soon as practicable", in this context, contemplates the possibility of some reasonable delay, in order that the offender can demonstrate that he has changed since the commission of the offence, and that the community is not endangered by a disposition which permits him to remain in the community;
2. *Bill C-41* has incorporated new non-custodial and community-based principles for sentencing, and has created the new "conditional sentence of imprisonment" to be served in the community. Moreover, prior to imposing a conditional sentence, the court must be satisfied that the safety of the community is not endangered. This will often require the offender to demonstrate that he has changed since he committed the offence. *Bill C-41* underscores the importance of obtaining information in relation to the offence, offender and community prior to sentencing. It may take some more time to assemble this information;
3. Section 720 requires the judge to "conduct proceedings to determine the appropriate sentence to be imposed". In my view, this is to be contrasted with "and shall sentence the accused" found in section 570(1). Section 720 contemplates the possibility of more elaborate proceedings, involving more and different kinds of information, with the objective of reducing the use of custodial dispositions;
4. The pre-*Bill C-41* cases forbidding postponement of sentencing do so on the basis "that both society and the accused have the right to have a case heard and disposed of within a reasonable time". If it is a right of the accused, surely that right can be waived. And if society, meaning the accused's community, wants some delay, to work with him in a community or aboriginal justice system, to ensure the subsequent safety of their community, why should judges who do not live in that community, object?

5. Finally, I believe that *Bill C-41* contemplates a justice system where judges and the community involve themselves in order to produce the "astonishing results" referred to in the *Cardin* case. To achieve these results will require community involvement, close monitoring of the accused by the community and the court, and some modest delays by way of postponement of sentencing. These delays need not and should not be inordinately lengthy. In the Yukon, circle sentencing takes place within three to eight months of first appearance. If an accused pleads not guilty, his trial would not take place more quickly. Provided the sentencing takes place within the *Askov*<sup>26</sup> time parameters, the time frame will be a reasonable one, in accordance with *Charter* standards. To hold otherwise would encourage an accused to plead *not guilty* initially, and thus obtain the extra "rehabilitation" time, and then change the plea to guilty prior to trial. A more honest and open approach is to be encouraged.

## CONCLUSION

I believe that *Bill C-41* could be a vehicle for change in our justice system. It could become a very important one, because of the latent frustration with the formal justice system, its inefficiencies and its ineffectiveness. My personal optimism is restrained by the following realities :

1. *Bill C-41* does not offer an integrated approach, but rather some contradictory alternatives;
2. Judges and justice system professionals retain the same discretion which has resulted in the current high rates of incarceration;
3. The legislation does not provide any guarantees of government support for these initiatives;
4. Legal professionals are conservative by nature and will resist change;
5. Government departments will not easily give up the dollars necessary to effect a proper delegation of justice responsibilities to communities;
6. For change to take place also requires the broader community to recognize that there is a problem, and to develop a consensus on what the solution should be : so far this has not yet happened.

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26. *R. v. Askov*, [1990] 2 R.C.S. 1199.