

Paul Kennedy

I'm Paul Kennedy and this is *Ideas*.

"The criminal justice system has failed the aboriginal peoples of Canada" — so says the Royal Commission on Aboriginal Peoples. "The justice system has failed Manitoba's aboriginal people on a massive scale" — so says the Manitoba Aboriginal Justice Inquiry. The number of natives in jail "should shock the conscience of everyone in Canada," says the Supreme Court. Behind these statements lies the reality of what is sometimes curiously called "aboriginal over-representation" in jails, as if we elected our prisoners. Native Canadians are five times as likely to be sent to federal prisons as other citizens and, in some provinces, 25 times as likely to be sent to provincial jails.

Tonight on *Ideas*, we ask why this has happened and whether new institutions constructed according to aboriginal principles and traditions can remedy this disastrous situation. The program is part of our continuing series about the idea of restorative justice. It's called "To Hurt or To Heal," and this is Part Four, by David Cayley.

David Cayley

When Murray Sinclair was in law school, he told a friend that his dream job would be to travel around Manitoba and ask aboriginal people about their relationship to the justice system. Ten years later, Murray Sinclair was made Manitoba's first aboriginal judge and only the second in all of Canada. The very next week, a native man named J.J. Harper was shot by a Winnipeg policeman. In response to the furor that followed, the provincial government appointed the Manitoba Aboriginal Justice Inquiry, and Murray Sinclair got his wish. He and another judge were asked to investigate the relationship between the administration of justice and the aboriginal people of Manitoba. This was what they found...

Judge Murray Sinclair

About two-thirds of the men who were locked up in the jails in Manitoba were aboriginal men. Just over 70 per cent of all of the boys who were locked up in the youth justice system were aboriginal boys. About 80 per cent of all the girls who were locked up in the youth justice system were aboriginal girls. About 90 per cent of all the women who were locked up were aboriginal women. The inclination was to think that it had always been that way. But we discovered from the statistics that we were able to find that, prior to the Second World War, there was no aboriginal over-representation in the jail system, that aboriginal people were being incarcerated at about the same rate as they were represented in the population. In Manitoba, that's about 12 per cent. In fact, at the turn of the century, the aboriginal inmate population in Manitoba was less than the aboriginal population of the province percentage-wise, and I was struck by that. I was struck by that from the perspective of an aboriginal person because what it said to me was, it has not always been like this.

David Cayley

This finding was a revelation to Judge Sinclair, and it focussed his commission's inquiry. What had happened since the 1950s to produce this huge influx into the province's jails? The commission suggested many reasons: changes in the province's liquor laws during the 1950s, which opened beer parlours to natives; new policing agreements, which stationed RCMP detachments in aboriginal communities for the first time; the demoralization of native war veterans who had braved battle for their country and then returned home to find they were still second-class citizens. But the overarching reason, the commission found, was the cumulative effect of public policies which undermined aboriginal cultures. One of the main agencies of this destruction, Judge Sinclair says, was the residential school, where native children were sent, in the words of one teacher, "to have the Indian educated out of them."

Judge Murray Sinclair

By the 1950s, between seven and ten generations of kids had gone through the residential school system, which had been started in Canada in the 1870s, and in Manitoba, it became the law in the 1880s. So between the 1880s and the 1950s, that many generations of kids had gone through the residential school systems.

We're just now, I think, beginning to realize the impact that residential schools have had on the communities. The most significant impact has been the amount of abuse, not necessarily sexual and not even necessarily physical, but emotional and psychological abuse that these kids went through. Even if they weren't verbally abused, they were still placed into an institutional setting from the time that they were five until they were 18 years of age. And when you're raised in an institutional setting, you don't know anything about how to raise a family or how to take care of children or how to take care of a household or how to be a normal human being in a family structure, not to speak of the terrible burdens that might have been placed upon you through the way that you were treated while at these schools.

The initial generations of kids would have been able to be counselled and treated and helped by the generations of older people who were at home and who were there for them when they were finished these schools and when they were released to their homes from these schools. But as time passed, there were fewer and fewer older people in their communities who could do that for them, and, therefore, they lost that kind of resource.

That residential school environment is coupled significantly with the laws that made it illegal for aboriginal people to practise their spiritual and traditional and cultural ways. One of the things that I have learned as an aboriginal adult that I didn't know as an aboriginal child is the

tremendous importance of spiritual healing and the importance of utilizing ways that allow you to connect to yourself and to your family and to your community that will help you to overcome whatever has been done to you or whatever you may have done to others.

David Cayley

It was the undermining of aboriginal cultures, Judge Sinclair believes, that led to the problems that the justice system now treats as punishable crimes. But punishment, he says, has just created new problems. Aboriginal societies were generally composed of small, non-hierarchical, highly interdependent groups living from the land — a situation in which there was no place for a separate institution of punishment. And so this alien institution only served to further erode their morale.

Judge Murray Sinclair

The aboriginal approach to problem identification and problem resolution — and I'm using those words in the widest possible sense, including the resolution of offences and offending, or crime, as we would call it — is different than the non-aboriginal approach.

In English common law, the need developed very early on for there to be a recognized principle called the rule of law in order to prevent people from being easily convicted and punished, because punishment was an incredibly significant part of the entire process. If you know anything about English criminal law, you know that people could be physically punished. They could be drawn and quartered and cut up and dismembered, and you could be executed for any one of dozens of types of offences. You could be physically whipped, locked up in stocks and be punished in ways that were very demeaning. In order to protect people from being falsely accused, the English criminal system historically developed means to make it more difficult than easy to convict people. The entire concept of legal process and due process

arose because we wanted to make sure that, if we're going to punish this person severely — and that's what we did with them usually in the past — then we wanted to be sure that we had the right person or that the person was in fact guilty of what it was that he was charged with doing.

Whereas in the aboriginal community, the concept of punishment was not there and, therefore, the whole question of process was not as significant, because ultimately the manner in which you resolve things was not intended to punish the person but was intended to focus on a solution that both sides were happy with. When you take that approach, then you don't worry so much about process and guilt determination. You worry more about whether or not there's a means of resolving a problem. A lot of aboriginal people still have that view of offences, particularly when the victim is a family member or somebody in the community that they know. They're primarily motivated to see if they can work out something that everybody's happy with. So the adversarial system, which evolved out of the English common law system, is not well-suited to an approach like the aboriginal person would bring to it.

David Cayley

The aboriginal understanding of justice remains vital and distinctive, Murray Sinclair says, and that, for him, is the key to eventually stemming the flood of natives into prisons. He has been involved himself in helping to set up several alternative justice programs for aboriginal people in Manitoba. Change will take time, he says, because of the profound disruption in aboriginal cultures. But he is confident that the recovery of aboriginal ways will some day put an end to his people's captivity.

In a series of recent decisions, the Supreme Court of Canada has recognized that aboriginal law is an aboriginal right. Aboriginal peoples, the court has said, were once "independent nations with...their own practices,

traditions and customs." Their right to continue in these traditions was recognized by the treaties made by the British crown and has now become part of Canada's constitution. And this right, according to the court's 1997 Delgamuuk decision, includes a distinctive understanding and practice of law.

The question, in the wake of these rulings, is what aboriginal law means. The longstanding colonial assumption has been that law, by definition, can mean only one thing: a positive, written legal code. But now aboriginal scholars have begun to challenge this view and offer their own account of law.

One of the rallying points in this recovery has been the Native Law Centre at the University of Saskatchewan. Sa'ke'j Henderson is its research director and, like Murray Sinclair, one of the aboriginal pioneers in the world of Canadian law. He says that the aboriginal understanding of law is dramatically different from the one that developed in Western Europe.

Sa'ke'j Henderson

We've never had a theory of abstract law like European law, which is all man-made, now being influenced by women, but basically it was constructed from a logical, rational model. But what it was never built on was the land. It was never built on a sensibility toward the land. You get the idea that this comes from being kicked out of Eden, that European people have to figure out how to survive by their own wits since God has kicked them out. And the Jewish people say that God stops talking to them at a time and then sends them out, so they have to rethink up the Talmud and try and remember what God told them in another period and write it down and try to carry that on. That leads into Roman law and the Greek law too. The Greeks were very clear that there were two kinds of law, one they call physics, which is law derived from nature, and the other is *nomos*, which is law created by convention or by men.

Unfortunately, Europe went *nomos*' path. They went to create artificial law, so everything in their law system is artificially constructed, where everything in aboriginal thought is constructed from the environment. It's not clear, in our languages, where our flesh ends and where the earth begins. It's just a very superficial boundary. What's very clear in our languages is that what people call "sky" is part of water. Our language doesn't distinguish. We live in shallow and thin water, but our concept for water is animate. It's an action. It's not just a cup of water. The environment is full of water, and our body's full of water. It starts at so fundamental a level that we are the environment.

So when we start looking for sources of law, we look to the land itself, and it can always be learned. The land always changes, so it's never set. We always deal with flux, and we always deal with change, and we don't think it's real helpful to have a bunch of rules that are set down. It's better to have much better processes which humans can respect and live up to than a bunch of rules written in a book like the Ten Commandments and such.

David Cayley

It's not yet quite clear to me what it means to derive law from environment.

Sa'ke'j Henderson

It would be called, in Eurocentric traditions originally, the natural law tradition. There's something implicate in society — in the way mothers respond to babies, in the way fathers refer to their children. There's some code that's implicit in loving and caring and kindness and generosity and terror and bitterness and jealousy that should establish the way people regulate themselves. It's not looking for mystical solutions, but it's trying to delve into the way they relate to each other.

The way the land relates to the shore, the way the waves relate to the beach, the way the wind

comes through the leaves in the tree and creates noises — all of those are about a relationship, and so aboriginal laws are nothing more than the law of relationships, which is sometimes called the kinship state. But more fundamentally, it's beyond just the relationship of human to human. It's a relationship with all the forces of ecology and all the constraints it puts on people, whether it be in the desert, where crops have to be grown that don't need much water, or in the forest, which requires a certain cleaning of the underbrush all the time to keep the trees good. Those kinds of relationships are also part of our laws.

David Cayley

Aboriginal law, as Sa'ke'j Henderson expounds it, is the consciousness of natural relationships, along with the duties and obligations this consciousness entails. And this consciousness is expressed in a language and in a way of life, not in formal codes or authoritative institutions. Violations of law, to this way of thinking, demand a return to the right path, a restoration of proper relationships. But this is not what native people have found, Henderson says, in Canadian courts.

Sa'ke'j Henderson

The courts now think that just by punishing us and putting us in jail for all the mistakes and the terror we do and all the bad things we do, that that's going to heal us. That's not going to heal us, because we've seen it already changing our entire culture from a culture of tolerance into a culture of power and capitalism and greed. This is exhibited in the development of aboriginal gangs, which are nothing more than mechanisms to survive in a prison. Afterwards they move into the market and the illegal markets, and they're becoming much more powerful than even our political organizations.

If we want an aboriginal culture, we're going to have to go reclaim it, and we're going to have to first take it away from the provincial justice

systems, not totally, but in a large part, and start reconstruction and go back to some very fundamental legal principles of our culture and our language and try and put that together to make some kind of healing circle for all the broken people and to affirm to the younger generations where we're going in terms of our destiny.

David Cayley

How this healing circle is to be established is the question now facing Sa'ke'j Henderson and his colleagues. The right to it has been affirmed. Everyone agrees that the present situation is untenable and will likely grow worse, as the aboriginal baby boom continues to come of age. So what is to be done?

Sa'ke'j Henderson

The Supreme Court has already said that the system is broken. The Attorney Generals across Canada in 1995 said the system was broken. We all agree on the fundamental proposition that the system is broken for aboriginal people. We have to incorporate some of aboriginal law in it to make it work, and there's two big versions of that. One is that we can tinker with the existing system and try and make it better. We did that with sentencing circles, where we brought in the community and the victims to confront the person. But we got a lot of problems with that, because it's not our system, and it's just in a bigger system. And we keep getting appealed by the Crown prosecutors, which adds about another \$7,000 to \$15,000 to every litigation, and most of the time we have to do this without the participation or the payment of the client, because they don't have that much money and Legal Aid doesn't pay it.

So there is now developing a very clear majority saying that we have to create, like in the United States, our own court system, using different procedures, to heal the breaches within communities and between peoples and really start perfecting a theory of justice as healing

rather than justice as punishment.

David Cayley

The aboriginal court system that **Sa'ke'j Henderson** envisions would remain part of the criminal justice system, and people wanting to be tried in provincial or federal courts would still have that right. Such a system, he recognizes, would be, by itself, only a pre-condition for what he calls justice as healing and not its actual accomplishment. He's noticed, for example, how similar the American tribal courts often are to the state courts. The key to establishing a truly different system, he thinks, will lie in the recovery of aboriginal cultures and languages, which for him are the bearers of the native understanding of law.

Sa'ke'j Henderson

Some of the best experiences in the United States that have been documented involve taking young aboriginal offenders and teaching them their language in jail. Because if they're thinking in English and they're thinking in a European style and they're surrounded by that, they don't know what the aboriginal consciousness says about all this. They don't even have the words or the vocabularies or a way of looking at this world from a different point of view that lets them understand what's expected of them as a human of a certain tribe, if they want to remain part of that tribe and to continue on in the traditions and create a new alternative destiny for themselves and their people and their children. It's been very powerful in the States as a tool, just as it's been in Canada with the ceremonies coming in, with people who previously never knew their ceremonies. But the ceremonies are just the tip of the iceberg. The key is learning the language and learning it in the right way and learning about all their relationships and why they're human and why certain behaviour goes against the whole grain of the people as they've experienced an evolution through time.

David Cayley

Sa'ke'j Henderson's hopes rest, for the moment, on a threatened foundation. Chief Ron Ignace, who heads the Assembly of First Nations Committee on Aboriginal Languages recently told an international conference in Toronto that many aboriginal languages are, in his words, "on the precipice of extinction." Of the 60 aboriginal languages spoken across Canada a century ago, he said, only four — Ojibway, Cree, Inuktituk and Dakota — remain really vital.

But Sa'ke'j Henderson remains optimistic, and one of the things that cheers him is the number of aboriginal legal scholars, judges and lawyers now practising in Canada. Aboriginal perspectives, he says, are now being brought to bear on the Western tradition of what he calls "artificial law," creating a dialogue that he believes will eventually make Canada a beacon to the rest of the world.

Sa'ke'j Henderson

We now have an amazing number of aboriginal lawyers, and now judges, who've been able to master all the intricacies of Canadian law and even human rights law and international law but still have found out that, somewhere in their soul, the essence of where this justice is coming from is coming from an aboriginal position. It's not coming from the law books, and it's not coming from all the law texts. The more they have to decide difficult questions and the more they have to pace around their desks or stay awake at night worrying about a problem, somehow your aboriginal instincts read to you a whole different way of looking at the problem and the law. And, some people have been saying, it's almost like a new vision quest or a new ritual for a new world of artificial law. It's the way you dream into artificial law and create those structures that are necessary.

But what we've found is that that really comes from an aboriginal consciousness and a quest that can't be discontinued, and that's the quest

for justice, the quest from the victimized or the dominated to reconstruct justice according to their experiences and the best of their oral traditions and teachings. I think that's the fabulous thing that's going to make Canadian law something really beautiful and astounding for the rest of the world who are still looking for those solutions.

David Cayley

One of the foundations of the idea that aboriginal people ought to have their own institutions of justice is the perception that the existing system has failed them. The Manitoba Justice Inquiry has said so, and so has the Royal Commission on Aboriginal Peoples and the Supreme Court. The criminal justice system, according to this perception, is racist, and its failure to understand and respect cultural differences puts all aboriginal people at higher risk of imprisonment.

But is this the whole story? criminologist Carol Laprairie wanted to know. Carol Laprairie is one of the few people, to my knowledge, who has done extensive empirical research in this area. And one of the things she's noticed is that since the issue of over-incarceration of aboriginal people was first broached in the 1970s, the problem has continued to grow worse, despite every effort to address it. This led her to ask whether the problem itself has been well-defined. Specifically, she wondered whether the offenders who were being jailed in such disproportionate numbers might be coming mainly from a certain stratum of aboriginal society and not from aboriginal society in general. So she undertook research in the inner cities of Edmonton, Regina, Toronto and Montreal.

Carol Laprairie

When I went into the inner city research, one of the theories that I was trying to test out was that in fact class, rather than race, might be the issue here.

One of the things that I did is that I divided the people into three groups. I had something called Inner 1, Inner 2 and Inner 3. I found out that the Inner 1, who were the people who were really most marginalized and really on the street, were very heavily involved in the criminal justice system and had suffered the most severe problems as children and as adults, I think. But as you moved beyond that to people who had residences or people in Inner 3 who moved in and out of the inner city, you saw a big difference in their involvement in the criminal justice system.

You also saw a big difference in the proportion of Inner 1 and Inner 2 and Inner 3 in eastern and western inner cities. If you looked at Regina and Edmonton, for example, there were many more of the Inner 1 group there, even though we randomly sampled. Many more of the people in the inner city in those western cities were Inner 1, which means that you have a larger group of marginalized people who, I think, are more vulnerable both to the commission of crime and to criminal justice processing.

David Cayley

Carol Laprairie's study found that the intensity and duration of aboriginal peoples' involvement in the justice system was closely related to their social and economic position and that this position was generally worse in the west than in the east. Racism may have been the original cause of the epidemic social problems she observed, but it was social disorganization, family disruption, slum housing and drug and alcohol abuse that best predicted who would end up in jail.

Carol Laprairie

When I did the inner city research, I think that I can honestly say, it was the most traumatic research I've ever done. There were times, when I first started it, that I didn't think I could finish it, and it was because of the stories that people told me about their lives. One of the things I was

astonished by was how many men it involved, how many men were on the streets compared to women. Women seemed to have other links in their lives, even though they may have suffered dreadful situations in their lives. They often had children, or they had a partner, or they had some kind of hook that kept them in a situation where their quality of life was better. So many of the men that I interviewed — and especially the Inner 1 men — has so few hooks to anything. They had these awful lives. They often had serious alcohol problems. Violence was so normalized. I remember asking somebody if they'd ever been assaulted violently, and he said, "What do you mean?" I said, "Well, punched, pushed." The kind of thing that I, as a middle-class researcher, if somebody came along and pushed me or punched me, I would consider myself well-assaulted. He pulled up his shirt and showed me this knife mark on his stomach, and his idea of being assaulted was something like that. Being punched or being pushed didn't mean very much to him. And I think that with this kind of normalization of violence in peoples' lives, it becomes accepted as a way of life. The other thing that was normal to so many of these people was being involved in the criminal justice system.

David Cayley

Carol Laprairie's research points to a possible reframing of the idea that the disproportionate number of aboriginal people in prison results from a systemic racial and cultural bias in the administration of justice. It does not say, I should emphasize, that there is no prejudice against natives. But it does suggest that the predominant reason why there are too many native people in prison is because too many of them live in social and economic conditions that make them vulnerable to involvement in the criminal justice system. Over-incarceration, Carol Laprairie says, reflects the relatively much larger lower class in aboriginal society.

Carol Laprairie

Some people are certainly much more disadvantaged than others. In my own mind, I sometimes compare aboriginal and non-aboriginal society to different shapes. I look at non-aboriginal society as a diamond shape, with a group at the top, who are very well off, and then this wide middle class, and then it goes down to a point at the bottom, which is this smaller, disadvantaged group at the bottom. Then I look at demographics of aboriginal society, and I see it more as a pyramid shape, where you have a smaller middle class. You have a point at the top, where you have certainly a more elite group. And then you have this very wide base at the bottom.

We know who gets involved in the criminal justice system, and one only need go and spend some time in courts, as I have done and you've probably done, to see who appears in court. By and large, it's the most marginalized people in our society, and you have a greater proportion of aboriginal people who fall into this group than you do in non-aboriginal society.

But there's also a variation in that across the country. If you look at socio-demographic data — by that I mean looking at education levels, looking at employment levels, all the standard stuff we look at to measure socio-economic status and social stratification — you can almost draw a line just east of Thunder Bay, because there's a part of Ontario around Thunder Bay that I think approximates Manitoba, Saskatchewan, Alberta more closely in terms of socio-demographics.

The other thing that I discovered in my community work in the aboriginal communities that I worked in — again this is, I think, another kind of conventional wisdom that perhaps needs to be looked at or challenged — is that there *is* social stratification in aboriginal society. Certainly one sees that in the communities, and I certainly saw it in the communities that I worked in and

lived in. There are haves and have-nots, as there are in many communities. I suspect that there are more have-nots in aboriginal communities though, and it's some of those have-nots who leave to try to find a better life in the city.

David Cayley

Recognizing social stratification in aboriginal communities leads on to the larger question of whether these communities are generally as uniform and homogeneous as they are sometimes taken to be. This question is significant for justice reform because returning justice to the community is often proposed as the solution to the over-involvement of natives in the criminal justice system. The proposal assumes that there is an uninterrupted cultural consensus in these communities about what justice is. Carol Laprairie has spent time in a number of aboriginal communities, including a year in the Cree communities of James Bay in northern Quebec, and she wonders if this assumption still holds.

Carol Laprairie

We've often assumed aboriginal societies as perhaps being more communal, more egalitarian, and I think, in some respects, they certainly are more communal.

But things have changed. One of the interesting things about the James Bay communities that I've lived in is that one starts to see the impact, for example, of mass communication. You see a great change in wage labour, with a lot of people working in the band councils and fewer and fewer people making their living, say, on trap lines. You see more emphasis on formal education. You see a plurality of values, so there's not necessarily a consensus of values, and this has come about, I think, because of these other changes in communities.

You see quite a change in traditional structures. The traditional lines of authority were largely

based on age and on gender and on peoples' ability, for example, in the bush. I think a lot of that has broken down, and one of the things that the older people would often say to me in these communities is that the young people didn't respect them.

The other big change, I think, is the very large, large numbers of young people. Aboriginal birthrates are still almost double non-aboriginal, and in those Cree communities, I think something like 68 per cent of the population was under 24. I think that compares to about, for example, 37 per cent or so in the rest of Quebec so that you've got this large group of young people, and so you have peer influences.

You also have television that brings images of the outside world and of teen sub-culture into communities, and that can't help but change communities.

David Cayley

Carol Laprairie's observations suggest certain cautions about community justice and about the extravagant hopes that are sometimes invested in this idea. Her view generally is that too much is taken for granted when it comes to justice alternatives and that what is needed first is a focussed program of research that will yield solid knowledge on which to base public policy. Her inner city research provides an example of what she thinks is wanted and why she thinks it's necessary. Identifying poverty, demoralization and pandemic physical and sexual violence as the main reasons why so many natives end up in jail suggests different remedies than the belief that a discriminatory justice system is mainly to blame. And without a correct diagnosis of the case, she thinks, what hope of a cure?

In what remains of tonight's broadcast, I want to focus in on one aboriginal justice program and try to give a sense of how it works and how it is different. The program is called the Community Council, and it is run by Aboriginal

Legal Services of Toronto. The council is composed of 30 members of the aboriginal community who deal with cases diverted from the courts under an agreement with Toronto's Crown Attorneys. Offenders meet in an informal setting with a panel of three or four council members and then come to an agreement on the conditions they are to fulfil. These can include apology, restitution, counselling, community service and various personal reforms. Offenders who fail to complete their conditions face no legal consequences but cannot be re-admitted to the program until they do. The council's director and one of its founders is Jonathon Rudin, a non-native lawyer with a longstanding interest in the aboriginal understanding of law. He says that they take all comers, subject only to space limitations, and consequently they often deal with extremely troubled people.

Jonathon Rudin

Almost half — and this varies year to year — but almost half have been adopted or in care at some point in their lives. Most haven't finished high school. Most are not at all connected with the aboriginal community. We're dealing with people who are estranged from the aboriginal community and largely estranged from any community. We're dealing with people largely, not exclusively, who are living out the visions other people had for them. They were never going to amount to anything. They were always no good. They were always a problem. They were an Indian, with all the negative connotations that had. Many of our clients come from adoptive homes where there's an adoptive breakdown, where, when things start to go badly, a parent or a relative will say, "That's the Indian in you acting out." So they had no positive sense of who they are. And when they get in trouble with the law, they are just living out everyone's vision of who they are. They don't have a sense that there is another option.

One of the significant aspects of a Community Council hearing is that, firstly, they're sitting

around a table with three aboriginal people, all of whom are making lives for themselves in Toronto. They may not be making a fortune, but they're all making a good life for themselves, which is an important message. It says, that can be done. It seems like nothing, but if you've been raised in an environment where it's assumed you will always be a failure, where all your problems are blamed on the fact that you're an Indian, when you deal with the standard prejudice and racism in our society, it's quite significant. Oh, look, there are people who are like me who are successful. As well, most of our council members have gone through what our clients have gone through. If they haven't gone through it, they've had brothers or sisters who've gone through it. So there's an ability to talk about experiences in a very real way.

David Cayley

The Community Council is based on a philosophy of justice that stresses care and consideration for both offenders and victims. The program was set up in 1992, and its establishment was preceded by a long period of consultation within Toronto's aboriginal community about how it should proceed. This process culminated in a meeting of elders at the Manitoulin Island community of Birch Island, and it was there, Jonathon Rudin says, that the new organization's direction was set.

Jonathon Rudin

When we went up to Birch Island, the first question I asked was, "What skills should we look for in council members? If we're going to be asking people to sit on the council, what should we be looking for?" And the elders and traditional teachers spent a half-day with me on this, largely because I couldn't get it. It's simple to me now, but it was very hard for me then. The message was, we should look for people who will treat victims and offenders with kindness and respect. That's the key, and if you treat people with kindness and respect, you can accomplish a great deal. Treating people with kindness and

respect doesn't mean that you never raise your voice. It never means you don't say, "Stop feeding me that line of crap." It doesn't mean any of those things. You can do those things. But if you do it in a way where you treat people with kindness and respect, where you're not imposing power relationships on people, you can accomplish a great deal. That's certainly what we've found.

Many of the clients who come into hearings talk about things in their lives that they've never spoken to anybody about. They talk about things that they had no intention of talking about when they came to the council hearing, but they do so because they realize the people who are there care about them. The rule is, what's said in a council room stays in the council room. So they can say whatever they want. They don't have to worry that it's going to get out later, that someone's going to say, Oh, you said X or Y, or this happened to you, that happened to you — that's not going to happen.

A hearing takes as long as a hearing needs to take. We've had hearings take 20 minutes. I think the longest was six or seven hours. It's not a counselling session. It's not about healing somebody. It's about identifying the work that needs to be done and helping the person, helping the client take responsibility for their actions — it's vital that they do that — and then you can be responsible for changing those things. That's what the council members and Aboriginal Legal Services and all the other service organizations around are there to help the person do, to help them make those changes.

David Cayley

Now, how would you contrast our received understanding of justice?

Jonathon Rudin

If you go to court and watch a sentencing, what do you see? You see an individual standing

there. The charge is read. They say to the person, "How do you plead?" If the person has a lawyer, the lawyer says, "Your Honour, my client pleads guilty." The client sits down. Someone reads the facts of the case, which may or may not be the facts of the case. "Are those facts correct?" The lawyer leans over, says something to the client. Sometimes the client starts shaking his head, saying, "The facts aren't right," and the lawyer is saying, "Shut up. It doesn't matter. If you say the facts aren't right, we're going to have a trial. You've got a deal. Just be quiet." So then the lawyer says, "These facts are correct." Then they discuss sentence. The judge says to the lawyer, "What do you have to say about sentence?" The lawyer says, "Your Honour, my client is X or Y or Z." Often what the lawyer tries to do, because they're trying to keep the client out of jail, is spin the saddest story they can spin, in fact, a story that in many ways tries to distance the individual from any sense of responsibility. "He had an awful upbringing..."—which may be true—"and all these things have happened to him," as if to say, he's not really responsible for what he's done. Therefore, you shouldn't send him to jail. Because if he's really responsible, then you have to send him to jail. The dichotomy we have in the Western system is, the more responsible you are, the harder we have to punish you. So we have a system which encourages people to try and come up with reasons why I didn't really do it. I mean, I know I did it, but think of my circumstances et cetera.

Now, what responsibility has the individual taken? None. The offender probably hasn't spoken in court. The judge knows nothing about the person, except what the person has maybe told the lawyer and what the lawyer chooses to tell the judge and, if there's a pre-sentence report, what people have chosen to tell people. Out of that, we're going to try and fashion a sentence. I don't know what you can meaningfully accomplish, at least in terms of how you're going to work to make changes in that person's life. You could certainly use that

information to decide how long you want the person to go to jail, I guess. But that's not going to do much to address what's going on in the person's life, because you don't know anything about that. The council hearing is completely different. We try to take a holistic approach.

David Cayley

The goal of this holistic approach is to instill a desire to change in the offender. He may be asked to right the wrongs he has done, but there is no sense of making the offender suffer an equivalent harm to the one he has imposed on others: no punishment. And this is where the aboriginal approach offers a radical challenge to our inherited thinking about justice. The Community Council, Jonathon Rudin says, begins from the assumption that punishment is futile, because, until the offender has been taught and shown justice, he is deaf to its claim.

Jonathon Rudin

Many of the people we deal with have severe drug and alcohol problems. Why do they have severe drug and alcohol problems? Often because they have been victims of physical, sexual abuse or whatever. So first of all, in the moral equation, victim-offender, most of our offenders actually are victims. It's sort of funny. We like to divide the world into this dualistic victim/good, offender/bad. Well, most of our clients have been both, and being a victim helps explain why they're an offender. It doesn't forgive them, but it explains it. But we don't like to think about that.

The other thing about alcohol and drugs is, they are an exceptionally good coping mechanism. If I want to forget some awful things that have happened to me in my life, alcohol and drugs are really good. So moral disapprobation from the general community hardly makes a big difference.

Also it's not as though the general community was there when our clients were physically,

sexually abused, when they were removed from their homes and sent to residential school, when all the things that have been done to aboriginal people were done. So it's hard to see how moral reprobation by a judge will have a whole heck of a lot of meaning. Where were you when I was five years old? Nobody was there. So I think it's a stretch to say that somehow someone who's been through that is going to be swayed by the state suddenly now taking an interest in them because they've done something wrong.

And I think if the concern is to stop criminal behaviour from happening, then you look at ways in which you can do that. If we abandon that as a goal, if the goal is simply to punish people for the sake of punishing them to let the world know that certain behaviours cannot be tolerated, then fine. But I don't think most people are interested in punishment for punishment's sake. Most people want to live in a safer society, and our feeling is, the program that we have has a much better chance of leading to a safer society, of leading to people ceasing the activities that bother people so much and also just ceasing the activities that are self-destructive to them and allowing them to become productive members of society. That's what our program is doing, and I would think people would want that.

David Cayley

Punishment is also futile, Jonathon Rudin argues, because jail holds no terror for most of the people who appear before the council. It's an accepted and accustomed part of their world.

Jonathon Rudin

I think one of the difficulties people have when we talk about justice and alternatives is that for most people who've never been to jail, going to jail is just such an awful thing that we can't imagine anything worse. For someone who's been to jail five or six times, it's no big deal. They know how to do it. Some people are very comfortable with it. It's not uncommon in northern communities — you've heard the story

— to find someone breaking a window in November in order to do time in the winter. It's not an incredibly hard life if you're used to it. So again when people say, "Well, they're getting off easy because..." What's unsaid is "...because if it were me, I would hate to go to jail." But it's not you. It's this person who's already been to jail 12 times. So obviously jail is not some huge deterrent to their activities. So what we found, clients tell us, is that it's harder to do the work that we want them to do, because we want them to start thinking about why they're doing what they're doing. We have expectations that they're going to do something. Going to jail means sitting around for a while. It's not a hard thing to do.

David Cayley

The fact that doing jail time is easier than turning one's life around indicates the magnitude of the challenge the Community Council faces. A recent independent evaluation of the program underlines the point. It showed that during the two-year study period, two-thirds of the clients had fulfilled their conditions, that most of the clients who were interviewed felt that the council had helped them and that many of those interviewed were now more involved in the aboriginal community. But it also showed that there was only a modest decline in the number of offences people committed after going through the program as compared with before. This is not necessarily a mark of failure. Changes in people often take shape over a longer period than the two years of the study, and this is particularly true of people in circumstances as desperate as many of the council's clients. But it does point to the difficulties the council faces. And these difficulties are compounded by the fact that initiatives like the council program still play only a small, exceptional and insecure part in the justice system as a whole. They have gained a precarious toehold, Jonathon Rudin says, but they are still far from being regarded as a regular and rightful part of justice.

Jonathon Rudin

One of the realities about aboriginal justice programs is that they are marginal. Without sympathetic people within government and in the justice system, programs would come to a halt. The program that we have would be over tomorrow if, for example, the Crown Attorney's office in Toronto decided to change their attitude towards consenting to diversions, because we have no inherent right to get anyone into this program. It's a diversion program. The Crown consents. The program could end if a government decided, oh, we don't want to fund this stuff anymore. So there is no footing, and that's a hard way to operate. We have no sense of permanence really. I hope that we'll continue. We're trying to expand the program into dealing with young offenders, child welfare matters. There are all sorts of places we could go, but as I said, something could happen tomorrow, and it could all get wiped away.