

Mi'kmaq Legal Support Network

Sentencing Circle Protocol

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Mi'kmaq Legal Support Network Guidelines for Mi'kmaq Justice Sentencing Circles

INTRODUCTION

These guidelines define a highly competent process for implementing Mi'kmaq Justice Sentencing Circles for First Nations individuals resident in Nova Scotia.

Inherent to this process are the principles of accountability to all stakeholders, respect for the requirements of the justice system as well as the needs of the First Nation community, and an appropriate balance between standardization and flexibility.

The process defined herein is specific to Sentencing Circles and is not intended to apply to other circles such as those used by Restorative Justice and Community Peacekeeping.

Background

The disproportionate presence and retention of aboriginal people in the justice system has been well documented. The effectiveness of a punitive system that disengages the offender from his/her community and enables disassociation from responsibility does little to discourage recidivism.

Western Canada and the north have been implementing the circle process for years to address community justice issues. Amendments to the Criminal Code allow an opportunity to give credence to alternative processes for sentencing aboriginal offenders through the justice system. The most effective alternative for aboriginal peoples has been the circle process.

The success of community-driven sentencing circles is well documented and has proven to decrease the rate of recidivism among aboriginal offenders who have participated in the process. Although the final sentencing decision rests with the justice system, instances where the recommendations of the community sentencing circle are not respected are rare.

The positive impact on the community as a byproduct of its participation cannot be overlooked. The return to traditional communal practice, the responsibility of the community in committing to the process, the empowering experiences afforded various community members, and the community-led rehabilitation of offenders, all serve to heal and empower the First Nations community.

The effective implementation of the Sentencing circle process is very time consuming and consequently may be viewed as correspondingly expensive. However, with

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reduced recidivism and presence in the penal system, long-term economic benefit is inevitable.

With the inception of the MLSN (Mi'kmaq Legal Support Network) in 2002, the subsequent development of the Mi'kmaq Court worker Program in 2003, and the transfer of the MCLP to the MLSN in 2004, professional services are now in place in Nova Scotia to support effective Mi'kmaq Justice Sentencing Circles.

The Cultural Connection

The application of the circle process to address community justice concerns and issues is not new and can be linked historically to community justice as it was implemented prior to European contact. It has been traced back to the earliest history of the Mi'kmaq Grand Council when it governed the seven districts of Mi'kmaki.

The circle concept is inherent to the cultural fabric of the Mi'kmaq and is reflective of their traditional communal practices. Other traditional practices accommodated by the sentencing circle process include spirituality (through prayers and/or sweet grass ceremonies), grassroots consultation and participation in decision-making, community consensus and shared responsibility. The importance of community elders is recognized by including elder presence throughout the process – from initial planning through to final sentencing.

Legal Context

For many years, the Aboriginal communities have been seeking alternatives to the mainstream justice system. The statutory foundation for the possibilities for community inclusion in the sentencing process is found in s.718 of the Criminal Code of Canada.

s.718.2 (e). All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

In *R. v. Wells* 213[1998] AJ No.405 (Alberta CA) the court held that in accordance with S.718.2 (e) the sentence judges are required to take into account unique considerations relevant to the Aboriginal offenders not only with respect to the sentencing outcomes or alternatives disposition, but also included the decision making process.

In *R v. Gladue* [1999] S.C.R. 688, paragraph 111, s. 718 was interpreted to recommend that sentencing should consider:

“The background considerations regarding the distinct situation of aboriginal people in Canada encompass a wide range of unique circumstances, including most particularly;

- (a) a unique systemic or background factor which may have played a part in bringing the particular aboriginal offender before the court; and

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- (b) the types of sentencing procedure and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”

THE SENTENCE CIRCLE PROCESS

An effective and accountable sentencing circle has several components, each carefully and thoroughly completed to ensure the integrity of the process is maintained:

Referral

Eligibility Investigation

Circle Preparation

Circle Proceedings

Sentencing

Referral

Recommendation to the Judge to refer an offender to a Mi'kmaq Justice Sentencing Circle process may come from several sources: RCMP, Court Worker, Defense Counsel, the Crown Attorney, the Offender, victim, etc.

The presiding judge holds the authority to refer an Offender to a sentencing circle. Once the decision is made to pursue this option, the Court contacts the MLSN Sentence Circle Facilitator to begin the process.

Eligibility Investigation

All information regarding the case is forwarded to the MLSN facilitator and reviewed before beginning the eligibility investigation.

When making the decision to prepare for a Sentencing Circle, several criteria are considered:

- The Offender must have been found guilty or plead guilty to the offence.
- The Offender must accept full responsibility for the offence.
- The Offender must be willing to listen and acknowledge the harm to the victim and the community.

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- He/she must be honest and willing to make amends for the harmful acts.
- He/she must be committed to the process and be willing to accept the Sentence Plan.
- The community must be willing to offer the offender support and guidance.
- The community must be willing to take a lead role in the reparation of harmful behaviours and seek solutions to assist re-integration into the community. Elders or respected non-political community members must be willing to participate.
- Disputed facts of the case must have been resolved in advance.

The MLSN facilitator interviews the offender to confirm that he/she is a suitable candidate for the sentence circle process. The offender must show sincerity and honesty, exhibit respect and understanding of the circle process, and be willing to take responsibility for the offence and make reparation as recommended by the Mi'kmaq Justice Sentencing Circle process. The disclosure of facts provided by the Court is reviewed with the Offender at this time to confirm there is no dispute with the facts on the part of the Offender.

The MLSN facilitator meets with the victim to discuss his/her participation in the process. Considerable work is undertaken to empower and encourage victim participation. The victim may choose to appear as a participant in the circle, submit a victim impact statement to the circle or have a surrogate speak on their behalf. The MLSN circle facilitator works with the victim to determine how his/her participation may be best accomplished.

Next, a Community Justice Panel is formed. To ensure inclusion, the facilitator uses every possible avenue to invite participation including: contacts with community service delivery agencies, Band staff, leadership, teachers, elders, etc. and posting in community newsletters, local cable vision/radio (as available), etc.

The facilitator then co-ordinates a meeting of the Community Justice panel. In the event that the Community Justice Panel recommends that the sentence process is not appropriate, such will be relayed to the MLSN and the case will be referred back to the Court process. It is assumed at this time that the community is not ready or willing to accept the responsibility for the circle process.

If the Community Justice Panel recommends proceeding with the circle process, the panel decides:

- Who the circle participants will be,
- The inclusion of any culturally appropriate processes such as prayer and/or smudging,
- How the circle preparation is undertaken,
- What other items will contribute to an effective process, such as the availability of community resources to meet the needs of the Offender after sentencing.

In instances where youth (under the age of 12) could contribute valuable information to the circle process, Victim Services will be advised and asked to assess the situation and make recommendation on the matter.

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Participation in a Sentencing Circle is voluntary. Anyone holding political position can only participate as a community member or in a professional capacity as appropriate.

Decisions/recommendations of the Community Justice Panel are made by consensus.

Following the meeting with the Community Justice Panel, the MLSN Facilitator identifies the time frame for the circle preparation process and meets with the Judge to request a suitable date for the circle.

Circle Preparation

All participants are to be prepared for the circle. This involves ensuring all have participants have the necessary information and fully understand the process. The MLSN meets with all participants to:

- Provide information relevant to the case as provided by the courts; i.e. the facts of the case,
- Ensure each participant has a clear understanding of his/her role and understands what he/she is bringing to the process.
- Provide information regarding the order of proceedings and circle code of conduct. It is important that all participants are familiar and comfortable with the order of the proceedings and appropriate conduct in the circle.
- Inform the participants of the sentencing parameters for the case. Participants are advised of the sentence that would be applied by the Courts if the case were to proceed through the judicial system for sentencing. This information acts as a guide for the participants when considering appropriate options for reparation and sentencing.

Each participant is advised that the MLSN accepts the responsibility of reporting any disclosures of sexual abuse of a minor, indication of self-harm on the part of the Offender, or any perception of public danger that may be revealed in the circle process.

Location/Accommodation

Whenever possible, depending on the circumstances of the case, a circle will be held in a First Nation community in a quiet area free from phones and other noisy distractions. The area should be large enough to accommodate the circle participants comfortably with an area for refreshments. Comfortable seats are provided for everyone, arranged in a circle with no tables separating the chairs. The circle of chairs should be as small as possible to accommodate everyone present.

The Circle Facilitator will place markers to identify the seating arrangement for the circle. Although the seating arrangements in Sentencing Circles may vary somewhat, there are some general logistical considerations to be followed. To avoid any possibility of intimidation, the offender and the victim are not seated either together or directly across from each other. As well, the police officer is not seated directly across or adjacent to the

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offender or victim. Generally the Judge is seated to the right of the facilitator and the offender to the left.

Co-Facilitation – The Sentence circle process may become a very long and emotional process depending on the nature of the case. For this reason, the MLSN provides a co-facilitator who is also fully briefed on the case. The Co-facilitator attends the circle and provides support for the lead facilitator as needed.

Translation – The Facilitator will ensure that Mi'kmaq translation services are available if required.

Circle Proceedings

Each Sentencing Circle is unique to the circumstances of the offence, the offender, the victim and the community. However, the process that is followed is the same. This allows for each of the circles to maintain its accountability to the parties while maintaining the unique flavour of the case.

The Circle Facilitator arrives early and smudges the room in preparation for the circle. He/She invites participants to be seated in their assigned locations.

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The following order of proceedings is a guide for the sentencing circle process.

Opening the Circle

- A prayer is offered by an elder.
- The Facilitator delivers opening remarks to the circle participants:
 - Background of the MLSN and introduction of the Sentence Circle Process.
 - Ground rules of the circle and code of conduct
 - Role of the facilitator. The facilitator poses discussion topics, questions & issues, acknowledges comments, summarizes discussion, highlights concerns or points raised, and re-focuses discussion if need be.
 - It is important to remember the Circle is not a forum to determine the innocence or guilt of the offender. The Circle is there to offer support, guidance and fair treatment to the offender who has committed to self healing and making amends for their wrongful action(s).
 - Etuaptmunk is a Mi'kmaw word meaning Two-Eyed Seeing. With one eye, we view the world through Indigenous ways of knowing and with the other eye, we view the world through Western, or Eurocentric, ways of knowing.

• ***The Storytelling***

- Introductions – The facilitator passes the talking stick clockwise around the circle and asks everyone to introduce themselves, state what they do, what brought them to the circle, and who they are representing.
- The Crown states the charge and reads a joint agreement on the Statement of Facts.
- The Offender addresses the Circle sharing information regarding:
 - The incident in his/her own words
 - Feelings about the incident
 - How it has impacted/affected the community, victim, etc.
 - How he/she would react differently.
- The victim (or victim spokesperson) addresses the circle describing the incident and consequent impact to him/her and others.
- The talking stick is passed around the circle and back to the facilitator giving everyone the opportunity to express concerns, feelings and reaction to the offender and victim statements and giving their perception of the impact on the community as a whole. It may take more than one round of the talking stick before all concerns are expressed.

At this time, the facilitator asks participants to reflect on the recent discussion in the circle and think about recommendations for sentencing.

• ***Agreement Building***

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- The facilitator summarizes the proceedings to date and advises that recommendations discussed in the next round will be recorded.
 - The talking stick is passed again. Members of the circle are asked to consider the problem and possible solutions. The specific needs and community resources available for the offender are discussed. 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, and recommends what must be done to prevent crime and make reparations for damages caused by crime. This round begins with the Offender.
 - The facilitator summarizes all options presented and facilitates consensus on what will be included in the Sentence Plan for the Offender. Another round may be necessary.
 - The Facilitator puts forth the options for consensus.
 - Circle participants discuss how it will be monitored.
 - The sentence plan is prepared by the facilitator and presented to the Judge for decision.
- ***Closure***
 - A final round of the talking stick gives participants an opportunity for personal closure. Participants are asked to reflect on their feelings and experiences in the circle.
 - The facilitator acknowledges the work of all participants, and the progress that was made. He/she thanks everyone for their participation.
 - A closing prayer is offered by the elder.

There is no limit on the number of times the talking stick is passed in the circle. It circulates as long as participants have something to say that contributes to the circle process. The circle may break and reconvene as needed throughout the process.

Sentencing

Careful consideration is given to the sentencing recommendation as participants have full knowledge of:

- The acts of the case,
- The statements from the community,
- The needs of the community and offender with respect to reparation,
- Services/programs/monitoring arrangements available for the Offender, and
- The sentence parameters for the case.

Once the sentence plan is prepared, and presented, the Judge has the option to pass decision at the circle or later. If the decision is not to be made at the circle, the facilitator will advise

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that the recommendations will be documented, forwarded to the Judge to be heard in court at a specified date.

RECORDING/CONFIDENTIALITY

The MLSN acknowledges that the decision to record circle proceedings, the extent of the record, and the method of recording, rests with the Judge and must be in keeping with the openness presumed of most court proceedings.

However, confidentiality is critical to the efficacy of community sentencing circles and if maintained, it promotes more frank and open discussion. The MLSN maintains that, in some instances, public access and verbatim recording will inhibit circle participation.

The judge decides what form of recording is necessary to fulfill the requirements of the justice system. In some instances, full recording equipment may be used, while in others, a small tape recorder may suffice. If the judge files all material as part of the record, provides either a written or recorded summary of the basis for the consensus and all reasons for sentencing, the legal requirements are satisfied. This approach accommodates the recording requirements of the Justice system while respecting the community's confidentiality. The individual statements of the participant's are protected in confidence.

As Canadian criminal and civil courts have repeatedly utilized procedures such as courtroom clearing, publication bans, etc. to deal with sensitive information in special cases, the MLSN recommends the Court exercise appropriate measures to protect the confidentiality for circle participants when personal and sensitive information is revealed in the circle process.

The issue of confidentiality and recording should be addressed at the intake and preparatory stages of the circle and discussed openly between the Court and community.

Generally courtrooms are open to the public for observation and transparency. Again, in the case of sentencing circles, public attendance may inhibit the degree of participation and personal disclosure. Consequently the effectiveness of the process may potentially be compromised. Due to the sacred stories that may be shared in the circle and the honor of the confidentiality of the circle process, the MLSN maintains the process not be open to the public. It is recommended that public attendance be determined on a case-by-case basis.

SCHEDULING

The eligibility investigation and circle preparation stages of the Sentence Circle process can be very time consuming as participants are confirmed, briefed, and prepared, and logistics are addressed.

Many variables contribute to the timing and scheduling of Sentencing Circles:

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- Participant confirmation of commitment to the process and availability.
- Availability of the Judge
- The number of participants to be prepared.
- The particulars of the case (background investigation, extent of community impact, etc.)

The MLSN realizes the importance of a timely process from referral to sentencing and strives to complete sentence circles within three months of referral.

Depending on the case, the circle process can be lengthy. Generally, a circle lasts an average of three hours. However, in some instances the circle breaks after a three-hour period and reconvenes at another time. Again the exact timing is determined on a case-by-case basis.

DECISION MAKING

Decisions for the sentencing recommendations in a sentencing circle are reached by consensus. It should be noted here that consensus does not necessarily mean that everyone is in agreement with the outcome. However, it does mean that all participants have come to a decision that all can accept to be for the good of the community as a whole. The good of the community is given priority by all participants.

APPENDIX I

Bibliography of References

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Interviews with MLSN Circle Facilitators were also held to gather information and recommendations for this document.

Appendix II

Code of Conduct for Sentencing Circles

The circle process has been utilized by aboriginal peoples since time immemorial as a means for decision making, reconciling differences in the community, and as a means of community sharing and healing. As such, it is a highly respected community process that demands a certain standard of conduct. This code of conduct is “understood” by the community and has been passed down through the generations.

- Participants are to be informed of the issue at hand and come prepared to contribute to the process.
- Participants have knowledge of the circle process.
- Everyone is treated with respect and dignity.
- Participants are expected to be punctual.
- Each participant is to focus on the chore at hand and not on personal agendas.
- Participants are to keep the proceedings and discussions of the circle in strictest confidence.
- Everyone is to speak calmly in the circle; a loud angry tone/hollering/yelling are not tolerated.
- Individuals who are impaired or show signs of alcohol or drug abuse are not permitted to participate in the process.
- Interruptions are not tolerated. If a participant must be excused from the circle, the facilitator should be advised well in advance. Cell phones are to be turned off.
- The Circle does not require acceptance or approval of someone else's values, but does seek to create tolerance for different values.
- Participation is guided by the talking stick, which moves around the circle in a clockwise manner. The participant holding the stick is the only person permitted to speak and ask questions. The questions are not immediately answered but put forth for consideration until everyone has had the opportunity to speak and the talking stick has returned to the facilitator.
- All participants in the circle are equal and have equal say in the outcome of the circle. There is no perceived or assumed position of authority on the part of any participant.

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- The recommendations are reached by consensus. Consensus does not necessarily mean that everyone is in agreement with the outcome. However, it does mean that all participants have come to a recommendation that all can accept to be for the good of the community as a whole.
- Due to the sacred stories that may be shared in the circle and the honor of confidentiality of the circle process, the circle is not open to public or media observation.
- There is no limit on the number of times the talking stick is passed around the circle. It circulates as long as participants have something to say that contributes to circle process.
- The Facilitator may ask questions of anyone holding the talking stick.
- The Facilitator leads the process introducing the topic, presenting appropriate questions, clarifying and summarizing the discussions, etc.

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Appendix III

Role of the Sentencing Circle Facilitator

Prior to the day of the Sentencing Circle, the Facilitator has prepared the participants with information regarding the case, the process and the sentencing parameters. The circle is the venue for decisions and recommendations.

The facilitator is expected to:

- Ensure the physical accommodation for the circle is comfortable and free from interruption.
- Encourage all significant interests to be represented and respected.
- Allow parties to deal directly with each other.
- Provide an equal, effective voice to all parties.
- Create a safe problem -solving environment that generates frank, honest, respectful exchanges of fears, concerns, interests and aspirations.
- Provide a forum that builds better relationships, forges new partnerships, and fosters co-operative, innovative problem solving.
- Summarize all questions from the circle and facilitate the answers from the circle.
- Provide breaks as needed.