

Yukon Sentencing Circles and Elder Panels

Heino Lilles was a visiting fellow at the Institute for 2 months earlier this year during which time he explored his interest in restorative Justice processes. He is a judge from Canada with considerable experience of sentencing circles. The following article provides some insight into indigenous restorative practices in the Yukon.

Introduction

Canada is not a very good place to live if you are an aboriginal person. Aboriginal people represent 2% of the population but account for 17% of the admissions to custody. This over representation is even more dramatic in the western provinces. For example, in Saskatchewan, 8% of the population is aboriginal yet 76% of the jail population is native.

Canada is even a worse place to live if you are an aboriginal child. Aboriginal children are eight times more likely to be taken into care by child welfare authorities than their non-native counterparts. For example, approximately 10% of children in Manitoba are aboriginal, while 60% of children in the care of the child welfare authority are aboriginal. Aboriginal youth are also disproportionately sentenced to custody: they represent 24% of custodial admissions, an over representation by a factor of 10.

In spite of numerous public inquiries and Royal Commissions, native incarceration in Canada has remained largely unchanged for the last 50 years. Marginal social and economic conditions, poverty and alcoholism continue to be operating causes of family dysfunction and criminal behaviour. The formal justice system continues to criminalize and label young people at an early age, increasing the likelihood of early, repeated and lengthy incarceration. Faced with these realities, the Yukon courts decided to explore more culturally relevant approaches. Two of those initiatives are circle sentencing and Elder Panels,

Circle sentencing

Circle sentencing is part of the court process. The sentencing circle replaces the formal sentencing hearing and attempts to divert defendants, not away from court but away from jail and into community based programming. Circle sentencing, therefore, is not often used for minor

charges, as the process is intrusive, lengthy and requires significant commitment from all participants. It has been used for both adults and youth, and primarily but not exclusively for aboriginal offenders. Jail can be an outcome, but when it is imposed it is usually for a shorter time and often for reasons other than punishment. For example, the offender has a serious addiction and needs to be 'dried out' in a safe supervised environment before the community is prepared to work with him.

There are some prerequisites. The offender must normally enter a plea of guilty at an early stage of the proceedings, thus indicating an acceptance of responsibility for the offence. In some communities, the permission of a community based justice committee must be obtained and the offender must demonstrate sufficient motivation to follow through what is usually a lengthy and difficult process.

The victim is advised of the offender's application for circle sentencing in advance and is provided with information about the circle process. The victim is also assisted in establishing a support group and is encouraged to attend the hearing with the support group. Unlike courts, victims are full and equal participants in circle sentencing hearings. The victim does not have a veto over the process, and not all victims choose to attend, although they attend circles more frequently than courts.

The procedure is as straightforward as the name suggests. Anyone is entitled to attend and participate, although in practice only those who know the offender and the victim do. Chairs are arranged in a circle and the session is chaired either by a respected member of the community, sometimes called 'the keeper of the circle,' or by the judge. Usually between fifteen and fifty persons are in attendance.

The seating arrangement is symbolic. Everyone is seated at the same level and the judge takes off his gown to emphasize that everyone is equal and that everyone will be heard. The proceeding usually starts with a prayer from an elder. Then the participants in the circle introduce themselves, the charges are read and the offender formally accepts responsibility in front of the community. The prosecution and defence lawyers make brief opening remarks, and usually do not speak again until the end of the proceeding.

An eagle feather or some other meaningful object is passed around the circle. Only the person holding the feather is entitled to speak. The feather is passed around

the circle as many times as is necessary to develop a consensus. The victim or someone representing the victim will talk about the impact of the offence. The offender must also speak, and explain what happened.

Unlike court-based sentencing, the discussions focus on more than just the offence and what can be done for the offender and the victim. Elders will talk about life in the community before crime became prevalent. Others who have been victims of similar offences describe how they and their families were affected. The various participants in the circle will talk about what can be done within the community to prevent this type of dysfunctional behaviour in the future.

In most cases, these discussions take from two to eight hours, usually spread out over two separate circle sentencing hearings. Often at the end of the first circle, the offender is given a set of interim goals. The circle will reconvene several weeks, or even months, later to review the offender's performance and make any necessary changes to the recommended plan. At this time, the judge will impose the final sentence incorporating the recommendations of the circle.

The result of the circle sentencing hearing is most often a community-based disposition that attempts to address the harm caused to the victim and the needs of the offender, usually by supervision and programming. The terms of the order are quite lengthy and detailed, specifying attendance at pre-determined counseling and treatment programs, and may also include culturally relevant conditions that would rarely be found in a probation order made in courts

After being sentenced in a circle, the offender's progress in following the sentencing plan is monitored by the support group, the community Justice Committee (if one exists) and a probation officer. Thereafter, the offender's progress will be reviewed periodically by the court (in a circle). These reviews hold the offender accountable, but also serve as a check on the justice system professionals who, along with the community members, are working with the offender

The circle is premised on three principles that are also part of the culture of Yukon's aboriginal people. Firstly, a criminal offence represents a breach of the relationship between the offender and the victim as well as the offender and the community. Secondly, the stability of the community is dependent on healing these breaches.

The third premise is that the community is better positioned to address the causes of crime, which are often rooted in the economic or social fabric of the community. These principles are consistent with how restorative justice views crime: not merely as an offence against the state but as an injury done to another person and the community that must be repaired

The circle redirects responsibility for developing a workable solution to the community. It promotes a sharing of responsibility to ensure that the sentence is successfully implemented. The circle discussions force community members to explore the causes of crime and what needs to be done to make their community safer. This equality created by and within the circle is essential to building a partnership between the community and the justice system. It combines empowerment with responsibility. And because of the reduced role of the justice system professionals, the potential for cross cultural bias and discrimination is lessened.

Elder panels

Fourteen years ago, the court docket in the Yukon town of Teslin was indicative of a fairly dysfunctional community. Many of the cases on the docket involved violence, and a disproportionate number of accused were young people. Alcohol was a factor in nearly all of the cases and few offenders were willing to accept responsibility for what they had done. Courts were not having a positive impact on crime rates and the community viewed them as an outside institution: the court came into town, sent a number of people to jail and then left the next day. The court was viewed as punitive, not rehabilitative, and this was inconsistent with the community's culture.

After a number of meetings with leaders in the aboriginal community, it became apparent that the aboriginal community wanted to renew its traditional clan structure. Everyone belonged to one of five clans, which functioned like large extended families. A respected elder presided over each clan. Clan leaders had considerable authority over their members, including responsibility for discipline within the clan and also for resolving problems between clans. The community was convinced that by renewing their traditional clan structure and by revisiting their original cultural values, their families and community could become healthy again: "in order to go forward, one needed to understand where one had been". It was agreed that the clan leaders would sit with the judge on the bench and that the judge would defer to their on sentence.

Involving the clan leaders in the court process, and giving them both the authority and responsibility for recommending sentencing plans to the court, was of mutual benefit. This process empowered the clan leaders and had a considerable impact on young people under 30 years of age, who had less knowledge of and commitment to the old traditions. At the beginning, it was very unusual to find a young person who knew who his clan leader was. Today, it would be an exceptional case if a young person could not identify his clan leader.

The court benefited as well. Offenders are much more willing to accept responsibility in a rehabilitative, non-punitive justice system and, as a result, lengthy trials were avoided. The offender, the victim and the community more readily accepted the dispositions made on the recommendation of the clan leaders. After the circuit court left the community, the clan leaders and the clan retained ownership of the disposition and assumed responsibility for supervising it and the offender. And when the court returned to Teslin two months later, the court received a report on the offender's progress. When the offender's plan was successfully completed, it was not unusual for the offender and his or her spouse and children to be present in the courtroom to receive congratulations from the clan leaders and the court.

The Teslin Elder Panel is both restorative and community based. It is restorative in that it addresses victims' needs and offenders' rehabilitation. By successfully following through on the clan leader recommendations, offenders reintegrate themselves into their community. The clan leaders always reinforce the fact that the offender has great potential and is a good person but that what he or she did was wrong. By making recommendations that we accepted by the court, the community is empowered.

But just as importantly, this process permits the community to learn about the causes of crime and about the impact of crime within their community. The community is then in a better position to take remedial action, to reduce those factors causing crime, and to make their community safer.

Ten years later there are substantial differences in the Teslin community. Teslin has developed as a healing Center where trained counselors deal with alcohol, family, and

emotional problems in ways that combine traditional approaches with modern ones. The community has developed a youth program and has hired a recreation director. The community has an ice rink and the local police are actively involved in running a hockey program. Court dockets have reduced dramatically as have the number of serious offences on the docket. Court lasts for half of one day, and most of the time is utilized, not in dealing with new cases but in reviewing the performance of offenders who have been previously sentenced. There are now very few denials of responsibility, due to the participation of clan leaders. Because offenders know that the dispositions will be restorative and rehabilitative rather than punitive, they enter guilty pleas at a very early stage of the proceedings.

As a direct result of the elder panels, the community established a peacemaker court in 1996. With the cooperation of both the police and the prosecutor, many cases are now referred directly to the peacemaker court where the clan leaders dispose of them without any conventional court involvement. Moreover, the peacemaker court can be proactive and preventative by dealing with issues before they become criminal charges: for example, it can deal with objectionable behaviour by young people or alcohol problems in a family. Today it is very unusual to have a youth appear on the Teslin docket.

Article originally appeared in the *Criminology Aotearoa/New Zealand*. A Newsletter from the Institute of Criminology, Victoria University of Wellington. September 2001, No. 16. Used by permission.