Brief to the Standing Committee on Justice and Human Rights on Bill C-9

From Aboriginal Legal Services of Toronto

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Aboriginal Legal Services of Toronto (ALST) appreciates the opportunity to present our position on Bill C-9 to the Justice Committee of the House of Commons. We believe that our experience with conditional sentencing over the years provides some real world experience that will be helpful to the committee's deliberations.

ALST appeared before the Supreme Court of Canada to address issues of sentencing of Aboriginal people in R v. Gladue, R v. Wells and R v. B.W.P. In all of these cases we were the only Aboriginal organization appearing. In addition, we appeared before both the House and Senate committees looking at the Youth Criminal Justice Act. We are proud to say that our appearances helped to see the wording of s.718.2(e) of the Criminal Code explicitly placed in the YCJA.

We are also very active on the ground in terms of justice issues and Aboriginal people. In 1991 we developed the Community Council, the first urban Aboriginal restorative justice program in Canada. Today it is the largest Aboriginal diversion program in the country.

We were also involved in the development of the Gladue (Aboriginal Persons) Courts in Toronto. Since its inception sitting one half day a week at the Old

City Hall Courts in Toronto in 2001, there are now three Gladue Courts in the city of Toronto sitting for a total of 3 ½ days a week. In addition, our Gladue Caseworkers provide detailed Gladue reports to judges in Toronto, Hamilton, Brantford and elsewhere in southern Ontario. Our work in this area has resulted in the imposition of many conditional sentences in circumstances where otherwise a jail sentence would have been a certainty.

We wish to make it clear at the outset that in our opinion, Bill C-9 is a retrograde move and one that will not only worsen the already significant Aboriginal over-representation in Canadian prisons, but it will also result in less safe communities.

In order to put this issue in some perspective it is important to keep in mind a few statistics. The issue of Aboriginal over-representation in prison is one that has concerned Canadians since it became widely known in the late 1980s. The reality of over-representation was one of the motivating factors behind Parliament's sentencing reforms in Bill C-41 in 1996 and specifically in the introduction of s. 718.2(e).

Yet, despite all the concerns expressed over Aboriginal over-representation, the situation continues to get worse. From 1997 to 2001 – covering the time from the introduction of Bill C-41 in 1996 to the years immediately following the Supreme Court of Canada's decision in R v. Gladue in 1999 – the percentage of Aboriginal people in jails in Canada rose from 15% to 20%. Since 2001, the numbers have continued to rise. In 2002, 21% of all inmates were Aboriginal. By the end of 2003/04 one in five men admitted to custody were Aboriginal while almost one in three women were Aboriginal.

We have five specific but linked concerns with the proposed bill: 1) the bill casts too wide a net; 2) in many cases it shifts important sentencing decisions from the judge to the Crown prosecutor; 3) it will, on some occasions, force judges into choosing between two less palatable sentencing options; 4) it will make the problem of Aboriginal over-representation in prison even worse; and 5) it will not address the legitimate safety concerns of Aboriginal and non-Aboriginal people.

We will address each issue in turn.

1) The bill casts too wide a net: If passed, Bill C-9 would include among offences ineligible for conditional sentences robbery and break and enter into a dwelling. While most Canadians might think that these offences represent particularly heinous crimes, as members of this committee know that is not always the case.

Take the offence of robbery. What is a robbery – it is theft with violence. In some cases the violence can be extreme and would require the incarceration of the offender for public safety. In other cases, a theft is turned into a robbery because the offender pushed, or threatened to push, the victim. Most of us would agree that this latter situation is by no means comparable to the first example, yet both are robberies.

The same holds true with respect to break and enter charges. While we cannot discount the trauma experienced by people who have their homes broken into, there is a difference between a gang carrying out a home invasion and someone with an addiction attracted to an open window. We have clients who have been

charged with break and enter who were found asleep in front of the television in the house they broke into. Did they commit a crime – yes – should their action disentitle them to consideration of a conditional sentence – no.

2) Increase in prosecutorial discretion: Many of the offences listed in Bill C-9 are hybrid offences - they can be prosecuted summarily or by indictment. If prosecuted summarily, a conditional sentence is possible, if prosecuted by indictment it is not. Examples of such offences include: possession of a weapon for dangerous purpose; criminal harassment; sexual assault; theft of a credit card; and being unlawfully in a dwelling house.

By designating an offence as hybrid Parliament granted to the Crown the ability to decide which way to proceed with a case based, in part, on the sentence the Crown hoped to obtain. Under the current regime, whether a Crown proceeds summarily or by indictment, a conditional sentence is a possibility. Under Bill C-9 a Crown can pre-empt consideration of a conditional sentence simply by deciding to proceed by indictment.

Sentencing decisions should be made by the sentencing judge, not by the Crown Attorney. There is nothing wrong with a Crown proceeding by indictment and, if a conviction is obtained, strenuously arguing for a jail sentence. But it does not seem right to us to allow the Crown to unilaterally remove one of the possible sentences available to the sentencing judge at the outset of the process.

3) Forcing Judges to Choose Between Probation and Jail: Bill C-9 does not require a judge to sentence an offender charged with an offence for which a 10

year jail sentence is possible to jail. What it does do however, is require the judge who does not think jail is an option to choose a sanction that may be less able to accomplish the sentencing goal than a conditional sentence. We fail to see the logic in this process. How is giving a judge a choice between two sanctions he or she would rather not choose better than allowing the judge the full panoply of sentencing options?

4) Increasing Aboriginal Over-Representation: It is worth remembering the words of the Supreme Court of Canada in R v. Gladue – the case that fleshed out the meaning of s. 718.2(e) of the Criminal Code: With respect to Aboriginal over-representation the Court said:

These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.

It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a

stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

Bill C-9 will impede the ability of sentencing judges to follow the dictates of the Supreme Court of Canada in Gladue. It will make the problem of Aboriginal over-representation worse.

We have found that judges can design quite creative and helpful conditional sentences when they have two types of information. First, information on the background of Aboriginal offender, including the impact of residential school and other government policies on the offender and his family, and second, community options that might be available to address these factors. In these circumstances a conditional sentence can be fashioned that will allow the offender to take responsibility for his or her actions and also take concrete steps to address why they are involved with the criminal justice system. In many cases the offenders are required to attend or complete treatment programs, often in conjunction with other conditions.

If the conditional sentence option is taken away, then what? In many cases, without the ability to rely on the frankly coercive powers of a conditional sentence, a judge may feel he or she has no choice but to send the offender to jail. And what will that accomplish?

Little or nothing.

Let's look again at Aboriginal over-representation but from a different perspective. Jail sentences are often advocated because they act as a general or specific deterrent. If incarceration really worked as a general deterrent we would expect that rates of Aboriginal representation in prison would drop. After all, what Aboriginal person in Canada does not know that if you break the law you stand a good chance of going to jail? If jail worked as a specific deterrent we would not see Aboriginal people coming before the courts with criminal records that stretched over three or four pages and included multiple periods of incarceration. But that is what we see, and we see it every day.

It is also helpful to keep in mind another finding of the Supreme Court of Canada in Gladue. That finding is that the prison milieu is particularly inappropriate for Aboriginal offenders, in part because of the racism that is prevalent in Canada's jails.

As this committee has heard, the average jail sentence of an offender serving time in a provincial institution is between two to three months. No positive change will come over a person who spends sixty to ninety days in custody. No programs will be made available to the person, no counselling will take place – nothing positive will happen. For our clients, frequent periods of jail lead simply to the institutionalization of the offender. Conditional sentences can offer hope for change for the Aboriginal offender, incarceration just offers more of the same – more of the same that does not work.

5) Removing conditional sentences will not make communities safer: Let's talk about victims. In addition to being over-represented in prisons, Aboriginal people are also over-represented as victims of crime. Aboriginal people and Aboriginal communities are very aware of the need for initiatives that will lead to safer communities. That is why, at ALST, we have a position for a Victim Rights Worker and why we are looking to further expand our work in this area.

But we know that incarceration does not make communities safer. It makes angry people angrier. It introduces petty criminals to major criminals. Jail just leads to more jail.

It is for this reason that Aboriginal communities are at the forefront of restorative justice programs. Restorative justice programs allow for individuals to break the cycle of jail and the street by having them take responsibility for their actions and for their healing. We have seen what incredible changes Aboriginal justice programs can have with individuals with long criminal histories including many spells in jail.

While a conditional sentence is not a restorative justice sentence, it is often an appropriate sentence for an individual who requires a greater degree of supervision. Taking away this option will not lead to safer communities, it will mean communities – Aboriginal and non-Aboriginal – will be more at risk from offenders who have simply done their time and emerged, at best no worse than when they went in – but certainly no better.

When important decisions are made in the Aboriginal community we are often reminded by the Elders that we must think seven generations ahead. As Oren Lyons - Faithkeeper of the Onandaga Nation has said:

> In our ways of life, in our government, with every decision we make, we always keep in mind, the seventh generation to come. It's our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours hopefully better. When we walk on Mother Earth we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them.

We realize that it is often difficult for politicians, particularly in a minority Parliament, to think 10 or 15 years down the line, much less seven generations. But the sad reality is that the tragedy of Aboriginal over-incarceration in this country can at least be partially understood by the fact that decision-makers have often not looked at all on the impact of their decisions on Aboriginal communities.

It is because we so often do not look forward and contemplate the outcomes of our decisions that we leap to hasty conclusions and quick fixes. Even if we cannot solve a problem we want to look like we are solving a problem.

In our opinion Bill C-9 is an example of a hasty ill-advised response to what is perceived to be public unease with the operation of the criminal justice system. It is a response that will have a disproportionate impact on Aboriginal offenders and will make the already growing problem of Aboriginal over-representation worse. And it will do so with no corresponding benefits in terms of increased public safety.

We urge this Committee to carefully review this Bill and to recommend against its adoption. Conditional sentences can play an important role in addressing the root causes of offending behaviour. They are not a panacea, but they are a very useful sentencing option for judges. Removing this option in a significant number of cases is a serious step backwards.