

Circle Sentencing: The Silence Speaks Loudly:

**Considering Whether the Victims' Needs Can be Met Through Circle Sentencing
1998**

Background Excerpts

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

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

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

Throughout this paper, the term **sexual violence** refers to “physical or sexual assault, or the threat of physical or sexual assault of women by men with whom they have, or have had,

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

The Royal Commission on Aboriginal Peoples: Report of the Royal Commission on Aboriginal Peoples, 1996, provides the standard for [other] terminology used in this paper. The term Aboriginal people applies broadly to "refer to the indigenous inhabitants of Canada" belonging to the political and cultural entities known as 'Aboriginal peoples'." Aboriginal peoples "refers to organic political and cultural entities that stem historically from the original peoples of North America." "The Commission distinguishes between local communities and nations." Consistent with this distinction, in this work I use the terms First Nations community to refer to "a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation." The term Indian is used only when contained in quotations, or when used in legislation or policy or discussions relevant to legislation or policy. These choices were made with respect for Aboriginal people.

Chapter Four: Empowering Victims



In this chapter I respectfully present four criterion which include ideas that I feel may improve the chances of victims' needs being met through circle sentencing. I stress that I am not recommending a process to be used by First Nations communities—that is not my place. In addition, there clearly is no “one size fits all” solution for Aboriginal justice. However, I trust that some of these ideas may be useful for individuals working in the area of circle sentencing. I remind the reader that most of the ideas presented here are not mine, they are compiled from information collected through interviews and a literature review.¹ The reader will note a change in the style of writing in this chapter. Because I feel that the ideas below may have practical applications as a whole or individually I present them as somewhat succinct and autonomous points. I hope that my interpretation and arrangement of the information will allow this chapter to stand alone and serve as a potential tool for those working in the field of circle sentencing.

The first of the four criterion suggests activities to be carried out far in advance of a circle sentencing and is related to ensuring the community has achieved a state of readiness required to implement circle sentencing. Criterion number two focuses on assessing which cases are suitable for circle sentencing. Criterion number three stresses the importance of adequate preparation for a circle sentencing session. Criterion number four refers to how the results of the circle will be monitored and evaluated. This chapter offers an examination of these four criterion. Note that

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

consideration of any or all of the ideas here may guide the user to the conclusion that *it is in the victim's best interests not to hold a circle sentencing.*

Three assumptions underlie the discussion in this chapter.

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

Meeting the Needs of Victims through Circle Sentencing

One: Assessing Community Readiness

1. Circle sentencing is agreed to be a viable alternative for the community.
2. Resources are available to ensure the successful implementation of circle sentencing, the safety and the healing of the victim, and the monitoring and healing of the offender.
3. Eligible people in the community are trained to facilitate and to participate in the circle sentencing process.
4. Standards and measures for evaluating the circle sentencing process are in place.

Two: Assessing Case Suitability

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

Three: Preparing for the Circle Sentencing

1. Adequate preparations for the circle sentencing are made.

² Also stated in Royal Commission on Aboriginal Peoples. 1996. *Bridging the Cultural Divide: a Report on Aboriginal People and Criminal Justice in Canada*. Ottawa: Canada Communication Group at 310-311, point 11 of the Major findings and Conclusions, is the view that "criminal law and procedure operative on Aboriginal territories is *concurrent* with federal jurisdiction over criminal law and procedure generally" and in the area of criminal law specifically, first securing agreements with other relevant orders of government would be advisable.

Four: Monitoring and Evaluating the Outcome

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

Meeting the Needs of Victims through Circle Sentencing

One: Assessing Community Readiness

Some means of assessing community readiness before increasing community responsibility over justice systems is important, especially for offences involving sexual violence. Perhaps an Aboriginal Justice Council, as proposed in *Bridging the Cultural Divide*, would determine “which Aboriginal initiatives would be funded and what the level of funding may be.”³

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

Bridging the Cultural Divide suggests a development period of one year to eighteen months prior to communities implementing Aboriginal justice initiatives.⁴ This recommendation was made in a report by consultants who evaluated two troubled alternative justice projects: the South Vancouver Island Tribal Council justice program and Attawapiskat Diversion program of the Sandy Lake First Nation. “One of the key recommendations was that each project have an explicit project development process consisting of three phases: a needs assessment phase; a project development phase; and a pre-implementation phase.”⁵ *Bridging the Cultural Divide* stresses the importance of *genuine community consultation* in the developmental process.

A genuine consultation process is one that allows all those affected by the development of the justice project to have meaningful input to the process. A process undertaken only as a formality and that ignores sectors of the community that want input is obviously not a true consultative process. Ultimately, of course, the process is a sham and will prove

³ RCAP. *Report on the Royal Commission of Aboriginal Peoples. v.4 Perspectives and Realities* at 67.

⁴ RCAP. *Bridging the Cultural Divide* at 169.

⁵ RCAP. *Bridging the Cultural Divide* at 170.

counter-productive, since without community support an Aboriginal justice project will not succeed. The hallmark of a meaningful consultative process is one where *not* proceeding with the project is always an option.

The consultative process must include elders, traditional teachers and clan leaders....

In addition, however, *the consultative process must reach out to the groups that are the most marginal in the community* - those whose views are most often ignored when important decisions are made. In many Aboriginal communities, as in the rest of the country, *women and young people are often among the most marginalized groups.* [emphasis added]⁶

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

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

Adequate resources are required to support the circle sentencing process otherwise there may be too much reliance on community volunteers. Mary Crnkovich describes how a circle run by volunteers was fraught with logistical problems and as such “can be of very little benefit to anyone.”⁷ Without adequate resources to implement and administer alternative initiatives, including sufficient resources to support the victims, and other’s impacted by the families of violent offences, as well as the offenders, they will not succeed.

When a case goes before a circle usually the purpose is to consider alternatives to a jail sentence, or at least a shorter jail term. Often the offender remains in the community for healing. This “emphasis on healing presents different resource needs than a punishment-based system,

⁶ RCAP. *Bridging the Cultural Divide* at 171.

⁷ Mary Crnkovich. 1993. *Report on the Sentencing Circle in Kangiqsujuaq* at 7-9. Prepared for the Department of Justice Canada

which requires jails, guards and related resources. A healing orientation requires resources such as treatment facilities, counseling services, elders and healthy staff.”⁸ The nature of the offence is also an important consideration here, because in cases of violence Crnkovich suggests “What is missing from the focus on ‘healing’ is the assurance that if the wrongdoer stays in the community the victim is protected from further assaults.”⁹

The safety and security of the victims of violence are tantamount. The victim and her family must be protected from further attacks and also entitled to some refuge from the offender’s intrusion on her daily life. Emma LaRocque describes how “studies on sexual abuse also strongly indicate it is psychologically destructive for victims to be subjected to their attacker’s presence. This is exacerbated in small communities, and, it must be emphasized, most Native communities are small ...!”¹⁰

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

How to ensure that the offender will stay away from designated places of refuge for the victim is beyond the scope of this paper. The limited success of restraining orders in protecting victims from further harassment from offenders attests that this is difficult to enforce. However,

⁸ RCAP. *Bridging the Cultural Divide* at 173.

⁹ Mary Crnkovich. *Report on the Sentencing Circle in Kangiqsujuaq* at 23.

¹⁰ Emma LaRocque. In: *Aboriginal and Treaty Rights in Canada* at 81. I rely heavily on Emma LaRocque as a source for this section as she is one of a few First Nations women to be so outspoken and specific about restorative justice initiatives as a response to sexual assault offences. In the articles cited LaRocque directs her criticism

one potential advantage of involvement of the community in developing and in monitoring sentencing alternatives combined with the generally small size of First Nations communities could be the ability to closely monitor offenders. Of course, there must be a will to do so and we have seen that this is not always the case. *Bridging the Cultural Divide* notes that with respect to family violence “These offences are not always viewed with the seriousness they warrant by all community members”¹¹

As healing victims and offenders is critical to the success of alternative justice initiatives consideration of the resources required and the means of achieving this goal is critical. Whether an Aboriginal justice initiative can achieve this goal “depends on the availability of programs in the community to allow [victims and] offenders to begin their healing.”¹² Andrea Kamin and Romeo Beatch describe a promising community based approach to developing the counseling and support services required for both victims and abusers. People from professional agencies outside of the community were brought in to work with groups and to train members of the community as “paraprofessionals.” Paraprofessionals are identified as “people within the community who lack formal psychological training but who are involved within their society as community-type workers.”¹³ While some positive indicators of this approach were observed, Kamin and Beatch remind their readers that it will be sometime before the long-term success of such initiatives can be evaluated. They report that research has shown that importing professionals into First Nations communities on a short-term basis does not help individuals or the community—ongoing support is required.¹⁴

specifically at the Hollow Water Model, in Manitoba. For more information about the Hollow Water Model see Rupert Ross. *Returning to the Teachings*. Chapter Two.

¹¹ RCAP. *Bridging the Cultural Divide* at 269.

¹² RCAP. *Bridging the Cultural Divide* at 173 as suggested in Pauktuutit, the Inuit Women’s Association of Canada, “Setting Standards First”, paper presented to a National Symposium on Care and Custody of Aboriginal Offenders, Correctional Service Canada, 1995. pp. 8-10.

¹³ Andrea Kamin and Romeo Beatch. In: *The Northern Review*. Summer 1991 at 94.

¹⁴ Andrea Kamin and Romeo Beatch. In: *The Northern Review*. Summer 1991 at 102. In doing the research for this paper I was told on a confidential basis that some First Nations people suspect that government initiatives of making

The importance of adequate resources, particularly funding, was identified as an important issue by the Royal Commission on Aboriginal Peoples. The Commission recommended “at a minimum, funding for new initiatives should be guaranteed for at least the period required for serious and proper evaluation and testing.”¹⁵ The Commission also suggests that these initiatives should not require a large amount of new money. They recommend re-allocating money that is already being spent to “process and in many cases warehouse a small segment of the population.”¹⁶

3. *Eligible people in the community are trained to facilitate and to participate in the circle sentencing.*¹⁷

professional psychologists available to First Nations communities on an intermittent basis actually resulted in an increase in suicides during the period following their community visits.

¹⁵ RCAP. *Bridging the Cultural Divide* at 296.

¹⁶ RCAP. *Bridging the Cultural Divide* at 291.

¹⁷ Mary Crnkovich also makes this recommendation. *Report on the Sentencing Circle in Kangiqsujuaq* at 24.

Circle sentencing will only be as good as the people that facilitate the process. I use the term facilitate, as in to assist or to make easier, to emphasize that organizational hierarchies which would give some individuals power *over* justice are not preferred for alternative justice systems. It is precisely this European imposed notion of hierarchies which is causing problems in contemporary First Nations communities.¹⁸ A method must be in place for determining who is eligible to facilitate and to participate in the circle sentencing initiative and people must receive adequate training for this role. Hopefully such preparation will help avoid the problem Judge Barnett encountered with a circle sentencing where the ‘deck was stacked’. Val Napoleon, with the Gitx̱san Health Authorities, alluded to this potential problem with community justice initiatives.¹⁹ She suggested that research issues in Hazelton related to Unlocking Aboriginal Justice are the power in formal and informal relationships, and how the program can withstand the pressures of family.

Irene James writing in *Native Issues Monthly* states that “women need input into the justice systems that will be revived in our communities to ensure that our abusers will not also be our judges.”²⁰ However, my thesis is that even if women are involved in alternative justice systems it may still be difficult for them to speak out. Aboriginal women have been involved in the development of the “Community Driven Holistic Circle Healing Program” at Hollow Water. The Hollow Water Program, which has received much praise, particularly from Rupert Ross in *Returning to the Teachings*,²¹ elicits the following criticism from Emma LaRocque.

¹⁸ Rupert Ross. *Returning to the Teachings* at 55.

¹⁹ Restorative Justice Video Conference. June 19/20, 1997. Held in various locations of the Province of British Columbia. Primary sponsor the John Howard Society.

²⁰ Irene James. In: *Native Issues Monthly*. March 1996. Volume 4. No. 2 at 9.

²¹ Rupert Ross. *Returning to the Teachings*. Chapter Two.

I have received many calls from concerned people expressing the view that Hollow Water is a travesty of justice and a cruel disregard for human dignity. In particular, Native women expressed shock, disgust, and outrage.... Even white journalists urged me to make a statement and told me they were not politically free to question the Hollow Water decision. All those Native women who called asked to remain anonymous because they too did not feel free to publicly challenge Hollow Water. I have not felt free either.²²

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

Judge Barnett spoke of the value of the pre-sentence report in alerting the judge when the family dynamics in a community are working to protect the offender at the expense of the victim. Perhaps the pre-sentence report could be mandatory in determining whether it is appropriate to use circle sentencing in a case of sexual violence, and consideration of family dynamics could become a standard component of the pre-sentence report. This is problematic however, as it may be difficult for someone from outside the community to evaluate well.²³ I also recognize the potential for this dynamic to establish the probation officer as having control *over* the process. There is an inherent danger there given the history of Aboriginal peoples and the justice system. It seems the probation officer would need to be very familiar with the community and the complicated issues related to sexual violence, and would need to work closely with community members in preparing the pre-sentence report.

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

²² Emma LaRocque, *Aboriginal and Treaty Rights in Canada* at 210. Note that LaRocque's criticism of Hollow Water *appears* to be focused on one case that came before the circle. I was unable to contact Emma LaRocque to confirm whether my understanding is accurate.

²³ Antonia Mills (personal communication, February 16, 1998)

Carol LaPrairie and Julian Roberts criticize statements like the following that “Circle sentencing and other community justice processes do spectacularly better than formal justice agencies,” when there is no empirical proof.²⁴ They stress that standards and measures must be developed to determine the relative success of circle sentencing to the criminal justice system.

The evaluation issues are relatively straightforward. It has been claimed that sentencing circles have the following benefits: they (a) reduce recidivism; (b) prevent crime; (c) reduce costs; (d) advance the interests of victims, and (e) promote solidarity among community members, however community is defined. In all these aims, *the assumption is that circles will achieve these goals to a greater degree than a conventional sentencing hearing.* These are all measurable objectives and they should be put to the empirical test.²⁵

In terms of evaluation Judge Stuart suggests that rates of offender recidivism may not be the most important consideration in evaluation of circle sentencing. Stuart suggests “The impact of community based initiatives upon victims, upon restoring relationships injured by crime, upon fostering harmony within the community” and other benefits “are in the long run more important than the immediate impact on offenders.”²⁶ Whatever the evaluation criteria, some meaningful method of evaluating circle sentencing initiatives must be established prior to their implementation.

Two: Assessing Case Suitability

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

Debate over the question of whether cases involving violence, specifically sexual violence, should come before the circle seems to have resulted in the following opinion.

Indictable offences where there is a jail sentence being sought of *more than two years* are not suitable for circle sentencing, and *indictable offences* where the jail term will be *less than 2*

²⁴ As quoted in Carol LaPrairie and Julian Roberts. 1996. Sentencing Circles: Some Unanswered Questions. In: *Criminal Law Quarterly*. Volume 39 pp. 69-83 at 73.

²⁵ Carol LaPrairie and Julian Roberts. In: *Criminal Law Quarterly*. [39] at 83.

²⁶ Yukon Territorial Court Judge Barry Stuart. 1995. *Circles into Squares Systems: Can Community Processes be partnered with the Formal Justice System?* unpublished at 5 & 6.

years and summary offences requiring 2 years less a day jail terms are suitable for circle sentencing. This is unfortunate in the case of sexual violence as ‘sexual assault’ is a hybrid offence. Hybrid means that depending on the aggressiveness of the assault and previous history of the offender sexual assault may be deemed a summary or indictable offence. Many times these cases will be deemed a summary offence and under this general guideline suitable to a circle sentencing. This important issue requires further debate. Given the 1993 policy of the *Attorney General Violence Against Women in Relationships Policy*, which takes a zero-tolerance approach to violence against women, one wonders whether cases involving sexual violence should even go before a circle.

The introduction to the policy reads:

When abuse occurs, there is usually a power imbalance between the partners of the relationship. That power imbalance is perpetuated by societal and individual messages undermining the potential for women to gain control of their situations, and for men to be held accountable for their actions within a relationship. For example, a woman may receive constant indications from the abuser, and even family members, that it is inappropriate or futile for her to seek assistance with a “family problem” from outside agencies. When police comply with the victim’s wishes and do not recommend charges, or when Crown Counsel refuse to approve charges because the victim is a reluctant witness, the abuser is reinforced in his belief that his behavior is acceptable and more importantly, the false message that is repeatedly conveyed to the victim, that no help is available, is fortified by this inaction.²⁷

For Aboriginal women the threat that abuse is a “family problem” not to be brought to the attention of outside agencies is exacerbated. In many First Nations communities the private sphere extends from the Western concept of the nuclear household to a sometimes quite extensive community. There are powerful dynamics among and between victims and offenders and their respective families in First Nations communities. Complicating this dynamic is rampant and justified mistrust of government institutions such that there is no desire to bring these issues to the attention of outside agencies. But clearly, power imbalances are not desirable in circle

sentencing, and an offender's abuse of power *over* the victim when sexual violence is involved must be considered. Criminal justice system personnel and Aboriginal justice system personnel must be familiar with the abuse of power and other dynamics which discourage victim's from taking steps to end abuse, as these may undermine the circle sentencing process.

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

[T]he court should examine the circumstances which are peculiar because of the relationship. When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they can often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape. Such women's financial state is frequently one of economic dependence upon a man. Their emotional psychological state militates against their leaving the relationship because the abuse they suffer causes them to lose their self-esteem and to develop a sense of powerlessness and inability to control events.²⁸

In addition, one must consider that "It is well known that recidivism of sexual offenders is very high, and as yet there are no substantive studies as to the success of Native mediation programs in rehabilitating offenders," thus again raising the question of whether cases involving sexual violence are suitable for circle sentencing.²⁹

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

²⁷ Ministry of Attorney General. 1993. Violence Against Women in Relationships Policy. In: *Policy on the Criminal Justice System Response to Violence Against Women and Children*. Victoria: Queen's Printer at 4.

²⁸ *R. v. Highway*. Alta C.A. May 14, 1992. reported [1993] C.N.L.R. 1 at 119.

²⁹ Emma LaRocque. In: *Aboriginal and Treaty Rights in Canada* at 93.

Bridging the Cultural Divide considers how an Aboriginal justice system might respond when individuals do not admit their guilt or ‘deny responsibility.’³⁰ They conclude that “Some Aboriginal nations and their communities, even as they develop their own Aboriginal justice systems, may decide that the most effective use of their energies and resources is to concentrate on cases where the individual is prepared to accept responsibility”³¹

R. v. Taylor, discussed earlier, exemplifies how problematic it is for the victim if the accused does not admit guilt.³² The trial judge stated “The plea is irrelevant to the issue of sentencing.”³³ Carol LaPrairie has a different view. She criticizes the fact that there is no guideline regarding whether there has been “an admission of guilt or ... a finding of guilt ... in order to institute the circle sentencing process.”³⁴ She suggests this is an “important issue as it addresses one of the underlying objectives of circle sentencing - victim-offender reconciliation and remorse. The willingness of victims to believe in the remorse of the offenders and subsequently to “reconcile” may be dramatically influenced by how “guilt” is determined.”³⁵

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

3. *The victim is a willing participant.*

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

³⁰ Guilt is a term of Western jurisprudence and many argue not so meaningful to Aboriginal people.

³¹ RCAP. *Bridging the Cultural Divide* at 198.

³² *R. v. Taylor* [1995] 3 C.N.L.R. 167 (Sask. Q.B). *R. v. Taylor* [1996] 2 C.N.L.R. 208 (Sask. C.A.)

³³ *R. v. Taylor* [1995] 3 C.N.L.R. 167 (Sask. Q.B). *R. v. Taylor* [1996] 2 C.N.L.R. 208 (Sask. C.A.) at 167.

³⁴ Carol LaPrairie. 1995. *Altering Course: New Directions in Criminal Justice and Corrections. Sentencing Circles and Family Group Conferences.* unpublished at 11.

³⁵ Carol LaPrairie. *Altering Course* at 11.

Again with regards to *R. v. Taylor* the trial judge reasoned that “A circle may be held even if the victim is opposed to it.”³⁶ With all due respect to the trial judge, while his rationale that the circle may be held if the victim is in opposition to it may be a legitimate point of law, this is not a commonly held view.³⁷ It is also important to recognize that there are often *many victims* when an offence has been committed. “We’re really really close families, as people could see ... how close my family was until this whole thing came and then it just kind of destroyed a lot of our family, their lives, and kind of separated us all.”³⁸

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

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

The importance of an objective victim’s advocate was addressed by one of the women I interviewed. Her experience was that one counselor was appointed to work with *both* the victim’s and the offender’s family. The victim’s family perceived that the person who was supposed to work with both families, ended up working on behalf of the offender and closely with the chief of

³⁶ *R. v. Taylor* at 167. With regards to this point Carol LaPrairie and her colleague Julian V. Roberts present the view that “...sentencing circles only proceed with the full co-operation of the victim....and this transfers “...an unacceptable degree of power to the individual victim.” In: *Criminal Law Quarterly*. [39] at 81. Consideration of this point is beyond the scope of this paper.

³⁷ Carol LaPrairie and Julian V. Roberts. In: *Criminal Law Quarterly*. [39] at 81.

³⁸ Advisor’s identity withheld (personal communication, October 8, 1996).

the offender's band. A probation officer suggests "the victim needs an informed advocate—someone who knows the dynamics of the issues in the circle or the court—a victim services worker "someone who understands their position."³⁹ While this recommendation is not specifically related to the example cited above it has merit as a means of helping to ensure the victim is not re-victimized through the circle sentencing process.

Three: Preparing for the Circle Sentencing

1. Adequate preparations for the circle sentencing are made.

Judge Barry Stuart outlines the significant preparation that should take place prior to a circle sentencing finding that "... the steps taken before a Circle Sentencing Hearing can substantially affect the success of the process."⁴⁰ Stuart advises "A justice liaison person hired from the community to co-ordinate the pre-hearing process can make a remarkable difference."⁴¹ Mary Crnkovich also stresses the need for adequate preparation, suggesting the lack of preparation and organization of the circle sentencing process in *R. v. Naappaluk*⁴² contributed to an awkward and uncomfortable environment. The victim and other circle participants did not understand the purpose or proceedings of the circle, and were not comfortable speaking out. Crnkovich attributes the lack of organization to limited resources and reliance on community volunteers for the circle organization, "a common problem faced in the North."⁴³ This example again shows the importance of adequate resources, both financial and human resources, for successful implementation of circle sentencing initiatives.

Four: Monitoring and Evaluating the Outcome

³⁹ Advisor's identity withheld (personal communication, February 27, 1997)

⁴⁰ Yukon Territorial Court Judge Barry Stuart. 1995. *Circles into Squares Systems: Can Community Processes be Partnered with the Formal Justice System?* unpublished at 9.

⁴¹ Yukon Territorial Court Judge Barry Stuart. *Circles into Squares Systems* at 9. Also detailed preparatory guidelines for Family Group Conferencing many of which would be applicable with circle sentencing are found in: McDonald, J.M., O'Connell, R.A., Moore, D.B., & Bransbury, E. *Convening Family Conference: Training Manual*. Attached to Carol LaPrairie. 1995. *Conferencing in Canada: Finding Middle Ground in Criminal Justice?* Unpublished.

⁴² *R. v. Naappaluk*. May 4, 1993. Dutil, J.C.Q. (C.Q.) Reported 1994 2 [C.N.L.R.] 143.

⁴³ Mary Crnkovich. *Report on the Sentencing Circle in Kangiqsujuaq*. unpublished at 9.

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

Evident in the thesis findings is the concern of many advisors that the offender be held accountable for compliance with the conditions of the circle. Judge Stuart describes how reviews after the circle sentencing are important in monitoring offender compliance. He cites a number of benefits of reviews, including: the review date serves as a milestone in working through the sentencing plan; the offender is made personally accountable at the review; reviews enable adjustments to be made to the sentencing plan; and the review keeps the community informed of what is happening.⁴⁴ A review process might also encourage the community to be more committed to monitoring offender compliance and ensuring that the probation officer is informed regarding any breach of the conditions developed by the circle.

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

Without exception the people I spoke with about this topic agreed that there must be consequences for the offender if the conditions developed by the circle are not met. Through the media we learn of the inherent difficulties in the criminal justice system with ensuring offenders comply with terms of probation orders. The same issues will arise in circle sentencing. Judge Stuart suggests that “Community support, and formal justice agency support, depends upon knowing the success stories, and knowing action will be taken if something goes wrong.”⁴⁵ Judge Levis and others express their preference that the sanctions for non-compliance involve a return to the formal justice system. Note that the problem of people not reporting non-compliance is a conspiracy of silence of a different sort.⁴⁶

3. *An appeal mechanism is in place.*

⁴⁴ Judge Barry Stuart. *Circles into Squares Systems* at 32.

⁴⁵ Judge Barry Stuart. *Circles into Squares Systems* at 32.

⁴⁶ Antonia Mills (personal communication, February 16, 1998)

Bridging the Cultural Divide suggests “A complete and comprehensive justice system not only has the ability to resolve questions of fact and law at the trial level, but also has room for dissatisfied parties to appeal decisions they believe are wrong.”⁴⁷ As long as the Western justice system plays a role in circle sentencing there will be a process of appeal. However, at such time that First Nations communities take on their own systems of justice then this would be a requirement.

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

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

⁴⁷ RCAP. *Bridging the Cultural Divide* at 179.