REVIEW

Justice in Aboriginal Communities: Sentencing Alternatives

BRADFORD W. MORSE*

Justice in Aboriginal Communities: Sentencing Alternatives, by Ross Gordon Green, (Saskatoon: Purich Publishing, 1998), 192pp.

Justice in Aboriginal Communities is an excellent addition to the scholarly literature that contributes to the active debate underway in Manitoba, as well as in many other parts of Canada, regarding the future of the Canadian justice system in its own right, in addition to its treatment of Indian, Inuit and Métis peoples. While the germination for this book commenced in the LL.M. thesis that Ross Gordon Green completed in August 1995 at the University of Manitoba, this book is far more than its origin might suggest. The author has drawn upon his wealth of experience as a lawyer for well over a decade and blended it with secondary research, along with field work in six rural Aboriginal communities in central Manitoba and Saskatchewan, to develop a particularly unique, well-rounded description and analysis of the use of community participation in sentencing within the mainstream Canadian criminal justice system.

Green has been a criminal defence lawyer in central Saskatchewan since 1986. He undertook his research and field work during the1994–1995 academic year, in which he observed sentencing circles at Hollow Water (Manitoba) and Sandy Bay, Saskatchewan, an elders panel at Waywayseecappo, Manitoba, community sentencing advisory committees at Sandy Bay and Pelican Narrows, Saskatchewan, and mediation committees at Pukatawagan, Manitoba, and Cumberland House, Saskatchewan. Although no data is provided regarding the precise quantum of cases watched or time spent in these communities, it is very clear from the descriptions provided that he was able to undertake reasonably thorough assessments of the processes involved. This was no doubt augmented by the fact that he practised in several of these communities and has partici-

* Professor of Law, University of Ottawa.

pated as defence lawyer in a number of such hearings. In addition, he engaged in detailed interviews with judges, RCMP officers, members of the committees or circles, prosecutors, defence counsel, elders, probation officers, and many other interested parties.

Justice in Aboriginal Communities consists of three parts; namely, a general overview of the Canadian criminal justice system and its impact upon Aboriginal peoples, a thorough description of the six community case studies, and an appraisal of the prospects for future evolution in light of the many fundamental issues raised by an emphasis upon community participation in implementing restorative justice principles. Part I commences with a brief introduction to the development of sentencing law in Canada over the last two centuries. This is followed by a succinct overview of traditional Cree and Ojibway criminal law and the changes wrought by the arrival of the Hudson's Bay Company, and later the North-West Mounted Police in Manitoba and Saskatchewan. The book then leaps forward to summarizing recent criticisms of the circuit court system, followed by a discussion of the space created over the last decade for victims and the broader community to become involved in the criminal sentencing process.[1] It is unfortunate that this latter chapter does not include an assessment of the *Criminal Code* changes of 1996 to include statutory direction to the courts in sentencing approaches (Part XXIII), and, in particular, the direction to consider the unique "circumstances of Aboriginal offenders" (s.718.2(e)).[2] The impact of these recent amendments upon community involvement in sentencing is worthy of further in-depth discussion.

Historically, "the courts have not always been so sensitive to the uniqueness of the Aboriginal perspective and the need to accommodate it within the Canadian legal framework."[3] Despite the stated purpose of "finding alternatives to current sentencing practices both inside and outside of our courts"[4] and the choice of the title, *Justice in Aboriginal Communities*, the author does not include an examination of Aboriginal justice systems themselves, choosing instead to

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1 This chapter is posted in full on the website of the Native Law Centre of the University of Saskatchewan at <http://www.usask.ca/nativelaw/jah_green.html>.

2 See, *Criminal Code*, R.S. 1985, c. c-46, s. 718.2

A court that imposes a sentence shall also take into consideration the following principles:

(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.

3 Canada, *Report for the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back* vol. 1, (Ottawa: Supply and Services Canada, 1996) at 219.

4 Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich Pub., 1998) at 17.

focus on the prospects for the reconciliation of Aboriginal concepts into a predominately Euro-Canadian legal system. An independent Aboriginal justice system should incorporate the values, philosophies, activities and practices of Aboriginal communities and ensure the delivery of culturally relevant programs and services including certain justice, law enforcement and correctional programs.[5]

Part II contains a detailed discussion of circle sentencing in Canada generally, as well as in the specific First Nations communities Green observed pursuing four different models of community participation in sentencing and mediation. This is truly the heart of the book both spatially and in terms of its *raison d'etre*. The careful descriptions of the four approaches being used—the elders' or community sentencing panel, the sentence advisory committee, the community mediation committee and the better-known sentencing circle[6]—provide extremely valuable information and insights for interested readers. On the other hand, this assessment falls somewhat short of an ideal comparative analysis among the four models. The author's extensive use of quotations, derived from interviews with community members, police, lawyers and judges, enables these people to express their opinions directly to a broader audience. This provides a greater sense of a dialogue with the reader by allowing the Aboriginal participants to express their critiques of the general system as well as commenting upon how their current efforts come closer to meeting their needs. It also captures the genuine commitment of non-Aboriginal professionals in favour of reform and why they have become actively involved in altering the *status quo* at the local level. Although the author does discuss concerns regarding the intrusion of politics within these models, this section is weakened by the lack of information and critical assessment concerning who sits on the sentencing committees and panels, how these persons are selected and therefore how representative they are and whether there is a risk of abuse inherent in this process. This section could also benefit from an assessment of the importance of support of key actors, without which the models are all fragile.[7]

Part III opens with a less satisfying discussion of the disastrous effects of colonization, the literature on legal pluralism and situating the rise of Aboriginal-specific alternatives within the general movement toward popular justice in North America. The last substantive chapter pulls together a number of major

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5 See Canadian Criminal Justice Association, online: <http://www.ccja-acjp.ca/en/abori3.html> and Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991).

6 For a recent example of an article on this topic see, P. Dawn Mills, "The Myth of Swan: The Case of *Regina v. Taylor*" (1998) 18 C.J.N.S. 255, along with the bibliography prepared by the Native Law Centre available at <http://www.usask.ca/nativelaw/jah_scircle.html>.

7 See *R. v. J.K.E.*, [1999] Y.J. No. 119 (Y. Terr. Y. Ct.) (QL) at paras. 64–67 for a discussion of the use of community circles in a proactive manner.

policy issues that emanate from the case studies for appraisal. Green comments on the community role of the court, concerns about possible political influence or community bias undermining fair treatment of offenders, the importance of the independence of decision-makers, the debate between volunteerism versus public financing of community sentencing and mediation, whether the experience of rural Aboriginal communities is translatable to other contexts, and the risk that the appellate courts might undermine the successes being achieved in the 'hinterlands', away from urban attitudes, in light of the jurisprudence. This latter section would have been strengthened by a more expansive treatment of the recommendations of the many reports of provincial inquiries and that of the Royal Commission on Aboriginal Peoples. Although the main report of the Aboriginal Justice Inquiry of Manitoba is drawn upon earlier reports, and the Royal Commission reports are mentioned, their elaborate reform proposals are not fully canvassed. As a result, the debate over whether to develop Aboriginal controlled justice systems *versus* simply incorporating modifications to the existing system is left untouched. The degree to which some positive steps have been implemented through amendments to Part XXIII of the *Criminal Code* implemented in 1996 would also have been a welcome component of this analysis, as would drawing upon the experience with youth justice committees under the *Young Offenders Act*.[8] Similarly, the challenges raised by some Aboriginal women that these processes favour men charged with physical or sexual abuse at the expense of female victims are largely ignored.[9]

The prospects for further change, even within our domestic justice system, have increased since this work was completed. The Supreme Court of Canada delivered its landmark judgment in *Delgamuukw v. B.C.*[10] on Aboriginal title in December of 1997, in which it breathed new life into the vital and continuing role of traditional Aboriginal law as determining the substantive law content of the rights recognized by s. 35(1) of the *Constitution Act, 1982*.[11] More recently, the Supreme Court of Canada embraced Parliament's direction to the courts to

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8 *The Young Offenders Act*, S.C. 1980-81-82-83, c. 110, s. 1, as rep. by *Youth Criminal Justice Act*, S.C. 2002, c. 1.

9 See *e.g.*, Emma LaRocque, "Re-examining the Culturally Appropriate Models in Criminal Justice" in M. Asch, ed., *Aboriginal Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (Vancouver: University of British Columbia Press, 1997). See also *R. v. Tony* (2002), 220 Sask. R. 135 (Ct. Q.B.); *R. v. Morris*, [2004] B.C.J. No. 1117 (C.A.) (QL) and *R. v. S.G.N.* (1999), 133 B.C.A.C. 277 (C.A.) at para. 41 where the court stated "All the protections of the criminal law [should] be extended to First Nations women and that this new provision in the Criminal code [s.718.2(e)] should not be permitted to do anything towards lessening the protection that they must be accorded."

10 [1997] 3 S.C.R. 1010.

11 *Constitution Act, 1982* (U.K.), 1982, c. 11.

require due consideration of "the circumstances of the aboriginal offenders" (s.718.2(e))[12] in *R. v. Gladue*.[13] Speaking for a unanimous court, Justices Cory and Iacobucci recognized the "particularly devastating impact upon Canada's Aboriginal people" of their over-incarceration[14] and the "widespread bias" that Indian, Inuit and Métis peoples have confronted.[15] The Supreme Court made clear that all juries in criminal cases must have regard to the "unique systemic or background factors that may have played a part in bringing the particular offender before the court" as well as the "types of sentencing procedures and sanctions which may be appropriate" in light of the person's "aboriginal heritage or connection."[16] The Court acknowledged the "primary emphasis" placed by Aboriginal societies upon restorative justice,[17] while stating that s.718.2(e) applied to all Aboriginal offenders. Concerns regarding the possible limiting of creative sentencing approaches solely to First Nations, and even then only to those who have developed community-based initiatives, appear to have been definitively put to rest.

The Supreme Court has recently had a further opportunity to comment upon how s. 718.2(e) should be interpreted and applied in *R. v. Wells*.[18] The Court applied its reasoning in *R. v. Proulx*[19] to make clear that a sentencing

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12 See, *Criminal Code*, R.S. 1985, c. c-46, s. 718.2(e).

13 [1997] 1 S.C.R. 688; 133 C.C.C. (3d) 385, [*Gladue* cited to S.C.R.]. See also *R. v. Bunn*, [2000] 1 S.C.R. 183, 182 D.L.R. (4th) 56, 250 N.R. 296, [2000] 4 W.W.R. 1, 140 C.C.C. (3d) 505 where, although not involving an Aboriginal offender, the Supreme Court considers conditional sentencing.

14 *Ibid.* at 715.

15 *Ibid.* at 721.

16 *Ibid.* at 724.

17 *Ibid.* at 726.

18 [2000] 1 S.C.R. 207; 182 D.L.R. (4th) 257; 250 N.R. 364; [2000] 3 W.W.R. 613; 250 A.R. 273; 141 C.C.C. (3d) 368; [2000] 2 C.N.L.R. 274; 30 C.R. (5th) 254, [*Wells* cited to D.L.R.].

19 [2000] 1 S.C.R. 61; 249 N.R. 201; 142 Man. R. (2d) 161; 212 W.A.C. 161; 140 C.C.C. (3d) 449 [*Proulx* cited to S.C.R.]. See also Philip Stenning and Julian V. Roberts in "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask. L. Rev. 137 where they suggest that the over-incarceration of Aboriginal people in Canadian prisons cannot be attributed to discriminatory sentencing *per se*, such that the application of s. 718.2(e) will likely result in unjustifiable inequities in sentences. They further claim that the provision overlooks the fact that the role of social and economic disadvantage is not unique to Aboriginal offenders and is something that should be taken into consideration regardless of race. This controversial article has resulted in a special collection of papers in (2002) 65 Sask L. Rev. responding to Stenning and Roberts along with a rebuttal from them.

judge's first task is to consider the appropriateness of a conditional sentence by excluding the popular opposites of probation and a penitentiary sentence. During this preliminary stage, the judge is required to consider ss.718 to 718.2 "only to the extent necessary to narrow the range of potential sentences";[20] however, the sentencing judge is still obligated to consider the systemic or background factors that may have contributed to the offender being before the courts, particularly when a sentence of incarceration has been selected, in light of other available sanctions that would be appropriate considering the circumstances of the offender and his or her Aboriginal ancestry.[21] When dealing with serious crimes, the Supreme Court clearly stated that any distinction in sentencing is likely to disappear.[22] Conditional sentences should not be excluded where deterrence and denunciation are paramount considerations as these objectives can still be fulfilled with the use of such a sentence through the careful crafting of the precise conditions to be imposed in a particular case and their severity.

Justice in Aboriginal Communities is very well-written and readily accessible to anyone interested in Aboriginal justice issues. Ross Gordon Green should be congratulated in achieving that rare blend of a book that is of significant value to the legal community yet is able to attract a far broader audience. Since the Supreme Court of Canada's decision in *Gladue*, its import has increased dramatically such that this book should now be required reading for judges, police, lawyers, and justice policy personnel engaged in criminal law. This reviewer can, however, readily recommend Green's book to anyone interested in the criminal justice system and its relationship to Aboriginal peoples.

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20 *Wells*, *supra* note 17 at 284.

21 *Ibid.* at 285. See also *R. v. Tavers*, [2001] M.J. No. 250 (Man. Prov. Ct.); *R. v. MacKenzie*, [2000] M.J. No. 370, M.B.C.A. 57.

22 See *Gladue*, *supra* note 12 at 729 where Cory and Iacobucci JJ state:

> In describing the effect of s. 718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation...Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant...Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.