

SENTENCING CIRCLES FOR ABORIGINAL OFFENDERS IN CANADA:  
FURTHERING THE IDEA OF ABORIGINAL JUSTICE WITHIN A WESTERN  
JUSTICE FRAMEWORK

by

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## ABSTRACT

This thesis examines the use of sentencing circles for Aboriginal offenders in Canada. The purpose of this thesis is to investigate the degree to which the idea of Aboriginal justice, and the concepts associated with this idea, have been furthered by the implementation of sentencing circles in Aboriginal communities across Canada. The amount of control that Aboriginal community members have over the sentencing circle process and sentencing itself will be an important factor in furthering the idea of Aboriginal justice within a Western justice framework.

The main source of data for this case study includes seventeen reported sentencing circles judgments, seven sentencing circle applications, and three appeals of sentencing circle decisions all of which took place between 1990 and 1999. Existing research on sentencing circles and Aboriginal justice is also explored throughout this thesis.

The findings suggest that community members, victims, and offenders have begun to act on the understanding that justice is a community responsibility by participating in sentencing circles. While circle participants can introduce Aboriginal traditions and practices into the circle process and can suggest restorative and healing sentencing plans, they do this within the constraints of the criminal justice system. The criminal justice system, through case law/appeals and legislation in the *Canadian Criminal Code*, places constraints upon the sentencing of offenders in sentencing circles. Judges are restricted as to the types of sentences that can be given to Aboriginal offenders in sentencing circles. While judges retain the power over sentencing they often accept the recommendations for sentence given by community members. The community members' suggestions are often reflected in the conditions of probation.

Many of the sentences given did further the idea of Aboriginal justice by ensuring

that offenders follow a rehabilitative plan, with the help of their fellow community members. These plans include aspects of restoration (and counselling), reconciliation, restitution, and reimbursement. The conclusion is made that even though Aboriginal justice initiatives, such as sentencing circles, are operating within the Western justice framework, they do allow for the advancement of concepts associated with the idea of Aboriginal justice.

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## CHAPTER I

### INTRODUCTION

For years now there have been reports on the high rates of incarcerated Aboriginal offenders<sup>1</sup> in Canada. According to the National Parole Board report of 1999, statistically, “Aboriginal<sup>2</sup> Canadians represent only about 3% of the general population but 16% of the federally incarcerated population” (<http://www.npb-cnrc.gc.ca/ppe.htm>). The percentage of incarcerated Aboriginal offenders in the provinces is much higher, especially in the Western provinces. It is unclear whether this overrepresentation merely reflects the high number of crimes committed by Aboriginal people or if it reflects an institutional form of discrimination that pervades the criminal justice system. Reforms to the criminal justice system<sup>3</sup> are needed that will lower the high rate of incarceration for Aboriginal men and women.

Other than the sentencing process itself, Quigley (1994) summarized the following causes that contribute to the over-incarceration of Aboriginal people: socioeconomic situation, high proportion of young people in the “age group prone to criminality”, susceptibility to alcohol abuse, policing (detection rates), cultural barriers in court, and prior criminal records (273). These are only some of the reasons why Aboriginal people most often come into contact with the law. Once Aboriginal people enter the system, there are even more barriers that they have to face.

Sinclair (1994) found that once arrested and charged

Aboriginal people are less likely than non-Aboriginal people to plea bargain or to benefit from a negotiated plea; Aboriginal people are often unrepresented or under-represented in court. They are largely economically impoverished and cannot afford to hire their own counsel....Aboriginal people are more likely than non-Aboriginal people to plead guilty, even when they are not, or do not believe themselves to be guilty; Aboriginal people are more likely than non-Aboriginal people to be incarcerated upon conviction (but compared with non-Aboriginal people, they are likely to receive, on average,

shorter sentences); Aboriginal people are more likely than non-Aboriginal people to leave the legal process without understanding, and therefore without respecting, what has occurred to them and why (173-174).

It is unlikely that Aboriginal offenders will be able to face such an adversarial system unscarred.

Turpel (1994) claimed that “the adversarial system, the Criminal Code, the prison system of punishment, the psychological model of rehabilitation based on confession and repentance and the paternalism of parole are all foreign practices to traditional Aboriginal societies, even though Aboriginal people are well acquainted with them in practice” (206). Even though in today’s day and age Aboriginal people are familiar with how the justice system works, that does not mean that they have any control over the negative impact of such a system.

Letourneau et. al. (1991) claimed that

the impact of the justice system on Aboriginal persons is most apparent at the sentencing stage. Many studies over many years have noted the high rate of incarceration of Aboriginal offenders ... Even more disturbing is that Aboriginal representation in prison has moved upwards over time - a situation which is completely unacceptable in a society that prides itself on being free and democratic (66-67).

Letourneau et. al. (1991) also found that

Aboriginal offenders are incarcerated in prisons that are geographically and culturally far removed from their communities. The programs and services at those institutions have not been sensitive to the culture of Aboriginal inmates and, in particular, to their spiritual needs. Few Aboriginal persons work within the correctional system. Native brotherhoods and sisterhoods have done important work, but they suffer from inadequate recognition and insufficient resources (79).

With incarceration on the rise, where there is little chance of rehabilitation, alternatives to prison sentences need to be sought.

Turpel (1993) claimed that

[o]ne of the biggest difficulties with the criminal justice system for Aboriginal people is the fact that it is oriented toward punishment of the offender in the interests of society by imposing a term of imprisonment, fines

and, less often, forms of restitution and community service. The two cornerstones of punishment, imprisonment and fines, are both alien to Aboriginal peoples ... [traditionally] the goal for Aboriginal communities after an incident of harm against a person or possessions was to resolve the immediate dispute through healing wounds, restoring social harmony and maintaining a balance among all people in the community. Harmony, balance and community welfare cannot be satisfied when an individual is imprisoned and taken out of the community. In very rare cases, Aboriginal persons may have been banished from the community, but imprisonment might be the offender's only avenue for healing and restoration. Also, when the offender is removed it may not be possible to restore the victim and the victim's family or clan to right the wrong. If the offender is paying a 'debt to society' through a prison term, what about the repair of the debt to the victim and others in the community (178)?

Are the interests of the Aboriginal community truly being served when their members are sent to distant prisons to do their time, often without access to rehabilitative programs which the community members could have provided? Common sense would lead one to answer in the negative. But is it so easy to return to the traditional ways that Turpel (1993) outlined for dealing with harmdoers?

Dickson-Gilmore (1992) argued that

the practical consequences of the subsequent British and Canadian drives to impose their culture, languages, laws, and legal traditions upon native nations have been to substantially erode much First Nations' traditional knowledge. As a consequence, many of those nations, who would wish to resurrect their traditional legal structures as alternatives to remaining under Canadian law, are faced with limited sources from which to draw the traditional stuff from ... The magnitude of this challenge varies across nations in accordance with the degree of success governments have had in wasting away traditional knowledge, for as knowledge is lost, so is the means from which a new system, or an old system for that matter, might be constructed in the modern context (481).

This does not mean that new systems or justice initiatives *can not* be constructed in the modern context. The inadequacies of the current justice system are expressed in a call for Aboriginal justice initiatives.

It is one of these initiatives, circle sentencing, that is the focus of this thesis. However, before proceeding with an analysis of sentencing circles, it is necessary to determine what is meant by the idea of Aboriginal justice. Such a concept is quite vast

and does not easily fall into a specific definition. The aim here is to arrive at a general definition of what is meant by the idea of Aboriginal justice. The following review of what scholars and practitioners deem Aboriginal justice includes will bring us closer to such a definition. Sinclair (1994) studied the differences between Aboriginal and non-Aboriginal cultures and he found that

[t]he primary meaning of ‘justice’ in an Aboriginal society would be that of restoring peace and equilibrium to the community through reconciling the accused with his or her own conscience and with the individual or family that was wronged ... Aboriginal cultures approach problems of deviance and nonconformity in a non-judgmental manner, with strong preferences for non-interference, reconciliation, restitution. The principle of non-interference is consistent with the importance Aboriginal Peoples place on the autonomy and freedom of the individual, and the avoidance of relationship-destroying confrontation (178-179).

For Sinclair (1994) the idea of Aboriginal justice includes the concept of restoring peace in communities in a non-judgmental manner.

Nielsen (1994) reviewed the basic characteristics of traditional justice that are common to most native groups in Canada. Nielsen (1994) stated that “it is difficult to discuss empirical data and theoretical considerations without some sort of common framework and many of the data on traditional Native justice have not yet been placed within such a framework” (247). She decided to look at the characteristics of traditional justice “in terms of the more recent conceptions of social control” (247). The characteristics she found were as follows<sup>4</sup>:

1. That there was no concept of justice per se, as justice was learned through socialization, of being taught to respect others and the community as a whole.
2. The interests of the community were held higher than the interests of individuals - the greatest harms done were those that affected the community as a whole.

3. Conformity to community expectations was important, if not followed counseling and perhaps forms of shaming were used to bring the person back in line.
4. Justice was meted out according to the situation, there were no standard punishments for wrongdoing.
5. "Punishments were immediate and designed to further the welfare of the group" (i.e. if you hurt someone you would have to take care of their family while they could not).
6. "Justice was based on informal social control mechanisms which were progressively harsher depending on the circumstances." Some of the increasing levels of punishment were: teasing/joking/gossip, Elders embarrassing the wrongdoer in public, the town crier would tell the community of the wrongdoing, making a lazy/wife-beating man wear an old woman's dress for a day, cutting off noses or fingers, dragging a person around the camp, banishment, using medicine, and death. "These severe punishments were evoked only when someone's behaviour seriously jeopardized the group".
7. There were practices of "reimbursement, replacement and reconciliation".
8. If communities had "enforcers", they could only act on the wishes of the group.
9. "Positive reinforcement was emphasized as much as punishments" (245-247).

For Nielsen (1994) Aboriginal justice includes the concepts of respecting oneself, others, and the community; counselling and/or shaming of harmdoers; no standard punishments; immediate punishments which restore balance ranging from informal social control mechanisms to death; reimbursement, replacement and reconciliation; punishments carried out on behalf of the community; and punishments which do not outweigh positive reinforcement.

Dumont (1993) conducted a comparison of Western values and commonly shared traditional Aboriginal values and discussed how these values would shape respective justice systems, he concluded that

[t]he Anishinabe justice system is one that leans toward wise counsel, compensation, restitution, rehabilitation, reconciliation and balance, rather

than obligatory correction, retribution, punishment, penance and confinement. As a people whose spirit and psyche revolves around a core of visions and wholeness that is governed by respect, it is natural that a system of justice be evolved that, in desiring to promote and effect right behaviour, not only attends to balance and reconciliation of the whole, but does so by honouring and respecting the inherent dignity of the individual (69).

For Dumont (1993) Aboriginal justice includes the concepts of compensation, restitution, rehabilitation, reconciliation and balance. It should be noted that Dumont (1993) *did not* associate punishment with an Aboriginal justice system. Just as Aboriginal communities differ, there will be differing views on which concepts make up the idea of Aboriginal justice.

A more recent view of Aboriginal justice came out of Bushie's (1996) review of the Community Holistic Centre of Healing in Wanipigow, Manitoba. She stated that this program

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 behaviour, and (4) to offer the opportunity for balance to be restored to all parties of the victimization (5).

For Bushie (1996) Aboriginal justice includes the concepts of bringing offences out into the open, accountability, and protection of the victim.

Ross (1996) stated that at one point during his research of finding out what Aboriginal justice and healing meant to Aboriginal community members he "asked what the community used to do in traditional times, before the courts came, to those who misbehaved. An old lady answered ...'We didn't do anything *to* them. We *counselled* them instead!'" (5). By counselling offenders, communities are taking responsibility for the *healing* of offenders.

Not only is the idea of Aboriginal justice reactive, it is also proactive. Dockstator (1984), in his search for understanding Aboriginal crime, explained that for Aboriginal people, the law was not written because it was lived "law was a part of human

community experiences ... the law therefore had the ability to reflect and adapt itself to the needs of the community. It might be said that in contrast to Euro-Canadian society, the Indian did not function within a legal system but rather, the legal system functioned within the Indian” (20). This is not a surprising concept when one remembers that Aboriginal societies are oral societies. Laws most likely would not have been written down for members to follow. Laws would have been passed on in everyday social interaction. Perhaps that is why crime rates are so high in Aboriginal communities. When a society is in distress, its laws will not be followed, especially if these laws are not being taught through social interactions.

McIvor (1996) in her search for contemporary Aboriginal justice models found that

if there is a center core to aboriginal justice, if there is a seed from which it will grow, it begins by aboriginal families and communities accepting responsibility for aboriginal criminality ... I believe what aboriginal people have been telling the government for over twenty years is that there must be aboriginal solutions to aboriginal problems regardless of how those problems arose. Aboriginal justice is a perfect example where aboriginal families and communities can rely on their traditions, values, languages and ceremonies to heal themselves (10).

Today there are Aboriginal communities across Canada who have begun to accept responsibility for crimes committed by their community members. These communities have undertaken initiatives, which implement the concepts expressed within the idea of Aboriginal justice.

Taking the overlapping concepts put forward by the above authors, a general definition of what is meant by the idea of Aboriginal justice can be formed. The idea of Aboriginal justice may mistakenly be assumed to be a realist description of past and/or present traditional community practices. Any definition of Aboriginal justice needs to be framed in a modern context. One must also remember that this definition does not contain an exhaustive description of the various concepts, which may make up the idea of Aboriginal justice. The concepts outlined herein are relevant for the purpose of the

present study and are therefore somewhat narrow in focus. Focus on the following concepts will allow for an analysis of how sentencing circles further the idea of Aboriginal justice. The idea is that Aboriginal justice would be controlled independently by Aboriginal communities and it would be socially based, in that concepts of justice would be lived and taught through everyday interactions. Crimes often affect the community as a whole, therefore the idea is that justice is a community responsibility. When someone in the community does something to upset the balance of society they would most likely be required to make amends. Ways of making amends would include what can be called “the five R’s”: restoration, reconciliation, restitution, reimbursement, and rehabilitation; all of which would likely be carried out with the help of various community members. Transgressors would likely be held accountable for their actions and they often would have to repay the victim(s) and the community in some way. At the same time offenders would likely be counseled and perhaps punished in such a way that would bring them back to a harmonious place within the community.

The general idea of Aboriginal justice seems to be readily acceptable. It is when the details of Aboriginal justice systems or “Aboriginal Justice Initiatives” are discussed that problems arise. Both are contentious due to differing beliefs and practices both within Aboriginal communities and across communities. It must also be recognized that members of Aboriginal communities are caught up in local, regional/provincial, national, and global relationships in many different ways therefore making the implementation of a system of Aboriginal justice difficult. Even if such a system could be implemented, another complication would be the legality of such systems. Should these systems operate within the framework of the *Canadian Criminal Code* or should they be recognized as separate systems of justice with rules and procedures decided upon by each community? In the end, it is possible to support the general concepts that form the idea of Aboriginal justice but disagree over the precise concepts and the way these concepts should be implemented.

While Aboriginal peoples have not been able to implement a system of Aboriginal justice, it is apparent that concessions have been made within the criminal justice system to address the failings of the system and its inability to take into account the particular problems faced by Aboriginal communities. These include sentence advisory committees, community mediation/diversion programs, sentencing panels, and sentencing circles. Sentencing is an area that lends itself, at least to some degree, to the application of elements associated with the idea of Aboriginal justice. Perhaps that is why the majority of the Aboriginal Justice Initiatives (AJI's) in operation to date deal with sentencing.

Mandamin (1996) explored the use of aboriginal justice initiatives for sentencing and found that these initiatives

focus on the healing of the individual and the restoration of harmony in the community. The Aboriginal priority is to turn the individual into a contributing member of Aboriginal society. Aboriginal people have shown a willingness to become involved and direct the resources of the community to helping in the restorative efforts. The results of this effort have been positive. The successes of the Aboriginal sentencing initiatives promise benefits for the Aboriginal community and for Canadian society (20).

For these initiatives to remain a success, they need to be responsive to the needs of individual communities. Mandamin (1993) argued that it "is unlikely that a single community-based initiative would extend across Canada to become a single system for all Aboriginal People" (279-280). Mandamin (1993) went on to suggest that "different models may be developed which would serve as a framework for a community Aboriginal justice system. These models would allow the community to initiate the process and apply the community's own considerations to criminal justice matters" (280).

One way communities can address criminal justice matters is through the establishment of sentence advisory committees. Green (1998) devotes a whole chapter to the study of these committees in his book Justice in Aboriginal Communities: Sentencing Alternatives (110-118). These committees discuss the cases outside of the court and

bring a recommendation for sentence to the judge. In most cases the recommendations are approved by the judge when the sentencing date comes around (Green, 1998, 110-118).

Green argued that “it is too early to draw conclusions about the overall impact of the sentence advisory process; however, it appears to have alleviated time pressure on the court - in contrast to lengthy sentencing circles - while at the same time facilitating community sentencing input” (113). Perhaps sentencing advisory committees are the next step toward some type of Aboriginal justice system. They would be beneficial for offenders, community members, and the courts. Yet once again we have the dilemma of communities working within the framework of the Canadian justice system. The idea of Aboriginal justice encompasses Aboriginal justice systems/initiatives, which are independently controlled by Aboriginal communities, such is not the case. At this point in time AJI’s operate within the framework of the criminal justice system and involve the delegation of power rather than jurisdictional autonomy<sup>5</sup>. Once community members are familiar and comfortable with sentencing offenders, the next step could be diversion programs - which are already taking place in some communities - where minor offences are not even brought before the courts, but dealt with directly by the community members.

Gosse (1994), in an explanation of why Aboriginal justice initiatives have been slow to come about in Canada, argued that

[t]here has been considerable political and bureaucratic resistance to change encountered by Aboriginal governments. There are a number of reasons for this. First, there has been a failure to understand the aspiration of Aboriginal Peoples and to appreciate the legitimacy of their inherent right to self-government. Second, there is a reluctance, natural to human beings, to give up power and control. Third, there is a fear that transferring or sharing justice responsibilities with Aboriginal governments could result in a deterioration of justice services. Fourth, there is the question of the expense of funding the proposed changes at a time when there are severe restraints on government spending. And fifth, there is government inertia (16-17).

With the introduction of such initiatives as the Aboriginal Justice Strategy, it is hoped that inactivity by the government will be turned around and public education will be a priority.

In recent years, Section 35<sup>6</sup> of the *Constitution Act* has been a focal point for Aboriginal communities who are negotiating modern day treaties, with the federal/provincial/territorial governments, and who are planning on controlling their own justice systems. McIvor (1996) explained that

aboriginal justice initiatives under section 35 of the *Constitution Act, 1982* will be developed and totally controlled by an aboriginal community or organization for the benefit of aboriginal families and communities. In this context, such a system will administer aboriginal laws, and these laws will be acceptable and developed by aboriginal women and men, jointly, as families and communities. The object of such laws will be ‘social control’ of the aboriginal community as a social contract among the families of that community (9).

Until aboriginal justice initiatives are “totally controlled” by Aboriginal communities other options are available.

A recent initiative in the realm of Aboriginal justice is “circle sentencing” (or sentencing circles). As of yet, there have only been a handful of research endeavours that deal explicitly with sentencing circles<sup>7</sup>. Sentencing circles operate within the Canadian criminal justice system, and therefore within parameters set out by the *Canadian Criminal Code* and case law/appeals, taking the place of criminal court sentencing hearings, once guilt has been established. A sentencing circle can be described<sup>8</sup> as a process by which an Aboriginal offender is sentenced by a judge who hears recommendations from the offender’s fellow community members. Sentencing circles often take place in the offender’s home community<sup>9</sup>. Victims may or may not participate in sentencing circles. Crown and defence lawyers also participate in sentencing circles.

Sentencing circles intervene in the sentencing process under certain conditions. Disputed facts are often resolved before the circle takes place. Offences, which have

minimum punishments above two years imprisonment, are rarely heard. Often only offenders who are eligible for a suspended or intermittent sentence, or a short jail term with probation, make it before a sentencing circle. Although some communities allow sexual assault cases to be heard by a circle, offences such as murder are almost never heard by circles. In most cases offenders must accept full responsibility for their crimes, and be willing to change, in order to be eligible for a sentencing circle. Judges often outline acceptable ranges of sentencing for community members to work within. Even so, most judges who hold sentencing circles are willing to depart from the usual range of sentencing. Sentencing circles involve a voluntary, though limited, delegation of judicial power to the community members. Sentencing circles may or may not include a traditional/healing component. Even when community members have in place substantive guidelines for how the circle should proceed, judges can supplement and/or override these guidelines with the establishment of specific court procedures.

Use of sentencing circles has been implemented in a number of Aboriginal communities and even in urban areas. In the last few years there have even been urban circles taking place with non-Aboriginal offenders. The main thrust behind holding sentencing circles has been to allow community involvement in sentencing decisions. Community members are given the chance to contribute to the rehabilitation of the offender and the “healing” of the community as a whole.

While sentencing circles are now being used in a number of Aboriginal communities, the use of circle sentencing to replace sentencing hearings was actually introduced to Aboriginal communities by judges. Judge Cunliffe Barnett (1995) claimed that “the term ‘circle sentencing’ entered our legal jargon when Judge [X] delivered his decision in [Case #1 in the early 90’s]” (1). This judge embarked upon a circle format for sentencing after realizing how rigid the sentencing process was and how it lead to the dominance of the court system over Aboriginal people (122).

The judge in *R. v. Morin* ([1995] S.J. No. 457), claimed that sentencing circles

have their roots in healing circles which have been taking place in Aboriginal communities for many years. This judge claimed that healing circles were held to address the wrongdoing of one community member against another. These circles were called healing circles because they were used to heal the wounds of the community by restoring balance. The judge pointed out that this focus on healing and restoration is in sharp contrast to the punishment and retribution focus of the Canadian justice system. In the justice system, the community members and the victims are often only minimally involved, and the “wrongdoer's ‘participation’ in the process can hardly be described as ‘willing’” (P80-83). This is not to say that rehabilitation is not the goal of the criminal justice system. The problem is that punishment, over rehabilitation, is often the focus of the Canadian criminal justice system.

Sentencing circles have introduced a move away from punishment of Aboriginal offenders towards rehabilitation of Aboriginal offenders. Such a move is one of core associations with the idea of Aboriginal justice. Sentencing circles are commonly described in terms associated with idea of Aboriginal justice such as community involvement, healing, restoration of balance, and rehabilitation. That is, they are cited as an example of an extension of justice, though it is recognized that they have evolved within the constraints of the criminal justice system and do not constitute an autonomous field of Aboriginal justice.

The purpose of this thesis is to investigate the degree to which the idea of Aboriginal justice, and the concepts associated with this idea, have been furthered by the implementation of sentencing circles in Aboriginal communities across Canada. The amount of control that community members have over the sentencing circle process and sentencing itself will be an important factor in furthering the idea of Aboriginal justice within a Western justice framework.

## NOTES

1. Although this is not an exclusive list of reports dealing with Aboriginal justice, these works will be a good starting place for anyone interested in the topic.

(1) Gosse, Richard; Youngblood Henderson, James; and Roger Carter, Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal People's and Justice. Purich Publishing: Saskatoon, Saskatchewan 1994.

(2) Royal Commission of Aboriginal Peoples, Aboriginal Peoples and the Justice System. Ottawa, ON: Minister of Supply and Services Canada, 1993.

(3) Frideres, James S. with Lilianne Ernestine Krosenbrink-Gelissen, Native Peoples in Canada: Contemporary Conflicts 4thEd. Prentice Hall Canada Inc. Scarborough, Ontario, 1993.

(4) Law Reform Commission of Canada, Report on Aboriginal People and Criminal Justice. Ottawa, ON: Law Reform Commission of Canada, 1991.

(5) Silverman, Robert A. & Marianne O. Nielsen, Aboriginal Peoples and the Canadian Criminal Justice System. Toronto, ON: Harcourt Brace and Company Canada Inc, 1994.

(6) Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal Peoples and Criminal Justice in Canada. Ottawa, On: Minister of Supply and Services Canada, 1996.

2. For the purpose of this study the term Aboriginal will be used when talking about both status and non-status Indians, Inuit and Metis. Frideres (1993) pointed out that there are many ways to refer to native people and that they fall under many different categories. There are those people who are "registered Indians", these people are legally recognized by the government as being Aboriginal. "Registered Indians are under the legislative and administrative competence of the federal government...and are regulated by the contents of the *Indian Act*. Slightly more than 450 000 Canadians are considered registered Indians" (30). Frideres (1993) also talked about people who are "described as having Indian ancestry" and although they may "exhibit all the social, cultural and racial attributes of "Indianness", they are not defined as Indians in the legal sense" (33).

3. The criminal justice system includes the process an offender must go through in Canada from the time of arrest, to sentencing, to the end of a sentence (including probation and parole).

4. Many of these characteristics were taken from the Native Counseling Services of Alberta, 1982. "Native People and the Criminal Justice System: The Role of the Native Courtworker." *Canadian Legal Aid Bulletin, Special Issue, Part I* 5(1): 55-63.

5. The scope of this study did not allow for the review of Aboriginal Justice Initiatives in self-governing Aboriginal communities, which may or may not operate within the framework of the criminal justice system.

6. Section 35 of the *Constitution* reads as follows  
RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada. (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons (taken from internet: <http://www.sfu.ca/~aheard/abrts82.html> References to Aboriginal Rights in the Constitution Act, 1982).

7. These will be discussed in Chapter 3.

8. Judge Barnett (1995) provided the following description of circle sentencing: [c]ircle sentencing is a creative alternative to the usual sentencing process. Sentencing circles are usually held in an offender's home community, not in a far away courthouse. The judge and lawyers do not dominate the proceedings in a sentencing circle. The judge is there to listen to the victim, the offender, and to other concerned and knowledgeable community members. The hope is that a framework may be constructed to provide for sanctions against the offender, his [/her] rehabilitation, and the healing of wounds within the community" (1).

9. Many times in this study the term community will be used. When discussing sentencing circles, community refers to the offender's local community made up of family members, friends, and others who interact with the offender and often the victim on a daily basis. For a more in-depth definition of community please refer to Orchard's (1998) thesis, pages 99 - 101.

## CHAPTER II

### REVIEW OF THE LITERATURE

Considering how long the Canadian criminal justice system has been in existence, sentencing circles are a fairly new phenomena. To date there have been very few books and articles dedicated to the topic of sentencing circles in Canada. There have been even fewer scholarly research projects, dissertations and theses written that specifically focus on sentencing circles. The works of Ross Gordon Green (1998) and Bonnie Orchard (1998) have had a major influence on this study because they specifically look at sentencing circles and the constraints imposed upon the use of such circles and how the idea of Aboriginal justice applies to the use of sentencing circles. Rupert Ross' (1996) work has been influential for this study as he explored the meaning of Aboriginal justice for Aboriginal communities across Canada. These three studies are a major resource for anyone wanting to explore the use of sentencing circles in Canada and how the idea of Aboriginal justice can be furthered by the use of such circles.

Other available studies/articles on sentencing circles or related topics often provide only a brief review of what sentencing circles entail, how they fit into the larger criminal justice framework, and how they may be used to further the idea of Aboriginal justice. While the relevant findings of these other works will be cited throughout the present study, a brief mention of these works is in order here.

Tim Quigley (1994), a professor at the University of Saskatchewan who instructs courses which deal with Aboriginal issues, wrote a chapter for a book entitled "Some Issues in Sentencing of Aboriginal Offenders". Quigley (1994) explored the reasons for the over-incarceration of Aboriginal offenders in Canada and from this he advocated changes in sentencing practices in order to solve this problem (272-279). Quigley (1994) believed that one of the ways to deal with this problem is to be innovative in sentencing

approaches, and to avoid “excessive concern about sentence disparity” (286). One of the innovations he discussed was the sentencing circle. Quigley (1994) conducted a brief review of sentencing circles, which had taken place prior to 1994 and pointed out the benefits and problems with the use of such circles.

LaPrairie (1995) also conducted a study in which she looked at initiatives that have been implemented as a way to deal with the over-representation of Aboriginal people in prison. LaPrairie (1995) concluded that the influence of the criminal justice system has limited the ability of Aboriginal communities to come up with innovative approaches to justice or perhaps community members believe that the dominant system is the best way to deal with offenders (531-532). LaPrairie (1995) suggested that communities need to look beyond the current justice system for other alternatives which address community needs (537). This would allow Aboriginal communities to escape the control of the dominant justice system (either government imposed or self-imposed) to a system which will work both in the short-term and the long-term to transform communities while taking into account their needs.

There are articles that have been written which generally explain the sentencing circle process and the benefits of sentencing circles such as the article written by Judge Barry Stuart. Judge Stuart’s (1996) journal article entitled “Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System” detailed the background of sentencing circles, the circle process itself, and the effect of circle on participants.

Another Judge who has written generally about sentencing circles is Judge Cunliffe Barnett (1995), who wrote an article entitled “Circle Sentencing/Alternative Sentencing”. Judge Barnett (1995) claimed that the comments in his article were “intended to provide some practical suggestions and cautions for persons working within Native communities and whose work brings them into contact with the criminal justice system” (1). Judge Barnett set out basic guidelines, which he believed should be

observed before deciding to go the route of alternative sentencing (2-5).

There are also articles that deal with justice issues without a focus on sentencing circles. Tony Mandamin (1993) and Jeremy Webber (1993) both wrote articles on Aboriginal justice systems as part of a National Round Table on Aboriginal Justice Issues. Mandamin (1993), in “Aboriginal Justice Systems: Relationships”, gave examples of Aboriginal justice systems in use to date and their relationship to the Canadian criminal justice system. He found that the common objectives of the two systems, maintaining peace and harmony in society, were reached with different uses of punishment and rehabilitation (275). Mandamin (1993) also explored the question of whether a parallel Aboriginal justice system would mean one system of justice or many systems. Based on the number of Aboriginal justice initiatives that have taken place across the country, Mandamin believed that a single Aboriginal justice system was unrealistic (279).

Webber (1993), in “Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice”, explored objections to, and justifications for, parallel Aboriginal justice systems along with issues of individuality, equality, and authority. Webber (1993) claimed that he would not be describing the “merits of particular forms of Aboriginal justice” since others could do that much better than him (135). These works do not speak directly to the scope of the present study, as the idea of Aboriginal justice itself is being explored, not the implementation and scope of Aboriginal justice systems.

One author who speaks to the topic of Aboriginal justice is Rupert Ross. Ross (1996) undertook a three-year study, starting in September 1992, to examine Aboriginal justice while on a secondment for the Department of Justice in the Aboriginal Justice Directorate. For three years he traveled to Aboriginal communities across Canada where he talked to community members who were involved in Aboriginal justice initiatives in an effort to understand what the concept of Aboriginal justice and healing meant to

Aboriginal community members. From this study he wrote Returning to the Teachings: Exploring Aboriginal Justice.

One community that he focused on in great detail in his book was the community of Hollow Water in Manitoba. This community created the well known, and often referred to, Community Holistic Circle Healing Program (CHCH). Ross (1996) stated that

Hollow Water never held itself out as a ‘model’ of some sort to be copied across the country, and I don’t mean to present it in that light. What it has taught me, however, is that a group of people determined to create a healing response *in their own way* can fundamentally change how justice is done in their community without ever trying to gain jurisdictional control over how it is being done at present (211-212).

This program was in the process of formation for five years, and over these years the team members created a program that reflected “both traditional Aboriginal and contemporary Western approaches” to justice (Ross, 1996, 31).

Ross (1996) traced the evolution of the Hollow Water program to demonstrate how such programs can be created. The team first began their involvement in the justice system by holding healing circles for offenders, victims and the community. This took place between the time the offender plead guilty and the sentencing - where the team would submit a report to the court (Ross, 1996, 192). Eventually the team involved themselves in the sentencing process itself so that the court could hear from them directly (Ross 1996, 193). The community members then began to hold sentencing circles in order to ensure that sentencing was but a step in the healing process instead of a diversion from it (Ross 1996, 193-194).

Ross (1996) quoted the CHCH interim report as stating “the inclusion of the formal court party [in the sentencing circles] confirms the conjunctive relationship between the community and the legal system, as established through the protocol with the Attorney General’s Department for Manitoba and supported by the federal Department of

Justice” (197). This community program then, is a joint program with the criminal justice system, possibly at the request of the Attorney General.

Ross (1996) believed that Aboriginal communities would be doing themselves no favours if they chose the route of negotiating transfers of jurisdiction over justice with the government thereby allowing them to establish their own justice institutions. Even if a transfer of jurisdiction was done, serious offences such as murder and sexual assault would not be transferred right away to community courts. In any case, Ross (1996) believed that such an initiative would only allow power to transfer from one set of hands to another (188-201). Once Aboriginal communities decide that they want to go the route of imposing Western penalties for crimes, they will have to provide the Western safeguards that go along with such systems - “including Western-trained lawyers and judges. Once that happens, the whole notion of *community* courts goes up in smoke” (Ross, 1996, 200).

By transferring jurisdictional control over justice Aboriginal communities would also gain the *power* to punish offenders. Ross (1996) stated that many Aboriginal people would probably oppose going about justice in the same way as the Western system, by punishing people instead of healing them (201). While this may be so, Ross (1996) also claimed that it may be hard for communities to “break free of punitive approaches and re-root themselves in restorative approaches instead” (15).

Ross (1996) stated “[i]n my view, Aboriginal people performing Western justice roles seem to end up just as powerless as non-Aboriginal justice professionals when it comes to offering victims, offenders and witnesses something powerful enough to lure them out of their present states of denial and silence. It seems to take the healers to do that” (203-204). Ross (1996) believed that healing programs would not “increase anyone’s power over anyone else” (205). Ross (1996) suggested that perhaps

the healing approach might be a way for Aboriginal communities not only to change the behaviour of the Western system, but to dispense with it entirely

for the vast majority of cases. This may not be as far-fetched as it sounds. For one thing, the healing that Hollow Water promotes is community healing aimed at the *causes* of criminal acts. To the degree that it succeeds, the numbers of those criminal acts will diminish. As that happens, the Western justice system will retreat on its own, without the need for constitutional change, legislative enactment or jurisdictional transfers (218).

Therefore, healing can bring about change without the need for jurisdictional transfers of power.

Ross (1996) concluded that

there is no reason why justice in Aboriginal communities has to come from the same premises, perspectives and processes that prevail in the Western system. If they wish to dedicate their attention and energies toward a search for - and healing response to - the dynamics that gave rise to the 'crime' before them, why should we object? Aboriginal people are not telling us that the Western way is the 'wrong' way - only that it is not their way. We are not being asked to change our methods of dealing with crime, but only to step aside so that Aboriginal methods can come to the service of Aboriginal people once again (251-252).

While sentencing circles are deeply rooted within the Western justice system, this does not mean that future initiatives will follow suit.

To summarize, Ross (1996) found that presently community members can have an effect on how justice is carried out in their communities without trying to gain control over the justice process. Programs, such as sentencing circles, can be created that integrate Aboriginal healing approaches within the Western justice system. If Aboriginal communities decide that they want to gain control over the justice process Ross (1996) warned that going about justice in the same way as the Western system would not be beneficial. Ross (1996) believed that the healing approach would be the best way for communities to help offenders by addressing the causes of crime and eventually lowering crime therefore leading to a retreat of the Western justice system.

Community members who want to use a healing approach to help offenders have to start this journey one step at a time. One of these steps can be the use of sentencing alternatives. Ross Gordon Green (1998) explored the use of such alternatives in his book

Justice in Aboriginal Communities: Sentencing Alternatives. This book was based on the research he undertook for his Master of Laws thesis, which he completed in 1995. For his thesis research Green observed and analyzed alternative sentencing initiatives in six different Aboriginal communities throughout Manitoba and Saskatchewan from September 1994 to August 1995. Green (1998) offered a breakdown of the communities and initiatives as follows

sentencing circles at Hollow Water, Manitoba and Sandy Bay, Saskatchewan; an elders'<sup>1</sup> 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 (19).

Green (1998) began his book with a comparison of conventional and Aboriginal systems of justice and sentencing. He then discussed recent sentencing initiatives and the “advantages and the dangers of enhanced participation by offenders, victims, and local community members in sentencing and mediation” (20). Lastly, he evaluated the progress of the various initiatives and their implications for justice system reform (20).

Overall, Green (1998) found that often, Aboriginal communities feel an estrangement from the criminal justice system with its emphasis on punishment. Green (1998) stated that

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 (141).

In the communities that he studied Green (1998) found a recurrent theme of wanting to replace the “punitive focus of conventional Canadian law with a more conciliatory approach that emphasized the restoration of peaceful relations between offender, victim, and community” (36). Green (1998) found that “Aboriginal approaches to sentencing

focus on greater community involvement in sentencing and more individualized sentences” (44).

One way to ensure community involvement in sentencing is through the use of sentencing circles. Green (1998) found that the “circle setting has promoted a sense of informality and equality among participants” (68) this informality in turn has “facilitated an interchange of opinions and information within the circle” (68). This interchange of opinions and information is conducive to consensus building within the circles.

Green (1998) found that

[t]he focus of the circle sentencing evolving in Saskatchewan and the Yukon appears to be achieving consensus among participants. This consensus-building approach differs from the approach used by presiding judges at Pukatawagan, Manitoba ... the practice of the Manitoba judges was to listen to sentence recommendations from circle participants and then to indicate their decision. These judges took a less active role in facilitating the circle and seeking consensus (69).

Such a finding points out the fact that sentencing circles will differ in each community based on the wishes of judges and community members.

Green (1998) found that the wishes of community members and victims would also have an effect on the type of sentence given (70). Green (1998) stated that

[m]any sentences rendered within the community justice initiatives studied in this book may appear inconsistent with the sentences begin imposed elsewhere in the province and country. These sentences, however, may, at the same time, be completely consistent with the wishes and aspirations of local community members and the victims (70).

Such a finding gives credence to the sentencing disparity that is often associated with alternative sentencing practices.

Green (1998) found that judges had many different views on the role of circle sentencing some of which include seeing sentencing circles as: a diversion from sentencing hearings where alternatives to prison can be recommended, a bridge between the criminal justice system and Aboriginal beliefs, a replacement for a pre-sentence

report, a way that communities can take responsibility for offenders, and a way to focus on rehabilitation rather than punishment (71). Overall, Green (1998) found that “[a]vailable judicial comment suggests circle sentencing is based in the court’s broad sentencing discretion, which retains for the judge ultimate decision-making power” (72).

Community involvement and consensus is the major goal of circle sentencing (Green, 1998, 72). Green (1998) found that although it is the duty of judges to legally impose sentences in sentencing circles, community members often decide the sentence (74). Green (1998) did not think that it was likely that judges would disregard the wishes of community members in sentencing circles by imposing a sentence that went against their consensus (74).

Even though a consensus for sentencing is developed by community members and often accepted by judges, Green (1998) found that “outside factors” such as “decisions on sentencing from appellate courts” has affected the “availability of alternative forms and severities of sentence” (53). Green stated that “[a]lthough many factors potentially enter into a sentencing decision, appellate court guidelines (which establish acceptable ranges of sentence and in some cases “starting points” for specific offences) act to significantly restrict discretion and hence the use of innovative approaches to sentencing” (54). Green (1998) believed that appellate courts and their rulings on sentencing circles “will undoubtedly affect the development and scope of circle sentencing and other forms of community participation at sentencing” (158).

Another factor, which will impact the development of sentencing circles, is the resources available for the holding of such circles and for helping both offenders and victims. Green (1998) stated that

[i]t is unrealistic to expect that a few hours in a sentencing circle will permanently alter historic patterns of offending and imbalances of power. Clearly, sentencing circles can be catalysts to start significant changes in behaviour on the part of offenders. Any chance of achieving this goal, however, depends on the availability and success of locally accessible

resources, including support, treatment, and counselling for victims and offenders, and, in cases involving abuse, close supervision of offenders and protection of victims (82).

From the communities that he studied, Green (1998) did not find much formal support for victims in sentencing circles. He only found a well-organized formal support system for victims in the community of Hollow Water (136).

While sentencing circles may be the first step toward furthering the idea of Aboriginal justice, sentence advisory committees may be the logical next step in this direction. A step which will allow community members to have control over the process of sentencing. Green (1998) concluded that

the most telling lesson to be taken from the development of sentence advisory committees is the *significant role that local community members can play without direct supervision by the court*. This lay involvement may enhance feelings of community ownership of the process, while at the same time providing additional resources to the court [emphasis added](113-114).

Green (1998) concluded that the next logical step after sentencing circles is the implementation of “complete diversion of offenders from the court system through community mediation committees” (119). Green stated that “[m]ediation is the only model of community participation considered in this study that allows local community members the final decision on disposition” (121).

To summarize, Green (1998) found that since sentencing circles are held based on judges’ discretion they will proceed differently and result in different sentences depending on the judges overseeing them and the communities in which they are held. The sentences that are given in sentencing circles will also be open to appeals. Appellate court decisions and lack of community resources both may serve to restrict the scope and use of sentencing circles. With this possibility other alternatives may need to be sought such as sentence advisory committees or community mediation committees.

In his concluding comments Green (1998) stated that

[a]lthough the reforms considered in this study have not achieved an autonomous justice system for Aboriginal people, they do highlight the

flexibility available within the conventional system to allow for a recognition of Aboriginal practices and processes, and to involve local community members in a sentencing process previously dominated solely by lawyers and judges (162).

Another researcher who examined the flexibility of the criminal justice system in regard to sentencing circles was Bonnie Orchard. Orchard completed her thesis, Sentencing Circles in Saskatchewan, for her Master of Laws degree, at the University of Saskatchewan, in 1998. Orchard's thesis examined sentencing circles that took place in Saskatchewan. For her study she relied on statutes, case law (including sentencing circle cases) and the relevant literature on alternative sentencing and Aboriginal justice issues. While Orchard (1998) did not engage in participant observation as Green (1998) did, nor did she conduct an in-depth analysis of Aboriginal justice as Ross (1996) did, she did focus specifically on sentencing circles and therefore was able to carry out a comprehensive examination of why sentencing circles are needed; how they fit into the justice system and compare to sentencing hearings; how they proceed; their benefits for offenders, community members and victims; and whether they are leading the way to justice reform and possibly Aboriginal justice systems.

Orchard (1998) explained that the foundation for sentencing circles is rooted in the criminal justice system. They are based upon the "existing sentencing hearing and the purpose and the principles of sentencing. Sentencing practices, theory, judicial precedents and legislation are the framework from which the sentencing circle is evolving" (Orchard 1998, 36). Orchard (1998) pointed out that although "[s]entencing circles, by their very nature, should be a community initiative ... in Saskatchewan they were initiated in the north by provincial court judges who were frustrated with the ineffectiveness of the criminal process" (81). The fact that sentencing circles are rooted within the criminal justice system and that they are often judge led frames much of Orchard's study therefore allowing an analysis of how sentencing circles can operate effectively within such a framework.

Just as judges do not have to accept joint sentencing submissions made by the defence and Crown in sentencing hearings, they do not have to accept a consensual suggestion for sentence made by community members in sentencing circles (Orchard 1998, 39). Just as Green (1998) did, Orchard (1998) found that “[t]he judge has overriding authority within the circle and makes the determination of the sentence” (89). Orchard (1998) also found, just as Green (1998) did, that usually the judges accepted the circle recommendations for sentence, when they did not, they often explained why (89-90). Sometimes judges do not accept the recommended sentences because these recommendations conflict with what they believe is a proper sentence.

Orchard (1998) found that “[t]here is conflict between the restorative approach of a sentencing circle and the perceived need for punishment, denunciation, and deterrence in the usual sentencing hearing” (46). A restorative approach looks to the case at hand and what is best for the offender in terms of rehabilitation. Often the focus of sentencing circles is on rehabilitation of the offender. Community members who participate in circles can come up with innovative plans for rehabilitation and ways to help the offenders carry out these plans.

Innovative approaches to sentencing, as Green (1998) pointed out, are often open to appeal by the Crown. Orchard (1998) explained that

[t]he philosophy of rationalizing sentence disparity often operates against rehabilitation because the principles of deterrence and protection of the public are often given more weight than rehabilitation of the offender. Using this approach, it may be particularly difficult to rationalize a rehabilitative sentence for an offender with a lengthy record, even though this particular offender may have reached the point where rehabilitation is a realistic objective (Orchard 1998, 46).

Fortunately the Supreme Court has given the direction that sentences should be overturned *only* when it is deemed that the sentencing judge clearly imposed an unfit sentence (Orchard 1998, 47). This will allow both judges, and therefore community members, the chance to formulate unique rehabilitative sentences. Orchard (1998) stated

that if this “‘deferential’ approach to the discretion of the sentencing judge is followed, the recommendations of participants at sentencing circles will more likely be adopted by the sentencing judge and upheld on appeal” (62-63).

Even though appeals of circle sentences may not be successful they are still disruptive. Appeals undermine the limited power that community members do have to help offenders. Orchard (1998) spoke in length about this very issue, she stated

Aboriginal communities question why the Saskatchewan Department of Justice is appealing sentencing circle decisions. It would seem to be an interference with the development of Aboriginal justice initiatives. It can also be interpreted as a lack of confidence in the community and the sentencing circle process, as well as a lack of good faith towards the circle participants who have volunteered their time ... If the prosecutor cites the ‘public interest’ as the reason to appeal a sentencing circle decision, who is the public he is representing? ... The public most affected by the offender’s conduct is usually the community represented at the circle. Yet, by appealing the sentencing circle’s decision, the Crown suggests that the victim and the community are not imposing an appropriate sentence or don’t know what is best or most effective in their own community ... It is not possible to change the sentencing process while appealing decisions of sentencing circles in order to conform to existing sentencing guidelines (112-113).

Reforms within an existing framework are hard to carryout, therefore, Aboriginal people may begin to look outside the criminal justice framework for other opportunities to further the idea of Aboriginal justice.

All of the above observations led Orchard (1998) to ask the following questions:

[a]re sentencing circles merely a reform within the existing justice system or are they a stepping stone to Aboriginal justice systems? Is the *raison d’être* of the sentencing circle to make the exiting justice system more responsive to the needs of Aboriginal offenders? Or, if the use of a circle is recognition that the justice system does not and cannot serve Aboriginal peoples, is the next step the creation of culturally appropriate and effective Aboriginal justices systems (148-149)?

Orchard (1998) concluded from her findings that

[c]learly, the sentencing circle is a reform within the existing justice system. It involves the same justice system, procedures and Euro-Canadian values as the ordinary sentencing hearing. The circle participants and the judge are still

bound by the existing limitations of the justice system, the sanctions allowed by the *Criminal Code*, and the sentencing guidelines of the Court of Appeal (although a departure from the usual sentence is normally expected). Although the victim and the community have input into the sentencing stage of the justice process, it is still the prosecutor, and not the community, who has determined the charges to be laid. It is only at the end of the existing process that the victim and community have become involved through the sentencing circle. The judge is still making the final decision on sentencing. From this perspective, the impact of the sentencing circle is limited (although an effective sentencing plan can be significant to the offender and community) (156-157).

Orchard (1998) further claimed that sentencing circles are probably a transition between the “reform of the existing system and the development of parallel or independent Aboriginal justice systems” (163). While a parallel system would be similar to the existing justice system, Orchard (1998) argued that it would “be under the *control* of the Aboriginal community or nation and have appropriate cultural modifications [emphasis added]” (157). Orchard (1998) concluded that

[i]n Saskatchewan, it is not acknowledged that sentencing circles may be playing a role as a bridge to Aboriginal justice systems. If this is where sentencing circles are heading, it is not intentional on the part of judges and justice officials. At this stage of their development, sentencing circles are regarded as an innovation in sentencing. However, as sentencing circles and other initiatives become more widely used and accepted, the barriers to Aboriginal justice systems are going to weaken (159).

Orchard did not think that Aboriginal justice systems would be established in the near future due to the existing barriers to such a move. Orchard (1998) outlined these as being “the lack of political will to act, the attitude of the non-Aboriginal public [who call for equality before the law] and the financial costs involved” (162). She believed that sentencing circles could lead the way to such systems while these barriers are broken down (162-163).

To summarize, Orchard (1998) found that sentencing circles are firmly rooted within the existing justice system and are often judge led. Even so, judges often implement the recommendations given by the circle participants in the final sentence. When such a sentence is deemed “unfit” it is open to appeal by Crown attorneys and the

possibility of being overturned by appellate courts. Such appeals will be questioned by the community members who were involved in the circle and may be interpreted as a lack of faith in both the circle process and the community itself. Judges and circle participants are therefore bound by appellate court rulings, as well as the *Criminal Code*. Such restriction points to the conclusion that sentencing circles are a reform within the justice system; a reform which may lead to the eventual development of Aboriginal justice systems.

Ross' (1996) study went further than the work carried out by Green (1998) and Orchard (1998) because he focused less on community initiatives and more on the ideas which shape these initiatives and the healing which accompanies these initiatives. Green's (1998) study was wider in scope than Orchard's (1998) as he was able to go to communities who were involved in alternative sentencing practices to observe how these processes worked. Even so, Orchard's (1998) study was the most significant for the present study as she was able to determine how sentencing circles fit into the current justice framework in Canada. All three authors found that while sentencing circles operate within the framework of the criminal justice system they allow for the integration of community wishes and healing approaches within that system. Both Green (1998) and Orchard (1998) found that differing community approaches and beliefs would lead to a disparity in sentences handed out in sentencing circles which often leaves these sentences open to appeal. Orchard (1998) suggested that appellate court decisions and *Criminal Code* restrictions may lead community members on a search for their own justice systems. Green (1998) believed that this search may lead to other alternatives such as sentence advisory committees or community mediation committees. Ross (1996) also thought that communities may begin to look for ways to control their own justice systems. He warned that such systems should be based on a healing approach and not on an approach adapted from the Western justice system.

One area of overlap stemming from the review of Orchard's (1998) and Green's

(1998) studies, that requires further discussion, is the look at the use of tradition by Aboriginal communities involved in justice programs. Orchard (1998) stated

[t]oday many Aboriginal communities are developing approaches to justice problems which reflect their contemporary needs and values ... The revival of traditional knowledge and institutions is a means to empower and rebuild communities within contemporary realities and to provide an alternative to Euro-Canadian structures. However, this process is sometimes criticized as 'creating tradition', rather than reviving traditional structures (20).

Green (1998) also came across this belief, that traditions were being created, when he examined how traditional dispute-resolution practices had evolved over the years and how these are used in modern sentencing alternatives (28). Green (1998) stated that "[p]ractices recognized and adopted within a culture depend to a great extent on current reality, and traditions may be adapted or invented in response to such reality" (28). Green (1998) commented on the fact that "Judge Fafard of the Provincial Court of Saskatchewan, when questioned whether circle sentencing represented an appeal to tradition, commented that this approach might more accurately be described as "inventing tradition" (29). Green (1998) believed that traditions were vastly wiped out by the colonization of Aboriginal communities across Canada (30). Even if communities have been able to retain and implement traditional justice practices, these practices are ruled over by the Canadian justice system in today's day and age (34).

A similar sentiment was expressed by Giddens (1991) in his analysis of modernity in a work entitled Modernity and Self-Identity: Self and Society in the Late Modern Age. Giddens (1991) claimed that societal institutions in today's day and age undercut traditional habits and customs (1). This can be said of the criminal justice system in Canada. Giddens (1991) believed that the demonstration of a need to return to traditional ways is a side effect of the stresses of modern life and that returning to tradition is but one choice that a person/society has to relieve this stress (5). This may be one explanation for the current pre-occupation with the idea Aboriginal justice and traditional

dispute-resolution practices among the research community and Aboriginal communities.

Lincoln (1989), in a study of the construction of society, claimed that groups who are faced with present problems, such as Aboriginal over-representation in prison, will look to the past to find a solution that will help the present problem (28). Therefore, Aboriginal peoples will construct traditions by using past ways of dealing with offenders, that are remembered by Elders, to deal with problems such as the over-representation of Aboriginal offenders in prison. Sometimes, unfortunately, traditional teachings die with the Elders who possess them. Such teachings or traditions, which had previously been contained in the cultural "stock of knowledge" (Berger and Luckmann, 1966, 41) of Aboriginal societies have been decreasing for centuries thus making it hard for Aboriginal societies to remember what their traditional practices entailed.

Hobsbawm (1983), who explored the invention of tradition in different societies, claimed that the invention of tradition is to be expected when the social structure, which supported the old traditions is destroyed, such as the case of close knit aboriginal communities that were relatively separated from outside ideas and values (4-5). Traditions, which can not possibly fit into modern society in their true form, therefore, are modified to work within the current justice system.

Dickson-Gilmore (1992) used Hobsbawm's theory of "invention of tradition" to analyze a traditional justice system proposed by "the People of the Longhouse of the Kahnawake Mohawk Nation" (479). Dickson-Gilmore (1992) found that due to assimilation "many of those nations, who would wish to resurrect their traditional legal structures as alternatives to remaining under Canadian law, are faced with limited sources from which to draw the traditional stuff from which such structures might be constructed" (481).

When trying to revive traditional justice practices for use in modern context it may be that "the past is reinterpreted to conform to the present reality, with the tendency to retroject into the past various elements that were subjectively unavailable at the time"

(Berger and Luckmann, 1966, 163). This would mean that communities who are exploring traditional justice practices may be interpreting what was done in the past with their present reality in mind. Therefore, Hobsbawm's (1983) claim that "invented traditions are responses to novel situations which take the form of reference to old situations" (1) may not be so accurate. Dickson-Gilmore (1992) explained that there is a difference between the "invention of tradition" and the "re-creation of tradition" (490-497). Perhaps what we are seeing is the re-creation of past traditions of community counselling for offenders being made to fit into the present reality of the criminal justice system by introducing sentencing circles.

Often what is also seen in the reconstruction of traditional Aboriginal ways is a phenomena called "pan-Indianism". Pan-Indianism is the selection of traditional practices from many different Aboriginal nations in order to come up with a set of traditions to be used by one's own nation (Jarvenpa, 1985, 31). Aboriginal groups today, therefore, may draw upon the ideas of other groups in modern society in order to define how justice should be carried out. There is one problem with this practice of pan-Indianism, which is, not all community members will agree with the practices that are being used. Dickson-Gilmore (1992) found that as Aboriginal groups "begin to draw together their traditional knowledge and articulate 'new' traditions of aboriginal justice and dispute resolution, there rise from some quarters the inevitable cries that ... many of the 'new' traditional systems are in fact something less than traditional" (481). Hence, the reason for the contentiousness of the idea of Aboriginal justice.

As stated in the previous chapter, the general idea of Aboriginal justice seems to be readily acceptable. It is when the details of Aboriginal justice systems or Aboriginal Justice Initiatives are discussed that problems arise. Both are contentious due to differing beliefs and practices both within Aboriginal communities and across communities. For the time being less contentious initiatives, such as sentencing circles, are a way for Aboriginal communities to begin helping offenders.

The different issues contained in this review of the literature has raised the following general questions about the use of sentencing circles for Aboriginal offenders in Canada. How are sentencing circles influenced and constrained by the criminal justice system? How do sentencing circles evolve within the framework of the criminal justice system? To what extent is judicial power delegated to community members? Does the delegation of power allow for a significant expression of Aboriginal justice and/or community interests? Are community members going beyond the mindset of the Western justice system towards an approach that adopts methods/traditions which are more closely linked to the idea of Aboriginal justice? If so, does this constitute a reform of the justice system or a move towards separate Aboriginal justice systems?

## NOTES

1. When discussing sentencing circles, the term Elder often arises. Elder's are the guardians of culture and history and have wisdom and life experiences which can benefit the community. Not every older person is an Elder. It is a position of respect and recognition conferred upon those the community looks to for guidance. Elders are both men and women, and have different 'gifts'. Individuals seeking spiritual assistance will choose an Elder on the basis of their needs of an Elder's gift (Orchard, 1998, 18).

## CHAPTER III

### PROCEDURE

#### Significance of the Study

This study is useful to both researchers and scholars as there are few studies of sentencing circles in existence to date. The studies that do exist, often only look at sentencing circles in certain regions of the country. This is a study of sentencing circles held across Canada. This study is also significant as it expands upon what has been found by other researchers by exploring how sentencing circles are linked to the idea of Aboriginal justice and how control over the process and sentencing will play a big part in establishing this link. This study also provides a groundwork for those interested in the sentencing circle process and for those wishing to propose changes to the criminal justice system with regard to Aboriginal offenders. Aboriginal communities will benefit from this study as it points out the conflicts surrounding the use of sentencing circles and the idea of Aboriginal justice and what possible solutions there are to resolve these conflicts. Aboriginal community members will be able to use the findings of this study in furthering the idea of Aboriginal justice and in implementing Aboriginal justice initiatives.

The findings in this study will contribute to the ongoing debate in Canada surrounding the idea of Aboriginal justice. It is hoped that the findings of this study will contribute to both the praises and criticism of the criminal justice system when dealing with Aboriginal offenders. Another goal of this study is to prompt action by those involved in the justice system in Canada, and by Aboriginal peoples themselves, whether this action be on a small or large scale is of little importance.

#### Design of the Study

My interest in Aboriginal studies, starting in my first year of university, was

mostly influenced by the fact that I myself am a status Indian. I am Mohawk, my grandmother is from the Six Nations reserve near Brantford, Ontario. In previous employment/volunteer capacities (Can-Am Indian Friendship Centre and New Beginnings) I had the chance to interact with Aboriginal offenders who were going through the criminal justice system. My interactions with these individuals, as well as my own personal interest in justice, have led me to commit myself to researching topics relating to the idea of Aboriginal justice. While I believe that it is important to conduct a study dealing with Aboriginal peoples and the justice system, this commitment will help to advance research in this area, not hinder it. The importance of objectivity was always first and foremost in my mind while conducting this study. As claimed by Cresswell (1994) “qualitative research is interpretative research” (147), and indeed the final analysis of this study was subject to my interpretations. I made sure that my personal interests and beliefs did not negatively influence the findings of this study in an unscholarly way.

Based on the qualitative nature of the data used in this study, the most appropriate design for this study was a qualitative case study design. Cresswell (1994) stated that qualitative case studies look at the process of things (145), and explore a single phenomenon (12) in search of patterns (156). This study involves the cross-case comparison of how sentencing circles proceed across Canada and the identification of patterns that emerge from the cases studied.

This study also involved interpretation, in that what was reported in the judgments themselves were interpretations of what the judges’ believed were the important events of the cases. From the study of these judgments I have made my own interpretations about how sentencing circles proceed, how they are constrained, and how they may further the idea of Aboriginal justice.

### Data Collection Procedures

This study contains an analysis of a sample of reported judgments for provincial/territorial sentencing circle cases since 1990, seventeen cases to be exact (for a breakdown of the province/territory in which each circle was held as well as the charge and sentence see Appendix 1). I originally found thirty reported judgments, thirteen of which did not include sufficient information for inclusion in this study. The seventeen judgments that I used were included due to their accessibility and their inclusion of the information needed to carry out the planned analysis. The exact number of sentencing circles held across Canada to date is not known as many circles go unreported. A search for an estimate of circle judgments using the search term "sentencing circle" in Quicklaw's database of court judgments turned up sixty nine cases for Provincial and Supreme Courts. This is only an approximate number since this search will detect when judges mention sentencing circles in any judgment.

The following data was also collected and analyzed: seven sentencing circle applications (denied/allowed) and three sentencing circle appeals (upheld/dismissed). Also reviewed were other court cases and judgments to understand how they impacted sentencing circles and findings from these reviews were also included in this thesis. The case study approach allowed for the gathering of an abundance of information on sentencing circles, which lent substance to the review of these circles.

The reported judgments included in this thesis were gathered from law periodicals obtained in the law library, through an e-mail list run by Rick Fowler at the University of Saskatchewan's Native Law Centre, and through the use of my student account on Quick Law (a search engine which will find and display reported judgments and cases).

Data collection and data analysis were conducted simultaneously in this study.

As each case was read any mental notes that I had were recorded. For each sentencing circle judgement reviewed, a database was kept and completed in order to answer the research questions. Originally I had planned to fill out a database for each of the following: sentencing circle applications approved, sentencing circle applications denied, sentencing circles, sentencing circle appeals upheld, and sentencing circle appeals dismissed. In the end it was much easier to complete a database only for the sentencing circle judgments studied and to just review and write up the information on the other reports.

The sentencing circle database included categories that corresponded to the questions being asked in the study. Any time a case answered a research question, a note of the answer was made in the corresponding database. Any information that was pertinent to the study, but did not fall under a database category was added to the individual database. All of the judgments analyzed for this study were photocopied and filed away in order to ensure accessibility in the event that a new research concept arose.

The data collection for this study was divided into four parts. The first part examines the role of the community members, victims and offenders in the sentencing circle process and sentencing. The second part examined the role of the judges and lawyers in the sentencing circle process and sentencing. The third part examines the overall sentencing circle process. The fourth part contains an analysis of the process of determining sentences in the circles.

### Ethics

Although the records analyzed for this study are a matter of public record, the names of all individuals involved in the cases are not disclosed in the body of this study. I assigned a number to each case for reference purposes. The judge, the defence attorney, the crown attorney, the offender, and the victim are all referred to by these titles. For the purposes of comparison in the data analysis judges, defence attorneys and crown

attorneys are all referred to in relation to the case (and it's number) being mentioned. When comparing two or more cases heard by the same judge or tried by the same lawyer, the cases (and their numbers) are noted. I have included the case names and their citations only in the reference section.

Members of the community are referred to in terms of their relationship to other individuals involved in the case (e.g. victim's father, offender's caseworker). Other community members are labelled "community member #1", "community member #2", etc. and Elders are referred to as such. These considerations are given in order to protect the offenders and victims from further scrutiny due to their involvement with the criminal justice system. The names of judges and lawyers are not disclosed in the course of the data collection or data analysis out of respect, since some of their practices are critiqued in this study.

#### Delimitations and Limitations of This Study

This study was restricted to looking at sentencing circle applications, oral and written judgments, and appeals in Canada, since 1990, which involve Aboriginal offenders (status and non-status Indians, and Inuit peoples). This study was limited due to the fact that there are many sentencing circles that have occurred which have not been reported in case law and written/oral judgments have not been filed. There is also a lack of statistical data on sentencing circles. There does not appear to be any official records on how many sentencing circles have taken place across Canada, or on offender information. This lack of information makes it difficult to determine how representative the sample used in this study is of sentencing circles taking place across Canada. This is not a major concern, since the sentencing circle process will differ from community to community. The internal validity of the study was affected by the fact that only reported judgments, applications and appeals are being analyzed. Why these judgments, applications and appeals were reported, while others were not, will affect how well the

findings of this study can be generalized to all sentencing circles.

Another limitation is the fact that the sentencing circles studied have not been compared to sentencing hearings to see how they differ. Although mention is made in most of the judges' reports as to how circles differ from hearings, it is not the same as conducting an actual comparison. One way of making up for this is by highlighting what the judges and Crown attorneys outline as the usual sentencing range for each offence.

All of the data studied came from both filed written/oral judgments and law periodicals. This was due to the fact that sentencing circle application, hearing and appeal transcriptions can only be obtained from the courts and the time limit of this study did not permit such an endeavour. The major limitation in this study was working with documents as the primary source of data. Using this data was limiting in that the reports only reflected the judge's description and interpretation of what had happened in the sentencing circle. There were instances of judges referring to something that was said by a circle participant, or even quoting what was said by participants, but even such references were subject to the judge's inclusion in the reported judgement. What was lost in this method of data collection was the true and uncensored voices of the sentencing circle participants. What was also lost was information that the judges did not deem relevant for report, which may have been relevant to the questions being asked in this study. Judges who hold and report on sentencing circle cases work within the constraints of the criminal justice system and discussion of these constraints is not often included in their judgments.

While this study and its results can only be generalized in the context of other studies of sentencing circles; this study is useful as a background for consideration of other forms of Aboriginal justice. Replication of this study, is possible in scope, but not in content due to the fact that the actual cases used are only cited in the reference section.

## Research Questions

The purpose of this thesis is to expand upon what has been found by other researchers by exploring how sentencing circles are linked to the idea of Aboriginal justice and how control over the process and sentencing in circles will play a big part in establishing this link. In order to determine how such a connection is established and/or inhibited, reported sentencing circle judgments, applications, and appeals were analyzed in order to answer the following questions. What are the different roles carried out by the sentencing circle participants (offender, victim(s), community members, judges and lawyers) and how are these roles constrained? Is there evidence of significant offender participation and rehabilitation? Is there evidence of significant victim participation? Is there a difference between Aboriginal and non-Aboriginal victim participation? Is there evidence of community member support for both the offender and the victim? Is there evidence of significant community member participation in both the process and the decision making? Is there a significant delegation of power between the circle participants? To what extent is judicial power delegated to community members in the proceedings? Are there hidden constraints that limit the power delegated to the community members in the circles? If so, does this affect healing strategies/practices? Is there evidence to suggest that community healing or balance is a serious consideration? How do the known constraints of the Western justice system (i.e. sentencing practices, theory, judicial precedents/appeals and legislation) affect both the process and the ultimate sentence given in sentencing circles? How do these constraints limit the use of practices associated with the idea of Aboriginal justice? Did the judges accept the recommendations for sentence given by the community members? If not, did they explain why? What types of sentences are handed out and do these sentences allow for rehabilitation of offenders and the healing of offenders, victims, and community members? How were healing approaches implemented in the sentences? Do sentencing circles allow for the use of practices (i.e. cultural/traditional) associated with the idea of

Aboriginal justice? If restorative sentences associated with the idea of Aboriginal justice are used, does this lead to sentencing disparity/leniency as viewed by the judges?

## CHAPTER IV

### ROLE OF THE OFFENDERS, THE VICTIMS, AND THE COMMUNITY MEMBERS

Any research on sentencing circles should include a discussion about the circle participants. Due to the nature of sentencing there are two categories of participants. There are those who were affected by the offence - the offender, the victim, and the community members (including Elders). There is also the court party - the judge, the defence lawyer and the crown attorney. All of these people have a role to play in sentencing circles. The judge in Case #1 claimed that the "circle setting dramatically changed the roles of all participants" (P37). In the traditional courtroom the judge "with the power to control the process, is rarely challenged. Lawyers ... control the input of information ... the community [is] relegated to the back of the room" (P37-39). The judge claimed that the sentencing circle changes all of this. The issue of control will only be touched on in this chapter, while it will be explored in more depth in the following chapters.

The objective of this chapter is to find out what roles the offenders, victims and community members played in the sentencing circles and how these roles allowed for the introduction of elements associated with the idea of Aboriginal justice. Due to the nature of the data studied, one learns about the offender, victim and community members through the observations of the judge. In their reports, the judges can control how others view the roles of these participants. This judicial control is revealed in discourse on the offender, the victim, and the community members.

Another objective of this chapter is to explore how the judges discussed the issues of crime and causation, along with discussion of the offenders' relationships to the victims. Such discourse is significant as it offers a justification/rationale for the sentences given. Rehabilitative sentences can be justified if the purpose of sentencing is to help offenders move beyond their troubled pasts and to restore their relationships with

others in the community. Restoration is a concept, which is, associated with the idea of Aboriginal justice therefore the offender, community members and victims may also contribute to the discourse on crime and causation to this end.

### The Offender

In the cases studied, the majority of the offenders were males past the age of twenty, with the majority of offenses committed being offences against the person. Only three cases in this study involved female offenders, one was a young offender. For a complete breakdown of the offenders' offence, sex, and age see Appendix 2. Due to the nature of the data used in this study, this is a restricted sample of the types of offences committed by offenders participating in sentencing circles.

In the circle, offenders are given a chance to speak on their own behalf. The judge in Case #1 explained that in sentencing hearings the offenders often "sit with head bowed" as their lawyers do the talking for them (P60-61). In most of the judgments the judges portrayed offenders as going along with the process and speaking to the circle when given the chance. The problem with the data used in this study is that reported judgments only reflect what the judges want to report, and this includes what offenders said in the circles. Therefore, what was actually said by offenders was often not reported. This evidence would suggest that the judges accorded offenders less of a role to play in the sentencing circles than community members.

Some of the judges in the judgments studied made mention of the offenders' motivation to change. This was often referred to without reference to what was actually said by the offenders in this regard. The judge in Case #13 stated "I am fully satisfied that [the offender] is motivated, sincere, and determined to deal with his issues ... he has demonstrated an ability to follow through and successfully complete his personal rehabilitation" (P56). An offender's motivation to change could be based on their wish to be restored to a healthy place in the community. Statements made by judges, recognizing

and commenting on this motivation, will help to justify the ultimate sentence given in the different cases.

The judges in Cases 3, 4, 6, 15, and 16 believed that another role of offenders who have gone through community sentencing circles is to pay back their community in some way. In Case #3 the judge, in reference to the type of community work that the offender could carry out, said to the offender “[y]ou need to put time in to this community to pay back what they have won for you today” (P 17). This same judge in Case #4 told the offender “[t]he first thing is you need to pay back this community ... It is your responsibility and within your ability to pay back your community” (P 27-28). The same judge in Case #6 stated that in “a small but important way, the 100 hours of community work under the direction of the Circle Support Group provides an opportunity for the offender to demonstrate his gratitude and reimburse the community for the time and resources they have invested in his treatment” (P 31). This same judge reiterated this role of paying back the community in three different cases, therefore suggesting that this is an important undertaking for offenders who are going through the circle process.

In Case #16 the judge said that the circle agreed “that the accused, in order to return some of what she has taken from her community, do a significant number of community service hours” (P9). In this case, the judge justified this belief by referring to the fact that the community members were in agreement. The judges in these cases have made paying back the community a vital role for the offenders to play. In some of the cases the judges indicated that the offenders agreed with this role, but in other cases it was not clear whether or not the offenders accepted this role. Such a role is consistent with the Aboriginal justice concept of restitution.

In fourteen of the cases studied the judges made mention of whether the offenders plead guilty or were found to be guilty at trial. Twelve offenders plead guilty, one was found guilty, and one was found guilty of one charge and pled guilty to a second charge. In the three following cases the judges also mentioned whether or not the offenders

appeared to be remorseful for their acts.

The judge in Case #2 initially stated that “[t]his vicious assault coupled with a pre-sentence report that described the offender’s essentially negative attitude about rehabilitation, an apparent lack of remorse ... suggested a significant jail sentence would be appropriate” (P32). This judge changed his/her mind about imposing a jail sentence after noticing a change in the offender’s attitude after working with another community member during the sentence adjournment. The judge stated that the “evidence was overwhelmingly persuasive that a significant rehabilitation plan was appropriate” (P50). The judge in Case #14 stated that “the plea in this matter is a sincere reflection of remorse” (P22). Due to the offender’s remorse in this case and her willingness to change, as observed by the judge, a formal probation order was not given, she was only required to keep the peace and be of good behaviour. The judge in Case #16 stated that “[t]here was no need for a sentence of incarceration as a specific deterrent because of [the offender’s] remorse” (Introduction to case). The judges control the construction of the offenders by referring to the plea of guilt and the offenders’ remorse (or lack thereof). A suspended sentence or a prison term served in the community are more justified when there is an offender who admits to his/her guilt and shows remorse for what he/she has done. Such offenders would likely be accepting of practices associated with the idea of Aboriginal justice. What also may justify a rehabilitative sentence over a jail term is mitigating factors such as an offender’s troubled past.

The judges’ discourse on the offenders in the cases studied set out a construction of the offenders. This construction controls how the offenders are viewed in the context of sentencing circles. The judges outlined the characteristics (and the pasts) of the offenders and their offences, and their actions before and during the sentencing circles. Such a discourse can be used to explain why the judges sentenced the offenders the way they did. The judge in Case #1 stated that the offender’s “record sadly evinces the need both to improve the existing system and to search for a dramatically different and

constructive alternative” (P 109). This judge, therefore, justified the use of the sentencing circle by indicating that the formal justice system had obviously failed this offender. The use of sentencing circles are also justified in that they allow for the application of elements associated with the idea of Aboriginal justice.

Most of the offenders came from different communities and different nations and yet they all had troubled histories. The judges in all of the cases studied made it a point to report on what they knew of the offenders’ past and present life circumstances; knowledge which was often gleaned from the community members present in the circle. In the cases studied, it was reported that all of the offenders charged with assault were physically and/or sexually abused as children, some were neglected as children and all of them abused alcohol. Such a discourse on the life histories of the offenders attempts to explain the aggressive behaviours accompanying many of the offences.

An interesting finding was that the three offenders who were convicted of sexual assaults did not mention that they themselves had been sexually assaulted in their lives. This goes against the common belief in society today which assumes that sexual offenders were once sexually assaulted themselves. Of course, these offenders may have been sexually assaulted and did not admit it at the circle sentencing, or if they did, the judges did not report it. Two of these offenders did suffer from relationship problems.

The offenders charged with impaired driving and break and enter had problems with alcohol. An offender charged with criminal harassment had a variety of problems including being physically and sexually abused as a child and seeing his mother abused by his father. An offender who was charged with arson had poor anger control and substance abuse problems.

The discussion of such mitigating factors is also common in pre-sentence reports and in sentencing hearings. Once again, this particular discourse about crime and causation is significant because it offers a justification/rational for the sentencing decisions made by the judge. Such discourse also gives credence to the wishes of

community members to restore the offender to a healthy place in the community.

The judges also referred to the nature of the offenders' relationships with the victims throughout the course of their judgments. Discussing these relationships also justifies the need for a rehabilitative sentence and the healing of offenders and victims. While the data does not permit a detailed look at these relationships, one can look at the surface relationships to get a sense of the problems that the offenders had in interpersonal relationships. At the outset of the study, it was expected that a majority of the offences heard in the sentencing circles would involve offences committed by one community member against another. In nine out of the seventeen cases studied the victim was a member of the offender's community. In twenty-four percent (24%) of the cases the offender and the victim were related. In twenty-four percent (24%) of the cases the offender and the victim were romantically involved. In six percent (6%) of the cases the victim was an acquaintance of the offender. These figures mean that over fifty percent (50%) of the offences committed were against someone the offender knew in their community. While this is not something that most of the judges explored further in their judgments, such evidence suggests that the healing of offenders, community members, *and* victims is needed.

### The Victim

The judges' discourse on the victims in the cases studied set out a construction of the victims and the roles they have to play in the sentencing circle. Only two judges in the cases studied made mention of whether or not victims supported the use of the circle. The victim in Case #15 did support the use of the circle, which was interesting, since the victim was a police officer. In Case #13 three out of the four victims were described as being uncomfortable with the use of the circle, primarily because this case was a test run for the community, since this was the first time that an offence of a sexual nature had been accepted in the circle sentencing program, and because they themselves were not

community members (P28). By not mentioning whether victims supported the use of the sentencing circle the judges placed the victims in a role that implied that their support was not necessary for the circles to proceed.

While victims may not want to participate in sentencing circles, it is important to recognize that circles are advantageous over sentencing hearings because community members and victims “do not have standing in [sentencing hearings] to compel presentation of their views to the judge. Recent changes to the *Code* ... still do not compel a sentencing court to hear victim and community representations” (Green, 1998, 47). At least in sentencing circles, victims are given a chance to speak freely about the offence and the offender.

Quigley (1994) claimed that “it is arguable that the victim is better represented [in a sentencing circle] than in the normal hearing” (289). In a sentencing circle the victim (or their representatives, if the victim can not or will not attend the circle) can let participants know how this offence has affected them. The victim can also suggest ways that the offender can be treated in order to set them on a healing path. Many of the victim’s concerns can be given voice in a sentencing circle. The judges in the cases studied often did not allow the victims’ voices to be heard in their judgments. Instead, they were more apt to relate whether or not the victims participated in the circles.

At the outset of this study it was expected that victims who had been treated violently by their offenders would not want to attend the circles. In fact this was only the case less than fifty percent (50%) of the time. The victims were present for cases: 4, 5, 7, and 15 (assaults); 10 (sexual assault); and 16 (arson). In Case #9 the offender had caused the death of his father while driving impaired. His family members were present in the circle. Victims were not present for cases: 2 and 11 (assaults), 6 and 8 (sexual assault of children), and 13 (criminal harassment). It was not clear whether the victim (police officer) was present in Case #1. In Case #17 the victim was a two-month-old baby, but the baby’s grandmother and other relatives were in the circle. Cases 3, 12, and 14 were

“victimless crimes”, although the judges did report on the community members’ discussion about how the crime had affected them. It is interesting to note that in cases 2 and 11 the offenders and victims did not know each other and in Case #13 the offender was not a part of the victims’ everyday life. In all three of these cases (where victims were not present) the victims were not from the offender’s community. This evidence suggests that people not from the Aboriginal communities in question are reluctant to participate in sentencing circles held in those communities.

From the following comments, included in the judgment, the judge in Case #13 implied that it is harder for non-Aboriginal victims to attend a sentencing circle when they are not familiar with the process and feel that they are not supported by the offender’s community. The judge quoted the probation officer as saying

‘[a]ll three women expressed their discomfort with this case proceeding to circle. Having been made aware that [the community] has not taken on such cases in the past, but view this case as a trial run, they question why this trial run involves victims who are not from the community and chose not to participate in person’ (P28).

In reply to the victims’ concerns, the judge stated

[i]f the Circle Sentencing process is to be judged by the attendance of victims at the sentencing hearing, then the formal court process should be evaluated on a similar basis. In reality, victims are almost never in attendance for sentencing in formal courtrooms. In the majority of cases, there is no written victim impact statement (P34).

Such a statement by the judge appears to be an attempt to define the victims’ role in a way that is compatible with courtroom conventions. This judge’s statement implies that since victims do not regularly participate in sentencing hearings, why should they be expected to participate in sentencing circles. Such an implication is not consistent with the idea of Aboriginal justice.

Victims who did not want to attend the circles had the option of submitting a victim impact statement. This was done in cases 2, 11, and 13. The judge in Case #2

commented on the fact that it was important to have input from victims at the time of sentencing. The judge discussed the fact that often at sentencing, victims seek retribution for the crime and that this can “generate improper retributive sentences’ (P 8). This judge believed that victims could contribute to the sentencing process more constructively by letting the offender know how the offence had affected them. The judge claimed that “[t]he input of victims ensure that offenders remain acutely aware of the devastating pain and suffering their crimes have caused ... the plight of victims can be instrumental in prompting offenders to pursue rehabilitation” (P9). The role of victims then, according to this judge, is to help offenders on a rehabilitative path, not to seek retribution for the harm done to them by the offender. The judge implied that since the court can not grant retribution to victims by the way of sentence, they should not be asking for it. This judge went on to say that

[p]ublic respect and support for the criminal justice system is enormously undermined by inviting victims to participate in a manner that induces expectations the justice system cannot deliver (P 12).

Such a statement implies that victims, who participate in sentencing circles, only have so much influence over the type of sentence that will be imposed and therefore how the offenders can make amends for the wrongs they have perpetrated against them.

This judge then went on to discuss the problem with victim impact statements, stating that

[c]ourts, as in this case, are forced to consider a victim's statement that represents the victim's initial reaction to the crime. Consequently, the Court, in genuinely attempting to incorporate a victim's concerns based solely on their reaction to the offence, may impose a sentence that could be the antithesis of what a victim fully informed about the offender might perceive as just (P13).

This judge’s comments outlines a role for the victims whereby they should be in attendance at sentencing circles in order to gain a better understanding of the offenders and perhaps to understand why the offence occurred, therefore giving victims a different

perspective in their call for justice.

The judge in Case #13 discussed his/her concerns over the joint victim impact statement that was submitted by the three victims. One thing the judge was concerned with was whether or not the joint statement represented “an accumulation of their individual impacts, or did each victim experience everything set out in the statement” (P6). The judge commented that while it may have been beneficial for the victims to meet each other and to share what had happened, that “it would be safer for victims to file individual victim impact statements” (P6). This judge made it clear that victim impact statements made directly after an offence has occurred will carry much of the hurt and anger that the victim is feeling. Hurt and anger are unavoidable emotions when someone has been victimized, and this judge seems to imply that such emotions coming from the victim are inappropriate.

Other judges believed that such a display of emotion was appropriate. The judge in Case #1 stated that “[o]nly when an offender's pain caused by the oppression of the criminal justice system is confronted by the pain that victims experience from crime, can most offenders gain a proper perspective of their behaviour” (P65). Unlike the judge in Case #13, this judge extends the role of the victim to that of a participant who must confront the offender with the pain that they have caused by the commission of their offence.

This same judge, in Case #6, actually played this role for the victim. The victim in this case was an 11 year old child who had been sexually assaulted by her father. She did not attend the circle. The judge stated that

[t]his attack severely affected her and has continued to haunt her. Her feelings towards her father are confused, fluctuating from love to hate, from wanting to be with him to wanting to stay away. Her anger persists, causing her to lose concentration. The memory of the attack interferes with much of her life. Yet despite all of these disturbing feelings, she desires to see her father and find the father she knew before this sexual assault (P9-10).

The judge made such a statement even though a victim support group was in attendance on the victim's behalf. The support group would have been the logical representative of the victim in this case, not the judge. This judge, therefore, downplayed the role of the Victim Support Group. Most of the judges in the cases studied, through their comments and lack of details about the offenders' and victims' roles, implied that offenders and victims have a limited role to play in sentencing circles. In contrast, the judges in the cases studied accorded community members a greater role in the circles.

### Members of the Community

Sentencing circles can be used to further the idea of Aboriginal justice if members of the offender's community are supportive of their use and are willing to work together to begin the healing process with the offender and the community as a whole. Before looking at the roles played by community members in the sentencing circle process, the judges' descriptions of "community" need to be explained. In the cases studied the judges did not mention how reflective the views of the community members in attendance were in relation to the views of the community as a whole. The community members present in the circles were often referred to as "the community" by the judges. This allows for the speculation that perhaps, for the judges in the cases studied, an acceptable "community" presence for sentencing circles is that of the members who were in attendance. The judges also made mention of community support groups, justice committees, and community healing circles in their reported judgments. There was no discussion as to how these different groups were formed in the communities (with the exception of Case #6), therefore one does not know how representative they were of the community as a whole. By accepting and acting on the recommendations put forward by these community members, the judges legitimated the imposition of the types of sentences that they gave.

The judge in Case #1 believed that as sentencing alternatives were broadened

more community participation would be required (P6). The judge claimed that in order to

engage meaningful community participation, the sentence decision-making process must be altered to share power with the community, and where appropriate, communities must be empowered to resolve many conflicts now processed through criminal courts (P6).

Even though community members are being given the opportunity to recommend how sentencing circles should proceed and what types of sentences should be given, the evidence in this study suggests that the judges still control the roles that these community members play in the actual process.

The judge in Case #1 set out one of the roles of the community members as being information providers for the court. The judge stated that

[c]ommunity involvement through the circle generates not only new information, but information not normally available to the court. Through the circle, participants can respond to concerns, fill in gaps, and ensure each new sentencing option is measured against a broader, more detailed base of information. In the circle, the flow of information is alive, flexible and more readily capable of assessing and responding to new ideas (P48).

The judge in this case believed that by allowing community members to provide information about the offender, this would “substantially improve the court’s perception” of the offender and the crime (P50).

The judge in Case #6 believed that community members can learn about themselves, and their community, in the context of sentencing circles, while teaching others about their offending community members. This judge stated that

[t]he Support Group's long standing knowledge of the offender who has lived most of his life in the community (and will probably live out his life there) adds considerable weight to their unqualified endorsement of the offender for rehabilitation. The formal, professional justice system must acquire greater confidence and trust in community knowledge, judgment and instincts (P31).

This statement serves to legitimize the role of community members in the sentencing circle process. The judges in the cases studied portrayed community members as

knowing what their members were capable of, therefore forming a basis for a solid working relationship with the offenders. Such knowledge once again justifies the imposition of a rehabilitative sentence.

The judge in Case #17 stated that “Gladue (P 93(7)) affirms the importance of community involvement in sentencing, as a means of obtaining the information necessary for a proper sentencing decision” (P 57). The judge then went on to quote the following statement made by the judge in *R. v. Gladue*

[quote] in order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report ... which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender [end quote] (P 57).

Instead of relying on the community members’ input for a pre-sentence report, in sentencing circles the judges can hear information about offenders directly from community members. Providing information about offenders is one way that community members are able to further the aims of Aboriginal justice by suggesting rehabilitative sentences that will address the offenders’ needs.

The judge in Case #12 believed that community members had a dual role in the sentencing circle process to “support the accused and assist him by participating in the process and ensure that the views of the community as victim were presented” (P23). The community members could help the offender while at the same time letting him know how the offence had affected them. The judge in this case assigned this role to the community members after claiming to have learned about the community’s “position with respect to the crime and with respect to this application” (P22). Through oral evidence and other information providers, the judge stated “I was satisfied that there was a willingness by the community to participate in the sentencing circle and also to assist

the probation officer in any conditions of a probation order that was granted and to do so for the best interest of the accused” (P24). The judge, then, further extended the role of the community members to helping the offender carry out his probation order. This reflects one concept associated with the idea of Aboriginal justice, that justice is a community responsibility.

Another community responsibility is protection of the community. The judge in Case #1 believed that the involvement of the community members in sentencing circles would help to ensure the protection of the community. The judge stated that in order to

properly employ any sentencing option, especially jail, the courts must not only be open to disciplines outside the legal community, but must eagerly and aggressively seek their involvement. The justice system’s current monopoly over sentencing offenders must be shattered. The court’s complex rules, authoritative practices, and overwhelming power has for too long kept communities and other disciplines at a distance. The circle provides one means of opening the process to the community, and, as in this case, can improve the input and assessment in determining what best protects the community (P125).

This implies that community members will know what best protects their community.

Another role of community responsibility assigned to the community members by the judge in Case #17 was that of learning from their past mistakes. This judge stated that it

is crucial that our entire community pay close attention to what really happened [in this case], so that we can develop more effective strategies which will prevent future occurrences. This self-examination will not be easy. But, unless we undertake this self-examination ourselves, it is highly likely that it will be forced upon us at a later date, perhaps by way of an intrusive and time-consuming public inquiry, as has happened in other jurisdictions (P8).

It seems that the judge outlines this role for the community for the community members’ own benefit. This judge went on to say that “it is important for family members and members of the ... community to reflect on the history of this case in an objective and non-defensive manner. I hope everyone will ask what they might do differently should they encounter similar circumstances in the future” (P9). The judge in this case tasked

the community members with the role of learning from what they hear in the circle in order to prevent similar offences from happening in the future.

The judge in Case #3 deemed involvement in a sentencing circle as being educational for the community members. The judge told the offender that

[t]he Chief and community have learned the nature of the healing power within their community. They have learned from working with you that if they spend time and show support for their own people they can heal and help their people achieve a positive role in the community. This is a very important lesson for any community to learn (P6).

Holding sentencing circles is another way that community members can take responsibility for justice by beginning to understand the healing work that needs to be done in the community as a whole.

The judge in Case #1 believed that the “circle discussions force community members to see beyond the offender, and to explore the causes of crime. This search inevitably leads [one] to assess what characteristics in the community precipitate crime, what should be done to prevent crime, and what could be done to rehabilitate offenders” (P75). The judge did not mention that the community members must have the willingness and the ability to go this route.

Out of the seventeen cases studied there was only one case, Case # 5, where an indication of support from community members was not mentioned. In Cases 3, 4, 6, 13, 14, and 17 there were “support groups” in the communities specifically in place for the offenders. These groups helped with such things as carrying out probation orders, cultural training and counselling. The judges’ mention of such community assistance outlines the supportive role that community members can play when involved in the sentencing of offenders. Such roles also demonstrate that for these communities, justice is their responsibility.

In Cases 10 and 11 the offenders worked with their community’s “justice committee” who did many of the same things that support groups did. In Cases 2, 5, 9

and 16 the offenders received, or were given access to, counselling/treatment by community members. In Cases 7 and 12 community members committed themselves to helping the offenders with their probation. In Case #8 a community member offered to interpret for the offender if he had to go for a psychological assessment. In Case #1 the community members wanted to help the offender to 'reintegrate' back into the community since he was in foster care and custody for so long. A common theme reiterated in the judgments was the judges' view that communities begin to understand how they can help their members during sentencing circles. Understanding how they can help their members during sentencing circles is one way that community members can further the concepts associated with the idea of Aboriginal justice.

In most of the cases the judges did not make mention of what the community members did to support the *victims*. This omission is in line with the limited role of the victims in circles that the judges seemed to adhere to. In Case #5 a counsellor set up a visit to a treatment centre for the offender and the victim, of course this set up was also made with the offender in mind. In Case #6 a Victim Support Group worked closely with the child victim. In Case #13 the community justice committee offered assistance to the four victims, but the judge did not mention whether the victims accepted their offer of help. By not discussing in more depth what community members can do for victims, judges are limiting the role of community members. The judges are in effect telling community members that they do not need to give much consideration to the needs of the victims. Offering support and assistance to victims, whether they belong to the community or not, would be on way of furthering the idea of Aboriginal justice.

When there are support groups set up for both the offender and the victim, sometimes conflict can occur. In Case #6 there was some conflict between the Circle Support Group and the Victim Support Group. The conflict was over a letter that the offender wrote to the victim. The Victim Support Group received the sealed letter and they were supposed to pass it on to the victim and instead they opened it and kept it (P11-

21). The judge, by including a discussion about this conflict, was able to outline the following roles for the respective support groups. The judge stated that

[t]he concept of a separate Victim and Offender Support Group has enormous potential but several measures must be taken to avoid both miscommunication and an adversarial relationship between these vital community support groups: 1. Clear Identification of Issues: Before any plan is initiated, the issues perceived by both groups must be clearly identified. This can best be achieved through prior Circle Court meetings of the Groups and through taking time in the Circle to ascertain and define all issues. 2. Consensus on A Plan for Action: Once the issues are clear, the possibilities for false assumptions will be lessened, but any action plan must be discussed in detail outside Circle Court and canvassed within Circle Court to minimize misconceptions of what is expected. 3. Membership: If the members of each Support Group know each other and have easy access to each other, miscommunication and adversarial tendencies will be minimized, most likely avoided (P22-25).

In order for such guidelines to work, many community/support group members will have to put in a lot of time and effort. The judge in this case talked about the “dedicated, tireless volunteers” (P11) who made up the support groups. The judge also discussed how none of the Victim Support Group members were from the community in question (P26). Even some members of the Offender Support Group were outside “professionals” (P27). The judge stated that “[i]n Circuit communities, the need to involve professional resources in Support Groups will always force the Support Groups to reach outside the community for members with the requisite professional skills” (P27). Such a statement implies that the community members involved in sentencing circles need to involve outside professionals in the treatment and healing of their members in order to legitimize their involvement in sentencing.

Another group of community members involved in the circle process are the Elders of the communities. In some sentencing *hearings* Elders have been allowed to make submissions to the court on behalf of the offender. This is not common practice in many courts. In nine out of the seventeen cases studied there were either Elders or keepers present in the circles. As for the other eight cases, no mention was made by the

judges as to whether or not Elders were present.

Orchard (1998) questioned whether Elders should participate in sentencing circles since they are healers and teachers and sentencing deals with the punishment of offenders (108). Perhaps this may be why Elders who participate in sentencing circles “generally [voice] a perspective opposing jail” (Green, 1998, 107).

If Elders push for non-incarceration in circles, one would hope that the judges voice respect for the Elders’ wishes, even when they do indeed incarcerate offenders. Orchard (1998) claimed that

[i]f [the Elders] work in the circle and their commitment to the offender, the victim and the community are not respected, if their recommendations are not followed, or if sentences are appealed, their confidence in the circle process and the justice system can be destroyed. Many may not be willing to participate in a second circle if their first efforts are overturned by the sentencing judge or appeal court (108-109).

If Elders are discouraged from participating in sentencing circles any progress that has been made in healing offenders and communities may be lost.

Each Aboriginal community will have different cultural ideas and practices, thus the Elders in each community will participate in the circles differently. The judges in sentencing circles will always have control over the extent to which Elders are involved in the process. In Cases 9, 12 and 15 the Elders had roles that brought traditional/spiritual and cultural aspects to the circles. The actual roles that they carried out will be explained in more detail in Chapter 6.

In some circles the Elders were an entrenched part of the circle sentencing process. In Case #13, Elders were part of the application approval process and they were the keepers of the circle. They explained the purpose and guidelines associated with the sentencing circle and they provided knowledge and support within the circle.

The discussion of Elders, and their roles in the sentencing circle, by the judges in the cases studied set out the role of Elders as being separate from that of the other

community members. The judges have placed the Elders into a role of conducting ceremonies, offering prayers, and discussing traditional ways of dealing with offenders. Elders may be the people who have the knowledge of traditional practices which can be used in sentencing circles to further the idea of Aboriginal justice, but community members must also understand these practices and support them.

The main objective of this chapter was to explore the roles the offenders, victims and community members played in the sentencing circles, as described by the judges; and how these roles allowed for the introduction of practices associated with the idea of Aboriginal justice. In the judgments analyzed, offenders were not accorded a great role in the process by the judges other than showing guilt, remorse, motivation to change, and a willingness to pay back the community. The judges, in their judgments, did not concentrate on the amount of support that was given to victims in circles, only whether victims attended or not. Two of the judges were reluctant to rely on victim impact statements, they believed that victims could contribute more to the circle if they were in attendance. The data suggests that community members can voice their concerns about the administration of justice and suggest changes. Community members can also use sentencing circles to further the idea of Aboriginal justice by ensuring that justice is a community responsibility. This can be done by supporting the use of sentencing circles, helping both offenders and victims throughout the process, providing information about offenders which will justify the use of a rehabilitative sentence which will address the offenders' needs, by exploring the causes of crime and working to prevent such occurrences in the future, and by working together to begin the healing process with the offender, the victim, and the community as a whole.

While all of the participants discussed in this chapter had a role to play in the sentencing circle process, as evidenced, these roles were often controlled by the judges. The judges' control over sentencing circles, and the individual participants, was revealed in the discourse on the offenders, the victims, and the community members. Judges and

lawyers also have roles to play in the sentencing circle process. Often their roles are played out within the constraints of the criminal justice system itself.

## CHAPTER V

### ROLE OF THE JUDGES AND LAWYERS

In Chapter 4 the judges' control over the roles in the circle in relationship to the offenders, victims and community members was discussed. This chapter will explore what judges deem *their* overall roles are in sentencing circles. The overall roles played by the lawyers in sentencing circles will also be explored. The theme of control will only be explored minimally in this chapter as it will be explored further in the next two chapters. How judges and lawyers affect the use of concepts/practices associated with the idea of Aboriginal justice will also be explored in more detail in the next two chapters.

#### The Judge

The judge in Case #1 stated that

[u]ntil communities keenly appreciate the limits of the formal system, and the corresponding need for their involvement to achieve society's objective in responding to crime, they will not be sufficiently motivated to invest their time and resources in providing community based alternatives and their misplaced excessive reliance on the formal justice system will persist (P 79).

This judge is implying that his role is to initiate the sentencing circle process for the first time in this community in order to "motivate" the community members to help their fellow members and to lessen their "excessive reliance" on the formal justice system. This judge also held the first sentencing circles in the communities for Cases 2 and 3.

Even if the community members are motivated and want to help offenders to pursue treatment options, the judge is often the one who decides whether the *offender* is motivated enough to go down this route. The judge in Case #3 stated that it is ultimately his/her responsibility to decide whether offenders have "the motivation to successfully pursue treatment" (P2). By contrast, in Case #6 the Circle Support Group met with the

offender several times before the actual sentencing took place to determine if the offender was willing to follow a rehabilitative plan (P13-14). By placing themselves in this role, these judges are detracting from the role that community members can play in deciding whether offenders are motivated to change. In order to be restored to a healthy place in the community the offender must be motivated to change with the help of fellow community members.

The judge in Case #1 believed that another role of the judge in sentencing circles is to ensure that the proper safeguards are in place in order to guarantee that individual rights are protected. The judge ensured this by: holding “open court” - “the public retained free access to the room”, a transcript of the circle was kept, the crown and defence made sentencing submissions, the judge “indicated the upper limit sentence for the offence”, the offender was given a chance to participate while at the same time having the representation of defence counsel, the Crown was also included in the process, and disputed facts were proven in the customary manner - “[p]roof of a disputed fact can be carried out in the circle by the examination of witnesses under oath. Alternatively, during a break in the circle discussions, court can be resumed and all the traditional trappings of the courtroom engaged to resolve a disputed fact” (P 87-100). The judge imposed these justice system constraints upon the sentencing circle, justifying this sort of control by saying that the constraints were needed to protect individual rights. The judge in Case #12 also allowed the proceeding to be recorded to ensure that “individual safeguards remained in place” along with the procedure outlined by the community members (P28). The fact that judges can easily turn sentencing circles into a traditional courtroom procedure indicated the amount of control that they have over the process.

Judges can easier share their control over the sentencing process, with community members, by having prior knowledge of the community in question. This will ensure that sentencing circles run smoothly and will enable the judge to hand out sentences that make sense for both the offender and the community members. In fourteen of the cases studied

the judges did not make mention of whether or not they were familiar with the communities in question. By not making mention of this fact in the judgments these judges failed to make knowledge of the community one of their roles when holding sentencing circles. The judge in Case #17 was familiar with the community because she/he held a sentencing circle there for Case #13, three years earlier. This was the only situation in this study where a judge held a sentencing circle for two cases in the same community.

The judge in Case #12 gave a very dry summary of what he/she knew about the community that he/she was attending. This judge did mention that he/she knew that the community had an alcohol treatment centre. Since sentences given in sentencing circles often result in a sentence being served in the community, it is important for judges who are holding sentencing circles to know what resources are available to help rehabilitate offenders. To this effect, the judge in Case #1 claimed that judges and lawyers should be careful in opposing rehabilitative plans of communities with which they are not familiar. As discussed earlier, within the idea of Aboriginal justice is the belief that justice is a community responsibility; therefore, it is important for judges to understand how community members will help offenders carry out their rehabilitative plans.

One of the community resources that judges need to know about is the existence of Support Groups for the offenders and victims. Support groups are an important component in Aboriginal justice initiatives. The judge in Case #4 took it upon him/herself to instruct that a Support Group be set up to work with the offender. The judge stated "I think there should be at least four or five people in the support group ... I do not want to volunteer people, but I would like to see a support group that represents some professionals in the community and some lay people with whom [the offender] can work. I expect the support group to come up with some plans" (P 66). The judge suggested the establishment of this support group after passing the sentence in which she/he made reference to the responsibilities that would have to be carried out by the as yet

non-existent support group!

The judges involved in sentencing circles also have a role to play in shaping how the sentencing circle will proceed. They may shape the entire process, part of the process, or very little of the process. This role will be discussed throughout Chapter 6. The judges' biggest role in sentencing circles is that of imposing sentence, this role will be discussed throughout Chapter 7.

### The Lawyers

The lawyers in sentencing circles give their submissions for sentencing along with the input of community members. In the cases studied the judges did not discuss the actions of lawyers in length or detail therefore it was hard to understand what role the lawyers played. Chartrand (1995) discussed the role of "lawyer as advocate". He pointed out that the more lawyers act as advocates for their clients, the less influence the participants of the circle have on the sentencing outcome. Chartrand (1995) claimed that

the role of the lawyer as advocate diminishes the role of the community as a participant in the process. From an aboriginal community healing perspective, this outcome is contrary to the very purpose of the circle sentencing process, which is to have the aboriginal community regain a measure of control over the justice system in a manner more conducive to its traditional methods of dispute resolution ... In Morin, the result was the absurd situation of the prosecutor, whose role is to serve the interests of the community, competing with that very same community. The lawyer's role in circle sentencing must be absolutely passive. Otherwise, from the aboriginal communities' perspective, the entire process is fraudulent (880-881).

If justice is a community responsibility, lawyers acting as advocates will diminish this responsibility.

The Crown is duty bound to act on behalf of the victim and society, and some times this means opposing the holding of a sentencing circle. In fourteen of the cases studied the judges did not make mention of whether or not the Crown supported the use of the circle. Only in Cases 12 and 16 was it made clear that the Crown supported the use of the circle. In Case #10 the Crown was opposed to the holding of a circle and it is no

surprise that the Crown appealed the sentence given in that case. The one area of control exercised by Crown attorneys in sentencing circles is that they can appeal the sentences given. This also happened in Case #9. These appeals will be discussed further in Chapter seven.

The judge in Case #1 pointed out that the Crown's presence in the circle lets the participants know that the interests of the State are also important in the sentencing process. The judge stated that

[t]he Crown at the outset placed before the circle the interests of the State in sentencing the offender. The Crown's participation through questions, and by engaging in the discussions retains the circle's awareness of the larger interests of the State. Aware of community-provided alternatives, having acquired first hand knowledge of a broad spectrum of community concerns and armed with detailed information about the offender, the Crown at the end of the circle discussions can more competently assess how the interests of the State and the interests of the community are best addressed in sentencing (P98).

This comment represents the ideal. While in most cases, if a Crown is part of a circuit court party they are often just meeting the victim and the community for the first time at the circle. This would not be conducive to merging the interests of the Aboriginal community with the interests of the State.

In Case #3 the judge discussed how the Crown had to push hard against the imposition of a curative discharge, even though that is what the community wanted. The judge stated it "is Crown's task to ferret out every doubt and to make sure that there is nothing the Court or the community overlook in evaluating a curative discharge application" (P 12). This comment brings up the point that, while it is the judges' duty to guard against disparity in sentencing, it is also the role of Crown attorneys to evaluate what they believe is a fair sentence for the offence committed. Due to the existence of sentencing circles within the criminal justice system, if communities do not have Victim Support Groups Crown attorneys must ensure that the victims' rights and wishes are considered. In communities in which there are Victim Support Groups the role of Crown

attorneys in the circle process would be more limited.

While the Crown speaks for the victim, and supposedly the community, in sentencing circles, the defence counsel speaks for the offender. Defence attorneys share this role with the offender's fellow community members, who in most cases will know the offender better than the defence counsel does. In Case #4 the defence counsel stated that she believed in her client and his readiness to rehabilitate. The judge claimed that this was a bold statement for a lawyer to make. It was even more bold in light of the fact that members of the offender's community were right there to hear it.

The judge in Case #1 stated that defence lawyers can "constructively use the circle to develop a sentencing plan to advance the immediate and long term interests of" their clients (P99). While this fits the role of a defence lawyer in a sentencing hearing, this is quite a powerful role for a defence lawyer to have in a sentencing circle. Especially if one of the purposes of holding sentencing circles is to give community members the responsibility of developing sentencing plans for the offender.

In Case #11 the defence counsel conducted himself as he would have done had this been a typical sentencing hearing. He pointed out mitigating factors in the case and that the offender had potential to change his ways (P39-41). Often in sentencing circles, community members can attest to such things as the offender's background, circumstances leading up to and surrounding the offence, and whether or not the offender is ready to change. The judges in the cases studied did not include in their judgments very much information about the role of the defence lawyers. This would suggest that defence lawyers have a diminished role in sentencing circles because offenders can speak on their own behalf. Community members also speak in the offenders' defence.

The evidence from this analysis suggests that the judges in the cases studied had extensive roles to play in the sentencing circles. These include shaping the process, passing sentence, speaking to the offenders' motivation to change, implementing safeguards, and knowing about the resources available in the communities to help with

the offenders' rehabilitation. It will be discussed in the next two chapters how these roles either further or inhibit the use of concepts/practices associated with the idea of Aboriginal justice.

While judges often reported what their responsibilities were, they did not often comment on the roles that the lawyers played, therefore suggesting that the lawyers only had a limited role to play in the sentencing circles. As reported in the judgments, the main roles of the Crown attorneys were to make sentencing submissions and relay the interests of the State - which may lead them to oppose sentencing circles or appeal the sentences given. As reported in the judgments the main role of the defence counsel is to develop a sentencing plan for the offender, hopefully in conjunction with the community members. These diminished roles, as outlined by the judges, may be due to the fact that offenders, community members, and victims are given the chance to represent themselves in the sentencing circle process.

## CHAPTER VI

### THE CIRCLE PROCESS

The previous chapters explored the roles accorded to the sentencing circle participants by the judges in each case. This chapter will include an analysis of how the judges and the community members<sup>1</sup> shaped the sentencing circle process and the amount of control that each had over the process. The constraints imposed upon the process by the criminal justice system will also be examined. Another objective of this chapter is to explore how components/practices associated with the idea of Aboriginal justice may have influenced the sentencing circle process in each case. The importance of the community members' involvement in sentencing circles will also be analyzed.

Some Aboriginal communities have in place organized sentencing circle programs that set out rules and guidelines for when a circle can be held, how it will proceed, and how the offenders and victims will be assisted. Other communities allow judges to implement and run the sentencing circles. Some circles include a traditional healing component and others do not. However circles are run, they are still subject to the same legal procedures as sentencing hearings.

#### Request for a Circle and Eligibility Criteria

For a circle to even take place the offender (or someone else) must apply to the court to hold a circle, and a judge must approve this application<sup>2</sup>. Judges in turn are constrained by the efforts of provincial courts, appellate courts and the Department of Justice in the types of cases that they can accept for sentencing circles (Judge, Case #10, P 3). The judge in Case #12 stated that

it has been noted by some judges and was a proposal of the Department of Justice that the sentencing circle be used only with respect to certain offenses or only if the range of sentencing will be less than 2 years. It is my opinion

that the nature of the offence and possible range of sentence are only factors to consider and are not determinative in considering an application (P21).

Such restrictions on when a sentencing circle can be held often comes from rulings at the appellate court level.

Appellate court decisions will have an impact on whatever criteria a judge uses for deciding if an offender is eligible to be sentenced in a sentencing circle. Green (1998) discussed the effect that appellate courts and starting-point sentences have on the decisions of whether or not an accused person is even eligible for a sentencing circle. Green (1998) claimed that “although the personal circumstances of an offender have been an element considered in sentencing, appellate court guidelines may restrict the range of offences referred to sentencing circles” (79). Many proponents of the criminal justice system believe that sentencing circles should not be used if the offender would likely face a penitentiary term of two years or more.

The judge in application Case A argued that when a sentence of two years or more is warranted a probation order cannot legally be imposed, therefore these offences should not be eligible for circle sentencing (176). Green (1998) claimed that “this line of reasoning suggests that sentencing circle participants have no role to play if probation is not a possible outcome of the conventional sentencing process” (79). A few of the judges in the cases studied referred to this case when discussing the eligibility criteria for holding sentencing circles. Quigley (1994) discussed sentencing circle application Case A, and he stated that

where [the judge] rejected an application to hold a sentencing circle by an accused convicted of aggravated assault. He held that ‘*at the very least*’ the offender should be eligible for a suspended sentence, or an intermittent sentence or a short term of imprisonment accompanied by probation. Indeed, he went further to state that where a penitentiary term (two years or more) is thought by a trial judge to be appropriate, there should be no resort to a sentencing circle. As well, the offender must be genuinely contrite and be supported by his/her own community, which is willing to provide supervision and support and take responsibility. Finally, the offender should be sincere in reforming with the help of the community (290).

Quigley (1994) claimed that the matter with this way of thinking was that much of this criteria can not be gleaned until the sentencing circle is under way. The judge in Case #1 also declared that a circle may be inappropriate when there is an expected sentence of two years or more in jail (P70). Not all judges share this view.

The crime committed may generate a sentence of two years or more to be served in prison in a sentencing hearing, but this does not mean that a sentencing circle decision would impose a similar sentence. Unless a mandatory minimum is in effect for the offence, Section 718.2 (e) of the *Code* gives judges, and therefore community members, in a sentencing circle, the power to impose sentences other than jail time. The judge in Case B (circle application) pointed out that even if jail time was warranted, at least in a sentencing circle this jail time can be shortened to less than two years so that a probation order can be utilized as part of the sentence (P18).

An important case to look at when discussing eligibility criteria and appeals courts, is the case of *R. vs. Morin* ([1995] S.J. No. 457). The sentencing judge in this case was of the opinion that a sentencing circle is very much like a pre-sentence report (PSR), in that all of the people who would be interviewed for a PSR are in attendance at a circle. The judge asked “[i]f a pre-sentence report can be used by a judge to gain information about the offender, then why can’t a sentencing circle be used for the same reason” (152-153)?

The appeal judge in *R. vs. Morin* ([1995] S.J. 457) took a different approach when discussing the eligibility of a case for a sentencing circle. The judge claimed that she/he was

reluctant to attempt either an all-inclusive or a partial list of the factors. Such matters are better left to legislators and the interested parties to work out and settle. At the very least, they should be left to the judges to settle on a case by case basis, as they hear cases where the issues are specifically raised, are found to be relevant and are thoroughly argued. In the end the factors that a judge ought to consider at this stage of the proceedings are those that will enable him or her to answer this critical question: Is a fit sentence for this

accused who has committed this offence better arrived at by using the restorative approach or the ordinary approach (P88-89)?

The restorative approach would allow for the use of components/practices associated with the idea of Aboriginal justice, the “ordinary approach” most likely would not.

From the appeal of *R. vs. Morin* ([1995] S.J. 457) the following criteria for holding a sentencing circle were outlined. A circle can be considered when: there is a well defined, supportive community; there are sufficient resources in the community; the offender feels accountable to the community; the offender wants to change his/her lifestyle; and the offender has plead guilty or accepted responsibility for the offence (Pg. 69-70).

A circle can be considered even when: the ordinary approach of a sentencing hearing would produce a sentence of two years or more in jail, and the victim does not want to participate in the circle. A circle may be inappropriate when there is a prescribed minimum sentence (Pg. 69-70). Since the appellate courts often dictate how the law is to proceed, other judges will follow these criteria when deciding on sentencing circle applications.

The appeal court judge in *R. v. Morin* ([1995] S.J. 457) stated that

[i]t would be wrong in my respectful view to impose a hard and fast rule to the effect that a sentencing circle is not available where the ordinary approach would likely produce a sentence of incarceration of say two years or more ... A hard and fast rule is tantamount to starting the process of a restorative sentence at the wrong end. It is tantamount to equating the carceral component of a fit ordinary sentence with the carceral component of a fit restorative sentence. Such a rule in my respectful view would have a serious emasculating effect on the underlying need for sentencing circles and would amount to offering the benefit of a sentencing circle to only those offenders who need it least (P94).

This judge is saying that sentencing circles, with their focus on restoration, will provide an appropriate alternative to jail sentences not based on mandatory minimums. Since this was an appellate court decision, it sets a precedent for all future sentencing circle application cases.

The following reflects what the judges in cases 10, 12, 13 and 15 and applications A, B, D, F and #9 put forth as constituting eligibility criteria for the holding of a sentencing circle<sup>3</sup>. A circle can be considered when: the offender is willing to change, he/she has plead guilty, was found guilty, or has accepted a guilty plea (preference given to an early guilty plea); the offender is eligible for a suspended or intermittent sentence, or a short jail term with probation; the offender is remorseful; the offender wants the circle to take place; the offender is willing to commit to and follow a healing plan; the offender will accept full responsibility for the offence in the circle; the offender has been in the community his/her whole life; the offender accepts responsibility for his/her offence and are willing to change; the offender agrees to the sentencing circle referral, and he/she has “deep roots” in the community; there is a supportive community where elders and non-political community members want to be part of the circle; the victim supports the use of the circle and is willing to participate without coercion; a victim who falls under the battered spouse syndrome has access to counselling and has a support team in the circle; the community supports the victim; disputed facts are resolved before the circle; and the judge is willing to depart from the “usual range of sentencing”.

The judges in cases 10, 11, 12 and 13 and application E put forward that a circle can be considered even when: the person is a young offender; when the offender is not a member of the community, as long as she/he has two community members who agree to support her/him; when the offender pleads not guilty, as long as she/he accepts the findings of fact made by the judge; the case involves a sexual offence; there is a threshold sentence of more than two years; and the victim does not participate or does not want a circle to be held. In Case #11 the sentencing circle was held in a city, not on a reserve. Community members, from the city, were in attendance in the courtroom. Members from the offender’s home community were not in attendance. As one can see, some of the criteria outlined above are included in the components that make up the idea of Aboriginal justice.

In Case #13 the community already had in place requirements for eligibility, yet the judge set out the following additional requirements

1. The offender must fully accept responsibility for their crimes before the Circle.
2. The offender must have significant support from the community, friends, or family.
3. The offender must complete all steps in the application process.
4. All steps necessary to accept a guilty plea must be followed (P11).

It is not clear why the judge thought these additional requirements were needed since the offender had pled guilty, and he had been accepted into the community circle process, thereby demonstrating that he had the required support and he had completed the application process. What these requirements seem to demonstrate is a way for the judge to show that she/he has the ultimate control over the process regardless of the community members' detailed program. This is demonstrated by the judge later on in the judgment when she/he stated that the Court's "own procedures supplement, and where there is a conflict, override the community guidelines" for how the circle should proceed (P13).

In the judgments analyzed for this study there was not much discussion about when a circle was not appropriate. This is often discussed when a sentencing circle application is rejected. The judges in application Cases B, C, and Case #9 put forward that a circle may be inappropriate when and if: the judge believes that the offender must receive two years or more in prison, the victim is not willing to participate, and if power imbalances between the offender and the victim are not offset by community support for the victim.

There is also much debate about whether or not a plea of guilt should be required in order for a sentencing circle to take place. The judge in Case E (sentencing circle application) stated that

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 (P6).

While not all communities or judges demand that a plea of guilt be a criterion of eligibility, there are judges who believe that a plea of guilt is needed in order for a sentencing circle to be held. The judge in Case F (sentencing circle application) stated that

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. In assessing the first criteria the Court must look for an indication that the accused is genuinely interested in reformation, and not simply manipulating for an easy way out (P15).

With these statements the judges have reinforced the concept of a remorseful offender who is willing to change as being the best candidate for sentencing circles. Such criteria are not in conflict with the concepts associated with the idea of Aboriginal justice.

#### Arrangement of the Circle

In most of the cases studied the sentencing circle participants sat in a physical circle while deciding upon a sentence for the offender. In Case #12 the Aboriginal significance of direction was used in the circle. The judge stated that

[t]he Keeper of the circle, ... sat with her back to the North. To her immediate left proceeding to the East was the Clan Chief, ... The Eagle Feather traveled from East to West, the same direction that the earth travels around the Sun. Each person could speak only when holding the Eagle Feather. All the men sat to the East of the Keeper of the circle in the following order: Judge, Crown Prosecutor, Oldest male to youngest male including the RCMP officer ... Accused. The women sat to the west of the Keeper of the circle commencing with Defense Counsel, then the oldest female to youngest female including the Probation officer (P34).

Such a seating arrangement, proposed by the community members, has the potential to counteract any surface power imbalances present in the circle (i.e. the judge presiding

over all with the lawyers at the forefront and the community members at the back of the room). The judge in Case #1 claimed that by changing the physical arrangement of the 'courtroom', they changed the dynamics of the process (P87).

The judge in Case #1 believed that physical changes in the process were necessary because

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 ... 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 arrangement 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 (P28-29).

This judge believed that once the rigidity of the courtroom was replaced with a circle of equally placed participants, people would be more relaxed and open to taking an active part in the process. Such an arrangement is also conducive to sharing the control of the process.

The following is a summary of the changes observed by the judge in Case #1 due to this change in dynamics. The usual barriers to participation were broken down. Everyone was on an equal level in the circle, everyone had a chance to speak and ask questions. Much more information was shared in the circle than would have been shared in a sentencing hearing. The information received in the circle was crucial for arriving at sentencing options. Sentencing circles allow for the exploration of more sentencing options that fit the case at hand. Everyone in the circle was responsible for providing a solution for sentencing. The judge stated that participants should not be discouraged by failures since this was a new process. In sentencing circles offenders can take part in the process and they will see that their community members care about them and are willing

to help them. Offenders will also get a chance to hear from victims about the pain they have suffered from the offence. It will mean more to offenders to be punished by their community than to be punished by a circuit court. The community resources that can be used in and after sentencing circles are superior to what the justice system can do for offenders. Sentencing circles will help communities by identifying causes of crime and exploring what can be done to prevent crime and what can be done to rehabilitate offenders. Such an awareness will lead to the mobilizing of community resources to be proactive in the face of crime. Sentencing circles are a good way to bring together the goals of the justice system and Aboriginal values in a positive manner in order to resolve crime in Canada (P33-85). Most of these changes are similar to components associated with the idea of Aboriginal justice. Such observations were also noted in the other judgments analyzed for this study.

Also involved in the arrangement of the circle is who is participating in the circle. Some judges, such as the judge in Case #9, outlined who from the community was able to participate in the sentencing circle. This judge came up with the list of participants in consultation with the lawyers (P 3). In contrast, the judge in Case #12 stated that the “participants, other than the professionals from the justice system, were determined by the community” (P29). Allowing community members to choose who will participate in the circle and letting them arrange the physical make-up of the process will give them some level of control over the process and allow them to accept some of the responsibility for community justice practices.

### Steps Involved

Another way that community members can further the idea of Aboriginal justice and be empowered is by shaping how the circle will proceed. It is unfortunate that the judge in Case #1 did not outline in his reported judgment the actual steps followed in the sentencing circle. The judge only outlined what took place prior to the circle. In Case #1

the judge decided that a normal sentencing hearing and a jail sentence would not benefit the offender and that perhaps it was time to see what community alternatives there may be for the offender. Once this route was decided upon, the judge asked the probation officer and an RCMP Corporal if they could enlist community and family members to be part of the sentencing process. The judge and the lawyers took some time to become familiar with the community and with the community members, to aid them in the sentencing process. The judge explained that traditionally what was shared in a circle in Aboriginal communities was supposed to stay within that circle. While this may be so, the judge insisted that the circle would be held as an open court and a transcript of the proceedings would be kept (P25-91). Since this was the first sentencing circle held in this community and it was judge driven, it is not surprising that the judge shaped the majority of the process.

In Case #2 a preliminary circle was held, where the judge heard from members of the community. The judge then adjourned sentencing for two months, until the next circuit court, to allow two community members to explore the prospects of rehabilitation with the offender and to counsel him. Sentencing was passed at the second circle based upon input from the community members (P30-43).

In Cases #6 (Appendix 3) and #13 the community already had a process in place for conducting sentencing circles. This process allowed for the use of components associated with the idea of Aboriginal justice. The community in Case #13 published extensive guidelines, which had to be followed when applying for and going through a sentencing circle (see Appendix 4). None of the community members in the cases studied went to the lengths that this community did. Even with all of the extensive community guidelines in place, the judge in Case #13 stated that “[t]he Court’s own procedures supplement, and where there is a conflict, override the community guidelines” (P13). These procedures were as follows:

1. Any criminal record or any other reports are received and marked as exhibits in the Circle Hearing process.
2. All proceedings are recorded.
3. A disputed fact is judicially determined in the usual manner through evidence heard under oath.
4. The Circle Hearing is open to the public.
5. All participants are given an opportunity to speak.
6. Crown and Defence are given the opportunity to participate and provide opening and closing remarks.
7. The Circle attempts to work towards a consensus. If a consensus is reached, the Keeper, Judge or Justice of the Peace may summarize the consensus. The Judge or Justice of the Peace will set out those parts of the consensus that relates to the offender in a Sentence.
8. If a consensus is not reached, the Keeper and the Judge or Justice of the Peace will summarize the matters agreed upon, and those not agreed. A Judge or Justice of the Peace will then impose a Sentence based upon all evidence heard in the Circle. All Sentences are recorded in accord with the common practices of a criminal Court (P 13-21).

This evidence suggests that no matter how much work and planning the community members put into the sentencing circle process, they will still be constrained by the wishes of the judge and the procedural rules of the criminal justice system. Such procedural rules will serve to both inhibit and further the idea of Aboriginal justice.

What was unique about Case #6 was that it was the first time that an offender guilty of sexual assault was accepted into the community program. For this reason a Victim Support Group was established. In Case #6 the offender was counselled by the Circle Support Group before sentencing took place. In Case #13 the offender also took part in counselling and treatment programs before sentencing. Such counselling and treatment even before sentencing takes places is in accordance with the idea of Aboriginal justice. The community members in Case #13 had a procedure in place, where if the members felt that an offender was not motivated to change and begin healing, they would send the case to a regular court for the offender to be sentenced by a judge alone. This implies that the community members in this community, not the judge, decided if the offender was motivated to change.

In Case #13 the community members planned to stay in contact with the victim

after the sentencing circle, as well as work with the offender. In relation to doing follow-up work with the offender after the circle, the community publication stated that “[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” (P23). This admission shows that while sentencing circles are firmly rooted within the criminal justice system, the community members still have some level of control because a review is conducted before the offender is found to be in breach of their conditions.

In Case #8 the judge allowed the sentencing to take place in the community, instead of in the city. Actually the judge in Case #8 made it sound like he/she accidentally found him/herself participating in a circle. The judge stated that

[t]here was a preliminary hearing in this matter, and after that hearing, [the offender], on a later day entered a plea of guilty. It was suggested that this was a difficult and unusual case, and that it might better be understood if the court people were to come to [the community] where [the offender] has lived all his life, and during the course of the proceedings today, I have learned a good deal that I would not, I think, have learned if we had stayed in the court house in [the city], and if [the offender] had been sentenced there. *The proceedings today have been what lawyers and judges these days call a circle sentencing* [emphasis added](P4-5).

By claiming that the hearing he/she conducted was what people “call a sentencing circle” this judge demonstrated that a sentencing circle can take place without the rigid guidelines and procedures that some communities have. Such circles would likely contain few components associated with the idea of Aboriginal justice.

In another case, Case #14, the judge seemed to have conducted the circle in a manner similar to a sentencing hearing. The judge stated that “the circle has been here to give the Court assistance in formulating what is an appropriate disposition” (P3). The judge went on to say “I’d like to thank everyone here for assisting in the work that I had to do in this matter” (P55). This evidence suggests that the judge retained total control over the circle process.

As one can see, sentencing circles proceed differently in each and every

community. In some of the cases studied the judges retained control over the overall process in most of the communities. Of course there were exceptions. What judges do allow for is the introduction of Aboriginal cultural/traditional practices into the process. In other cases, the community members controlled most of the process. In the latter cases, there was a greater use of Aboriginal cultural/traditional practices in the sentencing circles.

### Aboriginal Cultural/Traditional Practices and the Circle Process

In the cases studied the judges did not include a lot of discussion about Aboriginal traditional approaches to crime and sentencing. In the few cases in which tradition was discussed, only the traditional views for each particular community were reflected. One cannot impose a blanket traditional process that would apply to all of the sentencing circles across Canada. This section will include a discussion of how cultural/traditional practices of the community shaped the sentencing circle process and therefore furthered the idea of Aboriginal justice. In the next chapter there will be a discussion about how the community members shaped the actual sentence given by exploring cultural/traditional healing practices and beliefs.

In Case #6 a Community Circle Support Group was already in place prior to this sentencing circle. This Group had a direct influence on how the process was shaped. The judge stated that the “offender’s sentencing process involved two community circle sentencing sessions, and several Circle Support Group meetings over a period of almost six months” (P1). The judge pointed out that without the “unqualified acceptance by the Circle Support Group, the case could not be handled in a Circle Sentencing” (P11). After the first sentencing circle the offender participated in counselling sessions and “several spiritual and cultural sessions” (P14). The use of counselling is a component of Aboriginal justice, which has the effect of adding a traditional element to the whole sentencing circle process.

By following traditional practices in sentencing circles, community members try to ensure the genuine participation of all involved. In Case #12 the judge stated that "I removed my gown, left my courtroom and joined with eighteen other people at the [community] in a sacred circle, convened for the specific purpose of sentencing [the offender] ...[who] ... pled guilty on his first appearance in Provincial Court ..." (P4-5). The judge went on to say that she/he "entrusted organizational details to the community itself. I did this to show the community that I was willing to be involved in a process that was shaped by their culture as well as ours and to encourage greater participation of the community" (P27). The judge also held an information session a week before the actual circle took place. The judge claimed that "[s]omeday, the process may be as familiar to us as the conventional sentencing hearing but until then, we need to ensure that participants are aware of what will occur prior to the convening of the circle" (P30). This statement suggests that often judges and lawyers are not familiar with sentencing circles and they therefore should understand how they will proceed before embarking upon their use.

The judge in Case #12 discussed the use of the Eagle Feather in the sentencing circle and stated that

[t]he Eagle Feather is one of the most sacred objects that an individual can have in their possession being a gift from the Grandmother and Grandfather Eagle to assist and guide native people on their quest for teachings of the native ancestral way. It is used in the circle process to guide the participants in their quest for a fit and proper sentence. Once the circle is opened, the Eagle Feather is passed and each participant speaks only when he or she holds the Eagle Feather. No one is to interrupt that person. To the native elders, there is a requirement of belief in the symbolism of the Eagle Feather; and for all others including non-natives there was a requirement that the participants in the circle respect the significance of the Eagle Feather and the obligation to always speak the truth and speak from the heart (P31).

While discussing the use of cultural practices in the circle, the judge imposed the criminal justice system rule of finding a "fit and proper" sentence. This fit and proper sentence is subject to precedence and established sentencing ranges, whereas a fit and proper

sentence carried out under the idea of Aboriginal justice would mean that the sentence was one that would restore the offender to a harmonious place within the community.

This judge explained that circles were used traditionally in this community and that

[i]n preparation for the sentencing circle, the Keeper of the circle explained the [community's] tradition with respect to circles. The Talking Circle is a forum that allows each member to participate in a process, voicing their opinions, thoughts and concerns. Each part of the circle is equal and the circle is a reminder of a spiritual or holistic way of life ... The sentencing circle being convened for the purpose of sentencing [the offender] was viewed by the Keeper of the circle as being consistent with the traditional use of a Sacred Circle. In native tradition, the Sacred Circle was used to determine punishment for crimes (P 32-33).

As for the actual sentencing circle process the judge stated that

[t]he sentencing circle was convened ... by the accused presenting the Keeper of the circle with a gift of tobacco. Without the gift of tobacco, the circle would not proceed. The Keeper opened the circle by having all of the participants stand, lighting the tobacco and offering a prayer to the spirits of the grandfathers and grandmothers. The Clan Chief then moved to each participant and cleansed each participant with the burning smoke of sweetgrass. He then used the ceremonial drum to call the spirits of the grandfathers and grandmothers to assist the participants in reaching a decision in the sentencing circle. The Keeper made a few introductory remarks and passed the Eagle Feather, which continued to be passed around the circle from east to west, until a consensus was reached. The first time I spoke, I indicated what an acceptable range of sentence would be for this type of offence. The Crown then recounted the facts of the case ... but made no recommendation at that point as to sentencing. On the first time around, each person spoke in turn discussing various matters relating to the case including topics such as alcoholism and drugs, idle youths, crime in general, traditional native values and customs, etc...We then took a break of 15 minutes. Once reconvened by the Keeper, the Eagle Feather was again passed and this time around, people voiced their opinion on the range of sentence...the accused [spoke about the offence] ... The Eagle Feather was passed around a third time and by the time I received it, a general consensus had been reached and I therefore summarized the discussion and passed sentence ... the Keeper of the circle closed the proceeding with a prayer(P35-42).

The evidence suggests that this community played a significant role in shaping how the sentencing circle should proceed; while at the same time following criminal justice

practices.

As discussed earlier, in Case #13 the established community guidelines for sentencing circles shaped the whole entire process. The process was set out as a “Community Justice” program. In the community information booklet it was stated that “[t]he community felt it would be important to implement alternatives [to the formal justice system] that would focus on healing and wellness, and the motivation of the offender to become a healthy member of the community” (P8). As part of the application process offenders were “encouraged to provide information about where they are on their healing path” (P9). One of the qualifications to apply for the program was that the offender “must be motivated and willing to commit a wellness or healing plan and to follow that plan” (P10). Another step required for application was that the offender must “[f]ind at least two community members who are willing to support you in your healing” (P10). After court there was “ongoing supervision of the offender to assist them in meeting the conditions of their probation and/or to assist them with the continuation of their healing plan” (P23). The implementation and use of such guidelines will help sentencing circles to further the idea of Aboriginal justice.

Guidelines such as the ones developed by the community members in Case #13 are in response to the failures of the criminal justice system. At the conclusion of his/her report the judge stated that the community members

developed this community based alternative and has mobilized its resources in this particular case, not because it has an affection for or wants to assist the formal justice system. Rather, it is because the experience of their family members, their fathers, brothers and sons, their mothers, sisters and daughters with the formal justice system, has been that jail has not helped to rehabilitate the offenders in their community. Too often it has had the opposite effect. The formal court process has not protected their victims or helped them heal. The formal justice system has not encouraged their community to develop, to strengthen families, to deal effectively with alcohol abuse and sexual victimization. [The community]'s involvement and participation in this case is predicated on a commitment to find viable and effective alternatives to the formal justice system in appropriate cases. They believe this is such an

appropriate case (P120).

The members of this community were determined to exert some control over the sentencing process in order to help their members. Often community members take on the roles they do in the area of justice to help their members to begin healing. Community members have begun to act on the understanding that justice is a community responsibility.

Introductions of traditional elements into sentencing circles do not have to be set out in formal guidelines. In Case #15 traditional elements were included as part of the circle process because these elements were part of the community's tradition. The judge stated that

[t]he sentencing circle for the sentencing of [the offender] was held ... at the Wellness Centre ... In keeping with the native tradition the keeper of the circle opened the sentencing circle with a prayer, in the [community's] language which appeared to bring a sense of familiarity and comfort to all participants. Nevertheless, a sense of solemnity and dignity pervaded the proceedings which continued with less formality, but all of the intensity of any sentencing hearing (P6-13).

In this circle a talking stick was used to allow all participants a chance to speak. Once the talking stick had gone around the circle the judge pronounced sentence.

The above examples show that community members can play a role in shaping the sentencing circle process with cultural/traditional practices. What must be remembered is that these practices are still subject to criminal justice system constraints.

#### The Importance of the Community Members' Involvement in the Circle

Some of the judges in the cases studied made it a point to discuss the importance of community involvement in the sentencing circle process. Interestingly, two of the judges who made references to the importance of community involvement in the process (Cases 1, 2, and 10) did not outline the process used. The judge in Case #1 in their overview of the process stated that "to engage meaningful community participation, the sentence decision-making process must be altered to share power with the community,

and where appropriate, communities must be empowered to resolve many conflicts now processed through criminal courts” (P6). The judge in Case #1 actually shaped the circle process by detailing for the community members how it would proceed. It was not obvious from the reported judgment whether the community members had any power at all in the process. Sentencing circles can be empowering for communities if they are conducted in a way that community members do have power over the process and the outcome.

The judge in Case #2 also spoke of partnerships between community members and the justice system, stating that “[t]he justice system in forging new partnerships with Aboriginal communities has much to teach and even more to learn from communities ... If the justice system genuinely seeks new partnerships with communities, it must be prepared to change” (P67-68). The judge went on to say that the

justice system cannot be serious about forging new partnerships with communities and fostering community participation unless it is equally serious about its readiness to respect the values, beliefs, concerns and desires of the community. This does not mean sweeping away the beliefs and values inherent to the justice system, it means seeking constructive changes that merge the positive practices and beliefs of communities and the justice system. Time, and a willingness to trust and experiment will reveal what changes are best suited to evolve a justice system capable of being a viable influence in each community (P69).

The judge in Case #10 also discussed the role of community members in dispensing justice claiming that

[a]ny step towards healthy, safe communities requires an active partnership of justice and community resources. The sentencing process offers an invaluable opportunity for that partnership to evolve and be effective ... Ultimately, as the partnership matures, less time will be required in each case, but sentencing based upon shared responsibility with the community will always take time - as it should (P15).

This statement highlights the fact that sentencing circles take time. It also takes time for the judiciary and the community members to agree upon the sentencing circle process to be followed.

The same judge who oversaw the circles in Cases 1 and 2 also participated in Case #6. This time the community members had an extensive process in place for the use of sentencing circles and the judge stated that “[t]he formal, professional justice system must acquire greater confidence and trust in community knowledge, judgment and instincts” (P31).

The judge went on to say that

[t]he 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. They inspire us all to persevere in seeking more effective methods of building safe and healthy communities (P36-37).

This statement highlights the importance of available community resources when conducting sentencing circles, including human resources. As stated before, judges need to be aware of these resources. This statement also reinforces the fact that sentencing circles are a form of partnership between Aboriginal communities and the justice system. These statements imply that community members have a role to play when it comes to dispensing justice in their communities as long as that role is played within the framework of the criminal justice system.

Beyond this idea of a partnership between Aboriginal communities and the justice system is the idea that community members should be involved in the sentencing process in order to be able to help offenders. The judge in Case #12 stated that he/she believed

that the sentencing circle process can be successful mainly because of the community involvement. By bringing to the sentencing process its own traditions and morals, the community is encouraged to take pride in itself. Moreover, the offender is encouraged to become a productive member of his

community not only by the fact it has participated in the imposition of sentence on him but because the community is in effect saying to him that it is interested in his future as a member of the community (P43-44).

This chapter has shown that Aboriginal community members work with the judiciary to implement sentencing circles and to organize the process. Community members have begun to act on the understanding that justice is a community responsibility. Even so, community members work within the constraints of the criminal justice system when participating in sentencing circles. One constraint is upon the decision of whom is eligible for a sentencing circle. Even so, the eligibility criteria established by the judges and appellate courts are often consistent with the idea of Aboriginal justice. While judges have the final say as to how sentencing circles will proceed, they do relegate some control over the process to the community members. As the evidence suggests, in some cases communities have extensive guidelines in place for how sentencing circles should proceed (including counselling requirements), while in other cases the judges control the circle process. Either way, it is the involvement of community members in this process that ensures that the idea of Aboriginal justice is furthered by the use of sentencing circles. While the sentencing circle process varies between communities, the formulation of sentence usually follows the same course across the different communities.

## NOTES

1. For the purpose of this and the following Chapters “community members”, unless otherwise stated, will also include the offender and the victim as they take part in the decision making as to how the circle should proceed and what type of sentence should be given.

2. The judges did not often mention in their judgments who requested the sentencing circle in the first place. From the data that was available, in only five cases did offenders request a sentencing circle on their own. In an additional four cases the judges reported that someone else requested the circle for the offender.

3. Not of all these criteria have to be fulfilled before a circle takes place. The criteria given have been put forward by different judges in different cases and they represent a range of criteria only.

## CHAPTER VII

### SENTENCING

Regardless of the process followed, the whole aim of sentencing circles is to sentence offenders, with the involvement of community members, for the crimes that they committed (for a breakdown of the crimes committed and the sentences given please refer to Appendix 1). One purpose of this chapter is to explore the level of influence that the community members have over the outcome of the circle. Another purpose of this chapter is to investigate whether the idea of Aboriginal justice is furthered with the types of sentences given. Another objective of this chapter is to explore how the criminal justice system, through case law/appeals and the *Canadian Criminal Code*, and therefore the judges, place constraints upon the sentencing of offenders in sentencing circles.

Green (1998) provided a brief but informative explanation of sentencing hearings and sentencing options in his book Justice in Aboriginal Communities: Sentencing Alternatives - Chapter 1. The circles in the present study were similar to sentencing hearings in that the offenders in all cases, but one, pled guilty to the offences they were charged with and they were before a judge, with legal representation, to be sentenced for their crime. The difference was that the community members were involved in the process of “deciding” upon a sentence. Usually in sentencing hearings, community members only participate by providing information to the court whether in person or for the pre-sentence report.

Sentencing circles are not specifically legislated by the *Canadian Criminal Code* - the same is true for sentencing hearings. Green (1998) claimed that many judges see circle sentencing as an extension of their discretionary powers in sentencing (73). The judge in Case #12 discussed the legality of sentencing circles stating that

[t]he use of sentencing circles is well established in Saskatchewan, Manitoba,

and the North but the Criminal Code makes no provision for the use of this type of process to determine sentence. In fact, the Criminal Code makes no provision for any particular type of sentencing hearing: the foundation for the conventional sentencing hearing as well as for the use of a sentencing circle (or other alternative forms of sentencing hearing) is case law ... 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, a 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 (P8).

The judge also stated that

the use of the sentencing circle is in accord with legislative and common law guidelines but, as was noted in *R. v. Morin* (1995), 101 C.C.C. (3d) at 135: [quote] 'Since there is no provision in the Criminal Code for the use of sentencing circles, it is implicit in their use, that when sentencing circles are used, the power and duty to impose a fit sentence remain vested exclusively in the trial judge' [end quote] (P9).

Even if there are no *provisions* in the *Criminal Code* for the *use* of sentencing circles, they still have to operate within the parameters set out for sentencing by the *Code*. Judges are not only restricted by the application of the *Code*; they are also restricted by case law and court of appeal decisions. Of course, judges are given a wide latitude for discretion when it comes to sentencing offenders, the outcome of which could always be an appeal of the sentence given.

The following data analysis will be conducted with the knowledge that certain parameters are set out by the *Code* and case law/appeals. The first section will deal with the purpose, objectives and principles of sentencing as set out by the *Code*, and the various considerations that stem from these objectives/principles. These considerations include deciding upon a sentence of jail/punishment versus a rehabilitative sentence. Before deciding upon a final sentence the following objectives/principles are also considered: deterrence/recidivism; and the leniency/harshness of the sentence given. The second section will deal with the constraints imposed on the actual sentence that can

be given. This will include a discussion on starting point sentences, mandatory minimums, sentencing parity, and appeal court decisions - all of which will affect the judges' establishment of sentencing ranges. The third section will outline the types of sentences that were given in the circles studied (suspended sentences, curative discharges, and conditional sentence orders) and the constraints surrounding them (i.e. rules for sentence adjournments). The final section will look at the community members' input for sentencing and how this input serves to further the idea of Aboriginal justice.

#### Constraints of the Criminal Justice System: Purpose, Objectives and Principles of Sentencing

Some of the judges discussed Sections 718, 718.1, and 718.2 (see Appendix 5) of the *Criminal Code* in relation to using sentencing circles. Section 718 outlines the purpose of sentencing which is to prevent crime and provide for a safe society by “imposing just sanctions” (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>). The objectives of sentencing are under this section of the *Code* are: denunciation, deterrence, separate offenders from society, rehabilitation, provide reparations for harm done, and promote sense of responsibility in offenders (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>). All of these objectives, with the exception of separating offenders from society (which often means jail) are similar to the concepts associated with the idea of Aboriginal justice. While the judges had the power to enforce these objectives by sentencing offenders, the community members suggested ways that these objectives could be enforced. Often these suggestions included a healing component, which will be discussed toward the end of this chapter.

Section 718.1 outlines the fundamental principle of sentencing which is “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender” (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>). The findings, based upon a comparison of the sentences given by the judges, show that

most of the judges handed out different sentences for the different cases that they presided over. The breakdown of judges went as follows: Judge A handled cases 1, 2, 3, 4, and 6; Judge C handled cases 7 and 8; Judge F handled cases 11, 13, and 17, and there were seven other judges who all handled one case each. The only consistency found was that Judge A in each case handed down suspended sentences that consisted of either two or three years probation. The conditions of probation given varied on a case by case basis. Judges C and F handed out very different sentences for the cases that they handled. These findings suggest that judges who hold sentencing circles uphold this fundamental principle of sentencing by handing out sentences that are based on the particularities of each case at hand.

Section 718.2 outlines what other principles should be taken into consideration when sentencing an offender. These are: mitigating and aggravating circumstances surrounding the offence, similarity in sentences, no unduly long or harsh sentences, no deprivation of liberty and least restrictive sanctions, and consider all available sanctions other than jail paying particular attention to circumstances of Aboriginal offenders (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>). Once again these principles, with the exception of similarity in sentences, would coincide with the concepts associated with the idea of Aboriginal justice

Even though not all of the judges specifically talked about the objectives and principles of sentencing in their reported judgments, these would have been weighed mentally when deciding upon sentence. Of those judges who outlined their considerations, the biggest principle considered was that of rehabilitation (see Appendix 6). This was also the principle that the judges reflected as being most favoured by the community members. The principle of rehabilitation was followed by the following principles in order of greatest mention by the judges: protection of the public, punishment, deterrence, and denunciation. The principles mentioned only by single judges all fell under the principle of providing reparations for harm done, these were:

reconciliation, retribution, and victim's compensatory needs. The following section will outline what the judges and the community members had to say about specific principles/objectives.

#### Subsections 781.2 (d) and (e): Jail/Punishment Vs Rehabilitation

It is the last two principles of sentencing, subsections 718.2 (d) and (e), that are especially important for sentencing circles. These sections read

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and (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 (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>).

The judge in *R. v. Gladue* (1999) claimed that this

provision is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of Aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force (Introduction to Case).

This section effectively allows judges to consider sanctions other than imprisonment when deciding what principles and objectives of sentencing should be given priority. This allows for the use of community sanctions as a sentence, which is common in sentencing circles. This section also enforces using jail as a last resort, especially when considering the situation of Aboriginal offenders. This legislation allows judges and community members to focus more on formulating a rehabilitative sentence, in line with the idea of Aboriginal justice, for the offender. While some judges have taken it upon themselves to devise sentencing plans that will help to rehabilitate Aboriginal offenders, subsections 781.2 (d) and (e) provide a push towards this practice.

As stated previously, the evidence suggests that rehabilitation was the guiding sentencing objective in the sentencing circle cases studied. The findings show that the

judges, while concerned about other sentencing objectives, stressed that rehabilitation was the key objective to ensure that offenders begin to change their ways. Rehabilitation would be jeopardized if the offender was not ready to change. Studies, which have concentrated on Aboriginal offenders, have shown that these offenders often have deep-rooted emotional problems, which they have not dealt with. These problems will create a barrier to healing, therefore, they must be addressed. The judge in Case #1 said “if jail worsens emotional or mental problems then incarceration should be avoided or shortened, and other remedies used that redress personal problems causing criminal behaviour” (P128). If personal problems of offenders are made worse by prison experiences then the safety of the community is in jeopardy when such offenders are released.

Some of the judges spoke about the need to protect the public, often in conjunction with discussing whether or not the offender should receive jail time. While protection of the public was often expressed as being equally important, as the judge in Case #1 stated “[p]ublic protection is diminished when we throw away the key and return offenders to the street unreformed and unsupervised” (P118). The community members in Case #14 also reflected this sentiment. The judge in Case #14 stated “[s]ome persons this morning told me how in other cases they had observed that goal appeared to be pretty useless. Some persons they said, from this community, have gone to gaol and come back more angry than they were before” (P16).

The judge in Case #8 expressed the same concern by saying that “sending the offender to gaol would quite likely be destructive, and cause problems which would outweigh anything good that might be seen as accompanying a gaol term” (P16). The judge discussed how the offender had already spent three months in jail before sentencing and that was enough punishment. In fact, eleven out of the seventeen offenders studied had previous criminal records (see Appendix 7). In nine out of the seventeen judgments analyzed the judges claimed that both they and the community members agreed that a sentence other than jail was needed because it had either not worked for these offenders

in the past, or it would do more damage than good. These judges would often state in their judgments that they wanted to focus more on rehabilitation than punishment.

There was one case that showed a diversion from this sort of thinking. The judge in Case #11 sentenced the offender to nine months in jail. Out of all of the cases studied, this was the only jail term given that was actually served in prison. The judge discussed how the offender's behaviour had not been that good in jail since his arrest. The judge stated that one community member had emphasized that the offender "has very deep problems that he has to work on. Jail may be necessary for the protection of society, but it should also, if at all possible, attempt to address some of [the offender]'s issues" (P30). The judge also stated that the offender should not see jail as a place to do time. Instead he should seek out the resources in jail that will help him to rehabilitate. In this case the judge believed that there was no alternative but to sentence the offender to a prison term (P42-44).

The judges in most of the cases studied expressed the view that a punitive sentence such as serving jail time would not help the offender. Since Case #1 was the first court recognized sentencing circle in Canada, it set the lead for all other cases. The judge in this case stated that "nothing can be gained by further punishment" of the offender (P156). The judge believed that something other than sending him to jail had to be done, because jail had obviously not worked for him. While prison officials do what they can, prisons are too overcrowded to be more effective than just being "warehouses" for offenders (P116).

The judge went on to say that "further punishment, particularly incarceration, would continue to lock [the offender] into a life of crime and self-destruction. For any prospect of rehabilitation, something other than punishment, something other than jail must be used" (P123). The judge stated that "[b]y the end of the circle discussion, the search for an appropriate sentence had shifted from punishment to rehabilitation. The resources contributed by [the offender]'s family, his First Nation, and his community

created a practical, realistic alternative to incarceration” (P153). This statement shows how community members can influence the objectives of sentencing and the actual outcome of the sentence in general.

Even in cases of violent offences, rehabilitation of the offender should remain an option in order to understand and treat the causes of the violence. The judge in Case #2 stated that

[a] severely violent offence may preclude any consideration of rehabilitative measures. Despite the excessive violence in this case, the offence does not, by itself, deny consideration of rehabilitative options ... To protect society from such contemptible violence, the underlying causes of such violence must be understood and confronted with remedial treatment ... Rehabilitative measures should be pursued whenever they are reasonably appropriate, since societal interests, and the interests of potential future victims are better served in the long term by successful rehabilitation, than by the momentary sense of justice and satisfaction realized from rebuking violence with the violence of a harsh jail term ... Creating a positive physical and emotional environment is necessary ... For the Court this is the first step in learning about [the] community values and beliefs and in discovering what this community can do in achieving our common goals rehabilitation of offenders and protection of the public (P81-84).

This judge also talked about how the community members asked that the offender not be jailed and that these members also offered to help the offender with his rehabilitative plan. The judge stated that “others in the circle volunteered to help [the offender] and restated in many different ways the same message; jail would be damaging to [the offender]’s new struggle to change his life” (P66).

While rehabilitation is the main focus in sentencing circles, it is the duty of the judges to ensure that all sentencing objectives are balanced in such a way that will allow for the full rehabilitation and deterrence of the offender. The judge in Case #2 stated that

Courts, coping with the contradictory goals of sentencing, often impose compromise sentences that fail to accomplish rehabilitation, punishment or general deterrence. Sometimes a blend of sentencing tools can work to achieve several conflicting objectives. However, Courts too often attempt to embrace all interests by employing an array of punitive and rehabilitative remedies without making tough choices about priorities. Especially where the

evidence satisfies the appropriateness of a significant rehabilitative plan, Courts must carefully assess whether a mix of sentencing remedies will jeopardize rehabilitation. If rehabilitation is clearly a priority, and warranted by that evidence, jail should be avoided whenever possible if it significantly jeopardizes rehabilitation (P46).

The judge in Case #2 also stated that

[a] significant rehabilitative plan which replaces or reduces punitive sanctions is appropriate only if the evidence establishes: a) a clear and significant need for such measures; b) the availability of appropriate rehabilitative resources; c) a significant likelihood that the offender can successfully utilize such measures; and d) a genuine and dedicated desire by the offender to undertake rehabilitation (P27-29).

Nine of the offenders studied had actually begun to work on rehabilitative steps even before the sentencing circle took place (see Appendix 8). These steps were often with the help and/or support of other community members.

Community members are key in helping offenders carry out rehabilitation plans. The judge in Case #6 claimed that while a prison term is usually given for such offences, rehabilitation was key in this case and the offender had extensive community support to help carry out his plan. The judge also pointed out that the offender was dedicated to rehabilitating. The judge stated that

[s]exual offences of this nature usually are sanctioned by a jail sentence. This would have been the sentence, but for the overwhelming dedication of the Community Support Group to the offender. The time and resources invested in the offender, combined with the offender's dedicated efforts to work with the Support Group, establish the basis for making an exception. Absent either of these factors, a sentence of jail would be unavoidable (P32).

The evidence suggests that the work of the support group was the driving force in helping the offender to rehabilitate in this community. The judge would not have been wise to go against this rehabilitative work by placing the offender in jail.

The judge in Case #13 stated that often jail is used *because* there are no alternatives to jail in many Aboriginal communities. The judge stated that the community in question had an alternative by holding sentencing circles. The judge said that the victims did not want the offender to go to jail, they just wanted him to leave them

alone (P112-119). The judge claimed that “[t]his objective can be met by incarcerating [the offender] for an indeterminate period of time, but that is not a practicable alternative. It can best be assured through [the offender]’s rehabilitation” (P112). The judge also said that “a lengthy probation following a short sentence, or a lengthy probation alone, would best service this young man and the community to ensure his continued efforts to change” (P40). The community would be best serviced by the offender’s rehabilitation because it would deter him from committing further crimes.

### Deterrence

Offender deterrence is as important to consider in circle sentencing as it is in sentencing hearings. At least eleven of the offenders in the cases studied had prior criminal records and had served jail time or carried out probation in the past (see Appendix 7). Since sentencing circles in Canada are so new, in relation to sentencing hearings, it is hard to find statistics on the recidivism rates for offenders who have gone through the circles. Mandamin (1996) recounted the success of the sentencing circles held in the Kwanlin Dun community of Whitehorse. He stated that the community would

take difficult cases involving Aboriginal people with extensive histories of repeat offenses. At a recent Aboriginal Justice seminar held at the Banff School of Management in March 1996, the Kwanlin Dun representatives reported that they had 56 offenders enter the circle over four years. In comparable time periods, those offenders had, before their entry in the circle committed a total of 140 indictable offenses and 160 summary conviction offenses. After entering the circle, the same individuals were only involved in 19 indictable offenses and 30 summary conviction offenses. The Kwanlin Dun Circle representatives emphasized that they anticipate there will be failures and successes. However, the record of the Kwanlin Dun Circle to date far exceeds the success rate of the criminal justice system (19).

This is an example of one community’s success with sentencing circles. It is not known if this reflects the outcome in other Aboriginal communities across the country, but it does reflect the desired result.

Deterrence is a desired result due to the over-representation of Aboriginal people

in prisons in Canada. Justice Lilles, in *R.v. J.A.P.* ([1991] Y.J. No. 180), commented on the fact that

[t]here is an increasing recognition in our society that “incarceration” has not been fulfilling the expectations of specific and general deterrence. It is a fact that Canada has the third highest incarceration [rate] in the industrialized world ... [i]ncarceration rates in northern parts of Canada are higher yet. No correspondence between high rates of incarceration and decrease in crime rates has been shown. Moreover, native people are significantly over-represented by population in our jail systems (7).

Justice Lilles went on to state that this situation has led the courts to rely more on community sanctions. This means that the offender will carry out their sentence in their community and the community takes “an active role in the rehabilitation, responsibility for, and treatment of the offender. The emphasis is placed on offender accountability or rehabilitation rather than on punishment” (7). Often offenders will be given a probation order to be served in the community and included in this order will be such things as counselling, treatment and programming for the offender to follow in the community.

Justice Lilles (1991) claimed that by involving the community in the offender’s sentence, crime reduction in the community often takes place and the communities take an active interest in justice issues that affect them (7).

Even though evidence was not found concerning whether or not the offenders in the cases studied committed further offences, this does not mean that they did not re-offend. The judges in two cases (#9 and #13) discussed the issue of deterrence rather than just outlining it as an objective of sentencing. The judge in Case #9 stated that the circle

began to focus on the issue of deterrence and how it could be achieved without sacrificing other concerns. The group came up with an extremely creative option. They recommended a sentence markedly different from customary sentences for such crimes. The circle, except for the Crown, forged a collective desire for something different. They suggested that [the offender] speak to youth in schools on the reserves and in the city about the pain he has suffered through his abuse of alcohol and the tragedy he caused his family as a result of driving while impaired. The group felt this would

achieve the objective of general deterrence in a much more practical and direct manner as [the offender] would be sending the message directly to potential drunk drivers and in particular, young people on the reserves (P17).

The judge in Case #13 quoted one community member as saying [quote] “[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” [end quote] (P78).

Lower recidivism rates would reflect a level of specific deterrence, of equal concern in sentencing is the objective of general deterrence. The judge in Case #13 stated

[s]ignificant general deterrence is achieved by going through a public sentencing hearing ... while I should not be understood to say that a jail term would not have any general deterrent effect, it is clear that the process of being found out, charged, brought before the courts and sentenced also serves this purpose. This general deterrent effect is magnified considerably when the sentencing takes place in a Circle with many members of family, extended family, and community present and when the details of both the offence and the offender are laid open in great detail for all to examine. In my opinion, the deterrent effect of this process exceeds that which might be achieved by the short jail term recommended by the Crown, especially in this community where incarceration has been used so frequently in the past it no longer carries with it any negative stigma (P118).

As noted earlier, one of the objectives of sentencing is to deter the offender and others from committing the same acts. Such deterrence is more properly focused on the community in question than the wider outside community as a whole. If members of the offender’s own community are deterred from committing crimes by taking part in, or knowing about, the sentencing circle process, then one of the objectives of sentencing will have been achieved. The issue of deterrence is not so much controlled by either judges or community members during the sentencing circle process itself. Instead, this is an objective that achieves fruition through the sentences given during the circles. Community members do have some control over deterrence once the offenders are serving their sentences by ensuring that they are getting the help they need. This corresponds with the view associated with the idea of Aboriginal justice, that justice is a

community responsibility.

### Leniency/Harshness of Sentence

A view which was often put forward by the judges in the cases studied, both on their own behalf and by repeating what community members had said in the circle, is that it is harder for offenders to go through a stringent rehabilitative program than it is to serve a jail term. The following statements will attest to this conclusion. In Case #3 the judge stated that

[a]s [the defence counsel] suggested earlier, a curative discharge with demanding community based conditions is a tougher sentence than simply going to gaol. It is tougher because so many people have believed in you ... [i]f you fail not only will your life be flushed down the toilet, but so will the aspirations of so many people who have worked so hard to demonstrate that they can recapture the goodness in their own people by working as hard as they have worked with you ... [i]f you fail, their punishment, their disappointment will be a lot tougher than anything I can impose today (P9).

In Case #6 the judge stated that

[i]mposing 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. 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 (P34-35).

The judge in Case #13 stated that

[a]s members of the Circle stated on numerous occasions, this community disposition is not easy; it is much tougher than a limited period of incarceration. Further, it is perceived by this community as being a much more difficult sentence. Moreover, the public interest is fully protected by means of a suspended sentence, as these charges do not "disappear" until [the offender] has successfully completed his period of probation, which will be lengthy (P125).

The judge in Case #17 stated that

[c]ommunity participation also facilitates the development of restorative dispositions. The court notes that over-reliance on incarceration and

resistance to restorative justice are based on the premise that restorative dispositions permit the offenders to "get off" lightly. The court notes, [in *R. v. Gladue*] at paragraph 72: [quote] 'The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence focussed [sic] on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence ... Restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment' [end quote] (P58).

In all of the above mentioned cases both the judges and the community members agreed that the sentence given would be harder to carry out than a jail term. They also agreed that probationary conditions would do more than a jail sentence to deter the offenders from committing further crimes.

As stated earlier, Section 718.2 of the *Code* sets out that sentences should not be harsh and the least restrictive sentence should be sought in each case. The evidence suggests that although judges and community members in the cases studied believe that rehabilitative sentences would be more harsh and restrictive than a jail term, such sentences are still preferable in order to help offenders change their ways.

In each circle studied the sentence given included a strong focus on the rehabilitation of the offender, therefore furthering the ideals of Aboriginal justice. Jail time was handed out in only one case, suspended sentences with probation were given out in eleven cases (Appendix 9 outlines the various probation conditions given in each case); conditional sentence orders were given out in two cases; a curative discharge was given out in one case, open custody was given out in one case and sentencing was adjourned in one case.

## Constraints of the Criminal Justice System Upon the Imposition of Sentence

### Starting Point Sentences, Mandatory Minimums, and Appeals Courts

It should be clarified that starting point sentences are different than mandatory minimums. Mandatory minimum sentences are set out for certain offences in the *Criminal Code*. Judges have no choice but to sentence offenders according to these provisions. What must be stressed is that although offenders may be facing mandatory minimum jail sentence of two years or more, they can still be sentenced by a sentencing circle. The judge can let the circle participants know that the offender must be sentenced to a specified jail term. The community members can then be instructed to decide upon further sentencing options on top of the jail term. For example, the community can “arrange for rehabilitative programs to commence immediately upon release from jail” (Stuart, 1996, 298); or community members can bring the programs to the offender in the prison setting.

As explained in the eligibility section, there are judges who believe that offences for which there is a threshold sentence, or a minimum sentence, should not be eligible for sentencing circles. The appeal judge in *R. vs. Jackson* ([1993] S.J. No. 642) claimed that a threshold sentence

is not a minimum sentence, but a starting point ... from which the sentencing judge may diverge depending on the appropriate mitigating or aggravating factors. In proper circumstances the sentencing judge will move from the starting point and go up or down the scale depending upon the presence of these aggravating or mitigating factors ... This approach, fittingly applied, in no way removes the sentencing judge’s discretion ... [the threshold sentence] may be characterized as a guide to sentencing judges to help guard against marked disparity and inflexibility. This Court, as have others, has long recognized a lack of disparity in sentences and the need for a rationalization of such disparity are essential if the administration of justice is not to be undermined in the eyes of the public (P11-12).

Therefore, disparity from threshold sentences, if rationalized, is acceptable. Judges, at their discretion, can allow a sentencing circle to take place regardless of the offence and

the usual range of sentencing for this offence. If the community members and the offenders are told what the usual range of sentencing is, they can come up with arguments and a plan for a rehabilitative sentence which will more than make up for any disparity seen by others in the sentence arrived at.

The reliance on starting point sentences by Crown attorneys, can be a constraint on sentencing circles. The judge in Case #10 claimed that the Crown was opposed to the use of a sentencing circle because the case involved a sexual assault. The judge said the Crown contended that for this offence there was a threshold sentence of three years in jail (P12). The judge stated that

[t]he reason behind this argument is that a circle will recommend a lesser sentence for an accused than what normally would be handed down and a judge will follow the recommendations (P12).

In this case sentencing was adjourned for one year while the offender was banished to a remote area with specified conditions. The adjournment was appealed by the Crown. The appeal was upheld and the case was sent back to the judge for sentencing. The judge took into consideration the nine months in jail that the offender had spent on remand, and the six months already spent in isolation. The judge sentenced the accused to ninety days imprisonment and three years probation. A condition of the probation order was that the offender spend six months in isolation. The Crown then appealed *this* sentence and the appeal was dismissed. The appeal judge stated “I find that the trial judge did not commit an error in principle when he exercised his power to make an order of banishment in the manner that he did ... I do not find the sentence demonstrably unfit” (Case 10c, P93). The dissenting appeal judge stated

I would have allowed this appeal and sentenced [the offender] to a term of imprisonment of two years less a day, a term reduced, for the reasons suggested by counsel for the Attorney General, from what it should have been originally, namely one of at least four years (P190).

When threshold sentences are in place for certain offences and judges go below

this threshold in sentencing, the sentence is open to appeal by the Crown. The sentence in Case #9 was also appealed by the Crown. In this case the offender plead guilty to impaired driving causing death (of his father). The offender was given a suspended sentence with three years probation (including six months house arrest) and his driver's licence was suspended for two years. At the beginning of the sentencing circle the Crown had asked for a minimum sentence of two years in prison. Later in the day the judge stated that the Crown "conceded that in view of the many mitigating circumstances in this case, a sentence of two years would be unduly harsh. She felt that a prison term of about one year or less would be more appropriate" (P12-13). In the end the appeal was dismissed. The appeal judge stated that the offender's "exemplary conduct since the commission of the offence permits us to sustain his sentence on that ground alone" (Case #9b, P1). Once again, this appeal was made based on the fact that the judge had not imposed a jail term, which was sought by the Crown.

When carrying out the data collection for this study only these two cases were found that had been appealed out of all seventeen of the cases studied. While there may have been more appeals, the fact that no others were found suggests that the crown attorneys in the other cases agreed that rehabilitation is a key focus for offenders going through sentencing circles. If Crown attorneys agree with the reasons behind the sentences given they will be less likely to appeal sentences on the basis of perceived disparity.

#### Sentencing Parity

Section 718.1 of the *Canadian Criminal Code* states that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>). The judge in Case #11 believed that a preoccupation with the disparity of sentences given in sentencing circles ignores the advantages of holding circles (P6). With the variety of sentencing options

available to judges sentence parity may not always be relevant or even appropriate in sentencing circles. Deviation from “normal” sentences are often seen at the outcome of sentencing circles.

In Cases 3, 7, 8, 9, and 15 the judges all indicated that a jail sentence would be appropriate yet none of these offenders were sentenced to serve jail terms. Therefore, it could be argued that these sentences did not meet the objective of sentencing parity.

Green (1998) discussed the pre-occupation with sentence parity and stated that the

evolution of community sentencing and mediation may be deeply distressing to those who believe strongly in province wide sentencing uniformity. Many of the sentences resulting from these approaches are outside established appellate sentencing ranges. Although sentencing uniformity is a concept innate to Canadian criminal law, blind adherence to this principle neglects the current reality in Aboriginal communities (162).

Orchard (1998) expanded on this by stating that

[t]he public perceives that sentencing circles are unfair to non-Aboriginal offenders. The public generally believes that all people should be equal before the law. However, this perception does not take into account the inequality of Aboriginal peoples within Canadian society. Equality before the law must encompass more than like sentences for like offenders or like offences (123).

The reality in Aboriginal communities is that many people have been sent to jail and they come out only to reoffend again. Much of the reason for this is that the underlying problems that caused the offending behaviour has not been dealt with. By keeping offenders out of jail and instead sentencing them to rehabilitative programs and treatment under a probation order or conditions of a conditional sentence order, these problems are more likely to be addressed.

Quigley (1994) claimed that the fate of sentencing circles and other

innovative procedures and alternatives to jail ... hangs in the balance as long as courts of appeal are overly concerned about the uniformity of sentences in their jurisdiction. Uniformity hides inequity, impedes innovation and locks the system into its mindset of jail. It also prevents us from re-evaluating the value of our aims of sentencing and their efficacy. It is true that on the

surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the Charter. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity (286).

This excessive concern about sentence disparity has the potential to thwart attempts to further the idea of Aboriginal justice.

There was evidence, by way of comments included in the judgments, of this line of thinking among the judges in the cases studied. The judge in Case #1 stated that

public censure often focuses on the differences in sentences meted out for the same crime. There should be more, not fewer differences in sentences ... [i]n a multi-cultural society, where gross inequities in opportunities, social resources, and social conditions abound, just sentencing cannot be monolithic or measured against any standard national "typical sentence" (P53).

While judges can control the level to which they want to follow the rule of sentence parity, they cannot control public censure on this issue. Handing out non-uniform sentences may be one way to address the inequities that this judge outlined.

The judge in Case #9 stated that

in sentencing I must always consider whether the public has confidence in the administration of justice which is, to some degree, shaped by their perception as to sentences imposed. In a very eloquent reply the elder stated that their community would lose confidence in the system if a jail sentence was imposed in this case (P 16).

Once again this statement reflects that fact that outside public opinion often has control over what happens in sentencing circles. Community members who participate in sentencing circles portray the opinions of the *immediate community* when they provide input into the type of sentence that should be given.

Often the need for rehabilitation far outweighs the need for punishment, thus sentencing parity can only go so far. The judge in Case #4 stated that "not to put you in gaol ... separates you dramatically from the normal sentencing of non-Aboriginal people and Aboriginal people who face the Court for similar offences in the absence of the

circle” (P43). While disparity in sentencing may be viewed in this way, it can also be viewed as upholding the objective of sentencing as set out in the *Canadian Criminal Code*. The judge in Case #1 stated that

[i]f the predominate objectives in sentencing are protection of the community, rehabilitation of the offender, minimizing adverse impacts on victims, and particularly greater community involvement, then even greater differences in sentencing for the same crime should be expected and welcomed (P53).

In most of the judgments studied the judges wrote about the histories of the offenders and the factors which may have led these offenders to commit the crimes that they did. This would suggest that these judges would have reviewed both the aggravating and mitigating factors before deciding upon sentence. The judge in Case #13 went through the verbal process of weighing these factors in some length in their judgment. The judge pointed out that the offender had entered an early guilty plea and since then had participated in hundreds of hours of counselling, meetings and treatment. The judge went through the aggravating factors of the crime as well as an exhaustive list of mitigating factors when giving reasons for sentence (P40). The judge claimed that the sentence given would “encourage the extensive rehabilitation program undertaken by the offender. It will increase the likelihood of community support and supervision of him after his probation period is over” (P124). The judge did look at other cases of criminal harassment while deciding upon sentence, and noted that jail terms were imposed when assaults, threats, or breaking and entering also took place along with the harassment (P79-87). By going through this process, disparity in sentence, if it is perceived as such, can be explained.

The judge in Case #16 considered each subsection in Sections 718, 718.1 and 718.2 when sentencing the offender (see Appendix 10). It is interesting to see how the judge literally considered each subsection for sentencing. The judge looked at sentences given for similar offences in the Province and stated “I must also take guidance from

common law jurisprudence and what was stated in cases involving sentences for like offenders” (P12). The judge also reviewed Ruby and Martin’s Criminal Sentencing Digest when deciding upon a sentence. Such attention to sentencing objectives/principles and case law will provide a strong case for the need for sentence disparity when sentencing Aboriginal offenders (such a need would not conflict with the ideals of Aboriginal justice). In contrast, such attention to case law will also lessen the amount of control that the community members have over the final sentence that is given.

### Establishing Sentencing Ranges

Judges can show their ultimate control over the sentencing process by establishing sentencing ranges. The establishment of sentencing ranges are affected by the *Code* in the area of mandatory minimum sentences for certain offences and ranges are also affected by case law and appeals which set out starting point sentences and speak to the issue of sentence disparity. In eight of the cases studied, the judges outlined the usual sentencing range for the offence in question (see Appendix 11). From a review of the judgments the evidence suggests that the judges did this to let offenders know what type of sentence they would have received had they not gone through a sentencing circle. Since most of the offenders in the cases studied received suspended sentences, this establishment of ranges also seems to be a warning to the offenders as to what type of sentence to expect if they breach any of their probation conditions. Green (1998) suggested another reason for the establishment of ranges at the beginning of circle. He stated that

[i]t may be appropriate for a judge at the start of a sentencing circle to outline the constraints upon his or her ability to adopt recommendations put forward by the circle ... circle participants will be less likely to believe they have been deceived if a circle consensus is subsequently rejected by the judge (P73-74).

This implies that the constraints under which the judges are working will justify going against the wishes of the community members.

Green (1998) stated that “[most] offences defined by the *Criminal Code* provide for a maximum prison term without mention of a minimum sentence. As a result, judges are given enormous discretion in arriving at a fit sentence” (26). Such discretion can be used in light of the wishes of circle participants. The judge in Case #1 stated that

[t]he circle is designed to explore and develop viable sentencing options drawing upon, whenever possible, community based resources. The circle is not designed to extract reasons to increase the severity of punishment. Accordingly at the outset of the circle process, Crown and defence counsel were called upon to make their customary sentencing submissions. Based on these submissions I indicated the upper limit sentence for the offence. By stating at the outset an upper limit to the sentence based on conventional sentencing principles and remedies, the offender enters the circle without fearing a harsher jail sentence provoked by candour or anger within the circle. This constitutes an important basis to encourage offenders to participate. The upper limit also provides a basis for the circle to appreciate what will happen in the absence of community alternatives. The utility of the upper limit sentence can be measured against any new information shared in the circle (P92-94).

Such a statement made by this judge serves to justify the establishment of a sentencing range by claiming that it was for the protection of the offender and to let the community know what kind of sentence could be expected if the circle had not taken place. Such a statement is very powerful in that it suggests to the community members that they are only there to work within an acceptable range of sentencing. This diminishes the value of their input. The judge downplays this aspect by stating that “[a]ny community based alternative developed by the circle may be substituted for part or all of this sentence” (P 94).

In Case #12 the judge explained how she/he liked to outline a range of sentence that can be given at the beginning of a circle. This judge liked to let the community members know what they can work with. The judge stated that the acceptable range of sentence can change at his/her discretion depending on the evidence given (P26).

Out of the eight cases where a clear sentencing range was established, the sentences given only fell within this range for three of the cases (Cases 11, 12, and 15).

In Case #11 the judge stated that “periods of custody can vary anywhere from an intermittent sentence to two years” (P52). The offender received nine months in jail with a two-year probation. In Case #12 the judge stated that the range “would fall between a suspended sentence with probation of 6 months to a period of jail of 3 months with probation of 1 year” (P26). The offender received a suspended sentence with one-year probation. In Case #15 the judge stated that “[t]he offence was an offence against the person which usually called for a period of incarceration” (P4). The offender received thirty days in jail to be served in the community. For the other five cases where the judges established a range of acceptable sentencing, cases 1, 3, 7, 8, and 9, the evidence would suggest that the judge was influenced by the input of the community members.

In Case #1 the judge suggested that if it had not been for the community support for the offender, he/she would have had no choice but to sentence the offender to serve jail time (P153). The judge in this case stated that “[t]he circle by engaging everyone in the discussion, engaged everyone in the responsibility for finding an answer. The final sentence evolved from the input of everyone in the circle” (P56). This would fit with the Aboriginal justice concept that justice is a community responsibility. The examples cited below also further this idea of Aboriginal justice.

The judge in Case #3 discussed the fact that with the offender’s record of seven previous drinking and driving offences he was facing jail time. What changed the judge’s mind was the commitment to change that the offender had shown since he was charged and the fact that his fellow community members supported him and would help him with his rehabilitative plan. The judge claimed that since the offender was the first person to be sentenced in this manner in the community, he was under pressure to succeed both for his sake and for the community’s sake (P6-16).

In Case #7 at the outset of the circle the judge said that a jail term of “6 months or more would be perfectly proper” (13). What seemed to change the judge’s mind was the commitment of the offender to change his ways and the fact that his community members

believed that he was trying to change (P14-15).

In Case #8 the judge did not discuss in detail the community member's recommendations for sentence but the judge did comment on the fact that many of the circle participants did not feel that a jail sentence would be beneficial to the offender (P16-17).

At the beginning of the sentencing circle, in Case #9, the Crown was asking for a jail sentence of two or more years. After listening to the circle discussion the Crown felt that a jail term of one year or less was more appropriate. The offender's family members, who were present in the circle, did not want him to go to jail. They believed that the pain of killing his father was punishment enough. The community members asked that the offender be placed on probation with electronic monitoring. The community members also asked that the offender be ordered to go for alcohol treatment and counselling. The judge was impressed with the support shown by the offender's family and fellow community members and implemented all of these suggestions. The judge believed that jail could hurt the offender's opportunity for a positive future (P9-36).

In all of the above cases the evidence suggests that the community members had an influence over the sentencing decision made by the judge. However, these judges did not say what would have happened if the suggestions given had gone beyond a sentence that they were willing to impose. As has already been made clear, no matter what the community members suggest for sentencing, the judge has the ultimate responsibility to impose the sentence.

The judge in Case #12 clarified the extent of this ultimate responsibility by stating that

[i]t is very important that the judge be willing not only to convene the circle but to allow the development of the circle to originate primarily from the community. He or she must be prepared to relinquish his or her mantle of power and control with only one exception: the ultimate decision, and he or she should be prepared to adopt the decision of the circle *so long as it falls*

*within the scope of a fit and proper sentence.* If I had retained control of who participated and the form of the process, the community participation would have been perfunctory. By deferring to the community, allowing it to determine the participants and details of the process, I ensured that the process was driven by community *choice* and that the community was truly willing to participate [emphasis added](P19).

This judge discussed relinquishing her/his control in the circle even though she/he set out a sentencing range to let the “sentencing circle participants know the parameters within which they will work” (P26). By setting out an “acceptable range” of sentence this judge set a standard for the type of sentence he/she was willing to accept (the final sentence did fall within this range). By making reference to a “fit and proper” recommendation the judge did not leave much of a role for the community members to play in helping to shape the ultimate sentence. Such a statement tells the community members that they can suggest a sentence but it has to be within the limits of what the judge is willing to accept. One would have to question whether or not this process was really driven by “community choice”.

The judge in Case #9 stated that “the passing of sentence is ultimately my responsibility and I am not bound by [the community member’s sentencing] recommendation” (P19). The judge went on to state that

the real dilemma I face in determining the appropriate sentence for [the offender] is how to achieve a balance between reliance on the principles of sentencing which have for so long guided our courts and the need to fashion a sentence which in the very exceptional circumstances before me will have real meaning for [the offender] and his community and will not offend public perceptions of equality (P30).

Following the principles of sentencing as set out in the *Code* does not bar judges from imposing sentences that contain elements of restoration, reconciliation, restitution, reimbursement, and rehabilitation. The implementation of such sentences would further the idea of Aboriginal justice and would likely have meaning for offenders and their communities while not offending public perceptions of equality.

## Constraints of the Criminal Justice System Upon the Sentences Given

### Suspended Sentences

Under s. 731(1)(a) of the *Canadian Criminal Code* an offender can be given a suspended sentence if “no minimum punishment is prescribed by law” (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>). In the cases studied suspended sentences were the favoured sentencing tool of sentencing circle judges pre-1997. Suspended sentences with varying probation orders were given out in eleven of the seventeen cases studied. Suspended sentences are community-based sentences, which allow offenders to carry out their probation orders in their own communities. Green (1998) stated that the “*Criminal Code* requires that a probation order be imposed in addition to a suspended sentence (which allows the court to re-sentence an offender if he or she commits another offence during the probation period), to a fine, or to a period of incarceration” (26-27). It is the shaping of the probation order that allows community members to have the greatest control over the sentencing process and therefore have a chance to further the idea of Aboriginal justice. Since suspended sentences will be served in the community in question, the community members will work very closely with offenders, while they are on probation, often providing both services and support.

The judges in Cases 4, 5, 6, and 13 all mentioned the fact that if the offenders breached any of the conditions of their probation while under a suspended sentence, that they would be back before the court for sentencing. This is made possible under s. 732.2(5)(d) & (e) of the *Canadian Criminal Code* which allows judges under these circumstance to either revoke the suspended sentence and “impose any sentence that could have been imposed if the passing of sentence had not been suspended”, or change the conditions of probation as desired, or extend the probation period for up to one year (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>). The following statements show that while community members may be moving towards embracing justice as a community responsibility, judges still have the ultimate control over the actions of

offenders while they are on probation.

The judge in Case #2 stated that “[i]n this case, a suspended sentence provides the means to trust in community beliefs while allowing a traditional formal justice response to be imposed if the community is sadly wrong” (P71). The judge in Case #4 said “I impose a suspended sentence which basically allows my reluctance to be addressed, because if you do not carry out the conditions which this circle will impose, you will be back before the Court to be sentenced” (P18). The judge in Case #6 said that a “suspended sentence provides the flexibility to embrace an ambitious rehabilitative plan, yet maintains the prospect of a punitive sanction if the commitment of the offender fails to keep him on the ‘healing track’” (P31). Suspended sentences give offenders a chance to change, if they do not take advantage of this they will most likely be sent to jail.

#### Curative/Conditional Discharge

Another type of sentence that is available for offenders going through sentencing circles is a curative/conditional discharge. Such a discharge is only available for offences for which there is no minimum punishment. The judge in Case #3 gave the offender a curative discharge, at the request of defence counsel. Under a conditional discharge, which is legislated by s. 730 of the *Canadian Criminal Code*, offenders are discharged of the offence (no record of conviction) after they carry out the conditions given by the judge. If at any time during their probation (of up to three years), offenders breach any of their conditions, the judges can revoke the discharge and convict the offenders of the offence and sentence the offender as he/she would have at the time of sentencing (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>). The judge in Case #3 even stated “if you do not follow these conditions this curative discharge is wiped out, and you will be back before the Court to be sentenced” (P28).

### Section 742.1 of the *Criminal Code*: Conditional Sentence Orders

If the judge, and the Crown, are determined that the offender should receive a jail sentence, and if this term is for two years or less, there is now the option of relying on Section 742.1 of the *Criminal Code*<sup>1</sup>. Section 742.1 allows judges to sentence offenders to two years or less imprisonment to be served in the community. While serving a conditional sentence the offender will abide by the conditions of the conditional sentence order. If the offenders break any of these conditions the court may

- (a) take no action;
- (b) change the optional conditions;
- (c) suspend the conditional sentence order and direct
  - (i) that the offender serve in custody a portion of the unexpired sentence, and
  - (ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or
- (d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>).

While judges have the ultimate control over sentencing they too are bound by such restrictions of the *Criminal Code*.

Section 742.1 came into effect September 3, 1996, therefore it was only in effect when Cases 14, 15, 16, and 17 were heard. In Cases 15 and 16 the offenders were given prison sentences to be served in their communities and in Case #17 the offender was placed in open custody. This evidence suggests that this section has had an impact on sentencing circles. For conditional sentence orders to work in Aboriginal communities, the community members must support such a sentence and be willing to work with offenders while they carry out their sentence. The use of sentencing circles and community support for them would be conducive to judges deciding upon a conditional sentence order.

For the first few years of sentencing circles in Canada, judges often relied on using suspended sentences as an alternative to sending offenders to jail. This carried with

it a lot of criticism from the outside public that jail terms were not being given when they should be. The use of conditional sentence orders may allay some of this criticism but not all of it. There are still many competing views on how this legislation should be applied in given cases.

The judge in Case #15 believed 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 understandings, 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 (P16).

This judge has implied that sentencing circles can be used as a "tool" to help implement conditional sentence orders. This judge is purporting that community members will have a role to play within the parameters set out by the *Code* for conditional sentence orders.

The Crown in Case #16 asked for a sentence of less than two years less a day. The judge in this case quoted Section 742.1 of the *Criminal Code* and wondered aloud if the offender should serve part of her sentence in jail or if she should be sentenced conditionally in the community (P19-21). The judge did not feel that sending the offender to jail was needed in order to deter her from committing the same crime again. It was the offender's display of remorse, as well as the mitigating factors, which convinced the judge of this. This judge also stated that the "restrictive conditions imposed on these sentences ... often make them more difficult to serve than the 1/6 th physical incarceration of a traditional sentence" (P23). Such a statement justifies the use of conditional sentence orders in sentencing circles.

#### Sentence Adjournments

Sometimes sentencing may have to be adjourned in order to "acquire more

information” about an offender and/or to explore the offender’s commitment to rehabilitation (Judge, Case #2, P39). The judge in Case #2 adjourned the sentencing circle for two months to allow two community members to work with the offender and to explore the offender’s commitment to rehabilitation. In this case the judge allowed the adjournment in order to give the two community members the chance to “explore the source of [the offender’s] violence and alcohol abuse, and to develop a rehabilitative plan for the sentencing circle to consider” (P41). The judge claimed that the new information gathered during the adjournment had an influence on the ultimate sentence (P43). This shows that community members working together to take responsibility for justice and finding ways to help restore offenders to the community, will have an influence on sentencing decisions made by judges in sentencing circles.

Sometimes in order to formulate an appropriate sentence, sentencing will have to be adjourned. The judge in Case #10 wanted to find an alternative to jail that would protect the public and rehabilitate the offender. The judge therefore adjourned sentencing for one year in order to banish the offender from the community. The banishment that the judge imposed, and the conditions for the offender to follow, were suggested and outlined by the community Justice Committee. While it was not specifically stated whether or not this banishment was based on a concept associated with the idea of Aboriginal justice, it must have been a form of justice that the members of the Justice Committee deemed as being appropriate for the rehabilitation of this specific community member. The Justice Committee also asked that at the end of the banishment the offender be placed on probation for three years. The judge made it clear that if the offender did not follow any of the undertakings outlined, the sentencing date would be brought forward. The judge said that he would determine if the offender had made changes to his lifestyle at the time of sentencing. The judge also said that he would consider probation if changes were evident. Finally, the judge said if he was not satisfied by the offender’s efforts to change he would consider sending the offender to jail (P19-

24).

The judge discussed the legalities of such an adjournment and he stated that

[t]he first problem which arises with adjourning [the offender's] sentencing for a year is whether it can be done in accordance with the provisions of the Criminal Code and the Charter of Rights. [The judge concluded that an adjournment would be appropriate in this case in order to fine tune a rehabilitative plan] ... The purpose of the isolation is to give [the offender] time to see the need for changing his lifestyle and is punishment for the offences against the victim. If the sentencing of [the offender] is adjourned for the period of one year and [the offender] is released on an undertaking then he would have time to show his community and the victim and myself that he can make changes in his lifestyle (P16-19).

The judge concluded that there was no specific provision in the *Criminal Code* or the Charter, which would deny such a lengthy adjournment. The judge wanted to go along with the wishes of the Justice Committee and give the offender time to show that he was willing to rehabilitate before he was sentenced.

The Crown Attorney brought forward an appeal in Case #10b, claiming that “the trial judge, having adjourned the proceedings for this length of time and these purposes, had failed to pass sentence upon the offender as required by law ... and had thus failed in effect to exercise jurisdiction” (209). The appeal judge claimed that the judge had the power to adjourn sentencing for a reasonable length of time “for the purposes of conducting a sentencing hearing of one kind or another; of obtaining an assessment of the accused’s mental condition ... and of getting a pre-sentence report; of receiving a victim impact statement; of reflecting upon a fit sentence, and so on” (211). The appeal judge went on to claim that “the purpose of adjournment was beyond anything contemplated by the law. And in granting it, the trial judge exceeded his powers. He was simply not empowered to adjourn the sentencing proceedings for this length of time and this purpose” (P213). Therefore, the appeal was upheld and was sent back to the judge for sentencing.

Usually when a judge adjourns sentencing it will be for the purpose of finding out

more information on the offender or to help acquire additional information which will help in deciding upon an appropriate sentence. Such adjournments will give community members time to work with the offender on rehabilitative plans and to submit more detailed suggestions to the judges in order to help them with their sentencing decisions. Adjournments may also allow community members to explore ways that they can further the idea of Aboriginal justice by suggesting sentences which will allow for the rehabilitation and restoration of their fellow community members.

#### Community Members' Input for Sentencing and Aboriginal Concepts of Healing

In sentencing hearings often the input for sentencing comes in the form of sentencing submissions made by the lawyers and pre-sentence reports. In sentencing circles pre-sentence reports are not needed since the people who would usually provide the information for these reports are present in the circle. In eleven of the cases studied, Crown attorneys gave submissions for sentencing (see Appendix 12). It is not clear how many defence attorneys made sentencing submissions in the cases studied since the judges did not often mention whether a submission was made or not (see Appendix 13). This may reflect the fact that the defence attorneys would agree with what was recommended by the community members in each case.

As has already been seen, the level of influence that community members will have in sentencing circles over the sentencing process will be left up to the discretion of the judge. Every judge has an idea of how the circle should proceed and some communities have outlined these processes. In the end “[u]ntil there is legislative reform, the extent to which aboriginal communities may be involved in the sentencing process rests within the judge’s discretion” (Chartrand, 1995, 874). Chartrand (1995) explained that

the extent to which the circle sentencing process will be a vehicle for true community input in the decision-making process is up to the judge. If the

judge is to give full respect to the aboriginal community, then his or her role must also change from being the focus of attention and authority to one where he or she largely concedes the decision-making authority to the community. The role of the judge has traditionally been one where the judge is intended to be passive and neutral. The proper role of the judge is one where he or she sits back and listens to counsel for each side, intervening as little as possible. Of fundamental importance is the requirement that the judge be completely impartial to the parties involved. Such is the hallmark of ensuring that the rule of law is maintained and the system is truly just. The judge's role in circle sentencing, if he or she is to even have a role, would be that of a mediator. In such a role, the judge would assist the community in arriving at a consensus of the best disposition for the accused. In undertaking such a role, judicial responsibility for ensuring impartiality and neutrality is not jeopardized. As a mediator, the judge can still maintain his or her neutrality in guiding the community to a consensus. As a mediator, however, the judge's role would change from one of passivity to one of active intervention as a facilitator in the process. Although such a role is not normal judicial behaviour, it does not necessarily threaten the rule of law or the ultimate fairness of the hearing. Until the procedural laws change, the judge still holds the ultimate discretion over sentencing under the Criminal Code. Nonetheless, it is possible to give the aboriginal community the respect it deserves by according it full decision-making authority, assuming, of course, that the judge would uphold every decision made by the community (881-882).

While judges legally make the final decision on sentencing in a sentencing circle, the holding of the circle is futile if they do not seriously consider the recommendations that the participants give for sentencing.

Green (1998) pointed out that there is a problem encountered when judges explain to the participants that everyone in the circle is equal, yet they, the judges, have the final decision over the sentence (73). Green stated that "given the judge's ultimate sentencing power, it is reasonable to expect that confusion might arise among circle participants who are asked to shape an offender's sentence yet who do not have final authority to impose it" (73). Green (1998) went on to suggest that "it may be appropriate for a judge at the start of a sentencing circle to outline the constraints upon his or her ability to adopt recommendations put forward by the circle (i.e., parameters placed on them by the *Criminal Code*)" (73). Although there are constraints upon judges in sentencing circles and they have the ultimate sentencing power, from the cases studied it seems that most

judges will adopt the recommendations of the circle as long as they are “fit and proper” (i.e., within the criminal justice system constraints).

Green (1998) commented on this fact by stating that

it is important not to underestimate the effect of allowing local community members to participate in the court process. Judges are human and are likely to be receptive to representations that focus on local aspirations and perspectives. The formal justice system cannot function in a vacuum; it must find some measure of credibility and respectability with the local citizens it controls. In the context of a sentencing circle, it is unlikely a judge would disregard a circle consensus that proposed a viable alternative to the sentence that would otherwise have been imposed. To do so would undoubtedly risk a loss of credibility by the court in the eyes of the local community (74).

It would not make sense for judges to agree to hold a sentencing circle if they had no intention of accepting the sentencing recommendations that the community made.

In thirteen of the cases studied, the judges outlined what the community members suggested for sentence (see Appendix 14). In six cases (2, 4, 5, 8, 13, and 15) the judges only stated that the community members did not want the offender to go to prison. The judges in turn did not sentence the offenders to serve jail time. In all of the cases, except one (Case #11), the judges accepted the circle recommendations that the offenders not be sent to jail. In cases 9, 10, 12 and 16 the judges implemented most of the community members’ suggestions in the actual conditions given to the offenders. This suggests that the community members have some level of control over the ultimate sentence given.

The offender in Case #11 was sentenced to serve nine months in jail. From the judge’s remarks, it did not seem that the community members were against sending the offender to jail. One community member did state that “we must all recognize that even if [the offender] goes to jail, he will come out again and he will need support and help from professional sources, but also from his support persons who were good enough to come to today’s sentencing hearing” (P30). The judge made reference to the following remarks by one of the community members “[f]or the time being, she recommends that he not be out in the community, that he needs to be in an environment where counselling

and support can come to him, where he can't walk away from that counselling and support, and where there is an opportunity to remain sober and to think about what he has to do" (P 34). Often community members will suggest sentences which contain a healing aspect and which serve to further the idea of Aboriginal justice. The following evidence will attest to this.

At first the judge in Case #2 believed that the offender should receive a jail term prior to the sentencing circle due to the offender's criminal record and negative attitude about rehabilitation (P32). The contribution of the community members in the circle changed the judge's mind about the use of jail. In this circle there were two community members who were influential in shaping the ultimate sentence. The judge even stated that community member #1's "interaction with [the offender] and commitment to continue volunteer work with [the offender] are central considerations shaping this sentence" (P50). The judge went on to say that "developing a friendship and counselling relationship with [community member #1], whose life experiences are so remarkably similar, provides an incentive and a unique opportunity with [the offender] to begin the difficult emotional journey through pain to healing" (P63). The judge also related that community member #2 "emphasized that healing can only be realized through emphasizing the unique and positive features of each person, and by demonstrating support and compassion. Putting his people in jail, he claims, has never worked and never will" (P64).

The judge in Case #4 wanted to impose a jail sentence but she/he did not want to go against the wishes of the victim and the circle consensus. The judge stated that she/he was not completely convinced of the offender's ability to reach the goals that he had set for himself. But the judge was impressed with the support that the community members were offering to the offender. The judge stated that

[t]here is a gap, and it is one of the first times that there has been a significant gap between my assessment of what is necessary and what the circle thinks is

necessary ... I am not satisfied that my belief in the need for a gaol sentence is so strong that it is necessary to go against the prevailing consensus of the circle. I find myself reluctant, but nevertheless agreeable to go with the consensus around the circle, and thereby not impose a gaol sentence (P15-18).

In Case #6 the Circle Support Group had a great impact on the eventual sentence given to the offender. The judge even stated that if it had not been for the work of the Circle Support Group (much of which included a healing aspect) the offender would have gone to jail (P31). Talk of healing and the need for rehabilitation arose many times throughout the judge's report. The judge stated that the

Circle Support Group has contributed many long hours and their own resources in achieving significant strides towards healing ... The Support Group will continue to work with the offender throughout his probation ... a jail sentence would sap the positive momentum for rehabilitation, and lower the offender's fragile self-esteem which must be rebuilt to meet the challenges of healing (P31).

The judge went on to say that "more demands will be placed upon the Support Group to provide the local help and treatment to sustain the offender's healing process" (P35). The judge handed out a suspended sentence with three year's probation. The conditions of probation contained counselling and treatment requirements (see Appendix 9) as well as instructing the offender to continue work with his support group and to participate in activities at the local healing camp (P31). All of these provisions had the effect of furthering the idea of Aboriginal justice in connection with this offender's sentence.

As stated before In Case #10 the community Justice Committee requested that this offender be banished for one year. The banishment that the judge imposed, and the conditions for the offender to follow, were suggested and outlined by the community Justice Committee. The judge did not state whether or not this banishment was based on traditional practices of this Aboriginal community. Even so, the ordering of the banishment by the judge showed that he/she was willing to accept this justice response put forward by the community members.

In Case #12 the judge reported that the Keeper of the Circle had told the

participants that

[i]n native tradition, the Sacred Circle was used to determine punishment for crimes. The punishment for a first offence against property as administered under a traditional Sacred Circle was described as first ordering the offender to make an apology to the victim; and second to restore to the victim the property and finally, at the request of the victim to work for the victim for a period of one year (P33).

The judge went on to say that

[o]ne native member determined that the accused should repay the community twice the amount of the damage in community service hours. Another member felt that the accused should spend time with the elders in order to commence his healing journey. Other members believed that the accused had problems with alcohol and should seek help for this addiction (P39).

Consequently, under the one-year probation conditions, the judge ordered the offender to write a letter of apology to be published in the community newsletter and to perform one hundred hours of community service work. The offender was also instructed to participate in five activities with elders in his community. Such a sentence is not only in line with the traditional practices of the community, but it also helps to rehabilitate the offender, while providing restoration to the community, all of which are aims included in the idea of Aboriginal justice. The judge stated that the community members “produced a sentence that is legal in that it is fit and proper but more importantly, is the beginning of a healing process between the offender the victim and the community (P43-44).

As discussed in the previous chapter, the community members in Case #13 had an extensive “Community Justice” program in place which the offender participated in. After being accepted into the program the offender undertook many rehabilitative initiatives which included a healing aspect. This included a “full weekend family healing session with ... his parents and common-law spouse” and attending weekly Justice Committee meetings (P43-46).

The judge in this case stated

[e]veryone who has come to the Circle knows, from experience, that the other system does not work well. All of the community members in the Circle strongly recommended that the Court not impose a jail term. It would create a gap in the healing process and would also erode the commitment of the community to support and supervise [the offender] over the long term (P74).

The judge even paraphrased some of the comments made by the community members during the sentencing circle. Once again the concept of healing was discussed. The following statements reflect what the judge remembers the community members saying in the circle (the quotation marks are added for clarity). “ ‘The Circle is an opportunity for healing that my brother never had’ ... ‘We are trying to put our community on a healing path’ ... ‘In the normal court system, and I’ve been there, there is no healing for the victim and no assurance of safety’” (P77-78). The community members in this case believed that a rehabilitative sentence would be good for both the offender and the victims in terms of the healing that it can achieve.

The judge agreed with the community members’ claims, stating that “[t]he purpose of the sentence and the involvement of the community with the offender after court is to promote healing within the community, a positive reintegration of the offender into the community, and healing and support for the victim” (P23). The sentence for the offender in this case included the healing aspect of attending treatment, counselling and support group meetings. The judge also stated that

[t]here was considerable discussion about how the traditional native system focused on reparation and restoration to the victim. Elders had been consulted and they affirmed the practice of offering gifts and valuables to a victim, in part as compensation but also as tangible acknowledgment by the offender and his family that they accepted that a wrong has been done. The question was asked: Is it possible to use some elements of the traditional native system which required the offender and his Clan to compensate the victim, to provide victim satisfaction and closure (P72)?

Upon sentencing the judge recommended

that under the supervision of the probation officer, and in conjunction with the victim services worker, ... and with the assistance of one or more female elders from [the community], and provided any or all of the victims are

willing, the Aboriginal custom of providing gifts or items of value to victims as a symbol of remorse and as a step in the offender's rehabilitation, be explained to them. And further, if any or all of them is willing to receive such items of value, [the offender] shall provide the same, up to the amount of \$500.00 in cash or kind, as specified by each of the victims and directed by the probation officer ... I wish to emphasize that this is not a payment for harm done. It in no way reflects the emotional upset, anxiety and fear caused by [the offender]. It is an integral part of the traditional rehabilitation process of the ... First Nation. I sincerely hope the victims are able to view this offer from this perspective. (P138 - 140).

Clearly the evidence suggests that the community members involved in this circle had a great impact on the actual sentence given by the judge and they had the ability to further the idea of Aboriginal justice by influencing the sentence in the way they did.

In Case #14 the judge commented on the fact that since her arrest the offender had participated in healing circles and had started to learn about the traditions of her community. The judge stated that

[i]t has also been indicated that [the offender] would continue to do these things and because of the sincere remorse, I have no question that, indeed, this is what is going to happen. [The offender] has indicated that she would continue her involvement with the healing circles and continue to personally learn about her own tradition (P23-26).

As a result of the judge's belief in the offender's commitment to continue on this healing path, he/she did not make this a formal condition of the offender's three-month probation order, which accompanied her suspended sentence.

In Case #15 the judge told the circle members that this type of offence (assault of a police officer and breach of probation) usually called for a period of incarceration. The judge said that

the keeper of the circle had already introduced into the circle the concept of banishment as an appropriate form of punishment in this case ... most of the members of the circle spoke against incarceration as they saw it serving no useful purpose and saw banishment as being a more serious and profound punishment (P13).

In the end the judge sentenced the offender to a period of imprisonment of thirty days, which was to be served in the community. The community members' suggestion for

banishment was not acted upon by the judge, while the community members' request that the offender not be sent to jail was acted upon by the judge. This once again shows the discretion which judges use in accepting recommendations from community members in sentencing circles.

In Case #16 the judge stated that the community members who participated in the sentencing circle

made it clear they are not seeking retribution. They seek healing and the accused's reform and re-integration into their community [all aspects of the idea of Aboriginal justice]. They recommended a community-based sentence. Although an incarceral sentence is required for these types of offences, for this accused, in the context of her community, actual physical imprisonment is not (P29).

All of the suggestions that the circle recommended for sentencing were accepted by the judge and included in the sentence. The conditions of the sentence included, among other things, attending healing circles and going to counselling with Elders.

In Case #17 the community members did not contribute to a rehabilitative healing sentence as much as the offender did herself. While the offender was in custody she participated in healing circles with her family and her community and she came up with a healing plan which could be carried out in conjunction with her sentence (P69-70). It was this healing plan which the judge relied upon to set out the conditions of her probation while serving time in open custody.

The evidence put forward in this chapter suggests that the criminal justice system, through case law/appeals and the *Canadian Criminal Code*, and therefore the judges, place constraints upon the sentencing of offenders in sentencing circles. Even so, community members do have a high level of influence over the ultimate sentence given by the judges. It is how these suggestions from the community members are implemented that indicates their level of control over sentencing and therefore their ability to further the idea of Aboriginal justice in sentencing circles. The sentences given

in each of the cases, except for Case #10, were in accordance with *Criminal Code* guidelines. At the same time many of these sentences did further the idea of Aboriginal justice by ensuring that offenders followed a rehabilitative plan, with the help of their fellow community members, which would include aspects of restoration (and counselling), reconciliation, restitution, and reimbursement. Judges hand out non-incarceral sentences in sentencing circles because they can. The community members' suggestions are often reflected in the conditions of probation. If offenders are given a suspended sentence or a conditional sentence order and they breach their conditions, they will end up back before the judge for sentencing. This is legislated by the *Criminal Code* and therefore is a constraint upon the judges in sentencing circles. There is no rule of law which dictates that offenders who breach their conditions will once again face a sentencing circle and therefore having to answer to their fellow community members. This also serves to limit the amount of control that the community members have over sentencing their own members.

## NOTES

### 1. Section 742.1 of the *Canadian Criminal Code* reads

[w]here a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court (a) imposes a sentence of imprisonment of less than two years, and (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentence set out in Section 718 and 718.2; the court may, for the purpose of supervising of the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under Section 742.3 1997, c.18, s. 107.1 (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>).

## CHAPTER VIII

### CONCLUSION

The purpose of this thesis was to expand upon what has been found by other researchers by exploring how sentencing circles are linked to the idea of Aboriginal justice and how control over the process and sentencing in circles will play a big part in establishing this link. In this conclusion I will first summarize the findings from my research. I will then discuss various suggestions for reform both for the use of sentencing circles in the future and other Aboriginal justice initiatives. Lastly, I will discuss the various problems of implementing Aboriginal justice reforms.

#### Findings

In the judgments analyzed the judges were constrained by legislation, case law and appeals and this in turn led to constraints imposed upon the participants of the sentencing circles. Due to the nature of the data used, one can only learn about the roles played by the offenders, victims, community members and lawyers through the discourse of the judges. From this discourse it was hard to tell what roles the offenders played in the circles as the judges did not often quote what was said by the offenders. Three of the judges, in five cases accorded offenders the role of having to pay back their community for the crimes that they had committed. Judges also talked about the offenders' displays of guilt, remorse, and motivation to change. Other times it was the community members who discussed the offenders' motivation to change as in Case #6.

As for the question of whether or not there was evidence of significant offender rehabilitation, the rehabilitative steps taken before sentencing by some of the offenders (see Appendix 8) did show that these offenders were willing to change. Some of these steps included counselling, abstaining from alcohol/drugs, maintaining employment,

attending healing sessions/circles and meeting with support groups.

The judges, in their judgments, did not concentrate a great deal on the contribution of victims in the circles or the amount of support that was given to victims. In fact, only two of the judges mentioned whether the victims even supported the use of the circle. The victims in Case #13 did not support the use of the circle and the victim in Case #15 did. What the judges did concentrate on was whether or not victims were present in the circle. Other than the three “victimless crime” cases, and the three cases which involved sexual or physical assaults of children (both for which community members spoke about the impact of the offence), victims were present for all but three of the cases (Cases 2, 11, and 13). There was no mention of whether the victim was present in Case #1. In the cases where victims were not present the victims were not members of the offenders’ communities. This indicates that there is a difference between Aboriginal and non-Aboriginal victim participation. It was not clear from the evidence whether this difference was due to differing values and beliefs or due to the fact that the non-Aboriginal victims were not members of the community in which the circles were held.

The victims who were not present at the circles submitted victim impact statements. The judges in Cases 2, and 13 believed that the victims could have contributed more to the circle, and gained a better understanding about the offender, if they had been in attendance. Even for victims who were in attendance at the circle, the judges did not relay information on the amount of community support for these victims.

In contrast, there was evidence of a great deal of community support for the offenders who were going through sentencing circles. One way that community members went beyond the mindset of the Western justice system was to ensure that sentencing was a step in the healing process for offenders. Out of the seventeen cases studied there was only one case, Case # 5, where an indication of support from community members was not mentioned. In Cases 3, 4, 6, 13, 14, and 17 there were “support groups” in the communities specifically in place for the offenders. These

groups helped with such things as carrying out probation orders, cultural training and counselling. The judges' mention of such community assistance outlines the supportive role that community members can play when involved in the sentencing of offenders.

In Cases 10 and 11 the offenders worked with community "justice committees". These committees carried out many of the same functions that support groups did. In Cases 2, 5, 9 and 16 the offenders received, or were given access to, counselling/treatment by community members. In Cases 7 and 12 community members committed themselves to helping the offenders with their probation. In Case #8 a community member offered to interpret for the offender if he had to go for a psychological assessment. In Case #1 the community members wanted to help the offender to 'reintegrate' back into the community since he was in foster care and custody for so long. This data suggests that community members can use sentencing circles to further the idea of Aboriginal justice by ensuring that justice is a community responsibility.

By ensuring that offenders are being given opportunities to begin on a healing path community members are showing that healing and balance is a serious consideration in the use of sentencing circles, not only for offenders but for the community as a whole. By insisting that offenders should be kept out of jail and be given restorative sentences instead, as the community members did in most of the cases, there is an assurance that the community is being protected from offenders who go to jail and come back out with more problems and anger than they went in with. Looking at the causes of crime, which was done in a majority of the cases, also allowed community members to address the problems that may have led the offenders down the wrong path. The offenders' rehabilitative plans often included ways that these problems could be addressed. In Case #2 the judge quoted one community member as saying that healing can only be achieved by supporting the offender (P64). This is one way that community members can begin to ensure that justice is a community responsibility.

Overall, the data suggests that out of the non-judicial participants in the circles, the community members had the greatest level of power, with the offenders having some level of power by outlining their own sentencing plans such as in Cases 14 and 17. The victims seemed to have the least amount of power in the sentencing circles.

The judges in the cases studied had extensive roles to play in the sentencing circles. The judges were responsible for the overall process and sentencing in the circle. This responsibility served as a constraint on the community members. In Cases 6 and 13 the community members had in place extensive guidelines for how sentencing circles should proceed. Regardless of the process in place in Case #13 the judge implemented on top of the community guidelines eligibility criteria and supplementary procedures that should be followed in the circle. Judges also imposed safeguards in Cases 1 and 12 such as allowing for recorded transcripts of the circle proceedings. In Case #1 the judge shaped the entire process as the circle had been implemented by the judge in the first place. In contrast, the judge in Case #12 *joined* the community members for the purpose of circle sentencing and he/she let the community members lead much of the process. The judge in this case claimed that he/she wanted to encourage community involvement in the process therefore he/she stepped back from the organizational details and only remained involved to the extent to ensure that individual safeguards were in place.

Usually when the judges took a more hands off approach with regard to the process, traditional practices of the communities were included in the process (Cases 6, 12, 13, and 15). Such practices included explaining the significance of the circle, opening and closing the circles with prayers, smudging with sweetgrass, and using a talking stick to guide the input of members. In sharp contrast to these practices was the finding in Case #14 where the judge controlled the entire process and in the end thanked the community members for helping him/her come to a decision on sentence. While judges have the ability to delegate their power over the process of the circle to community members - they do not have this discretion when it comes to imposing

sentences.

Under s. 723(3) of the *Code* judges can require evidence to help them with their sentencing decision (Green, 1998, 155). This does not mean that the community members will have the final say as to sentence. Even though the judges were responsible for the ultimate sentence given in the sentencing circles they would often accept the recommendations put forward by the community members. In all of the cases where community members asked that offenders not be sent to jail, the judges complied by not imposing jail sentences. Some of the judges claimed that the offenders would have received jail time had it not been for the support of the community members (Cases 1, 2, 3, 4, 6, and 7). Although the offenders in Cases 15, 16 and 17 were given custodial sentence, these sentences were served in the community. In Case 9, 10, 12, and 16 the judges implemented most of the community suggestions for sentence in the actual probation conditions given to the offenders.

The area that community members have the most influence over the sentences given is in suggesting possible conditions for probation. Unfortunately, due to legislative restrictions, if the offenders breach any of their conditions they will be brought back before the *judge* for sentencing. There is no consideration given to as to the community members' role if offenders are charged with a breach of conditions. Other legislative restrictions such as mandatory minimums, starting point/threshold sentences, and the objective of sentencing parity also affect the level of influence that community members can have over the sentences given. None of the offenders in the cases studied were facing mandatory minimum sentences. This may reflect a pattern whereby offenders who do commit offences for which mandatory minimum sentences are warranted are denied the opportunity of a sentencing circle. In Cases 9 and 10 the Crown attorneys contended that the offences required threshold sentences. These thresholds were not met and both of these cases were appealed by the Crown attorneys.

Concerns with sentencing parity by the judges, Crown attorneys, and the general

public will also affect the level of influence that community members have over the ultimate sentence given and the use of restorative dispositions for Aboriginal offenders. This may be why the judges in seven of the cases established sentencing ranges at the beginning of the circles. In the end though, the sentences fell within these ranges in only two of the cases (11 and 12). It would seem that judges actually impose these ranges in order to give offenders and community members an indication of what range of sentence the offenders could have expected had they not gone through the sentencing circle and the type of sentence they can expect if they breach any of their conditions.

The breakdown of sentences given in the cases were: one jail term to be served in jail, eleven suspended sentences with probation (Appendix 9 outlines the various probation orders given in each case), two conditional sentence orders, one curative discharge, one sentence of open custody, and one sentencing adjournment for one year (which was appealed). The probation conditions which accompanied these various sentences all incorporated “the five R’s” associated with the idea of Aboriginal justice which are restoration, reconciliation, restitution, reimbursement, and rehabilitation. The probation conditions varied from the usual conditions of keeping the peace, reporting to a Probation Officer, remaining within the jurisdiction of the court to abstaining from alcohol/drugs, attending counselling and anger management/support groups, taking life skills courses, community service work that usually had a traditional focus such as working in a local healing camp or working with Elders, attending residential treatment programs, and attending healing circles.

The use of such restorative sentencing practices may lead to sentencing disparity. Looking at the established sentencing ranges put forward by the judges and the ultimate sentences given one can see that the sentences in the cases studied did lead to sentencing disparity. Disparity in sentencing for such initiatives as sentencing circles is not surprising as the members of each community will have different wishes and aspirations when it comes to dispensing justice (Green, 1998, 70). The findings of this study suggest

that sentencing disparity is only an issue because the possible jail sentences reflected in the judges' established sentencing ranges were not imposed. Even though sentencing disparity is a result of the use of restorative sentences, and therefore sentencing circles, this does not mean that the sentences given were by any means lenient. Actually the community dispositions were viewed as being harsher than a jail sentence by the judges and community members in four of the cases studied. Orchard (1998) found that

the same commitment to rehabilitation is not demanded of a person sentenced in the usual manner as is expected in a sentencing circle. Experience may show that it would be easier to have an ordinary sentence imposed and served, than it would be to go through the healing process, community rebuilding and rehabilitation required of a circle's sentence (122-123).

Restorative sentences ensure that offenders are held accountable for their actions, offenders have to make restitution for their offences, and they have to reconcile with their victim(s) and their fellow community members. None of this is done when offenders are sent away from their communities to serve a prison term.

This is comparable to what Green (1998) found at the conclusion of his study on sentencing alternatives in Aboriginal communities. Green (1998) stated that

although the Aboriginal practices described [i.e. sentencing circles] 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 decisions ... 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 (134).

It is this flexibility and recognition that allows for the furthering of concepts associated with the idea of Aboriginal justice.

The reader should keep in mind that the more specific findings, such as the roles of the communities and the offenders, will be applicable to the cases at hand but not necessarily generalizable to other sentencing circles across the country. One must always

remember that different Aboriginal communities have different beliefs, values, and practices. Therefore, what one community does in the way of sentencing circles may not be appropriate for another community.

### The Need for Reforms

Justice reforms are needed in order to address the rising incarceration rates of Aboriginal men and women across Canada. Even if this means statutory reform, which is not needed to continue with community initiatives like sentencing circles (Green, 1998, 155). Throughout the report of the Royal Commission on Aboriginal Peoples (1993) many Aboriginal people said that now is the time for healing. Aboriginal communities, such as the community in Case #13, have begun to develop community based alternatives because the conventional justice system has failed their members (Judge, Case #13, P120). Berma Bushie (1996) explored contemporary Aboriginal justice models and she believed that the

restoration of balance [in Aboriginal communities] 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 (61).

The push for sentencing circles started with the hope that it would help to reduce the high incarceration rates of Aboriginal offenders in Canada. Green (1998) stated that 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 (17).

While incarceration rates may be reduced, what is equally important is that recidivism rates should be reduced. Sentencing circles in theory should lead to lower recidivism rates among offenders who go through them. In Chapter 7 the success of sentencing

circles in the Kwanlin Dun community was discussed, at least for that community sentencing circles have resulted in specific deterrence and therefore lower recidivism rates.

Another way that rates of incarceration for Aboriginal people may be reduced is by looking at the causes of crime. Ross (1996) believed that once communities begin to look at the causes of criminal acts and address these causes the number of crimes will begin to lower therefore leading to a retreat of the Western justice system (218).

If initiatives such as sentencing circles are to continue within the framework of the criminal justice system there are certain practices which should be implemented. Adjournments should be a requirement if a judge is going to hold a sentencing circle for the first time in a certain community. The judge will have to learn more about the community in order to make effective decisions. Discussions need to be held with the community members prior to the use of sentencing circles to determine the resources available in the communities and the level of comfort that community members have with such sentencing initiatives. The willingness of community members to participate in and shape the sentencing circle process will have to be measured and factored into a determination of whether or not a circle should be held. Support groups for both the victim(s) and the offender should be established. All of the above requirements should be met before a sentencing circle is held in an Aboriginal community.

As for participation in sentencing circles, anyone who is interested in participating in the circle should be allowed to do so. Elders and community members should be encouraged to bring traditional practices to the circle. If it is a question of room restrictions, a larger area should be sought. There may be people who are dissuaded from participating in sentencing circles because circles are time consuming. But the benefits far outweigh the sacrifices. The more time and effort that judges, offenders, and community members put into the circles, the more healing will take place.

The future of Aboriginal offenders is the future of Aboriginal communities. By

healing offenders, community members are investing in their own future. It is the community members who are often responsible for offenders during their sentences, therefore the community as a whole should be encouraged to participate. Sentencing circles can have a significant impact on both those who participate verbally and those who are only observers. While it may be necessary to hold a sentencing circle in a city courtroom, everything should be done to ensure that the arrangement and process of the circle has ties to the Aboriginal community in question.

In the cases studied there were some communities who already had guidelines in place for how sentencing circles should proceed (Cases 6 and 13). It would be ideal if all communities who hold sentencing circles could make up their own extensive guidelines. Hopefully in the future, if sentencing circles are to remain within the jurisdiction of the court, there will be enough cooperation between the courts and the communities that an overriding of community guidelines, by the judge, is not needed.

Communities who hold sentencing circles should have both circle support groups and victim support groups, regardless of the offence. In order for victims to fully participate in sentencing circles, they need to feel secure that they will not be re-victimized and that their concerns will be addressed fairly. Counselling for both the offender and the victim should take place before and after the sentencing circle. In order to help heal members of the community, community members must do more than provide input at a sentencing circle. They can counsel offenders and allowing them access to treatment and healing ceremonies. The participation of offenders in such initiatives will also show judges and other members of the community that offenders are willing to change and that they will be committed to a rehabilitative plan.

Sentencing circles are one way that communities can start the healing process for offenders, victims, and the community as a whole. Chartrand (1995) argued that

Aboriginal communities must begin a process of restoration to heal themselves. That restoration process begins with respect. To regain respect,

members of aboriginal communities must have control over their lives, including control over their social order systems. Circle sentencing can be seen as an important building block in the process of restoring aboriginal community respect and healing. In the circle sentencing process, this restoration can be achieved by allowing the community to have final control over the decision-making that determines the appropriate disposition for an offender (878).

The fact is that Aboriginal communities must begin to question *how much* control they have over the decision making in sentencing circles.

Shaping Aboriginal justice initiatives within the Canadian justice framework is not the ideal. By duplicating what has already been done, only in a different way, Aboriginal communities will be hindered in their search for a way to heal their members. McIvor (1996) discussed the problem that she saw with the sentencing circles in the North West Territories and Labrador. She claimed that the

aboriginal sentencing circle was developed by white judges to involve the community in sanctioning or penalizing aboriginal offenders. The circle provides for a fly-in judge who controls the process a fly-in crown attorney, a fly-in social worker, a fly-in police officer and maybe a fly-in defense counsel. All are foreigners in the community ... The aboriginal sentencing circle may also include fly-in elders, as they did at South Island. They did not actually fly in, they drove in from another aboriginal community. From the community itself, there may be some elders, the accused and the victim and his or her family. This is not aboriginal justice. It is not an aboriginal justice initiative because it involves foreign laws, and foreign criminal justice administrators ... much of the focus of aboriginal justice theoreticians has been at the rear end of the criminal justice system, mainly, 'sentencing', with little focus on crime prevention, social control and social rules at the community level. Aboriginal justice is made up of more than its rear end, and more than just getting community involvement in the punishment of aboriginal offenders. When you hear about sentencing circles and the involvement of aboriginal elders and other community members, I hope you will remember we are dealing with the rear end of the Criminal justice system (5).

I would argue that sentencing circles *are* an Aboriginal justice *initiative*, concepts associated with the idea of Aboriginal justice are furthered with the use of sentencing circles. I would concede that sentencing circles are a reactive initiative and there is a need for more proactive initiatives.

### Problems of Implementing Reforms

Both Gosse (1994) and Orchard (1998) have attempted to explain why Aboriginal justice initiatives have been slow to come about in Canada. Gosse (1994) cited one of the main reasons as being “political and bureaucratic resistance to change encountered by Aboriginal governments” (16). This resistance to change is based on a failure to understand the goals of Aboriginal groups, a resistance to give up established power holdings in the justice arena, a fear that such a loss of power “could result in a deterioration of justice services”, a lack of resources and a lack of government “inertia” (16-17). Orchard (1998) also found that Aboriginal justice initiatives may not be established in the near future due to a lack of political will, little support from non-Aboriginal people and resourcing concerns (162). Green (1998) also found that resourcing concerns were a problem for Aboriginal justice initiatives including “support, treatment, and counselling for victims and offenders, and, in cases involving abuse, close supervision of offenders and protection of victims” (82). The judge in Case #6 stated that there is also a need for professionals within the communities with skills to help offenders and victims (i.e. psychologists, addictions counsellors, rape crisis personnel) (P11).

A lack of community consensus may also inhibit the implementation of Aboriginal justice initiatives in communities across Canada. Even in the cases studied for this thesis it was not known if the views expressed in the circles were representative of the views of the community as a whole. In the same vein, Orchard (1998) found that there is some concern, especially among women, that the courts are going into communities and holding sentencing circles where either the community members are not receptive to them or are not ready for them (107). Orchard (1998) went on to state that the

initiative to transfer responsibility [for justice] should come from the community, not from governments or judges. The community’s and victims’

needs must not be compromised by the needs of the offender or the need to make changes in the justice system. Community-based services must have clear guidelines and standards which reflect the interests and needs of all members of the community, especially the victims. Because women are often victims, they must be involved in the design and delivery of offender programs (107)

Orchard (1998) also found that among community members there “may be fears about new power structures and internal power struggles for control of new institutions or areas of jurisdiction” (20). Orchard claimed that traditional structures will only work if the interests and concerns of everyone in the community are addressed (21). This is a concern that many researchers raise when exploring Aboriginal justice initiatives.

Ross (1996) also found that one problem Aboriginal women have pointed out about gaining control over justice issues is that “certain power groups would use power over justice only for their own benefit, by prosecuting their blameless enemies and *not* prosecuting their abusive friends” (200). Ross (1996) claimed that the women he talked to suggested that if “community courts” are to be established that the Western courts not withdraw from the communities completely until it is known how these communities will “use their new-found jurisdiction” (200). Ross (1996) also found that many of the women he talked to “wanted to restore the situation where no one received such power over others, where such decisions came out of the clans and families from the bottom up, not the top down” (54-55).

Green (1998), in his final analysis, considered the evolution of community sentencing whether the move was toward total autonomy from the Canadian justice system or “towards increased local participation and control within the existing system” (160). He concluded that for either approach to be reached the following courses of action needed to be taken

[1] appellate recognition and support of these approaches across Canada will be crucial to the continued evolution of community sentencing ... [2] expansion of government-funded resources, specifically providing trained personnel and treatment facilities ... will increase the community-based sentencing options ... [3] a focus on victim participation and support ... [4]

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 ... [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 ... communities will be allowed to regain some measure of control over criminal dispute resolution (160 -161).

There are two problems with this proposed course of action. First, the call for government-funded resources is problematic. Yes, government-funded resources are needed, but at what expense. The government is not in the practice of providing resources without controlling to some extent how these resources are used. If community justice programs are to be funded by the government there is a possibility that the communities will not have total control over how these programs are run. Second, a negotiation of protocols seems counterproductive to increasing local participation and control of justice initiatives. The only protocol negotiation that may be unavoidable is the insistence that justice initiatives are in line with the *Constitution* and the *Charter of Human Rights*.

Even if communities establish their own systems of justice, separate from the Western justice system and the *Canadian Criminal Code*, legislation such as the *Constitution* and the *Charter* will most likely still apply to these systems. Not that this is an undesirable situation. The concern is, that if these products of a Western governmental system still apply to Aboriginal community programs what other products of this system will apply? Ross (1996) argued that Aboriginal communities should not go about justice in the same way as the Western system (188-201), yet such an approach and mindset is hard to break free of (15). Turpel (1994) claimed that

understanding how to work with the other side requires some critical reflection, dialogue and creativity. One cannot erase the history of colonialism, but we must, as an imperative, undo it in a contemporary context. The challenge of this process is great because we are not conversing outside the colonial context. We are aware that it is part of what we say and do, and that we are attempting to resist and dismantle it. Perhaps this

explains why some proposals for an Aboriginal justice system are simply the Canadian justice system with Indians instead of non-Indians in all the conventional roles. If this is the option a community chooses, I would like this choice to be made as a truly post-colonial option, as opposed to a neo-colonial turn dictated by those in the system (208-209).

For the time being, Aboriginal justice initiatives, such as sentencing circles, are operating within the Western justice framework. These initiatives do allow for the advancement of concepts associated with the idea of Aboriginal justice. Perhaps in the future Aboriginal communities will be able to establish their own systems of justice to further this goal.

### Next Steps and Further Research

The purpose of this study was to expand upon what has been found by other researchers by exploring how sentencing circles are linked to the idea of Aboriginal justice and how control over the process and sentencing in circles will play a big part in establishing this link. I have shown how circles proceed in individual communities. I have shown how circles are constrained by the justice system and therefore by judges. I have shown that community members do have some influence over the process. I have explored the fact that the influence of community members can only go so far, as judges retain the ultimate power in circles since they alone pass the final sentence. I have demonstrated that sentencing circles are a positive step toward healing offenders and furthering the idea of Aboriginal justice. While sentencing circles are a good start, in the end Aboriginal communities will still be working within the framework and control of the criminal justice system.

This study has provided the groundwork for more extensive studies and it has expanded upon previous studies by looking at circles from across the country and by showing that sentencing circles indeed further the idea of Aboriginal justice. What needs to be stressed is that sentencing circles will differ between each and every community who hold them. The only link between each community at this time is the fact that they all operate within the criminal justice framework. In order to gain a better understanding

about the use and impact of sentencing circles, researchers need to actually talk to circle participants. Judges' views on circle sentencing made up a large part of this study due to the nature of the data used. Most of the available research on sentencing circles is also very judge centered. The views of offenders, victims and community members need to be explored further and in more depth.

Some questions that future researchers may want to address are as follows: Are the sentences given out effective in rehabilitating the offenders? Are the support groups that are set up helping offenders and victims? Have crime rates and recidivism rates dropped in communities where sentencing circles are held? Have the use of sentencing circles lead to the expansion of healing resources in communities? Have community members begun to explore other options of Aboriginal justice initiatives as a result of holding sentencing circles? These questions and more need to be explored by researchers in the future. It is one thing to hold sentencing circles claiming that they are the answer to rising crime rates and levels of incarceration for Aboriginal peoples. It is another thing to know that they are indeed accomplishing this goal.

APPENDIX 1: Charge, Sentence, and Jurisdiction

<b>CASE</b>	<b>CHARGE</b>	<b>SENTENCE</b>
1 Yukon	Carrying a weapon to commit assault on police officer, theft, and breach of probation	Suspended sentence with two year probation
2 Yukon	Assault causing bodily harm (of a bartender) and two breaches of probation	Suspended sentence with three year probation and \$100 fine per breach
3 Yukon	Two impaired driving offenses	Curative Discharge with three year probation
4 Yukon	Two counts of spousal assault and one count of assault	Suspended sentence with three year probation and \$300 fine
5 Yukon	Assault on a common law spouse	Suspended sentence with two year probation
6 Yukon	Sexual assault -touching for a sexual purpose (on his 11 year old daughter)	Suspended sentence with three year probation
7 B.C.	Spousal assault causing bodily harm	Suspended sentence with fourteen month probation
8 B.C.	Sexual assault (child acquaintance)	Suspended sentence with three year probation
9 Sask.	Impaired driving causing death (of father)	Suspended sentence with three year probation (including six months under house arrest) and a two year suspension of driver's licence
10 Sask.	Sexual assault- penetration, uttering threats, and common assault (on ex-girlfriend)	Sentence adjourned - banished from community for one year
11 Yukon	Assault causing bodily harm	Nine months in jail and two year probation
12 N.B.	Break and enter	Suspended sentence with one year probation
13 Yukon	Four charges of criminal harassment	Suspended sentence with three year probation
14 ON	Failed to provide breath sample and failure to attend court	Suspended sentence with three month probation, \$350 fine, and licence suspended for one year
15 N.B.	Assaulting police officer and breach of probation	30 day jail term to be served in the community and one year probation
16 Sask.	Arson (of sister's house)	18 month jail term to be served in the community
17 Yukon	Criminal negligence causing bodily harm (of her two month old baby)	6 months open custody and 18 month probation

APPENDIX 2: Offenders' Offence, Sex, and Age

<b>CASE</b>	<b>CHARGE</b>	<b>SEX</b>	<b>AGE</b>
1	Carrying a weapon to commit assault on police officer, theft, and breach of probation	Male	26
2	Assault causing bodily harm (of a bartender) and two breaches of probation	Male	30
3	Two impaired driving offenses	Male	?
4	Two counts of spousal assault and one count of assault	Male	?
5	Assault on a common law spouse	Male	?
6	Sexual assault -touching for a sexual purpose (on his 11 year old daughter)	Male	?
7	Spousal assault causing bodily harm	Male	37
8	Sexual assault (child acquaintance)	Male	35
9	Impaired driving causing death (of father)	Male	23
10	Sexual assault- penetration, uttering threats, and common assault (on ex-girlfriend)	Male	28
11	Assault causing bodily harm	Male	20
12	Break and enter	Male	19
13	Four charges of criminal harassment	Male	26
14	Failed to provide breath sample and failure to attend court	Female	?
15	Assaulting police officer and breach of probation	Male	?
16	Arson (of sister's house)	Female	?
17	Criminal negligence causing bodily harm (of her two month old baby)	Female	17

### APPENDIX 3: Steps Involved in Case #6

The judge in Case #6 outlined the steps as follows

[t]his 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 ... This was the first sexual assault case heard in their Community Sentencing process. In this case, a separate Victim Support Group, consisting of people familiar with the community, but living in [the city], 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. 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. 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 [a] Healing Camp ... The two support groups agreed to meet to discuss plans for reconciliation. A letter to be written by the father was agreed could be the basis of the first step towards reconciliation. Both support groups agreed to explore this first step. A special Circuit to the community ... was held to finalize the Circle Sentencing based upon the results of the measures initiated at the previous Circle Sentencing. All goals set by both support groups had been achieved. The offender had participated in ... Healing Camp retreats, including a four day fast. He had met regularly with the Support Group and with the people specially assigned for private sessions. The complete absence of any appropriate professional resources in the community forced the support group to seek out help for proper assistance to sexual offenders in [nearby cities]. ... Both support groups met to gain a better appreciation of the respective perspectives of victim and offender. During this meeting, the contents of a letter to be written by the offender was discussed. After the meeting, with extensive help from one member of the Support Group, Reverend [X], a letter was written by the offender, sealed and given to the Victim Support Group to pass on to the victim (P11-21).

## APPENDIX 4: Steps Involved in Case #13

### **Prior to the Circle**

Before being accepted in the community's Circle Sentencing program, the offender identified a Support Group and met with them once or twice weekly for five to six months. He also went for personal counselling and attended a weekend family healing session, attended weekly Justice Committee meetings and enrolled in the community based sex offender program (P41-53).

### **Circle Guidelines**

The judge claimed that

[t]his sentencing hearing was held in the [community], part of the [local] City ..., in a forum which is commonly referred to as "Circle Sentencing" ... this court heard an application from defence counsel to have this case dealt with in the [community] Circle process. After hearing extensive submissions from defence, Crown and the community justice representative, the application was granted (with extensive oral reasons). Prior to this application, the offender made application to the [community] Justice Committee, and his application to the court had the support of this Committee ... the procedure followed is set out in the information booklet ... : [quote] '[The community] Circle Court deals primarily with sentencing where a guilty plea has been entered. Offenders wishing their cases heard in the Circle are now required to complete an Application and develop an action plan (with the assistance of a support worker), which is reviewed by the Justice Committee ... The victim will be contacted to discuss the crime, any support or resources they need, how they feel about the offender applying for circle sentencing, and whether they would like to be part of the process ... Based on the information provided by the offender (particularly what steps they have taken on their action plan), their support worker, and the victim, the Justice Steering Committee and Elders will make a decision about approving the application. If the application to Circle Court has been approved, the offender works closely with members of the Community Justice Program prior to their court appearance' [end quote] (P8-9).

The judge commented on the fact that

[t]he procedure for conducting Circle Courts is also set out in the Circle Sentencing booklet published by [the community]: [quote] 'Circle proceedings are conducted in the [community] First Nations Potlach House

#### APPENDIX 4: Steps Involved in Case #13

and all community members are encouraged to attend and participate. Chairs are arranged in a circle, and the Judge, removed of formal gown, is seated in the circle along with defence and Crown counsel, the offender, the victim, formal and community based justice representatives, and community members. The Keeper of the Circle welcomes participants and explains the purpose and guidelines of the Circle. All participants are introduced and then the charges are read, followed by Crown and defence counsel giving opening submissions. The Keeper of the Circle then invites community members to speak. This includes submissions from the victim or someone on behalf of the victim. Elders provide knowledge and support within the circle. Honesty is a very important factor in the circle. It is essential that the positive and the negative (reality) are discussed so that the needs of the victim and offender can be met and solutions to the underlying conditions of the criminal behaviour are addressed. It is understood that the decisions that are made in the circle will affect the community as a whole. After everyone has had an opportunity to speak, the Keeper of the Circle, Justice of the Peace or the Judge will address the circle to determine if a consensus has been reached about a sentencing plan. Once the circle process is complete, the sentence plan will be imposed. However, if the offender has not followed through on 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. In all circle sentencing cases, a community sentencing plan will involve commitments by the offender and the community. The sentencing plan will be supervised by a probation officer or a community support person' [end quote]. The Court's own procedures supplement, and where there is a conflict, override the community guidelines:

1. Any criminal record or any other reports are received and marked as exhibits in the Circle Hearing process.
2. All proceedings are recorded.
3. A disputed fact is judicially determined in the usual manner through evidence heard under oath.
4. The Circle Hearing is open to the public.
5. All participants are given an opportunity to speak.
6. Crown and Defence are given the opportunity to participate and provide opening and closing remarks.
7. The Circle attempts to work towards a consensus. If a consensus is reached, the Keeper, Judge or Justice of the Peace may summarize the consensus. The Judge or Justice of the Peace will set out those parts of the consensus that relate to the offender in a Sentence. If a consensus is not reached, the Keeper and Judge or Justice of the Peace will summarize the matters agreed upon, and those not agreed. A Judge or Justice of the Peace will then impose a sentence based upon all evidence heard in the Circle. All sentences are recorded in accord with the common practices of a criminal Court. To this point in the proceeding, all of the above guidelines and

#### APPENDIX 4: Steps Involved in Case #13

procedures have been followed. [The community] document also sets out what may happen after the Court has imposed its sentence. [quote] ‘AFTER COURT There is continued contact with the victim. This may be to advise them of the outcome of court, and/or offer support and/or continue resources. There is ongoing supervision of the offender to assist them in meeting the conditions of their probation and/or to assist them with the continuation of their healing plan. A failure to abide by the sentencing plan may cause a review in the circle, and in some cases may involve a breach and sentencing by the court. The purpose of the sentence and the involvement of the community with the offender after court is to promote healing within the community, a positive reintegration of the offender into the community, and healing and support for the victim’ [end quote]. Preliminary Matters: Several orders were made prior to this hearing: 1. By Court Order, restrictions were placed on access to the psychological report prepared by [the psychologist] ... this report was summarized by myself in some detail, at the beginning of the hearing. A publication ban was imposed on the psychological report, with the exception of the actual recommendations made by [the psychologist], copies of which were made available to the media. 2. The usual Order was made prohibiting the identification of the complainants pursuant to s. 285(3) of the Code. 3. While the hearing was fully open to the media, and they could report everything that was said subject to (1) and (2) above, they were prohibited from attributing statements to specific community members or volunteers in the Circle. Full attribution was allowable regarding statements made by all professionals present, such as lawyers, probation officer, therapists and counsellors, as well as the accused (P12-27).

The judge claimed that

[The offender] spoke directly and openly to the Circle on each of the two days of this sentencing hearing. On the first day, he apologized to his parents and to the community for what he had done ... He read out a letter to his victims, apologized to them for what he did and acknowledged that he did not then pay attention to their feelings. On the second day, [the offender] was the last person to speak ... He acknowledged the pain he had caused his parents. He noted that this process, the community process, was not an easy one and that at times he felt like giving up. He tries to take each day, a day at a time ... The Circle Consensus: The Circle Sentencing Hearing was held over two four hour sessions, one week apart. After introductions by the Keepers of the Circle, an eagle feather was passed around the Circle. The person holding the feather was entitled to speak. Almost everyone in the Circle participated in a meaningful way, with considerable support given to the victims of these offences by persons who had been victims themselves (P54-70).

## APPENDIX 5: Purpose, Objectives and Principles of Sentencing

The purpose and principles of sentencing set out in the Canadian Criminal Code are as follows (<http://canada.justice.gc.ca/en/laws/C-46/39774.html>):

### **Purpose and Principles of Sentencing**

#### **Purpose**

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

#### **Fundamental principle**

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

#### **Other sentencing principles**

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
  - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
  - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child, or
  - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim shall be deemed to be aggravating circumstances;
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (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.

APPENDIX 6: Objectives of Sentencing Considered by the Judges

CASE	OBJECTIVES
	Objectives outlined in Criminal Code: denunciation of unlawful conduct, deterrence (general and specific), separate offenders from society (punishment), rehabilitation, provide reparations for harm done to victims/community, promote sense of responsibility in offenders, and acknowledgment of harm done.
1	Protection of the community, rehabilitation, minimizing adverse impacts on victims, reconciliation, and punishment.
2	Retribution, denunciation, punishment, compensation for victims, rehabilitation, and protection of society.
3	None mentioned
4	None mentioned
5	None mentioned
6	None mentioned
7	None mentioned
8	None mentioned
9	Deterrence (general deterrence), protection of the public, punishment, reformation, and rehabilitation.
10	Protection of the public and rehabilitation.
11	None mentioned
12	None mentioned
13	Deterrence (specific and general), denunciation, punishment, and rehabilitation.
14	Deterrence (specific and general) and rehabilitation.
15	The judge said they consider[ed] all of the relevant sentencing principles, with specific mention of rehabilitation.
16	The judge talked extensively about sections 718, 718.1 and 718.2 specifically mentioning the following: denounce the unlawful conduct, deterrence (specific and general), protection of the society, and rehabilitation. The judge also took into consideration, verbally, all subsections of 718.2 when deciding upon sentence in this case.
17	The judge in this case discussed the Supreme Court's decision in R.v. Gladue and the direction that case provided when looking at sentencing objectives/principles.

APPENDIX 7: Previous Convictions and Sentences of the Offenders

CASE	PREVIOUS CONVICTIONS/SENTENCES
1	The judge stated that in the past ten years the offender had committed 43 offences and had served over eight years in jail and carried out many probation orders. In the past three years alone, prior to this case, the offender had committed 27 offences (P108).
2	The judge outlined the offender's history as follows "[t]hree convictions for impaired driving, the latest occurring [three years earlier], and two convictions for assault registered [one year earlier] ... The offence before the court occurred before the two assault convictions [a year earlier]" (P26).
3	The offender had seven impaired driving offences on his record.
4	Not mentioned by judge.
5	Not mentioned by judge.
6	The judge stated that the offender had "no prior criminal record of sexual assault. His criminal record consists of minor offences which ceased [thirteen years ago]" (P3).
7	Two years earlier he assaulted his wife and was put on probation. He also committed a third drinking/driving offence, and received thirty days in jail. He has also been convicted for driving while prohibited.
8	No prior record.
9	He does have a record but it is not outlined, only that he was convicted for failing to remain at the scene of an accident (P26). His previous sentences were not outlined but the judge did say that he had never been incarcerated (P26).
10	The offender had a limited criminal history and he was previously convicted of assaulting two common-law wives (P18).
11	Not mentioned by judge.
12	Not mentioned by judge.
13	The judge stated that "[s]oon after leaving school, he was arrested for the first sexual assault [ten years ago] ... He also apparently made a sexual telephone call for which he was not charged ... (He was 15 or 16 years of age at this time and was convicted as a young offender)...Following the treatment, [the offender] was convicted of theft, two charges of assault, possession of a narcotic, and failure to provide a breath sample" (P37). The judge also stated that the offender "entered treatment in a group for sexual offenders in [the city], but indicates that his participation was inhibited by several factors" (P37).
14	Drinking and driving offense, 11 years ago.
15	Not mentioned by judge, but it was mentioned that he was on probation.
16	Not mentioned by judge.
17	The judge stated that the offender's "first involvement with the courts was [five years ago], around the age of 13. A PDR from [three years ago] notes that [the offender] had a history of petty thefts, largely to support her drug use. Over the past four years, [the offender] has incurred several different charges including

APPENDIX 7: Previous Convictions and Sentences of the Offenders

<b>CASE</b>	<b>PREVIOUS CONVICTIONS/SENTENCES</b>
17 cont'd	<p>violations of the Motor Vehicle Act and the Liquor Act, three charges of Theft Under \$5,000 and a Breach of Undertaking. Last year she was also charged with assaulting her cousin" (P16). The judge also stated that "[a]t the time of the offence, early [that year], [the offender] was still on probation, primarily for property and alcohol-related offences. She was released on a s.7.1 YOA Undertaking to her uncle subsequent to the offence involving her child. She attended voluntarily at the In-Patient Assessment Unit in [the community] for a s.13 YOA assessment from April ... to May ..., [that year]. She also attended a life-skills program in [the community] from February ... to March ... , [that year]. She also attended for some counselling at Mental Health Services. Notwithstanding the above programming, [the offender] relapsed into serious substance abuse in June [of that year]. This led to her arrest ... and ... she was again released, this time to her grandmother. Shortly thereafter, she again began abusing drugs, a warrant was issued for her arrest, and she was arrested [one month later]. She has been on consent remand since that date, some four months" (P25-26)</p>

APPENDIX 8: Rehabilitative Steps Taken By the Offenders Prior to Sentencing

CASE	REHABILITATIVE STEPS TAKEN PRIOR TO CIRCLE
1	None mentioned by judge.
2	The pre-sentence report indicated [that the offender] had pursued information about alcohol abuse primarily to avoid incarceration" (P38).
3	The judge said to the offender "[i]n the last eight months, not only have you maintained sobriety, you have maintained active and gainful employment, and as the police have stated, you have not been in trouble in any way, shape, or form in this community" (P15).
4	The judge said to the offender "[y]ou completed the residential program [30 day program] I am impressed that you have only turned to alcohol once, and I am impressed that you have maintained, since that relapse, three months of sobriety" (P14).
5	The offender had an anger management assessment and had sessions with a priest.
6	None mentioned by judge.
7	The offender and his family attended a treatment centre together and the offender had maintained full time employment (P14).
8	None mentioned by judge.
9	The judged claimed that "[a]fter the accident [the offender] went through a very difficult time. He accepted full responsibility for the accident and suffered severely from the guilt of having caused his father's death ... [the offender] became very dedicated to the church. He stopped drinking. He is now enrolled in the [local] University ... in the Department of Social Work and will commence his studies in January" (P8).
10	None mentioned by judge.
11	The offender had "written a letter and it was filed with the Court. He had also developed a plan for the Court. That plan involved probation, living [in his community] and performing community service" (P36).
12	None mentioned by judge.
13	The offender did the following before the sentencing circle: identified a support group to direct, counsel and support him; met with the support group once to twice weekly for five to six months; was involved in one on one counselling, at least once a week; attended a weekend family healing session with his parents and common-law spouse; was drug and alcohol free for 6 months; attended a residential alcohol and substance abuse program for four weeks; attended A.A. meetings on a regular basis; attended Men's Wellness Group meetings; made an effort to change his peer group; attended weekly justice committee meetings; and he enrolled and participated in a community based sex offender program.
14	The offender attended healing circles, started to learn about the traditions of her nation, and started seeing a councillor.
15	None mentioned by judge.
16	None mentioned by judge.

APPENDIX 8: Rehabilitative Steps Taken By the Offenders Prior to Sentencing

CASE	REHABILITATIVE STEPS TAKEN PRIOR TO CIRCLE
17	<p>The judge stated that "[w]hile in custody, she has done very well. In addition to participating in the normal programming of the facility, she met with ... a mental health nurse, who prepared a report for the court. Most importantly, [the offender] participated in four healing circles at the youth facility, facilitated by two first nation counsellors. These circles brought together various family members, who, at the time, were not on speaking terms with each other but came together to help [the offender]. [The offender] participated well in these healing circles. I am satisfied that these healing circles contributed to the progress made by [the offender] while in custody. During her remand custody, [the offender] has cleared her system of drugs, established contact with Mental Health Services, expanded her base of community support, made decisions regarding her baby, reconciled with the mother of the father of her child, formulated a healing plan and participated in school programming" (P27-28).</p>

APPENDIX 9: Probation Conditions for the Offenders

<b>CASE</b>	<b>PROBATION CONDITIONS</b>
1	To stay with his family on the trapline, to attend a two month residential program for alcoholics, to go back into the community into an alcohol-free home, to upgrade life and employment skills, and to attend substance abuse counselling.
2	Keep the peace, report to Probation Officer, take alcohol counselling/treatment, take anger management treatment/counselling, 200 hours community service within the year, and have a review within four months.
3	Keep the peace, report to support group and probation officer, 400 hours of community work over three years (take community kids into the bush, speak to youth about experiences, etc.), take alcohol treatment/counselling, attend A.A. meetings, meet with support group at least once a month, prohibition from possession/consumption of alcohol, blood tests, respect breath sample requests from police, a medical exam to assess for after-care programming, and a three year prohibition from driving with the ability to drive after one year under certain conditions.
4	Keep the peace, report to a probation officer, report to support group, 400 hundred hours of community service (working at the treatment camp, etc.), take alcohol assessment/treatment/counselling, attend alcohol relapse courses, may have to go back to treatment centre for another 30 day treatment, take husband's assaultive course, take relationship course, take whatever other course the support group/Probation officer recommend, take general counselling or lifeskill courses, a review will take place if he consumes alcohol, and spend forty-five days at the local treatment camp.
5	Take anger management assessment/treatment as recommended, enter into a residential treatment program with common-law wife and children, remain within jurisdiction of the Court, can leave with permission of Probation Officer, notify probation officer of change in address, and comply with such other reasonable orders made by probation officer.
6	Keep the peace, report to Probation Officer and support group, take counselling/treatment for grieving of marriage breakup, take counselling/treatment for sexual offenders, take substance abuse assessment/counselling/treatment, go for psychological assessment and go for psychological counselling/treatment, if assessed as necessary - undertake more residential treatment, complete one hundred hours of community service work in three months (help to build the local Healing Camp), do not possess/consume any prohibited drugs, upgrade life skills, meet with support group/Probation Officer as required, participate in activities at healing camp and any other activities the support group indicates, and no contact with victim unless authorized by Probation Officer.
7	Report to Probation Officer and Chief of reserve and a band of elders if required, voluntarily organize and manage a 'rediscovery camp for youth in July and August, abstain from alcohol, help to organize and participate in a support group for assaultive men and return to court within the year to report on progress.

APPENDIX 9: Probation Conditions for the Offenders

<b>CASE</b>	<b>PROBATION CONDITIONS</b>
8	Report to a Probation Officer, never baby sit, never go to a house where children live if their parents are not at home, take sex education, attend school, and if ordered at a later date, to attend a forensic institute for an inpatient assessment.
9	Report to Probation Officer/IPSEM coordinator once a week, reside at current address unless permitted otherwise, be confined to residence for six months (must have written permission to leave), present himself to any peace officer monitoring the provisions of this order, abstain from purchase/possession/consumption of alcohol, submit to breathalyzer on demand, continue attendance at the University, submit to alcohol and drug addiction assessment and co-operate and comply with any treatment directed, do not enter any licensed premises where there is the consumption/sale of alcohol, perform one hundred and twenty hours of community service work (provide lectures on drinking and driving), and follow all lawful instructions of chief Probation Officer/designate.
10*	The conditions while banished were: remain within a two mile radius of the cabin unless permitted to do otherwise, use the two-way radio (rented by him)/cell phone (provided by father) only for emergencies, only have contact with authorized persons, only visit with immediate family once a month for three hours, take self-improvement programs, cut wood for winter, insulate the cabin, install a door, build an outhouse over a pit, build another cabin according to plans, move into that cabin and restore the old one to its previous condition, make a vegetable garden, refrain from use of alcohol and non-prescription drugs, do not possess a gun or power bow (none allowed within two mile radius of cabin), peel logs, burn all garbage, do any other work required by Justice Committee or Probation Officer, do not use gas or electric powered tools unless authorized, and was responsible for his own clothing.
11	Keep the peace, report to Court as and when directed, report to Probation Officer, take alcohol assessment/counseling/treatment, attend residential treatment as directed, take such psychological assessment and counseling as directed, reside at such place as approved by Probation Officer, meet with community justice committee, and not to possess any firearms, ammunition or explosive substances (five year firearms prohibition).
12	Keep the peace, report to Probation Officer, remain within jurisdiction of the court, perform one hundred hours of Community Service to be done in five months, write a letter of apology to the local newsletter, go to local rehabilitation centre for interviews, counseling and treatment for drug/alcohol problems, participate in treatment recommended, and participate in five activities with elders.

APPENDIX 9: Probation Conditions for the Offenders

CASE	PROBATION CONDITIONS
13	<p>Keep the peace, report to court when directed, report to Probation Officer, not communicate directly or indirectly with the victims, not knowingly enter or loiter near their places of employment, not approach within 100 meters of their homes, complete the sex offender treatment program, attend any other programs deemed necessary, take alcohol/drug assessments/counseling/treatment (consent to release of information to Probation Officer in this area), go to residential treatment when directed to do so, abstain from possession/consumption of alcohol/non-prescription drugs, submit to blood test/breathalyzers/urinalysis as directed by Probation Officer, attend the following meetings: family, support group, justice committee, attend future Circle Sentencing Hearings in the community, attend any other programming as directed by the Probation officer/support group, give letter of apology to the victim services worker who will distribute it to the victims, provide gifts/items of value to the victims (within four months) up to five hundred dollars in cash or kind, with an elder's assistance, if the victims refuse the gift it is to be given to the local transition centre, not possess/use any firearms/ammunition/explosive substances, and it is expected that the offender will spend a minimum of 90 days in residential treatment programs over the three years.</p>
14	<p>Keep the peace - the judge stated that they did not feel a need to make a formal probation order to ensure that the steps outlined under the offender's rehabilitation so far, continue to be carried out.</p>
15	<p>Complete forty hours of community work.</p>
16**	<p>The following were the conditions to be followed under sentence: keep the peace, appear before the Court when required, report to the Chief Supervisor within two working days, remain within the jurisdiction of the Court unless given written permission, notify the Supervisor in advance of any change of name/address, notify with change of employment, abstain from consumption of alcohol and non-prescription drugs, attend school regularly and follow the rules and regulation of the school, attend healing circles with family and band members, attend parenting classes, attend personal counselling, take treatment for alcoholism including residential treatment, attend cultural ceremonies, and complete two hundred and forty hours of community service work. For three months she had to follow the following conditions of electronic monitoring: report to the electronic monitoring (IPSEM) coordinator, participate in the electric monitoring program and abide by the rules and regulations of that program, reside at an approved residence on the reserve, personally present herself to any peace officer or IPSEM Co-ordinator monitoring the conditions of this order, follow the lawful instruction of the IPSEM Co-ordinator pertaining to employment or attendance at school, submit to alcohol/drug testing as arranged and directed by the IPSEM co-ordinator/Peace Officer, go for assessment and participate in counselling for alcohol abuse as arranged by IPSEM co-ordinator, and participate in the Adult Probation attendance Centre Programs as directed.</p>

APPENDIX 9: Probation Conditions for the Offenders

CASE	PROBATION CONDITIONS
17	Report to youth worker as and when directed, if directed to do so, participate in the Intensive Probation Supervision Program, reside at approved residence and abide by it's rules, abide by curfew by being home between 9:00 p.m. and 6:00 a.m. (unless give permission to do otherwise, when with an adult, or until further order of the court), do not possess/consume alcohol/non-prescription drugs, submit to random breath tests/urinalysis as directed by her youth worker, participate in assessment/counselling/programming/ treatment for: substance abuse, life skills, mental health, school, work skills, parenting skills, Aboriginal Healing Circles, and sexual abuse treatment, identify a support group and meet with them regularly, do not have personal contact with the father of her baby, she can talk to him on the phone and correspond by letter, and give a list of negative peers to youth worker and have no contact with the people on that list.
*	In this case the sentence was adjourned and the accused was given a set of conditions to follow during his one year banishment before sentencing.
**	In this case the sentence was being served in the community, no probation was given but she was given a set of conditions to follow while carrying out her sentence.

APPENDIX 10: Judge's Consideration of Principles and Objectives of Sentencing in  
Case #16

The judge outlined Sections 718, 718.1 and 718.2 and stated that

[t]hat leaves the question of whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in Section 718 to 718.2 of the Criminal Code. Section 718 which I have quoted in full earlier in this sentencing, provides for purpose and objectives of sentencing. I turn to consider each subsection: (a) Will a conditional sentence in this case denounce the unlawful conduct of this accused? I am satisfied that the conditional sentence in this case will be denunciation of the crime committed because it is a sentence of imprisonment and imprisonment is the norm for offences of this nature. The difference is this Court imposes the terms of that imprisonment rather than leaving it to the correctional system. (b) Will a conditional sentence deter this accused and other persons from committing offences? This accused needs no additional punishment as a personal deterrent. She is very well motivated not to re-offend. In respect to the effect of conditional sentences on general deterrence of others, it is my hope that given the restrictive conditions imposed on these sentences, which often make them more difficult to serve than the 1/6th physical incarceration of a traditional sentence, that they will have a greater effect on deterrence than the traditional sentence has had - only time will tell. (c) In this particular case I see no necessity to separate this accused from society any longer. Whatever is to be gained from doing so has been achieved during her 73 days of remand. In her quiet way she very effectively informed the circle of her personal response and transformation as a result of what she experienced and observed during remand. (d) Will a conditional sentence assist in rehabilitating this offender? Twenty member's of the accused's band and family attended the sentencing circle. They, together with her, struggled with what had been done, how they felt about it and what should now be done. The accused heard them and the impact on her was obvious. The members of her family and band, the victims of her actions, arrived at a virtual consensus of what should be done and made recommendations for conditions to be attached to the accused's sentence. They asked her what she would do in light of their recommendations. She said she would work hard to follow the recommendations. These actions have laid a very good foundation for the conditional sentence to be most effective in the accused's rehabilitation. The conditions recommended will provide the accused with the treatment and guidance she needs to help rehabilitate herself. (e) and (f). This accused clearly accepts her responsibility and acknowledges the harm she has done to her community. She has expressed a willingness to do community service hours to return something of what she has taken from her community. With respect to Section 718.1, in my view the sentence to be served conditionally is one which is proportionate to the gravity of the offence and the degree of this accused's responsibility. She is being sentenced to imprisonment. The

APPENDIX 10: Judge's Consideration of Principles and Objectives of Sentencing in  
Case #16

length of the imprisonment as 18 months has been determined by me to be appropriate given the nature of the offence and the accused's lack of criminal record. The only difference is that she will serve the sentence in the community unless she is foolish enough to breach the stringent conditions that the sentencing circle has recommended and I intend to impose upon her. With respect to Section 718.2 (a) I have calculated the sentence cognizant of the aggravating and mitigating factors I referred to earlier. With respect to Section 718.2(b) ... I am of the view that the sentence to be imposed does meet the principle of parity as defined in this subsection. In coming to this conclusion, I am not unmindful that in most cases of arson the sentence should be served in a correctional facility. The sentence also meets the requirements of subsections (c) and (d). The sentence will not be unduly long or harsh. Less restrictive measures would not be appropriate in these circumstances. I wish to emphasize subsection (e) ... If this subsection is to have any impact on sentencing. It surely must be in the context of these facts. [The offender] is an Aboriginal accused, all her victims - her sister, her sister's family and the other members of her band, who collectively owned the house which was destroyed, are Aboriginal. They, in the sentencing circle, made it clear they are not seeking retribution. They seek healing and the accused's reform and re-integration into their community. They recommended a community based sentence. Although an incarceral sentence is required for these types of offences, for this accused, in the context of her community, actual physical imprisonment is not (P22-29).

APPENDIX 11: Range of Sentence Outlined by the Judges

CASE	SENTENCING RANGE
1	The judge indicated an upper limit to sentence based on submissions made by the Crown and Defence. They did not specify what this upper limit was.
2	Not mentioned by judge.
3	The judge stated that based on the circumstances of the offence and the offender's record, if they had received a jail sentence it would have been in excess of eight months (P16).
4	Not mentioned by judge.
5	Not mentioned by judge.
6	Not mentioned by judge.
7	The judge stated that "a gaol term of six or more months would be perfectly proper" (P13).
8	The Crown suggested two years in jail, while the judge said that "[m]y own observation is that in most cases where a man has done something like this to a little child, he should expect to go to gaol for not less than 6 months, and perhaps a year would be a usual sort of sentence, with a probation order also, in many cases" (P7).
9	The judge stated that the circle would "consider a sentence of one year in the provincial correctional institute" (P16).
10	Not mentioned by judge.
11	The judge stated that "a number of cases were placed before me and I have reviewed them. They indicate that there is a range of dispositions available to me and a variety of factors come into play in deciding what the length of custody should be. Periods of custody can vary anywhere from an intermittent sentence to two years, in my view, for an offence such as this, for a person this age, for a person with the kinds of problems that he has" (P52).
12	The judge stated that the range "would fall between a suspended sentence with probation of 6 months to a period of jail of 3 months with probation of 1 year" (P26).
13	Not mentioned by judge.
14	Not mentioned by judge.
15	The judge stated that "[t]he offence was an offence against the person which usually called for a period of incarceration" (P4)
16	The judges stated that "considering all of these factors I am satisfied that an appropriate sentence is 18 months...there is no minimum sentence for [this] offence" (P18-21).
17	Not mentioned by judge.

APPENDIX 12: Crown Submissions for Sentence

CASE	CROWN SUBMISSION FOR SENTENCE
1	A submission was made but it was not outlined by the judge.
2	Not mentioned by judge.
3	Not mentioned by judge.
4	Not mentioned by judge.
5	The Crown asked for an order directing the offender to abstain from alcohol.
6	Not mentioned by judge.
7	The judge stated that the Crown "quite properly made a submission to the effect that [the offender] should receive a gaol term for assaulting and hurting his wife at a time when he was on probation for having assaulted her just over four months previously" (P13).
8	The Crown submitted that two years in jail is the usual range (P7).
9	The judge stated that "[the Crown] discussed the seriousness of drinking and driving offences and the need to send a message to the whole of the community. She emphasized the deterrence aspect of sentencing ... Specific deterrence sends a message to the accused that he should no longer commit these crimes. General deterrence sends a message to the whole community that they should not drink and drive or they will be held responsible. This assures the public that they can drive on the road without risk. [The Crown] stated the Crown's position that [the offender] should receive a minimum of a two-year sentence. She cautioned the group that the Court of Appeal had previously held that electronic monitoring is not, in most cases appropriate for this particular offence. However, later in the day, in complete fairness, she conceded that in view of the many mitigating circumstances in this case, a sentence of two years would be unduly harsh. She felt that a prison term of about one year or less would be more appropriate (P12-13).
10	The Crown said that the threshold sentence for such an offence was three years in jail (P12).
11	The Crown asked for a firearms prohibition (P60).
12	Not mentioned by judge.
13	The judge stated that "[i]n the case at bar, the Crown has recommended a short period of incarceration, to be followed by a lengthy, treatment oriented, community monitored period of probation" (P110).
14	The Crown stated that "[o]n the basis of general and specific deterrence, the Crown would normally in these circumstances, be requesting a 14 days jail term. However, notice was not given, and given the dated record of ten years ago, there is one prior conviction of impaired, but it is over ten years ago. In light of that, notice was not given and I leave it up to Your Honour with respect to that matter" (P9-10).
15	Not mentioned by judge.
16	The judge stated that "the Crown concedes that [the offender] should receive a sentence less than two years less a day" (P21).
17	Not mentioned by judge.

APPENDIX 13: Defence Submission for Sentence

CASE	DEFENCE SUBMISSION FOR SENTENCE
1	One was made but not outlined by the judge.
2	Not mentioned
3	The defence counsel applied for a curative discharge.
4	Not mentioned
5	Not mentioned
6	Not mentioned
7	Not mentioned
8	Not mentioned
9	Not mentioned
10	Not mentioned
11	Not mentioned
12	Not mentioned
13	Not mentioned
14	The defense stated the following "I would respectfully submit to the Court that [the offender]'s contribution for her community for this judicial system itself and it's ability to meet needs of people in our community has been a remarkable and significant contribution that many who are involved in the justice system and who are unfortunate for one reason or another to come before it, from her own community will benefit for many, many years to come. I would ask the court to respectfully submit to the Court that it would be appropriate to consider that long term benefit to the community and the contribution that's so clearly has brought us here today" (P12-14).
15	Not mentioned
16	Not mentioned
17	Not mentioned

APPENDIX 14: Community Members' Suggestions for Sentence

CASE	CIRCLE SUGGESTION FOR SENTENCE
1	Suggestions were given but they were not mentioned by judge.
2	"[Community member #2], a First Nation councillor, ... volunteered his time to help [the offender] ... Putting his people in jail, he claims, has never worked and never will ... The Probation Officer recommended against incarceration, noting that [the offender] had significantly changed his life since the first pre-sentence report was compiled ... [Community member #3] and others in the circle volunteered to help [the offender] and restated in many different ways the same message; jail would be damaging to [the offender]'s new struggle to change his life" (P64-66). [Community member #1] in his statements also claimed that it would be "devastating to this man if he ever was sent to goal" (P50).
3	Not mentioned by judge.
4	Not mentioned but the judge stated that "clearly this circle is not suggesting gaol" (P15).
5	The judge did not mention what was specifically suggested, but they said that "no one who spoke during this circle sentencing thinks that jail will assist [the offender]" (P1).
6	Not specifically outlined but the judge did mention that "[d]espite 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 (P35).
7	Not mentioned by judge.
8	Not specifically outlined by the judge, but they did discuss how many people in the circle felt that a jail sentence would not be beneficial for the offender (P16-17).
9	The judge stated that "[i]n terms of sentencing alternatives, [the offender]'s family, who are also victims, recommended that he be placed on probation rather than be incarcerated. The possibility of electronic monitoring was mentioned as an alternative. Various alcohol treatment centres were also discussed. In the end though, it was recognized by the family that [the offender] had stopped drinking and they feel alcohol treatment was unnecessary. A social worker on the reserve offered to arrange counselling sessions for the accused as a condition of probation" (P10). The judge went on to say that "in the end, a consensus was reached by everyone except the prosecution that [the offender] should be sentenced to a term of probation which would include six months house arrest with electronic monitoring. This way he could begin his studies at University and work and continue to support his family. The group also agreed that he should give lectures to youth in schools on drinking and driving (P17-18).

APPENDIX 14: Community Members' Suggestions for Sentence

CASE	CIRCLE SUGGESTION FOR SENTENCE
10	<p>The judge stated that "[a]t the circle ... the consensus of the participants excluding the Crown prosecutor and the provincial corrections officer who had prepared the pre-sentence report, was that [the offender] should be banished to an island for the period of one year and if he completed this period of banishment then he should be put on probation for three years with conditions that he attend a program on sexual abuse, anger management and alcoholism and that he would not have contact with the victim for a period of three years from the commencement of the probation ... I also suggested to the ... Indian Band Justice Committee, who had suggested isolation to the circle, that they prepare a program for the isolation. This was done and the program was presented to a circle held [two months after the first circle] at [the] Band's hall. The circle reached the following consensus except for the Crown prosecutor, namely: 1. [the offender] should spend a year at a cabin located on an island 28 miles by water from the nearest road; 2.[the offender] should be confined to a two-mile radius of the cabin; 3. [the offender] should be supplied assistance by [the] Indian Band Welfare Department, which monies would be handled by a trustee; 4. [the offender] should be supervised every two weeks for the first four months and then once a month thereafter; 5. [the offender] should have no visitors except for service providers and resource people; 6. In case of an accident in which [the offender] requires hospitalization the time of his stay in the hospital will be doubled and added to his sentence; 7. A two-way radio should be provided by [the offender]'s family and the radio is to be used only in an emergency. 8. No weapons such as firearms or high-power bows will be allowed within a two-mile radius of the cabin; 10. A first aid kit is to be supplied for [the offender]'s use" (P1-2).</p>
11	<p>The circle's suggestion was not specifically outlined, but the judge did say that "there was quite a bit of discussion about the possibility of a placement in [the community] as part of a probation order" (P42).</p>
12	<p>The judge claimed that "[o]ne native member determined that the accused should repay the community twice the amount of the damage in community service hours. Another member felt that the accused should spend time with the elders in order to commence his healing journey. Other members believed that the accused had problems with alcohol and should seek help for this addiction" (P39).</p>
13	<p>The judge stated that "[a]ll of the community members in the Circle strongly recommended that the Court not impose a jail term. It would create a gap in the healing process and would also erode the commitment of the community to support and supervise [the offender] over the long term" (P74).</p>
14	<p>Not mentioned by judge.</p>

APPENDIX 14: Community Members' Suggestions for Sentence

CASE	CIRCLE SUGGESTION FOR SENTENCE
15	There was no sentence suggestion mentioned only that "most of the members of the circle spoke against incarceration as they saw it serving no useful purpose" (P11).
16	The judge stated that "[t]he 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. The circle agreed that the sentence should include the following conditions (not necessarily in order of priority): (1) that the accused attend school regularly; (2) that the accused attend healing circles with her family and elders; (3) that the accused attend parenting classes; (4) that the accused attend personal counselling with the band therapist, Lorna Gilbert and/or an elder; (5) that the accused participate in rehabilitation programs for her alcoholism; (6) that the accused attend cultural ceremonies with elders; (7) that the accused, in order to return something of what she has taken from her community, do a significant number of community service hours; (8) that the accused serve part of her sentence on electronic monitoring. Two of the participants of the circle objected to use of the electronic monitor. They said, that as they understood it, it was more difficult to serve time on the electronic monitor than in a correctional centre" (P9-10).
17	The healing plan was outlined by the judge as follows "Needs of the Young Person, [the offender]: As a result of the comprehensive and most helpful assessment prepared by Dr. X at the [local] Youth Forensic Psychiatric Services, the involvement of community-based counselling and [the offender]'s participation in four healing circles, a treatment plan was prepared by ... a community mental health nurse stationed in [the city], and ... a clinical psychologist. The 10-point plan, set out below, is prioritized: 1. It is imperative that [the offender] be provided Alcohol and Drug Services (ADS). Her continued use of substances places not only her immediate health at risk, but also greatly elevates her risk of harm by misadventure. In addition, as she apparently has continued interest in conceiving a child, it is likely that she will imperil an unborn child, as she will likely not know until well into her first trimester that she is in fact pregnant. 2. Appropriate living arrangements will be important for [the offender] If possible, having her live with sober and responsible adults would likely be in her best interests. She has demonstrated difficulty staying out of abusive relationships, and it seems clear that this is the nature of the relationship she has with her daughter's father. In whatever home she is placed, consistent structure, including both rules and consequences, should be in place. As it may be difficult for her to abide by these, regular respite should also be arranged in advance if possible. "3. [The offender] should be connected with a family doctor. Establishing a relationship with a physician will provide a forum for her to gain information about sexually transmitted diseases (STDs) and contraception. A relationship with a physician will

APPENDIX 14: Community Members' Suggestions for Sentence

CASE	CIRCLE SUGGESTION FOR SENTENCE
17 cont'd	<p>will also make it easier to obtain services as needed should she become pregnant. 4. [The offender] may gain benefit from attending the Youth Achievement Centre (YAC). In this organization, she will have the opportunity learn life skills and anger management techniques. In addition to this, the YAC is closely connected with [local] School, which may be an appropriate interim school placement for her. Having [the offender] connected to one organization in which she could establish longer term relationships would undoubtedly be beneficial to her, given her relationship history. 5. [The offender] should be connected with someone who could mentor her, both artistically and spiritually. Perhaps this could be accomplished through connection with an elder in the ... First Nation. 6. [The] Friendship Centre may also be able to provide [the offender] with some essential life skills. In particular, should her daughter be returned to her, attendance at the traditional parenting course would likely prove useful for her. 7. [The offender] may benefit from services of the Family Violence Prevention Unit (FVPA), as she has suffered extensive abuse throughout her entire life. This may also be an organization from whom she can gain anger management skills, and would be an alternative should the YAC not be available to offer her services. 8. Additionally, should [the offender] not receive services from the YAC, she should be encouraged to attend school (preferably), or to seek employment to provide structure in her life. Should she be reluctant to attend regular high school, perhaps an adult upgrading programme through [the local] College would be appropriate, as she has been "living an adult lifestyle for some time now. 9. It is not clear whether [the offender] does indeed have a learning disability. Should she experience limited success in the school programme she ultimately attends, a learning disability assessment may be appropriate, either through the Special Programs Division of</p>
17 cont'd	<p>the Public Schools Branch, or through the Learning Disabilities Association of [the Province/Territory]. 10. Finally, should any service provider involved with [the offender] observe any signs of mental health difficulties, [the offender] should, of course, be referred to MHS" (P68).</p>

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