

COMING FULL CIRCLE: REDEFINING “EFFECTIVENESS”  
FOR ABORIGINAL JUSTICE

by

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DALHOUSIE UNIVERSITY

DEPARTMENT OF SOCIOLOGY AND SOCIAL ANTHROPOLOGY

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## **ABSTRACT**

*- Musse'j -  
(A Small Piece)*

Aboriginal peoples are vastly over-represented in many demographics of adversity. Most striking is their presence in the justice system. Aboriginal offenders experience the highest levels of incarceration, and later recidivism, in Canada. Clearly the current system is not serving this community well. Sentencing circles are an indigenized alternate approach to sentencing and justice. They integrate ideologies and customs relevant to the indigenous population into a holistic restorative justice procedure. They are a transformative approach, which facilitate peacemaking and reconciliation through communication and accountability.

Most studies conducted on the efficacy of circle sentencing have focused on its short-term capacity to reduce crime, seriousness of offences and the timing of subsequent offences. The findings of such research conclude that circle sentencing is ineffective at achieving such outcomes. I propose that these are the wrong outcomes to analyze and in turn seek to research new evaluative criteria for assessing the effectiveness of circle sentencing, by focusing on its restorative capacity instead of its reductive ability alone. The literature points to three levels where restoration occurs, each having its own approach to achieving justice and measuring restoration: The individual level - achieved through conflict resolution, community level - achieved through restoring social harmony, and the socio-political level - achieved by empowering the Aboriginal political structure.

The legitimacy of these measures is examined by interviewing individuals that represent different levels of restoration and later comparing findings to existing scholarship and more dominant measures of efficacy. Semi-structured interviews and ethnography are used to investigate the efficacy of Mi'kmaq circle sentencing in Millbrook, Nova Scotia.

## **LIST OF ABBREVIATIONS USED**

|           |  |
|-----------|--|
| AJS       | Aboriginal Justice Strategy  |
| CJS       | Canadian Justice System  |
| CMM       | Confederacy of Mainland Mi'kmaq  |
| INAC      | Indian and Northern Affairs Canada                                     |
| MA        | Masters of Arts  |
| MCLP      | Mi'kmaq Customary Law Program  |
| MJI       | Mi'kmaq Justice Initiative   |
| MLSN      | Mi'kmaq Legal Support Network  |
| NSRJ-CURA | Nova Scotia Restorative Justice-Community University Research Alliance |
| RCAP      | Royal Commission on Aboriginal Peoples                                 |
| RCMP      | Royal Canadian Mounted Police  |
| TRC       | Truth and Reconciliation Commission                                    |
| UCCB      | University College of Cape Breton                                      |

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## CHAPTER 1: INTRODUCTION

*- Kiskaja 'toq -  
(Getting Ready)*

My thesis is a continuation of my undergraduate Honours research project. Originally I asked, “Is circle sentencing effective?” After talking to a number of circle sentencing participants I found that much of what they noted as “effectiveness” had little to do with recidivism and more established understandings of justice. After making sense of those findings I was reminded of an experience from my youth that encompassed everything that I was trying convey.

*A friend of mine, who we will call Church, and myself were target practicing in the woods behind my house. Church wanted to go visit his cousin, who we will call Lucky, who lived next door. Upon arriving at Lucky’s doorstep I realized my gun was still loaded. So to discharge the rifle I safely fired it into the bushes behind his house. Absent-mindedly Church did not and entered the house, gun loaded. I do not remember exactly what we did during our visit, but I do remember what took place on our way out the door.*

*Lucky exited first, followed by Church, then myself. As I stepped towards the door I remember the sound of a gunfire and Lucky scream; he had been shot. Lucky was shot above the small of his back where the kidneys are located. I knew myself that it was not me who shot him because I discharged the gun prior to entering his house. However, because of strong family ties, fear and dishonesty Church blamed me immediately. And worst of all Lucky believed him. Lucky’s (and Church’s) family then showed up to see what the commotion was about. The two cousins telling them that I had accidentally shot Lucky in the back on our way out. And of course, since they both pointed fingers at me the parents believed that I it was my fault; and this was all compounded by the fact that he was the Chief’s grandson. I remember feeling frustrated that no matter how much I protested they still believed this fabrication. In anger I was told to get into their car and that I am in “big trouble.”*

*We arrived next door, to my house, shortly after to tell my parents what “I had done to Lucky.” The first thing that my parents ask me, because they knew that I was not the type to lie, was “is this true?” Although Church had a greater number of people convinced that he was innocent, my parents and I knew that the others were in the wrong. It was just a matter of proving it.*

*Lucky’s family was invited into my parents’ house and he was taken to the out patient clinic. Church’s parents were contacted and told to come over because the police would soon be arriving. I remember waiting for the police to show up thinking that I would be taken away in handcuffs even though I was not old enough to be sentenced as a youth or adult. A local Aboriginal police officer showed up soon after.*

*What he did, although not a sentencing circle, was conduct his investigation with both families present in my family's living room; all of us sitting amongst one another. We took turns recounting the events that took place, but Church's story changed every time he told it – mine stayed the same. The RCMP officer took him aside with his parent's permission and questioned him further. They returned to the group with a confession. Church admitted that he went into the house with his gun loaded and as we were exiting the house he fired the gun, shooting his cousin*

*From there he asked the parents what they thought should be done. Our families recommended that we lose our privileges to use firearms, as well as a parental issued sentence of being grounded for 2 weeks. I remember being so relieved that the blame was no longer on me, but upset that I was grounded even though I did nothing wrong. My parents told me when I asked why I was grounded, after everyone had left, that I should not have put myself in that position. I should not have visited friends with a firearm on my person. Even though I was responsible enough to make sure that the gun was unloaded I should not even open the possibility for something like that to happen – somebody being injured and the wrongful blame being put on me.*

What the officer did was restorative in nature and Aboriginal in virtue. We were made to confront one another, accuser and accused, we heard reactions of our families, we contextualized the offence, and we were offered the chance for reconciliation. After the offence we went back to the way things were before, in that we did not alienate ourselves from one another. The balance of social harmony was maintained, the circle unbroken. The officer recognized that we were neighbours, family members (Church and Lucky) and friends, and that we, as a collectivity, would benefit from the group conference setting. Although nobody was sentenced formally the event was effective at restoring the could-have-been broken social bonds between our two clans. This set the stage for what eventually became this thesis.

For my Master's thesis I set out to explore the meaning of "efficacy" in criminal justice, as well as how evaluators and the evaluated perceive it, not with the intention of privileging one definition over the other, but rather to develop (or scratch the surface of) new measures of efficacy that are representative of the intentions of restorative justice initiatives.

## The Project

Canada's justice system has been criticized on a number of fronts. Many conclude that the cost of maintaining the current system far outweighs its benefits. This suggests a need for developing more effective alternatives to achieving justice. Restorative justice is one of them. It was developed in response to the alleged shortcomings of the mainstream penal system, particularly the overcrowding of prisons and high levels of recidivism (Winterdyk, 1999). Restorative justice is said to offer holistic alternatives to sentencing and advocates of this approach believe that it is more effective because it is not reductionist in the way that it is structured and exercised. The dominant model of justice, the Canadian justice system (CJS), reduces the complex nature of legal violations into simple precedence, which compartmentalizes offences into categories of criminal and civil violations – offences against the state versus those against another human being. This is in contrast to restorative practices, which deal with offences on a contextual, case-by-case basis. Sentencing circles are one of such practices.

Circle sentencing falls under the umbrella of restorative justice because of its holistic approach to dispute resolution, which is inspired by pan-Aboriginal understandings of the circle. Among many First Nations the circle is considered a sacred symbol that “represents the wholeness of the Native way of life” (Leavitt, 1995. p. xvii). It is a representation of the holistic nature of Aboriginal spirituality, which is, in part, why offences necessitate restorative measures. Circle sentencing decisions are made with the goal of understanding the context of the offence, to find a method of correcting the behaviour that led to the offence and compensating those who have been wronged. The goal is to rehabilitate the offender and to restore balance to stakeholders and the

communities impacted by unlawful conduct. Unlike the mainstream system of justice, circle sentencing goes beyond simply punishing criminal actions.

Most of the literature dealing with restorative justice and sentencing circles focuses on *why* they should be used rather than addressing *how*, or if, they actually work. Thus, my main research question asks: “are sentencing circles effective in achieving their aims?” To answer this question it is important to first consider how “effectiveness” is defined.

The most common measures of effectiveness are concerned with three primary outcomes: reducing *recidivism* (re-offending), reducing the *severity* of subsequent offences, and *increasing the time interval* until a subsequent offence is committed. These are all based on the logic of punitive sentencing, as they do not account for the practices restorative capacities. When these evaluative criteria are employed to assess sentencing circles the practice is often deemed ineffective. For instance, a recent study on circle procedures, conducted by *the Bureau of Crime Statistics and Research* in New South Wales, Australia, concluded that “taken as a whole, the evidence presented here suggests that circle sentencing has no effect on the frequency, timing or seriousness of offending” (Fitzgerald, 2009. p. 7). Fitzgerald (2009) cautions that “[i]t should not be concluded that circle sentencing has no value simply because it does not appear to have any short-term impact on reoffending. Reducing recidivism is just one of several objectives of the process” (Ibid.). He further notes, “[i]f it strengthens the informal social controls that exist in Aboriginal communities, circle sentencing may have a crime prevention value that cannot be quantified through immediate changes in the risk of reoffending for individuals” (Ibid.).

As a result, my research proposes that the indicators used to measure the effectiveness of punitive sentences do not represent the intentions of circle sentencing and thus cannot effectively assess it. This is largely why, thus far, circle procedures are seen as ineffective. Existing evaluations have been too preoccupied with quantifying particular outcomes rather than focusing on the procedure's *restorative* capacities. That is, the process of strengthening informal social constraints. It should be noted that I am not arguing that circle sentencing and restorative justice are more effective legal alternatives, but rather proposing a set of more representative criteria to measure efficacy for evaluating Aboriginal justice, more specifically circle sentencing, on its own terms.

Throughout the literature it is evident that restoration is both complex and difficult to define. Unlike the indicators of efficacy employed to gauge the effectiveness of punitive sentences (*recidivism, seriousness and timing of subsequent offences*) restoration is not easily observable. This is because it is a process that restores social bonds among those involved in a crime (victim and offender), their immediate social networks (families and friends) and the broader community where the crime occurred (residents of the reserve or place where the crime took place).

As a result, I propose evaluating circle sentencing's restorative capacity on its own terms. To do this, three levels of interaction: the *individual*, the *community*, and the *socio-political* need to be analyzed. Each of the levels of social interaction involves a different mode of achieving restoration and targets different groups of people directly and indirectly, involved in the offence. Accomplishing this is a difficult task because restoration is so multifaceted. My research, however, aims to at least begin the process of assessing whether or not an evaluation of restoration can be done. In doing so, my

research tests whether or not circle sentencing practices are effective when evaluated with these considerations in mind. In Chapter 2 I outline the context that has provoked the political and legal reformations that lead to the enactment of restorative justice, sentencing circles and their relevant policies. Chapter 3 provides a brief explanation of Mi'kmaq spirituality and description of how our philosophies of the circle differ from pan-Aboriginal understandings. Chapter 4 outlines the philosophical debates surrounding contested interpretations of sentencing circles legislation, the ideological differences responsible for the dichotomy in that exists among proponents of Aboriginal rights, and the theoretical tenets associated with ponderings of justice-based efficacy. Chapter 5 (*Methodology*) is where the three levels of restoration are defined. The process of operationalizing “effectiveness” – identifying and assessing efficacy, is discussed as well as how it was applied to gauge the successes of 3 sentencing circles held in community of Millbrook First Nations. That chapter is accompanied by a description of the people, place and organizations examined in addition to the methods of data collection. Chapter 6 reports the results of the data collection and interpretation. Responses of research participants are discussed with respects to the proposed measures, followed by a comparison to the conventional reductive measures of the mainstream system of justice. Lastly, Chapter 7 wraps up the discussion on restorative effectiveness. It also highlights some of the concerns and recommendations made by research participants, as well as recommendations of my own.

### *Contribution to Knowledge*

The primary goal of this project is to develop representative measures of effectiveness for Aboriginal restorative justice procedures. There is little literature on the internal value of circle sentencing to Aboriginal communities, which is the essence of the alternate criteria for measuring restoration. It is my hope that I have articulated the interests of those who seek and have gone through the practice. Furthermore, by exploring the restorative capacities I feel I have pointed to the successes that validate it as a legitimate legal practice, as well as having highlighted the shortcomings with the optimism that the results be used to improve upon the elements receiving the most criticisms.

Throughout the literature it is evident that there is a great deal of skepticism regarding the capacity of Aboriginal peoples to manage their own affairs, whether it be legal, political, or economic. These perceptions are exemplified by the fact that studies often dismiss the legitimacy of Aboriginal legal practices because of a very narrow definition of effectiveness. It is my hope that my research effectively conveys the importance of holism to Native communities, and non-Aboriginal ones too, and that restoration may in fact be a more viable legal alternative than skeptics perceive.

## CHAPTER 2: CONTEXT

*- Nei'apukua'sit -*  
(Bring into Full View)

In order to adequately conceptualize the complexity of sentencing circles it is necessary to provide some context on their origin, policies, motivation, and their uniqueness.

The Department of Indian and Northern Affairs Canada (INAC) plays an instrumental role in making Aboriginal justice possible. INAC is one of many federal departments dedicated to fulfilling the federal government's responsibilities to Aboriginal communities. The department's mandate is a manifestation of the legislature under the *Indian Act* (1985). More specifically, INAC's mandate is procured in accordance with existing policy and judicial decisions under the *Indian Act* (INAC, 2009).

This is done in large part through partnerships between INAC, Aboriginal communities (and their respective administrative bodies) and federal-provincial agreements. It is through this alliance that the INAC negotiates "comprehensive and specific land claims and self-government agreements on behalf of the Government of Canada; oversees implementation of claim settlements; delivers provincial-type services such as education, housing, community infrastructure and social support to Status Indians on reserves; manages land; and executes other regulatory duties under the *Indian Act*" (Ibid.).

In 1991 the *Royal Commission on Aboriginal Peoples* (RCAP), a standalone commission, was established to investigate the relationship between Aboriginal and non-Aboriginal populations as a key source of Aboriginal adversity in Canada (RCAP, 1996). In part, RCAP was a response to the political awakening of Aboriginal peoples seen in

the early 1970's and then again in the early 1990's.

Much of the mobilization of Aboriginal peoples was in response to political events that threatened Indian status, treaty agreements and systemic prejudice. Prejudices can be seen time and time again. One such example can be found in the 1971 Donald Marshall Jr. case, where then 17-year-old Marshall was wrongfully convicted and sentenced to life imprisonment for the murder of a peer. It is believed that racial profiling by law enforcement towards Aboriginal peoples was responsible for the conviction. After his release, Marshall later used his reputation to gain support in the 1990's to protest for the recognition of Aboriginal fishing rights.

The demise of the Meech Lake Accord in 1990 was perceived as a triumph for Aboriginal peoples and it caused quite a reaction among Canada's political community. The Meech Lake Accord was an effort to amend Canada's constitution to better incorporate Quebec. Before the accord was ratified it was met with great distaste from Canada's Aboriginal population. Manitoba MLA Elijah Harper, an Oji-Cree First Nation's chief, stalled the ratification process and contributed to its failure. Harper held that the proposed amendments to the constitution were made without the input of Aboriginal peoples and that proper protocols were not followed (Dickason, 2002).

Quebec's Oka crisis of 1990 occurred shortly after the scuttling of the Meech Lake Accord. The early 1700's marked the beginning of what would end up being an almost 300 year long land claim by the Mohawk of Kanesatake. Ownership of the land which was taken from Mohawk, switched hands several times over the centuries ending up in the ownership of a Belgian real estate company (Ibid. p. 326-330). Ultimately a violent standoff ensued between the Mohawk and the Quebec provincial police

(eventually the Canadian military intervened) after the town of Oka declared it would be expanding a golf course onto the disputed land (Ibid, p. 329). Ten years later, in June of 2000, a deal was struck whereby the federal government purchased the contested land and signed an agreement-in-principle with the Mohawks, giving them legal jurisdiction over 960 of the 10,3200 disputed hectares (Ibid.).

Prime Minister Mulroney was propelled in light of these events and the media attention they garnered, to establish the *Royal Commission on Aboriginal Peoples* (RCAP) in 1991, to investigate the sources of the problems Aboriginal peoples face and possible strategies to overcome them. This marked the onset of “an intensive period of increased academic participation in the clarification of the self-government idea” (Hylton, 2008. p. 13). The RCAP aimed to explore the changing relation between Aboriginal and non-Aboriginal society with the purpose of offering strategies to the federal government to improve its relationship with its Aboriginal counterparts. The 4000-page report found that one site of oppression in dire need of refinement was the Canadian Justice System (CJS). The RCAP noted that the CJS was ineffectively addressing the needs of Aboriginal peoples. This is evident by “disproportionately high levels of arrest, conviction and incarceration relative to the Aboriginal representation in the population” (Department of Justice, 2009<sup>2</sup>). The overrepresentation of Aboriginal peoples in the Justice System is thought to weaken the social fabric of Aboriginal communities on a national scale. Although the document made 440 recommendations to the Canadian federal government regarding how to potentially improve its relationship with Aboriginal peoples little has been done until recently.

In 1996 the Aboriginal Justice Strategy (AJS) was developed in response to the

findings from the RCAP's report *Bridging the Cultural Divide* (1996). This report, developed in cooperation with INAC, addressed the alarmingly high rates of incarceration of Aboriginal people and identified self-determination as the appropriate means of improving Aboriginal adversity. Accordingly, "[w]hile Aboriginal adults represent 2.7% of the Canadian adult population, they accounted for 11% of admissions to federal penitentiaries in 1991-92 and 18% in 2002-03" (Canada, 2008). With such disturbingly high levels of involvement in the justice system, the RCAP posited that the CJS is not effectively meeting the needs of the Aboriginal populace. Although there are many explanations that address the cause of the phenomenon (which will be discussed later), it is quite evident that the CJS is failing to meet the needs of Aboriginal people, regardless of the cause. This is made apparent when one considers that little has changed in over 10 years with respects to Aboriginal overrepresentation. "In 2007/2008, Aboriginal adults accounted for 22% of admissions to sentenced custody, while representing 3% of the Canadian population" (Canada, 2011). If the federal government intends on ameliorating the matter of sentencing disparity then something has to change. In light of the figures provided by INAC it is quite apparent that Aboriginal adversity will not be resolved if the legal system persists to administer justice in the same manner as it has since 1867.

The AJS was first conceived in 1996, in response to the RCAP as a general federal crime initiative to encourage community involvement and develop justice initiatives that reflect the values of Aboriginal peoples as a means of improving their status and experience within the CJS. A branch of the Department of Justice's Programs Branch, the Aboriginal Justice Directorate, manages the AJS. The AJS asserts that the

key to remedying Aboriginal adversity is to elevate Aboriginal peoples to a position of responsibility, where they are themselves responsible for the administration of justice in their own communities. The goal of the AJS is to find strategies for Aboriginal communities that promote involvement in “local administration of justice” and develop effective alternatives to the CJS when legal-matters necessitate Aboriginal-appropriate recourse” (Department of Justice, 2009). These initiatives are designed to be non-oppressive, in the sense that they represent the interest of subordinate groups, and have the long-term goal of diminishing overall rates of “victimization, crime and incarceration” in Aboriginal communities, which should in due course resolve the issue of overrepresentation in the justice system (Ibid.).

Consistent with the notion of community mobilization and empowerment, the AJS offers 2 types of funding components: Community-Based Justice Programs and Capacity Building support. Both of these approaches are influenced by the mandate and objectives of the AJS. The funding components function to provide a provisional structure to Aboriginal justice strategies. Community-Based Justice Programs include, but are not limited to, diversionary programs, development of pre-sentencing options, and community sentencing options (like circle sentencing, victim support, and offender reintegration services (Ibid.). Capacity Building strategies on the other hand are operate to develop community-based justice programs for Aboriginal communities without available services, train Aboriginal peoples to manage the programs, improve upon existing programs, conducting evaluations upon said services for the sake of enhancement, support development of new additional services and to support initiatives that intend to improve the relationship between Aboriginal communities and the

mainstream system of justice (Ibid.).

When one considers the efforts being made by the federal government to improve the relationship between Aboriginal communities and the CJS it becomes apparent that the matter of Aboriginal overrepresentation in the justice system is not simply a problem facing the afflicted population. It is also a matter of broader public concern that has prompted the federal government to accept a degree of responsibility in causing Aboriginal adversity. It is now a task that is being addressed through cross-cultural partnerships – between the CJS and First Nations communities, whereby unique culturally sensitive programs are being created as a remedy to the problem. Before we discuss these ‘culturally appropriate solutions’ let us first conceptualize the notion of overrepresentation within the Aboriginal context.

The issue of overrepresentation is often accompanied by the assumption that cultural disparity is the cause of Aboriginal adversity. Winterdyk and King (1999) note that anthropologist Michael Jackson presents a useful three-tier typology to categorize the most prominent explanations of Aboriginal overrepresentation in the justice system. Jackson’s first explanation is classified by a *cultural* interpretation of overrepresentation, whereby “cultural difference between Aboriginal and non-Aboriginal Canadians... is so great that Aboriginal societies have not been able to adapt to non-Aboriginal values and conceptions” (Winterdyk and King, 1999. 49). The supposed gap between Aboriginal and non-Aboriginal societies is thought to alienate the subordinate population from identifying with and participating in the country’s dominant society.

Second, problems within the Canadian justice system are seen as rooted in the social structure of the polity – which is “grounded in economic and social disparities”

(Ibid.). This classifies the matter of Aboriginal overrepresentation in *socio-structural* terms (Ibid.). Thus, impoverished environments, disorganized tribal politics, politically inactive citizens, socially disorganized communities, and high levels of unemployment are understood to be conducive to criminality. This view ends up placing the burden of overrepresentation in the justice system on the shoulders of Aboriginal peoples.

According to Winterdyk and King, Jackson's third explanation suggests that Aboriginal adversity is resultant of the residual discrimination of Canada's colonial past (Ibid.). This classifies the problem in terms of its *historical* context. Furthermore, former colonial mentalities and prejudices during Canada's formation have manifested themselves in the country's political structure, thus alienating Aboriginal peoples on the socio-structural level. In effect residual discrimination allegedly results in the hasty sentencing of Aboriginal peoples in the Courts.

According to Winterdyk and King (1999), because of intense debate over addressing which specific cause is responsible for Aboriginal overrepresentation in justice system, nothing is getting done by means of solving the problem (Ibid.). Although Jackson's three-tier typology is helpful, it treats each category – culture, social-structure and history - as if they are distinct and unconnected from one another.

When it comes to understanding overrepresentation, especially when Jackson's model is considered, it is not a matter of choosing which single explanation is most representative of the problem at hand. Instead, culture, social structure and history interact together as a *process*; a process whereby overrepresentation is not an end result, but rather a link in the cycle that perpetuates adversity for Aboriginal populations. What this means is that the origin of Aboriginal adversity is prompted by *cultural* difference,

carried out through the *historical* process of colonialism, which brings us to the present where the legacy of our past is embedded into the political and *social structure* of our society causing Aboriginal peoples to be consistently overrepresented in the CJS.

Knitting the three explanations into a narrative on overrepresentation provides a jumping off point for addressing how Aboriginal communities can remedy their adversity.

When one considers the adversity experienced by Aboriginal peoples in the CJS it becomes clear that self-determination is the key to reducing overrepresentation of Aboriginal peoples in the CJS. As Clairmont and McMillan (2006), note “The recent publication of the CSC investigator’s report (CSC, 2006) comparing Aboriginal and other inmates in terms of parole and other prison experiences illustrates again that not only are aboriginal persons in many parts of Canada over-represented in prisons but also they serve more time and do the poorest there in terms of accessing programs and other policy benefits. Such studies point up the need to respond better to aboriginal inmates and also to further explore alternatives to incarceration” (Clairmont and McMillan, 2006. p. 15). As noted above, culturally appropriate solutions, like those being implemented by the AJS, are being pursued as a means of recognizing cultural difference while simultaneously addressing the supposedly different expectations of justice relevant to Aboriginal peoples.

A common thread among most Canadian Aboriginal justice initiatives is that their framework is typically structured around three criteria: (1) *Indigenization*, (2) *Cultural Specificity* and (3) *Restorative Justice*. These components are believed to respond more effectively to the justice needs of Aboriginal peoples by making the law more accessible and familiar through the development of programs that recognize and respect the

uniqueness of Aboriginal culture and the importance of self-determination.

According to Dickson-Gilmore and LaPrairie (2005), *indigenization* is the idea that making existing legal services seem more *Indigenous* in form will make Aboriginal peoples feel less alienated and in turn respond more positively to the justice system. The concept itself is “based upon the assumption that the system is basically ‘good,’ and only minor reforms are necessary to render it equally ‘good’ for all people.” (Dickson-Gilmore and LaPrairie, 2005. p. 68). The term, in short, refers to the process of making something become indigenous or recognizable to indigenous populations by re-structuring programs to reflect their ideals. The process of indigenization of the CJS can be achieved by having Aboriginal peoples hold positions within the justice system - more specifically, to hold positions in Aboriginal-run justice initiatives. The process also entails the incorporation of relevant Aboriginal values and mores into the framework of justice strategies. Ironically, indigenized programs stem from the Canadian ideal of blind justice – the image of the blindfolded maiden and the notion that all people should be subject to the same universal legal system. However, in order for Aboriginal peoples to feel comfortable within that structure, special accommodations are made, by means of indigenization, to foster familiarity (Ibid.). By indigenizing certain facets of the justice system for the purpose of addressing the needs of Aboriginal peoples these programs become exclusive to the indigenous population. This is where the notion of *cultural specificity* emerges.

The idea of *cultural specificity*, like that of *indigenization*, is based on the assumption that cultural disparity is the cause of Aboriginal overrepresentation in the CJS. With the acknowledgment of culture as the root of the problem there is an

assumption that the adversity can be remedied with culture. To quote a popular cliché, policy makers have taken the approach of “fighting fire with fire.” Since “Canadian law operates to exclude, omit, and deny difference” it is near impossible to accommodate the concerns of Native communities within existing policies (Monture, 2006. p. 75). Unlike *indigenization*, which integrates Aboriginal mores into the existing system to make it more accessible and relatable, *cultural specificity* is concerned with targeting the population in need and legitimating the programs on a legislative level. Creating “equal treatment” legal strategies as a means of improving the unpleasant conditions of Aboriginal peoples is the fundamental rationale of culturally specific practices. It has been argued that since the rise of the American civil rights movement there has been a “shift in emphasis from the *rights* of minority individuals to the *preferential treatment* of minority groups” (Wilson, 1993. p. 243) [emphasis added]. This alleged special treatment has been manifested in the development of culturally specific practices and policies that allow for Aboriginal peoples to be treated differently in the CJS on the basis of their identity and dire circumstances.

The most apparent and relevant policy to legitimate the Aboriginal justice initiative is section 718.2(e) of the Canadian Criminal Code. It is the most overt and instrumental culturally specific legislation employed to address Aboriginal overrepresentation. Section 718 of the Criminal Code outlines the primary role that sentencing plays, by means of: (a) denouncing unlawful conduct, (b) deterring offenders from committing crimes, (c) separating offenders from society, (d) rehabilitating offenders, (e) providing restoration for damage and harm, and (f) promoting responsibility among offenders (Kramar and Sealy, 2006. p. 125-126). Section 718.2

outlines a number of sentencing considerations, such as mitigating factors and rational for deciding upon appropriate sentences in light of unique circumstances that bring offenders to court. 718.2(e) of the code is particularly interesting because the policy “calls for an element of exceptional treatment. The section suggests “[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” (Ibid. p. 126).

It should also be noted that the Indian Act (1985) works in conjunction with the sentencing provision, section 718.2(e), to legitimize and target the population in need of Aboriginal Justice Services. The Indian Act is a Canadian parliamentary statute established to deliver absolute power to the federal government to regulate the affairs (lands, resources and rights) of Canada’s Aboriginal population (INAC, 2008). Individuals affirmed as being “Aboriginal” by the Indian Register, an official record of all registered *Indians* kept by Indian and Northern Affairs Canada (INAC), are granted *Indian* status.

In spite of the fact that the Indian Act (1850) was historically enacted to “solve the Indian problem” –by eliminating and assimilating Native peoples, it now serves the purpose of protecting the rights of Aboriginal peoples and protecting them from further exploitation (Paul, 2006). The paternalistic role that the state has taken, to ensure that the Aboriginal population is not subject to any further systemic mistreatment, has fostered the assumption that the Indian Act (1850) was ratified to recognize that the First Nations’ people were here first and that they are now entitled to differential treatment (Flanagan, 2008). Indian status is also unique because it is the only legally ascribed identity that

defines and determines what it is to be a specific ethnicity: to be a Canadian Indian.

Aboriginal Justice initiatives are made available to those who are officially and unofficially recognized as *Indian* – status and non-status alike. Access to Aboriginal legal services is not denied if candidates live off reserve.

The ‘alternative’ sentences to accommodate the concerns of Aboriginal overrepresentation in CJS have predominantly taken the form of the *Restorative Justice* model. Restorative justice is a relatively new approach to resolving legal conflict. It is said to have developed in response to the alleged shortcomings of the mainstream justice system, particularly the overcrowding of prisons and high levels of re-offending. In North America grassroots organizations, social movements and academic schools of thought have influenced restorative justice. These include faith-based groups, legal abolitionists, feminist approaches, and the teachings and ideals of Canada’s First Nations’ population. Although very diverse, these groups all share in common the belief that justice should be achieved through restoration, reintegration and rehabilitation - not punishment, revenge and deterrence. Restorative justice is based on the assumption that restoring broken social relationships is the key to unlocking a superior form of justice. These approaches offer holistic alternatives to sentencing, which is in contrast to the conventional punitive nature of the sanctions imposed by the dominant Canadian model.

The power of restorative justice resides in its unique approach to achieving justice by holding offenders directly accountable for their actions to their victim and community through open communication. This is why it is believed that restorative justice is the appropriate means of sentencing Aboriginal offenders. It is seen to emphasize the importance of holism, restoration, compensation, and the consideration of the collective,

as opposed to considering only the interests of the primary stakeholders (victims and offenders) and legal specialists. Most Aboriginal restorative justice programs are community-based. They are made possible through partnerships between Aboriginal communities (band council or community justice services) and the federal government. As stated earlier, the INAC negotiates “comprehensive and specific... self-government agreements on behalf of the Government of Canada” (INAC, 2009). Because Aboriginal communities take control of certain aspects of the justice system, they exercise a degree of self-determination. This is done by developing appropriate and representative models of justice to accommodate the concerns of Aboriginal peoples.

Circle sentencing is one such practice. It is structured around the notions of *indigenization*, justified through *cultural specificity* and it fits under the umbrella of *restorative justice*. Circle sentencing is a politically contentious topic that generates a polarity of reactions, ranging from avid supporters to complete skeptics. The goal of Chapter 3 will be to demonstrate that circle sentencing is not simply a matter of “rearranging the furniture” (Monture, 2006. p. 78). This will be achieved by exploring the cultural ideals, legal rationale, political tenets, and theoretical assumptions that act as the foundation and framework for operationalizing sentencing circles.

## CHAPTER 3: SYMBOLISM, SIGNIFICANCE, AND SENTENCING

### - Kiwto 'qopia 'tjik - (*Sitting in a Circle*)

Sentencing circles are a unique example of how Aboriginal justice alternatives can be employed as a means of tending to Aboriginal overrepresentation in the Canadian justice system. Not only does circle sentencing enact all three criteria of Aboriginal justice initiatives: *indigenization*, *cultural specificity* and *restorative justice*, but it is also instrumentally different than dominant justice practices. Unlike judicial sentencing, the supposed efficacy of circle sentencing is believed to reside in the *process* of the practice, rather than the *penalty* issued at the end of a trial. The framework of circle sentencing is dynamic and no two circles are orchestrated in the same way. The fact that the procedure lacks a rigid systematic protocol has generated an array of negative perceptions regarding their legitimacy and efficacy as a viable legal practice. Although the practice is supported by judicial rationale and backed by the Canadian criminal code, circle sentencing is vulnerable to criticism because of its overtly contradictory political tenets. In order to conceptualize the uniqueness of circle procedures I will examine the cultural ideologies, political tenets, legal rationale, and theoretical perspectives upon which they are founded.

#### The Circle

To the Mi'kmaq the circle is considered to be a sacred symbol. "The circle represents the wholeness of the Native way of life. It is a perfectly balanced shape without top or bottom, length or width" (Leavitt, 1995. p. xvii). Mi'kmaw teachings tell us that the circle represents the interconnectivity and complexity of the human and non-human condition. Some of the key tenets that it represents are unity, equality, balance,

and the cyclical nature of life. It symbolizes unity with one another, other living beings, and with the environment. Traditionally, a community would not be able to survive with self-serving members. Equality is symbolized in the circle by the fact that there is no top or bottom; therefore hierarchy cannot be imposed. There is a responsibility among man and woman to recognize their position in nature; we should not place ourselves above anyone, or anything else. The notion of balance is found in the geometry of the shape itself. The distance from the centre to any point along the circumference of the circle is the same. If this is violated the shape no longer resembles a circle. On the personal level there must also be balance of body and mind in order for people to live healthy lives. Ailments arise when the two become out of sync. On the social level, deviance is considered an ailment resulting from imbalance between the social body and social mentality – the collectivity and its beliefs and norms.

The Mi'kmaw revere the circle as a sacred object because it can be found everywhere in nature. The sun and moon are circular, our eyes are round, birds construct their nests in a circle, and if you throw a rock into the water circles will emanate from the site of impact. If you trace the circumference of a circle you will always arrive at the same place that you started; a cycle is continuous and repetitive. The seasons are constantly changing but do so in the same succession and the cycle of day and night never varies. Many life forms go through biological cycles including aging, maturation, life, fertility, and nutritional consumption. The circle is the utmost embodiment of what is meant by “holism” and “harmony,” because if one link in the circle is broken the harmony of the cycle is completely disrupted.

There is phrase that is recited to recognize and respect our place in the world that encompasses the very philosophy represented by the circle: *Msit No'kmaq*, which translates to “all my relations.” *Msit No'kmaq* is uttered as a verbal acknowledgment of our intimate and undeniable connection with everything that surrounds us, from the animate and physical to the inanimate and metaphysical. The phrase is an affirmation of ones role in the circle. “All my relations” does not simply acknowledge that all things are dependent upon one another for a balanced existence, but it also recognizes that we are made up of the things around us, which makes us equals. Like the plants and animals that we live amongst we are carbon-based life forms, our physical bodies rely on the same things: water, minerals, vitamins, which are nothing more than nutrients found in soil and stone. We are composed of the same materials that are paramount to our survival.

The name of the nation – *Mi'kmaq* – is also reflective of the holistic virtues intrinsic to the circle. “*Mi'kmaq*” translates to English as “the family” (CMM, 2007. p. 2). It becomes quite apparent how important the collective is over the individual in *Mi'kmaw* culture, especially when one considers that an entire people inherited the name “the family.” *Mi'kmaw* Elder Sister Dorothy Moore reminds us that the *Mi'kmaq* “lived a communal existence where sharing and exchanging of goods was the basis of survival” (Moore, 2001. p. 3). A social structure that values kinship and cooperation creates the social harmony necessary for a society to function efficiently in a demanding climate. A multifaceted recalcitrant society would be ill prepared to face cold winters and tribal warfare. In essence “[r]espect for all was the basis of their spirituality” (Ibid. p. 4).

The circle is a very powerful symbol that represents a specific way of life. Although the dynamics of Native communities and the country as a whole have changed

and this has minimized the necessity for cooperation to ensure safety and survival of an entire population, the philosophies of the past are still present in Mi'kmaw communities today (Crnkovich, 1995. p. 108). The previous chapter notes that many Aboriginal Justice initiatives *indigenize* existing legal processes to make them more accessible to individuals in need of legal assistance. In large this is accomplished by restructuring legal structures to decentralize oppressive conventions (like hierarchy, compartmentalization, professionalization) by incorporating more holistic tenets like holism. Circle sentencing is an example of how a judicial procedure – the sentencing process – can be modified to address the concerns of Aboriginal peoples.

As the name suggests, circle sentencing integrates the sacred symbol of the circle into an already existing legal process, whereby the process of determining an appropriate penalty for an offender has been indigenized. Although the goal of judicial and circle sentence are similar - finding an appropriate course of action in response to a legal violation - the process is quite different in comparison. Although the symbol of the circle can be found in many Aboriginal nations across Canada, the circle means something very different to each one. Since all First Nations are heterogeneous my focus will discuss circle sentencing within the Mi'kmaq context and focus on the aspects that are consistent with the Mi'kmaq interpretation of the circle.

### *Circle Sentencing – Purpose of “Rearranging the Furniture”*

Circle sentencing is an indigenized variation of the judicial sentencing process. It integrates elements of Aboriginal spirituality and philosophy into the process of determining an appropriate sentence for Aboriginal offenders (MLSN, 2006. p. 4). As

noted in the previous chapter, the purpose of indigenization is to make the justice system more accessible to Aboriginal offenders with the aim of diminishing their disproportionately high rates of incarceration, with the long-term goal of reducing their overall adversity. Advocates of circle sentencing argue that they are more effective than conventional sentencing because they are modeled around the shared assumptions of Aboriginal holism and restorative justice. Restoration is understood as an appropriate means of achieving justice, because the community is seen as knowing best practices (Ibid.). Circle sentencing achieves this by displacing conventional legal rationale and bringing Aboriginal epistemologies of holism to the forefront. This indigenized sentence “is a process adopted by judges as an alternative to hearing formal sentencing submissions from the defense and Crown lawyers” (Lilles, 2002. p. 80-81). The process of sentencing thus undergoes a variety of changes, which can be seen on a number of fronts.

The physical orientation of circle sentencing is the most evident modification of the dominant justice processes. Participants are seated in a circle so everyone is visible to one another (Dickson-Gilmore and LaPrairie, 2005. p. 133). This is quite different from the formal court setting, where the public, prosecution, judge, and jury are all segregated from one another (Ibid.). In the courtroom, seating is arranged in a typical assembly room fashion. Individuals are seated in rows where their attention is directed forward, to the judge who is usually the only person facing the opposite direction. Also, judges are often seated at a higher elevation than the others in attendance to symbolize their legal authority. With circle sentencing everybody is seated as equals (Dickson-Gilmore and LaPrairie, 2005; Crnkovic, 1995).

Circular orientation is said to promote better communication by eliminating the symbolic organizational hierarchy of the conventional judicial seating arrangement. This ensures a degree of equality among participants (Cayley, 1998. p. 186). Regardless of the participants' social status they are obliged to show their humility by putting their expertise and authority aside to become of a part of the collective – the sentencing circle (Ibid.). Given that circle sentencing intends to make the justice system more accessible, by bridging the so-called cultural divide, it is important for professionals to be humble and to be willing to put themselves in a position of unfamiliarity. Another element of circle sentencing that conveys the good intentions of the courts is exemplified by the venue where the event takes place (Ibid. p. 188). Sentencing circles are often conducted on-reserve in an accessible space, like a community hall (Monture, 2006. p. 78). By doing so the CJS closes the gap between Aboriginal communities and the space of the legal system, by replacing the Court setting with a familiar on-reserve location. When the tension is alleviated, the emotional environment becomes more conducive to the type of communication necessary for restoration to occur.

#### Circle Sentencing – Pre-Sentence Protocol

Circle sentencing is a dynamic practice and no two are ever conducted quite the same. According to the Mi'kmaq Legal Support Network (MLSN), “to ensure the integrity of the process is maintained” several criteria must be followed carefully (MLSN, 2006. p. 5). These include: the *referral*, an *eligibility investigation*, *circle preparation*, *circle proceedings*, and *sentencing*. Since my thesis is concerned with circle sentencing in Mi'kmaq communities, the MLSN's *Sentencing Circle Protocol* (2006)

will be used to provide a framework for conceptualizing how circles are implemented and orchestrated.

Referrals typically take place after an offender is found guilty of a crime. This may take place at various stages of the trial process. An offender may decide to admit their guilt early in the criminal process or they may be found guilty at the conclusion of the trial's investigation. In cases where offenders are found guilty through the criminal trial process, they must both acknowledge and accept their guilt. Regardless of how guilt is determined, it is essential for the offender to express a will to be rehabilitated and to restore the injustices incurred by their victim, as a result of their wrongdoing. Once good intentions and the desire to make amends with their victim are expressed, circle sentencing may be deemed a possible recourse, assuming the victim is willing to cooperate.

Recommendations come from a variety of avenues: RCMP officers, court workers, community justice committees, defense counsels, Crown attorneys, victims, and the offender (MLSN, 2006. p. 5; Roberts and LaPrairie, 1996. p. 70). Although these actors are able to make recommendations, “[t]he presiding judge holds the authority to refer an Offender to a sentencing circle” (MLSN, 2006. p. 5). If circle sentencing is deemed to be an appropriate alternative the MLSN, or any other legal resource capable of hosting circles, is contacted so the facilitator can start the process. From here, an eligibility investigation is conducted on the client – the offender.

The circle facilitator is provided with all of the available information pertaining to the relevant case. When reviewing the information the facilitator looks for signs that the offender is willing to be held accountable for their actions, listen to the impact of their

actions, be honest, be willing to make amends, and be prepared to accept the sentencing plan. They also determine whether the community will be willing to aid in the rehabilitation of the victim and offender. Facilitators must also make certain that both parties recognize the facts of the case as true and undisputable (MLSN, 2006. p. 6).

To ensure that the offender is an appropriate client, and to validate the facilitator's inclination, an interview is conducted. Offenders must display a will to change for the better and to make reparation with their victim and community, regardless of the course of action determined by the circle. Next, the facilitator meets with the victim to review the facts and discuss their participation. Victims are encouraged to participate, as their involvement is necessary for restoring the relationship between themselves and the offender, which is one of the intentions of both restorative justice and circle sentencing.

A community justice panel, comprised of individuals from "every possible avenue," is then formed. Their role in the circle process is to add another level of accountability for the offender to realize – the community. By having community representatives present, offenders are able to see the indirect societal impacts of their wrongdoing. Community Justice Panels also have a non-participatory purpose in the eligibility process. The panel is used for consultation, regardless of whether or not they think circle sentencing is appropriate and bears in mind the gravity of the offence and circumstances that caused the incident. If it is deemed appropriate the panel decides who will participate in the circle, which cultural practices will be implemented – smudging (spiritual purification) or prayer, how to properly prepare, and what additional resources will be required to promote an effective sentencing circle (availability of rehabilitative resources). If a client is not recognized as being a suitable candidate the case will be

referred back to the Courts for conventional legal sentencing in the dominant system (MLSN, 2006. p. 5-7).

After the facilitator meets with the Community Justice Panel they commence circle preparation. First, a suitable location for hosting the circle is sought and booked. The facilitator then communicates case-related information to all to-be members of the circle. Facilitators update the 'to-be participants' of any newly found information so they all have a clear and similar understanding of the case at hand. Participants then receive an explanation of their expectations as a circle member and how the event will be orchestrated, in regards to its provisional protocol. Next, the facilitator describes what an offender would be likely to receive, as a penalty, if they were to be sentenced in Court. "This information acts as a guide for the participants when considering appropriate options for reparation and sentencing" (Ibid. p. 7). A Co-facilitator is then chosen and briefed on the case, to aid the lead-facilitator with their duties. If a client is not fluent in English a Mi'kmaq speaking translator is contacted.

### Circle Sentencing – Participants

Although all circles are conducted differently due to the unique circumstances of each offence, there are commonalities regarding who is present during a sentencing circle. Every circle includes a judge, defense lawyer, Crown prosecutor, the offender, community members, and circle facilitator (McNamara, 2000; Roberts and LaPrairie, 1996). The presence of the legal specialists has two aims: to provide judicial legitimacy to the 'community-based' practice and to act as ambassadors of the Canadian Justice System. Their ambassadorial responsibility is to convey the will of the federal

government to ameliorate the lived adversity of Aboriginal peoples in the CJS by working in partnership with Aboriginal communities. McNamara (2000) notes that this is accomplished in large by reversing “the colonial pattern of excluding Aboriginal people and values from important decision-making functions with respect to the administration of justice, and instead, [inviting] Aboriginal communities to actively participate in decisions related to the sentencing of criminal offenders” (McNamara, 2000. p. 1).

Other circle members include but are not limited to a court recorder, family members (of the victim and offender), RCMP officers, community leaders (band councilors, spiritual leaders), elders, rehabilitative council, teachers, probation officers, court workers, social workers, and the victim (McNamara, 2000; MLSN, 2006; Roberts and LaPrairie, 1996). They are expected to hold the offender accountable to something real rather than the abstraction of the state and to offer opinions, insight and experience to help further contextualize the case and contribute to the determination of a fit sentence. It should be noted that the victim might opt not to participate in the circle, for emotional reasons. The MLSN “Sentencing Circle Protocol” (2006) explains that if the victim decides not to actively engage in the sentencing circle there are other opportunities for his or her voice to be heard. Such options include the submission of a victim impact statement to be read during the circle or victims may ask for surrogates to represent them at the event to speak on their behalf. Together, all of the participants, regardless of status, collaborate to establish a sentencing plan to submit to the judge. Detailed recommendations are reached through the process of consensus, whereby participants agree upon the most effective strategy to achieve full restoration - among and between all stakeholders (Cayley, 1998; Dickson-Gilmore and LaPrairie, 2005; MLSN, 2006).

### Circle Sentencing – Circle Proceedings

Circle procedures conducted by the MLSN, although different from one another, share a similar process. A smudging is done in the room where the circle is scheduled to take place (MLSN, 2006). Smudging is a spiritual purification and cleansing ritual conducted by burning sacred herbs like sweet grass, sage, cedar, and tobacco. “The smoke gets rid of evil spirits and invites positive energies to enter” (CMM, 2007. p. 52). By smudging the space the area becomes suitable for prayer, as well as creating an area free of negative energies that may hinder the kind of communication necessary for an effective sentence.

Following the smudge, the first phase of a four-tier process begins. MLSN (2006) refers to this as *opening the circle*; which consists primarily of introductions and the reiteration of appropriate conduct. First an Elder offers a prayer and this is followed by opening remarks by the circle facilitator (MLSN, 2006). The facilitator gives a brief genealogy of the organization (MLSN) and the sentencing circle process. Ground rules are then reviewed to ensure that the circle does not become a hostile environment. The round is concluded with an explanation of the facilitator’s role. Each round is typically followed by a brief intermission so participants do not become overwhelmed by any emotional strain (Ibid.).

Round two – *story telling* – follows a traditional talking circle format, whereby members sit in a circle and speak only in a clockwise succession. An object of cultural significance: eagle feather, talking stick, pipe, braid of sweet grass, is passed from person to person to represent that individual’s opportunity to address the collective. “As long as the speaker is holding the symbol, he/she has the sole right to speak to the members of

the circle on any subject” (CMM, 2007. p. 53). Talking circles have been used by the Mi’kmaw as a mode of societal healing through group communication. Having both the aims of conflict resolution and communal reparation it seems appropriate that circle sentencing, a *restorative* justice practice, would be modeled after this custom.

The purpose of the first circulation is for everyone to introduce themselves, explain why they are involved in the circle, who they representing, and what their role is in the circle (Ibid.). Next the Crown attorney discusses the charge and the facts of the offence, which have been agreed upon before hand. The offender then recounts the event in their own words, explaining how they feel about their actions and the consequences. The offender may also acknowledge how he or she feels their actions have impacted the victim and community. If the offender feels remorseful for their actions this would be the time to make that known. The victim, or his or her representative, is then given a chance to address the offender and the circle, telling the story of the offence from their standpoint and discussing how they have been affected by their wrongdoer’s deviance. When the victim has finished, the other circle participants are able to express their concerns and feelings about the occurrence. Round two is followed by another brief intermission; however, the facilitator asks that everyone consider sentencing recommendations based on the information revealed (Ibid.).

This round is geared toward contextualizing the offence by having all circle members share their experiences and perspectives regarding what occurred and how not only they but also the community has suffered. By doing so a more detailed picture of the offence and what led the primary stakeholders (the victim and offender) to interact in such a manner is painted. Advocates believe that Aboriginal overrepresentation in the

CJS will be diminished by contextualizing cases, as it unearths the unique circumstances that brought the offender to the Courts and ensures that sentences of incarceration will not be administered frivolously (Cayley, 1998; Crnkovich, 1995; Dickson-Gilmore and LaPrairie, 2005; McNamara, 2000; Roberts and LaPrairie, 1996).

Round three – *agreement building* – is dedicated to developing a sentencing plan for the offender that reflects the best interest of the collectivity, while maintaining an appropriate level of severity to aid in the treatment of the offender. “The Circle examines the crime and criminal in the larger context of the social, economic, family and cultural environments to determine the underlying causes of crime” (MLSN, 2006. p. 9). The circle then addresses the needs of each party, which is the prerequisite for an effective sentencing circle. This often involves identifying facilities, services, attitudes that will meet the participants’ expectations of what justice is. Once the underlying causes and needs have been identified the group considers what resources are available in the community, or within proximity, to foster rehabilitation, facilitate restoration and to make recidivism less likely (Roberts and LaPrairie, 1996). After everybody has had a chance to propose a plan of action the facilitator reiterates the options and works toward achieving group consensus to finalize a fit sentence. Once the pros and cons have been discussed and approved by the group, the facilitator prepares a proper sentencing plan to submit to the Judge (Cayley, 1998; Dickson-Gilmore and LaPrairie, 2005; MLSN, 2006; Roberts and LaPrairie, 1996).

The fourth round – *closure* – concludes the sentencing circle. The purpose of this round is to provide members with the “opportunity for personal closure” (MLSN, 2006. p. 9). Participants are able to ask any final questions, raise any further concerns, reflect

upon their experience during the circle, and discuss how the process has changed their feelings about the offender or circumstance. Closing remarks by the facilitator and a closing prayer mark the end of the circle sentencing process (Ibid.).

The sentencing circle process has no time constraint. An event can last anywhere from several hours to several days. Although lengthier than conventional judicial sentencing, the circle alternative takes as long as necessary to identify the root of the problem and treat it through societal and communicative means, rather than simply punishing the deed. One of the alleged sources of circle sentencing's efficacy lies in its contextual thoroughness through community involvement (Crnkovich, 1995. p. 103).

#### Circle Sentencing – The Sentence

Once the Judge has been presented with the sentencing plan he or she reviews the recommendations thoroughly. Although there is a disparity in terms of professionalism between the presiding Judge and circle participants the proposed suggestions are legitimately considered, as the Judge is aware of the intensity of the process and the knowledge and insight possessed by the contributors (Lilles, 2002; MLSN, 2006). If the plan is found to be inappropriate, for whatever reason – for instance, too lenient or unlikely to succeed, the Judge is able to decline the proposition and impose a precedent sentence that would have been issued under conventional sentencing protocol.

Once a sentence has been issued the circle is complete. The intent of circle procedures is to impose a sentence, a plan of action, for resolving the issues resultant of the offence (Dickson-Gilmore and LaPrairie, 2005; Roberts and LaPrairie, 1996). From that point forward, it is up to the community and the offender's network – family, friends,

and community – to ensure that the offender honours his or her commitment to the sentencing plan (Lilles, 2002). This is why it is paramount for the circle participants to thoroughly identify factors such as available resources to ensure an effective restoration. The next chapter will examine the theoretical perspectives that underlie circle sentencing and those that are used to understand how efficacy is defined and operationalized when circles are evaluated.

## **CHAPTER 4: IDEOLOGY, PHILOSOPHY, AND THEORY**

*- Milita'sit -  
(Thinking About Different Things)*

Sentencing circles have caused quite a reaction among the public, politicians and scholars since their origin in the early 1990s. They have prompted a dichotomy, in which critics either stand *for* or *against* the practice; very rarely do individuals assume a neutral position. Although criticisms often correspond with particular political affiliations – conservative (skepticism) or liberal (support) – a commentator's reaction can best be understood in terms of their own expectations of justice. Thus, attitudes regarding the legitimacy of circle sentencing take on both a political and cultural tone. For this reason this chapter will first examine the relevant case law that gives circle procedures legitimacy on a policy level, followed by an examination of circle sentencing's political foundation. The mainstream justice system will be juxtaposed against the Aboriginal model to illustrate the structural differences between the two systems. The purpose of examining the discontinuity between the two systems of justice is not to further the notion that the two are diametrically opposed, but rather to highlight the debates and attitudes that determine how the procedural evaluations of circle sentencing are fashioned.

### *Circle Sentencing – The Beginning*

Circle sentencing first emerged in 1992 as a means of contextualizing a criminal offence, in hopes of rehabilitating a repeat offender and to improve relations with him and his community. Judge Barry Stuart, of the Yukon Territorial Court, presided over *R. v. Moses*, which is the prototype case for this practice. In that case Philip Moses pleaded

guilty to the act of carrying a weapon, a baseball bat, with the intent to assault a police officer. The Crown prosecutor informed Judge Stuart that the community wanted Moses to be imprisoned for his deed. Before issuing a sentence Stuart deliberated the fate of the offender (Cayley, 1998. p. 182-183). Stuart said,

I was not suspicious that the request was fabricated, but was curious to hear from the community... most of what I knew about the offender came from people who didn't live in the community... I did not have the input of the people who knew him and who would be the most directly impacted by the sentencing: his community, family, and friends. I certainly didn't know what they thought might happen when he came back to the community after I had done "my job" of sending him to jail... What would we do then, but wait until someone suffered at his hand in a manner that enabled the justice system to once again legally remove him from his community. The futility, expense, and insensitivity of... sending the offender yet again to jail, pressed me to do something else (Ibid. p. 183).

After postponing the case for a month, Stuart rearranged the court into a circle and invited Moses' friends, family and community to attend the sentence. The purpose of their attendance was to have the community give their input, raise their concerns and make recommendations for Mr. Moses' sentencing plan.

Stuart's communicative approach to sentencing allowed for his questions to be answered directly by the community impacted by the offence, rather than basing his decision on legal precedence and the insight of disassociated legal professionals (Ibid.). Moses' family agreed to assist in his rehabilitation, which was contrary of the Crown prosecutor's original assertion. In light of the community's eagerness to facilitate Moses' restoration, Judge Stuart issued a sentence of two years probation on the basis that the community make sure that the offender obliged to the sentencing plan (Ibid.).

Shortly after this landmark case, in 1996, section 718 of the *Criminal Code* was amended to recognize the potential of restorative justice as a legitimate means of sentencing (Bloisvert, 2003. p. 5). The statute's "general sentencing principles" were

revised to include sentencing strategies that assist in rehabilitating the offender, provide reparations for damages made unto the victim and the community at large, and to promote a sense of accountability in offenders to recognize the harm that they have inflicted upon the victim and community (Bloisvert, 2003. p. 5; Kramar and Sealy, 2006, p. 125). All of which are central traits of restorative justice and circle sentencing more specifically.

Arguably the most striking of amendments was under section 718.2 – sentencing consideration, as it opens the door for the validation of “exceptional treatment” under the law (Ibid. p. 126). Sentencing considerations were revised to include a principle that acknowledges the unfortunate circumstances of Aboriginal peoples. Section 718.2(e) reads, “[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” (Ibid. 126).

Interestingly, s. 718.2(e) opposes conventional notions of equality under the law because justice is no longer treated as blind, or based on a system of “one size fits all.” This has in turn caused a great deal of confusion and displeasure by proponents of the dominant legal system and Aboriginal rights.

The amendments to *Criminal Code* in the mid 1990’s brought about the legitimacy of restorative justice and differential treatment for sentencing Aboriginal offenders. In 1999, the interpretation of 718.2(e) was called into question because it gained the reputation as being a “race-based discount on sentencing” (Kramar and Sealy, 2006. p. 127). The Supreme Court first addressed this matter in the case *R. v. Gladue*.

Jamie Tanis Gladue, an Aboriginal woman from British Columbia pled guilty to manslaughter of her common-law partner Reuben Beaver (Kramar and Sealy, 2006. p. 127; Hindle, 2004. p. 20). Gladue suspected that her partner, the victim, had been having an affair with her sister. After confronting him an altercation ensued and the victim responded by antagonizing the accused to a point of anger and humiliation. Gladue, who was legally drunk, retaliated by stabbing him in the chest, which ultimately lead to his death (Ibid.). She was sentenced to three years incarceration and a ten-year weapons prohibition was issued. Her sentence was influenced by several mitigating factors: she had no criminal record, other than one conviction for impaired driving, she had three children and was expecting another, she was a young mother, she was willing to be rehabilitated, she was pursuing alcohol counseling, and she conveyed signs of remorse for her actions (Hindle, 2004; Kramar and Sealy, 2006).

Gladue appealed the sentence to the British Columbia Court of Appeal with the argument that section 718.2(e) of the *Criminal Code* was ignored (Hindle, 2004). Her appeal for a restorative, rather than a carceral sentence, was denied for two reasons. First, the sentencing judge concluded that section 718.2(e) was not applicable to Gladue because she resided off-reserve in an urban area and did not have the clear Aboriginal community ties needed for accessing Aboriginal-based restorative practices (Ibid.). Second, the sentencing judges did not give proper consideration to the circumstances of the case that were directly tied to the hardships of being Aboriginal. Gladue's appeal was dismissed because section 718.2(e) was intended to be remedial in response to the overincarceration experienced by Aboriginal offenders, not an automatic reduction in sentencing severity (Hindle, 2004. p. 21). Although the Criminal Code directs Judges to

consider restorative sentences when appropriate, the sentencing of serious and violent crimes will tend toward carceral sentences regardless of ethnicity (Ibid.). Her appeal was also dismissed because she was granted full-parole (Ibid.).

The following year the meaning of section 718.2(e) was again called in to question with *R. v. Wells*. Wells was found guilty of sexual assault and was sentenced to 20 months imprisonment (Ibid.). The sentencing judge concluded that the penalty fit the crime, as it was a serious case of sexual assault and Wells had a number of prior convictions and showed no signs of remorse for his actions. Wells' appeal was based on the grounds of his Aboriginality. A conditional sentence was denied because it was concluded that there were no uniquely Aboriginal circumstances that brought the offender before the Court. Furthermore just because an offender happens to have Aboriginal ancestry, sentences do not automatically necessitate a reduction in severity (Hindle, 2004. p. 23). The appeal court of Alberta concluded that restorative sanctions should be imposed when the gravity of the offence is likely to respond positively to restorative justice. The Court asserted that even where the circumstances of Aboriginality play a part in the production of crime, violent and serious cases are likely to justify and necessitate the penalty of imprisonment.

These cases laid the groundwork for programs and organizations to be established for the purpose of remedying Aboriginal overrepresentation. The following section examines how the various interpretations and clarifications of section 718.2(e) have provided Aboriginal communities with the policy-based tools necessary for implementing Aboriginal-run legal services.

### Circle Sentencing – Decolonizing Criminal Justice

Aboriginal-run legal services, which act as indigenized cultural accommodations, are flourishing because many Aboriginal communities desire purging the paternal relations they have with the Canadian state. The process of colonialism replaced autonomous nations' lifestyles with one of subordination and paternalism, whereby European mores became dominant (Nielsen, 2006; Paul, 2006). Indigenous populations “were coerced by missionaries, schools, and government officials to exchange indigenous cultural and spiritual practices, values, and beliefs for various Christian faiths and were forced to move to reserves or missions so that settlers could take their land” (Ibid. p. 158). Having been coerced to abandon their spiritual beliefs and autonomy, which comprise the nucleus of a culture's identity, to adopt those of newcomers has since made Aboriginals feel alienated by Canadian society and its politics because it does not recognize or account for their voices (Alfred, 2009; Nielsen, 2005; Monture, 2006; Paul, 2006). In turn colonization has left behind a perpetual cycle of lived adversity among Aboriginal peoples.

Although it is not completely a practice of sovereignty, circle sentencing was developed to diminish the lived adversity of Aboriginals by returning what was taken away from them – their autonomy. By extending liberties to Aboriginal communities, so they can manage a degree of their own legal affairs, the state demonstrated that it was willing to mend the wrongs of the past and it is willing to work in collaboration with Aboriginal peoples to minimize any residual inequalities and to perhaps even eventually improve the relationship between Aboriginal and non-Aboriginal populations (Dickson-Gilmore and LaPrairie, 2005; Nielsen, 2006; RCAP, 1996). It can then be said that

Aboriginal-run legal services and cultural accommodations were developed to decolonize a justice system founded upon a tradition that runs counter to Aboriginal customs.

With progress made in terms of Aboriginal claims to sovereignty and self-determination, there has also been an emergence of Aboriginal-run legal services. Services range from indigenized judicial procedures, like circle sentencing, to culturally sensitive systems of dispute resolution, like the Tsuu T'ina First Nations Court in Alberta - First Nations courts which are an extension of the provincial court system (Cayley, 1998; Clairmont and McMillan, 2006; Nielsen, 2006). These services have the goal of creating a familiar cultural atmosphere for Aboriginal offenders to be sentenced by a predominantly First Nations tribunal. Aboriginal and non-Aboriginal notions of justice, however, differ on a number of fronts, including the goals of holism versus reductionism. This in turn affects how systems of justice are developed, the procedures used to implement justice, perceptions of severity, and ultimately how circle sentencing is evaluated.

### *Holism versus Reductionism*

The meaning of “holism” has many applications in the realm of Aboriginal justice. By definition “holism” is “the theory that parts of a whole are in intimate interconnection, such that they cannot exist independently of the whole, or cannot be understood without reference to the whole, which is thus regarded as greater than the sum of its parts... The opposite of atomism” (Apple, 2009). As noted in Chapter 2, Aboriginal justice initiatives often take the form of restorative justice. This is because the concept of “holism” is intrinsic to both restorative justice and many First Nations’ way of life.

Although Aboriginal justice services take the form of restorative justice this is not to say that restorative justice is inherently Aboriginal, but rather, First Nation's justice is inherently restorative. It should also be noted that while circle sentencing is an indigenized variation of the judicial sentencing process it is not an authentically Aboriginal custom – there were no sentencing circles in Aboriginal communities until *R. v. Moses*. These procedures are not Aboriginal, they are “mere add-ons” to the mainstream system and function to *indigenize* or make standard justice procedures familiar and accessible to Aboriginal offenders (Monture, 2006. p. 77).

Reductionism on the other hand aims to reduce otherwise complex phenomenon into more simple form. By minimizing sophisticated ideas and concepts their understandings become greatly distorted. Canada's justice system is often criticized as being reductionist on a number of fronts (Kramar and Sealy, 2006; Monture, 2006). However, by simplifying understandings of crime on a conceptual level it becomes much easier to deal with procedurally, especially when determining guilt and appropriate sentences. This is the main distinction between the Aboriginal and the Canadian justice systems.

The holism-reductionism dichotomy also rings true for the interactions typical of Aboriginal and non-Aboriginal societies. On the societal level holism is manifested in the social cohesion that exists in Aboriginal communities (Alfred, 2009. p. 111). Such solidarity is derived from the common identity possessed by Aboriginal peoples, in terms of their common history of oppression and their common goal towards self-determination (Alfred, 2009; Dickson-Gilmore and LaPrairie, 2005; Nielsen, 2006).

As an Aboriginal person who has grown up on-reserve, and lived on one for over 20 years, it is apparent that a common thread that binds all community members together is cultural identity. It is well documented that reserves are tightly knit communities where the majority of individuals know one another on a personal basis. This does not suggest that everyone is a friend with one another, but there is a high degree of familiarity and understanding with the people they are surrounded by. Canada at large is analogous to Aboriginal communities, but cultural ties are more diverse and the prizing of individuality often forsakes a shared identity.

Norberto Bobbio (2005) tells us that liberalism and democracy, core philosophies of the dominant Canadian society, are both individualistic and value atomism over holism (Bobbio, 2005. p. 42). According to Bobbio (2005) the philosophy of “[l]iberalism amputates the individual from the organic body... Democracy joins him together... [in] an association of free individuals” (Ibid. p. 43). A society that places a great deal of emphasis on individuality, like the dominant Canadian society, is quite different in structure from Aboriginal communities that value holism and social cohesion. The principles characteristic of each population are also manifested in their definitions of effective justice – individual versus holistic.

### *Systems of Justice*

The difference in cultural understandings manifest themselves in the way that each system determines their sentencing goals and what type of sanctions are considered appropriate for denouncing illegal conduct and penalizing offenders. The title of Honourable Associate Chief Justice Al Hamilton’s book, *A Feather Not a Gavel*:

*Working Towards Aboriginal Justice* (2001), uses the imagery of the feather and gavel to illustrate the differences between the objectives of the two systems.

The gavel, although not actually used in our courts, is a symbol of authority – harsh, concise and unyielding. The image is that the system it represents will be strict with people [...] who break the law of the land. It represents a severe system of justice and exudes a warning to those who come to court... The feather represents honesty, truthfulness and a kinder approach (Hamilton, 2001. p. 10).

Aboriginal justice is depicted as a holistic and non-oppressive mode of social control, whereas the dominant system is made to represent an omnipotent, disinterested institution. These contrasting ideologies also influence the sentencing values of each system, whereby the dominant CJS privileges punitive sanctions over the rehabilitative recourse favored by restorative models (Morrison and Ahmed, 2006. p. 209; Winterdyk, 1999). The mentalities that justify each method of sentencing can be linked to the ways in which each society (Aboriginal and non-Aboriginal) interacts.

Aboriginal justice services, like circle sentencing, put a great emphasis on the concept of “holism” so that procedures are able to reduce the animosity resultant of criminality. The goal of circle sentencing is not simply to resolve the conflict between individual victims, offenders, and other stakeholders, but also to restore social harmony to communities affected by a given incident. Restoring social harmony is an important goal because in small tightly knit communities, like Aboriginal reserves, crimes often disrupt entire communities, families and clans and not just victims and offenders.

[P]unishment, imprisonment and fines, are both alien to Aboriginal peoples ... [traditionally] the goal for Aboriginal communities after an incident of harm against a person or possessions was to resolve the immediate dispute through healing wounds, restoring social harmony and maintaining a balance among all people in the community. Harmony, balance and community welfare cannot be satisfied when an individual is imprisoned and taken out of the community (Turpel, 1993. p. 178).

Although First Nation's are very diverse, many share a common belief that justice should be achieved through restoration, reintegration and rehabilitation, rather than punishment, revenge and deterrence (Hamilton, 2001). As a result, circle sentencing is an appropriate method of sentencing for Aboriginal offenders, particularly Mi'kmaw offenders, because the circle is a representation of the holistic nature of Aboriginal spirituality. By the same token, just because restorative justice is deemed an effective recourse for Aboriginal offenders, especially when one considers their disproportionate levels in the carceral system, it is unreasonable to assume that Aboriginal populations do not value the principles of mainstream judicial sentencing, deterrence, denunciation, and separation, in such cases (Dickson-Gilmore and LaPrairie, 2005; Hindle, 2004; Kramar and Sealy, 2006).

### *Procedural Differences*

The differences in social structure, and core philosophies of Aboriginal and non-Aboriginal societies are thus responsible for the directions that each justice system takes when settling legal disputes. According to Hamilton (2001), “[holism] is the preferred approach to almost every problem that arises” in Native communities (Hamilton, 2001. p. 271). He notes that in Aboriginal justice procedures, like circle sentencing, it is believed that “the totality of the problem should be examined in a comprehensive or holistic way” to account for the complexity of the offence (Ibid. p. 272). This is because criminality is seen as a symptom of an on-going problem, a process rather than an outcome, whether it is individual (mental illness, substance related) or societal (abusive family, impoverishment). Thus, the purpose of circle sentencing is to conduct “an analysis to find

out how the problem arose, why it is continuing, and [to address] the changes that are required to repair the damage that has been caused” (Ibid. p. 271).

By considering the entirety of a crime, legal matters then become personalized violations of another individual and community, rather than criminal acts against an abstract social structure (the state and its laws). Winterdyk (1999) suggests that having offences become personalized shifts the onus of the offender from a moral responsibility (to the state) to social responsibility (to entire communities). Unlike the dominant system there is no distinction between civil or criminal cases in Aboriginal justice. In essence all offences are civil in nature as the process and outcome of circle sentencing is geared towards benefiting stakeholders, rather than the Crown. This is why circle sentencing is considered to be an appropriate alternative for Aboriginal peoples. It emphasizes the importance of the community by situating the dispute between the primary stakeholders and between the stakeholders and their respective communities. It recognizes that the health of the collective is just as important for achieving justice as compensating the victim.

In comparison, the mainstream system of justice exhibits a reductionist character in the way that it interprets acts of illegality and determines appropriate sentences. Judicial sentencing, of the dominant system, treats crime as an outcome that transpires when rational individuals act in a selfish and lawless pursuit of their self-interests (McCarthy and Hagan, 2005; Petee, Milner and Welch, 1994; Winterdyk, 1999). In this instance the source of crime is conceptualized in terms of a socially fragmented society or in individualistic terms. Within a justice system that values universality of treatment, it becomes acceptable and convenient to rely upon a standardized set of penalties.

Consequently sentences are issued to offenders not through contextualization, but by relying upon legal precedence. Appropriate penalties are issued on the basis of what has been done in the past in similar circumstances.

### Perceptions of “Severity”

Each of the justice models has its own distinct method of denouncing unlawful conduct, accompanied by a set of goals that sentences should bring about. The CJS is said to rely heavily upon punitive sentences, like monetary fines and incarceration, whereas the Aboriginal system favors restorative sanctions, like compensation and rehabilitation. Prior to the amendments to the sentencing principles of the Criminal Code to recognize restorative tenets, Section 718 read,

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:

- (a) to denounce unlawful conduct;
  - (b) to deter the offender and other persons from committing offences;
  - (c) to separate offenders from society, where necessary...
- (Kramar and Sealy, 2006. p.125).

These sentencing principles are designed to *stigmatize, discourage* and *segregate* wrongdoing; which affirms the allegations of the CJS valuing punitive sentences.

Canada’s justice system not only *values* punitive sentences, it also *relies* heavily upon punitive sanction, especially carceral sentences. Canada has high rates of incarceration compared to other countries (Canada, 1997. p. 2; Dickson-Gilmore and LaPrairie, 2005. p. 39). The problem with relying on incarceration and punitive sentences is that they only play a limited role in the prevention, or deterrence, of crime (Canada, 1997).

Deterrence theories of crime play an essential role in the legitimization and endorsement of incarceration and punitive sanctions in the CJS (Canada, 1997; McCarthy and Hagan, 2005; Petee, 1994; Winterdyk, 1999). Deterrence theories hold that in order for rational thinking individuals to be dissuaded from (re)committing a crime the sanctions must convey three conditions: swiftness, certainty, severity (McCarthy and Hagan, 2005; Petee, 1994; Winterdyk, 1999). *Swiftness* refers to the expedience of procedural justice or the time that it takes to respond, convict and sentence an offender. *Certainty* is defined as the probability of having ones criminal act discovered and punished (Ibid.). *Severity* pertains to the gravity and unpleasantness that a sanction will inflict upon an offender (Ibid.). Also, the sentence imposed will be proportionate to the act committed (Ibid.). Accordingly, the greater the perceived certainty, severity and swiftness of legal consequences, the less likely it is that an individual will break the law, and vice-versa for a reduction in perceived risk.

Circle sentencing differs from the judicial sentencing process in the type of deterrence it uses and the value it places on it. Sentencing circles rely upon individual deterrence, which posits that an offender may be deterred from recidivating because of their experience in the processing of the crime. The disapproval that their loved ones express can have an impact on the offender that carries more weight, in terms of deterrence, than the general disapproval of the state (Canada, 1997; Petee, 1994. p. 86). By comparison, this value is not as pertinent in judicial sentencing because it is the penalty that sways offenders from committing crimes. In other words, the source of circle sentencing's deterrence capacity is also located in the procedural experience – the process of contextualization, accountability and disapproval, not solely the threat of punishment.

With circle sentencing, offenders are shamed to evoke responsibility for their actions so they can be reintegrated into their communities without a high degree of resentment and animosity (Morrison, 2006). Ultimately in tightly knit communities like reserves, crimes affect more than just the victim and offender. Often cases disrupt entire clan systems, which can result in large-scale resentment. When this is the case it may be to the detriment of all parties (offender, victim, community) if the animosity sparked by the crime is not reduced prior to the reintegration of the offender back into their community. The purpose of publically shaming an offender in the community spectacle of circle sentencing is thus to evoke a sense of responsibility and accountability of the offender for the harm that they have caused their victims, and in turn the social networks of each stakeholder.

This is just as true for the reintegration of victims. A key informant from my undergraduate thesis pointed out that some victims play the role of “professional victims,” where they intentionally cause offences to happen by provoking offenders to behave in an irrational manner (Gloade, 2008). By holding victims accountable, when necessary, a clearer picture of the offence is painted. By exposing this information, animosity is reduced and social harmony is better achieved. This ultimately restores broken social bonds between stakeholders and their respective communities.

Aboriginal justice initiatives, however, have been criticized for their alleged inability to reduce crime via deterring offenders with the threat of being sentenced severely (Roberts and LaPrairie, 1996). This has generated contention regarding expectations of what constitutes appropriate sentencing strategies, particularly between Canadian and Aboriginal justice models. Although circle sentencing is an Aboriginal

justice procedure, which often values holism and restorative penalties over the punitive alternative, it does not always impose restorative sanctions. As a restorative practice its restorative goals are to reduce animosity through communicative processes of contextualizing offences and collectively determining a sentence. In some cases the circle will deem incarceration to be an appropriate sanction but often alternatives are sought. Unfortunately not all critics are aware of this detail.

Roberts and LaPrairie's (1996) summarize critical perspectives against circle procedure sentencing plans. In doing so, they overlook and undervalue the restorative component of the practice. As they note:

The principle of proportionality is an important element of any judicial sanction, yet it is ignored by proponents of circle sentencing who misrepresent the sentencing process merely as a failed crime-control mechanism. Since sentencing circles avoid notions of culpability, and pay scant attention to offence seriousness, they accordingly fail to incorporate any degree of [severity] (Roberts and LaPrairie, 1996. p. 75).

They perceive the process as a means of leniently sentencing Aboriginal offenders by emphasizing cultural difference in order to displace the accountability of actions on to the systemic inequalities of the CJS. Roberts and LaPrairie's (1996) discount the role of judges because they believe that circle participants unearth the root cause of crime and propose potential solutions for the Judge to consider for sentencing.

### *Perceptions of Special Treatment*

On both the political and cultural front critics of circle sentencing are concerned with conflicting notions of special treatment in politics and law. Perceptions of lenient sentences and unequal treatment are also influenced by one's understanding and reaction to "the native situation." People who see circle sentencing as a "get out of jail free card"

for Aboriginal offenders, are often misinformed or know little of the complex motivations and rationales and context that give circle sentencing their legitimacy. The same could also be said about those who deem that circles are a contradiction to the Canadian Constitution.

Ramos (2007) asserts that these perceptions are construed as being special privileges appointed to Aboriginal peoples on the basis of their unique citizenship – Indian-Status.

[M]any Canadians are increasingly unwilling to accept ‘special’ rights for national minorities because they see them as running counter to the central tenets of liberal democracy. However, to recognize group rights is not necessarily to contradict those tenets... Minority groups often cannot assemble the majorities or coalitions necessary to have their needs met in processes or democratic decision making. Equality can be achieved only if their group rights are recognized... Nevertheless, employing the language of ‘special’ status skews the issues at hand by conflating the recognition of colonized nations’ rights, and the promotion of a ‘just society,’ with conferring ‘advantage’ on particular groups (Ramos, 2007. p. 133).

Ramos (2007) asserts that ‘special’ has two diametrically opposed implications: positive and negative – *special plus* and *special negative* (Ibid.). With the negative reactions to sentencing circles considered, it becomes apparent that the reason that the practice is perceived to be an abomination to the intrinsic tenets of a liberal-democracy is because they are seen to exemplify the special treatment of Aboriginal peoples in the CJS who thus receive *special plus* rights. However, the rationale that has led to the authorization of circle procedures is based on an understanding of our history of colonialism and modern structural inequality in Canada – *special negative* treatment.

As a result, each system has its own understandings of how justice should be conceptualized and operationalized. Yet, whether the intentions are holistic or reductionist the two systems share the same goal – to provide justice effectively.

However, having two systems, with differing expectations and techniques of accomplishing justice and with different procedural goals, affects how “effectiveness” is defined. The next chapter will examine this issue in detail. By examining how effectiveness is defined within the context of each model’s ideological framework, alternate –more representative evaluative indicators of procedural efficacy will be proposed.

## CHAPTER 5: METHODOLOGY

*- Sa 'se 'wi 'tatl -*  
(Change the Language)

The sub-title of this chapter, “Change the Language,” encompasses the entire purpose of my thesis project – to challenge the evaluative language of sentencing circles and Aboriginal justice. The challenges are twofold: (1) to redefine *efficacy* so it better apprehends the goals of Aboriginal justice and (2) in doing so bringing the voice of Aboriginal peoples to the forefront of the process.

Chapter 4 illustrated how most of the focus on circle sentencing is on *why* they should be used rather than addressing *how* or *if* they actually work. Such focus ultimately influences the theoretical assumptions about the procedure’s potential success. Although the previous chapter discussed the sites of contention separately – the legal, political and cultural front – the ideologies that define procedural efficacy are an aggregate of these reactions. For many, sentencing circles are viewed as excessively lenient legal alternatives that treat Aboriginal offenders as less criminally responsible for their actions than non-Aboriginals. Concern arises from the belief that this means they have no influence on the reduction of recidivism (Kramar and Sealy, 2006; Monture, 2006; Roberts and LaPrairie, 1996). This is not an accurate view of sentencing circles, as it places emphasis on goals of achieving justice that are not at the focus of restorative justice. Thus, I argue that it is important to ask: are sentencing circles effective in achieving their restorative aims? To answer this question it is important to first consider how “effectiveness” is defined.

Changing the Language – Efficacy Defined

A recent study on the effectiveness of circle sentencing, conducted by *the Bureau of Crime Statistics and Research* in New South Whales Australia concluded, “taken as a whole, the evidence presented ... suggests that circle sentencing has no effect on the frequency, timing or seriousness of offending” (Fitzgerald, 2009. p. 7). Similarly, Roberts and LaPrairie (1996) draw similar conclusions, although their analysis is purely theoretical. They note, “We are skeptical that circles can have an impact on the high rate of incarceration for... aboriginals” (Roberts and LaPrairie, 1996. p. 78). Their conjecture is based on the criteria for inclusion of circle sentencing, which is exclusive to Aboriginal offenders and on inconsistent applications from judge to judge, in terms of both orchestration and decisions (Ibid.). Fitzgerald’s pessimism on the other hand is based on a statistical evaluation of circle sentencing.

Although their research designs are different their findings are illustrative of the most common measures of effectiveness; which as we have seen, are concerned with three primary outcomes: reduction of recidivism, reducing the severity of subsequent offences, and increasing the time interval until a subsequent offence is committed. These indicators are all based on the logic of punitive sentencing and reductionism.

When these evaluative criteria are employed to assess sentencing circles the practice is often deemed ineffective. However, Fitzgerald (2009) cautions that “[i]t should not be concluded that circle sentencing has no value simply because it does not appear to have any short-term impact on reoffending. Reducing recidivism is just one of several objectives of the process” (Ibid.). The author goes further, saying, “[i]f it strengthens the informal social controls that exist in Aboriginal communities, circle

sentencing may have a crime prevention value that cannot be quantified through immediate changes in the risk of reoffending for individuals” (Ibid.).

My research proposes that the indicators used to measure the effectiveness of punitive sentences do not represent the intentions of circle sentencing, and restorative justice in general, which cannot be effectively assessed with conventional measures. This is largely why circle procedures have been regarded as ineffective thus far.

Existing evaluations have been too preoccupied with quantifying particular outcomes rather than examining the *procedural* utility circle sentencing has for resolving conflict and restoring social harmony. In order to account for the success of circle sentencing, evaluations must focus on the procedure’s *restorative* capacities, not its *reductive* abilities.

Throughout the dominant literature it is evident that restoration is both complex and difficult to define (Dickson-Gilmore and LaPrairie, 2005; Fitzgerald, 2009). Unlike the indicators of efficacy employed to gauge the effectiveness of punitive sentences (recidivism, seriousness and timing of subsequent offences) restoration is not easily observable. This is because it is a process that restores social bonds among those involved in a crime (victim and offender), their immediate social networks (families and friends) and the broader community where the crime occurred (residents of the reserve or place where the crime took place). Because of the difficulties posed in an attempt to observe restoration of different social bonds, many researchers and policy makers revert back to looking at easily defined and observed statistics on punitive outcomes. It is clear that that doing so will miss the mark when looking at phenomena that they were not designed to capture.

This is not to say that restorative justice and Aboriginal Justice initiatives do not regard reduction of punitive outcomes (recidivism, seriousness, and timing) in an evaluation of efficacy, but rather evaluations of restorative programs should also account for their chief goal: restoration. To do this, three levels of interaction: the *individual*, the *community*, and the *socio-political*, need to be analyzed. Each of the levels of social interaction involves a different mode of achieving restoration and targets different groups of people, directly and indirectly, involved in the offence. Before operationalizing these concepts let me first elaborate on how each is understood and why punitive measures of efficacy do not capture these forms of restoration.

The *individual* level of restoration is concerned with the primary stakeholders in an offence –victims and offenders. Restoration is achieved through conflict resolution, whereby the offender is held morally accountable to the victim and is obliged to restore them (financially and emotionally) to a previous state. At the same time the victim is theoretically supposed to find closure to their loss or grievance through the communicative nature of circle sentencing’s community conference setting. It is important not to place too much significance on the role of the offender. Victims must be elevated to a position of equal importance in the evaluation of efficacy as the offender because restorative justice situates offences between stakeholders, rather than the offender against the state. In theory, restoration cannot truly be achieved if victims are not involved in the process of achieving justice or if they are devalued or removed from the scope of the procedure as seen in the mainstream justice system. Thus, to measure the efficacy of sentencing circles one must assess not only whether or not the offender re-offends, commits a more serious offense, or takes a longer time to commit another

offence. One needs to also analyze how the stakeholders have responded to the sentencing circle and whether or not there has been any change in the relationship between the victim and offender. This means talking to stakeholders about their satisfaction with the process during sentencing (procedural efficacy) and with the sentencing plan produced at the end of the circle (outcome-based efficacy).

At the *community* level, restoration occurs among the social networks of the stakeholders and the communities they live in. This includes immediate and extended families, of victims and offenders, their friends, and members of the community at large. This level of restoration is concerned with the effectiveness that circle sentencing has in providing social harmony. This is important because in small tightly knit communities, like Aboriginal reserves, crimes often disrupt entire communities, families and clans and not just victims and offenders. As Turpel, (1993. p. 178) notes, “[P]unishment, imprisonment and fines, are both alien to Aboriginal peoples ... [traditionally] the goal for Aboriginal communities after an incident of harm against a person or possessions was to resolve the immediate dispute through healing wounds, restoring social harmony and maintaining a balance among all people in the community. Harmony, balance and community welfare cannot be satisfied when an individual is imprisoned and taken out of the community.” Sentencing circles are a consensus-based process whereby decisions are achieved by articulating the needs of the collective, so one’s satisfaction with the process is equally important. Circle sentencing offers an opportunity for the community to play a role in holding offenders directly accountable to the community and their victims, which is theoretically believed to facilitate the healing processes among general community members. This level of restoration serves two purposes: to collectively shame the

offender and to allow the community to express its grief. This is geared toward assessing the capacity of circle sentencing to restore the community to a less disruptive state through the administration of restorative justice. These are not captured by individual level punitive-based statistics, which do not measure the intended outcomes of circle procedures.

Reintegrative shaming and social bonding are key processes to achieving this end. Offenders are shamed to evoke responsibility for their actions so they can be reintegrated back into their communities without a high degree of resentment and animosity (Morrison, 2006). This is just as true for victims. As mentioned in Chapter 4, a key informant from my undergraduate thesis pointed out, some victims play the role of “professional victims,” by intentionally causing the offence to happen (Gloade, 2008).

The last level of restoration occurs at the *socio-political* level, which is concerned primarily with the social actors involved in Aboriginal governance; for instance, band councils and First Nation’s rights organizations, community leaders (spiritual, elders), and Aboriginal legal professionals (for instance RCMP and Legal Support organizations). This level of interaction is oriented towards examining the capacity of sentencing circles to empower the Aboriginal socio-political structure and to decolonize these communities.

Circle sentencing was developed to accommodate the cultural differences between ethnic groups and to right the wrongs of the past as a response to overrepresentation in the dominant justice system. The Royal Commission on Aboriginal Peoples (1999) suggests that these types of justice initiatives act as a way of closing the cultural divide and restoring the relationship between Aboriginal communities and the Canadian government. Restoration at the socio-political level is achieved by allowing

Aboriginal communities to work in partnership with the CJS to administer justice as Aboriginals' see fit. This is seen to improve the relationship between Native communities and the Canadian government, decolonizing that relationship through reconciliation. Restoration on this front is gained through the legitimacy and quality of circle sentencing. That is, the efforts on behalf of Aboriginal communities to better their socio-political standing by taking control of the justice system, an institution in which they are consistently overrepresented. Circle sentencing allows Aboriginal communities to take ownership of the sentencing process, a form of self-governance, through the exercise of their traditions. Circle sentencing aims not only to restore broken relations resultant of criminal activity, but also to restore the inter-societal relationship among Aboriginals and their non-Aboriginal counterparts by working in collaboration towards establishing "capable communities and a regenerated culture" (Cayley, 1998. p. 189). Again, like the other levels of restoration, this too is missed by a focus on punitive measures alone.

Measures of restorative efficacy thus should reflect these criteria and avoid placing too much emphasis on gauging its reductive ability. Achieving this will be a difficult task, with respect to operationalization and observation, because "restoration" is complex. My research, however, aims to at least begin the process of seeing whether or not an evaluation of restoration can be done. Moreover, it will test whether or not sentencing circles are effective when evaluated on their own terms.

### *Finding and Defining Restoration*

The indicators of efficacy used to assess traditional punitive sentences are quite different from those of restorative justice. Recidivism, timing, and seriousness of

subsequent offences are treated as *outcomes* or *results* of efficacy. All can be easily observed and defined because they are easily quantifiable and because inferences on efficacy can be made simply by examining crime rates and statistics. In contrast restoration, is a *process*, whereby healing takes place and restitution is made through continuous social interaction. There is no single outcome point that nullifies the crime. Cayley (1998) reminds us that, “the process itself is as important as the outcome of individual cases,” and that in some cases “the impact of circles is . . . not evident until years later” (Ibid.). It is thus important to examine both the outcome-based effects of circles on individuals and the procedural effects on Aboriginal communities.

In order to adequately operationalize restorative measures in a way that represents the intentions of Aboriginal Justice initiatives I situate my research in what Shaun Wilson (2008) refers to as the “Indigenous Research Paradigm” (Wilson, 2008. p. 44). An Indigenous Research Paradigm urges a paradigmatic shift away from conventional Western *epistemology, methodology, ontology* and *axiology*, towards an Indigenized framework that emphasizes the mores of Indigenous peoples. In large part, this involves incorporating the significance of cultural traditions, language and symbolism into an explanation of the intrinsic importance of circle sentencing on Aboriginal communities. This approach informs my analysis of the efficacy of Aboriginal restorative justice practices by shifting the research paradigm to one that appreciates and incorporates an Aboriginal perspective rather than ignoring it.

Wilson (2008) also argues for *relational accountability* between researcher and participants. To achieve this I submitted a research proposal to not only Dalhousie University’s Social Science Research Ethic Board, but also to the Mi’kmaq Ethics Watch

at Cape Breton University. The Mi'kmaq Ethics Watch submission was done to try to ensure that my research objectives and methods met the cultural, traditional, and ethical standards of the Mi'kmaq people. This process helped further develop measures of effectiveness that are true to the spirit of sentencing circles in Mi'kmaq communities. Thus my research *engages*, rather than *dichotomizes* two worlds: that of dominant social science and Canadian society and that of Indigenous, more specifically Mi'kmaq, tradition and scholarship. Through the practice of *relational accountability* my research also concretizes and operationalizes “efficacy” to offer empirical insight into whether or not restoration is achieved when using measures advocated by an Indigenous perspective.

#### Research Site and Participants

Canada's First peoples are a heterogeneous population that cannot readily or thoroughly be engaged in the scope of an MA thesis. For this reason I examine sentencing circle practices of the Mi'kmaq people of the Atlantic Provinces (Mi'kma'ki); more specifically, the Millbrook Indian reserve outside of Truro, Nova Scotia. Millbrook's demographics will be discussed in more depth with respects to circle sentencing's “effectiveness” in the following chapter. It was chosen for several reasons. First and foremost, it is close in proximity to Halifax and did not require an extensive commute. Millbrook is also one of the most economically self-sufficient and socially progressive native communities in Mi'kma'ki (Community Well-Being Index, 2004). This is beneficial for a study of this magnitude because of the available resources and organizations to investigate. For example, the Mi'kmaq Legal Support Network (MLSN), a native legal aid organization administered by the Confederacy of Mainland Mi'kmaq

(CMM), is located in the area. It offers legal aid and programming for assisting Aboriginal peoples enrolled in the justice system. The Millbrook band council office is also located in the vicinity. It houses the offices for the Millbrook band councilors. It is also the community that I was born, raised, and am registered under as a band member.

Circle sentencing requires an offender to admit their guilt. Since guilt has been determined and circle sentencing is a community event, the subject matter of cases is public knowledge and did not jeopardize one's right to a fair trial. Because of this and my personal connections with many of the community members, I was able to contact research participants through snowball sampling, starting with one known circle participant. Participants were asked who was in attendance representing members of the *community* and *socio-political* levels of restoration. 7 interviews were conducted in total. Interviews ranged from 30 minutes to 2 hours. I attempted to recruit victims and offenders for this study, but due to the intense nature of the topic none agreed to participate. From there three cases were tracked in order to represent the variation of cases that make it to circle sentencing. Selected cases represented a gradation in seriousness of offences: Case 1: *Armed Robbery*, Case 2: *Major Assault* and Case 3: *Major Assault*.

### *Gathering the Data*

Qualitative methods, interviews and ethnographic observation, were used to obtain information on alternate indicators of "efficacy" because, as noted earlier, circle sentencing and restoration are *processes* rather than easily observable *outcomes*. Evaluations conducted on the efficacy of conventional sentencing focuses on the capacity

that a particular legal recourse (e.g. incarceration, house arrest, monetary fines) has on achieving a certain outcome (e.g. reducing recidivism, seriousness and timing until next offence). These types of sentences can easily be evaluated through empirical methods. Examining crime statistics can easily identify the outcomes of interest. Circle sentencing on the other hand is a *process* whereby a sentence is determined through the means of restorative justice and is not simply a *penalty*. The efficacy of circle sentencing is believed to rest not in the final sentence but in the in the procedure itself – through the contextualization of the offence and restoration of social relationships. Because the primary goal of circle sentencing is restoration, which is difficult to both observe and define, qualitative methods were employed to see what restoration entails and to capture its complexity. This was done to uncover more representative indicators of efficacy.

Data from the qualitative methods is also compared against existing statistical research and the dominant theoretical literature on the efficacy of circle sentencing to see if any differences emerged. The purpose of my research is to test whether or not holistic measures of efficacy are more representative indicators than the punitive measures. The purpose of employing such a multi-method strategy is to investigate the relationship between participant understandings and experiences and to compare them against official crime statistics. That is, to compare holistic and punitive justice models of efficacy and dominant Canadian and Aboriginal expectations of justice.

Initially I planned on exploring all three sites of qualitative data (*individual, community and socio-political*), however, victims and offenders of crimes were difficult to contact and convince to participate, and rightfully so. Although there is much to learn from hearing about their individual experiences, I opted to focus my efforts on

community and socio-political restoration because of the time and scope of the MA project. I felt that the greatest contribution that could be made to the existing literature would be through an examination of the *inter-societal* and *intra-societal* implications that circle sentencing has on Aboriginal communities, as they tend to be overlooked in conventional research. The absence of the *individual* voices will be addressed and accounted for in the “Analysis and Findings” chapter to ensure that conclusions are not misrepresented.

Circle sentencing’s capacity to restore social harmony in the community is important to examine because, as noted earlier, criminal offences often create tension among families and in tightly knit communities, like reserves, and social cohesion is crucial in such environments. This level of restoration was investigated by interviewing community members and other individuals who participated in circle events. Community participants were asked about their experience with circle sentencing, if they felt that justice was achieved, if the animosity had been resolved between the individuals and community, what their role contributed to the circle, what their positions were on the conflicting theoretical notions of justice, if they felt that the severity of the sentence was appropriate, and if they felt that they, as a participant, benefited personally from the experience. It is important to ask if participants felt the severity of the sentence was appropriate because circle sentencing has received criticisms on a number of fronts, especially with regards to the severity of sentencing (Roberts and LaPrairie, 1996). In some cases, when a participant’s opinion was not clear, they were asked if they felt that the reductive indicators of efficacy that are used to assess circle sentencing are representative of the intents of restorative justice and if the state’s definition means

effectiveness to them. Since circle sentencing is about *restoring* social harmony, the opinions of community members, regarding the current trends, are of vital importance.

Interviews with community members, family members and friends of victims and offenders were conducted through snowball sampling. I started with one person (a personal friend who I knew had participated in her brother's circle) who then identified a number of other circle participants. Four of the participants she identified had participated in a number of other sentencing circles. From there I compiled a list of four names of people who that person knew was involved in the case, then branched out from there. If there is continuity among participants with regards to the appropriateness of the sentence, then there is some evidence to suggest that there is effectiveness. Since one of circle sentencing's goals is concerned with reintegration through shaming, community members must be asked if they feel that stakeholders were successfully reintegrated post-sentence. Seven people, all of whom were involved in the sentencing circles of the three cases investigated, were interviewed to account for a diversity and range of perspectives. A number of participants were able to provide commentary on several cases (one individual discussed all three cases and three individuals were able to discuss 2 of the same cases). Their contributions to circles were valued, hence their involvement in more than one procedure.

The purpose of the interviews was to find out if participants were broadly satisfied with the process and outcome of circle sentencing and if there was consensus among the responses of interviewees. If there is a great deal of discontinuity among participant responses regarding the practice's effectiveness (procedural and outcome-based) then there may be evidence of a procedural bias. For example, if offenders and

their familial networks report high levels of satisfaction when victims report low levels, the evidence would suggest that the sentencing circle was ineffective at addressing the justice needs of the collective, favoring the needs of only one stakeholder. Therefore, procedural bias or broad satisfaction, on behalf of one party/stakeholder, is a sign of failure or success of the procedure. If a circle is truly successful there should be a high degree of satisfaction with the process and outcome of the practice as well. This will be used to gauge the efficacy of circle sentencing as a viable *restorative* justice initiative.

Interviews were also conducted with leaders of Millbrook to see if circle sentencing was seen as effective at the political and spiritual realms of the community. Representatives from organizations like the Confederacy of Mainland Mi'kmaq (CMM), Mi'kmaq Legal Support Network (MLSN) and Millbrook Chief and Council were interviewed. The community's political leaders staff these institutions and represent the various levels of Mi'kmaq governance. I interviewed 1 addictions councilor, the director of CMM, an ex-MLSN employee, and 1 Elder for the community of Millbrook. Interviews were conducted to see if Mi'kmaq leadership felt that circle sentencing is doing what it has promised, in regards to legitimating Native government and if circle sentencing is in fact different than sentences in the dominant justice system. Interviews were oriented towards discussing whether or not circle sentencing has empowered the community in regards to its capacity to preserve cultural traditions and practices. Leaders were also asked if they felt that circle procedures have legitimated the Aboriginal political structure. Legitimacy of political structure is concerned with whether or not the federal government perceives their efforts towards self-governance as effective by governmental standards. These participants were also asked how leaders of the

community have perceived the efficacy of circle sentencing and if they feel that the current indicators are representative of the intentions or restorative recourses. The purpose of such inquiries was to see whether or not they felt circle sentencing has restored the political tensions (closed or bridged the cultural divide) between Aboriginal communities and the dominant justice system.

Interviews, although focused on the satisfaction of individual participants, were geared towards assessing how participant's felt as a part of a collective – were interviewees satisfied with the circle individually and as a part of the community at large? Interviewees were asked if they were satisfied with the restoration that occurred between the offender, victims and the community (community level), as well as if they were satisfied with their interactions with representatives of the CJS (socio-political level). By examining these elements of collective satisfaction we are better able to understand circle sentencing's capacity to restore broken social relationships at various levels.

To supplement interviews, ethnographic observation in Millbrook was also conducted. I visited the community over a number of months to see what resources are available to foster restoration and social harmony and if they are being used by victims and offenders. These resources included legal and social services, medical and rehabilitative services, recreational and other community programming that facilitate wellness. I documented how many available community organizations and resources are available that can theoretically provide social harmony.

Additionally, I met with various members of these services where I was given information and documents regarding youth and adult deviance, levels of unemployment, and academic achievement. Data was obtained from the MLSN, the RCMP detachment in

Millbrook, and from Statistics Canada's Community Well-Being Index (2001). The information on available resources was compared to the levels of adversity to assess whether there is a relationship with availability and usage of community-based rehabilitative resources and social harmony. This is important because the sole purpose of circle sentencing is to administer sentences, rather than ensuring that those who require rehabilitation (offenders, victims, members of their social networks) receive the necessary assistance. If offenders and individuals afflicted by criminality are regularly using the available rehabilitative resources and if there are generally low levels of adversity in the community then there is evidence of social harmony. Since social harmony is defined as being the alignment of community solidarity and welfare, harmony is present if sentencing recommendations are earnestly pursued and treatment is actually undergone (Turpel, 1993). In theory, restorative justice and circle sentencing should thrive in communities where these conditions are regularly followed. Ethnographic observation and comparison to documented statistical data allows me to contextualize interview findings.

The data collected in my research examines the potential of redefining the evaluative methods for Aboriginal justice based on the logic of holistic outcomes and restoration. This is important because the existing research misses the mark by relying upon punitive measures efficacy. That is, they target the wrong outcomes and come to premature conclusions – that circle sentencing is ineffective. The next chapter provides an analysis of the data collected and engages the information into an evaluation of circle sentencing on the community and socio-political level.

## **CHAPTER 6: RESEARCH SITE, ANALYSIS, AND FINDINGS**

*- Nango 'n -  
(Fine-Tooth Comb)*

### *A Brief History of Millbrook First Nation*

During the late 1700's the Mi'kmaq of Truro Nova Scotia lived primarily in Salmon River area (Millbrook, 2010). In the mid 1850's, when a plot of land was sold where the Mi'kmaq were settled they were relocated into the heart of Truro, King Street (Ibid.). Mi'kmaq hunter, Charles Wilmot, found a piece of land towards Hilden that was laden with game and timber (Ibid.). A spokesman from the King Street Mi'kmaq was chosen to talk to the local Indian Agent about inhabiting this land, which is known today as Millbrook First Nations (Ibid.).

Originally spanning 35 acres, the main reserve has since expanded to cover 906 acres of land (Millbrook, 2010 and UCCB, 2010). Millbrook First Nations also encompasses 3 satellite reserves located in Cole Harbour, Sheet Harbour and Beaver Dam, for a total cumulative acreage of 1129 acres (Ibid.). According to the Nova Scotia Government's Aboriginal Affairs "Community Information" profile, Millbrook's population was 1,345 in 2007 (Nova Scotia, 2007).

For the last two decades the community of Millbrook has been striving towards developing the reserve on an economic front.

The philosophy has been that to achieve community well-being the Band must approach its problems holistically, addressing all aspects of the community; social, mental, physical, emotional, and spiritual. By increasing economic development in the community, the Millbrook Band has provided employment, training, education, and other programs that would not otherwise have been accessible. The goal is to increase the level of self-worth one Band member at a time (Millbrook, 2010).

These goals are reflected by the community's Well-Being scores, which is an aggregate score based on a community's levels of income, education, housing, and labour force activity and is used to evaluate the socio-economic conditions of Aboriginal communities in Canada in comparison to their non-Aboriginal counterparts (INAC, 2004). The scores range from 0 – 1.00, whereby 0 indicates the lowest possible value and 1.00 represents the highest score (INAC, 2004). The evaluative standards, as indicated by INAC (2004), suggest that a score between 0 and 0.55675 is considered to be below the average Canadian standards; 0.55676 – 0.75525 is average; and scores from 0.75526 – 1.00 are above average (INAC, 2004. p. 12).

In comparison to other First Nation's in Nova Scotia it is apparent that Millbrook is an atypical community with regard to these criteria. Millbrook scores the highest in income and housing and second highest in education and labour force activity out of all Nova Scotian reserves (See Table 6.1). Its overall score is identical to Bear River; however, it is difficult to make comparisons because of the missing individual scores for Bear River. Millbrook scored a value of 0.11 higher than the Canadian Aboriginal community average and only 0.02 under the overall national average (Ibid.). Also, when compared to the neighbouring town of Truro, Millbrook scored higher in "Labour Force Activity" and on par in terms of educational attainment. Millbrook's well-being scores were all "average" or "above average".

**Table 6.1**

| Community Well-Being Index Scores:<br>Nova Scotia's First Nation Communities and Town of Truro |             |             |             |                       |             |
|--|-------------|-------------|-------------|-----------------------|-------------|
| Name   | Income      | Education   | Housing     | Labour Force Activity | CWB Score   |
| Truro  | 0.75        | 0.85        | 0.94        | 0.77                  | 0.83        |
| <b>Millbrook</b>   | <b>0.58</b> | <b>0.84</b> | <b>0.87</b> | <b>0.8</b>            | <b>0.77</b> |
| Bear River   | MISSING     | MISSING     | MISSING     | MISSING               | 0.77        |
| Membertou  | 0.49        | 0.92        | 0.81        | 0.74                  | 0.74        |
| Acadia   | MISSING     | MISSING     | MISSING     | MISSING               | 0.72        |
| Annapolis  | MISSING     | MISSING     | MISSING     | MISSING               | 0.71        |
| Chapel Island  | 0.48        | 0.78        | 0.76        | 0.83                  | 0.71        |
| Indian Brook   | 0.48        | 0.82        | 0.75        | 0.7                   | 0.69        |
| Pictou Landing   | 0.48        | 0.72        | 0.84        | 0.71                  | 0.68        |
| Afton & Pomquet  | 0.34        | 0.79        | 0.78        | 0.64                  | 0.64        |
| Eskasoni   | 0.38        | 0.79        | 0.66        | 0.65                  | 0.62        |
| Wagmatcook   | 0.43        | 0.68        | 0.76        | 0.59                  | 0.61        |
| Whycocomagh  | 0.34        | 0.81        | 0.65        | 0.54                  | 0.59        |

*Source (Data): Community Well-Being Index, INAC (2004).*

*Source (Common Area Names): Mi'kmaq Bands in Nova Scotia, UCCB (2010).*

It is in part due to the advantageous socio-economic position of Millbrook that Aboriginal-run legal services are able to thrive in the community. The reserve is home to an extensive number of organizations that promote community well being, cultural revival and self-governance. For example, Millbrook has its own RCMP detachment; health centre with onsite doctor, dentist and nurses; economic development organizations; community, youth, fitness and wellness programming; the Mi'kmaq Legal Support Network (MLSN); and the Confederacy of Mainland Mi'kmaq tribal council, which formerly housed MLSN. The purpose of highlighting Millbrook's unique position is not to discredit other Aboriginal communities or to hierarchically rank Mi'kmaq communities in Nova Scotia, but rather to understand how its extensive roster of on-reserve resources can help facilitate the needs of Aboriginal justice initiatives like

sentencing circles. It is worth discussing MLSN in brief, because the three sentencing circles and cases analyzed in my thesis were conducted by the organization.

### MLSN and Circle Sentencing

As noted above, Millbrook First Nation houses the Mi'kmaq Support Network (MLSN), which was organized by the Confederacy of Mainland Mi'kmaq (CMM) until recently. MLSN was founded in 2002 in response to the failures of the former Mi'kmaq Justice initiative (MJJ) in Nova Scotia. The MJJ was concerned with issues of social and criminal justice, as well as what constitutes fairness and equity under the law, by conducting investigations into the Royal Commission on the Donald Marshall Jr. Prosecution (1989-1990) and the RCAP's *Bridging the Cultural Divide* (1996) to develop recommendations to improve Aboriginal law in Nova Scotia (Clairmont and McMillan, 2006, p. 41). Although the MJJ made a number of recommendations to improve relations between Aboriginal peoples and the justice system, little was achieved by means of their stated goals (Ibid.). MLSN has since improved the structure and organization of Mi'kmaq legal services in Nova Scotia. Clairmont and McMillan (2006) note that,

[i]n 2002 a special team of government officials and CMM officials was spawned by the TWC [Tripartite Working Committee in justice] to create framework models and protocols for a replacement body, the MLSN, and funds were found to employ a full-time coordinator to head up that exercise. The result was agreement on a plan to advance a model entailing the format of an umbrella organization, funded in its own right, managing Mi'kmaq justice programs and services province-wide (Ibid. p. 46).

In the initial stages CMM helped to co-manage MLSN's "financial and personnel matters" (Ibid.). A research participant in Clairmont and McMillan's (2006) assessment

of MLSN noted that CMM has “provided the structure and the accountability that was needed in light of the past disasters [of the MJI]” (Ibid.).

With proper funding, staffing and advisory bodies the MLSN now offers a variety of services to Aboriginal peoples in need of legal assistance, most notably through the Mi’kmaq Customary Law Program (MCLP). The MCLP is a program that works in partnership with the *Nova Scotia Restorative Justice Community University Research Alliance* (NSRJ-CURA) to provide culturally appropriate, non-oppressive restorative alternatives of conflict and dispute resolution – including circle sentencing (CMM, 2009). According to CMM’s *Annual Report: 2008-2009*, MLSN’s MCLP received 127 referrals that year, 18 of which were for sentencing circles (Ibid.). The report also notes that the MCLP works to empower communities to “*choose* their [own] response to conflict... Victims, offenders and communities actively participated to devise and implement *mutually beneficial* solutions” (Ibid.)[Emphasis added].

‘Choice’ and ‘mutual benefit’ are the driving forces of restorative justice, especially with respect to sentencing circles, and represent the key elements that differentiate customary law from the dominant system. As noted in the previous chapter, it is a large part of what constitutes an effective sentencing circle.

The following section will present brief summaries of the three cases that were analyzed, accompanied by reactions to the process and outcomes as told by interviewees. Summaries will be followed by an analysis of the circles’ effectiveness in terms of both conventional punitive and restorative measures. The implications of choice, rather than precedence, will be scrutinized to assess if and how subjective means of decision-making affect the circle’s trajectory and ultimately its success.

Case 1 Summary (Armed Robbery)

The first case examined was an armed robbery that took place in Millbrook. The offender robbed an employee of a commercial establishment at gunpoint while under the influence of alcohol. He made off with a small sum of money and shortly turned himself into the authorities as a result of a guilty conscience.

Initially the matter was going to be settled in Court, however, the offender's council recommended that circle sentencing be pursued. The offender was deemed an appropriate candidate because of the fact that he did not have a criminal record, he came from a "good" family and because he recognized that he had done wrong and was willing to turn his life around. This was exemplified by his guilty plea and turning himself in. There was, however, a history of substance abuse that ultimately led him to commit the crime. "His actions were just a cry for help," said one of his family members who participated in the circle (Gloade, 2010 – Interview 6). These circumstances were believed to indicate that he was a favorable candidate for this type of justice.

When the time came for the sentencing circle there was a variety of people bringing different perspectives to the table. There was a Judge, opposing council (Crown and defense), an Elder from the community, a spiritual leader whom the offender revered quite highly, and an addictions counselor who was also the offender's uncle, an RCMP officer, the offender, one of his parents, one sibling, the circle facilitator, his/her assistant, and a representative who stood on behalf of the victim. The victim was not present because he/she was not emotionally able to face their wrongdoer. I was able to interview five of these people: his parent, a sibling, addictions counselor/uncle, Elder, and circle facilitator.

Circle participants worked together to develop the offender's sentencing plan and came to the consensus that both punitive and restorative penalties were to be issued. The offender received a fine to compensate for his theft, community service hours, alcohol counseling, a term of house arrest, and a 10-year firearms prohibition. Both stakeholders and their respective family and social networks agreed that the sentence was appropriate in severity and proportionality.

According to all five of the circle participants that I was able to interview, the offender responded positively to both the sentencing circle (process) and sentencing plan (outcome). Before and during the circle the offender displayed remorse for his actions and a legitimate willingness to change his destructive behaviours. During the process he was reported as being cooperative, respectful, receptive to feedback and willing to accept the sentencing plan regardless of the decision. Post-circle the offender honoured his word by fulfilling his entire sentencing obligation. The offender saw an addictions counselor for a period of time to help him cope with his alcohol problem. He completed his community service by serving food at community functions, assisting his uncle with addictions awareness workshops, and chaperoning community youth dances. He also paid his fines and has not been in the possession of firearms since, which has been particularly difficult for him as he formerly enjoyed hunting.

According to one of the offender's family members, he has reoffended since the sentencing circle. However, the subsequent offence was less serious in nature: impaired driving. Although he recidivated he was not discovered committing the offence. Like his former crime he turned himself in to the authorities because of his guilty conscience and was sentenced appropriately.

Case 2 Summary (Major Assault)

The second case examined was difficult to piece together because the offender died after the sentencing circle, during the period that she was supposed to be pursuing treatment. As a result, interviewees were hesitant to offer opinions on whether they felt the offender responded positively, since she had not completed treatment and interviewees did not want to hypothesize out of respect for the deceased. From what was discussed, the offender was charged for a violent assault on her sister. The source of the conflict was not told, however, the offender reacted violently because she was intoxicated.

The case was originally going to be settled in Court, but because of the offender's history of prostitution and substance abuse her legal council opted for a sentencing circle. Circle sentencing seemed appropriate as a means of potential rehabilitation for the offender's self-destructive behaviours. Unlike the previous case, the client was not deemed an appropriate candidate because the criminal act and context leading up to the offence were uncharacteristic of the offender, but rather because the individual needed rehabilitation for the safety of herself and others. From what interviewees have said about the case, and offender, restorative sentencing was pursued, "more for her [the offender] then for the victim" (Gloade, 2010 – Interview 2).

Attendance was similar to the previous case. Present were: opposing council, victim, offender, circle facilitator, the mother (of victim and offender), their helper, an Elder, a spiritual leader, an RCMP officer, an addictions counselor, and the Judge. Of these people the circle facilitator, addictions counselor, and Elder were interviewed. The circle concluded that the sentencing plan would consist of intensive addictions counseling

held on reserve, and probation. It was also noted that for this case, there were very few family members present during this circle, when compared to others.

Unfortunately, post-circle, the offender did not hold up her end of the agreement. She attended only a couple of her addiction counseling sessions and eventually stopped going all together. Her addictions counselor actually had to go out and look for her to ensure she received her treatment. After a number of unsuccessful attempts, the addictions counselor made arrangements to enroll the offender in a detox facility.

According to the counselor:

After detox she came out and started using again, so I called MLSN. Told them what was going on and that she [the offender] stopped treatment. So they said, okay we'll get in touch with her, which they never did. So I checked in on them [MLSN] and wrote them a letter to the head of MLSN... and still never got a response. There was absolutely no follow up on this client (Gloade, 2010 – Interview 2).

Another interviewee, a circle facilitator who has since resigned from her position, recounted the same story and articulated the same concern that there is no follow-up conducted on clients after a sentencing circle is conducted. The circle facilitator noted that, not only was there nothing formal in place to ensure the client received her rehabilitation, but also the offender lacked the proper support network (family, friends, etc.) to encourage her to stay on the road to recovery. After the sentencing circle the offender returned to the same environment that brought her before the Courts, which is not conducive to bringing about the type of change expected from circle sentencing. She noted that giving someone their sentencing plan when they lack a proper support network “is like putting someone in the middle of the ocean when they can't swim” (Gloade, 2010 – Interview 3). How can one be expected to change their ways without guidance and knowledge?

Two of the interviewees who had participated in this circle (the addictions counselor and circle facilitator) reported that, “it was a farce... nothing happened” (Gloade, 2010 – Interview 2). There was nothing in place after the circle to ensure that the offender did not recidivate, which she eventually did. Unfortunately for her she was never able to receive further treatment. The offender was found dead in Halifax within a year.

### Case 3 Summary (Major Assault)

The third case was also a major assault, however, the assault was more severe. The victim and offender, both males, had known one another for most of their lives. They had been feuding from the time they were 13 and 14. According to the circle facilitator, the victim was intimidating the offender until the offender felt cornered and retaliated with violence. As a result the victim had his jaw broken in several places and required reconstructive surgery.

Native legal aid recommended that the case be dealt with in circle fashion, as a means of resolving their history of animosity. The facilitator explained how the crime had caused tension between the stakeholder’s families and how the health of the community necessitated restorative justice over conventional punitive methods. Also, the way that the offender reacted was out of character for him. The circumstances identified by legal aid (a need for conflict resolution and community healing) constituted grounds for circle sentencing to be pursued.

During the circle, the victim and offender were present, along with their legal council, the victim and offender’s partners, the victim’s parents and brother, an RCMP

officer, addictions counselor, the circle facilitator, a helper, an Elder, a spiritual leader, and the Judge. I interviewed the facilitator, Elder, brother of victim, and addictions counselor. Together they decided that the sentencing plan would consist of a payment of \$7,000 to the victim for time off of work due to injuries, the offender was required to pursue counseling for his addictions, which played a role in how he reacted during the confrontation, and house arrest.

According to the addictions counselor, Elder, and facilitator interviewed, the victim and offender have come to peace with one another; however, they are “still far from friends” (Gloade, 2010 – Interviews 2 and 4). The offender successfully completed his rehabilitative treatment and paid his fine to the victim. Another positive outcome of this case is that the victim’s brother has since quit using drugs as a result of participating in the circle. A number of the participants interviewed in relation to this case made a point of mentioning how the brother turned his life around post-circle. When asked about his experience, the brother noted that it was an eye-opening experience (Gloade, 2010 – Interview 7). This is what circle sentencing is meant to be, a site for educating the offender as well as the collective community. Although the victim’s brother was not the one being sentenced, the circle was effective in that he stopped using drugs because of what he heard during the event. These are the types of details that are overlooked by conventional evaluations.

#### *Analysis of Conventional Measures of Efficacy*

With all three cases considered it is apparent that there is not a high rate of post-sentencing efficacy with regards to the three conventional reductive indicators of

procedural effectiveness – reduced crime, seriousness and increased timing until subsequent offence. In Case 1 and Case 2 the offenders both ended up recidivating shortly after the sentencing circle. However, in the first case the subsequent offence was less seriousness – driving under the influence. The offender from *Case 2* did not recidivate into crime, but did recidivate into drug and alcohol abuse. Unfortunately for the offender from *Case 2*, her choice to recidivate likely contributed to her untimely death.

This shows that circle sentencing plays a minimal role in influencing the conventional outcomes employed to evaluate the practice on a punitive level. Circle sentencing, according to the Elder interviewed, “is about planting a seed” in the victim and the offender (Gloade, 2010 – Interview 4). Since circle sentencing is as much about the process as it is the outcome, it often takes time for the impact of the circle to manifest itself. Judge Barry Stuart, one of the founding figures in the development of circle sentencing shares the same sentiment, noting “the impact of circles is...not evident until years later” (Cayley, 1998. p. 189). The process of achieving full-internalized restoration on the individual level, whereby an individual recognizes and addresses their deviance, may take much more time than the process of restoration and restitution that takes place between primary stakeholders. The addictions counselor noted from his experience that, “it takes longer to see a difference, the longer a person has been doing something [deviant]” (Gloade, 2010 – Interview 2). This in effect could be evidenced by the fact that the offenders in Cases 1 and 2 recidivated shortly after the circle, whereas the younger brother of the victim who had been using drugs for a short amount of time responded almost immediately to the denunciative role of the practice.

Although these offenders recidivated, the acts were of less severity – offenders did not commit the *same* crime after the sentencing circle. With the contextual nature of circle sentencing considered, it seems as though the denunciative capacity of circles is limited to the context of the offence at hand. Sentencing circles, although they broadly address how criminal behaviours are generally responsible for the acts that brought the individual to the circle, focus almost solely on the behaviour relevant to the crime being sentenced. In other words, circle sentencing fails to impact the larger picture of crime by concentrating on specific acts of deviance rather than the broader context. This would suggest that its denunciative ability is no different than that of the mainstream justice system, as applied in the three cases examined.

Therefore, the phenomenon of recidivism can be understood in terms of a lack of deterrence. Recidivating into crime or substance abuse, whether more or less severe than the offence committed pre-circle, demonstrates a disregard for the *certainty* of being discovered committing an illegal act. Offenders appear not to be deterred by the thought of being caught. Those evaluating the case with punitive measures of efficacy would quickly conclude that the individual has not changed and this permanently stigmatizes the offenders as hopeless criminals. But this is problematic because it stigmatizes offenders and victims rather than seeing them in context or working to deconstruct such labels. Hill (2008) notes that,

From the moment of arrest, the criminal justice system inscribes and reinforces a series of identities on the offender which become increasingly difficult to escape; the process transforms an offender into a convict, and then into an ex-convict who will likely re-offend because incarceration has forced him to adopt strategies and modes of subjectivity which reinforce and encourage the very modes of behavior which the traditional justice system purports to ‘correct.’

This hopeless nature of offenders, both first time and repeat, and the expectation that

these individuals will constantly reoffend are manifested in the evaluative criteria used by the CJS to evaluate the efficacy of legal services. Gauging efficacy in terms of *subsequent offences*, whether assessing the timing or seriousness, (Fitzgerald, 2009) assumes that convicted offenders will at some point reoffend. One interviewee said,

From what I understand of the Canadian's Justice System's definition [of effectiveness] is that they have already categorized everybody that goes through the justice system, as if they are going to reoffend at some time. There is no hope, no light at the end of the tunnel... And I think that's what restorative justice and sentencing circles are all about. It's about not only fixing that person, but recognizing the context of the offence that made it happen (Gloade, 2010 – Interview 1).

In two of the three cases the offenders in my sample reoffended, it could be concluded hastily that circle sentencing is ineffective. Instead, this points to an underlying problem with way in which circle sentencing is evaluated. As the MLSN circle sentencing protocol notes, aside from developing equitable sentences for stakeholders and their communities, circle sentencing and restorative justice in general aims to facilitate post-sentence reintegration for both victims and offenders so that they do not return home to a hostile environment (MLSN, 2006).

During the sentencing circle stakeholders are confronted by a group of their peers to contextualize the offence and to shame the offender into accepting responsibility for their actions and the importance of compensating their victim and rehabilitating themselves. The idea of shaming stakeholders for the sake of post-sentence reintegration, especially the shaming of offenders, is what reintegrative shaming means. Shaming stakeholders removes the negative stigmas associated with acts of criminality, because the process is intended to evoke both shame and understanding for the offender, the reintegrative intentions of sentencing circles differ from typical methods in that they are

intended to act as a counseling tool for circle participants. All those who are present at the event are (supposed to be) “there with the purpose of working towards forgiveness” (Gloade, 2010 – Interview 6). Participants are bestowed with the power to directly address the offender, saying what they need and asking questions to hear the answers that they require to forgive the offender (Ibid.). When opposing kin groups reach common understanding and are ready to forgive one another, or at least start to forgive, the offender can be safely reintegrated into their community. The addictions counselor recounted the changes he saw in the offender from Case 1.

He showed up the first day real quiet and scared. He was ordered to do Drug and Alcohol counseling as a part of his sentence, which he completed, so I brought him to Addictions Services for one-on-one counseling... He had to do so many community hours too. So he helped me set up workshops, chaperone dances. So the community saw him out there [serving his punishment]. He knew he did wrong and he worked for his punishment. He fit right back into the community because he was so cooperative and everyone saw that... It worked out for him (Gloade, 2010 – Interview 2).

This suggests that circle sentencing is a tool used to de-stigmatize offenders through the process of shaming the individual for the purpose of forgiveness and resentment-free post-circle reintegration. Although the offender, by reductionist standards, was a recidivist considering the entire offence and recognizing the significance of restorative outcomes we see that circle sentencing tells a different story of its efficacy when it is evaluated on its own terms.

Without circles, as Hill (2008) notes the stigmas associated with being a convicted offender may cause individuals to internalize such negative labels, causing them to perpetuate the very behaviours that the CJS sets out to correct. Thus, the measures of efficacy employed by the dominant system are counter-restorative, in that they automatically treat offenders as if they are bound to break the law again. The following

section explores the utility of using restorative indicators, by exploring circles restorative capacity, circles impact on Aboriginal communities and the utility of evaluating restorative practices on their own terms.

#### *Analysis of Community Restoration – Representativeness of New Indicators*

The purpose of this project was to explore more representative measures of efficacy for circle sentencing that access the practice's restorative effect. Three sites of restoration – *individual, community, socio-political* – were identified because evaluating punitive and individual outcomes is not enough. Recognizing the effect that sentencing circles have on Aboriginal communities is paramount to understanding the practice's overall efficacy, because crime impacts more than simply the primary stakeholders. Crime disrupts the harmony of communities, kin networks and clans. Circle sentencing provides an environment for participants to forgive and understand the context that caused the offence, in theory making post-circle reintegration possible. Furthermore, unlike other judicial practices circle sentencing allows community members to participate in the sentencing of their own offenders, because communities know the offenders better than the Courts. This section is an exploration of the community-level of restoration to assess whether or not the measures proposed in this project are representative of the intentions of circle sentencing and to see if the practice is “effective” based on the logic of the new measures.

The measures proposed in this project were found to be representative of the intentions of restorative justice. The sister of the offender from Case 1 noted the

importance of including an evaluation of community satisfaction when assessing the efficacy of circle sentencing.

The circle has a very strong community feel. Everybody is there with the same purpose... [The stakeholders] have to come back to the community at the end of the day and the community has to live with them, not the Judges or lawyers. We know if the circle has done its job. (Gloade, 2010 – Interview 1).

The point being made is that the community not only knows whether an offender is an appropriate candidate for circle sentencing, or if a certain sentencing plan will be more effective over another, the community also knows if the circle was effective or not. The interviewee went further to suggest that, since circles are a community event and the practice is meant to restore community relations, then the perspectives of these people must be included in an evaluation. Doing so ensures that conclusions about efficacy are not biased in favor of certain outcomes, especially with the tendency towards favoring reductive indicators considered (Ibid.).

The addictions counselor, circle facilitator and Elder noted that in all three cases the circle participants forgave the offenders for their actions (Gloade, 2010 – Interviews 2, 3 and 4). The mother and sister of the offender from Case 1 shared the same sentiment in that they went into the circle “angry, hurt and frustrated,” but left the circle with the closure needed to forgive the offender for his actions. Furthermore, they emphasized how the circle was meant to help and restore the larger social relationships broken by criminality. The sister noted that,

there was literally a circle of people who were there to help us all get through it and to help show him a better way... I think it was a good way for all of us to kind of come together and come to a level of understanding and a way to get through it. Because I don't think that people really always understand how much it impacts the family and friends around somebody (Gloade, 2010 – Interview 4).

This supports the notion that crime impacts more than just primary stakeholders and supports the argument that circle sentencing plays an integral role with restoring relations on the community level. The mother, circle facilitator, Elder and addictions counselor all acknowledged the positive impact that circles have onto the community. The following section will examine procedural efficacy in more detail and circle sentencing's effect on the community level.

### *Analysis of Community Restoration – Procedural Efficacy*

Sentencing circles are said to be effective at the community level if there is a high degree of participant satisfaction and if people from all associations (victim, offenders, general community members) are mutually satisfied with the process. During the course of interviewing, it was found that participants were divided between perceptions of procedural efficacy and outcome-based efficacy. First, let us examine circle sentencing's procedural effect on the community of Millbrook.

All interviewees reported high levels of satisfaction with the programs orchestration and the overall experience. The circle facilitator and Elder and addictions counselor, who are both socio-political and community representatives, were present at all cases followed for this project and noted that each of the circles was beneficial to the healing and forgiveness process of all parties present at the event (Gloade, 2010 – Interview 2, 3 and 4). The facilitator and addictions counselor both referred to Case 3, citing the findings as evidence of procedural efficacy. The victim of the offence was found to have provoked the offender into acting violently (Gloade, 2010 – Interview 2 and 3). Revealing that the victim actually played the role of a “professional victim”

changed everybody's understanding of the event (Ibid.). Aside from unearthing how the crime was initiated this newfound truth caused both victim and offender to take ownership for what happened.

At the conclusion of the circle the opposing kin groups, although outraged initially, came to a mutual understanding of the events that transpired and that there was more to the story prior to the attack. Now the stakeholders, although they are not friends, have managed to coexist in a healthy manner. The circle facilitator explained the effect that this circle had on the community and the families of the primary stakeholders.

The process stopped retaliation. When it stops retaliation it will start the road towards mending the rift. They may not have to be good friends, but it can be the beginning of forgiveness and trust. Just going about living in the same community without the animosity... The community really benefited because the offence was drug related. The community definitely benefits because you are educating the people in the circle... Circle sentencing is a process of education, not only victims and offenders, but the community, the Judge. The circle teaches where the drugs are taken, what the drugs are doing to people, to the community, to the younger kids... [Overall] the biggest impact on the community is reducing the likelihood of retaliation. And it did this (Gloade, 2010 – Interview 3).

The mother and sister of the offender from Case 1 were also satisfied with the process of the circle. Before the circle the sister said that she was willing to participate in the circle, but had her doubts about the circle's efficacy. She explains how this perspective changed after taking part in the circle.

The reason I was asked [to participate] was because they really wanted [the offender] to feel the impact of how his actions affected those who are closest to him. Not only the victim, but other people in his community. And seeing as how mom and I are really close to [the offender] we were the 2 family members asked to participate... I thought that [the offender] would just receive a slap on the wrist. And I wanted to know that he got more than that, because I am so against that behaviour that I wanted him to know that something was going to be done... This may sound a little hoaxey, but I honestly believe that hearing what everyone had to say in that circle was a punishment that he needed. He was actually hearing the words from my mom of how much it hurt her and how it changed her trust of him. Hearing the victim's report of how scared he was, and how he didn't want to

come back to Millbrook anymore because of the decision that my brother made. That was a punishment. And I think that was a huge thing for my brother to hear. I feel like the punishment, it wasn't like, you're going to jail, see you later... That sort of punishment, I think it was more about the philosophy of restoration, making things right again. Not punishment. (Gloade, 2010 – Interview 1).

The sister, although skeptical at first, after seeing her brother being held directly accountable for his actions and seeing his own emotional reaction she realized it was more effective than originally imagined. She noted that, the circle benefitted her personally because she was able participate in her brother's rehabilitation (Ibid). This was a common theme among all community-level participants, that the circle helped them with forgiveness and by contributing to the process of restoration. Because of this, she and the other interviewees were satisfied with the process of the circle.

Furthermore, she confirms the notion that shame is punishment. By hearing how his delinquency affected people of various associations, the victim, his family, the community, he was shamed into accepting responsibility for the emotional hardship he caused. If you recall, the offender turned himself into the police because of his guilty conscience. Thus, his eagerness to be reformed and his strong acceptance of responsibility made him truly remorseful for his actions, which was responsible for the high levels of satisfaction among the interviewees who participated in this case. This illustrates how effective ritual shaming can restore social harmony, which in turn facilitates offender and victim reintegration.

The sister and mother of the offender noted how there is an assumption among the public that families are there to defend the actions of their kin (Gloade, 2010 – Interviews 1 and 6). This is not the case. "My role was not to cover for him. It was to get him the help he needed," said the mother (Gloade, 2010 – Interview 6). The circle was the ideal

way of getting him the help he needed because it sentenced him to addictions counseling and because he “couldn’t hide from his problems anymore” (Ibid.). She noted that, “it took a very long time to restore my trust in him... but we saw that his actions were a cry for help... so we [herself and the offenders’ sister] ensured that he honoured the plan and followed through with the treatment” (Ibid.). Her words show how the process was effective at restoring trust in her son, as well as how important it is for offenders to have a strong kin network to ensure that the sentencing plans are carried out fully. Additionally, she notes that “in many ways the circle is more difficult because of how intense, emotionally, it is on [the offender].” It should be noted that the offender’s sister, the circle facilitator and the Elder also share this sentiment.

#### *Analysis of Community Restoration – Outcome-Based Efficacy*

While all participants expressed satisfaction with the procedural component of circle sentencing 4 noted that the outcomes of the sentences were not pleasing (Gloade, 2010 – Interviews 1, 2, 3, and 4). These 4 participants voiced concerns for the reputation of circle sentencing, because there was nothing in place to ensure that stakeholders, namely offenders, received their treatments post-circle. “How can [circle sentencing] work if nobody is making sure that these people are going to their treatment sessions?” one participant asked (Gloade, 2010 – Interview 3). In Cases 1 and 3 the Courts ensured that the victims received their financial compensation and in Cases 2 and 3 local law enforcement made sure that probation was abided. With the restorative aspect of the sentences, however, the duty to perform community service and see addictions counseling, were left to the discretion of stakeholders, their families and to an extent the

community. The necessity of post-sentence follow-up is evidenced by the fact that 4 of the participants voiced the same grievance, that circle sentencing needs some sort of mandatory follow-up protocol to accompany the holistically developed sentencing plans, to ensure that the time, effort and resources required to make sentencing circles possible do not go to waste.

From a punitive-reductionist standpoint, considering the rates of recidivism discussed earlier, it is apparent that offenders are not likely to honour their sentencing obligations when left to their own devices. If the trend, whereby an offender is convicted of a crime, sentenced via circle sentencing and penalized with restorative recourses that go largely unenforced continues, then the procedure's credibility, legitimacy and efficacy will be compromised.

Although the process of the circle may bring about the shame necessary to reintegrate offenders back into their communities post-sentence, it does little to ensure that offenders do not fall off the radar. In this regard the problem is a matter of surveillance, or a lack there of. This is why I propose evaluating efficacy in terms of both its procedural and outcome-based efficacy, to gain a more complete picture of the practice's successes and shortcomings. Likewise, this is why it is important to expand evaluations of restorative justice initiatives to include their restorative capacities, because circle sentencing's reintegrative component – one of its most significant components with respects to holistic community healing – would be largely overlooked.

In his book *Discipline and Punish* Foucault (1975) discusses Jeremy Bentham's panopticon as a technology of surveillance, whereby inmates are imprisoned within a circular building with an observation post, manned by a guard, in the centre. Those who

were incarcerated were always visible to the guard and always subject to his gaze (Foucault, 1975; Harrington, 2005. p. 210). With the prisoners unable to see the guard or able to tell when or if they were being *surveilled* they became self-policing by the mere thought of being subject to the guard's gaze (Ibid.). Self-policing through surveillance (or the thought of it) is said to be an exercise of power to induce normal behaviour, which in accordance to common knowledge is acceptable and appropriate (Harrington, 2005. p. 211). The gaze produces a certain form of knowledge about acceptability through the exercise of panopticism's carceral power (Gordon, 1980). Inmates internalize these beliefs and transform their identities from deviancy to normalcy because of the effects of the continuous gaze.

What does this mean for sentencing circle's efficacy? On the procedural front, the circle is panoptic in the sense that stakeholders are subject to the gaze of the participants, causing them to become self-policing individuals. According to one interviewee, "standing in front of the people you wronged and hearing the pain that you caused makes you [rethink] your choices... [M]akes you humble" (Glode, 2010 – Interview 2). The contextual and communicative aspect of circle sentencing is then a process of knowledge production and transmission for all parties. Community members hold the offender directly accountable for their actions by expressing their feelings, which causes offenders to see that their actions effect more than just themselves and the victim. The offender then internalizes these new perspectives as knowledge, causing their identities as criminal to be restored to a level of normalcy, whereby they are remorseful and law abiding.

During the circle, community members base their decisions regarding procedural efficacy on how the offender behaved. Because of the arrangement of seating the

offender cannot escape the gaze of the circle participants. Thus, offenders must present themselves in a manner reflective of the expectations of the circle, whether the presentation is authentic or not, if they want to be safely reintegrated back into their communities. On the post-sentence front, however, circle sentencing's panoptic effect is not as prominent.

After the sentencing circle event has been completed, the Courts relinquish ties with the case on the faith that offenders and victims will pursue their treatment as agreed upon. Consequently, the members of the stakeholder's social network and the community at large have assumed the responsibility of ensuring that these people oblige the sentencing plan. However, as the punitive indicators show, this is not the case. After the sentencing circle has concluded so have the offenders ties with the justice system and, to an extent, the people responsible for his or her rehabilitation. The levels of recidivism found from my research and Fitzgerald's work (2009) suggest that, when out of the sight of the justice system and when no longer *surveilled* by familial and community members, it is easy and extremely likely for offenders to return to the same behaviours that got them into trouble in the first place. Therefore the fact that there are high levels of procedural satisfaction and low levels of outcome-based satisfactions suggests that because offenders do not honour their rehabilitative responsibilities there is a need for circle offenders to be kept in the gaze of sanctioners until their obligations are fulfilled. It may also be easy for victims and offenders to fall back into their deviant behaviour because they often return to the same context of criminality (Bonta, LaPrairie, and Wallace-Capretta, 1997). This is particularly likely without the watchful eye of the law enforcement or concerned relatives.

Rehabilitation is often a sentence. However, the process of rehabilitation requires a proper support network. It is obvious that individuals will not be able to achieve rehabilitation when left to their own devices. One participant noted that in such cases “the practice is a waste of the time and effort of [circle participants] if offenders aren’t going to follow the plan” (Gloade, 2010 – Interview 2). He further elaborated upon the outcome of Case 2 saying, “I had major trouble getting [the offender] to show up for his meetings. There was no follow-up on the client... I would strongly recommend sending them right back to Court [if they do not honour the sentencing plan]. Otherwise if you let an offender get away with dodging the sentence it’s a laughing matter for the non-Native community” (Ibid.). Four other interviewees also articulated the issue of nonexistent follow-up and the fear of the processes being delegitimized if offenders do not make a conscious effort to follow their treatment plan. Consequently, 3 of the interviewees disassociated themselves from participating in sentencing circles because there was no follow-up conducted.

Sentencing circles are merely an *indigenized* variation of the judicial sentencing process, developed to provide a familiar environment and more thorough investigation of contextual issues for Aboriginal peoples in the legal system. The reality of the matter is that circle sentencing functions to offer Aboriginal communities the ability to make recommendations for their offenders to ensure that they are not sentenced hastily or frivolously. Thus, in the current state of affairs, it is beyond the scope of the circle to ensure treatment is pursued. The onus falls on the shoulders of the stakeholders and their respective social networks, whether they are family members, friends, circle participants, or concerned citizens, to make sure that offenders and victims fulfill their sentencing and

treatment plans; not the state. Furthermore, the outcomes of sentencing circles are only as effective as the people who are involved. Success depends on the level of commitment and dedication of all parties. However, if Aboriginal legal services were able to develop a post-circle protocol, or establish a partnership with an external entity, this would bring stakeholders back into the gaze of the CJS and likely improve efficacy and legitimacy on the socio-political level.

With these cases considered, the outcome-based inadequacies of the practice are most evident in the rehabilitative treatments assigned as sentences –such as counseling and therapy. It was noted in the *Case Summaries* section that many of the offenders agreed to participate in the process for a number of reasons, some of which were out of necessity for the safety of the community and others for the safety of the stakeholders. The decision to pursue rehabilitative treatments, however, was not always made by the offender. This is a serious issue that can undermine the value of the whole process. In circumstances where offenders do not express a will to improve or remorse for their actions, or both, they are not likely to respond positively (Gloade, 2010 – Interviews 1, 2 and 3). Although clients may appear to be responding well during circle sentencing (processes) it is important for community members to also guarantee that the treatment is not isolated to the circle. It must continue post-circle for true restorative efficacy to be achieved. By amending existing protocol to include mandatory invigilation in the post-sentence stages the sentencing plan might be seen as a binding punishment, rather than an immediate response that goes largely unenforced.

### *Analysis of Community Restoration – Overall Efficacy*

As a whole, efficacy on the community level offers a mixed story. Circle participants were satisfied with their experiences during the circle, but were disappointed with the post-sentence commitment of offenders. What is most important is that mutual satisfaction is achieved among all members when it comes to procedural efficacy. The circle, however, as a process is effective at bringing opposing familial networks together to reconcile differences and produce meaningful sentences that are the product of community input. Chapter 4 proposed the idea that the communicative nature and the self-determining capacities of circle sentencing empowers communities to develop sentencing plans that are tailored to fit the individual offender and to both compensate victims and restore social harmony to the community. What we learn from the differences between procedural and outcome-based efficacy is that circles are effective at empowering communities. Likewise, according to the reactions of interviewees, recidivism does not mean that the circle was ineffective. Communities value more than simply immediate crime reduction.

On the community empowerment front, Cayley (1998. p.188) notes, “[c]ircle sentencing...fosters an art of citizenship that goes far beyond the outcome of individual cases. It allows people to take back capacities that have been...”stolen” by the criminal justice system.” At the community level social harmony is restored through the empowering of Aboriginal communities to resolve their own legal conflicts. “Whatever the nature of the conflict is, if a community goes through a process in which they can be empowered to resolve the conflict, they’re going to get a greater sense of being able to trust each other, to move with each other and get an understanding that they can make a

difference” (Ibid.). Circle sentencing provides community members with the opportunity to work together, taking the reins of the sentencing process until consensus is reached and a Judge approves the community’s sentencing plan. In turn this restores the bonds broken through criminality.

With regards to outcome-based efficacy, reactions from interviewees regarding procedural and outcome efficacy support the notion that restoration is integral to the social harmony of the community. The fact that interviewees were unanimous in their satisfaction with the procedure and noted the successful reintegration of offenders into the community shows that restoration is accepted as a process that will manifest down the road. For example, consider Case 1. “I saw [the offender] walking down the road when he was supposed to be [under house arrest]” (Gloade, 2010 – Interview 4). But this was okay, because the offender was going to see their child (Ibid.). Although the offender’s recidivated it was of lesser severity and on that occasion put nobody directly in harm’s way. Since harmony had been restored to the community the circle was seen as a success at this level of restoration, because the offender fulfilled his sentencing recommendations and returned to the community free of animosity. Another reason why interviewees did not see recidivism as a sign of an ineffective circle is that interviewees felt that the onus was on the host organization, the CJS and MLSN, to ensure that recidivism did not occur and that offenders completed their sentence. Examining these issues further, the following section examines this assumption with respect to the practice’s policies and protocol.

*Analysis of Socio-Political Restoration – Aboriginal Politics and the State*

Four people were interviewed for this level of restoration – addictions counselor, circle facilitator, Elder, and CMM executive director and all acknowledged that the landscape of Aboriginal justice has made a positive change towards creating better working relationships between Mi'kmaq communities and the state.

As noted in the previous chapter, efficacy on the socio-political level involves bridging the proverbial cultural divide between Aboriginal and non-Aboriginal communities. Restoration at this level is achieved when the Canadian government perceives Aboriginal justice initiatives as reliable and sustainable. Thus, a signifier of the socio-political restoration process is the transference of increased liberties and self-governance to Aboriginal organizations that administer justice. According to CMMs executive director, Mi'kmaq political and legal organizations are gaining more credibility outside Aboriginal communities as time goes on (Glode, 2010 – Interview 5). MLSN has made vast improvements from the days of the MJI and is now becoming its own self-sustaining entity that will no longer be under the umbrella of CMM (Ibid.). Since the interview MLSN has become autonomous. They do, however, maintain ties with CMM and other governmental organizations such as chief and council, the Native Women's Centre, Mi'kmaq Friendship Centre, and the confederacy band chiefs, for consultation purposes. A handful of members from each of these groups comprise MLSNs advisory committee, whose role it is to make recommendations and act as consultants for programming and policy ventures.

This has worked in MLSNs favor because prior to their move towards independence, the organization was funded by year-to-year contracts. Now, with

improved organizational structure and accountability, they have received a contract for 3 consecutive years of funding. Their new arrangement will allow them to make more long-term goals that would have been trumped by uncertainty regarding the financial future of the organization. Although they are an independent entity they are still at arms length from their advisory committee and the government of Canada.

This is what Will Kymlicka (2009) refers to as the “nation building” dimension of transitional justice. “Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse” (Ibid.). Its goals are to rebuild broken social relationships between the government and affected societies to foster a sense of trust and support. This is achieved through political transformation on a policy and structural level. In this regard transitional justice mirrors the objectives of Aboriginal justice, in that both share the holistic goal of restoration through reconciliation.

The nation-building dimension of transitional justice consists of reshaping the identities of ethnic or religious groups who have been adversely impacted by institutional wrongs (Kymlicka, 2009). Kymlicka (2009) notes that, “the aim is to weaken aspects of identities that were the source of violence and conflict and replace those with a strengthened sense of shared identity related to common membership in the national political community” (Ibid.). According to Kymlicka (2009), this is a necessary condition for democratic consolidation (Ibid.). Nation-building is a delicate task for countries undergoing democratic transition, especially with “a strongly mobilized minority nationalist movement seeking some form of self-government on a territorial basis, either

through federalization or independence,” much like the demands of Canada’s Aboriginal self-governance movement (Ibid.).

Kymlicka notes a weakening of identities as a precondition for nation-building to be made possible. What is being broken, in the case of circle sentencing, is the identity of an overrepresented population who is a burden to and heavily dependent upon the state for funding. Circle sentencing and organizations such as MLSN exist to improve the relationship between Aboriginal populations and the Canadian Justice System, by providing these groups with the opportunities to sentence their own offenders and resolve inter-community tensions. Additionally, policy amendments such as those found under section 718.2(e) of the *Criminal Code* is evidence of this process taking place. Section 718.2(e) of the *Criminal Code* has the intention of elevating Aboriginal peoples, particularly those accused of criminal conduct, to a level of ‘equalness’ under the law so they are no longer subject to any unintentional structural prejudices. Indian and Northern Affairs Canada (INAC) informs us, “[w]hile Aboriginal adults represent 2.7% of the Canadian adult population, they accounted for 11% of admissions to federal penitentiaries in 1991-92 and 18% in 2002-03... 28.5% of all incarcerated women and 18.2% of all incarcerated men in Canada are Aboriginal” (INAC, 2006). If democratic consolidation is a goal it becomes troubling to think that such a large proportion of an already small population is so highly overrepresented in Canada’s carceral system. Although it may be perceived as a ‘special plus,’ the sentencing provisions originated out of a will to improve Aboriginal overrepresentation. By giving Aboriginal communities such liberties, to settle their own legal disputes and appropriate sentencing plans, the state exhibits a will to improve and amend the wrongs of the past, building a stronger nation.

Much like the process of restoration between individuals and communities restoration on the socio-political level is a process. Prior to the emergence of circle sentencing and its relevant policies, Canada tried to ameliorate Aboriginal adversity. Concurrently the goals of Aboriginal rights groups have long been to achieve self-governance. Transitional justice is thus not a new phenomenon, in fact the RCAP's *Bridging the Cultural Divide* can be thought of as an early call for transitional justice and nation building. In the mid 1990s RCAP recommended,

through their own processes of justice [Aboriginal communities] be able to deal with victimizer and victim in the context of their continuing relationships, in the context of their place in their communities, in the full understanding of the forces that have turned family members into victims and victimizers, and in the conviction that through their own justice systems they can do more than simply fuel the cycle of violence. To do that they need not only the strength of their own philosophies and, the skills of their healers, but also a share of the enormous resources consumed by the non-Aboriginal system in a manner that has failed to meet the needs of Canadian aboriginals. Those resources must include the legal resource of recognized jurisdiction in relation to justice, as part of the right of self-government, and the fiscal resources to make that jurisdiction an effective one (Canada, 1996. p. 4).

The rhetoric of effective justice necessitating territory, consumption of legal resources, transference of liberties, empowerment, and self-determination demonstrate the virtues of Aboriginal restorative justice. Although this model is far from sovereignty, it shows that the process of restoration between these two groups is very much under negotiation.

More recently the *Truth and Reconciliation Commission* (TRC) of Canada is exemplary of the same nations in transition towards achieving social justice. The commission's mandate states that in response to the wrongs committed in the past, by the Canadian government towards Aboriginal populations nation wide with respect to the Residential School system, the government is now committed to amending the injustices committed, "so that we can work towards a stronger and healthier future" (TRC, 2010).

Circle sentencing, much like the TRC requires the good intentions of both parties – the state and Aboriginal communities to succeed.

*Analysis of Socio-Political Restoration – Aboriginal Communities and the State*

Another condition of socio-political restoration is an improved relationship between Aboriginal communities and the state. Above we saw that circle sentencing, and Aboriginal justice initiatives in general, have fostered a strong relationship between the state and Aboriginal politics, but what about the relationship between Aboriginal communities and the state? Like restoration on the community level, socio-political efficacy between Aboriginal community members and the state were evaluated in terms of satisfaction.

All interviewees reported high levels of satisfaction regarding their interactions with representatives of other levels of restoration (Gloade, 2010 – Interviews 1, 2, 3, 4, 6, and 7). Interviewees noted that although there is a history of inequality with the Courts and Aboriginal communities, it is apparent that the Courts and state are willing to amend the wrongs of the past (Gloade, 2010 – Interview 1, 4, 5, and 6). One interviewee noted, “for the Judge to give his insight to talk to [the offender] one on one and have a real conversation with him is something that nobody would ever get in the court room. It showed that they were really there to make this work... for everyone” (Gloade, 2010 – Interview 1). Another interviewee noted that it was sometimes difficult “to make sentencing recommendations for the offender in front of the individuals family,” but the Judge, prosecutors, and police made sure that everyone had a chance for their suggestions to be heard (Gloade, 2010 – Interview 4).

Overall restoration on the socio-political front was effective in the 3 cases analyzed. Aboriginal-run legal initiatives have shown that they are responsible and capable to manage their own affairs. Furthermore, circle sentencing is effective at producing restoration between Aboriginal communities and the state. The levels of satisfaction and testimonials of circle participants show this. What is troubling, however, is the relationship between Aboriginal communities and Aboriginal run legal initiatives. As we will see, Aboriginal organizations are not meeting the demands of the communities they serve. This is problematic because it may very well compromise the overall effectiveness of circle sentencing. The following section looks at the dissatisfaction between members of Aboriginal communities and their legal organizations. More specifically, we will examine the policies and protocols that relinquish responsibility of overseeing the completion of sentencing plans.

#### *Perceptions of Legal Holism and the Direction of Circle Sentencing*

One of the questions asked during the interviews was, “How does the federal government perceive the efforts of self-governance through circle sentencing?” All respondents noted that the CJS perceived their efforts as positive, however, this is only because circle sentencing is becoming more like the judicial process. It should be noted that what is reported in this section does not reflect my personal position on circle sentencing. Instead this is an analysis of material that surfaced during interviews and what will be referred to as “breaks in holism.” They are issues that participants had with the current state of affairs of Aboriginal justice and circle sentencing. This was explored only at the Socio-political level; however, all but one participant voiced the same concern

regarding the direction that circle sentencing is heading and the form it is taking. What was particularly interesting about the responses is that although only those at the socio-political level were asked questions on this issues, participants at the community level voiced the same concern on their own when asked if they had any additional comments.

The problem, as the respondents described it, is that as the relation between the state and Aboriginal-run legal services improves, especially with circle sentencing, the practices become less holistic in form and ultimately less effective as a restorative and reintegrative tool. Participants noted a number of changes that occurred as circle sentencing evolved. First, the practice became more regimented. For circle sentencing to continue it requires proper funding and that demands consistency. Circle sentencing has been confronted with the criticism that, “[a]side from speaking in turn, there are no particular rules of order for circles; sentencing decisions are made in the absence of an identifiable process or structure” (Roberts and LaPrairie, 1996. p. 71). Although much has been done to develop a level of predictability and standardization, sentencing circles still remain contextual to a degree.

The issue at hand is not circle sentencing’s loss of fluidity and contextual (holistic) nature. Instead the problem arises when an organization’s protocol leaves out steps to facilitate its programs objectives. For instance, consider the sequence of events in the judicial system between the discovery of guilt and the completion of punishment. An individual commits a crime, goes through the trial process, which leads to sentencing. After a suitable penalty is determined, whether it is punitive or restorative, the offender starts his path to retribution, while under the constant surveillance of the CJS. For example, when an individual is sent to be imprisoned it is guaranteed that his time is

served. If the sentence is house arrest, officers frequently check-in on the offender to ensure that he or she is abiding by the sentencing plan. If there are no further penalties are imposed – losing chance for parole, loss of privileges. Lastly, when the sentence is complete the individual regains lost liberties, or most of them, that he was deprived during his punishment. This is not the case with circle sentencing.

Sequentially, circle sentencing is similar until the conclusion of sentencing. This is one of the biggest limitations with the current state of sentencing circles. Offenders “fall off the radar” because there are steps missing between sentencing and completion of the sentencing plan. According to interviewees, this reflects a break in the holistic virtue in the sense that true holism would have the organizations, in addition to the families and communities, “[track] the individuals, see if they received their treatment and see that they completed it through to the end” – whether their rehabilitation was successful or not (Gloade, 2010 – Interviews 2, 3 and 4).

Two interviewees recounted how “by the book” sentencing circles are, in the sense that the policies that exist stipulate that the practice is meant only to develop a sentencing plan for the offenders, and that is it (Gloade, 2010 – Interviews 2 and 3). Both interviewees were concerned that this had detrimental affects on the success of restorative sentences and the healing needed by offenders and victims. The problem exists because follow-up tabs are not kept on individuals sentenced because it is not part of the protocol. This is not to suggest that MLSN’s policies discourage employees from assisting stakeholders in their rehabilitation, but rather after the sentence the offender is no longer their responsibility.

In the event that individuals falls off the radar or do not respond to their treatment they should be referred back to the Courts, because “circle sentencing is a privilege” (Gloade, 2010 – Interview 4). When offenders take advantage of the practice they take advantage of those who had faith in them and those who gave their time and resources to help them. With the symbolism of the circle considered, what you are left with is a broken circle (Ibid.). Proper correspondence with clients and referral back to the Courts when necessary could ensure that the circle will not go unbroken.

Three of the interviewees noted that when an offender is confronted with the option to pursue circle sentencing, over the judicial alternative, circle sentencing becomes an appealing option when one considers the high incidences of recidivism due to a lack of surveillance (Gloade, 2010 – Interviews 2, 3 and 4). “When you see so many people, so many of your [peers], skipping out on their [judicial] responsibilities it sends the wrong message.” The message is one regarding the practice’s leniency. Severity of sentencing, one of the factors of penalty-based deterrence, cannot have an effect when nothing ensures that offenders stay on track. Interviewees cited this fact as evidence that circle sentencing is a lenient form of justice because offenders can “get off with a mere slap on the wrist and not have to do real time [because of existing policies]” (Gloade, 2010 – Interview 4). Furthermore, interviewees noted that circles become easy-ways out because of the lack of follow-up, not because the sentencing plans are ineffective. This is consistent with the claim that follow-up is essential for the outcome-based efficacy of circle sentencing to be properly evaluated. In addition, as noted in Chapters 3 and 4, the process of the circle is meant to be punishment in the form of ritual shaming. This offers

proof that circle sentencing has little immediate effect in terms of deterrence and reductive capacities.

What these “breaks in holism” tell us, aside from the fact that further policy development is essential, is that due to regimentation and standardization the efficacy for circle stakeholders diminishes because the contextual nature is deemphasized and organizational responsibility does not go far enough.

This is troubling because these are virtues that are integral to circle sentencing’s intrinsic effectiveness. An Elder noted that these “breaks in holism” represent an abuse of tradition, “abuse for the sake of funding” (Ibid.). The more that is done to make circles more appealing to state powers and funders, the less holistic they become. Circle sentencing, which is “marketed” as a holistically indigenized cultural accommodation, is becoming less Aboriginal and less holistic. For example, consider the lack of organizational responsibility post-circle. Consequently, with the trends discussed above considered, it causes the practice to be less effective, especially on the restorative front, which is circle sentencing’s chief objective.

Although the CJS perceives the efforts of Aboriginal-run legal initiatives to be positive, their standards of evaluation are different from the people that circle sentencing is meant to benefit. According to Chester Barnard (1968) this is because “organizational success [is] not viewed as the achievement of goals but rather as survival of the organization through securing contributions by providing sufficient rewards or incentives” (Tolbert and Hall, 2009. p. 192).

Since Aboriginal -state relations have improved to the point where new liberties, trust and stronger funding arrangements have been bestowed upon Aboriginal-run legal

initiatives, such as MLSN, it is now time to turn our sights on to the issue of post-circle supervision. If this goes unchecked the reputation of circle sentencing and the Aboriginal political structure will be called into question. This should be made a new priority, as one of the practice's chief objectives is to empower communities and to show that the organizations and communities are capable of managing their own affairs.

Lastly, this shows that fixing the “breaks in holism” is relevant at all three levels of restoration, because it would guarantee that victims are properly compensated (individual), communities would have the reassurance of knowing for certain that the individuals were not being let off easily (community), and it would mitigate the high turn-over rate of circle employees discussed above considered (socio-political).

#### *Mi'kmaq Circle Sentencing – Assumptions About Holism*

Throughout the literature Aboriginal justice it is treated as synonymous with the term holism (Hamilton, 2001; Monture-Angus, 2006; Ross, 1996). Many assert that traditional Aboriginal approaches to conflict resolution are benevolent and restorative, creating a notion of a passive justice that seems compassionate when juxtaposed to the harsh, ill-intentioned, judicial system (Hamilton, 2001; Ross, 1996). As noted in Chapter 4, Hamilton (2001) asserts that “[holism] is the preferred approach to almost every problem that arises” in Aboriginal communities (Ibid. p. 271). After talking to the interviewees it became clear that this image was not entirely true.

Although interviewees strongly believed in the restorative benefits that circle sentencing offers, they still believed that the sentences and justice in general should be equal to the gravity of the offence. The mother and sister, of Case 1, both mentioned that

when it came time for the circle to decide upon a sentence they wanted to make sure that the offender did not receive a mere slap on the wrist (Gloade, 2010 – Interviews 1 and 6). “We wanted to make sure that he didn’t get off easy. So he would never do anything like that again” (Gloade, 2010 – Interview 6). The sister said that when the circle was developing the plan she “wanted to see that he got the punishment he deserved, because what he did was not excusable” (Gloade, 2010 – Interview 1). They noted that the sentence was comprised of both restorative (community service) and punitive (fine, house arrest, firearms prohibition) penalties. In addition to the sentencing plan, the shame from the sentencing circle process was punishment enough because of the intense emotions that arose during the event. Both the mother and sister noted that the circle was “emotionally harder than it would have been to go into a Court” (Gloade, 2010 – Interviews 1 and 6). The same was said about Case 3, “[i]t was an emotional time, an emotional circle. It was frightening for both families, the victim and offender’s family, to come together for that one... But the circle changed them, because they couldn’t hide from the emotions... It really affects you [offender and victim]” (Gloade, 2010 – Interview 3). Case 3 also consisted of both restorative and punitive sanctions. The reactions from the interviewees show that circle sentencing offers offenders a balanced sentencing plan consisting of restorative, punitive and emotional consequences.

From the interviews we see that punishment is not a foreign or undesirable approach for addressing criminal action in Aboriginal communities. In fact, as an Elder noted, the “old way” of punishing deviance was very much similar to the judicial eye-for-an-eye mentality (Gloade, 2010 – Interview 4). The Elder noted that through her own research and oral tradition she learned that the Mi’kmaq did not solely rely on holistic

methods of conflict resolution (Ibid). She said that traditionally in the event of murder the penalty was likely the same (Ibid). In some cases murderers would replace their victim in terms of their occupation, so the affected family did not have to suffer from the burden (Ibid).

Thus the most striking difference between traditional Aboriginal justice and dominant Canadian understandings are in the intention of punishment. In Aboriginal justice, each punishment was meant to teach a lesson to the wrongdoer and to the collective (Ibid.). And the lesson was often overt, “you must give back what you took away” (Ibid.). Retribution was made to the person who was wronged, not to an abstract third party like the state. As the Elder noted, “It’s the difference between teaching someone not to do something [illegal] because they’ll get caught by the police, rather than teaching them not to break the law because it’s just wrong” (Ibid.). Punishment, although unpleasant in form, was not meant to be vengeful, but rather to show the wrongdoer first hand what their victim experienced. This fostered a sense of accountability, regret and understanding for the misconduct. The circle must remain unbroken.

## CHAPTER 7: CONCLUSION

*- Kaqtaqaiq -  
(End of the Trail)*

The aims of my thesis were twofold: 1) put forward a set of new evaluative criteria, inspired by Aboriginal epistemologies, to better assess the efficacy of Aboriginal justice, and to 2) employ those criteria to evaluate circle sentencing's restorative capacity. Redefining how "efficacy" is examined for Aboriginal justice is important because legal initiatives like sentencing circles are often dismissed as ineffective because they fail to reduce crime. This is only one of the practice's intended goals and thus is not a just way of evaluating it. Participants noted that evaluations must consider more than reductionism when assessing the efficacy of Aboriginal restorative justice. It is distinctive from the dominant system in that it is communal in form and holistic in nature.

### Community

After talking to former circle participants, it was apparent that achieving restoration was just as important to the community of Millbrook as seeing offenders receive their "just desserts." This was found to be true when offenders abided by their sentencing plans and showed signs of positive change. Conversely the restorative approach is "a waste of everyone's time if the offender does not hold up his or her end of the bargain" (Gloade, 2010 – Interview 2). Although restoration may be a valued goal, circle sentencing will be deemed ineffective if there is little to no restorative effect. Efficacy at the community level was defined as the reduction of animosity towards offenders and victims, as well as the restoration of social harmony to the affected community. The proposed indicators were representative of circle sentencing's

restorative intentions. All participants emphasized the importance of social harmony to Aboriginal communities, while noting that sentencing circles provided the setting necessary to start the process of forgiveness. As noted in chapter 4, Mi'kmaq communities are typically tightly knit, meaning a crime not only affects victims and offenders but also the whole community. As a result, acts of criminality necessitate restoration of the social harmony of communities. If harmony is not restored, which often happens when Aboriginal offenders are sentenced in the dominant justice system and when restoration on the community level is not achieved, then it is difficult for offenders to be reintegrated back into their community because of the negative stigmas they bear as a delinquent. Normal measures of efficacy do not consider such restoration.

My research has found that restoration has two levels of impact: *procedural* efficacy (during the circle) and *outcome-based* efficacy (after the sentence). Procedural efficacy emphasizes circle sentencing's capacity to facilitate forgiveness by fostering a common understanding regarding the offence for community members. Outcome-based efficacy pertains to the respondent's perceptions of effectiveness after the sentencing circle – if offenders and victims did not respond to treatment or recidivated.

Perceptions of procedural efficacy were uniform. All participants were satisfied with the orchestration, stakeholder behaviour, sentencing recommendation, and appropriateness of penalty –or what in the mainstream system is considered to be punishment. Most importantly, participants said that circle sentencing offered an opportunity to rid hard feeling towards stakeholders by confronting them directly. As a result offenders and victims were reintegrated into communities successfully post-sentence with minimal negative stigmatization because of the emphasis that circle

sentencing placed on restoration and forgiveness. Again, this is in contrast to the stigma attached to “doing time.”

Contrary to the dominant literature, the evidence collected in my thesis shows that participants of circle sentencing value restorative aims, *as well as* punitive measures. In fact, out-come based perceptions of efficacy were heavily influenced by an offender’s level of recidivism and seriousness of subsequent offences. When offenders were known to have been caught breaking the law a second time for a less severe offence respondents were not too concerned because in all cases subsequent offences were to the detriment of the individual, rather than the community at large. Again, this points to the way that mainstream measures fail to account for the complex nuances of rebuilding social harmony.

An important finding of my research is that despite valuing social harmony, punitive sentencing, often imagined as being diametrically opposed to the holistic tenets of Aboriginal spirituality, are not devalued by proponents of circle sentencing or Mi’kmaq people. Mi’kmaq punitive intentions were different however. As explained by a Mi’kmaq Elder, the “old way” of dealing with deviance was similar to the conventional sentencing philosophies, in that they were based on the disciplinary eye-for-an-eye mentality of conflict resolution (Gloade, 2010 – Interview 4). Aboriginal sentencing philosophies differed from the dominant Canadian tradition in that the lesson associated with the punishment was more overt and restoration to the victim was mandatory in all cases.

### Socio-Political

On the socio-political front, efficacy is defined as the amelioration of the relationship between Mi'kmaq communities and the state. Efficacy is observed when the state bestows further liberties to Aboriginal communities to manage their own affairs.

When asked, "how the efforts of Tribal Council and Aboriginal Legal organizations (CMM, Chief and Council and MLSN) were perceived by the Canadian state and non-Aboriginals," respondents felt that it helped legitimate the Mi'kmaq political structure. Yet at the same time, the community members interviewed were unsatisfied with MLSNs role in post-circle etiquette. That is, in how it follows-up the offender's sentencing plan.

However, although participants point fingers at MLSN for not ensuring that treatment is sought and obtained, sentencing circles can only be effective if offenders and their families are involved in rehabilitation. It is the responsibility of offenders and their familial networks to make sure they get to and from appointments, such as counseling, and honour the sentencing plans. As noted earlier, in Chapter 6, the purpose of circle sentencing is merely to make a recommendation to a Judge in the dominant system. Anything more, like ensuring that offenders oblige to a sentencing plan, goes beyond the current scope of circle sentencing. Once the event is over the fate of efficacy is in the hands of the stakeholders and the community at large. They too need to feel responsibility in making it work.

Popular and conservative perceptions of sentencing circles believe that they are to blame for the disconnection between punishments issued and punishments received. This contradicts two of the fundamental tenets of community sentencing and Aboriginal

justice. The mentality of community sentencing is based on the philosophy that the community knows best, in terms of who is an appropriate circle client and what will be an appropriate penalty (Cayley, 1998 and Dickson-Gilmore and LaPrairie, 2005). Similarly, Aboriginal justice initiatives often follow suit with self-governance and self-determination movements, where the authority to sentence and police their own offenders is transferred to communities (Dickson-Gilmore and LaPrairie, 2005 and Roberts and LaPrairie, 1996). Although the state may have some wrongs to atone for in terms of the successes circles, in some cases the lack of success is not entirely theirs alone. From a policy and programming standpoint, if Aboriginal offenders are not seeking treatment because they do not take the sentencing plan seriously, then the onus falls upon the shoulders of offenders and their communities. Not organizations such as MLSN. This, however, would not be the case if existing policies were amended to enact mandatory offender sentencing-plan supervision.

### *Overall Efficacy of Circle Sentencing*

The research question for this project was not “will everybody be on board with my ideas?” Instead it was to see if participants’ expectations of circle sentences are reflected by conventional evaluative measures. Since respondents expected both proportionate amounts of severity and reconciliation, I conclude that sentencing circles need to be evaluated in terms of their reductive *and* restorative capacity. By accounting for both expectations of justice, competing interests are balanced and a more reflective story of efficacy is told.

With respect to the three cases examined in my thesis, circle sentencing produced the desired restorative aims during the process, while providing effective sentencing plans that satisfied the needs of the community and eased its concerns. However, outcome-based efficacy is dependent upon the intentions and level of dedication of offenders, victims, and their families. Furthermore there is a relationship between the effects of reintegrative shaming and social bonding. As the outcomes of circle sentencing become more successful with respect to its capacity to cause shame and remorse, reintegration will be more successful improving the bonds between both stakeholder groups. Thus, the success of circle sentencing's denunciative capacity is dependent upon the dedication of offenders and victims and the onus of this aspect success falls on these individuals and their respective families.

Although, offenders have the responsibility to commit to the circle, the organizations responsible for making sentencing circles possible have a responsibility as well. While sentencing circles produce a sentence something else is also needed to ensure that offenders do not fall off the rehabilitative radar. This will help guarantee that treatments are being sought and sentences fulfilled. Similarly, new policies must be explored so that in the event that offenders do not take sentencing circle verdicts seriously they will be redirected to the mainstream justice system. Section 718.2 reminds sentencing Judges to sentence fairly, not sympathetically or leniently, because a tendency towards lenient sentences will ultimately jeopardize the legitimacy of circle sentencing. Furthermore, when the sentencing plan is not taken seriously and negative perceptions regarding the practice's legitimacy arise, the restorative capacity of circle sentencing is rendered ineffective at ameliorating relationships on the socio-political front.

Fortunately this is not always the case. MLSN has been working towards amending the past wrongs of faulty Aboriginal-run legal initiatives and in the process they have proven themselves to be both accountable and effective. In turn they have received added organizational independence – breaking off from CMM and receiving longer funding agreements. With this considered, Mi’kmaq circle sentencing is effective on the socio-political level. Yet, participants in my research cautioned that it unacceptable to use tradition and culture as a means of instrumentally gaining funding to maintain a unique system of justice.

As a whole, circle sentencing is effective at providing satisfaction on the procedural and socio-political front. These two components are the centre of what is necessary for achieving *restorative* efficacy. Denunciative and outcome-based efficacy, which are most closely related to the values of the mainstream system, tell us that circle sentencing’s *reductive* capacity is not successful when offenders lose contact with the justice system. As a form of restorative justice and transitional justice, however, circle sentencing is effective. Yet, in order to be successful at meeting the needs of Aboriginal and non-Aboriginals, something must be done post-sentence to ensure that sentencing plans are honoured. As one participant noted, “to be effective is to *follow through*. And in order to guarantee that this happens we must *follow up* on clients” (Gloade, 2010 – Interview 3). The necessity of having mandatory post-sentence follow-up is evidenced by the numbers of people who are disassociating themselves from the practice. Follow-up would not only ensure that offenders are serving their sentences, but it also makes certain that the resources and effort that goes into making the circle possible do not go to waste.

### Closing Remarks

Although circle sentencing is not the silver bullet heralded by Judge Barry Stuart (Cayley, 1998), or the miscarriage of justice asserted by right-wing critics, it has its utility for restoring social harmony to Aboriginal communities. It is also important to keep in mind that it is a *cultural accommodation* developed as a means of reducing systemic inequalities by leveling the playing field for aboriginal peoples.

Culture plays an important role in defining the landscape of making self-determination possible in the realm of criminal sentencing. It ensures that the mentalities responsible for over-incarcerating Aboriginal offenders in the first place cease to continue.

It is largely because of the fact that culture is an intangible entity that circle sentencing is highly scrutinized. Because it is often a free form approach to sentencing, its contextual basis for sentencing is prized, it is difficult to observed and difficult to operationalize outcomes, sentencing circles have been viewed with skepticism by many.

My thesis only scratched the surface of the puzzle of sentencing circles, revealing the utility of alternate indicators and showing the hidden potential of the procedures. If circle sentencing is to have a future what is needed is not further regimentation or regulation, but rather the creation of more representative evaluative criteria that account for the interests of organizations conducting sentencing circles and for those who seek restoration. Since circles are intended to do more than simply reduce crime, it is paramount to account for their holistic tenets when evaluating the practice.

It is unreasonable to assume that the measures developed with one particular outlook, the mentality of the dominant system, can be applied universally when

evaluating all other forms of justice. By evaluating the practice on its own terms we treat it as distinct from the dominant system. We must keep in mind that sentencing circles exist to rid the judicial sentencing process of any prejudices or biases towards Aboriginal offenders so these vulnerable populations do not feel alienated by the Canadian Justice System. It is clear from the interviews I conducted with Mi'kmaq circle participants that it is a culturally appropriate means of sentencing that emphasizes reconciliation over vengeance and reintegration over stigmatization.

Staying true to the notion of the circle and the notion of “Coming Full Circle” I would like to end my thesis the way it started, with a story. The second sentencing circle conducted by Judge Barry Stuart was held in the Yukon town of Carcross. Harold Gatensby a Yukon Territories’ Métis played an instrumental role in the development of sentencing circles alongside Judge Stuart. A reformed offender who found salvation in the sweat lodge ceremony, he recounts his impression with circle sentencing.

He remembered the alienation he had felt when he was in court himself: “my heart just about leap[ing] out of my throat, my hands... sweating... everybody... an expert but me.” He knew that jailing people only “makes you mean, makes you bitter, [and] teaches you to be dishonest,” since he himself had learned how to forge cheques and crack safes in prison. He had pondered the unfairness of having outsiders make the decisions the community would have to live with, as ex-prisoners returned home rejected, isolated and volatile. And he knew the virtue of the circle. “I had been cornered in my life. Perhaps I did it myself. A lot of help from the institutions, what I call heartless institutions. But I’d been cornered. And when I started to learn about a circle, I realized that you cannot corner the human being in a circle... (Cayley, 1998. p. 185).

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## **APPENDIX – A**

|   |                           |
|---|---------------------------|
| Interview #1, March 21 <sup>st</sup> , 2010 | Sister of offender        |
| Interview #2, April 6 <sup>th</sup> , 2010  | Addictions counselor      |
| Interview #3, April 6 <sup>th</sup> , 2010  | Circle facilitator        |
| Interview #4, April 22 <sup>nd</sup> , 2010 | Elder                     |
| Interview #5, April 27 <sup>th</sup> , 2010 | Executive-director of CMM |
| Interview #6, May 11 <sup>th</sup> , 2010   | Mother of offender        |
| Interview #7, June 25 <sup>th</sup> , 2010  | Brother of victim         |

7 interviews conducted: 4 female and 3 males, all of whom reside in the community of Millbrook First Nations or the town of Truro.