

## **THE MYTH OF SWAN: THE CASE OF *REGINA* v. *TAYLOR***

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### **Abstract / Résumé**

The sentencing circle, a traditional way of issuing sanctions in First Nations communities, is endorsed by the Judiciary in many parts of Canada. This paper uses the Dene myth of Swan to discuss and illustrate the principles of sentencing circles in Dene and Métis communities in light of several current legal cases.

Dans de nombreuses parties du Canada, le système judiciaire approuve les conseils de la détermination de la peine, façon traditionnelle d'émettre des sanctions dans les communautés autochtones. Cet article se base sur le mythe dene de *Swan* pour examiner les principes des conseils de la détermination de la peine. Il illustre en outre la place de ces conseils dans les communautés dene et métis à la lumière de plusieurs procès actuels.

## The Myth of Swan

Swan, one of the mythic heroes of the Dene, is banished by his father for purportedly sexually molesting his step-mother. Swan is taken to an island in the middle of the ocean and tricked into staying there. It is springtime when he is abandoned. It is the time when the swans are returning from the south. Swan is left without tools, and it is his artifice that facilitates his survival.

A year later his father returns to seek Swan's bones. But Swan is still alive. It is then Swan who tricks his father. Swan takes his father's canoe, and leaves the island. Ten days later, Swan returns to find his father dead with feathers sticking out of his mouth.

Swan becomes mad with grief. It had not been his intention to kill his father, only to teach him what it was like to be alone. Swan goes back to the mainland to confront his stepmother, but as his stepmother sees him, she backs into the water, where she is boiled to death, proving that her accusation of rape was untrue. Swan's guilt is doubted; he neither admits guilt nor claims innocence. This doubt is introduced into the story through the death of his stepmother. This horror sends Swan into deeper sorrow and he takes up with *Onli Nachi*.

At first, Swan does not know who *Onli Nachi* is, but soon she asks Swan to help her kill people for food. Then Swan suddenly remembers who he is. He can never kill people. *Onli Nachi* kills a man and a woman, and pursues two children. Swan cannot stand idly by, so he rescues the children by attacking *Onli Nachi*. After Swan conquers *Onli Nachi*, he is transformed into *Saya*.

*Saya* lives out his life transforming mythic animals, as a guardian spirit, into animals that can be eaten by the people. Eventually, *Saya* is called to heaven and becomes the link between earth and heaven, summer and winter, like his counterpart, the swan.

The story tells us, of course, that a period alone in the bush can enable a person who manages to survive to realize the necessary order of the universe: one must not do certain things (such as killing people), and must do other things (such as ensuring food for others). Those who achieve a vision while separated from the company of others, learn the rules of surviving together with others.

In recent years a number of courts in Canada have adopted innovative procedures for dealing with Aboriginal offenders. These include such practices as sentencing circles, a means of reaching decisions on punishment and rehabilitation within a community setting, and vision quests, or healing approaches rooted in traditional concepts relating individuals to spirits within the communities. These methods seek to substitute emphasis upon healing and rehabilitation for the usual practice of simple—and remarkably ineffective—punishment and/or compensation for offenses committed against individuals and communities. In effect the courts have finally begun to recognize that the previously accepted means of dealing with many offenses, means which have separated the offender from the offended, have all too often failed to do more than delay further offenses. In recent years the courts appear to have discovered a greater ability to consult with all parties, including the communities of both the offenders and offended, and have begun to seek ways of healing those problems within individuals and communities which often lead to breaches of the peace. This new emphasis upon healing and rehabilitation necessarily falls back upon methods of socialization within Aboriginal communities, means which have for generations worked to minimize conflict within these small, well integrated groups of hunters and fishers. Both group decision-making—or, more properly, the lack of autocratic decision-making—and the process through which cultures encourage the development of secure individual identities within communities now form major new alternatives for Aboriginal offenders in the existing, rather blemished, criminal justice system. It is therefore worth describing some of these approaches in terms of traditional Aboriginal societies before looking at specific recent cases in Canada.

Many of the Cree and Dene hunters of western Canada experience visions, either as pre-adolescents or as adolescents. These visions mean contact with spirits, often a guardian spirit, and the achievements of some means to contact spirits for guidance in adult life. In some groups, such as the Dunne-za of British Columbia (Ridington, 1988), the vision experience is not directly sought, but rather occurs almost “naturally” in the course of childhood exploration in the bush world. In other cases, such as the western woods Cree, individual adolescent males are sent out to the bush alone to seek visions (Smith, 1981:260; Rossignol, 1938:69-71). In virtually every case, the acquisition of the ability to communicate with, seek the assistance of, and benefit from one or more spirits is practical; persons who have had visions and can summon guardian spirits are better able to cope with the dangers and misfortunes of life. Moreover, in many cases the guardian spirits are presumed to teach proper moral behaviour, and to stress the importance of relationships between and among people, and between

animals and people. In essence, guardian spirits mediate among the worlds of humans, animals and spirits, and effectively dramatize and reinforce appropriate behaviour. In effect, those individuals who do not have that period of solitude or outright isolation in the bush with spirits, do not have the same knowledge of proper/improper behaviour as those who have had visions. Nor can they easily or effectively deal with disruptive social relationships among others; one might say they lack both the comprehensive understanding of human relationships and the spiritual tools necessary to assist other humans in need.

The myth of Swan among the Dunne-za of north central British Columbia, as related above, suffices to illustrate the concept of individual responsibility and the vision quest.

### **Aboriginal Practice in the Courts: *Regina v. Taylor***

In the case of *Regina v. Taylor* ([1995] 3 C.N.L.R. 167 (Sask. Q.B.); rev'd [1996] 2 C.N.L.R. 208 (Sask. C.A); aff'd [1998] 2 C.N.L.R. 140 (Sask. C.A), the choice of the court to use a sentencing circle and a traditional healing process, the vision quest, for the rehabilitation of an offender, bears witness to a new working partnership between First Nations and the Canadian justice system. The vision quest, as laid out in the myth of Swan (Ridington 1988: 126-138), for the Dene people, illuminates how individuals become members of the community, and, as the court adopts the time-honoured model of banishment and seclusion, tempered by a strong emphasis on community reintegration, the justice system and the Lac La Ronge First Nation are taking a real step forward by sharing the responsibility of re-introducing viable forms of Native justice into common procedure.

The premise behind the vision quest is twofold: to show a neophyte member of society that knowing something is far more important than having something, and to teach that knowledge of the animals and their mythic counterparts (especially the mental animal images encountered during the quest), are as much part of being a person as are the skills that are needed to hunt and dress them for nourishment. To both the Cree and the Dene, animals in the wilderness are more than food; they are guides throughout life. It is to the animals that a person turns for spiritual nourishment. The myth of Swan as applied to the case of *R. v. Taylor* convinces us that First Nations stories are not mere bedtime tales, but important vehicles for transmitting relevant cultural information.

The application of community recommended sentencing for William Bruce Taylor by The Honourable Justice James Milliken, Saskatchewan Q.B. has interesting parallels to the myth of Swan. Mr. Taylor was banished for a period of one year to an island for sexually assaulting a woman ([1995]

3 C.N.L.R. at 167). He was to be left with a limited amount of supplies, a two way radio, and traditional hunting equipment, not including firearms ([1995] 3 C.N.L.R. at 168-169). Prior to the order for banishment, in June of 1995, Mr. Taylor was seen by Court-appointed psychiatrists, who deemed him fit to live in isolation. He was to be instructed by the Elders of the Lac La Ronge community in ancestral modes of survival and was considered to be competent with traditional tools ([1995] 3 C.N.L.R. at 168). During the summer of 1995, members of the community visited him regularly to make sure he remained well. By fall, contact was limited to weekly radio conversations. Furthermore, Mr. Taylor had agreed to build his own accommodation, to repay the Lac La Ronge community for the cost of his food during his isolation and to take correspondence courses in anger management and alcoholism, and to upgrade his high school education ([1995] 3 C.N.L.R. at 174-177). The appeal process interfered with the completion of Mr. Taylor's original sentence, and it was changed to include banishment for a period of six months, a period of isolation which he completed successfully.

Mr. Taylor was asked by the community to use his artifice to turn his behaviour around. He was urged to turn into himself to find the source of his anger. The Court agreed to allow Mr. Taylor access to the appropriate counsel of Elders when necessary. The participation of the community during this time, while Mr. Taylor actively sought solutions to his problems, was designed to ensure that after he completed his period of isolation, he would be able to re-integrate into the community, not as a stranger returning from the alien experience of gaol, but as a member who had undertaken a ritual sanctioned by the community.

It is interesting to note that Mr. Taylor did not enter a plea: he neither admitted guilt nor denied it ([1995] 3 C.N.L.R. at 168). According to prevailing legal requirement an admission of guilt is a precursor to forgiveness and reform. The fact that guilt is not part of First Nations spirituality gives us clues as to how to approach First Nations justice issues. This also speaks to fundamental cultural differences that must be illuminated.

Besides the narrative parallels between the *Taylor* case and the myth of Swan, which include a sentencing in the *Taylor* case similar to Swan's banishment, the presence of a healing circle and a sentencing circle are possibly the first steps in putting together a partnership between the jurisdiction of the Crown and the jurisdiction of First Nations people with respect to justice issues.

## Native Sentencing and Healing Circles

Native sentencing and healing circles are possible legal means of breaking the pattern of First Nation repeat offenders who are, in effect, serving life sentences in increments (Hamilton and Sinclair, 1991:85-113). This may well be the opportunity to reverse the trend of endemic violence in Native communities and in urban centres by making First Nation offenders accountable either to their communities or neighbourhoods for transgressions. In all the cases discussed in this paper, it is agreed that a crime against a person and/or property has been committed. However, responsibility for the reconciliation process has been shifted ever so slightly from the individual's and the judge's shoulders to the community. Thus, a liaison is established between the Crown, the First Nation community and the offender, with respect to both the decision-making process on what the sentence is, and how the sentence is carried out. Current sentencing allows judges to receive submissions from lawyers, probation officers, and other interested parties. A sentencing circle, however, permits the community a more active role in determining what the sentence is, and how it should be carried out (Fine, 1995:A3).

One of the earliest cases recorded in Canada to use a sentencing circle, *Regina v. Moses*, ([1992] 3 C.N.L.R. 116 Y.Terr.Ct.), includes a well thought out plan with procedures intended to be applied to other cases. While of interest, these procedures pale beside the clear purpose of the circle itself.

Mr. Moses was a twenty-six year old youth with a very lengthy record. He was found guilty of carrying a gun with which he intended to assault a police officer, and of theft. He already had a record of 43 convictions and had previously been sentenced to a total of eight years in gaol ([1992] 3 C.N.L.R. at 116). He had been assessed many times over the previous twelve years as a person who needed extensive counselling by someone with whom he could bond. He was the victim of both abuse and neglect at home, and had spent the years from age ten to sixteen in a procession of foster homes, group homes and juvenile centres. During this period he suffered both physical and sexual abuse. He was also a victim of Fetal Alcohol Syndrome, and did not go beyond elementary school. He had been unable to find a job during the periods when he was not in gaol.

Typically he would commit offenses fuelled by significant alcohol abuse. Mr. Moses would appear in court and be sentenced to gaol. Upon release he would again fall victim to his long standing abuse problem, commit more offenses, and would be sent back to gaol. Two things were notable in his youth, although they are all too often very common for both Native and non-Native youth across Canada. The first is that numerous assessments were made over the years, some by professional health care personal and

some by people in the justice system. These assessments drew attention to the years of abuse of and by Mr. Moses, and many made concrete suggestions to provide remedial help in greater or lesser degree ([1992] 3 C.N.L.R. at 120). The second is that rather than providing practical restorative help—such as counselling, psychotherapy, living and working skills and so forth—the courts just kept sending Mr. Moses back to gaol. As Judge Stuart noted in his report on the sentencing circle, the only question was the amount of gaol time Mr. Moses should be given. Faced with the fact that Mr. Moses' crimes were becoming more and more violent, he decided instead to put an end to this cycle which clearly benefited nobody and was obviously harmful both to Mr. Moses and to the community.

Judge Stuart deliberately changed the usual courtroom process from one with the judge and court staff at one end of a square room, faced by Crown and Defence attorneys and whatever audience might gather, to a format more conducive to community involvement and less threatening to all participants who are not part of the justice system. Judge Stuart arranged thirty chairs in a circle, with the defence sitting next to the accused, whose family sat next to him ([1992] 3 C.N.L.R. at 122). The Crown sat across the circle, next to the judge. Various others chose their own places within the circle. They included members of the First Nation and some Band officials, the police and a probation officer who had met previously with many First Nation members including Mr. Moses' family. Formal opening statements by the judge and lawyers led into an informal discussion of what could be done to help Mr. Moses and to protect the community from further crimes and violence by him. The accused listened as many members of the community, and notably both his family and the police, spoke of the need to bring him fully into the community, to help him overcome his problems. It was clear the community did not simply want to remove him from their midst, but to have him back as a valued member of society. Mr. Moses was drawn into the discussion too, an unusual thing in itself. As Judge Stuart noted, his:

... eloquence, passion and pain riveted everyone's attention. His contribution moved the search for an effective sentence past several concerns shared around the circle... he did not convince everyone, nor did he ultimately secure what he sought, but his passion and candour significantly contributed to constructing the sentence ([1992] 3 C.N.L.R. at 127).

The accused had been through seven sentencing sessions before, but never had such an opportunity to participate, except through officials of the justice system. But a sentence was constructed for him, through this circle, with both family and community involvement, which clearly reflected that

wide participation. One person present thanked Mr. Moses, expressing appreciation:

...for sharing your pain with us, I have learned so much that I did not know before ([1992] 3 C.N.L.R. at 144).

The sentence that resulted from this community endeavour was a suspended sentence and two years probation. The sentence could be considered to be a three-part sentence; that is, the first part involved living on the family trapline for a period of time, always in the company of a family member; the second part was a two month residential program for Native alcoholics in the south; and the third part was residence with his family in the community and continual support services including skill upgrading, substance abuse counselling and assistance in finding a job. This, of course, is the crux of the community sentencing circle. That is, essentially it was aimed not at continuing the cycle of abuse, crime and gaol, but trying to reintegrate an offender into his family and community after he had been virtually written off. It was a rare instance of culturally appropriate rehabilitation rather than an exercise in providing fodder for what has become simply a costly penal system.

Mr. Webb, (*Regina v. Webb* [1993] 1 C.N.L.R. 148 Y.Terr.Ct.) like Mr. Moses, pleaded guilty to assault causing bodily harm and breaches of prohibition. In this case, the judge allowed two sentencing circles held at the request of the First Nation of which Mr. Webb was a member. The first sentencing circle included some thirty community members and twenty justice officials.

The pre-sentence report:

described the offender's essentially negative attitude towards rehabilitation, and apparent lack of remorse, and superficial efforts to understand or address his alcohol abuse or to control his anger ([1993] 1 C.N.L.R. at 153).

At the first sentencing circle a community member spoke of his own previous problems and pointed out that the professionals were not aware of many factors in the life of the accused. As Judge Stuart noted:

When John finished—no one spoke. John, by sharing his own experience had pushed deeper into the causes of violent conduct, than courts usually venture ([1993] 1 C.N.L.R. at 154).

Webb himself then spoke, movingly, and it became clear that rehabilitation measures rather than simply punitive measures should be considered.

Thus a second sentencing circle was held two months later, and a sentence based upon new information brought up at the first sentencing circle led to general consensus among community members of the circle.



Webb was fined \$100.00 for each breach of probation. Then Judge Stuart summed up the essence of the sentencing dilemmas:

The evidence was overwhelmingly persuasive that a significant rehabilitation plan was appropriate, the outstanding issue was whether the plan should be in concert with a jail term ([1993] 1 C.N.L.R. at 156).

Ultimately Webb was given a three part probation order, the maximum possible, with the following conditions intended to assist his rehabilitation:

- 1) keep the peace and be of good behaviour;
- 2) report to a Probation officer as soon as possible and there after as required by the Probation officer;
- 3) take such alcohol counselling and treatment as a particular community member or a Probation officer may require;
- 4) to take such counselling and treatment for anger management as a particular community member or a Probation officer may require;
- 5) to complete 200 hours of community work under the direction of a community member or in the absence of a community member or a Probation officer, and
- 6) appear before the court in Kwanlin Dun for a review within four months and at such other times as the court and other community members or a Probation Officer may require ([1993] 1 C.N.L.R. at 163).

Again, in the case of *Regina v. Rich* (S.) (No. 1) [1994] 4 C.N.L.R. 167 Nfld. S.C. T.D.; *Regina v. Rich* (S.) (No. 2) [1994] 4 C.N.L.R. 174. Nfld. S.C. T.D., Mr. Sylvester Rich was convicted on a charge of having sexual intercourse with a female who was not his wife and was under the age of fourteen. The community, through the Innu Nation counsel, requested that the court undertake a "sentencing circle". The Crown opposed the establishment of a sentencing circle because of the nature of the offence, the fact that the complainant, though supportive of having the sentencing circle, did not want to participate, and the range of the offence. The defence counsel suggested that Mr. Rich be given a short period of incarceration with lengthy probation under community control. A sentence of fourteen months imprisonment and three years probation under the control of the Innu Nation was imposed.

The unique features of this case warrant examination. The sentence reflects genuine remorse on the part of the accused as well as the victim's support for the offender receiving counselling and healing rather than a period of incarceration ([1994] 4 C.N.L.R. at 171). Furthermore, there was

a willingness on behalf of the community to partake in the process as an active participant in both providing support to the victim and assisting the accused in dealing with his problems through counselling and becoming an active volunteer in the counselling programs. In addition to the community support, Mr. Rich's provincial probation officer's recommendation that the accused was a good candidate for probation assisted all parties involved ([1994] 4 C.N.L.R. at 184).

Furthermore, Judge O'Regan listened to Ms. Jourdain—a Montagnais from Quebec—explain traditional Innu life ways and their perspective on crime, punishment, healing and spirituality. Generally speaking, the Innu prefer group meetings as opposed to sole authorities; hence the practice of the sentencing circle would not only facilitate community involvement, but also ensure that the decision reached by the group would be respected and would influence the accused. Since the Innu historically lived in the country and their total energy went towards providing for their families, crime was almost nonexistent. However, when an Innu looks for healing he/she wants to be accepted and cured. Healing means finding peace through forgiveness ([1994] 4 C.N.L.R. at 179). This is a cardinal point; Innu culture demands and expects everyone to help each other in times of crisis and times of joy. People are expected to put aside their anger and jealousy and cooperate. The statement from the victim—that though she did not want to participate in the sentencing circle until the accused had received some healing—is in keeping with her need for healing. It could be speculated that her healing was the community's responsibility and could only happen if the community was willing to acknowledge the greater problems of drug/alcohol abuse and sexual violence in the entire community ([1994] 4 C.N.L.R. at 178). Thus, "breaking the silence" is an integral part of the healing the process.

Collective responsibility for the offender and the victim must be there in order for the "healing process" to be effective. In allowing community involvement in the sentencing process the court is not losing jurisdiction; rather, it is merely sharing its control. By using probation coupled with incarceration with respect to Mr. Rich's situation, the court still has the power to revoke probation where there has been a breach and substitute a higher sentence ([1994] 4 C.N.L.R. at 182).

Likewise, in the case of *Regina v. Rope* ([1995] 2 C.N.L.R. 209 (Sask. Q.B.); aff'd [1995] 4 C.N.L.R. 98 [Sask. C.A.]), the accused, Charlton James Rope, a member of the Carry The Kettle Band in Saskatchewan, was operating a motor vehicle under the influence of alcohol and subsequently caused the death of his father, Theodore Rope. The accused's request for a sentencing circle was granted, and held in Regina. In this case the Elders

of the Carry The Kettle Band argued that it was important to incorporate Aboriginal methods of dispute resolution as confidence in the Justice system would wane if the accused went to gaol. Furthermore, the court determined that in this particular case they would be able to achieve a balance between reliance on the principles of sentencing (deterrence, protection of the public, punishment and reformation) and rehabilitation of the offender. Moreover, the sentencing circle fit the need to fashion a sentence that would have real meaning to the accused and his community; furthermore, the sentence would not offend the public perceptions of equality. The court further determined that any sentence imposed would pale in significance compared to the fact that the accused would have to live with the knowledge that he caused his own father's death. The sentence given to Mr. Rope was a combination of house arrest, electronic monitoring, and community service—that is, lecturing to individuals, in particular to children on-Reserve with respect to the consequences of drinking and driving ([1995] 2 C.N.L.R. at 217-218). Though the Crown appealed the decision of the sentencing circle, the court determined that Mr. Rope's exemplary conduct since the commission of the offence, and the fact that this was his first conviction, permitted the court to sustain his sentence ([1995] 4 C.N.L.R. at 98). Though leave to appeal was granted, the appeal was dismissed on the grounds that Mr. Rope's behaviour has more than met with the terms of the sentence's requirements. Though the court had recently developed ground rules for the interaction between sentencing circles and the present sentencing system in *R. v. Morin* ([1995] 4 C.N.L.R. 37), the court felt that Mr. Rope's situation did not necessarily represent the "extraordinary circumstances" as outlined in the majority decision of the *Morin* case. It was determined that if and when the facts reasserted themselves, a further determination of the validity of the sentencing situation would be made at that time.

The Saskatchewan Crown examined the legitimacy of Mr. Ivan Morin's (*R. v. Morin*, [1995] 4 C.N.L.R. 36 (Sask. C.A., rev'd [1994] 1 C.N.L.R. 150 (Sask. Q.B.)) initial sentence imposed by means of a sentencing circle supported by members of the Saskatoon Métis Local and the victims. The Crown had suggested that Mr. Morin, a Métis with 34 prior criminal convictions ranging from drunk-driving and small-time break-ins to attempted murder and kidnapping, did not warrant this consideration ([1995] 4 C.N.L.R. at 36). However, according to David Amot, general council to the Aboriginal Justice Directorate of the Federal Justice Department (Fine, 1995:A5), the most salient feature of Native sentencing is that this is done in partnership with a First Nation community. Yet, the Saskatchewan Court of Appeal decided with respect to Mr. Morin that the sentencing circle and

healing process of community service and monitoring was, perhaps, too lenient given the nature of the crime; a violent robbery, and an individual with a lengthy record. From the Crown's perspective, Mr. Morin, was not a "fit candidate for the calculated risk" the Court had to take by making Mr. Morin directly responsible to his most recent victims—the gasoline station he robbed, and the woman he attempted to strangle during his get-away ([1995] 4 C.N.L.R. at 77). Nonetheless, from a different point of view it could be argued that the habitual behaviours Mr. Morin displayed actually make him a more fit candidate; the reason being that since there is no rational method of predicting future outcome, the Crown's route of extracting justice may pose equal risk to Mr. Morin and possible future victims. Mr. Morin may spend the rest of his life in some type of penal situation, neither furthering the goal of incarceration as a deterrent, nor helping restore another's life or property. In addition, a question was raised as to the nature of the accused's community, suggesting that only tightly formed communities, as found on Reserves warrant judicial consideration for alternative sentencing practices. This suggests that First Nations personhood is limited to Reserve areas and does not extend to the boundaries of traditional territory.

The Crown contended that whoever was to be an applicant for a First Nation sentencing circle must be a "fit candidate" for the calculated risk the Crown was undertaking, by a clear admission of guilt. He/she must demonstrate that the investment in rehabilitation is a sound one, that the sentence that was to be handed down is equivalent to others for similar offenses in similar jurisdictions, and furthermore, that the nature of the offence and the record of the offender will weigh heavily as deciding factors. Furthermore, there must exist a community that is reasonably defined by its racial origins, religion, culture, geography, or some feature that distinguishes it from other communities and the community must recognize the accused not only as a member but as one who has the kind of relationship with the community that ought to make him or her feel accountable to it for any criminal wrong doing ([1995] 4 C.N.L.R. at 69-70). However, though the Crown was adamant in restricting these criteria in determining who was, or was not a "fit candidate" for such practices, they upheld the legality of Native sentencing circles because these circles are part of First Nation tradition and are becoming part of the judicial landscape.

## Discussion

First Nation societies demand from their members a rigid and accountable code of behaviour (Hamilton and Sinclair, 1991:50-54). Disruptive conduct or offenses against others that result in the death of innocent members could easily throw the group into peril. Sanctions against offend-

ing members are often severe and swift. Though it is assumed that it is up to the individual to assume responsibility for aberrant behaviour, it is up to the group to provide the necessary skills, both mental and actual, to enable any member to function as equals. When the lives of other members are at stake, then the group contends with the individual. Generally, before European settlement, inter-personal disputes within First Nations were handled in various fashions. From the simplest form of moving one's abode further away from the feuding parties, to finding a new leader to follow, remedies included banishment, and, if need be, death. With the advent of the Reserve system and European settlement, punitive sanctions and Canadian law standards have been imposed on local issues, with the result that First Nation people have found themselves not only at the mercy of another culture's concept of law, but the interpretation of correct behaviour given a set of extraneous circumstances. Thus, interpretation of any sanctions in the traditional way is problematic.

The traditional legal system of First Nation peoples is an oral tradition which served to maintain law and order as well as to restore a public peace. The principle difference between Euro-Canadian and First Nation law is seated in the intent of the individual and the act which is considered to be the crime. That is, the criminal act or crime in Euro-Canadian culture requires the presence of a guilty mind to carry out a guilty act. With a First Nation person, however, the offence is viewed as completely subjective and situational. There is the possibility that the criminal act, according to First Nation standards, may not exist at all. Furthermore, if a First Nation community has defined that a crime has been committed and the narrative suggests that the individuals involved, including the victim, are at fault, then the community's goal is not punitive and is solely directed towards healing the offender as well as the victim (Monture-Okanee, 1995:2). Thus the emphasis of Native justice is on healing, rather than on imposing punitive sanctions on individuals who are deemed by his or her community to be unwell. The actions of the individuals are conceptualized within the greater story, and as far as the community is concerned transgressors require rehabilitation.

Presently there is no accommodation in the Criminal Code for the banishment to isolated areas of countryside as a sentence. Euro-Canadian justice does not have an appreciation for the severity of this type of sanction. Those acting on behalf of the Crown do not see that banishment is far greater punishment than incarceration as a means to impose punitive measures, nor does the Crown have an appreciation of the re-integration process the individual will have to under go in order to be reinstated as a respected member of the community.

Mr. Taylor, like the character Swan, was sentenced to be left on his own, to use his artifice both for survival and to look into the sources of his anger. Mr. Taylor was asked to use traditional tools for survival, and as well to use traditional knowledge to examine himself and his motivations. In addition to being able to survive, he was asked to become a productive Canadian citizen by upgrading his educational level and demonstrating to Judge Milliken after a year in isolation that he would warrant a sentence reflecting his effort in turning his life around.

The Crown argued that Mr. Taylor's behaviour warranted incarceration. However, the tribal community had a great desire to acknowledge the presence of a member, namely Mr. Taylor. They could not let a person lapse into anonymity and become a statistic; instead they embraced his individuality and faults as theirs, or as potentially theirs. Furthermore, it appears that the Elders and other community members applied traditional knowledge and found that there was a possibility for Mr. Taylor to learn from this experience. What was desired by the community was that Mr. Taylor, over the years giving back to the community his experiences as a set of stories, will have a significant effect upon to others.

As for the Crown wondering if this collaborative sentencing practice is legitimate, though power may appear to have left the Crown's hands and have been entrusted to the Lac La Ronge First Nation, the community itself is fighting to restore a balance caused by a disruption. One could say that there is no transfer of jurisdiction, that is whether or not a "crime" has been committed or what the type of crime was, but only that the community wishes to remain stable and law-abiding.

## Summary

It would be disappointing if the Crown now suggested that First Nation's sentencing and healing circles were unlawful. Justice A.C. Hamilton and Judge C.M. Sinclair's work on the Aboriginal Justice Inquiry of Manitoba (1991), or Judge Sarich's Cariboo-Chilcotin Justice Inquiry (1993), has opened to the Canadian justice system possibilities that may help address high First Nation recidivism. First Nation justice issues must be addressed. Furthermore, the statement by Judge Milliken suggests that if there is a willingness on behalf of the individual to recant unacceptable behaviour, and if there is a community willing to support the process of rehabilitation, then the healing circle and community sentencing will work (*R. v. Taylor* [1995], S.J. No. 363 (Q) para:4). These innovative practices shed light on both the shortcomings of our Anglo-society, where community has formed in defence of the "rule of law," and on the extreme colonial pressures that demand assimilation of Aboriginal groups.

In making First Nation justice practices relevant to the "Anglo-community," we must take a discriminating look at our underlying reasons for the imposition of incarceration sentences and, at the same time, continue to seek out traditional examples drawn from First Nations' chronicles and applied at First Nations sentencing and healing circles. Furthermore, if First Nations' sentencing and healing circles can address First Nation recidivism, then the practice should be considered successful. However, if any part of the myth of Swan rings true for the Taylor case, it would more than likely be the eternal human struggle with anger and vengeance, which necessitates the reconstruction of a disruptive individual into a contributing member of society.

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