

ONTARIO COURT OF JUSTICE

DATE: 2017 06 5
Old City Hall – Ontario Court of Justice

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

PETER FRANCIS-SIMMS

Before Justice S.R. Shamaï
Guilty Pleas on September 14, 2016
Sentencing Circle on April 19, 2017
Decision delivered in Court on June 5, 2017
Written reasons filed June 14, 2017.

A. Chamberlaincounsel for the Crown
S. Kelly counsel for the Defendant

Shamaï J.:

[1] Mr. Francis-Simms has waited a long time to see the realization of his wish to be sentenced for heroin trafficking related crimes. Before considering the evidence of the offences, the evidence on sentencing, and the position, ultimately a joint position, I would briefly review the history of proceedings and the process, a sentencing circle, by which this matter comes to court for reasons for sentence.

[2] Two features of this proceeding cause me to write detailed reasons for sentence: the proceeding by way of sentencing circle; and the elements of the evidence which exemplify restorative justice in sentencing. Although sentencing circles are not new in Canada, this courthouse has only recently started using them. To give an example of how one might work, I am providing a detailed description of the mechanics and dynamics of this one. The process feeds the conclusions I draw. Those are the foundation of my acceptance of the joint submission of counsel. The record in its totality supports findings that principles of restorative justice are served. The record of evidence and the principles justify the restraint counsel recommend in sentencing Mr. Francis-Simms on these serious offences.

CHRONOLOGY

[3] Arrested on July 15 2015 and charged with several offences over the preceding months, Mr. Francis-Simms was released after nine days in jail upon a recognizance with three sureties, and upon conditions including house arrest. He entered guilty pleas on May 6, 2016 before Justice Harris. A Gladue Report was ordered and prepared for September 14, 2016. That date, the guilty pleas were struck, as Justice Harris was retiring, and Mr. Francis-Simms wished to be sentenced in a circle proceeding. As a result, a process relating to renewed guilty pleas commenced before me. The pleas were entered that same day, on September 14. I made findings of guilt and adjourned, pending a series of in-chambers meetings required to make arrangements for the circle proceeding.

[4] Prior to proceeding to sentence however, Mr. Francis-Simms wanted to complete a rehabilitation programme. After some delays, he gained entry to a six week residential treatment programme at Native Horizons Treatment Centre on January 8, 2017. It was not until April 19, 2017 that the circle convened. The purpose of the circle generate evidence, informing the Court of the unique circumstances of this Aboriginal offender (S. 718.2(e)) and to provide a forum in which those affected by this offence, in its many facets, might speak directly with the Court and with each other. The circle is particularly appropriate in cases of Indigenous offenders, as the Supreme Court of Canada and other writers suggest.

[5] In this case the circle proceedings had a particularly unique outcome, as counsel agreed part way through that Mr. Francis-Simms enter a guilty plea on an additional count, on a possession of proceeds of crime count. That enabled the Court to impose a conditional sentence, which counsel proposed jointly to be a fit sentence in all the circumstances, and to Mr. Francis-Simms' advantage. A conditional sentence is no longer available on the trafficking counts, as they are punishable by a maximum life sentence (section 742.1(c)). The joint submission contemplates a conditional sentence on the proceeds count, in addition to a sentence on the trafficking counts reflecting the time served prior to sentence.

THE FACTS

[6] The fact underlying the pleas are not particularly unusual, for this offence. An undercover officer had received Mr. Francis-Simms' phone number, as a source for heroin purchase. Over a period of a month, three purchases were negotiated, in increasing amounts. The purchases took place in different parts of the city. The first transaction involved 0.37 gm heroin, and \$120; the second, 0.32 gm heroin and \$120. On the third occasion, Mr. Francis-Simms was arrested after a sale of double the quantity in the preceding sales. A search of Mr. Francis-Simms' residence followed the arrest. It yielded 3.39 gms heroin, 9.8 gms cocaine, 4.47 gms marijuana, and \$270. These are the bases for the two counts of trafficking, the count of possession for the purpose of trafficking, and possession of proceeds of trafficking.

CIRCUMSTANCES OF THE ABORIGINAL OFFENDER AND THE SENTENCING CIRCLE

[7] Mr. Francis-Simms is a 25 year old man of Aboriginal heritage. His life experience has been described for the purpose of court sentencings on two occasions: a Gladue Report was prepared in 2012, prior to the first sentencing as an adult, on a count of trafficking in a controlled substance, cocaine. The report was updated between May and September 2016, in relation to these charges. Together, the reports provide a detailed account of Mr. Francis-Simms circumstances, relating to his heritage and to the events which bring him before the Court. The two reports are exhibits on sentencing. I sealed them, at the request of counsel, due to some of the sensitive information contained in them.

[8] The sentencing circle provided a wealth of information, and was itself a process allowing a significant concrete outcome, in terms of the additional plea and joint submission referred to above. These are the circumstances I have become aware of.

DRUG INVOLVEMENT

[9] Mr. Francis-Simms' trafficking in heroin is in conjunction with his own use of the drug. The term "addict-trafficker" fits. Mr. Francis-Simms has used opiates, starting with prescription drugs, OxyContin and Percocet, prescribed for pain relief in relation to an injury he incurred, in 2009. His use of "pills", as he put it, commenced while he was in an open custody facility and was stabbed at age 17. This resulted in a lung puncture. Consequently, he started using opiates, on prescription. He turned to street drugs when his prescription was terminated. This cycle happened twice. A couple of years after the first injury, while in the community, Mr. Francis Simms was shot in the leg in the course of a drug debt dispute. Thus, there were two crime-related injuries, two prescriptions for pain relief, and two spirals from prescription drugs to street drugs and the concurrent criminal activity.

[10] Mr. Francis-Simms told the Gladue Report writer that he continued to use heroin, as it was much less costly than "pills" on the street, and he found himself using not only for pain relief but because he had become addicted. In this instance, he says he thought he was helping a friend of a friend acquire the drug: it turned out to be an undercover police officer. Mr. Francis-Simms described his use of drugs and alcohol as starting when he was much younger: marijuana at age seven or eight and alcohol at age 14. He has not used alcohol extensively, citing his father's alcohol abuse and accompanying violent temper as the reason.

[11] Mr. Francis-Simms is not a first offender. This is the second instance of adult convictions. He received an eight month conditional sentence, followed by a twelve months' probation, in 2012 on a guilty plea to trafficking in cocaine. In addition, he has a youth record, with 6 entries.

[12] Going in to the sentencing circle, the Crown took the position that a six to nine month sentence in custody was required. Defence was seeking a suspended sentence.

THE SENTENCING CIRCLE

[13] I have referred earlier to the reasons the format of sentencing circle has significance in this proceeding. Here are detail of form and substance of the circle.

[14] On April 19, a sentencing circle convened in a large room, not the courtroom, but within the courthouse at Old City Hall. Participants in the circle sat together at a table. The court clerk and I sat in the circle as well. Stepping out of the usual ceremony and convention of the courtroom, I did not wear judicial robes but rather, business attire. The court reporter sat to one side, in order to properly record proceedings. Present in the circle, in addition to the court party, were counsel, Ms. Shaunna Kelly for Mr. Francis-Simms, and counsel for the Director of Public Prosecutions, Mr. Andre Chamberlain; Mr. Francis-Simms partner, Sherri Joseph; his mother, Alexandra Francis; Aboriginal Legal Services caseworker Bronson Bob; and Elder Dorothy Peters, who works with Aboriginal Legal Services. She asked that we refer to her as Grandmother. In this ruling, I will refer to her as Ms. Peters, or Grandmother Dorothy.

[15] The proceeding was an “open court” proceeding, meaning that members of the public might attend, and in fact there were a couple of interested members of the public who attended, though not part of the circle. The circle proceeding was made part of the sentencing hearing, and was recorded as the record of proceedings. I opened the circle proceeding, affirming that it was a session of the Ontario Court of Justice, and acknowledging the traditional lands of Indigenous People, where we sat together. As well, I referred to a passage from the Report of the Truth and Reconciliation Commission, which speaks to the significance of a circle in Indigenous custom, in nature and in human life:

“Black Elk, a well-known and highly respected nineteenth-century spiritual leader from the Plains, expressed the importance of the circle. Everything the power of the world does is always done in a circle. The sky is round and I have heard that the earth is round like a ball and so are all the stars. The wind, in its greatest power, whirls. Birds make their nests in circles, for there is the same religion as ours. The sun comes forth and goes down again in a circle. The moon does the same and both are round. Even the seasons form a great circle in their changing and always come back again to where they were. The life of a man is a circle from childhood to childhood, and so it is in everything where power moves.”
(Final Report of Truth and Reconciliation Commission, Vol. 6, p. 41)

In this way, I recognized the Indigenous significance of the forum we employed, while not purporting to assimilate a tradition outside the function which I serve as a judge in the Province of Ontario.

[16] The participation of Grandmother Dorothy gave us greater presence of Indigenous tradition, ceremony and knowledge. Ms. Peters commenced proceedings by offering a smudge, which she explained to those present. As well, she shared an opening prayer in Ojibway, which she interpreted into English as well. She acknowledged the gift of tobacco, which Mr. Francis-Simms had given her, when they spoke before the commencement of proceedings. We conducted the circle, attempting to facilitate the discussion by use of a talking stick. All members of the circle introduced themselves.

[17] The formal plea and admission of facts had been conducted at a much earlier time. This permitted the circle to focus on the matters which it was convened for, the sharing of information and experience in a format which was the not conventional Anglo-Canadian court setting. In part, for that reason, I gave the formal decision on sentencing some time after the circle proceeding, in a courtroom. This carved out a space for the circle, without entirely harnessing it to the usual trappings of a guilty plea and sentencing

[18] We had agreed at the meetings prior to plea, between myself and counsel, that we would elicit contributions from those in the circle on three “go-rounds” of the circle: once, to discuss how Mr. Francis-Simms got to the point of being before the Court, charged with serious trafficking offences; next, where he is now, meaning, in conventional terms, the position he is in at sentencing, with the work he has done in preparation for sentencing, and the information available on progress. The third “go-round” was to canvass where we should go from this point: the actual sentence and the trajectory of Mr. Francis-Simms’ life, going forward. How did we get here, where are we now, and where do we go from here.

PORTRAIT OF A RECOVERING ADDICT: FROM SHAME AND ABUSE TO IDENTITY AND ACTION

[19] The previously admitted circumstances of the case were re-iterated so that all in the circle would know of those admissions. The criminal and youth record relied on by the Crown and admitted by Mr. Francis-Simms, the Gladue Reports, and reports from counsellors at the rehab centres were filed. The Gladue Reports were sealed, at the request of counsel, not to be released without the order of the Court. Documenting Mr. Francis-Simms’ participation and progress in counseling, at the Reconnect Counselling Criminogenic Harm Reduction Program, a letter from Trish Scott was filed. A letter confirming Mr. Francis-Simms completion of the six week programme at Native Horizons has subsequently been obtained, to be filed, from Native Horizons. Mr. Bob relayed the report orally in the circle. There was a minor confusion as to the order in which we might seat ourselves around the table, and how best to facilitate the process with the talking stick, to maintain a respectful flow of discussion and give some recognition to the direction in which the stick would traditionally be passed. I was advised that some traditions dictated the discussion move clockwise, and others go counter-clockwise. While we might not have maintained a traditional decorum, certainly the discussion was respectful, and heartfelt. To me, that is the important procedural part.

[20] In canvassing the three areas, a progressive portrait of Mr. Francis-Simms’ life emerged. His mother, Ms. Francis spoke in moving terms not only about her son’s life but significantly about her own experience, growing up Native in Toronto. She described the legacy of shame, which her mother passed on to her, in terms of the Indigenous heritage. She described specifically the years of raising her son, and leaving him with his grandmother while she completed a university degree. In doing so, she unwittingly exposed him to the alcohol abuse of his grandmother and the environment of alienation crime and substance abuse in the Jane-Finch area where they lived. Later during his teen years, having him join her in her new home in Orangeville, where she worked as a

counselor in a women's shelter, she further re-enforced his sense of not belonging. This fed her son's attempts to establish himself as part of an anti-social and eventually criminal circle, even in high school. This sense of identity was in part molded by the environment in which he spent his earlier years, and in part by the poor example his father set in the earlier years, as he too had a criminal record. Mr. Simms served jail terms, was estranged from family, abused drugs and alcohol, and engaged in verbally abusive conduct around his family, according to the information presented to the circle. The example of his father has changed over the years, and in fact, the clinical director at Reconnect, who counseled Mr. Francis-Simms, was his father's counselor as well. Ms. Francis described her son as a follower, lacking a sense of self direction.

[21] The comments of Ms. Francis in the circle were the subject of more detailed examination in the Gladue Reports. The Reports showed how the family disconnection in Mr. Francis-Simms early years, and the legacy of substance abuse and emotional aridity and incapacity left him very open to the negative influences he absorbed as a teen. As he put it himself in the circle:

“Since a young age I always – I thought drinking and drugging was normal, because it was always present in my life. I just pretty much was following in the footsteps of my father, my role models around me, my uncles or my cousins. My life, I always thought this was a normal life until I started seeing other kids who had good households.

My mom always tried to provide the best for me, but she was always at work or doing stuff, so I just pretty much ended up going and turning to the streets, and that's where it led me.

There's only two options for the streets, it's either jail or death. So pretty much it led me to either jail or almost getting killed a couple of times, and, yeah.”

[22] The sad irony is that during the time that Mr. Francis-Simms' mother was not present, she was working to provide a better life for her family, and has clearly met with some success: a university degree, a responsible position in the community. Her commitment to her son never seems to have been the question: the means by which she has been able to express and offer that commitment has been the issue.

[23] However, the family disconnection and emotional vacuum is part of a bigger picture, which Grandmother Dorothy described:

“A lot of our people grew up with a lot of shame and a lot of guilt, I guess, which led to a lot of trauma for families because of what happened to residential school, the Sixties Scoop, just racism, sexism, all kinds of abuses that people have faced during their time in residential school.

Because in residential school, you weren't able to express emotions, you weren't able to make physical contact. So

there was no hugging, there was no verbal emotional expressions of love, pride in your family members.

When that's missing and you have a family, a lot of the young people went out and had families, they were unable to express that and be able to be human towards their children, because they weren't treated as humans, they were treated very badly.

So you're left with a lot of generations of children, and this didn't happen hundreds of years ago, this happened in my generation, so it affected, like, my family, my mother, my grandmother, my brothers, my sisters.

I'm just going to speak about my experience because that's what I know. So my siblings were unable to express that kind of emotion. They didn't want to talk about their experiences. If you have trauma like that, it's really difficult to be able to know who you are, your foundation is not solid.

You grow up in kind of an unbalanced environment, and you don't have those trust, you don't have those teachings, you don't have that ceremony. You don't have that language to be able to even formulate that is something is wrong and you know that.

You try to fit into your community, you try fit into society, you just don't fit in anywhere. So when you're very impressionable, you get dragged into things that you know is not right, but you are pulled in anyway, so that's what happens. So there's a lot of these young people that are growing up in that background and are led astray.

Even though you have family, there are- I'm not saying that all families are like that, but we do feel the effects of that. Even the more healthier families, there is that residue of that history that we carry, because as Aboriginal People we are all affected by what happened to us.

So you can't really, as much as you love your children and you care about your family members, and you just are not able to even voice that because that voice was taken away from you, and you can't even express those emotions. They are all inside.

It takes years and it takes process, and it takes a lot of trust and culture and community to bring that back in just one person, and you're talking about families and you're talking about communities all across the country that need this."

[24] I reproduce these comments by Elder Dorothy as they provide the context in which Mr. Francis-Simms and his family find themselves. Her comments illustrate the value of the participation of an Elder in the circle. This is a voice of community, which assists the process of the sentencing circle.

[25] In addition to the input of Grandmother Dorothy as a community voice, our very experienced court clerk, Ms. Mavis Thomas offered a voice of community from a perspective within the system, but as with Grandmother Dorothy, not personally connected with the offender. She spoke to her observation of the many people affected by drug addiction, whom she has seen over years in the system. She observed that it is necessary to “step out of the judicial system... go to a different level... to make actual change” in one’s life.

[26] With regard to Mr. Francis-Simms’ work in Native Horizon, Mr. Bob reported from the Native Horizon staff. They described Mr. Francis-Simms as “an ideal model participant”; saying that he thrived in the programme and they couldn’t ask for a better participant. Mr. Francis-Simms was asked to participate as a speaker to a group for at-risk youth, and he did so. A two week follow-up programme at Native Horizons is available to Mr. Francis-Simms in the summer.

[27] Ms. Kelly read from one of the letters from Trish Scott, clinical director at Reconnect:

“It has been an absolute pleasure counseling this young man. He’s worked diligently to earn the self-respect he now feels. Ms. Simms set out to break old habits of thought and action. He’s learning healthy communication skills and how to be a good partner and father. He continues to respond to situations, versus react. He considers the potential outcome of impacts of his actions.”

[28] The reports of change which the Reconnect counseling and the Native Horizons work have brought about are mirrored in the observations of Mr. Francis-Simms’ close family, his mother and his partner. Mr. Francis-Simms now has three young children with Ms. Joseph. She told the circle the following:

“The treatment centre is probably the best thing that’s like ever happened to him. He is a much brighter person. His kids, he’s way more with his kids now. They like, know him way better, and I’m so happy about that. Before, they would always, like, run to me for, like when they were, like crying or whatever, but now they run to him, which is really good.”

[29] His mother reported similarly about the emotional growth, which her son has undergone. She described to the circle that she believes her son has now understood the impact of his childhood, and that only now does he understand he has choices about his path in life. She describes her pride and pleasure at knowing her son is learning and sharing about his Aboriginal heritage. She said:

“For him, he’s so young ... the sky is the limit in terms of education, opportunity to really show his family and himself his full worth and his self-esteem is through the roof now. Before he was very shy, very introverted, didn’t really articulate his words, it was more like just yes and no, not really present...he’s full of life now, and for me that’s the proudest thing ever, that we can share our life together”

[30] The information provided to the Court, through the Gladue Reports and the circle, show that a key issue for Mr. Francis-Simms has been the absence of his father and the absence of emotional support and indeed emotional life. Those factors plus the negative identity or absence of identity in his own Indigenous community resulted in a personal vacuum. In applying himself to the counseling work in which he has participated while on bail, Mr. Francis-Simms expresses change at a deep level. He told the circle:

“I went through some stuff I never told no one over there, so it helped me, like, get back to myself, get back to my soul. Just, I feel like I became, like, a better person, a better father. I just, yeah, it just gave me, like, I’m able to express my emotions now instead of just going through the motions and being emotionless. I can show my kids love. I feel like this made me a better person all around, and I plan to continue counseling at Anishnawbe Health

He continued, to describe his plans for the follow-up programme at Native Horizons, and his work speaking with at-risk youth in shelter)

These are the key aspects of the evidentiary record on sentence before me.

THE LAW

[31] The applicable principles in this sentencing hearing relate, as always, to both the offender and the offence. Section 718.1 of the Criminal Code sets out the fundamental principle in sentencing:

“A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

[32] That principle animates the purpose of sentencing, set out in Section 718 of the Code:

“The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect of the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

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

- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community;
and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community

[33] Section 718.2 sets out “other sentencing principles”. Most relevant is the principle of restraint and the requirement to consider the specifics of Mr. Francis-Simms history in this case:

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

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

[34] The provisions of the Criminal Code, in Section 742.1(c), restrict the availability of conditional sentences for trafficking offences, as Section 5(3)(a) of the Controlled Drugs and Substances Act creates a maximum life sentence for trafficking offences in Schedule 1 substances, as heroin is.

[35] Clearly, trafficking in heroin is a serious offence. Nowhere is that more clearly illustrated for the purposes of this proceeding than in the testimony of the offender himself. Mr. Francis-Simms states that on two occasions, he was prescribed opiate painkillers, developed an addiction, and turned to street drugs, heroin, when the prescription dried up. He has now withdrawn from the addiction twice. As Crown points out during the circle however, the vulnerability of an addict to resuming use is known to be very high, in the time immediately after successful treatment. Again, Mr. Francis-Simms’ situation demonstrates this, as he had stopped using once, but on being injured again, the cycle resumed, and it has brought him, as an addict-trafficker, to this point in the sentencing proceedings.

[36] In addition to the personal price an individual pays for addiction, the impact on an individual’s family is clearly illustrated by the evidence on this hearing. Knowing of Mr. Francis-Simms incapacity to participate fully in his own life, I reflect that the addiction levies a toll on those around a person using this drug.

[37] Mr. Francis-Simms’ story must be situated in the recent post-contact history of Indigenous people in Canada. His resort to drugs must be seen in the intergenerational trauma suffered by members of First Nations, recounted by Grandmother Dorothy, and told by Ms. Francis about her own family and the offender’s family, and by Mr. Francis-Simms comments about his family life.

[38] Mr. Francis-Simms spoke as well about the impact on society in terms of violent of unproductive outcomes of participation in the drug trade: you either die or you go to jail. The injuries which led Mr. Francis-Simms to prescription painkillers, and thence to street drugs, were themselves injuries incurred in the context of criminal involvement:

one, an injury in an open custody facility, the other, gunshot to his leg, in the context of a drug debt dispute.

[39] In this case, the joint position for a non-custodial disposition does not minimize the seriousness of the offence. I note the following mitigating factors: this is a guilty plea, entered at a relatively early stage. Certainly there was no trial required, no witnesses called. Having now been on bail for close to two years and bound by conditions of house arrest, any consideration for incarceration must be modified by this lengthy and strict period during which Mr. Francis-Simms liberty has been constrained. Most significantly, in this particular case, Mr. Francis-Simms has engaged in intensive and meaningful treatment and rehabilitation during the time he has been on bail. He has engaged in a sentencing circle, in which he has called on his mother and his life partner, the mother of his three children, as well as members of the community and the professionals who have guided his rehabilitative efforts.

[40] Recent trends in the jurisprudence show that a non-custodial disposition may serve the ends of justice, even in serious drug offences. *R. v. Voong* [2015] B.C.J. No. 1335 is the pronouncement of the British Columbia Court of Appeal in using a suspended sentence, where conditional sentence is no longer available. Justice Bennett begins the reasons of the Court by saying: “Those who embark in drug trafficking engage in serious criminal conduct. Absent exceptional circumstances, in British Columbia, they should expect to be sent to prison.” The thrust of the decision is to show how exceptional circumstances resulting in non-custodial dispositions might still achieve a suitable punishment.

[41] After a detailed review of the development of the conditional sentence order (CSO) and suspended sentences with regard to drug offences, the Court says at paragraph 60:

“A CSO was considered a sentence of imprisonment because of the strict and punitive conditions that could be imposed. As we have seen above, a suspended sentence can attract similar strict conditions, but only if they are aimed at protection of the public and reintegration of the offender into society. Rehabilitation clearly plays a significant role in both of those conditions.”

In Ontario, the recent decision of Justice Allen in the Superior Court in the case of *R. v. Thevarajah* [2016] O.J. No. 462 paragraph 10 provides a helpful compendium of cases where non-custodial dispositions are meted out to trafficking offenders, post-*Voong*.

RESTORATIVE JUSTICE

[42] Two principles of sentencing, often referred to only in passing, are remorse and restorative justice. We ask, has the offender shown remorse? Less frequently, we look to actions of the offender as showing restorative justice to have been effected, or how it can be given effect in the future. In my view this is because we have not fully understood what restorative justice is, and what its role is, in sentencing. Similarly, while the jurisprudence on sentencing is replete with references to remorse as a mitigating feature in sentencing, it is not well understood. I do not propose to launch into an academic inquiry on the subject, but simply to make a few observations about the

genesis of the terms in our jurisprudence, and what appears to me to be a crucial link between remorse and restorative principle of sentencing. In Mr. Francis-Simms' case, the record of evidence shows the link between the two. In concluding these observations, I wish to show how the proposed joint submission properly serves these principles of sentencing, on the record before the court.

[43] In the landmark sentencing decision in *R. v. Gladue* (1999) Canlii 679, the Supreme Court of Canada describes the then-recently enacted principle of restraint in Section 718.2(e) as a remedial provision, rather than just a codification of previous law (para. 41). In discussing the application of Section 718.2(e), the court makes it clear that the section applies “to all aboriginal offenders wherever they reside, whether on or off-reserve, in a large city or a rural area. Indeed it has been observed that many aboriginals living in urban areas are closely attached to their culture.” The Court cites the Royal Commission on Aboriginal Peoples, vol.4 at p. 521:

“Throughout the Commission’s hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples’ existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities” (at *Gladue* para 91).

Mr. Francis-Simms was raised in an urban environment of negativity and disconnection to his Aboriginal identity and heritage. The connection between acquiring a positive connection with his Aboriginal identity, and the restorative and remedial principles of sentencing is clear in principle.

[44] This connection assists me in answering the question raised when Justices Cory and Iacobucci released their decision on behalf of the Supreme Court in *R. v Gladue*, some eighteen years ago: what is intended by restorative justice?

[45] In that decision, the Supreme Court considers Section 718.2(e) for the first time. At paragraph 70, the Court refers to the importance of restorative justice as expressed in para’s (d), (e) and (f) of Section 718. 2 and says “

“...most traditional aboriginal conceptions of sentencing place a primary emphasis of the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(e)...*In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist.*”(para’s 70-71) (emphasis added)

... in our view a sentence focused on restorative justice is not necessarily a “lighter” punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances

impose a greater burden on the offender than a custodial sentence”

The Court goes on to quote from a scholarly work at paragraph 72: “restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility.”

[46] That proposition is well illustrated by Mr. Francis-Simms’ circumstances. Still, the application of restorative justice has been hard to grasp in practical terms. What are we restoring? Was there a pre-existing harmony in Mr. Francis-Simms life? As with many Indigenous offenders, who bear the legacy of intergenerational trauma due to the incursion of earlier Canadian policy, it does not appear to have been the case. The more recent decision of the Supreme Court of Canada in *R. v. Ipeelee* 2012 SCC 13 permits us to take judicial notice of the negative outcomes of colonialism without looking at each individual’s circumstances. At paragraph 60, the Court makes a clear statement:

“To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools, and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course, higher levels of incarceration for Aboriginal peoples.”

[47] This backdrop hardly shows a pre-existing harmony, in general terms. Failing a harmony which existed prior to the criminal conduct being the object of restorative justice, in considering what the reality of restorative justice entails, one must look to “the harmony...which it is felt should exist”. In the case of Mr. Francis-Simms, I suggest that the goals of civil society, the guarantees of human rights and cultural choice and determination are the conditions which should exist. That harmony may be reflected in the United Nations Declaration of the Rights on Indigenous Peoples (UNDRIP). Canada endorsed the UNDRIP only in 2016, 8 years after the resolution was adopted by the General Assembly of the United Nations. As we are now signatories to this declaration, I consider Articles 5 and 11 to describe the aspirational harmony referred to in *Gladue*. Those sections read as follows:

Art. 5: Indigenous peoples have the right to maintain and strengthen distinct political legal economic social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political economic social and cultural life of the State.

Art. 11 – (1) Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. ... (2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”

These articles provide a framework in which restorative justice may be considered, in Mr. Francis-Simms case

[48] Restorative justice is engaged on many levels in this case: we are restoring dignity to his family, in giving voice and dignity to their heritage as Indigenous people. It is plain through the evidence of Grandmother Dorothy that the deprivation of a cultural identity is a systemic consequence of previous policies of Canada's government, of colonization. Articles 5 and 11 of the UNDRIP resolve to redress these losses. The Court can identify these losses and the means to redress, in this case. The impact of those policies, played out through the shaming of identity, and the eradication of cultural practice, affects three generations in the case before me. In reconnecting with an identity in his Indigenous community, by tapping into rehabilitation resources provided through that community, Mr. Francis-Simms shows by his behavior, witnessed by his close family and his counsellors, that he is coming to life and exercising self determination in his emotional and personal choices. In endorsing a sentence which recognizes this commitment and assumption of personal responsibility, we are giving voice to a healing process for an individual through Indigenous resources, and a justice process which incorporates the wisdom and in some measure, the ceremony of the Indigenous community. We are reflecting on, not denying, the devastating impact of colonization, as it has shamed and destroyed members of First Nations, physically, psychologically and culturally. In this sentencing process, we are recognizing the need to restore the individuals and families and traditions as healthy vibrant actors in our collective Canadian community. This is consistent with the commitments Canada has made in subscribing to the United Nations Declaration of Rights of Indigenous People. This gives substance to the principle of restorative justice.

[49] The Saskatchewan Court of Appeal described restorative justice in these terms, as cited in *Ruby on Sentencing* (8th ed. pp. 652-3):

“Restorative justice has been defined as the creation of a positive environment for change, healing and reconciliation for offenders, victims and communities. It is a condemnation of criminal actions rather than perpetrators and an integration of offenders into the community rather than a stigmatization or marginalization of them. Within this framework the offender is encouraged to accept responsibility and to make reparations to the community” (*R. v. Laliberte* [2000] S.J. [No.138 @pp. 529-30](#))

Clearly Mr. Francis-Simms has been able to find an environment for change as described by the Court in *Laliberte*. The evidence he has provided and which his close family members have provided show that he is prepared to take his place as a responsible member of the community, perhaps for the first time.

REMORSE AND RESTORATIVE JUSTICE

[50] Sentencing judges frequently looks to signs of remorse, as a mitigating factor in determining sentence. As Justice Melvyn Green documents in his recent decision, *R. v. Al Saedi*, [2017] O.J. No. 1566, the word is frequently invoked, but like restorative

justice, the substance of it is little discussed.. There is a clear link between the desired changes we call restorative justice, and the renunciation of criminal identity, which we call remorse.

[51] Professor Richard Weisman speaks of the psychological shift, when a person renounces his identity as a criminal, and takes on the role of a fully functioning member of the community. In his book, “Showing Remorse” (2014: Ashgate Publishing CO., Burlington Vt.). Professor Weisman describes this process as a facet of remorse: (p.37)

“It is the third criterion for validating a claim of remorse that is potentially the most expansive of all because it widens the involvement of the state in managing the offender. From this vantage point, the proof of remorse consists not just in the acknowledgment of responsibility and the demonstration of visible suffering for one’s wrongdoing, but in the willingness of the offender to make fundamental changes in one’s character so that the wrongdoing will not recur. *Here, the task of the remorseful offender or their advocates is to show to the satisfaction of the court that they are no longer the person who perpetrated the transgression – that they are taking or have taken steps to renounce those parts of the self that led to the misconduct and to develop a new self for whom such actions would no longer be possible. The transgressive act becomes the occasion for the wrongdoer to affect a radical rupture with the past; in turn, remorse is demonstrated by abandoning previously cherished ways of seeing, by changing one’s lifestyle, or by means of effecting deep characterological transformations*” (emphasis added)

[52] The process which Professor Weisman describes is a socio-legal application of the restorative principle. I see Mr. Francis-Simms’ journey to sentence as the transformation Professor Weisman discusses, taking steps to part ways with previously anti-social patterns and taking a place in the community as a responsible, self-respecting, contributing citizen. Without saying “I’m sorry for what I’ve done to myself and to my family”, Mr. Francis-Simms work in rehabilitation has brought him to a point of understanding the impact of his criminal activity on himself and his close circle. He has taken steps, as Professor Weisman describes, enabling a “radical rupture with the past”. Professor Weisman describes remorse from a sociolo-legal perspective; the UNDRIP enumerates aspects of Canada’s commitment to restoring Indigenous persons to the status any citizen might expect, and in particular Indigenous persons subjected to colonization.

[53] Thus Mr. Francis-Simms claims identity not as a criminal, and drug-dependent subculture member, but as a person of Indigenous heritage who can acquit himself of his responsibilities to himself, his family and to the community at large. I am satisfied that he has demonstrated this to the Court.

CONCLUSIONS

[54] In Mr. Francis-Simms' case, it is plain that Mr. Francis-Simms has suffered in the community in his younger years, despite the good intentions of his mother. His father's work in rehabilitation has ultimately benefitted Mr. Francis-Simms, but growing up, Mr. Francis-Simms was victimized by his father's conduct, in terms of the family violence, family disruption, and the criminogenic, substance abusing environment he lived in. Grandmother Dorothy puts this in perspective in a larger context. Deprivation of liberty has not served to restore Mr. Francis-Simms to a position of dignity and self-worth. His work pending sentence on rehabilitation shows that this is a man who has become an example of rehab, a veritable model for other youth in crisis. In being invited to speak at a shelter for at-risk youth, Mr. Francis-Simms demonstrates that he can and will give back to the community. This is another facet of restorative justice, as the earlier passage from *Gladue* enumerates. Particularly situated in the Indigenous community, Mr. Francis-Simms efforts show that he is reclaiming his identity from the shamed past he inherited from his mother and from her recent forebears.

[55] As indicated earlier, partway through the sentencing circle proceedings, Crown and Defence conferred off the record, and a further guilty plea was taken, in order to open the door to a non-custodial disposition. In reviewing the evidence and the principles, I am, as indicated, prepared to adopt the position proposed by counsel.

[56] On the two counts of trafficking, I am suspending the passing of sentence and imposing twelve months' probation, concurrent. On the possession for the purpose of trafficking, I am imposing one day in light of thirty days' time served (nine days upon arrest, twelve days on a subsequent breach allegation, to be credited as thirty days). . On the possession of proceeds of crime, I am imposing a conditional sentence of twelve months. That sentence runs concurrent with the suspended sentences.

[57] The terms of probation and conditional sentence are identical, on the recommendation of counsel. You will report upon release to the supervisor/probation officer, and thereafter as required; you will abide by statutory conditions and take such counselling in a culturally appropriate setting. You will provide a release to the supervisor/probation officer, so that s/he can monitor your attendance and participation in counselling.

[58] Counsel jointly recommended small fines on the trafficking and proceeds counts, as a punitive measure. While superficially, it is a proposition which appears innocuous, I am concerned that the true purpose is more to avoid a much more punitive victim fine surcharge (VFS). The Superior Court in *R. v. Berhe* [2016] O.J. No. 5339 tells me I cannot avoid the VFS by imposing small fines. I am therefore following the direction of the Superior Court in *R. v. Fedele* [2016] O.J. No. 3661 and ordering that the victim fine surcharge on the possession for the purpose count be concurrent on all counts. The monies seized at the time of the search are forfeited to Her Majesty. An order under Section 109 bars possession of prohibited or restricted weapons, for life, as this is a second offence of trafficking. That is the order of the Court.

[59] All other charges are withdrawn at the request of the Crown.

[60] I wish to thank all those who participated in the circle, particularly Mr. Francis-Simms and his family. The process provided a meaningful communication of the key

information, and illuminated the applicable principles, clearly to a good result for Mr. Francis-Simms, his family, and the community. I wish to thank Grandmother Dorothy for her presence and her contributions in the circle as well. In providing elements of Indigenous ceremony, a balance between Canadian law and Indigenous justice in the sentencing process became tangible.

Released on: June 14, 2017.

Signed: Justice Shamaï S.R.