PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Elliot,* 2014 NSPC 110

Date: 2014-11-18
Docket: 2419079; 2450914; 2450916; 2507674; 2562104-2562110

Registry: Dartmouth

Between:

HER MAJESTY THE QUEEN

v.

PAUL JASON ELLIOT

Decision on Sentencing Circle Application

Judge:	The Honourable Judge Timothy Gabriel,
Heard:	September 19, 2014 and November 24, 2014, in Dartmouth, Nova Scotia
Oral Decision:	November 24, 2014
Written Release:	January 13, 2015
Charges:	Criminal Code 334(b); 259(4); 249.1(1); 145(2)(b); 348(1)(b); 333.1; 348(1)(b); 333.1; 348(1)(b); 333.1; 259(4)(b);
Counsel:	John MacDonald for the Crown Karen Endres for the Defence

By the Court: (Orally)

INTRODUCTION

[1] Mr. Elliot's case involves consideration of when it is appropriate for the Court to direct that a sentencing circle take place in relation to an aboriginal offender. On April 24, 2013 he changed his plea, thereby admitting his guilt with respect to three offences: theft contrary to s. 334(b), driving while prohibited contrary to S. 259(4), flight from police contrary to s. 249.1(1), and also with respect to a s. 145(2)(b) charge. The Court directed that a Gladue report be prepared.

[2] The matter returned on September 10, 2013. At that time, Mr. Elliot entered guilty pleas with respect to some further offences as set forth in the September 30, 2012 Information. Three were break and enters, contrary to s. 348(1)(b), three were thefts of a motor vehicle contrary to s. 333.1, and there was another driving while prohibited, contrary to s. 259(4) of the **Criminal Code**.

[3] The Gladue report recommended (among other things) that Mr. Elliot participate in a Sentencing Circle through Mi'kmaq Legal Support Network (or, as I will refer to it henceforth, MLSN). Mr. Elliot (through Counsel) requested that

all of his outstanding matters be referred to a Circle. The Crown did not oppose at that time and the matter was thus referred to MLSN at Eskasoni, Nova Scotia, for a recommendation as to whether a Sentencing Circle should take place in this instance. Further dates for status review were set.

[4] On November 13, 2013 Defence Counsel reported that MSLN had requested an additional six weeks to schedule the Circle. Ms. Endres requested that the matter be put over to January 6, 2014. The Crown did not comment at that time.

[5] On January 6, 2014, Defence Counsel advised Chief Judge Williams that, since Mr. Elliot was actually a member of the St. James Bay, Ontario community, MSLN was attempting to determine whether a Nova Scotia community would host the Circle. The thinking was that it would be the Mi'kmaq Native Friendship Center in Halifax Regional Municipality that would ultimately do so. Crown Counsel's remarks at this time were limited to "that's fine". This echoed what had been said on September 10, 2013 when the initial referral was made. A further status date of March 18, 2014 was assigned.

[6] Mr. Elliot was once again remanded by consent. Indeed, he has been on remand at the Nova Scotia Correctional Facility since his arrest on February 13, 2013.

[7] In early March of 2014, MLSN confirmed that the Halifax Mi'kmaq Native Friendship Centre were prepared to act as a host community for Mr. Elliot and that they were considered suitable to do so. MSLN recommended to this Court that the matter be referred to a Circle, to take place on May 13, 2014.

[8] At this point the Crown voiced its initial opposition to the referral of Mr. Elliot to a Sentencing Circle. This was expressed in a brief dated March 10, 2014 filed by Mr. MacDonald, who, at this point, assumed carriage of this matter on behalf of the Provincial Crown.

[9] On March 18, 2014, the proceeding was adjourned to April 14, 2014 for further status review, and from there to May 5, 2014 for a (now) contested application to determine whether a Sentencing Circle should take place. Various adjournments have ensued. I have received Ms. Endres' written brief in response to that of Mr. MacDonald, her's being dated September 9, 2014. I have also heard oral argument on September 17, 2014.

[10] My conclusion is that, in these circumstances, a referral to a Circle is appropriate, and Mr. Elliot's matters will proceed accordingly. As I explain why I have come to this conclusion, I will address the issues as the Crown has framed them, namely:

1. Are the offences and Mr. Elliot's record so objectively serious that there can be no sentence of two years or less and thus no probation or conditional sentence, and no opportunity for any conditions as recommended by the sentencing circle and;

2. Do Mr. Elliot's personal circumstances make the use of a circle inappropriate, according the criteria used by the Court to determine appropriateness in a sentencing circle?

ANALYSIS

[11] Before dealing with the issues noted above, it is important to consider first, the nature of Sentencing Circles in general, and second, the criteria set out in **R. v. Joseyounen**, [1995] 6 WWR 438 (Sask. PC), and the extent to which this criteria is helpful in assessing when it is appropriate to refer an accused to such a circle. As will be seen, the issues raised by the Crown, in the case at bar, directly engage the seventh and second (respectively) of the **Joseyounen** criteria.

[12] Section 718.2(e) of the **Criminal Code** is a good place to start. While it does not abrogate any of the sentencing principles that are contained in Section 718 as a whole, it does oblige the Court to consider in addition "…all available sanctions other than imprisonment… with particular attention to the circumstances

of aboriginal offenders.". The Supreme Court of Canada has given extensive attention to this section, particularly in such decisions as **R. v. Gladue,** [1999] SCR 688, **R. v. Wells,** [2000] SCR 207 and **R. v. Ipeelee** 2012 SCC 13. A host of lower Courts across Canada have also considered and applied the principles set out in these cases.

[13] In **Gladue** (**supra)**, at paras. 64 and 65, we are told that the effect of s. 718.2(e) is such that the Court must "…inquire into the causes of the problem and… endeavor to remedy it, to the extent that a remedy is possible through the sentencing process". Neither section 718 or any of the other provisions of the **Criminal Code** mentions, much less regulates, the use of sentencing circles in relation to an aboriginal accused. Their use, however, appears to flow logically from the duties of a Sentencing Court set out by the Supreme Court of Canada in the decisions mentioned above.

[14] Indeed, the road to their use appears to have been paved by an earlier decision of the court, **R. v. Gardiner** [1982] 2 SCR 368, which in tandem with s. 718.2(e), requires that the Court should have enough information about an accused to ensure that his or her sentencing is an individual exercise. The Court in **Gardiner (supra)** puts it quite well at para. 414:

> It is a commonplace that the strict rules which govern at a trial do not apply at a sentencing hearing and it would be undesirable to have formalities and technicalities characteristic of the normal adversarial proceeding prevail… The Judge traditionally has wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime. (emphasis added)

[15] The evolution of the use of Sentencing Circles has taken place against this backdrop. Judge Fafard, in **Joseyounen** at paras. 37 to 41 explained their *raison d'etre* and genesis in the following way:

> It is often said in sentencing circles and elsewhere that one main purpose of the circle process is to keep aboriginal offenders out of jail. It is not so. It may well be that a welcome side-effect of sentencing circles is that fewer offenders are incarcerated. I know that this is the result in property related offences especially. I know this because at the opening of the sentencing circle I inform the participants that without their assistance in finding an alternative a certain period of incarceration will be imposed. This is to insure that the offender knows where he stands.
>
> But keeping people out of jail is not the aim of this exercise. If that were the only goal, one need only open the jail and release all aboriginal inmates immediately. The aim of sentencing circles is the same as it is when the disposition is arrived at by other means: the protection of society by curtailing the commission of the crime by this offender and to others.
>
> However, in sentencing circles the emphasis is less on deterrence and more on re-integration into society, rehabilitation, and a restoration of harmony within the community.
>
> I understand that this attitude was developed as a survival tool because traditional native North American groups could ill afford the luxury of exacting revenge on individual productive members of the group. Subsistence was sometimes marginal, particularly before the arrival of the horse and the gun. I believe revenge could only be contemplated if the group had sufficient foodstuffs in storage to ensure the continued survival of the band, otherwise, killing or incapacitating one capable of contributing to hunting or gathering would put the group's survival at risk. That does not mean that there were not individual acts of retribution, but these were probably frowned upon by the band because, again, this would jeopardize group survival. (emphasis added)

[16] Then, at page 439 of **Joseyounen**:

> The first sentencing circle to be held in Saskatchewan took place in Sandy Bay in July of 1992. I was the presiding judge. Since then many sentencing circles have been held in Northern Saskatchewan (I estimate that I have dealt with over 60 cases in that manner myself), and out of this experience by me and my colleagues on the Provincial Court in the north, there have emerged seven criteria that we apply in deciding if a case for sentencing should go to a circle. These criteria are not carved in stone, but they provide guidelines sufficiently simply for the lay public to understand, and also capable of application so that our decisions are not being made arbitrarily. (emphasis added)

[17] Judge Fafard went on to outline these criteria, which consisted of the following:

> (1) The accused must agree to be referred to the sentencing circle. (2) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn. (3) That there are elders or respected non-political community leaders willing to participate. (4) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing. (5) The Court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she is, then she should have counselling made available to her and be accompanied by a support team in the circle. (6) Disputed facts have been resolved in advance. (7) The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.

[18] In **Joseyounen**, the accused had embedded an iron poker in his brother's head and the victim was still in the hospital at the time of trial. The charge was aggravated assault and endangering life and the accused's record featured a dozen prior related convictions, including assault causing bodily harm, assault with a weapon, and several common assaults. Judge Farfard was not prepared to take "a calculated risk" and impose anything other than a penitentiary term because there was a "threshold sentence" in a case of this sort from which he felt "he could not and should not depart".

[19] There is only one case in Nova Scotia (to my knowledge) in which reference is made to the **Joseyounen** criteria. It is an indirect reference, and it occurs in **R. v. Brooks** 2008 NSPC 58, where Judge Anne Derrick states at para. 2 of her decision:

> The Crown's acknowledgment that the recommendations of a sentencing circle could be helpful in Mr. Brook's case made it unnecessary to determine whether a sentencing circle should be convened. An analysis of principles that go into the determination of whether a sentencing circle should be used is found in the decision of the Newfoundland Court of Appeal in **R. v. J.J.,** [2004] N.J. No. 422.

[20] In **R. v. J.J. (supra)**, Justice Rowe distilled the various authorities (including **Joseyounen** and **R. v. Morin**, [1995] 101 CCC (3d) 124 (Sask. C.A.)**)** to the following effect:

> I find the case law from Saskatchewan persuasive as to when a sentencing circle should be used. I would adopt the Saskatchewan Court of Appeal decisions in Morin and Taylor. In light of these, I would note five general factors to be considered in deciding whether or not to use a sentencing circle:
>
> 1. the willingness and suitability of the convicted person;
> 2. the willingness of the victim (freely given);
> 3. the willingness of a suitable community to participate in the circle and in implementing its recommendations;
> 4. whether the offence, in all the circumstances, is one that requires a term of imprisonment; and
> 5. such other relevant factors as may appear important to the Trial Judge, in the context of the case.

[21] Two things are apparent. First, no case purports to exhaustively set forth the criteria that can or could possibly impact upon the determination of whether or not to convene a Circle. That point is implicitly made (number five) in the above

quote from **J.J (supra)**, and expressly made in **Joseyounen (supra)** ("These criteria are not carved in stone") at p. 439. Second, all of the criteria to which the authorities refer are, generally speaking, reflected in the factors set out in **Joseyounen (supra)** to which repeated references have already been made.

[22] To be sure, the emphasis placed on one or the other of the criteria in an individual case may differ, and in some cases a particular criterion may be expressed differently. For example, with respect to the seventh factor in **Joseyounen (supra)** ("… Court… willing to take a calculated risk and depart from the usual range of sentencing") the Saskatchewan Court of Appeal, in **R. v. Cheekinew**, [1993] S.J. No. 119 (Sask. C.A.) had earlier framed the issue this way at para. 149 to 150:

> Clearly, if the trial judge is, following the conviction of the accused, of the view, on the whole of the evidence, that the offender must receive a punitive term of imprisonment of two years or more then, as such a sentence cannot, by virtue of the provisions of s. 737 of the **Criminal Code**, be coupled with a probation order, a submission should not be heard to the establishment of the sentencing or like circle in such cases.

[23] However, differences in elaborations or differences of emphasis, like those noted above, are the exceptions that prove the rule. By and large, the criteria espoused in the various authorities are either derivatives of, or very comparable to, those set out in **Joseyounen (supra).** Clearly, they are adaptable enough to be applied to individual cases involving the specific circumstances of individual

aboriginal offenders. For this reason, I regard the seven criteria set forth in **Joseyounen** (**supra)** as a helpful (non-exhaustive) general statement of guidelines to assist the Court when attempting to decide whether to refer a particular matter to a Sentencing Circle. The other authorities, some of which have been referred to above, provide additional elaborations upon these various factors, as they are applied in specific factual contexts.

[24] In this case, I deal with only two of these criteria, those bearing upon the issues raised by the Crown herein. That said, it will be seen (particularly when we deal with the second issue raised by the Crown, which involves the second of the **Joseyounen** criteria) that no individual factor or criterion can be considered in isolation from all other relevant circumstances.

[25] Thus, we arrive at the first issue (whether the objective seriousness of the charges precludes the use of a Sentencing Circle). The Crown contends that support for its position may be found in cases like **Joseyounen (supra)** ("…threshold sentence from which I cannot and should not depart"), and **Cheekinew, (supra)** ("… of the view… that the offender must receive a punitive term of imprisonment of two years or more"). Particular emphasis has been placed on the decision in **Morin (supra)**, where Justice Sherstobitoff, writing for the majority, stated at para. 18:

> As a matter of principle, however, we should say that it would be futile, for the reasons given in both, **Joseyounen supra** and **Cheekinew supra**, to use a sentencing circle in those cases where it is clear that the circumstances require, at a minimum, a penitentiary term. If a sentence exceeds two years imprisonment, the court is without power to impose any conditions on the accused after he has served his term. There is, accordingly, no means of enforcing any obligations undertaken by an accused as a result of the recommendations of the community through a sentencing circle. That does not preclude voluntary action on the part of the community and the accused such as that contemplated by Fafard P.C.J in **Joseyounen** when he indicated that he was prepared to use what he termed a "healing circle" which might make suggestions for parole conditions to the Parole Board if and when the accused made application for parole.

[26] In **Morin (supra)**, the accused's pre-sentence report indicated that he was remorseful but also manipulative, persuasive and in need of control. He had said nothing of his plans to straighten himself out except a general promise to do better. The Court of Appeal had been left with the impression that he was only interested in a lower sentence when he agreed to participate in a Circle.

[27] This is to be contrasted with Mr. Elliot, in the case at bar, where:

1. The Gladue report recommended that a sentencing circle be implemented;

2. On September 13, 2013, November 13, 2013 and January 6, 2014 two different Crown Counsel (again, not the Counsel presently having carriage of the case) acquiesced with the Defence request that the matter be referred to MSLN for a recommendation as to whether a circle should be held;

3. This acquiescence occurred at a time when the objective seriousness of the charges being faced by Mr. Elliot was known to all. Further, the fact of the accused's prior (extensive) criminal record was also known to the Crown, but was was not available to the Court at that time (since his previous record receives only sparse and passing treatment in the Gladue report).

4. It was not until early March 2014, after MSLN had succeeded in identifying what it considered to be a suitable host community and ascertained that this community, the Mi'kmaq Native Friendship Centre in Halifax, was prepared to act as host, that the Crown, through present Counsel, indicated its opposition to the referral.

[28] Virtually all of the information with respect to Mr. Elliot's prior record and what the Crown has referred to as the objectively serious nature of the current charges was known to the Crown when the referral to MSLN was first made on September 13, 2013. The Crown's acquiescence in the face of this knowledge, taken at face value, suggested or implied a position in which the use of a Sentencing Circle is not (necessarily) precluded by consideration of the arguments which it now raises in relation to the its issue.

[29] Similarly, it matters not whether the Crown's acquiescence was only given at first instance because it doubted that MSLN would be able to find a suitable host community willing to act. As I will discuss shortly, the Crown also knew, since at least January 6, 2014, that the host community was very likely to be the Mi'kmaq Native Friendship Centre in Halifax. It was stated explicitly in court on that date that this was the host community under consideration at that time.

[30] As we have seen in **Joseyounen,** the seventh criterion states that the case must be one in which the Court would be willing to take a "calculated risk and depart from the usual range of sentencing". It is also true that this guideline has been expressed in different ways, some of which have been more categorical than others. In **Joseyounen** itself, which involved the serious circumstances to which I have referred earlier, Judge Fafard concluded at para. 45:

> I will grant the request. It will not be a sentencing circle as such because there is a threshold sentence in this case from which I cannot and should not depart. As a healing circle, however, it will serve a useful purpose and perhaps a circle will be able to make suggestions for parole and conditions that the parole board would wish to consider if the accused makes an application for parole.

So, too we the have the quotes from **Morin (supra)** and **Cheekinew (supra)** to which previous reference has been made.

[31] With respect, I prefer the more flexible manner with which this guideline was approached in cases such as **R. v. McDonald,** 2012 SKQB 158. This dealt

with a charge of criminal negligence causing death. The Court stated at para. 16 to 17:

> Crown counsel indicated that the basis for the Crown' position that a three-year penitentiary term was appropriate was the case of **R. v. Pauchay**, 2009 SKPC 35, 333 Sask. R. 167. However, in the same case, the learned Provincial Court judge had ordered a sentencing circle to assist him in determining the appropriate sentence. See 2009 SKPC 4, 328 Sask. R. 173. At para. 44 of the sentencing circle decision, the learned Provincial Court judge stated:
>
> > A review of these cases leads me to conclude that whereas I am prepared to say that a penitentiary term may be an appropriate sentence in these circumstances, I am not prepared to say that, to use the phrase used in the **Morin**, supra, case, that "it is clear that the circumstances required, at a minimum, a penitentiary term. Without deciding what an appropriate sentence would be, I am mindful of the fact that not every case in criminal negligence causing death has resulted in a penitentiary term. One further example is the **Rope**, [(1995), 136 Sask. R. 171], sentence, referred to earlier in this decision.
>
> Based upon the above cases and without deciding what an appropriate sentence may be, I am satisfied that the circumstances of this case do not require a minimum penitentiary term. Accordingly I am not prevented from ordering that a sentencing circle to be held based upon this criterion. (emphasis added)

[32] In this case, I would echo the above comments. There is no applicable mandatory minimum sentence in the case at bar. Without having heard any of the applicable facts (this case involves a guilty plea where none of the facts have been read into the record as of yet) I can say (at most) that a penitentiary term may be an appropriate sentence when the dust settles. However, I am not prepared (at this time) to say that this case is one which would require, at a minimum, a penitentiary term, particularly when the Crown itself was not prepared to take such a position until six months had passed after the initial referral was made by the Court to

MLSN for a recommendation. Also of relevance is the length of the pretrial and / or presentence custody served by Mr. Elliot, which will result in a significant "credit" against the length of the overall sentence that is ultimately imposed, pursuant to section 719. There is also the possibility of enhanced credit pursuant to s. 719(3.1).

[33] The second issue being raised by the Crown (and the second basis for its objection to use of the Sentencing Circle in this case), has been earlier noted: "do Mr. Elliot's personal circumstances make the use of a circle inappropriate, according to the criteria used by the Court to determine the appropriateness of the sentencing circle?" The Crown's written and oral arguments with respect to this issue were focused upon the fact that MSLN has identified the host community for the Circle to be the Mi'kmaq Native Friendship Centre in Halifax, Nova Scotia. In the absence of an indication that the accused has resided very long in Halifax Regional Municipality, the Crown has indicated a concern that the Friendship Centre will be unable to adequately assist and / or supervise him.

[34] In **Joseyounen** (**supra)** Judge Fafard's second criterion suggests that the accused must have "deep roots in the community in which the circle is held and from which the participants are drawn". Would this invariably require a period of long standing residence in the proposed host community, or is it a more flexible

criterion, one to be determined on the basis of all relevant circumstances, in which case the length of residence would be merely one such circumstance?

[35] It is important to bear in mind that one of the most important things that we are attempting to evaluate (when engaging this issue) is the degree of accountability that an offender will have or feel toward the proposed host community and the individual members who will comprise the Circle. Often, an offender who has lived all or the greater portion of his / her life in a particular community will feel accountable to it, thus facilitating the supervisory function that the community will be undertaking in such cases post-sentence.

[36] But recall that the rehabilitative function which the circle also attempts to advance through its recommendations focuses upon the re-integration of the offender back into his or her community. The community in general, and the constituent members of the circle, in particular, must therefore be capable of playing a meaningful role in supervising the compliance of the offender. To do so, the community must possess sufficient moral authority in relation to the offender. He or she must feel sufficiently accountable toward it. Among other things, the offender must be someone to whom it will matter very much if he / she ends up being ostracized by, or estranged from, the community in question.

[37] Often, as indicated, individuals who have spent a lifetime (or most of one) in a small, close-knit community, such as a western rural reserve, will feel very accountable to it. This does not mean, in my view, that more transient or urban aboriginal peoples, who have spent a much less significant portion of their lives in a particular place, cannot ever establish roots that are "deep enough" to merit consideration. I say this notwithstanding the comments contained in **R. v. Cheekinew** (**supra)** at para. 149 to 150, which are to the effect that the offender must be:

> …supported in the request for the establishment of a sentencing circle by the offender's own community willing to participate in the sentencing circle process and to make meaningful sentencing recommendations. As well, to assume responsibility for the supervision and enforcement of the terms of the probation order including the reporting of any breach of the terms thereof. In this context the term "community" ought not to receive a wide and liberal construction as the term "community" may be, and probably is, a term capable of different interpretations depending on the residence, or proposed residence, of the particular offender and/or other fact relevant to that term's interpretation.
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> (emphasis added)

[38] The Crown also cites **Cheekinew** (**supra)** to the effect that: "As well, I am not satisfied even if given the opportunity to do so that he has a "community" in Saskatoon, that his community will be able, and even willing… to properly control and supervise him".

[39] Emphasis has also been placed upon an excerpt from **McDonald** (**supra)** where the Saskatchewan Provincial Court states at para. 25:

> In my opinion, the proposed members of the sentencing circle do not meet the definition of "community" referred to in the case authorities previously cited in paras. 19 and 20. It is proposed that the sentencing circle be held in the City of Saskatoon. While there may be circumstances in which Saskatoon will be considered a community for the purpose of holding a sentencing circle, such circumstances do not exist in this case. Although the accused has lived in Saskatoon for at least 15 years, there is no evidence before me that she has deep roots in the community. All of the participants proposed in the PSR are family members or quasi-family members and none of them live in Saskatoon except for the accused's common law spouse, Brad Chatelaine.

[40] Interestingly, in both **Cheekinew** and **McDonald,** the objection offered to Saskatoon as a viable host community had its basis, for the most part, in the proposed makeup of the members of the Circle rather than the city as such. Were these cases to be considered broad enough to rule out the use of an urban center as host in all cases, it would clearly place aboriginals in such settings at a distinct disadvantage to those who have elected to remain, for example, in their ancestral communities, which are, in the Prairie Provinces (generally speaking) rural ones.

[41] In **R. v. J.J. (supra)**, as we have seen, the Newfoundland Court of Appeal gleaned from the authorities a list of criteria for use when determining whether or not to make use of a sentencing circle. When addressing who should host it, Justice Rowe merely spoke (at para. 34) in terms of "the willingness of a suitable community to participate in the circle and in implementing its recommendations".

[42] Moreover, the previously mentioned excerpt from **Cheekinew,** which suggests that "community" should be given a restricted rather than a liberal

meaning for present purposes, seems to run counter to the thrust of later pronouncements by the Supreme Court of Canada, in decisions such as **Wells (supra)**, **Gladue** (**supra)**, and **Ipeelee** (**supra),** as well as to the criteria noted by the Newfoundland Court of Appeal in **J.J. (supra),** all of which have been previously cited. These decisions posit a more flexible definition of the term, one which would appear to be more applicable to the particular circumstances of aboriginal peoples in the Atlantic or Maritime Provinces and their particular histories.

[43] In **Gladue (supra)**, for example, although the Court does not directly advert to Sentencing Circles as such, it does state in para. 81:

> The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the **Criminal Code** and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

[44] And at para. 92 of **Gladue,** Justices Cory and Iacobucci continued:

> Section 718.2(e) requires the sentencing judge to explore reasonable alternatives to incarceration in the case of all aboriginal offenders. Obviously, if an aboriginal community has a program or tradition of alternative sanctions, and support and supervision are available to the offender, it may be easier to find and impose an alternative sentence. However, even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative. For all purposes, the term "community" must be defined broadly so as to include any network of support and interaction that might be available in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.
>
> (emphasis added)

[45] If the Court in **Morin** had had the (later) **Gladue**, **Wells**, and **Ipeelee** decisions to draw upon, I cannot conceive that a narrow definition of the term "community" (in this context) would have been adopted or espoused.

[46] I noted earlier that a broader definition of "community" is one much more applicable to aboriginal peoples in the Atlantic Provinces, many of whom do not live on reserves as "rural" as those in the Western provinces. In Nova Scotia, for example, many such reserves are very proximate to urban centres, and this proximity frequently encourages people to move around and reside in different areas of the province for different portions of their lives. We also encounter, in Nova Scotia, the after-effects of a centralization policy pursued by the Provincial Government which attempted the forced relocation (in 1942) of aboriginal people in Nova Scotia to either the Eskasoni or Indian Brook reserves. One of the effects of this policy was an exodus of people from the other reserves, many of whom

chose to live in predominantly non-aboriginal urban communities, elsewhere in the province, rather than in either mandated location.

[47] As stated, in **Ipeelee** (**supra)** the Supreme Court of Canada, (at para. 85) reiterated that we must consider the "unique circumstances of aboriginal offenders". A broader, more flexible definition of the term "community", in my view, simply assists that process by ensuring that the totality of the circumstances bearing upon an individual may be considered when the suitability of a proposed host community is assessed. Length of residence in the particular community is only one factor in such an analysis.

[48] A Sentencing Circle can, in appropriate cases, be a powerful tool to ameliorate or (at least) address those factors which have caused or contributed to the behaviour of the offender in the first place, and promote his or her re-integration into the community in question. The availability of a Circle to an aboriginal offender ought not to be determined merely on the basis of the length of residence in the proposed host community. Nor should all urban centers be dismissed from consideration as "communities" summarily upon the basis that the aboriginal population in such places forms only a smaller part of the total urban mix. All factors bearing upon the ability of the host community to discharge its responsibilities in relation to the supervision of the offender, and bearing upon the

degree of accountability that offender might feel in relation to it, are relevant when the depth of his or her roots in the community is assessed.

[49] Some of the factors relevant to this analysis were considered by Chief Justice Bayda in his dissent in **Morin (supra)**. This dissent received favourable comment from the Newfoundland Court of Appeal in **J.J. (supra)** at para. 30, to the following effect:

> Chief Justice Bayda, in his dissent in **Morin supra** (concurred in by Jackson, J.A.), addressed when it is appropriate to use a sentencing circle. At para. 86 et seq. he set out two main criteria and then referred to other factors to be considered:
>
> > …When is it appropriate to hold a sentencing circle? It is clear from the literature on the subject and from the agreement in argument of counsel before us that two mandatory criteria must be present: the willingness of the offender and the existence and willingness of a community.
> >
> > The two criteria when fleshed out produce two prerequisites which may be stated as follows: Before directing that a sentencing circle be held the judge, upon considering all the evidence before him or her bearing upon that specific issue, must be satisfied that:
>
> 1. There exists a community with the following attributes:
>
> (i) the community is reasonably well defined by reason of the racial origin of its members, their religion or their culture or by geography or some other feature which distinguishes the community from other communities;
>
> (ii) <u>the community recognizes the accused not only as a member but as one who has the kind of relationship with the community that ought to make him or her feel accountable to it for any criminal wrongdoing;</u>
>
> (iii) the community supports the accused in his or her difficulty with the law and is prepared to accept the accused as a person who has the capacity, inclination, need and the sincerity to be restored (healed) in his or her relationship with the community and his or her relationship with the victims of the wrongdoing;

> (iv) the community has sufficient healing or restorative resources to help the accused (and where necessary the other persons affected by the wrongdoing) in that restoration or healing.
>
> 2. The accused:
>
> (i) considers himself or herself a member of the community and as one who has the kind of relationship with it that makes him or her feel accountable to it for the wrongdoing;
>
> (ii) has the capacity, inclination, need and sincerity to be restored (healed) in his or her relationship with the community and with the victims of the wrongdoing;
>
> (iii) has taken full responsibility for the wrongdoing;
>
> (iv) has pleaded guilty or in some other acceptable way has demonstrated the attributes described in (ii) and (iii);
>
> (v) is prepared to accept and carry out the decision of the community acting through its representatives at the sentencing circle respecting the measures the community deems appropriate for the restoration or healing.
>
> (emphasis added)

[50] In Nova Scotia, the Sentencing Circle process is invariably initiated by a referral (by the Court) to MLSN. The referral to MLSN is for recommendation as to whether a Circle should be held. MLSN has a set of criteria which it follows when deciding whether or not to recommend a circle, with respect to a particular accused. Some of these criteria are noted in the Crown's brief as such:

> The offender must:
>
> - Accept full responsibility for the offence brought before the Circle.
> - Be willing to listen and acknowledge the harm to the victim and community.
> - Be honest and willing to make amends for the harmful acts.
> - Be committed to process and be willing to accept the Sentence plan.
>
> The community must:
>
> - Be willing to take responsibility for the offender.

- Be willing to offer the offender support and guidance and hold the offender accountable.
- Take a leading role in the reparation of harmful behaviours and seek solutions to assist the offender's re-integration into the community.

[51] Implicit in the above is that the community must be one which is not only "willing" to take responsibility for the offender, but "able" to do so. As well, it must be able to offer guidance and support and hold the offender responsible, and seek solutions to effect the offenders' re-integration into the community. If the community is not considered to be one with the ability to give effect these objectives, then it is not a suitable host community.

[52] In this case, MLSN has investigated and determined that, in its view, the Mi'kmaq Native Friendship Centre is an appropriate "host". There has been no objection by the Crown on the basis of the specific members who would constitute the circle, nor to my knowledge, has their names been publicized.

[53] Rather, the Crown maintains that all of the offences were committed outside the community being proposed. The community is but one small part of the urban landscape of the Halifax Regional Municipality or the city of Halifax, into which the offender could conceivably disappear after sentencing without any accountability to the community, even if the community could satisfy the other desirable attributes or features of a "host community" for present purposes. The

Crown says there just isn't enough in this case to show that the accused would feel bound to the proposed community or that he has sufficient desire to re-integrate into it.

[54] In response, we must consider the results of the investigation of MLSN which suggests that the Mi'kmaq Native Friendship Centre is not only willing but able to fulfill its responsibilities that pertain to the host community. According to its present Sentencing Circles protocol as updated in May of 2014 at page 6:

> The MLSN began operations in July 2002 under the umbrella of The Confederacy of Mainland Mi'kmaq. The purpose of MLSN is to develop and maintain a sustainable justice support system that will address inequities for all Mi'kmaq and Aboriginal peoples involved in the Nova Scotia Criminal Justice System. MLSN activities are guided by the vision and goals of the Mi'kmaq Legal Services Network Framework. The vision of MLSN is:
>
> > *That Mi'kmaq and First Nation people will have autonomy and control over their justice support system within a time frame to be determined by the Mi'kmaq and First Nation people and their leadership.*
>
> MLSN houses the Mi'kmaq Customary Law Program. It is through this program that MLSN facilitates Sentencing Circles for Mi'kmaq and Aboriginal people in conflict with the criminal justice system within Nova Scotia.
>
> (emphasis in original)

[55] MLSN follows a detailed process post referral, one in which the offender is considered for eligibility and suitability. With respect to the latter, the following are considered, and again I am quoting from the MSLN protocol ("the protocol"), as set out on page 17 thereof:

(a) The accused accepts full responsibility for the offence;

(b) The accused voluntarily wishes to proceed with the Sentencing Circle;

(c) The accused understands the Sentencing Circle process and exhibits respect and understanding of the Mi'kmaq justice circle process;

(d) Any areas of concern and the needs of the accused;

(e) The accused is willing to actively participate in a Wellness Plan, prior to the commencement of the Sentencing Circle, if the community Justice Circle Committee determines one is necessary;

(f) The accused can identify supports within the Aboriginal community;

(g) The accused is willing to discuss, listen and acknowledge the harm to the victim and the community and;

(h) The accused is honest, committed to the process and willing to make amends for the harmful acts and willing to accept the Sentence Plan derived from the Sentencing Circle

[56] As to the host community itself, it must be one, (as per the protocol at para. 18):

> "…willing to take responsibility for the accused, offer the accused support and guidance, take a lead role in the reparation of harmful behaviours and seek solutions to assist the accused's re-integration into the aboriginal community".

[57] Further, at clause 7.5(4) it says:

> "in cases where the identified Aboriginal community is unwilling or unable to adequately support the accused, or views the referral as inappropriate for a sentencing circle, the matter will be referred back to the Courts…"
>
> (emphasis added)

Thus, we can see that, in practice, both the willingness and the apparent ability of the proposed host community to achieve the rehabilitative and reintegrative goals to which a Sentencing Circle aspires, are addressed by MLSN before it makes its recommendation whether for or against the use of a Circle, in an individual case.

[58] MLSN is, in my view, in a much better position than the Court to assess the suitability of a proposed host community with respect to the obligations which it would have to shoulder in the event of a sentencing circle. The role of MLSN is investigative in this regard. The investigation is triggered, as I indicated earlier, by a referral from the Court. After investigation in accordance with this protocol, MLSN may or may not recommend that the matter be referred to a circle.

[59] Obviously, this does not mean that the Court has abdicated its role in any aspect of this matter. It is only a recommendation (at the request of the Court) that MLSN provides. What this does mean, however, is that when MLSN has investigated and considers that a particular community is willing and able to fulfill the role expected of a host, the onus will lie with the party opposing the recommendation (generally the Crown), to demonstrate either that the attitude or bona fides of the offender, the resources of the community or the proposed members of the Circle (in the event those individuals are known), renders the community inadequate for the purpose. In most cases, this onus will not be discharged merely by pointing to the length of time that the offender has been resident in or associated with the community in question.

[60] An attitude of accountability to the community, to the point where the community may assist the offender to achieve the goals to which the circle aspires,

is what is sought in a assessing a candidate's suitability for the use of a circle. This attitude may be cultivated (if indeed it is ever achieved) in different people over different time spans. These spans vary with the individuals and their individual circumstances. In some, it may be a lifelong process, while for others a far shorter interval will suffice. Some individuals will never acquire or develop a feeling of accountability to any community, even after having spent a lifetime in a particular place. The phrase "deep roots" contained in the second of the **Joseyounen** criteria must be flexible enough, when it is applied, to take in the particularities and circumstances of the offender and community under consideration and should, in my view, be considered in tandem with Chief Justice Bayda's elaboration of the relationship between the community and the accused in his dissent in **Morin (supra),** to which previous reference has been made.

[61] In the case at bar, Mr. Elliot has been resident of Halifax Regional Municipality since at least 2010. In 2011, he enrolled in an automotive service program offered by the Native Council of Nova Scotia. He has attended sweat lodge ceremonies facilitated by one or more members of the Mi'kmaq Native Friendship Centre and has participated in various programs, while incarcerated, (prior to his residency in Halifax Regional Municipality) that were sponsored or put on by members of the Centre. At least one of the crimes for which he is to be

sentenced involves the aboriginal community, that being the Nova Scotia Native Council, and the project co-ordinator, Amanda Curtis is prepared to participate in the circle and is indeed in favor of its use. The Gladue report recommends Mr. Elliot's participation in the circle and, as discussed, MLSN, acting upon a referral from this court, has come back with a recommendation that the matter should be referred to a circle to be hosted by the Halifax Mi'kmaq Native Friendship Centre.

[62] This particular (recommended) host cannot have come as a surprise to the Crown. Mr. Elliot lives in Halifax Regional Municipality and has lived at all relevant times in this community. It is not immediately clear who else besides the Mi'kmaq Native Friendship Centre in Halifax Regional Municipality could have even been considered as a possibility to host it in the event that the circle was to go forward.

[63] If there existed any doubt on the point (as I indicated earlier), on January 6, 2014, it was explicitly stated in court by Defence Counsel that the Friendship Centre was the particular host under consideration. Again, no objection was taken on this issue either until early March 2014.

CONCLUSION

[64] Under all of these circumstances, for the reasons stated, I am prepared to refer the matter to a sentencing circle on all charges. It is self-evident that the recommendations, once received, are not binding upon the Court. They will, however, better inform the Court in the discharge of its responsibility to ensure that the sentencing process in relation to Mr. Elliot is an individual one, and that all of the sentencing considerations (including that of proportionality, to which the Gladue factors speak) are addressed. If it should be the case that all or any of the recommendations emanating from the circle are not acted upon, they may, nonetheless (after sentence is imposed) have other uses. One such use was referenced in **Joseyounen** (**supra)** in which they were used to facilitate the healing of the individual in conjunction with his community. The recommendations may also be relevant to services to be made available to Mr. Elliot in prison, if his sentence should involve a period of incarceration.

Timothy Gabriel, JPC