

# Appellate Court Scrutiny Of Circle Sentencing\*

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## I. INTRODUCTION

ONE OF THE MOST SIGNIFICANT FEATURES OF THE PRACTICE of circle sentencing as it has developed in Canada in recent years is the central role of the judiciary. Although calls for law reform to improve the capacity of the Canadian criminal justice system to “deliver” justice to Aboriginal communities have tended to assume the need for action by *legislative* and/or *executive* government, the key governmental participant in circle sentencing has been the *judiciary*.<sup>1</sup> Of course, that is not to say that circle sentencing has been uniformly adopted by all sections of the Canadian judiciary. Given the origins of the practice in judicial sentencing discretion, the inclination of the presiding judge has a pivotal impact on whether circle sentencing takes place in any given case, or more generally, whether it “takes hold” on a court circuit or in an Aboriginal community. The point is that it has been judges, rather than legislators or justice department bureaucrats, who have been, in co-operation with First Nations communities, responsible for the adoption of circle sentencing as a recognised process in the Canadian criminal justice system.

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<sup>1</sup> By drawing attention to the role of judges respecting the emergence of circle sentencing I do not intend to minimise the role of First Nations communities as co-participants in this particular community justice initiative.

Various aspects of the development and practice of circle sentencing have been the subject of analysis and discussion in the academic literature.<sup>2</sup> Elsewhere the rules, guidelines and criteria that have been developed by judges and Aboriginal communities to “frame” the operation of sentencing circles have been examined.<sup>3</sup> Another important dimension of the judicial influence on the development and direction of circle sentencing is the review role played by appellate courts. Given the central role played by trial court judges—particularly judges of provincial/territorial courts—in the initiation and development of circle sentencing, appellate courts stand in a powerful position with considerable potential for influencing the manner in which sentencing circles operate.

This article reviews the manner in which provincial/territorial appellate courts have responded to the emergence of circle sentencing in their respective jurisdictions. The aim of this discussion is to shed light on the actual and potential impact of appellate court scrutiny on circle sentencing.

To date,<sup>4</sup> only the Saskatchewan Court of Appeal and the Yukon Territorial Court of Appeal have been called upon by the Crown to review sentences arrived at by sentencing circle.<sup>5</sup> This article will focus on the appeal decisions

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<sup>2</sup> See e.g., R. Green, “Aboriginal Community Sentencing and Mediation: Within and Without the Circle” (1997) 25 Man. L.J. 77; R. Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich Publishing, 1998) c. 5 [hereinafter Green (1998)]; see B. Stuart, “Circle Sentencing in Yukon Territory, Canada: A Partnership of the Community and the Criminal Justice System” (1996) 20 Int’l J. Comp. & App. Crim. 291; J.V. Roberts & C. LaPrairie, “Sentencing Circles: Some Unanswered Questions” (1996) 39 Crim. L.Q. 69; C. LaPrairie, “Altering Course: New Directions in Criminal Justice—Sentencing Circles and Family Group Conferences” (1995) Aus. & N.Z. J. of Crim. 78; M. Crnkovich, “A Sentencing Circle” (1996) 36 J. L. Plur. 159; L. Chartrand, “The Appropriateness of the Lawyer as Advocate in Contemporary Aboriginal Justice Initiatives” (1995) 33:4 Alta. L.R. 874; A. Janvier, “Sentencing Circles” in R. Gosse, J. Youngblood Henderson & R. Carter, eds., *Continuing Poundmaker & Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing and the College of Law, University of Saskatchewan, 1994) at 301; and C. Barnett, “Circle Sentencing/Alternative Sentencing,” [1995] 3 C.N.L.R. 1.

<sup>3</sup> L. McNamara, “The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines” (2000) 18 Windsor Y.B. Access Just. (forthcoming).

<sup>4</sup> As of 27 October 1999—the date of submission.

<sup>5</sup> Of course, many appellate courts have rendered decisions in cases involving an appeal against the sentence imposed on an Aboriginal offender where the Court has been required to consider the relevance of the offender’s Aboriginal status and the applicability of restorative justice principles and community-based sentencing—particularly since the 1996 addition of s. 718.2(e) to the *Criminal Code* that directs sentencing judges that:

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.

handed down in these two jurisdictions. While the primary ground of appeal in each of the appeal cases has been the fitness of the sentence imposed, both courts have taken the opportunity—in varying degrees—to comment on the broader issues regarding the place of circle sentencing within the Canadian criminal justice system.

## II. YUKON TERRITORY

### A. Johnson

In *R. v. Johnson*<sup>6</sup> the Crown appealed to the Yukon Territory Court of Appeal from a case where the accused had been sentenced by a sentencing circle in the Yukon Territorial Court on a conviction for assault causing bodily harm. The Crown appealed against Stuart J.'s decision not to impose a mandatory firearms prohibition as required by section 100 of the *Criminal Code*.<sup>7</sup> Stuart J. granted a constitutional exemption to the offender—a member of the Kluane First Nation—on the basis that the firearms prohibition would constitute cruel and unusual punishment given the offender's identity as a member of the Kluane community and the importance of hunting to his cultural identity. The appeal was successful. The Court of Appeal ruled that the case was not appropriate for the granting of a constitutional exemption.

On its face, the Crown's appeal did not involve a direct attack on the adoption of the circle sentencing procedure—the main submission was that there had not been “a proper factual basis ... proven by sworn testimony.”<sup>8</sup> However, the Crown supported its submission by reference to the fact that the evidence relied upon by Stuart J. in granting the exemption was derived from a sentencing circle, the participants in which, apart from the offender, were not under oath. The success of the Crown appeal did not turn on the status of statements made by participants in the sentencing circle. Finch J.A. observed that whether or not such statements constitute “evidence,” they “contained information which the learned sentencing judge could properly take into account in deciding whether to grant a constitutional exemption. He further noted:

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See e.g., *R v. Wells*, (April 15, 1998) Calgary 97-16918 (Alta. C.A.); *R. v. C.J.* (1997), 119 C.C.C. (3d) 444 (Nfld. C.A.); *R. v. Gladue* (1997) 119 C.C.C. (3d) 481 (B.C. C.A.); and, *R. v. Gladue*, [1999] 1 S.C.R. 688 [hereinafter *Gladue*]. However, for the purpose of this paper only cases where the nature or status of the practice of circle sentencing are at issue will be discussed.

<sup>6</sup> (1994), 31 C.R. (4<sup>th</sup>) 262 (Y.T. C.A.) [hereinafter *Johnson*].

<sup>7</sup> *Criminal Code of Canada* R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

<sup>8</sup> *Johnson*, *supra* note 6 at 282 per Finch J.A.

[The] statements were made in a solemn judicial setting. They were spontaneous statements elicited without leading questions, and the sentencing judge had the opportunity to see and to hear those who spoke.<sup>9</sup>

The appeal succeeded on the basis the making the mandatory firearm prohibition order would not amount to cruel and unusual punishment.

During the course of determining the substance of the appeal each of the judges commented on the practice of circle sentencing. The tone of the judges' comments are revealing of the very novel nature of circle sentencing in 1994. For example, Finch J.A. observed:

The judge appears to have regarded community involvement in the process as important to its acceptance of any sentence which might be imposed, and to the [offender's] rehabilitation.<sup>10</sup>

The implication of the tone of this observation is that Finch J.A. considered this to be a somewhat curious, or at least, novel notion. Another comment suggests that while Finch J.A. was aware of the limitations of "long distance justice," there was little appreciation of the justice system's capacity for flexibility and responsiveness vis-a-vis the needs of First Nations communities:

I recognize that this reasoning may not appeal to the residents of Burwash Landing. They may see these views as those of a person of European ancestry living in a large, urban centre. I acknowledge that our understanding of the native perspective is imperfect at best. All one can try to do is to balance sensitivity for the individual offender with an equal and dispassionate application of the law.<sup>11</sup>

The inadequacy of conventional judicial decision-making and the limitations of the circuit court system for Aboriginal communities has been one of the motivations for the developments of community-based justice in the form of circle sentencing.<sup>12</sup> Finch J.A.'s pessimistic conclusion that "[a]ll one can try to do is balance sensitivity for the individual offender with an equal and dispassionate application of the law" is ironic. The emergence of circle sentencing reflects the refusal of judges and Aboriginal communities to accept the conventional constraints on those steps that can be taken in pursuit of fairness, justice and appropriateness in the sentencing process.

McEachern C.J.'s brief judgment consisted primarily of a figurative "raised judicial eyebrow" about the use of circle sentencing:

<sup>9</sup> Johnson, *supra* note 6 at 285–286.

<sup>10</sup> *Ibid.* at 280.

<sup>11</sup> *Ibid.* at 295.

<sup>12</sup> See *R. v. Moses* (1992), 71 C.C.C. (3d) 347 (Y.T. Terr. Ct.) at 384 per Stuart J.; Fafard J. in M. Nicholson, ed., *Justice and Northern Families: In Crisis—In Healing—In Control* (Vancouver: The Northern Justice Society and Simon Fraser University, 1994) at 53. See also Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: R.C.A.P., 1996) at 109–116.

I wish ... to observe that the sentencing circles employed in this case, although possibly useful in cases of this kind, went through several phases, and took far longer than the sentencing process prescribed by the *Criminal Code*. It is apparent that this procedure cannot be employed in every case.

Sentencing circles are not prescribed by the *Criminal Code of Canada*. If the judges of a court propose to use sentencing circles to assist them in some kinds of sentencing (and I do not suggest they should not), they should establish and publish rules under *Code* s. 482(2) and the *Interpretation Act* ... s. 35 ... so that both the Crown and the accused, and their counsel, will know the kinds of cases to be tried in this way, and precisely what they and their client may expect. It would be wrong, in my view, if the judges of a court should follow different procedures on such a common question as sentencing which is an important component of every case where a conviction is entered.

Also, if rules are established, any aggrieved party will have a certain basis for attacking such procedure either before or after the commencement of the sentencing process.<sup>13</sup>

Cumming J.A. "agree[d] with the recommendation of the Chief Justice with regard to the promulgation of Rules relating to sentencing circles."<sup>14</sup>

The decision of the Court of Appeal in *Johnson* was hardly a warm reception for circle sentencing, although the judgment of Finch J.A. did, at least, suggest some appreciation of the potential value of the practice. However, even though there appeared to be some unease about the appropriateness and validity of the practice of circle sentencing, it is significant that the Court of Appeal did not attempt to proscribe how or when sentencing circle should operate. Perhaps reflecting the novelty of sentencing circles at the time McEachern C.J. and Cumming J.A. went no further than to recommend that rules be established.<sup>15</sup>

## B. D.A.L.

In *R. v. D.A.L.*<sup>16</sup> the Yukon Territorial Court of Appeal considered a Crown appeal against sentence in a case where the offender was convicted of sexual assault. Strictly speaking this was not a sentencing circle case. The sentencing judge was not advised until the commencement of the scheduled sentencing hearing that the offender wanted to have his sentence determined in a sentencing circle.<sup>17</sup> Further, the Crown did not support the holding of a circle.

<sup>13</sup> Fafard J., *supra* note 12 at 296.

<sup>14</sup> *Ibid.* at 278.

<sup>15</sup> In *R. v. H.R.* (1997), 205 A.R. 227 (Alta. P.C.) at 237, Marshall J. quoted extensively, and with approval, from the judgment of McEachern C.J. in *Johnson* to support his own reservations about "[t]he difficulty with utilizing Sentencing Circle Recommendations to the full" given the absence of clear rules and procedures.

<sup>16</sup> [1995] Y.J. No. 2 (Y.T. C.A.), online: QL (Y.J.) [hereinafter *D.A.L.*].

<sup>17</sup> *R. v. Lucas* (1994), 78 W.A.C. 315 (Y.T. C.A.) [hereinafter *Lucas*].

Consequently, the judge rejected the offender's application for a sentencing circle. However, rather than conduct a "conventional" sentencing hearing Hudson J. organised the sentencing hearing as follows:

All persons who were present and were thought to be of importance by the accused and his counsel were heard. They were sworn at once and sat as a group and shared each other's company while testifying. Each was able to defer to another in answering questions.<sup>18</sup>

Hudson J. explained that this process was "not a sentencing circle in the cultural sense that has been adopted in other courts,"<sup>19</sup> and observed that such sentencing circles "are achieved by some preparation and the agreement of the prosecuting authorities, which was not the case here."<sup>20</sup> The judge continued:

However, though no circle resulted, there were certainly relaxations of the traditional way, and ... I hope that the fullness of the presentation by the witnesses has achieved the satisfaction of the community in expressing their interest and concern.<sup>21</sup>

Even though the case did not involve a full sentencing circle, the disposition clearly reflected the principles of community-based and culturally appropriate sentencing. Hudson J. sentenced the offender to three months imprisonment and two years probation. The primary probation condition was that the offender was "banished" for a period of 12 months from the town of Mayo—where the offence occurred—as well as from Dawson City and Whitehorse to a First Nation "bush settlement" called No-Gold. During the "banishment," the intention was that he would gain "the rehabilitative effects of required bush living, living the Indian way."<sup>22</sup>

The Crown appealed against the sentence on two main grounds. First the Crown argued that the sentencing process adopted by the judge "amounted to a one-sided circle sentencing in which the interests of the victim were not properly represented."<sup>23</sup> Second, the Crown argued that the sentence imposed by the judge was inadequate given the seriousness of the offence.

The Court of Appeal unanimously dismissed the appeal. Wood J.A. (Rowles and Finch JJ.A. concurring) expressly approved of the trial judge's decision to

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<sup>18</sup> *Lucas*, *supra* note 17 at para. 1.

<sup>19</sup> *Ibid.* at para. 2. For a detailed description of the distinctive features of a sentencing circle see Judge B. Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Aboriginal Justice Learning Network, Justice Canada, 1997). For a discussion of how sentencing circles differ from other forms of Aboriginal community-based justice, see Green (1998), *supra* note 2.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at para. 14.

<sup>23</sup> *D.A.L.*, *supra* note 16 at para. 11.

decline the offender's request for a sentencing circle given the circumstances of the absence of adequate notice and Crown opposition.<sup>24</sup> However, despite describing the alternative sentencing process as "somewhat unusual"<sup>25</sup> Wood J.A. rejected the Crown's submission that there was an absence of balance and a failure to address the victim's concerns.<sup>26</sup> On the substantive issue of the sentence imposed, Wood J.A. concluded that the judge had not erred and that the sentence was not unfit, thus, implicitly endorsing Hudson J.'s decision to adopt "an innovative approach to sentencing"<sup>27</sup> in the circumstances of the case.

In *D.A.L.*—as in *Johnson*—the Court declined to explicitly endorse or "sanction" the use of circle sentencing or related forms of community-based sentencing. However, the decision in *D.A.L.* suggested a willingness on the part of the Yukon Territorial Court of Appeal to allow sentencing judges considerable latitude with respect to both the use of alternative community-based sentencing processes in addition to the range of acceptable sentencing outcomes.

### C. Johns

In *R. v. Johns*<sup>28</sup> the Crown again appealed against a sentence that was imposed as a result of a sentencing circle. Johns was sentenced to 90 days imprisonment with two years probation on a charge of alcohol-impaired driving under section 253 of the *Criminal Code*. It was the seventh time Johns had been convicted of drinking and driving. At the sentencing hearing the Crown submitted—and the sentencing judge agreed—that the usual sentence range would be one to two years imprisonment. However, in light of a number of mitigating circumstances the Crown requested a sentence of six to nine months imprisonment.

Prowse J.A., for the Court of Appeal (McEachern C.J., Goldie and Prowse J.J.A.) summarised the basis of the Crown appeal:

The Crown submitted that the sentence imposed on Mr Johns was inadequate given Mr Johns' record for related offences, and that it fell well below the range of sentences endorsed by this Court in similar cases.<sup>29</sup>

The Court of Appeal dismissed the appeal, ruling that the sentence when "viewed in its entirety [including a detailed and restrictive probation order] ...

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<sup>24</sup> *D.A.L.*, *supra* note 16.

<sup>25</sup> *Ibid.* at para. 12.

<sup>26</sup> Wood J.A. noted that the victim had not complained of the incident, had refused to give evidence at the sentencing hearing and had refused to complete a victim impact statement: *ibid.*

<sup>27</sup> *Ibid.* at para. 15.

<sup>28</sup> [1996] 1 C.N.L.R. 172 (Y.T. C.A.) [hereinafter *Johns*].

<sup>29</sup> *Ibid.* at 174.

cannot be said to be unfit.”<sup>30</sup> However, Prowse J.A. went on to make some observations and recommendations regarding the practice of circle sentencing. Prowse J.A. began by noting:

... there are apparently no well-publicized guidelines in place to assist sentencing judges in the Yukon in determining whether circle sentencing is appropriate in a given case, and, if so, what procedure is to be followed. This absence of guidelines in the past may be attributable to the fact that this approach to sentencing was relatively new to the mainstream criminal justice system. As with any significant innovation, there was much to be said for moving with caution and adjusting the process as experience and the particular circumstances dictated.

In my view, however, circle sentencing is no longer in its embryonic stages, particularly in the Yukon ... That being so, further heed must be paid to the recommendation of the Yukon Territorial Court of Appeal in *R. v. Johnson* ... that rules, or, alternatively, well-publicized guidelines for circle sentencing, should be established by Territorial Court judges, with the assistance of those with expertise in the process.<sup>31</sup>

The Court of Appeal emphasised the value of guidelines to the Crown, the accused, defence counsel, and sentencing judges “as well as to judges of the Court of Appeal in appeals from sentences imposed in a sentencing circle.”<sup>32</sup> Significantly, Prowse J.A. observed that “it would be inappropriate for this Court, which is one step removed from the sentencing process, to impose its own structure on such proceedings.”<sup>33</sup> Prowse J.A. then discussed at some length the criteria developed by judges in Saskatchewan—particularly in *R. v. Joseyounen*<sup>34</sup>—and examined and approved by the Saskatchewan Court of Ap-

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<sup>30</sup> *Johns*, *supra* note 28 at 177.

<sup>31</sup> *Ibid.* at 178.

<sup>32</sup> *Ibid.* Goldie J.A. similarly emphasised this side to the value of guidelines:

If the appellate process is to have an appropriate role, some objective rules or guidelines must provide a standard against which the conduct of the trial and the rights of the offender under the criminal law of Canada may be assessed.

*Ibid.* at 181.

<sup>33</sup> *Ibid.* at 178.

<sup>34</sup> *R. v. Joseyounen*, [1996] 1 C.N.L.R. 182 (Sask. Prov. Ct.) [hereinafter *Joseyounen*]. The seven criteria adopted by Fafard J. (at 185–88) were:

1. The accused must agree to be referred to the sentencing circle.
2. The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.
3. There are elders or respected non-political community leaders willing to participate.



peal in *R. v. Morin*.<sup>35</sup> However, Prowse J.A. concluded by stressing that her discussion of the Saskatchewan guidelines did not amount to a recommendation that these same criteria should be adopted in the Yukon.<sup>36</sup> Clearly, in the view of Prowse J.A. the setting of guidelines was a matter for Territorial Court judges, not judges of the Court of Appeal. One might also assume that Prowse J.A.'s suggestion that judges complete this task "with the assistance of those with expertise in the process"<sup>37</sup> implicitly recognised the value and importance of community participation in the setting of any criteria and guidelines.

McEachern C.J. called for the formulation of rules for the conduct of sentencing circles, expressing concern that in the absence of rules the "credibility of the administration of justice"<sup>38</sup> might be damaged:

It is for this reason that this court stated in *R. v. Johnson* ... that the judges of courts utilising this new process should formulate rules, so that the public will understand the basis upon which individual judges are appearing to depart from the practices followed in all other cases.<sup>39</sup>

The Chief Justice was clearly concerned that the Court of Appeal's recommendation in *Johnson* did not appear to have been implemented. Of particular importance to McEachern C.J. was the need to clarify the role of the Crown. The Chief Justice indicated that consideration should be given to allowing the Crown prosecutor to "test" the opinions of some members of the circle on the basis that "[t]he contrary views of Crown counsel may sometimes be the right view."<sup>40</sup> It is unclear from the Chief Justice's short judgment what sort of "testing" he would advocate. However, the suggestion *appears* to be motivated by a

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

5. The court should try to determine beforehand, as best it can, if the victim is subject to battered woman's syndrome. If she is, then she should have counselling and be accompanied by a support team in the circle.

6. Disputed facts have been resolved in advance.

7. The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.

<sup>35</sup> *R. v. Morin*, [1995] 4 C.N.L.R. 37 (Sask. C.A.) [hereinafter *Morin*].

<sup>36</sup> *Johns*, *supra* note 28 at 180.

<sup>37</sup> *Ibid.* at 178.

<sup>38</sup> *Ibid.* at 180.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* at 181.

concern that community members participating in sentencing circles might be exerting an inappropriate level of influence on sentencing decisions with a commensurate marginalisation of the Crown's influence. This interpretation is supported by the tenor of the following observations made by the Chief Justice:

The public ... should be given reason to be confident that the Rule of Law has not been displaced by some undefined process.

The public must also be made to understand that the court retains both authority and jurisdiction to impose whatever sentence the judge, rather than the circle, decides or recommends in any particular case. In other words, the circle, representing the community of the accused in the entire process, and the prosecutor, representing the larger public in the court proceedings, may assist and advise the judge, but the judge and the judge alone must decide what sentence should be imposed.<sup>41</sup>

When compared with *Johnson*, the Court of Appeal's decision in *Johns* reflects a higher degree of awareness as to what is involved in circle sentencing and of the potential benefits of community participation. The court again took the position that while criteria and clear guidelines are necessary, it is not the appropriate role of a superior court to formulate and impose such rules. Certainly there would be cause for concern if the Court of Appeal did undertake this task. In particular, the judgment of the Chief Justice reflects only a partial appreciation of the nature of decision-making in circle sentencing. McEachern C.J.'s conception of the sentencing circle as an entity that does not include the judge and the Crown prosecutor is at odds with the nature of the practice, particularly in the Yukon where the co-operative and power-sharing potential of circle sentencing appears to have been most fully realised.<sup>42</sup>

Therefore, to date, the Yukon Territory Court of Appeal has not exercised a high degree of scrutiny with respect to the practice of circle sentencing. The Court's preferred approach, as reflected in the decisions of *Johnson*, *D.A.L.* and *Johns*, has been to exercise an "arms-length" review of circle sentencing with a high degree of deference to the authority of sentencing judges, both with respect to specific sentencing outcomes and general rules of eligibility and procedure. Although the Court of Appeal has *recommended* that more formal guidelines be developed for the operation of sentencing circle in the Yukon Territory, it has declined to be prescriptive in this regard. The Court's position that such matters are more appropriately addressed by the judges of the Yukon Territorial Court "with the assistance of those with expertise in the process" is a significant recognition of the importance of "local" relevance and participation to the success of community-based initiatives such as circle sentencing.

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<sup>41</sup> *Johns*, *supra* note 28.

<sup>42</sup> See generally, Stuart J., *supra* note 19.

### III. SASKATCHEWAN

#### A. *Morin*

In Saskatchewan the first circle sentencing case to be appealed by the Crown was *R. v. Morin*.<sup>43</sup> The offender pleaded guilty in the Saskatchewan Court of Queen's Bench to a charge of robbery involving violence. Morin applied to have the sentence determined by way of a sentencing circle involving the Métis community in Saskatoon. The Court granted the request. Milliken J. indicated that he was inclined to impose a sentence of four years imprisonment—including the one year already served while awaiting trial. However, with minor modifications, he accepted the sentencing circle's recommendation and sentenced the offender to a combination of imprisonment and electronic monitoring for 18 months and probation for 18 months.<sup>44</sup>

The Crown appealed on two grounds. First, the Crown submitted that the sentence was inadequate given "the seriousness of the offence, the previous criminal record of the accused, the deterrent aspect of sentencing, and the need to protect the public."<sup>45</sup> Second, the Crown submitted that "the judge erred in law in holding a sentencing circle."<sup>46</sup> This second ground of appeal was not a challenge to the legality of sentencing circles, but was included by the Crown as an effort to persuade the Court of Appeal "to lay down some 'guiding principles or limitations which should be placed on a court requested to hold a sentencing circle'."<sup>47</sup>

All judges of the Court of Appeal unanimously confirmed that circle sentencing was an established and valid procedure for use in determining the sentence for a criminal offender.<sup>48</sup> The majority implicitly endorsed the criteria developed by Fafard J. in *R. v. Joseyounen*<sup>49</sup> and Grotsky J. in *R. v. Cheekineew*<sup>50</sup> and concluded that Milliken J. had departed from these criteria. The Crown argued that the criteria employed by Milliken J.—"an 'indication from [the accused] that he wished to change his lifestyle' and the 'existence of a community which

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<sup>43</sup> *Morin*, *supra* note 35.

<sup>44</sup> *R. v. Morin*, [1994] 1 C.N.L.R. 150 (Sask. Q.B.).

<sup>45</sup> *Morin*, *supra* note 35 at 42 per Sherstobitoff J.A. (Tallis and Cameron JJ.A. concurring).

<sup>46</sup> *Ibid.* at 42–43.

<sup>47</sup> *Ibid.* at 43, quoting from the Crown's *factum*.

<sup>48</sup> *Ibid.* at 43 & 68–69.

<sup>49</sup> *R. v. Joseyounen*, [1996] 1 C.N.L.R. 182 (Sask. Prov. Ct.).

<sup>50</sup> (1993), 80 C.C.C. (3d) 143 (Sask. Q.B.).

appeared to be interested in helping [the accused] change his lifestyle”—were over-broad and an inadequate basis for distinguishing between appropriate and inappropriate cases for sentencing. The majority was clearly sympathetic to the Crown’s concerns in this respect. Sherstobitoff J.A. (Tallis and Cameron JJ.A. concurring) stressed the following:

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. If a sentencing circle is used, and it recommends a sentence which is not a fit sentence, the judge is duty bound to ignore the recommendation to the extent that it varies from what is a fit sentence.<sup>51</sup>

However, Sherstobitoff J.A. expressed a reluctance to impose guidelines for determining whether a sentencing circle should be held:

... given the wide latitude accorded judges as to the sources and types of evidence and information upon which to base their sentencing decisions, it is doubtful that this court should attempt to lay down guidelines in respect of a decision whether or not a sentencing circle should be used in a given case. We might comment on some of the principles at work in making such a decision, principles by which we are all bound, but we should be reluctant to lay down guidelines.<sup>52</sup>

Although deciding that it would be inappropriate for the Court of Appeal to develop and impose rules for the conduct of sentencing circles by lower courts,<sup>53</sup> Sherstobitoff J.A. repeated, with approval, the suggestion made by McEachern C.J. of the Yukon Territory Court of Appeal in *R. v. Johnson*<sup>54</sup> that judges involved in sentencing circles should establish and publish rules. In addition, the majority effectively recommended that an offender should not be considered eligible for a sentencing circle if the circumstance requires a minimum term of two years imprisonment. Having declined to impose criteria or guidelines, the majority stated:

As a matter of principle, however, we should say that it would be futile, for the reasons given in both *Joseyounen* and *Cheekinew* to use a sentencing circle in those cases where it is clear that the circumstances require, at a minimum, a penitentiary term. If a sentence exceed two years' imprisonment, the court is without the power to impose any conditions on the accused after he has served his term. There is, accordingly, no means

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<sup>51</sup> [1995] 4 C.N.L.R. 37 at 48.

<sup>52</sup> *Ibid* at 47.

<sup>53</sup> Sherstobitoff J.A. stated that “the judges of the trial courts are empowered, as this Court is not, to make rules governing these matters, something they may wish to consider.” *ibid.* at 47.

<sup>54</sup> (1994), 31 C.R. (4<sup>th</sup>) 262 (Y.T. C.A.) [hereinafter *Johnson*].

of enforcing any obligations undertaken by an accused as a result of the recommendations of the community through a sentencing circle.<sup>55</sup>

The majority's recommendation/rule regarding a purported two year imprisonment "cut-off" for the purpose of eligibility misunderstands the nature and rationale for circle sentencing. It over-emphasises the objective of alternative sentencing and the avoidance of incarceration at the expense of the objective of community participation in, and responsibility for, decision-making. More specifically it reflects an erroneous assumption that the only reason to hold a sentencing circle is to produce an "alternative" or non-custodial sentence. As Lilles J. observed in *R. v. C.P.*,<sup>56</sup> by adopting this approach, the majority in *Morin* "ignored many of the advantages of conducting sentencing hearings in a circle format."<sup>57</sup>

The majority ruled that the sentence imposed by Milliken J. was inadequate. Sherstobitoff J.A. stated that the sentence imposed on Morin "clearly falls outside the established range."<sup>58</sup> In the majority's view, such a sentence

must be set aside on account of disparity, unless it can be shown that there are, in this particular case, reasons for putting rehabilitation ahead of the other factors considered in sentencing [punishment, deterrence and public protection], or unless there are other exceptional circumstances to justify departure from the normal range of sentences.<sup>59</sup>

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<sup>55</sup> *Morin*, *supra* note 35 at 47–48.

<sup>56</sup> *R. v. C.P.* [1995] Y.J. No. 186 (Y.T. Terr. Ct.), online: Q.L. (Y.J.) [hereinafter *C.P.*].

<sup>57</sup> *Ibid.* at para. 6. In his reasons for decision in *C.P.* Lilles J. was prompted to criticise courts of appeal (explicitly, the Saskatchewan Court of Appeal in *Morin*, *supra* note 34, and, implicitly, the Yukon Territorial Court in *Johnson*, *supra* note 5, and *Johns*, *supra* note 27) for failing to

distinguish between the procedural aspects of holding a circle sentencing hearing, and the imposition of an alternative sentence. Sometimes, but not always, a circle sentencing hearing results in the development of a community based alternative sentence. In other instances, it results in a disposition which involves incarceration within a range that could have been expected in ordinary court.

*C.P.*, *supra* note 56 at para. 2.

Lilles J. argues that while strict criteria (including an eligibility criterion of less than two years imprisonment) might be appropriate in cases where the charges are very serious and the purpose of the circle is to determine an alternative sentence, the same criteria may not be appropriate where the purpose and effect of the circle is to facilitate community participation in the decision-making process and to realise the restorative and healing potential of sentencing circles. See generally, McNamara, *supra* note 3.

<sup>58</sup> *Morin*, *supra* note 35 at 52.

<sup>59</sup> *Ibid.*

The majority found no such exceptional circumstances in the facts of *Morin* and therefore substituted a sentence of 15 months imprisonment in addition to the time already served on remand, imprisonment, electronic monitoring and probation. A major influence on the majority's decision to allow the Crown's appeal was their conclusion that the offender had not demonstrated, during the sentencing circle or at any other time, the "willingness to change." It is the "willingness to change" that is considered central to the effectiveness of circle sentencing and essential before a court should consider "favouring rehabilitation over the other sentencing factors."<sup>60</sup> Based on a review of the sentencing circle transcript the majority formed the impression that the offender "was only interested in bargaining his period of imprisonment down to the least amount of time."<sup>61</sup>

In dissent, Bayda C.J. (Jackson J.A. concurring) held that there was nothing about the circle sentencing process followed by Milliken J. that justified questioning its validity, and that Milliken J. did not err in following the recommendation of the sentencing circle. The Chief Justice stated that it was a "borderline" case and admitted "an unease about the respondent and his motives for seeking to have his sentence fixed through the medium of a sentencing circle."<sup>62</sup> However, Bayda C.J. concluded that "there was evidence before the judge upon which to base the conclusion he reached."<sup>63</sup>

It is clear from the judge's reasons that he considered the circle's recommendations, if accepted, as constituting the basis of a fit sentence in the restorative sense ... Was he right to accept the circle's recommendations? Viewing the sentence in the restorative sense, I can find no fault in it from the perspective of fitness.<sup>64</sup>

On the question of eligibility rules for the holding of sentencing circles Bayda C.J. identified "two mandatory criteria: ... the willingness of the offender and the existence and willingness of a community."<sup>65</sup> The Chief Justice held that a

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<sup>60</sup> *Morin*, *supra* note 35 at 57.

<sup>61</sup> *Ibid.* at 54.

<sup>62</sup> *Ibid.* at 76.

<sup>63</sup> *Ibid.* at 76. Bayda C.J. stated: "I may not have reached the same conclusion he did had I been the trial judge but I am not persuaded that his exercise of discretion in this respect ought to be interfered with:" *ibid.* at 76-77.

<sup>64</sup> *Ibid.* at 77.

<sup>65</sup> *Ibid.* at 69. In *R. v. Antoine*, [1997] O.J. No. 4078 (Ont. Prov. Ct.), online: Q.L. (O.J.), the judge rejected the offenders' request for a sentencing circle on an application of the "two mandatory criteria" endorsed by Bayda C.J. Fitzgerald J. concluded, with respect to the case at hand, that

judge should not direct the holding of a sentencing circle unless he or she is satisfied that the community and the offender have the necessary attributes.<sup>66</sup> According to Bayda C.J. where these two pre-requisites are satisfied, the judge should not automatically approve an application for a sentencing circle, but should first "consider all of the other factors that bear upon the issue."<sup>67</sup> The Chief Justice did not attempt to enumerate these factors, preferring to leave this task to "legislators and the interested parties to work out and settle."<sup>68</sup> However, the Chief Justice stated somewhat cryptically:

In the end the factors that a judge ought to consider at this stage of the proceeding 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 [that is, the retributively flavoured approach of the traditional justice system]?<sup>69</sup>

One factor that Bayda C.J. did specifically address was the relevance of the seriousness of the offence. In contrast to the position taken by the majority, the minority concluded that, except in the case of an offence for which there is a prescribed minimum sentence, citing murder as an example, Bayda C.J. stated:

a sentencing circle is, technically speaking, possible in every case. Whether it would be appropriate to hold one is, of course, another matter. It would be wrong ... 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.<sup>70</sup>

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there does not appear to be an offender willing to accept full responsibility for the wrongdoing, nor does it appear that there is an existing and willing community to assist in the restoration or healing as contemplated in *Morin*.

*Morin*, *supra* note 35 at para. 33.

The case involved numerous charges relating to hunting on Manitoulin Island by members of First Nations communities contrary to Ontario legislation (the *Game and Fish Act* [R.S.O. 1980, c. 182] and the *Trespass to Property Act* [R.S.O. 1990, c. T.21].)

- <sup>66</sup> Bayda C.J. elaborated in some detail on the necessary attributes for satisfaction of the mandatory criteria: *Morin*, *supra* note 34 at 69–70.
- <sup>67</sup> *Ibid.* at 70.
- <sup>68</sup> *Ibid.* Bayda C.J. further stated: "At the very least ... [the factors] should be left to the judge to settle on a case-by-case basis."
- <sup>69</sup> *Ibid.*
- <sup>70</sup> *Ibid.* at 73. Bayda C.J. ruled in *R. v. Cheekineew* (1993), 80 C.C.C. (3d) 143 (Sask. Q.B.), that Grotsky J. erred in setting such a threshold.

Further, the Chief Justice specifically discussed the importance of considering the need for the victim's participation in the proceedings, but did not consider that victim participation should be considered mandatory in all cases.<sup>71</sup>

The minority judgment canvassed a number of issues regarding the establishment and conduct of the sentencing circle. Bayda C.J. ruled that both tasks should be overseen by the judge. While the judge should be in control of the circle sentencing proceedings, "he or she should be sensitive to the cultural tenets and customs of the community in question."<sup>72</sup> Proceedings of the circle should be recorded and transcribed, unless there is serious objection by the community representatives, in which case, the judge should "summarize the proceedings in his or her reasons for judgement."<sup>73</sup> While reaching a consensus is desirable and valuable, Bayda C.J. indicated that "a rule that renders a sentencing circle result nugatory in the absence of a consensus in much too harsh."<sup>74</sup>

Bayda C.J. also considered the issue of the "legal effect of a sentencing circle's conclusion."<sup>75</sup> The Chief Justice ruled:

At the end of the sentencing circle the judge should ask himself or herself two questions. The first is this: After hearing what took place in the sentencing circle and keeping in mind the two prerequisites, as well as the other factors I considered in deciding whether a sentencing circle should be held, am I still satisfied that the restorative approach is the right approach in this case?<sup>76</sup>

If the answer is "no," the judge should impose a sentence according to "the usual norms" of the ordinary approach and not follow the recommendations of the circle. If the answer is "yes," the judge should ask himself or herself a second question: "Would the recommendations by the sentencing circle, if accepted, constitute a fit sentence ... in the restorative sense?"<sup>77</sup> If "yes," the recommendation should be implemented as the sentence of the court, either unaltered, or where necessary, with some variations. If "no," the judge should impose a "conventional" sentence using the ordinary approach.

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<sup>71</sup> *Morin*, *supra* note 35 at 73-74.

<sup>72</sup> *Ibid.* at 74.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.* at 75.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.* As an example of a consideration which may persuade the judge to reconsider his or her original decision to adopt a restorative approach, Bayda C.J. cited the example of doubts which might emerge during the course of a circle about the accused's sincerity: that is, "evidence that the accused was using the circle as a mere vehicle to obtain" a lighter sentence.

<sup>77</sup> *Ibid.* at 76.



Finally, Bayda C.J. expressly noted that the approach to sentencing that he and Jackson J.A. were proposing might be seen as encouraging sentence disparity and risking the creation of “one system of justice for First Nations people and one for everyone else.”<sup>78</sup> In answer to such concerns the Chief Justice noted that the statistics on Aboriginal over-representation in prisons already point to the existence of “two systems of justice” and that steps must be taken to address the disparity.<sup>79</sup>

How should the decision in *Morin* be interpreted in terms of its treatment of, and impact on, the practice of circle sentencing? On the one hand, a majority of the Court of Appeal overturned the sentence handed down by the judge that was based on a sentencing circle’s recommendation and effectively ruled that the case was one in which a sentencing circle should not have been held. On the other hand, the Court formally acknowledged the validity of the circle sentencing process as part of the Canadian criminal justice system. Furthermore, the majority declined to impose its own guidelines or criteria for the conduct of sentencing circles while the minority endorsed a detailed but relatively unrestrictive set of guidelines.

Care needs to be taken before interpreting the Court of Appeal’s decision not to impose eligibility criteria as suggesting a “hands off” approach to circle sentencing. Implicit in the majority’s judgment is the characterisation of circle sentencing as essentially a procedural mechanism for gathering “evidence and information” rather than as a decision-making forum. Therefore, the appearance of appellate court deference to the first instance sentencing process, is in fact deference to the authority of the sentencing judge rather than an endorsement of the legitimacy and appropriateness of community participation in the determination of sentence.

To a certain extent, this same comment applies to the minority judgment. While Bayda C.J. and Jackson J.A. differed radically from the majority judges in their endorsement of the restorative justice alternative, of which circle sentencing is an example, the minority conception of the circle sentencing process is still very much “judge-centred.” The tests formulated by the Chief Justice to assist the judge to “navigate a way through” circle sentencing involve a substantial retention of decision-making authority—both formal and practical—in the hands of the judge. Moreover, the status of the criteria outlined by Bayda

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<sup>78</sup> *Morin*, *supra* note 35 at 72. Note, however that the rules suggested by Bayda C.J. would not limit the availability of circle sentencing to First Nations communities, although the Chief Justice acknowledges that First Nations people are more likely to utilise the practice.

<sup>79</sup> Bayda C.J. referred specifically to the evidence contained in T. Quigley, “Some Issues in Sentencing of Aboriginal Offenders” in R. Gosse, J. Youngblood Henderson & R. Carter, eds., *Continuing Poundmaker & Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing and the College of Law, University of Saskatchewan, 1994) at 269.

C.J. remained unclear following *Morin*, given that they were contained in a minority judgment and were clearly not endorsed by the majority. Indeed, the disagreement amongst the judges of the Saskatchewan Court of Appeal in *Morin* means that the case has not effectively clarified the state of the law in Saskatchewan with respect to the relevant criteria for circle sentencing. Ironically, while the *majority* endorsed the idea of relatively fixed criteria, the only criteria expressly outlined and endorsed in *Morin* are contained in Bayda C.J.'s *minority* judgment.

*Morin* was poised to become the first case on which the Supreme Court of Canada would be given the opportunity to comment on circle sentencing when *Morin* lodged an appeal against the Saskatchewan Court of Appeal's decision. However, before the Supreme Court ruled whether it would hear the appeal, the appeal was withdrawn when *Morin* was charged with further criminal offences.<sup>80</sup>

### B. Rope

Just two weeks after handing down its decision in *Morin* the Saskatchewan Court of Appeal ruled in another Crown appeal against a sentence imposed by a sentencing circle in *R. v. Rope*.<sup>81</sup> The offender pleaded guilty to a charge of impaired driving causing death contrary to section 255(3) of the *Criminal Code*. With the exception of the Crown prosecutor the circle reached a consensus on a two year suspended sentence with a range of probation conditions including electronic monitoring and community service in the form of lectures on the

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<sup>80</sup> See G. Struthers, "Morin's Sentencing Circle Case Abandoned As New Charge Laid" *The [Saskatoon] Star-Phoenix* (1 March 1996) A2. While the Supreme Court of Canada is yet to consider an appeal from a sentence imposed by sentencing circle, it did make brief mention of the practice in *Gladue*. It was here that the Court ruled on the obligation imposed on sentencing judges by s. 718.2(e) of the *Criminal Code* to consider:

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.

Cory and Iacobucci J.J. (for the Court), while outlining in some detail the nature of the duty imposed on judges by s. 718.2(e) when sentencing Aboriginal offenders (at paras. 66–85), observed that it was

unnecessary to engage her in an extensive discussion of the relatively recent evolution of innovative sentencing practices, such as healing and sentencing circle, and aboriginal community councils.

*Gladue*, *ibid.* at para. 74.

<sup>81</sup> *R. v. Rope*, [1995] 4 C.N.L.R. 98 (Sask. C.A.) [hereinafter *Rope*].

consequences of drinking and driving. The trial judge handed down a sentence in these terms.<sup>82</sup>

In a one page judgment the Court of Appeal dismissed the appeal. The Court (Bayda C.J., Vancise and Jackson J.JA) held that “Mr Rope’s exemplary conduct since the commission of the offence permits us to sustain his sentence on that ground alone.”<sup>83</sup> The Court declined to rule on whether the facts of *Rope* constituted “extraordinary circumstances” in accordance with the terms adopted by the majority in *Morin*.

The Court’s reluctance to address this issue in *Rope* appears to have been prompted by their view that judges of the Provincial Court and Court of Queen’s Bench should be given time to digest and apply the Court of Appeal’s ruling in *Morin*. In its judgment in *Rope*, the Court stated:

Recently in *R. v. Morin* ... this Court laid the groundwork for the interaction of sentencing circles with the present sentencing system. By the very nature of this process, how these circles will be used and viewed must be considered as evolving, but it is too soon to write again in any extensive manner.<sup>84</sup>

The Court of Appeal’s preparedness to give judges involved in circle sentencing some “breathing space” is admirable, but, with respect, “laying the groundwork” is a curious choice of phrase to describe the appellate court’s role with respect to the operation and development of sentencing circles. The use of the construction metaphor is ironic given that what can appropriately be described as the groundwork or foundation for sentencing circles has been laid primarily by circuit court judges in co-operation with First Nations communities—a community-based approach.<sup>85</sup> Rather than having laid the groundwork with its decision in *Morin*, the Court of Appeal can perhaps more accurately be said to have initially “set the limits” of community-based justice in the form of circle sentencing. Perhaps, in using the phrase “laying the groundwork” the Court was not claiming to have been involved in this foundational sense, but rather was adopting the construction metaphor in another sense—as a reminder that the task of scrutinising the operation of circle sentencing begun by the Court of Appeal in *Morin* was a “work in progress.” That is, the Court of Appeal’s decision not to consider the issue in *Rope* should not be read as an indication that the Appellate Court intended to “step back” from the role of overseeing the operation of circle sentencing.

Finally, in considering the Saskatchewan Court of Appeal’s decision not to “push” the issue of criteria so soon after its decision in *Morin*, it is worth noting

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<sup>82</sup> [1995] 2 C.N.L.R. 20 (Sask. Q.B.).

<sup>83</sup> *Rope*, *supra* note 81 at 98.

<sup>84</sup> *Ibid.*

<sup>85</sup> See McNamara, *supra* note 3.

that counsel for Rope submitted an addendum to the respondent's factum once the decision in *Morin* was rendered. Counsel submitted that in *Morin* the Court of Appeal had "accept[ed] the use of Sentencing or Healing Circles as a valid vehicle for reflecting Aboriginal culture and traditions in the criminal justice system."<sup>86</sup> More specifically, with regard to the question of criteria and guidelines, the respondent submitted that "the principles guiding Sentencing Circles within the First Nations community reflect ancient and distinct cultural and social values."<sup>87</sup> The submission continues:

Given the uniqueness of the history and the value of Sentencing Circles in our respectful submission the development of any rigid guidelines for their usage would be inappropriate without the explicit input and guidance of First Nations Elders and Leaders. It is further submitted that Sentencing Circles have developed as a mechanism to reflect First Nations values and practices in the criminal justice system and any unilateral attempt to define or constrain the operation of these values by the non-Indian system without direct involvement by First Nations Elders and Leaders, would be inappropriate and disrespectful of the different values and practices expressed through the Sentencing or Healing Circle.<sup>88</sup>

The tone of these submissions—and the fact that they were considered necessary—reflects the ambiguous nature of the Saskatchewan Court of Appeal's assessment of the practice of circle sentencing. On the one hand, the submissions serve to remind that, in *Morin*, the Court effectively "sanctioned" the use of sentencing circles in cases involving Aboriginal offenders and, thus, the legitimacy of the practice should not be subjected to further scrutiny in *Rope*. On the other hand, defence counsel submissions in *Rope* were a reaction to the implicit threat in the *Morin* majority's close scrutiny of the parameters of circle sentencing that restrictive guidelines might be judicially imposed at some future point. The *Rope* submissions emphasise the First Nations origins of circle sentencing, and, in very strong terms, advance the position that guidelines for sentencing circles appropriately emanate from within First Nations' cultures.

### C. Severight

*R. v. Severight*<sup>89</sup> was not an appeal from a sentence imposed after a sentencing circle, but the judgment is nonetheless worth considering in the context of an examination of the Saskatchewan Court of Appeal's approach to the process. In this case the Court of Appeal (Tallis, Wakeling and Lane JJ.A.) allowed an ap-

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<sup>86</sup> M.-E. Turpel-Lafond (co-counsel for the respondent), "Addendum to the factum of the respondent in *R. v. Rope*," *Justice as Healing* (Winter 1995) at 6.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> (1996), 137 Sask. R. 306 (Sask. C.A.) [hereinafter *Severight*].

peal against sentence in case where the Aboriginal offender had plead guilty to a charge of armed robbery. The Court of Appeal replaced the sentence imposed in the Court of Queen's Bench—imprisonment for one day and two years probation—with a sentence of imprisonment of two years less a day and one year probation. In the course of delivering the Court's judgment Tallis J.A. observed that, although requested, a sentencing circle had not been convened because the non-Aboriginal victim—who had been assaulted during the armed robbery—declined to participate. Tallis J.A. quoted at some length from the Sentencing Circle Assessment:

[The victim] ...stated that he has no general prejudice towards Indian people, that he deplores racial discrimination or prejudice of any kind, and that, in this instance, he feels no anger nor hatred towards [the offender] for his having taken part in robbing him. ...

[The victim] stated to us that he wants to leave all of this experience in his past. He understands that sentencing circles are beginning to be utilized in some criminal cases, but that he doesn't want to be a part of one, believing that our current Justice System is adequate to bring [the offender] and his co-accused to full accountability for their actions.<sup>90</sup>

The attention paid by the Court of Appeal to the victim's decision regarding a sentencing circle is interesting given that it was essentially irrelevant to the appeal issues before the Court. It is indicative of a high degree of sensitivity on the part of judges of the Saskatchewan Court of Appeal towards the development and use of circle sentencing in the province. More specifically Tallis J.A.'s account of the victim's decision not to participate and the trial judge's subsequent rejection of the offender's request for a sentencing circle suggests two things. First, Tallis J.A. implicitly endorsed the "rule" that a sentencing circle should not be held where the victim does not agree to participate. Second, Tallis J.A. implicitly approved of the observation made by the victim that his opposition to the use of a sentencing circle should not be interpreted as based on racism. This suggests a high degree of judicial awareness of the somewhat hostile political climate in which circle sentencing has operated in Saskatchewan. This climate includes the portrayal of circle sentencing by some critics as an "easy option" to which only Aboriginal people have access and the defence of circle sentencing as a mechanism of justice administration that Aboriginal people are *entitled* to as a matter of right.

#### D. H.K.C.

In *R. v. H.K.C.*<sup>91</sup> the offender pleaded guilty to sexual assault and assault and applied for a sentencing circle. The Crown opposed this application "on the ba-

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<sup>90</sup> *Severight*, *supra* note 89 at 308.

<sup>91</sup> (1997), 158 Sask. R. 157 (Sask. C.A.) [hereinafter *H.K.C.*].

sis of *R. v. Morin* ... and also because the victim was in a cycle of violence which might have precluded her from meaningful participation."<sup>92</sup> Notwithstanding the Crown's opposition, the judge granted the application and ordered the offender not to contact the victim in the interim. The offender ignored the order and contacted the victim before the sentencing circle. Consequently, the victim indicated that she did not want a sentencing circle to be held. Notwithstanding the offender's breach of his undertaking and the victim's clear opposition the judge decided to proceed with the sentencing circle. However, during the course of the circle the judge "concluded it was no longer appropriate to carry it on as a judicial proceeding and left."<sup>93</sup>

Without the aid of a sentencing circle the judge imposed a conditional sentence of two years less a day and two years probation. The Court of Appeal ruled that this sentence was inadequate. It allowed the Crown appeal and substituted a sentence of three and a half years imprisonment.<sup>94</sup>

Ultimately, *H.K.C.* was not a case in which the sentence was imposed by a sentencing circle. However, during the course of its consideration of the Crown appeal against the judicially-imposed sentence, the Court of Appeal (Gerwing J.A; Sherstobitoff and Lane J.J.A. concurring) commented, with obvious disapproval, on the sentencing judge's determination to utilise a sentencing circle. Echoing the threshold for holding a sentencing circle endorsed by the majority in *Morin*, Gerwing J.A for the Court, observed that "this is not a case where a sentence of less than two years would have been appropriate."<sup>95</sup> In addition, Gerwing J.A. stated: "[I]t is also far from clear that any alternative procedure to a regular sentencing should have been embarked upon."<sup>96</sup>

This aspect of the decision constitutes further evidence of the ambivalent response of at least some of the judges of the Saskatchewan Court of Appeal's to circle sentencing, including the exercise of a relatively high degree of scrutiny in relation to the processes and outcomes of the procedure.

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<sup>92</sup> *H.K.C.*, *supra* note 91 at para. 2 per Gerwing J.A.

<sup>93</sup> *Ibid.* It is not apparent from the Court of Appeal's judgment what finally prompted the judge to abandon the use of a sentencing circle in this case. However, elsewhere in the judgment, in the context of an attempt to identify the sentencing judge's motivation for handing down what the Court of Appeal considered a "lenient" sentence, Gerwing J.A. noted that, according to submissions by defence counsel, the offender's community had "abandoned a local justice committee for holistic healing" and "community support systems had been disbanded:" *ibid.* at para. 3.

<sup>94</sup> *Ibid.* at para. 6.

<sup>95</sup> *Ibid.* at para. 5.

<sup>96</sup> *Ibid.*

*E. Taylor*

In *R. v. Taylor*<sup>97</sup> the Saskatchewan Court of Appeal again had cause to consider the appropriateness of a sentence imposed after a sentencing circle, as well as the question of whether a circle should have been convened at all. The offender, from the Lac La Ronge Indian Band, was convicted at trial on a number of charges including sexual assault. He then requested a sentencing circle. The Crown objected on three grounds, arguing that a sentencing circle should not be held because: the offender pleaded not guilty and was convicted at trial; the sentence requested by the Crown was in excess of three years imprisonment; and, the offence was sexual assault. These objections, notwithstanding, Milliken J. in the Saskatchewan Court of Queen's Bench, ordered the sentencing circle.

During the course of the sentencing circle process, a consensus emerged—with the exception of the Crown prosecutor—that the appropriate sentence was banishment to a remote island in northern Saskatchewan for one year, followed by probation for three years. Milliken J. decided to accept the circle's recommendation, but rather than impose the sentence directly, he adjourned the sentence for a year on condition that the offender complete the term of banishment or isolation.<sup>98</sup> The Crown appealed successfully against this adjournment order on the basis that the judge did not have the power to order an adjournment for the proposed length or purpose.<sup>99</sup> The matter was remitted for sentencing. Recognising that Taylor had already spent nine months in jail on remand and six months in isolation, the judge sentenced the offender to an additional 90 days imprisonment and three years probation, a condition of which was that he spend a further six months in isolation.

The Crown appealed this sentence to the Court of Appeal. There were four main issues before the Court:

- (i) did the sentencing judge have the power to impose a probation condition that the offender be required to live in isolation for a period of time?
- (ii) should a sentencing circle have been convened and conducted, in light of the absence of a guilty plea, the nature of the offence, that fact that offence would normally attract a prison term of more than two years, and given the victim's initial unwillingness to participate?
- (iii) should the sentencing circle's recommendations have been accepted or rejected?
- (iv) was the sentence a fit or adequate sentence?

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<sup>97</sup> (1997), 122 C.C.C. (3d) 376 (Sask. C.A.) [hereinafter *Taylor*].

<sup>98</sup> The order contained detailed arrangements regarding the banishment, including the provision of sufficient food for the offender etc: *Taylor*, *supra* note 97 at 388–90 per Bayda C.J. (Jackson J.A. concurring).

<sup>99</sup> (1996), 104 C.C.C. (3d) 346 (Sask. C.A.).

On the first issue the majority of the Court of Appeal (Bayda C.J., Jackson J.A. concurring) held that the sentencing judge did have power to make a banishment order as part of a probation order under section 737(2)(h) of the *Criminal Code*. In his reasons Bayda C.J. noted that while evidence before the Court was scarce, "it appears that First Nations people, including the Plains Cree and Dene, have for centuries used banishment in one form or another as a method of redress for wrongdoing ... ." <sup>100</sup> The Chief Justice further concluded that

banishment...tends to be more an individualized measure having as its central purpose the influencing of the offender's future behaviour...than a punitive measure... <sup>101</sup>

The second issue was treated as raising five sub-issues. The majority first held that the decision of the Court of Appeal in *Morin* should not be interpreted as removing a judges' discretion to order a sentencing circle in cases where the sentence would "normally" exceed two years imprisonment. Bayda C.J. ruled that the seventh of the criteria enumerated by Fafard J. in *R. v. Joseyounen* <sup>102</sup>—that "[t]he case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing" <sup>103</sup>—should not be applied rigidly. <sup>104</sup> Cameron J.A. dissented on this point, viewing the "two year imprisonment" limit as one that Milliken J. should have applied, thus rendering the case ineligible for circle sentencing. <sup>105</sup>

Bayda C.J. further ruled that an offender's eligibility for a sentencing circle should not turn on whether or not he or she pleaded guilty or went to trial. According to the Chief Justice: "what is relevant is whether the accused person

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<sup>100</sup> *Taylor*, *supra* note 97 at 396.

<sup>101</sup> *Ibid.* at 397.

<sup>102</sup> *Joseyounen*, *supra* note 34.

<sup>103</sup> *Ibid.* at 188.

<sup>104</sup> Bayda C.J. cited with approval the manner in which Fafard J. had himself flexibly interpreted the seventh criteria in deciding to order a sentencing circle, in the case of *R. v. Ratt and Charles*, an appeal from which had been dismissed by the Court of Appeal [*R. v. Ratt and Charles* (June 1997), Regina 7117 / 7123 (Sask. C.A.)]: *Taylor*, *supra* note 97 at 399–400.

<sup>105</sup> According to Cameron J.A.:

Mr. Justice Milliken should neither have convened nor proceeded with a sentencing circle. The case was beyond the scope of sentencing circles, and his decision to proceed along these lines was contrary to prevailing practice according to the decisions of the Queens' Bench and Provincial Courts in *R. v. Cheeknew* ... and *R. v. Joseyounen* ...

*Ibid.* at 426. See also 429–30.



wishes to change his lifestyle and whether there is a community which is willing to help him do so.”<sup>106</sup> A guilty plea will be good evidence of the offender’s willingness to accept responsibility. However, where the offender has pleaded not guilty he or she will need to “demonstrate his [or her] remorse, sincerity and acceptance of responsibility in some other way.”<sup>107</sup> Bayda C.J. criticised Milliken J. for not paying sufficient attention to this issue and for failing to refer the offender’s request for a circle to the La Ronge Justice Committee for screening, in accordance with the procedures developed by the Provincial Court. However, Bayda C.J. stopped short of finding the sentencing circle invalid on this basis as the circle participants had, after serious consideration, determined that the offender was remorseful, sincere and that he accepted responsibility for what he had done.<sup>108</sup>

Next Bayda C.J. ruled that “[t]he fact that the offence is a serious sexual assault does not automatically rule out a sentencing circle.”<sup>109</sup> However, the Chief Justice held that Milliken J. had erred by failing to refer the matter to the Justice Committee. This error thereby deprived the community of the opportunity to make an early decision regarding their willingness and capacity to assume responsibility for the case given its nature. Again, this error was not considered fatal to the validity of the sentencing circle because the circle participants discussed at length the appropriateness of handling a sexual assault case via sentencing circle, and although initially divided, ultimately reached a united position of willingness to deal with the matter.<sup>110</sup>

Bayda C.J. also turned to the issue of victim participation. The Chief Justice held that Milliken J. had erred in ordering a circle without first endeavouring to obtain the victim’s agreement, emphasising that in a sexual assault matter it is particularly important to consult with the victim. However, this error was, again, not considered fatal, as the victim eventually freely agreed to participate and had been part of the consensus that recommended a sentence to the judge.<sup>111</sup>

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<sup>106</sup> *Taylor*, *supra* note 97 at 401.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.* at 401–3.

<sup>109</sup> *Ibid.* at 403.

<sup>110</sup> *Ibid.* at 406.

<sup>111</sup> *Ibid.* at 407. Bayda C.J. suggested that in special circumstances it may be appropriate to allow a surrogate to represent the victim in the sentencing circle. Cameron J.A. ruled that Milliken J. should have aborted the planned sentencing circle

on learning that [the victim] was unwilling to participate and that both the Family Service Centre, run by the La Ronge Native Women’s Council, and Kikinahk Friendship Centre were opposed to this proceeding.

The final matter relevant to the second issue was that Crown counsel—somewhat paradoxically—took issue with comments made by Milliken J. Milliken J.'s comments indicate that he thought the notion of healing was irrelevant to the process of circle sentencing, and that there was no significant difference between a pre-sentence report and a sentencing circle.<sup>112</sup> Bayda C.J. agreed that these comments were inaccurate and inappropriate. The Chief Justice observed that “[a] sentencing circle is much more than a fact-finding exercise with an aboriginal twist ... The notion of healing ... is at the centre of the circle restorative approach.”<sup>113</sup> Again Bayda C.J. ruled that while Milliken J. had been misguided, or in error, the other participants in the circle had been “on track:” “for the circle participants the notion of healing was central to their deliberations and quest for a solution.”<sup>114</sup>

When it came to issue three, the combined effect of the majority's rulings on the various matters relevant to issue two, was that the participants in the circle, rather than the judge, were considered to be “the principal authors and fashioners of the sentence now under appeal ... [T]he judge's errant thinking was overridden by the correct thinking of the circle members.”<sup>115</sup> What is particularly significant about this aspect of the decision is that having located primary authorship for the sentence in the circle—as opposed to the judge—the majority of the Court of Appeal characterised this as the sentence's “saving grace” from the point of view of deciding whether it should be overturned. Bayda C.J. stated:

In the end, the validity of the process was saved by the attitude, conduct, and thinking of the circle participants who were the principal authors and creators of the sentence which the trial judge approved and adopted as his own. Accordingly, the recommendations of the sentencing circle have a distinct and important role to play in any assessment of the fitness of the sentence.<sup>116</sup>

The majority concluded that while Milliken J. had made numerous errors with respect to the establishment and conduct of the sentencing circle, he had acted appropriately in adopting the circle's recommendations. In fact, Bayda C.J.'s analysis of this issue carries an implication that, ironically, Milliken J. may have been considered to have fatally erred if he had *not* accepted the circle's recommendation for a sentence with blended “restorative and retributive measures

*Taylor, supra* note 97 at 430.

<sup>112</sup> *Ibid.* at 407–8.

<sup>113</sup> *Ibid.* at 408.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.* at 409.

<sup>116</sup> *Ibid.*

with a nod to the restorative."<sup>117</sup> The Chief Justice concluded that if Milliken J. had second guessed the circle participants, this would have exhibited "an unacceptable degree of presumptuousness and insensitivity where judiciousness and responsiveness are in order."<sup>118</sup> These comments stand as the strongest appellate court endorsement to date of the legitimacy of the decision-making role of the circle on the matter of sentence.

Dissenting on this point, Cameron J.A. stated that Milliken J. should not have accepted the recommendation of the circle because, in his view, they recommended an unfit sentence.<sup>119</sup> Cameron J.A. concluded that the sentencing judge was left "with no choice but to reject the recommendation in keeping with the decision of this Court in *R. v. Morin*."<sup>120</sup>

On the fourth issue, the majority ruled that the judge had not erred in his application of the principles of sentencing and that the resulting sentence was not unfit. In dissent, Cameron J.A. held that the sentence was unfit because it lacked proportionality and parity.<sup>121</sup>

Despite finding ample grounds for allowing the appeal, Cameron J.A. chose to dismiss on the basis that his inclination to allow the appeal and substitute a sentence of four years imprisonment—inclusive of time served—was moot. This was noted since by the time the appeal had been determined, Taylor had already served most of the sentence imposed by Milliken J. In the result, the appeal was unanimously dismissed.

Although the Saskatchewan Court of Appeal has examined the practice of circle sentencing more frequently and more closely than any other appellate court in the country it remains difficult to state with clarity or certainty the Court's position on the use of sentencing circles. Taken on its own, *Taylor* suggests a high degree of commitment by the Court of Appeal towards supporting the practice. Given the numerous errors and irregularities in the trial judge's handling of the process, the Court was faced with a perfect opportunity to "clamp down" on circle sentencing if it was inclined to do so. However, Bayda C.J. and Jackson J.A. showed no such inclination. Indeed, the majority showed a willingness to grant considerable latitude and autonomy to the sentencing circle based on the demonstrated collective thoughtfulness, integrity and thoroughness of the circle participants in this particular case.

However, it would be premature to conclude on the basis of the decision in *Taylor* alone that the Saskatchewan Court of Appeal can be expected, in the

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<sup>117</sup> *Taylor*, *supra* note 97 at 412.

<sup>118</sup> *Ibid.* at 412–13.

<sup>119</sup> *Ibid.* at 426.

<sup>120</sup> *Ibid.* at 426–27.

<sup>121</sup> *Ibid.* at 432–441.

future, to continue to show considerable deference to the outcomes of sentencing circles. This might be a reasonable prediction with respect to the likely approaches of Bayda C.J. and Jackson J.A., who constituted the minority in *Morin*, were part of a unanimous bench in *Rope* and constituted the majority in *Taylor*. These two judges have consistently demonstrated strong support for the use of circle sentencing, have disapproved of strict criteria and have established a high threshold for appellate court intervention. However, to date, no other judge of the Saskatchewan Court of Appeal has offered the same degree of encouragement<sup>122</sup> for the use of sentencing circles. Indeed, other judges of the Court of Appeal—specifically Sherstobitoff and Tallis J.A. in *Morin* and Cameron J.A. in *Morin* and *Taylor*—have often demonstrated skepticism regarding the practice of circle sentencing and a desire to maintain a relatively tight rein on its development.

Ultimately, the Saskatchewan Court of Appeal's further influence on the process and outcomes of circle sentencing is likely to depend in large part on what message Crown prosecutors have taken from the manner in which the Court of Appeal has handled the cases that have already come before it. In all but one case the sentence arrived at by the sentencing circle has been upheld. It remains to be seen whether this low success rate will discourage the Crown from further appeals. *Morin* remains the only case where the Crown has successfully appealed against a sentence imposed after a sentencing circle. Yet, in the long term, even this case—an apparent victory for advocates of close appellate scrutiny of circle sentencing—may leave a rather different enduring legacy. Bayda C.J.'s central participation in each of the post-*Morin* Court of Appeal decisions has meant that particular importance must be attached to his dissenting judgment in *Morin*. The situation is not so clear cut as to warrant the conclusion—so often apt with respect to the evolution of case law—that the Chief Justice's minority opinion in *Morin* has subsequently become the majority opinion on the Saskatchewan Court of Appeal. It must be noted that two of the three majority judges in *Morin* have not participated in subsequent sentencing circle appeal cases and the third judge, Cameron J.A., maintained in *Taylor* an approach consistent with the majority position in *Morin*.

#### IV. OBSERVATIONS ON THE NATURE AND IMPACT OF APPELLATE REVIEW

IN THE DECISIONS OF THE YUKON TERRITORY COURT OF APPEAL and the Saskatchewan Court of Appeal reviewed in this article, the primary concerns of appellate judges have been:

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<sup>122</sup> With the possible exception of Vancise J.A., who formed part of the unanimous court that rejected the Crown's appeal against sentence in *Rope*, *supra* note 81.

- (i) whether there are adequate guidelines and criteria for the operation of sentencing circles;
- (ii) whether the sentence imposed by a circle is outside the range which would normally be considered appropriate for an offence of the type with which the accused has been charged, and if so, whether it is sound; and
- (iii) whether the ultimate decision on sentence is made by the judge or the community as represented by the participants in the circle.

A number of general observations can be made about the manner in which these issues have been addressed, and generally, about the nature and impact of appellate court scrutiny of circle sentencing to date.

First, only a very small proportion of the hundreds of cases in which circle sentencing has been employed have resulted in Crown appeals against sentence. Further, of the small number of Crown appeals arising out of sentencing circles heard by the Yukon Territorial Court of Appeal and the Saskatchewan Court of Appeal only two have been successful: *Johnson* and *Morin*. Moreover, in *Johnson* the success of the Crown appeal did not turn on the role, conduct or outcome of the sentencing circle, but rather on an incidental legal ruling by the sentencing judge.

Second, notwithstanding the low frequency and low success rate of Crown appeals, both the Yukon Territorial Court of Appeal and the Saskatchewan Court of Appeal have not only evaluated the *outcomes* of sentencing circles—whether the sentence imposed was appropriate—but have also, to varying degrees, scrutinised the *parameters and content* of the practice itself.

Third, considering the combined effects of the decisions discussed above, it appears that appellate court scrutiny of circle sentencing has been somewhat more rigorous in Saskatchewan than in the Yukon. This is not simply reflected in the higher number of appeal cases, but in the depth of critical attention that has been directed at both the process and the outcomes of circle sentencing. The Yukon Territory Court of Appeal has so far limited its supervision of the practice of circle sentencing to general calls for the adoption of rules and guidelines. While, in principle, adopting a similar position—that it is for first instance courts, not appellate courts, to set the rules for circle sentencing—the Saskatchewan Court of Appeal has assumed a more interventionist approach to the task of overseeing the operation of circle sentencing.

Whether this can be seen as reflecting widely differing attitudes towards circle sentencing on the part of the two appellate courts is questionable. By the nature of some of the cases that have come before it—particularly *Morin* and *Taylor*, both of which have stretched the parameters of recognised sentencing processes and outcomes to a greater extent than the cases that have come before the Yukon Territory Court of Appeal—the Saskatchewan Court of Appeal has arguably been called upon to exert a greater level of influence on the “grass roots” operation of circle sentencing. Whatever the precise motivation for its approach, the practical result is that the Saskatchewan Court of Appeal has

provided more detailed and proscriptive supervision of the operation of circle sentencing than the Yukon Territory Court of Appeal.

The fourth observation that can be made—to some extent in contradiction of the third—is that there has been stronger appellate court support for the practice of circle sentencing in Saskatchewan than in the Yukon. This apparent paradox is explained by the facts that the decisions of the Saskatchewan Court of Appeal have been characterised not only by close scrutiny, but by a divergence of opinion on a number of key issues. These issues include the criteria for holding a sentencing circle and the degree of deference that should be shown to sentences determined using the sentencing circle format.<sup>123</sup> Some judges—most notably Bayda C.J.—have strongly endorsed the integrity of the practice of circle sentencing, stating a preference for a “minimalist” approach to operational rules and criteria and explicitly supporting active First Nations community participation in the sentencing process. Other judges on the Saskatchewan Court of Appeal, while recognising the validity of circle sentencing as a method for determining the sentence for a criminal offender, have adopted a more cautious and restrictive approach to the questions of eligibility criteria and the respective role of judge and community representatives. As a result of the differing approaches it is difficult to speak with confidence about the approach of the Saskatchewan Court of Appeal to the task of overseeing the operation of circle sentencing.

Fifth, although it is not yet possible to determine the full extent of the appellate courts’ influence, the differences in approach adopted by the respective Courts of Appeal have, as would be expected, had differing impacts on the operation of circle sentencing within the relevant jurisdictions. The conflicting views expressed by the judges of the Saskatchewan Court of Appeal and the overall perception of the Court keeping a “close eye” on circle sentencing may be one of the factors that have contributed to the recent decline in the number of cases being handled by sentencing circles in Saskatchewan. This is particularly so in the north of the province where the practice first developed.<sup>124</sup> It would be misleading to simplistically allocate responsibility for this decline to the Court of Appeal, but it seems fair to assume that the Court’s rulings, and the associated risk of Crown appeals, have contributed to the loss of momentum of this form of community-based justice in a number of First Nations communi-

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<sup>123</sup> For a detailed discussion of these issues see McNamara, *supra* note 3.

<sup>124</sup> In interviews with Aboriginal community representatives conducted in 1998 during the course of researching the establishment of rules, criteria and guidelines for sentencing circles, uncertainty regarding the status of sentencing circles as a result of Court of Appeal decisions was identified as a disincentive to persist with the use of sentencing circles, and a motivation for exploring alternative approaches to community justice: see McNamara, *supra* note 3.

ties.<sup>125</sup> Some communities have responded by deciding to redirect their community justice energies elsewhere where the influence of the courts is less significant and the attitude of the Crown less determinative. More positively, such shifts in community justice direction may also reflect a determination to take further steps towards autonomous Aboriginal justice systems, having utilised the practice of circle sentencing as a valuable stepping stone.

In contrast, judges of the Yukon Territorial Court and Yukon First Nations communities involved in circle sentencing have continued to operate largely unrestricted by the influence of close appellate court oversight. The Yukon Territorial Court of Appeal's decisions in *Johnson* and *Johns* appear to have had relatively little impact on the operation of sentencing circles or on the willingness of First Nations communities and sentencing judges to engage in the practice. More specifically, judges of the Yukon Territorial Court have largely resisted the Court of Appeal's call for firm guidelines or criteria for the operation of circle sentencing.<sup>126</sup> This outcome is surprising given the strength of the Court of Appeal's recommendation in *Johnson*, and particularly in *Johns*, that clear guidelines should be adopted. However, the Court of Appeal showed little inclination in either case to force the issue by attempting to impose guidelines or criteria of its own. Furthermore, neither *Johnson* nor *Johns* appear to have been surrounded by the same degree of political controversy and media interest as the Saskatchewan cases of *Morin*, *Rope* and *Taylor*.<sup>127</sup> Put together, this creates additional pressure on appellate courts to maintain their supervisory role.

These observations regarding the nature and impact of the manner in which the Yukon Territory Court of Appeal and the Saskatchewan Court of Appeal have handled appeals against sentences determined by way of a sentencing circle are necessarily tentative. It is only six years since the first sentencing circle appeal was decided, and only a small number of appeal cases have been decided thus far. It remains to be seen whether the respective approaches to the task of appellate review adopted in the Yukon Territory and Saskatchewan will be maintained. In future cases it will be interesting to see whether the Yukon Territory Court of Appeal maintains its largely non-interventionist stance, if judges of the Territorial Court continue to resist calls for formalisation of eligibility

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<sup>125</sup> Local community politics, individual and community fatigue, and the movement or transfer of key justice system personnel—including R.C.M.P. officers, lawyers and judges—have also been contributing factors.

<sup>126</sup> See e.g., *C.P.*, *supra* note 56; *R. v. Gingell* (1996), 50 C.R. (4<sup>th</sup>) 326 (Y.T. Terr. Ct.). See also Stuart, *supra* note 19 at 32–38; Stuart, *supra* note 2 at 298; and, "Circles" (National Film Board of Canada, 1997).

<sup>127</sup> See e.g., D. Hoffman, "Easy Time? Debating Sentencing Circles" *The [Saskatoon] StarPhoenix* (19 September 1995) A1; S. Fine, "Consensus Sentencing A Controversial Too In Aboriginal Trials" *The [Toronto] Globe and Mail* (31 May 1995) A3; and, Editorial, "Revisiting Aboriginal Justice" *The [Toronto] Globe and Mail* (31 May 1995) A20.

criteria and procedural rules. Moreover, whether judges of the Saskatchewan Court of Appeal are able to overcome existing uncertainty by adopting and articulating a more uniform position on the status and operation of sentencing circles.

Finally, future appeal court decisions are likely to involve closer examinations of the implications for circle sentencing of the commitment to restorative justice sentencing principles now found in Part XXIII of the *Canadian Criminal Code*. In *Gladue* the Supreme Court of Canada ruled that Part XXIII of the *Code*, and section 718.2(e)<sup>128</sup> in particular, imposes an obligation on sentencing judges to take into account the unique circumstances of Aboriginal people when sentencing Aboriginal offenders.<sup>129</sup> The Court held that in fulfilment of this statutory obligation, sentencing judges must consider the following:

- (i) the unique systemic or background factors that may have played a part in bringing the particular Aboriginal offender before the courts, and
- (ii) the types of sentencing *procedures* and sanctions that may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.<sup>130</sup>

In *Gladue*, the Supreme Court of Canada did not specifically consider the status of circle sentencing.<sup>131</sup> However, it is likely that in the wake of the Court's interpretation of section 718.2(e) in *Gladue*, appellate courts will be called upon to further consider the practice of circle sentencing. Especially in light of the legislative requirement that sentencing judges must now adopt appropriate sentencing procedures, and sanctions, for Aboriginal offenders.<sup>132</sup>

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<sup>128</sup> Text of sub-section, *supra* note 6.

<sup>129</sup> *Gladue*, *supra* note 5 at para. 64.

<sup>130</sup> *Ibid.* at para. 66 [emphasis added].

<sup>131</sup> The Case was note one in which a sentencing circle had been held. The Court observed:

[I]t is unnecessary to engage here in an extensive discussion of the relatively recent evolution of innovative sentencing practices, such as healing and sentencing circles ... which are available especially for Aboriginal offenders.

*Ibid.* at para. 74.

<sup>132</sup> For further discussion of the likely impact of s. 718.2(e) of the *Code* on circle sentencing, see McNamara, *supra* note 3.