

R. v. A.J.R., 2001 ABPC 120

Date: 20010514
Docket: 15080591Y1

IN THE PROVINCIAL COURT OF ALBERTA
YOUTH COURT

BETWEEN:

HER MAJESTY THE QUEEN

- and -

R.(A.J.),

A Young Person

INTERLOCUTORY JUDGMENT OF THE HONOURABLE L.T.L.COOK-STANHOPE

COUNSEL

For the Crown: Ms S. Virdis

For the Young Person: Mr. R. Bennett

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I. THE CHARGE

[1] The young person has entered a plea of guilty to the following charge that he:

On or about the 15th day of January, 2001, at or near Calgary, Alberta, did unlawfully rob T.S.L., while using a firearm, contrary to section 344(A) of the Criminal Code of Canada.

II. THE ISSUES

[2] While the eventual task in this case will be to determine what is a fit and proper disposition for the young person, there are two preliminary issues raised which must first be addressed:

1. Does this Court have jurisdiction to make a referral to Calgary Community Conferencing absent the consent of both Crown and Defence?
2. Should a Youth Court refer the case of a young person to the Calgary Community Conferencing program where there are unresolved criminal charges pending against co-accused persons?

[3] Consideration of the second issue raises the following questions:

- (a) Should the Youth Court be concerned whether the young person's participation in a Community Conference might have an impact on evidence the young person is likely to provide at a subsequent preliminary inquiry or trial?
- (b) Should the Youth Court be concerned with the possibility that contact between the victim and the young person during a Community Conference will increase the Crown's disclosure obligations to other alleged perpetrators not present at the Conference?
- (c) Should the Youth Court be concerned whether the contact between the victim and the young person might taint the victim's potential testimony against a co-accused in a subsequent preliminary hearing or trial?

[4] With the gradual evolution in our criminal courts in general, and the Youth Court in particular, towards a more inclusive response to criminal behaviour, and in the absence of statutory guidelines to assist our courts in determining how or whether to incorporate what could be termed "complimentary" justice programs and practices into traditional disposition and sentencing models,

this court is asked to rule whether the case at Bar is a proper one in which to make a referral to the Calgary Community Conferencing program.

III. BACKGROUND

[5] In the present case, the young person, A.J.R. faces disposition on several Criminal Code charges, one of which is the present one, which he committed with another young person, J.P.T., and also allegedly with an adult individual, M.R.K. J.P.T. has recently entered a plea of guilty to the charge and received disposition. M.R.K. is contesting the charge and I was informed that his preliminary inquiry is scheduled for early September, almost four months from now. A.J.R. has been detained in custody since shortly following the commission of the offence, a further period of four months.

[6] On March 1, 2001, the young person entered pleas of guilty. This court then ordered the preparation of both Pre-Disposition and Psychological Reports. On March 9, 2001, prior to J.P.T.'s plea of guilty, by letter directed to the Court and to counsel for the Crown, counsel on behalf of the young person alerted the Court to a proposed application for referral to the Conferencing program. In that correspondence appeared the following statement:

I understand that the co-accused in the robbery have not entered guilty pleas. Mr. Borch [coordinator of the Calgary Conferencing program] is concerned that Mr. [R.]'s participation in the program at this time could have an impact upon any evidence provided by the victim in the future.

[7] This matter has been adjourned from time to time to allow for transcript preparation, argument and decision. I have pointed out the chronology of events by way of explaining what may appear to be a undue delay on the part of the young person in answering this charge. None is attributable to the young person.

[8] I have had the immense benefit of having received both oral and written arguments on behalf of both Crown and Defence in reaching my decision. I wish to express my appreciation for the high level of cooperation between counsel behind the scenes, which is apparent from the arguments which have been made. As soon as this issue was clearly defined, and appreciating its potential importance not only to A.J.R. but to other young persons in the future, counsel met with Mr. Borch and applied their considerable skills in an attempt to resolve the problems presented by this case.

IV. CALGARY COMMUNITY CONFERENCING

1. BRIEF HISTORY OF THE PROGRAM

[9] For about two years, judges of the Youth Court in Calgary have had available a unique Pre-Disposition program developed to address some of the effects of youth crime in this

community, known as Calgary Community Conferencing. *R. v. B.J. K.* (2000), 270 A.R. 312, a decision of this court, contains a detailed explanation of the program to which referral is being sought in the present case: (p. 314)

[The original pilot project had] as its goal to bring together selected individual victims of crimes and young offenders who had perpetrated against them, in a group “conference” environment, with a view to reconciling the damages which had been done, both financial and emotional. The principle guiding the process was to recognize that crimes are acts against human relationships as well as against the offender’s community.

[10] Calgary Community Conferencing replaced the pilot project but has maintained its original intentions:

Restoration conferences [are] aimed at having youth accept responsibility and [become] accountable for their offence behaviour directly to their victims, in order that they [may] be accepted back into their broader communities. All parties [are] encouraged to attend these conferences with supporters and/or family members and [are] allowed to express their views and concerns surrounding the offenses. All of this [is] facilitated and moderated by a professional social worker, skilled in working with youth, families and victims. The results [are] then compiled and reviewed.

[11] As the program has expanded, as an alternative to the laying of formal charges or of suspending young people following inappropriate behaviour, conferencing work has also been conducted on-site at schools, where violence among youth has sometimes created tensions or safety concerns. In addition, conferences are now facilitated or convened not only by social workers, but also by qualified professionals from other disciplines.

2. CURRENT REFERRAL PRACTICES

[12] For the most part, cases referred to conference by the Court have tended to be high-severity or more serious offences. This fact alone sets the program apart from other similar programs across the country which may either exclude violent offences outright or have a limited mandate to deal with property offences only. The conference itself is often an intense and emotional experience which may last several hours. At its end, restoration proposals are made by the young person directly to the victim or victims of the crime. These proposals often take the form of monetary compensation or personal service to the primary victim of the offence, but as often they may be intended to address the emotional or psychological fallout from the offence as it is experienced by secondary victims such as family members.

[13] Restoration proposals may be accepted, rejected, accepted in part or modified by the victim. A document is then prepared by the conference facilitator outlining the course of the

conference, recording the restoration proposals and the victim's reaction to the same. Both the offender's willingness to follow through on the proposals and the victim's willingness to accept the proposals are noted and the parties sign the document. This document, known as a Conference Report containing any Restoration Agreement which may have been struck, is then forwarded to the Court for its consideration at the time of the disposition hearing along with any other materials.

[14] As the program is presently structured, it is true to say, as pointed out by counsel for the Crown, that one of the steps in the restoration process is for the offender to recount, in full detail, events leading up to, during, and subsequent to the offence committed against the victim participant. Open dialogue between the victim and the perpetrator is encouraged, and during this, much information as to motivation, intention and planning is elicited from the offender.

[15] One goal of conferencing is the development, if not of empathy, then of understanding between the victim and the young person. The hope is that a mutual connection between the offender and the victim will begin to dispel the fear that often reverberates throughout the lives of victims and their family members in the aftermath of their victimization.

[16] Another hope is that bringing the victim and perpetrator together will remove the anonymity of the crime. This not only connects the offending behaviour to the victim, but also allows the victim to catalogue to the young person the extent of the often unknown impact of the crime, including its psychological effects. Finally, the creation of a connection between victim and perpetrator often opens the door to the reintegration of the offender into his community and to the possibility of forgiveness by the victim.

[17] In its initial phases of operation, cases were sent by individual Judges to the program with a request that they be screened for suitability as referrals. If the answer was in the negative, no referral was made. Subsequently, it has been more common for a Judge to make a referral, then, if it is inappropriate or cannot be pursued, a conference facilitator indicates this in a letter to counsel and the Court, and again, no referral is made.

[18] No reasons are necessary for a decision by Calgary Community Conferencing not to accept a referral. This Court has no list of the criteria which are applied within the program to determine whether a referral will be rejected. One assumes these include not only the refusal of young person to participate, but also the unwillingness or inability or unavailability of victims to do so. If the referral is not accepted, that is the end of the matter.

[19] In cases where a young person enters a plea of guilty and has perpetrated with another young person, often adjournments have been sought so it may be ascertained whether the co-offender is also intending to enter a guilty plea. If the other accused person or persons do enter guilty pleas, often, but not always, all perpetrators may be referred to the program for a joint Community Conference.

[20] Sometimes, however, a young person may not *wish* to go a Conference. Despite the view of some that participating in a Conference is an “easy way out”, some young persons find the prospect intimidating or even terrifying, and would much rather receive even a stiff sentence of incarceration than meet with those they have harmed. An apparent lack of enthusiasm on the part of the offender to participate in a Conference is not necessarily a bar to the Court initiating a referral to the program.

[21] In cases where the accused has initially been reluctant, a facilitator will meet with him or her to explain the program and its possible benefits. More often than not, once the program is fully understood, the young person decides to proceed.

[22] Thanks to an enlightened attitude and a high level of cooperation on the part of the management this city’s young offenders custodial facility, and because of the courage and willingness of a number of victims of serious crimes to participate in these Conferences, some incarcerated young persons who have agreed to attend a Conference have found these being facilitated on the premises of the Calgary Young Offenders Centre.

[23] Word of these gatherings has made the rounds, so to speak, within the Centre, and we are informed that as a consequence of the willingness of some incarcerated young persons to amend by participating in a Conference, they have sometimes been the brunt of name-calling and bullying from peers within the institution. On the other hand, even in the face of these kinds of difficulties, the Conferences have proceeded and concluded with good results.

[24] Because a major focus in this program is accountability, it might be argued that a young person’s refusal to participate should be viewed as an unwillingness to make amends and be accountable. It therefore needs to be remembered that there are a number of other ways accountability can be achieved, including participation in other restorative justice programs, notably the Victim/Offender Reconciliation Program of the local John Howard Society, the performance of personal service work for the victim, the performance of community service, writing letters of apology, making personal apologies, paying financial compensation and the like.

[25] In terms of affording an opportunity for greatest impact, however, a restorative approach that brings the parties together in a structured, safe and professionally-facilitated environment following the commission of a high-severity crime has impressive potential to change behaviour and thereby lives.

3. CONFERENCE PERSONNEL AS PERSONS IN AUTHORITY

[26] It must be reiterated here that Calgary Community Conferencing is a post-guilty plea program which is neither Court-controlled nor mandated. It is a restorative justice initiative with features similar to dozens of other programs across Canada. Into its policies or protocols the Court has no input; it is completely independent of the Court. As far as I am aware, at no time has this

Court suggested intake criteria; rather, the decision as to whether a referral is accepted by the program has at all times been that of program staff, based upon its internal criteria.

[27] For this reason, I disagree with the submission on behalf of the young person that conferencing personnel are “agents of the state and persons in authority”. That is simply inaccurate. First, Conference facilitators are not probation officers in the context of the Calgary Conferencing model, even though some may have been prior to their Conference facilitation work. Indeed, some are educators, mediators from religious denominations and other trained community participants. As well, while probation officers may sometimes be present during Conferences, they attend to support their client young persons and not as youth workers engaged in duties specifically flowing from that designation.

[28] I therefore cannot conclude that any obligation thereby rests upon these individuals to provide notes and other materials to the prosecutor for review in order that disclosure may be made, unless they are specifically called upon to do so (consistent with the ‘harsh reality of justice’ described by Sopinka, J. in *R. v. Stinchcomb* [1991] 9 C.R. (4th) 277 at p. 287. This issue will be discussed again later in these reasons.

V. ANALYSIS

1. JURISDICTION OF THE COURT TO MAKE A REFERRAL

[29] In response to the Crown’s argument that this Court has no jurisdiction or authority to refer a case to Calgary to Calgary Community Conferencing absent consent of counsel, it is my opinion that this Court has jurisdiction to do so, and furthermore, that no such consent is required. This is a separate issue from whether consent should be part of the intake criteria, and that issue, too, will be discussed later in these reasons.

[30] I agree with the Crown’s general proposition that no statutory provision exists, specifically recognizing a jurisdiction to make a referral to a program such as Calgary Community Conferencing within the *Young Offenders Act (Canada)*. However, within the parameters of s. 20 of the *Act*, it is clear that the role of the Youth Court Judge is to fashion a disposition that is most likely to honour the principles enunciated in s. 3 of the *Act*. That section speaks of the Court fulfilling its role in crime prevention by:

S. 3(1)(a) “...developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future;

noting that:

S. 3(1)(c.1) “...protection of society, ... is ... best served by rehabilitation... [which] is best achieved by addressing the needs and

circumstances of a young person that are relevant to the young person's offending behaviour;

and also acknowledging that:

S. 3(1)(d) "...taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;

[31] The *Act* contains the following further direction that:

S. 3(2) This *Act* shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1).

[32] Furthermore, s. 20 of the *Act*, states:

S. 20(1) Where a youth court finds a young person guilty of an offence, it shall consider....any representations made by the parties to the proceedings, ... and any other relevant information before the court..."

and then shall:

S. 20(1)(l) impose on the young person such other reasonable and ancillary conditions as it deems advisable and in the best interest of the young person and the public.

[33] To achieve these ends, it is often necessary for the court to order, receive and review various pre-disposition materials. The most common among these are formal Pre-Disposition Reports mandated by s. 14, and Medical or Psychological reports contemplated by s. 13 of the *Act*. The Crown suggests that nothing is "before" the Court if not by consent. I cannot accept the interpretation of the words "information *before* the court" in s. 20(1) proposed by the Crown which would confine material available for consideration by a Court only to statutorily-mandated documents. Such an interpretation, in my opinion, is not in keeping with the overall spirit of the *Act*.

[34] It is indisputable, in my view, based upon the provisions cited and the law, that the court has as wide a latitude in considering submissions and sworn evidence at the time of a disposition hearing as would be the case in any adult sentencing matter. It is a far less formal proceeding than the trial proper. The value of the Conference process within a disposition context may be likened to that of sentencing circles in some aboriginal communities. The same might be said of these Conferences as was stated in *R. v. Morin* (1995), 101 C.C.C. (3d) 124:

There is no provision in the Criminal Code for the use of sentencing circles. The foundations for their use consist, first, of the sentencing hearing, with its wide scope and measure of informality, as set down in *R. v. Gardiner* [1982] 2 S.C.R. 368; 698 C.C.C. (2d) 477; 140 D.L.R.(3d) 612; and, second, of the principles of sentencing as set forth in *R. v. Morrissette* (1970), 1 C.C.C.(2d) 307, 12 C.R.N.S.392, 75 W.W.R. 644, including, in particular, the need to consider the rehabilitation of the offender in determining a fit sentence.

[35] In *R. v. R.D.F.* [1997] N.W.T.J. No. 34, the jurisdiction of Youth Court to hear disposition recommendations from a Youth Panel was questioned. A volunteer group consisting of twelve high school students was selected to consider cases referred to it by a Youth Court. The panel, along with the Youth Court Judge, heard facts in a case of impaired driving by a 17-year old following his guilty plea. The presiding Judge advised the panel members what the usual disposition might be, and also indicated what an adult might receive in similar circumstances.

[36] The Youth Panel then conferred in private. No record was kept and the Judge did not participate in the discussions. The Panel then provided the Court with certain recommendations as to disposition. The Youth Court Judge adopted some, but not all, of the Panel's recommendations. In challenging the Youth Court Judges' jurisdiction to hear these recommendations, on appeal, the young person argued that the Judge had improperly delegated his sentencing function.

[37] In rejecting this argument, Schuler, J. of the Northwest Territories Supreme Court noted that because the Panel made only recommendations and did not purport to render the final disposition, there was no delegation by the Youth Court Judge of his sentencing jurisdiction. Furthermore, the less formal disposition hearing, in her view, allowed for the participation at such a hearing of a Youth Panel, just as sentencing circle recommendations were permissible. She went on to say that nothing in the *Young Offenders Act (Canada)* restricts the court to obtaining recommendations by means only of a Pre-Disposition Report. I respectfully agree with this position.

[38] Often school, social reports, or testimonials are offered for consideration to permit the Court to have the fullest understanding of the background of the offender and the social context within which he or she is offending. While I agree with the Crown's argument that any party may object to the admission of disputed facts, I fail to see how the proceedings in a Conference and consequent Restoration Agreement can give rise to disputed facts. Furthermore, while it is always available for any of the parties to object to the tendering of written materials, this in no way assures their exclusion.

[39] In the event that a party does not approve the admission of a Conferencing Report, it is always permissible for the author/facilitator to be called upon to give *viva voce* evidence concerning a disputatious matter. This already occurs when issue is taken with the contents of a

Pre-Disposition Report and the probation officer is called to testify. Thereafter all parties are welcome to cross-examine the report writer.

2. CONCLUSION

[40] In light of the responsibility of the Court to make as informed and individualized a disposition as possible for each young person, also keeping in mind the needs of victims and the community at large to be heard, and finally, recognizing the duty of the court to structure dispositions most likely to emphasize the goal of rehabilitation of youthful perpetrators, it is my opinion that it in no way tortures the wording or underlying meaning of s. 3 and s. 20 of the *Act* to interpret a jurisdiction to refer cases to restorative justice programs, even absent consent of one of the parties in a young offender prosecution.

[41] To conclude, I am satisfied that these Conferencing Reports may contain highly relevant information [s. 20(1)] derived from a program which the young person has been directed to attend and which aims to address the interests of the young person and the public [s. 20(1)(1)] and that an absence of consent on the part of counsel must not be a bar to its admission.

3. THE PROPRIETY OF MAKING A REFERRAL

[42] I turn now to the crux of this case, namely, whether this Court *should* make the referral requested on behalf of the young person.

[43] It will be clear from my earlier comments that whether or not a referral is made, the intake of a case into the program under consideration is not controlled by the Court. The Crown has argued, however, that a referral to the Calgary Conferencing program makes the program a “Court-sanctioned” one, and that in essence, to cause such a referral, of itself, could interfere with the integrity of a subsequent criminal proceeding.

[44] Whether or not this may be the case, if a particular restoration initiative is operational in one branch of the criminal justice system, and if it aims to maintain a sensitivity to the realities of the rest of the system, then its own operational protocols must reflect a recognition of the very real potential that program decisions may negatively affect another branch of the same system. This sensitivity is obvious from the comments of Mr. Borch made to the court concerning this referral: (Transcript p. 36-37)

Our concern is really more the relationship issues and there may well be an opportunity for the people immediately involved. With a referral from Youth Court, ...our program's concern is that should those people, whether it's the young person and/or the victim and/or who else may be involved in a community conference process then be called as witnesses in the adult matters. ... I would hate to think that we would put any of those folks, ...in any sort of jeopardy...that would raise concerns for them that

if this process is largely about a sense of understanding and healing for people, my concern is ... that could happen today and it could be quite severely undone [as a result of subsequent court proceedings].

[45] In this, the program under discussion is no different from other support services provided to the Court by various other professionals, for example, social workers, psychiatrists and psychologists. The nature of the reports these individuals provide and the manner in which their evaluations are conducted are all controlled by guidelines provided by their respective professional organizations. All members of the various professional groups are expected to do their work and conduct their enquiries within rules, regulations, protocols and best practices established by these organizations, such that harm is not done to those touched by their practices.

[46] The possibility of negatively affecting persons who may be called to participate in subsequent criminal proceedings is not in any sense remote. The Crown has pointed out the issues which might arise should pre-hearing contact occur between victim and perpetrator. It is easy to predict circumstances where their very co-participation in a restorative justice initiative might expose these participants to unexpected attacks against their credibility or unwarranted intrusions into private records. The organizers of any such program need to ask themselves whether these individuals should be forewarned of these possibilities.

4. CROWN DISCLOSURE

(a) Third Party Records

[47] It appears to be agreed by both counsel that bringing witnesses together into a conferencing environment will somehow impose an additional disclosure obligation upon the Crown. Following the reasoning in *O'Connor v. The Queen*, [(1996), 103 C.C.C.(3d) 1; affirming 89 C.C.C.(3d) 109] it is submitted that any records of the Conference, including notes taken by or on behalf of the Conference facilitator, could be considered "third party records" and be potentially discloseable in the same way as could be private records generated by a therapist caring for the complainant in a sexual offence.

[48] It should, however, be remembered that *O'Connor* dealt specifically with s. 278.1 of the *Criminal Code*. It is clearly intended that this section should apply to cases where material gathered is outside the reach of the defendant because of its inherently private nature. It is not the case that Calgary Community Conferencing is a private process. Rather, it is a program which has developed to be just the opposite.

[49] Members of the families of victims and perpetrators, school personnel, spiritual advisors, medical supporters, friends, neighbours, school resource or other police officers, community residents and other observers are at all times encouraged to attend. They are invited to participate in various ways; often they merely observe. Participants are not asked to enter into any form of confidentiality agreement prior to attend a Conference.

[50] It seems the only limits upon who will have access to the Conference process are those necessitated by the size or location of the room where the meeting is held. Sometimes this has been in a school resource room, sometimes this has been in the meeting room of a community church. Sometimes, as already noted, it has been conducted at the Calgary Young Offenders Centre.

[51] In this context it cannot, therefore, be said that notes taken by a facilitator, or by anyone else during the process would be private or contain personal information for which there is a reasonable expectation of privacy. Nor is access to this material controllable by the Crown. Indeed, following the completion of the Conference, if notes are prepared they become the basis of the Conferencing Report which is always filed and becomes a part of a public Court record.

[52] I therefore reject the argument that referral to a Conference will create a potentially discloseable third party record.

(b) Additional Disclosure Arising out of a Conference

[53] It is next suggested that during a Conference, a victim might reference private records of various kinds, potentially containing information concerning the offence or its impact upon the victim. The Crown argues that this kind of revelation would need to be shared with the Defence and could thereafter become the subject of an *O'Connor* application.

[54] Three things can be said of this concern, in my opinion. First, a thorough investigation by police will or should already have involved the elicitation of this kind of information from the victim. I would add that this argument seems to imply that it is the role of the Court to fill these kinds of investigatory gaps. It is not.

[55] Second, it is also not the Court's role to predict, then respond to the worst case scenario, should a victim later decide to engage counsel to protect their privacy interests. This is simply too remote.

[56] Third, the Crown cannot have the onus of directing the manner in which data is collected by persons engaged in a Conferencing process, any more than the Crown can be expected to bear the onus of managing or directing the collection of therapeutic details, or other information which might be gathered by any other professional, post-offence.

[57] It is finally not the role of the Court to insulate witnesses from potential cross-examination surrounding statements they may have received or made during the course of extra-judicial proceedings conducted in the presence of young persons who have offended against them. This is separate from the issue of witness taint. That this subsequent questioning might potentially undermine the feelings of safety and security generated during the course of a Community Conference is another matter entirely, as I have already stated.

(c) Lack of a Formal Record

[58] The Crown suggests that discussions between witnesses at a Conference might well be of interest not only to the Crown but also to counsel for any adult who may have co-offended with the young person participating in the Conference. It is suggested that a failure to accurately record the proceedings at a Community Conference might result in a “lost evidence” application by a co-offender.

[59] With this argument, the Crown attempts to draw a parallel between investigatory notes taken by a social worker during an interview of a particular complainant who had attended at a sexual assault crisis Centre (as in *R. v. Carosella*, (1997), 112 C.C.C. (3d) 289 (S.C.C.), with those which might be prepared during or following a Community Conference.

[60] In *Carosella*, (*supra*), notes containing confidential material taken from a victim at a sexual assault crisis centre were purposely destroyed to combat any future defence disclosure application. The difference between that situation and the situation in a Community Conference is that in the Conference, the focus is upon openness, and it cannot seriously be argued that the decision not to take notes is the same as a decision to purposely destroy notes to avoid their disclosure.

[61] Of the decision in *R. v. La*, (1997), 116 C.C.C.(3d) 97 (S.C.C.), and its applicability to the present case, all that can be said is that the present case does not involve the loss of recorded *evidence* or the preservation of the “*fruits of investigation*” as did the *La* decision. Again, the argument that a Conference is a form of “investigation” or that the Crown should be expected to respond to disclosure issues arising from the Conferencing process cannot be sustained.

[62] I decline to find that there is some kind of onus on the Crown which the Court should recognize, to ensure that a formal recording of conferencing proceedings is made. For the Court to insist upon this kind of recording, would have the effect of unduly formalizing a process whose strength lies, in part, in its lack of formality.

[63] An hypothetical situation is then described by the Crown wherein the young person takes full responsibility for a particular offence at the Conference and exculpates the adult who is awaiting trial. It is suggested that if the statement is false, then it becomes discloseable. I disagree, again because I do not consider the Conferencing process as akin to one in which there is a reasonable expectation of privacy.

[64] The process described in the hypothetical would be on par, for example, with statements made by a young person engaged in the performance of community service work to persons engaged in monitoring them. It is likely that in the course of their statutorily-mandated work, perpetrators frequently disclose information concerning their offences with those around them. It would be a colossal undertaking for any investigatory agency acting on behalf of the Crown to vet

all such exchanges to ensure disclosure compliance. Additionally, such an expectation would cast too wide a net across ordinary non-protected communications over which it would be totally unrealistic for the Crown or its agents to exercise any reliable level of control.

[65] It might also be argued that statements of the kind contemplated in the hypothetical are different than those which might be given to a probation officer during the course of the preparation of a Pre-Disposition Report, since the latter are mandated under the *Young Offenders Act (Canada)*. It is noteworthy that the *Act* not only makes such Reports part of the Court record, and also contains provision for their disclosure:

S. 14(8) Where a pre-disposition report made in respect of a young person is submitted to a youth court, the court

...

(b) may, on request, cause a copy or a transcript of the report, or part thereof, to be supplied to any person not otherwise authorized under this section to receive a copy or transcript of the report if, in the opinion of the court, the person has a valid interest in the proceedings.

[66] It is not unheard of for a young person (or an adult, for that matter), who has been found guilty of an offence, while in the context of interviews by a probation officer or youth worker, to attempt to minimize the impact of his or her participation in a particular crime, even when there has been a complete disclosure of the facts during the course of a trial. It is equally common for young persons, (and also adults), to “take the rap” or cover up for co-offenders, whether adults or young persons, whether those individuals have been charged or not.

[67] There are many reasons why offenders may do these things. Some may have been threatened or intimidated. Some may wish to raise their own stature in the eyes of peers or other offenders. Some are simply trying to avoid taking complete responsibility for their offence behaviour. Some are so immature they misjudge the likelihood of getting trapped in their own falsehoods. Yet others may want to protect friends from getting into trouble.

[68] There are no reliable methods of statement validity analysis available to the probation officer in such situations, no opportunity to administer an oath, no cross-examination or perjury warning available. The probation officer’s interview is but one example.

[69] Another example might be a school disciplinary hearing where re-admission to a particular school might well be contingent upon a young person having a full and frank discussion with school truancy or attendance board professionals on the topic of offense behaviour. Undoubtedly disclosures dealing with adult or other co-offenders are made frequently in these situations.

[70] Clearly there is no form of control that could conceivably or reasonably be exercised by agents acting on behalf of the Crown to ensure that such disclosures which appear to exculpate adult co-perpetrators will always be brought to the attention of the Crown or counsel for the Defence.

[71] There is nothing to suggest that statements made in the course of a Conferencing session are any more likely to be motivated by self-interest than those given to the probation officer in the example I have given. On the contrary, if anecdotal experience is any guide, it appears that young persons are far more likely to give an honest, frank and complete explanation of their participation in the criminal acts within the context of a Community Conference, face to face with those they have harmed, than almost anywhere else, because of the very nature of the process.

[72] Nor are statements “compelled” at a Community Conference any more deserving of “appropriate safeguards” than those expected during discussions between probation officers and young persons and their family members or supporters. The conferencing process is voluntary.

[73] There are undoubtedly dozens of discussions which will follow an act of crime of which the same or worse can be said. One can conceive of discussions with teachers, parents, employers and peers to name only a few. During none of these are we likely to feel compelled to generate recordings from which accurate transcriptions of these discussions may later be made.

[74] I can think of no reasonable mechanism which could be devised to control the multiplicity of these types of statements which so concern the Crown and which have prompted the suggestion that somehow trial fairness may be compromised if records of them are not preserved.

[75] I therefore reject the suggestion that the lack of a formal record of Conference proceedings should be a bar to referring a case to the program.

5. WITNESS TAIN

[76] I turn now to the argument that encouraging communication between potential witnesses regarding an offence, for which criminal proceedings are outstanding, furthers the possibility of “witness taint”. In my opinion this is the Crown’s most compelling argument.

[77] I would begin by agreeing with the argument made on behalf of the young person that there is no bar to participants in the criminal justice system communicating with one another unless this is prohibited by some law, as in the case of bail restrictions, for example. I also agree that evidence may be tainted in many ways irrespective of participation in a Conference.

[78] It is my opinion, however, that there may well be a significant risk attendant upon bringing together the victim and one of the co-offenders, both potential witnesses in the subsequent prosecution of another co-offender, within a Community Conference. That risk would be that one

of the two witnesses could be “taught” by hearing the other’s testimony. This might be advertent or inadvertent.

[79] One could conceive of a situation where, for example, the victim was unable to recall what each of two perpetrators was wearing, although she knew the one wearing blue jeans held the firearm. In conversation during the course of the Conference it might well come to light that the young person wore jeans on the night in question, but that the adult had the weapon.

[80] Clearly the victim could be susceptible to changing her story based upon the subtle influence of this minor clarification. Then, when the matter goes before the Court for a preliminary inquiry some months later, the victim’s testimony is challenged and her credibility attacked on the basis that her in-Court evidence is inconsistent with her earlier written statement.

[81] What was initially a solid, reliable witness becomes someone who is shown to have been mistaken and therefore potentially unreliable in her recollection of other important events surrounding the commission of the crime.

[82] It could also be argued that having the young person make amends to the victim while the adult exercises his right to a trial, with its concomitant inconveniences and delays, might harden the heart of the victim against the adult in advance of his subsequent prosecution. Or, the young person himself could learn something at a Conference which might provoke him to eventually change his evidence at the subsequent trial for his adult co-perpetrator. While none of these examples would be the intended result of bringing potential witnesses together to discuss testimony prior to trial, the result could still be unfairness to the Crown.

[83] The case of *R. v. Buric and Parsniak* (1997) 114 C.C.C.(3d) 95, a first degree murder case, was one wherein witness tainting was found to have affected trial fairness. There, in the course of a police investigation, a witness was shown copies of statements made by other potential Crown witnesses, then induced into giving a witness statement in exchange for being allowed to enter a plea of guilty to a lesser offence.

[84] There was no way of knowing whether the witness had pre-existing evidence of the kind he eventually gave in a statement to police, then repeated in a *voir dire* because police investigators had not obtained a statement from him prior to showing him the other evidence and making a plea arrangement with him.

[85] On appeal it was held that the trial judge had fallen into error when he concluded that the potential evidence of this witness was tainted *ab initio* and was therefore unreliable. He then denied the witness the opportunity of testifying. That error was pivotal and led to the acquittal of an accused charged with first degree murder.

[86] The Court concluded that the witness should have been allowed to give his testimony, whereupon the trial judge could then have given the jury a warning concerning the potential dangers inherent in his evidence. Additionally, counsel for the accused would have had the opportunity to attack the credibility of the witness, test the reliability of the evidence or determine the effects of the tainting.

[87] The appellate Court went on to state that while the trial judge had been justifiably concerned that the evidence could affect trial fairness, he went too far excluding it from evidence before the jury. Instead, the evidence should have been allowed, cross-examined and the Court should have addressed the argument of possible taint. The Court's decision not to do so resulted in the accused's acquittal, a subsequent appeal by the Crown, and an order for a new trial.

[88] The tainting caused by the police decision to share witness information in this way is somewhat parallel to a decision which would encourage the young person in the present case to share witness information with the victim at a Community Conference. It seems to me that making such a referral has the very real potential of placing the credibility of both in jeopardy at a future prosecution.

6. CONCLUSIONS

[89] As Sopinka, J. reminded us in *Stinchcomb*, (*supra*), the fruits of an investigation accumulated by the Crown are not the Crown's sole property; rather they are public property gathered with the goal of furthering the cause of justice and fairness. However, I have already stated that a Conference is not a form of investigation. On the other hand, there is no protection for an accused against some third party, whether a co-accused or Crown counsel, a police investigator or indeed a Conference participant, who while working with a potential witness for some related or unrelated reason, may manipulate or mold the evidence of that witness to fit the needs of one party's case.

[90] The degree to which evidence is thereby corrupted may depend upon the degree of suggestibility of a potential witness. The revelation of information or evidence to a witness may then have the effect of "informing" the witness's future answers or, in the extreme, of prompting or provoking a witness to concoct evidence. As I have already pointed out, these effects may be intended or completely inadvertent.

[91] That said, one would be hard pressed not to conclude that a Conferencing environment is as likely a context as any within which a significant if inadvertent shift in evidence might occur. And while it is not the primary task of a Court considering a disposition to concern itself with insulating or preserving evidence wherever it may be found, where the Court is informed that there is pending, the prosecution of a co-perpetrator, the issue cannot be ignored.

[92] I am concerned that guidelines for the acceptance of referrals to Calgary Community Conferencing have not been more clearly set out. This factor has certainly protracted the present application unduly. Having said this, I do recognize that conferencing in the context of the Calgary Community Conferencing program has been an evolving process comparable to that we have seen in many cases since the advent of sentencing or healing circles.

VI. CONFERENCING VERSUS SIMILAR RESTORATIVE INITIATIVES

[93] It is useful perhaps to touch upon the experience of other courts in accommodating the sentencing circle alternative in some communities when considering the present restorative justice initiative. I would point out that the significant difference between sentencing circles and Calgary Community Conferencing is that the Judge is an active participant in the sentencing circle in the majority of cases, while the Judge plays no role in the Community Conference.

[94] The initiative for sentencing circles began with Canada's aboriginal communities. The lead case which alerted the justice system to the possibilities which this approach could bring to these communities was *R. v. Moses* (1992), 11 C.R. (4th) 357. As interest began to be expressed in the utility of this healing model, courts began to develop guidelines "sufficiently simple for the lay public to understand, and also capable of application so that (Courts') decisions (were) not being made arbitrarily". [*R. v. Joseyounen*, (1995) S.J. No. 362 [para.4].

[95] In *Joseyounen*, (*supra*), a decision of the Provincial Court of Saskatchewan, Farard, J. expressed the following opinion: [para.5]

"It is imperative that the public, aboriginal and others, be able to know and understand what is happening in the development of sentencing circles: the credibility of the administration of justice depends on it."

[96] He went on to describe the referral criteria, (generally similar to those set out in *R. v. Cheekinew* (1993), 80 C.C.C. (3d) 143) as follows:

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 counseling 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.

[97] Over time, other concerns have been expressed as to the propriety of conducting a sentencing circle, as for example in cases involving sexual offences. In *R. v. W.B.T.* [1995] S.J. No. 363, (Q.B.), for example, Milliken, J. addressed a number of additional concerns, including whether a circle should be held if a victim chose not to participate or signified a desire that a circle not be held, whether the accused had been found guilty following a trial, as opposed to having entered a plea of guilty at the outset, whether a circle was ever appropriate for a sexual offence, and whether sentencing should be adjourned to allow the accused to show a sincere effort to change.

[98] The Court in *W.B.T.*, (*supra*), concluded that while recognizing that no one wished to re-victimize the victim of a sexual assault in the context of a circle, even if the victim chose not to participate, her views could be brought to the circle by way of a victim impact statement. The fact that the offence committed was a sexual assault was no automatic bar to conducting a circle. Further, the Court concluded that the plea of not guilty or guilty was irrelevant since the issue at a circle was the willingness of an accused to change his lifestyle and the desire of community members to support him in doing so.

[99] In another case, *R. v. Johns*, [1995] Y.J. No.132, McEachern, C.J.B.C. stated:
...sentencing circles are a relatively new criminal law innovation, and great care must be taken to ensure, so far as may be possible that the credibility of the administration of justice is maintained. It is for this reason that this court stated in *R. v. Johnson* (1994), 31 C.R. (4th) 262 (Y.T.C.A.), 91 C.C.C. (3d) 21, that the judges of courts utilizing this new process should formulate rules, so that the public will understand the basis upon which individual judges are appearing to depart from the practices followed in all other cases. [para. 33]

... the courts' adoption of ... guidelines would be a good start towards legitimizing what appears to be a salutary practice in some kinds of cases. To this I would add that the role of the prosecutor should be clarified. This is because it may be useful in some cases for the opinions of some members of the circle to be tested at least in the court proceedings. The contrary views of Crown counsel may sometimes be the right view. It goes without saying, of course, that the prosecution has no role in out-of-court circle activities. I have no present view on whether in-court testing should be by conventional

cross-examination under oath. I leave that question to be resolved in the light of future experience. It may be that such processes may be appropriate in some cases and not in others. The public, however, should be given reason to be confident that the Rule of Law has not been displaced by some undefined process. [para.35]

The public must also be made to understand that the Court retains both authority and jurisdiction to impose whatever sentence the Judge, rather than the circle, decides or recommends in any particular case. In other words, the circle, representing the community of the accused in the entire process, and the prosecutor, representing the larger public in the court proceedings, may assist and advise the Judge, but the Judge and the Judge alone must decide what sentence should be imposed. [para. 36]

[100] These comments could as easily be made about the many restorative justice initiatives we have seen developing in this and other parts of the country.

VII. SOME GUIDELINES FOR RESTORATIVE JUSTICE INITIATIVES

[101] Upon the advent of passage of the new federal *Youth Criminal Justice Act*, which is expected to give legislative *imprimatur* to the concept of conferencing, it is notable that the proposed legislation makes no attempt at setting down guidelines to assist Courts in evaluating the numerous approaches to conciliation and restorative justice which these new provisions will permit.

[102] Drawing upon the experiences of our Courts in the past decade as sentencing and healing circles began to be considered as a useful part of our justice system, it is clear that guidelines need to be established to allow for the development of appropriate programs which will have the best chance of addressing the significant problems caused by crime in our communities. These guidelines need to flow from the starting point that the greatest number of individuals who are eligible or good candidates for conferencing will be considered.

[103] While it is not my intention to propose a closed list, it is my view that minimum guidelines for the conduct of community conferences of the kind contemplated in the present case would be:

1. Each restorative justice initiative should have a clear set of intake criteria, a statement of objects and purposes and a listing of credentials of facilitators; such information should be readily available to persons interested in pursuing a conferencing or other restorative approach within the youth criminal justice system. Intake criteria should include the following minimum requirements:

- (a) Both the victim and young person must agree to participate in the restorative justice initiative;

(b) The young person must have acknowledged the particulars of the offence or offences being referred, and a finding of guilt must be recorded prior to the referral;

(c) It must be clearly understood that program recommendations are not binding upon the disposition or sentencing court, although they may be persuasive.

[104] There are many different conferencing approaches depending upon communities' needs, public support, availability of individuals adequately trained in facilitation and the mediation of disputes, and of course, the resources to carry out restorative work.

[105] Not only will the provision of these kinds of details in advance alert potential users of the process as to what to expect with any particular approach, but also whether the process is an appropriate one in a particular case. This can only add to the transparency and thus the credibility of the process.

[106] Conferencing or programs of a similar kind should never be undertaken by unskilled persons who lack the appropriate training from qualified professionals, resources and on-going support and mentorship to enable them to work effectively within a conferencing or restorative justice environment.

[107] This will be especially important if the cases being undertaken require specialized knowledge as, for example, when the offences involve domestic violence or sexual assault, or where the offences are of high severity, to name only a few. I would hasten to add that I am *not* suggesting that volunteer facilitators should be automatically excluded from consideration as potential facilitators, rather that only well-trained and professionally supported persons in this category should be considered. In addition, on-going training, evaluation and education for all facilitators should be mandatory.

2. A community conference should not be directed where there are unresolved cases pending against co-perpetrators, be they adults or young persons, except by agreement between Crown and Defence;

[108] A complete prohibition should not be considered because it is entirely possible that the chance of tainting could be obviated or sufficiently reduced such that a Conference could proceed, following informed agreement between counsel.

3. Intake criteria should address at minimum, the safety and security (emotional and physical) of conference participants, including consideration of the potential affects on conference participants, should they be called to give evidence at some future time, as

well as sufficient information to allow the potential participants to make an informed decision whether or not to participate;

[109] Properly developed program intake criteria of the kind contemplated will address the issue of witness tainting as well as a number of the other legal issues raised in the present case. Because it is not apparent to me, other than anecdotally, what are the criteria for the Calgary Conferencing program, it has been necessary to fill in the blanks, so to speak, and for this reason to decide against a referral. Decisions made within the criminal justice system are frequently complex. Concerns of the kind raised in the present case were not unpredictable. In my opinion, it must be readily apparent that legal principles of fairness to both the Crown and the Defence have informed the creation of any such criteria.

4. A system of cross-referencing should be put in place which would alert Crown officials to the existence of parallel prosecutions on the the adult and youth sides of justice system, and integrate the tracking of such cases.

[110] The aim of such a system would be, wherever possible, to give such adult prosecutions sufficient priority that their efficient resolution will enable co-offending young persons to take full advantage of restorative justice initiatives.

[111] Within the framework of such an exercise, it would be prudent if we could stop comparing the youth justice system with the adult justice system in the context of “us” versus “them” and started considering both as part of the justice continuum. The benefit of this shift in attitude would be the recognition of the importance of each constituent part of the broader system in addressing crime and its victims fairly and effectively. It would also serve to curb inappropriate expressions of preference or priority that tend to cause the outside observer to believe that adult prosecutions are somehow more “important” merely because of their broader penal ramifications following conviction.

[112] An integrated tracking system of this kind would be especially useful in helping ensure that youthful offenders are not left in limbo because of scheduling practices for older offenders, and would recognize that the population of usually older young offenders who commit crimes with adults is part of that same group who will likely benefit most from restorative justice initiatives.

[113] One can reasonably predict the likelihood of restorative justice programs of a similar kind to Calgary Community Conferencing being slowly introduced into the adult side of the justice system in the near future, as successes experienced by virtue of the application of the restorative principles within the youth system inevitably drive interest in these programs. This is yet another reason why an integrated system of tracking would be extremely useful.

VIII. DECISION

[114] In the result, I am not satisfied that the present case is one where a referral to Calgary Community Conferencing is appropriate. The risk of witness tainting is real. This risk and the consequent potential for negatively affecting the prosecution of a co-perpetrator outweigh the benefits which the young person A.J.R. would potentially derive from participating in the program. Accordingly, I decline to make the referral.

DATED at the City of Calgary, in the Province of Alberta this 14th day of May, 2001.

Written Reasons released July 4, 2001.

L.T.L. Cook-Stanhope,
Judge, The Provincial Court of Alberta