

1-1-1994

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Recommended Citation

Hugh J Benevides, "R. v. Moses and Sentencing Circles: A Case Comment" (1994) 3 Dal J Leg Stud 241.

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R. v. MOSES AND SENTENCING CIRCLES: A CASE COMMENT

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The sentencing circle derives from the First Nations concept of the talking circle. The talking circle is a First Nations method of physical, mental, emotional, and social healing. It is a mode of resolving disputes, extending insight, and resolving affairs, in which all participants meet as equals and speak openly. Each person has the right to speak without interruption; the others must listen. Mutual respect and community responsibility guide the process. It is a far cry from the adversarial talk of the traditional courtroom where, at the end of the day, the best talker wins.

In a sentencing circle, the participants in a conventional criminal sentencing hearing (the accused and counsel, Crown counsel, and the judge) are joined by others normally excluded from the process: the victim(s) of the offence, the police officers involved, and members and officials of the accused's First Nation community. Tables and chairs are arranged in a circle. To encourage the participation of the offender, the judge declares the maximum possible terms of sentence. Once this and any other appropriate opening statements are made, each person seated in the circle has an equal opportunity to speak about the needs of the offender and of the victim, about any constraints on the community's participation in the rehabilitation of the offender, or about any other concerns the participants might

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¹ This case comment adopts an earlier paper completed as part of a term of clinical legal education at Dalhousie Legal Aid Service. The thesis was that the sentencing circle process might be used in criminal cases involving non-native accused and offenders, particularly young accused. The success of sentencing circles in aboriginal communities might inspire the larger community to recognize that it has a role in re-acquainting itself with alienated youth. The sentencing circle, with the involvement of parents, school teachers, neighbours, and victims of offences, might be put to use to reach young offenders before their lives run out of control.

have. Perhaps most significant is the opportunity for the victim, the offender, and the community to speak at this crucial stage of the criminal process. They are the people who will be most affected by the sentence, therefore they should be the main participants in the sentencing process.

Because some degree of consensus is required, the process might continue for hours, or even for days. The ideal result is a sentence shaped by all participants and endorsed by the community that will be participating in its implementation.

The circle has been employed only rarely in the criminal sentencing process in Canada,² mostly in northern and western Canada.³ This note examines *R. v. Moses*,⁴ one of the earliest reported cases in which a sentencing circle was used. In his reasons, Stuart, Terr. Ct. J. undertakes an extensive survey of the merits of the process.

R. v. Moses

Philip Moses was a 26 year-old member of the Na-cho Ny'ak Dun First Nation in Mayo, Yukon. He was found guilty of theft and of carrying a weapon for the purpose of committing an assault. He had a prior record of 43 convictions, with a total of almost eight years of jail sentences. He was assessed by a number of professionals as having "significant dysfunctional coping skills" for which treatment had been suggested, but had never been carried out. In Stuart, J.'s opinion, this was an appropriate case for a sentencing circle, not because there were high hopes for successful rehabilitation of the of-

² Because sentencing decisions often go unreported, or appear only incidentally in decisions, it is difficult to provide an exhaustive list of sentencing circle decisions.

³ There are signs that the process is being adopted in different provinces, for example, in Newfoundland. See M. Valpy, "Justice gets cold feet" *The Globe and Mail* (29 January 1994). Other aboriginal communities are guided by similar principles, but the systems used differ procedurally. For example, in the Shubenacadie Band Diversion Program at Indian Brook, Nova Scotia, a panel of community members makes the final determination as to sentence. The case must first be diverted, with the consent of all the parties, from the court to the reserve. A further variation is the use of sentencing circles in cases where a guilty plea is entered. This is the practice with several First Nations in Yukon. See "Circle sentencing programs give Yukon Indian bands an alternative to the traditional legal system" *The Lawyer's Weekly* (1 October 1993) 12.

⁴ (1991), 71 C.C.C. (3d) 347 (Y. Terr. Ct.) [hereinafter *Moses*].

fender, but because no other options had worked. In the judge's words, "what could be lost in trying?"⁵

After the conviction was entered, the court was adjourned for three weeks, during which time the probation officer made inquiries as to whether the First Nation community and Moses' family wished to be involved in the sentencing. The RCMP was asked by the court to canvass the larger community for any interest it might have in participating in the circle.⁶ Two Crown prosecutors visited Mayo two days before the sentencing to talk to the RCMP, probation officer, and members of the First Nation.

Moses was given a suspended sentence coupled with a two-year probation order. This sentencing plan was divided into three stages, with reviews planned for the end of each stage. The first stage required Moses to reside with his family on its trap line for two months. This was intended to re-integrate him into the family lifestyle and the family itself. The second stage required him to attend a two-month alcohol rehabilitation program in British Columbia. The third stage involved his return to the family home in Mayo, and an alcohol-free life. The First Nation leadership in Mayo committed itself to provide support and counselling services, and to assist Moses in his search for employment.

Benefits

The distinctiveness of the circle is summarized by two features that emerge from its use in sentencing: the assumption of greater responsibility by both the offender and the community, and the less adversarial nature of the process.

By participating directly in the hearing rather than speaking through her lawyer, the offender assumes greater responsibility for both her prior actions and her sentence. The circle expands the basic right set out in the *Criminal Code*, namely, the offender's right to speak on her own behalf before the sentence is pronounced.⁷ However, essential to her willing participation is the understanding that she will not face greater jeopardy simply because she is candid. The offender must assert a commitment to her own rehabilitation,

⁵ *Ibid.* at 354.

⁶ Caselaw suggests that the community, not the accused, must initiate a circle by requesting it.

⁷ *Criminal Code*, R.S.C. 1985, c. C-46, s. 668.

but at the same time, Judge Stuart notes, she must not be burdened with too much responsibility.⁸

The community assumes responsibility for the sentence to be set down.⁹ This commits the community to participate in the rehabilitation and healing of its members. The involvement of the community reminds the offender that she belongs. By meeting and talking in the circle, everyone acknowledges their shared responsibility for community problems. Inevitably, certain members of the community will bear the weight of this collectively assumed responsibility by taking active roles in the sentence, otherwise the sentence will not succeed. Judge Stuart emphasizes the need for the expansion of the circle to community members whose ability to contribute is not already stretched to the limit by other commitments.

The other main feature is that the sentencing circle is less adversarial and less confrontational than the conventional sentencing process. The physical layout of a sentencing circle offers an alternative: hierarchical and adversarial aspects are minimized. In *Moses*, all participants remained seated during the circle. Counsel for the Crown was seated directly opposite the offender, his family and his counsel. The RCMP officers, First Nation officials and members, probation officers and others were seated elsewhere within the circle. A second, outside circle was provided for latecomers.

This physical layout shifts the focus away from the legal professionals, and concentrates it on the parties more directly affected by the crime and by the sentence. The professional monopoly of the sentencing process is challenged, and lay participation is encouraged.¹⁰ The changed physical setting and the "rule" that all participants have an equal opportunity to speak, breaks down the traditional domination of the proceedings by judge and counsel. The functions of Crown and defence are nevertheless preserved in the circle process. The Crown is a participant and nothing interferes with its duty and role of representing the larger interests of the state. A feature of the circle is that the Crown's assumptions about the efficacy of the proposed sentence can be tested by the commu-

⁸ *Supra* note 4 at 379.

⁹ If there are reasons why community members cannot assume responsibility, they have an opportunity to reject any terms which they feel cannot be carried out.

¹⁰ *Supra* note 4 at 357-358.

nity.¹¹ Defence counsel continues to represent all interests of the client.

In spite of the preservation of the traditional roles of counsel, all those present are encouraged to participate. Because of the broad range of participants, the nature and quality of information is enhanced. Stereotypes about the accused and her relationship to the community, or misconceptions about the victim, cannot be resorted to in the face of factual information from all participants. Stuart, J. writes: "the court rarely appreciates whether the sentence resolves or exacerbates the fundamental problems promoting crime."¹² While the court knows that problems exist, the sentencing process "encourages willful blindness about many relevant circumstances."¹³ In comparison to the traditional sentencing process, the circle breathes life into the portrayal of the facts and, as a result, the potential for the realization of sentencing objectives¹⁴ is increased. Context is provided, with the possible result that the solution to the sentencing problem becomes "obvious and compelling."¹⁵

Just as the sentencing circle may provide a more realistic view of the context in which criminal behaviour occurs, it may provide the community with greater insight into the limitations of the justice system.¹⁶ Stuart, J. notes that public reliance on the justice system is excessive. The circle impresses upon participants the value and necessity of community involvement in all community matters, including the criminal justice system. Continued experience with sentencing circles will, if successful, make community problems obvious to the community, and better understood. Community resources will be mobilized to prevent crime, not simply to react to it.¹⁷

¹¹ *Ibid.* at 369.

¹² *Ibid.* at 358–359.

¹³ *Ibid.* at 359.

¹⁴ See *R. v. Webb*, [1992] Y.J. No. 144 (QL), another case in which Stuart, Terr. Ct. J. made use of sentencing circles, for a discussion of the delicate balancing act between the conflicting sentencing objectives of rehabilitation, punishment, and general deterrence. In that case, the court, through a sentencing circle, determined that the rehabilitation of the offender should have priority and handed down a suspended sentence with a three-year term of probation.

¹⁵ *Ibid.* at 360.

¹⁶ *Ibid.* at 363–364.

¹⁷ *Ibid.* at 365–366.

In *Moses*, because the flow of communication followed the natural rhythm of participants' interest, running amongst them rather than along a single current to the judge, something closer to a consensus was achieved. The result was a new recognition of a shared responsibility for the outcome, and shared concern for success.¹⁸

An exception to the non-confrontational aspect of sentencing circles is the confrontation of the offender with the pain of the victim, as expressed by the victim and her family or friends. Stuart, J. writes that the offender will then have the proper perspective to feel pain herself, and finally to realize the impact of her actions.¹⁹ This may give some motivation for the rehabilitation of the offender. Stuart, J. calls the circle a *productive* way to incorporate victim impact into sentencing, implying that it is not always productive in the conventional process.²⁰ If the sentencing circle allows the offender to better realize what she has done, then one would have to agree. The circle itself might in some cases serve as the first stage of the rehabilitative part of the sentence, where the offender faces the context of her actions without any formal barriers to hide behind. A traditional court room environment can be degrading and negative, "proclaiming the moral inferiority of the offender."²¹ The circle takes positive advantage of the presence of the offender, and begins the rehabilitation and the re-integration of the offender into the community. Relative to the conventional process, a more constructive environment is realized.

Finally, Stuart, J. notes that sentencing circles can serve to provide a meeting of First Nations and Western values.²² A process that fairly accommodates all value systems must emerge if we are to deal successfully with crime.

Concerns

There may be some concern that dramatic alteration of court processes will compromise conventional safeguards of individual rights. Stuart, J. considers some of these concerns in *Moses*.

¹⁸ *Ibid.* at 360–361.

¹⁹ *Ibid.* at 362–363.

²⁰ *Ibid.* at 363.

²¹ *Ibid.*

²² *Ibid.* at 366–367.

The talking circle tradition includes the tenet that "what comes out in a circle, stays in a circle."²³ Because the circle theoretically enhances the quality and extent of relevant information, there is more potentially sensitive information. In cases where the reasons for a closed circle are compelling, the rationale behind principles of open court might have to be reconsidered. Similarly, more flexible rules might be developed concerning the storage of, and public access to, transcripts.²⁴ Reading *Moses*, one gets the impression that Stuart, J. has purposely left out the more personal information that emerged in the circle.

The need to solve evidentiary problems need not preclude the use of a circle. Disputed facts arising out of circle discussions can be proved or disproved in the conventional manner during a break from the circle, or, by consent of the parties, within the circle.²⁵ The question arises whether facts decided upon within the circle would be subject to appeal. Amendments to the *Criminal Code* might be considered whereby full transcripts were allowed to be kept in a sealed packet, to be opened only in the event of an appeal, but ultimately to be destroyed.

The use of a circle does not eliminate any substantive considerations; its procedural advantages make it useful to the discovery of sentencing alternatives, since many such alternatives will require community resources. Stuart, J.'s discussion of sentencing considerations in *Moses*, for example, is conventional. He outlines the proper weight and considerations to be accorded the offender's criminal record, and the appropriateness of a jail sentence, for both this offence and this offender. The analysis is enhanced by what the judge learns during the circle discussions.

Evaluation

The circle was used as a last resort in *Moses*, where the accused had a considerable history of incarceration. As the process becomes more familiar, courts may become less hesitant to allow a sentencing circle. The circle could become an innovative means of rehabilitation, applied at the outset of a person's criminal history.

Seeking the support of the community will be more difficult in larger communities, especially where the victim, the offender,

²³ *Ibid.* at 368.

²⁴ *Ibid.* at 367-368.

²⁵ *Ibid.* at 370.

and/or the crime is connected to an urban area. "Community" is less easily defined in such a situation, especially when compared to the situation in *Moses*, where the circuit court was visiting a small, largely aboriginal community.

A relative disadvantage of the circle process might be to the victim, because she must face the offender directly. The victim's assumption of the responsibility to communicate the real harm she has suffered will be painful at times, but may help the offender realize the effect of her actions. This communication is complementary to, and consistent with, the participation of the larger community, the search for "truth" (what really happened, and what sentencing options might be effective and appropriate), and providing context.

The presence of an open-minded judge, Crown and defence counsel, who can see and appreciate the merits of a circle, is necessary. The judge will need to be receptive to the suggestion of a circle, especially where the Crown might object to an application for its use, as it did in *Moses*. A Crown prosecutor who is hostile to the use of the circle will have the strength of established judicial practice on her side. As Stuart, J. notes, however:

[T]he Crown and judge who do not live in the community and are not familiar with the community must be cautious in opposing, on the basis of a need to "protect the public," a rehabilitative plan developed by the community.²⁶

The tone of Judge Stuart's description of the sentencing circle indicates his enthusiasm for the process. Other decisions in which the use of circles is considered²⁷ are of interest for their considera-

²⁶ *Ibid.* at 382.

²⁷ See *R. v. Cheekinew* (1993) 80 C.C.C. (3d) 143 [hereinafter *Cheekinew*], and *R. v. Morin* [1993] S.A.S.D. No. 7475-01 (QL) [hereinafter *Morin*]. Grotsky, J. suggested in *Cheekinew* that for a sentencing circle to be held, the accused must be eligible for either a suspended sentence, an intermittent sentence, or a short term of imprisonment coupled with a probation order; that she be genuinely contrite and interested in turning her life around; and that she be supported in the request for a circle by the community of which she is a member. In *Cheekinew* not all those factors were present, and the holding of a circle was refused. In *Morin*, Milliken, J. indicated that sentencing circles may have broader application and perhaps should not be limited to aboriginal offenders and communities. He reasoned that similar to a pre-sentence report, which has no limitations or restrictions, a sentencing circle was intended to gain information about the offender. There should likewise be no restrictions on the use of a circle.

tion of situations where the application of the process might not be appropriate. For example, Judge Grotsky suggests in *R. v. Cheekineu*²⁸ that an offender must indicate that she is contrite before a circle can be held. This approach is problematic. An offender may not realize the effect of her actions until she has been involved in a circle. Refusal to order a circle in such cases would be a denial of the benefits of the circle, to both the community and to the offender. Without the circle, the offender may return from imprisonment without having had the community speak to her, and she to them.

The possibility of holding a sentencing circle, even in cases where the offender may be subject to a long term of imprisonment, should be examined more carefully. While s. 737 of the *Criminal Code* only allows a term of probation to be appended to a jail sentence of two years or less, the fact that the success of a sentence is in the best interests of the community might mean that a circle is nevertheless appropriate. A circle might enhance any rehabilitative value of the jail term, or it might produce a sentence that replaces imprisonment altogether. In *Cheekineu*, Grotsky, J. suggests that a sentencing circle should not be used for any offence to which two years or more of incarceration *may* attach.²⁹ This is problematic because it denies the court the opportunity to assess the needs of the offender and the likelihood of success of various sentencing options. If a lengthy prison term is not going to help the offender, the court can exercise its discretion to forge another plan; the circle enables the court to discover the most appropriate plan.³⁰

In *R. v. Morin*,³¹ Milliken, J. suggests that where the offence occurs in a larger community, members of that community should participate in the circle. While this may be appropriate in some cases, it might encumber the circle unnecessarily. It also raises the question of which community members should participate. If the offence is against another First Nations community member within an urban area, for example, there may be no need for the involvement of members of the "outside" community.

²⁸ *Cheekineu*, *ibid.* at 150.

²⁹ *Ibid.* at 149-150.

³⁰ For a discussion on blending sentencing options, see *R. v. Webb*, *supra* note 14.

³¹ *Supra* note 27.

There is no guarantee that ideal solutions will emerge from the use of sentencing circles, especially given the short history of their employment. Nevertheless, it is encouraging that at least some judges have found the process useful.

The acceptance of the sentencing circle for use in the broader community will require that interested lawyers watch for appropriate cases to arise. Once the process is established, and assuming some successes are reported, there is potential for it to be adopted in the wider system. Potential participants will need to demonstrate not only a high level of commitment to the use of sentencing circles, but also an appreciation for the values that aboriginal communities exhibit in both talking circles and sentencing circles, namely, responsibility, openness and mutual respect.