

SENTENCING CIRCLES  
AND  
VICTIMS OF DOMESTIC VIOLENCE

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## A. INTRODUCTION

### 1. *R. v. MORRIS*<sup>1</sup>

On July 22, 2003, Daniel Morris pleaded guilty to assaulting and unlawfully confining Elizabeth Dickson, his common law wife, and to two counts involving Ms. Dickson's boyfriend, Douglas Charles Creyke. Both Mr. Morris and Ms. Dickson are from the Liard First Nation,<sup>2</sup> whose traditional territory is located in what the government of Canada calls the Yukon. The BCCA summarized the facts of incident as follows.<sup>3</sup> On June 30, 2003, Mr. Morris located Ms. Dickson and Mr. Creyke sleeping in Ms. Dickson's vehicle in Lower Post, British Columbia, just south of the Yukon. Mr. Morris pointed a rifle at Mr. Creyke's head and threatened to kill him. He told Ms. Dickson to get into the car and drive. He followed and eventually forced her to pull over, forcibly removed her from the vehicle and hit her. He forced her into his truck and drove to a gravel pit, where he began to punch and kick her. Ms. Dickson agreed to have sexual intercourse with Mr. Morris if he would stop beating her. After intercourse, he continued the brutal assault, which lasted about two hours altogether. Ms. Dickson spent three

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<sup>1</sup> *R. v. Morris*, 2004 BCPC 43 [2004] B.C.J. No. 476 [*Morris BCPC*], rev'd in part 2004 BCCA 305, [2004] B.C.J. No. 1117 [*Morris BCCA*].

<sup>2</sup> The Government of British Columbia considers Liard First Nation a "band" and member of the Kaska Nation (British Columbia Ministry of Aboriginal Relations and Reconciliation *Kaska Nation* (2007), online: Kaska Nation <[http://www.gov.bc.ca/arr/firstnation/kaska\\_nation/default.html#negotiations](http://www.gov.bc.ca/arr/firstnation/kaska_nation/default.html#negotiations)>). Schmidt J., refers to the Kaska Nation (*Morris BCPC*, *supra* note 1), as does the Liard Aboriginal Women's Society (LAWS, online: <<http://www.liardaboriginalwomen.ca/>>).

<sup>3</sup> *Morris BCCA*, *supra* note 1 at para. 5, summarizing the facts from the Crown's submissions. The Court "did not understand [Morris] to disagree with anything contained in [the Crown's] summary."

days in the hospital. Seven months after the incident, she reported ongoing difficulties with her vision.

Upon his guilty plea, Mr. Morris resigned as Chief of the Liard First Nation, a position he had held for six years following three years of service as Band Councillor.

Mr. Morris' sentencing hearing took the form of a sentencing circle and occurred before Schmidt J. for the BC Provincial Court on February 26, 2004,<sup>4</sup> almost six months after the incident. The circle was preceded by a Family Violence Conference and a Talking Circle, both held at Watson Lake, Yukon. At the final sentencing circle, Schmidt Prov. Ct. J. heard from Mr. Morris, Crown and seven community members. He also considered written submissions from the Family Violence Conference, the Talking Circle facilitator, Ms. Dickson, and Liard Aboriginal Women's Society (LAWS).

In the course of his oral disposition, Schmidt J. questioned the utility of incarceration in domestic violence cases. Further on, he noted Kaska Nation's efforts to address domestic violence on reserve and to begin the healing process. In conclusion, Schmidt J. handed Mr. Morris a suspended sentence with two years' probation. Special conditions included:

- (1) no-contact with Mr. Creyke, the boyfriend;
- (2) conditional no-contact with Elizabeth Dickson (exceptions included supervised contact for the purposes of counselling or other community processes approved by the Probation Officer in consultation with the Kaska Tribal Council);
- (3) spousal abuse counselling;
- (4) holding a Potlatch for the purpose of healing if recommended by the Elders;
- (5) participation in a Man's Talking and Sharing Circle if recommended by the Elders; and,
- (6) 60 hours community service directed by the Probation Officer, in consultation with Kaska Tribal Council and Liard Aboriginal Women's Society (LAWS).

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<sup>4</sup> *Morris BCPC*, *supra* note 1.

A little over three months later, Finch C.J. for the British Columbia Court of Appeal (BCCA) varied the initial sentence.<sup>5</sup> He imposed an additional custodial sentence of 12 months, deleted the Potlatch provision as well as the Man's Talking and Sharing Circle provision, and deleted the consultation requirement from the community service condition.

## 2. OBJECTIVE AND OUTLINE

The events in *Morris* give context and meaning for the rest of my paper. My intention is to use *Morris* as a basis upon which to critique the use of sentencing circles as they apply to cases of domestic violence on reserve. First, I discuss the definition, purposes, and limitations of sentencing circles. I suggest that sentencing circles may ultimately be a barrier to the pursuit of Aboriginal justice. Second, I highlight the risks that sentencing circles may pose to a victim in relation to the offender. Third, I examine the potential risks to a victim in relation to her community. Finally, I conclude with my thoughts on how to move beyond the current sentencing circle paradigm toward a safer and more just system.

For clarification on the author, I am a non-Aboriginal, white woman in my third year of law school. I am in my mid-twenties, bisexual, and originally from Minneapolis, Minnesota. I do not consider myself to have experienced domestic violence. Some of the concepts I used above also deserve clarification. By *domestic violence*, I mean

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<sup>5</sup> *Morris BCCA, supra* note 1.

violence done to an Aboriginal woman, to whom I also refer as the *victim*,<sup>6</sup> by a male partner,<sup>7</sup> whom I label the *offender*.<sup>8</sup> My critique is ‘feminist’ in the sense that it will focus on the possible impacts on the victim in relation to the offender and her community. Because my analysis touches on the possible conflicts between a woman and her community, it also necessarily emphasizes the individual. However, in drawing a distinction between the individual and her community, my hope is not to uniformly preference the individual but rather to highlight a tension that, in my opinion, should be openly addressed.

Finally, I acknowledge that the facts in *Morris*, or in any case study, cannot describe the experience of every victim with sentencing circles. For instance, the following analysis may not translate well to an urban setting, such as the sentencing circle model used by the First Nations Court in New Westminster, British Columbia.<sup>9</sup> Indeed, situational differences change the sentencing circle and vary its impact on the victim, even within the limited context of describing Aboriginal women victims of

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<sup>6</sup> Others may prefer terms such as “survivor” or “resistor” and reject the term “victim” on the grounds that it reinforces a narrative of oppression and harm. See, e.g., Allan Wade, “Resistance Knowledges: Therapy with Aboriginal Persons Who Have Experienced Violence” in Peter H. Stephenson et al., eds., *A Persistent Spirit: Towards Understanding Aboriginal Health in British Columbia* (Victoria, B.C.: University of Victoria Department of Geography, 1995) 166 at 175.

<sup>7</sup> Although some of the same considerations may apply, I cannot adequately canvass the unique context and issues that arise with same-sex domestic violence within the scope of this paper.

<sup>8</sup> Sentencing circles address those who have entered guilty pleas. I acknowledge that legal culpability is not the only motivation for pleading guilty.

<sup>9</sup> Anecdotally, I have attended First Nations Court twice. Two hearings involved a male offender who pleaded guilty to violence against a woman. In neither case did the victim play a clear public role in the hearing.

domestic violence on reserve. By using the events in *Morris*, I simply hope to add context and meaning to what would otherwise be a fairly theoretical critique.

## **B. THE LIMITS OF SENTENCING CIRCLES**

By examining the components and purpose of the sentencing circle as it is currently understood, we can also begin to recognize its functional limits. This is important for two reasons. First, there are connections between the construction of the sentencing circle and some of the risks they impose on victims of domestic violence on reserve. Second, by understanding the limitations of the sentencing circle as a tool of justice, we can begin to ask how we can offer greater protection and support to the victim within but also beyond the confines of the sentencing circle model.

### 1. WHAT CONSTITUTES A SENTENCING CIRCLE?

There does not appear to be one standard for what is or is not a sentencing circle.<sup>10</sup> Generally, a sentencing circle involves the offender, the prosecutor, the victim, and the community in a discussion with the judge who, after hearing from the circle, determines the sentence. In practice, new participants may be added while anticipated parties may be absent. For example, in *Morris*, the sentencing circle participants were: Crown Counsel, Daniel Morris, and seven unnamed “persons in positions of community

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<sup>10</sup> Jonathan Rudin, “Aboriginal Justice and Restorative Justice” in Elizabeth Elliott & Robert M. Gordon, eds., *New Directions in Restorative Justice: Issues Practice, Evaluation* (Portland: Willan Publishing, 2005) 89 at 97; Mary Crnkovich, “The Role of the Victim in the Criminal Justice System – Circle Sentencing in Inuit Communities” (Prepared for the Canadian Institute for the Administration of Justice Conference in Banff, Alberta, 11-14 October 1995) at “4” [pinpoint refers to approximate location only, out of 26 printed pages], online: Canadian Association of Sexual Assault Centres (CASAC) <<http://www.casac.ca/node/185>>..

responsibility”,<sup>11</sup> including the Chief of the Kaska Council. Elizabeth Dickson did not attend the sentencing circle although Schmidt J. was in possession of her victim impact statement.<sup>12</sup> Schmidt J. also considered a letter submitted by Liard Aboriginal Women’s Society (LAWS),<sup>13</sup> in which LAWS voiced its concern that Kaska women were being directly and indirectly prevented from speaking out about their experiences with domestic violence.<sup>14</sup>

## 2. ABORIGINAL JUSTICE AND THE PURPOSE OF SENTENCING CIRCLES

One of the envisioned results of sentencing circles as it relates to the experience of the victim is that they offer her an opportunity to speak and to be involved in the process of healing. More broadly, the purpose of a sentencing circle “is for social rather than for strictly legal justice; the focus is on empowerment of those marginalized by the mainstream legal systems; the objective is contextualized justice; the goal is to return the conflict to its rightful owners.”<sup>15</sup> Courts can use sentencing circles as a way to shift the focus from symptoms to the root causes.<sup>16</sup>

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<sup>11</sup> *Morris BCCA*, *supra* note 1 at para. 29.

<sup>12</sup> *Ibid.* at para. 28.

<sup>13</sup> LAWS is engaged with two projects: (1) the *Kaska Project*, a restorative healing program which addresses residential school survivors and their affected relations; and (2) *Hearing Our Voices*, aimed at ensuring meaningful roles for women in Kaska governance (LAWS, “The Liard Aboriginal Women’s Society” (01 April 2008), *supra* note 2).

<sup>14</sup> This letter is reproduced in part in *Morris BCCA*, *supra* note 1 at para. 27.

<sup>15</sup> Carol La Prairie, as quoted in Crnkovich, *supra* at “4” of 26.

<sup>16</sup> *R. v. S.(D.)* (05 March 2010), New Westminster B.C. (B.C. Prov. Ct. (First Nations Court)), Buller-Bennet J. orally.

Expressed in these ways, sentencing circles are linked to the concepts of anti-colonialism. Violence and crimes involving Aboriginal offenders are unique in that they are symptoms of purposeful, systematic, and ongoing attempts to intervene and replace Aboriginal institutions of government, economy, community, family, and the individual with the western colonial model.<sup>17</sup> It would therefore be incomplete to talk about justice in an Aboriginal context without also discussing anti-colonialism and the challenges that come with rebuilding nations.<sup>18</sup> Nevertheless, just because sentencing circles apply almost exclusively to Aboriginal offenders<sup>19</sup> and are based on traditional Aboriginal dispute-resolution techniques,<sup>20</sup> it is inaccurate to describe sentencing circles as Aboriginal justice initiatives. First, sentencing circles are not strictly traditional.<sup>21</sup> Rather, they became an established form of criminal sentencing in Canada through Judge Stewart's decision in *R. v. Moses*, 1992.<sup>22</sup> Arguably, then, sentencing circles are an emergent tradition.<sup>23</sup>

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<sup>17</sup> Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission of Aboriginal peoples*, vol. 3 (Ottawa: Canada Communication Group Publishing, 1996) at 62-63, 72-75 [Royal Commission v. 3].

<sup>18</sup> See, e.g., *ibid.* at 75.

<sup>19</sup> Rashmi Goel, "Aboriginal Women and Political Pursuit in Canadian Sentencing Circles: At Cross Roads or Cross Purposes?" in James Ptacek, ed., *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 60 at 61.

<sup>20</sup> I gratefully credit Jonathan Rudin's essay, *supra* note 10, for this perspective.

<sup>21</sup> Crnkovich, *supra* note 10, at "5-9" of 26.

<sup>22</sup> *R. v. Moses* (1991), 11 C.R. (4<sup>th</sup>) 359 (Yukon Terr. Ct.), Stuart J.

<sup>23</sup> Another view is that sentencing circles are an "invented" tradition (Goel, *supra* note 19, at 63). Others would treat the word "tradition" with scepticism and invite us to

An initiative need not be traditional to be a legitimate aspect of Aboriginal justice. Such a requirement would fall into the trap of imagining Aboriginal law as frozen in time.<sup>24</sup> Second, and more fundamentally, sentencing circles are not Aboriginal justice initiatives because they do not and cannot fully empower the Aboriginal community to develop and administer justice that appropriately addresses its needs.<sup>25</sup> In practice, the judge may feel obligated to adopt the community's recommendations, but legally speaking they<sup>26</sup> retain the independence to craft whatever sanction they see fit.<sup>27</sup>

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enquire instead: which aspects of whose "tradition" are being invoked, by whom, to what end, and is it beyond critique? (Crnkovich, *supra* note 10 at "9" of 26; Royal Commission v. 3, *supra* note 17 at 66, citing Marilyn Fontaine). See, e.g., Sharon Payne, "Aboriginal Women and the Law" in Chris Cunneen, ed., *Aboriginal Perspectives on Criminal Justice* (Sydney: The Institute of Criminology, 1992) 31 at 37, discussing the use of customary laws to deal with violence against women: "Groups of Aboriginal women are saying that they are being subjected to three types of laws....: 'white man's law, traditional law and bullshit law', the latter being used to explain a distortion of traditional law used as a justification for assault and rape of women."

<sup>24</sup> Unfortunately, the Supreme Court of Canada almost always adopts such an impoverished understanding of Aboriginal systems as they apply to the Canadian legal concepts of Aboriginal Rights and Title. For a thorough critique of this approach, see Minnawaanagogiizhigok (Dawnis Kennedy), "Reconciliation Without Respect? Section 35 and Indigenous Legal Orders", in Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007)

<sup>25</sup> Rudin, *supra* note 10 at 99. In reference to governance, I use "community" to refer to any Aboriginal group that is legally capable of creating, implementing, and enforcing its own justice initiatives. Others may prefer terms such as "government", "Nation" or "sovereign".

<sup>26</sup> I use "they" and "theirs" as a gender-neutral single person pronoun and possessive, respectively. Others may prefer "she or he" and "his or hers".

<sup>27</sup> Goel, *supra* note 19, at 65. However, Goel recalls she knows of only one judge who rejected the sentence proposed by the circle. This indicates that sentencing circles possesses actual influence, although it is not absolute or guaranteed.

Simultaneously, judges are also constrained by the principles of sentencing.<sup>28</sup> To the extent that the Aboriginal community does not create or control the sentencing circle, the process perpetuates the colonial message that Aboriginal peoples are not capable of self-determination.<sup>29</sup>

While the sentencing circle as it is normally understood is not a true source of Aboriginal justice, nor does the resultant sentence enjoy the same deference as those imposed through a more conventional court process. We see this in *Morris*, where the BCCA felt justified in varying both the sentence and the conditions.<sup>30</sup> Furthermore, Finch C.J.B.C., for the Court, implied that Schmidt J. should have considered evidence that, in the opinion of the BCCA, Mr. Morris appeared not to have been victimized by certain systemic factors such as substance abuse, lack of education, or family dysfunction.<sup>31</sup>

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<sup>28</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>29</sup> Rudin, *supra* note 10 at 96.

<sup>30</sup> *Morris BCCA*, *supra* note 1 at para. 62.

<sup>31</sup> *Ibid.* at para. 60. The BCCA implies that the consideration of the circumstances of Aboriginal offenders, as set out in s. 718.2(e) of the *Criminal Code* and *R. v. Gladue*, [1999] 1 S.C.R. 688, should cut two ways – not only to mitigate punishment where an Aboriginal offender has experienced clear systemic disadvantage, but also to justify more conventional punishment where the offender cannot point to significant disadvantage. I caution that this second use may be unsupportable in law and logic. First, there is no language in *Gladue* to suggest that s. 718.2(e) could be used to the detriment of the Aboriginal offender. To use s. 718.2(e) in this way would defeat the ameliorative purpose of the provision. Further, merely because a particular Aboriginal offender has not experienced all possible forms of disadvantage, it does not follow that the offender has not been affected by the systemic destruction of Aboriginal institutions, community and persons. It is difficult to imagine that Mr. Morris, as an Aboriginal person living on reserve and fulfilling a leadership role in his community, would not experience the effects of systemic disadvantage on a regular basis.

### **C. DOMESTIC VIOLENCE ON RESERVE**

In this section, I describe some of the possible risks associated with applying sentencing circles, as they are currently understood, to the context of domestic violence on reserve. I begin with a brief introduction to the Aboriginal context of domestic violence. The rest of the section focuses on the possible harm sentencing circles do to the victim as a result of her relation with: (1) the offender; and, (2) the community.

Generally speaking, domestic violence is chronically under-reported. In the United States, less than one half of women who have experienced violence by an intimate partner or rape will contact police.<sup>32</sup> Furthermore, Aboriginal women living in Canada experience an elevated amount of abuse in contrast to Canadian women generally. In 1999, Statistics Canada found that 1 in 4 Aboriginal women reported abuse by an intimate partner, twice the overall rate for Canadian women (1 in 8).<sup>33</sup> Other studies suggest the prevalence of abuse might be higher. In 1989, the Ontario Native Women's Association found that 8 of 10 Aboriginal women respondents had experienced violence.<sup>34</sup>

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<sup>32</sup> James Ptacek, "Resisting Co-optation: Three Feminist Challenges to Antiviolence Work" in James Ptacek, ed., *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 5 at 5.

<sup>33</sup> Goel, *supra* note 19 at 62.

<sup>34</sup> Royal Commission v. 3, *supra* note 17 at 57. Of these, 57% had experienced sexual abuse and 87% had experienced physical abuse. Similarly in a 1992 study by the Helping Spirit Lodge in British Columbia found that 86% of those surveyed had either witnessed or experienced violence in the family (Goel, *supra* note 19 at 62).

Restorative justice practices, including sentencing circles, were not created for the purpose of addressing domestic violence.<sup>35</sup> It is perhaps unsurprising, therefore, that although sentencing circles have heard domestic violence cases for over 15 years, there has not been a marked decrease in the frequency of abuse.<sup>36</sup> On the other hand, fewer incidents of abuse is only one of many articulations of success – another could be victim satisfaction. Some recent studies suggest that victims are increasingly ‘satisfied’ with restorative justice processes.<sup>37</sup> However, I was unable to find data on the experience of domestic violence victims generally or those involved specifically with sentencing circles.

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<sup>35</sup> Ptacek, *supra* note 32 at 9. A notable exception to this general statement is the Hollow Water Community Holistic Healing initiative. The communities around Hollow Water, Manitoba, developed the programme to address widespread sexual abuse, particularly child abuse, as an alternative to conventional incarceration. Hollow Water is rightly credited as a restorative justice initiative that was able to address the needs of extremely sensitive and vulnerable victims. However, the communities planned and established a comprehensive programme for the specific purpose of healing a whole category of offenders. This can be distinguished from the mainstream sentencing circle model, which typically taps into pre-existing resources on an *ad hoc* basis to craft individual sentences.

<sup>36</sup> Goel, *supra* note 19 at 61, 68. Two systemic considerations may help to explain why high frequencies of abuse persist. First, there is a connection between Aboriginal domestic violence and systematic colonial interference with Aboriginal institutions. Second, mainstream Canadian society continues to devalue the experiences of women, particularly those who are victims of abuse.

<sup>37</sup> Julie Stubbs, “Restorative Justice, Gendered Violence, and Indigenous Women” in James Ptacek, ed., *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 103 at 104. Stubbs notes that there is variance in the way these studies measure and define “satisfaction”.

## 1. THE VICTIM AND THE OFFENDER

Prior to the final sentencing circle, Elizabeth Dickson and Daniel Morris attended a Talking Circle. Its purpose was ultimately restricted to sharing thoughts and feelings, largely in response to Ms. Dickson's increased feelings of fear and anxiety, which she believed were connected to the stress of the process and the expectation that the Talking Circle would make recommendations to the sentencing circle.<sup>38</sup> Ms. Dickson attended the Talking Circle with one supporter and her father. Mr. Morris attended with two supporters. Other participants included five women elders, and the Chief Executive Officer of the Kaska Nation.<sup>39</sup> Ms. Dickson did not attend the final sentencing circle, although she provided a victim impact statement to Schmidt J. There is no evidence that Ms. Dickson provided a written position on sentencing, or that an advocate attended the circle on her behalf.

Schmidt J.'s probation order contemplates only passive rather than active participation by Ms. Dickson.<sup>40</sup> The probation officer, in consultation with the Kaska Tribal Council, retained the power to approve community processes in which Mr. Morris could have contact with Ms. Dickson. There is no similar requirement that the officer consult with Ms. Dickson or seek her consent. Mr. Morris was also ordered to host a Potlatch upon the Elders' recommendation and where the Elders have either Ms. Dickson's consent or "if it is in keeping of their traditional ways." Again, although

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<sup>38</sup> Facilitator's Report, as reproduced in part in *Morris BCCA*, *supra* note 1 at para. 25.

<sup>39</sup> *Morris BCPC*, *supra* note 1 at para. 28.

<sup>40</sup> See probation order, *ibid.*, at para. 67.

presumably the Elders would have taken into account Ms. Dickson's feelings, the order does not require consultation or consent.<sup>41</sup>

*Morris* provides us with a powerful example of the gap between sentencing circles in theory, which listen to the victim and include her in the healing process, and the sentencing circle in practice, which operate to effectively exclude victims like Ms. Dickson from almost every part of the process. In this first sub-section, I reflect on some of the reasons why, because of the victim's relation to the offender, she may be silenced and shut out of the sentencing circle process.

*a. Balancing rights, needs, and interests*

Because sentencing circles currently exist within the realm of the *Charter*,<sup>42</sup> the *Criminal Code*,<sup>43</sup> and Canadian criminal law, the process remains focussed on the offender, his sanction, and his healing.<sup>44</sup> It is the offender's right rather than the victim's to pursue or decline to pursue alternative sentencing measures. Similarly, while the offender has a right to attend the proceedings, the victim does not automatically enjoy the same right.<sup>45</sup> This is because Canadian law envisions the criminal process as predominately affecting the life, liberty and security of the accused.<sup>46</sup>

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<sup>41</sup> *Morris BCCA*, *supra* note 1 at para. 84.

<sup>42</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

<sup>43</sup> *Criminal Code*, *supra* note 29.

<sup>44</sup> Goel, *supra* note 19 at 71.

<sup>45</sup> But see requirements for circle sentencing in Saskatchewan, below at 12

<sup>46</sup> Crnkovich, *supra* note 10 at "13-14" of 26; *Charter*, *supra* note 42, s. 7.

I do not suggest that the strong focus on the offender is necessarily misplaced. Rather, it is important to remember that prioritizing the offender's rights, needs and interests comes at the cost of giving less weight to competing rights, needs, and interests of the victim.<sup>47</sup> It is possible that focussing on the offender is consistent with an Aboriginal world view, in the sense that each member of a community is responsible for and held accountable to the community.<sup>48</sup> However, the community also has a responsibility to care for each of its members, including the victim.<sup>49</sup> Therefore, to the extent that a sentencing circle fails to adequately engage the interests, needs and rights of the victim, they do not fully reflect this world view. In *Morris*, Schmidt J. discusses at considerable length the consequences to Mr. Morris, his feelings, and his desire to heal himself and his community.<sup>50</sup> In contrast, he refers to Ms. Dickson twice, and in the limited realm of recognizing the Court's obligation to provide for her safety.<sup>51</sup>

It does not follow that conventional criminal sentencing in Canada would necessarily provide the victim with a more desirable alternative. On the contrary,

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<sup>47</sup> There is also a risk that victims' "rights", such as the right to safety, are defined narrowly so as not to unduly infringe on the rights of the offender (below at 13).

<sup>48</sup> James (Sa'ke'j) Youngblood Henderson, "Ayukpachi: Empowering Aboriginal Thought" in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 248 at 270, discussing responsibility to kin as community.

<sup>49</sup> Don McIntyre (lecture presented to UBC First Nations Legal Clinic at the Faculty of Law, University of British Columbia – Vancouver, 08 April 2010) [unpublished].

<sup>50</sup> *Morris BCPC*, *supra* note 1 at paras. 41, 49, 57, and 61-62.

<sup>51</sup> *Ibid.* at paras. 58 and 104 ("I have an obligation to ensure that I create an environment that the victim is safe in. That's what I've done.") But see *Morris BCCA*, *supra* note 1, which discusses the impact of the case on Ms. Dickson but also Kaska women more generally, at paras. 25-27, 62, 68.

because it is connected to Canadian criminal law regime, the sentencing circle reflects the same potential for subordinating the victim.<sup>52</sup> However, the risks to the victim are heightened in domestic violence cases because there are almost always pre-existing power imbalances between the victim and the offender. In the more intimate environment of the sentencing circle, these power imbalances can serve to intimidate, coerce, and effectively silence the victim. Ms. Dickson's absence from the final sentencing circle and her anxiety in relation to making recommendations, may indicate that the process failed to readjust any inequities of power between Ms. Dickson and Mr. Morris.

In an effort to prevent restorative justice programs from reinforcing these harmful power dynamics, Nova Scotia has prohibited the programs from hearing domestic violence cases.<sup>53</sup> Alternatively, rules could be established to ensure that sentencing circles do not impose additional risks on victims. In *R. v. Joseyounen* (1995),<sup>54</sup> the Saskatchewan Provincial Court summarized the criteria it uses to assess whether it will grant an offender's request to be sentenced by a sentencing circle. These criteria include: that the victim agreed to participate free from coercion or pressure, and; where the victim is subject to battered spouse syndrome, that the victim have adequate counselling and support.<sup>55</sup> In the Yukon, courts have not adopted a similar set of rules

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<sup>52</sup> Goel, *supra* note 19 at 70.

<sup>53</sup> Stubbs, *supra* note 37 at 108.

<sup>54</sup> *R. v. Joseyounen* (1995), [1996] 1 C.N.L.R. 182 (Sask. Prov. Ct.) (Q.L.).

<sup>55</sup> *Ibid.* at 5-6. The seven requirements are: (1) The accused must agree to go before a sentencing circle; (2) The accused must have deep roots in the community in which the sentencing circle is held and from which the participants are drawn; (3) There are

to govern the use of sentencing circles, despite calls to do so.<sup>56</sup> However, the courts may be using the Saskatchewan criteria as a matter of practice.<sup>57</sup>

*b. What is “safety” to a battered woman and how do we ensure it?*

If we accept that the adoption of some rules might be the best way to offer some measure of protection to victims, it is worth asking what, of all the victims’ rights, needs and interests, are we most concerned about protecting?

In the context of domestic violence, perhaps protecting victim’s safety is most important. Safety is particularly important for sentencing circles, which contemplate a space for the victim’s voice, because it is widely recognized that victims of violence will not speak out unless they feel safe.<sup>58</sup> Arguably, the stakes are higher on reserve. If an Aboriginal woman does not feel safe, she may feel she has no choice but to leave the reserve and with it, her community, lands, kin and identity.

But what is ‘safety’ and who evaluates it? In the context of domestic violence, safety may require support long after the victim’s physical integrity is secured.

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elders or respected non-political 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 is, then she should have counselling made available to her and be accompanied by a support team in the circle; (5) Disputed facts have been resolved in advance; (6) The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.

<sup>56</sup> See *R. v. Johnson*, [1994] Y.J. No. 78 at paras. 90-93, 48 B.C.A.C. 93 (Yukon Terr. C.A.) (Q.L.), McEachern C.J.; see *R. v. Johns*, [1995] Y.J. No. 132 at para. 28 (Yukon Terr. C.A.) (Q.L.), Prowse J.A., Goldie J.A. concurring.

<sup>57</sup> *Johns*, *supra* note 56 at para. 34, McEachern C.J.

<sup>58</sup> *Royal Commission v.* 3 at 67.

Providing a meaningful safe environment can require shelter, financial security, family, safety from blame, emotional support and psychological support. However, there is a danger that someone other than the victim will define the parameters of safety, restricting it to the realm of mere physical safety. In *Morris*, it is likely that Ms. Dickson did not feel entirely safe during the process. First, her common law partner subjected her to two hours of brutal physical abuse and rape, for which she experienced significant and lasting injuries.<sup>59</sup> Second, she expressed increasing anxiety at the prospect of formulating recommendations and did not attend the final sentencing circle. Schmidt J. confirmed that it is the Court's duty to provide a safe environment for Ms. Dickson,<sup>60</sup> yet it is difficult to see how a conditional no-contact order, the only order that directly addresses Ms. Dickson's 'safety', could provide the type of meaningful safety Ms. Dickson likely required.

Interestingly, sentencing circles have been alternately characterized as more and less safe than conventional sentencing. Those advocating that sentencing circles may be more safe connect a victim's reluctance to call the police with the fear that incarceration may strain the relationship<sup>61</sup> or impose financial hardship.<sup>62</sup> The inference

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<sup>59</sup> Two of my clients at the UBC First Nations Legal Clinic have spoken to me about incidents of sexual assault and the severe emotional stress the assaults caused. Both women reported that even years later, they were still learning to cope with the impact the assaults had on their lives. By contrast, during a psychological assessment that preceded sentencing, Mr. Morris felt that Ms. Dickson would probably not suffer long-term effects because she had support (see psychological assessment by Dr. D.P. Boer, reproduced in part at *Morris BCCA*, *supra* note 1 at para. 20).

<sup>60</sup> *Morris BCPC*, *supra* note 1 at para. 104.

<sup>61</sup> Goel, *supra* note 19 at 71-72; see also *Morris BCPC*, *supra* note 1 at paras. 39-40 (discussing a previous sentence and the possible damage to the family).

we are asked to draw is that if a victim knew sentencing circles were available and could provide alternatives to incarceration, she may be more likely to report abuse. On the other hand, critics of sentencing circles point out that conventional sentencing could feel more familiar to the victim and could connect her to more resources.<sup>63</sup> Depending on the victim and her relation to the offender and her community, conventional sentencing may provide a welcomed degree of anonymity.<sup>64</sup>

Other critics take issue with non-incarceration of Aboriginal offenders in general. The argument is that where the victim of domestic assault is an Aboriginal woman, and the Aboriginal offender is not incarcerated, courts send a message that the crime is less serious than if the victim and offender had been non-Aboriginal.<sup>65</sup> Similarly, the BCCA in overturning Schmidt J.'s sentence in part, emphasized the need to send a stronger message of denunciation and deterrence, particularly where "spousal abuse is endemic".<sup>66</sup> While denunciation and deterrence are important parts of ensuring victims

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<sup>62</sup> Royal Commission v. 3, *supra* note 17 at 65; *Morris BCPC*, *supra* note 1 at paras. 11-15.

<sup>63</sup> Crnkovich, *supra* note 10 at "15" of 26. The difference in resources could also be related to an urban/rural divide. One client that I represented through the UBC First Nations Legal Clinic is a survivor of rape. She had been charged with assault, although she maintained that the other party attacked her. Each day of her trial, held in the Vancouver area, B.C., my client attended with at least two support workers as well as her partner.

<sup>64</sup> Christine Zuni Cruz, "[On The] Road Back In: Community Lawyering in Indigenous Communities" (5 *Clinical L. Rev.* 1998-1999) 557 at 574-575 (discussing more generally the importance of understanding the individual in the context of their community).

<sup>65</sup> Payne, *supra* note 23 at 37, 39.

<sup>66</sup> *Morris BCCA*, *supra* note 1 at 62.

and potential victims feel safe, incarceration is not the only way in which to do so. Traditional Aboriginal justice mechanisms, such as public punishment or banishment, also fulfil the principles of denunciation and deterrence, perhaps even more effectively than institutional incarceration<sup>67</sup> and in a way more closely aligned with Aboriginal world view and identity. In practice, sentencing circles have not utilized these Aboriginal tools of justice to deal with domestic violence cases,<sup>68</sup> but there does not appear to be any principled or legal reason why they could not do so.

## 2. THE VICTIM AND HER COMMUNITY

In the previous sub-section, I described some of the risks a sentencing circle might impose on a victim by virtue of her relation to the offender in the context of sentencing circles hearing domestic violence cases on reserve. This sub-section focuses on the ways in which the victim's relation to her community may act to silence her.

### *a. Assumptions about community*

Two assumptions about the reserve community can impede the ability of the victim to meaningfully participate in the sentencing circle process, particularly where these assumptions are left unaddressed. These two assumptions are: (1) that the

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<sup>67</sup> McIntyre, *supra* note 49 (After Mr. McIntyre's community banished his nephew, the nephew called. Because his nephew no longer existed, Mr. McIntyre hung up the phone. The nephew also visited Mr. McIntyre's home. Because his nephew no longer existed, Mr. McIntyre shut the door. Later on, his nephew would confirm that he had tried every relation he knew and received the same response. He described it as the worst feeling in the world.).

<sup>68</sup> Goel, *supra* note 19 at 72.

sentencing circle fairly represents the community; and, (2) that the community represents the victim.

i. The sentencing circle fairly represents the community

The legitimacy of sentencing circles is based, in part, on an assumption that the sentencing circle fairly represents the whole community.<sup>69</sup> The community, in an Aboriginal world view, looks after the interests of the offender and the victim in the context of the community as a whole.<sup>70</sup>

Where courts do not think critically about the people and perspectives represented in the sentencing circle, there is a danger that the resulting sentence will not adequately account for the perspective of the victim. In *Morris*, neither Schmidt J. nor the BCCA question whether the sentencing circle was a fair representation of the community, the offender, or the victim. We do know, however, that the sentencing circle included oral submissions from Crown counsel, the offender Mr. Morris, the Chief of the Kaska Tribal Council, and four people with community responsibility.<sup>71</sup> LAWS, in its letter to Schmidt J., expresses concern that the Kaska Tribal Council was too closely involved with the case. It specifically claimed that Kaska women feared retaliation by Aboriginal political leaders if they dared to speak out against violence.<sup>72</sup> Mr. Morris'

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<sup>69</sup> I use “represent” here to mean to understand, consider, and express the rights, needs, and interests of those being represented. Fair representation might mean that certain groups will require more time, resources, or representatives than others.

<sup>70</sup> McIntyre, *supra* note 49.

<sup>71</sup> *Morris BCCA*, *supra* note 1 at para. 29.

<sup>72</sup> *Ibid.* at para. 27.

official political career ended when he pleaded guilty to these charges, but it is unlikely that all of his ties to the Council were severed. However, Schmidt J. expressly dismisses the political dimensions of the case as “not the Court’s concern.”<sup>73</sup>

By side-stepping the ‘political’ aspects of the case, Schmidt J. failed to address the real risk that the circle participants disproportionately represented Mr. Morris’ interests over Ms. Dickson’s, or that the circle represented problematic attitudes prevailing in the community.<sup>74</sup> Unless courts meaningfully grapple with the actual dynamics at play within the sentencing circle, the circle can continue to be used to suppress the voices of the victim and her supporters.<sup>75</sup>

Although there are problems with making assumptions about who sentencing circles do and do not represent, it would be unreasonable to expect perfect representation. First, the concerns I have raised here do not differ markedly from those in conventional sentencing hearings. In theory, counsel for the Crown represent the public interest, yet they are individuals with their own perspectives, employed by a branch of the government that has its own political, fiscal and legal agenda. These perspectives may not always, if ever, correspond to the interests of the public, let alone the victim. Second, and on a deeper level, public and community interests are illusory terms which are never fully represented because of divergent perspectives within the group. However, I suggest that a judge may avoid some of the problems we see in

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<sup>73</sup> *Morris BCPC*, *supra* note 1 at para. 43.

<sup>74</sup> See, e.g., letter from LAWS, reproduced in part at *Morris BCCA*, *supra* note 1 at para. 27.

<sup>75</sup> Crnkovich, *supra* note 10 at “10, 14-15” of 26; *ibid.* at para. 69.

*Morris* by actively examining the sentencing circle. A few of the questions they may wish to ask include:<sup>76</sup>

- Who are the individuals in this circle?
- Who solicited and selected these individuals and by what process?
- Which communities and individuals are represented by this circle?
- With what legitimacy do the individuals and the circle speak for the community?
- From what position am I, as a judge, receiving and processing this information?

These questions are just the first step down a longer road to fair political representation at all levels of Aboriginal community and governance. I return to this idea in the conclusion of this paper.

ii. The community's voice is the voice of the victim

As I noted in the previous paragraphs, a community is not homogenous. It is made of individuals and groups with varying and possibly divergent interests. Where courts uncritically assume that the community's interests are identical to those of the victim's, the victim's voice may be unfairly diminished, particularly where there are also unchecked power imbalances at work within the community.

Schmidt J.'s decision in *Morris* indicates something akin to this type of assumption. He notes that the conditions are almost identical to what was discussed at the Talking Circle, "which included the victim".<sup>77</sup> Schmidt J. appears to assume that, by addressing the requirements of the Talking Circle (which, notably, did *not* recommend

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<sup>76</sup> I gratefully refer the reader for further discussion and inspiration: Cruz, *supra* note 64; Crnkovich, *supra* note 10 at "10, 14-15" of 26, 24; Royal Commission v. 3, *supra* note 17, c. 2.; Lynne Henderson, "The Dialogue of Heart and Head", (1998) 10 *Cardozo L. Rev.* 123 (on judges' self-reflection).

<sup>77</sup> *Morris BCPC*, *supra* note 1 at para. 107.

sentencing conditions), he has also met Ms. Dickson's needs. Similarly, the Talking Circle facilitator reports that "everyone in the circle" felt that healing and counselling would be more beneficial than jail.<sup>78</sup> Ms. Dickson was present at the Talking Circle, but does this report accurately represent her position? Or is the facilitator merely registering the absence of objection? Relying on the two decisions alone, it is impossible to tell.

An Aboriginal world view reminds us that it may not be entirely misguided to focus on the community's perspective, since the community is responsible for both the needs of the victim and the offender, as well as everyone else in the community. Ultimately, a community-centred discourse may be a more appropriate guide for sentencing circles as well as for future Aboriginal justice initiatives, but I would argue that the focus on community should be chosen consciously. I would further suggest that courts and other decision-makers remember to ask whether, by listening to the voice of the community, they are also hearing the voice of the victim in a way that they consider to be fair.

*b. The pressure to heal*

I have discussed how the victim may be silenced as a result of the courts' uncritical assumptions about representation within the sentencing circle and the community. Here, I argue that an Aboriginal woman's community may exert pressure or influence to effectively silence her.

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<sup>78</sup> See facilitator's report, reproduced in part in *Morris BCCA*, *supra* note 1 at para. 26.

Kinship is an integral component of community in an Aboriginal world view.<sup>79</sup> Domestic violence can trigger emotions with negative associations, such as pain, denial, fear or shame. In small and close-knit reserves, these emotions can reverberate within the entire kinship network. In turn, the community may exert pressure on a victim to remain silent, particularly where the offender is or was a highly respected leader, such as Mr. Morris.<sup>80</sup>

It is important to remember that Aboriginal domestic violence on reserve occurs in the context of colonialism. First, because of the systemic and intentional damage done to Aboriginal institutions, domestic violence cases are more likely to be part of a pattern of widespread abuse on reserve.<sup>81</sup> Where abuse is widespread, the community may be reluctant to begin talking about domestic violence, especially where Aboriginal leadership is male-dominated.<sup>82</sup> This reluctance may put direct or indirect pressure on the victim to remain silent. As an example, Schmidt J. in *Morris* considered that domestic abuse may be “at a crisis point” in the Watson Lake community. Yet, it also appears that it wasn’t until Mr. Morris’ arrest that domestic violence began to be addressed at a community-wide level. Schmidt J. describes Mr. Morris’ case as

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<sup>79</sup> See Cruz, *supra* note 64 at 573, on the importance of blood relations to the concept of community. See also Henderson, *supra* note 48, discussing responsibilities to kin as community.

<sup>80</sup> Royal Commission v. 3, *supra* note 17 at 68-69.

<sup>81</sup> *Ibid.* at 57.

<sup>82</sup> See, e.g., LAWS letter to Schmidt J., reproduced in part in *Morris BCCA*, *supra* note 1 at para. 27. Communities may also experience “collective trauma”, where the whole community has suffered trauma and loss and, as a result, is no longer capable of caring for and healing individual members (Royal Commission v. 3, *supra* note 17 at 84).

following numerous other cases that took Schmidt J. “five minutes to do.”<sup>83</sup> Likely, these incidents of violence had done little to spark widespread community action.

Second, the terms ‘victim’ and ‘offender’ are more complicated in an Aboriginal context.<sup>84</sup> Colonialism has caused lasting harm to the Aboriginal community and all its members, including the victim and the offender. We saw above that the sentencing of Aboriginal offenders is inextricably tied to anti-colonialism and self-determination. Thus, the community may reject the colonial model of dealing with domestic violence and choose instead to heal itself, the offender and the victim in the manner it deems most appropriate. We see this in *Morris*, where Schmidt J. notes that the case “has galvanized the community” to break the silence and address the issue of domestic violence.<sup>85</sup> He also notes that the community leaders expressed their desire to pursue a healing process. In principle, there does not appear to be anything contradictory about simultaneously pursuing self-determination and supporting victims of domestic violence. Yet in practice, the victim may face significant pressure not to appear to be going against her own community.<sup>86</sup> She may feel obliged to support the community’s

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<sup>83</sup> *Morris BCPC*, *supra* note 1 at paras. 17-18.

<sup>84</sup> Goel, *supra* note 19 at 69.

<sup>85</sup> *Morris BCPC*, *supra* note 1 at paras. 18-37.

<sup>86</sup> *Royal Commission v. 3*, *supra* note 17 at 72; Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission of Aboriginal peoples*, vol. 4 (Ottawa: Canada Communication Group Publishing, 1996) at 63, quoting an Aboriginal participant who related her experience pressing charges against her husband and confronting sexist bylaws: “In my community, I’ve been ostracized, blacklisted.... [I was] scared to come here today...it gets lonely, fighting that battle and not knowing who is going to be the oppressor, because they’re one of us” [*Royal Commission v. 4*].

plan despite her own views, or, like Ms. Dickson, decline to participate in the final sentencing.

Finally, the Aboriginal community's desire to begin the healing journey may encourage the judge to impose alternative sentencing measures that the community is not yet in a position to enforce. Where healing remains incomplete, and sentencing conditions go unenforced, the victim and others may be left with the impression that the community and the courts are not taking domestic violence and the victim's experience seriously. This can be seen quite clearly in *Morris*. Schmidt J. was impressed with the Family Violence Conference and Talking Circle and hoped these measures signalled that the community was committed to meaningful and permanent actions against domestic violence. In response, he crafted probation conditions that contemplated and required ongoing community involvement. Two such conditions required Mr. Morris to host a Potlatch and attend a Men's Circle upon the Elders' recommendation. Another condition required that the probation officer consult with LAWS and the Kaska Tribal Council to direct Mr. Morris' community service.

On appeal, the BCCA removed the Potlatch and Men's Circle conditions entirely and eliminated the consultation clause for community service. The Court justified its decision on the grounds that the community was still at an information gathering and planning stage – in other words, it was too soon to expect the community to participate in Mr. Morris' healing to the degree Schmidt J. envisioned. Specifically, the BCCA found that the community could not agree on who was an "Elder" and what constitutes a

“potlatch” under the conditions.<sup>87</sup> It also found that LAWS and Kaska Tribal Council had such different opinions on Mr. Morris’ community service that the requirement to consult had become “unworkable”.<sup>88</sup> Finch C.J.B.C., for the Court, commented that Schmidt J. had been “mistaken to confuse such positive developments [in the community] with a capacity to actually give effect to appropriate traditional sanctions.”<sup>89</sup> It is unclear whether the BCCA felt Mr. Morris and the community were, nevertheless, on the road to healing.<sup>90</sup>

Even if Schmidt J.’s conditions were “unworkable”, which I do not necessarily concede,<sup>91</sup> I submit that, in this case, confidence in the community was not at the root of the problem. Two alternative reasons strongly suggest themselves. First, Schmidt J. uncritically implied there was community consensus where there was none. His

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<sup>87</sup> Some in the community requested direction from the Court since the Court had imposed the terms. The BCCA refused to give direction on the grounds that it was the community’s responsibility to give the terms meaning. It then went on to find the community had failed to do so, and struck out the provision in its entirety (*Morris BCCA*, *supra* note 1 at paras. 76-83).

<sup>88</sup> *Ibid.* at para. 84. On the other hand, consultation may simply require discussion rather than agreement. For example, sentencing circle judges consult with, but are not bound by, the recommendations of the participants. See also, e.g., *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 42: “there is no duty to agree; rather, the commitment is to a meaningful process of consultation” (discussing the Crown’s duty to consult with Aboriginal peoples).

<sup>89</sup> *Ibid.* at para. 65.

<sup>90</sup> The Court observes that Mr. Morris had not attended spousal abuse counselling, although he had scheduled an appointment for assessment (*ibid.* at para. 18). Mr. Morris also stated that he is unclear about his community service requirement, but that he has helped elders and performed other tasks, presumably related to community service (*ibid.* at para. 48).

<sup>91</sup> See footnotes 88 and 89.

decision almost exclusively talks about the community's desire to heal with Mr. Morris *in the community*, as if there were general agreement on this issue. In fact, the community was deeply divided – some advocated for jail while others felt it was best for Mr. Morris to stay in the community.<sup>92</sup> Nor was the community required to reach a decision. The responsibility for crafting a sentence rested with Schmidt J., which he did without acknowledging or providing for disagreements that would surely continue. Second, and more fundamentally, the jurisdiction of a sentencing circle judge ends with the imposition of conditions upon the *offender*. They have no corollary power to order that the Aboriginal community be provided with the opportunity and sufficient resources to research, develop and initiate a comprehensive healing plan.<sup>93</sup> Thus, the sentencing circle creates a paradigm in which Aboriginal communities shoulder greater responsibility for enforcement while gaining no official power to create the sentence and no additional resources beyond those conventionally associated with sentencing.

#### **D. CONCLUSION AND RECOMMENDATIONS**

By examining *Morris*, we see that sentencing circles that deal with domestic violence on reserve diverge from their theoretical origins. Ideally, the victim speaks freely in a sentencing circle and participates in the healing process. In practice, however, sentencing circles pose a great deal of harm to the victim. These sources of harm emerge from the interaction between the victim, the offender, their community,

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<sup>92</sup> *Morris BCPC* at para. 10.

<sup>93</sup> Goel, *supra* note 19 at 68. See also Rudin, *supra* note 10. Where an Aboriginal community has greater access to resources, such as urban Aboriginal communities in association with the First Nations Court, there seems to be greater certainty that the community can enforce the sentence conditions.

and the sentencing circle itself. Of course, some risks are similar to those of conventional sentencing. Further, additional measures could be taken to mitigate some risk. However, sentencing circles are ultimately a tool of limited utility both for Aboriginal victims of domestic violence and for the communities in which they live. This is because they seek to recognize and give effect to Aboriginal concepts of justice but must do so through the criminal courts, a legacy of Canadian colonialism. One writer described sentencing circles as “hybrid”,<sup>94</sup> but perhaps they are paradoxical. At least as they are currently designed, sentencing circles are charged with what appears to be the impossible task of dismantling the master’s house with the master’s own tools.<sup>95</sup>

In my opinion, the solution for both the Aboriginal victim and her community is to replace the sentencing circle regime with Aboriginal justice initiatives,<sup>96</sup> and to ensure that these initiatives (a) receive proper funding,<sup>97</sup> and, (b) fairly represent the community from the most formative stages of information gathering and planning. Fair representation contemplates the inclusion of women,<sup>98</sup> but will also include other underrepresented groups. By ensuring fair representation from the earliest stages, special processes may be established for domestic violence in order to prevent victim subordination. These processes may ensure that the victim is provided with adequate

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<sup>94</sup> Goel, *supra* note 19 at 71.

<sup>95</sup> I refer interested readers to Audre Lorde; Albert Memmi, *The Colonizer and the Colonized* (Orion Press, 1965); and Henderson, *supra* note 48.

<sup>96</sup> Royal Commission v. 3, *supra* note 17 at 81-82.

<sup>97</sup> Crnkovich, *supra* note 10 at “22” of 26; Rudin, *supra* note 10.

<sup>98</sup> Royal Commission v. 4, *supra* note 87, c. 2, part 7, “The need for fairness and accountability”.

information, counselling and support. They may also allow a victim to request a special women's panel, or to opt-in to a more conventional legal process, although the impact on the offender would have to be addressed.<sup>99</sup>

Regardless of the particular form an Aboriginal justice initiative takes, we will need to shift our thinking in several ways. First, we will need to recognize that Aboriginal justice has a legitimate "political" dimension, both generally, as an anti-colonial process, and in the context of domestic violence specifically, as part of an ongoing struggle to hear victims' voices. Second, we should expect that Aboriginal justice may look radically different than the conventional justice system.<sup>100</sup> A community may not accept that 'justice' is a concept wholly severable from social services or the physical, mental, emotional, and spiritual health of its members.<sup>101</sup> Finally, full recognition demands a willingness to anticipate and address imperfections and even failures. Aboriginal governments enjoy a Constitutional right to establish and administer their own justice systems. This right cannot be defeated merely because federal or provincial governments decide they do not like the way the job is done. Unfortunately, the reality of funding has created a back door for this type of

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<sup>99</sup> Stubbs, *supra* note 37 at 114-115.

<sup>100</sup> Rudin, *supra* note 10 at 111.

<sup>101</sup> *Ibid.* at 103. The Royal Commission envisions the solution to domestic violence as "whole health", which it describes as the "ideal of harmony and balance at an individual level, involving body, mind, emotions and spirit; at a social level, implying peaceful, caring, mutually supportive relationships; and at an environmental level, enjoying safety and practising respect for the natural world" (Royal Commission v. 3, *supra* note 17 at 86).

paternalism.<sup>102</sup> Therefore, in committing to Aboriginal justice, it will become necessary to commit to the creation and maintenance of respectful relations as between sovereign nations capable of self-determination.

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<sup>102</sup> Rudin, *supra* note 10 at 103.