Justice as Healing
A Newsletter on Aboriginal Concepts of Justice

Aboriginal People and the Canadian Justice System

Ross Green, B. Comm., LL.B., LL.M. Mr. Green has practised law in several of the communities described in his book, Justice in Aboriginal Communities: Sentencing Alternatives, and has advocated for the kind of sentencing alternatives he describes therein. Mr. Green currently lives and practices law in Melfort, Saskatchewan.

Editor’s Note: The following is Chapter 3 of Ross Green’s book entitled, Justice in Aboriginal Communities: Sentencing Alternatives, originally printed in 1998 by Purich Publishing in Saskatoon, Saskatchewan. The editor would like to thank both the author and the publisher for granting permission to reprint an excerpt from Mr. Green’s book.

“At the most basic level of understanding, justice is understood differently by Aboriginal people,” wrote the AJI:

The dominant society tries to control actions it considers potentially or actually harmful to society as a whole, to individuals or to the wrongdoers themselves by interdiction, enforcement or apprehension, in order to punish harmful or deviant behaviour. The emphasis is on the punishment of the deviant as a means of making the person conform, or as a means of protecting other members of society.¹

The purpose of a justice system in an Aboriginal society is to restore peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family that has been wronged. This is a primary difference. It is a difference that significantly challenges the appropriateness of the present legal and justice system for Aboriginal people in the resolution of conflict, the reconciliation of offenders and victims, and the maintenance of community harmony and good order.²

I frequently encountered perspectives supporting this interpretation of Aboriginal justice within the communities studied. Initially I thought the criticisms of the conventional justice system simply reflected a deep distrust and rejection of that system and were a sign of anger against it. Later, however, I saw these criticisms as more likely reflecting a fundamental difference in the meaning of justice and the process to be followed upon an offender’s transgression. A recurrent theme was the replacement of the punitive focus of conventional Canadian law with a more conciliatory approach that emphasized the restoration of peaceful relations between offender, victim, and community. This view was reflected in the comments of Harry Morin, a Cree from Sandy Bay, who was active in the development of circle sentencing within his community:

Like a lot of times, to me personally, the system is right now just a punishing system, it’s punishing. They’re not looking at what’s causing these problems, they’re looking at, hey, we have to punish this guy for what he’s done, basically, that’s all it’s at. And a lot of these guys go to jail, and they sit around this ten-by-twelve cell or whatever size they may be, and they sit there and think. And they get very bitter. [The offender’s] bitter at the people that put him in there, the victim that reported him. He’s mad at the justice system, he’s mad at the RCMP. Here in a sentencing circle, we make sure somebody tells the offender that we’re here to help, for support, and not only that, if recommendations are made that he takes some kind of programing to better himself back in society, he’s not only promising to the magistrate or the probation officer, he’s promising it to his own community. And then he knows he’s got all that support.³

The Hollow Water assessment team also articulated a justice process that stands in sharp contrast to the conventional adversarial system:

[We] are attempting to promote a process that we believe is more consistent with how justice matters would have been handled traditionally in our community. Rather than focussing on a specific incident as the legal system does at present, we believe a more holistic focus is required in order to restore balance to all parties of the victimization. The victimizer must be addressed in all his or her dimensions—physical, mental, emotional, spiritual—and within the context of all of his or her past, present, and future relationships with family, community, and Creator. The legal system’s adversarial approach does not allow this to happen.⁴

[Sample Article]
Closely related to the perspective that questions the overall focus of the system is a sense of estrangement between local community members and the conventional justice system. This sense of estrangement is shared by many Aboriginal people and is reflected in the report of a 1988 Cree justice symposium in northern Quebec:

Whether because of being historically obliged to do so or whether in a certain way they accept it, owing to fate or the fact of its usefulness, the Cree communities have relied for almost a half century on a Western system of justice. In court a Cree has to answer only very indirectly to his own society; he is more answerable to a little known world, to a society foreign to his habits and traditions. And what is more, the society that bears the social costs of the transgression by that individual has neither control over that individual nor any say in the judicial process.\(^5\)

Despite this sense of estrangement, the goals of Aboriginal and Canadian justice are similar. Members of the Indigenous Bar Association suggest that those similarities include deterrence of members from misconduct, public condemnation of offenders, restoration of the offenders to society, and punishment, if necessary.\(^6\)

Although a plurality of views on justice is evident among Aboriginal people, there is significant emphasis on holistic approaches to justice that integrate the social, religious, and economic functioning of the offender vis-à-vis the community.\(^7\) The Law Reform Commission of Canada recognized this and commented that “[t]he Aboriginal vision of justice gives pre-eminence to the interests of the collectivity, its overall orientation being holistic and integrative.”\(^8\) Similarly, the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta commented that “[j]ustice and dispute resolution in traditional aboriginal societies can be illustrated by a restorative model of justice. ... The holistic context of an offence is taken into consideration including moral, social[,] economic, political and religious considerations.”\(^9\)

Many Aboriginal dispute-resolution traditions and perspectives appear at odds with those accepted within the conventional Canadian justice system. Despite a common aim of controlling and deterring deviant behaviour and thereby protecting the community, Aboriginal justice approaches are characterized more by private inter- and intra-familial solutions, collective decision making, and an emphasis on reconciliation between offender, victim, and community, and less by an emphasis on punishment, the conventional Canadian approach.

The following section considers how such differences in perception and tradition, together with other factors, have affected conventional sentencing practices in Aboriginal communities.

**The Circuit Court as Absentee Justice System**

Most non-urban Aboriginal communities across Canada are serviced by circuit courts. Based in central urban locations, circuit court parties travel to these communities by road in the south and (usually) by air in the north. The northern fly-in court party usually comprises the judge, court clerk, Crown prosecutor, and legal aid counsel. Don Avison,\(^10\) a former Crown counsel in the Yukon, described the often-tenuous relationship between the circuit court party and the community:

I have strong memories of how difficult it was to get people to come to court there, even those who were actual parties to the disputes. I remember days in Carmacks, and other Yukon communities, when I was there in court trying to sort out what the appropriate response or sentence should be, knowing that I was part of a group of three—the judge, the prosecutor and the defence lawyer— who probably knew less about what had happened than anyone else in the community, and we were the ones there to decide what the consequence should be. I also remember many times when I heard a dull rumble of voices behind me and I would know that, somehow, I had just fouled up the facts and there was no way to fix it.\(^11\)

Many Aboriginal offenders facing sentence at circuit courts are intimidated by the process. Derek Custer and Cecile Merasty, two members of the sentencing circle committee at Pelican Narrows, Saskatchewan, explained that local offenders understand neither court procedures nor the English language. As a result, they usually stand mute before the judge, hoping their sentencing will be expedited.\(^12\) This sense of confusion and intimidation has also been described by defence counsel Nick Sibbeston of the Northwest Territories, who commented that “[t]he general impression Dene people have of the court circuit
is that a bunch of strangers, most of whom are nonnative people, have come to town.” He said these people “see the court proceedings as very strict and formal, and for most of them, scary.” Estrangement from the circuit court system was also evident in the comments of Harry Morin from Sandy Bay:

With the probation officer or the magistrate [the judge] … you only see him once a month. You don’t care. You know, ‘I’ll get away with this, I’ll get away with that. They’re not going to know.’ Well, of course, nobody knows because they’re gone. Nobody sees them until the next court date. Here, he [the offender] knows the people that are involved, and he knows the people that care and they keep an eye [on him], and they tell him that right in the circle, ‘If you ever need any help, if you need someone to talk to, if something’s troubling you, we’re available.’ And if you don’t have a phone, you know, and a lot of times the probation officers won’t accept a collect call, what do you do? When the pressure gets so tough, do you just say, ‘To hell with it?’ Well, basically, that’s what the system is doing. Here, [in Sandy Bay] you have your community of people. You know who is there. You know who you can talk to.

I frequently encountered such feelings of estrangement in the communities I studied.

Many problems have been associated with the administration of justice by non-resident circuit courts. These include large court dockets, time constraints, lack of interpreters for Aboriginal offenders, and cultural differences between court personnel and Aboriginal offenders and communities. In northern Saskatchewan and Manitoba, circuit courts regularly face heavy case loads. For example, despite an extremely high case count, Sandy Bay is allocated only one court date per month. Constable Brian Brennan indicated Sandy Bay had the second highest case load per member in Saskatchewan, next to La Loche. He reported that Sandy Bay had a total yearly load of nine hundred cases, shared by three officers who functioned without secretarial staff.

Sentencing hearings in such communities are often conducted quickly with little participation by offenders, victims, and local community members. During my appearances in the courts of central Saskatchewan, I have often experienced days on which more than fifty Aboriginal accused have appeared. As the vast majority of these accused either entered guilty pleas or were found guilty, there was little time to consider offenders as individuals during sentencing. This case-processing approach has been described by Judge Fafard:

I’m really not interested in making more sausage or better sausage or adding spice to the sausage. Personally, I want to see a change away from that. I want to see us do good work. I sometimes feel it doesn’t really matter if I do the forty or fifty cases before me on the docket in the morning, because if I do get them all done, I will not have done them very well. If I could do just a few of them and do them well, I would probably be further ahead than having case-processed them all and having done a bad job. So what we have at the moment, I believe, is an offender-processing system. It’s not a criminal justice system because we’re not achieving justice. We’re not resolving the conflicts and the problems that are brought to us, and I think that our present system, as we operate it, just doesn’t have the wherewithal to do that.

Given current restraints on public funding in all sectors of government, a significant increase in court resources to allow for the additional time and personnel required to move away from a case-processing system appears unlikely. The more likely scenario is that we shall see incremental changes to conventional sentencing practice based on the requests and advocacy of lawyers or lay community members or on the willingness of judges to take risks and depart from the status quo.

A further explanation of the seeming detachment displayed by Aboriginal offenders at conventional sentencing is that facing a judge is viewed as simpler than facing one’s own community. This view was echoed in comments made by Constable Brian Brennan of Sandy Bay, who explained differences between conventional sentencing and circle sentencing:

And it really actually confronts the accused a lot more … standing … before his community, and admitting that he was wrong and explaining why he did it, than to stand before a stranger. It’s easier to stand before a stranger for four to five minutes while the judge sentences you and be done with it, than to sit for an hour or two, maybe even three, and have a number of people criticize your character and your actions, and you have to defend yourself.

These comments reflect the impact of local systems of social control on offender response, and confirm the statue of circuit court judges and personnel as “strangers” and “outsiders.”

The relative isolation of rural and northern communities may be a factor in the relationship between
the court and the community. Local participants and resources may be more easily identified and accessed in northern Aboriginal communities that are geographically isolated from the larger centres of the South and whose population is generally less transient. Constable Brennan associated community isolation and population stability with the availability of the local support systems he viewed as prerequisite to effective circle sentencing. He contrasted the situation in Sandy Bay with that of the Red Earth and Shoal Lake Reserves, 250 kilometres (155 miles) to the south, where he had been stationed previously:

The main difference is that Sandy Bay is an isolated community. … I think sentencing circles can work in any community anywhere if there’s the proper support structure. I don’t think that in a place like Red Earth and Shoal Lake unless that support structure’s there … that it’s going to work. They’re [the residents of Red Earth and Shoal Lake] on the move. They move back and forth between Nipawin and the reserves and Prince Albert … so much that you don’t have the solid core community support that you need to have a sentencing circle work.19

Although time constraints and separation from local communities and local culture are problems faced by circuit courts sitting in Aboriginal communities, one advantage appears to be the broader discretion over the sentencing process exercised by circuit court judges in comparison with urban judges. A significant majority of the sentencing circles conducted in Saskatchewan by the fall of 1997 had been conducted by northern judges operating out of La Ronge and Meadow Lake. During a sentencing circle on April 19, 1995, at Sandy Bay,20 Judge Fafard estimated that he had conducted between sixty and seventy sentencing circles. In addition, Judge Bria Huculak and Judge Ross Moxley, both previously of La Ronge, and Judge Jeremy Nightingale of Meadow Lake had been active in conducting sentencing circles in northern Saskatchewan. Judge Huculak stated unequivocally that circle sentencing development in northern Saskatchewan had been essentially “judge driven.”21

The tendency of northern circuit judges to depart from conventional practice is not new. This is reflected in the following description of a 1978 court hearing conducted by Judge Jim Slaven of the Territorial Court of the Northwest Territories:

The court party arrived in Rankin by plane from Yellowknife at noon on the trial date. It was an autumn day in 1978 and Judge Slaven was ready to proceed. But a group of Rankin people—Inuit—asked him to delay proceedings. They were calling a community meeting to talk about the young man [the accused] and his fate. ‘It was the first time that such a thing had happened in Rankin,’ the judge said, ‘the first time the local people had ever set clown together. You see, coming from all various backgrounds the way they had, different strains of Eskimo, they’d never merged as a real community. There was a professor up there, fellow named Williamson from the University of Saskatchewan, who’d been going to Rankin for eighteen years, and he said this was the old traditional Inuit way of doing things, meeting together and looking after their own. Well, hell, under those circumstances the court was pleased to stand aside for a few hours. That might sound ridiculous to [a] judge in the south but northern justice is different.’22

This breadth of judicial discretion allowed innovation by individual judges to significantly affect the relationship between court and community. Greg Bragstad, a participant in several sentencing circles at Sandy Bay, commented on the local impact of Judge Fafard:

Judge Fafard I find, anyway, has made a tremendous impact here and has, I think, in himself … made a lot of changes and allowed those things to happen and allowed people in the community to be responsible and so there’s a whole lot less anger in the community towards him, than there [was] in the past. Because he’s allowed the community to take responsibility.23

In addition to the systemic problems and advantages of circuit courts described above, misinterpretation of information about and of behavior by Aboriginal offenders in the conventional justice system has been a concern.

The Misinterpretation of Aboriginal Offender Information and Behaviour at Sentencing

A further problem during sentencing of Aboriginal offenders is obtaining accurate and relevant information about the crime committed and the offender. In obtaining and assessing such information, caution must be exercised not to misinterpret interpersonal behaviours of Aboriginal offenders. Lawyer and author Rupert Ross explained the tendency of people of European descent to interpret lack of direct eye
contact as indicating evasiveness, and noted that direct eye contact among the Cree and Ojibway of northwestern Ontario was a sign of disrespect as “[you] only look inferiors straight in the eye.”

Similarly, expectations of appropriate court behaviour may influence a judge’s conclusions about the attitude of the offender. I have appeared with many Cree and Saulteaux offenders in the courts of central Saskatchewan from 1988 to the present, and I have noted that many of them respond to the stress of court by smiling or laughing nervously. This behaviour has sometimes been misinterpreted by the presiding judge as indicating a lack of respect, despite the seriousness with which the offenders viewed the proceedings when I interviewed them prior to court.

A further example of potentially misunderstood behaviour is the lack of verbal participation by Aboriginal offenders at sentencing. Such passivity may lead to an erroneous conclusion respecting offender attitude. Judge Murray Sinclair of the Provincial Court of Manitoba explained:

A final example is the implicit expectation of lawyers, judges and juries that accused will display remorse and a desire for rehabilitation. Because their [Aboriginal offenders’] understanding of courage and their position in the overall scheme of things includes the fortitude to accept, without protest, what comes to them, Aboriginal people may react contrary to the expectations of non-Aboriginal people involved in the justice system. Many years of cultural and social oppression, combined with the high value placed on controlled emotion in the presence of strangers or authority, can result in an accused’s conduct in court appearing to be inappropriate to his plea.

Rupert Ross also cautioned against drawing an immediate link between lack of participation by Aboriginal offenders and lack of remorse.

Language has also created problems during sentencing in Aboriginal communities. As explained by Derek Custer and Cecile Merasty of Pelican Narrows, lack of familiarity with English exacerbates fear and misunderstanding of court processes. By contrast, the Pelican Narrows sentencing circle committee, which began to meet with offenders outside of court in the spring of 1994, operated in Cree. This empowered offenders to explain their behavior and their plan for compensating and reconciling with their victims.

In Saskatchewan, problems with language at sentencing have been compounded by a shortage or absence of trained court interpreters. This has been recognized by the Saskatchewan Indian Justice Review Committee. The need for a trained interpreter was clearly displayed at a sentencing circle conducted on November 14, 1994, at Pelican Narrows, Saskatchewan. Of the thirty people within the circle, the only non-Cree speaking participants were the judge, a defence lawyer, two police officers, and the operator of a group home in Creighton, Saskatchewan. Approximately half of the circle’s discussion was in Cree. Some comments were interpreted on an ad hoc basis by various circle participants, while others were left uninterpreted. Towards the conclusion of the circle, which lasted approximately two hours, Judge Fafard apologized for his poor grasp of Cree and indicated his hope that the community would soon have the benefit of a Cree-speaking judge. In contrast, a court communicator formed a regular part of the circuit court party in Manitoba. This was evidenced at court in Pukatawagan on April 11, 1995, where a court communicator was present to assist Aboriginal offenders appearing before the court.

A further difficulty with language at sentencing is incompatibility between languages. Professor Tim Quigley of the University of Saskatchewan, a former defence lawyer in northern Saskatchewan, commented on the difficulties associated with translation: “I recall from my legal aid days being told that the Dene language does not make the same precise legal distinction between ‘rape’ and ‘intercourse,’ something that is obviously important in a sexual assault case. Likewise, in Cree, it is apparently difficult to distinguish between an accidental pushing from an intentional one—again, a vital difference in an assault trial. Yet both languages are very precise in their own cultural context. It is simply that our legal system is alien and difficult to describe in those languages.”

My own experience with Cree people in the courts of central Saskatchewan has repeatedly evidenced their difficulty in explaining sexual interaction. Although one of the explanations of this may well be shyness and the trauma associated with the recollection of an unpleasant memory, it also appeared that the Cree language simply does not contain a similar vocabulary to English respecting sexual acts.

Aboriginal approaches to sentencing focus on greater community involvement in sentencing and more
individualized sentences. What are the opportunities for increasing community participation and sentencing discretion, given the current practice in Canadian law?

2. Ibid.
3. Interview with Harry Morin, October 19, 1994, Sandy Bay, Saskatchewan.
5. Department of Justice of Quebec, Cree and Justice Symposium: Problematics on Justice in the Cree Milieu (Prepared by the Consulting Services in Social Sciences, Development and Cultural Change SSDCC Inc. English version by the Department of Justice of Quebec) [unpublished] at 14.
12. Interview with Derek Custer and Cecile Merasty, October 20, 1994, Pelican Narrows, Saskatchewan.
13. N. Sibbeston, “Circuit Court: The Community’s Perspective” (Presentation at the founding convention of The Northern Conference in March 1994 at Yellowknife) in Circuit Court and Rural Court Justice in the North: A Resource Publication (Vancouver: Simon Fraser University, 1985) at 1-6.
17. Brennan interview, supra chap. 3, note 16.
18. Ibid.
19. R. v. Bear (Sask. Prov. Ct.) [unreported], hereafter called the “Sandy Bay circle.”
22. Interview with Greg Bragstad, October 19, 1994, Sandy Bay, Saskatchewan.
28. Hereinafter called the “Pelican Narrows circle”.