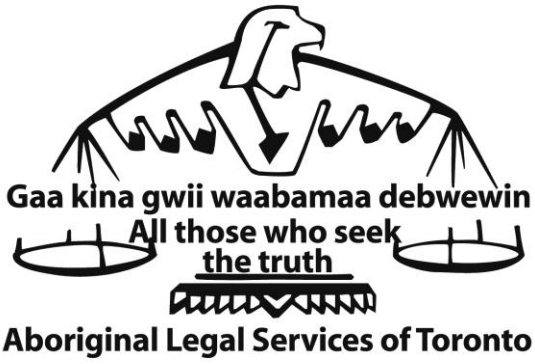

Brief to the Senate Standing Committee, Legal and Constitutional Affairs on the *Safe Street and Community Act*

February 23, 2011 **Christa Big Canoe, Legal Advocacy Director**

Aboriginal Legal Services of Toronto (ALST) would to thank the members of the Legal and Constitutional Affairs Committee for inviting us to make submissions regarding the *Safe Streets and Communities Act.* ALST has an interest in vocalizing objection to the passing of the *Safe Streets and Communities Act* because of acute Aboriginal overrepresentation in the criminal justice and penal systems and the overall impact this Bill will have on Aboriginal people.

ALST is a multi-service legal agency serving Toronto's Aboriginal community. Our guiding principles include: that Aboriginal individuals require equitable treatment in the Canadian justice system; access to the legal and related resources within the justice system; as well as understanding of the system, and their options within those systems.

ALST provides advocacy in all areas of the law as well as alternatives which can break the cycles of recidivism and dependency which is all too prevalent. With other justice sector

partners, ALST has assisted and facilitated the creation of and has provided on-going services that are available at the Gladue Courts in Toronto. The Supreme Court of Canada has granted ALST intervener status in twelve cases in which systemic issues affecting Aboriginal peoples were addressed[1]. ALST also participated as an intervener, or as counsel to the accused, in fourteen cases before Ontario Courts in which the application of sentencing principles in responding to systemic issues involving Aboriginal people were addressed[2].

As already stated, ALST does not support the proposed *Safe Streets and Communities Act* (the "Act") being passed. Given the limited time I have to present, I will only highlight our major concerns with part two the Act and discuss the need for amendments that include a "safety valve" in respect of mandatory minimum sentences and conditional sentences. Along with my notes I have provided to the committee's clerk Appendix "A" that contains citation to case law, academic writing, submissions, statistical resources as well as commissioned reports on the issues I am discussing today.

ALST's major concerns with Part 2 of the proposed *Safe Streets and Communities Act*

Our largest concern is that passing of the Act will result in a retreat or undermining of the principles of sentencing as set out in section 718.2 of the *Criminal Code of Canada*. It is also our position that any progress made in respect of the application of Gladue principles for Aboriginal people in sentencing and beyond will be harmed by the Act.

We believe that the *Safe Streets and Communities Act* will make the problem of Aboriginal over-representation in prison even worse while at the same time not actual address the legitimate safety concerns of Aboriginal and non-Aboriginal people in this country.

I will not spend time identifying the gross over representation as a number of witnesses have also presented these statistics, other than to say that the alarming over representation is only increasing and will increase with the passing of this Bill. It has been well researched, and documented in literature and case law over the last 30 years. When Aboriginal people only represent 4% of the Canadian population but are one quarter of the people incarcerated in this country there are obvious problems and failures within the justice system, both historically and currently. Courts have recognized the Canadian criminal justice system has failed Aboriginal people in this country. We provide services to Aboriginal people to stave off or minimize the impact of those failures and we can see that this Act has the potential to cause further harm through the proposed approach of being "tough on crime". Highlights of our major concerns include:

- Iincreased reliance on minimum sentences means there is less opportunity for conditional sentences and prevents judges from considering them as a sentencing option.
- Minimum sentences of 90 days to one year cannot seriously be justified for their ability to deter crime or to lead to rehabilitation or a correction in behaviors of offenders while incarcerated. Often those incarcerated will be at higher risk of increased drug use, gang involvement and experience lack of mental health or other social resources to address the very issues that lead to their offending behaviour.
- For those who are incarcerated in the penitentiary system, realistically they come out worse than when they went in, sometimes having exposure to drugs and reliance on substances they never had prior access to. For Aboriginal offenders they experience higher rates of racial discrimination and a higher risk of being gang affiliated.
- The Act also proposes to replace 742.1 *CC* and rely on maximum terms of imprisonment as well as listed offences that will prohibit the use of conditional sentences.

- Conditional sentences are currently only available, where legislation allows, when a judge is satisfied that the sentence would not endanger the community and are consistent with the fundamental purposes and principles of sentencing. There are offenders who will be captured by the proposed legislation that will be the best candidates, and who fall within the appropriate circumstances for conditional sentencing.
- A conditional sentence can provide up to 5 years of judicial oversight that can include conditions that have better supervision and will provide safer streets and better protection of communities than 90 days of incarceration.
- Besides the impact of actual custodial time on an offender, mandatory minimum sentences remove judicial discretion where such discretion is needed the most in order to fulfil the fundamental principles of sentencing.
- Shifting discretion to police agencies (in laying charges) and Crown prosecutors from the judiciary is egregious because it does not allow justice to be seen to be done. It will result in the worst kind of plea bargaining and put decisions out of the public view. Judges decisions on the other hand are reviewable.

The prosecutorial safety valve verses a legislative and judicial safety valve

We recommend that if the Act is going to be passed, that there are amendment that give judges an option to not impose a minimum sentence in exceptional circumstances. Such a provision, often referred to as a "safety valve", would go a long way in meeting objections that the law is unconstitutional and would allow judges to consider other sentencing provisions, such as s. 718.2(e), in situations where to impose a minimum sentence would be clearly unjust in the circumstances.

ALST supports the Canadian Bar Association's Resolution 11-09-A. Specifically we concur that:

> Any bill which proposes mandatory minimum sentences or limits the availability of conditional sentence orders should, in accordance with international norms, provide for some kind of legislative exception to allow Crown prosecutors and sentencing judges to depart from statutory sentencing limitations and mandatory minimums where there are exceptional circumstances or where it would be unjust not to do so.[3]

ALST also agrees and truly believes that the lack of judicial discretion to achieve a just result in particular cases will have a disproportionate impact on Aboriginal people.[4] The best way to ensure that there is no disproportionate impact is to allow judicial discretion in applying the sentencing fundamental principles as opposed to allowing Crown prosecutors to use their discretion as a safety valve.. A stipulation of such exception could require a judge to make written reasons for their departure from the mandatory minimum or why they are imposing a conditional sentence. This type of decision would be reviewable.

ALST submits that the recent decision in *R. v. Smickle*, 2012 ONSC 602 provides a strong example of how prosecutorial safety valves, specifically that "Crown discretion to proceed summarily is the safety valve that protects the constitutionality of s. 95(2) of the *Criminal Code*."[5], are not an adequate safety valve. Indeed there is "very little scope for judicial review of an exercise of Crown discretion and no possibility of reversing a decision made in good faith and in the valid exercise of that discretion."[6] Please see Appendix "B" for summary provided by Molloy, J. in her decision, of other jurisdictions legislated exceptions or safe valve provisions. Reviewability of judicial decisions ensures a measure of accountability, and ensures that justice is not just done but seen to be done. There is more at stake than simply offender accountability.

Closing remarks

As has been ALST's position for some time that incarceration does not make communities safer. Jail just leads to more jail. Aboriginal and non-Aboriginal communities 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. Simply put, more incarceration is not going to reduce the over incarceration of Aboriginal people.

The principles found in section 718.2 were legislated as remedial recourse and recognition of the dramatic overrepresentation to the disadvantages that historical abuse and poverty pose for many Aboriginal people in Canada. The evolving case law that comes out of these provisions and the sentencing principles outlined in *Gladue* are a measured and appropriate response to the dramatic overrepresentation of Aboriginal Canadians in the penal and criminal justice systems.

The dream would be, that one day there would be no need for a provision that requires Canadian courts to pay particular attention to the circumstances of an Aboriginal offender before them, and that at some point in time this caveat of the provision could be repealed. In the current legislative regime, we are not there. The Act will only assist in creating continued overrepresentation and likely increase it. Now is not the time to repeal this provision of the *Criminal Code*. The work that is required has not been done yet. It would seem that from where we stand, that the *Safe Streets and Communities Act* attempts to repeal 718.2 by stealth, taking the legs out from under the principles enunciated in these provisions without actually repealing it. We urge the Senate, not to let that happen, or at the least to make amendments to ensure fit and appropriate sentences that will benefit the safety of all of our streets and communities. Thank you for your time and consideration. Miigwech.

END NOTES

[1] *R. v. Williams*, [1998] 1 S.C.R. 1128; *Corbiere v. Canada (Minister of Indian and Northern Affairs),*[1999] 2 S.C.R. 203; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Wells*, [2000] 1 S.C.R. 207; *R. v. Golden*, [2001] 3 S.C.R. 679; *Sauvé et al. v. Attorney General for Canada*, [2002] 3 S.C.R. 519; *R. v. Powley*, [2003] 2 S.C.R. 207;*Hill v. Hamilton Wentworth Regional Police Services Board et al* [2007] 3 S.C.R. 129; *Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28*; *Her Majesty the Queen in Right of Alberta (Minister of Aboriginal Affairs and Northern Development), et al. v. Barbara Cunningham, et al.* 2011 SCC 37; *R. v. Ipeelee* [decision pending]

[2] *R. v. Penasse*, [2002] O.J. No. 4346 (Ont. C.A.); *R. v. Dorian*, [2003] O.J. No. 1415 (Ont. Ct. Jus.); *R. v. Hamilton et al.*, [2004] 72 O.R. (3d) 1 (Ont. C.A.); *R. v. Parenteau* [2007] O.J. No. 1290; 2007 ONCA 255 (Ont. C.A.); *R. v. Wilde* [2007] O.J. No. 2342; 2007 ONCA 434 (Ont. C.A.); *R. v. Towegishig* [2008] O.J. No. 1662; 2008 ONCA 338 (Ont. C.A.); *R. v. Chickekoo*, [2008] O.J. No. 2435; 2008 ONCA 488 (Ont. C.A.); *R. v. Whiskeyjack*, [2008] O.J. No. 4755; 2008 ONCA 800 (Ont. C.A.) and *R. v. W.E.J.M., 2009 ONCA 844*; *R. v. McKay*, 2010 ONCA 323 and *R. v. Lebar*, 2010 ONCA 220.; *R. v. Barnhart*, 2011 ONCJ 528 *R.* v. *Kokopenace* and the *R.* v. Spiers [both currently before the OCA]

[3] Canada Bar Association, Submissions on Bill C-10 *Safe Streets and Communities Act,* October 2011, page 21. See also pages 22-24.
[4] *Ibid* page 24.
[5] *R. v. Smickle*, 2012 ONSC 602, paras. 106-110.
[6] *Ibid*., para 107

***Please note that ALST does not make submissions in respect of Part 3 in our brief nor our oral submissions but if permitted to do so, we will make additional written brief available to the Standing Committee on Part 3.**