Submission to the Senate Committee of Legal and Constitutional Affairs regarding Bill C - 75

Jonathan Rudin – Program Director, Aboriginal Legal Services

September 17, 2018

We are pleased to have this opportunity to provide our perspective on Bill C - 75 to the Senate Committee on Legal and Constitutional Affairs. Aboriginal Legal Services’ Ojibway name is Gaa Kina Gwii Waabama Debwewin – which translates as “all those who seek the truth.” We have been working in the area of justice for Indigenous people since 1990. Our experience has been gained through work with tens of thousands of clients as well as engagement in test case litigation and law reform. We have appeared as an intervenor before the Supreme Court of Canada over 20 times and have made many appearances before committees of the House of Commons and the Senate including an earlier appearance before the House Committee studying this bill.

The focus of our submissions will be on four aspects of the bill that we think are definite steps forward; two provisions of the bill that we see as significant steps backwards; and one glaring omission that represents a broken promise to Indigenous people.
We will start with the four provisions of the bill we strongly endorse.

First, we are completely supportive of the elimination of peremptory challenges in jury trials. We have worked extensively on the issue of Indigenous jury representation – or more precisely under-representation - for over 10 years. Government neglect and the use the peremptory challenges has had a corrosive impact on efforts to encourage Indigenous people to volunteer as jurors. We are glad the government has finally adopted the recommendations of the Aboriginal Justice Inquiry of Manitoba and the Iacobucci Jury Review. We know that the Committee has received a submission from Professor Kent Roach on this matter and having read it we want to say that we support his recommendations wholeheartedly.

For that reason we will leave peremptory challenges and move to the second area where we feel the bill provides a real step forward – effectively decriminalizing many administration of justice offences.

Study after study has shown that Indigenous people are significantly over-represented among those charged with administration of justice offences. Penalties for these offences often results in jail. As significantly, these convictions themselves are often bars to release on bail on subsequent arrest. This then leads to people pleading guilty to offences they did not commit just to get out of pre-trial custody.
The root problem in this area is the over use of unnecessary bail conditions by judges and justices of the law. That we still see the imposition of no alcohol conditions on people who clearly struggle with addictions is shocking; but hopefully the use of these conditions will diminish when it becomes clear that breaches of them will no longer result in further criminal convictions or jail.

Speaking of bail; that brings us to the third amendment we are very supportive of, the amendment that enshrines the application of the Gladue principles to bail. Although courts in most parts of the country have arrived at this conclusion on their own, this will ensure that the law is applied evenly everywhere.

Finally, the victim fine surcharge. It’s good that the bill implements what the Supreme Court did in Boudreau v. R. when it struck down the mandatory aspect of the victim fine surcharge. It is unfortunate that the bill does not respond to the Court’s request for a legislative response for those people who received mandatory victim surcharges prior to the legislation being struck down.

I will now turn to two provisions which we feel are misguided and should be rethought.

The first is the reverse onus provision on bail applications for those charged with a domestic violence offence who have been convicted of such an offence in the past. ALS takes the issue of domestic violence very seriously and is all too aware of the impact of this violence on Indigenous women and girls. At the same time, we are also very aware that many well-meaning attempts to address the
scourge of domestic violence not only fail but they have unintended
consequences that can be damaging to the very people they are supposed to help.

In this context we would point out that the phenomenon of dual charging, which occurs when a man charged with domestic assault insists that his partner “started it” and should be charged, has led to more and more women becoming enmeshed in the criminal justice system. Police policies that grant no discretion to officers and require arrest whenever domestic violence is alleged exacerbate this problem.

One of the impacts of dual charging is that women end up with convictions for assault that they should never have had. If these provisions go through and their partner once again alleges abuse then they may have trouble meeting the reverse onus. This means that they will be detained they will likely plead guilty and the cycle will continue and continue. Over 40% of women in custody today are Indigenous - this provision of the bill will make a shameful situation even worse.

The problem of domestic violence is complicated and the unique experiences of Indigenous families must be the starting point every time bail is being considered. This will not happen with this “one size fits all” approach to this issue.

If someone has a prior conviction for domestic assault and they are charged again with a similar offence then, if there are concerns for public safety, whether
for a particular individual or for the community at large, bail should be denied. There is no need to resort to a reverse onus that will not end up accomplishing what its proponents hope but will have dire consequences for many Indigenous women.

Our second concern is with the increase in the number of super summary offences. The term super summary refers to those summary offences where the maximum sentence is two years less a day rather than the standard six months. If this bill passes however, the super summary will go away; the two year less a day maximum sentence will become the norm.

We know from our almost 30 years working in the criminal courts with Indigenous people what will happen if the maximum penalty for summary conviction offences becomes two years less a day. What will happen is that crowns will insist on those higher penalties and judges will impose those higher penalties and one of the justifications for the higher penalties will be that it reflects the will of Parliament which expressly raised the maximum sentence. This is a perfect example of what criminologists refer to as net-widening.

If there is a need to have some super summarys where straight indictable offences have now become hybrid offences - and I stress the “if” - then perhaps their use can be justified. As it stands however, the promise of increased hybrid offences is being used as Trojan Horse to lead to a widespread and unjustified increase to the maximum penalty for summary offences.
There is no evidence that communities will be made safer by increasing the maximum penalties for summary offences. There is no evidence to suggest that there will be more rehabilitation or less recidivism. There is however every reason to believe that people will go to jail for longer periods of time and the people who will experience this phenomenon most acutely will be Indigenous people.

Finally let me address what is missing from this bill. Given how comprehensive the bill purports to be and how many issues big and small it addresses, it is baffling to us how it avoids the issue that is the elephant in the room – the proliferation of mandatory minimum sentences and unjustified restrictions on access to conditional sentences. This is the single largest change to the Canadian criminal justice system in the 21st century. It is something this government has explicitly committed to changing and it is not addressed at all in this bill.

One of the purposes of this bill is to increase efficiency and unclog the courts. Yet there are many, many Charter challenges currently under way and many more being contemplated to mandatory minimum sentences. Having been involved with some of these Charter challenges I can tell you that they take up a lot of court time.

Legal scholars speak often about the concept of dialogue – the way in which courts and legislators speak to each other. In Lloyd in 2016 the Supreme Court of Canada implored the government to come up with a process that would relieve
courts of having to adjudicate the constitutionality of each and every mandatory minimum – the legislature has not entered into the dialogue about this pressing issue - instead it has engaged in willful deafness.

Addressing the proliferation of mandatory minimums isn't hard to do. We know that Senator Pate has proposed reform in this area. The simplest and most expedient response is to put in place a safety valve mechanism that would allow a judge to avoid imposing a mandatory minimum where to do so would shock the conscience of Canadians. The judge would be required to provide written reasons and those would, of course, be subject to review by appellate courts.

Every day the government fails to address the impact of mandatory minimum sentences people are sent to jail who don’t need to be there – every day. How do mandatory minimums impact Indigenous people – all you have to do is look at the number of challenges to mandatory minimums that are brought by Indigenous offenders.

This government pledged to enact all the calls to action of the Truth and Reconciliation Commission that fell within its ambit. Call to Action 32 states:

We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.

Members of this Committee it is time – it is past time – to heed this Call to Action by the TRC. This is the last chance to address the issue of mandatory minimums
before the election. And if it doesn’t happen before the election then it will be years until it happens.

There can be no excuse for waiting; there is no justification for waiting. Senators, we know what the right thing is to do and we need to do it now.

Meegwetch, thank you.