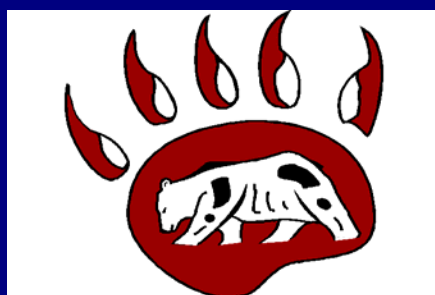


Native Counselling Services of Alberta



**Brief to the
House of Commons
Standing Committee on Justice, Human Rights, Public Safety and Emergency
Preparedness**

39th Parliament

Regarding Bill C-9 and Bill C-10

**Native Counselling Services of Alberta
September 19, 2006**

Introduction

Native Counselling Services of Alberta

Native Counselling Services of Alberta's (NCSA) mandate is to contribute to the holistic development and wellness of the Aboriginal individual, family and community. Established in 1970, the organization has continually evolved to meet the needs of Aboriginal people in the various communities throughout the province. NCSA has developed and maintained strong partnerships in order to deliver dynamic programming and community education in Alberta.

As an organization that designs and delivers programs for Aboriginal people in our communities, we have a greater sense of their circumstances and needs. Native Counselling Services of Alberta has been a leader in the development of alternative programming for those Aboriginal people that have come into contact with the criminal justice system, as well as a plethora of programs that have Aboriginal-focused services. Criminal justice related programs include: a group home for young offenders, residential correctional and healing centres, as well as a court worker program.

The Criminal Court Worker Program is a contracted service with Alberta Justice, and co-shared with Justice Canada. It was the first program to be delivered through Native Counselling Services upon the organizations inception. The Program provides Aboriginal people with counseling (other than legal) in relation to court procedure, rights under the law and the availability of legal aid or other resources. As well as assisting clients, Court Workers speak on their behalf during court procedures (such as providing information to the court as per the Supreme Court's *Gladue* decision); speaking to sentence is a key role of the Court Worker as cultural and geographic considerations are necessary to ensure the Judiciary have all the necessary information to make fair decision in the sentencing process.

The Court Workers assist, on a daily basis, those Aboriginal people that have come into contact with the law, and provide services to ensure fair and equitable treatment in the criminal justice system. It is through this, that they have developed an extensive knowledge and understanding of the various issues that clients are facing when they come before the courts. In 2005 / 2006 fiscal year alone, the Criminal Court Worker Program delivered services to 9634 clients across Alberta.

Stan Daniels Healing Centre is another program under Native Counselling Services of Alberta that provides services to Aboriginal accused that have come into contact with the law and have been incarcerated. It is a Section 81 facility in the CSC Prairie Region, which is designated as a releasing centre and federal penitentiary. Residents at the Centre are conditionally released offenders, and residents on federal inmate status. The effective operation of the Centre relies on the belief that Aboriginal offenders require specific programs to address their social, education, emotional, physicals and spiritual needs. In meeting these needs through support systems and programs, it enables the offender to make a smooth transition back into the community.

Concerns Regarding Legislation

It is through such programs and overall history of programming of the organization, that Native Counselling Services of Alberta possesses the requisite knowledge, experience and cultural sensitivity to speak on concerns regarding proposed legislation in Bill C-9 and Bill C-10 and the potential impact such legislation will have on Aboriginal people.

It is through data and research from other Western countries that have implemented such sentencing regimes, that this strategy has proven ineffective at deterring crime. Many countries / states that have implemented mandatory minimum sentencing have repealed or are in the process of repealing such legislation. There is further growth in disenchantment with such legislation because of the lack of efficacy and inequities in the administration of justice. Such growing opposition includes that of public opinion, the Judiciary and the United Nations.

Further, there is a significant increased cost to taxpayers as a result to higher incarceration rates and lengthier sentencing. The escalating rate of incarceration in other countries with mandatory sentencing regimes has led to prison overcrowding. This further translates into the building of more prisons, and growing expenditures on the operation of new facilities.

Mandatory minimum sentencing send a disparate number of minorities and non-violent offenders to lengthy and often unnecessary incarceration without regard to their circumstances, however unique they maybe. These minority groups already have substantial overrepresentation in the criminal justice system, and new mandatory sentencing regimes have put even more behind bars. This has been the case with Australia and United States in the implementation of such sentencing legislations aimed at *getting tough on crime*.

In Canada, the overrepresentation of Aboriginal people in the criminal justice system has been and continues to be a problem. This is an issue that has been attempted to be addressed through legislation amendments, as well as the Supreme Court decision in *R v. Gladue*, that special consideration be given to the circumstances of Aboriginal people when it comes to sentencing. It is through such instruments that the over-reliance of incarceration of Aboriginal people has been somewhat reduced, and the implementation of other appropriate measures in order to effectively deter and rehabilitate them from further contact with the law has been implemented.

The most pressing concern with regard to Aboriginal offenders is that the proposed legislation in Bill C-9 and Bill C-10 will only exacerbate the situation of overrepresentation. Presently Aboriginal people make up large proportions of the incarcerated and conditionally sentenced populations across Canada, due to numerous contributing factors. With the elimination of conditional sentencing and the decrease of judicial discretion, there will be even larger numbers of Aboriginal people sentenced to jail for obscene lengths of time. The lack of transparency eliminates any proper consideration of circumstances that led the Aboriginal accused before the courts, and contributes to the further inequality of administration of justice.

The New Legislation:

Bill C-9 and Bill C-10 have been introduced and are now in their second reading. They outline part of the harder line that the Department of Justice is taking in an effort to overhaul the criminal justice system.

Bill C-9 proposed to make amendments to the Criminal Code, by prohibiting Conditional Sentencing for serious crimes of sentencing ten years or more. Under section 742 of the Code, the courts have the discretion to issue a "conditional sentence order" whereby the offender is required to serve his or her sentence in the community, rather than in a penal institution¹. This encourages a reduced reliance on imprisonment and increased emphasis on community-based alternatives. (I.e. Treatment programs, counseling, etc)

Bill C-10 introduces mandatory minimum prison sentences for weapons offences, repeat offenders, as well as consecutive sentencing for use of firearm while committing an offence. The proposal will call for mandatory sentences of up to 10 years for more than two dozen crimes involving prohibited weapons and firearms.

Proposed legislation based on US Model:

In the proposed legislation contained in Bill C-10, the Department of Justice uses the basis of a pilot project that was employed in Richmond, Maryland. The project aimed to decrease gun violence, as there was an abnormal increase in the number of gun-related deaths in the late 1980's and early 1990's. The Department of Justice is using the experience of this project in the United States as a basis for bringing mandatory minimum penalties for weapon-related crimes into Canada.

This initiative is Project Exile, which was introduced to Richmond, Maryland in 1997. The project acted to prosecute all cases that included firearms, regardless of the number brought before the court. The project also included a mandatory minimum sentencing regime for these particular offenders. Since its inception, the project has been declared a success by many, as Richmond has seen dramatic decline of firearm offenses- approximately 40% drop between 1997 and 1998.²

However, a report by Steven Raphael and Jens Ludwig have found that cities with the largest increases in homicide rates during the 1980s and early 1990s also experienced the largest decreases during the late 1990s³. Richmond was one of the cities that had an unusually large increase in homicide rates in the early 1980s. Also noteworthy is that crime rates were already declining in many other parts of the country during the time that the Project was launched. Not only was crime on the decline across the country, but so to was the crime rate in Richmond, and when the project was launched in Richmond, the crime rate was already on the decline. It is for this reason that it is difficult to fully accredit Project Exile for any successes that were claimed.

Bill C-9 and Bill C-10 are being introduced at a time when crime is on the decline. Crime statistics released for 2004 show that the national crime rate has been on the decline since 1991. Police reported about 2.6 million offences in 2004, resulting in a crime rate that is 12% lower than a decade ago.⁴ Moreover, it is also reported in these statistics that the incidence

of violent crimes has also decreased approximately 10% over this same period. It would seem likely that the legislative proposals are coming a decade too late. If crime is already on the decline, this would mirror the situation in Maryland as a radical legislative amendment that reaps benefits from being equally ineffective at lowering crime rates.

South Africa also brought in mandatory minimum sentencing in an effort to decrease the number of violent crimes being committed, with very uncertain results on crime deterrence. The country passed legislation that called for very lengthy prison terms for violent crimes. It was reaction to a court decision where the court stated the importance of creating a standardized, uniform response to serious crimes⁵. It also came into legislation as a means to respond to perceived need to show concern with high crime rates, the public perception that sentences were not sufficiently severe, as well as the need to be “tough on crime”. However, since its enactment, it has been difficult to produce hard evidence that the new penal regime has had any general deterrent effect- or even that it has reduced crime in South Africa.

Conditional Sentencing at Present

The *Criminal Code* provisions concerning the conditional sentence of imprisonment (sections 742.1 to 742.7) defined a new sentence and its application; it was enacted in September, 1996. Section. 742.1 describes the imposition of a conditional sentence: Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court:

- (a) imposes a sentence of imprisonment of less than two years, and
- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in section 718 to 718.2, the court may, for the purposes of supervising the offender’s behaviour in the community, order that the offender serve the sentence in the community, subject to the offender’s complying with the conditions of a conditional sentence order made under section 742.3.⁶

The judge must also consider if a prohibition order concerning a weapon is required (as described in s. 100 of the *Criminal Code*). Mandatory conditions of the conditional sentence order are listed in section 742.3 of the *Criminal Code*. The supervision requirements are to report to a supervisor within two working days, to keep the peace, to be of good behaviour, to appear before the court when required, to remain in the jurisdiction of the court, and to notify the court or supervisor of any change in name, address, employment or occupation.

Optional conditions that may be ordered by the court include one or more of the following: abstain from alcohol or drugs (except prescription drugs); abstain from owning, possessing or carrying a weapon; provide support or care for dependants; complete community service; attend an approved treatment program; and, any other conditions the court considers desirable to ensure good conduct and to prevent future offending. The conditional sentence is one that employs a support system for the offender, in order to enforce the required limits, and access the necessary services in the community that are necessary to meet the rehabilitation factor of the sentence.

Conditional Sentencing bears the purpose of decreasing the amount of dependence on incarceration that our system has come to rely upon, and strives to rehabilitate the offender

while in the community. Bill C -9, in abolishing conditional sentencing, will take this support away which is to the great detriment of the accused. The prison experience is one that is not conducive to rehabilitation, and possibly increasing the recidivism rates leading them right back behind prison walls where they started.

Present Sentencing Principles

Canada's approach to sentencing and corrections strives to emphasize fairness, effective protection of public safety, flexible and individualized approaches to sentencing and policy decision-making based on evidence of what works to reduce crime. An emphasis has been placed on "least restrictive measures" as a means of addressing the overuse of the prison system, as well as striving to utilize a more "restorative" approach to rehabilitate offenders.

Bill C-41, passed in 1996, sets out the purpose and principles of sentencing⁷.

The fundamental purpose of sentencing is to maintain the safety of society, and prevent further commission of crimes, by imposing sanctions that have one or more of the following objectives:

- **Denounce** unlawful conduct
- **Deter** the offender and other persons from committing offences
- **Separate** offenders from society, where necessary
- Assist in **rehabilitating** offenders
- Provide reparations for harm done to victims or the community
- Promote a sense of responsibility and acknowledgement of harm done
- An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances
- All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.⁸

The sentencing decision is one of the most complex decisions that a Judge is required to make. The criminal justice system has recognized that offences are committed by a wide variety of persons in widely varying circumstances. It is for this reason Judges are given the discretion to determine individualized sentences. Tailoring a sentence to the individual includes weighing factors both on part of the offender condition, the degree of responsibility of the offender, as well as the gravity of the offence committed.

Bill C-10 undermines and contradicts what the sentencing principles as set out in provisions of the criminal code. Equal sentencing does imply that it will have equal effect on the accused. A one size fits all approach is not effective in sentencing, which has become exceedingly apparent in the case of Aboriginal peoples. They already comprise large numbers in the prison system, which will only continue to be amplified by the legislation proposed in Bill C-10. Mandatory minimums will take away any consideration of their circumstances, and only sentence more Aboriginal people to jail.

Overrepresentation of Aboriginal People in Canadian Prison System

It is important to take a look at the issue of Aboriginal overrepresentation in the justice system to understand the type of impact that a piece of legislation, such as Bill C-10 will have. The

issue is an ever-growing problem in Canadian society. In the 2001 census, it was reported that Aboriginal peoples made up 3.3% of total Canadian population – approximately 976,000 identified themselves as Aboriginal.⁹ The adult populations of Canada is comprised of only 3% of Aboriginal people, but are accounted for 21% of the admissions to provincial/territorial custody in 2003/04, and the same proportion at the federal correction level. During this same reporting period, statistics show that Aboriginal women accounted for 30% of all female admissions to sentenced custody, and Aboriginal men accounted for 20%.¹⁰ This number bears some considerable variation across the country with respect to prison numbers in each province.

It should be noted that this overrepresentation does not only encompass the admission into custody, but also to conditional sentencing and probation. Aboriginal people comprised 18% of adult federally sentenced, 20% of provincial/territorial admissions and made up 19% of conditional sentences in Canada. Aboriginal people make up 16% of probation orders, as well as 16% of conditional sentences.¹¹

In terms of the concentration of Aboriginal populations in the country, the largest of this number resides in the Western provinces. A large percentage of the population in the territories, also are of Aboriginal status- 84% in Nunavut, 48% in Northwest Territories, and 20% in the Yukon. However, the largest proportion of Canada's Aboriginal people live in British Columbia and Ontario, each with approximately 140,000 counting for about 18% of the entire Aboriginal population. At the same time, 16% lived in Manitoba, 15% lived in Alberta, and 14% lived in Saskatchewan.¹²

The Western provinces and the territories have the largest number of Aboriginal people in the general adult population, not to mention the most disproportionate number of admissions of Aboriginal adults to custody. In 2003-2004, the proportion of persons admitted to adult provincial facilities in Saskatchewan (80%), in Manitoba (68%), and in Alberta (39%).¹³ Between these three provinces, the ratio of the adult population Aboriginals make up in the criminal justice system to the actual percentage they make up of the provincial population, ranges between six and ten times to one.

The Aboriginal population in Canada is relatively young, compared to the non-Aboriginal population. The average age of people identifying themselves as Aboriginal, was 25.5, where the average age of non-Aboriginal Canadians, was 35.4 years old. Also, noteworthy, is the birth rate of Canadians is on the decline, but the birth rate of Aboriginal people is on the rise.

It is also important to look at the recidivism rates of Aboriginal people. The rate of recidivism is higher in this group of people than the rest of those incarcerated.¹⁴ With the numbers of Aboriginal people incarceration rates as pronounced as they are, amendments to lengthen incarceration periods to certain crimes will only sentence even more Aboriginals to jail. In a research report released in 2003, statistics show that the rate of Aboriginal male reconviction is 58%, and the Aboriginal female reconviction rate is 57%. This amount of recidivism among all offenders conveys the fact that incarceration is not an effective deterrent, which is especially true for Aboriginal people, given their high reconviction rates. This is something that the proposed legislation is not taking into consideration.

There a melee of contributing factors that has lead to the overrepresentation of Aboriginal people in the criminal justice system. These include: years of oppression, lack of employment, cycles of abuse and poverty, breakdown of family values, substance abuse, and homelessness. Other factors come from statistics that show Canada's Aboriginal population as: younger than the national average both incarcerated and in the community, has lower attainment of education than the rest of Canadians, and have been brought up in single-parent homes.¹⁵ These factors in combination or alone, are not solely responsible for, but elevate the risk of criminal offending, recidivism, and victimization in the Aboriginal population.

One of the strongest factors in this overrepresentation is the fact that an alarming amount of Aboriginal offenders have moderate to severe substance abuse issues. Substance abuse is an understated catalyst in committing of crimes, both on and off-reserve. For instance, in the case of homicide, alcohol use, by both victim and offender, is far more likely in Aboriginal than non-Aboriginal homicides. Homicide statistics which were committed by Aboriginal accused found that they were ten times more likely than non-Aboriginals to commit such a crime. It was also found that second degree murder was the most common of homicide charges being 66%.

In the past, data has shown that 70% of Aboriginal incidents involved alcohol, while only 25% of non-Aboriginal homicides did.¹⁶ This issue of substance abuse has been reported to be even further pronounced in Aboriginal female offender population. According to Canadian Public Health Association report released in 2004, it was found that 71% of female Aboriginal female offenders struggle with serious drug abuse issues compared to 66% of non-Aboriginal female offenders. In this report Aboriginal offenders were more likely to become involved in interpersonal violence while drinking than non-Aboriginal offenders, and this was related to their current offence(s).

It would seem that from the occurrence of offenders having some form of alcohol or drug abuse issues, and from the fact that Aboriginal people's tendency towards violent behaviour when intoxicated, that merely locking them up for extended periods of time would be of no service to the offender, or society. It makes more sense to have treatment-based approaches which would be far more cost effective than lengthy prison terms, as there is not enough support for them on the inside.

In the United States, substance abuse has been an ongoing battle which the Government continues to fight. Mandatory minimum sentencing regime in many of the states was a means of combating the war on drugs. Drug offenders are by and large, low-level drug offenders, with an overwhelming number of women offenders¹⁷, who are committing out of necessity more than out of inherent delinquent and violent natures. The amount of poverty and substance abuse in many neighborhoods, and black neighborhoods in particular, all over the United States is both rampant and devastating. It is their circumstances that have led them to jail, where there are hundreds of thousands of others just like them, also behind bars. It is for this reason, that overall federal prison population in the United States has reached record levels that a high proportion of prisoners are non-violent drug offenders, and that racial disparity in sentencing and the proportion of lower-level drug offenders are increasing.

Another drug related catalyst in the pursuance of criminal activity and the incidence of recidivism, is that of Fetal Alcohol Syndrome Disorder (FASD). This disorder inhibits cognitive development, hence the absence of ability to make the connection between cause and effect within the thought pattern. FASD is a growing problem within Aboriginal youth offenders. In provinces such as Yukon and British Columbia the diagnosis for youth with FASD, is estimated at 2.6% and 23%.¹⁸ Further, there have been reports that Aboriginal people have 25 to 30 times the rate of FAS in comparison to the general population.¹⁹

With regard to criminal activity and repercussions, there is no correlation made between *cause* – the act of committing the crime, and *effect* – incarceration for that crime. The overwhelming numbers of FASD in Aboriginal people translates into high conviction and recidivism rates within these groups if involved in criminal activity.

With regard to the perpetrating crime by Aboriginals people, it is important to bear in mind that they are not predisposed to substance abuse, violence, nor are they pre-disposed to committing random acts of violence on the public at large. Approximately 56% Aboriginal victims of violent incidents were more likely to be perpetrated by someone who was known to the victim.

Much of these violent incidents are committed in Aboriginal communities. According to research on the matter, reserves rates of crime are higher than that outside reserves, approximately three times higher. The data also shows that in 2004 the crime rate for offences committed on-reserves was 28,900 per 100,000 population compared to 8,500 per 100,000 population for crimes committed elsewhere.²⁰ Of particular interest is the rate of offensive weapon violations, as they were a startling seven times higher in occurrence on-reserve, than the rest of the country.

The issue of overrepresentation of Aboriginal people in the criminal justice system is one that is not at all simple. It is to be understood that there are varying factors involved in the committing of crimes, where they commit those crimes, as well as the view of being rehabilitated while incarcerated. These factors are vast and varying between different groups of people, especially among the Aboriginal population. It can be seen that employing a uniform sentencing regime, such as that proposed in Bill C-10 cannot serve equitable justice. Nor does it serve society, as the stereotypes of criminals and of Aboriginal accused will continue to be perpetuated, if all accused are seen by courts and public at large, as the same regardless of their differences.

Further, provinces like Saskatchewan, where Aboriginal people make up 72% of all those serving conditional sentences and Manitoba where 46% of conditional sentences are Aboriginal²¹, one could only expect that these numbers will skyrocket with the elimination of conditional sentencing. The Supreme Court has already said that offenders and especially Aboriginal offenders are not likely to be rehabilitated by the prison experience.²² Conditional sentencing provides a very necessary alternative to that experience, which is not a culturally effective means of deterrence or rehabilitation

Other countries have employed new sentencing legislations which has contributed to minority groups in general, as well as the Indigenous populations in those countries. Australia is country whose history and current social situation closely reflects on the current situation of our Aboriginal people in Canada. Australia has enacted mandatory minimum sentencing into their Criminal Justice system, which has resulted to the detriment of its Aboriginal peoples, as the offences under this new regime were those that were overwhelmingly committed by Aboriginals²³. The Northern Territory has been the area of most punitive mandatory minimums in the country, applying to both adults and juveniles. The offences affected include a broad range of property offences, for which if found guilty repeat offenders could face up to one year of incarceration.

Those subject to mandatory minima were offences that were committed by an overwhelming number of Aboriginal people. In the Northern Territory, they make up 25% of the overall population 32% of the population aged 12-25. As of 1999, 76% of all adult admissions to prison custody were Aboriginal.²⁴ The imprisonment rate for Aboriginal people in the Northern Territory was more than 10 times the rate of non-Aboriginal people. Even more stark figures were revealed in this same report with regard the imprisonment rate of Aboriginal women.

In 1999, there was a campaign launched to have the mandatory minimums repealed as there were suicide-deaths related to these penalties. As a result, a commission was struck in order to investigate this issue. Among their recommendations, they urged the courts to impose imprisonment as a sentence, only as a last resort and if no other means were deemed appropriate.²⁵ These recommendations were ignored, for the most part, and the disparate sentencing ensued, placing even more Aboriginals behind bars.

This ignorance continued until the United Nations began to voice their concerns on the matter. The United Nations saw these mandatory minimum sentences as a form of discrimination and that the Australian government should take measures to repeal some of the legislation so as to not be as targeted toward the Indigenous population. Finally, in 2002 Western Australia repealed the sentencing provisions for a majority of the property offences.

The United States has also sentenced disparate numbers of minority groups to prison for obscene lengths of time, with their mandatory minimum sentencing legislation. The U.S rate of incarceration has increased by 22 percent since 1989, and is generally 5-8 times the rate of most industrialized nations. African American males are incarcerated at a rate of 3,822 per 100,000. According to the statistics release in 2005 by the Bureau of Justice Statistics, African American men were nearly 6.8 times the rate of incarceration than the rate of white men. In California, African Americans make up 4% of the population, and account 20% of all arrests in that stat.²⁶

The Gladue Decision

Understanding there are systemic and background factors to take into account when dealing with Aboriginal accused, is of the utmost importance to effectively deal with the issue of their overrepresentation. Despite legislative changes, the considerations of these factors were not used to any potential at all. The Supreme Court of Canada did their part in speaking to the issue of overrepresentation, and lent force to provisions laid out by Bill C-41. It provided

shape to Section 718.2(e) of the Criminal Code, that a court that imposes a sentence should consider all available sanctions other than imprisonment that are reasonable in the circumstances, and should pay particular attention to the circumstance of Aboriginal offenders.²⁷ This provision had been in existence for some time but before this decision, had never really been used to its full potential.

This Supreme Court decision was the court's way of speaking to the overrepresentation of Aboriginal people in the prison system. This decision was a watershed in the sentencing of Aboriginal people, and a means of addressing the importance of taking into account the situation of Aboriginal offenders when coming before the court. This provided clarification of the judiciary to consider background and systemic factors in sentencing Aboriginal offenders. It acknowledges the underlying roots of discrimination and that these must be addressed, and cannot be misunderstood nor interpreted away.²⁸

Justices Cory and Iacobucci, the co-writers of the decision, recognized that a 'one size fits all' approach to sentencing was not only discriminatory, but also served no real purpose in the administration of equal justice. The court acknowledged that the behaviour of an offender is not likely to be improved by the prison experience²⁹. They saw that for sentencing it is important, for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims, and the community. This is even more so with regard to the unique circumstances of Aboriginal people.

In light of the *Gladue* decision, the task of the crafting an appropriate sentence, is an even more complex, and their discretion is used to the utmost.³⁰ However, it also can be said that it is more meaningful and just. The judge is forced to spend a greater amount of time in weighing those factors brought before the court, and thus more time in the overall sentencing process. The judge must be educated as to the history and current condition of Aboriginal peoples in Canada, so as to understand the significance of these unique circumstances to be weighed.

Prison Overcrowding

Correctional institutions in Canada are already in a state of overpopulation, and it is an increasing problem. Lengthier sentences and elimination of conditional sentencing will only further amplify this problem. The abolishment of conditional sentencing is bound to create an even greater inflation of population in correctional facilities throughout the country. In Saskatchewan for example, 33% of criminals sentenced to house arrest in 2005 would have wound up in jail under the provisions of Bill C-9. This would mean, then, that in Saskatchewan correctional facilities would require 33% more beds, employees, and programs to serve them.³¹

A case in point of sentencing legislation affecting prison population is that of South Africa. There, the average length of time prison terms has increased overwhelmingly, resulting in the overcrowding of prisons. Sentences with a term of seven years or more, more than doubled within a seven-year period. More astounding is the number of life term imprisonment, from 638 to 5511 during the same span of time. Before the legislation, only 19% of sentenced prisoners were serving a term of longer than ten years³².

These lengthier sentences have contributed to the overcrowding in prisons, and there is no hard evidence to confirm that longer sentences have made any kind of impact on the committing of crime in South Africa. In fact, crime rates have not changed since the inception of mandatory minimum sentencing. Without any evidence to confirm the positive impact that overcrowding prisons has had on South African society and the condition of the offenders

Overpopulation of prisons persists in the United States as well, and the incarceration rates continue to soar at epic proportions, in spite of legislative efforts to curb both drug-related and violent crimes. As of 2003- 161,673 people were held in federal prisons, an increase of 81% from 1995. The federal prison population has increased at nearly three times the rate of state prisons since 1995- 7.7% vs. 2.7%.³³ The prison population has changed in dynamics, as much of the population is older, and non-violent due to consecutive prison sentences being served. The lengthy prison stays house those older offenders who are passing the age to which recidivism is most common.

These figures put America as having the highest rate of incarceration in the world and also possess the highest rate of gun and drug-related crimes also. These statistics have further undermined the efficacy of prisons with regard to any deterrence factor that they hope to achieve. Many states have repealed their offensive weapon sentencing schemes for this very reason. Massachusetts, Michigan, Florida, and Pennsylvania have all found in various research studies³⁴, that mandatory minimum sentences do not deter criminals from pursuing criminal activity.

Judges are seeing this lack of deterrence, as well as the swell in correctional facilities being built in the United States. Judicial Conference of the United States which represents federal judges, endorsed the repeal of mandatory sentences, as did each of the 12 Federal judicial conferences. One Judge even noted, "We have more persons in prison per thousand than any other country in the world. And still the crime rates are up. The whole thing doesn't seem very effective".³⁵

Costliness of Legislative Proposal

The overall monetary cost that this new legislation implicates are unknown by the Department of Justice, as there has never before been a criminal justice legislation change of this magnitude. However, it has been said that there will be a growth in numbers admitted to provincial institutions. It was further commented that there is no commitment by the Federal Government to bear any of this financial burden that the new legislation will incur. The means to fund such population boom in provincial institutions will be the burden of the provincial governments.

What is known is that maintenance costs for one male inmate that is incarcerated in a maximum security is approximately \$110, 223 per year. The cost per female incarcerated is slightly more, at \$150, 867 per year. Minimum and medium security correctional facilities have slightly lower costs per inmate at \$70,000 annually.³⁶ These numbers are based on costs to keep inmates in these institutions, as they do not take into consideration the actual operating costs necessary to keep the prisons and jails running.

Further, there was a cost estimate prepared by Correctional Services of Canada in 2004. The numbers were published in a story by Dan Gardner in The Ottawa Citizen which estimated prison expenditures to range between \$5 billion and \$11.5 billion over a 10-year period.³⁷ Bill C-10 has provision for money to be set aside in order to build new prison cells. The dollar amount of money to be allocated ranges between \$220 and \$245 million over the next five years³⁸, which is a far cry from the numbers that have been projected elsewhere.

No other country knows about the costs associated with imposing sentencing legislation, like the United States. Addressing gun crimes comes not only with overcrowded prisons, but also with a large price tag. One example is that of California, where the three-strike law has added \$6.1 billion to correction costs. Other states are feeling the hit with regard to soaring expenditures as well. Due to escalating corrections costs, prison overcrowding and the growing movement for sentencing reform led Louisiana, Connecticut, Indiana, Iowa and North Dakota to modify or repeal their mandatory penalties. The increase in jail terms, has resulted in the United States spending over \$40 billion dollars a year on prison expenditures³⁹.

Effects on Judicial Discretion and the Judicial Process

Mandatory Minimum Sentencing will have a profound impact on judicial discretion. It is a cornerstone of judicial independence, which is the judiciary's inherent power to make legal decisions according to their discretion. It allows a judge to decide a legal case within a range of possible decisions. They look at the mitigating and extenuating circumstances of the offender and craft a sentence that both fit the crime, and the offender's circumstances and needs⁴⁰. The decisions are made in the courtroom, where everything is recorded, as well as documented in the reasons for the judgment, giving the entire process a sense of transparency and fairness.

Implementing more mandatory minimum sentences means taking away more judicial discretion, as it will be transferred from the judiciary and put in the hands of Crown prosecutors and police. The police have the power to arrest an individual or let him/her go with a warning. Prosecutors will have the power to proceed, dismiss, or stay a charge. They have an increased ability to have the accused plead down their case if the Crown threatens to proceed with a more serious charge. Such cases provide no transparency with regard to the administration of justice, and undermine the importance and complexity of judge-crafted sentences.

The lack of openness and accountability of charging and plea negotiations processes may very well undermine the integrity of the entire sentencing process⁴¹. The sentencing process is one of the most important and difficult duties of the judge. Judges are put in the position to preside over and render decisions over cases, is because they have the legal training, the requisite experience, and the ability to maintain independence from the system so as to render the most appropriate conclusion. With the implementation of Bill C-9 and Bill C-10, the hands of the judges are tied, and so to are the hands of equal justice.

No equity in the administration of justice means that every person that comes before the court under a charge triggered by a mandatory minimum is given the same sentence regardless of

their systemic or background factors. This reneges on Section 718.2 of the Criminal Code whose primary goal was to provide remedy to the already gross over-use of incarceration by the justice system and over-representation of Aboriginal people in the Criminal Justice system. Further, it pulls out the very teeth that the Supreme Court gave this section via *Gladue*. The sentencing judge is no longer able to look at the circumstances surrounding the commission of the offence or those of the offender, particularly with respect to those of the Aboriginal people.

The South African legislation provides a clause that allows for judicial discretion: courts may impose a lesser sentence in cases in which “substantial and compelling circumstances exist that justify the imposition of a lesser sentence.”⁴² The judges still can maintain a fair amount of discretion, which must include the grounds for imposing a lesser sentence in the reasons of their judgment. This maintains transparency in the justice system, as well as keeping sentencing principles in tact without being completely bound by mandatory sentencing.

Australia had a similar departure from judicial discretion when mandatory penalties were passed in that country. However, due to condemnation from the United Nations over the discrimination of the growing overrepresentation of Aboriginal people in the prison system, the judges were able to regain a significant amount of their sentencing power. This legislation allowed the courts some discretion where there were exceptional circumstances to justify a departure from the sentencing⁴³.

In the United States, judges are restricted with regard to discretion when hearing a case that has triggered mandatory minimum. The Judiciary in the United States has grown further disenchanted with this sentencing regime. There was a Gallup poll of 350 state and 49 federal judges who belong to the American Bar Association found eight percent in favor of and 90 percent opposed to federal mandatory minimums⁴⁴.

Other countries that have implemented mandatory minimum sentences have also effected judicial discretion, but to a less certain degree because of there is provision to keep judicial discretion in tact. One such example is South Africa. Mandatory minimum penalties have been part of the South African judicial landscape for many years, but have encompassed very few yet very serious charges, including murder and rape. Other mandatory minimum were created by the 1998 Criminal Law Amendment Act aimed at repeat offenders, ranging from 15-25 years of imprisonment.

Conclusion

This paper has sought to present the inefficiencies of the proposed legislation set forth in Bill C-9 and Bill C-10. Many of these downfalls have been not just based on forecasting of numbers and the potential of disparities in sentencing minorities, but has come from the actual scenarios of other countries that have employed mandatory minimums. Furthermore, the experience of such Western nations indicates that minorities are the ones that are going to jail in significantly larger numbers than other groups in their societies. It can be seen that from data presented in this paper, that a similar fate will be met in Canada, particularly with regard to Aboriginal people.

Sentencing, and the sentencing of Aboriginal people, is a very integral piece to the overall fairness of the justice system. However, it is something that will be undermined with integrating more mandatory penalties and the elimination of conditional sentencing. Judges will no longer have the ability to craft appropriate sentences for the various offenders that come before them. Any unique circumstances that Aboriginal people may have will no longer be taken into account, which lead back to the very systemic discrimination the Supreme Court took heed to in the *Gladue* decision.

Further there is very little, if any, research to indicate that mandatory penalties have any sort of deterrence factor. It would seem inappropriate to apply the same kind of sentencing regime, if it has not proven any efficacy to achieve this end in any other Western nation that has used them. Other countries and / or states are repealing their sentences because of this factor and due to the fact that it the costs are far too excessive to declare any value they do possess.

While the intentions to curb violent crime are well-intentioned, the means to achieve this end are inappropriate to implement in Canada. The goals of imprisonment are deterrence, denunciation, separation and rehabilitation, which cannot be satisfied by a narrow and inequitable sentencing regime. Additional research and innovative approaches that fit the Canadian situation are needed, as offenders are a complex group with very dynamic characteristics, and as such, a standardized blanket solution will prove ineffective to attain any decrease in crime or equitable administration of justice.

¹“Anti-Crime Bills FAQ” in CBC News Indepth, May 4, 2006.

² Janofsky, Michael, “New Program in Richmond Is Credited for Getting Handguns Off Streets,” New York Times, February 10, 1999.

³ Ludwig, Jens and Steven Raphael, “Prison Sentence Enhancements” The Case of Project Exile”, in *Evaluating Gun Policy: Effects on Crime and Violence* (Washington: Brookings Institution Press, 2003): 254.

⁴ Juristat: Crime Statistics in Canada, 2004, Vol. 25, no. 5.

⁵ Roberts, Julian, “South Africa”, in *Mandatory Sentences of Imprisonments in Law Jurisdictions: Some Representative Models*. Research and Statistics Division, Department of Justice, Ottawa: 21.

⁶ Criminal Code. Available at www.justice.gc.ca/en/

⁷ “Backgrounder: Fair and Effective Sentencing – A Canadian Approach to Sentencing Policy” in NewsRoom, Department of Justice. www.justice.gc.ca/en/news/nr/2005/doc_31690.html

⁸ Ibid.

⁹ *Victimization and Offending Among the Aboriginal Population in Canada*. Canadian Centre for Justice Statistics, 2004.

¹⁰ “Adult Correctional Services in Canada, 2003/04”, Canadian Centre for Justice Statistics, 2004, Page 15.

¹¹ Ibid, Page 14.

¹² *Aboriginal Peoples in Canada*, Canadian Centre for Justice Statistics Profile Series. 2001.

¹³ “Adult Correctional Services in Canada, 2003/04”, Page 15.

¹⁴ “Aboriginal Offenders and the Criminal Code”, *The Globe and Mail*, February 9, 1999. –

<http://fact.on.ca/newspaper/gm99020a.htm>

¹⁵ These factors were assessed in report by Carol La Prairie, as she posits that collective efficacy and social capital theories suggest that it is social and economic organization and related structures of advantage or disadvantage that affect people’s lives and dictate crime and disorder, both on reserve and in city neighborhoods. “Aboriginal Over-Representation in the Criminal Justice System: A Tale of Nine Cities”. Department of Justice, Ottawa:2001.

¹⁶ All statistics in this section are taken from, “Risk Assessment of Aboriginal Offenders wit Mental Health Issues”, University of Saskatchewan, Page 27.

¹⁷ Between 1986 and 1996 the number of women in prison for drug law violations increased by 421 percent, and current population of low-level, non violent female offenders is at 70%. “Mandatory Minimum Sentences” in *What’s Wrong With the War on Drugs*, Drug Policy Alliance, http://www.drugpolicy.org/drugwar/mandatory_min/

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- ¹⁸ “Risk Assessment of Aboriginal Offenders with Mental Health Issues”.
- ¹⁹ Canadian Pediatric Society, *Pediatric Child Health*, Volume 7, No 3, March 2002
- ²⁰ Adult Correctional Services in Canada, 2003 /04.
- ²¹ Canadian Centre for Justice Statistics, *Conditional Sentencing in Canada: A Statistical Profile 1997 – 2001*. Ottawa: 2001. Pages 71 and 101. These numbers reflect those numbers collected for the year 2001.
- ²² *R v. Gladue* [1999] 1 S.C.R 688 CanLII 679 (S.C.C) Hereinafter noted as *R v. Gladue* .
- ²³ The Northern Territory is one of the many areas more adversely affected by mandatory penalties and disproportionate number of Aboriginal convictions. “Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience”, Northern Territory Office of Crime Prevention (2003).
http://www.nt.gov.au/justice/ocp/docs/mandatory_sentencing_nt_experience_20031201.pdf
- ²⁴ Australian Bureau of Statistics, *Corrective Services, Australia*, December 2005. Released June 22, 2006.
- ²⁵ “Implications of Mandatory Sentencing for Particular Groups, Including Australia’s Indigenous People and People With Disabilities”. <http://www.dic-au.gov/html/implications/html>
- ²⁶ “Federal Prison Populations: A Statistical Analysis”. A Statement of Christopher A. Wray Assistant Attorney General, U.S Department of Justice, before the United States Sentencing Commission, November 17, 2004. Available at: www.Sentencingproject.org.
- ²⁷ *Ibid.*
- ²⁸ *R v. Gladue*
- ²⁹ *Ibid.*
- ³⁰ Her Honour, M.E. Turpel-Lafond. The following paper was provided at the CIAJ [Canadian Institute for the Administration of **Justice**] Conference: "Changing Punishment at the turn of the Century", in Saskatoon Saskatchewan on September 26 - 29, 1999. The paper is to be published in early 2000 and forthcoming in *Criminal Law Quarterly*, 1999
- ³¹ Returning to Correctional Services after release: A profile of Aboriginal and non-Aboriginal adults involved in Saskatchewan Corrections fro 1999/00 to 2003/04. Canadian Centre for Justice Statistics, Statistics Canada, Ottawa. Released 2006.
- ³² *Assessing the Impact: Mandatory and Minimum Sentences in South Africa*”. Criminal Justice Initiative, Open Society Foundation for South Africa. 2005.
- ³³ *Ibid.*
- ³⁴ Families Against Mandatory Minimums – History of Mandatory Minimum Sentencing in the United States. www.famm.org
- ³⁵
- ³⁶ CBC’s “Reality Check” – <http://www.cbc.ca/canadavotes/realitycheck/crimetime.html>
- ³⁷ <http://www.dangardner.ca/Coljan0606.html>
- ³⁸ Bill C-10 : An Act to Amend the Criminal Code (Minimum Penalties for Offences Involving Firearms) and to Make a Consequential Amendment to Another Act. Library of Parliament. <http://parl.gc.ca/common/Bills>
- ³⁹ “SPEECH AT THE AMERICAN BAR ASSOCIATION ANNUAL MEETING”, An Address by Anthony M. Kennedy Associate Justice, Supreme Court of United States, August 9, 2003. <http://www.mandatorymadness.org/site/pp.asp?c=erKNIYPHIsE&b=475269>
- ⁴⁰ *Ibid.*
- ⁴¹ “Mandatory Penalties and Sentencing Disparities” in *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures*, Research and Statistics Division, Department of Justice, Canada, 2002.
- ⁴² The Supreme Court of Appeal in *S v. Malgas* decided that if the prescribed sentence would result in an injustice, this would amount to a substantial and compelling circumstance, and the sentencing court would then impose an appropriate sentence. 2001 (1) SACR 469 (SCA).
- ⁴³ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*, Research and Statistics Division, Department of Justice, Canada, 2001.
- ⁴⁴ Families Against Mandatory Minimums. http://www.famm.org/si_history_of_mandatory.htm