

Lister Sinclair

Good evening. I'm Lister Sinclair, and this is *Ideas* about the search for alternatives to imprisonment among native people.

Harold Gatensby

We need something different. Eighty per cent native people in the jail at times. Seventy, 80 per cent of the young-offenders facility, native people. I mean, some time people have got to have a serious look and say, There must be something we're not doing right, there must be something we could be doing better.

Lister Sinclair

In February of 1996, the Royal Commission on Aboriginal Peoples released an interim report on justice issues. It argued that aboriginal nations have a right—and I'm quoting directly—"to establish and administer their own systems of justice, including the power to make laws within the aboriginal nation's territory." The initial response from the Minister for Indian Affairs was sceptical, but the cabinet is reportedly willing to give aboriginal communities much greater power in the sentencing of their own offenders and in finding alternatives to imprisonment.

Tonight's *Ideas* reports on some of the justice initiatives that are already underway in aboriginal communities. It will also examine some of the objections to these initiatives that have been put forward by native women's groups. The program is episode nine of "Prison and Its Alternatives" by David Cayley.

David Cayley

Native Canadians are over-represented in Canada's prisons. In Ontario, natives are 2 per cent of the general population and 7 per cent of the prisoners in provincial jails. In Manitoba, they make up 12 per cent of the population and 47 per cent of the prisoners. And in Saskatchewan, where 11 per cent of the citizens are native, they're 72 per cent of the prisoners. The story is the same in federal prisons: Natives are 3½ per cent of the Canadian population, but they account for 12 per cent of male federal prisoners and 17 per cent of females.

The story that these numbers tell is an old one. Cunliffe Barnett is a judge of the B.C. Provincial Court, and he remembers how things were when he first practised as a lawyer in northern BC 25 years ago.

Judge Cunliffe Barnett

When I was in Prince Rupert, in communities around there and in all the smaller communities in British Columbia, in fact, there were still lay judges, men—and I say that deliberately, because they were men—who had no training as lawyers of any description but were considered local good citizens. And they would get a call from the Attorney General or would be asked by the man in charge of the local RCMP detachment if they'd like the job of judge, and somebody would send them a Criminal Code and swear them in and they would go to work. And there was a common belief that these lay judges only heard minor cases, but that wasn't true; they were doing, I believe, much more than anybody wanted to know.

And some of the things that I saw, while I was in Prince Rupert, truly horrified me. I would be sent over sometimes by the Attorney General to the Queen Charlotte Islands as Crown counsel to appear in court and to tell the local lay judge that the Attorney General did not want young native boys, raised into adult court, to be sentenced as criminals for very minor offences. And I would hear the judge say, well, he could care less what the Attorney General wanted; he was going to send this boy to prison so that he would learn a trade and become a good citizen. And some of those court cases were held in the RCMP corporal's office, and boys would be sent off to jail for long periods of time for truly minor offences. That happened not just in the Queen Charlotte Islands, which I saw, but in many, many other communities around the province. That was one of the things that, I suppose, impelled me towards becoming a judge.

David Cayley

As a judge, Cunliffe Barnett became a leader in the search for alternatives to imprisonment. He was appointed to the bench in 1973 and worked out of Williams Lake, often holding court in remote communities that other judges were reluctant to visit regularly. One of them was the island of Bella Bella, on the BC coast, about 500 kilometres north of Vancouver. There, in 1978, in the case of a young boy called Frank Brown, he imposed a sentence that became a landmark.

Judge Cunliffe Barnett

Frank Brown was only 14, but he came from a troubled background, and he'd had some troubles with the police before and then he got charged with what was really a

very serious armed robbery. There'd been a gun involved, and Frank, at age 14, had been the leader. And it was very clear that, unless something stopped what seemed to be an inevitable headlong rush to a jail cell, that Frank was going to wind up as a career criminal. And he had the potential to be a very threatening and dangerous person as a criminal. People in the community at Bella Bella, however, could see—better than those of us in the legal system, I'm sure—that Frank had a lot of potential, which they were hoping could be channelled in a different direction.

And when it became very obvious after that armed robbery that Frank was going to go to jail, people from the community met outside the courtroom, and they talked about things that could be done to keep Frank away from jail. And the result was that Frank's uncle and some other community leaders came into the courtroom and asked whether I would consider making an order sending Frank to a remote island, which was actually one of the band's reserves, and Frank would spend a period of time there by himself. His uncle was working on a salmon enhancement project at the time, and that work took him to the island pretty well every day, I believe. So, Frank was isolated but not totally abandoned.

And Frank went there, and he spent a good period of time there and it transformed his life. He came back changed, and he's never been in trouble with the law since. And, in fact, he's somebody who has become—he's not so young a leader anymore, but he has become a leader in the aboriginal communities in British Columbia. And, I think, Frank has undoubtedly contributed to keeping a lot of other young persons out of trouble with the law. He's a real community leader.

David Cayley

In the years since Frank Brown was sentenced, Judge Barnett has continued to be guided by the communities in which he holds court, and he's continued to take risks in his decisions. A case which he tried in the winter of 1994 concerned a man in his 30s called David who was accused of sexually molesting a young girl. He held court in the small community of Nazko, where the offence had occurred.

Judge Cunliffe Barnett

I remember the day pretty well, because it took hours for the community hall to get heated up with the little

wood stove, and I was suffering with a bad cold. But we stayed there a good part of the day and held court in the community hall, seated in a circle. Most of the people who came to court in the community hall that day were themselves mothers. And there were some teenagers there, and there were some men, quite a number of people considering that we were there during the day and it is a small community.

And I learned that it was true that David had gone into this little girl's home while she was there alone with her blind grandmother and that David had sexually assaulted this little girl, whose cries were heard by a neighbour, I learned all that; but I also learned that David had the mind of a boy perhaps six years old. David is a man afflicted with fetal-alcohol syndrome. When his mother was carrying him, she was drinking very heavily. David is mentally retarded.

But he was not regarded in the Nazko community as a frightening, bad man. He was regarded as a very simple man, a gentle man. He used to babysit for a number of families. He used to watch over children on the playground. He used to do chores for elders.

And the people of Nazko wanted me to know that they were very afraid that, if a judge sent David to jail for what he had done, because that would be the normal response of any judge, the people of Nazko felt that his life would be destroyed and that he would come back to the community, which was the only home he had ever known, in all likelihood, having been victimized and probably having learned things in prison that would make him dangerous in the community. They did not want David to go to jail. What they wanted was for the community to know of David's situation, and by holding court in Nazko, everybody in the community came to understand just what David had done. They wanted David not to continue to have access alone to little children, because clearly there's a danger there. And they wanted me to order that arrangements be made for David to get some very basic education about sexual issues, because here was a man over 30 with the sexual drives of an adult but the mind of a child.

And, in the end, David did not go to jail. A probation order was made that had the conditions in it that the community wanted. And I've kept track of David's situation, at least a little, since then, and I continue to be told it was the right thing. There haven't been any

further incidents.

David Cayley

The community-based sentencing that Cunliffe Barnett introduced in BC has also been widely used in the Yukon. One of the judicial pioneers there has been Territorial Court Judge Barry Stuart. Barry Stuart was made a judge in 1978. He came to feel that the criminal justice system was crippling the capacity of local communities to deal with their problems. So, he began to conduct sentencing hearings seated in a circle with the concerned community and to encourage dispositions that involved rehabilitation in the community rather than jail. The circle form was adapted from native custom, and circle sentencing stuck as a name. Judge Stuart describes the impact of the circle on one habitual offender.

Judge Barry Stuart

There was somebody who had been in and out of the criminal justice system for 20 years and had probably been sentenced to jail a dozen or more times and expected to go to jail again. The community dealt with this person. They offered him the opportunity of going to the circle and set out the conditions that this person had to fulfill, which would be the first time that person had taken some responsibility for his own fate. They challenged him to do this and said that, if he was capable of fulfilling some conditions that they set out for him, they would provide support. He did that, came to the circle and, in the circle, heard some pretty harsh things about his conduct. But, unlike a court, where we say you did a bad thing and then say you're a bad person, in the circle, they say you did a bad thing, but you're not necessarily a bad person. And how can we help you convert the energy that you're putting into doing bad things into doing something constructive? And they went on to express love for him, support for him, to express real hope for him that he could make some significant contributions and to recognize the positive things he had done in his life.

It was the first time that that person had ever spoken and participated in decisions that affected him, because he did speak out, which he'd never done in court before, of course. He broke down and said nobody'd ever talked to him like that before, and he didn't think that anybody had any respect for him.

Anyway, he ultimately lived up to the commitments that

the circle had imposed and went on to contribute significantly to his community and still is and feels a tremendous amount of support and respect. And, in fact, he's like many others that have gone to the circle and who have made it. I have to say that circles aren't a panacea. We're dealing with people whose life is *in extremis*, and, therefore, they have a long, long way to go. But what this man has been able to do is carve out a healing trail for others to follow and has gone and talked to others and worked with them to move them from a life of substance abuse and crime and back to substance abuse into being a part of the healing journey.

David Cayley

Circle sentencing has now been taken up in communities throughout the Yukon. In Carcross, one of the keepers of the circle is Harold Gatensby, a man with some experience of the criminal justice system. At 15, he was raised into adult court and sent south for a year to the federal penitentiary at Fort Saskatchewan. He was subsequently in and out of jail a number of times before his life turned around. He says that he immediately embraced the idea of circling sentencing when Barry Stuart introduced him to it.

Harold Gatensby

He asked for a meeting with the people in our community about justice, and so, I thought, well, I want to be involved in that, I want to go. And he said, We want to try this new process, a circle. And the one thing that I realized, during my recovery, I guess you could call it, is that a circle is so powerful.

I had been cornered in my life. Perhaps I did it myself. A lot of help from the institutions, what I call heartless institutions. But I'd been cornered. And when I started to learn about a circle, I realized that you cannot corner the human being in a circle, that there is an equality about a circle, that all of life around us—the Earth is round, the trees are round. You burn a fire in the middle of winter. I mean, it doesn't matter if you stack it up square or what. It's going to burn and melt the snow in a circle. I started to see something very powerful in this circle.

And so, when the judge, Barry Stuart, came to the community and had a meeting on justice and said, We've been doing this circle, we want to try out this circle—I think they'd done it in one other place, in Mayo—he said, "Would you guys like to do that here?"

And right away I said, without hesitation, "Yes, yes, we want to do it in Carcross." Because I knew the power of it.

David Cayley

Harold Gatensby's enthusiasm grew out of his own experience. He had been in court many times as a boy and as a young man, and he could recall the alienation he had felt.

Harold Gatensby

I just remembered that feeling well, how they came to our community, how I felt when I was in court, how I felt. My heart would start beating, just about leap out of my throat. My hands would start sweating, I felt like I was in a foreign land. I didn't understand half the things that they were saying. Everybody there was an expert except me. And the more I thought about it, the more I realized that to me it's not right. It's not right that strangers from a different world can come and not only influence the lives of those people that stand before them but their families and our whole community.

David Cayley

Circle sentencing has allowed those affected to participate in deciding the case. The judge remains ultimately responsible, but he sits in the circle along with the Crown, the defence and other officials of the court. The gathering is still officially a session of the court, but its procedures and ceremonies are drastically altered.

Harold Gatensby

When we go through a court circle sentence, we gather everybody together in a circle. We start off with a prayer. We may join hands. We may use a smudge to clean the air, clean the environment. But we start off with a prayer, and we invite the Creator, we invite the ancestors, we invite help. We humble ourselves to them, say, "We can't do this alone. Please, be with us." And we explain to people that this is a process. Everyone is equal here. Everyone will have an opportunity to talk. Let one person speak at a time. Everybody else listen. This is a way of showing respect to each other. Then we'll pass a feather around, perhaps a talking stick, maybe a rock but something to, I suppose, hold the direction. Each person will introduce themselves, what's their purpose for being there and it goes right around in a circle. And then we proceed with the case.

And then what happens, after the person comes out is that everybody who was there is now watching the offender. If a person says, "I'm never going to drink again," and they start to drink, well, then they've got 30 people in the community, who are saying, "Don't you remember what you said in the circle sentence? You told us you weren't going to do this."

It's a healing process, it's a process to get the community involved and it gives people a chance. And, I think, that's the biggest thing about the circle, is that it gives people a chance, which they may never have had before, a chance for recovery and a change in their life.

David Cayley

A number of cases have now been sentenced in this way in Carcross. The most important effect, Harold Gatensby says, has been the way that it has brought the community together.

Harold Gatensby

What it did was it got people from our community involved that usually just sat back, that were never there. When court came to town, it was, like, Well, who's going to court today? And if it was some kind of an offence that people were interested in, perhaps they would go and sit in the audience and see what was going to happen; otherwise, you'd drive by the community hall, and you'd see a bunch of vehicles there and say, "Oh, it's court day today" and be thankful that you were not on the docket yourself.

But what this circle did was it got people involved, even if they didn't agree with it. I mean, at our first circle, there was a few people there that didn't agree with what we were doing. But they had an opportunity to speak their mind, and we listened, so it worked out quite well. It started getting more people from our community involved, which is a wonderful thing, because, I mean, when somebody goes to court, it's not only that offender or the victim that hurts; our whole community hurts, the family hurts.

And one of the things that we think about is that person is going to come back, going to come back to the community. And I know what jail does: It makes you mean, makes you bitter, teaches you to be dishonest. When I went there, I learned how to open a safe; I learned how to paper-hang, which I thought, when someone first mentioned it, meant a guy that put

wallpaper on the walls, but I learned that first time, when I was 15 years old, that a paperhanger forged cheques. How to open this kind of safe, spring this kind of lock, that kind of lock, how not to get caught. And I know this still goes on in jail. And so, when someone does get sentenced to jail, I'm certain, in some cases, it's appropriate, but, I think, people have to consider what happens in that process to those people.

And also those people are going to come back to the community, they're going to come back to their family. And they're going to feel isolated, they're going to feel rejected, they're going to feel like they don't belong there. And we all have to deal with that. We may be scared of them, because sometimes they're bitter. You can see it in their eyes, boy. They're so volatile: Don't come near me, boy, or you're going to get it. Because that's what you learn in jail, and they don't know how to put that aside when they come home.

So, we thought that perhaps, by the community sitting down and saying, Look at what you did, you've hurt people, this is not the way our people are, this is not the way we're meant to be, this is not the way we want to live—but we need more opportunity to teach, to share, to show the goodness of our own people's way.

David Cayley

Circle sentencing has now been in use in the Yukon for a number of years. The term was put into official circulation in a decision filed by Judge Barry Stuart in 1991. In Whitehorse, where the Kwanlin Dun Circle Court has now heard some 200 cases, the federal and territorial governments have funded a pilot Community Justice Program to work with offenders and victims going through circle sentencing. In other communities, preparing for the circle and following through on its decisions still depend on volunteers. Barry Stuart evaluates the results so far as extremely promising for both communities and offenders.

Judge Barry Stuart

The majority of people who have gone through the circle-sentencing process have either stopped committing crimes completely or have reduced both the frequency and the seriousness of their criminal conduct. In the communities, what I've seen is the beginning of a much better understanding among them of their different opinions. I've seen people who have not participated in the community at all beginning to be

very active and involved in the community.

I think the most important thing to develop in any community is resolving conflict. Whatever the nature of the conflict is, if a community goes through a process in which they can be empowered to resolve the conflict, they're going to get a greater sense of being able to trust each other, to move with each other and get an understanding that they can make a difference. And whether it's municipal problems or health problems or criminal problems, I think that's the case. And I think I'm seeing many people who are coming out of the circle-sentencing process with a better understanding of how to use the consensus-based skills in their home situation, in the workplace and in the community generally.

David Cayley

Circle sentencing in the Yukon grew out of the recognition that the criminal justice system was powerless to address the underlying causes of the problems that were ending up in court; it could only punish the symptoms. Rupert Ross has come to the same understanding of the difficulty facing the justice system in the Cree and Ojibway communities, where he works. He's an assistant Crown Attorney from Kenora, who flies into small settlements across northwestern Ontario for court hearings. In 1992, he published Dancing With A Ghost, a book that explores the clash of native and Western understandings of justice and recounts his own progress in understanding native world views. He says that he still remembers the court session that made him aware of the drastic limitations of the system he represented.

Rupert Ross

On the court list that day were probably 20-some youngsters, all under the Young Offender Act, and they had all been charged with breaking the band bylaw against using intoxicants. But underneath that dry language, the reality was that they had all been found about four o'clock in the morning, standing on a sandbar out in front of the community, sniffing gas out of bags and wailing like banshees.

And as I came into the room where we were going to deal with these 20 children—in this community, that really is the future of that community—I had to ask myself what I was possibly going to contribute to getting at the difficulty that kind of behaviour

illustrated. Was I going to put people in jail? Was I going to give them fines? If I was going to put them on probation, what kinds of terms were we going to set?

What occurred to me then was that my processes did not permit me to ask the central question, and that is, Why? Why are 20 children all out there at that hour in that state? What is going on here? And the failure of our system to ask the “why” question is something that’s been haunting me ever since.

David Cayley

This failure, in Rupert Ross's view, arises from a narrow concept of individual responsibility. Aboriginal cultures, he says, take a broader view of the forces that put those children on that sandbar.

Rupert Ross

It seems fair to say that our Western justice system, if not the larger society, sees individuals as individuals; where within another understanding, individuals are seen as the sum of their relationships. We are really the end result of all of the various forces and people that are a part of our lives. So, the notion of either helping somebody or changing somebody by dealing with them strictly as an individual, I gather, is seen as perplexing, that the understanding seems to be that, unless you deal with all of the people who are intimately involved in the life of that offender, that ultimately, because you don’t change the patterns, the dynamics, the forces, the context, there is very little hope of changing the person in the middle of it.

The Western criminal justice system is primarily driven by an act which we call a crime. That’s what we investigate, that’s what we charge, that’s what we have to prove. My growing understanding of aboriginal approaches says the act is nothing more than a symptom of underlying dysfunctions. And all of our fascination with the act and attention to the act is almost beside the point. The issue is all of the dysfunctions within relationships, out of which that act erupts. And unless you, as a justice system, address your attentions and your skills and your questions to the relationships out of which those crimes erupt, there will be more crimes erupting out of them tomorrow and the next day.

David Cayley

The problem, as Rupert Ross sees it, is not the criminal justice system as such. It has its place, he thinks. The

problem is our excessive reliance on it.

Rupert Ross

Everything that we don’t like in society gets funnelled into the process that ultimately is set to handle Paul Bernardo. We put moose hunters who shoot out of season into that process, drunk drivers, schoolyard fights, all into a process which is ultimately geared to deal with the most dangerous offenders. And when you’re dealing with those offenders, people who, for whatever reason, are unable or unwilling to live within society’s norms, who are just too dangerous to have on the streets, then we need a process with all of the protections that we presently have in it, because we’re saying that the state wants to take away your liberty and for a very long time. And then we need all those processes, those rights, all those protections. And we need the adversariality of it, because it is adversarial.

My worry is that, by funnelling absolutely everything into it, we are creating adversarial approaches and antagonisms and angers and alienations in situations where they may be the problem, and we may be adding to the very thing that we’re trying to cure. By putting people into an adversary process, you’re only adding to the antagonisms between them. By putting them through a process based on power, you are only adding to the definition of what life is to offenders, and, that is, life is a power struggle. You’re adding to their notions of defiance, of the imposition of their own will, of rugged individualism. You’re only making him more into the kind of person who is living that way and taking his power out on other people.

David Cayley

A better alternative, to Rupert Ross's mind, would be a style of justice that heals, rather than reinforcing existing hostilities. Recently he undertook a study of native justice initiatives for the federal government's Aboriginal Justice Directorate, and he says that he found an outstanding example of this healing justice at work in the Hollow Water First Nation and its three adjacent communities, at the southeast tip of Lake Winnipeg. In the mid-’80s, these communities began to face up to epidemic levels of alcoholism and of incest. In a survey of 60 community members, two-thirds said that they had been sexually abused as children and one-third admitted to victimizing others in turn. The figure is astonishing but does square with the result of a survey taken by the Canim Lake Band in British Columbia, in which more

than half of band members said that had been sexually exploited as children. In Hollow Water, a group of social workers, who called themselves the Community Resource Group, mobilized the community to deal with this buried history. Burma Bushie, who works for the Manitoba Department of Child and Family Services, was one of the leaders. She says that they soon recognized that the criminal justice system held no answers. Its only resource was prison, and prison could only interrupt, and perhaps ultimately intensify, the problem.

Burma Bushie

They can incarcerate a person for two years. That's time out for my community. But that person is coming back and coming back a changed person, in a lot of situations, maybe for the worse. I've been to those jail institutions, and they're not healthy places, they're not conducive to people healing. And the inmates in those institutions are not very open to offenders, victimizers talking about their sexual offences; their own lives are at stake if they do that. It's terrible.

I don't know how our society continues to believe that those institutions are serving what they're supposed to do. It's just not doing it. And the people that come out of those places are, I think, worse off than before they went in. I really do.

David Cayley

Based on this understanding of the counter-productivity of imprisonment, the Hollow Water Community Resource group came to an agreement with the Manitoba Department of Justice and the RCMP that allowed them, where the offender admitted guilt, to deal with disclosures of sexual abuse within the community.

Burma Bushie

We know our families, we know our history. We can quickly validate disclosures. And we insist that we be the ones to do confrontations. Police don't have the relationships and the history to be able to tell if a person is in denial or is actually not guilty. So, we insist that we do the confrontations. We call them confrontations for lack of a better word. But basically we take the disclosure, and we go and ask the offender, "Did you do this?" We explain that they have the option to go with the regular court system, which is go to court, deny and take your chances. Or you can take responsibility, we'll support you through the system, we'll be there all the

way through.

David Cayley

Offenders who choose this route are diverted from court, while they participate in what is called the Community Holistic Circle Healing. This involves both traditional practices and contemporary therapeutic techniques. Sentencing is delayed while this goes on.

Burma Bushie

Once a guilty plea has been entered, we ask the courts for four months to do our own assessment of the victimizer's commitment. We know that initially, when he says, "Yes, I did this," he's under pressure, he's afraid, all kinds of things are in play. So, we ask for four months, because we want to know, Is this person serious about his healing? And, when we say healing, we're talking initially about five years, and that's just a beginning. So, we ask the courts for four months.

And in that four months, we prepare the victimizers and the victims for what we call the Special Gathering. The Special Gathering is the sentencing circle, and that's when sentence is passed, and the whole thing is open to the community. So, in the four months, we sit with the offender, and he tells us, in as much detail as possible, what he's done. It's important that he start to take responsibility for what he's done and that he start telling community members about what he's done.

The next circle is with his family. In lots of cases when a family member is charged with sexual assault, if that person is in denial, then the whole family goes into denial. And so, it's important that the offender begin to tell his family what he's done so that no group denial is possible once he starts to take responsibility.

The other circle is with his victim. It's time for the victim to tell the offender what they've gone through with the impacts on his or her life.

And then the fourth circle is, of course, the sentencing circle, where the court party comes in, and the whole case is open to the community. The community has the opportunity to come and respond to the victim directly, to the offender directly, and they have opportunity to make recommendations to the judge for sentencing.

David Cayley

Sentencing will not normally involve jail, according to a

protocol negotiated between the healing team and the Manitoba Department of Justice, but will keep the offender in the community. The results, Rupert Ross says, have been outstanding.

Rupert Ross

They have dealt with a total of 48 sexual offenders, and 5 of those people ultimately went to jail. They wouldn't participate in the healing program, and they went to jail. Forty-three of them worked with the team, and only 2 of them ever went into a repeat of their behaviour. The other 41 remained in the community, remained in the healing program, remained in their jobs, remained a part of the outside life, with no recidivism. This is over a ten-year period. And that's a record which, I suspect, cannot be matched anywhere in the other system.

What has happened is that, when the team ultimately comes before the Western court for sentencing at the end of their process, they are presenting the court with an alternative to jail, which Crown attorneys and judges and the police have uniformly found far more promising, far more attractive than simply sending somebody off to jail, because it promises a process where there can be a full understanding of the harm of the behaviour that was done, a process where all of the parties involved in these webs of relationships are brought back to notions of respect for each other. And it promises a return to peace and order in the community for the benefit of everybody. It is a community healing program. It's not just focussed on offenders or victims.

David Cayley

Aboriginal sentencing alternatives have been controversial. Decisions of sentencing circles have been overturned on appeal, and critics have taken issue with the idea of racially segregated justice. Some of the loudest criticism has come from native women. The Inuit Women's Association, Pauktuutit, for example, has complained, for some time, about what its members see as a pattern of very lenient sentences imposed by northern judges in sexual assault cases. They fear that alternatives like sentencing circles, in the absence of other changes, will only make the situation of Inuit women worse.

Mary Crnkovich is an Ottawa lawyer and a consultant to Pauktuutit's Justice Project, which has looked at the likely effects of alternatives on Inuit women. She was present at the first sentencing circle ever held in

Nunavik, the northern Quebec region in 1993. It involved a man charged with assaulting his wife. He had already been convicted on this charge three times before and had been to prison. The Judge, Jean-Luc Dutil, decided to try a sentencing circle. Neither he nor the community had any prior experience with this format. The organization of the circle was carried out by the community's mayor and "appeared to be left to the day of the event," Mary Crnkovich says. She was interested in what happened to the victim.

Mary Crnkovich

She clearly was uneasy about this whole process. She indicated that she was told by her husband that she was to participate. When I asked her where she wanted to sit, she said that he had asked her to sit beside him. In the time that I spoke with her, he was always very close by. So, if at any point, she wanted to indicate any kind of concern or fear or doubts about what was going on, it would have been very difficult, I think, for her to do that.

That circle deliberated for a period, I think, of about three to four hours. During that time, what was considered initially his problem became their problem. That was the terminology that was used by the participants in this circle. And they ultimately decided that what would be best is that the couple come on a weekly basis and talk to three individuals that the group had identified to act as counsellors. These individuals that were identified were not identified because of any expertise they had in dealing with abuse, but just because they were individuals that, the circle thought, the couple could best talk with. And that was the determination of the circle, and the judge suspended sentence and said he would go with that—and this was in May—and then the following October, he would return and meet with the couple and discuss how things were working out.

David Cayley

Things didn't work out well. The counselling group fell apart. The man resumed drinking and beating his wife. Later he was found guilty of a sexual assault on his wife's sister and sent back to jail. The case was reported in detail by Mary O'Connell on CBC Radio's "Sunday Morning" and appears to present a textbook case on how not to organize a sentencing circle. There was no preparation, no effective follow-up, and no consideration for the victim's position. Mary Crnkovich

this.

David Cayley

Mary Crnkovich's criticisms of sentencing alternatives specifically address the situation of Inuit women. They don't necessarily apply in communities where alternatives are better organized and better supported. But Rupert Ross, who has studied native justice initiatives across the country, says that he certainly sees some of the same problems that she does.

Rupert Ross

I have seen communities which put forward what were described as healing programs for violence in the home and for sexual abuse, and it's my own view that some of them amounted to little more than abuser protection plans, where nothing really was going to be done to change the dynamics of what led up to the original offence. I don't have answers on this, but I can only mention some of the things that I would look for in order to evaluate whether something is sincerely and fully within the healing paradigm.

I would look, for instance, at any program that only dealt with the offender as one that was not responding to this other way of looking at things, that considers all the people in a relationship with the offender and spends at least the same amount of time on victims, if not a great deal more, than on the offenders, but at the same time, extending that to all of the other people who are involved. If I didn't see that breadth of analysis, I would be suspicious that this was something put in place just to make it easier for the offender.

I would also look at whether or not the program was going to be one where a group of people were essentially going to be telling parties what was going to happen in their lives as opposed to putting themselves together as facilitators of the parties creating their own solutions.

If I saw systems where essentially people were going to be playing the Western role of judges, making all the decisions and telling people what to do, then I would wonder whether or not this was within the healing paradigm. I'd also look for whether or not there was a strong representation of women on the group that was going to be doing the facilitating.

In aboriginal communities, I would also be looking to see whether or not there was good representation from

all the various families within the community to avoid the potentials for one family maintaining a position of power or abuse over other families.

David Cayley

Using these criteria, Rupert Ross believes that a clear distinction can be drawn between the healing justice that he sees at work in Hollow Water and initiatives that simply co-opt alternatives in support of an unjust status quo. But an element of risk is bound to remain, even with the clearest criteria. Judge Cunliffe Barnett thinks that this risk is worth taking but without illusions.

Judge Cunliffe Barnett

You're testing uncharted waters and you're going to make mistakes. I've made mistakes, or I have done things which in hindsight appear to be mistakes. But then I've sent people to jail and watched that person come out more angry, more violent, a bigger threat to the safety of other persons, and go back to jail, come out and go back again. Jails are very much a revolving-door syndrome for many persons who go there. And if there is a sensible way to avoid a jail sentence, then I think that courts should take the time to explore that possibility. But nobody should think that alternative procedures are going to work in every case and rehabilitate every person who is sentenced in some alternative way.