

An *Ex Post Facto* Review Of A Restorative Justice Deferment Circle Case

"Hope is being able to see that there is light despite all the darkness."

~ (Archbishop Desmond Tutu, 1931-2021)

Restorative justice (RJ) circles have been practiced by indigenous peoples globally *in memoriam*. Historically, major religious texts such as the Quran, Torah and Bible also reference them. These practices have been assimilated and adopted by Anglo-Western jurisprudence in the past hundred years as an alternative to the court system.

In 2021, the Federal-Provincial-Territorial Working Group on Restorative Justice

published a report entitled *Increasing the Use of Restorative Justice in Criminal Matters in Canada: Findings from a 2018-2019 Jurisdictional Scan*. That report identified that in 2018/2019, 30,658 cases had been referred to RJ. Of those accepted, 51% involved crimes against property, followed by 36% involving crimes against the person.¹ The direction provided by the report is clear: "given the high number of cases going through the court system every year, there is an opportunity to consider increasing the use of RJ, particularly as RJ is not often used for cases in adult criminal court."²

International and Canadian research consistently has demonstrated that RJ can:

1. increase victim satisfaction and likelihood they will receive an apology.
2. reduce victim's fear, anxiety and desire for revenge.
3. provide the offender with a platform to participate in a non-punitive process.³

As trained practitioners in RJ, we had previous opportunity to work with the Crown on Deferment cases, and we are electing to share our forensic review in one Ontario case *ex post facto*: a sexual assault. Deferment is solely criminal and led by the Crown. Additionally, the deferment practitioner has the authority to prescribe sanctions within the file, including anger management, addictions treatment, community service and Canada Revenue Agency-approved charitable donations. This case was a successful RJ Circle involving the victim, offender, their support persons, the Crown, and lawyers.

This case took over 80 hours from receipt of file to completion and was specifically prescribed as an RJ Circle. It required significant investment from the circle facilitators in individual participant interviews and preparation, process design and circle execution.



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On assumption of the file, we identified three key stages: file activation, pre-circle, meetings, and circle day.

File Activation

In conception and design of the circle, we considered these factors: subject matter, emotional sensitivities, availability of out-of-town and out-of-province participants, diverse needs of the participants, and legal accommodations.

We designed documents for circle participants to review, sign and return:

1. a customized agreement to participate that included shared principles of confidentiality, respect and expectations
2. a brief description of the circle process, participant roles and responsibilities
3. a nomination of a support person for circle day, and the requirement to meet with them pre-circle

We then advised participants that circle day could be a minimum of three hours to a full day. The confidentiality and safety of all participants was affirmed with a commitment to provide a secure, private meeting location.

Pre-Circle Meetings

We sent individual invitations to participants for a pre-circle meeting of approximately 60-90 minutes. This meeting was used to outline the process as well as participant roles and responsibilities. In this meeting we also provided an opportunity for participants to share their account of the incident and impact and to discuss the nomination of support persons. Participants were made aware that they could meet with us multiple times pre-circle day to address any questions or concerns. This offer was widely utilized.

Pre-circle meetings also permitted us to assess and recommend if further support, counselling, sanctions, or other measures may be required prior to circle day. We specifically designed the gap between pre-circle and circle to be several months. During this gap, the participants availed themselves of additional supports.

Circle Day

As certificate holders of the Advance Peacemaking Circles course taught at Conrad Grebel University College (University of Waterloo), we elected to use the six foundational concepts in this course as the premise for this circle design:

1. skill development in designing questions for circles
2. exploration of difficult challenges in circle and possible responses
3. exploration of strategies for reaching consensus
4. increased knowledge of ways to use arts, movement and music in circles
5. increased knowledge of creative openings and closings in circle
6. increased awareness of self in relationship to circle keeping⁴

1. Skill Development in Designing Questions for Circles

RJ deferment questions are different from other alternative dispute resolution (ADR) processes because they permit the participant who is holding the Talking Piece to speak to their experience without restraint, filter or time limit. Participants feel that they are entering in a sacred, confidential space which encourages them to speak, be heard and listen without judgement.⁵

Additionally, good circle questions consider the tone, pace, momentum and stability of a live circle. The questions and speaking order, which are inextricably

tied, are formulated from information gathered in pre-circle meetings.

2. Exploration of Difficult Challenges in Circle and Possible Responses

Circle facilitators may encounter multiple challenges, including guilt, blame, past personal experiences, and other historical memories which may not have a direct causal link to this incident. Because of the difficult subject matter (sexual assault), we anticipated that participants would experience strong, volatile emotions. As a result, we designed this process to allow for multiple pre-circle meetings.

When designing the circle, we considered culture, age, race, language, gender, socio-economic status, power imbalance, religion and legal accommodations. Additionally, we elected that the circle had to be in-person considering the subject matter, number of participants, duration, security, confidentiality. In addition, we considered the importance of the live energy of listening, speaking and feeling.

The highly confidential circle day address and date were disclosed only to circle participants to ensure no public or media access. We provided staggered arrival times to allow the circle facilitators to greet participants individually. Additionally, we designed separate spaces for lunch, washroom breaks, and break-out sessions.

Upon arrival, participants entered a carefully curated room filled with elements to evoke a transition from the outside world to a sacred space. Participants were instructed to place their cellphones in a container, and provision was made for any contact emergencies. All four walls were covered with quotations, art, poems

and a medicine wheel. Curated music played in the background, a four-season themed centrepiece dominated the room, and participants were asked to ritually wash their hands.

3. Exploration of Strategies for Reaching Consensus

For us, this is an intentional process that evokes the tradition, history and global use of RJ circles in cultures such as the Sami, Maori, Ayoreo and Ojibway. This process is non-punitive and non-adversarial.

Ritual hand cleansing was the start of the walk around the staged room to shift the participants from outside into the sacred circle room. The focus was a large medicine wheel that included the four R's: Respect, Relevance, Reciprocity and Responsibilities. This provided a visual representation of the circle values of interconnectedness and harmony.

We designed the circle centrepiece on the theme of the four seasons to honour the indigenous tradition of earth, wind, water and fire. The centrepiece was anchored by a 15-kilogram piece of driftwood from Humber Bay, an important indigenous meeting site on Lake Ontario. We consulted with a Dene Elder from the Native Canadian Centre of Toronto to ensure that the other components of the centrepiece would be culturally appropriate. These components included: sage, cedar, sweetgrass, tobacco, feathers, and fresh wildflowers (e.g. Queen Anne's lace). Additionally, we asked the Elder to select and bless stones that would be given to each participant at the conclusion of the circle as a memento.

At the start of Circle Day, we asked participants to consider and write three core personal values that they wished

to contribute anonymously to the circle centrepiece for the opening (e.g., truth, integrity, honesty). Additionally, we asked them to write three anonymous hopes and aspirations for the closing (e.g. forgiveness, peace, reconciliation). The opening values were collected, randomly shuffled and distributed around the centrepiece. This permitted participants to physically contribute to the centrepiece in real time.

4. Increased Knowledge of Ways to Use Arts, Movement and Music in Circles

The circle room was highly staged and stylized to evoke all senses: smell (wildflowers, tobacco); texture (feathers, shells); sound (music); visual (art, poems). We directed the participants to walk in a clockwise direction and read and initial each page on the wall.

The talking piece was a tropical seashell owned by one of the circle facilitators. This seashell fit into the full palm of one hand and weighed enough for the participants to be aware of its presence.

Two indigenous watercolours decorated the walls. One depicted a Canadian lake shared by multiple bird species, such as eagles and loons.

The arrival playlist included songs such as *Morning is Broken* and *Bridge Over Troubled Water*. The concluding playlist included *Peace Train* and *Imagine*.

5. Increased Knowledge of Creative Openings and Closings in Circle

The formal circle opening included: history of the circle, participant role, land acknowledgement, and the distribution of the three core participant values around the centerpiece.

For the prelude question, we asked the participants to verbally share a treasured memory, then hold and reflect upon that memory throughout the day. Next, we proceeded to pose the opening, embracing question: "What brings you here, *today*?". This question offered participants an opportunity to join and rejoin because it was a living question. This was the only question asked, and it maintained momentum for the entire day.

Towards the end of the day as the circle moved to close, we asked participants whether there was anything more they wished to share. The unanimous answer was "no". Participants were then asked to express their closing sentiments and feelings. They shared words of peace, forgiveness, hope and gratitude. The sheets containing the participants' closing hopes and aspirations for the day were unveiled and placed around the centrepiece. Unbeknownst to everyone, the written aspirations participants wrote in the morning were similar to the verbal sentiments expressed at closing.

Before arrival, we had placed one unmarked stone, which had been selected and blessed by the Elder, under each chair. To the background of the closing playlist, the participants retrieved their stone and were told this was their memento. Next, participants were asked to stand and physically acknowledge the person to their immediate left and right, with a mutually agreed gesture (e.g. handshake, nod, hug, etc.). We then extended the offer for participants to physically connect with others in the circle by stepping *out of the circle and walking around* to reach each other. This honoured the sacredness of the centrepiece and circle. There were tears, hugs, words of

encouragement and gratitude.

6. Increased Awareness of Self in Relationship to Circle Keeping

Participants: During the pre-circle meetings, we prepared participants by using some ADR tools. Once they had the talking piece in their hand, they were coached to use “I” statements to own their own story. Another tool we shared was acknowledgement versus agreement. Knowing that the subject matter could potentially trigger a fight-or-flight response, they were coached on how to identify the difference. Previously, participants took advantage of the gap between pre-circle and circle to avail themselves of support opportunities. This further bolstered their ability to participate.

Circle: The integrity of the circle was paramount. Once we became aware of a confidential breach regarding location and date of the circle day, we immediately acted and moved forward the circle date.

Being mindful of the history and tradition of the circle and our privilege as circle facilitators, we liaised with the Elder from the Native Canadian Centre of Toronto, and we were guided by the advance circle training we received from Kay Pranis, Jennifer Bell and Tahnagha.

Circle Facilitators: In this role, we

set clear boundaries as the custodians of this process. Those boundaries included upholding trust, confidentiality and security. We were explicit in letting participants know that this circle was custom designed for them, and that the best way for this circle to work would be through their earnest and honest involvement.

Designing this circle was not just an intellectual exercise. During the gap between pre-circle and circle day, we personally committed to actively acquiring elements that would ultimately be included in the centrepiece and circle room. To this end, we visited a range of indigenous sites, including Leslie Spit, High Park and Humber Bay.

Conclusion

In October 2023, the Women's Legal Education and Action Fund (LEAF) published a report entitled *Avenues to Justice*. The report stated that: “In 2018, the Ontario government announced that it was considering the use of restorative justice for cases of sexual assault, though no policy change was implemented”.⁶ The report continues: “Section 717 of the Criminal Code allows for Crown Attorneys to divert cases into alternative measures programs, many provinces have implemented moratoriums on sexual violence cases under this provision. This report argues

that the moratoriums need to be critically revisited and revised for a more nuanced and permissive approach that will allow survivors to access RJ/TJ if they desire.”⁷

Howard Zehr, an RJ proponent, purports that while a justice system that is fully restorative may not be realistic, a more attainable future is one where RJ is the norm.⁸ We note that countries such as Australia, Canada and the United Kingdom have an adversarial system of justice where RJ is used post-adjudication. By contrast, other countries such as Germany and Sweden use an inquisitorial system where RJ is used prior to, or part of, the court process. Globally, there is no consistent approach to when and where RJ is applied.⁹

A successful application of RJ Deferment can be found in Northern Ireland.¹⁰ Perhaps there is an opportunity to revisit the RJ process and its applicability in the criminal justice system. 🏠

“Life is divided into three terms – that which was, which is, and which will be. Let us learn from the past to profit by the present, and from the present to live better in the future.”

(William Wordsworth, UK Poet Laureate, 1770-1850)

1. Federal-Provincial-Territorial Working Group on Restorative Justice [2021]. *Increasing the Use of Restorative Justice in Criminal Matters in Canada: Findings from a 2018-2019 Jurisdictional*. Retrieved from: <https://scics.ca/en/product-produit/principles-and-guidelines-for-restorative-justice-practice-in-criminal-matters-2018/>

2. Federal-Provincial-Territorial Working Group on Restorative Justice [2021], *supra* note 1

3. Federal-Provincial-Territorial Working Group on Restorative Justice [2021], *supra* note 1

4. Conrad Grebel University College (Waterloo), Conflict Management Program, Advanced Peacemaking Circles. Retrieved from: <https://uwaterloo.ca/conflict-management/advanced-peacemaking-circles-training>. Example of a legislative model (New Zealand): <https://www.justice.govt.nz/courts/criminal/charged-with-a-crime/how-restorative-justice-works/#process>

5. The authors' training includes Ministry of the Attorney General (Ontario) in Restorative Justice – Deferment; Ontario Community Mediation Coalition – Circle; Conrad Grebel College (University of Waterloo) - Advanced Circle Keeping.

6. Burnett, Tamara and Mandi Gray, *Avenues to Justice: Restorative and Transformative Justice for Sexual Violence* (2023), Women's Legal Education and Action Fund (LEAF), p. 28. Retrieved from: <https://www.leaf.ca/wp-content/uploads/2023/10/Avenues-to-Justice-Report-LEAF.pdf>

7. Burnett and Gray, p.1, *supra* note 6.

8. Zehr, Howard. *Little Book of Restorative Justice* [2002]. Good Books (Skyhorse Publishing), p. 59.

9. Wood, William and Masahiro Suzuki, “Four Challenges in the Future of Restorative Justice”. *Victims and Offenders: An International Journal of Evidence-based Research, Policy and Practice* (2016). Volume 11, Issue 1. Retrieved from: <https://www.tandfonline.com/doi/abs/10.1080/15564886.2016.1145610>

10. John Howard Society, *Benefits of Restorative Justice* [November 6, 2018]. Retrieved from: <https://johnhoward.ca/blog/benefits-restorative-justice/>