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Sentencing Circles – A Quick Guide to What are They and When They Can Be Used

Gladue Evolution Report

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cpd Continuing Professional Development

SENTENCING CIRCLES – A QUICK GUIDE TO WHAT ARE THEY AND WHEN THEY CAN BE USED

In the early 1990s some courts across Canada started engaging in an alternative sentencing process, frequently called sentencing circles, when sentencing indigenous offenders. These alternative sentencing processes were controversial and while many courts saw their value, others were less convinced of their utility. In more recent years, especially after the Supreme Court of Canada's decisions in *R. v. Gladue* [1999] 1 S.C.R. 688 and *R. v. Ipeelee* [2012] 1 S.C.R. 433, there has been a resurgence of interest in sentencing circles. While there appears to be incentive in some communities to use sentencing circles, there is still a strong view that sentencing circles are not appropriate for all crimes or all offenders. This papers will briefly explore the history of sentencing circles and the potential utility of sentencing circles as a proper extension of the principles enunciated by the Supreme Court of Canada in both *R. v. Gladue* and *R. v. Ipeelee.*

WHAT IS A SENTENCING CIRCLE

The term sentencing circles is used to refer to an alternative process for sentencing indigenous persons who have been found guilty of criminal offences[i]. The sentencing circle attempts to "combine aboriginal and non-aboriginal processes and norms of justice" in the sentencing process[ii]. In its 1996 report on the criminal justice system, "Bridging the Cultural Divide", the Royal Commission on Aboriginal Peoples described a sentencing circle as a meeting where "individuals are invited to sit in a circle with the accused and discuss together what sentences should be imposed".[iii] To many, the sentencing circle is an attempt to incorporate aspects of indigenous culture into the sentencing process so as to give judges the ability to impose more meaningful sentences that properly take into account Aboriginal values. Stuart J. one of the first jurist to engage in sentencing circles and a leader in developing processes around sentencing circles, stated in *R. v. Moses,*

> Much of the systemic discrimination against Aboriginal people within the justice system stems from a failure to recognize the fundamental differences between Aboriginal and western cultures. 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.
>
> After extensive exposure to the justice system it has been assumed too readily that Aboriginal people have adjusted to our adversarial process with its obsession on individual rights and individual responsibility, another tragically wrong assumption. Similarly, we have erroneously

> assumed by inviting their involvement in our system they will be willing and eager participants. If we genuinely seek their partnership in resolving crime, a process that fairly accommodates both value systems must emerge.
>
> The circle has the potential to accord greater recognition to Aboriginal values, and to create a less confrontational, less adversarial means of processing conflict. Yet the circle retains the primary principles and protections inherent to the justice system. The circle contributes the basis for developing 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.

Fafard J. in *R. v. Joseyounen*, [1995] 6 W.W.R. 438 (Prov.Crt.) explained the purpose and value of sentencing circles in this way:

> 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.
>
> 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. 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 to others[iv].
>
> 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.

Bayda C.J.S., in the case of *R. v. Taylor (W.B.T.),* [1998] 7 W.W.R. 704 described a sentencing circle as follows: paragraph 70,

> …A sentencing circle is much more than a fact finding exercise with an aboriginal twist. While it may and does serve as a tool in assisting the judge to fashion a "fit" sentence, and in that respect serves much the same purpose as a pre-sentence report, a sentencing circle transcends that purpose. It is a stock-taking and accountability exercise not only on the part of the offender but on the part of the community that produced the offender. The exercise is conducted at a quintessentially human level with all interested parties in juxtaposition speaking face to face,

> informally, with little or no regard to legal status, as opposed to a clinical, formal level where only those parties with legal status participate and only at their respective traditional physical, cultural and ceremonial distances from each other. The exercise permits not only a release of information but a purging of feelings, a paving of the way for new growth and a reconciliation between the offender and those he or she has hurt. The community to which the offender has accounted assumes an authority over and responsibility for the offender – an authority normally entrusted to professional public officials to whom the offender does not feel accountable. All of this is subsumed in the term "healing" so often used by aboriginal circle participants. The notion of healing, as Crown counsel has intimated, is at the centre of the circle restorative approach[v].

As can readily be seen by the above comments, sentencing circles are essentially sentencing hearings that take place in a less formal and less adversarial manner that allow for the inclusion of aboriginal concepts of justice. A sentencing circle also ensures that the sentencing judge has all the information necessary to properly address the objectives of sentencing with particular attention to the unique background and circumstance of the offender.

HOW DO SENTENCING CIRCLES WORK?

In practice, sentencing circles take many different forms and there is no agreement amongst Canadian courts on what a sentencing circle should look like. There are, however, some similarities. In most sentencing circles, the judge and all other participants sit in a circle. Altering the physical setting of the sentencing is viewed as a significant component to the process. Stuart J. stated in *R. v. Moses*[vi],

> In any decision-making process, power, control, the overall atmosphere and dynamics are significantly influenced by the physical setting, and especially by the places accorded to participants. Those who wish to create a particular atmosphere, or especially to manipulate a decision-making process to their advantage, have from time immemorial astutely controlled the physical setting of the decision-making forum. Among the great predator groups in the animal kingdom, often the place secured by each member in the site they rest or hunt, significantly influences their ability to control group decisions. In the criminal justice process (arguably one of contemporary society's great predators) the physical arrangement in a courtroom profoundly affects who participates and how they participate. The organization of the courtroom influences the content, scope and importance of information provided to the court. The rules governing the court hearing reinforce the allocation of power and influence fostered by the physical setting.

> The combined effect of the rules and the courtroom arrangements entrench the adversarial nature of the process. The judge, defence and Crown counsel, fortified by their prominent places in the courtroom and by the rules, own and control the process and no one in a courtroom can have any doubt about that.

In a sentencing circle, the location of the parties, including the judge, sitting in a circle where no one has a position of prominence, allows for a greater feeling of community and party participation thereby allowing for a more restorative justice approach and a forum where parties are better able to speak. By using a circle as opposed to the regular courtroom, it signals to the participants that they have an important role in the sentencing process and may serve to better include the voices of indigenous persons that are often absent from the court process. In a sentencing circle I was involved in last year, when asked, after the sentence was imposed, about the circle, the offender commented on how meaningful it was for him to be seated next to the judge. It led him to believe that he was an important part of the hearing and that he would be heard[vii].

Sentencing circles also tend to include not just the immediate parties but also victims and community members. In fact the victim and the community members are fundamental members of the circle. For the circle to properly speak to the harm caused the victim's voice is essential. Moreover, by having the community at the table, creative sentencing options can be reviewed with real input from the community about what role if any, they can have in holding the offender accountable for his/her actions and also to help with the healing process.

While these are some common features to sentencing circles, there are still many differences between circles. Firstly, while the appellate courts have developed some authority for when circles should or should not be conducted, there is no uniform model adopted across the country. There are no rules or guidelines about whether the arraignment happens within the circle or in a regular court setting. There is also no general agreement on whether the circle takes places on the record or off the record. In the latter case, the imposition of sentence takes place on the record and the trial judge summarises for the record what took place during the circle.

In some circles, community members are greatly involved and make recommendations for sentence. In other circles, where the community is harder to define because the particular offender is still dislocated from his/her community, there is no community recommendation and the sentencing judge relies on the enhanced record as created in the circle to determine the appropriate sentence.

One place where there is agreement, is that in circles where the community makes a recommendation, the sentencing judge is not bound by that recommendation. While it is seen as being important that the sentencing judge place weight on the recommendation of the circle, because if no weight is to attach to it, the utility of the circle is questionable, ultimately the decision on sentence is left to the judge.

Dutil J. in *R. v. Naappaluk,* [1994] 2 C.N.L.R. 142 (C.Q) eloquently spoke about this issue,

> As I see it, the judge's role in a "consultation circle"[viii] is that of a discreet facilitator, who must allow participants to express themselves.
>
> Of course, the judge is not bound by the recommendations of the participants in the consultation. When I set up the consultation circles in Kangiqsujuaq, [an Inuit community in northern Quebec, in May 1994] ... I clearly explained to all participants that I would not be bound by their recommendations. It is understandable, however, that if the judge systematically sets aside the circle's recommendations, it may become entirely useless to hold such sessions. In my opinion, the judge must listen to the participants, discuss with them if need be, listen to their recommendations and follow them in most cases, unless he has serious reasons to set them aside, in which case he must explain clearly the reasons for his decision, so that the sessions are not looked upon as futile exercises.

Similarly, more recently, in *R. v. Elliot* [2014] N.S.J. No. 69, in holding that a sentencing circle should be conducted despite the Crown's opposition to it, the sentencing judge specifically referenced the fact that any recommendations made by the circle were not binding on the court. Gabriel J. stated,

> Under all of these circumstances, for the reasons stated, I am prepared to refer the matter to a sentencing circle on all charges. It is self-evident that the recommendations, once received, are not binding upon the Court. They will, however, better inform the Court in the discharge of its responsibility to ensure that the sentencing process in relation to Mr. Elliot is an individual one, and that all of the sentencing considerations (including that of proportionality, to which the Gladue factors speak) are addressed. If it should be the case that all or any of the recommendations emanating from the circle are not acted upon, they may, nonetheless (after sentence is imposed) have other uses. One such use was referenced in Joseyounen (supra) in which they were used to facilitate the healing of the individual in conjunction with his community. The recommendations may also be relevant to services to be made available to Mr. Elliot in prison, if his sentence should involve a period of incarceration[ix].

In *R. v. Jacko,* [2010] O.J. No. 2583 (C.A.), the Ontario Court of Appeal overturned a sentencing judges' decision that ran contrary to the recommendation of the sentencing circle. One of the errors noted by the Court of Appeal was that the "trial judge failed to give sufficient weight to the nature of the community in which these offences were committed and the views of that community (as reflected in the recommendation of the sentencing circle) about the nature of the punishment best suited to respond to the community's needs and notions of justice"[x]. This sends a strong signal to sentencing

judges that they must strongly consider the recommendation of the circle and, if the judge is going to reject the recommendation, reasons for doing so should be provided.

In some cases, there are no community members to make recommendations to the sentencing judge. In such cases, the court considers the submissions of counsel, the enhanced record from the information received during the circle and the case law before imposing sentence[xi].

It may be that there is no uniform model for a sentencing circle. This is because personal circumstances are so unique that the circle must be sufficiently flexible to account for this reality. This flexibility is particularly important when one remembers that concepts of justice, practice and ceremony are vastly different from Nation to Nation. There is not one pan-indigenous concept of justice.

WHEN SHOULD A SENTENCING CIRCLE BE HELD?

There is no appellate authority in Ontario giving the lower courts in Ontario guidance about when a sentencing hearing should be held. Other provinces, however, have significant jurisprudence in this area. In Saskatchewan for example, sentencing circles are used in some communities with relative frequency and the appellate court has provided some guidance on what factors are relevant in assessing the appropriateness of conducting a sentencing circle. In *R v. Morin,* [1995] S.J. No. 457 (CA), the Court of Appeal, citing from *R. v. Jaseyounen*, [1995] 6 W.W.R. 438 (Prov.Crt), referred to seven criteria that should normally be considered before deciding to conduct a sentencing circle:

> (1) The accused must agree to be referred to the sentencing circle. (2) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn. (3) That there are elders or respected non-political community leaders willing to participate. (4) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing. (5) The court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she is, then she should have counselling made available to her and be accompanied by a support team in the circle. (6) Disputed facts have been resolved in advance. (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.

In addition to these criteria, the court noted that where a penitentiary sentence is inevitable a sentencing circle will not be appropriate. This is because there is no possibility for community involvement in carrying out the sentence when penitentiary sentences are imposed

Other provinces have applied similar criteria. In *R. v. Rich (No 1)*, [1994] 4 C.N.L.R. 167,[xii] O'Regan J. in the Newfoundland Supreme Court in addressing whether or not a sentencing circle should be conducted referenced the factors in *R. v. Morin* and went on

to note that the participation of the victim was one of the most significant factors in assessing the utility and appropriateness of conducting a sentencing circle. In reaching this conclusion, O'Regan J. stated,

> Without the complainant a large slice of the circle is missing. I find that a sentencing circle certainly requires four integral parts:
>
> 1.the judge;
>
> 2.the accused;
>
> 3. the complainant (if there is one); and
>
> 4.the community.

More recently, the issue of when a sentencing circle should be conducted was considered in *R. v. Elliot* [2014] N.S.J. No. 691. In this case the court did not strictly adhere to the Morin guidelines. In deviating from these guidelines, Gabriel J., highlighted some of the issues that arise from strict adherence to the criteria set by other courts. Of real concern was the issue of community participation. Gabriel J. noted that if community involvement is a necessary piece of a sentencing circle then this factor alone will frequently be a barrier to indigenous persons residing in larger urban settings where the offender is not well known and there is no readily identifiable community. Gabriel J., in his reasons, recognized that a broader definition of community is required to properly reflect the impact of forced dislocation and relocation and ensure that sentencing circles are accessible to all indigenous persons. Gabriel J. stated at paragraphs 46 and 47,

> **46** I noted earlier that a broader definition of "community" is one much more applicable to aboriginal peoples in the Atlantic Provinces, many of whom do not live on reserves as "rural" as those in the Western provinces. In Nova Scotia, for example, many such reserves are very proximate to urban centres, and this proximity frequently encourages people to move around and reside in different areas of the province for different portions of their lives. We also encounter, in Nova Scotia, the after-effects of a centralization policy pursued by the Provincial Government which attempted the forced relocation (in 1942) of aboriginal people in Nova Scotia to either the Eskasoni or Indian Brook reserves. One of the effects of this policy was an exodus of people from the other reserves, many of whom chose to live in predominantly non-aboriginal urban communities, elsewhere in the province, rather than in either mandated location.
>
> **47** As stated, in Ipeelee (supra) the Supreme Court of Canada, (at para. 85) reiterated that we must consider the "unique circumstances of aboriginal offenders". A broader, more flexible definition of the term "community", in my view, simply assists that process by ensuring that the totality of the circumstances bearing upon an individual may be considered when the suitability of a proposed host community is

assessed. Length of residence in the particular community is only one factor in such an analysis.

In his decision, Gabriel J. noted that in Nova Scotia, sentencing circles are referred to the court by the Mi'Kmaq Legal Support Network who have their own criteria for deciding whether or not a sentencing circle is appropriate. These criteria are very similar to the Morin guidelines and include that the offender must take full responsibility for the offences, be willing to listen and acknowledge the harm caused to the victim and the community, be honest and willing to make amends for the harmful conduct, be committed to process and be willing to accept the sentencing plan. Moreover the community must be willing to take responsibility for the offender, be willing to offer the offender support and guidance and hold the offender accountable and, be willing to take on a leading role in the reparation of harmful behaviours and seek solutions to assist the offender's re-integration into the community[xiii].

There are very few reported sentencing decisions in Ontario that have specifically addressed the test for when a sentencing circle should be held. In the few cases that have addressed it, the guidelines from *R. v. Morin,* are cited as proper considerations. For example, in *R. v. Antoine,* [1997] O.J. No. 4078 (OCJ), a case from Gore Bay, Fitzgerald J. placed substantial weight on the guidelines articulated by the Saskatchewan Court of Appeal in *R. v. Morin* and found that for a sentencing circle to be a viable option, the offender must take full responsibility for his/her actions, be a member of and accountable to a community that is willing to take responsibility for him and, the community has sufficient resources to help the offender[xiv]. In Antoine, the court decided that a sentencing circle was not appropriate because the offender was not taking responsibility for his actions nor was there a community to assist the offender in the restoration or healing[xv].

In *R. v. W.M.,* [1997] O.J. No. 2778 (Gen.Div.), Sedwick J., dismissed the application by the offender to conduct a sentencing circle. In so doing, the sentencing judge held that the following criteria must be met before a sentencing circle could be conducted: i) the accused has been convicted of sentences where a sentence of less than two years is likely to be imposed; ii) the accused accepts responsibility for the offences and is interested in turning his life around: iii) the victim will participate; iv) the leaders and members of the community support the request for a circle and are willing to participate and assume responsibility for the offender; v) the community is willing to support the victim; and, vi) disputed facts have been resolved in advance[xvi]. In W.M., because the victim did not want to participate and the offender was not admitting the offences, it was held that a sentencing circle was not appropriate.

The vast majority of the sentencing circles that take place in Toronto are on consent of both parties. Many would otherwise not meet the criteria set out in *R. v. Morin.* Many indigenous persons residing in Toronto are not from Toronto and move to the city for work or educational opportunities. Others were raised by adoptive white families and have had little opportunity to connect to their heritage. These realities make it difficult to

define or include the offender's community. Nonetheless, sentencing circles are taking place in Toronto and they have been quite successful. The community piece is met, but in a different way. Instead of having a community that the offender has been a member of for many years, a different kind of community is involved. Members from different indigenous agencies across the city who have worked with the offender typically attend the meeting and provide information about the supports the offender has been accessing and what supports will be available in the broader community in the future. In *R. v. McGill,* [2016] O.J. No. 1346 (OCJ), for example, there was no community present to take responsibility for Mr. McGill or to make recommendations to the court. Instead people who have worked with Mr. McGill present to assist the court. In *R. v. Moses* (unreported December 17, 2016 OCJ), a drug related offence, there was no victim present nor were there members of a community present to make recommendations as to sentence or to accept responsibility for Mr. Moses. Instead support workers were present to describe Mr. Moses' healing process and his commitment to his healing. In *R. v. Karp-Johnson* (unreported March 10 and 24, 2017 OCJ), a sentencing circle was conducted for an offender who entered a plea of guilty to a charge break and enter. In that case, there was also no community and no victim present but family members were present to speak to the steps taken by Mr. Karp-Johnson to address the issues that caused him to come into conflict with the law. In all these cases, despite the absence of the victim and a community willing to take responsibility for the offender, the sentencing circle process still proved to be fruitful to both the offender and the administration of justice by providing a broader scope of information about the offender and his/her potential for rehabilitation. In all these sentencing circles, the full scope of the offender's background and steps towards rehabilitation were canvassed in a non-adversarial way that put the sentencing judge in the best position to assess the impact of these factors on the appropriate sentence. In all these circles, as noted above, while community members in the more typical sense were not present, community in other forms was present and necessary. Community support workers, family, and/or sponsors were frequently present at the sentencing circles and provided the dual function of sharing information with the court and providing a source of support to the participants. The vulnerability that arises from the open sharing of traumatic events as often takes place in a circle cannot be forgotten and prior to engaging in a circle, this must be considered.

Over the past two years, the Old City Hall Court House in Toronto has grappled with the notion of conducting sentencing circles and what that looks like in a city as large as Toronto where the offenders are either new to the city or frequently disconnected from their community. After extensive consultation, a committee, chaired by Justice Shamai, developed a protocol for conducting sentencing circles at Old City Hall in Toronto[xvii]. Since the release of this protocol, at least half a dozen sentencing circles have been conducted at Old City Hall. It is important to note that the authors of this document reviewed all the relevant case law as well as practice and procedures from other jurisdictions including Thunder Bay and Brantford Ontario where sentencing circles are being used with some frequency.

POTENTIAL BENEFITS OF CONDUCTING THE SENTNECING CIRCLE

The question that must really be asked and answered, however, is what, if any, is the benefit of conducting sentencing circles as opposed to traditional sentencing hearings? There are a number of obvious benefits. Firstly, it allows for the inclusion of aboriginal values into the sentencing process. Secondly, it provides a better opportunity for the indigenous offender to be heard. Thirdly, it provides a broader scope of information to the court about the offender's personal situation in a way that includes the offender and gives him/her space to articulate the effect of his/her background on the offending behaviour. Fourthly, it provides an opportunity for the court and the offender to understand the harm suffered by the victim and to start the healing process. Fifthly, it provides a solid platform for the court to consider restorative justice principles. In other words, the sentencing circle equips the sentencing judge with the information and tools necessary to comply with the Supreme Court of Canada's direction in *R. v. Gladue* and affords the sentencing judge with a real ability to impose a meaningful and proportionate sentence.

In *R. v. Elliot*, the court identified some additional benefits to sentencing circles. The court stated that even where jail is imposed on an offender after a sentencing circle, the circle itself may help with healing the individual in conjunction with the community. The court also noted that the information received in the sentencing circle and the recommendations made the by community may serve to help in guide the offender's correction plan in the prison or the terms of parole[xviii].

Luke McNamara in his article, "The Locus of Decision Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines[xix]" citing from Stuart J's decision in *R. v. Moses,* noted the following benefits to the sentencing circle,

i) challenges the monopoly of professionals;

ii) enhances the range and quality of information on which a sentencing decision can be made;

iii) increases the likelihood that creative sentencing options will be identified;

iv) promotes shared responsibility for the making and implementation of sentencing decisions;

v) encourages offender and victim participation in the sentencing decision;

vi) facilitates improved understanding of the limitations of the conventional justice system;

vii) broadens the conventional criminal justice system's narrow focus on the conduct of the offender;

viii) encourages identification of productive ways to use community resources; and

ix) involves greater recognition of Aboriginal cultures and values.

In addition to these benefits, Stuart J. noted that sentencing circles also serve to help develop a partnership between aboriginal communities and the justice system, he stated as follows in *r. v. Moses,*

> 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. ... The circle contributes the basis for developing 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.

There can be no doubt that there will be occasions where a circle is not appropriate. Having said, that, it is clear from all these authorities that there is a real and substantial benefit to conducting sentencing circles. In light of these benefits it is incumbent on all participants in the justice system to turn their mind to the potential viability of conducting a sentencing circle when sentencing an indigenous person. Moreover, given their obvious utility a flexible approach should be taken when assessing whether or not a hearing should be conducted.

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[i] It should be noted that the term "sentencing circle" does not have universal approval with the focus of the criticism being on the fact that while these alternative sentencing processes focus more on restorative justice principles and include aboriginal justice concepts, the ultimate sentencing decision is still made by a Judge using the Canadian system.

[ii] "The Locus of Decision Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines" by Luke McNamara, (2000) 18 Windsor Y.B. Access to Justice 60 at page 61

[iii] R. Dussault, Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Royal Commission on Aboriginal People, 1996)

[iv] *R. v. Joseyounen*, [1995] 6 W.W.R. 438 (Prov.Crt.) at paragraphs 37-41

[v] *R. v. Taylor (W.B.T.),* [1998] 7 W.W.R. 704 at paragraph 70.

[vi] *R. v. Moses,* [1992] 3 C.N.L.R. 116 (Y.T.C.)

[vii] *R. v. Moses,* unreported December 17, 2016
[viii] As noted previously, the term sentencing circle is not universal. Consultation circle is another name for the same concept.
[ix] *R. v. Elliot,* [2014] N.S.J. No. 691 (Prov. Crt.) at paragraph 64
[x] *R. v. Jacko,* [2010] O.J. No. 2583 (C.A.) at paragraph 81
[xi] *R. v. McGill*, [2016] O.J. No. 1346 (OCJ)
[xii] *R. v. Rich (No 1)*, [1994] 4 C.N.L.R. 167 at page 179
[xiii] R. v. Elliot, *supra note. 8* at paragraph 50
[xiv] *R. v. Antoine,* [1997] O.J. No. 4078 (OCJ) at paragraphs 31 and 32
[xv] R. v. Antoine at para 33
[xvi] *R. v. W.M.,* [1997] O.J. No. 2778 (Gen. Div.) at paragraph 12
[xvii] Report of Gladue Evolution Subcommittee, October 5, 2015
[xviii] *R. v. Elliot, supra note viii*, at paragraph 64
[xix] Supra note ii at paragraph 75

REPORT OF GLADUE EVOLUTION SUBCOMMITTEE

October 5, 2016

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[1] The Gladue Operations Committee has given stakeholders in the Court an opportunity to meet from time to time since the inception of the Court at Old City Hall in 2001. Noting trends towards sentencing circles and other non-traditional formats in other courts intent on implementing *Criminal Code* Section 718.2(e), and reflecting Indigenous tradition, the Committee tasked a Subcommittee with an examination of the evolution of the Court. That Subcommittee reported in August, 2014.[1] A further Subcommittee, through this report, now wishes to propose strategies for implementation of sentencing or healing circles, to identify remaining issues, and to create a forum for further discussion, both at the Old City Hall and other court locations in the GTA. The Gladue Court as it started in 2001 has seen many changes relating to its initial purpose over these nearly fifteen years. Whether broadly styled as restorative justice initiatives, or case conferences mandated by the Youth Criminal Justice Act[2], or an adaptation of traditional Indigenous justice and customary law, [3] innovation in criminal law proceedings is evident in many locations of the Ontario Court of Justice. Courts at 311 Jarvis deal with Aboriginal youth in case conferences, where the judge does not robe and all parties speak together at a table, not under the Coat of Arms and the hierarchical setup of Anglo-Canadian courtrooms. Courts in Walpole Island[4] and Brantford [5] have moved closer to a court

model which is an expression of the Aboriginal community's voice and values. A number of hearings in the nature of circle sentencings have been conducted at the Old City Hall to assist the sentencing judge coming to a just determination by giving the community and affected parties an opportunity to gather and present relevant information and move towards a restorative result. There are cases where the accused and complainant are not part of a First Nations community, and the judge uses a circle format to gather information, give the parties an opportunity to engage in a restorative process, and still maintain the judicial presence only in the courtroom.[6] Other courts in Ontario have incorporated different aspects of a less adversarial court, one which speaks less to the legacy of colonialism than to a resolution, and reconciliation with and healing of the affected community, with particular emphasis on Aboriginal offenders, as the statute directs us. Examples include the Court at Attawapiskat, where the judge has convened court, sitting with two elders of the community[7] and taken their advice on a case before rendering sentence. In some of these alternative settings the judge does not wear the traditional regalia of the judge, appearing in business attire, and sitting not "above" the parties, but at a table with them.[8] However, it is noteworthy that at Walpole Island and in Attawapiskat, where integration with local community is clear, the judge does appear in judicial robes.

[2] Although sentencing circles are being gradually implemented as a

mode of sentencing in Toronto, such proceedings have been current in Saskatchewan, according to the reported cases, for decades now. Similarly, we are advised that in northwestern Ontario, Courts not infrequently employ this less formal approach to hearing interested parties and considering information relevant to sentencing.

[3] At time of writing, Old City Hall's Gladue Court has seen three matters proceed on sentencing with a circle proceeding. At a Subcommittee meeting in June 2016, we focussed on what appeared to be a low rate of utilization of circle proceedings. We believe that without a practical understanding of the basics of circle sentencing, counsel will not request circle sentencings. Defence counsel Shaunna Kelly has moved the Subcommittee's process forward, as the representative of the Criminal Lawyers' Association. She drafted a FAQ type document for distribution to the profession. The Subcommittee reviewed, commented on and revised the document, and we commend it to all practitioners in our Court. It is appended (Appendix A) to this Report.

[4] As a user's guide for defence counsel, the document does not address all the issues which may arise. The judges who ordinarily sit in Gladue Court will need to consider their role in the circle, and as a gatekeeper to the proceedings, will be required to ensure that the interests of all parties are satisfied before proceeding in this manner. While it is

anticipated that circles will be recommended as a joint submission in most cases, there may be cases where there is an issue with the participation of a complainant, or where the community does not appear to be fairly or adequately represented. The Court must give reasons for denying or departing from or augmenting the recommendation of counsel. From a facilities point of view, security issues will need to be canvassed. Our Subcommittee assumed that proceedings will be on the record; however, one judge of Indigenous heritage in Ontario stays off the record when participating in circles. The findings or recommendations of the circle are placed on the record; however, the judge in that case protects the process in circle by not having a record made of it. The one time we know our Court of Appeal in Ontario considered circle sentencing, the issue came down to reflecting the findings or recommendations of the circle, and giving reasons for departing from them.[9] It is noteworthy that in that case as well, the circle took place in the community, and the judge did not participate.

[5] Practical issues may arise for the Court. The experience of the completed circles at the Old City Hall tells us that extensive pretrial meetings assist in establishing the timing, the participants, the physical setup, the ground rules: will a talking stick be used? Will there be an assigned question for each time round the circle? What is the role of the judge? Will support staff be given the opportunity or expected to participate in other than their usual roles? Are there security or other practical issues? Is a smudge

desired or feasible? Who will conduct the smudge? Is an eagle feather to be used? If so, how; by whom; in whose custody ought it be kept? No doubt these procedures will become settled as parties gain more experience with them.

[6] It is recommended that an acknowledgment of the traditional Indigenous occupants or caretakers of the lands be made at the outset of proceedings. Although some refer to specific nations, the uncertainties and historical disagreements among previous occupants of the land avoid preferring the claims of some over the claims of others. As well, an acknowledgment should be made, presumably on the record, about the purposes of the circle, in the presence of all participants. The process of the circle and introduction of participants can be described at the outset as well.

[7] The Crown will need to exercise a discretion in agreeing to sentencing with a circle proceeding. In some cases, there will be input or contact with the complainant through Victim Witness Assistance Programme (VWAP). In cases where those services are not available, contact with a complainant will be facilitated by police, or possibly by Aboriginal Legal Services (ALS). To date, the circles at OCH have involved exclusively drug charges, and so to the extent that an individual complainant's interest is in the hands of the Crown, the decision to consent to a circle sentencing has not required consideration of that factor. Where there is a complainant,

especially in violent or domestic crimes, the decision may be more complex. Crown representative on our Subcommittee suggests that in principle, circles are not barred if the complainant does not wish to participate. As an opportunity to effect restorative justice,[10] there may be considerable value in the process of a circle; however, one wants to ensure a sense of safety for the complainant, if participating. The Crown may always express an interest in the representative of the community, victim or no victim. Victim services, including but not limited to VWAP, ALS, Anishnawbe Health or Toronto Police Services, may have significant input on a decision of whether or how to conduct a sentencing circle. That decision is in the judge's discretion, and as such is subject to review.[11] Although it is anticipated that most circle proceedings will be proposed on consent, it is a judicial decision, and the jurist must be prepared to rule on the issues. It is anticipated as well that in an urban centre like Toronto, the representation of the community is not likely as contemplated by the Court in *Morin*,[12] where the community was more traditional. Another issue for the Court in *Morin* viewed the involvement of the offender with the community in adequate to make meaningful connection through the circle proceedings. One might note in the *McGill* case, the trajectory from disconnected to connected, changing the relationship of the offender to the community through the process up to and including the sentencing hearing in circle. Similar change has been noted with individuals who have participated in community council: achieving

involvement by the process itself.

[8] The Court on Walpole Island is directly connected with the First Nation whose traditional land the court convenes on. Brantford is in a similar situation, although historically at that place, members of Six Nations are not always unanimous about what tradition dictates or who speaks for the community.

[9] Such issues may be anticipated to require different solutions in communities like the ones served by the Toronto Region courts. Aboriginal Legal Services, the courtworkers, or workers from other agencies in the city may fulfill that role. In the *McGill* case, the time preparing and waiting for sentencing gave the offender the opportunity to make real connection with Indigenous/Aboriginal agencies in the city. His community worker became an important voice in the circle through the process as well.[13] There may be Elders associated with an accused party or with another interest in the sentencing hearing, and we would like to encourage that participation. Various ways of funding the participation of Elders is under discussion around Toronto.

[10] Clearly, a sentencing circle may be requested after a trial, or in a proceeding outside the Gladue court. We expect that all judges will be

prepared to consider this format.

[11] While it is anticipated that most sentencing circles will be initiated by defence counsel, we are mindful of the important role played by Duty Counsel in this Court. We are hopeful that Duty Counsel will be given the opportunity to participate in sentencing circles, should the occasion arise. This is particularly likely if abbreviated circles are conducted in relation to offences against the administration of justice. In the Gladue context, these offences are not uncommon, but have considerable significance, as bail hearings and the support of bail supervision are a cornerstone of the Court. It has been suggested that to that end, using a circle for a more meaningful consideration of why an offender breached his or her conditions, and what the concerns are of probation officer, or bail supervisor, with a view to restoring the offender to good standing, would be an excellent application of the principles underlying the circle. To make an expeditious hearing, the suggestion is that the Court reconvene within the courtroom, but at a table to the side of the dais and counsel table, in circle format. It is anticipated that if necessary parties are not there at the courthouse, they can be gathered in short order, not be as numerous, and the issues not likely be as complex as for other offence categories. However, these proceedings must not preoccupy or pre-empt the duties of the Court as it stands, in terms of dealing with bail and guilty plea matters in the ordinary course.

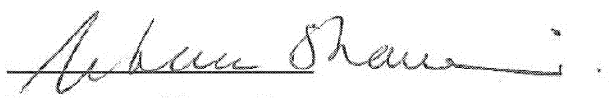
[12] The members of the Subcommittee have consistently assumed that circle proceedings are on the record, as an exercise of a Criminal Code sentencing obligation. Certainly, the circle follows an arraignment on criminal charge(s), a finding of guilt on guilty plea and factual admission by the defendant, or after a trial finding of guilt. Aboriginal Legal Services cautions us that a circle sentencing does not take the place of a Community Council diversion. Program Director Jonathan Rudin comments that one outcome of a circle could be that an individual who was not eligible for Community Council diversion might use the process of the circle and its outcomes to re-qualify for diversion, should the occasion arise in the future.

[13] Not all circles are on the Court record. As mentioned, a judge elsewhere in Ontario makes a point of not having the circle recorded on a court record.[14] In the restorative circles entertained by Harris J. at OCH, the circles are not part of the court proceeding – the judge does not sit with the circle, but is advised of the participants and receives the information, which that group chooses to return to him. In this way, the circle is another form of information-gathering, not unlike the impetus in 2000-2001 to acquire information about the unique circumstances of aboriginal heritage. That led to the Gladue Report, for which Aboriginal Legal Services deserves great credit for its work in developing, monitoring and producing reports.[15] Justice Harris recognizes that the process employed by the circle can be the result in fact.[16] Similar observations were made by Justices Green and Greene

concerning the outcomes of the circle proceedings they conducted, that the process of the circle is itself restorative.

[14] We anticipate that the proposed announcement to the defence bar (Appendix A) will generate a considerable response in terms of requests for, or discussion between counsel, about sentencing circles. It is our hope that other affected parties, principally the judges, will continue to discuss the impact on proceedings, from the jurists' point of view. We may see policy directives for the Crown, and expansion of Duty Counsel responsibilities, and hopefully some ways of better involving Elders, where appropriate. It is anticipated as well that other Gladue or Aboriginal Persons court in the Toronto region may benefit by this report, and may wish to continue the conversation in their own courthouses. Certainly other judges and courtworkers in the Region have let us know of their interest. We look forward to seeing a positive outcome from this development in conduct of Gladue courts in Toronto.[17]

Respectfully submitted,



Rebecca Shamai
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ENDNOTES:

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[1] 2014 Subcommittee Report

EVOLUTION OF OCH GLADUE COURT.doc

[2] Section 19(1) and (2) of the *Youth Criminal Justice Act* provide as follows:

> 19 (1) A youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker may convene or cause to be convened a conference for the purpose of making a decision required to be made under this Act.
>
> (2) The mandate of a conference may be, among other things, to give advice on appropriate extrajudicial measures, conditions for judicial interim release, sentences, including the review of sentences, and reintegration plans.

[3] TRC Final Report, Volume 6 - http://www.myrobust.com/websites/trcinstitution/File/Reports/Volume_6_Reconciliation_English_Web.pdf

At p.46:

> At the Truth and Reconciliation Commission's (trc) Traditional Knowledge Keepers Forum, Blackfoot Elder Reg Crowshoe said,
>
> > "When I was younger, in my community my grandmother brought me to the societies ... I believed [that] everything was equal—plants, animals, the air, the moon, the sun, everything was equal. That was the belief system that we had in our culture. Out of that belief system, we developed practices, practices where we sat in circles in a learning society ... And once you join the society, you become part of that learning society and your responsibility [was] to be a part of [the] practices that allowed you to survive, which includes reconciliation and forgiveness ..."

and at pp.58-59:

> "Black Elk, a well-known and highly respected nineteenth-century spiritual leader from the Plains, expressed the importance of the circle.
>
> > Everything the power of the world does is always done in a circle. The sky is round and I have heard that the earth is round like a ball and so are all the stars. The wind, in its greatest power, whirls. Birds make their nests in circles, for theirs is the same religion as ours. The sun comes forth and goes down again in a circle. The moon does the same and both are round. Even the seasons form a great circle in their changing and always come back again to where they were. The life of a man is a circle from childhood to childhood, and so it is in everything where power moves. Our teepees were round like the nests of birds, and these were Indigenous law always set in a circle, the nation's hoop, a nest of many nests, where the Great Spirit meant for us to hatch our children.

Although other traditions and approaches to reconciliation are apparent within Cree society, circles are critically important in working towards reconciliation within Cree

law. In fact, there are many types of circles that can be convened in a Cree context, including prayer circles, talking circles, and healing circles. Such circles can be activated when someone is unbalanced and does something harmful. These circles provide a place where such people can discuss the causes and consequences of their actions with family members, Cree Elders, leaders, and medicine people in an attempt to restore proper balance in their lives and within their communities."

[4] The Practice Manual reflects collaboration between Bench and Bar, active in the Brantford Aboriginal Persons' Court (soon to be renamed, "Indigenous Persons' Court".) The contents, apart from day to day docket and resource information, may be accessed by clicking documents below:


TAB 4 - Practice Direction.pdf


TAB 4A - Crown Policy.pdf


TAB 4B - Case Specific Information.p


TAB 4C - Gladue Panel Standards.pdf

[5] Justice D.J. Austin describes the process and purpose of the Memorandum of Understanding, drafted at the inception of the Court on Walpole Island, in the following terms:

> "[The Walpole Island] Court addresses Family and Criminal matters that occurred or are based on their territory and is now well received by the community.
>
> The Chief and Band Council were signatories because they were providing permission and welcome for the Court to function on their territory and indeed, in their Governance building. We sit at their council table and use their breakout rooms and facilities.
>
> It is my view that the process of developing the Memorandum of Understanding built a relationship and trust and ensures the expectations are clear, reasonable and appropriate.
>
> There is an active Working committee that includes representation from all the stakeholders including of course, the First Nation and the usual justice participants to address the ongoing issues related to this Court.
>
> ….I am not sure this model is widely applicable or adaptable elsewhere, but it has proven successful for our jurisdiction."

[6] Possible Sentencing Circle Options for Consideration by Justice Peter Harris –


Peter Harris Possible Restorative Justice C

[7] The Honourable Gerry Michel (retired, Ontario Court of Justice)

[8] The Honourable Justice Jonathan George (as he then was – now a member of Superior Court of Justice) presided in London, Ontario at a table in his courtroom, attired in a business suit, rather than in judges' robes, above the parties on the dais.

[9] *R. v. Jacko* (2010), ONCA 452 per Watt, JA at para 32:

> "The trial judge rejected the recommendations of the sentencing circles. The prosecutor and judge were not present. No one advanced the position of the prosecutor or apprised circle members of the prior convictions of each appellant. The recommendations lacked specifics, especially regarding enforcement and control mechanisms."

And at para. 81:

> [the Court lists reviewable errors] Third, in my view, the trial judge failed to give sufficient weight to the nature of the community in which these offences were committed and the views of that community (as reflected in the recommendation of the sentencing circle) about the nature of punishment best suited to respond to the community's needs and notions of justice.

[10] In his collection of essays and articles, Restorative Justice and Violence Against Women, Professor James Ptacek (ed.) (2010, Oxford University Press) shows the discussion concerning the utility and the drawbacks of using restorative justice, in a variety of settings which resile from state involvement in responding to these crimes.

[11] Justice Sheila Ray, "*Précis on Sentencing Circles: A Milestone Following a Long Journey and the Lessons Learned*," Regquest, 9:5, May 2016, 1-7.

Sentencing Circles Article.pdf

[12] In 1993, Judge Milliken of the Saskatchewan Court of Queen's Bench considered whether sentencing circles were appropriate in an urban setting or only in Aboriginal communities in northern Canada, as Crown contended. He expressed the opinion that the sentencing circle process "firstly, gives the sentencing judge the fullest possible information concerning the person to be sentenced; secondly, gives the accused, the victim, the community, the police and probation authorities an opportunity to arrive at a sentencing option, which gives the accused an opportunity to try and change his lifestyle with the help of community involvement. The buying into the sentencing process by the accused and the involvement of the community in his or her rehabilitation are the key ingredients of the sentencing circle, in my opinion…" He then continues to describe the participants in the circle, and those whom he chose to be present in the circle. (*R. v. Morin*, 1993 CanLII 9045)

The decision of Judge Fafard, *R. v. Joseyounen* of the Saskatchewan Provincial Court is reported at 1995 CanLII 10830. In it, Judge Fafard describes criteria to be considered for a sentencing circle:

1. The accused must agree to be referred to the sentencing circle.

2. The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.

3. That there are elders or respected non-political community leaders willing to participate.

4. The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.

5. The court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she is, then she should have counseling made available to her and be accompanied by a support team in the circle.

6. Disputed facts have been resolved in advance.

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.

The discussion of the criteria is interesting and instructive, although no doubt some of the criteria may be subject to some amendment in light of local conditions and various changes to the *Criminal Code* since 1995.

[13] *R. v. McGill*, 2016 ONCJ 138, http://www.canlii.org/en/on/oncj/doc/2016/2016oncj138/2016oncj138.pdf

[14] The practice of Justice Pelletier in Thunder Bay has been, to date of writing, to conduct circles off the record. Justice Harris in Toronto has benefitted from the input of a sentencing circle, conducted of the record, without his participation. We understand that this format has been used by judges of other courts, as well, *R. v. Jacko (supra fn. 9)* being a well-known example.

[15] Just as the Gladue Report, as Aboriginal Legal Services has forged it, provides an invaluable source of information for judges, guidelines for the content of reports providing this type of information have been drafted in jurisdictions outside Toronto. The Brantford Aboriginal Persons Court Practice Binder (see endnote #5) provides one example. Similar directions have been drafted in Manitoba http://vawlawinfo.ca/wp-content/uploads/Gladue-Handbook-MB-Univ.pdf
and British Columbia,
http://www.lss.bc.ca/assets/aboriginal/gladueReportWriterRosterPolicy.pdf

A pilot project supported by Osgoode Hall Law School is using video's to show the circumstances of Aboriginal offenders, uses the visual aid thereby possible, and brings information to Court through that medium to assist the process of sentencing.

[16] See endnote #6

[17] Evaluation of the Gladue Court at Old City Hall by Professor Scott Clark, Ph.D. http://www.aboriginallegal.ca/assets/gladue-court-evaluation---final.pdf

Appendix "A"

Sentencing Circles
Criminal Lawyer's Association
Memo to the Defence Bar

WHERE

Old City Hall

WHO

Circles are encouraged by the Gladue Court for sentencing hearings involving all persons (Status Indian, non-status Indian, Inuit or Metis) where 'Gladue'/Section 718.2(e) considerations are in play. Consent of all parties (Crown and Defence) is anticipated on appropriate applications. The Court will consider sentencing circle as an option, even if not on consent

****It is recommended that the option of a sentencing circle be canvassed with the presiding justice prior to commencing this type of hearing****

WHAT

Any and all charges are eligible for consideration. Charges may include allegations against the administration of justice, drug offences and violent offences. A sentencing circle may take place upon a guilty plea or after a finding of guilt at trial.

HOW

Please speak to your assigned Crown or Prosecutor. The onus is on the defence bar to raise such a process on behalf of our clients. Please note that a plea inquiry, where a sentencing circle is anticipated, should allude to the nature of the circle, to show that the plea is informed

WHY

To encourage alternate approaches to sentencing: the circle process will take into consideration the relationship between the accused and the complainant (or state) as well as the well-being of the community as a whole. The sentencing circle is a means of implementing restorative justice, which is one of the objectives of the Gladue Court, and Section 718.2(e) generally.

WHEN

NOW! We are making attempts to have these matters heard in a timely fashion, but we need your help. The more interest in these types of resolution, the better we'll get at the process. As of right now, we expect the process to be a few hours to half a day (although the complexity of the matter and number of people involved in the process will obviously affect the length of the hearing).

Please note:

- ***That the requirements listed under section 606 of the Criminal Code still apply: the position of the parties does not have to be a joint recommendation. Parties will still make their positions known, and the judicial officer will still make the final determination on sentence.***

- ***The outcome of the circle may still result in a custodial sentence.***

- ***The sentence imposed cannot be one that is not sanctioned by the Criminal Code.***

- ***An agreed statement of facts must be reached PRIOR to commencing the circle process. For this reason, the arraignment and facts will be done on the record in open court, prior to the commencement of the circle.***

- ***Please note that a sentencing circle may be held at the conclusion of a trial that results in a finding of guilt.***

- ***And remember that the circle process is a unique process, which is tailored to the circumstances of the individual and the facts that are before the court.***

Some helpful considerations prior to engaging in this process:

- ***What do you know about your client's aboriginal heritage?***
- ***Have you discussed the matter with Aboriginal Legal Services and received a release plan from the workers?***
- ***What community resources are available to your client?***
- ***Who is the 'victim' in the matter: this is a broad definition and may include bail program supervisors, probation officers, civilians or the state.***
- ***Timing: will the Crown consent to release upon a finding of guilt, but pending the circle sentencing?***

Questions? Please feel free to contact me directly at skelly@h-b-a.ca or shaunnakelly@gmail.com