

Restorative justice in Urban Aboriginal Communities

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Table of Contents

1. Introduction 1
 2. Restorative justice: what is it, and the rationale 1
 3. Restorative justice is now mandated by law 5
 4. How does restorative justice work? The circle 9
 5. Other varieties of models 12
 6. The first circle experiment, and its results 16
 7. Limiting use of sentencing circles 23
 8. A Vancouver circle 30
 9. Other urban forays into restorative justice in aboriginal communities 33
 10. The Vancouver Aboriginal Restorative Justice Program 36
 11. Why we must break down resistance to urban restorative justice 42
 12. Conclusion 46
- Bibliography 48

1. Introduction

A revolution has been quietly taking place in the way the justice system responds to crime. The practice of restorative justice is increasingly being reflected in sentences meted out for criminal offences. The movement has been slow and tentative. It is an important change, and especially important for aboriginal offenders. In this paper, I will consider the practice as it relates to aboriginal offenders in urban communities, where there has been the greatest resistance to implementing change.

There is also a major new initiative in the city of Vancouver. In the fall of 1999, the Vancouver Aboriginal Restorative Justice Program opened its doors in the Vancouver Aboriginal Friendship Centre

on East Hastings Street. This paper will discuss the genesis of the Vancouver project.

2. Restorative justice: What is it, and the rationale

What exactly is restorative justice? It is a term that reflects a new way of thinking about and responding to crime. It is both a process and a result. The process involves consultation within a select community. It considers the needs of the community, the offender, and the victim in devising an appropriate response to crime. The result will be a response that is restorative. It restores balance to the community and repairs the harm done.

The Supreme Court of Canada recently offered a definition of restorative justice in its landmark sentencing case, *R. v. Gladue*. (1) While recognizing that the concept and principles of restorative justice will have to be developed over time in the jurisprudence, the Court stated:

In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime. (2)

In contrast, the old approach to criminal justice is well-known and deeply ingrained. The traditional European-influenced view is that crime is an offence against the state. Crime is behaviour which is contrary to social norms, so much so that the state considers itself justified in meting out punishment. Punishment is seen as an unavoidable aspect of modern society. (3) Punishment has a retributive aspect: to apply suffering in retaliation for the alleged suffering of others. A Canadian appeal court judge expressed the essence of this view in 1939:

The villain who inflicted injury upon another, shall he not suffer? It is a survival of the *lex talionis*, an eye for an eye. Organized society has the right to protect itself by taking all necessary and proper steps to restrain the enemies of society, the criminals by appropriate means; in ancient days by outlawry and even by death; now by imprisonment and, in the case of murder, by death. (4)

Although there is now a somewhat different range of punishments, and there is a greater emphasis on rehabilitation of the offender, there continues to be a retributive aspect of the state's response to crime. By its very nature, punishment continues to inflict suffering. (5) The effectiveness of a deliberate punitive regime at deterring future criminal behaviour can be questioned. (6) Punishment is "[v]iolence justified for the State, but not for anyone else, in order to prevent violence! Why hurt people who hurt people to show that hurting people is wrong?" (7) In contrast, the restorative view does not have punishment as its focus, but restoration and healing. (8)

Further, in the traditional model, the victim's role is secondary. There may not be an actual victim of the crime. The state is the one perceived as harmed, as its orders were violated, its rules offended. The rules are presumed to be there for a reason, so contravening them has some penalty. If the crime does involve an injury of some sort to a person, that person is peripheral to the justice process. The victim may be called as a witness at the trial to determine whether a crime occurred, or may introduce their perceptions by a victim impact statement. (9) However, the victim's interests are not necessarily taken into consideration in deciding the appropriate response to the crime. As stated by British Columbia's Attorney General Ujjal Dosanjh, "Victims feel alienated, neglected, ignored in the criminal justice system." (10)

The restorative justice model sees crime as a conflict in society, which needs to be repaired. (11) Balance and harmony needs to be restored in the community. As such, the victim has a central role in helping to

identify the injury and its impact on the victim and community, and in suggesting what outcomes would restore balance. The sentencing process considers how to repair the harm which was done, and thereby provide healing in the community. For example, instead of sending an offender to jail for the offence of fraud, the offender might make restitution to the victim for the loss. After the sentence has been completed, the offender can legitimately feel that the damage has been repaired, and can be re-integrated into the community. A more traditional sentence of jail time does nothing to restore the victim, while isolating and stigmatizing the prisoner.

The restorative justice model also provides an opportunity for healing of the offender, which can help to reduce recidivism. The process considers the underlying reasons behind the offence, and the offender's needs. Perhaps counselling or training might be appropriate. There may be a lack of social services in the community which contributes to the type of crime being considered. A healing plan can be devised, which may incorporate spiritual and cultural factors.

The process itself of having to face the victim and the community is a powerful learning opportunity for the offender. Offenders gain an appreciation for the impact of their behaviour, which cannot be conveyed in the traditional impersonal courtroom by a judge from on high. Many disadvantaged people in our society, especially those in contact with the justice system, are themselves victims of long-standing crimes and abuse. (12) Their own needs may have eclipsed their perceptions of how their behaviour has affected others. Many aboriginal people have experienced discrimination, systemic loss of culture and spiritual values, and suffered abuse as children in residential schools or in foster care. (13) A healing plan is more likely to address needs arising from historical abuse. Traditional criminal justice does not deal very well with offenders who were themselves victimized; often such crimes remain unreported, and the offender may have no realization of the link between their historical abuse and their present difficulties.

Because the goals of restorative justice are different than those of traditional criminal justice, the result in terms of sentencing will necessarily be quite different. By involving more community members, the quality of information available for sentencing will be improved, and more creative options may be developed. There will be greater knowledge of community resources that may be used in a healing plan. (14)

Another benefit of the restorative justice process is greater community involvement and ownership of the justice system. There is currently a movement toward greater community involvement in policing and other justice areas. (15) This movement coincides with an increasing desire to move conflicts away from the courts and into alternate dispute resolution mechanisms. (16) The need is greater in aboriginal communities, which have been historically disenfranchised, and where there is now a recognition of the need for self-governance. (17)

3. Restorative justice is now mandated by law

The Supreme Court of Canada has signalled a new commitment to restorative justice, in *R. v. Gladue* (18). Parliament enacted a revision to the sentencing provisions of the *Criminal Code*, which came into effect on September 3, 1996. (19) It had been argued that these provisions were simply a codification of the prior case law. The Court disagreed. "The enactment of the new Part XXIII was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law." (20) The purpose of sentencing is now set out as follows, in section 718 of *the Criminal Code*:

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

to denounce unlawful conduct;

to deter the offender and other persons from committing offences;

to separate offenders from society, where necessary;

to assist in rehabilitating offenders;

to provide reparations for harm done to victims or to the community; and

to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

This section contains something of both old and new approaches to sentencing. The new approach is contained in paragraphs (e) and (f). Along with paragraph (d), these focus on restorative goals: "repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgement of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender." (21) As a result, the goals of restorative justice are now embedded in the purposes of sentencing, and must be considered in any sentencing process which is used.

Imprisonment was found to be sometimes inconsistent with restorative justice. "Restorative sentencing goals do not usually correlate with the use of prison as a sanction." (22) Alternative methods of sentencing which are based in the community are to be considered whenever possible. This is consistent with another principle of sentencing, that an offender's liberty be deprived as little as possible.

While this principle applies to all Canadians, aboriginal offenders were highlighted in the new section 718.2 of the *Criminal Code*: "[A]ll 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." Why should aboriginal offenders have been highlighted in this way? The Court recognized that there has been a serious problem in the over-incarceration of aboriginal offenders. It also recognized that there has been systemic discrimination of aboriginal people, which has contributed to the over-representation in the criminal justice system:

Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. (23)

When aboriginal offenders come into contact with the justice system, it is more likely that they will be imprisoned than for other offenders. For example, in 1997, less than 3% of Canadians were aboriginal people, although they formed 12% of the population of federal prisons. (24) Unfortunately, due partly to the relative youth of the aboriginal population, this disproportionality simply continues to grow. (25)

While imprisonment has adverse consequences on offenders in general, consequences on aboriginal offenders will very likely be more severe. As a result of systemic discrimination described above, the Supreme Court of Canada found that aboriginal people are "more adversely affected by incarceration and less likely to be 'rehabilitated' thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions." (26)

Restorative justice helps to rectify these problems of systemic discrimination in the criminal justice system and in penal sanctions. Sentences are more creative and community-focused, reducing the

tendency to use imprisonment where it otherwise would have been used. The potential healing for the offender has the potential of reducing recidivism and future interaction with the justice system. Community healing takes place, reducing tensions in a ripple effect that may ultimately reduce other potential conflicts with the law.

Further, aboriginal traditions and values may be given more respect in restorative justice models, which have their roots in aboriginal traditions. This respect is helpful affirmation to begin to reverse the pattern of historical systemic discrimination. The Supreme Court of Canada noted that "the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these [aboriginal] offenders and their community", while "most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice." (27)

Restorative justice may not always involve alternative sentencing processes involving community consultation. In the terms outlined earlier, restorative justice as a result can be achieved without restorative justice as a process. There are advantages to the community as a whole by utilizing an alternative process, which will be lost when the traditional courtroom forum is used. However, "sentences can also be crafted by a judge alone that are equally effective and that fall within the restorative justice framework." (28) Whatever process is used, it needs to take into account special circumstances such as systemic and background factors of an aboriginal person. "In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective." (29)

4. How does restorative justice work in practice? The Circle.

There are many forms of restorative justice processes. An important form is the sentencing circle. The form of the circle is instructive of many elements important to the restorative justice process. Its use also has historical significance, and demonstrates how modern justice practices are now being informed by historical aboriginal practices.

Using a circle process to resolve issues amongst the people was not a new idea. Circles were a part of ancient aboriginal histories and are at the core of many traditional beliefs, laws and spirituality. The circle was a reflection of all aspects of life, including community peacemaking. (30)

Berna Bushie, the coordinator of Community Holistic Circle Healing in Hollow Water, Manitoba, which deals with sexual abuse and family violence issues, described the meaning of the circle in Ojibway tradition:

[T]he circle has a very significant role in our traditional way of life. Our whole culture is based on the circle. You look at the cycle of life, it's all in a circle, seasons are all in a circle. Everything! Everything operates on a circle in our culture. And this is what we have to return to. And definitely, in our work, the circle gives us the strength to be able to deal with these horrific cases [of sexual abuse]. (31)

The circle patterns the movement toward healing, a form of closure that must take place for relationships, victims, offender, and community, to become whole again. There is also a sense of equality and respect for all participants which is enhanced by the seating arrangement of a circle. In the traditional courtroom setting, the judge sits on high, while the defendant sits or stands below, rarely speaking at all while counsel play out their roles. The professionals are in charge, in a formal setting that is very foreign to the layperson or aboriginal culture. Judge Stuart described how the power dynamics change by the use of a circle:

By arranging the court in a circle without desks or tables, with all participants facing each other, with

equal access and equal exposure to each other, the dynamics of the decision-making process were profoundly changed. . . .

The circle significantly breaks down the dominance that traditional court-rooms accord lawyers and judges. In a circle, the ability to contribute, the importance and credibility of any input is not defined by seating arrangements. The audience is changed. All persons within the circle must be addressed. Equally, anyone in the circle may ask a direct question to anyone. . . .

The circle drew out the person buried behind their role, and encouraged a more personal and less professional contribution. The circle, in revealing the person behind the professional façade fostered a greater sense of equality between lay and professional participants in the circle. This sense of equality and the discovery of significant common concerns and objectives is essential to sustain an effective partnership between the community and the justice system. (32)

Not only is the seating arranged in a circle, but the process of sharing information usually moves around the circle. A ceremonial object such as a feather, talking stick, or stone is passed around the circle. The person who holds the symbolic item has the floor until they are finished speaking. Several rounds may occur before everything is said that needs to be said.

An effort is made to make the decision on sentencing by consensus, although the judge has the final authority and can override the decision of the group. The effort to come to consensus works to affirm the dignity of all participants. The community is treated as resourceful and wise in their ability to come to an appropriate and helpful sentence. Judge Stuart challenged the monopoly of judges to make such decisions:

[In the traditional courtroom setting, the] judge presiding on high, robed to emphasize his [or her] authoritative dominance, armed with the power to control the process, is rarely challenged. Lawyers, by their deference, and by standing when addressing the judge, reinforce to the community the judge's pivotal importance. All of this combines to encourage the community to believe judges uniquely and exclusively possess the wisdom and resources to develop a just and viable result. *They are so grievously wrong.* [emphasis added] (33)

In circle sentencing, the participants include a judge. Other participants may include the Crown and defence counsel, the defendant and his or her family or support persons, the victim and any support persons, First Nation elders, police, probation officers, and other community members who have an interest in the case.

Aboriginal spiritual practices are carried out in accordance with local customs. The circle may begin and end with a prayer. There may be smudging, or burning of sweetgrass, in order to purify the place and the participants and to represent honesty. One sentencing circle program includes a pipe ceremony, hanging of flags, placement of the community drum, and an offering of tobacco on the morning of the circle. (34) Such practices provide a spiritual focus that is meaningful and positive. Demonstrating respect for traditional aboriginal practices also helps to counteract the discriminatory influences which often work to bring a person into contact with the criminal justice system. If the offender has lost a sense of self-worth because of the effects of colonialism, his or her worth as an aboriginal person is affirmed.

After the circle hearing is completed, there is some form of ongoing follow-up until the conditions of the sentence have been completed. At times, offenders are required to return for a review of their progress. Some programs provide monitoring through their coordinator, or through a justice committee. (35) If the offender does not meet the requirements of their sentence, they may be required to return before the circle and explain the reasons for the failure. (36) Alternately, they may face a breach of probation charge in the

traditional courtroom setting, and if the sentence was suspended, may face further sanctions. [\(37\)](#)

5. Other varieties of models

Other forms of restorative justice than sentencing circles also exist. In several small Saskatchewan communities, *sentence advisory committees* have met without a judge and provided recommendations. [\(38\)](#) This process allows the community to have input into the sentence, while reducing the length of time required by the judge. In Yukon, the Teslin Tlingit Council Peacemaker Court Project provides an advisory panel to the circuit court on sentencing as well as pre-release matters. [\(39\)](#)

Mediation is another form. [\(40\)](#) This is a meeting where the victim and the offender are brought together, with an impartial mediator and possibly other community representatives. After discussing the effects of the crime and the underlying reasons for it, a mediator attempts to work out a negotiated resolution. No judge is involved. Victim/Offender Reconciliation Programs (V.O.R.P.), as they are sometimes known, are mediation programs which operate in non-aboriginal communities. [\(41\)](#) This form of restorative justice has its origins in a separate stream in the Mennonite faith community, beginning in 1974 in Kitchener, Ontario. [\(42\)](#) The V.O.R.P. program in Langley, B.C. is one of the oldest in North America. [\(43\)](#)

Family group conferencing is variation of a restorative justice process which is used primarily for young offenders. This process emphasizes the involvement of support persons within the family of the offender. In January, 1999, eleven British Columbia communities had family group conferencing programs in place. [\(44\)](#) The process originated in New Zealand for Maori young offenders, and has subsequently largely replaced Youth Court as the forum for all young offenders. [\(45\)](#) The success of that program has resulted in extensive discussions about providing a restorative justice system for adult offenders in New Zealand. [\(46\)](#)

Community Council Forums are a hybrid of the above-mentioned models. These aboriginal models have developed in urban centres, and are discussed in more detail below. [\(47\)](#) The hearing includes representation of a panel of aboriginal volunteers, and possibly an elder. Along with the victim, offender, and their support persons, the panel comes to a consensus on a healing plan. The circle format may be used, and aboriginal traditions are very important in the process.

On the farthest end of the scale, restorative justice can mean developing an *entirely separate court or court system*. A separate justice system for aboriginal offenders has been recommended by the Royal Commission on Aboriginal Peoples, both as a way of addressing problems with the current justice system, and as consistent with the inherent right to self-government. [\(48\)](#) It was also a recommendation of the Manitoba Aboriginal Justice Inquiry in 1991, [\(49\)](#) although that province does not plan to proceed with a separate system. [\(50\)](#) An American precedent of a separate justice system, the Navajo Peacemaker Court, has been operating in the Navajo Nation since 1959. [\(51\)](#) The Province of Alberta recently created an aboriginal court to be headed by Ojibwa Judge Leonard (Tony) Mandamin, which will be patterned somewhat after the Navajo model. "It will be a pilot project, and we have great hopes it will become a model for Canada". [\(52\)](#)

All of these models can operate at different stages of the charging process. Programs such as circle sentencing operate after a charge has been laid and a decision must be made on disposition. Some begin before charges are laid, where police or the Crown exercise their discretion not to charge an offender if they agree to participate in a diversion program. As stated by Goundry:

There are examples of restorative options at every possible stage in the criminal justice system - pre-charge, post-charge, post-conviction, post-sentence, even several years into a lengthy penitentiary

sentence. Restorative initiatives may even have a place in preventive (pre-offence) efforts. In addition there are some models which contemplate no contact whatsoever with the criminal justice system. (53)

Some aboriginal restorative justice programs also offer a variety of models to their clients. For example, the Community Justice Committee at Haines Junction, Yukon, offers a healing/talking circle, circle sentencing, mediation circle, diversion circle, a justice of the peace circle, and circuit court. (54)

6. The first circle experiment, and its results

In December 1991, Yukon Territorial Court Judge Barry Stuart decided to try an experiment in sentencing for the first time in Canada. After a day of circuit court in Mayo, Yukon, instead of immediately giving a sentence following a trial and submissions from counsel, the case was adjourned. Philip Moses had been found guilty of two charges: carrying a weapon, a baseball bat, for the purpose of committing an assault on a police officer, and theft of clothes from a Mayo home. Moses had pled guilty to a further charge of breach of probation. Judge Stuart described the scene:

It was late in the evening, everyone was tired. The police plane waited to return Mr. Moses to jail. The charter plane waited to return the court circuit to Whitehorse. Everyone -- including me -- expected the sentencing hearing would be short, directed only to the question of how much time in excess of the last sentence of 15 months would be imposed. Numerous factors which never appear in sentencing decisions but often affect sentencing, pressed the court to "get on with it".

We did not. (55)

Judge Stuart was particularly sensitive to how the justice system had failed aboriginal people. He also believed that community involvement was essential to break the cycle that had happened in the life of this offender. He enlisted the aid of the community, and set up the first Canadian sentencing circle, with 30 participants.

Philip Moses was a 26-year-old member of the Na-cho Ny'ak Dun First Nation of Mayo. There had been alcohol abuse in his family of nine children, although his parents had recently gained sobriety. From age 10 until 16, Moses had been removed to a series of foster homes, group homes, and finally juvenile centres. While in the care of the state, he was physically and sexually abused. Suffering from Fetal Alcohol Syndrome (56), Moses functioned at a grade six level. His criminal record contained 43 convictions, involving sentences totalling almost eight years of imprisonment. When in prison, he experienced severe depression and suicidal tendencies. (57) Most treatment recommendations were not carried out, mainly because there was an absence of suitable resources. (58)

Judge Stuart found that the criminal justice system had failed both the community, and this offender:

First, the criminal justice system had miserably failed the community of Mayo. Born and raised in Mayo, his family in Mayo, Philip instinctively returned to Mayo after each of the previous seven jail sentences. He would again return after any further jail sentences, each time returning, less capable of controlling either his anger or alcohol abuse, more dangerous to the community and to himself. The criminal justice system had not protected, but had endangered the community.

Secondly, the criminal justice system had failed Mr. Moses. After 10 years, after expending in excess of a quarter of a million dollars on Mr. Moses, the justice system continues to spew back into the community a person whose prospects, hopes and abilities were dramatically worse than when the system first encountered Philip as a wild, undisciplined youth with significant emotional and general life-skill handicaps. His childhood had destined him for crime, and the criminal justice system had competently

nurtured and assured that destiny [footnote omitted]. (59)

Using traditional sentencing, a term of imprisonment greater than 15 months would have resulted. A federal penitentiary was a possibility. (60) By using a sentencing circle, the issues changed, and the result was markedly different. In a decision issued in March 1992, Moses was given a suspended sentence, with two years of probation. The sentencing plan involved three phases of rehabilitation. After each phase, the circle would reconvene, and fine-tune the plan and offer whatever further support may be required. (61)

The first phase called upon Moses' family to reintegrate him into their family and cultural practices by having him live at their home on a remote trap line. The second phase involved treatment at a residential program for aboriginal alcoholics, which was unfortunately only available in southern British Columbia. The third phase was to return to his family, where the First Nation would develop a program for him to upgrade his life and employment skills, and provide continuing counselling for substance abuse. In all phases, there was an attempt to monitor Moses' progress by close supervision and support.

Was the program successful? The court and the community were taking a big risk. Moses had a string of 43 prior convictions; 27 of them in the previous three years. (62) He was not a person who inspired confidence. However, the alternative, sending him off to yet more time in jail, was not working, but was only worsening the problem. Judge Stuart stated, "It was hardly the model case to experiment with community alternatives. What could be lost in trying!" (63)

Unfortunately, the sentencing circle on this matter was not the last contact of Philip Moses with the criminal justice system. On October 19, 1992, Moses was back before the Court in a traditional sentencing hearing. He pled guilty to three breaches of the conditions of the circle sentence probation order, by becoming intoxicated. He also pled guilty to failing to attend court. He was sentenced to a total of 8 weeks imprisonment for the four counts. Judge Faulkner noted that Moses was already incarcerated relating to some other relatively more serious matters, which would be proceeding to trial in November 1993. "[T]here have been repeated breaches of an order which Mr. Moses himself had a part in fashioning, an order in which, to use the vernacular, Mr. Moses was given a considerable break or a chance was taken on him, which chance has so far proved to have been ill-conceived." (64)

Was it ill-conceived? The community took on a challenge perhaps greater than it was equipped to do. Our medical knowledge has also increased of the inherent challenges of Fetal Alcohol Syndrome (F.A.S.). Even now, this condition of brain damage continues to be misdiagnosed, its effects misunderstood even in the medical and social services community. (65) The mental disability resulting from this condition usually precludes employability, although the sentence given to Moses had included recommendations to help him become employable. Further, individuals with F.A.S. often have difficulty appreciating the consequences of their actions. (66) In this case, although a psychiatric assessment was prepared, there does not appear to have been any psychiatric expertise within the sentencing circle. Where there are known psychiatric issues, some professional expertise is probably necessary in fashioning a fit sentence.

Recidivism is one important measure of success, but it is not the only measure of success. Some important achievements took place when Moses was sentenced. Judge Stuart outlined numerous advantages of the circle process, some which have been discussed earlier. Community-building takes place. Judge Stuart felt that communities need to take more responsibility for crime prevention and dispute resolution. "In the circle, [Moses'] family, First Nation, and community moved beyond their frustration, beyond seeing Philip as a problem, beyond relying on the justice system for answers and began to recognize their responsibility and fundamental role in healing and helping a member of their community." (67) The circle was instrumental in providing a greater role for the community, greater ownership over the justice process within their community, by taking responsibility for issues such as conflict resolution and crime prevention.

The community-building and increased ownership over justice processes did not die when Moses breached the conditions of his probation order. Since the first circle sentencing case, even more communities within Yukon have taken on greater participation in the justice system. Restorative justice programs are now in place at Watson Lake, Teslin, Carcross, Haines Junction, Whitehorse, and Dawson City, with other communities to follow. [\(68\)](#)

Each initiative which affirms aboriginal cultural values also contributes to reversing the systemic discrimination within the justice system. The circle process accords more closely with aboriginal values, by seeking consensus and harmony, rather than the confrontational approach in our justice system.

Aboriginal culture does not place as high a premium on individual responsibility or approach conflict in the direct confrontational manner championed by our adversarial process. Aboriginal people see value in avoiding confrontation and in refraining from speaking publicly against each other. In dealing with conflict, emphasis is placed on reconciliation, the restoration of harmony and the removal of underlying pressures generating conflict. [\(69\)](#)

The western value of individual rights is maintained by ensuring that protections are included within the system. For instance, if important facts are in dispute, they can be resolved by re-convening a hearing to receive evidence under oath. [\(70\)](#) Guilt is not at issue, as the sentencing circle usually follows a guilty plea (occasionally a conviction following a trial, as in *Moses*). In respecting the western values of individual rights as well as aboriginal values of seeking harmony and balance, there can be "a genuine partnership between aboriginal communities and the justice system by according the flexibility for both sets of values to influence the decision-making process in sentencing." [\(71\)](#)

Yukon Territorial Court Judge Lilles provided a useful summary of the majority of the points raised by Judge Stuart about the advantages of the circle sentencing process:

1. Family and community members are encouraged to participate, offer facts and information and to be part of the decision making process. . . .
2. Justice system professionals no longer dominate or control the sentencing hearing.
3. Community involvement through the circle generates relevant information which would otherwise not have been available to the court.
4. Community participation de-emphasizes the adversarial approach taken by lawyers; victories are not measured by the amount of jail ordered and the exploration of other options is encouraged.
5. Offender participation is increased and the impact of the sentencing hearing will be more meaningful to him or her. It is one thing to be 'condemned' by a faceless judge, quite another to be told by members of one's family and friends that certain conduct is unacceptable and will not be tolerated. . . .
6. Participation in the circle increases understanding of the justice system and its limitations by family and community members. This is particularly important today when the public is prone to receive a biased view of the justice system from the media publicity surrounding exceptional cases.
7. Family and community resources can be mobilized through a circle hearing; where an offender goes to jail, the family will better understand the need to maintain close contact and to prepare the offender's return to their community.
8. Even where the offender goes to jail, . . . family and friends have an opportunity to express their

affection, love and support for him [or her]. The offender is less likely to view himself [or herself] as a 'victim' of the justice system and more likely to use his [or her] jail time constructively. (72)

Clearly, it is not only the offender who benefits from the circle sentencing process. There is a process of community healing and education that takes place. However, the education does not go only one way, as may be implied by the above. While the community can learn more about the requirements and limitations of the legal system, those who deliver justice also have much to learn from aboriginal communities. The lawyers, judges, and other officers of the court have a greater opportunity to learn about the limitations of traditional sentencing, and how to broaden sentencing parameters to become more meaningful for aboriginal people.

Numerous other cases used the circle sentencing process after *Moses*, following the lead of Yukon. The process was adopted in Saskatchewan in July 1992, when the first sentencing circle in that province took place in Sandy Bay, with Provincial Court Judge Fafard presiding. (73) By March 1995, Judge Fafard had personally handled over 60 sentencing circles in northern Saskatchewan; (74) roughly 100 had occurred in total in that province. (75) The process was recently adopted by the Ontario Superior Court for the first time, when Madam Justice Rose Boyko left her courtroom to conduct a circle at the Mnjikaning First Nations reserve. (76)

Judge Stuart's assessment of his experiment in *Moses* was filled with optimism. He did not consider in depth the potential downsides of circle sentencing. There is a potential risk to the community if a violent offender is not removed; although when the offender returns from having served a sentence, possibly more angry and violent, the community is even more at risk. There is a great deal of time and resources which are required in conducting the circle process. (77) However, the time and resources spent now must be balanced against the time and resources spent later if there is continued future contact with an ineffective justice system.

Judge Stuart's experiment in circle sentencing had many positive results, despite the fact that the conditions of the sentence were not finally met. Judge Stuart did not see this experiment as the last word, but as a first step. "We must find a way to change. We must find communities, First Nations, professionals and lay people willing to work together to explore 'truly new ways'. We will; we have no choice. In making the circle work, the Na-cho Ny'ak Dun First Nation took an important first step. Can we follow?" (78)

That first step did have an impact. The circle sentencing process evolved further as new cases arose. Guidelines and procedures were developed in different jurisdictions, such as the Kwanlin Dun area of Whitehorse, (79) which are outlined in *R. v. Gingell*. (80) One of the participants in *Gingell* observed that circle sentencing has had real success in ultimately reducing recidivism: "A lot of people in this community went to jail but continued to offend over and over. With Circle Courts, this has stopped. I have seen changes in people's lives." (81) Although some authorities point out that evidence of a reduction in recidivism is primarily anecdotal, (82) there is some documented evidence of improvements, such as the 46% reduction in crimes in the 17 to 20 year old age group in New Zealand. (83) Yukon's Minister of Justice, Lois Moorcroft, has expressed a firm belief that "a restorative justice approach is the best way to reduce the incidence of crime [and to] rehabilitate offenders". (84)

7. Limiting use of sentencing circles

The Kwanlin Dun guidelines in Yukon were quite broad in accepting offenders for the circle sentencing process. Preference was given to offenders residing in a particular subdivision, and to members of the Kwanlin Dun First Nation, but other individuals could apply with the support of at least two band members. The offender also had to accept responsibility for the crime, show commitment to the process

and the eventual disposition, and go through an application process. The Court added some basic requirements, including that the offender must have significant support from the community, friends, or family. (85)

Another set of guidelines arose in northern Saskatchewan, which became the subject of discussion at the appellate court level in *R. v. Morin*. (86) *Morin* was the first case where an appellate court affirmed the legality of sentencing circles. At the same time, those guidelines have led to some argument about the appropriateness of circle sentencing in urban communities. A view has emerged that innovations like sentencing circles can only work in small, homogeneous communities; a view which Judge Stuart has called a myth. (87)

In *R. v. Joseyounen*, Saskatchewan Provincial Court Judge Fafard outlined seven criteria which were applied in deciding if a case would be appropriate for a circle. "These criteria are not carved in stone, but they provide guidelines sufficiently simple for the lay public to understand, and also capable of application so that our decisions are not being made arbitrarily." (88) The criteria are as follows:

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. . . . [T]here are elders or respected non-political community leaders willing to participate.
4. The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing.
5. The court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she [or he] is, then she [or he] should have counselling made available to her [or him] 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. (89) [emphasis added]

Judge Fafard explained that the offender should have "deep roots in the community" so that the sentence would include access to needed resources for the offender. Further, the participants would be less likely to be "conned" by the offender to include inappropriate conditions, as they would have intimate personal knowledge of the offender:

One of the functions of a sentencing circle is to call upon the community to marshal its resources, even though they may be meagre, and to come to the aid of the offender in his [or her] quest for rehabilitation and re-integration into society. This is not possible if the accused does not have roots in the community. Participants who have no knowledge of the offender will be of little use to him [or her] and might easily be "conned" by an experienced offender. It is precisely because they know his [or her] background, his [or her] culture, his [or her] strong point, and his [or her] weaknesses, that the members of the offender's community can reach out to him [or her]. (90)

As noted above, the *Joseyounen* criteria were discussed by the Saskatchewan Court of Appeal in *Morin*. In that case, although members of the Métis community had offered to help the offender by participating in the circle, *Morin* might not have been easily described as someone with "deep roots in the community." It was argued that a sentencing circle had been inappropriate because the offender did not

live in a small northern community. He lived in an urban area, Saskatoon.

Crown counsel argued that sentencing circles work most effectively in small, close-knit communities. The community can more easily supervise compliance with the conditions of the sentence. "[I]n a small community breaches do not go undetected. That type of community control is an essential feature of the sentence circle concept. This type of community control is lacking in an urban setting, or at least, very much more difficult to obtain." (91) Moreover, it was argued that the benefits of the circle can be easily seen by the community as a whole in a small, relatively homogeneous community: the reconciliation between the victim and offender, the visible acknowledgement of the harm caused, and the mobilization of community resources to support the offender and the victim.

The Court of Appeal did not address this issue directly, but upheld the use of a circle sentence for Mr. Morin (although increasing the custodial part of the sentence). The Court was hesitant to set out guidelines about whether sentencing circles should be used in a given case, given the wide latitude provided to judges in sentencing hearings generally. (92) Instead, it was suggested that provincial court judges develop their own rules in order to provide more certainty to participants. Having refused to set aside Morin's sentencing circle process, in theory, an opening was provided for the possibility of sentencing circles in urban areas.

The subject of community also arose in *Morin* when the Court quoted from yet another set of guidelines for sentencing circles in Saskatchewan, set out in *R. v. Cheekinew*. The Court described the *Cheekinew* criteria as generally consistent with those in the *Joseyounen* decision. However, on the subject of community, they provide a potentially more expansive view:

The offender should be . . . supported in the request for the establishment of a sentencing circle by the offender's own community willing to participate in the sentencing circle process and to make meaningful sentencing recommendations. As well, to assume responsibility for the supervision and enforcement of the terms of the probation order including the reporting of any breach thereof. In this context *the term "community" ought to receive a wide and liberal construction* as the term "community" may be, and probably is, a term capable of different interpretations depending on the residence, or proposed residence, of the particular offender and/or any other factor relevant to that term's interpretation [emphasis added]. (93)

Although the above statement suggests that a wide and liberal interpretation of the word "community" should be employed, a narrower view was taken in the context of the *Cheekinew* case itself. "Unlike in *Moses* this offender does not live in, have, or enjoy a 'community' in the same sense as did Mr. Moses. Here, this offender lives in an urban setting in the City of Saskatoon." (94) While Morin also lived in Saskatoon, Grotsky J. found that Cheekinew's community did not show as much willingness to participate. It was defence counsel rather than the community itself who initiated contact with the community. Defence counsel simply provided two names of individuals at the Saskatchewan Indian Federation College who had expressed an interest in becoming involved in a circle. During the trial, the offender had vilified his victim and other witnesses, who were also aboriginal. Further, Grotsky J. was not satisfied that this community, if it did exist, had the ability to adequately supervise the conditions of the sentence. The offender had a long criminal record of 58 previous convictions, some involving violence. Although Grotsky J. expressed reluctance to find any sort of community in a city, the quality of community in this case was found wanting. The application for a sentencing circle was denied.

The dissent in *Morin* also discussed the subject of community. The dissent would not have interfered with the sentence determined by the sentencing circle. Chief Justice Bayda would have reduced the criteria for circle sentencing to two matters only: the willingness of the offender and the existence and willingness of a community. The community would be required to have the following attributes:

(i) the community is reasonably well defined by reason of the racial origin of its members, their religion or their culture or by geography or some other feature which distinguishes the community from other communities;

(ii) the community recognizes the accused not only as a member but as one who has the kind of relationship with the community that ought to make him or her feel accountable to it for any criminal wrongdoing;

(iii) the community supports the accused in his or her difficulty with the law and is prepared to accept the accused as a person who has the capacity, inclination, need and the sincerity to be restored (healed) in his or her relationship with the community and in his or her relationship with the victims of the wrongdoing;

(iv) the community has sufficient healing or restorative resources to help the accused (and where necessary the other persons affected by the wrongdoing) in that restoration or healing. [\(95\)](#)

This view of community is broad enough to include many aboriginal people living in urban communities, who often have close ties with their culture. [\(96\)](#) The definition also captures connections that arise from reasons other than culture, such as geography or religion.

In summary, the resistance to sentencing circles in urban communities in the case law appears to stem from a number of arguments. Small communities are perceived to have a greater ability to control and monitor compliance with conditions of a sentence. Community members are more likely to have personal knowledge of the offender, and thus may be more informed about his or her needs to support a program of rehabilitation. The desired effects of healing conflicts and restoring harmony may be more visible in a small community. Members of a small rural community will benefit more from the effort of mobilizing resources which occurs in the circle sentencing process.

However, underlying these arguments, urban areas are seen as usually lacking the quality of community necessary for this initiative. Circle sentencing requires a strong level of community participation, and a willingness to support an offender in his or her effort to complete the terms of disposition. Ultimately, urban areas are not perceived as having the sort of cohesive community required.

In general, there are also other reasons for resistance to restorative justice initiatives, which might also operate in urban settings. There are ongoing political pressures from sources such as victims rights groups and the Reform Party arguing for more stringent sentences and longer periods of incarceration. These groups react to sentences without understanding the difficulties of incarceration and the overall failure of the justice system with regard to aboriginal people. [\(97\)](#) Alternative sentencing models may appear to offer "light" sentences. A program on the southern area of Vancouver Island apparently got into trouble when, dominated by only a few men, it "was used to allow their relatives to escape punishment for sexual offences." [\(98\)](#)

While it is less punitive, restorative justice is not an easy way out, and "is not necessarily a 'lighter' punishment." [\(99\)](#) As Kwochka has stated, central to restorative justice "is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility." [\(100\)](#) Taking responsibility in front of their own community can be more frightening to some offenders than standing up in a relatively impersonal courtroom and facing a possible jail term. Territorial Court Judge Lilles summarizes the views of participants at one circle:

Circle Court is not easy. It is much harder than going to ordinary court. It is very hard to stand up in front of one's community and to admit openly what one has done wrong, to want to correct it and to ask for forgiveness. 'Circle justice is tough!' [\(101\)](#)

One offender was offered a non-custodial sentence by the Crown, but only if the offender went through a sentencing circle. The offender chose jail. [\(102\)](#)

Not only is the process difficult, but the sentence itself can also include numerous strict conditions. In *Gingell*, [\(103\)](#) which involved four counts of criminal harassment, there was a lengthy set of detailed conditions of a three-year probation order. The conditions included no contact with the victims, following a variety of treatment programs and counselling, not having alcohol or drugs or firearms, writing a letter of apology, providing gifts according to aboriginal custom, and attending a variety of meetings.

Further, the sentence may not always avoid imprisonment. The *Morin* disposition included 18 months of imprisonment, followed by 18 months of probation with detailed conditions. Although the majority of the Court of Appeal found the incarceration period too short, Bayda C.J. dissented: "to assess the fitness of a restorative sentence by comparing its incarceration component with the incarceration component of a fit sentence using the ordinary approach is to engage in an exercise that is either flawed or irrelevant." [\(104\)](#) The objectives of the two methods are quite different. Further, Bayda C.J. stated that the success of the healing aspect of the restorative approach is often contingent on a minimal incarceration period or none at all. The challenge is to inform the public about the benefits of the restorative approach, to work at reducing the resistance.

Finally, a further reason for limiting restorative justice in urban areas is the same set of forces which operate to cause aboriginal people to be poorly treated within the criminal justice system. Stereotypical views do not change quickly, and where they are ingrained into systemic structures, it is extremely difficult to implement change. There is a view that aboriginal people living in cities have chosen to live there apart from their culture and ways:

There is often an unspoken assumption that Aboriginal justice systems will develop in rural or northern communities and that urban Aboriginal people, because they have chosen to live in the city, have no choice but to deal with the non-Aboriginal system if they come into conflict with the law. This ignores the facts about Aboriginal people today, however, and makes the promise of culturally appropriate justice systems an illusion for almost half of Aboriginal people in Canada - the half that lives in towns and cities. [\(105\)](#)

8. A Vancouver circle

There have been very few urban sentencing circles. *R. v. H.(S.E.)* [\(106\)](#) was a rare circle which took place at 222 Main Street in Vancouver in 1993. The offender pled guilty to sexual assault of his two step-daughters. He had himself been sexually abused as a child, by his grandfather and by a church minister. The circle was initiated at his request. It included leaders from the aboriginal community in the lower mainland, representing Cree, Haida, Ojibway and Squamish Nations. It also included social service providers and other support persons. It was a "circle of peers", as opposed to a circle of people who knew the offender intimately. In contrast to the usual circle procedures, it does not appear to have included Crown or defence counsel, as they maintained very different positions on sentencing, while the circle came to a consensus.

The offender received a suspended sentence along with three years' probation. Terms of probation included receiving treatment for sexual and substance abuse, family counselling, and no alcohol or drugs. The offender was to have no contact with a child under sixteen years except in the presence of an adult. He was to arrange for a feast in accordance with aboriginal tradition. The order was to be reviewed in another twelve months. The circle recommended that very stiff sentences be given should the probation order be breached: ten years consecutive on each of the three counts. Of course, the judge at this sentence had no jurisdiction to impose a sentence for a future breach; that matter would have to be dealt with at the

time that a breach was found.

The Crown had expressed concern that one of the children may still be at some risk. The child, who was eleven years old at the time of sentencing, continued to live with her mother, who had been unable to protect her from abuse in the past. The other child had reached adulthood and was no longer living in the country. The offender was separated from the family, but was attempting to be reconciled.

Members of the circle also expressed concerns about the offender's cooperation with the circle. He had missed appointments with his psychologist and with the native courtworker. He had looked at options other than those suggested by the circle when the process had been adjourned. Provincial Court Judge Stromberg-Stein suggested that this may have had to do with his difficulty "reconciling his beliefs in Christianity with native culture, traditions and ways." (107) Concern was expressed that he saw the circle as a way of avoiding a jail sentence.

Judge Stromberg-Stein stated:

I hope that this is not the case. Many people have taken time out of their lives to reach out to you, to guide you and to help you.

The accused impresses me as sincere in his efforts to rehabilitate himself, though he may not recognize the extent of commitment that is expected of him and required of him. The accused has accepted an awesome responsibility asking for the circle - to not let his people down - this being the first circle in this jurisdiction. Very high expectations have been placed on his shoulders. As one member of the circle said to the accused, the eyes of the future are looking at you, looking at us - do what you have to do to make sure that there is a future. (108)

Although there have been numerous cases in northern Canada, there does not appear to have been a future for circle sentencing in the Vancouver jurisdiction. No further sentencing circles appear to have been held. Provincial Court Judge Barnett described this case as one which was "a unique, time-consuming and problematic experience for her (Judge Stromberg-Stein) and for everybody else who became involved. Identifying and gathering together the concerned 'community' will not be easy in an urban setting." (109) Crown counsel also wrote a "cautionary memorandum" about such cases. (110)

As for *Moses*, the *H.(S.E.)* case was a difficult one to use as a test of circle sentencing. There are complex issues in cases dealing with sexual assault. Many restorative justice initiatives avoid cases involving sexual assault or domestic violence. (111) Power imbalances work against an effective circle sentence, which is principled on arriving at decisions by consensus as a group of equals. The power imbalance that often occurs in sexual assault and domestic violence usually will make such cases inappropriate candidates for mediation or restorative justice models. (112)

It is also unclear whether the *H.(S.E.)* disposition was adequate to protect one of the victims from the risk of further sexual assaults. This concern can arise equally in traditional courtroom settings, where sentences for sexual assault are frequently served in the community, and may lack adequate protective measures. (113) Such issues can be addressed in either forum by taking separate measures. Judges and other decision-makers at sentencing can be educated about issues surrounding sexual assault. It would also be useful to ensure that adequate psychological or other professional expertise is provided in the sentencing process where needed.

Unfortunately, what seems to have been a difficult experience with circle sentencing in Vancouver probably discouraged further attempts toward an innovation which had great potential.

9. Other urban forays into restorative justice in aboriginal communities

Although urban experiences have been rare, there was one fairly early exception. At about the same time that Judge Stuart was initiating a circle sentence experiment in Mayo, Yukon, another initiative was underway in Canada's largest city. In 1991, Toronto's Community Council Project (C.C.P.) was founded in response to the over-representation of aboriginal people in jails and in the justice system. (114) It was developed by Aboriginal Legal Services of Toronto, a one-stop legal advice centre. It is funded jointly by the provincial Attorney General and the federal Department of Justice.

Operation began in 1992 after an 11-month development and consultation period. Initially a five-month period had been contemplated, but in retrospect, a longer period was deemed wise. "Community involvement takes time; it follows the adage, 'go slow to go fast'. Unless the community is given the required amount of time to take ownership of the program it may well fail entirely or fail to represent the wishes and objectives of the community." (115)

The C.C.P. is a post-charge diversion project. Referrals come from native courtworkers, counsel, aboriginal agencies, and other sources such as other aboriginal offenders. Offence types started out with fairly minor matters such as theft under; after several months of operation, more serious offences such as assault were added. Recently, the Department of Justice has agreed to have the C.C.P. deal with offences under the *Controlled Drugs and Substances Act* (such as possession of a narcotic and trafficking). Offences which are not eligible for diversion include impaired driving, firearms offences in which a prohibition will be sought, sexual assault and domestic violence offences.

The Crown makes the final decision whether to proceed with diversion. The existence of a prior criminal record does not prevent diversion; on the contrary, the program targets repeat offenders. Similarly, the likelihood that an offender might receive a sentence of imprisonment in a traditional court forum, does not prevent diversion.

As for other restorative justice programs, the offender must accept responsibility for the offence. The offender is offered an opportunity to consult with his or her lawyer or duty counsel prior to making the decision to participate, in order to canvass the options such as the possibility of a defence, and to be fully briefed on the diversion process. If the offender proceeds to diversion, the charges are stayed.

The Community Council consists of a small group of three trained volunteers. The victim is also invited to participate. In cases involving personal injury, the victim's consent is required. Most victims choose not to attend, although some ask to have input into the hearing, or to be advised of the outcome. "To protect against possible pressure on a victim to consent to diversion, the offender is not informed of the victim's preference." (116) The decision is arrived at by consensus.

Unfortunately, the Toronto program is only able to handle a very limited caseload and must turn away many eligible clients. With current staffing and funding levels, it is only able to receive seven new cases per month, although it would like to receive twenty. (117)

Other urban programs have also recently begun. The Thunder Bay Community Council Project began in 1997. This project deals with post-charge sentencing of adult and 16-17 year old offenders. The Council members did not feel qualified to deal with younger offenders, but "decided to hear cases involving 16 and 17 year olds since this group experiences more difficulties in obtaining assistance as they are too old for youth programs and too young for adult programming." (118) The process has many similarities to that of Toronto, with a three-member Council making a decision by consensus.

In 1998, a similar diversion program began in the city of Winnipeg as a three-year pilot project, the

Winnipeg Community Council Diversion Program. Development took place over five years, with some delay in obtaining government funding. This program "seeks to avoid the language of the mainstream criminal justice system in an attempt to redefine a wrongdoer as someone who is out of balance, and a wrongdoing as an offence against the community rather than the state." (119) An offender is called a "broken-spirit"; dispositions are called "healing plans." By re-defining the language, aboriginal value systems are more deeply ingrained into the processes.

Both pre-charge and post-charge cases are dealt with. Cases come from a variety of referring sources, although the Crown approves all cases. The Community Council hearing includes four aboriginal members, plus a full-time Elder/Peacemaker. "The Elder/Peacemaker facilitates the hearing and provides traditional cultural and spiritual teaching and guidance to individuals (offenders and victims) and families." (120) After a healing plan is developed, which may take more than one hearing, the Coordinator monitors compliance with the plan. A non-compliant broken-spirit must re-appear before the Council. If the Council is not satisfied with the explanation, the case may be referred back to Crown for prosecution, and the broken-spirit will not be able to use the program's services again.

A separate youth diversion program has also been available in Winnipeg for aboriginal young offenders since 1998, called "CP.1879". (121) Two processes are used, depending on whether the victim chooses to take part. If so, mediation is used with a small group of aboriginal volunteers. Otherwise, there is a meeting with the project coordinators, the offender, and his/her support network. One of the concerns mentioned by the program's coordinators is the "lack of culturally appropriate services in Winnipeg for Aboriginal youth in the areas of drug and alcohol counselling, detox, life skills, anger management and sexual abuse counselling." (122) While the adult program in Winnipeg will accept repeat offenders, the youth program only deals with first-time offences.

10. The Vancouver Aboriginal Restorative Justice Program

Although there has been no specific aboriginal restorative justice process utilized in the city of Vancouver since the 1993 *H.(S.E.)* circle sentencing case, discussions began in 1995 within the aboriginal community to develop a program. (123) A Steering Committee was initiated. Later, a 15-member Aboriginal Caucus (124) was created in order to make decisions as a community prior to meeting with government representatives on the Steering Committee. Their efforts are coming to fruition as the program prepares to accept its first clients in the time frame of approximately January 2000.

The program set out to accomplish a variety of goals:

provide more culturally appropriate programs and services for Aboriginal people in conflict with the law in Vancouver;

involve all Aboriginal representative organizations, including Elders and women, in all aspects of programming to enable input on spiritual and cultural matters;

develop processes which promote self-determination for Aboriginal people;

provide more effective justice services for Aboriginal people in Vancouver;

reduce the rate of incarceration and recidivism among Aboriginal people in Vancouver;

reintegrate Aboriginal people who come into conflict with the law, and their victims; and

enhance public safety. (125)

The process involves a Community Council Forum similar in some ways to the Winnipeg and Toronto models. The process is led by an elder and three Community Council members, who are aboriginal volunteers from the lower mainland. They meet in a circle with the victim, offender, and their respective support people. The circle format is important to the consensus-style process:

Within the circle, the participants will discuss the circumstances of the offence and the underlying problems which led to the wrongful behaviour. At the end of the process, the Council, with input from both the victim and offender, will reach a consensus on what is necessary for the offender to do to begin to restore his/her lost balance and make amends for the harm caused to the victim and the community. [\(126\)](#)

A particular challenge in the Vancouver area is the cultural diversity among aboriginal people. "[T]he urban aboriginal community is considerably more diverse than any single First Nation reserve community." [\(127\)](#) An effort is made to have an elder from the offender's nation, but it will not always be possible given the diversity of the Vancouver community. The Vancouver aboriginal community tends to be more transient and includes more nations than, for example, Toronto's community, which has a large Ojibway population. [\(128\)](#)

Aboriginal values are affirmed in the program, in a way that attempts to accommodate this cultural diversity. It was recommended that relatively "widely-held aboriginal values (e.g. harmony, consensus decision-making, modesty, patience and careful listening) should be instilled in the process through the use of the Circle and the teachings of the sacred Four Directions of the Medicine Wheel." [\(129\)](#) More specific cultural and spiritual matters are addressed either by having an elder from the offender's nation, or by referring the offender to resources available in the community. Some urban offenders may have lost, or never had, a real connection with their culture and unique identity as an aboriginal person. [\(130\)](#) Re-connection with those values becomes an important part of the healing process.

Initially, the program will operate on a pre-charge basis. In British Columbia, offences which are prosecuted by the provincial Attorney General go through a charge approval process. Police recommend whether charges are to be laid, and Crown makes the final decision. Crown counsel is expected to be informed about the Aboriginal Restorative Justice Program and to refer and approve appropriate cases. Offenders must be dealt with according to Alternative Measures procedures, within three months of referral. If an offender is not compliant with his or her healing plan, the case is expected to be referred back to Crown for charging.

There are some obvious difficulties with such a limited referral process which relies entirely on the Crown to refer potential offenders. Aboriginal organizations, native courtworkers, counsel, and service providers such as the University of British Columbia's First Nations Legal Clinic, are powerless to suggest individuals who could benefit from the program. Many Crown counsel may be uneducated about the issues surrounding restorative justice, and the aboriginal community. Placing control into the hands of the Crown is also inconsistent with the increasing movement toward self-governance and self-determination for aboriginal people. What does it say to the aboriginal community that its own program is, in effect, controlled at crucial decision points, by a non-aboriginal community? Criminologist Ted Palys comments:

Over the long haul, this protocol is problematic for at least two reasons: (1) placing eligibility criteria completely in the hands of the Crown diminishes the very community authority required for a project of this sort to succeed; and (2) it requires aboriginal leaders to be accountable to the authorities whose justice system has failed aboriginal people, rather than to their own communities. [\(131\)](#)

A rationale was offered by the program for taking this approach initially. It was considered a cautious

approach, ensuring that the "level of referrals does not ever-extend its [the program's] resources and thereby diminish its chances of success." (132) Further, it was felt that the fact that the Crown would be in a position to prosecute offenders for non-compliance, could act as a "safety net", allowing the aboriginal community and community council members to gain confidence in the program's abilities. However, these arguments are not persuasive. Issues such as caseload and monitoring compliance can be dealt with separately. They do not provide an adequate justification for limiting referral sources.

Fortunately, there is the potential for some movement on this matter. "The Crown is committed to being 'flexible' in designing a protocol that reflects the vision of the program. The negotiated agreement anticipates a time when referrals may emanate from several sources". (133) Nevertheless, the tone will have been set for the future, which may be difficult to remove.

A further difficulty is that the program will initially be dealing primarily with first offences, and with relatively minor offences, identified as "category 3 and 4" by the Attorney General. The reasoning was that "Community Council members will need to gain experience and confidence in their abilities to deal with minor offenders before facing the challenges presented by more serious offenders." (134) Further, the wider aboriginal community and the Crown will want to see that the program is proven before agreeing to the management of more serious matters. As stated by Kent Patenaude, member of the Aboriginal Caucus and Steering Committee, and Director of Native Programs, Legal Services Society of B.C., "you have to crawl before you can walk. It is a learning process for everyone. We want a manageable, comfortable pace for everyone involved." (135) The negotiated protocol with Crown anticipates that eventually a broader array of offenders and crime categories will be eligible to the program. (136)

It might be questioned whether dealing with relatively minor issues is the most effective use of resources. Provincial Court Judge Cunliffe Barnett stated that "[a]lternative sentencing is too time-consuming to be considered appropriate for many or minor cases." (137) The Crown already has in place alternative measures programs for first-time adult offenders. Providing a separate aboriginal program will be helpful, but may not be applying the resources where they are most needed. Ted Palys has commented that it is frequently irrelevant or tangential what offenders get arrested for; the broken spirit is the issue. (138) However, closing the door on people who have committed more serious offences limits the usefulness of the program.

Further, restorative justice is occurring more and more in the context of traditional courtroom settings for minor and first-time offences. A first offence for a category 3 or 4 offence will generally not involve a sentence of imprisonment. A conditional discharge under section 730 of the *Criminal Code* allows an offender to avoid a criminal record by complying with specified terms of probation. Suspended sentences or conditional sentences are also served in the community. Although these sentences do not always incorporate all elements of restorative justice, they tend to be focused more on the rehabilitation of the offender than on retribution or punishment. While the traditional courtroom setting does not provide the full benefit of the restorative justice process to the community and to all participants, the sentence resulting can indeed be restorative. If this can be achieved relatively quickly in the courtroom, an offender may prefer that approach to going through a more intensive community forum.

Circle sentencing cases have tended to deal with the most serious of offences: "aggravated assault, assault causing bodily harm, robbery with violence, sexual assault, spousal assault, criminal harassment, impaired driving causing death, break and enter, theft over \$1,000, and arson." (139) Except for sexual assault and domestic violence cases, due to the potential of power imbalances, the greatest impact might be found in some of the cases where the traditional justice system has failed, with offenders who have had previous offences and perhaps incarcerations. Of course, these are also the most difficult cases. Perhaps the Vancouver program is justified in proceeding with some caution, and will thereby avoid

some of the pitfalls of the historic circle sentencing cases. The Toronto program has been very successful while actually targeting repeat offenders. It too, started on a more conservative plan of dealing with relatively minor offences only, which was expanded after several months. [\(140\)](#)

The Vancouver program has taken a very cautious approach generally. It has also spent a great deal of time on planning and developing the program along with a variety of aboriginal organizations. This year, it held a Community Forum and Feast, as well as an Elder's Consultation. Members travelled to other urban locations to learn from experiences there. By this deep level of consultation, the Vancouver program worked to avoid problems experienced by other communities, and to ensure the broad base of support that would best promote its success. [\(141\)](#) Perhaps such measures can also help to break down any resistance within the wider community.

11. Why we must break down resistance to urban restorative justice

The Supreme Court of Canada in *Gladue* has now left no doubt that restorative justice belongs as much in urban settings as it does in rural areas. A unanimous court rejected the argument that the circumstances of aboriginal offenders are to be given particular attention only if they live, and commit offences, on reserve. [\(142\)](#) The court recognized that both aboriginal identity and community are important to aboriginal people living in cities:

Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal people's existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities. [\(143\)](#)

The court also held that the term "community" must be defined broadly, which would encompass urban areas:

Obviously, if an aboriginal community has a program or tradition of alternative sanctions, and support and supervision are available to the offender, it may be easier to find and impose an alternative sentence. However, even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative. *For all purposes, the term 'community' must be defined broadly so as to include any network of support and interaction that might be available in an urban centre* [emphasis added]. [\(144\)](#)

Applying this broad view of community, if some level of community support is available, even if it is not an especially strong level of support, there should be no bar to initiating a restorative justice process. There is no reason why this should apply differently to a sentencing circle as to another model. As a result, the *Joseyounen* criterion of "deep roots in the community" should no longer be a requirement to have a sentencing circle.

The Court provided an even greater opening for disenfranchised people, recognizing that there are many who have no community support around them. Even in such a case, a sentencing judge is required to make "every effort" to find a "sensitive and helpful alternative" to imprisonment. "[T]he residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment." [\(145\)](#) In reality, those individuals who have no community of support to rely on may be most in need of community. Women fleeing abusive relationships are often isolated from others by the dynamics of the relationship. Those who have fallen prey to addictions may have traded a substance for their former relationships with people. Individuals with the greatest social need are those most in need of building a community of support. "The use of the circle may put the offender in touch with his/her community again. . . . The aboriginal

community will assist the offender to make the necessary changes in his/her life and provide the critical community support that aboriginal people believe in." (146)

It would be unrealistic to require a restorative justice process to take place only where the offender was personally known by all participants. That approach also carries with it greater risks of bias in decision-makers. Smaller communities may have pre-disposed views about the parties or the conflict, or other power issues, which would not exist in larger urban centres. For example, one circle was terminated by Judge Barnett, who is quite supportive of sentencing circles, when he felt that there was pressure on participants to support a particular view. (147)

Smaller communities may also be more prone to place pressure on victims to consent to a process that they do not want. In *Gingell* (148), the four women complainants of criminal harassment were not in favour of a circle sentence process. (149) Only one woman sat in on part of the process. It was thought to be influential that the offender was the son of the Yukon Commissioner. This case was conducted without the consent of the victims, although usually consent is required, and may be obtained by undue pressure.

Rather than personal knowledge of the offender being helpful, in some cases, "sentencing circles may be more beneficial, and potentially less threatening, when victims are not well acquainted with the offenders." (150) This opportunity occurred in *Morin*, where the victim, a university student, confronted Morin and challenged him to end his cycle of crime. (151)

Another advantage of applying restorative justice in an urban setting is the wide array of resources available. Small rural communities may have little if any treatment programs or medical or social service infrastructure. Many urban areas, such as Vancouver, aboriginal people have a well-developed network of social and cultural agencies. (152) Because cities have greater referral opportunities, more creative, appropriate sentences can be fashioned.

The need for restorative justice processes is greater in cities. "More than 50 percent of Canada's aboriginal population live in cities, and the largest number of charges and incarcerations involving aboriginal people arise in urban settings." (153) Urban areas contain the bulk of the population and the greatest contact with the justice system. The need is most pronounced in inner cities. (154) Vancouver's Downtown Eastside has been described as a "community in crisis":

The community has the lowest per capita income in Canada and is faced with a very high crime rate driven by a regional market for illicit sex and drugs; a high incidence of drug and alcohol addiction; an HIV and Hepatitis C epidemic; a child poverty rate estimated to be as high as 52%; child prostitution, racial tension, urban native issues, gang activities, community fragmentation and breakdown, and the presence of illegitimate retailers and businesses. (155)

Such needs can also present extremely difficult challenges, which may partly explain the reluctance of the Vancouver program to move quickly. The circumstances of an offender must be seen in context. If he or she comes from a community where there are significant social needs, the crime may be only one small part of the picture. Providing a complete restorative justice experience will be very complex. However, the alternative of the traditional justice processes will be hard-pressed to adequately address the underlying issues of why the offence occurred.

It is ironic that the distinction between urban and rural programs of restorative justice does not arise in non-aboriginal communities. It is simply a non-issue. For example, the question does not arise in any of the public submissions which were received in New Zealand on the proposal to expand restorative justice programs beyond young offenders. (156) The Law Commission of Canada has similarly tabled a discussion paper, which has no mention of urban concerns. (157) This paper argues for an even more

expansive view of restorative justice moving to the civil disputes, "transformative justice":

Might not we be able to apply the ideas of restorative justice to conflicts in the civil law arising in areas such as environmental law, corporate law, labour relations, consumer bankruptcy and family law to name a few? Might we even be able to use these ideas in handling civil disputes where there is no obvious wrong or wrongdoer?

Non-aboriginal communities are learning from what were largely aboriginal justice initiatives. (158) It would be unfortunate if urban aboriginal communities cannot benefit from the initiatives which they helped to create, while other communities benefit. It is time that any urban/rural dichotomy for aboriginal people be abandoned.

12. Conclusion

I have examined the history of restorative justice initiatives in Canada, particularly for aboriginal offenders in urban environments. I have reviewed the sources of resistance to such programs in urban areas, and suggested reasons why these views must be rejected. There is a great need for healing in aboriginal communities. Mary Ellen Turpel has elaborated on why criminal justice problems cannot be separated from the broader context of aboriginal experiences in Canadian society:

I would suggest that when we carefully take apart Aboriginal experiences and perspectives on the criminal justice system - or for that matter any other 'issue' - a tangled and overarching web gets spun. From economic and social disempowerment to problems in the criminal justice system, Aboriginal people's issues are seemingly indivisible - one crosses over to another in an interconnected and almost continuous fashion. Alcoholism in Aboriginal communities is connected to unemployment. Unemployment is connected to the denial of hunting, trapping and gathering economic practices. The loss of hunting and trapping is connected to dispossession of land and the impact of major development projects. Dispossession of land is in turn connected to loss of cultural and spiritual identity and is a manifestation of bureaucratic control over all aspects of life. This oppressive web can be seen as one of disempowerment of communities and individual Aboriginal citizens. (159)

Restorative justice has the potential of beginning to address the healing which is required in a broader context than isolated criminal acts. Fortunately, restorative justice as a result is occurring more often even in traditional courtroom settings as conditional sentences and similar sanctions are utilized. Vancouver's new restorative justice program will provide a greater opportunity for restoring balance and harmony. However, its weaknesses are the level of Crown control, and the limited offence types and offenders which will initially be considered. Even the successful Toronto program, which accepts a broad range of offenders and offences, is limited by a lack of funding for more than a small number of cases. Such matters need to be addressed if Canada is to restore the dignity to aboriginal people which is their due.

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58. 0 *Ibid.* at 353.
59. 0 *Ibid.* at 354.
60. 0 *Ibid.* at 353.
61. 0 *Ibid.* at 383.
62. 0 *Ibid.* at 372.
63. 0 *Ibid.* at 354.

64. 0 *Moses* (No. 2), *supra* note 37.
65. 0 Bonnie Buxton, "Why hasn't it sunk in?", *The [Toronto] Globe and Mail* (29 November 1999) A17.
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71. 0 *Moses*, *supra* note 7 at 367.
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74. 0 *Ibid.*
75. 0 *R. v. Morin* (1995), 101 C.C.C. (3d) 124 (Sask. C.A.) [hereinafter "*Morin*"] at 130.
76. 0 Bill Rogers, "Ontario Reserve Scene of Sentencing Circle", *The Lawyers Weekly* (Markham, Ontario: Butterworths, 19 November 1999) 1.
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78. 0 *Moses*, *supra* note 7 at 385.
79. 0 Yukon circle sentencing processes are thought of as rural, although technically, Whitehorse is a small city. Its population in the 1996 census was 21,808. See Statistics Canada, Census, <http://www.statcan.ca>.
80. 0 *Gingell*, *supra* note 70.
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88. 0 *Joseyounen, supra* at 439.
89. 0 *Ibid.* at 442-445.
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91. 0 *Morin, supra* note 75 at 130.
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93. 0 *R. v. Cheekinew* (1993), 80 C.C.C. (3d) 143 (Sask. Q.B.), appeal dismissed [*Morin, supra* at 132], at 149-150 per Grotsky J.
94. 0 *Ibid.* at 147.
95. 0 *Morin, supra* note 75 at 157-158.
96. 0 *Gladue, supra* note 1 at para. 91.
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98. 0 Cunliffe Barnett, "Circle Sentencing/Alternative Sentencing", [1995] 3 C.N.L.R. 1 [hereinafter "Barnett"] at 5.
99. 0 *Gladue, supra* note 1 at para. 72.
100. 0 Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996), 60 *Sask. L.R.* 153 at 165.
101. 0 *Gingell, supra* note 70 at 342.
102. 0 Bill Rogers, "Sentencing Circles Said Not a Softer Alternative", *The Lawyers Weekly* (Markham, Ontario: Butterworths, 19 November 1999) 7.
103. 0 *Gingell, supra* note 70.
104. 0 *Morin, supra* note 75 at 159.
105. 0 René Dussault, Bridging the Cultural Divide: Synopsis of a Special Report by the Royal Commission on Aboriginal Peoples (Canadian Bar Association Conference proceedings, *Contemporary Aboriginal Justice Models: Completing the Circle*, Kahnawake, Québec, 26-27 April 1996) [hereinafter "Dussault"] at 37.

106. 0 *R. v. H.(S.E.)*, (9 September 1993) Vancouver 48969D (B.C. Prov. Ct.), [1993] B.C.J. 2967 (Q.L.).

107. 0 *Ibid.* at para. 27.

108. 0 *Ibid.* at para. 29.

109. 0 Barnett, *supra* note 98 at 6.

110. 0 *Ibid.*

111. 0 Warhaft, *supra* note 36 at 29.

112. 0 Green, *supra* note 31 at 80.

113. 0 For example, *R. v. Bauder* (1997) 118 Man. R. (2d) 32 (Man. C.A.), leave to appeal refused [1997] 3 S.C.R. xiii, discussed in Anne McGillivray, "*R. v. Bauder*: Seductive Children, Safe Rapists, and Other Justice Tales" 25 *Man. L.J.* (1997-98) 359.

114. 0 The information which follows was derived from Warhaft, *supra* note 36.

115. 0 *Ibid.* at 21, citing Moyer and Axon, 1993 implementation evaluation of Aboriginal Legal Services of Toronto.

116. 0 *Ibid.* at 24.

117. 0 *Ibid.* at 25.

118. 0 *Ibid.* at 18.

119. 0 *Ibid.* at 2, n. 3.

120. 0 *Ibid.* at 3.

121. 0 *Ibid.* at 8.

122. 0 *Ibid.* at 11.

123. 0 Interview with Barry Warhaft (19 November 1999).

124. 0 Membership includes a variety of mainly aboriginal organizations providing services to the aboriginal community in the lower mainland: Aboriginal Women's Action Network, Aboriginal Women's Council, Battered Women's Support Services, Circle of Eagles Lodge Society, Empowerment Consulting, Legal Services Society of B.C., Native Community Law Office Association of B.C., Our Elders Speak Wisdom Society, U.B.C. First Nations Legal Clinic, United Native Nations, Urban Native Youth Association, Vancouver Aboriginal Friendship Centre Society, Vancouver Métis Association, Vancouver Police and Native Liaison Society, and Warriors Against Violence Society. Vancouver Aboriginal Restorative Justice Program, "Vancouver Aboriginal Restorative Justice Program's Aboriginal Caucus" (29 July 1999) [unpublished].

125. 0 Vancouver Aboriginal Restorative Justice Program, "The Vancouver Aboriginal Restorative Justice Program" [undated, unpublished] [hereinafter "VARJP"] at 1.

126. 0 *Ibid.* at 3.

127. 0 Ted Palys, "Vancouver's Aboriginal Restorative Justice Program: The challenges ahead", *Aboriginal Justice Bulletin* 3:1 (Summer 1999) 2 at 2.
128. 0 Interview with Kent Patenaude (1 December 1999).
129. 0 VARJP, *supra* note 125 at 3.
130. 0 The Thunder Bay Aboriginal Community Council Project noted that "for many clients, the Community Council hearing is their first encounter with an Aboriginal cultural process." Warhaft, *supra* note 36 at 18.
131. 0 Palys, *supra* note 127 at 3.
132. 0 VARJP, *supra* note 125 at 2.
133. 0 Palys, *supra* note 127 at 3.
134. 0 VARJP, *supra* note 125 at 2.
135. 0 Interview with Kent Patenaude (1 December 1999).
136. 0 Palys, *supra* note 127 at 8.
137. 0 Barnett, *supra* note 98 at 4.
138. 0 Interview with Ted Palys (20 October 1999).
139. 0 Green, *supra* note 31 at 79 [footnotes omitted].
140. 0 Warhaft, *supra* note 36 at 22.
141. 0 For example, it was suggested that the South Vancouver Island project did not have the broad base of support within the communities it was to serve, and was dominated by a few male decision-makers. Barnett, *supra* note 98 at 5.
142. 0 Gladue, *supra* note 1 at para. 89.
143. 0 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Volume 4 (Ottawa: Canada Communications Group, 1996) at 521; also available at <http://www.inac.gc.ca/rcap/index.html>; cited in Gladue, *supra* note 1 at para 91.
144. 0 Gladue, *supra* note 1 at para. 92.
145. 0 *Ibid.*
146. 0 Sam Stevens, "Report on the Effectiveness of Circle Sentencing" (March 1994) [unpublished, archived at Vancouver Aboriginal Restorative Justice Program] at 45.
147. 0 Lyle Gardiner (Videoconference: *Achieving Satisfying Justice in Your Community*, Vancouver and other British Columbia communities, 19 June 1997).
148. 0 Gingell, *supra* note 70 at 334-335.

149. 0 Sandra McEwan (Videoconference: *Achieving Satisfying Justice in Your Community*, Vancouver and other British Columbia communities, 19 June 1997).

150. 0 Green, *supra* note 31 at 82, referring to interview with Rupert Ross (4 January 1995).

151. 0 *Ibid.* at 82.

152. 0 Consider the many agencies involved in the Aboriginal Caucus; see footnote 124 above.

153. 0 Palys, *supra* note 127 at 2.

154. 0 Carol LaPrairie, *Seen But Not Heard: Native People in the Inner City* (Ottawa: Department of Justice, 1994).

155. 0 Canada, Department of Justice, "Backgrounder: Building a Future Together" (News Release, February 1999).

156. 0 New Zealand Ministry of Justice, "Restorative Justice: The Public Submissions" (Wellington: Ministry of Justice, June 1998), available at http://www.justice.govt.nz/pubs/reports/1998/restorative_justice.

157. 0 Law Commission of Canada, "From Restorative Justice to Transformative Justice: Discussion Paper" (Ottawa: Law Commission of Canada, 1999), available at <http://www.lcc.gc.ca/en/forum/rj/paper.html>.

158. 0 "It is ironic that Aboriginal people are over represented as offenders in the justice system - yet it is they who provide some of the best models for many of the new approaches we are adopting." Ujjal Dosanjh, British Columbia Attorney General, Notes for opening address to *Diversion Workshop* (11 February 1997) at 3.

159. 0 Dussault, *supra* note 105 at 2.

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