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1. Key Themes (to be explored)

Circles are one type community restorative justice approaches being used in the Yukon.

There is confusion around the terminology – part of this can be attributed to the types of circles being used.

- Talking Circle
- Healing Circle
- Community Circle – Community Peacemaking Circle
- Court Circle – Court Peacemaking Circle

In those circles where the Court participates, there is some discussion if this truly a form of community justice or court-connected form of justice.

Commentary on circles includes:

- barriers to implementation (e.g. changing people's beliefs and perspectives, time-consuming nature of the entire circle process)
- the nature and role of the community,
- concerns about the victim in the process,
- issues related to offender participation,
- the role of the judge.

2. Research Questions

2.1. Definitions

What kinds of circle processes are used in the community?

- Talking Circle
- Healing Circle
- Community Circle – Community Peacemaking Circle
- Court Circle
- Other

For each circle process how many were conducted over the last five years?

2.2. Guidelines

Are there guidelines for circles? *If so, the questions in the questionnaire could be adapted to meet the circumstances of the community?* Are they used by the community justice projects?

2.3. Application/Acceptance into the Circle

Who advanced the idea of having a Circle? Offender? victim? courtworker? defence counsel? Crown? Other?

Did the offender (or with the assistance of a support person) complete an application form indicating his/her:

- Offence
- Community supporters
- Reasons for applying to the community justice approach
- Goals/plans

What considerations were taken into account for making the decision to admit the offender into the circle process?

- **Offender's Input/Actions:** accepts responsibility and enters a guilty plea; genuine commitment to changing his/her life; sincerity of remorse; acknowledge hurt caused to others; demonstrate serious commitment to accounting for their harm to others; commit to healing/self-care; be prepared to compensate victims and community; meet as often as required with the local justice committee; develop a plan to take responsibility for the offence, reconcile with and compensate the victim; carry out all the steps required by the support group/justice committee; what offender has done rather than said
- **Connection of Offender to Community:** significant support from offender's personal community (friends, family, co-workers etc.); willing to be honest with the community; establish a balanced support group to assist him/her through all steps in the approach; demonstrate appreciation for community assistance and address their rehabilitative needs; identify a sponsor/Elder
- **Nature/type of the Offence;** minor/serious offence
- Circumstances of the offender
- Experience/Skills of the Community Justice Committee
- Impact on/Views of the Victim
- Views of the Crown
- Views/Participation of Elders
- Views of the RCMP
- Views of the Defence Counsel
- Impact on /Community readiness
- Potential benefits to the offender, victim and community

Who authorized the Circle? Community rep? Community justice committee? Court? Other?

In deciding whether to accept the offender application, did the community justice committee:
- Review the application
- Consult with Elders
- Meet with the offender, several times in most cases, and with the offender support group
- Assess the realistic objective of the offender's proposed plan
- Meet with the victim and his/her support group
- Review the criminal record and any previous pre-sentence reports
- Contact reference sources about the offender and offence (police, family, friends, employers and anyone else who could provide information)
- Review the capabilities and suitability of the proposed support group

Did the community justice committee reject the application?
- If so, did the case continue with the mainstream justice process? What was the reason for non-acceptance? or
- If so, did the committee seek additional information or test the ability of the offender support group – adjourning to enable the offender to demonstrate commitment. Was more information obtained? Was the case subsequently accepted or rejected?

Did the community justice committee accept the application?
- If so, were conditions imposed for the offender to follow in preparing for the community justice approach?
- If the offender failed to achieve the conditions imposed by the committee, was the decision to accept the offender reviewed?

What criteria were used in deciding when to hold the circle?
- Until the offender completed several conditions, including substance abuse residential treatment, or anger management courses
- Immediately because of tensions in the community – bail circle may be held
- Until the victim was ready to participate

What decisions were made regarding who would participate in the circle?
- Open to the public (except for healing or talking circles)
- Secure attendance of key people
- Special efforts to encourage voluntary participation by the victim & supporters/family; offender & supporters/family

How much time was involved in making the decision to accept the offender to the circle process?

2.3.1. Nature of the Offence

What was the nature of the case/offence?
If the case involved domestic violence was there prior counseling for the victim, offender, community members – were power issues handled/discussed?

2.3.2. Offender Profile

Did the offender have a connection the community – deep roots? relationship with victim, family, others

- Gender
- Ethnicity
- Age
- Disabled
- Group Home/Mission School
- Socio/Economic/Educational/Health status
- Faith/Spiritual Roots
- Previous criminal records
- Pre-victimization factors – previous experience/satisfaction with the justice system
- Previous participation in community justice processes

2.3.3. Victim Profile

Did the victim have a connection the community – deep roots? relationship with offender, family, others?

- Gender
- Ethnicity
- Age
- Disabled

- Group Home/Mission School
- Socio/Economic/Educational/Health status
- Faith/Spiritual Roots
- Pre-victimization factors – previous experience/satisfaction with the justice system
- Previous participation/satisfaction with community justice processes

2.3.4. Community Profile

Does the community have a connection to the offender and the victim?

2.4. Pre-Circle Process

2.4.1. Victim Preparation

See also chapter on 'victims'

Was the victim provided at the outset with a clear outline of what was expected from him/her and the steps in the process? E.g. information sheets
Did the victim voluntarily agree to participate in the circle?
Did the victim identify support people within the community? What was their relationship to the victim?
How much time was involved in preparing for the circle?

2.4.2. Community Preparation

Was a broad-section of community members willing and able to participate and provide follow-up to the circle process?
Are community members willing to assist in:

- organizing the circle
- providing translation services if necessary
- other ways

Are community members willing and able to:

- mobilize community resources so as to assist the offender and his/her family in the process of rehabilitation and recovery if necessary;
- welcome the participants,
- if possible provide coffee, milk, Kleenex, lunch and transportation for the Elders if needed.

Did community members have previous experience/training in the circle process?
How much time was involved in preparing for the circle?

2.4.3. Offender Preparation

Was the offender provided at the outset with a clear outline of what was expected from him/her and the steps in the process? E.g. information sheets

Did the offender voluntarily agree to be referred to the circle?

Was the offender willing to face his/her victims and to do whatever was necessary for the victim to reconcile the negative relationship created between them?

Was the offender willing to make whatever legal amends may be necessary?

Was the offender willing to face his/her community and to do whatever was necessary for the community to reconcile the negative relationship created between them?

Did the offender identify support people within the community? What was their relationship to the offender?

Was the offender willing to participate in traditional ceremonies to initiate the healing process?

Did the offender consult an Elder?
Was the offender willing to spend time with an Elder AND participate in any preparations the Elder recommends at his/her home reserve or his/her choice?

Did the offender meet regularly as required with the justice committee and his/her support group?

Did the offender draft a plan for rehabilitation/restitution/reconciliation? If not, what were the reasons?
To what extent did the offender complete the support group plan?

Did the offender prepare to speak on his/her behalf in the Circle?

Did the offender develop a proposal to give practical expression of her/his appreciation for community support?

Did the offender make all reports/records available for the Circle participants? If not, what were the reasons?

2.4.4. Offender Support Group Preparation
2.4.5. Keepers of the Circle What was the role of the Keeper?
2.4.6. Defence Counsel Preparation
What role did Defence counsel play in the circle process?
Did Defence counsel: • Offer legal advice to the offender • Inform the offender of the circle process; the nature of participation and responsibilities expected from the offender in developing a balanced support group • Help the offender prepare for the Circle and develop a plan to change her/his life, to demonstrate acceptance of full responsibility to compensate the victim and community • Assist the offender in converting intentions to change into action • Prepare the offender to participate directly in the Circle
Did Defence counsel have experience/training in the circle process?
How much time did Defence counsel spend on preparing for the Circle?
Was there an overlap in roles/responsibilities with courtworkers or the offender support group or the community justice project members?
2.4.7. Courtworker Preparation
What role did the courtworker play in the circle process?
Did the courtworker have experience/training in the circle process?
Did the courtworker: • Offer legal advice to the offender • Inform the offender of the circle process; the nature of participation and responsibilities expected from the offender in developing a balanced support group • Help the offender prepare for the Circle and develop a plan to change her/his life, to demonstrate acceptance of full responsibility to compensate the victim and community • Assist the offender in converting intentions to change into action • Prepare the offender to participate directly in the Circle
How much time did the courtworker spend on preparing for the Circle?
Was there an overlap in roles/responsibilities with courtworkers or the offender support group or the community justice project members?
2.4.8. **Crown Preparation**
Was the Crown fully aware of the circumstances and progress of the offender within the community justice process and did it enable him/her to: • Fully understand and appreciate what has been done within the community justice process • Be respectful of the community and the offender efforts to make fundamental changes • Fully aware of the proposals for dispositions • Make relevant contributions If not, why?
Was the Crown fully aware of the most recent views of the victim? If not, why?
Did the Crown inform the community justice project of its interests or concerns? If so, what were they? If not, why?
Did the Crown provide the community justice project with all relevant information? (note this assumes as part of being accepted into the Circle, the offender agreed to release to the justice committee their criminal records and the relevant information constituting the legal basis for the offence) If so, what was provided? If not, why?
Did the Crown participate in community justice projects' meetings that assess the offender's initial and continuing

suitability?
Did the Crown review and comment upon plans and progress reports from the • community justice project, • victim/victim support group and • offenders support group?
Did the Crown contact the victim/victim support group to ascertain the victim's interests and determine what assistance was required?
Was the Crown experienced/trained in the circle process?
How much time did the Crown spend on preparing for the Circle?
2.4.9. RCMP Preparation
Was the RCMP fully aware of the circumstances and progress of the offender within the community justice process and did this enable him/her to • Fully understand and appreciate what has been done within the community justice process • Be respectful of the community and the offender efforts to make fundamental changes • Be fully aware of the proposals for dispositions • Make relevant contributions If not, why?
Was the RCMP fully aware of the most recent views of the victim? If not, why?
Did the RCMP inform the community justice project of its interests or concerns? If so, what were they? If not, why?
Did the RCMP provide the community justice project with all relevant information? (note this assumes as part of being accepted into the Circle, the offender agreed to release to the justice committee their criminal records and the relevant information constituting the legal basis for the offence) If so, what was provided? If not, why?
Did the RCMP participate in community justice projects' meetings that assess the offender's initial and continuing suitability?
Did the RCMP review and comment upon plans and progress reports from the: • community justice project, • victim/victim support group and • offenders support group?
Did the RCMP contact the victim/victim support group to ascertain the victim's interests and determine what assistance was required?
How much time did the RCMP spend on preparing for the Circle?
2.4.10. Other Preparation
Was pre-circle conference held to: • Involve any of the participants who were new or unfamiliar with the Circle process • Ensure there is a confidential report containing information that may embarrass third parties or that would ordinarily be subject of an applications to protect the information from publication • Ensure that if the case raises difficult/sensitive issues need to be clearly addressed prior to the Circle • Ensure that if the Circle was held being, despite Crown and victim's objections, steps were taken to accommodate the interests of the victim and Crown as much as possible.
Facilitator - judge, JP, keeper of the circle (what do they do before and during)? - Elder peacemaker?

Prerequisites: are there are effective medical and treatment services willing to participate in the trial;[1]

2.5. During the Circle

2.5.1. Logistics

Place: Where was the circle held? community facility, court or outdoors?
Were the offender and/or victim consulted about what place would be comfortable for them?
Physical Setting: Was the seating arranged in a circle?
Seating: Was seating pre-arranged? Offender and supporters; Victim and supporters
Were empty chairs left for latecomers?
Was there an 'inner circle' – all persons directly involved?
Was there an 'outer circle' – those persons who wish to observe?
Time: At what time was the circle scheduled to be held? (e.g. Evening after working hours)
Number of Cases: How many cases were heard in one Circle session? How many case reviews were in this Circle?
Notice: Was the community informed about the Circle? How? Public posting? Mailing notices? By whom?
Safety: Was consideration given to how the victim and offender would be scheduled to arrive/leave at different times, so that offender did not have the opportunity to harass, threaten or coerce the victim?
Was consideration given to how escorts could be provided for victims arriving and departing the venue?
What safety procedures were followed when both victim and offender were present in the same venue?
What steps are taken when safety measures are violated during the circle process?
Record: Was a tape recorder set up to record the comments in the circle?

2.5.2. Participants

Was anyone entitled to attend and participate in the circle?
Who played a role in determining who would attend the circle?
Was there a balance of interested groups?
Who was included and present at the circle?
Who facilitated the circle? What kind of experience/training did this person have in mediation?
Had any of the participants had experience/training in the circle process?
If the offence was a serious crime (sexual or spousal assault) were specialized resource people invited?

2.5.3. Opening the Circle

Did the circle consist of any ceremonies/prayers by the Elders?
Who welcomed the participants? Elder? Keeper? Judge? Facilitator? Other?
Was appreciation expressed for those who had come a long way or for those who had to overcome significant difficulties to attend?

Did the participants:

- introduce themselves – who they are and what they do,
- explain their relationship with the offender or victim or others
- express how they feel
- their interest in the offence/circle – what they hope to achieve

Who explained:

- the role of the circle
- the methods of proceeding in circle/guidelines
- the rule of conduct within the circle

Were questions raised – additional guidelines suggested?

What was the duration of the 'opening of the circle'?

[1]New South Wales Attorney General's Department, Aboriginal Justice Advisory Council, Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process, Options for NSW, Discussion Paper
http://www.lawlink.nsw.gov.au/ajac.nsf/pages/circlesentencing

2.5.4. Rules of Conduct Within the Circle

What kind of rules governed the conduct of the circle? What, if any rules apply to perjury or slander?

- Speaking from the heart – honesty/compassion
- Speaking in a 'good way' – respect feelings, interests, inputs from others, strive to share openly in a kind, honest way
- Respect right of others to speak – to give everyone an equal opportunity to speak;
- Respect others when they speak - there are no interruptions while a person is speaking; body language
- The laws of the Creator shall govern the person speaking: those laws are honesty, sharing, kindness, and respect;
- Use of the Feather or Talking Stick – Keeps explained how to show respect to the feather, how to hold it, pass it and what it means to talk when holding the feather
- Remain in the Circle – all participants remained until excused by the Keeper or until the Circle concludes; at all times during the proceedings of a circle the Keeper maintained the order and the process of the circle; Keeper indicated at the outset that breaks would be taken.
- All participants are equal: there were so special powers or privileges for anyone in the circle; everyone was respected and treated equally.
- Confidentiality – what comes up in the circle stayed in the Circle
- In the circle decisions are made on the basis of consensus;

2.5.5. Facts

Were the facts of the case presented?
By whom?
Was this portion of the Circle guided by the Court?
Were the facts discussed and accepted?
Materials: Was the criminal record and other notices entered by the Crown? Was the material passed around the Circle?
If not, was the circle discontinued until such time the facts were resolved?

Crown's Opening Remarks: Did the Crown:

- outline the usual sentence tariff,
- describe the interests, concerns, and
- what they hoped to explore in the Circle

Defence's Opening Remarks: Did Defence Counsel provide key details about the offender?

Probation Officer's Opening Remarks: Did the Probation officer provide a written pre-sentence report into the Circle?

Court: Did the Court summarize the legal background to

- highlight the main issues
- not what needs to be resolved
- clarify sentencing or other options and the impact
- outline the challenges the community faces in developing alternatives

2.5.6. General Discussion

In what order, did participants speak? decided by the Keeper: random; pre-arranged

What was the circle discussion – who said what?
The offender? Support group? Family?
The victim? Support group? Family?
Community members?
Community justice committee members?
Justice officials?
Other?

Did the circle discussion cover:

- the offence;
- its impact on the victim, families and the community; Did the offender get the clear message, "What you did was solely your responsibility and it was not okay to do that"?
- what needed to be done to the right the wrong – for the victim, families, community and offender? – what options?
- what support may be available for the offender and victim?

Was there also a discussion about:

- extent of similar crimes in the community,

- underlying causes of such crime
- victims of similar offences describing how they and their families were affected
- an analysis of what life was like in the community before the increase in crime·
- what can be done in community to prevent this type of behaviour

2.5.7. Offender

Did the offender acknowledge that the facts were true?
Did the offender formally accept responsibility in the circle?
Did the Court accept the plea of guilty

2.5.8. Offender Support Group/ Report

Was an offender support group report presented?
Did the report indicate what the offender had done and what s/he promised to do?

2.5.9. Victim

Was victim asked if s/he felt safe and what (if anything) would make s/he feel safer?
What procedures were in place to ensure that there was an appropriate environment for victim to express their feelings about the offence – a chance to tell his/her story?
Was victim able to express the impact of the offence on him/her to the offender?
Did everyone present provide assurance that they were "on the side" of the victim and would support her/him during and after the testimony? Eg. Provide words of encouragement ("Take your time; focus on someone safe; take deep breaths;" etc.)?
Were participants interested in the victim's story and try not to cut her/him off?
Did participants express the how they valued the victim's input?
Did the participants express gratitude for the victim's participation?
How did victim know that she/he only need tell as much as s/he felt comfortable?
Who intervened immediately if the focus of the circle became uncomfortable for the victim?
Was anyone able (trained) to deal with the emotional reactions that can result from this type of interaction?
Was there an opportunity for the victim to ask questions of the offender?
Was there an opportunity for the victim to contribute his/her views about what is required to put things right?
Did the offender and others validate the victim's testimony? If not, what happened?
Did the victim get the clear message, "What was done to you was wrong; it was not your fault; you are justified in feeling afraid, angry and unforgiving"? (NOTE: In a domestic violence situation, it is important for both the victim and the perpetrator to hear that the responsibility for the violence rests solely with the perpetrator, and not at all with the victim. This must be stated up front; nods and body language are not enough.)

2.5.10. Victim Support Group/Report

Was a victim support group report presented?
Did the victim support group or the report indicate:

- the victim's concerns, feelings
- the impact of the crime
- what has happened since the offence
- what the victim desires to see included in the sentencing and wellness plan

2.6. Closing the Circle

Did someone (who?) provide a summary of the circle discussion and decisions reached?
What were the terms of the offender's restitution/compensation plan?
Was a support/support group for the offender was established? Who were the members?
Was a support/support group for the victim was established? Who were the members?
How was the victim's safety issues relating to restitution addressed?
Was date for review set?
How long did the discussion take place?
Did the circle process take place in one session or several ones?
If the process took place over a few sessions, was the offender given a set of interim goals?
Were there closing remarks and a closing of the circle?

2.7. Post –Circle Process – Follow Up

Was the community fully informed of what actually happened after the Circle process? By whom? When? How? What was communicated?

How was information provided to victim with information about the offender's reparation/restitution schedule, amounts that will be paid, etc.?
Did the offender meet regularly with his/her support group? If not, what were the reasons?
Did the offender's support group report back to the CJ Committee on the offender's progress? If the offender had shown no willingness to meet the conditions, was the circle abandoned and the offender sentenced in the mainstream court?
Was the circle reconvened later to determine how the offender was progressing? When? Who attended? What was the outcome? Did the Support group or offender request additional support at the post-circle review? If the offender had shown no willingness to meet the conditions, was the circle abandoned and the offender sentenced in the mainstream court? Was the victim provided with information about civil remedies in cases where the offender did not fulfill his/her restitution obligation, and provided with assistance in seeking such remedies?
Did community members celebrate or show appreciation of the progress of the offender made?

2.8. Potential Circle Outcomes
2.8.1. Progress of the Offender To what extent did the offender meet the commitments to which she/he had agreed to in the circle process? If yes, why? Were there any breaches? If so, why? Were the conditions extended or modified?
2.8.2. Recidivism Subsequent to the circle process, did the offender re-offend? If so, when? If so, what type of offence was committed?
2.8.3. Incarceration Using the circle process, what was the period of incarceration?
2.8.4. Addressing the Underlying Causes
Using the circle process, was a plan developed and implemented to address the underlying causes of the offender's harmful actions?
Using the circle process, was a plan developed and implemented to address what needs to be done to make the community safer?
2.8.5. Community Satisfaction
What was the overall level of community satisfaction with the circle process?
What was the overall level of community satisfaction with the outcomes of circle process?
What was the overall level of community satisfaction with the involvement of community members in decision making stages of the circle?
Did community members feel free to ask questions? express their opinions?
Are community members involved in ongoing supervision? re-integration of the offender into the community? evaluation of the offender's progress on a regular basis?
What was the overall level of community satisfaction of the support for and involvement of offenders in the circle process?
What was the overall level of community satisfaction of the support for and involvement of victims in the circle process?
Did the community believe the circle process mobilized community resources? Improving relationships within the community?
Did the community believe the circle process has contributed to improving relationships with the mainstream justice system? Increased confidence? Reduced barriers? Provide more appropriate sentencing options?
2.8.6. Victim Satisfaction
Did victims feel safe before/during/after the community justice approach? Sought/received help for self and family Sought/received necessary medical treatments Safety to disclose (confidentiality) If not, why?
Did the victim believe she/he received answers to his/her questions – his/her needs were met? If not, why?
Did the victim believe she/he had had a chance to tell his/her story? If not, why?
Did the victim believe they have a better understanding of why they were victimized? If not, why?
Did the victim gain some insight into the personal situation of the offender?
Did the victim believe she/he received proper apologies for the injustice against him/her?
Did the victim believe she/he received adequate support – before, during and after the community justice approach?

Did the victim believe she/he had been treated fairly?
Did the victim feel less fearful – regain a sense of security?
Did the victim believe s/he contributed to decisions about the restitution agreement for the offender?
Did the victim believe the offender complied with the restitution agreement? If so, did the victim believe this contributed to his/her 'healing'? If so, did the victim believe this contributed to his/her 'reconciliation' with the offender?
Did the victim believe s/he was a full and equal participant in the circle process?
Given the victim's experience in the community justice approach – the circle - would the victim choose the circle process, another community justice approach or the court process?
2.8.7. Offender Satisfaction
Did the offender believe s/he was supported through the circle process?
Was the outcome of the circle process relevant and meaningful for the offender?
What kind of changes occurred in the offender's life due to his/her participation in the circle process? Were the chances of rehabilitation improved? Higher level of self-esteem
2.9. Potential Cost of Circles **– see chapter on "Costs"**

3. Relevant Documents, Studies and Practices - Yukon

3.1. Yukon – Court Circle Cases – verify with actual court records[2]

3.1.1. 1997

- *R. v. Jules* Y.J. No. 236 (QL) (Yuk. Ter. Ct.)

- *R. v. Kocsis* 1997 Yukon Territories Supreme Court

3.1.2. 1996

- *R. v. Everitt* 1996 Yukon Territorial Court
- *R. v. Gingell* (1996), 50 C.R. (4th) 326 (Y. Terr. Ct.).
    - This case shows that jail is not a deterrent for some Aboriginal communities.
    - Case is also mentioned in *Aboriginal Community Sentencing and Mediation* and this other works.
- *R. v. Swanson* 1996 Yukon Territories Supreme Court

3.1.3. 1995

- *R. v. Craft* [1995] Y.J. No. 15. DRS 95-13969. Whitehorse Registry No. T.C. 94-00644. Yukon Territorial Court. Oral ruling: filed January 17,1995.
    - Accused plead guilty of assault and was remorseful after assault "... and was sufficiently accepting of responsibility for the offence so that he was a proper candidate for this alternative form of punishment. But because the accused pleaded *not guilty* there were concerns about whether Mr. Craft could have a sentencing circle.
    - Judge Thomas said: "I am reluctant to conclude that as a matter of principle a person may not be sentenced in a sentencing circle after a not guilty plea and a conviction at trial. I do not think that an accused person should be inhibited in his constitutional right to have the Crown prove the case against him. However, if a person continues to deny responsibility for the offence after the conviction or does not fully accept the findings of fact made by the trial judge, in my view, that person would not be a suitable candidate for a circle sentencing. ...The evidence ... is as follows: that prior to the trial there had been denial of the offence, but that subsequent to the trial there had been no denial of responsibility. There was no indication that his version of events was different from those which had been found at trial ... Mr. Craft had expressed ... that he was shamed before the elders because of the offence."
    - Judge Thomas concluded that Mr. Craft was "sufficiently accepting of responsibility to be a proper candidate for a circle sentencing."

- *R. v. Johns* [1995] Y.J. No. 132. DRS 96-00792. Whitehorse Registry No. YU00326. Yukon Territory Court of Appeal. [1996] 1 C.N.L.R. at page 172. Judgment: November 3, 1995.
    - Case is about repeat offender for drinking and driving.
    - The appeal for a sentencing circle was dismissed.

3.1.4. 1994

- *R. v. O'Brien* [1994] Yukon Territory Supreme Court Judgment No. 21 File No. 833.93 [3]
    - "At first blush, it appeared that the transcript of the circle sentencing below was so deficient that it would be necessary to order a new trial. As incompetent as the transcript is, it is clear that the representations made in the transcript,...universally (with one exception...) supportive of Mr. O'Brien, as the sentencing judge acknowledged in his Reasons. This Court was, accordingly, able to feel comfortable in coming to a decision on the fitness of the sentence on the transcript and the representations of the Crown... The sentence is a good example of a community-approved-

[2] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[3] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

and-crafted sentence which will enhance respect for the administration of justice in Carmacks..." - *Judge Maddison. Filed Feburary 16, 1994*

- *R. v. P.D.B.* [1994] Yukon Judgment No. 7. Yukon Territorial Court. January 24, 1994.
  - This case is about a young offender and criminal law.
  - Judge Stuart stated that "The police officer suggested to the young offender that the Community Circle Sentencing process favours genuine remorse, implying that if he confessed, the sentence imposed by the Circle would be lenient. This is very dangerous ground for the police to explore (R. v. Zaveckas (1969), 54 C.R. Appr. 202 C.A.; R. v. Lazure (1959), 126 C.C.C. 331 Ont. C.A. Suggesting a guilty plea will be the precondition to admission to a more lenient process, whether true or not, is an inducement to confess If pressed, acknowledged, or acted upon by the young offender, this inducement would suffice to deny the voluntariness of his statement."

3.1.5. 1993

- *R. v. D.N.* This case may also be index as *R. v. N.(D).* 1993 Yukon Territories Territorial Court. Published in [1993] Y.J. No. 193.
  - Case has to do with a sexual assault.
  - [#11] This case was proposed to the Circle Support Group by the offender and his counsel for a Circle Sentencing.
    - Without the unqualified acceptance by the Circle Support Group, the case could not be handled in a Circle Sentencing.
    - Their acceptance came after discussions with the offender, which convinced the Circle Support Group that the offender was genuinely remorseful, anxious to seek help for his problem, willing to face the community in a Circle, and had accepted the obligation to meet with the Circle Support Group when asked to do so.
    - The Circle Support Group, a number of dedicated, tireless volunteers from the First Nation and from the community, had gained significant valuable experience over the past year and a half working with several offenders in Circle Sentencing.
    - This was the first sexual assault case heard in their Community Sentencing process.
  - [#12] In this case, a separate Victim Support Group, consisting of people familiar with the community, but living in Whitehorse, was established.
    - The Victim Support Group included two people whose work involved providing support for child victims of sexual assaults.
    - The Victim Support Group met frequently with the victim and her family.
  - [#13] After accepting the case at the first Sentencing Circle, the Circle Support Group met several times with the offender, and assigned two members of the Circle Support Group to counsel the offender in private sessions.
  - [#14] At the next Circuit to the community, the Community Circle explored the underlying causes of the offence, discussed the seriousness of the offence, the impact upon the victim, the need within the community to focus on healing and prevention.
    - Several goals were set to determine if a rehabilitative sentence could be developed.
    - Psychological and substance abuse assessments were planned and a series of counselling sessions with the Support Group were scheduled.
    - The offender was invited to participate in several spiritual and cultural sessions, including a four day fast, at Nares Mountain Healing Camp.
  - There were problems, the court record shows, between the Victim Support Group and the Circle Support Group.
    - Specifically with a letter not being passed on for professional reasons which shows that the two groups must be able to talk together.
    - In this case everything worked out.
    - But it could have turned out differently...
  - [#33] Imposing a community based rehabilitative plan as opposed to jail is not a shift from a hard option to a soft option.
    - First, because if the offender fails to diligently pursue the rehabilitation plan, then through a breach or revocation of the suspended sentence, a jail sentence is likely.

        - [#34] Second, because, as any offender who has been through a Community Circle and community rehabilitation sentence will attest, jail is a shorter, less demanding and less traumatic sentence.
    - [#35] A community based sentence focuses on the long term best interests of the offender, victim and community.
        - It requires a significant interference with the usual priorities of the offender.
        - The offender's first priority must be healing. In this case, the offender's seasonable employment directly interferes with the rehabilitation plan.
        - Despite my concerns, I have submitted to the consensus of the Circle that the offender should maintain his job for the season, and fit treatment around his work day and after the working season, in the late fall, implement the more onerous parts of the treatment program.
        - It is the view of the Circle Support Group that the job is now essential not only to provide a financial base for the winter, but his employment is essential to building the higher level of self-esteem necessary to carry him through the healing process...
    - [#37] The work of volunteers must be recognized and sustained by all justice officials, through co-operation and the diversion of basic resources to cover their costs and training.
        - As much as possible, the formal parts of the justice system must be localized to enhance the partnership between the community and the justice system, and to create an adequate locally-based foundation for community-based alternatives.
        - Until the justice system can reallocate resources to embrace and sustain this exciting new partnership, many offenders, as in this case, must be extremely grateful to the members of Support Groups who sacrifice so much of their time and resources - solely because they care enough about the well-being of the offender, the victim and of their community.
    - [#38] They inspire us all to persevere in seeking more effective methods of building safe and healthy communities.

- *R. v. Webb* (1993) 1 Canadian Native Law Reporter 148 Yukon Territorial Court
    - Re: rehabilitation vs. imprisonment as sentencing option, use of sentencing circle involves community and family...

3.1.6. 1992

The Classic Case of Circle Sentencing:[4] - The First Court Circle in the Yukon

- This is the classic case, which has defined the circle sentencing principles and procedures in the Yukon.
    - The offender, who had a long history of substance abuse, violent acts, and incarceration, had committed an assault with a bat on an officer, thieved, and breached probation.
    - He was found guilty on these charges.
    - The disposition was non-incarceral but multi-stage and involved family support, isolation, counselling, etc.
    - Apparently the resort to the circle sentencing format was rather spontaneous, occasioned by many officials believing that the whole situation from a conventional justice-response perspective was self-defeating and likely to worsen things.
    - A case is made for the circle's physical arrangements and the circle dynamics (e.g. speak while sitting, use personal names not titles, all persons within the circle must be addressed, anyone in the circle may ask a direct question of anyone else there).
    - The advantages of circle sentencing are claimed to include greater lay participation, creative new solutions, involving victims, extending the focus of the criminal justice system to look at the causes of crime, mobilizing community resources and partnership, and merging values between first nations and provincial and federal governments.

[4] R. v. Moses", 11 Crim. Rep. (4th) 357 (Yukon Terr Ct); also reprinted in the text Dimensions of Criminal Law, 1992 cited in Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

- This is a complex document which deals at depth with the issues raised by the inventive approach used to sentence an Aboriginal person.

Background

- In December 1991, Yukon Territorial Court Judge Barry Stuart decided to try an experiment in sentencing for the first time in Canada.
    - After a day of circuit court in Mayo, Yukon, instead of immediately giving a sentence following a trial and submissions from counsel, the case was adjourned.
    - Philip Moses had been found guilty of two charges: carrying a weapon, a baseball bat, for the purpose of committing an assault on a police officer, and theft of clothes from a Mayo home.
        - Moses had pled guilty to a further charge of breach of probation.
    - Judge Stuart described the scene:
        - It was late in the evening, everyone was tired. The police plane waited to return Mr. Moses to jail. The charter plane waited to return the court circuit to Whitehorse. Everyone -- including me -- expected the sentencing hearing would be short, directed only to the question of how much time in excess of the last sentence of 15 months would be imposed. Numerous factors which never appear in sentencing decisions but often affect sentencing, pressed the court to "get on with it". We did not.[5]
- Judge Stuart was particularly sensitive to how the justice system had failed aboriginal people. He also believed that community involvement was essential to break the cycle that had happened in the life of this offender. He enlisted the aid of the community, and set up the first Canadian sentencing circle, with 30 participants.

The Case of Mr. Philip Moses

- Philip Moses was a 26-year-old member of the Na-cho Ny'ak Dun First Nation of Mayo.
    - There had been alcohol abuse in his family of nine children, although his parents had recently gained sobriety.
    - From age 10 until 16, Moses had been removed to a series of foster homes, group homes, and finally juvenile centres. While in the care of the state, he was physically and sexually abused.
    - Suffering from Fetal Alcohol Syndrome[6], Moses functioned at a grade six level.
    - His criminal record contained 43 convictions, involving sentences totaling almost eight years of imprisonment.
        - When in prison, he experienced severe depression and suicidal tendencies.[7]
    - Most treatment recommendations were not carried out, mainly because there was an absence of suitable resources.[8]

[5] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 353-354. cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57_
[6] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 376. . cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57_
[7] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 352 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57_

Criminal Justice Failure?

- Judge Stuart found that the criminal justice system had failed both the community, and this offender:
    - First, the criminal justice system had miserably failed the community of Mayo. Born and raised in Mayo, his family in Mayo, Philip instinctively returned to Mayo after each of the previous seven jail sentences.
        - He would again return after any further jail sentences, each time returning, less capable of controlling either his anger or alcohol abuse, more dangerous to the community and to himself.
        - The criminal justice system had not protected, but had endangered the community.
    - Secondly, the criminal justice system had failed Mr. Moses.
        - After 10 years, after expending in excess of a quarter of a million dollars on Mr. Moses, the justice system continues to spew back into the community a person whose prospects, hopes and abilities were dramatically worse than when the system first encountered Philip as a wild, undisciplined youth with significant emotional and general life-skill handicaps.
        - His childhood had destined him for crime, and the criminal justice system had competently nurtured and assured that destiny.[9]
    - Using traditional sentencing, a term of imprisonment greater than 15 months would have resulted. A federal penitentiary was a possibility.[10]

Sentencing Circle

- By using a sentencing circle, the issues changed, and the result was markedly different.
- In a decision issued in March 1992, Moses was given a suspended sentence, with two years of probation.
- The sentencing plan involved three phases of rehabilitation.
    - After each phase, the circle would reconvene, and fine-tune the plan and offer whatever further support may be required.[11]
    - The first phase called upon Moses' family to reintegrate him into their family and cultural practices by having him live at their home on a remote trap line.
    - The second phase involved treatment at a residential program for aboriginal alcoholics, which was unfortunately only available in southern British Columbia.
    - The third phase was to return to his family, where the First Nation would develop a program for him to upgrade his life and employment skills, and provide continuing counselling for substance abuse.
    - In all phases, there was an attempt to monitor Moses' progress by close supervision and support.

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[8] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 353. cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57_.
[9] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 354 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57_. .
[10] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 353 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57
[11] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 383 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

Success or Failure

- Was the program successful?
    - The court and the community were taking a big risk.
        - Moses had a string of 43 prior convictions; 27 of them in the previous three years.[12]
        - He was not a person who inspired confidence.
        - However, the alternative, sending him off to yet more time in jail, was not working, but was only worsening the problem.
        - Judge Stuart stated, "It was hardly the model case to experiment with community alternatives. What could be lost in trying!"[13]
- Unfortunately, the sentencing circle on this matter was not the last contact of Philip Moses with the criminal justice system.
    - On October 19, 1992, Moses was back before the Court in a traditional sentencing hearing.
        - He pled guilty to three breaches of the conditions of the circle sentence probation order, by becoming intoxicated.
        - He also pled guilty to failing to attend court.
        - He was sentenced to a total of 8 weeks imprisonment for the four counts.
    - Judge Faulkner noted that Moses was already incarcerated relating to some other relatively more serious matters, which would be proceeding to trial in November 1993.
        - "[T]here have been repeated breaches of an order which Mr. Moses himself had a part in fashioning, an order in which, to use the vernacular, Mr. Moses was given a considerable break or a chance was taken on him, which chance has so far proved to have been ill-conceived."[14]

Lessons Learned

- The community took on a challenge perhaps greater than it was equipped to do.
- Our medical knowledge has also increased of the inherent challenges of Fetal Alcohol Syndrome (F.A.S.).
    - Even now, this condition of brain damage continues to be misdiagnosed, its effects misunderstood even in the medical and social services community.[15]
    - The mental disability resulting from this condition usually precludes employability, although the sentence given to Moses had included recommendations to help him become employable.

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[12] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 372. cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57
[13] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 354 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57
[14] R. v. Moses (12 January 1993), Whitehorse 91-07003B, 92-03863A, 92-03759D (Yukon Terr. Ct.), [1993] Y.J. 10 (Q.L.) supra note 37 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57_
[15] Bonnie Buxton, "Why hasn't it sunk in?", The [Toronto] Globe and Mail (29 November 1999) A17 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

- Further, individuals with F.A.S. often have difficulty appreciating the consequences of their actions.[16]

- In this case, although a psychiatric assessment was prepared, there does not appear to have been any psychiatric expertise within the sentencing circle.

- Where there are known psychiatric issues, some professional expertise is probably necessary in fashioning a fit sentence.

Judge Stuart's assessment of his experiment in Moses was filled with optimism. He did not consider in depth the potential downsides of circle sentencing.

- There is a potential risk to the community if a violent offender is not removed; although when the offender returns from having served a sentence, possibly more angry and violent, the community is even more at risk.

- There is a great deal of time and resources which are required in conducting the circle process.[17]

    - However, the time and resources spent now must be balanced against the time and resources spent later if there is continued future contact with an ineffective justice system.

- Judge Stuart's experiment in circle sentencing had many positive results, despite the fact that the conditions of the sentence were not finally met.

Judge Stuart did not see this experiment as the last word, but as a first step.

- "We must find a way to change.

- We must find communities, First Nations, professionals and lay people willing to work together to explore 'truly new ways'.

- We will; we have no choice.

- In making the circle work, the Na-cho Ny'ak Dun First Nation took an important first step. Can we follow?"[18]

Success Achieved

- One of the participants in *Gingell* observed that circle sentencing has had real success in ultimately reducing recidivism: "A lot of people in this community went to jail but continued to offend over and over. With Circle Courts, this has stopped. I have seen changes in people's lives."[19]

- Recidivism is one important measure of success, but it is not the only measure of success. Some important achievements took place when Moses was sentenced.

    - Judge Stuart outlined numerous advantages of the circle process.

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[16] For a discussion of the consequences of Fetal Alcohol Syndrome, in the context of the criminal law, see R. v. J.(T.) (2 July 1999) Whitehorse 92-07634 (Yukon Terr. Ct.), [1999] Y.J. 57 (Q.L.) cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

[17] "I wish also to observe that the sentencing circles employed in this case, although possibly useful in cases of this kind, went through several phases, and took far longer than the sentencing process prescribed by the Criminal Code. It is apparent that this procedure cannot be employed in every case." R. v. Johnson (1994), 91 C.C.C. (3d) 21 (B.C. C.A.) at 24, per McEachern C.J.Y.T cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

[18] Moses, supra note 7 at 385 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

[19] Gingell, 346 T cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

- Community-building takes place. Judge Stuart felt that communities need to take more responsibility for crime prevention and dispute resolution.
    - "In the circle, [Moses'] family, First Nation, and community moved beyond their frustration, beyond seeing Philip as a problem, beyond relying on the justice system for answers and began to recognize their responsibility and fundamental role in healing and helping a member of their community."[20]
    - The circle was instrumental in providing a greater role for the community, greater ownership over the justice process within their community, by taking responsibility for issues such as conflict resolution and crime prevention.

- Yukon Territorial Court Judge Lilles provided a useful summary of the majority of the points raised by Judge Stuart about the advantages of the circle sentencing process:
    - Family and community members are encouraged to participate, offer facts and information and to be part of the decision making process.
    - Justice system professionals no longer dominate or control the sentencing hearing.
    - Community involvement through the circle generates relevant information which would otherwise not have been available to the court.
    - Community participation de-emphasizes the adversarial approach taken by lawyers; victories are not measured by the amount of jail ordered and the exploration of other options is encouraged.
    - Offender participation is increased and the impact of the sentencing hearing will be more meaningful to him or her. It is one thing to be 'condemned' by a faceless judge, quite another to be told by members of one's family and friends that certain conduct is unacceptable and will not be tolerated.
    - Participation in the circle increases understanding of the justice system and its limitations by family and community members. This is particularly important today when the public is prone to receive a biased view of the justice system from the media publicity surrounding exceptional cases.
    - Family and community resources can be mobilized through a circle hearing; where an offender goes to jail, the family will better understand the need to maintain close contact and to prepare the offender's return to their community.
    - Even where the offender goes to jail, . . . family and friends have an opportunity to express their affection, love and support for him [or her]. The offender is less likely to view himself [or herself] as a 'victim' of the justice system and more likely to use his [or her] jail time constructively.[21]

- Clearly, it is not only the offender who benefits from the circle sentencing process.
    - There is a process of community healing and education that takes place.
    - However, the education does not go only one way, as may be implied by the above.

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[20] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 379 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57.
[21] R. v. P.(C.) (8 January 1996), Whitehorse 94-00144A and 95-00882 (Yukon Terr. Ct.), [1995] Y.J. 186 (Q.L.), at paras. 7-14 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

- While the community can learn more about the requirements and limitations of the legal system, those who deliver justice also have much to learn from aboriginal communities.

- The lawyers, judges, and other officers of the court have a greater opportunity to learn about the limitations of traditional sentencing, and how to broaden sentencing parameters to become more meaningful for aboriginal people.

Other Resulting Initiatives

That first step did have an impact. The circle sentencing process evolved further as new cases arose. Numerous other cases used the circle sentencing process after *Moses,* following the lead of Yukon.

- The process was **adopted in Saskatchewan in July 1992**, when the first sentencing circle in that province took place in Sandy Bay, with Provincial Court Judge Fafard presiding.[22]

    - By March 1995, Judge Fafard had personally handled over 60 sentencing circles in northern Saskatchewan[23]; roughly 100 had occurred in total in that province. [24]

- The process was recently adopted by the **Ontario Superior Court** for the first time, when Madam Justice Rose Boyko left her courtroom to conduct a circle at the Mnjikaning First Nations reserve.[25]

- The community-building and increased ownership over justice processes did not die when Moses breached the conditions of his probation order.

- Since the first circle sentencing case, even more communities within Yukon have taken on greater participation in the justice system.

    - Restorative justice programs are now in place at Watson Lake, Teslin, Carcross, Haines Junction, Whitehorse, and Dawson City, with other communities to follow.[26]

- Each initiative which affirms aboriginal cultural values also contributes to reversing the systemic discrimination within the justice system.

- The circle process accords more closely with aboriginal values, by seeking consensus and harmony, rather than the confrontational approach in our justice system.

- Aboriginal culture does not place as high a premium on individual responsibility or approach conflict in the direct confrontational manner championed by our adversarial process.

- Aboriginal people see value in avoiding confrontation and in refraining from speaking publicly against each other. In dealing with conflict, emphasis is placed on reconciliation, the restoration of harmony and the removal of underlying pressures generating conflict.[27]

- The western value of individual rights is maintained by ensuring that protections are included within the system.

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[22] Discussed in R. v. Joseyounen, [1995] 6 W.W.R. 438 (Sask. Prov. Ct.) at 439366 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

[23] Discussed in R. v. Joseyounen, [1995] 6 W.W.R. 438 (Sask. Prov. Ct.) at 439366 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

[24] R. v. Morin (1995), 101 C.C.C. (3d) 124 (Sask. C.A at 130 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57.

[25] Bill Rogers, "Ontario Reserve Scene of Sentencing Circle", The Lawyers Weekly (Markham, Ontario: Butterworths, 19 November 1999) 1 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57.

[26] Yukon, supra note 39.) cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

[27] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 366 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

- For instance, if important facts are in dispute, they can be resolved by re-convening a hearing to receive evidence under oath[28]
- Guilt is not at issue, as the sentencing circle usually follows a guilty plea (occasionally a conviction following a trial, as in *Moses*).
- In respecting the western values of individual rights as well as aboriginal values of seeking harmony and balance, there can be "a genuine partnership between aboriginal communities and the justice system by according the flexibility for both sets of values to influence the decision-making process in sentencing."[29]

3.1.7. 1991

- *R. v. J.A.P.* (28 May 1991), Teslin No. T.C. 90-04222 & 90-07328 (Yuk. Ter. Ct.) Unreported.

3.2 National Institute of Justice[30]

Lessons Learned

Very little research has been conducted to date on the effectiveness of sentencing circles. One study conducted by Judge Barry Stuart (1996) in Canada indicated that fewer offenders who had gone through the circle recidivated than offenders who were processed by standard criminal justice practices. Those who have been involved with circles report that circles empower participants to resolve conflict in a manner that shares responsibility for outcomes; generate constructive relationships; enhance respect and understanding among all involved; and foster enduring, innovative solutions

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3.3 PhD Dissertation on Circle Sentencing – Christel Percival – Yukon College -2002

- **completion expected by September 2002**

3.4 Circle Sentencing: Part of Restorative Justice Continuum - 2002[31]

- Circle sentencing is one of many restorative justice practices.
  - It seeks recognition of the needs of the victim, community involvement, and identification of the rehabilitative needs of the offender.
  - Unlike some restorative justice practices, circle sentencing participates in and replaces sentencing in the criminal justice system.
- In this chapter, Judge Lilles studies the nature and application of circle sentencing in the Canadian context.
  - This includes a survey of the circle process and its outcomes (what happens with the offender after the circle and the impact of the circle on participants).
  - Critical commentary on circle sentencing addresses
    - barriers to implementation,
    - the nature and role of the community,
    - concerns about the victim in the process,

[28] R. v. Gingell (1996), 50 C.R. (4th) 326 (Yukon Terr. Ct.) at 332 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57
[29] R. v. Moses (1992), 71 C.C.C. (3d) 347 (Yukon Terr. Ct.) supra note 7 at 367 366 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57
[30] http://www.ojp.usdoj.gov/nij/rest-just/CH5/3_sntcir.htm
[31] Lilles, Heino Circle Sentencing: Part of the Restorative Justice Continuum, Restorative Justice for Juveniles: Conferencing, Mediation and Circles. Edited By Allison Morris and Gabrielle Maxwell, Reviewed by Gregory Strong. January 2002, http://www.restorativejustice.org/rj3/Reviews/RJforJuveniles/circlesentencing.htm

- issues related to offender participation,
- the role of the judge.

3.5 Guiding principles for peacemaking circles - 2001[32]

- In this essay, Judge Stuart proposes guiding principles for designing and implementing peacemaking circles.
- He begins with an overview of peacemaking circles.
- Such circles, which can be used in response to crime and to other conflicts, consist of processes and structures to resolve differences, prevent conflict, or build better relationships.
    - They include four stages:
    - (1) deciding to use the circle;
    - (2) preparing for it;
    - (3) conducting the circle; and
    - (4) following up after the circle.
- He presents an actual example of a sentencing peacemaking circle to illustrate circle processes and guiding principles.
- These principles include identification and clarification of personal and shared values, respect for participants, inclusion of all affected parties, commitment to the voluntary nature of participation, shared vision, local design, flexibility, accessibility, holism, spirituality, consensus, and accountability.
- The author then addresses some of the challenges in designing and implementing peacemaking circles:
    - changing people's beliefs and perspectives;
    - the time-consuming nature of the entire circle process; and
    - involvement of both volunteers and criminal justice professionals.

3.6 Yukon Sentencing Circles and Elder Panels- 2001 [33]

- Canada is not a very good place to five 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.

[32] Stuart, Barry. 2001. Guiding principles for peacemaking circles. In *Restorative community justice: Repairing harm and transforming communities*, ed. Gordon Bazemore and Mara Schiff, 219-241. With an introduction by Gordon Bazemore and Mara Schiff. Cincinnati, OH: Anderson Publishing Co http://www.restorativejustice.org/rj3/Reviews/Bazemore%26Schiff/guidingprinciples.htm

[33] *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.* Yukon Sentencing Circles and Elder Panels, Article originally appeared in the Criminology Aotearoa/NewZealand. A Newsletter from the Institute of Criminology, Victoria University of Wellington. September 2001, No. 16. Used by permission. http://www.restorativejustice.org/rj3/Full-text/

- 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 an 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.

3.7 Harmony in the Community -1998[34]

"...It was obvious that the usual sentencing approach offered no better prospect for success than previous occasions. The probation officer and the local RCMP constable made inquiries about community and family involvement, and the Chief and other members of the First Nation agreed to

[34] Mandamin, Tony "Harmony in the Community" *Justice as Healing* Native Law Centre, University of Saskatchewan vol. 3 no. 2 (summer 1998) pages 6 to 8. Article was also published in (August 1996) vol. 21 *Law Now*. No 1 at pages 17 to 20. Re: the R. v. Moses case: University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

help in searching for a solution. The Crown counsel visited the community to learn more from the community about their concern.

To facilitate participation of all, the Aboriginal circle was used instead of the traditional courtroom arrangement. The accused, his lawyer and his family sat together on one side of the circle to the left of the Judge. The Crown sat across the circle. The First Nation members, the RCMP, the probation officer, and others found their own places within the circle. Everyone began by introducing themselves. After opening remarks from the Judge and counsel, the process became a less formal but very intense discussion of what might best protect the community and help the accused. The circle setting contributed to a wide ranging examination and exploration of ways to change the situation. Most important, the resources of family, community, and institutions were brought to bear to find a solution.

An important consequence was the community dynamics. The family, Chief, community members, police and probation officer expressed constructive concern for the accused. This was the first time the accused heard anyone in his First Nation offer support. He was drawn to participate in the discussion, a rare event for Aboriginal offenders before court...

...Since then, the Yukon sentencing circle process has developed protocols and procedures and improved support systems available...

- Quoted from page 7 of *Justice as Healing* vol. 3, no. 2 (summer 1998).

3.8 Building Community Justice Partnerships: Community Peacemaking Circles - 1997[35]

This is an interesting, detailed case for, and outline for initiating, community peacemaking circles, by a judge who has been one of the leading advocates and initiators of this justice system development in the Yukon Territory. Judge Stuart focuses on community court circles which entail much community involvement, as opposed to sentencing circles which he defines as court-initiated courtroom circles. He discusses the principles of the circle process (especially distinctive is the focus on holistic healing), the participants (circles differ from the mainstream system in emphasizing equal opportunity and respect for all participants), and the operating philosophy ("community development is as central to the work of circles as community justice"). In discussing the maintenance of community justice initiatives that spawn circles, Stuart emphasizes the importance of a number of factors including community support, volunteers, and evaluation. In the latter case he stresses the importance of internal evaluations that get at the secondary impacts of community peacemaking circles (e.g. reduced interpersonal conflict).

Stuart makes it clear that community peacemaking circles are more than sporadic, spontaneous events occasioned by a particular judge. He stresses the essential role of a community justice committee which receives applications for circles and which channels cases to a variety of options. Also emphasized are key community roles such as 'keeper of the circle', the occupant of which has significant responsibilities for organizing the circle and guiding its implementation in a specific case. Pre-circle preparation is deemed to be very important for the success of community court circles as are training courses (for professionals as well as for volunteers) and public meetings. In a long chapter on the circle hearing he informs the reader as to issues of logistics, consensus building, and spirituality, and describes the hearing in terms of seven stages (e.g. opening the circle, legal steps, closing the circle). In an appendix to the text Stuart provides an example of such an initiated program from his Yukon experience.

Stuart contrasts the circle innovation with the mainstream system which he says "doesn't work". He is very positive about the circle initiatives, arguing that they produce reduced recidivism, community development,

[35] Stuart, Barry. Building Community Justice Partnerships: Community Peacemaking Circles. Ottawa: Department of Justice, Aboriginal Justice Learning Network, 1997 cited Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998
http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

and improved justice delivery. A number of "myths that act as barriers to community justice" are identified including the myth that only professionals can be effective, and the myth that such justice programming can only work in small, homogeneous communities. Throughout the monograph Stuart exudes humility and openness to alternative processes. He does appear somewhat more combative on the issue of evaluation and especially towards the media and academic researchers who, in his mind, are quick to disparage community justice on the basis of too narrowly conceived performance indicators such as recidivism.

3.9 Circle Sentencing Study - 1996[36]

- Researchers at Simon Frazier University in Vancouver have conducted research on circle sentencing and recidivism rates in the Yukon Territory.
    - A 1996 study compared the number of crimes committed by offenders before and after they went through the process of circle sentencing.
    - The study found that crimes decreased by an average of 86 percent after circle sentencing took place.
    - Offenders had an average of twenty convictions prior to circle sentencing.

3.10 Circle Sentencing: Turning Swords into Ploughshares - 1996[37]

- This report describes circle sentencing, which involves community meetings to address both family and community circumstances that are underlying causes of crime.
- Circle sentencing is being practiced in a large number of northern Canadian communities.
- They
    - involve offenders, victims, friends and families of each, and community members;
    - provide sentencing consultation to courts; and
    - are built on principles in mediation, Aboriginal peacemaking processes, and consensus decision making.
- Circle sentencing proceeds best in environments that are comfortable for resolving disputes and facilitating informal processes.
- The value of circle sentencing goes beyond its impact on the offender and the victim to include its impact upon the community.
- Participants in circle sentencing address a broad scope of issues relating to conditions in the community that contribute to crime.

[36] Restorative Justice Programs in Minnesota, http://www.enterprisefoundation.org/model%20documents/e1231.htm
[37] Stuart, Barry D. "Circle Sentencing: Turning Swords into Ploughshares". Pp. 193-206 in Burt Galaway and Joe Hudson (eds.), Restorative Justice: International Perspectives. Monsey, N.Y.: Criminal Justice Press, 1996

3.11 Satisfying Justice, Safe Community Options -1996 [38] [39]

Kwanlin Dun Circle Court

- 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 had become 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. These alternatives must deal with the problems and not just the symptoms, with the desired outcome of a healthier community and a reduction in Band members in trouble with the law.

- The first Kwanlin Dun Territorial Circle Court was held in the Kwanlin Dun Village on March 31, 1992. Court proceedings were held in a circle setting (consisting of judge, crown, defence counsel, court worker, probation worker, alcohol and drug worker, crime prevention coordinator, family members, elders, and community members at large). In one year, between March 31, 1992 and March 31, 1993, there were eleven scheduled and four special Kwanlin Dun Circle Courts. The frequency of community based Sentencing Circles has increased to accommodate the court dockets. More recently, to address the amount of time needed to process each case and the growing number of community requests for cases to be heard in the circle, Territorial Court Sentencing Circles are normally scheduled bi-weekly.

- *"To fit the sentence to the circumstances not only of the offence and offender, but also to the needs of the victim and the community, and do so within available time and resources requires significant information and time. The temptation to impose standard sentences must be overcome for the sentencing process to avoid squandering scarce resources, and to be used to its full potential in achieving its objectives."*

  Judge Barry Stuart,
  Yukon Territories

- Circle proceedings are conducted in the Kwanlin Dun First Nations Potlatch 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 (Keepers of the Circle act as hosts and facilitators of the circle process, appointed by the Community Justice Committee). 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 completed, the sentence plan will be imposed. However, if the

[38] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[39] The Church Council on Justice and Corrections, Correctional Service Canada, Satisfying Justice, Safe Community Options that attempt to repair harm from crime and reduce the use or length of imprisonment 1996 http://www.csc-scc.gc.ca/text/pblct/satisfy/juste.pdf http://www.csc-scc.gc.ca/text/pblct/satisfy/e_jus1.shtml

offender has not followed through on their 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 their lack of motivation into consideration.

- There is continued contact with the victim (and the justice committee). This may be to advise them of the outcome of court, and/or continued resources. There is ongoing supervision of the offenders 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.

3.12 Sentencing Circles – A Review - 1995 [40]

- This report provides a summary overview of how sentencing circles have operated in Canada, especially in the Yukon and Saskatchewan where these initiatives have been concentrated.
    - The sentencing circle's key ingredients are considered to be a prior guilty plea or finding of guilt, and the assembly of justice system officials and community representatives along with the offender and the victim, to discuss and reach a consensus on the disposition of the case.
    - In compiling the information the author depended upon interviews of participating judges and crown prosecutors, and a small number of available case files.
    - After a brief discussion of reasons for the development of sentencing circles in the early 1990s (citing the 1992 case of "R. v. Moses" as path-breaking), there is reference to factors influencing a decision to hold a sentencing circle, factors such as the willingness of all participants, the type of offence, community readiness, and, especially, a willing judge who is the authoritative decision maker in virtually all aspects.
    - Since the sentencing circles have no specific legislative basis it is not surprising that there is considerable variation in practical aspects (e.g. location of the circle, notification procedures, diversity of participants, pre-circle activities, and seating arrangements).
    - Still, a style has been developing which incorporates some cultural traditions, is basically informal in dress and discussion, assembles core participants in a circle, and where consensus decisions are respected by the judge.
    - Although little systematic evidence is presented on the impact of this phenomenon, the reported (by the interviewees) positive outcomes and community benefits are many – chiefly meaningful, direct offender, victim, and community involvement, the mobilization of community resources, and the merging of First Nation and Western values.
    - The issues and concerns reported included the obvious diversity as regards selection of cases, community participation, legal considerations (e.g. legal status of statements made in the circle), and resource implications for communities and for the justice system.

3.13 Sentencing Circles: Purpose and Impact - 1994[41]

- Stuart, a judge, has been credited with implementing the first modern-day sentencing circle in Canada.

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[40] Campbell, Jane and Associates. Sentencing Circles – A Review. Ottawa: Justice Canada, Aboriginal Justice Directorate, 1995. This report provides a summary overview of how sentencing circles have operated in Canada, especially in the Yukon and Saskatchewan where these initiatives have been concentrated. In compiling the information the author depended upon interviews of participating judges and crown prosecutors, and a small number of available case files. cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[43] Stuart, Barry. "Sentencing Circles: Purpose and Impact". National: The Canadian Bar Association Magazine, 1994 cited in Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm. See also comments by Barry Stuart in "Objectives of Circle Sentencing" in Seeking Common Ground (21st International Conference, Toronto, Ontario, 20-23 October 1993) Society of Professionals in Dispute Resolution (SPIDR) 1994. pp. 283-293.

- Here he emphasizes that such interventions, such as sentencing circles, can empower community members to resolve their own issues and, in that way, restore a sense of collective responsibility.
- Circle sentencing, in his view, "improves the capacity of communities to heal individuals and families and ultimately to prevent crime".
- It offers opportunities for all members to better understand the causes of crime and to work together to remove conditions fostering criminal behaviour.
- Stuart's approach is a pragmatic rather than a legal or a political position on Aboriginal systems of justice.

3.14 Exploring the boundaries of justice: Aboriginal justice in the Yukon – 1992[42]

- Carol LaPrairie prepared the above noted report in 1992 for the Yukon Department of Justice, First Nations, Yukon Territory and Justice Canada. In this report she noted that in many respects, the circle may be the most effective mechanism to achieve greater community knowledge of the existing system. In addition, the circle provides an ongoing opportunity for criminal justice personnel to become and remain connected to community concerns and expectations.

4. Relevant Documents, Studies and Practices – Other Northern Territories

4.1. Inuit Women and the Nunavut Justice System – 2000 [43]

In one sentencing circle, it was observed: [44]
People involved in circle didn't know why judge was holding the circle.
No explanation was provided to community about its goals or origin of circle.
Nothing said about how it relates to Inuit customs.
The judge didn't explain what participants to circle could do "to help" the accused.
The timing of circle precluded a lot of community participation.
The size of the room limited number of people who could observe.
No plan was prepared regarding how to set up the actual circle.

Little thought was given to how circle could be structured and where specific participants would sit.
Great responsibility was placed on Mayor, putting a burden on his time and resources.
The judge did not provide any information about the ground rules, or about what was expected of participants.
Very little was said about the victim.
Some circle members spoke of the assault as "their" – the couple's - problem.
The victim never spoke about what the impact of the actions had been on her or her family.
No one from community indicated dislike for what offender had done..
The Judge suggested wife should attend the support group. What was troubling about this suggestion was that the judge overlooked his own power over the victim; consequently, that suggestion was perceived as an order.
There is great pressure not to speak out against a sentencing alternative supported by so many.

Question: Which approach, among those proposed in the Working Document, would be the best way for the judges to consult the community?
Answer: Circle Sentencing -this is not an Inuit method, it is not Inuit tradition.

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[42] LaPrairie, Carol "Exploring the boundaries of justice: Aboriginal justice in the Yukon" University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[43] Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf.
[44] Pauuutit. *Inuit Women and the Administration of Justice, Phase 1: Project Repor*t, 1993 *cited in* Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf.

-when this is used in spousal assault, sexual assault, child sexual assault, abuse cases it only victimizes the victims more, it silences them
-in the Yukon the drop in the crime rate could be attributed to the fact that many women are afraid of sentencing circles and don't report abuses and assaults; these models have to be severely scrutinized for abuse and assault cases
-when it was used in Kangiqsujuaq, we were used like guinea pigs in a test, we cannot play with peoples lives
-the recommendations and concerns raised in our Pauktuutit report on the circle in Kangiqsujuaq should be reviewed and considered by the Committee
-sentencing circles are not "group therapy" and did not lead to a "very significant involvement of the community prior to during and after the sentence" when dealing with spousal abuse
-more focused on meeting the needs of the accused at the expense of the victim
-victims may "consent" due to family pressure or perceiving that they consent because the judge wants to do this
· -it is a contradiction in terms to suggest someone who lives in an abusive situation is "free" to express her or his view

5. Relevant Documents, Studies and Practices – Other Canadian

5.1. Canadian - Court Circle Cases[45]

R. v. A.B.C. adjournments for intervention. Also see Green book page 81
R. v. Brady. Conditional sentences
R. v. Cabot-Blanc Participants at sentencing hearings. Green page 61-62.
R. v. M.(C.A.). Re: Appellate court and local concerns.

- Quotation from the judgment of Judge Q.C.L. Dutil:
  - If there is contestation, or if the judge is debating whether to hold a circle or not, what should be done?
    - It is clear that the judge could simply exercise his judicial discretion and convene a consultation circle. He often does so when he himself requests that a pre-sentence report be made.
    - Another conceivable solution would be to hold a voir dire. The judge would be better informed and his decision whether to hold a consultation circle or not would only be better founded.
  - In any case, evidence on sentence has always been admitted before the courts, and it is only normal that a judge have all the relevant information before rendering sentence. Each sentence must be personalized, and the contribution of people in the milieu is a very important source of information for the judge in charge of rendering sentence.
  - The philosophy in penal law has changed a great deal over the years. The goals sought in a penal sentence are the reflection of the society involved and in particular of its values. The Honourable Justice Charles D. Gonthier stated in a speech he delivered at the annual meeting of the Court of Quebec on November 6, 1992, that change in society was one of the factors in the relaxing of rules of evidence and the reason for testimony by experts because to play its role in setting standards the law must have all available knowledge, both quantitatively and qualitatively speaking. He illustrated certain fields in which expert intervention may be useful and even necessary. In the case of Amerindian communities or certain particular social groups, he stated:
    - The trial judge may not be aware that their traditions and customs, family organizations, rules of ethics and perception of honour differ from his. Even if he is conscious of these differences, he does not necessarily understand them in detail. To understand the facts of a dispute involving a native person, it may be necessary for the trial judge to call in an expert in the field to help him.
    - It is possible that knowledge of certain particular moral or social principles peculiar to the Amerindian culture and unknown in legal precedents could guide the judge when he makes his decision.
  - The court must abide by one of the main principles issued by the Canadian Sentencing Commission ("Sentencing Reform: A Canadian Approach" (Government of Canada, February, 1987)), which is that the sentence must be rendered by the person who knows the case best. When a sentence is being given in a milieu in which the habits and customs are different, this knowledge must be given to the judge, who consults the fellow citizens of the accused.
  - Earlier on, we talked about the qualities required in a member of a consultation circle. We cannot talk about qualities peculiar to such a person without thinking about how the members of the consultation circle will be designated.
  - It goes without saying that the members may and should vary according to the case. The parents of the accused, the victim(s), persons in authority, the probation officer, the social worker, the local police officer, the lawyers on the case, the companions of the accused, experienced people, elders, the people interested in the [page744] community's well-being could be part of the consultation circle. Who will appoint the members? In the Yukon, it seems that this job was assigned to the probation officer. In Naappaluk it was also the probation officer who was given this task, in January, 1993 (the consultation circle was held on May 4, 1993). When travelling through the villages, the probation officer talked to the mayor in order to contact the persons who comprised the circle. We proceeded in the same manner in this case. There are other possibilities, such as forming a committee composed of a few persons responsible for recruiting participants for the circle.
  - It is especially important that the people chosen to form the circle, and to whom the supervision of the accused will be entrusted later on, have the capacity and the desire to do the job.
  - In Naappaluk, the court noted the advantages to be gained in isolated regions from holding consultation circles. It is obvious that there are many. They constitute the first steps toward making the Inuit responsible for the actions of their fellow citizens. They want to be parties to the imposition of certain sentences. This permits them to assert themselves in this field.
  - Nothing is perfect
  - It should be understood that the consultation circle is not a universal cure-all. We believe that this method may help people to get back on their feet with the help of the community, but nothing is perfect. It would be Utopian to think that the accused are going to change their ways in every case. Participants in the judicial process often put a great deal of hope in the rehabilitation of certain offenders. Just when everything seems to be going fine, there are major relapses and hopes are shattered like porcelain vases which break into a thousand pieces when thrown onto the rocks.
  - Probation officers doing follow-ups on certain delinquents, under a court order, have experienced such disillusions.

[45] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

- Does this mean that consultation circles should not be used? In other places, such as the Yukon, for example, it has proved to be a precious tool in the fight against crime. The crime rate has decreased by about 35% in less than two years. However, there are cases in which the circle was not successful. This does not mean that the system has failed but rather that the accused himself has failed."

5.1.1. 2002

- R. v. Baret Labelle, 2002 Albert Court of Appeal [46]
  - A recent case from the Alberta Court of Appeal, R. v. B.L., which discusses the use of sentencing circles by the trial courts.
  - Without setting formal guidelines, the Court of Appeal makes a number of useful comments on
    - the proper use of sentencing circles,
    - problems of establishing facts prior to a circle,
    - the composition of the circle,
    - the need for support for the victims,
    - the scope of Gladue and Wells,
    - the sentencing of violent crime by aboriginal offenders and
    - the use of probation, conditional sentences and imprisonment in sentencing assaults.
  - [1] The respondent, Baret Labelle, entered a plea of guilty to aggravated assault. The sentencing judge, on his own motion, conducted an informal sentencing circle, following which he imposed a suspended sentence plus one year probation on conditions. The Crown appeals that sentence.

Issues

- [2] This appeal raises issues concerning sentencing circles,
  - their use and
  - the means of establishing facts when employing a sentencing circle.
  - In addition, it raises the issue of the appropriateness of the sentence in this case.

Decision

- [3] Notwithstanding numerous concerns relating to the constitution and conduct of the sentencing circle in this case, we decline to set firm guidelines for sentencing circles.
  - It is preferable that the laws relating to this sentencing tool develop incrementally and, in our view, the trial courts are the appropriate forum for this process to mature.
  - [4] The sentencing judge erred in his understanding of the breadth of ***R.*** **v.** ***Gladue*** , [1999] 1 S.C.R. 688.
    - A suspended sentence in the circumstances of this case fails to properly take into account deterrence and denunciation.
    - However, as the sentence has now been served, and because of the specific and changed circumstances of this offender, we are reluctant to interfere with the sentence at this time.

Background Facts

- [5] After an evening of drinking, the respondent Baret Labelle, his brother Sherman Labelle, and Marty Ear (all aboriginal persons) went to a campground to "shake down" a few vehicles.
  - During the course of this activity, Mr. Anderson was beaten and severely injured, resulting in some paralysis and damage which impacted on his ability to fully function.
  - The brothers, Sherman and Baret Labelle, were charged under the *Criminal Code of Canada* , R.S.C. 1985, c. C-46 with endangerment of life by committing an aggravated assault (s. 268), and committing assault with a weapon (s. 267(1)(a)).
  - The third person, Marty Ear, was not charged and gave evidence for the Crown.
- [6] Following the charges, and prior to this matter being resolved in court, Sherman Labelle committed suicide.

[46] http://199.213.44.18:8080/ISYSquery/IRLE2C.tmp/1/doc

- [7] Baret Labelle ("Labelle") pled guilty to aggravated assault (s. 268) and the matter was adjourned for a pre-sentence report.
- No facts were admitted at that time, the Crown advising that it would be reading in the facts for admission at the adjourned date.
- The sentencing judge indicated his intention to conduct an informal hearing into the circumstances, noting that he would invite several elders from Morley, the victim, and Labelle's grandparents to attend.
    - He commented on the recent decision of ***R.* v. *Gladue***, *supra*, and the use of aboriginal concepts of restorative justice in determining a fit sentence for an aboriginal offender.
    - No input was sought from either counsel as to the constitution of a sentencing circle or the procedure to be followed.
- The matter was adjourned to September 7, 1999.
- [8] On September the 7th, the matter was further adjourned to October 1, 1999, the court indicating that "if Mr. Anderson doesn't show up at that time we will do a regular sentencing thing, except I would still like to hear from Barrett." (AB 8)
- [9] When the matter resumed, the Crown was not called on to read in the facts.
    - Rather, the matter proceeded by way of a sentencing circle hearing.
    - Unfortunately, the respondent's precise involvement in the incident was not established prior to commencement of the hearing.
    - The difficulty of this failure quickly became apparent.
    - Labelle took the position that he was a reluctant participant, having armed himself only as a result of threats by the other two participants.
    - Moreover, he said that he simply threw the wrench over his shoulder and did not know if it had struck the victim or not.
    - The Crown, on the other hand, said that Labelle struck the victim with a wrench resulting in the serious injuries sustained by Mr. Anderson.
- [10] The Crown recognized that there was a problem arising with respect to Labelle's involvement and sought to clarify the facts.
    - The sentencing judge, indicating that he did not want to disrupt the flow of the hearing, noted that Labelle's guilty plea was sufficient to establish that Labelle agreed that he was involved with Sherman and Marty in the incident where they had harassed and struck Mr. Anderson.
- [11] During the circle hearing, the sentencing judge made several comments indicating his acceptance of the fact that Labelle had struck the victim with the wrench.
    - He had heard the preliminary inquiry and knew that the victim had been beaten.
    - He had also heard the inquiry into Sherman Labelle's death.
    - Comments at that time suggest that the judge attributed the injuries to blows struck by Labelle.
    - He observed that the injuries would indicate more than something thrown at him.
    - He noted that somebody beat on Mr. Anderson's head and face viciously.
- [12] Following sentencing and the Crown's notice of appeal, the sentencing judge filed written reasons for judgment.
    - The judge had not indicated that there would be further reasons for judgment.
    - Unfortunately, those reasons indicated that the sentencing judge took a different and minimal view of Labelle's involvement.
        - For instance, in his written reasons, the sentencing judge held that the Crown had not established that Labelle had directly inflicted blows that caused the injuries to Mr. Anderson.
        - Rather, he noted that Labelle threw the wrench behind him and commented that Labelle did not know if he hit Mr. Anderson or not.

- The written reasons provide (at AB 78) "I find that it has not been established that Baret Labelle directly inflicted the blows that caused the injuries to the victim. He minimized his part in the incident, and this may have been accurate."
- The sentencing judge indicated that the fact that Sherman Labelle had committed suicide a few days before his court date may indicate that Sherman was the more active participant.

- [13] Unfortunately, the Crown was not afforded the opportunity to establish its facts when the contradiction became apparent.
  - The Crown takes the position that the degree of involvement of an offender is a relevant fact in sentencing and the Crown has the right to establish its facts, which must be satisfied beyond a reasonable doubt. It argues that it was deprived of its right to establish the facts, which should have been determined before the sentencing circle commenced.
- [14] To avoid a rehearing, the parties agreed to the following facts for the purpose of the sentence appeal.
  - (a) The respondent, an aboriginal person, was 18 years old and a resident of the Morley reserve, near Canmore, Alberta in May of 1997. He turned 18 on March 15, 1997, just three months before this incident.
  - (b) On May 16 th , 1997, the victim, John Henry Anderson (age 56) and his wife, Tam Nguyen, had driven their truck camper to the Seebee Dam area. This location is a recreation area frequented by fishermen, campers, and other outdoor enthusiasts. It is public land adjacent to the western boundary of the Morley reserve. They spent the day fishing in the Ghost River wilderness area and stopped at the Seebee Dam campground to rest because the victim was too tired to drive further. They were asleep in their camper when the incident began.
  - (c) In the early morning hours of May 17 th , Labelle was out drinking with his brother, Sherman Labelle, and a friend, Marty Ear. On their way to Canmore someone suggested they stop at Seebee and "shake some cars". The respondent felt intimidated by the other two into going along with the plan. It was approximately 5 a.m.
  - (d) Marty Ear appeared to be the prime motivating force in the incident, although he took no active part in the assault on the victim.
  - (e) All three armed themselves, Labelle putting an eight-to-ten-inch long ratchet wrench in his back pocket. In the campground they woke up the victim and his wife by banging loudly on the window of their truck. The victim came out and was confronted by the three.
  - (f) Sherman Labelle called the victim a white man and accused him of trespassing. The victim protested that he was also native, being an Ojibway from Ontario. Sherman called him a liar and commenced hitting him with his fist. The victim was fighting back when Labelle, as he was leaving the scene, threw the ratchet wrench at the victim striking him in the neck. The victim then fell to the ground and the three young men fled the area.
  - (g) Although disoriented and bleeding, the victim was able to drive himself to the Canmore Hospital. The blows suffered by the victim were so severe that his back teeth were loosened. The blow from the wrench caused a stroke that resulted in memory loss, visual impairment, loss of balance, loss of problem solving skills, loss of expressive language, and paralysis to the left side of his body. He is now permanently disabled and unable to work. The medical reports of Dr. Suchowersky and Dr. Danji [sic] read in by the Crown at the sentence hearing accurately describe the injuries.
  - (h) Sherman Labelle committed suicide on May 21, 1998, two and one-half weeks prior to his youth court trial scheduled on June 10, 1998, in Canmore. Marty Ear died in early March of 2000.

Sentencing Decision

- [15] Labelle received a suspended sentence and two years probation. Conditions for the probation included attending assessment, treatment and counselling, along with attending educational upgrading, job training, as well as seeking employment. In addition, Labelle was ordered to complete 50 hours of community service, to abstain from alcohol, be of good behaviour, keep the peace, and report as required to a probation officer.

The Crown's Position

- [16] The Crown argues that the sentencing judge misunderstood and inaccurately applied the law of sentencing. It also argues that the procedures and the structure of the sentencing circle were improper, resulting in a sentence that was demonstrably unfit for the offender and the offence.
    - [17] The Crown says that the process began and concluded arbitrarily, allowing neither the defence nor the Crown to make submissions at the appropriate stages. Moreover, the sentencing judge directed the circle on his own motion and chose the participants without giving either the Crown or the defence an opportunity to make submissions. No objective members of the community were present, notwithstanding the sentencing judge's stated intention to have elders attend. The Crown argues that the composition of the circle lacked adequate representation for either the victim or the community. The only community representatives were relatives of the respondent.
    - [18] The Crown urges this court to set guidelines for sentencing circle hearings.

The Respondent's Position

- [19] Labelle argues that the sentence complies with sentencing principles. He submits that the establishment of the sentencing circle accorded with case law and other writings recognizing the need for a flexible, individualized response in matters of aboriginal justice. Moreover, sentencing procedures are always flexible, allowing for information from a variety of sources on an informal basis. In short, he argues that the discussions were consistent with the aims of restorative justice, and the sentence was a fit and proper sentence for this offender and this offence. In addition, it was arrived at with the input and consensus of the victim.

Legislation

- [20] Labelle was charged with s. 268.(1) of the *Criminal Code* :
    - s. 268.(1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
- [21] In sentencing, the relevant sections from the *Criminal Code* include ss. 718 - 718.2. Section 718 lays out the fundamental purposes of sentencing - denunciation, deterrence, rehabilitation, separation, and reparations. Section 718.1 requires that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 requires the court to take into consideration following principles, including:
    - a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender...
- Section 723.(1) requires that a court give, before determining the sentence, the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.

Analysis

- [22] The Criminal Code does not provide for the use of sentencing circles.
    - This sentencing tool is a judicial innovation, originating from aboriginal traditions.
    - For good discussions on sentencing circles see:
        - H. J. Benevides, "R. v. Moses and Sentence Circles: A Case Comment," (case comment)
        - R. v. Moses (1992), 71 C.C.C. (3d) 347 (Y.T.T.C.). (1994) 3 Dal. J. Leg. Studies at 241.;
        - ***R.*** **v.** ***Moses*** (1992), 71 C.C.C. (3d) 347 (Y.T.T.C.);
        - E. Mansfield, "Balance and Harmony: Peacemaking in Coast Salish Tribes of the Pacific Northwest" (1993) 10:4 Mediation Quarterly at 339;
        - ***R.*** **v.** ***Morin*** (1995), 134 Sask. R. 120 (C.A.), discontinued leave to appeal [1995] S.C.C.A. No. 392;
        - B. Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (1997) Aboriginal Justice Learning Network: Department of Justice Canada, at 33;
        - T. Groh, "Sentencing Circle: a General Overview and Guidelines," Justice as Healing, (Fall 1998) 3:3;
        - J. V. Roberts & C. LaPrairie, "Sentencing Circles: Some Unanswered Questions," (1997) 39 C.L. Q. 69 at 71-72.
- [23] The sentencing circle process is aimed at restorative justice and preventing recidivism.
    - It provides for community and victim input into decisions.
    - Although originally utilized in aboriginal settings, in appropriate circumstances a sentencing circle approach could be adapted to other community settings.

- In theory, a circle sentence results from the negotiation of interested groups and produces a sentence that the community endorses.

- [24] The sentencing judge must endorse any negotiated sentence and is obligated to ensure that the sentence is fit and complies with the sentencing provisions of the *Criminal Code* . Thus, the judge must agree to the process and, in the end, approve, reject, or amend any proposed sentence.
- [25] As indicated by the Supreme Court in ***R.* v. *Gardiner*** , [1982] 2 S.C.R. 368, a sentencing hearing can be informal and have a wide scope. Therefore, the strict rules of evidence that apply at trial do not apply at a sentencing hearing. In ***Morin*** , at 126, the court stated that "given the wide latitude accorded judges as to the sources and types of evidence and information upon which to base their sentencing decisions, it is doubtful that this court should attempt to lay down guidelines in respect of a decision whether or not a sentencing circle should be used in a given case." We agree. As Bayda C.J. noted in ***Morin*** at 145, a judge must be mindful of two mandatory criteria "the willingness of the offender and the existence and willingness of a community".
- [26] Guidelines for sentencing circles were commented on in ***R.* v. *Johnson (G.)*** (1995), 48 B.C.A.C. 93 (Y.T.C.A.). The court stated that, where sentencing circles were to be used by judges to assist them in the sentencing process, guidelines should be published to inform the Crown and the defence of the process and the expectations of a circle hearing.
- [27] Similarly, in ***R.* v. *Johns (J.C.)*** (1995), 108 W.A.C. 97 (B.C.C.A.), the court commented on the use of a sentencing circle with no developed guidelines. The court stated that great care should be taken to ensure that the administration of justice is maintained when sentencing circles are utilized. To meet this goal, the court stated, at 104, that judges utilizing the sentencing circle process " should formulate rules, so that the public will understand the basis upon which individual judges are appearing to depart from the practices followed in all other cases." In Saskatchewan, Provincial Court judges have developed criteria for determining whether a sentencing circle is appropriate in each particular case. The Saskatchewan Court of Appeal commented on these criteria and indicated that it was reluctant to impose its own guidelines in ***Morin*** , *supra* .
- [28] In Alberta, in ***R.* v. *Manyfingers (C.J.)*** (1996), 191 A.R. 342, the Provincial Court acknowledged that there is a need for well-publicized guidelines for the sentencing circle process to educate both the public and appellate courts. Furthermore, as outlined in ***R.* v. *Johns (J.C.)*** , *supra,* the court recognized the concern that an undefined process not displace the rule of law.
- [29] The *Commission on Crime Prevention and Criminal Justice,* ESC Res. UN ESCOR, 9 th Sess., (2000) draft resolution to the Economic and Social Council proposes a set of principles for the use of restorative justice programmes in criminal matters. While this is only a recommendation and relates to an out of court mediation process, it may be a useful reference for sentencing judges.
- [30] We are not prepared to set definitive parameters of a sentencing circle. In our view, it is preferable that the laws with respect to sentencing circles develop incrementally. Procedures applicable to this case may not be applicable to other offences and offenders. Given the limited judicial authority regarding sentencing circles and their resulting use, there is insufficient information for this court to fully appreciate all the variables involved. Moreover, as this court is one step removed from the sentencing process we prefer to draw on the experience of trial courts before establishing specific criteria to be employed in every case. Having said that, we have a duty to examine the procedure adopted here. In doing so, we will touch upon some areas a sentencing judge may wish to consider when employing the sentencing circle.

Sentencing Circles

- Facts
  - [31] Section 724.(3) of the *Criminal Code* requires that:
    - where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
    - (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
    - (b) the party wishing to rely on a relevant fact, including a fact contained in a pre-sentence report, has the burden of proving it;
    - (c) either party may cross-examine any witness called by the other party;
    - (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
    - (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender

- [32] In this case, the initial failure to address the facts and the contradictions contained in the different reasons for sentence, impede this court's ability to ascertain the facts upon which the sentencing judge relied when he accepted the circle's recommendation.
- [33] The facts the Crown sought to establish were relevant to determining an appropriate sentence. Section 718.2(a) requires that, when imposing a sentence, the court consider any aggravating or mitigating circumstances relating to the offence. In ***Gardiner*** , *supra* , Dickson J. stated, at 414-15, that "any facts relied upon by the Crown in aggravation must be established by the Crown. If undisputed, the procedure can be very informal. If the facts are contested, the issue should be resolved by ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender." While the sentencing judge does not need to resolve facts beyond those necessary to establish an assault for the purpose of entering a conviction, where the Crown wishes to rely on aggravating facts those facts must be admitted or proven. Here that did not happen because of the way the proceeding unfolded.
- [34] ***Gardiner,*** *supra* , provides further (at 414) that "[t]he sentencing judge therefore must get his facts after plea... .[A] plea of guilty, in itself, carries with it an admission of the essential legal ingredients of the offence admitted by the plea, and no more." Before sentencing, a judge must ensure that the admitted facts sustain the charge: ***R.*** **v.** ***Pardais*** (28 July 1989), Edmonton 8903-0466-A (Alta. C.A.). To enter a conviction that is all that is required. But here the Crown intended to establish and rely on a particular set of facts for sentencing purposes and that never occurred.
- [35] Typically, a guilty plea is entered on the basis of admitted facts and a conviction is entered. Factual difficulties are avoided because both parties accept the facts that are the basis of the plea. Once the facts are admitted or proven for the purpose of the conviction, the sentencing judge evaluates whether those facts sustain the charge prior to entering a conviction.
- [36] Additional facts, not required to sustain the charge, may also be relevant to the sentencing process. New facts may emerge. Sometimes they will be caught by the earlier agreement or admission as to facts. Sometimes they will relate to peripheral sentencing matters and fall outside the earlier admissions or the plea bargain process. If either party wants to challenge such facts, there should be a hearing where those facts should be established in the ordinary course.
- [37] A key finding of fact at issue in this appeal relates to Labelle's degree of involvement in the assault on Mr. Anderson. As noted earlier, whether Labelle beat the victim with the wrench, or just threw it over his shoulder, was never established.
- [38] In our view, the facts should have been ascertained at the commencement of the hearing as requested by the Crown prior to the adjournment. Moreover, when this factual dispute became apparent, and the Crown raised the issue during the hearing, the sentencing judge erred in not dealing with it prior to sentence. Perhaps the parties could have agreed on the facts, as they did for this appeal. It was not sufficient for the sentencing judge to simply dismiss the problem on the grounds that Labelle's involvement with the others was sufficient to sustain the plea. Degree of involvement is an aggravating factor which the Crown is entitled to prove.
- [39] In ***R.*** **v.** ***Joseyounen*** , [1995] 6 W.W.R. 438, at paras. 33-34 (Sask. Prov. Ct.), Fafard P.C.J. stated *:*
    - The sentencing circle is not designed for fact-finding, nor does it have a mandate to embark on such a quest. Moreover, the accused's rights on appeal might be jeopardized. The judge must give the facts to the circle, and if after the guilty plea there is some dispute which does not invalidate the guilty plea, the judge must hear evidence and find the facts beyond a reasonable doubt.
    - To do otherwise is to leave the circle struggling to no end with issues that the participants may not be able to resolve beyond a reasonable doubt. Circles operate by consensus; they do not apply the doctrine of reasonable doubt as we know it.
- [40] As indicated in ***Moses*** *, supra* , any disputed facts must be proven in the manner typically utilized in the criminal process. Section 723(1) states that before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence. Further, if the Crown seeks to rely on a disputed fact in the sentencing process, it must prove it beyond a reasonable doubt: ***Gardiner*** *, supra* .
- [41] Preferably, disputed facts should be resolved prior to the start of the sentencing circle process. Alternatively, where a disputed fact arises mid-process, that fact must be established. One option is for the court to break out from the circle and resume a traditional court process.

In such a case, an accused may not wish to proceed with the circle, or the Crown may want to make submissions with respect to continuation in that forum. ***Moses*** *, supra,* noted (at 370) that "the formal court process provides a `safeguard' to be called upon by either counsel at any time a matter in the circle necessitates formal proof." In short, the facts upon which the Crown wished to rely and intended to procure by admission were never determined in the manner required by criminal procedure.

- [42] This case illustrates the importance of establishing facts. The sentencing judge's comments during the hearing, compared to those contained in his later written reasons, make it difficult to determine which facts he relied upon when approving the sentence.
- [43] In ***R.*** **v.** ***Papequash*** (1987), 55 C.R. (3d) 398 (Sask. C.A.) there were two competing versions of the events leading up to the assault at issue. A sentencing hearing was not held and, as a result, the trial judge did not hear the Crown's evidence on potential aggravating factors nor the defendant's response. The Court of Appeal ordered a rehearing, in part, because it did not know what test and procedure the judge used to resolve the disputed circumstances, nor the facts the trial judge ultimately relied upon in imposing his sentence.
- [44] In summary, facts should be established before a circle hearing, either by admission or by proof in the ordinary course. Those facts should be presented to the circle. The circle is not the appropriate forum in which to prove disputed facts. The sentencing circle deals with the possibility of a restorative sentence based, in part, on the facts constituting the offence. No doubt additional facts will frequently arise during the course of the hearing, but, if challenged, disputed facts must be proven as outlined above.
- [45] In this case, the sentencing judge erred by refusing to resolve the disputed facts on the grounds that Labelle's acknowledged participation with others was sufficient to support his plea. The Crown sought a sentence on the basis of the violence of the attack and had the right to establish those facts as an aggravating circumstance. The conflicting comments by the judge make it difficult to ascertain which facts he accepted. But for the agreed facts provided at this appeal, we would return this matter for rehearing.

- Composition of the Circle
  - [46] A sentencing circle must always be fair and representative, and may vary from case to case. It will take time to develop the rules for excluding or including people within the circle, and even then, the specific circumstances may require flexibility. While we are not prepared to set firm guidelines for the exact composition of every circle, we do comment on the composition in this case.
  - [47] At the outset, the sentencing judge indicated that he would invite the elders. In fact, there were no independent members of the community present. The circle included the offender Baret Labelle, his common-law wife, his counsel, his two grandparents, two Crown counsel, the victim who had suffered a stroke with resulting memory loss and other disabilities, the investigating officer, the probation officer and the sentencing judge.
  - [48] The victim's wife was not present. We note that, due to her husband's injuries, she was yet another victim in this proceeding, as she is the one left with the responsibility of providing for their family. Her attendance would have been desirable. We acknowledge that the sentencing judge invited her. Mr. Anderson did attend. The sentencing judge seated Grace Auger, a member of the prosecutor's office, next to the victim and stated "She is also a Cree Indian, and I'm hoping that her presence will be of assistance to Mr. Anderson." He also requested that Constable Johnson provide support to the victim.
  - [49] No one appeared to have been designated to explain to Mr. Anderson his role and any rights he might have. Considering his disabled condition, it would have been helpful had he had more support. Initially, Mr. Anderson wanted a jail term of a year. By the end, he said he was no longer angry. The sentencing judge discussed the lack of benefit from prison. What is not clear is whether the victim's changed position on imprisonment was really a change of heart or whether he felt pressured by the process and the judge's position on the value of jail.
  - [50] Moreover, as ***circle sentencing*** deals with consensus, support for Mr. Anderson might have placed him in a better position to deal with his concerns. For instance, the judge asked Anderson if Labelle could hunt for him. Mr. Anderson declined but did have one request that was never dealt with. He said that he would be willing to discontinue his civil suit but didn't want any of the associated costs. With appropriate support he may well have been in a position to address that concern.

- [51] As noted, it is difficult to set a specific formula for the composition of all sentence circles. It may vary depending on the offence, the community services available, whether a community is urban or rural, and the nature of the offence.
- [52] Judges should always carefully consider the composition of a sentence circle. Some of the appropriate considerations include the following: Is there balanced representation of the interested groups? Does the community have a stake and is it prepared to play a role? Does the offender agree to participate? Should there be a representative or a support group for the offender or the victim? Is there a power imbalance between the victim and the offender, for example, does any party suffer an impediment interfering with the ability to speak his or her mind? Where a question of the ability of a party to properly speak for him or herself arises, is there a support group that could assist?
- [53] In the normal case both the offender and the victim will agree to participate. There may be exceptional occasions where a victim is no longer available, or is completely disinterested one way or the other, yet the effected community is still interested in proceeding. If a case proceeds without a victim, a victim's interest should still be represented by the Crown or some other representative that may wish to be heard.
- [54] As the sentencing circle generally involves releasing an offender into the community, it may be important to involve respected members of that non-political community at the hearing. Is there an identifiable community, with the healing and restorative resources, willing to support the offender? Are there impartial members of the effected community represented? (See: ***Morin*** for a good discussion of the need for community representation.) The community holds a considerable stake in any sentence imposed as it is interested in community safety, community awareness of the offence, community participation, use of resources, and the support and supervision of any sentence.
- [55] It is not clear that the victim understood his right to stand alone in disagreement or if his condition interfered with his capacity to do so. In this case, there were no impartial community members, nor was there appropriate support for the victim, notwithstanding an identifiable community into which the offender was to be released.
- [56] The Crown wanted to restrict those allowed to speak to the offender, the victim, the community or court parties. We decline to limit circle hearings in that manner at this time. Sentencing judges have a broad discretion to decide on the information they require and receive for sentencing purposes. Frequently courts allow representations from family members, friends, employers, social workers, members of rehabilitative organizations and parties with information that can assist the court.
- [57] In this case, the sentencing judge's initial intention to invite elders of the community was a good one. This was a case where objective members of the community would have had much to contribute. There were racial overtones to the violent attack and a decision to release a violent offender who requires treatment involves the community. This accused will be released into an identifiable community, and an objective community presence at the hearing would have been beneficial.

- Ordering a sentencing circle
  - [58] The Crown urges the adoption of principled criteria for directing a sentencing circle. Since it is unnecessary to deal with this issue, we decline to do so. The trial courts require flexibility in assessing the value of a circle. Some authorities suggest that a circle should not be held where it seems apparent that a penitentiary term is required (see: ***R.*** **v.** ***Taylor (W.B.)*** (1997), 163 Sask. R. 29 (C.A.)). Others disagree, recognizing that indirect benefits may flow from the circle process itself: ***Morin*** at 148). A sentencing circle may increase awareness in victims and the community, resulting in restorative measures following incarceration. Any process that improves an offender's chance of rehabilitation within his or her community is worth considering.
- Conclusion regarding the hearing

  [59] As noted, the most serious problems with the sentencing circle arose with respect to the facts, the lack of input by the parties, and the composition of the circle, specifically, the wife's absence in view of Mr. Anderson's disability and the absence of objective community members. All of these issues worked to undermine the circle's conclusions.

The Fitness of Sentence

- [60] Baret Labelle was a young offender, only 18 years old when the assault occurred. He was a first-time offender. The agreed statement of facts accepts that he was not the instigator of the incident. By the time of sentencing he was 20 years old, had a common law wife and two children. He entered a guilty plea and was truly remorseful. Labelle's childhood was difficult. His mother had an alcohol problem, which existed during her pregnancy with Labelle. As a result, he was raised primarily by his grandmother. He has a grade 7 education from the Morley Reserve, which the social worker equated to a grade 2 or 3 public school level equivalent. His brother, Sherman, committed suicide before going to court on this charge. The Crown made a deal with Marty Ear, the other participant in this crime, whereby he was not charged in exchange for testifying. The facts accept that Marty was the prime instigator. As a result, there are no comparative sentences, as Labelle stands to be the only one sentenced for this serious offence.
- [61] There are, however, serious aggravating factors in this case. The parties deliberately armed themselves and went to "shake down" vehicles. Labelle took the wrench with him. The unprovoked assault on Mr. Anderson occurred at his trailer at the Seebee campground, and is akin to an attack on someone in his home. There was at least the suggestion of racial overtones to the assault. Mr. Anderson's injuries are severe and have resulted in serious financial hardship for himself and his wife.
- [62] The Crown argues that the trial judge erred in two significant ways. First, he failed to correctly understand and apply general principles of sentencing. Second, he failed to impose a sentence within the appropriate range as reflected in the case law. It submits that a sentence between one and two years incarceration would be appropriate.
    - Error in principle
        - [63] The trial judge made the following statement:
            - I am not inclined that punish for the sake of punishing. I'm **not inclined to think there is any merit to it** and, as a matter of fact, I think I'm supported by that in comments that the Supreme Court of Canada made in the ***Gladue*** case that imprisonment has had a very minor affect on the reduction of crime. It doesn't prevent repetition of crime. It often contributes to it because people get into this milieu of criminal people that does more harm than good.

              (AB 53:45 -54:7)
              (Emphasis added.)
        - [64] In the written reasons for judgment, he stated as follows:
            - The sentence is not within the range of other similar cases.
            - I am particularly mindful of my sentence in **R v Hunter** 52 Alta L.R. (3rd) 359, and 211 A.R. 110 in which I sentenced the accused to a period of probation for a serious domestic assault, and The Alberta Court of Appeal **R v Hunter** 63 Alta L.R. (3rd) 229 and 216 A.R. 72, added 18 months imprisonment to that sentence because the Court found that for that type of offence a period of imprisonment was necessary to meet the requirements of deterrence and denunciation required. I had based my decision in that case on my view of the new sentencing provisions of the Criminal Code, particularly Section 718.2(e). I now rely on the interpretation by the Supreme Court of Canada of that section in **R v Gladue** , as well as the results of this Family Group Conference/Healing Circle to again pass a non-custodial sentence in the case of an even more serious assault. In my view the amendments to the Criminal Code as interpreted by the **Gladue** case mark a change in the use of imprisonment as a sanction for Criminal offences. ... (b) - This sentence may not be similar to others, but I find that sentences which pre- date the Gladue decision are now not binding. (AB 74-75, 78)
        - [65] In our view, the sentencing judge carries the statements in ***Gladue*** beyond their intended reach. He ignores the statement in **Gladue** at para. 93:13:
            - It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non- aboriginal.

- [66] This matter was addressed further in ***R.*** **v.** ***Wells*** (2000), 141 C.C.C. (3d) 368 (S.C.C.) where the Supreme Court of Canada provided at para. 39:
    - In the search for a fit sentence, therefore, the role of the sentencing judge is to conduct the sentencing process and impose sanctions taking into account the perspective of the aboriginal offender's community. As was noted in *Gladue* , it is often the case that imposing a custodial sentence on an aboriginal offender does not advance the remedial purpose of s. 718.2(*e*), neither for the offender nor for his community. This is particularly true for less serious or non-violent offences, where the goal of restorative justice will no doubt be given greater weight than principles of denunciation or deterrence.
- [67] The Supreme Court in ***Gladue*** certainly recognized that Part XIII has "changed the range of available penal sanctions in a significant way" (para. 40) and that sentencing must be aimed at what is "a fit sentence for this accused for this offence in this community" (para. 93). Further, it noted at para. 76 that disparity in sentences for similar crimes is a "natural consequence of this individualized focus" (citing with approval Lamer C.J.C.'s comments in ***R.*** **v.** ***M. (C.A.)*** , [1996] 1 S.C.R. 500). And in ***Wells*** , *supra* , the Supreme Court noted that there were no set categories of offences that preclude the non-custodial sentence and denounce the use of offence specific ranges.
- [68] We do not, however, accept that the Supreme Court concluded that there is no merit to incarceration, and that incarceration does more harm than good in **all** cases. Rather, the Supreme Court made it clear that deterrence and denunciation do have a role to play and that restorative principles do not always take precedence. It recognized that the more serious the crime, the greater the chance of incarceration. In our view, this is a serious crime.
- [69] Thus, the sentencing judge took an overly broad view of ***Gladue*** . While no category of offence is automatically excluded from consideration for a restorative sentence, a sentencing judge must weigh the offender and the offence, properly understanding the role that denunciation and deterrence play in sentencing.
- [70] Moreover, the sentencing judge did not even impose a conditional sentence with significant conditions, opting to impose a suspended sentence only. Such a sentence fails to address the punitive aspect of sentencing at all in any meaningful way. It ignores the need for deterrence and denunciation for this serious crime. Lamer C.J.C. commented in ***R.*** **v.** ***Proulx*** , [2000] 1 S.C.R. 61 on the deficiencies of a suspended sentence as compared to even a conditional sentence when he said at para. 23:
    - While a suspended sentence with probation is primarily a rehabilitative sentencing tool, the evidence suggests that Parliament intended a conditional sentence to address both punitive and rehabilitative objectives.
    - Lamer C.J.C. noted that the conditional sentence is defined in the *Criminal Code* as a sentence of imprisonment, and therefore a conditional sentence (at para. 29) "intended imprisonment, in the form of incarceration, be more punitive than probation, as it is far more restrictive of the offender's liberty." He cautioned (at para. 30) against equating probation with a conditional sentence because:
        - ...Parliament has mandated that certain non-dangerous offenders who would otherwise have gone to jail for up to two years now serve their sentences in the community. If a conditional sentence is not distinguished from probation, then these offenders will receive what are effectively considerably less onerous probation orders instead of jail terms. Such lenient sentences would not provide sufficient denunciation and deterrence, nor would they be accepted by the public. ... Inadequate sanctions undermine respect for the law. Accordingly, it is important to distinguish a conditional sentence from probation by way of the use of punitive conditions.
- [71] As Vancise J.A. noted (dissent in ***R.*** **v.** ***McDonald (D.P.)*** (1997), 113 C.C.C. (3d) 418 at 443 (Sask. C.A.) approved by Lamer C.J. C. in ***Proulx*** at para. 35) conditional

sentences were designed to "permit the accused to avoid imprisonment but not to avoid punishment". Conditional sentences generally include punitive conditions restricting the liberty of the offender. Thus, the conditional sentence is intended to be more punitive and to address the issues of deterrence and denunciation in a more meaningful manner. For a crime of this nature, imprisonment would generally be the sentence for both aboriginal and non-aboriginal offenders.

- [72] This court's power of review of sentencing is a limited one. As stated in ***Proulx*** at para. 123 from ***M. (C.A.)*** :
    - Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
- [73] In our view, however, this sentence is demonstrably unfit. The imposition of the suspended sentence with no house arrest and no curfew for this serious and violent crime is totally inadequate. It demonstrates that the trial judge failed to attribute the appropriate weight to denunciation and deterrence.

Conclusion

[74] The seriousness of this crime indicates that it is one where the sentence of a non- aboriginal and an aboriginal offender are more likely to be the same.
[75] Considering all of the aggravating factors in this case, a term of imprisonment for this type of violent attack would generally be required. This suspended sentence is demonstrably unfit.
[76] However, in view of the tragic personal circumstances that surround this offender, his age, his family obligations, his role and, most importantly, the fact that the suspended sentence has now been served without any breach of the imposed terms, with personal progress, we are not prepared to revisit this sentence and insist on a term of imprisonment at this time.
[77] The appeal is dismissed.
APPEAL HEARD on January 16, 2001
MEMORANDUM FILED at Calgary, Alberta,
this 20th day of February, 2002

CONRAD J.A.

SULATYCKY A.C.J.Q.B.A.

McFADYEN, J.A. (concurring in the result):
[78] I have had the opportunity to read the Memorandum of Judgment of Conrad, J.A. I completely agree with her reasoning and conclusions respecting the failure to establish facts, and the composition of the sentencing circle. I agree that the sentencing judge erred in his interpretation of the S.C.C. decision in ***R.*** **v.** ***Gladue*** , and that the two year suspended sentence imposed in this case is demonstrably unfit and fails to disclose any regard to principles of denunciation and deterrence.
[79] Because there were no independent community members, I am of the view that there was no sentencing circle and no recommendations or conclusions. Rather than obtaining submissions from the community involved, the sentencing judge put forward his own theories about the condition and grievances of the aboriginal people and the lack of value in deterrent and punitive sentencing, in rejecting the suggestions of the victim and the Crown.
[80] Although a conditional sentence with strict conditions undoubtedly would have been preferable to the suspended sentence imposed by the trial judge, I am of the view that a sentence of actual imprisonment should have been imposed. I am taking into consideration the seriousness of the assault, which resulted in the victim's permanent disability, and the circumstances which included the planned participation by three armed men to harass innocent individuals who happened to be in the wrong place at the wrong time. However, having regard to the history of this matter, the successful completion of the sentence imposed, the fact that almost four years elapsed between the event and argument in this Court, changes in the circumstances of the appellant, and the eventual agreement by the victim, I reluctantly agree with my colleagues that the appeal should be dismissed.
APPEAL HEARD January 16, 2001
MEMORANDUM FILED at Calgary, Alberta,
this 20th day of February, 2002

McFADYEN, J.A.

5.1.2. 1999

- R. v. Gladue Supreme Court of Canada. File No.: 26300. April 23, 1999. Appealed from the Court of Appeal for British Columbia.
    - This case is not specifically about sentencing circles but about principles governing section 718.2(e) of the Criminal code (Criminal Code, R.S.C., 1985, c. C-46, s. 718.2(e))that states that:
        - (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.
- *R. v. Paul* [1999] 1 C.N.L.R. 149 New Brunswick Court No. 331 Re Criteria for sentencing circles - assault (July 15, 1998).
    - "In considering the use of a sentencing circle, the Court was mindful of the direction provided in R. v. C.P. [1995] Y.J. No. 47, where a sentencing circle was used for a conviction of assault causing bodily harm. The concern in C.P. (supra) was to ensure that the use of the circle did not in any way have the effect of diminishing the sentence of the accused nor be seen by the accused or the community as a "way out" for the accused to avoid being incarcerated. The criteria for use of a circle were stated as follows:
        - the accused must agree to be referred to the sentencing circle
        - the accused must have deep roots in the community in which the circle is held and from which the participants are drawn;
        - there must be elders or respected non-political community leaders willing to participate;
        - the victim must be willing to participate and has been subjected to no coercion or pressure in agreeing.
    - It was apparent in reviewing the documented evidence provided in support of the application that there was support for the use of the sentencing circle by the Chief and Council of the Woodstock First Nation.
        - In addition the list of proposed participants included community leaders, spiritual leaders, family members of the accused and members of the First Nation Treatment and Counselling Programs.
        - The victim also agreed to the use of the sentencing circle and agreed to participate.
        - The fact that the accused was a life long member of the Woodstock First Nation where he still lives today was also noted as was the fact that his family members were prepared to take part in the circle."
    - Provincial Court Judge Jackson concluded, at paragraph 16, that:
        - From the perspective of a non-native Judge, sentencing circles can, if used in appropriate cases, be an effective tool in sentencing and also in promoting the community's understanding, monitoring and acceptance of conditional sentence orders. Some commentaries on the use of sentencing circles, suggest that sentencing circles can over-rely on alternative sentencing; however, in this Court's opinion, the sentencing alternatives as set out in the Criminal Code have extended the traditional approach to the art of sentencing and the use of sentencing circles allows the Court to fully utilize effective community sentencing in the native community.

5.1.3. 1998

- R. v. A.G.A. [1998] Alberta Court of Queen's Bench. No. 282 March 17.
    - "The accused submitted that the process that his community wished to adopt was not one of ostracization, but rather one that found a solution through the intervention of elders in the community.

- He submitted that a condition of his sentence should be to meet regularly with the Elders to assist him in his rehabilitation.

- Such a condition would embrace the aboriginal healing philosophy.

- The Crown submitted that the sentence should be served in a penitentiary."

- R. v. Bernard [1998] N.S.J. No. 547 Nova Scotia Supreme Court (Pictou, Nova Scotia) December 21, 1998. Case re: Criminal Code s. 90(1) -- Prohibited weapon.
  - This is a standard sentence for the offence of having a prohibited weapon in possession.
  - The offender and the victim were members of the Pictou Landing First Nations community and were cousins and friends.
    - Both were drinking heavily when the victim pulled a .22 caliber rifle and pointed it at the offender, who seized the gun, and struck the victim over the head causing a depressed skull fracture.
    - There was no significant risk to the intelligence function of the victim.
    - The Crown originally charged more serious offences, but accepted a guilty plea on this charge.
    - The offence occurred on sacred grounds on Indian Island.
  - A well structured and organized "Mi'kmaq Justice Circle" was held under the direction of the Mi'kmaq Justice Institute involving appropriate members of the Pictou Landing First Nation community and professional counsellors.
    - This Justice Circle made recommendations to the sentencing judge, most of which were recommended by the Crown and defence counsel, and were accepted by the Court.
    - The sentencing judge noted that such Justice Circles, properly organized and conducted as it was here, can be a valuable informative process, and has value for the courts, the community and the victim and also involves the community in supporting the rehabilitative process of the offender.
    - It is particularly useful for Mi'kmaq offenders as it can provide that native counsellors and supervisors, speaking the mother tongue of some offenders, engage in the rehabilitation process of the offender...
    - [At paragraph 6 of this case judge Kelly states:]
      - [6]. I have been most impressed with the material that has been provided to me describing the background, the planning, the objectives and the description of the Justice Circle process. The Mi'kmaq Justice Institute has implemented some one hundred Justice Circles in the past three and a half years dealing mainly with young offenders at a pre-charge stage. They now are interested in participating in the adult sentencing field and I am advised today that this may be the first of those interventions or involvement in sentencing in this Court. [7] In my opinion, the attempt to empower the community and families of those directly involved, both the offender and the victims, is a healing process for them as individuals, and also for the community. It is also a valuable informative process, one that can be of considerable value to the courts and the community. Its purpose is to encourage reparation to the community and to the victims, to support and assist the offender to restore himself or herself to the community and to restore himself or herself to self-respect. Our adversarial system has removed the responsibility of the offence from the smaller community to the state, and this process seeks to return to the community some responsibility to assist in developing a positive sentencing plan and hopefully a considerable measure of responsibility to the offender as well. Responsibility is also given to the community to ensure as best it can that the offender is accountable for his or her offence and try to restore him or her to their community. It appears to be a useful method to attempt to restore "health" to the whole community.
      - [8] Fortunately, the Mi'kmaq community now has available to it some useful resources such as anger management programs and drug and alcohol counselling

programs. This has not always been available to this community, but they now have direct access to these resources which are often provided by native professionals. The sentencing plan or proposal here was reached through a consensus of the people participating. I am advised that this is the traditional Mi'kmaq method of arriving at important decisions and I am advised that in the Mi'kmaq community this decision making process is used by the Mi'kmaq Grand Council. Along with the representatives from the Mi'kmaq Justice Institute who were trained and experienced facilitators, others participated in the Justice Circle. These participants included elders and other leaders from the community. Normally they invite the victim and the supporters of the victim into the Circle as well as supporters of the offender and his family. The Justice Center also invites the appropriate law enforcement officer and appropriate native counsellors of the various treatment programs that may be appropriate to the offender. In this instance a Captain of the Mi'kmaq Grand Council also attended as a secondary victim because the whole community was affected by the fact that the offence had occurred on sacred ground. I find this scheme to be an important step in implementing a restorative justice process in our courts.

    - [9] I have been provided with a lengthy and thorough sentencing proposal and the program or plan arranged by the Institute. There had been some difficulty because the primary victim, who is a first cousin and was a friend of the offender, and his mother, were scheduled to attend but did not. They were prepared for attendance by the Institute officers or facilitators, but on the final day apparently the victim decided that he was not prepared to participate in the program, feeling that he required more time to heal physically and spiritually....

- *R. v. Peters* Sask. Prov. Ct. 1998 Re: arson
    - "This was the first sentencing circle held on the Sturgeon Lake First Nation. The sentencing circle after four hours of intense sharing of feelings and ideas, with the exception of the Crown, unanimously agreed that the accused should receive a community based disposition."
- *R. v. Williams (1998) Man. Court of Appeal No. 482*
    - Judge Huband stated:
        - "I think it is apparent that the entire healing circle process was not helpful in this case, resulting as it did in conflicting recommendations.
        - ...Certain conclusions, however, can be drawn from its use [the use of a healing circle] in the present case.
            - Firstly, where the healing circle recommends treatment or counselling or assessment which are likely to extend for months, if not years, the disposition of the case in court should not await the results of those processes.
                - In the present case, the involvement of the Healing Circle delayed the disposition of the matter for well over a year.
            - Secondly, healing circles are not appropriate for receiving and analyzing professional reports couched in the jargon of their authors.
            - Thirdly, this type of case, involving a man with continuing pedophilic tendencies, seems singularly inappropriate for consideration by a healing circle. A healing process may be workable where an accused is capable of mending his ways, but in this case it seems evident that the accused is a continuing risk."

5.1.4. 1997

- *R. v. Antoine [1997] O.J. No. 4078. June 27, 1997. Prov. Court Judge Fitzgerald.*
  - This case is mostly about hunting, sale of game animals, firearms regulations, hunting at night and the Game and Fish Act. I quote below the small portion of what Judge Fitzgerald said about sentencing circles:
    - "[para 29] The other major concern that Mr. Weppler had was with regard to the Sentencing Circle. Mr. Weppler made an application earlier this week to have a Sentencing Circle for his clients. We did have a Sentencing Circle for some of the persons involved on an earlier occasion and I indicated then and I indicated this week and I will indicate again that the Sentencing Circle that was conducted, I thought, was a most worthwhile and valuable experience and that the community, the defendants and the court benefited a great deal. I know I certainly did. To have the concerned input from the community in those circumstances was of considerable benefit to me in determining and imposing penalties at that time.
    - "[para30] Now the application for the Sentencing Circle this week was denied and I indicated that it was denied because I was not satisfied that the level of the responsibility was present and that I might give further reasons today, and I will give those further reasons now.
    - "[para31] I am going to refer to the Morin case. I don't have the reported version here. I understand it can be found at 101 C.C.C., 3d, p. 124. A copy of the reasons that I have and the part of the reasons that I am referring to begin at p. 27 where the court, in dealing with Sentencing Circle, asks the question: "When is it appropriate to hold a Sentencing Circle?" And I will read from that decision..." [See *R. v. Morin*]
    - ...Simply put, there does not appear to be an offender willing to accept full responsibility for the wrongdoing, nor does it appear that there is an existing and willing community to assist in the restoration or healing as contemplated in Morin."

- R. v. C.J. (C.) (1997), 119 Canadian Criminal Cases (3d) 444 (Nfld. C.A.)
  - Sentence - Principles - Aboriginal offender - Restorative justice –
    - In borrowing from restorative justice approach, courts should be cautious in determining when and in what matter it should be applied...

- R. v. Caron [1997] Ontario Court .Court File No. 96-084183 Oral judgment: October 30, 1997. Re: breath sample to a police officer and failing to attend court. Circle formed "to give the Court assistance in formulating what is an appropriate disposition." From paragraph 43 Susan Stewart states that:
    - "I feel it [the sentencing circle] was a very positive experience for myself. I can't speak for everybody else in the circle but we certainly got the feeling that we did an awful lot of work here, and I think the end result, that none of this would have happened in a regular court setting. None of the healing would have happened for B_____; none of the connecting would have happened for the support group, and the communication that was opened up between mediation between defence between Crown, wouldn't have happened in a regular court setting. I think we've all learned an awful lot today and I'm very honoured to have been here."

- R. v. H.K.C. [1997] Saskatchewan Court of Appeal. No. 577. Written reasons: September 15, 1997.
  - "The defence applied for a sentencing circle to which the Crown objected on the basis of *R. v. Morin* (1996), 101 C.C.C. (3d) 124, a decision of this Court, and also because the victim was in a cycle of violence which might have precluded her from meaningful participation.
  - The judge despite this ordered a sentencing circle and ordered that, inter alia, the accused not contact the victim during the period leading up to that.
  - Contrary to his undertaking, the respondent did contact the victim and the victim ultimately indicated to the Court that she did not wish to participate in or to have a sentencing circle take place.

- The Court elected to proceed with a sentencing circle, but during the course of it, concluded it was no longer appropriate to carry it on as a judicial proceeding and left."

- R. v. H.R., [1997] A.J. No. 816 (Q.L.) which Judge Marshall said at para. 53:
  - "With respect, it is not clear as to what exactly these words are intended to mean. I do not read section 718.2(e) as creating a separate category for an "aboriginal offender" since the words "with particular attention to the circumstances of aboriginal offenders" follow the words of general classification, namely "all offenders" so that aboriginal offenders would be included in that general classification, but it is required that particular attention is to be paid to the circumstances of "aboriginal offenders". This suggests to me that additional tools that are unique to aboriginal people such as sentencing circles, traditional healing methods, respect for the advice of elders, etc., should be utilized whenever reasonably possible and that special recognition should be given to the native traditional way of life, and the effects that the removal from that community, and way of life, would have upon an aboriginal offender. Such an approach, it is hoped, would make the justice system more just, and meaningful and acceptable to the aboriginal people."
- R. v. Meehcance (1997) North Battleford Prov. Court
- R. v. McDonnell (1997), 6 C.R. (5th) 231 (SCC)
- R. v. Peavoy [1997] O.J. No. 4086. Court File No. 3347/94. Ontario Court of Justice (General Division). Judge Thompson. October 3, 1997.
  - Case is about considerations on imposing sentence re: manslaughter - Previous criminal offences (including repeat offenders) - Time already served - Addicts - Manslaughter. I don't believe that a sentencing circle was held in this case. But on a keyword search the case comes up due to the word in paragraph five where Judge Thomas stated:
    - "Although I do not profess to be knowledgeable of the First Nations system of justice, I have come to understand that revenge is no more a part of their belief in justice than it is in our system. As understand it, it is the desire of the First Nations community that a judicial decision - be it through the sentencing circle or the Ontario Court of Justice - result in a healing of the community. The desire of both cultures is that the sentencing process will result in a peaceful and harmonious family of citizens."

- R. v. Pena B.C.S.C. June 20, 1997

- R. v. Swiftwolfe (1997) North Battleford Provincial Court

- R. v. W.B.T. (1997) Saskatchewan Court of Appeal. [1998] 2 C.N.L.R. 140. Judge Bayda
  - Sexual assault - Validity of circle - Crown putting in issue of validity of circle on procedural grounds - Factors considered - Departure from usual range of sentencing - Accused's remorsefulness, sincerity and acceptance of responsibility - Appropriateness of sexual assault case for sentencing circle - Role of community - Willingness of victim - Element of healing inherent in process.

Quoting from page 140 of the [1998] 2 Canadian Native Law Reporter 140

> "The respondent, a member of the Lac La Ronge Indian Band, was convicted of three violent offences, including sexual assault. At trial, the judge accepted the recommendation of the majority of the participants of a sentencing circle. He ordered the sentencing proceedings be adjourned for one year and that the respondent be released from custody on a series of undertakings which included spending one year in isolation. The trial judge held that if all went well during that time, he would suspend sentencing and place the respondent on probation for three years (reported [1995] 3 C. N. L. R. 167 (Sask. Q. B.)). The Crown appealed. The appeal was allowed and the matter was remitted to the trial judge for sentencing according to law. Taking into account the amount of time the respondent spent in remand and isolation, the trial judge held that a fit sentence would be an additional 90 days imprisonment and three years probation, with one condition of probation being that the respondent spend an addition six months in isolation.
>
> The Crown appealed on the grounds that the judge imposed an unfit sentence having regard to: the nature of the offences and the previous criminal record of the accused; the need for a sentence to be a deterrent; its reconcilability with other sentences for similar offenses; the seriousness of the offences; the need for protection of the public; and, the need to maintain public confidence in the law. **The Crown also questioned the creditability of the sentencing circle and whether the sentencing judge had the power to include in a probation order a condition that the offender live for a period of time in isolation**". – *(emphasis added)*

R. v. W. M. [1997] O.J. No. 2778. Court File No. 1892/92 Ontario Court of Justice (General Division). June 27, 1997. Judge Sedgwick. Re: Break and enter, aggravated assault and causing bodily harm (plead guilty to this third charge). Complainant is wife of the accused.
Judge Sedgwick definition of a sentencing circle:

> [para8] **A sentencing circle is a process by which a sentencing court may consult members of a community about the appropriate sentence for one of its members for an offence committed against another of its members.** [emphasis added]
>
> [para9] The duty of imposing a fit sentence remains the responsibility of the Court. However, a sentencing circle may offer assistance to the Court in appropriate cases, in determining the fit sentence and, if it is to be served in the community, in administering the sentence once it is imposed.
>
> [para10] Sentencing circles ("cercles de consultation") have been held in the territories and in many provinces (including Ontario), most often in isolated communities where the sense of community is strong and well-defined and where the victim and the offender must continue to live in the same community after the offence has been committed. The procedure and objectives of a sentencing circle are well-described in the decision of Judge Stuart of the Yukon Territorial Court, *R. v. Moses* (1992) 71 C.C.C. (3d) 347.
>
> [para11] In my view, where the offence involves spousal violence, the element of healing is important. The rupture between the victim and the offender and their families and supporters, resulting from the offence, must be effectively addressed through the circle. The willingness of the community to accept responsibility for the rehabilitation of the offender is another important element, as is its willingness to offer support to the victim.
>
> [para12] Taking into consideration the criteria developed in other cases, I indicated to counsel by letter dated June 6, 1997 (a copy of which was sent to Chief R. Donald Maracle of the Mohawks of the Bay of Quinte), the following criteria to be met in this case to satisfy me that a sentencing circle would be helpful to me in the sentencing process:
>
> (1) the accused has been convicted of offences for which the sentence likely to be imposed is a conditional or suspended sentence, an intermittent sentence or a term of imprisonment for less than 2 years;
>
> (2) the accused genuinely accepts responsibility for committing the of fences of which he stands convicted and is honestly interested in turning his life around with the assistance and supervision of his community;
>
> (3) the victim will participate of her own free will and, if she requests, will have counselling made available to her and be accompanied by a support team in the circle;
>
> (4) the leaders and members of the community support the accused's request for a circle and are willing to participate in the sentencing circle process and to assume responsibility for the supervision and enforcement of the terms of any, probation order made;
>
> (5) the community is willing to support the victim; and
>
> (6) disputed facts have been resolved in advance.

In this case, the person laying the charges, considered the offenses as a "private matter" and did not want the community (through a sentencing circle) involved. The judge also said that while W.M. plead guilty to the third charge, he did not plead guilty to the first two. So no sentencing circle was held in this case.

5.1.5. 1996

- R. v. Bogdan, 11 Sept. 1996 (Sask. Prov. Ct.)

- *R. v. Manyfingers* 1996 November 14 Alberta Provincial Court. (1996) 191 Alberta Reports at page 342. This is the textbook of sentencing circle cases. A.J. No. 1025 (Alta. Prov. Court). Provincial Court Judge Jacobson.

    - Quote from *R. v. Manyfingers* (Prov. Court Judge Jacobson):

        - [para66] To give evidence on the background and objectives of the sentencing circle and to explain the report, Defence Counsel called Morris Little Wolf, a member of the Peigan Band who was the mediator of the circle. Mr. Little Wolf stated that he had started the sentencing circle procedure in this area, and had experience with about 14 of them in Montana, Saskatchewan, British Columbia and Alberta. He testified that research showed that the process had been in effect in North America over 500 years ago as a "healing process", that still has validity today:

- The circle structure was developed from our research department. Regarding the past from 500 years ago, how we used to do it before the Europeans came. Before, there was respect. There was unity, and on and on, and it developed through that

- ... the circle structure has no age limit. We deal with them as human beings across Canada. And hopefully, the circle structure that we developed is not only for our Reserve or for the Native Communities. We developed it for Canada so that we can work with our youths rather than throwing them into a pothole and have a record for being in that situation. Where the community itself can Start working together. And that is the reason for our circle structure.

- [para67] Before taking on a case, circle representatives "do a study on it" and only if the circle can properly handle it does the circle get involved. The process is not intended to "overrule the court system" and it "relates closely to the Canadian justice system".

[para68] The specific objective of the sentencing circle in *R. v. C.(L.M.)* was to achieve:

> some resolution ... as part of the healing process.

The process involves many steps, starting with reconciliation and finally to rehabilitation through contractual obligations:

> By bringing both the two families and the two parties together to end any feuding, to make peace between them and to lay the ground work for a good relationship, to be friends instead of enemies ...

The elders, and all of the community were said to be involved:

> Today, nobody knows that she's in this courtroom but when she comes to the circle, the whole community knows what kind of person she is and its the biggest punishment anybody can ever get is when people know about you.

[para69] Mr. Little Wolf stipulated the need to involve leading and knowledgeable community leaders, eg. the elders, police officers, probation officers, psychologists, social services, and other specialist occupations as necessary.

[para70] He pointed out the need to focus on families, both from within the family and the community, all with emphasis on the children:

> ... I advise the circle that we should start working together and pulling together. If we're going to share this country, we have to work together regardless of what colour we are.

[para71] Deterrence is achieved through public awareness of the offender individual to utilize the benefits and opportunities of participation in a sentencing circle:

> ... once they go into the circle structure, they can never come back and repeat it. The individual commitments to the sentencing circle stand, as obligations to be fulfilled, no matter what the court rules.

[para72] On the basis of the foregoing, the sentencing circle then submits its recommendation to the Court based on "a type of personal contract", with the "aim of achieving healing" and "the potential of success".

- R. v. Nicholas. *(1996) 177 New Brunswick Reporter (2nd) at page 124. Re: criteria and judical analysis of sentencing circles.*

"On March 25, 1996, I [Judge Desjardins] removed my gown, left my courtroom and joined with eighteen other people at the Maliseet Nation at Tobique (Wolastokwik Negoot-Gook) in a sacred circle, convened for the specific purpose of sentencing ---- ----- Nicholas. The circle set forth on its quest for an appropriate sentence, embracing the trappings of a conventional sentencing hearing and the sacred teachings of the native way of life. It was a small but tangible beginning of a bridge across the cultural divide. The reasons for this sentence are the story of that beginning...

"The Supreme Court of Canada judgment in *R. v. Gardiner*, [1982] 2 S.C.R. 368, 68 C.C.C. (2d) 477 at 514, accurately summarizes the aim of any sentencing hearing, regardless of its form:

> It is a commonplace that the strict rules which govern at trial do no apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accuse if he is to fit the sentence to the offender rather than to the crime. (emphasis added).

Rupert Ross echoes this in his article "Leaving Our White Eyes Behind: The Sentencing of Native Accused" in R.A. Silverman & M.O. Nielsen, eds. *Aboriginal Peoples and Canadian Criminal Justice* (Toronto: Butterworths, 1992) at 146:

> [Sentencing] is a tool employed in an effort to accomplish rehabilitation of the individual, deterrence to him and to others in the community and protection of that community. It requires that we learn as much as we can about that individual and about the context in which he lives. The greater our misinterpretation, the less likely it is that our sentence will produce the results we intend.

To learn as much as possible about the accused, judges regularly accept hearsay evidence at sentencing hearings, they listen to family or friends without requiring that these persons be sworn, they listen to the accused, they read unsworn character letters and they listen to the victim or read his or her statement. In some cases, sentencing hearing resembles a discussion between all of the parties involved. A sentencing circle is simply a different way to accomplish the same purpose. There are more persons to contribute to the discussion, and the setting is less informal, but the end goal remains the same...

- *R. v. Sellon (1996) 172 N.J. Newfoundland Supreme Court - Trail Division. See Justice as Healing http://www.usask.ca/nativelaw/jah_sellon.html Re: Appendix A, in this case i.e. the sentencing circle report*
- *R. v. Taylor, (1996) 104 CCC (3d) 346 (Sask. CA), 1995 CNLR 3*

5.1.6. 1995

- *R. v. Bear (19 April 1995), Sandy Bay (Sask. Prov. Ct.) [Unreported]*

- *R. v. Joseyounen Reported at: (1995) 6 W.W.R. 438 (Sask. Prov. Ct.) and [1996] 1 C.N.L.R. at page 182.*

  - The case is mentioned also mentioned in Green's book at pages 76, 77, 136 and 150. And see the Justice as Healing article on Sentencing Circle Guidelines. Re: Guilty plea necessary for a Sentencing circle, power imbalances and rehabilitation.

  - Provincial Court Judge Fafard stated:
    - Seven criteria applied in determining whether it was appropriate for the court to seek the guidance of a sentencing circle. The accused had to agree to be referred to the sentencing circle. The accused had to have deep roots in the community from which the circle was drawn. There had to be elders willing to participate. The victim had to be willing to participate and not be subjected to coercion or pressure. It was to be determined whether the accused was the victim of battered spouse syndrome. Disputed facts had to be resolved in advance. Also the case was to be one for which the court was willing to take a calculated risk and depart from the usual sentencing range. Protection of society by curtailing the commission of crimes by the offender and others was the aim as it was in any other case. However the emphasis was to be more on integration than deterrence, as well as rehabilitation and restoration of harmony in the community. Incarceration was still a possible sentence where a sentencing circle was appointed. The community understood that incarceration was a necessary measure here to deter drunkenness and to afford the accused the chance to reflect on his lifestyle. The last criteria had not been met here such that there would not be a sentencing circle as such. There was a threshold sentence which could and should not be departed from. But as a healing circle to heal and insure such incidents would not be repeated as the family requested, it would serve a useful purpose and could suggest parole conditions.
    - [para1] FAFARD PROV. CT. J.:-- The accused pled guilty to a charge of aggravated assault by endangering the life of his brother... [and the accused] applied for an order that a sentencing circle be held.
    - [para2] In deciding whether or not to hold a sentencing circle the Court is exercising a judicial function. That means that the decision must not be made arbitrarily, it must be made with reference to certain criteria.
    - [para3] Those criteria must be such that the public can be made aware of them. A democratic society cannot suffer a situation where a reasonably well-informed person with the application of due diligence cannot discover what rule (what law) is being applied.
    - [para4] The first sentencing circle to be held in Saskatchewan took place in Sandy Bay in July of 1992. I was presiding judge. Since then many sentencing circles have been held in Northern Saskatchewan (I estimate that I have dealt with over 60 cases in that manner myself), and out of this experience by me and my colleagues on the Provincial Court in the north, there have emerged seven criteria that we apply in deciding if a case for sentencing should go to a circle. These criteria are not carved in stone, but they provide guidelines sufficiently simple for the lay public to understand, and also capable of application so that our decisions are not being made arbitrarily.
    - [para5] It is imperative that the public, aboriginal and others, be able to know and understand what is happening in the development of sentencing circles: the credibility of the administration of justice depends on it.
    - [para6] The criteria were developed by researching the materials and decisions coming out of the Yukon, particularly the decision of Judge Barry Stuart of the Yukon Territorial Court in R. v. Philip Moses (1992) 11 C.R. (4th) 357, and by discussing the necessity for criteria with the sentencing circles as they came into existence in different northern communities.
    - [para7] The utility of sentencing circles has been amply discussed in Moses and other cases. In any event, that is not an issue that concerns us here.
    - [para8] A discussion of the criteria will follow, but first it will be useful to outline the facts of the incident that resulted in the charge and also look at the offender's criminal record.
    - [para15] There are two questions that must be answered:

- (1) Is this case one where it would be appropriate for the Court to seek the guidance of a sentencing circle? This question can be answered by applying the criteria to the facts in this case.
- (2) If the case does not fit into the criteria, is there still good reason to hold a sentencing circle?

- THE CRITERIA APPLIED TO THIS CASE
  - (1) The accused must agree to be referred to the sentencing circle.
    - [para16] Most of the time this first requirement will be met when the accused pleads guilty to an offence and requests that the Court grant him a sentencing circle. What one is looking for here is that the accused regrets the conduct which led to the laying of the charge and calls upon the community to help him in changing his attitude and behaviour. Of course, the strongest indication of remorse is a guilty plea. It would be difficult to discover genuine remorse in an individual who has pled "not guilty", had his trial, and after conviction says, "Now that you have found me guilty I am full of remorse and I want to mend my ways." It smacks of a "death bed repentance", especially where the accused has testified that his conduct was not wrongful.
    - [para17] In assessing the first criteria the Court must look for indicia that the accused is genuinely interested in reformation, and not simply manipulating for an easy way out.
    - [para18] Mr. Joseyounen has entered a guilty plea and applied for a sentencing circle. He admits that when he drinks violence is almost sure to follow. The antecedents in his record, his own admission of it, and the facts of this case show this to be true.
    - [para19] The first criteria is no obstacle to the granting of a sentencing circle in this case.
  - (2) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
    - [para20] One of the functions of a sentencing circle is to call upon the community to marshall its resources, even though they may be meagre, and to come to the aid of the offender in his quest for rehabilitation and re-integration into society. This is not possible if the accused does not have roots in the community. Participant who have no knowledge of the offender will be of little use to him and might easily be "conned" by an experienced offender. It is precisely because they know his background, his culture, his strong point, and his weaknesses, that the members of the offender's community can reach out to him.
    - [para21] Wollaston Lake is Mr. Joseyounen's home community. He has always live there. It is his immediate family and his extended family. Criteria number two favours a circle.
  - (3) That there are elders or respected non-political community leaders willing to participate.
    - [para22] In the Euro-Canadian model where the judge imposes sentence without the aid of a sentencing circle, the judge speaks for the people and attempts to deliver a fair, impartial and just disposition. This he does without fear of political interference while at the same time he attempts to reflect the legitimate concerns and aspirations of the community.
    - [para23] This is as it should be in any civilized society, and our history show that the fire that forged the independence of judicial decision-making was sometimes cruel.
    - [para24] In exploring the flexibility of the criminal law of Canada and its ability to accommodate First Nations cultures and legitimate needs, let us not re-invent those things which are so important to an impartial system of justice. If we throw out the essence of impartiality we run the risk of doing grave injustice to both offender and victim. What I mean is that the input of community elders and leaders must not mean the exercise of political influence in the circle to the detriment of an accused or a victim.
    - [para25] I am of the firm view that political non-intervention must become a cornerstone of the circles from the very outset, so that any attempt to contravene that principle is immediately and automatically challenged by others in the circle.
    - [para26] The principle of judicial independence in decision-making is one that is deeply ingrained in the Canadian population, including the First Nations. The many sentencing circles I have held have included the participation of chiefs, band councillors, mayors, and others in political office. I have never seen any of these persons attempt to influence the outcome by virtue of their political office.
    - [para27] In Robert Joseyounen's case elders, respected leaders, the Chief and some councillors have expressed a willingness to participate in the sentencing circle. This would be the first such experience in Wollaston Lake and the community is anxious to try it.
  - (4) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
    - [para28] It probably would not be difficult to find exceptions to this criteria. But, for the most part, it seems to me that to proceed without the willingness of the victim is to further alienate the victim from the process, a shortcoming that the criminal justice system has recently been attempting to remedy. Further, a victim who does not consent may yet feel compelled to attend or run the risk of having his or her trauma and point of view misrepresented.
    - [para29] In this case, the victim Napoleon Joseyounen does not presently have sufficient mental capacity to express his wishes on this criteria. He may never have. His family would, however, be present since the offender and the victim are brothers.
  - (5) The Court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. I she is, then she should have counselling made available to her and be accompanied by a support team in the circle.
    - [para32] This criteria was added after a period of trial and error. It has no applications to this case.
  - (6) Disputed facts have been resolved in advance.
    - [para33] This is imperative. The sentencing circle is not designed for fact-finding, nor does it have a mandate to embark on such a quest. Moreover, the accused's rights on appeal might be jeopardized. The

judge must give the facts to the circle, and if after the guilty plea there is some dispute which does not invalidate the guilty plea, the judge must hear evidence and find the facts beyond a reasonable doubt.
    - [para34] To do otherwise is to leave the circle struggling to no end with issues that the participants may not be able to resolve beyond a reasonable doubt. Circles operate by consensus; they do not apply the doctrine of reasonable doubt as we know it. [para35] In the case before us, the facts are not in dispute. The accused admits them.
- (7) The case is one in which a Court would be willing to take a calculated risk and depart from the usual range of sentencing.
    - [para36] This criteria is the most difficult to apply to the circumstances in cases of a serious nature. It is, nevertheless, the most important of the seven criteria that have been developed because, properly applied, it is the one which guarantees the maintenance of public confidence in the administration of justice.
    - [para37] It is often said in sentencing circles and elsewhere that one main purpose of the circle process is to keep aboriginal offenders out of jail. It is not so. It may well be that a welcome side-effect of sentencing circles is that fewer offenders are incarcerated. I know that this is the result in property related offences especially. I know this because at the opening of the sentencing circle I inform the participants that without their assistance in finding an alternative a certain period of incarceration will be imposed.
    - This is to insure that the offender knows where he stands.
    - [para38] But keeping people out of jail is not the aim of this exercise. If that were the only goal, one need only open the jail and release all aboriginal inmates immediately.
    - [para39] The aim of sentencing circles is the same as it is when the disposition is arrived at by other means: the protection of society by curtailing the commission of the crime by this offender and others.
    - [para40] However, in sentencing circles the emphasis is less on deterrence and more on re-integration into society, rehabilitation, and a restoration of harmony within the community.
    - [para41] I understand that this attitude was developed as a survival tool because traditional native North American groups could ill afford the luxury of exacting revenge on individual productive members of the group. Subsistence was sometimes marginal, particularly before the arrival of the horse and the gun. I believe revenge could only be contemplated if the group had sufficient foodstuffs in storage to ensure the continued survival of the band, otherwise, killing or incapacitating one capable of contributing to hunting or gathering would put the group's survival at risk. That does not mean that there were not individual acts of retribution, but these were probably frowned upon by the band because, again, this would jeopardize group survival.
    - [para42] Wollaston Lake is a relatively isolated community where much of the protein consumed by the people is caribou and fish. Although the Dene people there now subscribe to Christian religions, the traditional values are still very much in evidence, and when this survivalist "don't make waves" ethic clashes with the Judeo-Christian "eye for an eye" ethic the result is conflict in the community and a confusion of emotions on the part of many individuals. There is a silent chorus which cries, "It's fine to believe in an eye for an eye, but we can't survive if half of us are blind."
    - [para43] Now in this case the opinions gathered by the probation officer in her report are indicative of the pragmatic attitude of the people of Wollaston Lake. They recognize that the accused must be incarcerated in a case such as this. Something has to reflect the gravity of the offence.
    - It is not so much a question of specific or general deterrence. People who get drunk and commit offence seldom address their minds to the consequences before committing the offence. In practice, deterrence should be aimed at drunkenness. Incarceration here is seen as a necessary measure to afford the accused the opportunity to reflect on the style of life which led him to do this terrible thing to his brother, and to deliberate on changing his attitude. [para44] Napoleon is almost lost to the Joseyounen family, they do not want to lose Robert as well. In spite of the fact that the case does not meet the seventh criteria (I could not in this case take a calculated risk and impose anything other then a penitentiary term) the family asks for a sentencing circle "as a way of healing and insuring that something like this does not happen again. They are requesting community involvement in this matter."...
    - [para45] I will grant this request. It will not be a sentencing circle as such, because there is a threshold sentence in this case from which I cannot and should not depart. As a healing circle it will serve a useful purpose...

- *R. v. C. (L.M.), No. 41537374Y10101, Pincher Creek, Alberta, September 1st, 1995, unreported (Alta YC).*

- *R. v. C.P. [1995] Y.J. No. 47 Case dealt with sentencing parity and assault*

- *R. v. Campbell, 6 March 1995 (Sask. Prov. Court)*
- *R. v. Shropshire (1995), 102 CCC (3rd) 193 (SCC)*
- *R. v. W.B.T. (1995) Saskatchewan Court of Queen's Bench. May be indexed differently. [1995] 3 C.N.L.R. 167*

5.1.7. 1994

- *R. v. A.F.* (1994) Ontario Court of Justice.
  - Includes sentence circle procedure and aspects of power imbalances. Green's book page 82 to 83.
- *R. v. A.(G.), (1994) 3 C.N.L.R. 77 (Nfld. C.A.)*
- *R. v. Allenburger, (1994) 149 AR 181*
- *R. v. Equash (13 December 1994), Regina (Sask. Q.B.) [Unreported].*
- *R. v. Johnson (1994), 24 W.C.B. (2d) 114 (Y.T.C.A.) or [1995] 2 C.N.L.R. 158*
  - Re: Court resources for sentencing circles - procedure - unsworn statements received by judge in sentencing circle, in addition to accused's sworn testimony.
- *R. v. Jones (1994) 30 CR (4th) 1 (SCC)*
- *R. v. Morin, [1994] 1 CNLR, [1995] 4 CNLR 37 (see The Morin decision: an excerpt, (1996) 101 CCC* (3d) 124 (Sask. CA).
- *R. v. Muise* (1994) 94 CCC (3rd) 119 Nova Scotia Court of Appeal
  - Re: community consenus, justice initatives, criteria, cultural sensitivity etc. Sentencing - Offence - Robbery with violence - Appropriateness of using sentencing circle.
- *R. v. Naappaluk (1994) 2 C.N.L.R. 143 Court of Quebec. (May 4, 1993) Re: judicial sentencing discretion.*
  - "Consultation circle" should be held when the court needs special information in order to pass a sentence. Especially when the community is involved and there is reason to believe that the offender will change his/her ways.
  - The following is quoted from [1993] C.C.L. (Canadian Current Law) 12726 at page 3394 stated:
    - Judge convening community members to assist in sentencing. Accused pleaded guilty with respect to a charge of assault on his wife and with respect to a charge of non-compliance with a probation order made earlier, which was also for assault on his wife. Accused was a Inuk living in community of about 500 people in Quebec Arctic. Experience has shown that sentencing an Inuk to prison a long distance from his community, did very little to rehabilitate him and he would inevitably reoffend. In order to help the Judge in determining an appropriate sentence for the accused, he decided to postpone formal sentencing and convene a "consultation circle". The circle was to include people who took a great deal of interest in the welfare of the community. In the present case it consisted of friends and relatives of both accused and the victim, the Judge, accused's lawyer, a social worker, a translator and other members of accused's community. They met for 3 1/2 hours and discussed what type of arrangement would benefit accused and his community. Their decision was that [the] accused ought to be integrated back into the community and be supervised and accountable to members of the community, more specifically, those members who were present at the consultation circle. Held, sentencing was postponed. The Judge made it clear from the beginning of the process that he was not bound by their decision. However, his view was that he ought to follow their recommendations unless he has serious reasons to set them aside. (29 pages)
    - The C.C.L. also states that this case was selected for reporting in the C.R., but I don't have a cite for this case yet.

R. v. Rich (1994) 2. CNLR 143 Court of Quebec. Re: judicial analysis of circle sentencing and judicial sentencing discretion. Wanted to establish a circle re: member of the Innu Nation convicted for a sexual offense but complainant was not willing to participate. Court refused request because a circle can not operate without the complainant.

R. v. S. R. [1994] N.J. No. 108. Newfoundland Supreme Court - Trial Division. Judge O'Regan. Filed: March 7, 1994. Re: Criminal Law - Sentencing -- Sentencing procedure and rights of the accused - Use of sentencing circle -- General -- When appropriate i.e. the complainant did not wish to participate in the sentencing circle. Application for a sentencing circle was denied in that an essential part of the circle was missing: "[para20] Without the complainant a large slice of the circle is missing. I [Judge O'Regan] find that a sentencing circle certainly requires four integral parts: the judge; the accused; the complainant (if there is one); and the community. Others may be added but these are the very foundation."

5.1.8. 1993

- *R. v. Alaku* (1993), 112 Dominion Law Reporter (4th) at page 732. Quebec Court Crim. Pen Div.)
  - Two critical criteria for sentencing circles.
    - 1. accused must want to rehabilitate himself.
    - 2. Community must want to be involved, and help one of its members.

- *R. v. Badman [1993] Alberta Court of Appeal No. 467.*
  - Criminal case re: input of elders
  - "The concurring judge added that he would like to see established some method of getting input from the members of an elder advisory panel with respect to sentencing in cases such as this where native people were involved." - from the introduction

- *R. v. Blazevic,* [1993] AWLD 238
  - Re: sentencing principles for cases of domestic assault.
  - Sentencing circles aren't specifically mentioned

- *R. v. Calfchild [1993] A.J. No. 770 October 19, 1993.*
  - This was an assault case where the Crown was willing to have a healing circle, but the community was not interested. (There are increasing demands on Elders and other in the community).
  - Prov. Court Judge Porter said, at paragraph 17:
    - The question of community support for this man to help him through his present difficulties has been of concern to this court. At the outset of the sentencing process an approach was made by counsel to have some community involvement in the sentencing process by way of a healing circle or something similar. Whilst both the Court and Crown counsel were quite willing to consider such an approach, and it may have been a most suitable case for such a process it required the approval and involvement of the Siksika community before the court could administratively accommodate such a procedure. Unfortunately the court was informed that the community was not ready at this time to get involved in such a process. Thus the idea was abandoned and the defence indicated their plan instead to call a number of elders and community people to give evidence at the sentencing hearing. Alas none were forthcoming and the court heard simply from the psychologist who had attended upon the accused. I express regret because such an involvement by the community might have been most useful in planning the future for this accused who one day will return to that community. He is from that community and to some extent ... that community should take some responsibility for him and they have not done so. As Rupert Ross points out in his book *Dancing with a Ghost - Exploring Indian Reality* simply removing an individual from a native community for a period of time does nothing to help him or this community and does not accord with traditional native ways of handling such situations. As Mr. Ross points out many serious criminal cases including manslaughter have been dealt with by way of suspension of sentence, leaving the accused in the hands of his community which has rallied around him in order to help deal with the situation. That is why I say it is unfortunate that the community at Siksika did not become involved, because they might have had very useful input.

- *R. v. Cheekinew, (1993) 80 CCC (3d) 143, [1993] 3 Canadian Native Law Reporter at page 172 (Sask. QB)*
  - Sentencing circle - Application dismissed - Offender not a suitable candidate for sentencing circle - Factors for the court's consideration of a request for the establishment of a sentencing circle.

- *R. v. Dusonne (1993) Winnipeg (Man. Prov. Ct.) [Unreported].*

- *R. v. Jackson, [1993] S.J. No. 642 (Sask. C.A.).*
- *R. v. Lumberjack, 3 Dec. 1993 Sask. Prov. Court*
- *R. v. McLeod (1993), 81 C.C.C. (3d) 83 (Sask. C.A.) Re: Incarceration as a deterent.*

- *R. v. Thomas, 3 December 1993 Sask. Prov. Court*
  - "...Kinistin Reserve (Sask. Prov. Ct.), which was the first sentencing circle within Melford area Provincial Court circuit. Judge Eric Diehl of the Provincial Court of Saskatchewan presided at the circle" -quoted from page 172 of Ross Green's *Justice in Aboriginal Communities*

5.1.9. 1992

- *R. v. Brown, Highway, Umpherville, (1992) 73 CCC (3rd) 242*

- *R. v. Moosenose [1992] N.W.T.R. 394 (N.W.T. Ter. Ct.). Re: Community involvement in sentence and restitution. Circles are not specifically mentioned, but the community was involved.*
  Judge Davis stated:
  - ...The Court in sentencing must take into account various principles, and penalties are imposed so that people will know that they must not commit offences.
  - In this instance, because of the recommendations being made, the Court must also be concerned about the effect of a sentence other than jail on the young people and other members of the community. If there is not a severe penalty imposed, will we meet the principle that sentences must be such and severe enough that they deter others from committing offences.
  - I have heard submissions from counsel today as well as representatives of the local Dogrib Band, Chief of the Band Council, and it is obvious that the community will scrutinize this accused person for an extended period of time. **It is obvious to me that the community has become involved and has scrutinized her to the extent that the leaders in the community are able to make recommendations about what should be an appropriate sentence because of the special circumstances of the accused**. We have today heard from an elder in the community who indicates that the elders in this community are supportive of a return, at least to some extent, to some of the more traditional ways that people have been dealt with when offences had been committed within the aboriginal community. The community therefore seems to be recommending that this offence, although of a serious nature, can be dealt with within the community by appropriate and proper supervision of the accused person by the local band, the hamlet, the police officer, the probation officer, and others who are always involved with the activities relating to the criminal process. The probation officer, the Band Council and the Hamlet Council have all supported a community based disposition, and the Dene Cultural Institute has responded to my request for information about what the community has done and who was involved with coming up with the recommendations made to the Court today.
  - I have been fortunate enough to have had a report from one of my brother judges, who was at a conference for judges studying aboriginal circumstances as they exist in the Court systems in Canada. One of the lectures that was given at that conference a few months ago about the status of aboriginal women, of Saskatchewan especially, and their involvement with the court system, was presented by members of the Elizabeth Fry Society of Saskatchewan; that is an organization that is now providing some assistance for women who are released from jails. One of the lecturers stated that because of the high percentage of aboriginal people in custody that there is stress and extra strain on the families of aboriginal people in Saskatchewan. Suicide rates are highest among aboriginal children and aboriginal women offenders. There needs to be a concentrated, determined effort made on behalf of these aboriginal women offenders to protect, at the very least, the children, not from the reality of jail but from the loss of their mothers. It is not in the interests of either the dominant or the aboriginal society to incarcerate a mother. The resulting damage perpetuates a cycle of recidivism, victimization, child apprehension and loss of parental control. The community has expressed to me at various times through representatives of the Band Council, and through the statements that have been made, that Lac La Martre is concerned about the separation of the accused from her family, that being a large family of young children. **I therefore find that in the circumstances in which we find ourselves today, and because of the willingness of this community to show its concern and to undertake special responsibilities in the application of community justice involving the accused, that we are in special circumstances that will allow me to impose a sentence other than jail for the accused.**
  - I want this community to recognize that this is what I classify as an extraordinary circumstance, and a very special determination by the Court. I am relying on the community to follow through on what the recommendations have been and the undertakings that the community has made, because this is like a pilot project for the reestablishment of community justice which has been the subject of study in this community for the past two years by experts. Defence counsel has suggested that it could be and now will be a step in the evolution of the participation of the community in the system.
  - It is a very serious undertaking by the community, because it is a serious consideration at this time by the Court, and I am strongly influenced by what the community has done and expressed its willingness to do with regard to one of its members today. I do not believe that anything beyond the suggested terms, and those that I will incorporate today into the sentence of the accused is necessary for specific deterrence, therefore I don't believe that this person requires more than the penalty that will be imposed. I am still somewhat concerned, however, about the effect on general deterrence, and therefore I charge the community with the responsibility to insure that they follow through on the commitment. *my emphasis*

- *R. v. Moses, [1992] 3 C.N.L.R. 116 to page 145, (1992) 71 CCC (3d) 347, 11 CR (4th), 357. Also see: Green's book*
- "R. v. Moses and sentencing circles : a case comment" by Hugh J. Benevides (1994) *Dalhousie Journal of Legal Studies* Vol. 3 p. 241 -250. Very important case. Also talked about in Green's book at pages 45-46, 51, 67, 71, 79.

5.1.10. 1989

- *R. v. S. (H.M.)* (1989) Manitoba Judgment No. 273. See page 81 of Green's *Justice in Aboriginal Communities*

5.1.11. 1987

- *R. v. Cabot-Blanc, [1987] N.W.T.R. 1 (N.W.T.S.C.)*
- *R. v. Onalik 65 Nfld & P.E.I.R. 74 Newfoundland Court of Appeal April 9, 1987*
    - "Sentencing - Considerations - Native people - The Newfoundland Court of Appeal discussed the power of a trial judge to consider the cultural background of a native accused when imposing sentence..."
    - [11] The trial judge is fully familiar with the ways of life of the Innuit and in imposing sentence he is justified in taking into consideration the different cultural background of the respondent. Indeed, as Nadin-Davis said in *Sentencing in Canada* in referring to sentences of native peoples, at p. 125:
    - "Even where imprisonment is used, the term may be modified to reflect the different impact and difficulties of incaration for a person from a remote settlement. Clearly, such considerations are highly personal to the accused and his own background..."
    - [12] This principle is well recognized and is very clearly enunciated in *R. v. Fireman* (1971), 4 C.C.C. (2nd) 82, where the Ontario Court of Appeal, in considering a sentence imposed on an Indian living in a remote settlement and with little comprehension of English language, said at p. 85:
    - "In my opinion, on can only proceed to consider the fitness of the sentence meted out to this man upon a proper appreciation of his cultural background and of his character, as it is only then that the full effect of the sentence upon him will be clear"
- *R. v. Zoe, [1987] N.W.T.J. No. 157 (QL) (N.W.T. Ter. Ct.)*

5.1.12. 1986

- *R. v. Sandercock, (1986) 48 CR (3d) 154*
- *R. v. Reference, re s. 94 (2) of Motor Vehicle Act [1985] 2 SCR 486, (1985) 23 CCC (3d) 289 at p. 325*
- *R. v. Gardiner, (1982) 68 C.C.C. (2d) 477 (S.C.C.), [1982] 2 S.C.R.*
- *R. v. Genaille (1982), 8 W.C.B. 197 (Sask. C.A.). Re: community peer pressure. See Green page 85.*
- *R. v. Shea, (1980) 55 CCC (2d) 475 (N.S. S.C.A.D.)*
- *R. v. Nunner,(1976) 30 CCC (2d) 199 (Ontario CA)*
- *R. v. Sangster,(1973) 21 CRNS 339 (Que. CA)*
- *R. v. Urton, (1974) 5 WWR 476 (Sask. CA).*
- *R. v. Fireman (1971), 4 C.C.C. (2d) 82 (Ont. C.A.) and also reported in [1971] 3. O.R. 380 and Canadian Native Law Cases Volume 7 page 337 to 342 of the print version. (Brian Slattery is the editior, University of Saskatchewan, 1988).*
    - The electronic version is not yet done. Case is about: "Sentencing - Principles - Indian killing cousin - Intoxication - Sentence of 10 years on plea of guilty to charge of manslaughter - Whether cultural background of accused a consideration" The judge was Brooke and quoting from page 342:
        - "...Frankly, I think it is doubtful that prison is the answer, but that is our way. However, regard can properly be had to the institutions in our system and their flexibility for some guidance in determining and arriving at a proper conclusion. In this case, as the dominant consideration is the reformation and rehabilitation of this man and of course the respect of the community for our system, I think the appropiate sentence would have been two years less one day.
        - However, having regard to the time that has transpired since the appellant's conviction and sentencing, there would be little benefit to him to in the change required by such a sentence and accordingly the appeal is allowed and the sentence will be reduced to one of two years."

- *R. v. Morissette,(1970) 1CCC (2d) 307, 12 CRNS 392, WWR 664. Principles of sentencing.*

- *R. v. McGrath (1962), 133 C.C.C. 57 (S.C.C.). Re: circle sentencing for sexual offences and appellate courts.*
- *R. v. Ayalik (1960), 33 W.W.R. 377 (N.W.T.C.A.)*
- *R. v. Wilson (1791), 100 Eng. Rep. 1134 (K.B.).*
- *R. v. Bunt (1788), 100 Eng. Rep. 368 (K.B.). Traditional participants at sentencing. See Green at page 23.*

5.2. Justice As Hope [47]

- Huculak, a judge in the Provincial Court of the Province of Saskatchewan (Canada), writes of her judicial experiences with restorative principles and practices in aboriginal contexts.
    - She remarks that, while restorative justice is not new, it is in the last decade moving more into the center of criminal justice theory and practice.
    - Examples of this movement include a United Nations document on restorative justice and court decisions in New Zealand and Canada.
- In her own judicial experience, which she makes concrete with summaries of actual cases, she has observed and participated in processes founded on aboriginal peacemaking and mediation principles that incorporate spiritual values and experiences, and that focus on healing.
    - In particular she sketches principles, processes, and results of sentencing circles. For Huculak, this and other restorative practices provide hope for more harmonious and fruitful ways to respond to conflict and wrongdoing.

5.3. Survey of Pre-charge Restorative Justice Programs [48]

Sentencing circles have emerged as one of the main responses to the need for localized, community-responsive justice for Aboriginal peoples. They are seen as utilizing the traditional philosophy and principles found in Aboriginal communities which emphasize peacemaking, mediation and consensus-building, as well as respect for alternative views and equality of voices. Used in the Yukon since the 1980's they have become more widely used across Canada in Aboriginal communities in the 1990's, primarily in rural communities, but some urban circles have been completed. Sentencing circles include the judge, victim, offender, family or supporters, elders and other justice and community representatives. The circle makes sentencing recommendations to the judge who may accept or reject them. Local justice committees are often involved and community members responsible for ensuring sentences are carried out.

Criticism of circle sentencing includes the lack of formal guidelines, procedural safeguards and due process, inequalities in sentencing, the realities of traditional practice, the extent of community involvement and its relative strengths and ability to support sentencing decisions, the definition of a community, and power imbalances within communities and circle decision-making. In particular, there has been criticism of the use of circles in the case of intimate sexual and physical abuse, and the 'equality' or protection afforded the victims.

5.4. Sentencing Circles Gain Judges' Approval -2002[49]

'It's a way of healing when you have a crime that cuts across an entire community'

[47] Bria Huculuk Justice As Hope, http://www.restorativejustice.org/rj3/Spiritual_Roots_of_Restorative_Justice/epilogue.htm
[48] Shaw, Margaret and Frederick Jané, Department of Sociology & Anthropology, Concordia University, Montréal, Québec, Network for Research on Crime and Justice, Survey of Pre-charge Restorative Justice Programs, http://qsilver.queensu.ca/rcjnet/projects/execsum.htm
[49] Heather Sokoloff National Post May 15/02

Though it is rare for non-natives to make use of aboriginal sentencing circles, a nearly identical process known as a community conference is increasingly becoming accepted by judges as an integral part of the criminal justice process, particularly when sentencing young offenders.

"Certainly the principles of restorative justice are much broader than just the aboriginal culture. It is a way of healing when you have a crime that cuts across an entire community and affects a lot of people," said Ross Gordon Green, a legal aid lawyer from Melfort, Sask., and author of Justice in Aboriginal Communities: Sentencing Alternatives.

In circles and conferences, members of the community -- victims and offenders -- discuss the crime and its effects before making a sentencing recommendation. The final decision, however, is up to the judge.

"What judges are saying now is, 'OK we know these programs work in small aboriginal communities. How can we make them work in an urban setting?'" said Daniel Brodsky, a Toronto criminal lawyer who has also written about aboriginal sentencing.

"After hearing from all the sides, from the hang 'em side and the side that says let them go with a warning, all the parties have to come to somewhere in the middle they can agree to," said Mr. Brodsky.

The circles allow families of both the offender and the victim to talk about the crime's effects as well as encourage the offender to play an active role in choosing his punishment.

Recently, at the Calgary Community Conferencing Project, for example, a teenager who vandalized his elderly neighbour's car met his victim in such a forum. He admitted guilt and offered to pay her back for the damages. The victim instead asked him to help her work in her garden as part of the community service component to his sentence.

The process was pioneered a decade ago in the Yukon, and the circles are now commonplace within the territory. According to the Department of Justice, sentencing circles are practised most often in Saskatchewan, Alberta and British Columbia, though even in the west they remain far from mainstream.

Mr. Green says the popularity of sentencing circles in Saskatchewan is encouraging the emergence of other forms of restorative justice such as community sentencing panels and mediation committees, which have gained currency in the last five years.

However, despite praise from victims, offenders and criminal lawyers, there appears to be no quantitative data on whether circles and conferences reduce recidivism rates.

Federal government researchers found no evaluation had been done anywhere in the world comparing sentencing circles to conventional court decisions.

Jeff Latimer, senior research officer at the Department of Justice, said general research on restorative justice points to high levels of victim satisfaction and low levels of recidivism. However, Mr. Latimer admits those results are skewed because only offenders who have accepted responsibility for their crimes are allowed to participate.

"The problem with the research, unfortunately, is that ... you are comparing a group of people who voluntarily chose to participate with a group who are forced through the criminal justice system," he said.

"It sets it up so that it will likely be successful since you have motivated people in the program."

5.5. Circle? - 2002[50]

[50] Rob Fairchild, Circle?, 2002, http://chat.carleton.ca/~rfairchi/circle_454.pdf

The discussion surrounding Aboriginal peoples within the Canadian legal system typically centres upon their tremendous (and tragic) over-representation inside Canada's prisons. The precise causes of this phenomenon are still largely in dispute, although a number of authors have considered potential answers in detail. Even as the *causes* of Aboriginal over-representation are debated, however, some impatient innovators have attempted to correct the imbalance with the introduction of a number of optimistic *solutions*. Recently, one innovation in particular has received a great deal of attention from judges, the media, lawyers, advocacy groups, and commentators alike. The focus of their scrutiny is, of course, the sentencing circle. Through a critical but balanced examination of the current debate over sentencing circles, this paper will explore the question of whether sentencing circles are, in fact, an effective and proven means of ensuring more *justice* for Canada's Aboriginal peoples.

The format of a sentencing circle is less rigid than that of a courtroom. They are generally held in rooms not associated with "the Court," comprising of a community-selected location filled with a circle of chairs without tables.[1] To facilitate dialogue among participants, an eagle feather, a rock, or a talking stick are passed around clockwise so that each may speak in turn. The ceremony generally commences with an Aboriginal prayer,[2] and the Keeper of the circle asks those present to introduce themselves to one another. Certain parties make opening remarks (the judge, the defence, the Crown), and then the circle sets out to explore the options available to it.

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[1] B. Stuart, Building Community Justice Partnerships: Community Peacemaking Circles (Ottawa: Department of Justice, 1997) at p. 59.

[2] Ibid. at p. 71.

Despite the large and growing body of literature to be found, it is difficult to find a balanced "middle ground" amidst the contentious discussion of sentencing circles. Certainly, most of the commentators encountered are aware of the problem of prison over-representation, and agree that it is a deeply troubling aspect of Canada's legal system. The great division revolves around how best to effect positive change -- *do* sentencing circles lower incarceration and recidivism rates, or do they merely divert attention, resources, and political will away from solutions demanding a fundamental reshaping of justice in Canada? In attempting to resolve this dispute, writers are either outspoken in their support for the use and expansion of sentencing circles, or they are strenuously opposed.

Arguably, the father of sentencing circles in Canada (and one of its most emphatic advocates) is Judge Barry Stuart of the Territorial Court in Whitehorse, Yukon. Judge Stuart presided over R. v. Moses,[3] a 1992 case in the Yukon Territory which initiated the definitive sentencing circle process within Canada's court system. In Moses, a 26-year-old youth with an extensive criminal record (43 convictions) and repeated prison sentences was once again facing incarceration. Philip Moses, the accused, had been convicted of stealing clothes, and was arrested after threatening a police officer with assault with a baseball bat.[4] As the court reviewed the pre-sentence reports and psychiatric assessments, however, a tragic history came to light. Philip's entire life had been fraught with alcohol abuse and desperation. He had been abused and neglected at

[3] R. v. Moses [1992] Y.J. No. 50

[4] R. v. Moses, *supra*, at p. 3.

home, and from the age of ten had been shuffled from a series of group and foster homes and juvenile centres, suffering physical and sexual abuse along the way.[5] Lacking social supports, employment, income, education, and even basic literacy, Philip Moses fell upon a life of substance abuse and crime. As Judge Stuart remarked, jail was his primary home.[6]

Instead of sentencing Philip Moses to a Federal penitentiary, however, the court set out to make a positive change, and correct the damage caused to Philip and the community of Mayo by the failures of the criminal justice system. Judge Stuart calculated that some $250 000 had been spent on the foster care, juvenile offences, adult convictions and imprisonment that shaped the angry young man before him, and concluded that further imprisonment would be of no good use to anyone.[7] He remarked, "In Philip's case, as with many others, jail sentences are unfortunately not simply the last resort, but the most expedient means of sweeping out of the community, off the court docket, a difficult problem."[8] Consequently, the court consulted the First Nation community within Mayo, Philip's family, the Crown and the defense counsel in order to determine what might be done to counter the vicious cycle. So it was that a sentencing circle was convened to search for a way to rehabilitate Philip Moses.

With input from Philip, his family, and the community of Mayo (including those affected by his crimes), a suspended sentence was imposed, coupled with a two year

[5]Ibid. at p. 3.

[6] Ibid. At p. 3.

[7]Ibid. at p. 5.

[8]Ibid. at p. 17.

probation order that included an extensive rehabilitation plan.[9] This plan required Philip to return to his family on the trapline, followed by a two-month residential treatment program for alcoholism, and finally a return to Mayo where Philip would have to reside in an alcohol-free home. There, Philip would upgrade his education, life and employment skills, and continue his treatment for substance abuse. At each stage, a review would be held to determine what additional support Philip might require. By sending Philip Moses down a healing path, an innovative model for sentencing commenced and began to spread.

Among the potential benefits advanced in favour of the use of sentencing circles is the relative flexibility and informality that circles allow. Unlike the conventional criminal justice system, sentencing circles focus on obtaining a community consensus that includes judge, defense, crown, police, offender, victim, and community members.[10] They answer the call for sentencing reform in Aboriginal communities, among others, to help solve deeply rooted problems like marginalization and prison over-representation. Circles can be a marked departure from the formality and rigid procedure of the modern Canadian justice system, where judge, counsel, and accused are all separated by physical barriers, as well as the symbolic barriers of dress, legalistic language, protocol, and a strictly observed hierarchy.

The comparatively informal setting of the circle – where participants face each other and are free to smoke or sip a beverage – promotes a sense of equality and eases

[9] Ibid. at p. 25.
[10] Ross Gordon Green, Aboriginal Community Sentencing and Mediation: Within and Without the Circle (1997) Manitoba Law Journal, vol. 25 no. 1 at p. 77.

tension, facilitating the sharing of opinions.[11] While the judge has the ultimate discretion over the sentence, great weight is currently accorded to the consensus reached in the circle. This reflects an unprecedented sharing of power – for example, Judge Fafard in northern Saskatchewan accepted every consensus for each of the 70 sentencing circles he conducted.[12] Assistant Crown Attorney Brian Holowka, member of the Aboriginal Justice Committee in Ottawa (and participant in many local sentencing circles), reports the same trend of judicial deference to the agreements reached in sentencing circles.[13] One encouraging indicator of the possible success of sentencing circles is that, of the hundreds of cases employing sentencing circles, the Crown has only appealed a handful of the decisions. Of these appeals, only two have been successful – and only one of those successful appeals actually hinged on the role, conduct, or outcome of the circles.[14]

An overdue effort to pay attention to the value of community input into sentencing is a fundamental part of any success. The Aboriginal Justice Inquiry of Manitoba has remarked:

> "If non-Aboriginal judges and courts are going to be able to formulate sentences which are appropriate to the needs of Aboriginal offenders, victims and communities, they will need direct input from those communities.... In particular, communities need to be involved in the sentencing process, since sentences should, in part, reflect the needs and desires of the community."[15]

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[11] Ibid. at p. 84.
[12] Ibid. at p. 89.
[13] Personal interview with Assistant Crown Attorney Brian Holowka, Ottawa Courthouse. October 19, 2001. Though generally supportive of the process, he is aware of a number of criticisms that must be considered, and was exceptionally helpful in making a great deal of information available, especially from his personal experiences. He reports that, of course, the circle still remains "under the thumb" of the legal process, with the judge overseeing and given the final say. The judge *usually* accepts the consensus, but is not bound to. Depending on one's perspective, this would either be a weakness or a strength.
[14] Luke McNamara, "Appellate Court Scrutiny of Circle Sentencing," (2000) Manitoba Law Journal, vol. 27 pp. 209-240. Obtained through QuickLaw; cited at p. 26 as numbered in this format.
[15] Ross Gordon Green, *supra*, at p. 80.

By including the community through the use of sentencing circles, the socializing effect of the criminal law is more strongly reinforced, and potentially enhances community interest in the administration of justice. The interested community is, at least, in an excellent position to keep a watchful eye on offenders and victims, as well as provide support.[16] Additionally, the community has an intimate familiarity with the victim and the accused that surpasses that of judges and lawyers. Naturally, such familiarity has disadvantages as well as strengths, such as the informal control that family and friends of offenders can exert on reluctant victims. Rupert Ross has also observed that the enthusiasm for a community justice setting also allows those in power in at least some "dysfunctional communities" to set up such healing programs in order to prevent their abusive friends "from being truly called to account in *anyone's* justice system, Western or Aboriginal [emphasis his]."[17] Nevertheless, through the cooperation of a circle, court officials benefit from a detailed knowledge of the parties involved. The community in turn is no longer as likely to feel quite so estranged by non-resident judges and officials,[18] especially those coming to the community in a circuit court.

Sentencing circles are rooted in both modern and traditional concepts, such as Aboriginal legal theory and reintegrative shaming. While not strictly originating specific Aboriginal traditions, sentencing circles leave room for the use of Native languages and spiritual/ceremonial rites such as sweetgrass and pipe ceremonies.[19] This has actually caused some friction with the conventional justice system, as police in courthouses

[16] Ibid. at p. 82.
[17] Rupert Ross, Returning to the Teachings (Toronto: Penguin Books, 1996) at p. 15.
[18] Ibid. at p. 81.
[19] Ross Gordon Green, *supra*, at p. 107.

frequently mistake the scent of sweetgrass for marijuana, and interrupt the proceedings to investigate.[20] Luke McNamara writes that the healing focus of the circle has philosophical, cultural, and spiritual significance for many First Nations in Canada.[21] He asserts that restorative justice is premised on customary law where the emphasis is more on reintegration than the simple punishment of transgressions.

James R. Guest[22], working with the Mashantucket Pequot Tribal Nation, reflects on Aboriginal legal theory in an article that appeared in *Justice as Healing* from the Native Law Centre. Certainly, modern Aboriginal communities are prone to the same flaws and abuses of vertical power structures as occur within Canadian society in general. That said, Mr. Guest is interested in exploring the comparatively *horizontal and egalitarian* structures that existed (broadly) within a variety of First Nations societies in the past. Such perspectives recognize that crimes create an inequality between the victim and the offender. These are initially private affairs, and accordingly crimes create a debt that is owed to the victim, not the state. The community intervenes only when the dispute remains unsettled and threatens to disrupt relations on a wider scale. When such community resolution is necessary, however, the justice process becomes an expansive teaching and learning experience that not only sparks discussion, restitution, and

[20] Personal interview with Assistant Crown Attorney Brian Holowka, Ottawa Courthouse. October 19, 2001. The assembly room at the Ottawa Courthouse on Elgin street is where sentencing circles take place. The distinctive scent of the sweetgrass often travels down the corridor and attracts the attention of the many police officers present in the building. It is an unfortunate reality of such cultural misunderstandings that it is usually only the presence of a judge that prevents the interruptions from becoming more frequent or intrusive.
[21] Luke McNamara, "The Locus of Decision Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines" (2000) Windsor Yearbook of Access to Justice, vol. 18 at p. 75.
[22] Guest, J.R., "Aboriginal Legal Theory and Restorative Justice," (1999) Justice as Healing, vol. 4 numbers 1 & 2.

rehabilitation, but ultimately serves to reinforce the values of the community as a whole. According to Mr. Guest, the offense is not merely punished, but regarded as an opportunity to instruct the offender and essentially "treat" the conditions that prompted the transgression.

Advocates claim that this is distinctly advantageous, as it requires that the perspective and needs of the victim are also *directly* addressed in the sentencing circle, which happens rarely (*if at all*, the feeling goes) in the conventional criminal justice system. Such concern is echoed by Justice Steven Point, who welcomes new approaches like sentencing circles, because he joins many commentators in insisting that the current system has repeatedly failed Canada's Aboriginal communities. In his opinion, the current system "is too expensive, too complex, not inclusive. It takes too long to get results, it ignores the needs of victims, it is adversarial in nature, it does not promote harmony or wellness in the community or family which the offender is from, and it requires specialists to travel in and interpret the inner workings of the system."[23] Instead, victims have little voice at trial and at sentencing, and few resources within the community to help in reconciling the feelings of anger, violation, uncertainty, and fear left by the crime.

In the context of community-based justice like sentencing circles, there is a recognition that the victim's experience, left unnoticed and isolated, can result in a "cascade effect" that may only cause further disruptions in the future. This may mean that either the victim is re-victimized, or goes on to offend against others him or herself.

[23]Judge Steven Point, "Alternative Justice, Testing the Waters," lecture delivered at the College of Law, University of Saskatchewan, January 29, 2001. Reprinted in Justice as Healing, vol. 6, no. 1 at: http://www.usask.ca/nativelaw/jah_point.html at p. 1.

Instead, because of the focus on understanding the offense and the circumstances of both victim and offender, each stands to gain an insight that the conventional justice system is unable to deliver, and rarely considers.

In the open discussion of the circle, not only must the offender clearly accept responsibility for his or her actions, but he or she must listen in turn and learn of the consequences of those actions for the victim, the victim's family, and the community as a whole. The victim, similarly, stands to gain a sense of closure by understanding the motives and the circumstances of the offender. Both are able to receive the support of volunteers within the community. On the one hand, the offender can receive treated with respect to factors responsible for his or her criminal behaviour (say, to overcome substance abuse, anger problems, or to increase educational levels) and is also supervised throughout the conditions of any non-custodial sentence by volunteers, family and friends. Meanwhile, the victim, if necessary, can be counseled and supported by the volunteers and resources that the community has to offer, and no longer feels like an isolated complainant. When the circle process is properly managed, the victim who wishes to speak out can take an active role in the process by directly taking part in the discussion of what must be done to correct the wrongs that have been done.

This is strongly related to the position that John Braithwaite[24] maintains in his theory of "Reintegrative Shaming." At the heart of this idea is the belief that societies that can communicate their disapproval of wrongdoing with respect enjoy lower crime rates because of the way such disapproval shapes one's morality and self-perception.

[24] John Braithwaite, "Shame and Criminal Justice" (2000) Canadian Journal of Criminology, July at pp. 281-298.

Rehabilitative shaming works by instilling within the offender a strong feeling of *shame* for violating the norms of his or her society, while encouraging him or her to correct the wrong and thereby resume a welcomed and important place as a member of a community. Instead of simply punishing and *stigmatizing* and offender, or entirely removing him or her from a community with a prison sentence, the aim of societies that employ reintegrative shaming is to encourage change while offering forgiveness. Some communities recognize that the conventional justice system effectively represents an abdication of responsibility for managing conflicts within the family and the neighborhood.[25] By advocating a reintegrative process, they hope to reclaim the power to manage conflict locally and put an end to the waste and abandonment of jail. The central theme of reintegrative shaming is that *good people can do bad things*. That is, the victim, offender and a community must refrain from assuming that someone who breaks the law can never change.

Braithwaite is informed by such criminological perspectives as *labeling theory*.[26] This means that our self-identities are greatly impacted by the labels (such as "you're a criminal") that others assign to us, particularly in our relationships with figures of authority. By stigmatizing and punishing offenders, they are led to internalize this stigma and ultimately act on a self-conception of being a criminal and a deviant with little hope of positive change. Braithwaite argues that reintegrative shaming reduces the incidence of crime because it results in a vital recognition of pro-social values.[27] He feels that is not the fear of punishment that prevents most people from committing crimes, but rather

[25] Steven Point, *supra*, at p. 2.
[26] John Braithwaite, *supra*, at pp. 288-289
[27] Ibid. p. 286.

the recognition that criminal acts are harmful and destructive to both victims and society. The message that certain acts are *wrong* comes from a strong group consensus that includes the offender's family and friends – people the offender is more likely to respect and listen to than a detached circuit judge passing sentence. As a result, reintegrative shaming promotes *moral clarity* about an individual's obligations to others. Braithwaite points approvingly to restorative justice initiatives in the west, including sentencing circles, because they make use of reintegrative shaming in the form of a community brought together to discuss the *problems* surrounding the crime and the offender.

For the offender, this dynamic means that the sentencing circle can a powerful deterrent effect. Offenders must admit, in front of a large audience from the community, that they were wrong and then explain why. Supporters of the sentencing circle argue that it is much more difficult to stand before family and friends and admit responsibility for a crime, than to passively sit through a formal court hearing that lasts no more than a few minutes while a judge passes sentence. The greatest concern is that offenders must agree to the sentencing circle with *sincerity*. The success of the circle hinges upon the offender putting forth the genuine effort to change, without being entirely motivated by the allure of lenience. On the other hand, even Philip Moses initially wanted nothing to do with the circle or treatment, instead declaring his desire to return to the familiar environment of prison.[28] As Judge Stuart has remarked, many offenders see jail as less demanding and traumatic than a rehabilitation sentence within the community.[29]

[28] R. v. Moses, *supra*, at p. 24.
[29] Ross Gordon Green, *supra*, at p. 97.

Additionally, according to Judge Fafard, it is also more likely that recommendations made by the entire community will be heeded than the orders of a remote judge.[30]

Similarly, Judge Lilles writes that: "Offender participation is increased and the impact of the sentencing hearing will be more meaningful to him or her. It is one thing to be "condemned" by a faceless judge, quite another to be told by members of one's family and friends that certain conduct is unacceptable will not be tolerated."[31] In R. v. Gingell, Judge Lilles wrote that severe penalties like jail have only had a negative impact on First Nations offenders and communities. He said:

> Every family in Kwanlin Dun has members who have gone to jail. It carries no stigma and therefore is not a deterrent. Nor is it a "safe place" which encourages disclosure, openness, or healing. The power or authority structures within the jail operate against openness. An elder noted: 'jail doesn't help anyone. A lot of our people could have been healed a long time ago if it weren't for jail. Jail hits them more and then they come out really bitter. In jail, all they learn is hurt and bitter."[32]

Keeping this in mind, it is true that circle sentences are not necessarily more lenient than traditional sentences handed down by the retributive justice system. Indeed, in R. v. CP, the case from which Judge Lilles' comment was taken, the community actually *rejected* the offender's sentencing proposal and opted for incarceration. Judge Stuart wrote in R. v. Moses that: "Punishment, if required, can be imposed in a circle as readily as in a courtroom. There is a significantly different sting to a punishment imposed by a community, than to a similar sentence imposed by a circuit court judge. Punished by a community, the offender must face his sentence daily."[33]

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[30] Ibid. at p. 108.
[31] Luke McNamara, *supra*, at p. 99.
[32] Ibid. at. p. 78.
[33] Luke McNamara, *supra*, at pp. 99-100.

A prominent case that passed down a sentence that was actually *harsher* than would have come from a conventional sentence hearing was R. v. Taylor.[34] In this case, a young man convicted of sexually assaulting a woman was *banished from his home to an uninhabited island for six months.*[35] While he was provided with a limited amount of food, he was required to build his own shelter, make use of traditional survival skills, and hunt for himself using traditional equipment only. He was deprived of all human company, except for weekly radio conversations to make sure he remained well. Upon completion of his exile, he was to repay the Lac La Ronge community for the food provided to him, and to take courses to help him deal with anger management and treat his alcoholism, as well as upgrade his high school education.[36]

All of these conditions he met successfully. The community saw his ordeal as a ritual designed to reintegrate a neophyte and force him to look inside himself to confront his angry impulses. His community did not want to allow one of its own people vanish into anonymity as nothing more than another statistic in a distant penitentiary. In fulfilling his conditions, Mr. Taylor demonstrated the ability to turn his life around, giving the community a productive member and the opportunity to transform his experience into a set of stories that he will tell for years to come in order to significantly impact those who hear it.[37]

In its ideal form, the circle forces offenders to reflect on what they've done, and what they must do to change. There is a strong general and specific deterrent effect in

[34] P. Dawn Mills "The Myth of Swan: The Case of Regina v. Taylor" at 258.
[35] In fact, the original sentence imposed by the circle was banishment for one year. This was shortened to six months following an appeal.
[36] Ibid. at 259.
[37] Ibid. at 268.

place, with both the offender and the assembled community being exposed first-hand to the negative consequences of criminal behaviour and the shame it brings. Community members at Hollow Water argue that the experience of admitting guilt to sexual and domestic assaults at a healing or sentencing circle breaks the cycle of silence, and violence, that the conventional justice system perpetuates.[38] Conversely, the adversarial court process encourages offenders to actively deny their guilt, and victims feel pressured to keep their families together by remaining silent about their abuse, for fear of sending loved ones to a prison far away.[39]

From the perspective of the victim, the sentencing circle can be either a greatly positive or negative experience, and consequently *extreme* care must be taken in deciding which cases are appropriate. Circles are *most* beneficial where victims and offenders are not as well acquainted, and in particular where the crime was not a sexual or severely violent one. The imbalance of power inherent in sex offenses can make a circle frightening or humiliating, especially when children are involved. This means that sexual crimes are generally a poor choice. With that said, Rupert Ross does argue that it is possible to conduct a circle when the inherent power imbalances between victims and abusers are thoroughly identified and remedied while all involved maintain a vigilant readiness to intervene whenever the imbalance is apparent.[40] This has been attempted with success at Hollow Water, where sexually abused children are assigned support teams who work with them and do not allow the circle to convene until they are confident that the victims are able to face offenders on the most level possible footing. Even then

[38] Rupert Ross, *supra*, at pp. 36-39.
[39] Ibid. at p. 38.
[40] Rupert Ross, *supra*, at p. 34.

any victim who chooses to participate must be accompanied by a specific support worker.[41] More generally, circles allow victims and offenders to put human faces on one another and understand each others' motives, feelings, and experiences since the crime.[42] Despite Ross' enthusiasm, however, it is difficult to recommend that cases involving sexual assault be broadly considered for inclusion within sentencing circles.

Supporters of sentencing circles report very high success rates for programs within their communities. This is encouraging, because it is only by reducing recidivism as compared to the conventional justice system that options like sentencing circles can be *proven* to work as an effective means of increasing public safety. What results have been reported are promising, but they must be accepted only *cautiously*. There is little in the way of empirical research into the impact of sentencing circles, and advocates who cite success rates do not always explicitly state their sources. This puts success rates into question, until such time as wide-scale evaluations can definitely provide an indication of efficacy.

Judge Barry Stewart, for example, makes the claim that sentencing circles boast an 80 percent success rate.[43] The source of this statistic, which he attributes only to the Kwanlin Dun project, is unclear. There is, regrettably, no indication of the sample size or a comparison group. Subsequently, Judge Stuart has revised his claim, and now states that, of some four hundred sentencing circles he has conducted, only "about half" of

[41] Ross Gordon Green, *supra*, at p. 95.
[42] Rupert Ross, *supra*, at p. 35.
[43] B. Stuart, Building Community Justice Partnerships: Community Peacemaking Circles (Ottawa: Department of Justice, 1997) note 10 at p. 138.

those involved have gone on to commit further offences.[44] Roberts and La Prairie criticize this figure because there has been no systematic attempts to empirically validate them with control groups.[45] By way of comparison, though, a study by Bonta, La Prairie and Wallace-Capretta indicated that (within their sample) Aboriginal offenders had a shockingly high recidivism rate of 65.9 percent.[46] While not a strictly generalizable figure, this could mean that even the modest success rate of 50% reported by Judge Stuart represents an encouraging 15% reduction if Stuart's figure is valid. Unfortunately, as has been stated already, this is difficult to determine.

Other encouraging numbers come Georgina Sydney, a researcher for the Teslin Tlingit Council in the Yukon. She reports that the criminal caseload in her community has dropped by *sixty percent* since the initiation of sentencing circles there in 1991.[47] Meanwhile, Judge Bria Huculak, writes that since the adoption of sentencing circles in the Yukon, crime rates there have dropped, as have the numbers of individuals imprisoned[48]. Again, however, these numbers must be considered tentative, as it is difficult to determine how they have been derived and what control attempts have been made. A call for explicit empirical documentation is rightly made by many commentators.

[44] Carol La Prairie and Julian Roberts, "Sentencing Circles: Some Unanswered Questions" (1997) Criminal Law Quarterly vol. 39 at p. 73. The authors quote Stuart from an article in the Ottawa Citizen.
[45] Ibid. at p. 73.
[46] J. Bonta, C. La Prairie, and S. Wallace-Capretta, (1996), "Risk Prediction and Re-Offending: Aboriginal and Non-Aboriginal Offenders," Canadian Journal of Criminology, April, at p 134. This compared to a 47.8% recidivism rate for non-aboriginal offenders in their sample.
[47] Maureen Nicholson, ed., "What is Circle Sentencing? How Does it Work?" in Justice and Northern Families: In crisis.... In Healing.... In Control (Burnaby: Simon Fraser University, 1994) at p. 23.
[48] Huculak, Bria. "From the Power to Punish to the Power to Heal." (1995) Justice as Healing. Published on-line at: http://www.usask.ca/nativelaw/jah_huculak.html at p. 2.

Jeff Latimer, researching the effects of restorative justice programming, wrote that victim dissatisfaction was most often reported when the offender failed to complete the agreed-on restitution process.[49] Generally, victim satisfaction and perceptions of fairness was high across all restorative justice programs when compared to the traditional criminal justice systems where victims play a very marginal role as complainants. There are, however, continued concerns surrounding the appropriateness of considering sexual offences in sentencing circles that generally make them poor candidates for the circle. The National Council of Welfare, for example, in its examination of legal aid and alternative justice programs, reported that many aboriginal women feel that family violence and sexual offences are too serious "for the typically mild solutions proposed, and that soft treatment is unlikely to discourage offenders from committing the same crimes again."[50] In addition, many women feel that panel members will be unable to address the victims' need to be protected from harm.

As we have seen, despite the large number of optimistic appraisals, a number of important questions about the efficacy and general utility of sentencing circles remain. The glowing (and sometimes syrupy) praise offered by the advocates of sentencing circles has been countered with a substantial amount of criticism (offered with what must occasionally be an equal collection of biases), too. Many critics contend that sentencing circles are too unproven, too vague, too open to abuse, and too limited to be of much help to the prison experience of Canada's Aboriginal population. Canada's First Nations and First Peoples are, after all, a diverse and heterogenous population with concerns and

[49] Latimer, Jeff. at 11.
[50] The National Council of Welfare, Legal Aid and the Poor (Toronto: National Council of Welfare 1995), at p. 67.

needs that cannot readily be pinned down under any one label or aided by a single strategy. The idea of a culturally appropriate justice program becomes almost nonsensical when one considers the absence of a single unifying culture. Some aboriginal communities are simply not interested in sentencing circles, to be sure, and prefer to retain the conventional legal justice system. Others have adopted healing programs for insincere, self-serving reasons. Still others have rejected the standard model of the sentencing circle entirely.[51]

This is just what occurred in Toronto. The large and diverse Aboriginal community within metropolitan Toronto is estimated between 40 000 and 70 000 people, and includes status and non-status Indians from across the nation.[52] This community is represented by its own multi-service, provincially funded legal agency, Aboriginal Legal Services of Toronto.[53] This organization provides Aboriginal court workers to assist in Toronto's criminal, youth, and family courts, and also operates a neighbourhood legal services clinic. Most significantly, however, ALST also directs the Community Council, which takes a measure of control over sentencing *away* from the conventional legal system *and* judges, and places it directly into the hands of the community.[54] Although offenders must plead guilty and consult counsel before taking part in the Community Council, there is otherwise no place for processes and officials of the court within its

[51] Personal interview with Assistant Crown Attorney Brian Holowka, Ottawa Courthouse. October 19, 2001.
[52] Noelle Spotton, "Aboriginal Legal Services of Toronto and the legal Aid Service Needs of the Metropolitan Toronto Aboriginal Community," (1998) Windsor Yearbook of Access to Justice, vol. 16 at p. 299.
[53] Ibid. at p. 300.
[54] Ibid. at p. 300.

structure. Indeed, the Crown must "sign off" entirely when the process begins,[55] either by withdrawing or staying the charges.[56]

The Council itself is takes place within a large urban context, with more community resources and sentencing options at its disposal to help deal with the multitude of justice issues facing the very large Aboriginal population within Toronto. In this way, it is set apart from sentencing circles, with their more limited scope and a direct attachment to judges and the courts. Instead of appearing with a judge, the Council consists of a panel of 3 community volunteers who reach their decision by consensus after hearing the accused and the victim (who is formally invited), all of whom speak for themselves.[57]

While they do not deny that a role may exist for sentencing circles in some contexts,[58] Carol La Prairie and Julian Roberts are even more emphatic in their criticism of the dominant role that judges play in sentencing circles. They note that judicial discretion makes judges the undisputed gatekeepers at two vital stages of the process. The first stage is at the outset, when the judge initially *agrees* to conduct the circle, and the second is at the conclusion, when the judge is free to accept, reject, or modify the consensus the circle has reached.[59] While judges *tend* to accept the recommendation of the circle, it is unfortunate that there is no reason that they *must* do so. Carol La Prairie also remarks that sentencing circles were not so much driven by the Aboriginal

[55] Personal interview with Assistant Crown Attorney Brian Holowka, Ottawa Courthouse. October 19, 2001.
[56] Ibid. at p. 300.
[57] Ibid. at p. 300.
[58] Roberts and La Prairie, *supra*, at p. 83.
[59] Ibid. at p. 72.

community as they were by "certain reform-minded judges."[60] There is also the concern that sentencing circles do little to satisfy the utilitarian sentencing principle of crime prevention. Or, rather, circles *may* help prevent crime (for example, through a reduction in recidivism rates), but the empirical evidence either way is so scant as to make definitive conclusions impossible.[61] Nor have any studies been conducted to determine whether the incidence of new crimes in jurisdictions that employ sentencing circles has lowered.

Further unresolved questions involve the relationship of sentencing circles to so-called *desert theory*. In contrast to utilitarian sentencing goals are those goals which instead apply censure and blame to crimes by means of punishment.[62] This punishment must be directly proportionate to the severity of the crime – and indeed is required by s. 718.1 of the *Criminal Code*. The authors assert that, by favouring alternative dispositions to Aboriginal offenders, sentencing circles abandon the principle of proportionality.[63] Closely connected to this is the issue of *equity* of treatment. If offenders are sentenced differently on account of their backgrounds, great disparity in sentencing will occur, making the system unfair in the eyes of many.[64] The authors are also critical of such systems on the grounds that, despite the advent of sentencing circles, incarceration is on the rise in Canada.[65] Although it is essential to find an alternative to incarceration as a sanction, Roberts and La Prairie doubt that sentencing circles are an effective means of

[60] Carol La Prairie, "Sentencing Circles and Family Group Conferences: Response to Jenny Bargen," (1996) Australia and New Zealand Journal of Criminology at p. 74.
[61] Roberts and La Prairie, *supra*, at pp. 72-73
[62] Ibid. at p. 74.
[63] Ibid. at p. 75.
[64] Ibid. at p. 75.
[65] Ibid. at p. 77.

accomplishing this, especially with respect to other visible minorities such as urban Blacks.

Philip Stenning and Julian Roberts present the argument that Aboriginal-specific sentencing provisions within the *Criminal* Code are an "empty promise" to Aboriginal people, and a "bitter pill" for sentencing judges.[66] They are, similarly, critical of Aboriginal-specific restorative justice programs, making the point that setting Aboriginal offenders apart as a matter of policy creates a parallel system of justice that, ironically, can do little to change the prison over-representation in any way. They contend that factors quite apart from discriminatory sentencing practices[67] contribute to over-representation (emphasizing that of special importance were those factors *outside* the legal system such as poverty, unemployment, higher proportions of youths, and alcohol abuse).[68]

This is an essential point, because similar factors may help explain the over-representation of other groups in various regions, such as Blacks in Ontario.[69] This would suggest that the appropriate solution is one that addresses broad *social factors* that impact the lives of Canadians across all cultures and ethnicities. These social factors, as Stenning and Roberts note, are not unique to Aboriginal offenders -- nor do these factors even *apply* to all Aboriginal offenders.[70] They state, "if the problem is over-

[66] P. Stenning and J. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders, " (2001) Saskatchewan Law Review at p. 167.
[67] Ibid. at p. 151.
[68] Ibid. at p. 146.
[69] Ibid. at p. 156.
[70] Ibid. at p. 157. Indeed, they accuse he Court of subscribing to a "pan-Indian" view of Aboriginal culture and circumstances.

representation in general, then the solution should be equally general in application.... the solution to this problem lies beyond the purview of the sentencing judge."[71]

These insightful critiques have been countered by a number of supporters of sentencing circles with varying degrees of success. Responding to the criticism that circle sentencing does not originate with Aboriginal communities, but rather "certain reform-minded judges," Luke McNamara counters that such viewpoints assume "that judicial *initiation* is necessarily inconsistent with *community ownership*."[72] Instead, what is crucial is that community justice initiatives like circle sentencing must be *based in* the community, and that the community itself is receptive of the circle and the values it stands for and is willing to participate. Additionally, control and development must be shared across the whole community.

One certainty that does emerge from the debate is that there is an imperative need for guidelines to direct the resolution of contentious issues such as eligibility, procedure, the role of the victim, and the appropriateness of various sentences. In meeting the call for definitive judicial guidelines, however, we must remember that excessively rigid guidelines risk taking too much power out of the hands of the community, placing this power back into the judge's, because of the increased need for judicial oversight. This is why judicial guidelines, while important as an informative framework, *should not be so rigid or stringent as to prevent communities from independently modifying the process to meet their particular needs.*[73]

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[71] Ibid. at p. 156.
[72] Luke McNamara, *supra*, at p. 76.
[73] Ibid. at p. 96.

Nevertheless, it is essential that the needs of victims be taken into account. In most cases, circles will not convene without the consent of victims, and while this creates the risk of an excessive power imbalance, we must be as concerned with the process of healing, reconciliation, and justice for one party as much as the other. For this reason, the greatest possible weight must be given to the wishes of the victim when deciding whether to convene a sentencing circle.[74] Roberts and La Prairie are emphatic in their call for a strong role for victims in sentencing. They do not wish to see circles going forward without the full and sincere cooperation of the victim,[75] and make the case that definitive criteria for including and excluding various offences be developed to guide circles.[76]

Advocates must still confront the fact that there is dearth of controlled empirical studies measuring the effectiveness of sentencing circles. Jeff Latimer of the Department of Justice, in his review of restorative justice programming, could find no studies specifically measuring the recidivism rates for sentencing circles.[77] However, he does find that restorative justice programs in general show at least slight reductions in recidivism when compared to the formal justice system.[78] This is an encouraging starting point – but there is no question that sentencing circles must be rigorously evaluated to

[74] Personal interview with Assistant Crown Attorney Brian Holowka, Ottawa Courthouse. October 19, 2001. Although victim participation and consent is *strongly* encouraged, sentencing circles can proceed without the victim. Without the participation of the victim, it falls upon the Crown to act as the victim's advocate, seeing to it that the victim's concerns are taken to account wherever possible. As a means of ensuring that the Crown and the victim retain some power in the process, the Crown has the right of appeal where it strenuously objects to the consensus that has been reached in the circle. Again, whether this should be interpreted as a wholly positive or negative aspect of sentencing circles is certainly a matter of perspective.
[75] Roberts and La Prairie, *supra*, at p. 80.
[76] Ibid. at p. 79.
[77] Jeff Latimer, The Effects of Restorative Justice Programming: A Review of the Empirical Research at 11.
[78] Ibid. at p. 10.

determine, at the very least, what works and what does not. More generally, empirical evaluation makes it possible to determine if sentencing circles are successful enough to warrant broader public support and funding, or if other approaches are required entirely.

With respect to criticisms that Aboriginal-sentencing practices create an unfair sentencing disparity, the chief point raised seems to be that sentencing circles force judges to consider an ever-increasing range of variables that seem to lessen the offender's moral responsibility in a confusing blur of relativism. Maureen Linker, in her paper "Sentencing Circles and the Dilemma of Difference," feels that such criticisms "ring hollow we are after [the] truly fair and equitable treatment of persons."[79] She refers to what has been described by Martha Minow as the "Dilemma of Difference." Roughly speaking, this is the introduction of social difference into legal contexts, specifically where marginalized minorities attempt to have their perspectives and experiences considered in court. While some commentators see this as a slippery slope, or the "proverbial bog without boundaries," Linker argues that relevant background knowledge of a group's history of oppression can actually constrain this relativism with empirical knowledge. Linker asserts that the particular experience of Canada's Aboriginals provides a very important framework by which to assess which perspectives and proposals are appropriate and significant.[80] Returning to the objections raised by Stenning and Roberts, though, it is difficult to understand why sentencing judges should not consider the adverse circumstances, socio-economic status, and historical oppression suffered by Canadians from a wide *variety* of groups.

[79] Maureen Linker, "Sentencing Circles and the Dilemma of Difference," (1999) Criminal Law Quarterly vol. 42 at p. 123.
[80] Ibid. at 124.

Supporters also argue that those who claim that sentencing circles are at odds with "just deserts" aims like proportionate sentencing are only repeating the same calls for harsh and punitive sentences that created the problem of prison over-representation in the first place. Maureen Linker reminds us that sentencing proportionality requires a judge, who was not involved in the events of the crime, to determine the severity of the crime and relate it to a set of sentencing guidelines. However, this determination must be done with careful analysis of the facts, and in keeping with s. 718.2 of the Criminal Code, which requires aggravating and mitigating circumstances to be taken into account.[81] Linker feels it is natural to ask: "How better to estimate the question of severity than by hearing from those affected – and hearing from them in an environment where their account of the events is requested and respected?"[82] She feels that a broad accounting from victims, offenders, and the community affected can only better inform the judge who must impose the final sentencing decision. "As it is currently constructed," Linker concludes, "the practice of sentencing circles does not undermine the role of judicial legal decision."[83]

Even with the spread of sentencing circles, it is unfortunate, as Carol La Prairie writes, that little has been done to reduce Aboriginal over-representation in provincial correctional institutions, particularly in the Prairie provinces. Meanwhile, levels are *increasing* in Federal institutions.[84] She makes the essential point that currently *not enough* is being done. Single initiatives with insufficient resources behind them are

[81] Ibid. at p. 119.
[82] Ibid. at p. 120.
[83] Ibid. at p. 120.
[84] Carol La Prairie, "Some Reflections on New Criminal Justice Policies in Canada," (1999) Australian and New Zealand Journal of Criminology, vol. 32 no. 2 at p. 148

simply a token effort. She writes that new initiatives must move into the wider justice agenda, stating that if the resources are not in place to support broad criminal justice initiatives, they will be ultimately doomed to failure. Community approaches, according to La Prairie, are *only* effective in terms of reducing recidivism when they are properly designed and delivered, "and where treatment and other services are in place to meet offender needs."[85]

Even within this extensive debate, it is nigh-impossible to dispute that the prison system has not only been a failure for Canada's Aboriginal peoples, but a failure for our entire population. This is why it is so difficult to dismiss the argument that the solution to the prison problem must involve more than mere sentencing reform. Prison, for *all* Canadians, remains expensive, overcrowded, often brutal, and of little rehabilitative value. The Canadian criminal justice system costs us some $9.57 billion annually.[86] This funds a massive complex discriminating heavily against the poor and homeless instead of investing money into education, food and affordable housing. For this reason, it is imperative that we consider a solution that positively impacts *all* Canadians, especially in terms of *prevention*. The best remedy for prison overcrowding and over-representation, after all, is to reduce the crime that sends people there in the first place. And this necessitates an investment in the social infrastructure that improves the education and prospects for all of us.

Of course, whether evaluating sentencing circles or proposing idealistic social revolution, we have to remember that progress and reform in the criminal justice system

[85] Ibid. at p. 149.
[86] Ruth Morris, Penal Abolition (Toronto: Canadian Scholars' Press, Inc., 1995) at p. 5.

is, sadly, *and notoriously,* slow and tentative. It's also important to look at this discussion of sentencing reform in context. For two hundred years, Canada has made use of prisons, and largely prisons alone, as its response to crime, with continued calls for its expansion. What progress we have so far made is commendable, however short it falls of revolutionary change. Writers like Colin Goff,[37] Elliot Currie,[38] and Walter DeKeseredy[39] consistently report that the general public believes that the criminal justice system has actually been far too *lenient* with offenders. Conservative political parties make use of this fear of crime, and recent acts of terrorism, to promote a tough "Law and Order" agenda as the only possible remedy, even as Canada boasts one of the world's highest incarceration rates.

We are never more than one election away from a government that discards what little progress has been made. Canada continues to invest tremendous amounts of money into the growing "Prison-Industrial Complex" even now. We only need to look at the United States to see a society where expanded incarceration nationwide has caused prisons to become America's primary social program for the poor and with many vulnerable minorities. Ontario, too, is leading the way for the rest of Canada with the introduction of so-called "Super-Jails" and a privately run, for-profit prison.

It is helpful to look at the American experience when assessing the future of crime and corrections in Canada. It serves as a grim *warning*. Facing us is a culture emphasizing the goodness of individual self-sufficiency and minimal social spending. Hosting a dense population, and widening economic disparity, the high crime and

[37] Goff, Colin. Corrections in Canada (Cincinnati: Anderson Publishing Co., 1999) at p. 21
[38] Currie, Elliot. Crime and Punishment in America (New York: Henry Holt and Company Inc., 1998)
[39] DeKeseredy, Walter. Contemporary Criminology (Toronto: Wadsworth Publishing Company, 1996)

violence America suffers is certainly a possible future for a Canada increasingly in the grip of socially and fiscally conservative trends to "toughen" social and criminal policies. The expansion of the justice system expansion takes place without recognizing the needs of vulnerable, and often makes the problems of disadvantaged persons worse because social spending is cut first when politicians decide how to pay for new prisons and more law enforcement personnel.[90]

In America, rates of incarceration have increased, and prison construction is booming. While some might intuitively expect to see increased incarceration rates paying off handsomely in terms of reduced crime, this is only true if two *other* critical assumptions about incapacitation are *also* true. Namely, that the repeat offenders now behind bars will not be "immediately and completely replaced by other offenders,"[91] and that the prison experience doesn't paradoxically *increase* the danger of recidivism by (for example) exposing novice criminals to a hardened group of experienced "career" criminals who effectively act as pro-criminal mentors. Currie[92] summarizes the findings of a number of American studies which report that doubling the prison population might reduce reports of serious crimes by a mere 10 percent. Without disputing that citizens must be protected from dangerous offenders, it is still true that the rates of serious crime in the United States remained stable, and frequently increased, even as the national incarceration rate *doubled*.

[90] M. Danner, "Three Strikes and It's Women Who Are Out" in Susan Miller, ed. Crime Control and Women. (London: Sage Publications, 1998) at p. 6.
[91] C. Goff, Corrections in Canada (Cincinnati: Anderson Publishing Co., 1999) at 36.
[92] E. Currie, Crime and Punishment in America (New York: Henry Holt and Company Inc., 1998) at 28.

In Canada, we already make a policy of incarcerating the most dangerous offenders we catch for lengthy sentences; widening the net only yields a broader population of lower risk offenders. Prison may well be the most appropriate punishment for *some* criminals, but not *all* of them. As more and more criminals are sent to prison in the wake of increased rates of incarceration, the prisons are then filled with larger numbers of less serious criminals, prompting conditions of overcrowding and making prisons more costly and dangerous. As a result of this dilution, there is less space and fewer resources available to house and monitor dangerous, violent criminals. Expanding incarceration only modestly reduces the less "socially costly" property crimes, and leaves the justice system insufficiently equipped to deal with the *most* serious and violent crimes, which still will occur in undiminished numbers. Prison by itself is unlikely to rehabilitate *anyone*.

Currie reminds us that the real question we must ask is not whether prison works, but whether it is the most effective mechanism to reduce crime: "The real choice," he maintains, "was between an approach emphasizing prevention, reintegration, and strategic social investment versus one that accepted – or encouraged – widespread social neglect and relied on vastly increased incarceration to contain its consequences."[93] By emphasizing prevention, rehabilitation, and risk/needs management, the minor offenders we now lock away in large numbers could become productive and law-abiding members of a functional society.

Mona Danner is also critical of expanding our use of prisons for the reason that increased rates of incarceration impact strongly upon the family. Incarcerated men and

[93] E. Currie, *supra*, at p. 65.

women from all backgrounds are often also fathers and mothers (56 percent and 67 percent respectively), leaving behind a fractured and wounded family to cope with the added hardship and deprivation of absent parents for the duration of increasingly lengthy sentences.[94] Increasingly burdened social agencies and (more commonly) another family member must shoulder the burden of raising these splintered families, and since men are sentenced to prison most often, usually that responsibility belongs to their intimate female partners. An already overcrowded prison system flooded with new inmates has no choice but to ship these prisoners to other provinces or states, meaning that the families they leave behind are deprived even of their emotional presence.

Policies favouring a "get tough" approach to crime are a political choice. Our leaders choose to spend public money on reactive solutions, investing in new prisons and boot camps over universities and halfway houses, devaluing preventative initiatives and social spending as wastes of taxpayer dollars. Where *success* is the measure of fitness, the value of people is unfortunately quantified in terms of wealth and self-sufficiency. Meanwhile, those on the margins are vilified as cheats and parasites. Prison has, as such, become the "social agency of first resort for coping with the deepening problems of a society in perennial crisis."[95] As North America becomes more socially fragmented, violent crime increases, spurring further calls for "tough" policies on crime that leach funds away from education, welfare, housing and training programs.

The push to ready our justice system for a battle against an apparent onslaught of random, violent crime becomes nonsensical when we realize that, since 1991, our crime

[94] Mona Danner, *supra*, at p. 10.
[95] E. Currie, *supra*, at p. 34.

rates are actually on the decline.[95] Canada's surprising increases in incarceration are a result of policy changes more than crime waves, with a growing population of poor, young males (Aboriginal or otherwise) facing tougher sentences than before. Ultimately, however, calls for increased severity in dealing with an "out of control" crime problem may prove to be a self-fulfilling prophesy. As we push for an expanded criminal justice system that must ultimately be bankrolled through social spending cuts, we will very likely experience the same explosion in violent crime and widespread poverty that is now so common in the daily lives of our American neighbours.

Many of our prisoners are, unfortunately, doomed to return to prison again and again because we prefer the short term savings of punitive policies (and a business-like model of individual accountability and self-sufficiency) over a long term investment in rehabilitation, reintegration, and significant social change. If we are to accomplish anything, we must learn the value of *prevention*. Prisons may always be necessary to confine the most dangerous and persistent offenders, but our reliance upon incarceration would ultimately decrease if we not only *reacted* to crime, but positively acted with the investments of education, social funding, and risk/needs assessments to *prevent* more crimes from transpiring in the first place.

Proposing a radical restructuring of the justice system, *penal abolitionists* advocate progressive and inclusive dispositions such as community supervision, treatment programs addressing educational shortcomings and substance abuse problems, restoration programs and community service orders, as well as programs emphasizing

[95] C. Goff, *supra*, at p. 18.

conflict resolution and victim-offender reconciliation.[97] Such programs are far cheaper (e.g. $6 a day for community service orders compared to $100 for a day in provincial prison[98] and more effective than imprisonment (for all but violent offenders), and promote a cooperative, healthy, supportive community structure of benefit to both victims and offenders. If the funds spent on prisons and criminal justice were instead, diverted to community-oriented programs and progressive sentencing and conflict resolution systems, the result would be a flourishing environment of effective programs and staff working to combat crime and recidivism by and instilling new values, skills, and problem-solving techniques to offenders of all backgrounds.

Penal abolitionists (compellingly, if perhaps idealistically) propose a system that would truly recognize and reaffirm our dominant values and beliefs – namely, a system of "transformative justice."[99] More than a simple knee-jerk reaction made in hindsight to the reality of crime, transformative justice involves acknowledging the social causes of crimes, and working to heal both victims and offenders in order to build a society of *prevention* and social justice that suffers fewer crimes in the future. This system strongly promotes justice, equality, responsibility and dignity by creating dialogues within communities that provide answers, assurances, as well as guiding feelings of safety and security by means of programs and options that help victims heal (by restoring their faith in the community and granting them more participation in the court process) and bring offenders to recognize the wrongfulness of their deeds.

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[97] Ruth Morris, *supra*, at p. 59.
[98] Ibid. at p. 62.
[99] Ruth Morris, *supra*, at p. 70.

To conclude, we as a society are at a threshold capable of delivering renewed justice, or profound injustice -- and, if used with care, sentencing circles will be a component of the former. What can be drawn from this exploration of the literature is that sentencing circles are far from perfect, and many serious questions remain unanswered. In the interests of justice, more emphasis should be placed on community involvement; but whether this specifically necessitates the use of sentencing circles as a panacea is doubtful. There is indeed a role for sentencing circles within the Canadian legal context, but a far broader approach is long overdue. I would instead argue for the expansion of *social justice* as a means of preventing crime, as I feel that it is in this sphere that the greatest benefits to society will occur. Great injustices have been suffered by Canada's Aboriginal peoples, but at the root even of the compelling over-representation problem are the social causes of crime and the desperate need to enhance the quality of life for disadvantaged Canadians of all backgrounds.

Where circles do take place, however, they should be subject to some guiding criteria as to inclusion, and be rigorously evaluated to determine the effectiveness. Funding and resources must exist to allow for meaningful treatment options, and as the concerns of victims are so essential, I cannot speak in favour of including sexual crimes in the circle setting. Both its proponents *and* critics must remember that it will naturally be difficult for *any single* program, especially one with limited resources, to routinely effect huge changes in recidivism rates. This is because offenders will have numerous overlapping criminogenic needs that must be addressed. As Judge Stuart, to his credit, has noted, "Whatever failures the [Sentencing] Circle may experience, it is important to

note how the justice system ha[s] failed numerous times with the same offender."[100] Indeed, we should applaud improvements wherever they appear -- so long as we can be sure that they are truly improvements. In the end, it must be stressed that there is no single and easy solution to the prison problem, just as there is no single cause. What is required are overlapping programs that remedy the social risk factors for crime and allow for the exploration of alternatives to "just-deserts" punishment. This is at the root of a *transformative* justice movement.

[100] B. Stuart, "Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System," (1996) International Journal of Comparative and Applied Criminal Justice, vol. 20 no. 2 at p. 293

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5.6. **Sentencing Circles for Aboriginal Offenders in Canada– 2001** [51]

5.7. Restorative Justice in Cases of Domestic and Sexual Violence: Healing Justice? -2000 [52]

- **Definition:** As participant at a Restorative Justice conference noted the differing definitions within the Aboriginal community when she stated that,
    - "Sentencing circles have different meanings...Each community is unique and each community decides what a sentencing circle is to them. So, when you say a sentencing circle in one community, it doesn't mean the same thing in another community."

[51] Melanie Spiteri. Sentencing circles for Aboriginal Offenders in Canada A thesis submitted to the Faculty of Graduate Studies and Research through the Department of Sociology and Anthropology in partial fulfillment of the requirements for the degree of Master of Arts at the University of Windsor. Windsor, Ontario, Canada 2001 c. 2001 Melanie Spiteri

[52] Bev Putra, PATHS Conference, tape two, April 15, 2000 in Coward, Stephanie, Restorative Justice in Cases of Domestic and Sexual Violence: Healing Justice? Directed Interdisciplinary Studies, Carleton University, December, 2000 http://www.hotpeachpages.org/paths/rj_domestic_violence.html

5.8. Justice paradigms and practice: the Peigan Nation sentencing circle - 1999 [53]

5.9. Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice/ Alternative Dispute Resolution - 1999[54]

- The **Sentencing Circles** of aboriginal communities reflect core restorative justice principles. They involve the victim, demand that offenders accept responsibility for their actions, decide on ways to repair the harm done and provide an opportunity for reintegration back to the community. Sentencing Circles generally occur after the offender has been to court and has been convicted. Instead of the judge giving a sentence, the offender meets with members of the community and they decide how best he can make amends.

5.10. Introducing the peacemaking circle: guiding principles -1999 [55]

5.11. Sentencing circles and the dilemma of difference - 1999[56]

5.12. Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue[57]

A court that imposes a sentence shall also take into consideration the following principles:
(e) all available sanctions other than imprisonment that are reasonable in the circumstances of aboriginal offenders.
(Section 718.2 of the Criminal Code of Canada)

1. The Introduction

The Supreme Court of Canada's decision in *R. v. Gladue* [2] clarified the duty of sentencing judges to consider background and systemic factors in sentencing Aboriginal offenders. In this appeal, the Court had to consider the appropriate interpretation of section 718.2(e) of the *Criminal Code* where an Aboriginal woman, Marie Gladue, pleaded guilty to manslaughter in the death of her common law husband. The offence took place in the town of Nanaimo, British Columbia. Ms. Gladue was one of nine children of a Cree mother and Metis father, born in McLennan, Alberta. She had been living with the deceased, Reuben Beaver, since she was 17 years old and they had one daughter, with another child on the way when he was killed. The relationship included a history of physical and alcohol abuse. The night he died, the two had been drinking and fighting over whether the deceased was having an affair with the accused's sister. Mr. Beaver was fatally stabbed in the heart.

Ms. Gladue was sentenced to three years imprisonment along with a ten year weapons prohibition order. She appealed her sentence, in part, on the basis that the trial judge found section 718.2(e) did not apply to her as she was "not within the aboriginal community as such" because she was living in Nanaimo when the offence occurred. The British Columbia Court of Appeal found that the trial judge's decision was in error as section 718.2(e) applies to Aboriginal people, regardless of their residence. Nevertheless, the Court of Appeal upheld the trial judge's sentence as Ms. Gladue had been granted day parole after six months of her sentence and was thought to be living in the community with appropriate supports. The Supreme Court of Canada upheld the disposition as to sentencing, but provided detailed reasons on the operation of section 718.2(e) and the duty of sentencing judges to find alternatives to incarceration for Aboriginal defendants.

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[53] Grogan, Susan E. "Justice paradigms and practice: the Peigan Nation sentencing circle." Source: *Legal Studies Forum* v. 23 no1-2 (1999) p. 155-75 ISSN: 0894-5993 cited in University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[54] Provincial Association Against Family Violence, Keeping an Open Mind: A Look at Gender Inclusive Analysis,Restorative Justice, And Alternative Dispute Resolution, June, 1999, http://www.nfld.com/~paafv/

[55] Stuart, Barry D. Introducing the peacemaking circle: guiding principles viii, 270 leaves, 1999. Thesis (LL.M.) York University.

[56] Linker, Maureen. "Sentencing circles and the dilemma of difference" in the May 1999 vol. 42 *Criminal Law Quarterly* at pages 116 to 128. University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[57] Justice as Healing Vol. 4, No. 3 (Fall 1999) Her Honour, M.E. Turpel-Lafond [1], Provincial Court of Saskatchewan, B.A., LL.B., LL.M., S.J.D. The following paper was provided at the CIAJ [Canadian Institute for the Administration of Justice] Conference: "Changing Punishment at the turn of the Century", in Saskatoon Saskatchewan on September 26 - 29, 1999. The paper is to be published in early 2000 and forthcoming in Criminal Law Quarterly, 1999.

The *Gladue* decision is an important watershed in Canadian criminal law. The interpretation of section 718.2(e) of the *Criminal Code* by the Supreme Court of Canada clarified that this provision is remedial in nature and note merely a codification of existing law and practice. In so construing the provision, the Court clearly endorsed the notion of restorative justice and a sentencing regime which is to pay fidelity to "healing" as a normative value. Healing is an Aboriginal justice principle which is slowly becoming merged into Canadian criminal law through the practice of circle sentencing and community-based diversion programs. The *Gladue* decision has brought the notion of healing into mainstream as a principle which a judge must weight in every case of an Aboriginal person, in order to build a bridge between their unique personal and community background experiences and criminal justice.

The Supreme Court of Canada has acknowledged that the legacy of discrimination faced by Aboriginal people in Canada is one of the reasons for over-representation in the system and consequently, the courts must address this in sentencing. Quite apart from the unique circumstances of Aboriginal peoples, the Supreme Court has criticized the over reliance on incarceration for all citizens in Canada. The recognition of the disproportionate representation of Aboriginal people in the criminal justice system, builds on a number of recent decisions relating to criminal justice and aboriginal people, including *R. v. Williams* which opened a door for juror challenges based on cultural or racial bias where there was a demonstrated potential of partiality. [3] Other decisions, at the Provincial appeal level, such as *R. v. Morin*, [4] have confirmed the restorative approach in the context of sentencing or healing circles. The implementation of the reasoning, and the regime contemplated in the *Gladue* decision, provides all criminal trial courts, and the appeal courts, with challenges and opportunities. The decision in *Gladue* explicitly builds upon over a decade of intense scrutiny of the criminal justice system and its impact on Aboriginal peoples of Canada, including the thorough analyses of situation by the Royal Commission on Aboriginal peoples, the Law Reform Commission of Canada, and the Manitoba Aboriginal Justice Inquiry. [5]

There is much that is innovative in the concise decision of Justices Cory and Iacobucci, written for a unanimous Supreme Court of Canada. However, hearing the clamour of criticism over judge-made law, it is vital to recall that the notion of alternatives to incarceration for Aboriginal peoples is not an innovation of the Supreme Court, but a Parliamentary proposal added to the *Criminal Code* when the package of amendments on sentencing were passed in 1996. Since 1996, there have been various interpretations of the sentencing amendments, with some courts of appeal deeming these amendments as a mere codification of pre-1996 law, while others construed them as a departure from the past. It was mine own experience that while section 718.2(e) was part of the criminal law for a number of years, it was rarely, if ever, relied upon by sentencing judges or, more importantly, counsel. With the decision of the Court in *Gladue*, this has irrevocably changed. Indeed, the criminal bar and bench are in the throes of a transition grappling with the impact of the decision on a daily basis. Certainly in the Prairie provinces, the impact of *Gladue* on the administration of justice was immediate. The impact is national in scale and may in the long run transform the practice of criminal law.

This brief commentary will address procedural implications of the *Gladue* decision. The procedural implications are a matter of immediate concern as experience suggests there may be little understanding of the approach to Aboriginal offenders required by *Gladue*. Moreover, it is imperative that counsel, both Crown and Defence, take the initiative to adjust their practice to reflect the requirements of the decision. For example, simply citing the decision and suggesting to a Court that it should take into account "the Gladue factors," is not a standard of practice which should be countenanced. How then should counsel approach this decision and, similarly, what are the duties of the sentencing judge? I will examine each of these questions in turn and leave aside the more fundamental policy issues for future analysis.

2. Practice Implications for Counsel

While the Supreme Court of Canada has created a duty on the sentencing judge to I consider the unique circumstances for Aboriginal offenders in all cases, a sentencing judge can only effectively discharge this responsibility if counsel and the supporting agencies in the criminal justice system, such as probation and youth services, assist the court in providing a full picture of the circumstances of the defendant and the offence. The *Gladue* decision highlighted the responsibility of the judge and described it as follows:

> There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence... In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender, it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances. as an aboriginal offender may be

> waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way. [6]

Judges need to make informed decisions, drawing on sources of information that might not normally be before the Court. The role of counsel is vital and should be seen as a kind of two- approach. First, the defence counsel needs to assist in bringing personal information regarding the defendant to the attention of the Court. Second, the Crown will need to assist in identifying alternatives to incarceration, in some instances with the collaboration of defence counsel, so that the court understands the available options. Unless defence counsel, or the individual defendant, waives the inquiry, this information will be required in all cases involving Aboriginal people.

Clearly, *Gladue* has created additional burdens on counsel. Mr. Justice Klebuc of the Saskatchewan Court of Queen's Bench adjourned a sentencing matter for several months to permit counsel to do their job and collect the information he required to make a decision regarding an Aboriginal defendant he was to sentence. [7] In adjourning the matter, Justice Klebuc made it quite clear that counsel is expect to do more "if we are to honour the direction of the Supreme Court of Canada."[8]. While he expressed the recognition that counsel will have to work harder, he noted that the "court can only move as fast and as far as Crown counsel and defence counsel enable it to." [9] Justice Klebuc's sentiments are undoubtedly shared by many on the bench. The work of counsel is axiomatic for the practical implementation of *Gladue*

Of course, if a defendant is unrepresented, the sentencing judge takes on most of the burden. The judge must question the defendant to determine personal circumstances. This kind of information would likely be better gleaned by counsel as a defendant might be very guarded in the formal context of judicial questioning. Judges will appreciate the assistance of counsel, where available, so that the disposition can fully reflect the concerns of Parliament and the Supreme Court of Canada regarding incarceration of Aboriginal people. One of the challenges for both counsel or the judiciary will be to encourage Aboriginal people to open up to them and describe their experiences. Because of the mistrust that has marked the relationships between Aboriginal and non-Aboriginal people in the criminal justice system, there will be a reluctance to share experiences. Furthermore, many Aboriginal people who have experienced racism, poverty, discrimination, addictions and family breakdown, may not be at a point in their life where they are willing to identify these issues, much less discuss them with strangers. This will be a significant hurdle in implementing the Supreme Court of Canada's reasoning. It will change with time, but initially, many defendants may waive the inquiry so as to maintain their privacy out of mistrust. They will wonder, "Why are they asking me this information? Will it be used against me?" Strong communication skills, and understanding on the part of counsel and the judiciary, will be vital, to open up the exploration of background experiences.

The following is a simple checklist of the types of inquiries which should be made by counsel, or the judge where the individual is unrepresented, when dealing with an Aboriginal defendant who faces incarceration:

i) Is this offender an Aboriginal person?

Aboriginal person is defined according to section 35 of the Constitution Act, 1982, as being Indian, Metis (of mixed ancestry) or Inuit.

- If the answer is yes, determine what community or band the defendant is from.
- Does the defendant reside in a rural area, on a reserve, or in an urban centre?

ii) What unique circumstances have played a part in bringing this offender before the Courts?

The sentencing judge *must* consider some of the following issues/factors and query counsel or unrepresented offenders. [10]

- has this offender been affected by substance abuse in the community?
- has this offender been affected by poverty?
- has this offender been affected by overt racism?
- has this offender been affected by family or community breakdown?
- has this offender been affected by unemployment, low income and a lack of employment opportunity?
- has this offender been affected by dislocation from an Aboriginal community, loneliness and community fragmentation?
- has the offender been affected by residential school education?

A pre-sentence or pre-disposition report might be of great benefit to the court in canvassing some of these issues. In order to sensibly ask these questions, it is helpful if counsel, or the judge as the case may be,

understands the historical and societal context of these questions. For example, has a community been relocated? Has a significant proportion of the Aboriginal community moved to urban centres? What are the reasons for these developments? Many of these issues have been thoroughly studied by the Royal Commission on Aboriginal Peoples, the reports from which are valuable educational resources for those unfamiliar with the broader context.

It is critical that all parties remember that this kind of inquiry is not necessary in all circumstances, but is imperative when the sentence would normally be one of incarceration. In terms of alternatives to incarceration, counsel can greatly assist the court in determining whether there are alternatives in the community, and whether or not the defendant would benefit, in a restorative justice sense, by participating in such alternative programming. Counsel will need to learn about the Aboriginal community, including in the urban context, in order to be familiar with the resources available to address the underlying problems which Aboriginal people experience. It may be in many instances that counsel will report to the court that there are no alternatives; leaving the Judge to determine whether the term should be adjusted nevertheless.

Again, a simple checklist of how this information should be brought before the court might be of assistance to counsel preparing submissions following *Gladue*:

> **A.** Lawyers can request judges to take judicial notice of the systemic and background factors which have to lead to Aboriginal people being disproportionately represented before the criminal courts and in the prison system. As the Court found: It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-Aboriginal offenders as well. However, it must be recognized that the circumstances of Aboriginal offenders differ from those of the majority because many Aboriginal people are victims of systemic and direct discrimination, many suffer the of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, Aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination toward them is so often rampant in penal institutions. [11]
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> **B.** Lawyers will need to address the concept of *restorative justice* in their sentencing submissions and explain how this is relevant to the particular Aboriginal offender. Restorative justice "will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context." However, restorative justice means a philosophy of personal and community healing and "an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime." [12]
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> **C.** Lawyers should know what alternatives to incarceration are available in the community (or elsewhere) and remind sentencing judges of these alternatives, especially where consistent with restorative justice, and ensure that these alternatives are explored for Aboriginal offenders "wherever they reside, whether on-or off-reserve, in a large city or a rural area." [13] The Supreme Court of Canada noted that Aboriginal people living in urban centres, even with a fragmented connection to the community, must be afforded the same restorative justice approach. This will be the greatest challenge as judges do not always know what resources are available in a community and whether they would be appropriate in the circumstances of an individual offender. Judges will want to know if an Aboriginal community or urban centre has alternative programs and if they are accessible through a probation order or conditional sentence of imprisonment. The Supreme Court of Canada found that "even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative." [14] Further "the residence of an Aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to find an alternative...." [15]
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> **D.** Even if there is no alternative to incarceration, lawyers should make submissions on the length of the term of imprisonment, taking into account the background circumstances of an Aboriginal offender. The term of imprisonment for an Aboriginal offender may be less than the term imposed on an non-Aboriginal offender for the same offence. The Supreme Court of Canada said "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of

imprisonment for Aboriginals and non-Aboriginal will be close to each other or the same, even taking into account their difference concepts of sentencing." [16] The sentencing judge will want to know background factors in fixing the length of sentence when imposing a sentence of incarceration.

E. Ultimately, in determining what is a fit sentence, the sentencing judge will make a holistic determination. Counsel should not forget this and review all relevant sentencing information and material with the court. This includes considering the factors listed above, and also exploring the understanding of criminal sanctions held by the offender and her community. "Would imprisonment effectively serve to deter or denounce this offender..., or are crime prevention and other goals best achieved through healing?" [17] What might be required for healing? This information is important in the sentencing process and will present some new challenges for everyone in sentencing.

F. Counsel will need to tailor their submission to sentencing judges so that they can discharge their duty "to craft sentences in a manner which is meaningful to Aboriginal peoples." [7] Defence lawyers will need to understand what is meaningful to a client and convey this to the Court. Although imprisonment is intended to serve the "traditional sentencing goals of separation, deterrence, denunciation and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals." [19] Prosecutor's will need to identify how to balance public safety concerns with what the Supreme Court has termed a "crisis in the criminal justice system" because of the over-incarceration of Aboriginal peoples.

The impact of *Gladue* on counsel as a matter of criminal practice is considerable. Not only only will there be additional burdens on counsel, in the case of legal aid, there will likely be a need for greater resources to discharge their obligations to the court. Continuing education on the implications of the decision will be valuable for best practices to be adopted. There will be a myriad of scenarios where the application where the application of the reasoning in *Gladue* will be controversial. This will entail legal argument and more detailed sentencing submissions. For example, where there are two parties to the offence and one is an Aboriginal person and the other is not. For consistency, it would be difficult to sentence one offender to incarceration and the other to a community disposition. However, these kinds of cases will need to be worked out on an individual basis with full consideration of their unique circumstances. The Supreme Court of Canada has interpreted the provision, section 718.2(e), in such a fashion as to enunciate a series of facts and policy objectives which underpin the provision, while leaving broad flexibility to judges to find the appropriate dispositions.

3. Impact of the Judiciary

The potential impact of the *Gladue* decision on the judiciary is arguably profound. The Supreme Court of Canada has clarified that Parliament's decision to add section 718.2(e) to the *Criminal Code* means that one must, as a matter of criminal law, recognize that Aboriginal people experience incarceration differently than others. While some might suggest that an Aboriginal person who receives the same sentence as a non-Aboriginal person is being treated equally, this has been rejected as fallacious reasoning by the Supreme Court of Canada. Sometimes treating different people the same results in inequality. Justices Cory and Iacobucci considered the argument that this treatment of Aboriginal peoples is "reverse discrimination" against non-Aboriginal people. [20] They concluded that section 718.2(e) is not unfair to non- Aboriginal people, it simply requires judges to treat Aboriginal people fairly by taking into account their difference.

This decision will affect the judiciary in at least three fundamental ways. First, judges will need to be educated regarding Aboriginal peoples in Canada, including Aboriginal peoples' history, culture, and experiences of discrimination. Second, judges will need to spend more time on the sentencing process to ensure that all information is before the court which is required to evaluate a more restorative approach to the defendant and the community. Third, judicial independence will be vital in discharging this function as individual judges and the judiciary may be subjected to considerable criticism and public attack for applying the *Gladue* principles in individual cases. Each of these three areas are important and the judiciary will experience a period of transition.

The first issue regarding judicial education is probably the most significant. While "social context" education for judges has been an important feature of training for judges, it has not been consistent and as sophisticated as is required to provide for a fuller understanding of the situation. It has not always been social context education which involves representatives of the Aboriginal peoples from the regions in which the judges sit. Furthermore, judicial education is but one component of a wider I education project regarding Aboriginal peoples. Legal education for lawyers is another - the experiences of Aboriginal peoples in the criminal justice

system, and the society at large, should be emphasized in the university context. For example, without proper instruction, a judge might not know how to ask a defendant about their background and personal circumstances. Or worse, they might ask for the information in a fashion which closes off the discussion instead of opening it up. Once one has a narration of the personal circumstances, what does the judge do with that information; not only in terms of fashioning a sentence, but in terms of speaking to a defendant and the broader community regarding the meaning of it? To be meaningful, in the broadest sense, requires a substantial degree of understanding and education outside the individual case.

For example, when I first became a judge, I was observing a colleague in Youth Court as part of my training. In providing reasons for disposition to a young Aboriginal person, the judge suggested that among other factors taken into account, it had been considered as a mitigating factor that the young person was raised by his grandparents and not his birth parents and that this would have had a negative impact on his early childhood. After the proceeding, I explained to my colleague that for Aboriginal people, at least in my experience as Nehiyaw (Cree), being raised by one's grandparents was a special gift. Perhaps the better way to appeal to the child raised by grandparents is to explain how they are bringing shame on their grandparents by acting the way they did. They were privileged to be raised by their grandparents and they of all people should know better. While this is a small point, it illustrates how useful it is to understand the Aboriginal peoples' culture and values in order to communicate in a manner which is meaningful to the defendant.

On the second issue of time, I sentencing Aboriginal peoples, while fully taking into account the *Gladue* considerations, will be more time consuming. This is a remark I've heard quite often since the decision and my own experience would suggest that it is the case. In a busy court context, such as the situation for the Provincial Court in a Saskatchewan the additional time required to address sentencing for Aboriginal peoples, after the Supreme Court of Canada's decision, will mean delays in other matters. There will soon be a need for the dedication of greater resources in the administration of justice to discharge this task. It will also require patience and attention to the importance of the sentencing process. In many ways, this might be long overdue and be a benefit in the system to all defendants. We will take more time to sentence, as we should, given how significant a moment sentencing is in the criminal justice system, for both defendants and victims, not to mention the broader community One significant impact then is that resources will be required in the community for alternative programming if the *Gladue* decision is to be implemented as imagined by the Court.

While the reasoning in *Gladue* is directed at sentencing, it is clearly for applicable to other areas such as breaches of conditional sentences, [21] show cause hearings, and parole reviews. One early concern was the application of the reasoning to the proceedings of the youth court under the *Young Offenders Act*. This was argued in Saskatchewan in a case of from *R. v. A. J. & A. J.* [22] where it was held that while the specific provision of the *Criminal Code*, section 718.2(e), is not resider applicable to young offenders, that the healing reasoning in the decision is applicable in terms of finding more restorative approaches to dispositions for young people. The reasoning in the Gladue decision is not of the sort that is narrowly confined to one specific component of the administration of justice, or criminal procedure. It is broad and of vast significance. Presumably, it will be introduced in a variety of contexts in the future with interesting results. It would be difficult to confine a notion like "healing" to only one component of the criminal justice system, i.e., initial sentencing for adults, and not to extend it beyond this to reviews of those sentences and to young people.

4. Impact on Aboriginal Communities

We should also consider the potential impact of the decision in Gladue on Aboriginal communities. These communities are diverse, culturally and geographically, although they have been engaged in focused efforts at community healing and development for some time. While the decision was greeted positively by representatives of the Aboriginal community, such as those attending a Canadian Bar Association - Indigenous Bar Association symposium on Aboriginal justice in Toronto in April 1999, the practical implications may raise some troubling problems.

For example, if judges are sentencing to community dispositions, drawing upon resources in the Aboriginal community, how heavily will this tax the limited resources of the community? While the financial resources dedicated to incarceration are significant on a per capita basis, will there be an investment in the Aboriginal community to meet the growing demand for community support, supervision, and healing resources? This is the crux of the matter from a practical perspective. The restorative turn in criminal justice might be only an imaginary one unless Aboriginal communities are able to engage in healing processes with support from the broader society. While personal counselling to address addictions, family distress and the ongoing effects of residential school education are vital to healing, so too are measures to eliminate or reduce poverty and other causes of crime. My point is that restorative justice, fully envisioned, is not something which is passed to the

Aboriginal community who are directed to "fix" a problem on their own, especially if they do not have the basic tools to do so.

The sentencing practices which emerge from the application of the Gladue decision will also interact with strong concerns in the Aboriginal community, particularly from women, that the concerns of victims should not be I disregarded in the healing enterprise. The l court will need to weigh, in considering alternatives to incarceration, whether the victim's interests are properly protected by a non-custodial disposition. This will be a strong consideration in remote communities where the victim will be living in close proximity to the offender.

The restorative notion of justice, as it is understood in the Aboriginal community, is not a notion which excludes the concerns of victims. To the contrary, the notion is rooted in the healing of the rift; and the restoration, if possible, of all those touched by the wrong-doing. This. side of the equation cannot be ignored in sentencing after *Gladue*. The British Columbia Court of Appeal, in *R. v. J.E.A.*, reduced an Aboriginal defendant's sentence from life-imprisonment for robbery and sexual assault to 20 years imprisonment, based on the background factors identified in Gladue. [23] They did not reduce it further, even though the defendant had a horrific set of background and personal experiences, because of concern for public safety and the experiences of the victims.

5. Future Challenges

As a judge in a criminal trial court in Saskatchewan which deals predominately with Aboriginal people, one often feels like Anthony Trollope's *Harry Heathcote*, constantly rushing about the territory trying to keep the fires abated, with no control over the PA weather causing the hazard. The tendency is to view the problems Aboriginal peoples experience as those of someone else's making and to view oneself as disposed to limited tools to contain the situation. However, a more balanced view would be to see that the criminal law is a critical site for the mediation of conflict between Aboriginal people and non-Aboriginal people in our society. The lawyer or judge working in the criminal law will benefit from an understanding of their mediating function beyond the circumstances of any individual case. This might seem unusual as judges tend to view the task as highly individuated. Nevertheless, the structural circumstances of Aboriginal peoples' entanglements with the criminal justice system will assist us in viewing our position in its full context. The task of the court, and the judge, is to dispense justice, understanding that justice as a human enterprise is hardly mechanistic.

This kind of approach pre-supposes a more nuanced interpretation of the rule of law than has historically been the case in mainstream legal discourse. For some, this would be a welcome departure as it potentially embraces the legal pluralism which is the basis of Canada law and holds promise for a more inclusive criminal justice system. For others, it might be vigorously challenged as a departure from the formal equality of the pre-*Charter* era. As a barometer of Canadian law, the *Gladue* decision certainly registers as vital departure point. Applying the reasoning in *Gladue* requires a strong understanding of how structural factors impact individual cases; or, how individual experiences reflect broader historical and community events. Perhaps this is no more than the history of the common law with its dialectic of stability and change. Nevertheless, reasoning which weighs both structural considerations and specific contexts, is vital to criminal justice. It is a form of reasoning which does not always sit well with the judiciary, as ingrained as we are with particularlizing decision-making. Nevertheless, *Gladue* is a reminder that highly particularized decisions, without regard for broader structural and historical factors, might lead to injustice.

The *Gladue* transition period will continue for some time as numerous matters are considered in a new light in various courts across the land. It is clear that society expects us to carefully consider the experiences of Aboriginal peoples and find creative responses which are appropriate to unique circumstances. The reasoning in this watershed decision will resonate throughout the criminal justice system, and spill over into the correctional institutions and youth justice system. For judges, the defendant's personal factors will be need to be weighed differently in the sentencing equation, however, the exercise is still one of careful balancing, taking into account the needs of the community and society, in crafting a disposition which is just for all.

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2. *R. v. Gladue* (1999) 23 C.C.R. ((5th) 197.
3. *R. v. Williams* [1999] 4 W.W.R.711 (Supreme Court of Canada). Also the decision of the Saskatchewan Court of Queen's Bench, Barclay, J. in *R. v. Fleury*,, [1998] 3 C.N.L.R. 160.
4. See the evaluation of this jurisprudence in D. Kwochka, "Aboriginal Injustice: Making Room for a Restorative Justice Paradigm," (1996), 60 *Sask. L. Rev.* 153.
5. The impact of the work of the Royal Commission on Aboriginal Peoples is especially evident in the decision. This Commission is having a broad influence on judicial decision-making. For an analysis of this, see D. Stack, "The Impact of RCAP on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom," (1999) 62 *Sask L Rev.* 471.

6. *Supra*, pare. 82-83, p.227.
7. *R. v. Carratt*, unreported decision of 21 May 1999, Saskatoon.
8. *Ibid.*, p. 9, lines 22-23.
9. *Ibid.*, p. 10, lines 22-24.
10. *Ibid.*, pare. 67 & 80, pas. 222 & 226.
11. *Ibid.*, pare. 69, p. 222.
12. *Ibid.*, pare. 71, p. 223.
13. *Ibid.*, pare. 91, p. 230.
14. *Ibid.*, pare. 92, p. 230.
15. *Ibid.*, pare. 93, p. 231.
16. *Ibid.*, pare. 79, p. 226.
17. *Ibid.*, pare. 80, p. 226.
18. *Ibid.*, pare. 77, p. 225.
19. *Ibid.*, para.57,p.218.
20. *Ibid*, pares. 86-88, pp. 228-229.
21. See decision of Judge Whelan of the Saskatchewan Provincial Court in *R. v. R.J. Stewart*, June 11, 1999, which concerned a breach of a conditional sentence and applied the *Gladue* principles to that disposition. Judge Whelan held: "I conclude without hesitation that the principles discussed in *R. v. Gladue*, continue to have application in a s.742.6 hearing. In arriving at the appropriate decision...I must consider the unique systemic or background factors which may have played a part in brining Mr. Stewart, an aboriginal offender, before the court...." pare. 20.
22. Unreported decision of Youth Court, May 14, 1999 (J. Lafond). This decision addressed whether or not Gladue applies to young persons given section 20(8) of the *Young Offenders Act* which exempts Part XXIII of the *Criminal Code*. In this matter, it was held that while section 718.2(e) does not technically apply to young people, the reasoning in Gladue regarding systemic discrimination and alternatives to incarceration is incorporated through section 3 of the *Young Offenders Act*.
23. *R. v. J.E.A.*, British Columbia Court of Appeal, July 15, 1999 (Ryan J.A. for the Court).

5.13. Circle Sentencing: The Silence Speaks Loudly - 1998[58]

Background Excerpts

Given the gathering momentum in favour of implementing circle sentencing initiatives, the project of this thesis is to consider whether the victim's needs can be met through circle sentencing. By victims I mean Aboriginal women who reside in reserve communities, and who have experienced sexual violence. I pondered for the longest time whether to use the label 'victim' to describe the women who are the focus of this discussion. I wondered if this term was dis-empowering, connoting an image of helplessness. This is neither the case, nor the impression I want to convey. However, 'victim' is a commonly used term and I respectfully use it hereafter.

Formal interviews were conducted with 16 advisors who had different experiences with the circle sentencing process. In-depth interviews were conducted with two key advisors, and information interviews with the other fourteen. All interviews were open-ended and were designed to try to understand the standpoint—or everyday experience—of Aboriginal women who are the victims of violence, to learn how circle sentencing might be problematic for these women, and to reveal how their experience is inextricably bound by the power relations in First Nations communities and beyond.

Most of the ideas presented here are not mine; they are compiled from information collected through interviews and a literature review. Note that consideration of any or all of the ideas here may guide the user to the conclusion that it ***is in the victim's best interests not to hold a circle sentencing.***

Throughout this paper, the term **sexual violence** refers to "physical or sexual assault, or the threat of physical or sexual assault of women by men with whom they have, or have had, ongoing or intimate relationships. Other behaviour, such as intimidation, mental or emotional abuse, neglect, deprivation and financial exploitation must be recognized as part of the continuum. In my opinion, the term sexual violence brings to the forefront the violent nature of any of the means by which men control and dominate women in relationships. Finally, with regard to sexual violence, in an overwhelming number of cases, this is violence by men against women, and I use the pronouns that reflect this reality.

The Royal Commission on Aboriginal Peoples: Report of the Royal Commission on Aboriginal Peoples, 1996, provides the standard for [other] terminology used in this paper. The term Aboriginal people applies broadly to "refer to the indigenous inhabitants of Canada ...." belonging to the political and cultural

[58] Circle Sentencing: The Silence Speaks Loudly: Considering Whether the Victims' Needs Can be Met Through Circle Sentencing *1998* Excerpted from the Master's Thesis of Charlene Levis http://www.hotpeachpages.org/paths/rjCharlene.html

entities known as 'Aboriginal peoples'." Aboriginal peoples "refers to organic political and cultural entities that stem historically from the original peoples of North America." "The Commission distinguishes between local communities and nations." Consistent with this distinction, in this work I use the terms First Nations community to refer to "a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation." The term Indian is used only when contained in quotations, or when used in legislation or policy or discussions relevant to legislation or policy. These choices were made with respect for Aboriginal people.

Chapter Four: Empowering Victims

In this chapter I respectfully present four criterion which include ideas that I feel may improve the chances of victims' needs being met through circle sentencing. I stress that I am not recommending a process to be used by First Nations communities—that is not my place. In addition, there clearly is no "one size fits all" solution for Aboriginal justice. However, I trust that some of these ideas may be useful for individuals working in the area of circle sentencing. I remind the reader that most of the ideas presented here are not mine, they are compiled from information collected through interviews and a literature review.[59] The reader will note a change in the style of writing in this chapter. Because I feel that the ideas below may have practical applications as a whole or individually I present them as somewhat succinct and autonomous points. I hope that my interpretation and arrangement of the information will allow this chapter to stand alone and serve as a potential tool for those working in the field of circle sentencing.

The first of the four criterion suggests activities to be carried out far in advance of a circle sentencing and is related to ensuring the community has achieved a state of readiness required to implement circle sentencing. Criterion number two focuses on assessing which cases are suitable for circle sentencing. Criterion number three stresses the importance of adequate preparation for a circle sentencing session. Criterion number four refers to how the results of the circle will be monitored and evaluated. This chapter offers an examination of these four criterion. Note that consideration of any or all of the ideas here may guide the user to the conclusion that *it is in the victim's best interests not to hold a circle sentencing.*

Three assumptions underlie the discussion in this chapter.

1. Circle sentencing will be adapted as a transitional measure prior to the possible development of distinct Aboriginal justice systems. Therefore, representatives of First Nations communities and the existing criminal justice system will work cooperatively to develop, implement and evaluate interim Aboriginal justice systems.[60]
2. The readers are mindful of the complexities of sexually violent offences and the power imbalances inherent in violent relationships.
3. Violence in contemporary First Nations communities is a byproduct of the devastation of colonization and the resulting disadvantaged social and economic situation of Aboriginal peoples. Efforts to remedy this situation are required to eliminate the structural causes of violence.

Meeting the Needs of Victims through Circle Sentencing

One: Assessing Community Readiness

1. Circle sentencing is agreed to be a viable alternative for the community.
2. Resources are available to ensure the successful implementation of circle sentencing, the safety and the healing of the victim, and the monitoring and healing of the offender.

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[59] Many of the sources I reviewed have excellent information and recommendations relevant to circle sentencing, including Judge Cunliffe Barnett. Circle/Alternative Sentencing *In: Canadian Native Law Reporter* [1995] 3 at 1-7. Mary Crnkovich. *Report on the Sentencing Circle in Kangiqsujuaq*. Prepared for the Department of Justice Canada. Gitxsan Health Authorities. *Peace and Justice: Five Year Plan*; Rupert Ross. *Returning to the Teachings;* Judge Barry Stuart. *Circles into Squares Systems* RCAP. *Bridging the Cultural Divide.* McDonald, J.M. and O'Connell, T.A. & Moore, D.B. & Bransbury, E. *Convening Family Conference with* Carol LaPrairie. *Conferencing in Aboriginal Communities.*

[60] Also stated in Royal Commission on Aboriginal Peoples. 1996. *Bridging the Cultural Divide: a Report on Aboriginal People and Criminal Justice in Canada.* Ottawa: Canada Communication Group at 310-311, point 11 of the Major findings and Conclusions, is the view that "criminal law and procedure operative on Aboriginal territories is *concurrent* with federal jurisdiction over criminal law and procedure generally" and in the area of criminal law specifically, first securing agreements with other relevant orders of government would be advisable.

3. Eligible people in the community are trained to facilitate and to participate in the circle sentencing process.
4. Standards and measures for evaluating the circle sentencing process are in place.

Two: Assessing Case Suitability

1. The nature of the offence lends itself to circle sentencing.
2. The offender admits responsibility for the offence.
3. The victim is a willing participant.
4. A knowledgeable and supportive victim's advocate is appointed to work with the victim. The assumption being that a Native Court Worker or Counsel will work with the offender.

Three: Preparing for the Circle Sentencing

1. Adequate preparations for the circle sentencing are made.

Four: Monitoring and Evaluating the Outcome

1. The offender must comply with the conditions set out by the circle.
2. There are consequences for the offender if the conditions set out by the circle are not met.
3. An appeal mechanism is in place.
4. The circle sentencing process undergoes a meaningful evaluation.

Meeting the Needs of Victims through Circle Sentencing

One: Assessing Community Readiness

Some means of assessing community readiness before increasing community responsibility over justice systems is important, especially for offences involving sexual violence. Perhaps an Aboriginal Justice Council, as proposed in *Bridging the Cultural Divide*, would determine "which Aboriginal initiatives would be funded and what the level of funding may be."[61]

1. *Circle sentencing is agreed to be a viable alternative for the community.*

Bridging the Cultural Divide suggests a development period of one year to eighteen months prior to communities implementing Aboriginal justice initiatives.[62] This recommendation was made in a report by consultants who evaluated two troubled alternative justice projects: the South Vancouver Island Tribal Council justice program and Attawapiskat Diversion program of the Sandy Lake First Nation. "One of the key recommendations was that each project have an explicit project development process consisting of three phases: a needs assessment phase; a project development phase; and a pre-implementation phase."[63]

Bridging the Cultural Divide stresses the importance of *genuine community consultation* in the developmental process. A genuine consultation process is one that allows all those affected by the development of the justice project to have meaningful input to the process. A process undertaken only as a formality and that ignores sectors of the community that want input is obviously not a true consultative process. Ultimately, of course, the process is a sham and will prove counter-productive, since without community support an Aboriginal justice project will not succeed. The hallmark of a meaningful consultative process is one where *not* proceeding with the project is always an option.

> The consultative process must include elders, traditional teachers and clan leaders....
>
> In addition, however, *the consultative process must reach out to the groups that are the most marginal in the community* - those whose views are most often ignored when important decisions are made. In many

[61] RCAP. *Report on the Royal Commission of Aboriginal Peoples.* v.4 *Perspectives and Realities* at 67.
[62] RCAP. *Bridging the Cultural Divide* at 169.
[63] RCAP. *Bridging the Cultural Divide* at 170.

> Aboriginal communities, as in the rest of the country, *women and young people are often among the most marginalized groups*. [emphasis added][64]

The project development approach recommended above will help establish whether circle sentencing is the most suitable alternative measure for a community. After all, a search for alternatives is intended to identify something more culturally appropriate than what the current justice system offers. If the people in the community—and this includes members of the Western justice system—are not supportive of the alternative this criteria has hardly been met.

2. *Resources are available to ensure the successful implementation of circle sentencing, the safety and the healing of the victim, and the monitoring and healing of the offender.*

Adequate resources are required to support the circle sentencing process otherwise there may be too much reliance on community volunteers. Mary Crnkovich describes how a circle run by volunteers was fraught with logistical problems and as such "can be of very little benefit to anyone."[65] Without adequate resources to implement and administer alternative initiatives, including sufficient resources to support the victims, and other's impacted by the families of violent offences, as well as the offenders, they will not succeed.

When a case goes before a circle usually the purpose is to consider alternatives to a jail sentence, or at least a shorter jail term. Often the offender remains in the community for healing. This "emphasis on healing presents different resource needs than a punishment-based system, which requires jails, guards and related resources. A healing orientation requires resources such as treatment facilities, counseling services, elders and healthy staff."[66] The nature of the offence is also an important consideration here, because in cases of violence Crnkovich suggests "What is missing from the focus on 'healing' is the assurance that if the wrongdoer stays in the community the victim is protected from further assaults."[67]

The safety and security of the victims of violence are tantamount. The victim and her family must be protected from further attacks and also entitled to some refuge from the offender's intrusion on her daily life. Emma LaRocque describes how "studies on sexual abuse also strongly indicate it is psychologically destructive for victims to be subjected to their attacker's presence. This is exacerbated in small communities, and, it must be emphasized, most Native communities are small …!"[68]

The size of the community and the availability of places of sanctuary, shelters, or safety zones for the victim and her family must be considered by communities contemplating circle sentencing, with a view to keeping offenders out of jail. Failing to explicitly deny the offender access to the neighborhood where the victim resides, where she works, the feast hall, the Bingo hall, or elsewhere, will often have the effect of excluding the victim through her fear of being in the vicinity of the offender.

How to ensure that the offender will stay away from designated places of refuge for the victim is beyond the scope of this paper. The limited success of restraining orders in protecting victims from further harassment from offenders attests that this is difficult to enforce. However, one potential advantage of involvement of the community in developing and in monitoring sentencing alternatives combined with the generally small size of First Nations communities could be the ability to closely monitor offenders. Of course, there must be a will to do so and we have seen that this is not always the case. *Bridging the Cultural Divide* notes that with respect to family violence "These offences are not always viewed with the seriousness they warrant by all community members …."[69]

As healing victims and offenders is critical to the success of alternative justice initiatives consideration of the resources required and the means of achieving this goal is critical. Whether an Aboriginal justice initiative can achieve this goal "depends on the availability of programs in the community to allow [victims and] offenders to begin their healing."[70] Andrea Kamin and Romeo Beatch describe a promising community based approach to developing the counseling and support services required for both victims and

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[64] RCAP. *Bridging the Cultural Divide* at 171.
[65] Mary Crnkovich. 1993. *Report on the Sentencing Circle in Kangiqsujuaq* at 7-9. Prepared for the Department of Justice Canada
[66] RCAP. *Bridging the Cultural Divide* at 173.
[67] Mary Crnkovich. *Report on the Sentencing Circle in Kangiqsujuaq* at 23.
[68] Emma LaRocque. In: *Aboriginal and Treaty Rights in Canada* at 81. I rely heavily on Emma LaRocque as a source for this section as she is one of a few First Nations women to be so outspoken and specific about restorative justice initiatives as a response to sexual assault offences. In the articles cited LaRocque directs her criticism specifically at the Hollow Water Model, in Manitoba. For more information about the Hollow Water Model see Rupert Ross. *Returning to the Teachings*. Chapter Two.
[69] RCAP. *Bridging the Cultural Divide* at 269.
[70] RCAP. *Bridging the Cultural Divide* at 173 as suggested in Pauktuutit, the Inuit Women's Association of Canada, "Setting Standards First", paper presented to a National Symposium on Care and Custody of Aboriginal Offenders, Correctional Service Canada, 1995. pp. 8-10.

abusers. People from professional agencies outside of the community were brought in to work with groups and to train members of the community as "paraprofessionals." Paraprofessionals are identified as "people within the community who lack formal psychological training but who are involved within their society as community-type workers."[71] While some positive indicators of this approach were observed, Kamin and Beatch remind their readers that it will be sometime before the long-term success of such initiatives can be evaluated. They report that research has shown that importing professionals into First Nations communities on a short-term basis does not help individuals or the community—ongoing support is required.[72]

The importance of adequate resources, particularly funding, was identified as an important issue by the Royal Commission on Aboriginal Peoples. The Commission recommended "at a minimum, funding for new initiatives should be guaranteed for at least the period required for serious and proper evaluation and testing."[73] The Commission also suggests that these initiatives should not require a large amount of new money. They recommend re-allocating money that is already being spent to "process and in many cases warehouse a small segment of the population."[74]

3. *Eligible people in the community are trained to facilitate and to participate in the circle sentencing.*[75]

Circle sentencing will only be as good as the people that facilitate the process. I use the term facilitate, as in to assist or to make easier, to emphasize that organizational hierarchies which would give some individuals power *over* justice are not preferred for alternative justice systems. It is precisely this European imposed notion of hierarchies which is causing problems in contemporary First Nations communities.[76] A method must be in place for determining who is eligible to facilitate and to participate in the circle sentencing initiative and people must receive adequate training for this role. Hopefully such preparation will help avoid the problem Judge Barnett encountered with a circle sentencing where the 'deck was stacked'. Val Napoleon, with the Gitxsan Health Authorities, alluded to this potential problem with community justice initiatives.[77] She suggested that research issues in Hazelton related to Unlocking Aboriginal Justice are the power in formal and informal relationships, and how the program can withstand the pressures of family.

Irene James writing in *Native Issues Monthly* states that "women need input into the justice systems that will be revived in our communities to ensure that our abusers will not also be our judges."[78] However, my thesis is that even if women are involved in alternative justice systems it may still be difficult for them to speak out. Aboriginal women have been involved in the development of the "Community Driven Holistic Circle Healing Program" at Hollow Water. The Hollow Water Program, which has received much praise, particularly from Rupert Ross in *Returning to the Teachings*,[79] elicits the following criticism from Emma LaRocque.

> I have received many calls from concerned people expressing the view that Hollow Water is a travesty of justice and a cruel disregard for human dignity. In particular, Native women expressed shock, disgust, and outrage.... Even white journalists urged me to make a statement and told me they were not politically free to question the Hollow Water decision. All those Native women who called asked to remain anonymous because they too did not feel free to publicly challenge Hollow Water. I have not felt free either.[80]

As Rupert Ross's book appears to be thoroughly researched and written with great participation of Aboriginal people, including Aboriginal women, one wonders whether his positive evaluation of the Hollow Water program is based partly on the continued silences of Aboriginal women. Regardless, Aboriginal communities must grapple with this critical issue of how to select a meaningful community of people, equally supportive of the victim and the offender, to participate in the circle sentencing process.

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[71] Andrea Kamin and Romeo Beatch. In: *The Northern Review*. Summer 1991 at 94.
[72] Andrea Kamin and Romeo Beatch. In: *The Northern Review*. Summer 1991 at 102. In doing the research for this paper I was told on a confidential basis that some First Nations people suspect that government initiatives of making professional psychologists available to First Nations communities on an intermittent basis actually resulted in an increase in suicides during the period following their community visits.
[73] RCAP. *Bridging the Cultural Divide* at 296.
[74] RCAP. *Bridging the Cultural Divide* at 291.
[75] Mary Crnkovich also makes this recommendation. *Report on the Sentencing Circle in Kangiqsujuaq* at 24.
[76] Rupert Ross. *Returning to the Teachings* at 55.
[77] Restorative Justice Video Conference. June 19/20, 1997. Held in various locations of the Province of British Columbia. Primary sponsor the John Howard Society.
[78] Irene James. In: *Native Issues Monthly*. March 1996. Volume 4. No. 2 at 9.
[79] Rupert Ross. *Returning to the Teachings*. Chapter Two.
[80] Emma LaRocque, *Aboriginal and Treaty Rights in Canada* at 210. Note that LaRocque's criticism of Hollow Water *appears* to be focused on one case that came before the circle. I was unable to contact Emma LaRocque to confirm whether my understanding is accurate.

Judge Barnett spoke of the value of the pre-sentence report in alerting the judge when the family dynamics in a community are working to protect the offender at the expense of the victim. Perhaps the pre-sentence report could be mandatory in determining whether it is appropriate to use circle sentencing in a case of sexual violence, and consideration of family dynamics could become a standard component of the pre-sentence report. This is problematic, however , as it may be difficult for someone from outside the community to evaluate well.[81] I also recognize the potential for this dynamic to establish the probation officer as having control *over* the process. There is an inherent danger there given the history of Aboriginal peoples and the justice system. It seems the probation officer would need to be very familiar with the community and the complicated issues related to sexual violence, and would need to work closely with community members in preparing the pre-sentence report.

4. *Standards and measures for evaluating the circle sentencing process are in place.*

Carol LaPrairie and Julian Roberts criticize statements like the following that "Circle sentencing and other community justice processes do spectacularly better than formal justice agencies," when there is no empirical proof.[82] They stress that standards and measures must be developed to determine the relative success of circle sentencing to the criminal justice system. The evaluation issues are relatively straightforward. It has been claimed that sentencing circles have the following benefits: they (a)reduce recidivism; (b) prevent crime; (c) reduce costs; (d) advance the interests of victims, and (e) promote solidarity among community members, however community is defined. In all these aims, *the assumption is that circles will achieve these goals to a greater degree than a conventional sentencing hearing.* These are all measurable objectives and they should be put to the empirical test.[83] In terms of evaluation Judge Stuart suggests that rates of offender recidivism may not be the most important consideration in evaluation of circle sentencing. Stuart suggests "The impact of community based initiatives upon victims, upon restoring relationships injured by crime, upon fostering harmony within the community" and other benefits "are in the long run more important than the immediate impact on offenders."[84] Whatever the evaluation criteria, some meaningful method of evaluating circle sentencing initiatives must be established prior to their implementation.

Two: Assessing Case Suitability

1. *The nature of the offence lends itself to circle sentencing.*

Debate over the question of whether cases involving violence, specifically sexual violence, should come before the circle seems to have resulted in the following opinion. *Indictable offences* where there is a jail sentence being sought of *more than two years* are not suitable for circle sentencing, and *indictable offences* where the jail term will be *less than 2 years* and *summary offences* requiring *2 years less a day jail terms* are suitable for circle sentencing. This is unfortunate in the case of sexual violence as 'sexual assault' is a hybrid offence. Hybrid means that depending on the aggressiveness of the assault and previous history of the offender sexual assault may be deemed a summary or indictable offence. Many times these cases will be deemed a summary offence and under this general guideline suitable to a circle sentencing. This important issue requires further debate. Given the 1993 policy of the *Attorney General Violence Against Women in Relationships Policy,* which takes a zero-tolerance approach to violence against women, one wonders whether cases involving sexual violence should even go before a circle.

The introduction to the policy reads:

> When abuse occurs, there is usually a power imbalance between the partners of the relationship. That power imbalance is perpetuated by societal and individual messages undermining the potential for women to gain control of their situations, and for men to be held accountable for their actions within a relationship. For example, a woman may receive constant indications from the abuser, and even family members, that it is inappropriate or futile for her to seek assistance with a "family problem" from outside agencies. When police comply with the victim's wishes and do not recommend charges,

[81] Antonia Mills (personal communication, February 16, 1998)
[82] As quoted in Carol LaPrairie and Julian Roberts. 1996. Sentencing Circles: Some Unanswered Questions. In: *Criminal Law Quarterly.* Volume 39 pp. 69-83 at 73.
[83] Carol LaPrairie and Julian Roberts. In: *Criminal Law Quarterly.* [39] at 83.
[84] Yukon Territorial Court Judge Barry Stuart. 1995. *Circles into Squares Systems: Can Community Processes be partnered with the Formal Justice System?* unpublished at 5 & 6.

> or when Crown Counsel refuse to approve charges because the victim is a reluctant witness, the abuser is reinforced in his belief that his behavior is acceptable and more importantly, the false message that is repeatedly conveyed to the victim, that no help is available, is fortified by this inaction.[85]

For Aboriginal women the threat that abuse is a "family problem" not to be brought to the attention of outside agencies is exacerbated. In many First Nations communities the private sphere extends from the Western concept of the nuclear household to a sometimes quite extensive community. There are powerful dynamics among and between victims and offenders and their respective families in First Nations communities. Complicating this dynamic is rampant and justified mistrust of government institutions such that there is no desire to bring these issues to the attention of outside agencies. But clearly, power imbalances are not desirable in circle sentencing, and an offender's abuse of power *over* the victim when sexual violence is involved must be considered. Criminal justice system personnel and Aboriginal justice system personnel must be familiar with the abuse of power and other dynamics which discourage victim's from taking steps to end abuse, as these may undermine the circle sentencing process.

R. v. *Highway* before the Alberta Court of Appeal addressed the issues of violence in relationships.

> [T]he court should examine the circumstances which are peculiar because of the relationship. When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they can often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape. Such women's financial state is frequently one of economic dependence upon a man. Their emotional psychological state militates against their leaving the relationship because the abuse they suffer causes them to lose their self-esteem and to develop a sense of powerlessness and inability to control events.[86]

In addition, one must consider that 'It is well known that recidivism of sexual offenders is very high, and as yet there are no substantive studies as to the success of Native mediation programs in rehabilitating offenders," thus again raising the question of whether cases involving sexual violence are suitable for circle sentencing.[87]

2. *The offender admits responsibility for the offence.*

Bridging the Cultural Divide considers how an Aboriginal justice system might respond when individuals do not admit their guilt or 'deny responsibility.'[88] They conclude that "Some Aboriginal nations and their communities, even as they develop their own Aboriginal justice systems, may decide that the most effective use of their energies and resources is to concentrate on cases where the individual is prepared to accept responsibility ...."[89]

R. v. *Taylor,* discussed earlier, exemplifies how problematic it is for the victim if the accused does not admit guilt.[90] The trial judge stated "The plea is irrelevant to the issue of sentencing."[91] Carol LaPrairie has a different view. She criticizes the fact that there is no guideline regarding whether there has been "an admission of guilt or ... a finding of guilt ... in order to institute the circle sentencing process."[92] She suggests this is an

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[85] Ministry of Attorney General. 1993. Violence Against Women in Relationships Policy. In: *Policy on the Criminal Justice System Response to Violence Against Women and Children.* Victoria: Queen's Printer at 4.
[86] R. v. *Highway.* Alta C.A. May 14, 1992. reported [1993] C.N.L.R. 1 at 119.
[87] Emma LaRocque. In: *Aboriginal and Treaty Rights in Canada* at 93.
[88] Guilt is a term of Western jurisprudence and many argue not so meaningful to Aboriginal people.
[89] RCAP. *Bridging the Cultural Divide* at 198.
[90] R. v. *Taylor* [1995] 3 C.N.L.R. 167 (Sask. Q.B). R. v. *Taylor* [1996] 2 C.N.L.R. 208 (Sask. C.A.)
[91] R. v. *Taylor* [1995] 3 C.N.L.R. 167 (Sask. Q.B). R. v. *Taylor* [1996] 2 C.N.L.R. 208 (Sask. C.A.) at 167.
[92] Carol LaPrairie. 1995. *Altering Course: New Directions in Criminal Justice and Corrections. Sentencing Circles and Family Group Conferences.* unpublished at 11.

"important issue as it addresses one of the underlying objectives of circle sentencing - victim-offender reconciliation and remorse. The willingness of victims to believe in the remorse of the offenders and subsequently to "reconcile" may be dramatically influenced by how "guilt" is determined."[93]

Some suggest that the offender who wishes to participate in circle sentencing should also have a sincere intention to rehabilitate himself. It seems such an intention would be difficult to assess.

3. *The victim is a willing participant.*

My research suggests that it is important for the victim to be a willing participant in the circle sentencing process. However, this analysis has shown that determining whether the victim is really a willing participant is more problematic than we can know.

Again with regards to *R.* v. *Taylor* the trial judge reasoned that "A circle may be held even if the victim is opposed to it."[94] With all due respect to the trial judge, while his rationale that the circle may be held if the victim is in opposition to it may be a legitimate point of law, this is not a commonly held view.[95] It is also important to recognize that there are often *many victims* when an offence has been committed. "We're really really close families, as people could see ... how close my family was until this whole thing came and then it just kind of destroyed a lot of our family, their lives, and kind of separated us all."[96]

Some consideration should also be given to whether the supporters of the direct victim agree to the circle sentencing. These people are undoubtedly victims as well and they *may* be better able to represent the concerns of the direct victim, especially in violent relationships where the personal safety of the victim could be compromised by breaking the silence. Of course I recognize it may also be too difficult for supporters of victims to break the silence.

4. *A knowledgeable and supportive victim's advocate is appointed to work with the victim. The assumption being that a Native Court Worker or Counsel will work with the offender.*

The importance of an objective victim's advocate was addressed by one of the women I interviewed. Her experience was that one counselor was appointed to work with *both* the victim's and the offender's family. The victim's family perceived that the person who was supposed to work with both families, ended up working on behalf of the offender and closely with the chief of the offender's band. A probation officer suggests "the victim needs an informed advocate—someone who knows the dynamics of the issues in the circle or the court—a victim services worker "someone who understands their position."[97] While this recommendation is not specifically related to the example cited above it has merit as a means of helping to ensure the victim is not re-victimized through the circle sentencing process.

Three: Preparing for the Circle Sentencing

1. *Adequate preparations for the circle sentencing are made.*

Judge Barry Stuart outlines the significant preparation that should take place prior to a circle sentencing finding that "... the steps taken before a Circle Sentencing Hearing can substantially affect the success of the process."[98] Stuart advises "A justice liaison person hired from the community to co-ordinate the pre-hearing process can make a remarkable difference."[99] Mary Crnkovich also stresses the need for adequate

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[93] Carol LaPrairie. *Altering Course* at 11.
[94] *R.* v. *Taylor* at 167. With regards to this point Carol LaPrairie and her colleague Julian V. Roberts present the view that "...sentencing circles only proceed with the full co-operation of the victim....and this transfers "...an unacceptable degree of power to the individual victim." In: *Criminal Law Quarterly.* [39] at 81. Consideration of this point is beyond the scope of this paper.
[95] Carol LaPrairie and Julian V. Roberts. In: *Criminal Law Quarterly.* [39] at 81.
[96] Advisor's identity withheld (personal communication, October 8, 1996).
[97] Advisor's identity withheld (personal communication, February 27, 1997)
[98] Yukon Territorial Court Judge Barry Stuart. 1995. *Circles into Squares Systems: Can Community Processes be Partnered with the Formal Justice System?* unpublished at 9.
[99] Yukon Territorial Court Judge Barry Stuart. *Circles into Squares Systems* at 9. Also detailed preparatory guidelines for Family Group Conferencing many of which would be applicable with circle sentencing are found in: McDonald, J.M., O'Connell, R.A., Moore, D.B., & Bransbury, E. *Convening Family Conference: Training Manual.* Attached to Carol LaPrairie. 1995. *Conferencing in Canada: Finding Middle Ground in Criminal Justice?* Unpublished.

preparation, suggesting the lack of preparation and organization of the circle sentencing process in *R.* v. *Naappaluk*[100] contributed to an awkward and uncomfortable environment. The victim and other circle participants did not understand the purpose or proceedings of the circle, and were not comfortable speaking out. Crnkovich attributes the lack of organization to limited resources and reliance on community volunteers for the circle organization, "a common problem faced in the North."[101] This example again shows the importance of adequate resources, both financial and human resources, for successful implementation of circle sentencing initiatives.

Four: Monitoring and Evaluating the Outcome

1. *The offender must comply with the conditions set out by the circle.*

Evident in the thesis findings is the concern of many advisors that the offender be held accountable for compliance with the conditions of the circle. Judge Stuart describes how reviews after the circle sentencing are important in monitoring offender compliance. He cites a number of benefits of reviews, including: the review date serves as a milestone in working though the sentencing plan; the offender is made personally accountable at the review; reviews enable adjustments to be made to the sentencing plan; and the review keeps the community informed of what is happening.[102] A review process might also encourage the community to be more committed to monitoring offender compliance and ensuring that the probation officer is informed regarding any breach of the conditions developed by the circle.

2. *There are consequences for the offender if the conditions set out by the circle are not met.*

Without exception the people I spoke with about this topic agreed that there must be consequences for the offender if the conditions developed by the circle are not met. Through the media we learn of the inherent difficulties in the criminal justice system with ensuring offenders comply with terms of probation orders. The same issues will arise in circle sentencing. Judge Stuart suggests that "Community support, and formal justice agency support, depends upon knowing the success stories, and knowing action will be taken if something goes wrong."[103] Judge Levis and others express their preference that the sanctions for non-compliance involve a return to the formal justice system. Note that the problem of people not reporting non-compliance is a conspiracy of silence of a different sort.[104]

3. *An appeal mechanism is in place.*

Bridging the Cultural Divide suggests "A complete and comprehensive justice system not only has the ability to resolve questions of fact and law at the trial level, but also has room for dissatisfied parties to appeal decisions they believe are wrong."[105] As long as the Western justice system plays a role in circle sentencing there will be a process of appeal. However, at such time that First Nations communities take on their own systems of justice then this would be a requirement.

4. *The circle sentencing process undergoes a meaningful evaluation.*

It is critical that there be a meaningful evaluation of circle sentencing initiatives. As suggested in criteria one (4) of this chapter the standards and measures of evaluating the circle sentencing process should be in place prior to its implementation. Some of the individuals I interviewed reasoned that circle sentencing and other alternative justice measures be tested and systematically evaluated on their ability to deal with offences such as minor property offences, before experimentation in cases of violence, notably sexual violence.

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[100] *R.* v. *Naappaluk*. May 4, 1993. Dutil, J.C.Q. (C.Q.) Reported 1994 2 [C.N.L.R.] 143.
[101] Mary Crnkovich. *Report on the Sentencing Circle in Kangiqsujuaq*. unpublished at 9.
[102] Judge Barry Stuart. *Circles into Squares Systems* at 32.
[103] Judge Barry Stuart. *Circles into Squares Systems* at 32.
[104] Antonia Mills (personal communication, February 16, 1998)
[105] RCAP. *Bridging the Cultural Divide* at 179.

5.14. Sex charge resolved by Native healing circle - 1998 [106]

5.15. Justice in Aboriginal Communities: Sentencing Alternatives - 1998 [107]

Book Review by by Iram Khan Justice in Aboriginal Communities: Sentencing Alternatives - Ross Gordon Green http://www.track0.com/cc/issues/0599books3.html

Using his background in law and his research in several northern Native communities, Ross Green has written a refreshing book that looks at the evolution of the Canadian criminal justice system with respect to Native communities' concepts of justice.

According to Statistics Canada, in 1993-94 71 percent and 47 percent of people at the provincial correctional centres in Saskatchewan and Manitoba respectively were Native even though they only represented 6-7 percent of the populations. This over-representation has caused many members of the justice system and the Native communities themselves to seek alternative methods of sentencing and mediation. The present Canadian justice system obviously is not helping the Native people of this country. In this book, Green explores four models of methods that combine traditional methods with "western" ones which include: the sentencing circle, the elders' or community sentencing panel, the sentence advisory committee, and the community mediation committee. As well, several essential case studies and interviews that analyse the successes and failures of each model are weaved into the book.

When I first approached this book I felt that, as many other Canadians feel now, why should the Natives get special treatment, and shouldn't these types of alternatives also be beneficial for the rest of Canada? However, as I read along, Green provides information which supports that these models would work best in Native communities, because they are usually remote and tightly knit. It isn't a Native/Non-Native issue, rather it is a rural/urban issue. These models are based on re-integration into the community, healing, and prevention and for these steps to successfully occur you need a tightly knit community who will be accountable for the offenders. When sentenced basically by their neighbours, offenders have the additional pressures put on them to admit to their crimes and agree to change their behaviors. Because judges fly in from "southern" cities to proceed over cases every month, when they leave their sentences and the authority behind them also leaves. Additionally, who would know the crime and the events leading up to it better than the community members?

Green admits that community involvement in sentencing is a fairly new trend that has brought up a few problems such as political pressures, funding, lack of support services. However, in general this type of sentencing seems to be working. Most importantly, for success, these communities need money to hire support services like psychologists and parole officers so more options can be given to them for sentencing. Additionally, the reins of justice have to be slowly handed over to these communities. Severe cases such as murder and rape, cannot yet be completely controlled by the communities. They need to practice re-integrating thieves and vandals before these kind of criminals, who usually have serious problems that need the help of specialists, which are not available in these communities.

Justice in Aboriginal Communities: Sentencing Alternatives is a good introduction to alternative sentencing models and the Native "over-representation" problem growing by the minute in our country's jails. At times, Green will lead readers into passages of legal jargon and the Criminal Code, but digging through them is well worth it. Canadian support and knowledge of this situation and the solutions towards it is necessary. As Chief Judge Lilles of the Yukon Territorial Court summarizes it:

Jail has shown not to be effective for First Nation people. Every family in Kawnlin Dun [the Yukon] has members who have gone to jail. It carries no stigma and therefore it is not a deterrent. Nor is it a 'safe place' which encourages disclosure, openness, or healing. The power or authority structures witchin the jail operate against 'openness'. An elder noted: 'Jail doesn't help anyone. A lot of our people could have been healed a long time ago if it weren't for jail. Jail hurts them more and then they come out really bitter. In jail all they learn is hurt and bitter.' (18)

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[106] Daisley, Brad. "Sex charge resolved by Native healing circle" (July 1998) 18 *Lawyers Weekly* No. 10 at page 6 *cited in* University of Saskatchewan, Books, articles and cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[107] Ross Gordon Green, Justice in Aboriginal Communities: Sentencing Alternatives, 1998
http://www.umanitoba.ca/faculties/law/Courses/McGillivray/Justice_Aboriginal_Communities.html

- This book is about community participation in the sentencing of Aboriginal offenders in Aboriginal communities.
    - It is also about finding alternatives to current sentencing practices both inside and outside of our courts.
    - It was written in response to current concerns about the high level of incarceration of Aboriginal people tried in courts designed by the prevailing white justice system.
    - The causes of Aboriginal over-incarceration in Canada in the 1 1990s are wide ranging and complex.
        - Professor Tim Quigley of the University of Saskatchewan has suggested they include the poor socio-economic circumstances of many Aboriginals, the high percentage of Aboriginal youth within the range of age most susceptible to criminal activity, the level of policing in Aboriginal communities, the "snowball" effect of a prior criminal record, a greater likelihood of an Aboriginal accused being denied bail, and the lack of sentencing alternatives available for sentencing under the *Criminal Code.'*
    - Although concerns regarding sentencing law and practice form only a portion of the concerns expressed in Aboriginal communities about the Canadian justice system, new approaches to sentencing may form part of the solution to the problems encountered by Aboriginal offenders and their families.
    - Clearly, there is enormous discretion available within the existing system to address these concerns. As Chief Justice Bayda of the Saskatchewan Court of Appeal stated in his dissenting judgment in R. v. *Morin.*

- [O]ur present justice system is flexible, accommodating and geared to do what must be done to achieve fairness and justice for all.
    - That quality enables the system to embrace sentencing circles as part of the system and to ascribe to them a role in addressing the disparity in the prison population by empowering communities to help individuals break their personal cycles of misbehaviour.

- It is unrealistic to expect changes in sentencing practice alone to achieve a significant reduction in the incarceration rate of Aboriginal offenders; however, exploring sentencing alternatives for Aboriginal offenders is one way that the rate of incarceration for Aboriginal offenders in Canada might be reduced, and diversion of offenders from the court system to community mediation committees is another.

- The need for sentencing reform within Aboriginal communities appears unquestionable, given the product of the conventional sentencing process.
    - Professor Michael Jackson detailed the over-representation of Aboriginal people within Canadian jails and observed that "[m]ore than any other group in Canada they are subject to the damaging impacts of the criminal justice system's heaviest sanctions."
    - Jackson described the situation in Manitoba and Saskatchewan as particularly distressing, with Aboriginal people, while constituting only 6 to 7 percent of the population, representing 46 percent and 60 percent of the respective prison admissions.
    - Figures from Statistics Canada confirm the continuation of this over-representation. In 1993-94, Aboriginal persons constituted 71 percent and 47 percent of the admissions to provincial correctional centres in Saskatchewan and Manitoba. Recently, the Royal

> Commission on Aboriginal Peoples stressed the disproportionate number of Aboriginal people going to jail and commented that the "over-representation of Aboriginal people in Canadian prisons has been the subject of special attention . . . because the sentence of imprisonment carries with it the deprivation of liberty and represents Canadian society's severest condemnation."

- The negative impact of jail upon First Nations offenders and communities was described by Chief Judge Lilles of the Yukon Territorial Court in R. v. *Gingell,* when he summarized the feelings of participants in that sentencing circle:

    - Jail has shown not to be effective for First Nation people. Every family in Kwanlin Dun [the Yukon] has members who have gone to jail. It carries no stigma and therefore is not a deterrent. Nor is it a "safe place" which encourages disclosure, openness, or healing. The power or authority structures within the jail operate against "openness". An elder noted: "Jail doesn't help anyone. A lot of our people could have been healed a long time ago if it weren't for jail. Jail hurts them more and then they come out really bitter. In jail all they learn is "hurt and bitter".7

- Allowing local communities to become more actively involved in the sentencing and supervision of offenders introduces a wider range of alternatives into the sentencing process.

    - In contrast to the conventional sentencing hearing is the practice of circle sentencing, which has recently been employed by judges presiding in various Aboriginal communities across Canada. Although these circles are formed within the parameters of existing Canadian law, retaining for the judge discretion as to whether such a circle is formed and the ultimate sentencing decision, they allow significant opportunity for input from victims and local community members.

    - In addition to making representations on their own behalf (as opposed to being represented by Crown or defence submissions), victims and local community members are allowed input in shaping, and potentially supervising, offender sentences.

    - Community participation is not a panacea; however, taken together with the availability and provision of adequate treatment and professional resources within a community, such local input may create a real opportunity for beginning to break deviant cycles of behaviour among repeat offenders.

- As a criminal defence lawyer practicing in central Saskatchewan since 1986, and as a lecturer in the Criminal Procedure Section of the Law Society of Saskatchewan Bar Admission Course, I have spent the last decade immersed in the problems associated with the sentencing of Aboriginal offenders. In June 1993, 1 attended a conference of the Northern Justice Society in Kenora, Ontario. Several presentations focused on the inadequacies of prevailing sentencing practices in Aboriginal communities and contained suggestions for reform. The ideas I heard expressed at the conference motivated me to do some research of my own. I subsequently conducted a detailed study of community sentencing and mediation in Aboriginal communities while completing my LL.M. degree at the University of Manitoba.
- To analyse the various initiatives within the Aboriginal communities I studied, I came up with the following four models:
    - the sentencing circle,
    - the elders' or community sentencing panel,
    - the sentence advisory committee, and
    - the community mediation committee.
- Although I consider each of these models individually in this book, the models are not mutually exclusive and a combination of approaches may exist within a community.

- I undertook my study from September 1994 to August 1995. I studied sentencing circles at Hollow Water, Manitoba, and Sandy Bay, Saskatchewan; an elders' sentencing panel at Waywayseecappo, Manitoba, sentence advisory committees at Pelican Narrows and Sandy Bay, Saskatchewan; a community mediation committee at Pukatawagan, Manitoba; and a sentencing circle committee at Cumberland House, Saskatchewan, that functioned both as a sentence advisory committee and as a community mediation committee.

- Part one of this book focuses on the often-tenuous relationship between Aboriginal communities and the conventional Canadian criminal justice system, especially with respect to the sentencing of Aboriginal offenders. Part two discusses several new approaches to dealing with Aboriginal offenders that have been attempted over the past few years. The focus of this discussion is on both the advantages and the dangers of enhanced participation by offenders, victims, and local community members in sentencing and mediation. Part three evaluates the development and progress of the various approaches and initiatives studied, and considers the implications these initiatives raise for reform of the justice system.

- In the course of this discussion, it is important to keep in mind that the sentencing process is only a part of the overall criminal justice system. I believe that the most meaningful yardstick by which to judge the unconventional sentencing approaches outlined in this study is whether they provide an enhanced opportunity for changed offender behaviour, while at the same time allowing both local community participation and protection of victims. It is hoped that the revolving door between community and jail will, at the very least, be slowed through the new approaches to conventional justice practices examined in this book.

The Development and Impact of Community Sentencing and Mediation Initiatives

Data from the Aboriginal communities studied yielded four approaches to community participation in the justice system: the sentencing circle, the elders' or community sentencing panel, the sentence advisory committee, the community mediation committee. Case selection in all models was controlled by judges, with the exception of criminal mediation at Cumberland House and Pukatawagan.

A wide variety of offences were disposed of through the community sentencing and mediation approaches considered in this study. In northern Saskatchewan, the criterion requiring that a case be one on "which the court would be willing to take a calculated risk and depart from the usual range of sentencing" appeared to have had the effect of restricting circle sentencing to offences and offenders for which a period of incarceration considerably less than two years would have been the norm. Other than *Taylor,'* no Saskatchewan circle sentencing case involved a sexual assault, an offence that usually results in a penitentiary term according to appellate sentencing guidelines.

The sentencing circles conducted at Hollow Water were, by contrast, sexual assault cases. Although the local dynamics at Hollow Water were complex, the protocol negotiated with the Department of Justice appeared to have been a major factor in allowing community sentencing for an offence that previously had automatically resulted in an penitentiary term. The question whether certain offenses, especially those involving domestic violence, were suitable for circle sentencing remained unanswered. Feminist scholarship has argued that the historical power imbalances existing in abusive relationships make violent men poor candidates for mediation, yet cases of spousal assault were considered within sentencing circles in northern Saskatchewan. The consideration of such cases by circle sentencing, or by other community sentencing or mediation approaches, will require great caution to ensure the victim has significant support and that she has not been coerced into participating.

The sentencing and mediation approaches studied included Aboriginal traditions and practices to varying degrees. A prayer was offered in Cree by an elder both at the Pukatawagan court on April 11, 1995, and at the Pelican Narrows circle. An Ojibway prayer was offered at the Waywayseecappo court on March 2, 1995, and at the Winnipeg circle. No prayer or traditional ceremony preceded the Cumberland House sentencing circle committee meeting on December 13, 1994. Sweet grass and pipe ceremonies were used during court at Hollow Water and Pukatawagan, and were also used during the Winnipeg circle. Offenders and other circle participants were allowed to speak their Native languages in all the court and mediation hearings I observed.

The Aboriginal practices incorporated into community sentencing and mediation included both spirituality (signified by prayers, the burning of sweet grass, and pipe ceremonies) and process (such as grassroots consultation, community consensus, and sharing). The circle itself has been viewed by Aboriginal people as having traditional significance. This point was made strongly by two sentencing circle participants: Berma Bushie, an Ojibway from Hollow Water, and Verna Merasty, a Cree from Sandy Bay. Whether or not such a specific historical link exists for the First Nations in this study, the circle format employed in court and mediation represented a more egalitarian process of adjudication, one that reflected the communal traditions and aspirations of Aboriginal society.

Although the Aboriginal practices described above formed an integral part of the sentencing process, their inclusion appeared to be more of an adaptation to conventional court protocol than an adoption of traditional Aboriginal dispute-resolution practices. Conventional Canadian adjudication practices were retained, with the judge controlling the final sentencing decision, and with the voices of defence and Crown counsel often predominant in an otherwise consultative process. Despite the continued prominence of judges and lawyers, these community sentencing approaches nevertheless demonstrated the flexibility of Canadian criminal law, in allowing local participation and in recognizing traditional Aboriginal practices during sentencing.

As all the initiatives studied were in their infancy, conclusions regarding their impact on offenders, victims, and communities were, at best, tentative and largely anecdotal. For example, lawyer Joyce Dalmyn described the positive impact of a sentencing circle on a young man at Pukatawagan:

> There are some [offenders], for example, the young man I mentioned earlier who should have been in a penitentiary and [would have] gotten no benefit there [and] who, for some reason, has done extremely well for two years. And I can't explain that. Did the input of the community help him? It must have. He spent three and a half out of the four preceding years in jail. Something good came [from the sentencing circle] for him. Is he an anomaly or is he a norms?

During a sentencing circle conducted on April 19, 1995, at Sandy Bay, Judge Fafard stated that, although two offenders sentenced before local sentencing circles had re-offended, the result of such circles had generally been positive. He believed offenders paid more attention to recommendations from the community than from a judge alone. "Before sentencing circles, I would leave your community at the end of the day without solving any of the underlying problems," he told the circle.

No data were available on recidivism rates for offenders dealt with through community sentencing or mediation in the communities studied. At Pukatawagan, Corporal Robert Brossart believed there had been little difference in **recidivism between offenders** sentenced in conventional court and those dealt with by the justice committees Although prominent cases of recidivism may have had the effect of fueling opposition to community sentencing, the usefulness of this measure in assessing the effectiveness of these reforms remains open to question, given the track record of the prevailing justice system in Aboriginal communities. As Judge Stuart of the Yukon Territorial Court noted, "Whatever failures the [Sentencing] Circle may experience, it is important to note how the justice system ha[s] failed numerous times with the same offender."

To gauge the impact of these initiatives upon offenders, I interviewed participants in the initiatives and observed offenders in court or during mediation. I interviewed two former offenders in Sandy Bay, but I did not interview any offenders at the time of sentencing because most were preoccupied with their cases. On a field trip to Sandy Bay in October of 1994, I spoke with one of the first offenders sentenced before a local sentencing circle. I planned to interview him on a future visit, but when I returned to Sandy Bay in April of 1995, he was in jail for breaching a no-alcohol provision in his probation order. While I was there, I tried to interview the offender sentenced in the Sandy Bay circle, but he declined to be interviewed.

I did manage to interview several people who had participated in community sentencing circles. The participants I talked to believed they were better equipped to control offender behaviour than judges, lawyers, or probation officers. They viewed peer pressure during community sentencing and mediation as a significant factor in promoting changed offender behaviour.

The immediate effect of peer pressure upon offenders was evident at the Sandy Bay and Pelican Narrows circles and during court at Waywayseecappo and Pukatawagan. The offenders sentenced on these occasions

appeared humbled by the experience of coming before other community members. Circle sentencing committee member Donald McKay, Jr., of Cumberland House described the Impact of his committee:

If the community people begin to deal with the community problems, you know, and people being accused of these crimes will come in, they are pretty nervous to face the community, but this person has to live in this community. Whether they get probation or jail, they're going to come back and live here. So I just think if they deal with the community and realize people around the sentencing circle are trying to help them out, I think more and more people will ask for the sentencing circle.

By involving community members in sentence design and supervision, judges made accessible additional resources to encourage behavioural reform and, at the same time, facilitated reconciliation among offenders, victims, and the local community. In *joseYounen.* Judge Fafard commented:

The aim of sentencing circles is the same [as] when the disposition is arrived at by other means: the protection of society by curtailing the commission of the crime by this offender and others. However, in sentencing circles the emphasis is less on deterrence and more on re-integration into society, rehabilitation, and a restoration of harmony within the community."

During a field trip to Sandy Bay in April 1995, 1 interviewed one former young offender, who had appeared before the Sandy Bay Youth Sentencing Advisory Committee. He described the positive impact this experience had had on him. When the committee had challenged him to explain the reason for his crime (a break and enter), he felt able to tell the committee about his troubled home life. He said the committee had helped him by exploring the problems underlying his behaviour and by providing him with ongoing support and counseling. At the time I spoke with him, he had not re-offended.

It was difficult for me to assess the impact of community sentencing and mediation initiatives upon crime victims. Out of respect for their situation, I did not interview any victims directly. I did get some information about their reactions from comments made by circle participants and by observing victims during circle sentencing and at the Hollow Water community review. CHCH at Hollow Water was the only initiative I studied that showed evidence of a formal support system for victims. Although the other community sentencing and mediation initiatives claimed to promote reconciliation between offenders and victims, the involvement of victims and provisions for victim support in these communities appeared disorganized and inconsistent.

Although victims were usually present at the formal and informal sentencing circles conducted at Pukatawagan, lawyer Joyce Dalmyn and

Corporal Robert Brossart questioned the lack of victim involvement in mediation conducted by the local justice committee. In northern Saskatchewan, victim involvement in circle sentencing and mediation was inconsistent. Although the victim had been active in arranging and participated at the Sandy Bay circle, the victim was not present at the Pelican Narrows circle nor did anyone speak on his behalf. At the sentencing circle committee meeting on December 13, 1994, at Cumberland House, no victims appeared before the committee, although some appeared to have been consulted previously by committee members. With the exception of CHCH at Hollow Water victims appeared to have participated less and have had less support offered to them than offenders. A major impact of these initiatives on the communities studied was the empowerment of the participants. Some viewed the development of community sentencing and mediation as essential to the health of their communities. At Cumberland House, sentencing circle committee chairperson Cyril Roy stated that expansion of his committee's role in local dispute resolution was the "only way we can keep our community a little stronger and keep it going.'" Lawyer Felicia Daunt observed that the impact of circle sentencing at Sandy Bay had been empowering

Well, in Sandy Bay, in particular, I've noticed that sentencing circles have really had a very positive impact on the community. In Sandy Bay we used to see a lot more violent offences and higher levels of violence than you do now. In general, I get the impression that the community has started to heal itself, and I think sentencing circles were a step in that. It sort of got the people in the community together talking about problems that, although they're sentencing one person, the community shares.

Despite these positive views, others I spoke with at Sandy Bay were sceptical of the impact of circle sentencing. Indeed, by the spring of 1995, a perception appeared to be developing among Sandy Bay offenders that sentencing circles were an easy way out. Sentencing circle participant Harry Morin viewed this development as resulting largely from the lack of treatment options available for offenders in northern Saskatchewan. This shortage often meant that a suspended sentence with few probation conditions was the only alternative to jail available for some offenders, leaving the impression that little if any penalty had been imposed. Criticism of the circle process was also heard at the Winnipeg circle when an Ojibway man, the brother of both victims, openly challenged the circle approach and suggested that the victims and the offender (his father) would have been better off if they had participated in a session with a trained psychologist as opposed to interacting with community members within the circle. Given such varied reactions and the short history of these initiatives, their longer term implications and impact remain difficult to assess. In the short term, however, such approaches have clearly had an empowering effect upon the community members involved in their development.

In my analysis of the community sentencing and mediation initiatives studied and the new approaches undertaken, I have utilized three theoretical frameworks: post-colonialism, legal pluralism, and popular justice. These frameworks provide further means towards understanding the reasons underlying dissatisfaction with the conventional system and understanding the implications of the changes to this system that have occurred in some Aboriginal communities.

Chapter 10 - Post-Colonialism, Legal Pluralism, and Popular Justice

- My research showed that Aboriginal people felt estranged from and disenchanted chanted with the prevailing justice system. These feelings were reflected in and were relevant to, problems associated with conventional sentencing practices. My research also showed that local systems of social control existed outside the formal court system and had an impact on the sentencing of offenders within it.

Post-Colonialism

The six Aboriginal communities I studied shared a history of European colonization. Scholars of post-colonialism examine the experiences of countries tries or communities following colonization. This branch of study is a useful tool to explain resistance to the justice system and conventional sentencing practices within these communities and to understand how Aboriginal people view justice and sentencing issues.

Criminal law has been described as pivotal to the colonization and domination of Indigenous Peoples. Peter Fitzpatrick, professor of Law and Social Theory at the University of Kent stated:

Operatively, the essence of colonization was concentrated in the criminal law As a universalistic project imperial colonization made all that stood outside it provisional and strange. "Native society" in its whole range was rendered deviant, and the colonized rendered ``presumptive criminals" [citations omit ted]. Anything that resisted re-creation in imperialism's own terms was denied or suppressed.'

Colonialism has been defined in two ways within socio-legal literature: sure: narrowly as a consideration of "European political, economic, and cultural expansion into Latin America, Africa, Asia and the Pacific during the last four hundred years," and more broadly as "a relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavours to impose its cultural order onto the subordinate group(s)." The broader definition is descriptive of the experience of Canadian Aboriginal people, who were recipients of a criminal justice system imposed through colonization.

Although early studies of law and colonization stressed "the role of law in imperial domination," subsequent scholarship focussed on the means by which Indigenous populations "resisted and accommodated" colonization. As an example of the latter focus, author Robert Kidder questioned earlier scholarship that suggested colonial law had simply been imposed by colonizers on less-powerful Indigenous populations. He argued that the degree to which colonial law had been successfully imposed upon such people depended largely on the degree of their resistance. He stated:

The sheer inventiveness of supposedly imposed-upon populations not only warms the heart of those who cheer for underdogs; it suggests that the fact of imposition is itself questionable. At what point in the process of legal challenge and indigenous response do we conclude that law has been "imposed"?

In a North American context, Professor Mike Brogden of Liverpool Polytechnic described various forms of resistance by the French Metis of western Canada to colonial authority during the nineteenth century and the resulting labels of criminality applied to the Metis in an effort to disable such opposition.

Post-colonial writing has been based largely in the experience and practice of the European colonization of India, Africa, and Latin America. Much of the writing on law and colonization has been authored by anthropologists, historians, and social scientists who are themselves members of colonizing societies. In response to a perceived Eurocentric bias on the part of such writers, a body of post-colonial literature authored by Indigenous writers, who analyse colonial history and dynamics from the perspective of the colonized, has emerged. Such writing, usually characterized by acerbic and pointed critiques of European colonization, provides a link to the experiences and perspectives of many Aboriginal Canadians who express disenchantment with and estrangement from the Canadian justice system.

Professor Sally Merry of Wellesley College in Boston, Massachusetts, described a form of resistance currently in existence in some post-colonial countries that is highly relevant to the analysis of Canadian community sentencing initiatives:

> Some post-colonial countries are now experimenting with new forms of local justice that are now more rooted in customary law, more conciliatory, and more locally controlled as the more established local courts become more formalized and bureaucratic over time and replicate the forms of the colonial courts.... Efforts to expand supervision, *to* develop formal procedures, and to reduce customary law to writing contradict efforts to reproduce local power relations and replicate a more informal, situationally informed vision of justice. *Courts designed in a capital city are very different when (hey are implemented in remote vii/ages and towns, places not easily supervised by the centre and already dominated by a local elite. Local courts are, to use Sally Falk Moore 's term . . ., semi-autonomous social fields: semi-independent social systems that develop local practices within a larger structure which constrains the way they function.'* [Emphasis added]

Resistance to the prevailing court system was in evidence within the communities I studied, both in perspectives expressed and local actions taken. All the communities had experienced estrangement from the prevailing court system: the system was viewed by many as external to and separate from **their communities.** Many people I interviewed believed local community members were better equipped than the court system to control offender **behaviour and should, therefore,** be given a greater role in the sentencing and supervision of offenders.

In seeking to understand community sentencing and mediation, it is essential to consider these "local" points of view. Professor Sherry Ortner of the University of California, Berkeley, has argued that many ethnographic studies of colonial dominance and resistance have suffered from a lack of Indigenous perspectives. She claims Indigenous perspectives facilitate an understanding of community political dynamics, inherent cultural richness, and local perceptions about the interaction between colonial and Indigenous people. I have attempted in this book to include as many personal perspectives of Aboriginal people as possible. These viewpoints come from a variety of local community members whose voices have rarely been heard in analyses of the criminal justice system. I hope these perspectives will provide some insight into how the criminal justice system may be adapted and made more effective in Aboriginal communities.

In the course of this study, I found active resistance to the prevailing court system at Pukatawagan, where, for a period of eight months in 1993, all spousal assault cases were diverted from court to the local justice committee because witnesses refused to testify at trial. Earlier resistance had been seen at Pukatawagan when, during the mid-1980s and fuelled by local dissatisfaction with the Provincial Court, this First Nation passed a bylaw forbidding the court party from entering their reserve. In 1997, the Mathias Colomb Band once again forbade the court party from entering the reserve. In Pelican Narrows, sentencing circle committee member Cecile Merasty described resistance by offenders who remained passive and refused to participate in conventional sentencing before the court. Such resistance was evidence of a lack of understanding and a mistrust or rejection of the prevailing system.

Given this history of estrangement from and resistance to institutions introduced and imposed by colonization, it is not surprising that people living in remote Aboriginal communities have a different relationship to the justice system from those living in larger, non-Aboriginal centres. Police influence in isolated Aboriginal communities appeared to be limited largely to peacekeeping. Corporal Bob MacMillan of Pelican Narrows explained:

Even though they don't really care for us, they know we're impartial. And they trust us in that regard. They don't really like us, but they know we're not going to choose sides based on family.... But that's where [the line is] drawn, it's finished.... [[O]utside of arresting people ... we have very little influence in this town. We go to the school and give them a lecture on drugs. Pooh! You might as well play a video, because they have no interest in what we say. None. It's not like in a southern community, where the RCMP are involved with the community as such, because here we're not part of the community, we're outsiders. White people as a rule are outsiders in Pelican Narrows."

This passage clearly reflects the imposed nature of Canadian criminal law in these communities. Judge Fafard repeatedly commented on his court's lack of credibility among local residents. This was reflected in the comments of several community members who expressed dissatisfaction with judges and probation officers who attended in their communities only one or two days a month and left immediately after court.

Many within these communities felt the prevailing justice system was focussed on punishment through imprisonment. By contrast, local perspectives favoured reconciling offenders with victims and the community, and healing the underlying causes of deviant behaviour. Jail was viewed largely as a place where offenders became bitter. After a period of incarceration, they would return to their home communities untreated with their underlying problems unresolved.

It was evident during the course of this study that the Aboriginal focus was on overall community welfare. Pukatawagan justice committee member Liz Bear reflected on this:

This is our community and it is dysfunctional. You can't deny that. It is dysfunctional because of the alcohol abuse, the lack of our social and economic means, and everything like that, but it is home. Let's heal here. Let's build a healthier community. And if we can do that, those behaviours are going to stop one way or another.):

This communal focus sometimes appeared at odds with the focus on individual rights within the conventional Canadian justice system. At Hollow Water, Berma Bushie said that upon receiving a sexual assault disclosure, the CHCH assessment team was able to determine quickly whether the complaint was true because of the team's experience with the people involved. If they believed the complainant, the accused would immediately be confronted by the assessment team and be given a chance to admit the abuse. Although dealing with the question of guilt and not sentencing, this example discloses a very different concept of the rights of the accused and the presumption of innocence than exists within the conventional system.

It may seem odd that community members actively participated in community sentencing initiatives that operated within a system they appeared to reject. This may reflect the achievement (either apparent or real) by community sentencing of some of the goals that, it is claimed, ordinary sentencing and incarceration processes do not achieve: reconciliation, healing, and community empowerment. The community sentencing and mediation initiatives in this study represent adaptations to conventional sentencing practices. These adaptations reflect the sensitivity of judges to local concerns about the inadequacies of prevailing sentencing practices and, most significantly, the power of local communities to facilitate change through resistance to the prevailing system. This judicial creativity is reminiscent of the creation of "customary law" by European colonial authority in Asia and Africa. As an example of this latter form of imposition, Francis Snyder, professor of European Community law at the European University Institute In Florence, argued that, in the context of the French colonization of Senegal, the law respecting land usage, which has been referred to as "customary law" in the twentieth century, was not based on local tradition but rather was created at the time of the colonial imposition of the capitalist state. In the end, whether community sentencing and mediation were judicially introduced is not as significant as whether these reforms were accepted and supported by local residents.

While the effects of colonization are wide ranging and, to a great extent, explain Aboriginal resistance to the conventional justice system, a further level of enquiry is required to more completely understand the dynamics

at work within the initiatives and approaches studied in this book. This requires a focus on the systems of informal law and social control that exist at the local community level, yet are outside the formal justice system.

Legal Pluralism

Another theoretical framework that facilitates the analysis of community sentencing and mediation is "legal pluralism." The dynamics of colonization are closely tied to the inter-relationship between local and state systems of law and social control. Legal pluralism focuses less on the historical aspects of colonization than on this inter-relationship. It is thus a useful tool in analysing specific sentencing initiatives and their relationship to local and state systems.

Professor Sally Merry defined legal pluralism as "a situation in which two or more legal systems coexist in the same social field [citations omitted]."' Sociologist Stuart Henry stated, "Legal pluralism . . . holds that every society contains a plurality of legal orders and legal subsystems (or fragments of these)."' This statement of legal pluralism recognizes the interaction between formal, state-imposed and local, indigenous systems of law and social control. As the sentencing initiatives under consideration in this study facilitated involvement of local community members in a process previously dominated by outside justice professionals, interaction between these systems was inevitable.

Social-control theorist Donald Black postulated an inverse relationship between the strength of local social control and dependence upon a formal legal cede. He traced modern reduction in social influence by the family within industrialized nations:

In modern societies such as America, however, family control is weaker than in more traditional societies. With modernization it has weakened everywhere, and everywhere law has correspondingly increased. In Taiwan, for instance, the *tsu,* or clan, has steadily lost its former authority. Its sanctions have been undermined by changes in land tenure, and the growth of economic relationships outside the village has made its jurisdiction less relevant anyway. Other social control in the village has also declined. As all of this has happened, Taiwanese peasants have more and more turned to the police and courts [citation omitted]. The same pattern has appeared in every part of the world, gradually in some societies, quickly, even suddenly in others. In Europe, it happened over centuries. For many Indians of North America, it happened almost overnight, as quickly as they were moved to reservations [citations omitted]. In most of Africa, Asia, Latin America, and Oceania, it has come only recently, if at all. In Africa, for instance, family control is still so strong that juvenile law hardly exists."

This tension between local and state systems of social control was also considered by Robert Ellickson, professor of law at Yale University, in his study of relations between cattle ranchers in Shasta County, California." He found that, despite considerable statutory regulation of the cattle industry, problems such as cattle trespass and boundary-fence disputes were not dealt with by the processes of formal law but rather through local mechanisms of social control. These included such self-help measures as "negative gossip and mild physical reprisals."' He theorized that people often choose custom over formal law, in large part because "the substantive content of customary rules is more likely to be welfare maximizing" for members of the local community.

All the sentencing initiatives considered in this book were characterized by an increase in local community participation in the sentencing process. Rupert Ross commented on a similar move towards local community justice among *the* Cree and Ojibway of northwestern Ontario:

The cries for local control over community justice are growing. It is tempting to conclude that they spring only from political claims of sovereignty, incidental only to the larger issue of political autonomy. While that may indeed form part of the background, it appears that much more is at stake in their eyes; the contribution which local control over justice would make, directly and indirectly, to the very goal of peaceful co-existence to which our system aspires.

The literature on legal pluralism is a valuable starting point for anaIying the relationship of the state and local systems of social control that exist in Aboriginal communities. Judge Sinclair highlighted an important aspect of this relationship in the distinction he made between community offender, and judge-driven approaches to sentencing. As an example of an offender-driven process, Judge Sinclair referred to a circle held in his court in December of 1993 at Winnipeg. He believed the process in that case was ineffective as the offender requested

the circle and was responsible for bringing most of the people to the circle. As a result, the process was offender and not community driven.

Justice initiatives may also be analysed by the prevailing philosophy employed within each. Rupert Ross distinguished community justice initiative on the basis of proximity and adherence to competing paradigms, which he defined as "aboriginal healing" as opposed to "western criminal justice In contrasting the sentencing initiatives at Sandy Lake and at Attawapiskat Ontario, with that at Hollow Water, Manitoba, he characterized the Hollow Water approach as more closely aligned with the Aboriginal healing paradigm, and he viewed the other initiatives as more closely tied to the state controlled Western justice paradigm. The origins of sentencing initiatives may predict whether sentencing reforms evolve towards a distinctive local justice system or are simply assimilated into the established Canadian court system. An example of the positioning of a community-based justice initiative between the formal state legal system and traditional Indigenous law can be found in a proposal made by the Gitksan and Wet'suwet'en' en to the British Columbia government:

The justice system brought to Canada by the Europeans has been very disruptive of both the individual and community life of its Aboriginal people. We propose to implement an alternative in Northwestern B.C. that will allow the dispute resolution laws and methods of the Gitksan and Wet'suwet'en people to interact with the provincial justice system in a way that does not undermine the integrity of either.

The discussion in this chapter has analyzed Aboriginal sentencing and mediation initiatives in terms of the effect of European colonization upon Aboriginal communities and in terms of local systems of social control and i Informal law. A final level of enquiry is whether the evolution of these initiatives and approaches parallels, to some extent, the development of other unconventional justice processes across North America and around the world.

Popular Justice

Yet another way of interpreting the development of community-based justice initiatives in Canadian Aboriginal communities is through the writing of Professor Sally Merry. In her study of community justice in California, she described "a move to popular justice." Her study of the San Francisco Community Boards program, a community-based justice approach begun in 1977, observed that popular justice initiatives are characterized by processes that are "informal in ritual and decorum, nonprofessional in language and personnel, local in scope, and limited in jurisdiction." She described the role of popular justice initiatives in countries with an Anglo-American legal system. Given the similarities in evolution and development between the American and Canadian criminal justice systems, her analysis is equally applicable to the conventional Canadian system:

In countries with Anglo-American legal systems, popular justice is described as the opposite to an adversarial, rights-based, act-oriented legal system.... Many Third World countries equipped with colonial Anglo-American legal systems are developing customary-law forms of popular justice to reclaim a law suppressed during the colonial era. Procedures are conciliatory rather than adversarial, the characteristics of the Anglo-American legal system.

A key element in the analysis of popular or community justice initiatives is their relationship to formal state law and local or indigenous systems of social control. Professor Merry theorized that "popular justice is best conceived as a legal institution located on the boundary between state law and indigenous or local law." She said that "[i]t can be thought of as intermediate, distinct from each side but linked to each. **Professor** Peter

Fitzpatrick also analysed popular justice initiatives and argued that popular justice is best described as an adjunct of formal state control: popular justice programs complement formal state law by fulfilling roles not addressed by the latter Despite the difference in emphasis, both Fitzpatrick and Merry recognize an important link between popular justice and formal state control; they differ on the degree to which popular justice initiatives intersect with and represent indigenous or local law and social control.

Professor Merry distinguished several popular justice traditions that have developed in the twentieth century. Two of these, the "reformist" and "communitarian" traditions, are directly applicable to the current analysis of community sentencing initiatives. Reformist approaches are described as endeavouring to "increase the efficiency of the formal legal system by streamlining it and increasing its accessibility. This approach seeks to increase "participation in modern legal institutions" and revise procedures. Control over the reformist approach

resides solely with the central stated, In contrast, communitarian approaches are described as being more closely related to "indigenous ordering than to state law." This approach seeks to operate entirely outside the state and its institutions. Communitarian popular justice is sometimes part of a withdrawal from secular society, an attempt to create a new religious or utopia[n] social order. Communitarian popular justice tribunals typically develop in small communities that are explicitly dedicated to maintaining a separate legal order and moral code.

The community sentencing and mediation initiatives in this study demonstrate a conjunctive relationship between local Aboriginal communities and the Canadian justice system and therefore are more closely aligned with reformist than communitarian approaches. Several findings illustrate this inter-relationship. At Hollow Water, the threat of being charged under the *Criminal Code* with breach of probation (or undertaking) was an inducement for offenders to continue their treatment within CHCH. At Waywayseecappo, offenders were regularly ordered by the judge, or a justice of the peace, to attend a meeting of the elders' council as a term of their release. At Pelican Narrows, Pukatawagan, and Cumberland House, all local committees limited the number of opportunities for offenders to appear before them before "turning them back" to the conventional court system.

Chapter 11 - Justice and Policy Issues Raised by Community Sentencing and Mediation

- This study has identified several key issues, the resolution of which, both at the local community level and across the Canadian justice system as a whole, will affect the evolution of community sentencing and mediation in Aboriginal communities. These recurrent themes increase the inter-relationship, and at times the tension, between local systems of social control and the conventional justice system.

- The following discussion focuses on the major policy issues raised in this study and the implications of each for reform of the criminal justice system in Canadian Aboriginal communities.

The Court's Supervisory Role in Community Sentencing Approaches

The development of sentence advisory committees at Sandy Bay, Pelican Narrows, and Cumberland House are evidence of a move away from circle sentencing with a judge in attendance towards developing community sentencing recommendations in the absence of the court party. This reduces the amount of court time required for such cases, but raises the issue of the court's role in such a progression: should it simply receive sentencing recommendations from a community committee or should it actively facilitate consensus in sentencing circles? Judge Stuart of the Yukon Territorial Court expressed concern about the absence of judges within the sentencing circle process. He viewed a judge's presence as the preferred means of identifying and controlling power imbalances between circle participants, although he recognized that such a role could also be performed by a community member.' While supporting the sentence advisory committee approach, Judge Fafard recognized the need for periodic judicial involvement in such circles, to ensure consistency and forestall potential misuse of the process:

> I guess I want to ensure some consistency, you know, because you have
> Several accused charged with the same or similar offences. I want to make sure that
> the dispositions are fairly consistent. But I guess the greater thing is that it affects so many different people in that one community, that I'm almost afraid of some political influence. Because it touches on so many people, and I just sort of felt that maybe I should be there to ensure that politics doesn't get involved, that you don't have a powerful family dictating to a weaker family, that kind of thing.

Despite this judicial caution over power imbalances? Trained and experienced community members might eventually perform the facilitation function currently performed by judges during circle sentencing. Indeed, at the sentencing circle committee meeting I attended on December 13, 1994, at Cumberland House, committee chairperson Cyril Roy performed a facilitation role similar to that performed by Judge Fafard at the Pelican Narrows and Sandy Bay circles. Judge Stuart described the use of community members as circle sentencing facilitators in the Yukon in the following terms:

In some communities, the presiding Judge or Justice of the Peace act as facilitators. Other communities have persons as "Keepers of the Circle" who act both as host and facilitator of the Circle process. If a "Keeper of the Circle" is not a Justice of the Peace, the "Keeper" will call upon the Judge or Justice of the Peace to handle all legal matters required throughout the Hearing 3

At a community review circle conducted on February 22, 1995, at Hollow Water (during which the progress of five offenders and victims previously dealt with through sentencing circles was evaluated), community member Marcel Hardesty acted as a facilitator for the victim, offenders, and community members in attendance.

Although judges provide protection from power imbalances during court, the court party regularly departs these communities after court, leaving community circle participants to deal directly with offenders in the court's absence, either immediately or upon the offender's return from jail. As a result, development of mediation and facilitation skills could strengthen the local, informal systems of social control that attempt to change offender behaviour and promote rehabilitation.

An ongoing consideration in analysing community sentencing and mediation approaches is whether a distinction should be drawn between legitimate community support and advocacy for an offender, on the one hand and political interference with the judicial process by a local participant, on the other. The following section deals with the difficult question of how "judicial independence," thought by many to be the cornerstone of our criminal justice system, is to be ensured while, at the same time, increasing the participation of offenders victims and community members.

Political Influence and Judicial Independence

Community sentencing and mediation involve interaction between local systems of social control and the formal justice system. In evolving community sentencing and mediation initiatives, the Canadian criminal court system, based on the principle of judicial independence from political interference and coercion, interacts with the opinions, informal relationships, and power structures of local communities. Local politics and the popularity and status of specific offenders can have an impact on community sentencing. Judge Fafard, in expressing concern for the integrity and independence of circle sentencing, was adamant that power imbalances resulting from political influence be avoided, thereby preventing actual or perceived bias. In Joseyounen he wrote:

In the Euro-Canadian model where the judge imposes sentence without the aid of a sentencing circle, the judge speaks for the people and attempts to deliver a fair, impartial and just disposition. This he does without fear of political interference while at the same time he attempts to reflect the legitimate concerns and aspirations of the community.... In exploring the flexibility of the criminal law of Canada and its ability to accommodate First Nations cultures and legitimate needs, let us not re-invent those things which are so important to an impartial system of justice. If we throw out the essence of impartiality we run the risk of doing grave injustice to both offender and victim. What I mean is the input of community elders and leaders must not mean the exercise of political influence in the circle to the detriment of the accused or a victim.... The principle of judicial independence in decision making is one that is deeply ingrained in the Canadian population, including the First Nations. The many sentencing circles I have held have included the participation of chiefs, band councilors, mayors, and others in political of fice. I have never seen any of these persons attempt to influence the outcome by virtue of their political office.

I observed no direct attempts at political influence through representations at community sentencing circles, although the potential for such interference necessitates caution. Associate Chief Judge Giesbrecht of the Provincial Court of Manitoba, while conducting an enquiry under the *Fatal Inquiries Act* of Manitoba, found numerous examples of political interference by chiefs and councillors in the operation of the Dakota Ojibway Child and Family Services. Judge Giesbrecht described the following examples of political influence within two reserve communities:

Constable Ralph Roulette of the Ontario Provincial Police Force described an incident that occurred at the Birdtail Sioux Reserve when he was a constable with DOTC [the Dakota Ojibway Tribal Council] Police. Mr. Roulette had evidence that the chief's son was guilty of the offence of impaired driving. The chief ordered Mr. Roulette not to charge his son....

- Constable Edward Riglin of the Brandon City Police described incidents of political interference that took place when he was a constable with DOTC Police from 1986 to 1990. Constable Riglin was personally threatened with a band council resolution (BCR) banning him from the reserve on a number of occasions because he insisted on charging influential reserve residents with criminal offences. 6

- While these examples point to the dangers of local political interference, it should also be remembered that judges and other participants in the justice system are not free of personal biases. Such biases are likely to play some role, either directly or indirectly, within the sentencing process.

- Closely related to, and at times indistinguishable from, questions of local political interference, is the effect of offender popularity and status on the sentencing process. These appeared to be significant factors in the developing initiatives, especially at Pukatawagan. Lawyer Joyce Dalmyn explained that judges sitting at this First Nation were significantly influenced by a lack of community support for an offender:

- Sometimes people have nothing to say, which can be very unfortunate. And that's something as defence counsel I have to alert my client to, is if they want to have a circle, they had better make sure that they're going to have someone there to speak for them. Because if the feather gets passed around and no one makes any comment whatsoever, I have heard a judge state, right on the record, "Well, it's clear that because nothing has been said, obviously they're not willing to say anything good about this person therefore I can only draw the conclusion that there's no sympathy for this person and I have to use the harshest penalties available to me."

- This raises the possibility of community bias against unpopular or marginalized offenders. This occurred in R. v. *Howard,* where the British Columbia Court of Appeal reduced a sentence that had been unfairly aggravated by community animosity. The court commented that "the sentencing hearing had turned into an extended post hoc attack upon the accused when the sentencing judge permitted anyone who wished to comment on the accused's character or the impact of the [victim's] death on the native community to be heard."

- The conventional Canadian court system has evolved as a buffer between offenders and the harshness of public and victim reaction to their crimes. Indeed, one of the tenets of the formal court system is avoidance of personal reprisal by victims, or their agents, against perpetrators. Author T. Marshall wrote: "The historical antecedents of our criminal adjudication system suggest that its main purpose is to preserve public order by substituting state sanction for private vengeance. [citation omitted]"" A valid concern regarding these community sentencing and mediation approaches is that local involvement should not become a forum for the application of political pressure to the advantage of local elites and to the detriment of politically unpopular or marginalized offenders or victims. In the future, when judges seek community participation in sentencing without the consent of offenders or victims, judicial vigilance will be required to ensure community comments and recommendations are not motivated by political considerations. This may prove a difficult task for the judge, who, as an outsider to the community, may not be able to recognize the often subtle and non-verbal forms of intervention and influence that may be present,

A related challenge will be determining the line between political influence, on the one hand, and community support, on the other. In the Saskatchewan communities studied, there had to be an indication of local support for the offender before a sentencing circle was formed, making negative bias unlikely. Indeed, any bias was likely to be in favour of rather a then against the offender. This leaves open the potential problem of interfamily politics. Before the Sandy Bay circle, the offender's family met outside the court, apparently concerned about the number of non-family community members and outsiders in attendance. At the start of the circle, family members questioned whether non-family should be allowed to participate, suggesting an attempt by this family to control the sentencing process. As the circle was open to the public, Judge Fafard refused to disqualify anyone from the circle.

Despite the variety of potential problems that are raised by direct community input at sentencing, personal relationships between circle participants and the offender although representing a lack of objectivity and a partiality towards offender support and rehabilitation-do provide the court; with a better understanding of the problems causing or contributing to the offender's behaviour. These relationships also increase the resources available to a court in attempting to control and change such behaviour.

For community sentencing and mediation initiatives to evolve, it is clear that the concern over local political interference must be addressed. A broader political consideration is the extent to which public funding should .

assist in this evolution. The following section considers competing view points on the propriety of volunteer support versus government funding in the local justice system.

Financial Infrastructure or Volunteer Support?

To what degree should community sentencing and mediation initiatives be supported by government funding as opposed to the voluntary efforts of citizens? Lawyer Sid Robinson of La Ronge viewed a financial infrastructure; as essential to the evolution of circle sentencing in northern Saskatchewan

Financial compensation for justice committee members who sat with the court was raised as a significant issue at Pukatawagan, as explained by justice committee member Theresa Bighetty:

When the court time [came] the justice committee don't go in the court because we don't get paid. That's why they don't like to go there-don't want to sit there for nothing.... Well, everybody likes to get paid when they do something.... This thing is not really settled yet. I remember I got paid a couple times there going on the court dates. I get paid just a couple of times. But before that we didn't get paid before

Judge Fafard, however, viewed payment as interfering with the independence of the court and preferred circle sentencing in northern Saskatchewan to continue developing through the dedication of community volunteers.

Although community and volunteer support was essential to the continued success of all initiatives, financial resources to train and pay support staff and establish treatment facilities contributed significantly to the development of several of the community initiatives studied. At Pelican Narrows participation by most members of the sentencing circle committee was facilitated through their employment with the Peter Ballantyne Band. The committee's chairperson, Derek Custer, managed this committee as part of his assigned employment duties. At Waywayseecappo, additional government funding supported the movement of court from Rossburn to the reserve, the employment of an Aboriginal person as a resident probation of officer, and payment of a per diem allowance for the elders sitting in court. At Hollow Water, most members of the CHCH assessment team were social workers employed by various levels of government.

A shortage of treatment facilities in northern Saskatchewan, and a lack of money to build them, appears to have slowed the development of circle sentencing in that region since 1995. According to Sandy Bay resident and sentencing circle participant Harry Morin, a shortage of accessible treatment resources has limited the sentencing options for repeat offenders.' The expansion of support and treatment resources appears essential to the evolution of all community sentencing and mediation initiatives.

Debates over public funding for such initiatives are likely to continue. Closely related to the issue of public funding is the extent to which the unconventional sentencing and mediation practices considered in this study are to be used in dealing with the myriad of charges that are laid throughout the criminal justice system.

Expansion of Community Sentencing Approaches

Another issue identified through this study is the breadth of application and potential for the expansion of community sentencing and mediation approaches. For example, are local representatives to be involved in all sentencing at court, as in the elders' council at Waywayseecappo, or only in specific cases, as in all other communities studied? Realistically, even assuming the appropriateness of circle sentencing for all offenders, current court resources in the northern Saskatchewan and Manitoba communities studied were insufficient to allow circle sentencing for every offender facing sentencing, given the time requirements of circle sentencing.' A significant increase in court funding (which appears unlikely) or a move towards the sentence advisory committee model or the elders' sentencing panel model seem to be the options available for making community sentencing available to more offenders.

Despite the attention attracted by the development of circle sentencing in northern Saskatchewan, these circles represented a very small percentage of the sentencing occurring. During the Sandy Bay court sitting on April 19, 1995, one sentencing circle was conducted and approximately thirty other offenders were sentenced in the conventional fashion. A further option to facilitate community participation in the justice system is broader-based diversion to local mediation committees. This option, to some extent, will depend on the range of

offences allowed to be diverted by provincial regulation. It will also depend on the willingness of Crown prosecutors to refer cases for mediation.

A related question about the breadth of community justice initiatives is whether community sentencing approaches could be used in larger, less isolated, and more ethnically diverse communities. All initiatives studied were located in small and relatively isolated Aboriginal communities. In *Morin,* the court directed a sentencing circle for a Metis man from Saskatoon after representations of support were made by the local Metis community. Although no definition of "community" has been rendered judicially so as to restrict the application of circle sentencing or other community participation approaches, one strength of the sentencing initiatives studied was the ability of local community members to influence offender behaviour both during and after sentencing. Corporal Bob MacMillan of Pelican Narrows suggested local social control was more easily identified and accessed in smaller and more isolated communities than in the larger urban centres:

You can't have a . . . sentencing circle in Saskatoon that would work. I can't see how it would work, because who are the community that's going to be dealing with the offender? You're going to go to Saskatoon and you're going to find a few elders somewhere that will come to a sentencing circle, impose whatever they feel is right for the accused, but then there's no follow-up. Who have these people got to go to? The rest of the community doesn't even know about it. Nor do they care.

Although community-based sentencing and mediation has not been precluded in larger mixed centres, the social control that can be brought to bear on offenders m small communities is a strength

Whether these community sentencing and mediation approaches will become established within non-Aboriginal communities is unclear. These approaches have evolved within Aboriginal communities largely in reaction to problems experienced with, and by, the prevailing justice system, and they have utilized the strength of local resources and systems of social control m the sentencing process. Although these approaches appear well suited to the communal traditions of Aboriginal society, nothing within Canadian law prevents non-Aboriginal offenders from seeking local sentencing input. There is no reason to believe the same degree of concern and social control could not be found and applied among identifiable communities in non-Aboriginal society. Indeed, two recent sentencing circle cases from Saskatchewan involved non-Aboriginal offenders: a non-Aboriginal offender charged with stealing a snowmobile attended a sentencing circle involving "the judge lawyers, police and about a handful of Katepwa residents"; and a local farmer charged with dangerous driving causing death received a suspended sentenced following a sentencing circle.

In addition to the nature and size of the community involved and to the level of volunteer and government support received, a further factor clearly will affect the evolution of community sentencing and mediation. The extent to which the criminal law, as defined in the *Criminal Code* and as interpreted through our appellate courts, allows or restricts application of these approaches will obviously affect their development

The Potential Effect of Statutory Reform and Appellate Sentencing Review on the Development of Community Sentencing

The power of judges to involve community participants in the sentencing process has been based in the broad discretion given to judges within Canadian criminal law. No specific reference to community participation in sentencing by sentencing circle or other means, appears in the *Criminal Code* although section 723(3) provides that "[t]he court may . .. require production bon of evidence that would assist it in determining the appropriate sentence," and section 717 of the *Code* establishes a framework for "alternative measures," that is to say, diversion of offenders from the court system. Regardless of these provisions, judges are clearly authorized to involve community members and victims in the sentencing process, making statutory reform unnecessary to the continued development of these approaches.

One statutory change that may affect the evolution of these approaches is the conditional sentence of imprisonment. As of September 3, 1996, the *Criminal Code* was amended to permit a court that imposed a sentence of imprisonment of less than two years, and which was satisfied that service of that sentence in the community would not endanger the community's safety, to direct that the sentence be served in the community subject to the conditions of a conditional sentence order. This amendment has allowed some offenders, who previously would have been facing an all-but-certain period of jail, to remain at home and access local resources identified through community sentencing processes.

The conditional sentence of imprisonment, however, does not apply to offenses require a minimum term of imprisonment, such as a subsequent conviction for impaired driving. In addition, effective May 2, 1997, Parliament amended this provision to require, in addition to being satisfied that community safety would not be endangered, that the court must also be satisfied that a conditional sentence would be "consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 7 l 8.2." This may serve to restrict the number of conditional sentences granted, especially if significant weight is given to the sentencing principles of denunciation, deterrence, and parity, as these are often cited by Crown prosecutors and appellate courts in justifying jail sentences as opposed to community-based dispositions. An example of a restrictive view towards the use of conditional sentences can be found in R. v. *Brady,* where Chief Justice Fraser of the Alberta Court of Appeal interpreted the number of community service hours that can accompany a conditional sentence (240) as indicating that Parliament intended this form of sentence for "relatively less serious offenders, or first-time offenders, or those who commit minor crimes."

- The Saskatchewan Court of Appeal, first in *Morin* and then in *Taylor,* is the only Canadian appellate court to have commented in any depth on the practice of circle sentencing. A major difference of opinion was evident within that court. In *Morin,* the majority, led by Justice Sherstobitoff, although recognizing the legality and appropriateness of circle sentencing m some circumstances, clearly viewed the court's over-riding consideration to be sentence parity and, hence, whether any extraordinary circumstances distinguished this case from the normal appellate range, given the offender and the circumstances of the offense. Chief Justice Bayda, in a strong dissent. argued that the principle of sentence parity must defer, in some cases, to attempts at ameliorating the over-representation of Aboriginal people in argued He viewed circle sentencing as a tool to address this inequity and argued that "the perpetuation of entrenched attitudes in relation to sentencing in administration guise of maintaining sentence parity is not in the interests of the " In an of justice in this province or the well-being of our follwing Morin In an interesting decision from the Yukon Territorial Court following *Morin,* Chief Judge Lilles, in *C.P.,* appeared to criticize what he viewed as the Saskatchewan Court of Appeal's preoccupation with sentence parity in determining the propriety of a sentencing circle for the offender. Judge Lilles commented “there are many advantages to community consultation through a sentencing circle, regardless of whether the sentence imposed is one of incarceration within the range "expected in ordinary court."

In *Taylor,* the Saskatchewan Court Appeal was again divided on the appropriateness of a sentencing circle. The offender had been convicted after trial on charges of sexual assault, uttering a death threat, and assault. He had spent a total of nine months in custody on remand before being sentenced Despite his not-guilty plea and his denial of guilt while testifying at the trial he sought and was granted a sentencing circle. The victim was initially not m favour of such a process but did eventually, if reluctantly, attend the circle After two meetings of the sentencing circle, and based on a proposal by the local Justice committee, the judge released the offender on an undertaking including conditions that banished him to a remote island for one year and adjourned sentencing for this one year.

The Crown appealed the decision, which resulted in a direction from the Court of Appeal that sentencing not be delayed further. After six months on the island, the offender was again brought before the circle. Based on the recommendations of the circle, reached by a consensus of all members except the Crown prosecutor, the judge sentenced the offender to ninety days m jail to be followed by three years' probation. The probationary term included a condition banishing him for a further six months.

Chief Justice Bayda, with Justice Jackson concurring, although expressing some concerns about the formation of the circle without the initial consent of the victim and about whether the offender was truly remorseful, held that the process was valid as it "was saved by the attitude, conduct, and thinking of the circle participants who were the principal authors and creators of the sentence which the trial judge approved and adopted as his own." Citing the Supreme Court of Canada's decision in *McDonnell,* Chief Justice Bayda found the fact that the offence is serious sexual assault does not automatically rule out a sentencing circle." He also found the sentence imposed by the trial Judge after the circle to be fit.

Justice Cameron, however, argued that this was not an appropriate case for a sentencing circle, especially given the nature of the offence and the victim's reluctance to participate. He found the judge erred in acting on the circle's recommendation and that the sentence imposed was unfit, considering the gravity of the offender's

conduct and the principle of parity (which required a starting-point sentence of three years' imprisonment for a sexual assault of this severity). Whether subsequent appellate comment adheres strictly to maintenance of established sentencing ranges and tariffs, on the one hand, or deference to the sentencing decisions taken by trial judges, the other, will undoubtedly affect the development and scope of circle sentencing and other forms of community participation at sentencing.

As one aim of the community sentencing approaches considered in this study was to change offender behaviour through community reintegration rather than a jail term, many sentences achieved through these initiatives have fallen outside accepted appellate ranges. This has drawn criticism from those espousing the goal of province wide sentence uniformity. However, such arguments have failed to take account of the availability and effect of local resources, including informal systems of social control and offender support, within Aboriginal communities. These resources have provided a wider range of sentencing options.

The philosophy behind these developing initiatives has run counter to the prevailing assumption that more severe penalties (including prolonged incarceration) provide greater general and specific deterrence than community-based sentences. The community of Hollow Water disagreed with this assumption:

> The legal system, based on principles of punishment and deterrence, as we see it, simply is not working. We can not understand how the legal system doesn't see this. Whatever change that occurs when people return to the community from jail seems to be for the worse. Incarceration may be effective in the larger society, but it is not working in our community.

In the communities studied, Crown support of community sentencing in general and of specific sentences awarded was essential, as a Crown appeal could result in the imposition of a harsher sentence in accordance with any relevant appellate sentencing tariff. Of the many sentencing circles that Judge Fafard had conducted in northern Saskatchewan by the time of this study, few had been appealed by the Crown. This was largely due to his insurance of Crown support before directing specific cases to a sentencing circle.

A further, and apparently as-yet-unaddressed question is whether the *Charter of Rights and Freedoms* applies to these community sentencing approaches. Does an offender have a constitutional right to be sentenced before a sentencing circle or to seek other community participation during sentencing? Can the *Charter* be used to resist attempts by judges to consult local community members at sentencing? No reported cases have considered these questions, nor were they raised by any offender or counsel during the course of this study.

As all offenders sentenced through the sentencing circles considered appeared to have consented to this approach, use of the *Charter* as a shield against state oppression during circle sentencing seems unlikely. The *Charter's* application will more likely be raised where an offender does not consent to some other form of community involvement in the sentencing process or where community antagonism or lack of offender support has aggravated sentencing. Whether a right to involvement of an offender's local community in sentencing might be an Aboriginal right, protected by sections 25 and 35 of the *Charter,* remains a vital issue, but one that is outside the scope of this book. This question was not raised in any sentencing case considered.

Despite the lack of judicial consideration of the *Charter* involving community sentencing, it has been applied in other sentencing cases. For example, in *Smith v. R.* the mandatory seven-year sentence for importing narcotics under the *Narcotic Control Act* was invalidated as it was held to violate section 12 of the *Charter.* In *R. v. Wallace36* the lack of a local temporary absence program was found to deny the offender her right to equal protection and equal benefit under the law under section 15 of the *Charter,* resulting in the sentence of a fine rather than imprisonment. In *R.* v. Willocks the Crown's refusal to divert a non-Aboriginal offender to an alternative-measures program for Aboriginal offenders was found not to constitute a breach of the offender's rights under section 15(1) of the *Charter.* More recently, Justice Noble of the Saskatchewan Court of Queen's Bench in *Latimer,* granted a constitutional exemption of the minimum sentence of life imprisonment with no chance of parole before ten years after Robert Latimer was convicted of second-degree murder. This was done on the basis that this sentence was grossly disproportionate in the circumstances and thereby constituted cruel and unusual punishment, contrary to section 12 of the *Charter.* The evidentiary basis for this ruling included the jury's recommendation that Latimer be eligible for parole after one year. Given the breadth of the cases mentioned, it is likely that the constitutional implications of community sentencing and mediation will be litigated at some point in the not-too-distant future.

Many factors will influence the development of community sentencing and mediation in Aboriginal communities and across the Canadian justice system as a whole. Conflicting views are sure to continue on key questions such as the range of offenders and offences that should be allowed to appear before community sentencing or mediation circles and the role of victims within these processes. These debates will contribute greatly to the evolution of Canadian justice policy as it relates to Aboriginal offenders, victims, and communities.

Policy Implications of Expanded Community Sentencing

The local initiatives studied were based in the conventional justice system but intersected with and related to, in varied fashion, local systems of social control and dispute resolution. Although judges may be considered by some Aboriginal people to be agents of state control, several judges presiding in the communities studied asserted their judicial independence in response to local community concerns and their own recognition of problems existing within the prevailing system. Judge Fafard was clearly conscious of the need for countering his court's lack of local credibility. He did this partly through his introduction of circle sentencing into the Aboriginal communities of northern Saskatchewan.

The community sentencing and mediation initiatives studied demonstrated a conjunctive relationship between local Aboriginal communities and the conventional Canadian justice system. Despite this conjunctive relationship, many Aboriginal people have envisaged breaking away from the prevailing system and establishing an independent justice and dispute-resolution system. CHCH assessment team member Marcel Hardesty of Hollow Water expressed the conviction that eventually his community would break from the prevailing justice system and operate independently. He said control and reform of offender behaviour would be achieved through public awareness of specific offenders and offences, and through education and treatment of offenders, suggesting that dispute resolution and social control would be dependent on local rather than central authority.

The evolution of the community sentencing and mediation approaches considered in this study, whether moving towards total local autonomy within a separate justice system as advocated recently by the Royal Commission on Aboriginal Peoples or simply towards increased local participation and control within the existing system, will depend on resolution of the justice issues raised in this book. In addressing these issues, the following courses of action will enhance the development and credibility of community sentencing and mediation.

1. Recognition of approaches by appellate authority

Outside Saskatchewan, no appellate court has commented, in any depth, on the community sentencing approaches identified and analysed in this study. Within Saskatchewan, a significant difference of opinion on the breadth and applicability of circle sentencing is apparent in the majority and minority decisions in *Morin* and *Taylor*. Although specific appellate guidelines should not be required, and perhaps are undesirable, appellate recognition and support of these approaches across Canada will be crucial to the continued evolution of community sentencing.

3. *Government support through provision of personnel and treatment facilities*

Although the voluntary participation and support of community members is vital to the development of sentencing and mediation initiatives, expansion of government-funded resources, specifically providing trained personnel and treatment facilities, will be essential to the development and expansion of these approaches. Availability of these resources will increase the community based sentencing options open for repeat offenders and will facilitate offender rehabilitation through community-based treatment and supervision. Governments must see a choice between funding these programs or continuing to pay currently high incarceration costs.

3. A focus on victim participation and support

Despite an apparent concern by local community participants favouring victim involvement and support within the initiatives studied, a greater emphasis on voluntary participation by and organized support and protection for victims both through formal justice channels and through local community involvement, will facilitate the development of initiatives. Enhanced support, protection, and voluntary participation will reduce the chances

of victim alienation from the system, as well as promote healing by victims and reconciliation among victims, offenders, and local communities.

4. Protocol negotiation between local communities and justice system representatives

Crown support is essential to the continuation and development of community sentencing and mediation. Although this support can be expressed in various forms, one way of ensuring ongoing support and consistency within these initiatives will be through the negotiation of protocols between local communities and representatives of the justice system. These will establish the conditions precedent to and the procedures to be followed within such community sentencing approaches. Establishment of protocols will also ensure continuity of approach within each initiative and help reduce the dependence upon and the influence of any one individual in the development of initiatives.

5. Development and expansion of criminal mediation

Mediation was the only model studied that diverted full decision-making power from the prevailing system to local community members. Although the *Criminal Code* now formally recognizes alternative measures for adults expansion of this approach, by diverting more offenders from the court system will increase the amount of court time available for consideration of more serious charges. At the same time, communities will be allowed to regain some measure of control over criminal dispute resolution. For expansion of mediation to be effective, training in mediation and facilitation skills should be provided to local committee members.

Community Sentencing and Mediation in Aboriginal Communities- 1998[108]

This paper is based on interviews and field observation in six Aboriginal communities in Saskatchewan and Manitoba. No victims and few offenders were interviewed. Starting from the over-representation, inequity, and alienation perspective, the author discusses the new initiatives in six communities serviced by a circuit court and policed by the RCMP.

Circle Sentencing:

- He discusses circle sentencing
    - (extensively utilized in Yukon and to a lesser extent in Manitoba, Quebec, and Saskatchewan),
    - its physical arrangements,
    - emphasis on informality and equality among participants,
    - core attendees,
    - range of styles,
    - legal status of circle recommendations (there is no provision in the *Criminal Code* for these and they may be likened to pre-sentence reports but judges indicate a strong commitment to the recommendations),
    - public accessibility,
    - emphasis on consensus among participants (though not necessarily unanimity), and
    - resource commitment (they take time!).
- He notes the criteria for selection of cases that have developed in some areas and mentions, too, protocol negotiations (e.g. Hollow Water) and the possible screening by a local justice committee.
- Some problems, and other limitations highlighted, concern:
    - domestic violence cases where there may be power imbalances between the victim's and the offender's 'sides',
    - long delays required to shore up victim participation,
    - the need for protection especially for victims, and
    - the need for some impartial agent to facilitate the interaction.

[108] Green, Gordon. "Community Sentencing and Mediation in Aboriginal Communities", Manitoba Law Journal, 1998 cited in Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

- Also discussed are elder panels and sentence advisory committees (here the sentencing circle committee may meet independently and then submit recommendations to the judge to save court time as well as empowering the community), and community mediation (the *Criminal Code* was amended in 1996 to recognise adult alternative measures programs).
- In considering the impact to-date the author notes that it is still premature but the following points can be advanced: the sentencing circle has been viewed by Aboriginal people as having traditional significance; victim involvement has been inconsistent and the support available for them sometimes less than that for offenders; a common view is that for offenders "it's an easy way out" especially as treatment options are so limited; concern exists about power imbalances though there has been little direct sign of attempted political interference; usage is still quite limited; statutory reform is unnecessary though there has been little appellate court comment and there may be issues regarding Aboriginal rights here that require appellate decisions.
- Green thinks that the initiatives could well apply to non-Aboriginal communities.

5.16. Planning And Evaluating Community Projects- 1998 [109]

- Circle sentencing is an application of the healing principle to dispute resolution.
- This traditional (in some, though not all, First Nations) method of resolving disputes was reborn in Canada through the willingness of some judges to utilize traditional methods of dealing with members of Aboriginal communities who have broken the law.
    - It was clear to most Aboriginal people and to some justice personnel that the conventional justice system was not working in Aboriginal communities.
    - The traditional sentencing circle was a community-based process that allowed friends and neighbours of the victim and offender to express their feelings of grieving, anger, and support.
    - Offenders became directly accountable to the community rather than to some remote justice system, and members of the circle were able to begin the restoration of peaceful relationships in their community.
- Circle sentencing typically takes place in a setting away from the formal court.
    - Chairs are set up for each participant in the circle.
        - Community members should be allowed to choose the setting and to host and run the circle as this will help in "creating a comfortable participatory environment, affirming community responsibility, and ensuring that the values, customs, and concerns of the community influence the process" (Stuart, 1996: 198).
        - Everybody is introduced and all are invited to actively participate in the process.
        - The shape of the circle encourages everyone to speak as equals.
        - Other guidelines including speaking from the heart, speaking briefly so all will have time to speak, and respecting others by not interrupting and by recognizing the value of their contribution.

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[109] Solicitor General Canada, Rick Linden University of Manitoba and Don Clairmont. Dalhousie University, Making It Work: Planning And Evaluating Community Corrections & Healing Projects In Aboriginal Communities, 1998
http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm

- Since the focus of the circle is on healing, the discussion will range beyond the details of the particular case to include individual, family, and community factors that are relevant to the offenders' problems and to the healing process.

- All participants must be willing to talk openly and to raise both positive and negative issues.

- Members of the circle will try to reach a consensus concerning the sentencing plan for the offender.

- Traditional rituals may accompany the opening and closing of the circle.

- Some communities have also adopted review circles in which the offender is brought back to meet again with members of the original circle to report on his or her progress.

- Several conditions must exist in order for circle sentencing to be effective:
    - The offender must take responsibility for his/her offence and agree to take part in the circle and to follow its recommendations
    - The community must be prepared to participate in the circle and to support the offender and the victim during the circle process and after the disposition
    - The victim must agree to voluntarily participate in the circle
    - The judge must be prepared to listen to the community's advice within the constraints of existing sentencing principles (The Church Council on Justice and Corrections, 1996)

- Circle sentencing has both strengths and weaknesses. One major benefit is that it strengthens the community. Circle sentencing is a return to historical Aboriginal traditions and it can mobilize community resources that may have never before been tapped. Accusers are confronted with the consequences of their crime and given a meaningful sanction for their offense, but at the same time they are also are given support by the community to change their lives. The process provides the opportunity to rebuild relationships that may have been damaged by the offenders that may have been damaged by the offenders' behaviour. Along with other approaches to restorative justice, this represents what Braithwaite (1989) has called reintegrative shaming. The victim is given the opportunity to talk about the pain caused by the crime and to participate in the discussion of the case and to ensure that the outcome meets their needs. This participation is an important factor in helping the victim's healing process.

  Despite its successes, several problems have arisen that must be considered by those planning new programs. Earlier we discussed the fact that political and power relationships in some communities can lead to a situation in which victims do not feel they have been fairly treated. This has been a particular problem in cases of sexual assault and domestic violence where women victims have not received sufficient support from their community. In order to remedy this problem, some have recommended that these vulnerable and often powerless victims be given counselling and also be accompanied in the circle by a team of supporters. Before healing can take place, the imbalance in power between victim and offender must be changed so that both are equal.

  Communities must also ensure that adequate resources are in place prior to establishing circle sentencing. If community support is not available for victims and offenders the dispositions resulting from the circle process will be meaningless. There have also been difficulties determining how circle sentencing can be adapted to urban areas where the Aboriginal population may be dispersed and where victims and offenders may not both be of Aboriginal background.

5.17. Sentencing circles in Saskatchewan - 1998[110]

5.18. Sentencing Circle: a General Overview and Guidelines -1998[111]

Introduction

The sentencing circle is a method of dealing with members of the community that have broken the law. A sentencing circle is conducted after the individual has been in the present western justice system and found guilty or if the accused has accepted guilt and is willing to assume their responsibility. This sentencing method encourages the offender and the community to accept responsibility and acknowledges the harm they have done to society and to victims.

A sentencing circle's aim is to shift the process of sentencing from punishment to rehabilitation and responsibility. It provides a new alternative for courts to incarceration. The sentencing circle proves an opportunity to start the healing process for both the offender and the victim. The offender is presented with the impact of their actions in front of respected community members, elders, peers, family, the victim and their family, stimulating an opportunity for real change.

When to Hold a Sentencing Circle

The criteria come from a decision from Judge Fafard of the Saskatchewan Provincial Court [*R. v. Joseyounen* [1995] W.W.R. 438 at 442-46 or Ross Green's *Justice in Aboriginal Communities* at page 76.]:

The accused must agree to be referred to the sentencing circle.
The accused must have deep roots in the community in which the sentencing is held and from which the participants are drawn.
There are elders or respected non-political community leaders willing to participate.
The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
The court should try to determine beforehand, as best it can, if the victim is subject to battered women's syndrome. If she is, then she should have counseling and be accompanied by a support team in the circle.
Disputed facts have been resolved in advance.
The case is one which a court would be willing to take a calculated risk and depart from the usual range of sentencing.

Rules Governing a Sentencing Circle

- There are so special powers or privileges for anyone in the circle.
- There are no interruptions while a person is speaking. In a sentencing circle a person may only speak in turn. The laws of the Creator shall govern the person speaking. Those laws are honesty, sharing, kindness, and respect;
- In the circle decisions are made on the basis of consensus;
- At all times during the proceedings of a sentencing circle the Chairperson will maintain the order and the process of the circle.

Sentencing Circle Exclusions

For purely punitive sanctions or where a tern of incarceration in excess of two years is realistic, the sentencing circle is *not* appropriate. The circle is not appropriate where:

- there have been frequent repeat offenses or the offence is indictable;
- the attitude of the offender prohibits his/her involvement;
- there are no community sentencing options available to the circle; and
- the community is not prepared to be involved in the circle.

Sentencing Circle Involvement and Requirements

The judge, lawyer, police should be:

- willing and able to participate;

[110] Orchard, Bonnie Sentencing circles in Saskatchewan: a thesis submitted to the College of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Masters of Law in the College of Law Saskatoon, Saskatchewan, Fall 1998 (c) copyright Bonnie Orchard, 1998. All rights reserved cited in University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[111] Justice as Healing * Vol. 3, No. 3 (Fall 1998)

- the decision as to whether a sentencing circle will be granted is the judge's alone but must take into consideration all the criteria as to whether or not to grant a sentencing circle and whether the court is prepared to take a calculated risk with respect to the offender; and
- after the circle has reached a consensus as to the sentence for the offender, the judge then steps back into his judicial role and may choose to impose or reject the sentence that the circle has recommended. However, the sentence is rarely rejected by the judge.

The Community should be:

- be willing and able to participate and provide follow-up;
- totally supportive of the process and be familiar with the proceedings;
- feel free to ask questions, express their opinions as their views are important and more valid than those of people from outside the community but people should refrain from counseling the offender or talking in excess;
- be involved in ongoing supervision, re-integration of the offender into the community and evaluation of the offender's progress on a regular basis;
- be willing to organize the circle and provide translation services if necessary (anyone can organize a circle i.e. probation officer, social work[er], First Nation Justice Committee member, Band Councilor or an Elder);
- be willing and able to mobilize community resources so as to assist the offender and his/her family in the process of rehabilitation and recovery if necessary; welcome the participants, if possible provide coffee, milk, Kleenex, lunch and transportation for the Elders if needed.

The offender should be:

- willing to participate and accept responsibility for his/her actions;
- willing to face his/her victims and make whatever amends may be necessary;
- willing to participate in traditional or Christian ceremonies to initiate the healing process;
- willing to spend time with an Elder and participate in any preparations the Elder recommends at his/her home reserve or his/her choice; and
- willing to make whatever legal amends necessary to the victim and do whatever is necessary to the victim to reconcile the negative relationship created between themselves, the victim and the community as a result of the offense.

The victim should be:

- involved in the sentencing circle process directly or through the aid of a representative or surrogate victim (when that is realistic);
- given as much consideration and respect as possible in recognizing compensation and/or restitution for the victim or a community service agency of the victim's choice; and
- willing to become involved with the community in some way to facilitate the healing of the offender.

Sentencing Options Available to Sentencing Circles:

- peer counseling;
- restitution/compensation, i.e. replace broken window;
- community service work;
- mediation;
- compulsory school attendance/work attendance;
- referral to specialized programs, i.e. anger management, sexual abuse awareness training;
- referral to counseling and/or treatment;
- Aboriginal spiritual activities, i.e. sweats, forgiveness/sacrifice ceremonies;
- Aboriginal cultural activities, i.e. pow wow security, Elders assistant, cleaning grounds, ration distribution;
- talking and healing circles;
- curfew rules and regulations respecting residency;
- disassociation from the negative influence of peers;
- keep the peace and be of good behavior (court undertakings);
- counseling for offender and family;
- speaking/teaching to students for example; and

- traditional sentences, i.e. fines, incarceration, probation, house arrest, electronic monitoring (six months usual).

Sentencing Circle Guidelines

- should be held in a community facility, court or even outdoors;
- there should be a sufficient number of chairs for participants arranged in a circle;
- arrange an inner and outer circle if participation if high;
- the inner circle includes: judge, crown prosecutor, defense council, victim, accused, community supports system, family, friends, outside support system, i.e. Justice Unit, observers;
- usually a tape recorder is used to record the comments in the center of the circle;
- preparation of the sentencing circle consists of any ceremonies directed by the Elders;
- seating is either pre-set or people sit where they feel comfortable;
- everyone in the circle is equal and has an equal voice;
- the judge or the designated chairperson outline the ground rules that govern the circle;
- the judge, the designated chairperson or an elder makes the opening prayer and remarks;
- all religious beliefs are tolerated and welcomed;
- moving clockwise, everyone is given an opportunity to speak.

Participants have the option to speak or remain silent. There may be several rounds of speaking. An example of these rounds would be: The first go around, "Why did I come today?" and "Why am I here?" The second go round, participants speak to the victim and the affect on self, family and community. The final go around participants outline expectations to the offender and/or state opinion as to what needs to be done to restore balance; and

- anyone has the right to ask anyone else questions.

Option: The defense may present their argument for a sentence. Then the Judge, the victim, and the victim's support system (family, defense, friends) leave the circle. The accused and community support discuss the sentence presented, add, delete and collectively arrive at a sentence. The two parties reconvene and reconcile and the Judge determines the sentence.

***Editor's note**: A copy of this overview and guideline was provided by Ms Tracy Grohs, an Alternative Measures Case Worker with the Yorkton Tribal Council Treaty Four Nations. The office of the Yorkton Tribal Council Treaty Four Nations is located at 21 Bradbrooke Drive North in Yorkton, Saskatchewan, 53N 3RI; telephone: (306) 786-7888; fax: (306) 786-7855.*

5.19. Raising Some Questions About Sentencing Circles - 1997 [112]

The authors contend that while claims have been made about Aboriginal sentencing circles in terms of ***reducing recidivism*** and ***reducing crime***, supporting evidence is non-existent.

Non-Aboriginals

- The authors indicate that their focus is on the utility of sentencing circles to the non-Aboriginal culture, indicating that their application in Aboriginal culture raises other issues that go beyond the scope of the paper.
- At the same time, in assessing the utility of sentencing circles, they basically put forth criteria and then assemble evidence drawn almost exclusively from the Aboriginal experience since there is no other experience to draw upon. [113]
- Although community-based sentencing and mediation has not been precluded in larger mixed centres, the social control that can be brought to bear on offenders m small communities is a strength. [114]

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[112] Roberts, Julian and Carol LaPrairie. "Raising Some Questions About Sentencing Circles", Criminal Law Quarterly, 1997 Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[113] Roberts, Julian and Carol LaPrairie. "Raising Some Questions About Sentencing Circles", Criminal Law Quarterly, 1997 cited in Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[114] Ross Gordon Green, Justice in Aboriginal Communities: Sentencing Alternatives, 1998 http://www.umanitoba.ca/faculties/law/Courses/McGillivray/Justice_Aboriginal_Communities.html

- Whether these community sentencing and mediation approaches will become established within non-Aboriginal communities is unclear. T
- These approaches have evolved within Aboriginal communities largely in reaction to problems experienced with, and by, the prevailing justice system, and they have utilized the strength of local resources and systems of social control m the sentencing process.
- Although these approaches appear well suited to the communal traditions of Aboriginal society, nothing within Canadian law prevents non-Aboriginal offenders from seeking local sentencing input.

There is no reason to believe the same degree of concern and social control could not be found and applied among identifiable communities in non-Aboriginal society. Indeed, two recent sentencing circle cases from Saskatchewan involved non-Aboriginal offenders: a non-Aboriginal offender charged with stealing a snowmobile attended a sentencing circle involving "the judge lawyers, police and about a handful of Katepwa residents"; and a local farmer charged with dangerous driving causing death received a suspended sentenced following a sentencing circle.

5.20. Circle Sentencing, Restorative Justice and the Role of the Community - 1997 [115] [116]

- In this short paper LaPrairie and Roberts make the case for a more scholarly and critical examination of sentencing circles which have become quite extensive in Canada.

- *Conclusions:* After describing circle sentencing (the authors refer to the paradigmatic case "R. v. Moses") they note that it is part of the restorative justice movement which in Aboriginal communities is also taking place in the context of self-government and empowerment of communities.

5.21. First Perspective -1997[117]

The newspaper FIRST PERSPECTIVE has an article on entitled, "Aboriginal justice an alternative to jail, judge says" (page 23 Dec. 97). They quote Judge Barry Stuart (who was holding a workshop on Aboriginal justice) [Judge Barry Stuart was the judge in the *R. v. Moses* case and he did an article in the Canadian Native Law Reporter on sentencing circles [1995] 3 CNLR pages 1 to 7. - To quote from part of the article: [118]

> "Rather than monopolizing the administration of justice, the country's judges, lawyers and police must share their power with ordinary citizen's by encouraging more community justice initiatives and relying less on expensive jails...He says communities must turn to less adversarial alternatives, such as Aboriginal peacemaking circles and mediation between victims and offenders, which are based on principles of consensus, forgiveness and reconciliation... "What we've done, as the justice system, is we've come into your communities and said, "Stand back, the experts are here' We've made you lazy, we've taken away conflict as a builder of communities, we've taken away your resolution skills"".

The article says several communities in the Yukon have peacemaking circles:

> "Circles have been used not just for sentencing, but also for child-protection cases, family based conflict, young offenders, bail releases and civil disputes. For that reason they are called peacemaking, rather than sentencing circles."

The article goes on to quote from a Tlingt Nations who was a repeat offender and when released from jail "learned how to forge cheques, hotwire cars and pick locks"

> "It was only with the help of elders in healing circles that he began a spiritual journey to work out for himself the meaning of honesty, trust and respect for other."

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[115] LaPrairie, Carol and Julian Roberts. "Circle Sentencing, Restorative Justice and the Role of the Community", Canadian Journal of Criminology, 1997 cited in Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998
http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm
[116] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[117] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[118] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

5.22. Building Community Justice Partnerships: Community Peacemaking Circles -1997[119] [120]

- The book is broken up into 7 parts.
  - Introduction to circles, Maintaining community initiatives, Acceptance into circles, Pre-circle preparation, Circle hearing, Follow-up, and Conclusion.
  - The manual discusses planning, government support, the importance of volunteers, the need to maintain essential justice principles and practices, eligibility and the application process, the logistics of a circle, and methods of follow-up.
  - The manual emphasizes that universal blueprints for achieving the maximum potential of a circle process are neither possible nor useful.
  - Instead, each community must struggle to evolve a process unique to its circumstances and must build, own, and operate the process.
  - The introduction also notes that the emotional and spiritual dynamics of the circle are more important than the steps of the process, although the manual focuses on the process itself.
  - It explains that the basic principles of interest-based negotiation, mediation, consensus building, and peacemaking were part of the dispute-resolution practices of many European and Asian communities many generations ago and are still inherent to the philosophy and practices of Aboriginal communities.
  - All contemporary peacemaking and sentencing circles share the following principles:
    - (1) a consensus approach, (2) an interest-based approach, (3) self-design by the community, (4) flexibility, (5) spirituality, (6) holistic healing, (7) inclusiveness, (8) voluntary participation, (9) direct participation, (10) equal opportunity, and (11) respect.

5.23. Aboriginal Community Sentencing and Mediation: Within and Without the Circle - 1997[121]

5.24. Rethinking disputes: the mediation alternative/-1997[122]

– Chapter eight has Judge Barry Stuart exploring the broader restorative effect that sentencing circles have on the community as a whole

5.25. Moving toward Native Justice: Intercultural communication in Aboriginal sentencing circles in Canada -1997 [123]

[119] Stuart, Barry D. *Building Community Justice Relationships: Community Peacemaking Circles* Aboriginal Justice Section, Department of Justice, Canada, 1997. No ISBN. 141 p.
[120] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[121] Ross Green, Aboriginal Community Sentencing and Mediation: Within and Without the Circle in Manitoba Law Journal.1997. 25:(1). University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[122] Rethinking disputes: the mediation alternative/ edited by Julie Macfarlane. Toronto: Emond Montgomery, 1997. 392 pages. $76.50 hardcover. According to the review in *Saskatchewan Law Review* by David Stack ((1998), 61 Sask. L. Rev. 597). University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[123] Restoule, Jean-Paul Moving toward Native Justice : Intercultural communication in Aboriginal sentencing circles in Canada *Issue 3/97 Indigenous Communications* at: http://www.oneworld.org/wacc/media/restoule.htm University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

5.26. Interrogating Justice: A cultural critique – 1997 [124]

5.27. The Four Circles of Hollow Water - 1997 [125]

This is an exceptional document which places in perspective, from a variety of standpoints, the well-known Hollow Water Healing Circle (see Lajeunesse below). The four circles are the Ojibwa Circle, the Hollow Water Circle, the Victim Circle and the Offender Circle. The Ojibwa Circle is discussed in relation to a variety of themes, including sexual norms and dealing with deviance, in pre- and post-colonization Ojibwa culture and society. The Offender Circle succinctly summarizes the latest professional knowledge about treating sexual abuse offenders, from a non-Aboriginal perspective. At the same time the authors show how the cognitive-behavioural treatment orientations which have yielded some success are generally quite consistent with the theory and practice underlying the Hollow Water approach. Some differences are noted, especially the greater emphasis in the latter on holistic treatment involving victims, offenders, and the community at large, an emphasis explained in terms of Ojibwa culture and the imperatives of living in small, somewhat isolated communities. The Victim circle explains the pain and processes of victimization, often in the words of the victims, and also convincingly argues for a different type of healing strategy as being required in communities such as Hollow Water, specifically the strategy evidenced in the community holistic circle healing. The Hollow Water Circle is discussed in terms of personal histories and descriptions provided by two major participants in that program. They present interesting details on the development of the program since 1983, describe the processes, and comment on the challenges facing this successful indigenous initiative which has revitalized the community, empowered it, and enabled it to deal with a major social problem.

Hollow Water, Manitoba[126]
The Four Circles of Hollow Water is a report on sexual abuse, that includes the Ojibwa Circle, Hollow Water Circle, Offender Circle and Victim Circle. Technically, the Community Holistic Healing Circle is closely related to Sentencing Circles. As the book says "the small community of Hollow Water has become ... [an] icon for Aboriginal people" p. iii. Any look at sentencing circles must also include a look at healing circles and Hollow Water.

Interim report of the Hollow Water First Nations Community Holistic Circle Healing Appendix 3" The seeds of a community healing process". [excerpt from Appendix 3 of the Interim report of the Hollow Water First Nations Community Holistic Circle Healing (C.H.C.H.), which describes the activities of C.H.C.H. for the period of April 1, 1993 to February 9, 1994. From Justice as Healing [127]

5.28. Establishing Shared Responsibility for Child Welfare through Peacemaking Circles - 1996 [128]

- ***Peacemaking Circle Process:*** Peacemaking circles provide a process for bringing people together as equals to talk about very difficult issues and painful experiences in an atmosphere of respect and concern for everyone.

[124] Proulx, Craig *Interrogating Justice: a cultural critique* by , Department of Anthropology, Submitted in partial fulfillment of the requirements for the degree of Masters of Arts. Faculty of Graduate Studies, the University of Western Ontario, London, Ontario, June 1997. University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[125] Aboriginal Corrections Policy Unit (eds.). The Four Circles of Hollow Water. Ottawa: Supply and Services, 1997 (also available at this Internet site) cited in Ministry of the Solicitor General of Canada, Don Clairmont, Dalhousie University and Rick Linden, University of Manitoba, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, 1998 http://www.sgc.gc.ca/epub/Abocor/e199805/e199805.htm
[126] Solicitor General of Canada. Four Circles of Hollow Water. (Aboriginal Peoples Collection) Ottawa; Supply and Service Canada. ISBN 0662256298. This report is at the site: http://www.sgc.gc.ca/epub/abocor/e199703/e199703.htm cited in University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[127] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[128] Excerpted from: " Establishing Shared Responsibility for Child Welfare through Peacemaking Circles" by Kay Pranis and Barry Stuart in Family Group Conferences, edited by Burford and Hudson, 1996
http://www.doc.state.mn.us/organization/commjuv/restorativejustice/ripeacemakingcircleprocess.htm

  - Peacemaking circles create a space in which all people, regardless of their role, can reach out to one another as equals and recognize their mutual interdependence in the struggle to live in a good way and to help one another through the difficult spots in life.

- Peacemaking circles are built on the tradition of talking circles, common among indigenous people of North America, in which a talking piece, passed from person to person consecutively around the circle, regulates the dialog.
  - The person holding the talking piece has the undivided attention of everyone else in the circle and can speak without interruption.
  - The use of the talking piece allows for full expression of emotions, deeper listening, thoughtful reflection, and an unrushed pace.
  - Additionally, the talking piece creates space for people who find it difficult to speak in a group.
  - Drawing on both traditional wisdom and contemporary knowledge, the circle process also incorporates elements of modern peacemaking and consensus building processes.

- Participants are seated in a circle of chairs with no tables.
  - Sometimes objects with meaning to the group are placed in the center as a focal point to remind participants of shared values and common ground.
  - The physical format of the circle symbolizes shared leadership, equality, connection and inclusion.
  - It also promotes focus, accountability and participation from all.

- The circle process typically involves four stages:
  - Acceptance – The community and the immediately affected parties determine whether the circle process is appropriate for the situation.
  - Preparation – Separate circles for various interests (family, social workers) are held to explore issues and concerns and prepare all parties to participate effectively.
    - Thorough preparation is critical to the overall effectiveness of the circle process.
    - Preparation includes identifying possible supporters in the natural network of the family to participate in the process.
  - Gathering – All parties are brought together to express feelings and concerns and to develop mutually acceptable solutions to issues identified.
  - Follow-up – Regular communication and check-ins are used to assess progress and adjust agreements as conditions change.

- At any stage multiple circles may be held to complete the tasks of that stage.

- Circles are facilitated by keepers who are responsible for setting a tone of respect and hope that supports and honors every participant.
  - All circles are guided by the following commitments participants make to one another:
    - What comes out in circle, stays in circle – personal information shared in circle is kept confidential except when safety would be compromised.

- Speak with respect – speak only when you have the talking piece; speak in a good way about good and difficult feelings; leave time for others to speak.
- Listen with respect – actively listen with your heart and body.
- Stay in circle – respect for circle calls upon people to stay in the circle while the circle works to find resolution to issues raised.

- Additional guidelines may be created by circle participants to meet the needs of that situation. Guidelines institute a covenant defining how people will interact and share space and time as a group.

- Circles consciously engage all aspects of human experience - spiritual, emotional, physical and mental.
    - Ceremony and ritual are used in the opening and closing of a circle to mark the space of circle as a sacred space in which participants will be present with one another in a different way than in an ordinary meeting.

- While the design, procedures and participants vary greatly from one circle to another, there are some fundamental principles common to all circles.

- Practices and principles common to all circles:

    Participants
    1) Act on personal values
    2) Direct participation
    3) Voluntary involvement
    4) Respect for all and all things
    5) Self design
    6) Equal opportunity to participate
    7) Shared vision

    Process
    1) Inclusive of all interests
    2) Easily accessible to all
    3) Flexible to accommodate each case
    4) Holistic approach
    5) Spiritual experiences respected
    6) Consensus outcomes
    7) Accountability to others and to process

- In the circle process social institutions play important roles, but the process is centered on the community context of the situation.
    - The circle throws a wide net to capture possible points of support or assistance and to gather all relevant knowledge.
    - Potential contributions are expected even from those who are part of the problem.
    - Multiple issues are dealt with at once.
    - Circles recognize that the issues interact with one another and cannot be effectively dealt with in isolation.

- Circles promote mutual responsibility, the recognition that individual well being depends upon the well being of all.

5.29. Authorities disagree about appropriate use, but... Sentencing circles gaining acceptance from lawyers - 1996. [129]

5.30. Sentencing Circles: Some Unanswered Questions -1996[130]

5.31. The healing power of the native circle-1996[131]

5.32. A Sentencing Circle - 1996 [132] 133 134

- This paper represents its author's observation of the first sentencing circle held in the Nunavik region of Quebec in the spring of 1993 (see also her Report On A Sentencing Circle in Nunavik. Ottawa: Department of Justice, 1994).
- The specific case dealt with wife battering and was the accused's fourth conviction for the same crime. The initiation of the circle was described as pragmatic with the judge asking the group assembled, "what are we going to do with this man."
- There was no explanation given about the idea of sentencing circles nor was anything said about their connection to Inuit customs, but the judge did mention that this practice (i.e. sentencing circles) was in use in the Yukon and was being employed in keeping with the recommendations of Inuit Justice Task Force. The organization of the sentencing circle appeared to have been "left to the day of the event" (e.g. sitting arrangements, participants). The judge indicated that everyone in the circle was equal but also stated that he was not obliged to follow the advice rendered by the circle members.
- The author observed that the circle discussions were low-keyed and focused on the accused with "virtually no discussion about the harm suffered by his wife, children and family relations because of his actions".
- Crynkovich recommended caution in the use of circle sentencing for cases of spousal assault, expressing concern for the victims and referring to the discriminatory nature of some Inuit traditions (e.g. elders might excuse wife abuse on the grounds that the woman has not been obedient to her husband, but Inuit women would not share this view).
- Further she argued that more discussion should be required concerning what cases go through the circle, and that the community – which knows best what its resources are – should have a say in that matter.
- This analysis addresses the problems associated with Sentencing Circles, as one of the justice initiatives that Northern communities may adopt, and advances considerations that must be included in developing and implementing them if those problems are to be adequately dealt with.
- This piece addresses the relationship with the mainstream criminal justice system and issues surrounding community mobilization and/or power dynamics.
- This is a paper based on the Crnkovich's observations of the first sentencing circle held in the Nunavik region of Quebec.
- Sentencing circles, started in the Yukon Territory, are described as a community-based justice initiative.

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[129] Foden, Brian "Authorities disagree about appropriate use, but... Sentencing circles gaining acceptance from lawyers". The Lawyers Weekly. December 13, 1996 University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[130] Roberts, J.V. and Carol LaPrairie "Sentencing Circles : some unanswered questions" in *Criminal Law Quarterly* v. 39 (August 1996) p.69-83.

[131] Dickason, Olive , "The healing power of the native circle" The Globe and Mail Saturday, October 12, 1996 at page D17 Books/Native Issues University of Saskatchewan, Books, articles and cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[132] Crynkovich, Mary. "A Sentencing Circle", Journal of Legal Pluralism and Unofficial Law, 36, 1996 Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[133] Crnkovich, Mary. "A Sentencing Circle", in *Journal of Legal Pluralism and Folk Law,* 36, 1996. *cited in* Department of Justice Canada, Research and Statistics Division, by Naomi Giff, Nunavut Justice Issues: An Annotated Bibliography, March 31, 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-7a-e.pdf

[134] University of Saskatchewan, Books, articles and cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

  - They are intended to address the limitations of the circuit court system of justice through incorporating the interests and needs of the community in the administration and delivery of justice.
- The Inuit Task Force on Justice suggested that such initiatives be utilized in the Nunavik region in order to involve the community and more adequately respond to and address the justice needs of the victim, offender and community.
- Responding to this, the judge in this particular case ordered a sentencing circle to take place.
  - This was a case where the accused was charged with (and pleaded guilty to) assaulting his wife. This was the accused˜s fourth conviction and the accused was on probation when the last assault took place.
- Crnkovich discusses her observations of the process, focusing on the limitations of sentencing circles, specifically as they relate to female victims of violence.
  - She goes on to outline possible safeguards that can be incorporated into Circles to protect Inuit women who are victims of violence.
- ***Themes***
  - Circuit courts do not meet the justice needs of the Northern communities.
  - Sentencing Circles, as a response, may alleviate some of the problems caused by circuit courts.
  - However, there are certain issues that must be addressed before they are implemented.
- ***Findings***
  - *Lack of organization:*
    - The event was not organized properly and took place in a haphazard fashion.
    - The Mayor, Judge and Mativik (Nunavik Inuit organization) were under the impression that the others would be organizing the location, informing the community and setting the agenda.
    - As a result, the Circle was unsuccessfully organized and it is observed that ˜while a circle may be in the best interests of the community, if it is not properly organized, it can be of little benefit to anyone.˜ (164).
  - *Objectives of the circle not defined for the community:*
    - *The* judge gave no substantial guidance to the community members present to help them understand the role or objectives of the sentencing circle.
    - As a result the community was unaware of how the circle was to operate, why it was chosen instead of a regular court hearing, what their options were in terms of recommendations to the judge, the role that Inuit traditions were expected to play, or what the law considered an appropriate sentence for domestic violence.
    - Further, the role of a sentence, its function as a sanction was not discussed or described to the community
  - *The roles of participants were confused:*
    - The author, in her conversations with the victim, found that she was confused about whether she had to be there and what her role was.
    - The judge added to the confusion by stating that although everyone was equal in the circle, he was not obliged to take their advice.
    - These mixed messages and resulting cynicism may lead to less community participation and motivation.
  - *Language:*
    - The issue of interpretation and translation.
    - Although the circle began with a translator who translated the exchanges, partway through another individual took over.
    - He was less diligent, and instead of interpreting and translating, he summarized and gave editorialized versions of the discussion.
    - As a result, unilingual members of the circle were excluded from a full understanding of the exchanges.
  - *Subject matter:*
    - The author found that the circle was dominated by an 'offender-focus'.
      - In other words, the discussion was all about helping the offender.

- While that is important, the author notes that there was no discussion about the harm suffered by the victim, children and family because of his actions.

- The author also noticed a shift in the discussion from the abuse being ˜his problem˜ to a discussion of ˜their problem˜ (the wife and husband).
  - This implies a shift in blame and responsibility that involves the victim, something that may be inappropriate.

- *Power dynamics:*
  - The author noted that the circle failed to incorporate an understanding of the power dynamics that exist in abusive relationships, specifically between a man and a woman, wife and husband.
  - In the circle that was observed, the victim did not speak in the circle, the sentence represented the plan submitted to the circle by the husband and the court suggested that the wife attend counseling with the husband.
  - These results make it clear that the power dynamics that occur in abusive relationships were not accounted for by the Circle and the judge.
- *Lack of community involvement:*
  - Because there was no information offered to the community about Sentencing Circles and its goals and there was no care taken to include a representation of the community, the community was unable to fully prepare for and participate in the circle.
  - There was no opportunity for the community to design the circle or offer input into its operation that may better reflect their cultural traditions and needs.
  - The Judge assumed a sentencing circle was the ˜best˜ way to include the community and its cultural traditions in corrections, a decision that should have been made by the community.

- ***Conclusions***
  - The author concludes the following:
    - It is essential that the community be involved in planning, developing and implementing new alternatives.
      - If it is not, the goals of the initiative will not be met
    - It is essential that the impact of the crime on victims be included in any alternative or community-based initiative such as a sentencing circle.
      - The interests of the victim(s) have to be represented and the forum must be conducive to victim participation.
    - Generally speaking, female victims of violence have special needs and concerns.
      - This is especially true in small, isolated Northern communities.
      - The physical presence of an attacker, combined with a lack adequate protection for victims of violence because. they have fewer police forces generally and detachments may be hours away, are issues that must be addressed in the development of community-based initiatives.
      - Also, where there exists strong support for community-based justice, a process that shifts the focus onto the offender, the needs of the victim without special attention, may not be adequately incorporated into the analysis.
    - Community-based corrections or alternatives, and justice initiatives generally, must be planned and developed carefully, not thrown together in a haphazard fashion with no regard to the impact that the form, process and outcome of corrections has on communities, victims and offenders.
- ***Recommendations***
  - Safeguards must be incorporated into sentencing circles (and other initiatives) to protect Inuit women who are victims of violence:
    - The community must be involved in the development, organization and implementation of a Sentencing Circle.

- The community must control case screening and offence threshold (the issues/harms that a Sentencing Circle will address).
- As well, the organization of the Circle, as well as the decision about who sits in a Circle, must come from the community.
- Finally, the community must be informed about the dynamics of power so they can understand them when they occur in the Circle, as well as how they affect the issues in the Circle.

- If Circles are to deal with wife assault or sexual assault the impact of the act on the victim as well as the interests of the victim must be represented in the Circle.
- The tension between ¯healing the offender¯ and ¯protecting the community" as very different goals of community-based justice initiatives (such as Sentencing Circles) must be adequately addressed by the community.
- There must also be attention paid to the fact that victims need healing too.
  - The focus should not be only on the offender.
- There must be a realization that such cases as sexual assault and domestic violence are not representative of a *shared problem* by the wife and husband.
  - Counseling together may not always be a good idea.
- Community-based initiatives in the North must recognize that there exists the potential for discrimination when traditional Inuit customs are incorporated into a community-based justice initiative. This may be the result of modernization and the displacement of many traditional cultural practices.
  - To truly meet the justice needs of the community and have the support of the community, this possibility must be addressed.

5.33. Circle sentencing in Canada: a partnership of the community and the criminal justice system – 1996 [135]

5.34. Satisfying Justice, Safe Community Options - 1996 [136] [137]

- **Circle sentencing** was also born in Canada, as a result of the efforts of a growing number of judges to counteract the futility of the current sentencing process and to respect in Native communities the traditional aboriginal method of dealing with members of the community who broke the law. It is one of the most promising breakthroughs in our western justice system because it can provide for a community-based, pre-sentence advisory process that presents a healthy opportunity for emotional expression of grieving, anger and support, and has a strong focus on accountability, reparation and restoration of peaceful and just relations in the community. It can also have a wider impact on crime prevention because of the number of people it involves in taking responsibility for solving the problems that surface. It is not without its dangers and limitations, however. The potential abuses from power imbalances in the formal and informal relations between members of the community must be watched for all the more carefully in a process that can give the illusion of reassurance that highly democratic principles of participatory decision-making are being respected. Interest is growing in learning from this process what can be adapted for use in urban, non-aboriginal communities. While the goal of circle sentencing is **not** to keep offenders out of jail, that is still often the outcome when the process of sentencing in a way that makes sense is taken seriously by the judge and the community. http://www.csc-scc.gc.ca/text/pblct/satisfy/e_jus2.shtml

[135] International Journal of Comparative and Applied Criminal Justice. Circle Sentencing in Canada: a partnership of the community and the criminal justice system" 1996 Fall Vol. 20 No. 2 University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[136] University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[137] The Church Council on Justice and Corrections, Correctional Service Canada, Satisfying Justice, Safe Community Options that attempt to repair harm from crime and reduce the use or length of imprisonment 1996 http://www.csc-scc.gc.ca/text/pblct/satisfy/juste.pdf http://www.csc-scc.gc.ca/text/pblct/satisfy/e_jus1.shtml

5.35. Community Holistic Circle Healing, Hollow Water First Nation -1993[138]

This report discusses the preliminary stages of one of the more famous Aboriginal justice interventions in Canada namely Community Holistic Circle Healing in Hollow Water and neighbouring Metis communities. The short description notes that the project's seeds go back to 1984 when a group of persons began to meet to discuss the problem on the reserve. Their dissatisfaction with the way the mainstream justice system dealt with their people led them to develop a more holistic, healing, community-based programme for sexual abuse conveyed in a "13 Steps" model which begins with "Disclosure", may go on to "A Special Gathering" and, some two years later, may conclude with "The Cleansing Ceremony".

This report dealt with the early stages of the program and consequently provides limited information about the implementation and operation of CHCH. The author contended that it has resulted in more victim disclosure and that the program leaders did not encourage incarceration for offenders who acknowledged their guilt.

5.36. A Healing Circle in the Innu Community of Sheshashit – 1996 [139]

- This is the report, attached to a sentencing decision, of a healing circle in a Native community in Canada in response to an assault case.
- The offender was non-Native, and the victim was Native (Innu).
- The report details the participants (including the offender and the victim), the principles, the process, and the outcomes of the healing circle for the participants.

5.37. Sentencing circles and family group conferences - 1996 [140]

5.38. Aboriginal Sentencing/Mediation -1995 [141]

5.39. Role of the victim - Circle Sentencing in Inuit communities – 1995 [142]

- Mary Crnkovich addresses issues relating to victims and circle sentencing in Canada based on her experiences working on a justice project with the national Inuit women's association, Pauktuutit.
- In particular, she expresses deep concerns about the use of circle sentencing in cases involving violence against women, young girls and boys, and children.

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[138] Lajeunesse, Thérèse & Associates. Community Holistic Circle Healing, Hollow Water First Nation. Ottawa: Solicitor General Canada, Aboriginal Peoples Collection, 1993 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998
http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[139] Newfoundland Supreme Court - Trial Division. 1996. "A Healing Circle in the Innu Community of Sheshashit." Justice as Healing 2 (Spring 1997). Appendix A of the Decision by Justice O'Regan of the Newfoundland Supreme Court - Trial Division, 1996.
http://www.usask.ca/nativelaw/jah_sellon.html

[140] LaPrairie, Carol "Sentencing circles and family group conferences" *Australian and New Zealand Journal of Criminology* Vol. 29 Number 1 March, 1996 University of Saskatchewan, Books, Articles and Cases about Sentencing Circles,
http://www.usask.ca/nativelaw/jah_scircle.html

[141] Green, Ross Gordon Aboriginal sentencing and mediation initiatives: the sentencing circle and other community participation models in six Aboriginal communities. Winnipeg: University of Manitoba, 1995. viii, 286 leaves : map, plates. Thesis (LL.M.) -- University of Manitoba, Fall 1995. University of Saskatchewan, Books, Articles and Cases about Sentencing Circles,
http://www.usask.ca/nativelaw/jah_scircle.html

142 Crnkovich, Mary. 1995. The role of the victim in the criminal justice system – Circle sentencing in Inuit communities. Paper presented at the Canadian Institute for the Administration of Justice conference. Banff, Alberta, Canada, 11-14 October.
http://www.casac.ca/mary_crnkovich.htm

- In this regard, after sketching the existing justice system in Inuit communities and the basic concepts of circle sentencing, she questions several assumptions made by advocates of circle sentencing:
    - (1) circle sentencing is rooted in Inuit culture and tradition;
    - (2) it is truly a community-based process;
    - (3) there is a single, relatively homogenous entity which is "the" Inuit community; and
    - (4) circle sentencing is truly an alternative to the existing justice system, and a beneficial one, for victims.
- This is a companion to the other Crnkovich piece in this collection, where the author describes her observations regarding the first sentencing circle held in Nunavik.
- That article provided the background information, mechanics and format of the circle, as well as the impact on the victim as a non-participant.
- This piece explores the issues and concerns further, examining how such alternatives engage with and impact on Inuit communities and Inuit women victims of violence extrapolating the issues and concerns about alternatives from the author's experiences and observations.
- It speaks to issues revolving around community dynamics and the Northern environment,
- This paper was presented to the Canadian Institute for the Administration of Justice Conference in 1995.
    - In it, Crnkovich examines the problems associated with the practice of circle sentencing as an alternative, community-based justice system in Inuit communities.
    - The paper is based on her shared experiences with Inuit women and her work on justice issues with Pauktuutit.
    - Specifically, the discussion is based on her observations of the operation of a sentencing circle in Nunavik.
    - In this paper she examines the issues and concerns that require serious attention before sentencing circles (and other alternatives) are adopted as a panacea for the problems associated with the existing criminal justice system.
    - She discusses the problematic issues
        - that arise from using such terms as "alternative dispute resolution," "tradition" and "community-based initiatives,"
        - the role of power and power dynamics in the community, and
        - the need for victims, especially female victims of violence and sexual assault, to have more support.
- ***Underlying Themes***
    - The author holds that the goals and objectives of many alternatives are good, but the means advocated to achieve these goals may cause more conflict than they attempt to resolve.
        - Many so-called community-based alternatives are grounded in erroneous assumptions about
            - the role of tradition,
            - about what "community-based" means,
            - about the homogeneous nature of Inuit communities, and
            - about how 'alternative' from the existing system these alternatives really are.
        - These assumptions need to be challenged.
    - It is only through Inuit-based justice systems that true, community-based justice will occur.
        - In other words, the design and implementation must arise from Inuit communities, not from the formal system.
- ***Findings***
    - *Inadequacy of the existing system:*
        - The existing system in the Northwest Territories, Northern Quebec and Labrador is inadequate.
        - The ineffective and small police presence, the absence of lawyers, courtrooms, and legal aid services or victims advocates, coupled with the circuit court system have all contributed to the over-representation of Inuit in the criminal justice system and the high rates of incarceration.

- *Circle sentencing as a solution:* Judge Barry Stuart introduced circle sentencing in the Yukon to address the failings of the criminal justice system.
  - It is intended to address the over-representation of Inuit in correctional facilities.
  - The objectives include encouraging active community involvement, focussing on rehabilitation and reconciliation as opposed to only punishment, a sharing of power between the formal system and the community, and the inclusion of traditional values into the process.
  - Crnkovich notes that there is variance among communities regarding how the circle operates and that oftentimes guidelines are lacking.
- *Assumption #1: Alternatives, such as circles, are a process that is rooted in Inuit culture:*
  - The author holds that sentencing circles do not represent a traditional Inuit practice that is now being revived.
  - Instead, these alternatives are a process and form that has been introduced into First Nations and Inuit Aboriginal communities by the formal judiciary.
  - Traditional Inuit formal and informal social control mechanisms and dispute resolution tactics (grounded in non-interference and addressing the conflict in a way that would not create *more* conflic*t)* took place in a physical environment that is very different than the one that exists now.
  - These tactics and responses took place within very different social interactions, representing the hierarchies that existed in the community that guided their responses.
  - Further, traditional Inuit communities had very different social disorders to address than those present today.
  - As a result, the values underlying traditional Inuit culture would not be easily spotted or discovered in the alternative processes being proposed.
- *Assumption#2: Alternatives, such as sentencing circles, are community-based if the community is involved:*
  - Here, a distinction must be made between Inuit-based justice initiatives and community involvement in an alternative that is crafted by outsiders; a distinction that recognizes that community *participation* does not mean community *contro*l.
  - Crnkovich holds that this distinction is not adequately addressed and as a result these alternatives are touted as a form and process that the community has developed.
  - Instead, the community is simply involved in administering the goals and objectives of the larger formal system.
  - She states: "Real change reflective of the goals and aspirations of Inuit will come only when the community members define what the change will be and control that change".
- *Assumption#3: Inuit communities are homogenous and share interests:*
  - This assumption leads to
    - (1) a belief that there exists in Inuit communities shared values, traditions and beliefs,
    - (2) that every member has equal participation in the community and how it operates, and
    - (3) that the victim and the community are, in effect, one and the same.
  - These assumptions overlook power imbalances in the community and promote the myth that all participating will have equal access and opportunity within the circle.
  - Crnkovich dispels each of these assumptions, holding that complex relationships exist in Inuit communities.
  - Power dynamics and relationships within the community must be understood if circles are going to take place.
  - Who the accused is within the community, who the victim is within the community, and whether the community feels that it can freely participate are issues that need to be addressed, as they directly impact on the sanctions and sentences that a community may recommend.
  - If they are not examined that decision will often ignore the needs of the victim(s).
- *Assumption#4: Sentencing circles as an alternative to the formal system:*

- The author holds that it must be understood that the sentencing circle is an alternative to the sentencing hearing only.
- In many respects it relies on the existing system to operate and as a result it is questionable to what extent the initiatives represent an alternative processes.

- *Critical decisions and the abuse of power:*
  - The author holds that the operation of sentencing circles demands that a number of critical decisions be made;
    - decisions about which case, if any, goes to the circle,
    - what the factors are for this determination,
    - how the circle is conducted,
    - who participates,
    - the role of the accused and
    - the role and level of participation of the victim(s).
  - Care must be taken to ensure that the power to make these critical decisions are not transferred to the community in a way that results in an abuse of that power (i.e. by allowing a select few or an individual to make them at the expense of the community).
- ***Conclusions***
  - *Exclusion of domestic violence and sexual assault*:
    - Sentencing circles, as they have operated, are completely ineffective for Inuit women victims of violence.
    - The limitations of alternatives (i.e. how they may operate to further victimize the victims of violence and sexual assault and how they may not ensure that the offender is held accountable) suggest to the author that these cases should not be dealt with by the (alternative) sentencing circle.
    - The result of not being adequately protected by the circle, an often used alternative, will mean that even *fewer* women will be reporting the violence they are subjected to.
    - A greater awareness of domestic violence, a recognition of the power dynamics within the community so that the victim can fully participate, and adequate support for the victim are pre-requisites to having community-level alternatives address these types of cases.
  - *Vital role of an infrastructure to support community-level alternatives:*
    - Safeguards and infrastructural supports must be a part of alternatives to protect the needs and interests of the victim:
    - "Alternatives are not welcome in communities if the necessary infrastructure, support services, and resources needed for these alternatives to operate are not also provided" (Pauktuutit).
      - Such things needed include
        - public legal education on alternatives (its goals, objectives, form and process),
        - paid administration to operate the alternative approach,
        - support and advocacy workers for women and children who are victims of violence,
        - male batterer counseling programs,
        - social worker and addiction counselor
      - Without these services and supports, the credibility and accessibility of any alternative is called into question.
  - *Problematic nature of relying on volunteer*s:
    - The author holds that alternatives must not rely upon volunteers for a number of reasons.
      - Depending upon volunteers makes the alternative vulnerable and its future always unreliable.

    - If (only) volunteers are relied upon, there will be a high level of variance between levels of service between communities in the North.
    - This is unacceptable and as a result, the community should have paid community service workers.
- *A coordinated and comprehensive approach is necessary:*
    - Making change at the level of criminal justice system is certainly an important area that requires attention: making the justice system more responsive to the needs of the community is one part of a coordinated approach.
    - However, it is not, on its own, a panacea to the problems that Inuit communities experience vis-à-vis justice.
- *The community needs to be defined:*
    - The term "community" needs to be defined by the community members in a way that neither excludes relevant parties within the community nor those individuals and organizations that, although not physically located within the community, can provide support.
- *Community-based needs to be understood and defined:*
    - The difference between community involvement in a process that was developed and designed outside of the community must be distinguished from the development of Inuit-based justice initiatives and models that represent that particular communities' goals and objectives.
- *Establishment of guidelines for (alternative) sentencing circle:*
    - Guidelines about how circles will operate as well as by whom must be established.
    - Questions about
        - case selection (which cases will or will not be addressed in a circle and how will that decision be made?),
        - protections from abuses of power (how will it be ensured that the power to make these decisions is not being abused?), require serious attention and
        - standards must be developed.
    - While this may appear rigid, it in fact is not, since it is the community that establishes the guidelines.
- *Power relationships and dynamic*s:
    - The intricate links and networks that give rise to power dynamics in Inuit communities must not be allowed to play out in alternative justice initiatives.
        - The author suggests that this problem may be adequately addressed by establishing an effective selection process, one that incorporates the power dynamics when determining who will participate in the initiative.

5.40. Altering Course: New Directions in Criminal Justice: Sentencing Circles/Family Group Conferences - 1995[143]

- This paper explores two new approaches in criminal justice which have important implications for indigenous and aboriginal communities, sentencing circles in Canada and family group conferences in Australia.

- Processes and principles involved in sentencing circles and family group conferences are described, and the effectiveness of each restorative justice approach is assessed and compared.

[143] LaPrairie, C. (1995). "Altering Course: New Directions in Criminal Justice: Sentencing Circles and Family Group Conferences." *Australian and New Zealand Journal of Criminology* (special issue): 78-99.

- The author concludes that sentencing circles and family group conferences will have to prove themselves before declaring success in redressing concerns with the mainstream criminal justice system upon which restorative justice is based.

5.41. Circle Sentencing / Alternative Sentencing - 1995 [144]

5.42. Report on the Effectiveness of Circle Sentencing - 1994[145]

5.43. The Seeds of a Community Healing Process-1995[146] [147]

Appendix 3

The Sentencing Circle

Background ...[T]he seeds of the Sentencing Circle concept have been within C.H.C.H. since the mid-1970's. It was at that time that a few individuals within our community began to look at traditional teachings and practices as a way of beginning personal healing journeys...
In 1984, these personal healing journeys became the seeds of a community healing process ... By then, most of us had come to occupy various social program positions in the community and we talked about how we could better meet the needs of the individuals and families with whom we were involved as service providers...
By 1989 ...[we] had come to the realization that sexual victimization seemed to be at the core of unhealthiness of most individuals and families in our caseloads... [W]e began to look for, develop, and then implement, a community healing process that would address sexual victimization. This eventually became known as Community Holistic Circle Healing (C.H.C.H.).
C.H.C.H. is our attempt to take responsibility for what is happening to us. Through the power of the circle we work to restore balance and make our community a safe place for future generations. C.H.C.H. stems from our beliefs: (1) that victimizers are created, not born; (2) that the vicious cycle of abuse in our community must be broken now; and (3) that, given a safe place, healing is possible and will happen.
C.H.C.H. utilizes the principles that were traditionally used to deal with matters such as victimization. The traditional way was for the community:

(1) to bring it out into the open;
(2) to protect the victim so as to minimally disrupt the family and community functioning;
(3) to hold the victimizer accountable for his or her behavior; and
(4) to offer the opportunity for balance to be restored to all parties of the victimization ...

Rationale

In our conjunctive relationship with the legal system we see our role as one of representing our community. We do not see ourselves as "being on the side of" the Crown or the Defense. The people they represent are both members of our community, and the pain of both is felt in our community.

Until now our efforts have focused on: (1) attempting to help both crown and defense see the issues in the court case as the community sees them, and asking for their support, therefore, in representing the community's interest, and (2) providing the court with a pre-sentence report which outlines the situation as we see it, informs the court of the work we are doing with the victimizer, and offers recommendations ion how we see best proceeding with the restoration of balance around the victimization.

Now, however, we believe it is time to expand the community's involvement in this process. We believe that it is time for the curt to hear directly from the community at the time of the sentencing. Up until now the

[144] Barnett, Cunliffe "Circle Sentencing / Alternative Sentencing" 1995 *Canadian Native Law Reporter* Vol. 3 page 1 to 7. Native Law Centre. University of Saskatchewan. ISSN 0225-2279 University of Saskatchewan, Books, articles and cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html
[145] Report on the Effectiveness of Circle Sentencing by Sam Stevens. Yellowknife, N.W.T. (HV 9279 S748 1994)

[147] The following is an excerpt from Appendix 3 of the Interim Report of the Hollow Water First Nations Community Holistic Circle Healing (C.H.C.H.) which describes the activities of C.H.C.H. for the period of April 1, 1993 to February 9, 1994. [This except was published in Justice as Healing: a newsletter of Aboriginal concepts of justice. Winter 1995.]

sentencing hearing as been the point at which all of the parties of the legal system (crown, defense, judge) and the community have come together. Major differences of opinion as to how to proceed have often existed. As we see it, the legal system usually arrives with an agenda of punishment and deterrence of the "guilty" victimizer, and safety and protection of the victim and community; the community on the other hand, arrives with an agenda of accountability of the victimizer to the community, and restoration of balance to all parties of the victimization.

As we see it, the differences of the agendas are seriously deterring the healing process of the community. We believe that the restoration of balance is more likely to occur if sentencing itself is more consistent in process and in content with the healing work of the community. Sentencing needs to become more of a step in the healing process, rather than a diversion from it. The sentencing circle promotes the above rationale.

Purpose

AS we see it, the sentencing circle plays two primary purposes (1) it promotes the community healing process by providing a forum for the community to address the parties of the victimization at the time of sentencing, and (2) it allows the court to hear directly from the people most affected by the pain of the victimization. In the past the Crown and defense, as well as ourselves, have attempted to portray this information. We believe that it is now time for the court to hear from the victim, the family of the victim, the victimizer, the family of the victimizer, and the community-at-large.

Participants

As we see it, the following need to be include, if at all possible, in the sentencing circle:

A. the victim
B. those support people working wit the victim, including his or her individual worker, group workers, psychologist, as well as members of his or her support group. If the victim is not able to attend, we see the individual worker taking the role of victim representative
C. the family of the victim
D. the victimizer (offender)
E. those support people working with the victimizer, including his or her individual worker, group workers, psychologist, as well as members of his or her support group.
F. the family of the victimizer
G. community this would include members of C.H.C.H. as well as whoever else from the community wishes to participate.
H. court party this would include judge, crown,. defense, and I. R.C.M.P. this would hopefully include the members responsible for the investigation as well as for policing our community.

Preparation for the Sentencing Circle

Advance preparation will include:

1. tobacco being offered to the presiding judge
2. the preparation of the pre-sentence report by the C.H.C.H. team and distribution to crown, defense and judge
3. meeting of the C.H.C.H. team with chief, mayors, and councils to develop and implement a process for ensuring community participation
4. circles with victim, victimizer, and family/ies the day before the sentencing circle, and
5. the sweat lodge being available to any interested circle participants the evening before the sentencing circle

In the morning of the day of the sentencing circle, preparations will include:

1. a pipe ceremony
2. the hanging of the flags
3. the smudging of the court building
4. the placement of the community drum and eagle staff in the courtroom
5. serving of breakfast to participants from outside of the community, and
6. offering of tobacco for a prayer to guide the sentencing circle.

The Structure

The courtroom will be set up in such a way that seating will consist of two circles an inner one and an outer one. The inner circle will be for those participants who wish to speak. The outer circle will be for the participants who wish to just observe and listen. It is hoped that most participants will choose the inner circle.

Sentencing Circle process

The process of the sentencing circle will be as follows:

A. personal smudges
B. opening prayer
C. court technicalities, e.g. confirmation of pleas
D. outline of "ground rules" that will govern the sentencing circle by presiding judge
E. first go around; why did I come today? why am I here?
F. second go around; participants speak to the victim
G. third go around; participants speak to the victimizer (offender) about how the victimization has affected self, family, community
H. fourth go around; participants outline expectations to victimizer, and/or state opinion as to what needs to be done in order to restore balance
I. judge gives decision re: sentencing
J. closing prayer

Following the judge's decision and the closing prayer, participants will be invited to stay and use the circle for sharing/debriefing purposes.

Seating/speaking order of inner circle

The judge will occupy the seat at the northern point of the circle. On the judge's immediate left will be two C.H.C.H. members who will play the role of process facilitators. To their left will set the victimizer, followed by his or her individual worker, then four members of the C.H.C.H. team, then the victim, followed by his or her support worker, then all other participants of the circle. Seated on the judge's immediate right will be the crown and defense lawyers. The first person to speak in the circle will be the person on the immediate left of the judge. Speaking will follow a clockwise direction and will end with the presiding judge.

The rules that govern the circle

The following shall govern participants' conduct in the circle:

A. only one person may speak at a time;
B. the Laws of the Creator shall govern the person speaking. Those laws are honesty, kindness, sharing and respect;
C. a person may only speak in turn. There are to be no interruptions while a person is speaking;
D. if desired, a person may pass when it is his/her turn to speak;
and E. all other participants should be attentive to the person speaking.

Conclusions

A. Use of the sentencing circle promotes sentencing as a step in the healing process.
B. Because those most affected by the victimization are involved and have input into the decision, the healing processes of individuals, family and community are enhanced.
C. The victimizer is both held accountable and supported by those most affected by the victimization.
D. Inclusion of the formal court party affirms the conjunctive relationship between the community and legal system, as established through the protocol with the Attorney General's Department and supported by the Federal Justice Department.

5.44. Trial by Healing Circle - 1994 [148]

5.45. Sentencing Circles Permit Community Healing -1994 [149]

- This paper presents a strong argument for Justice interventions such as sentencing circles which can both assist community healing (something rarely achieved under conventional sentencing practices) and restore a sense of ownership (and 'tradition') to Aboriginal peoples.

- Arnot holds that sentencing circles have fostered a revitalization and self-worth in the individuals who came before the circles and "revitalized a collective pride in Cree communities in the area".

5.46. A Need for Change: Cross-Cultural Sensitization of Lawyers -1994 [150]

- The article is about systemic discrimination in the Canadian criminal system but he touches briefly upon sentencing circles.

5.47. On being a northern judge - 1994. [151]

5.48. Sentencing Circles and the Search for Aboriginal Justice - 1994 [152]

5.49. Changing directions in criminal justice - 1994 [153]

- In this paper LaPrairie discusses new initiatives in popular or restorative justice based on the premise that the conventional criminal justice systems ignore the social context of offences and marginalize the offender, the victim, and the community, whereas restorative justice emphasizes social rather than legal goals and empowers communities and individuals in dealing with problems and influencing the direction of the criminal justice system. She discusses the theory behind the restorative justice movement (e.g. communitarianism, community, restorative, or transformative justice). She goes on to compare family group conferencing and sentencing circles, two of the principal restorative justice interventions and common in Australia / New Zealand and Canada (primarily the Yukon and Saskatchewan) respectively. She compares the two in terms of theory, definitions and objectives, process and principles, and effectiveness. In general, while both share a large common 'domain of sentiments', sentencing circles are judged to be more Aboriginal-focused (though family conferencing advocates usually link their approach to Aboriginal traditions as well), more focused on the offender than the event, more oriented to adult offenders, less clearly formulated in theory and in operational guidelines, and more open to abuse and misunderstanding. For example, in her view, the sentencing circle intervention is often accompanied by unexamined postulates (e.g. cultural consensus) and underestimates power imbalances in the community. LaPrairie appreciates the arguments for flexibility and "the greater good" of political imperatives but argues that critical analyses and assessments should be encouraged.

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[148] Canadian Lawyer, March 1994, page 7,University of Saskatchewan, Books, articles and cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[149] Arnot, David. "Sentencing Circles Permit Community Healing". National: The Canadian Bar Association Magazine, 14, 1994 Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[150] Clalifoux, Troy. "A Need for Change: Cross-Cultural Sensitization of Lawyers" (1994) Volume 32 Alberta Law Review (No. 4) at page 762. University of Saskatchewan, Books, articles and cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[151] Fafard, C. "On being a northern judge" in Continuing Poundmaker and Riel's Quest Eds.Richard Gosse et al. Saskatoon: Purich Publishing 1994. University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[152] Donlevy, Bonnie. Sentencing Circles and the Search for Aboriginal Justice. Indian & Aboriginal Law, University of Saskatchewan, 1994Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[153] LaPrairie, Carol *Changing directions in criminal justice.* Ottawa: Department of Justice, 1994. See http://www.sgc.gc.ca/epub/Abocor/e199805/e199805.htm University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

This paper provides a brief but valuable description of the processes and principles that characterize sentencing circles, clearly pointing to the considerable vagueness that exists on both fronts. LaPrairie lists the chief criticisms of commentators as the need for guidelines in setting up and operating circles, the potential for sentence disparity among similar criminal cases, the role of and impact on victims, the 'representativeness' of participants, how offences and offenders for circle sentencing are selected, the lack of procedural safeguards, the community impact, and the degree to which sentencing circles reflect Aboriginal traditions and value. As of the end of 1994 there have been approximately 300 circle sentencing experiences in the Yukon Territories, about 100 in Saskatchewan and a handful in Manitoba and British Columbia.

5.50. Sentencing Circles: A Discussion Paper– 1993 [154]

- This discussion paper addresses the use of sentencing circles in Saskatchewan, noting that there has been some such experience in the northern part of the province and that a major theme in Aboriginal justice has been making the sentencing process more relevant and appropriate for Aboriginal people.
    - The paper suggests that the idea of a sentencing circle might itself be seen as the imposition of a foreign idea on Aboriginal people, as suggested by some scholars and observers who contend that the traditional system emphasized non-interference and avoided confrontation and allocation of responsibility.
    - The paper notes that the idea of having a sentencing circle has, in practice, been deemed relevant only after a finding of guilt has been made, and has been advanced sometimes by judges and sometimes by others such as defence counsel.
    - Review of court experience to date indicates that the purpose of sentencing circles is to shift to sentencing principles other than retribution, and to involve the victim and the community.
    - Other factors affecting the issue of the appropriateness of utilizing sentencing circles include the seriousness of the offence (e.g. where the conventional sentence would be less than two years in prison), the willingness of offenders and the community to participate, the ability to involve the victim directly or through representations, and the attitude (i.e. contriteness) of the offender.
    - Clearly, each case would have to be decided on its merits and, as the authors note, one impact of this individualized approach may well be increasing disparity in sentencing, thereby raising the issue of equity.
- The paper raises issues such as who is responsible for investigating the potential for the Circle, for handling its arrangements (the authors think there should be an objective service provider here), how does one identify 'the community', who should attend and what should their role be, what is the process to be followed in the actual sentencing circle (e.g. sitting arrangements, judge presiding, introductions, prosecution and defence sentencing submissions), whether the judge's final decision is seen as informed by the discussions or as directed by the group consensus, what if any rules apply with respect to perjury, slander, etc.
    - Finally, the paper notes that for evaluation purposes, considerations include the resources required, and the impact on the victim, the community, and the offender. A prior consideration is agreement on the aims of sentencing circles.

5.51. Considerations for Achieving "Aboriginal Justice" in Canada - 1993[155]

Sentencing Circles – Some of the Criticisms

[154] Saskatchewan Justice. Sentencing Circles: A Discussion Paper. Regina: Policy, Planning and Evaluation, Department of Justice, Saskatchewan, 1993 *cited in* Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

[155] Ted S. Palys, School of Criminology, Simon Fraser University Considerations for Achieving "Aboriginal Justice" in Canada presented at the annual meetings of the Western Association of Sociology and Anthropology, held in Vancouver, British Columbia, in 1993. http://www.sfu.ca/~palys/wasa93.htm

- There are variants of the theme which involve some greater degree of participation by Native communities in the resolution of criminal actions committed by their members.

- In the Yukon Territory, it involves the use of what the presiding judges - who are non-Aboriginal, legally-trained judges of the Yukon Territorial Court - have called "Sentencing Circles".

    - First tried and written up at length in the decision of *Phillip Moses versus The Queen*[156], the use of the circle attempts to actively engage the members of the community, and particularly to solicit input from the community elders in the sentencing decision-making process, has met with some success, at least in terms of apparent acceptance by both the local aboriginal and criminal justice communities.

    - Indeed, when I last spoke with the judge who initiated the practice in Moses several weeks ago, he indicated that he had now employed "sentencing circles" in more than 200 cases, and that one of his two colleague judges had also commenced the practice.

    - The issues become a bit more complex for me in this instance.

        - On the one hand, I can only admire the judges' receptivity to community input and community involvement.

        - But on the other, I cannot help but note that "elder" is a term reserved for those who have gained authority by demonstrating their wisdom in some area of life, and that one impact of the presiding judge continuing to retain the role of final decision-maker, albeit after a process of community consultation, is that it serves at least in part to reaffirm the subservience of elders' views to those of the agent of the Crown.

        - My worry is thus that instead of helping to *regenerate* community structures, the implementation of "sentencing circles" may actually serve to further *undermine* them, by denying elders the opportunity to actually control that process.

        - Ultimately, that is indeed the crucial issue - what will the judge do when and if the community elders perceive him or her as an irrelevant element in the process?

        - My hope is that s/he would have both the wisdom and the courage to defer.

    - The true test of governmental amenability to the reality of aboriginal self-determination will come the day the elders in the Yukon ask to hold their own circle, probably without a "trial" in the Euro-Canadian sense, and indicate that the judge need not attend.

5.52. Community Holistic Circle Healing - 1993 [157]

[156] Stuart, Barry. (1992). Reasons for Sentencing, Regina versus Philip Moses. Yukon Territory: Territorial Court cited in Ted S. Palys, School of Criminology, Simon Fraser University Considerations for Achieving "Aboriginal Justice" in Canada presented at the annual meetings of the Western Association of Sociology and Anthropology, held in Vancouver, British Columbia, in 1993. http://www.sfu.ca/~palys/wasa93.htm

[157] Lajeunesse, T. Community Holistic Circle Healing Ministry of the Solicitor General, Ottawa, 1993. University of Saskatchewan, Books, Articles and Cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

5.53. A Risky Experiment: Lawyers Criticize Circle Sentencing - 1992 [158]

- This is an interesting, brief account of a court case where the presiding judge decided to utilize a circle sentencing format subsequent to a non-native, physically and mentally disabled teenager pleading guilty to 'assault with a weapon' against another non-native at school.
- The judge contended that the justice system too often had failed offenders and he did not want to incarcerate the youth so, despite the objections of the defence attorney, he was going to borrow from Aboriginal practice and use a sentencing circle. Circle sentencing procedures were followed and several Aboriginal persons experienced in the procedures were involved as advisors.
- While the sentence rendered was not controversial, both crown prosecutor and defence attorney were critical of the judge's initiative, arguing chiefly that procedural safeguards were lacking in that no record was kept of the circle discussions, no cross-examination was allowed, and the bases for opinions offered there were unexamined.

5.54. Sentencing Team, Crime and Public Policy Sector – 1992 [159] [160]

- Here it is noted that Bill C-90 articulates the principle that "all available alternatives to imprisonment that are reasonable in the circumstances should be considered, particularly in relation to Aboriginal offenders".

- In reporting on the last round of consultation for this document the authors note that "there was general support to find ways to involve Aboriginal communities in the sentencing process. There was concern that the current system has too many legal obstacles. It is important to bring criminal justice closer to Aboriginal communities".

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[158] Edwards, Bob. "A Risky Experiment: Lawyers Criticize Circle Sentencing", British Columbia Report, August 31, 1992 Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm
[159] Sentencing Team, Crime and Public Policy Sector, Justice Canada. Intermediate Sanctions. Ottawa: Department of Justice, 1992 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm
[160] University of Saskatchewan, Books, articles and cases about Sentencing Circles, http://www.usask.ca/nativelaw/jah_scircle.html

6. Relevant Documents, Studies and Practices – USA

6.1. Peacemaking Circle Process [161]

- Peacemaking circles provide a process for bringing people together as equals to talk about very difficult issues and painful experiences in an atmosphere of respect and concern for everyone. Peacemaking circles create a space in which all people, regardless of their role, can reach out to one another as equals and recognize their mutual interdependence in the struggle to live in a good way and to help one another through the difficult spots in life.

- Peacemaking circles are built on the tradition of talking circles, common among indigenous people of North America, in which a talking piece, passed from person to person consecutively around the circle, regulates the dialog. The person holding the talking piece has the undivided attention of everyone else in the circle and can speak without interruption. The use of the talking piece allows for full expression of emotions, deeper listening, thoughtful reflection, and an unrushed pace. Additionally, the talking piece creates space for people who find it difficult to speak in a group. Drawing on both traditional wisdom and contemporary knowledge, the circle process also incorporates elements of modern peacemaking and consensus building processes.

- Participants are seated in a circle of chairs with no tables. Sometimes objects with meaning to the group are placed in the center as a focal point to remind participants of shared values and common ground. The physical format of the circle symbolizes shared leadership, equality, connection and inclusion. It also promotes focus, accountability and participation from all.

- Circles are facilitated by keepers who are responsible for setting a tone of respect and hope that supports and honors every participant. All circles are guided by the following commitments participants make to one another:

    - What comes out in circle, stays in circle – personal information shared in circle is kept confidential except when safety would be compromised.

    - Speak with respect – speak only when you have the talking piece; speak in a good way about good and difficult feelings; leave time for others to speak.

    - Listen with respect – actively listen with your heart and body.

    - Stay in circle – respect for circle calls upon people to stay in the circle while the circle works to find resolution to issues raised.

Additional guidelines may be created by circle participants to meet the needs of that situation. Guidelines institute a covenant defining how people will interact and share space and time as a group.

Circles consciously engage all aspects of human experience - spiritual, emotional, physical and mental. Ceremony and ritual are used in the opening and closing of a circle to mark the space of circle as a sacred space in which participants will be present with one another in a different way than in an ordinary meeting.

While the design, procedures and participants vary greatly from one circle to another, there are some fundamental principles common to all circles.

Practices and principles common to all circles:

Participants

[161] Minnesota Department of Corrections, Peacemaking Circle Process
http://www.corr.state.mn.us/organization/commjuv/restorativejustice/rjpeacemakingcircleprocess.htm

1) Act on personal values
2) Direct participation
3) Voluntary involvement
4) Respect for all and all things
5) Self design
6) Equal opportunity to participate
7) Shared vision

Process
1) Inclusive of all interests
2) Easily accessible to all
3) Flexible to accommodate each case
4) Holistic approach
5) Spiritual experiences respected
6) Consensus outcomes
7) Accountability to others and to process

In the circle process social institutions play important roles, but the process is centered on the community context of the situation. The circle throws a wide net to capture possible points of support or assistance and to gather all relevant knowledge. Potential contributions are expected even from those who are part of the problem. Multiple issues are dealt with at once. Circles recognize that the issues interact with one another and cannot be effectively dealt with in isolation. Circles promote mutual responsibility, the recognition that individual well being depends upon the well being of all.

6.2. National Institute of Justice[162]

Sentencing Circles
A sentencing circle is a community-directed process, conducted in partnership with the criminal justice system, to develop consensus on an appropriate sentencing plan that addresses the concerns of all interested parties. Sentencing circles — sometimes called peacemaking circles — use traditional circle ritual and structure to involve the victim, victim supporters, the offender, offender supporters, judge and court personnel, prosecutor, defense counsel, police, and all interested community members. Within the circle, people can speak from the heart in a shared search for understanding of the event, and together identify the steps necessary to assist in healing all affected parties and prevent future crimes.
Sentencing circles typically involve a multi-step procedure that includes: (1) application by the offender to participate in the circle process; (2) a healing circle for the victim; (3) a healing circle for the offender; (4) a sentencing circle to develop consensus on the elements of a sentencing plan; and (5) follow-up circles to monitor the progress of the offender. The sentencing plan may incorporate commitments by the system, community, and family members, as well as by the offender. Sentencing circles are used for adult and juvenile offenders with a variety of offenses and have been used in both rural and urban settings. Specifics of the circle process vary from community to community and are designed locally to fit community needs and culture. Sentencing circles have been developed most extensively in Saskatchewan, Manitoba, and the Yukon and have been used occasionally in several other communities. Their use spread to the United States in 1996 when a pilot project was initiated in Minnesota.
Goals
Promote healing for all affected parties. Provide an opportunity for the offender to make amends. Empower victims, community members, families, and offenders by giving them a voice and a shared responsibility in finding constructive resolutions. Address the underlying causes of criminal behavior. Build a sense of community and its capacity for resolving conflict. Promote and share community values
Implementation
A successful sentencing circle process depends upon a healthy partnership between the formal justice system and the community. Participants from both need training and skill building in the circle process, peacemaking, and consensus building. The community can subsequently customize the circle process to fit local resources and culture. It is critically important that the community's planning process allows sufficient time for strong

[162] http://www.ojp.usdoj.gov/nij/rest-just/CH5/3_sntcir.htm

relationships among justice professionals and community members to develop. Implementation procedures must be highly flexible, because the circle process will evolve over time based on the community's knowledge and experience.
In many communities, direction and leadership are provided by a community justice committee that decides which cases to accept, develops support groups for the victim and offender, and helps to conduct circles. In most communities, circles are facilitated by a trained community member, who is often called a "keeper."
Sentencing circles are not appropriate for all offenders. The connection of the offender to the community, the sincerity and nature of the offender's efforts to be healed, the input of victims, and the dedication of the offender's support group are key factors in determining whether a case is appropriate for the circle process.
Because communities vary in health and in their capacity to deal constructively with conflict, representatives of the formal justice system must participate in circles to ensure fair treatment of both victims and offenders.
The capacity of the circle to advance solutions capable of improving the lives of participants and the overall well-being of the community depends upon the effectiveness of the participating volunteers. To ensure a cadre of capable volunteers, the program should support a paid community-based volunteer coordinator to supply logistical support, establish linkages with other agencies and community representatives, and provide appropriate training for all staff.

For More Information

For a more complete discussion of sentencing circles, see *Building Community Justice Partnerships: Community Peacemaking Circles*, by Barry Stuart

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6.3. Minnesota State Supreme Court Upholds Use of Sentencing Circles - 2002 [163]

A January 2002 Minnesota Supreme Court decision reinforced the purpose and decision-making authority of sentencing-circles. The case questioned whether a circle could include a stay of adjudication as a part of sentencing recommendations.

The case in question involved two felony theft counts, one count of wrongfully obtaining public assistance and one count of wrongfully obtaining food stamps. In a plea agreement, the State and the offender, Singe Pearson, agreed that the case would go to a sentencing circle and return to court for sentencing. The circle recommendations included:

- stay of adjudication;
- restitution;
- credit counseling;
- community service;
- attendance in follow-up circles; and
- appearance in court for sentencing.

The purpose behind the stay of adjudication was to avoid a felony record for the offender. The circle felt that since the offender was not a risk to public safety, this path would least impact her future employment.
Although the state objected to the stay of adjudication, the district court accepted the recommendations.
In the court of Appeals, the court sided with the State ruling that a "restorative justice program does not have the authority to assign a sanction that would be improper if imposed by the district court." The ruling was founded on the criteria set out for a court to stay adjudication.
In overturning the appeals court, the Minnesota State Supreme Court held that restorative justice programs are given the authority to assign appropriate sanctions. This included a stay of adjudication when both sides agree beforehand as in a plea agreement. When the two sides agreed to the sentencing circle, there were no limits placed on the possible sentence recommendations. The court stated
"The work of a circle is often arduous, emotional and time-consuming. Necessarily, then, any limitation on the agreement to send a case to a restorative justice program, if allowable at all, must be made up front, before the laborious process of reconciliation and resolution takes place. To allow an after-the-fact objection to the authority of the sentencing circle would eviscerate the purposes of the restorative justice program."
See the decision.

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[163] Parker, Lynette. 2002. "Minnesota State Supreme Court Upholds Use of Sentencing Circles." Restorative Justice Online. February 2002 Edition.
http://www.restorativejustice.org/rj3/Feature/Feb02/mnstatesupremecourtup.htm

6.4. A Comparison of Four Restorative Conferencing Models - 2001[164]

Circle sentencing. Proponents of circle sentencing are concerned with protecting victims, providing them with support, and hearing their stories. Circle organizers avoid an unbalanced focus on offenders' issues, which may cause victims to withdraw or react by challenging offenders (Stuart, 1996). Victims' telling of their stories is viewed as important not only for victims, offenders, and their supporters, but also for the community as a whole. If a victim is unwilling to participate in a circle, the organizer may encourage a friend or relative to speak on the victim's behalf; however, organizers emphasize the value of community residents hearing victims' stories firsthand whenever possible (Stuart, 1996).

Because the circle sentencing process is so open and community driven, a potential concern is that the importance given to victims' needs may vary widely. The seriousness of offenders' needs may slant the focus of some circles toward offender rehabilitation, service, and support and away from victims' needs, as also appears to occur in some family group conferences (Maxwell and Morris, 1993; Umbreit and Stacey, 1996). In addition, because the circle sentencing model requires extensive preparation on the offender's part before the circle convenes (see discussion in the following section), some circles become "stacked" with offender supporters who have little relationship to victims.

Initially unique to the circle sentencing model of conferencing is the concept of victim support groups (Stuart, 1996). Support groups are formed by community justice committees, which are responsible for achieving an appropriate balance among victim, offender, and community needs and representation. Usually a support group is formed at the time an offender petitions for admission to the circle, but the group may expand at any time (including during the circle ceremony itself).

Circle sentencing. Perhaps because its community empowerment and healing goals are most ambitious, the circle sentencing model demands the most extensive pre-session preparation. As a condition of admission to a circle, offenders are required to petition the community justice committee, visit an elder or other respected community member for a conference, begin work on a reparative plan that may involve some restitution to the victim and community service, and identify a community support group (Stuart, 1996). This pre-session process serves as a screening device and an indicator that offenders are serious about personal change. It is not uncommon for circles to be canceled or postponed if offenders fail to complete the preliminary steps (Stuart, 1996). When the screening process works well and offenders meet the pre-session obligations, however, a circle can actually be less a hearing about disposition requirements than a celebration of the offender's progress and an opportunity for victim and offender to tell their stories.

Follow-up should be as intensive as preparation in the circle sentencing model. Circle participants are expected to take responsibility for monitoring and enforcing the conditions of the circle sentence, which often include an extensive list of reparative responsibilities, treatment requirements, and (in aboriginal communities) traditional healing and community-building rituals. Support groups for offenders and victims, which are formed through community justice committees, also monitor offenders and act as victim advocates to ensure that agreements made within the circle are carried out. Sentencing circle agreements are subject to review by a judge, who asks for routine reports from the justice committee and support groups. At the conclusion of a circle, the judge may assign further monitoring responsibilities to members of the community and may withhold a final decision about detention terms or other sanctions pending the offender's completion of obligations as verified at a followup hearing.

Background and Concept

Circle sentencing is an updated version of the traditional sanctioning and healing practices of aboriginal peoples in Canada and American Indians in the United States (Stuart, 1995; Melton, 1995). Sentencing circles—sometimes called peacemaking circles—were resurrected in 1991 by judges and community justice committees

[164] Gordon Bazemore and Mark Umbreit **"**A Comparison of Four Restorative Conferencing Models" in Juvenile Justice Bulletin February 2001 http://www.ncjrs.org/html/ojjdp/2001_2_1/contents.html

in the Yukon Territory and other northern Canadian communities. Circle sentencing has been developed most extensively in Saskatchewan, Manitoba, and the Yukon and has been used occasionally in several other communities. Its use spread to the United States in 1996, when a pilot project was initiated in Minnesota. Circle sentencing has been used for adult and juvenile offenders, for a variety of offenses, and in both rural and urban settings.

Circle sentencing is a holistic reintegrative strategy designed not only to address the criminal and delinquent behavior of offenders but also to consider the needs of victims, families, and communities. Within the "circle," crime victims, offenders, family and friends of both, justice and social service personnel, and interested community residents speak from the heart in a shared search for an understanding of the event. Together they identify the steps necessary to assist in healing all affected parties and prevent future crimes. The significance of the circle is more than symbolic: all circle members—police officers, lawyers, judges, victims, offenders, and community residents—participate in deliberations to arrive at a consensus for a sentencing plan that addresses the concerns of all interested parties.

Procedures and Goals

Circle sentencing typically involves a multi-step procedure that includes (1) application by the offender to participate in the circle process, (2) a healing circle for the victim, (3) a healing circle for the offender, (4) a sentencing circle to develop consensus on the elements of a sentencing plan, and (5) follow-up circles to monitor the progress of the offender. In addition to commitments by the offender, the sentencing plan may incorporate commitments by the justice system, community, and family members. Specifics of the circle process vary from community to community and are designed locally to fit community needs and culture.

Goals of circle sentencing include the following:

- Promoting healing for all affected parties.
- Providing an opportunity for the offender to make amends.
- Empowering victims, community members, families, and offenders by giving them a voice and a shared responsibility in finding constructive resolutions.
- Addressing the underlying causes of criminal behavior.
- Building a sense of community and its capacity for resolving conflict.
- Promoting and sharing community values.

Considerations in Implementation

The success of the circle sentencing process depends to a large extent on a healthy partnership between the formal juvenile justice system and the community. Participants from both need training and skill building in the circle process and in peacemaking and consensus building. It is critically important that the community's planning process allow sufficient time for strong relationships to develop between justice professionals and community members. Implementation procedures should be highly flexible, because the circle process will evolve over time based on the community's knowledge and experience. As it gains experience, the community can customize the circle process to fit local resources and culture.

In many communities that have implemented the circle sentencing concept, direction and leadership have come from a community justice committee that decides which cases to accept, develops support groups for the victim and offender, and helps to conduct the circles. In most communities, circles are facilitated by a trained community member, who is often called a keeper.

An Example of a Circle Sentencing Session

The victim was a middle-aged man whose parked car had been badly damaged when the offender, a 16-year-old, crashed into it while joyriding in another vehicle. The offender had also damaged a police vehicle.

In the circle, the victim talked about the emotional shock of seeing what had happened to his car and his costs to repair it (he was uninsured). Then, an elder leader of the First Nations community where the circle sentencing session was being held (and an uncle of the offender) expressed his disappointment and anger with the boy. The elder observed that this incident, along with several prior offenses by the boy, had brought shame to his family. The elder also noted that in the old days, the boy would have been required to pay the victim's family substantial compensation as a result of such behavior. After the elder finished, a feather (the "talking piece") was passed to the next person in the circle, a young man who spoke about the contributions the offender had made to the community, the kindness he had shown toward elders, and his willingness to help others with home repairs.

Having heard all this, the judge asked the Crown Council (Canadian prosecutor) and the public defender, who were also sitting in the circle, to make statements and then asked if anyone else in the circle wanted to speak. The Royal Canadian Mounted Police officer, whose vehicle had also been damaged, then took the feather and spoke on the offender's behalf. The officer proposed to the judge that in lieu of statutorily required jail time for the offense, the offender be allowed to meet with him on a regular basis for counseling and community service. After asking the victim and the prosecutor if either had any objections, the judge accepted this proposal. The judge also ordered restitution to the victim and asked the young adult who had spoken on the offender's behalf to serve as a mentor for the offender.

After a prayer in which the entire group held hands, the circle disbanded and everyone retreated to the kitchen area of the community center for refreshments.

Although circles have been used as a response to serious and violent crimes, circle sentencing is not an appropriate response to all offenses. Key factors in determining whether a case is appropriate for the circle process include the offender's character and personality, sincerity, and connection to the community; the victim's input; and the dedication of the offender's and victim's support groups. Moreover, circles are often labor intensive and require a substantial investment of citizen time and effort; circles should not, therefore, be used extensively as a response to first offenders and minor crime.

The capacity of the circle to advance solutions capable of improving the lives of participants and the overall well-being of the community depends on the effectiveness of the participating volunteers. To ensure a cadre of capable volunteers, the program should support a paid community-based volunteer coordinator to supply logistical support, establish linkages with other agencies and community representatives, and provide appropriate training for all staff.

Lessons Learned

Very little research has been conducted to date on the effectiveness of circle sentencing. One study conducted by Judge Barry Stuart in Canada in 1996 indicated that recidivism was less likely among offenders who had participated in circles than among offenders who were processed traditionally (Stuart, 1996). Those who have been involved with circles report that circles empower participants to resolve conflict in a manner that promotes sharing of responsibility for outcomes, generates constructive relationships, enhances respect and under-standing among all involved, and fosters enduring, innovative solutions.

For More Information

For more information on circle sentencing, see *Building Community Justice Partnerships: Community Peacemaking Circles,* by Barry Stuart.

6.5. Circles – "A way to be." – 2001 [165]

- Chandler-Rhivers sees peacemaking circles as a unique way to involve the community in crime prevention and community-building.
- A circle process in which a group of women discuss issues of respect is narrated as an example.
- The author notes that such processes can also be used for "circle sentencing" in criminal justice settings, and that circle sentencing projects are being developed in various places in Minnesota.
- Core values of peacemaking circles are identified by Chandler-Rhivers in the article.

6.6. A circle reflection - 2001 [166]

- McCreight writes out of her own experience of participating in almost 150 restorative justice circles in two rural Minnesota communities.
- A proponent of such circles, she describes the kinds of participants in circles, the overall purpose, and key values that shape and guide circle processes.
- At the same time, she recognizes challenges for restorative justice circles, and so she enumerates a number of questions to consider for effective use of circles in communities.

6.7. Primary restorative justice practices - 2001 [167]

- According to McCold, restorative justice processes should involve victims and offenders in face-to-face meetings where the victim and the offender, along with their respective "communities of care," determine how to deal with the offense. He contends, moreover, that currently only three processes or practices fully meet these requirements: mediation; conferencing; and circles.
- In support of his perspective, McCold describes these practices and presents key examples.
- With respect to mediation, he reviews community mediation, victim offender reconciliation programs, and victim offender mediation.
- The discussion of conferencing includes youth justice family group conferencing and community conferencing.
- His examination of circles covers Navajo justice, sentencing circles, and healing circles.

6.8. Circle sentencing: A victim centered process - 2001 [168]

- Phillips outlines the traditional criminal justice response to crime:
    - the crime is against the state, not the victim;

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[165] Chandler-Rhivers, Gwen. 2001. Circles – "A way to be." *Hearts & Hands: Minnesota's Restorative Justice Newsletter* Winter/Spring: 2-3. http://www.doc.state.mn.us/organization/commjuv/restorativejustice.htm

[166] McCreight, Nancy Miller. 2001. A circle reflection. Hearts & Hands: Minnesota's Restorative Justice Newsletter Winter/Spring: 4.

[167] McCold, Paul. 2001. Primary restorative justice practices. In *Restorative justice for juveniles: Conferencing, mediation and circles*, ed. Allison Morris and Gabrielle Maxwell, 41-58. With a foreword by DJ Carruthers. Oxford: Hart Publishing.

[168] Phillips, Charles. 2001. Circle sentencing: A victim centered process. *Crime Victims Report* 5 (March/April): 1-2, 6.

- victim and offender are kept separate;
- to a large extent the victim's needs and interests are ignored;
- if the accused is found guilty, prison is often the sanction.

- According to Phillips, restorative justice seeks an alternative in victim-centered justice.
- Circle sentencing is a restorative justice practice involving those affected by crime: victims; offenders; and community members.
- Phillips describes key elements of circle sentencing in Travis County (Austin), Texas: participants; eligibility and referring agencies; screening panel; screening process; and the circle-sentencing process itself.

6.9. Going around in circles - 2001[169]

- In her article introducing this newsletter issue, Pranis states that peacemaking circles bring together the ancient wisdom of community and the contemporary value of respect for the individual.
- Such circles are being used in Minnesota in a number of contexts:
  - support for victims;
  - assistance to help offenders with behavioral change;
  - sentencing of offenders; aid for families in crisis; and conflict resolution in schools and workplaces.
- Pranis surveys some of the values and processes of peacemaking circles.

6.10. Restorative justice for juveniles: Conferencing, mediation and circles- 2001 [170]

- In this book the editors, Allison Morris and Gabrielle Maxwell, have collected studies of a variety of ideas and practices related to restorative justice for juveniles.
- Beginning with more theoretical perspectives on restorative justice, the book moves into chapters on restorative practices in a number of settings, before turning to chapters on critical issues stemming from those practices.
- Specifically:
  - the chapters in Part 1 set the scene by introducing restorative justice and by comparing restoration and punishment;
  - those in Part 2 cover conferencing, mediation, and circles as conducted in different countries around the world; and
  - those in Part 3 deal with such issues as the restorative needs of victims, police involvement in restorative practices, the relevance of restorative justice to aboriginal people, and the impact of restorative justice practices on reoffending.

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[169] Pranis, Kay. 2001. Going around in circles. *Hearts & Hands: Minnesota's Restorative Justice Newsletter* Winter/Spring: 1. http://www.doc.state.mn.us/organization/commjuv/restorativejustice.htm

[170] Morris, Allison, and Gabrielle Maxwell, eds. 2001. *Restorative justice for juveniles: Conferencing, mediation and circles.* With a foreword by DJ Carruthers. Oxford: Hart Publishing.

- Part 4 consists of a chapter by the editors in which they review key ideas and findings among the many chapters; their purpose is to identify ways to determine how restorative various practices are.

- Contributors to the book include leading theorists and researchers in restorative justice.

6.11. Introducing restorative justice -2001[171]

- As an introduction to the themes of this book, the authors of the first chapter provide an overview of restorative justice by surveying its key principles and processes as identified by a number of restorative justice theorists and practitioners.

- Their overview includes the following topics: a discussion of restorative justice as a new paradigm or new way of approaching crime and response to crime; a sketch of the history of restorative justice; a definition of restorative justice; synopses of three hallmark programs (victim offender mediation; conferencing; and circles); and a review of worldwide developments related to restorative justice (including developments in and through the United Nations – an appendix to the chapter presents the United Nations' preliminary draft elements of a declaration of basic principles on restorative justice).

6.12. Overview of mediation, conferencing, and circles – 2000 [172]

Aboriginal Peace Circles
I think that when I describe what we call peacemaking in English, I am describing the traditional justice of many aboriginal groups of people. I have been to the South Pacific, Norway and across the U.S. and Canada to talk with aboriginal leaders. Others of the Navajo Nation court system have visited Australia, New Zealand, Bolivia, and South Africa to do the same. Often, when we describe peacemaking, other aboriginal leaders nod their heads with approval and tell us that it is the same as their traditional justice methods. (Yazzie 1998:129)

The recent re-emergence of tribal sovereignty on North American reservations has spawned a series of circle models of restorative practice (Dickson-Gilmore 1992). The restorative justice circle models have evolved along two general paths: a healing paradigm (healing circles) to dispose of situations and a co-judging paradigm (sentencing circles) limited to making recommendations to judicial authority for actual case disposition (Ross, 1994).

Navajo justice.
The process opens with a prayer to seek divine assistance. Following prayer, the parties have an opportunity to lay out their grievances. Feelings are vented, the victim has an opportunity to disclose not only the facts, but also their impact. People are given an opportunity to say how they feel about the event and make a strong demand that something be done about it. Relatives also have an opportunity to express their feelings and opinions about the dispute.

The person who is the focus of the discussion is provided an opportunity to explain his or her behavior in full. The people who know the wrongdoer best—his spouse, parents, siblings, other relatives and neighbors, expose denial and excuses. The process is designed to clarify the situation and get to the root of the problem.

The peacemaker will then give reality therapy and do values clarification in a talk to the parties designed to guide them. This talk focuses on the nature of the problem and uses traditional precedent to guide a decision.

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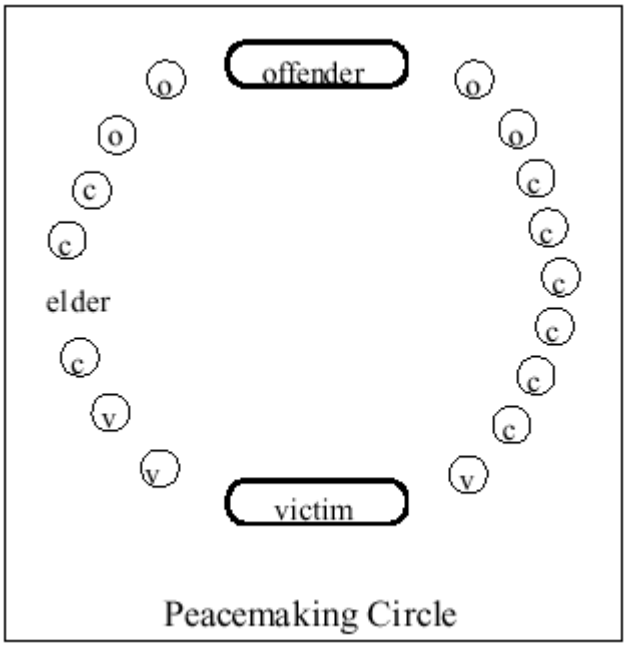
[171] Van Ness, Daniel, Allison Morris, and Gabrielle Maxwell. 2001. Introducing restorative justice. In *Restorative justice for juveniles: Conferencing, mediation and circles*, ed. Allison Morris and Gabrielle Maxwell, 3-16. With a foreword by DJ Carruthers. Oxford: Hart Publishing.

[172] McCold, Paul. (2000). "Overview of mediation, conferencing, and circles." Paper presented at the United Nations Crime Congress, Ancillary Meeting on Implementing Restorative Justice in the International Context. Vienna, Austria, 10-17 April 2000. http://www.restorativejustice.org/rj3/UNBasicPrinciples/AncillaryMeetings/Papers/Overview.pdf

The peacemaker has persuasive authority and draws on the traditions and stories of the culture to offer practical advice. The parties then return to a discussion of the nature of the problem and what needs to be done to resolve it.

Often, the action taken is in the form of nalyeeh, which also translates as restitution or reparation. Payments can be in the form of money, horses, jewelry, or other goods. The payment can be symbolic only. The focus is not upon adequate compensation, but upon a holistic kind of remedy. It is the feelings and relationships of the parties that are most important.

The process ends in an action plan to solve the problem.



A person who agrees to pay nalyeeh may not have the personal means, so it is traditional for family and clan members to help make payment on their relative's behalf. The tradition isn't simply that relatives assume obligations for others, but when an individual commits a wrong against another, it shames the person's relatives—"He acts as if he had no relatives." The family agrees to keep an eye on the offender to assure there will be no future transgressions. "Peacemaking is designed to resolve problems among people and is not concerned about imposing punishment" (Yazzie & Zion 1996).

Sentencing Circles.
A sentencing circle is a community directed process, in partnership with the criminal justice system, for developing consensus on an appropriate sentencing plan which addresses the concerns of all interested parties.

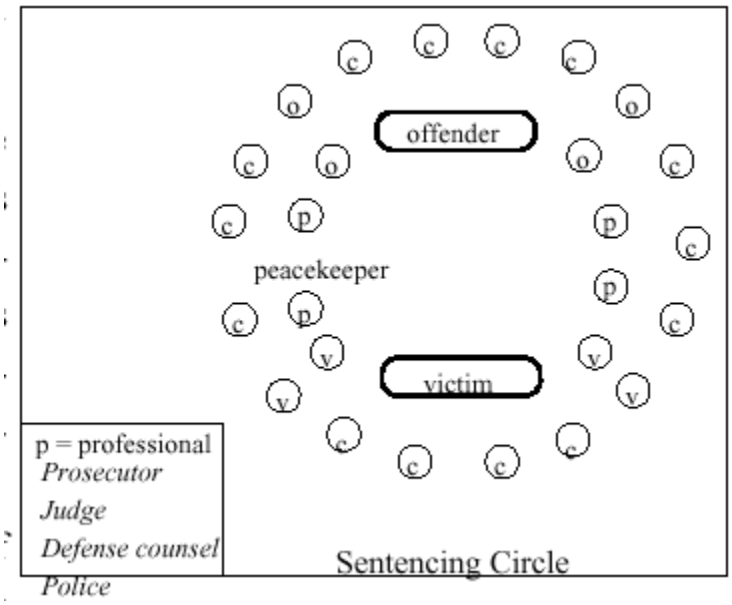
Sentencing circles use traditional circle ritual and structure to create a respectful space in which all interested community members can speak from the heart. The purpose is to shared a search for understanding of the event and to identify the steps necessary to assist in healing all affected parties and prevent future occurrences (Pranis 1997). Sentencing circles not only involve all the players found in traditional court— they are often held in a courtroom. Present are victim, victim supporters, offender, offender supporters, judge, prosecutor, defense counsel, police, court workers and any interested community members. Everyone may not participate, but it is important for everyone to know they can and are encouraged to do so.

These circles may be organized in one large circle or split into an inner and outer circle. The inner circle is composed of the victim, the offender, supporters or members of their respective families, and justice

professionals normally involved in court. The outer circle includes professionals who may be called upon for specific information and interested members of the community.

Opening the circle with a prayer, the keepers of the circle welcome everyone to the circle and then discuss the teachings of the circle and explain the guidelines extracted from the teachings. Everyone introduces themselves and tells why they are present, as an eagle feather or other sacred object is passed around the circle. During the first round many express concern for victims, offenders and their families, and speak of their hope for the circle to find a way to heal all who share in the circle.
The sacred eagle feather travels around the circle five times during the session. The first circle is people stating why they're there. The second circle is people speaking to the victim, absolving the victim of guilt and shame. The third circle is to speak about how important the offender is to the family, the kinship system, and the community. The third round is people speaking directly to the offender, saying how it's made them feel and what their expectations are for that person. The fourth circle is to give recommendations to the judge saying what should happen to this person.

The closing rituals include summarizing what has or has not been agreed, outlining next steps, thanking everyone for their participation, passing the feather for closing comments by all participants, and a closing prayer.



CONCLUSION

Restorative justice programs attempt to address the harm crime creates for victims, offenders, and their communities. Family group conferencing, community justice conferencing, peacemaking circles and healing circles are holistic because they simultaneously address the restorative needs of all three. This ideal approach is not always possible.

For example, where the identity of the offender is unknown, victims still have a need for reparation which could be met by their community of care or by victim service programs. In cases where offenders refuse to cooperation, programs holding offenders accountable respectfully, especially those which engage or create a community of care in the process.

A healthy society would be one in which all types of restorative justice programs operate simultaneously, supporting choice and providing a flexibility of restorative response.

6.13. Restorative Justice Circles in South Saint Paul, Minnesota – 2000 [173]

- In the relatively homogenous community of South St. Paul, the South St. Paul Restorative Justice Council seeks to strengthen community bonds and pride.
- The purpose of the council is to work in the criminal justice system, especially with young offenders, to resolve conflicts without the hostility of criminal proceedings.
- The council prefers the sentencing circle because it focuses on the goals set by the council.
- Also working as a part of the school system, the council holds sentencing circles in the local school system for violation of school regulations.
- Through this process, the council teaches responsibility, conflict resolution, and community integrity.

6.14. Restorative Justice Practice –The State Of The Field - 1999[174]

The circle is central to traditional aboriginal cultures and social processes. Circle processes for handling crime and wrongdoing originate with traditional concepts of freedom and individuality–one person cannot impose a decision upon another. Native cultures around the world have developed a variety of processes for responding to wrongdoing.

The restorative justice circle models have evolved along two general paths: a healing paradigm (healing circles) to dispose of situations and a co-judging paradigm (sentencing circles) limited to making recommendations to judicial authority for actual case disposition (Ross, 1994).

Whether used as a pre-adjudicatory alternative or for determining post-adjudicatory disposition, the circle models tend to follow similar structural processes (Van Ness & Strong 1997, Cutshall & McCold, 1983).

> I think that when I describe what we call "peacemaking" in English, I am describing the traditional justice of many aboriginal groups of people. I have been to the South Pacific, Norway and across the U.S. and Canada to talk with aboriginal leaders. Others of the Navajo Nation court system have visited Australia, New Zealand, Bolivia, and South Africa to do the same. Often, when we describe peacemaking, other aboriginal leaders nod their heads with approval and tell us that it is the same as their traditional justice methods. (Yazzie 1998:129)

There has always been much about ancient intra-tribal practice which is restorative of community (La Prairie & Diamond 1992; Consedine 1995; La Prairie 1995). It may be as some have suggested that the "Indian nations and the other indigenous nations of the world have practiced restorative justice for centuries. Whether denominated as 'traditional Indian law,' 'native law,' 'customary law,' 'peacemaking' or some other name, restorative justice is in fact the original, pre-state form of law" (Zion 1998:141).

The recent re-emergence of tribal sovereignty on North American reservations has spawned a series of circle models of restorative practice (Dickson-Gilmore 1992). There are many circle processes, differing on the purpose of the circle, who participates and the role of participants. Healing and talking circles focus on a particular concern common to all parties (men or women's healing circles, substance abuse groups) or are constituted to help someone with their healing journey (support groups for victims or for offenders). Such circles rarely involve justice professionals but may include professional counselors.

This paper describes three North American circle processes: the peacemaking courts of the Navajo of Arizona (Yazzie & Zion, 1996; Yazzie 1994), the sentencing circles in native communities in the Yukon (Stuart 1996),

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[173] Coates, Robert B., Umbreit, Mark., Vos, Betty. September 1, 2000. "Restorative Justice Circles in South Saint Paul, Minnesota." St. Paul, Minnesota: Center for Restorative Justice & Peacemaking, University of Minnesota.
http://ssw.che.umn.edu/rjp/Resources/Documents/Circles.Final.Revised.pdf

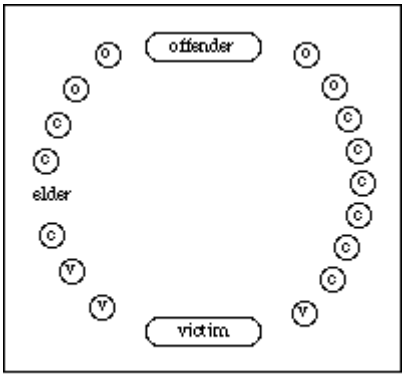
[174] McCold Paul, Community Service Foundation, International Institute for Restorative Practices, Restorative Justice Practice –The State Of The Field 1999 http://www.restorativepractices.org/Pages/vt_mccold.html

and the elaborate circle model developed in the aboriginal community of Hollow Water, Manitoba, Canada (Bushie 1997).

Navajo justice. Traditional Navajo custom to resolve conflict involves the idea of *Hozhooji* (living in "right relationship"). If one person believes they've been wronged by another they first make a demand for the perpetrator to put things right. The term for it is *nalyeeh*, which is a demand for compensation. It is also a demand to readjust the relationship so that the proper thing is done (Yazzie & Zion 1996). If this is unsuccessful, the wronged person may turn to a respected community leader to facilitate and organize a peacemaking process. The process is not confrontational but involves family and clan members of victims and perpetrators talking through matters to arrive at a solution.

> When we started putting rules for traditional Navajo justice into English in 1982, we used words like "mediation" and "arbitration" to describe what Navajos do. That was a mistake. First of all Navajo peacemaking is not "mediation." In general American practice, "mediation" is a process where a person called a "neutral" works with parties to get them to reach an agreement. In our system a *naat'aanil* or peacemaker is not "neutral." That is, a peacemaker is a community leader who has very definite points of view about problems. Peacemakers use traditional teachings to clarify false values and correct untrue assumptions about behavior. (Yazzie 1998:123-4)

The process (Figure 11) opens with a prayer to seek supernatural assistance. Following prayer, the parties have



Traditional Peacemaking Circle
Figure 11

an opportunity to lay out their grievances. Feelings are vented, the victim has an opportunity to disclose not only the facts, but their impact. People have an opportunity to say how they feel about the event and make a strong demand that something be done about it. Relatives also have an opportunity to express their feelings and opinions about the dispute.

The person who is the focus of the discussion is provided an opportunity to explain his or her behavior in full. Denial and excuses are exposed by the people who know the wrongdoer best – his spouse, parents, siblings, other relatives and neighbors. The process is designed to clarify the situation and get to the root of the problem.

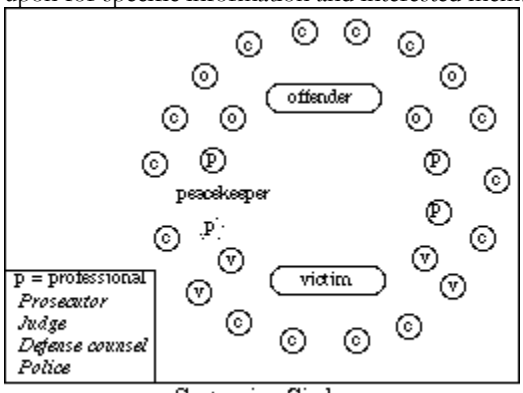
The peacemaker will then give reality therapy and do values clarification in a talk to the parties designed to guide them. This talk focuses on the nature of the problem and uses traditional precedent to guide a decision. The peacemaker has persuasive authority and draws on the traditions and stories of the culture to offer practical advice. The parties then return to a discussion of the nature of the problem and what needs to be done to resolve it.

Often, the action taken is in the form of *nalyeeh*, which also translates as restitution or reparation. Payments can be in the form of money, horses, jewelry, or other goods. The payment can be symbolic only. The focus is not upon adequate compensation, but upon a holistic kind of remedy. The feelings and relationships of the parties are what is most important. The process ends in an action plan to solve the problem.
A person who agrees to pay *nalyeeh* may not have the personal means, so it is traditional for family and clan members to help make payment on their relative's behalf. The tradition isn't simply that relatives assume obligations for others, but when an individual commits a wrong against another, it shames the person's

relatives–"He acts as if he had no relatives." The family agrees to keep an eye on the offender to assure there will be no future transgressions. "Peacemaking is designed to resolve problems among people and is not concerned about imposing punishment" (Yazzie & Zion 1996).

Sentencing Circles (SC). A sentencing circle is a community directed process, in partnership with the criminal justice system, for developing consensus on an appropriate sentencing plan which addresses the concerns of all interested parties. SCs use traditional circle ritual and structure to create a respectful space in which all interested community members, victim, victim supporters, offender, offender supporters, judge, prosecutor, defense counsel, police and court workers can speak from the heart in a shared search for understanding of the event and to identify the steps necessary to assist in healing all affected parties and prevent future occurrences (Pranis 1997).

Sentencing circles not only involve all the players found in traditional court–they are often held in a courtroom. These circles may be organized in one large circle or split into an inner and outer circle, as shown in Figure 12. The inner circle is composed of the victim, the offender, supporters or members of their respective families, and justice professionals normally involved in court. The outer circle includes professionals who may be called upon for specific information and interested members of the community.



Sentencing Circle
Figure 12

Pre-requisites for offenders include an acceptance of responsibility, a plea of guilty, a connection to the community, a desire for rehabilitation, concrete steps toward rehabilitation, support within the community for the offender, and the input of the victim. Acceptance into the circle is decided by a community justice committee or circle support group. Work undertaken in preparation for a SC is believed to be critical to the success of the hearing. Communities are increasingly investing more time and effort into pre-hearing work with the offender, the victim, and with families and support groups. Pre-hearing work includes exchanging information, developing plans, and preparing all parties to participate. With proper pre-hearing preparation, a circle sentence hearing will take from one to two hours. Without proper pre-hearing preparation the case may often require two hearings; the first sometimes over two hours, the second significantly less (Stuart 1996).

In the first circles, the judge primarily facilitated the circle hearing. Now some communities select one or two local people to act as keepers of the circle. They act as facilitators, ensuring respect for the teachings of the circle, mediating differences and guiding the circle towards a consensus.

Opening the circle with a prayer, the keepers of the circle welcome everyone to the circle and then introduce themselves by explaining who they are, what they do, where they are from and why they are in the circle today. The keeper then asks others to similarly introduce themselves, as an eagle feather or other sacred object used as a "talking" token is passed around the circle.

During the first round many express concern for victims, offenders and their families, and speak of their hope for the circle to find a way to heal all who share in the circle. Introductions help set the tone for the circle and begin to identify the pain, anger and hope of different participants.

Keepers discuss the teachings of the circle and explain the guidelines extracted from the teachings. Questions from participants can generate changes or additions to the guidelines. Most guidelines–such as speaking from

the heart, remaining until the end in the circle, allowing others to speak by speaking briefly, respecting others by not interrupting and by recognizing the value of their contribution–are common to most communities. The closing rituals include summarizing what has or has not been agreed, outlining next steps, thanking everyone for their participation, passing the feather for closing comments by all participants, and a closing prayer. The sacred eagle feather travels around the circle four times during a SC session.

The first circle is people stating *why they're there.*

The second circle is people *speaking to the victim*, absolving the victim of guilt and shame. They praise her or him for their courage for bringing this out, saying that what happened to them was not their fault.

The third circle is to *speak to the offender* because the crime that the offender has committed has not only touched the victim, it has also touched the family and the kinship system. The third round is people speaking directly to the offender, saying how it's made them feel and what their expectations are for that person.

The fourth circle is to *give recommendations to the judge* saying what should happen to this person.

The SC process is inclusive. Everyone in the community has a stake in the outcome, and thereby a reason to participate. Everyone may not participate, but it is important for everyone to know they can and are encouraged to do so.

The value of sentencing circles derives not as much from its impact upon the offender, or upon the victim, but with its impact on the community. Helping others helps oneself. Participating makes one feel belonging. Being acknowledged and respected engenders respect and acknowledgment from others. Contributions to the circle are respected, built upon by others, and quickly become not the idea of the contributor but of the circle. Above all sentencing circles are about community building (Stuart 1996; Pranis 1997).

Healing Circles (HC). One of the most important of the circle models of restorative justice is the Community Holistic Circle Healing developed in Hollow Water, Manitoba, by the Ojibwa tribe of the Anishnaabe people (Sivell-Ferri 1997).

The Hollow Water Healing Program began as a program to respond to incest and sexual assault by seeking to heal not only the intimate connections and the human dignity that was destroyed but also addressing the social arrangements that enabled this violence to flourish (Bushie 1997; Taraschi 1998:117).

> We made another mistake in setting up a traditional Indian method of justice in a Western adjudication system. It is another mistake based on assumptions. That is, are there certain kinds of cases you "can" or "cannot" handle in traditional justice? They tell us that we "can't" handle murder in peacemaking. We do. .. They tell us we "can't" handle domestic violence cases in peacemaking. We do. ... The point I am making here is that it is a mistake to classify problems. We shouldn't label people to make assumptions about them, and we must not assume that there are things you "can" or "cannot" do in restorative justice process. (Yazzie 1998:112)

Like many aboriginal communities, Hollow Water had fallen into deep patterns of alcoholism and a culture of violence and were in danger of losing their culture entirely. Joyce Bushie (1997) describes what led Hollow Water to develop their healing circles.

> The beginnings were in the community in the early eighties. Back then, what we were faced with was alcohol abuse at its highest point. You could find a party in the community any time of the day and any day of the week. There was violence between men. ... There was also violence against women, both physically, sexually, mentally and psychologically. But the physical violence and sexual assaults were the most visible...
>
> In the early eighties a few of us decided to sober up. Our community was in crisis, and the question was where to start? It was such a big problem in all areas and just a very few people were talking about what was happening and trying to address the problems. In the early eighties we did a lot of talking, did a lot of crying, and slowly, over time, more and more people came together. ...

> Over time, when I look back, it just feels like someone was leading us down this road. It was very much felt in the circles that we used. We didn't plan to start using our traditional ways, we just kind of stumbled and my impression of what happened to us is we were being led, being shown, what methods to use. People were brought into our path to help us, and so each year we were moving closer and closer to the core of the problem. At first we were saying alcoholism was the problem; suicide was the problem; child neglect was the problem; kids dropping out of school was the problem. The more we learned about ourselves, the more we learned about our community. Those were awesome times that sent us deeper.
>
> Then we started touching on sexual abuse. I always remember one workshop where there were sixty people. ... It was there that we couldn't ignore the problem any more because we were faced with actual numbers. For the first time we were able to talk about the sexual victimization of our past as children, and as young people in this community. It was not one incident. There were multiple incidents, multiple abusers. Many of us started off as victims, as children. ...
>
> Breaking that silence for the first time was very shocking, and I think we all knew it was a crisis. People disclosed because of all the work we had been doing and because people had sobered up. ... A lot of us have gone down that road of abusing alcohol to numb the pain. Thoughts of suicide were never far away from our minds, so we had traveled that road, and we knew what the symptoms were. We came to realize that a lot of the stuff we had to deal with goes back to our childhood. It was a journey that took probably four or five years.
>
> What happened here on a small scale was one person disclosed and gave courage to the next person, and to the next person, so that over time, you begin to share the burden. It's your own pain, but it's shared because you're telling more and more people that this is what happened to you and you're giving hope to other people. As they begin to deal with their own stuff, then it comes back. You get so much back in return.
>
> That is how it works. That's how I see healing in the community–it's that web, making those connections. That's exactly what has happened amongst the women here. (Bushie 1997)

The complete Community Holistic Circle Healing (CHCH) process as developed in Hollow Water involves thirteen phases:

1. Disclosure
2. Establish safety for the victim
3. Confront the victimizer
4. Support the spouse/parent/child
5. Support the family(ies)/community
6. Meeting of assessment team with RCMP
7. Circles with victimizer (one to two hours at least two times a week)
8. Circles with victim separately (one to two hours at least two times a week)
9. Circles with victimizer's family (gradually brings in family, until all join)
10. Circles with victim's family (gradually brings in family, until all join)
11. Sentencing circle with all present to recommend disposition (with judge)
12. Sentencing review circle with community (w/o judge every six months for 5 years)
13. Cleansing circle

According to Bushie, following disclosure, the assessment team arranges for the safety of the victim and confronts the offender. The offender is encouraged to admit responsibility and seek support in changing their behavior. The offender is assigned a case worker and must begin weekly sessions with a counselor. They are then brought into an "offender circle" with the team, which may be joined by recovered offenders. This circle continues until the offender can disclose all the details. "With each circle they add on and add on as they begin to feel the support. They begin to understand that they are not being judged, that we're here to help them, that we want the crimes to stop and we want them to go from this place to the place where they become productive balanced people. That is the first thing they have to do, the first circle."

The second circle that offenders have to do is to start working with their nuclear family. They have to bring their partners and their children to a healing circle. It's their responsibility to tell their families what they've done. Those circles are also ongoing. In the third circle they have to start working with their families of origin–their mothers and fathers, their sisters and brothers. Again, they have to tell what they've done.

Simultaneously, the assessment team begins healing circles with the victim ("victim circles"), and gradually brings in the victim's family. Finally the two healing circles come together. In this third circle, the offender does not speak. The victim speaks to the offender, saying "this is what you did to me, and this how it affected me," and the offender sits in silence and listens.

The fourth circle is the "sentencing circle." Here the offender must tell the whole community what they're being charged with and what they've done so far. The community will make its recommendation and the judge passes sentence. "We feel if a person can go through those four circles, then we're convinced that he's committed to his own healing and will do everything in his power to continue. If that person is not able to complete the circles then we will honour the courts."

Six months following sentencing, the offender is called to a fifth circle, this time without the court party–just the community is present. "Community circles" provide the whole community a chance to get a report on the offender's and victim's progress. What was said in court is reviewed and a report as to healing work in the past six months is given.

The offender is required to answer back to their community, "because their community had spoken on their behalf. We're finding that this really keeps people on track when they realize that every so often we're going to go back to the community to report."

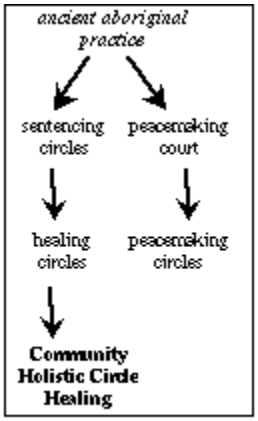
The sixth circle is called the "bonding circle," where both victim and victimizer meet once a week; these often last all day. The seventh circle, called "cleansing circles," is where the victim and the victimizer and both families get together. The victim and victimizer usually pull this circle together because of the work they have done on all the other six circles so everyone can see how much both have dealt with their pain together. The cleansing circle is a community event for both families as a celebration of their growth, and a beginning of their new journey of peace (Bushie 1997).

> As I see it now, part of the genius of Hollow Water–and of the traditional teachings that shaped it–is that each person who comes to them for help finds himself in a circle composed of people who have already built relationships of honesty and openness with each other and who consistently demonstrate their respect and care for each other in every thing they do. In other words, they get to sit, perhaps for the first time in their lives, in a "safe" place, "hope" place and a "learning" place. (Ross 1996:148-149)

Hollow Water continues using circles to transform social dysfunction in their community within more Holistic circles. Victims of domestic violence are thus protected by much more than a restraining order from court.

> Instead of coming out with a piece of paper, they're coming out after an opportunity to put their problem and their feelings on the table. They are coming out with their relatives understanding what is going on and a new commitment from those relatives to help. They are coming out after an opportunity to reach into the minds and the hearts of their relatives in the "talking things out" process. (Yazzie 1998:129)

Unlike the other restorative justice models, the circle models did not follow as linear a path in their evolution. The diagram shown in Figure 13 can only be considered a very rough approximation of the development of circle models since 1982.



Evolution of Circle Models 1982-199
Figure 13

6.15. Restorative Justice Conferencing: Guidelines for Victim Sensitive Practice-1999[175]

The purpose of this monograph is to present guidelines for the practice of victim sensitive restorative justice conferencing, a term used here to identify all those processes that facilitate restorative dialogue and problem-solving among victims, offenders, family members, and other support persons or community members.

Umbreit refers specifically to four established expressions of restorative justice conferencing: victim offender mediation, family group conferencing, peacemaking/sentencing circles, and reparative community boards before which offenders appear. Umbreit addresses a number of questions concerning the nature of restorative justice conferencing. Using examples of cases and programs, he notes specific characteristics of a multi-method approach to victim offender conferencing. Then he identifies core principles and skills of restorative justice conferencing, including humanistic "dialogue-driven" mediation/facilitation, guidelines for victim sensitive conferencing, and multi-cultural implications.

6.16. Indigenous justice. Full Circle – 1999 [176]

- In their introductory essay to this issue of the journal, the editors contend that indigenous justice has many lessons to teach advocates of restorative justice.
    - Hence, they review aspects of indigenous justice in relation to restorative justice.
    - This includes a sketch of indigenous philosophy, worldview, principles, and practices.
    - Of particular note are practices such as circle sentencing and conferencing.
- The authors also introduce statistics on Native Americans involved in the current criminal justice system in the United States to indicate problems with that criminal justice system.

6.17. Restoring Community: The Process of Circle Sentencing – 1997 [177]

- This paper presents the peacemaking or sentencing circle as a community directed process, in partnership with the criminal justice system, for developing consensus on an appropriate sentencing plan which addresses the concerns of all interested parties.
- Peacemaking circles use traditional circle ritual and structure to create a respectful space in which all interested community members, victim, victim supporters, offender, offender supporters, judge,

[175] Umbreit, Mark S. 1999. "Restorative Justice Conferencing: Guidelines for Victim Sensitive Practice – 'Adapting Conferences, Mediations, Circles and Reparative Boards to People, Communities, and Cultures' (Draft)." Ft. Lauderdale, Florida, and St. Paul, Minnesota: The Balanced and Restorative Justice Project. A partnership between the Community Justice Institute (Florida Atlantic University) and the Center for Restorative Justice & Peacemaking (University of Minnesota).
http://ssw.che.umn.edu/rjp/Resources/Documents/CONFRNGMN2.PDF
[176] Richardson, Greg, and Bill Preston. 1999. Indigenous justice. *Full Circle: The Newsletter of the Restorative Justice Institute* 3 (Spring): 1.
[177] Pranis, Kay. 1997. "Restoring Community: The Process of Circle Sentencing." Paper presented at "Justice without Violence: Views from Peacemaking, Criminology, and Restorative Justice," June 6, 1997.
http://www.doc.state.mn.us/organization/commjuv/restorativejustice/rjcircle.htm

prosecutor, defense counsel, police and court workers can speak from the heart in a shared search for understanding of the event and to identify the steps necessary to assist in healing all affected parties and prevent future occurrences.

The stories from circles have taught me about the incredible strength of those who have been victimized, the capacity of many who have caused harm to reclaim their lives and give back to their communities after decades of destruction and despair, and the wisdom of regular folks in the community who are teaching us how to wrap those who have been victimized in arms of loving comfort and protection and wrap those who have offended in arms of loving discipline and limits. Circles are a community development process as well as a justice process.

Community needs and responsibilities
There are multiple community needs and responsibilities in the wake of crime.

1. A need and responsibility to express the pain and outrage directly to those who cause harm.

2. A need and responsibility to play a constructive role in the resolution of the crime in order to regain a sense of efficacy and control over community life.

3. A need and responsibility to address the well being of every member of the community and to provide healing for all affected.

4. A need and responsibility to understand and address the underlying causes of crime to prevent future occurrences

5. A need and responsibility to affirm community norms.

The western formal legal system impacts those needs and responsibilities as follows:

1. The process provides no opportunity to express outrage except through abstract opinion polls or exploitive politicians or talk radio. None of these forums allows for real interpersonal communication with the offender about the pain and fear felt by the community.

2. The system provides few constructive roles for the community - thus exacerbating the sense of helplessness about the problem of crime.

3. The process does not encourage the community to recognize the connection between the community's well being and that of every member. Through its activity the system actually deliberately decreases the well being of the offender and inadvertently that of the victim.

4. The process does not provide a way for the community to address underlying problems.

5. The formal legal system attempts to confirm community norms but its impact is very weak because the process is technical, abstract and largely unobserved.

Circle Sentencing Process
A peacemaking or sentencing circle is a community directed process, in partnership with the criminal justice system, for developing consensus on an appropriate sentencing plan which addresses the concerns of all interested parties. Peacemaking circles use traditional circle ritual and structure to create a respectful space in which all interested community members, victim, victim supporters, offender, offender supporters, judge, prosecutor, defense counsel, police and court workers can speak from the heart in a shared search for understanding of the event and to identify the steps necessary to assist in healing all affected parties and prevent future occurrences.

Circles typically involve a multi-step procedure including application by the offender to the Circle process, a healing circle for the victim, a healing circle for the offender, a sentencing circle to develop consensus on the elements of a sentencing agreement, and follow-up circles to monitor the progress of the offender. The sentencing plan may incorporate commitments by the system, community and family members as well as by the offender.

The impact of the circle sentencing process on the needs and responsibilities of the community is quite different:

1. Circles provide the opportunity for any community member to participate and to speak - thus community pain and outrage are respectfully heard by the offender and his/her support system.

2. Circles provide the opportunity for any community member to participate in identifying the problem, suggesting solutions and making commitments to action as part of the solution. Community members have significant roles in decision-making and implementation and monitoring, creating a sense of efficacy and capacity to solve problems in the community.

3. Because it is a consensus process circle sentencing must pay attention to the needs and well being of every participant.

4. Circles routinely discuss larger community problems which contribute to the particular crime under discussion and develop plans to begin to address those problems.

5. The entire circle process is one of affirming norms and expectations for behavior by the community and those close to the offender.

The process places power and responsibility in the community and is structured to emphasize respect and an understanding of common fate.

Mille Lacs Circle Sentencing Project
The Mille Lacs Circle Sentencing Project, initiated in late 1996 on the Mille Lacs Indian Reservation in central Minnesota, has limited experience with circles, but already demonstrates the potential for circles to restore key community connections and capacity.

- Addressing underlying problems: In a case involving a juvenile who assaulted a police officer, the healing circle for the police officer, who was the victim, began a dialog between the community and police which is altering the very hostile relations which existed between the community and the police.

- Building leadership capacity: The young man whose case was the first heard in circle is now trying to pull his friends away from their self destructive behaviors. This young man has become a member of the Community Justice Committee and recently participated as part of the training team on circles for other communities. He describes himself as unable to hold his head up and look people in the eye before his circle experience and is now able to speak in public before groups.

- Building relationships and support in the community: In the first circle case a drop-in participant offered to assist the offender in building a bird feeder (one of the elements of his community compact) and to take him to his first meeting with an anger management counselor. The offender's own support system failed to show up for the circle. The offender expressed great surprise at finding others in the community who cared about him and would help him.

- Increasing the community's sense of ownership of the problems: The first circle had a small number of participants. They now regularly have around 25 participants.

- Affirming community norms: In the case of the juvenile assault of the police officer, the juvenile violated the terms of his acceptance plan by drinking. In a subsequent circle the community very clearly told him that they knew he was drinking and that he could not manipulate them. They made it clear that eyes and ears of the community were on him.

- Leadership capacity building: There is growing confidence among the key participants and a visible growth in the sense of efficacy and competency in working on community problems, particularly as the leaders in Mille Lacs do workshops around the state.

- Strengthening relationships: A brother and sister, offender and victim in the case, who fought and had a rocky relationship now attend AA together and support one another in recovery.

- Addressing other problems which surface / prevention: In the first case the sister, who was the victim, has in the past had her children removed from the home because of her drinking problem. The circle process is now more focused on helping her to keep her children than it is on the offender because he is doing well. The issue was not related to the offense, but the circle process provided a way to help with the problem.

- Building the capacity for appropriate support and criticism: In the supportive process of the circle a mother, who previously always enabled her son and justified his behavior, blaming others, was able to tell him that what he did was wrong that he should apologize.

The real meaning of the circle process was eloquently expressed by an Indian man on the White Earth Reservation at an informational meeting which was introducing circles to the community. Toward the end of a three hour meeting, when the group was caught up in a technical discussion of the defense attorney's concerns about the details of the procedure, this man who had been quietly listening said, "This is about: Do we love ourselves? Do we love our community? Are we going to take care of each other?"

Circles call people to more conscious awareness of our connections, our shared fate, our humanity, our spirituality. Awareness of connections is the foundation of authentic community. Circles provide a way for building that authentic community.

6.18. Peacemaking circles-1997[178]

ABSTRACT: Part of a special section on restorative justice. Peacemaking circles are community-directed processes developed in partnership with the criminal justice system and work by involving all those affected by an offense in deciding an appropriate sentencing plan that addresses the concerns of all participants. Peacemaking circles are public events but involve healing circles, which are private and are be used for both victims and offenders.

[178] Pranis, Kay. "Peacemaking circles: restorative justice in practice allows victims and offenders to begin repairing the harm." *Corrections Today* v. 59 (Dec. '97) p72+

7. Relevant Documents, Studies and Practices – International

7.1. Restorative Community Justice: Repairing Harm/Transforming Communities – 2001 [179]

An anthology that offers a strong international flavor on what the editors call restorative community justice. The book is organized into five major sections. The first deals with the theoretical foundations; the second on the roles of victims, offenders, communities and criminal justice organizations; the third examines conferencing, reparative boards and circles; the fourth offers critical perspectives; and the final section considers the future of restorative community justice.

7.2. Evaluating Restorative Justice Programs – 2000 [180]

- There is growing evidence that restorative justice is a powerful alternative to the traditional criminal justice system: where everything else is failing, restorative justice programs somehow seem to be 'working'.
- For those of us who have observed mediation, conferencing or circles first-hand, we *know* that the claims of restorative justice ring true: for the most part, these encounters really do give participants access to 'a higher quality of justice', they do somehow manage to 'shame the offender within a continuum of love and respect', they do 'enable victims to experience forgiveness'.

7.3. Restorative Justice Around the World – 2000 [181]

- The processes that Tony Marshall describes, and the principles that Susan Sharpe outlines, have been demonstrated for thousands of years in informal, customary traditions. More recently they have been implemented in a variety of ways within and alongside the criminal justice system. However, three programmes have become hallmarks of restorative justice processes: victim offender mediation, community conferencing, and peacemaking circles. Two other programmes have been given acknowledged as being potentially restorative outcomes: restitution and community service.

- *Peacemaking Circles.* Circles are similar to conferencing in that they expand participation beyond the primary victim and offender: their families and supporters may attend, as well as criminal justice personnel. But in addition, any member of the community who has an interest in the case may come and participate. So circles define "parties with a stake in the offense" most expansively.

- Circles were adapted from First Nations practices in Canada, and they retain some of that flavor. All the participants sit in a circle. Typically the offender begins with an explanation of what happened, and then everyone around the circle is given the opportunity to talk. The discussion moves from person to person around the circle, with anyone saying whatever they wish. The conversation continues until everything that needs to be said has been said, and they come to resolution.

- There is a "keeper of the circle" whose role, like that of the mediator and facilitator in the other two processes, is to ensure that the process is protected. There is usually a "talking piece" as well, which may be a feather or some other object that has meaning to members of the circle. The talking piece is passed around the circle, and only the person holding it is permitted to speak.

[179] Restorative Community Justice: Repairing Harm and Transforming Communities, edited by Gordon Bazemore and Mara Schiff,http://www.restorativejustice.org/rj3/April--2001/New%20Books%20in%20Restorative%20Justice.htm, 2001
[180] Derek R. Brookes, Prison Fellowship International, Evaluating Restorative Justice Programs, United Nations Crime Congress: Ancillary Meeting, Vienna, Austria, 2000
http://Www.Restorativejustice.Org/Rj3/Unbasicprinciples/Ancillarymeetings/Papers/RJ_UN_Dbrookes.Htm

[181] Daniel W. Van Ness Prison Fellowship International, Restorative Justice Around The WorldUnited Nations Crime Congress: Ancillary Meeting, Vienna, Austria, 2000
http://www.restorativejustice.org/rj3/UNBasicPrinciples/AncillaryMeetings/Papers/RJ_UN_DVNess.htm

- Circles are used at various stages of the justice process. They are also used independent of criminal justice to address community or group problems that may not have risen to the level of criminal activity or which are not likely to lead to criminal charges. Sometimes called healing circles or community circles, these may not include all the parties: healing circles, for example, may involve only the victim and the victim's supporters or the offender and the offender's supporters.

- Circles developed in Canadian indigenous communities, and have been adapted for use in majority populations as well. They can be found in both rural and urban settings in Canada and the United States.

- *Circles of support* in Canada work with serious sexual offenders (often guilty of paedophilia) who are being released into fearful communities at the conclusion of their sentences. The circles are formed by members from faith communities who enter into a "covenant" with the released offender relating to accountability and support. The programme increases public safety by holding the offender accountable to a reintegration plan through regular monitoring and notification of the police when necessary, and by ensuring that any community resources the offender needs are made available. It also works to secure the safety of the offender by offering a forum for community members to voice their concerns, by intervening with community members when necessary, and by working with the police and other authorities to provide protection and services as needed.

- Can an official in the criminal justice system – with its coercive powers – adopt the neutral and supportive role of a victim offender reconciliation/mediation facilitator, conference facilitator, or circle keeper? In some instances -- and with the right selection and training of facilitators -- it appears to be possible

7.4. Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process – 2000[182]

Background:

- Circle sentencing or circle courts arose in Canada in the early 1992 out of a decision from the Supreme Court of the Yukon in the case of R v Moses.
    - In that case the presiding judge, Judge Stuart, advocated a significant change in the Canadian sentencing process.
    - Judge Stuart was of the opinion that a significant and immediate improvement could be achieved within the judicial system by increasing meaningful community involvement in the sentencing process, before during and after the sentencing takes place.
    - In attempting to implement this Judge Stuart consulted the local Indian community and the concept of circle courts was developed.
    - Circle courts were adopted by a number of more traditionally oriented first nations people in Canada, but have subsequently been adopted in Canadian urban settings and are also now used in the United States.

What is a Circle Court:

- Circle Courts are designed for more serious or repeat offenders and aim to achieve full community involvement in the sentencing process.
    - It aims to broaden the sentencing phase so that it can fully examine the underlying issues of offending behaviour and examine the needs of victims of crime.
- The circle court begins by arranging the seating in the room into a circle, the presiding judicial officer sits in the circle with the offender and the other participants.
    - The defence council sits with the offenders and his/her family or support people.
    - Others participating in the sentencing are free to sit anywhere in the circle.

[182]New South Wales Attorney General's Department, Aboriginal Justice Advisory Council, Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process, Options for NSW, Discussion Paper
http://www.lawlink.nsw.gov.au/ajac.nsf/pages/circlesentencing http://www.lawlink.nsw.gov.au/ajac.nsf/pages/circle9

- Additional chairs are often brought in to accommodate late comers.
- The procedures for circle courts may differ in limited ways from community to community, although the usual process should be that participants are welcomed to the circle by community elders and the judicial officer, each person then introduces themselves and explains why they are there.
- The facts of the case are then presented to the circle by the crown and the defence is then allowed to comment.
- The discussion that follows in the circle would then focus on:
  · extent of similar crimes in the community,
  · underlying causes of such crime,
  · an analysis of what life was like in the community before the increase in crime,
  · the impact of these crimes on community and family life,
  · impact of these crimes on victims,
  · what can be done in community to prevent this type of behaviour,
  · what must be done to heal the victim,
  · what must be done to heal the offender,
  · what will constitute the sentence plan,
  · who will be responsible for carrying out the sentence plan,
  · who will support the offender to ensure that the sentence plan is completed,
  · what support can be provided for the victim.

- This discussion may take from 2-3 hours and in all cases the offender must address the circle, this may occur after a statement by the victim of the impact of the crime on him/her.
  - The format of the circle encourages free discussion and allows for the participation of the victim and offender in that discussion.
  - At the end of the circle a set of goals are set for the offender such as curfew, work programs, abstention of alcohol, anger management programs.
  - The circle is then adjourned and these items set as bail conditions.
- The circle is reconvened several months later and the court hears from the support group about the offenders progress.
  - If the offender has successfully met the conditions these conditions may be extended or modified as probation conditions.
  - If the offender has shown no willingness to meet the conditions then the circle may be abandoned and the offender sentenced in a regular court.
- Circle sentencing is not preoccupied with punishment however punishment is incorporated into the sentencing plan.
  - It is not necessarily a prison diversion program as a term of imprisonment is available to the circle if the circle believes that to be appropriate.
- Justice Fafard of the Saskatchewan Provincial Court stated "it is often said in sentencing circles and elsewhere that one main purpose of the circle process is to keep Aboriginal offenders out of jail.
  - It is not so.
  - It may well be that a welcome side effect of sentencing circles is that fewer offenders are incarcerated.
  - I know that this is the result in property related offences especially."

How does someone come to circle court

People come to circle courts after they have pled guilty or are found guilty by a court. An offender who wishes to participate in a circle court needs to do reasonably extensive work prior to their being accepted to a circle court. Many communities operating circle courts have established community justice committees who administer the circle court process for their community. An offender must gain the approval of the community justice committee and usually needs the active support of other influential community members, particularly elders before they can participate in a circle court. Offenders need to demonstrate that they are committed to the circle court process, this can often mean participating in programs, such as drug and alcohol programs or other work prior to the circle to demonstrate to the community justice committee their commitment to the

circle process. Essentially the offender needs to show that they are committed to healing the harm caused by their actions and setting themselves on the path to rehabilitation and not just participating because they think they will get a lighter sentence.

What happens after the Circle Court

The circle usually sets a sentencing plan for the offender which will aim at addressing the underlying causes for his/her offence. Some members of the circle will take responsibility for seeing that the offender completes the sentencing plan and often form another circle to support the offender through the sentence. The circle will also examine the needs of the victim and look at what needs to be done to heal him/her. Often another group will be formed to support the victim and work with him/her on healing the damage done.

The circle may also look more broadly at issues in the community that are causing serious problems and examine ways of addressing them.

Why focus on the sentencing phase

In sentencing the court has a vast range of discretion allowed to be exercised within the framework of existing sentencing principles. The greatest possibility for success exists where the process is most flexible and judicial discretion at its highest. It allows the Aboriginal community involvement in determining the conditions for punishment ensuring that they are culturally relevant and it ensures that the offender sees the punishment as being more appropriate as it comes from his/her own community.

Why involve the community

Circle courts operate with the belief that crime is more broad than one person, that it has consequences that can effect whole communities. It operates on the understanding that the underlying causes of crime are often more broad than a single incident and need the active participation of the whole community to fix. It further believes that criminal offences cause ruptures within communities that need to be healed.

Also it has already been stated that empowering the community in the sentencing process is sought with the aim of ensuring that the punishment is culturally relevant. Further having communities punish their own members means that punishments are seen as real community sanctions and not a continuation of an oppressive colonial system. The offender is confronted with his or her sentencers everyday making the sentence more real and immediate for offenders.

The circle encourages openness and honesty from its participants and is able to get a full picture of the offence, the offender, the victim and the circumstances that may have led to the crime. The participation of the community in determining a sentence ensures that the sentence is realistic and is not beyond the scope of the community's resources.

Benefits of Circle Sentencing

Circle courts have demonstrated a number of benefits in the areas where they have operated.

1. Breaks down the traditional dominance of legal professionals and hierarchies of traditional court rooms, all participants are able to fully participate and to speak for themselves.

2. Legal jargon is removed from the court, the language of the community becomes the language of the court.

3. The court receives information about the whole community, the background to the offenders, the impact of the offence on the victim, the problems experienced by the local community. This information is received to a level rarely available through written pre sentence reports.

4. As members of the community play a significant role the potential for racial bias in the court and in the sentence is significantly reduced or removed. This greatly assists in removing the barriers between the court

and the community.

5. The input of the community in determining the sentence greatly improves the potential for workable solutions and promotes the sharing of responsibility between the community and the criminal justice system. The Circle Court attempts to address the causes of criminal behaviour and to implement broader solutions to the issues raised, actively involving the community in solving its own problems.

6. Fosters a greater sense of equality between participants and encourages their participation. The physical separation of the traditional courtroom setting is completely done away with and there are no defined rules or legal rituals.

7. Enhances and improves the level of information available. Traditional courts often rely heavily on second or third hand information, also very little is know about the offender before the court. This situation is often made worse when their legal representative may only have a few hours or days to gather information. Very little is know about the underlying factors of criminal behaviour and the context of the community and society where the offence occurred. The circle court aims to actively overcome these difficulties.

8. Encourages a broader range of solutions and increases the ability for the court to address the specific problems unique to each case. Each circle court consists of different participants and different circumstances, thereby each sentence can be unique to that case.

9. The circle court allows the community to be collectively responsible for determining the outcome. The shared responsibility is carried beyond the determination of the sentence and into the implementation of it. The success or failure of the sentence becomes the concern of all the participants and not the offender alone.

10. Circle courts encourage the offender to participate. Most offenders participate very little if at all in the regular sentencing process. In traditional court settings the offender participation is limited to advising their lawyers or addressing the court when asked. Circle courts actively encourage the participation of the offender and those who know him or her best.

11. Circle courts actively involve the victims of crime. Often victims get lost in the traditional court process. Circle courts allow the offender to get a full perspective of the effects of their actions on the victim, the offender is directly confronted with the hurt experienced by the victim.

12. As Circle Courts involve participation of the offender's own community and family, they are punished by their own community and family. This can mean that the sentence and the process is seen as more relevant and taken more seriously by the offender. Circle courts extend the focus of the criminal justice system from the narrow perspective of the offenders actions in relation to the state onto the broader consequences for their community. This means that it can look beyond the individual criminal act and examine ways of preventing similar behaviour in the same community. The current criminal justice system focuses on a response to criminal behaviour rather than the prevention of it. Through the circle court the community can of learn the different factors leading to criminal behaviour and develop strategies to address them.

Circle courts allow the values of indigenous people and the structure of the western justice system to be merged. While still operating in the setting of a court, circle courts allow for greater community participation and are able to incorporate the values and culture of the local community.

Some Limitations

Circle courts in their operation have been generally greeted as successful by the communities that use them and the judiciary who initiate them, however their have been some problems with their administration.

Legality

One problem circle courts have encountered is that they lack a legislative base, which has caused problems in consistency from one community to another and has meant that the legality of circle court has been questioned. There is no specific provision in the Canadian sentencing code for the use of sentencing circles, it

remains implicit in the use of sentencing circles that the power and duty to impose a fit sentence remains with the trial judge.

The Saskatchewan Court of Appeal has noted that there is general satisfaction on all sides with the outcome of sentencing circles as shown *"by their extensive use by the provincial court and the very few appeals by the crown from sentences imposed with their advice."* In determining the legitimacy of using sentencing circles the court noted that it must have *"regard for the reformation and rehabilitation of the offender. It is a requirement in particular which may be best met in some cases by holding a sentencing circle, since the circle emphasises healing, or in other words reformation and rehabilitation."* However the court also noted that the trial judge has a duty to impose a fit sentence. Should the circle impose a sentence that is not "fit" the judge is bound to ignore the circle's advice to the extent that it varies from what would constitute a fit sentence.

Cost

Another factor reducing effectiveness of circle courts is cost. Circle courts can take four to five times a long as a regular court session and as many are held in remote areas the cost for circle court can be quite high and could over time create backlogs for other court matters.

Responsibility

The sentencing plans devised by circle courts often require broad community support and involvement to implement them. For instance a person may be sentenced to attend community run alcohol programs, to reside in an alcohol free home and to always be in residence with their families. Given the conditions involved in these types of sentences it may arise that a sentence is not completed effectively because one or other of the people who have responsibility for some type of activity under the sentence does not meet their obligations. In this way the terms of the sentence may not be met through no fault of the offender. In these circumstances the only legal option available to the court is to charge that person with contempt of court or for breaching a court order, or to reconvene a regular court and re sentence the offender.

Aboriginal people in the NSW Criminal Justice System

Aboriginal people are significantly over represented in the NSW Criminal Justice system. 1998 New South Wales Criminal Court Statistics show that Aboriginal people are more likely than non Aboriginal people to be imprisoned for the same offence. In all 16.5% of Aboriginal people found guilty were imprisoned compared with 7% for all NSW persons. 21.7% of Aboriginal people found guilty for offences against the person were imprisoned. 29.4% of Aboriginal people convicted for theft offences were sent to prison compared with 16.2% overall. A recent Aboriginal justice Advisory Council report shows that Aboriginal people are on average 15 times more likely to be prosecuted for offensive language or conduct charges, and up to 80 times more likely in some local government areas.

The Need for Reform

It is clear that from the large numbers of Aboriginal people appearing in the NSW Criminal Justice System and particularly the significant proportion of Aboriginal people that receive prison terms as sentence that there is need for reform in dealing with Aboriginal defendants. In recent years a number of Aboriginal communities have expressed strong interest in working more closely with the judiciary in determining sentence for members of their communities. Also a number of judicial officers have approached Aboriginal communities to attempt to create more effective and appropriate ways of dealing with Aboriginal people at court. There is a strong will to attempt to find more effective and empowering ways of sentencing Aboriginal defendants

Options for NSW

Possible trial

It is proposed that a trial of Circle Sentencing be established in New South Wales. A working party was established by the Criminal Justice System Chief Executive Officers to develop a model for a possible trial. That working party was convened by the Aboriginal Justice Advisory Council and consisted of members from NSW Police Service, Ministry of Police, Attorney General's Department, Department of Corrective Services, Department of Juvenile Justice, Office of the Director of Public

Prosecutions and the NSW Judicial Commission.

The model proposed here has been developed by this Working Party. The proposed model is a broad framework which may establish circle sentencing in selected trial locations, the working party was of the view that specific detail of process should be left to local communities to determine for themselves and to ensure that local Aboriginal communities had as much control of the process as possible.

Objectives
The objectives of the trial would be to:
1. empower Aboriginal communities in the sentencing process
2. increase Aboriginal community confidence in the sentencing process
3. reduce barriers between Aboriginal communities and courts
4. provide more appropriate sentencing options for Aboriginal offenders
5. provide relevant and meaningful sentences for Aboriginal defendants
6. provide effective support to Aboriginal defendants when completing sentences
7. provide support to Aboriginal victims of crime
8. reduce offending in Aboriginal communities

Trial Time Frame and Locations
It is proposed that a three year trial be established in three Aboriginal communities in New South Wales.

In determining trial locations there are a number of pre requisites that would have to be met:
1. that a broad cross section of the Aboriginal community of a specific location be willing to support the trial,
2. that an Aboriginal Court Liaison Officer be operative in the area,
3. that there are effective medical and treatment services willing to participate in the trial,
4. there is support for the trial from local Aboriginal Legal Services,
5. the local magistrate supports the trial.

Proposed Process

Types of offences
The proposed category of offences that would be eligible for circle sentencing has been kept as broad as possible. An offence would be eligible if that offence can be finalised in a local court, carries a term of imprisonment, where a term of imprisonment is judged by the magistrate as a likely outcome. All sexual offences would be excluded from the trial.

Management of the process
It is envisaged that a Community Justice Committee would be established to oversee much of the circle sentencing process. The proposed committee would consist exclusively of respected members of the Aboriginal community in each location where the trial operates. The Community Justice Committee would oversee aspects of the gate keeping function of the trial.

Role of the Aboriginal Court Liaison Officer
It is envisaged that the Aboriginal Court Liaison Officers would play a vital role in assisting the Community Justice Committee in operating the circle sentencing trial. The Aboriginal Court Liaison Officer will provide contact with the local Aboriginal community and in facilitating the organisational side of the circle court.
As well the Aboriginal Court Liaison Officers would:
· contact Community Justice Committee
· contact victim/s
· inform defendant of process
· inform victim of process
· contact interested community members
· organise venue

Gate Keeping
Entry into circle sentencing would be by application to the court by the defendant after a plea/determination of guilt. There would be two tests for acceptance to circle sentencing, firstly a **suitability** test by the court and secondly an **acceptability** test by the community.

The judicial officer would determine whether the offence meets the criteria for Circle Sentencing, that is a matter that can be finalised in the local court, that is not a sexual offences, where a term of imprisonment would be likely for that offender. If it does not meet the criteria the offender would be sentenced in regular court. If the offence meets the criteria then the application would be forwarded to the Community Justice Committee to determine the acceptability of the offender.

The Community Justice Committee will then assess whether they view the offender as eligible for circle sentencing. In determining their eligibility the Community Justice Committee will consider:
· the offence,
· the willingness of the offender to be an active part of the process and the support the offender has in the community,
· its impact on the victim and the community,
· the potential benefits to the offender, victim and community through the use of the circle sentencing process.

As part of the acceptability test the views of the victim/s of the offence will be sought regarding their perception of the acceptability of the offender for circle sentencing. While the community justice committee would consider the views of the victim/s their views would not be determinative. The Community Justice Committee will make a recommendation to the magistrate concerning the acceptability of the defendant and provide clear reasons for accepting or rejecting the defendant's application. If the Community Justice Committee rejects the defendant's application the matter will return to be sentenced in regular court.

Defendant Preparation
To ensure the defendant's commitment to the circle process prior to the circle sentence the defendant should be able to identify support people within the community. The defendant should be able to notify the Community Justice Committee of who will support him/her through the circle and in completing any sentence arrived at in the circle.

Who would attend the circle
The circle would be presided over by the responsible magistrate and include the defendant and support people/family, victim/s and support people/family, prosecuting authority, defendants legal representative, elders from the community, other community members affected by the offence, service providers who may be required to provide services to the defendant or victim. Basically the attendees at each circle would be different and catered to that particular matter. The Aboriginal Court Liaison Officer would have the responsibility of ensuring that appropriate people knew about the circle sentencing time and place and the Community Justice Committee would also play a role in determining who might be invited to attend.

Process During The Circle
Below is a proposed process for conducting the circle sentencing, however it must be noted that specific Aboriginal communities may wish to alter or change that process.

1. Aboriginal elders welcome all participants,
2. the magistrate will welcome all participants to the circle and formally open proceedings
3. participants introduce themselves, explain who they are, their relationship with the defendant or victim or their interest in the offence
4. magistrate explains the role of the circle, that it is a court and functions as a court
5. magistrate explains methods of proceeding in circle/guidelines, the rule of conduct within the circle
6. defendant comment, the defendant will make comment regarding the offence, him/her self, their commitment to rehabilitation

7. the victim or a representative of the victim may make a statement regarding the impact of the offence
8. circle discussion, the discussion should cover the offence its impact on the victim and community, what need to be done to right the wrong, what support may be available for the defendant and victim
9. magistrate provides summary of circle discussion/decisions reached
10. magistrate determines sentence
11. support for defendant established, formal support group that will support offender is established
12. support for victim established, support group for victim is established
13. date for review set
14. closing remarks, magistrate formally closes the circle

After Circle Sentencing
A support group for the offender will be established during the circle and that group will assist the offender complete his/her sentence. The support group will report back to the Community Justice Committee on the offender's progress. The Community Justice Committee will keep the magistrate apprised of the progress of defendants after circle sentencing. Any breaches of the terms of the conditions of the sentence can be reported to court in the same way that exists for regular court imposed sentences, however the community justice committee would also be able to advise the court of any breaches of sentence conditions.

Evaluating the trial
It is proposed that the trial be evaluated in a number of ways including the overall level of Aboriginal community satisfaction with the process, the progress of individual offenders after circle sentencing and any impact on the overall level of offending in the pilot communities. It is further proposed that the evaluation be conducted by an independent Aboriginal body.

1. Assessment of community satisfaction with the process
The most important and significant measure of the success of the trial will be an assessment of the communities satisfaction with the process. It is proposed that the satisfaction be measured at the conclusion of the trial that thorough consultation be held with the local community to determine the level of satisfaction, that the satisfaction be measured on a number of levels,
· level of satisfaction with process of the circle court
· level of satisfaction with the outcomes of that court
· overall level of community involvement with the process including at decision making stages
· support for and involvement of victims in the process

2. Assessment of the progress of individual offenders
While measuring levels of recidivism is implausible it is possible to assess the progress of individual participants who have proceeded through the circle sentencing process. The measure to asses those individual success would be to measure the extent to which each defendant met the sentence conditions, and the number of breaches among participants compared to non participants.

3. Reduction in overall offending
A further measure of the trial would be an assessment of the overall level of offending within the trial areas to determine whether there has been a reduction in offending, and if that reduction can be directly related to the trial.

7.5. A Role For ADR In The Criminal Justice System? - 1999 [183]

- Sentencing circles use restorative justice principles.
    - There is an article in the Canadian Criminal Law Quarterly entitled *Sentencing Circles: Some Unanswered Questions* by Julian V. Roberts and Carol LaPrairie[184] for those interested, which deals with their use in the Yukon and Saskatchewan.

[183] Laurence M. Newell, Adviser to the Chief Justice of Papua New Guinea, A Role For ADR In The Criminal Justice System?, A paper prepared for the PNG National Legal Convention 25-27 th July 1999 Papua New Guinea

- A sentencing circle is a process whereby community members contribute to sentencing decision-making in cases involving community members[185].
    - The circle is held in open court, proceedings are recorded and interpretation services provided where necessary. Participants sit in a circle and there is no formal arrangement about who sits where.
    - There is variability in procedures, but these basically entail some version of the following.
        - Participants are welcomed and introduced, the facts of the offence and offender are presented by the criminal justice participants, at which point the discussion is opened to the public present.
        - The discussion can involve any number of subjects, including the underlying cause of the crime, the impact of the crime on the victim and the community, and the details of potential sentences.
        - The objective is to bring to the circle (including the judge) the best available information out of which an appropriate sentence can emerge.
        - There is no sworn testimony or cross-examination of the participants, and there are no rules regulating the statements that may be made.
- It will be seen that this is a form of restorative justice used at the sentencing stage.
    - It is clear from the article in the Canadian Criminal Law Quarterly that it is ADR in the sense of giving the Court a much better appreciation of how to resolve the issues in a matter, than could come out of normal sentencing systems.
    - It does not divert matters from the Criminal Justice System, but does perhaps provide a stepping stone to full use of restorative justice by the Criminal Justice System.

7.6. Are We Doing Anything about the Disproportionate Jailing of Aboriginal People? - 1999[186]

Although some authorities point out that evidence of a reduction in recidivism is primarily anecdotal,[187] there is some documented evidence of improvements, such as the 46% reduction in crimes in the 17 to 20 year old age group in New Zealand[188]

[184] (1996) 39 CLQ 69. See also Community-based Sentencing of Aboriginal Offenders: Some thoughts on the Canadian experience by Judge Jeremy Nightingale (Provincial Court of Saskatchewan, Canada) in the NSW Judicial officers Bulletin (August 1997) Vol. 9 No. 7 page 49 to 51.

[185] (1996) 39 CLQ 69 at 71. I have slightly varied the wording as it refers to proceeding being "translated", when it should read "interpreted". The second definition of "interpreter" according to the Concise Oxford Dictionary is "one whose office it is to translate orally in their presence the words of persons speaking different languages". Whereas "translate" means "express sense of (word, sentence, book) in or *into* another language". That is to say *Translate* is the generic term, whereas *Interpret* is the term used specifically where someone is translating orally.

[186] Tim Quigley, "Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?" (1999) 42 Criminal Law Quarterly 129 at 160, citing M. Dhyrberg, "Sentencing of Children in New Zealand: A New Direction" (1995), 19 Crim. L.J. 133. cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/restorative.htm#N_83_

[187] Julian Roberts and Carol LaPrairie, "Raising Some Questions About Sentencing Circles" (1996), 39 Criminal Law Quarterly 69 at 83 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57

[188] Tim Quigley, "Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?" (1999) 42 Criminal Law Quarterly 129 at 160, citing M. Dhyrberg, "Sentencing of Children in New Zealand: A New Direction" (1995), 19 Crim. L.J. 133.