INTRODUCTION

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WHO WE ARE AND WHAT WE DO

The Kenora Lawyers Sentencing Group is a group of lawyers working every day to create Sentencing Options which will improve the lives of Aboriginal clients and their communities. We have a talented group of people with great academic qualifications and impressive life experience.

We serve about forty First Nations communities in Treaty Three and Treaty Nine territories. Aboriginal people are close to making up a majority of the residents in the District of Kenora.

First Nations in the Treaty Nine area are not served by roads. We access these communities by air. These communities are generally small, with 200 to 400 inhabitants. Pikangikum and Sandy Lake have populations in excess of two thousand people.

The health of the communities varies. All have experienced the fall-out from residential schools. Generalizations are difficult; but it is fair to say that all reserves in the northwest experience overcrowding, sub-standard housing, low educational attainment, high rates of unemployment, alcohol, solvent and drug abuse and to varying degrees, crimes of violence. Mental health and Fetal Alcohol Syndrome issues appear to be undiagnosed and/or untreated.

In Pikangikum the situation is particularly dire. Homes are sub-standard and most have no sewer or water; solvent and gasoline abuse is common among young people; of eight hundred school age children, four hundred are not in school. In 2000, Pikangikum was reported to have the highest suicide rate in the world. The number of children in care in relation to the population of the reserve is the highest of any community in Ontario. The climate is one of "hopelessness and despair."[1]

Kenora Justices serve fifteen of the northern First Nations. Court now sits in Pikangikum up to four times a month; in the other fourteen communities, approximately four times a year, or on "as needed" basis.

WHAT IS GLADUE?

Gladue[2] expresses the overriding sentencing principle that judges must use *restraint*, that Jail is to be imposed only when there is no less restrictive alternative.

718 (2) (e) requires judges to give particular attention to the circumstances of Aboriginal Accused; but as the Supreme Court said in *Gladue*, 718 (2) (e) "should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal."[3]

It is not, a "get out of jail free card."[4] Justice Fraser of our District has said:

> Gladue…is …not a licence to say, 'Give me less punishment because I am a First Nations person.' The issue is, if there can be restoration and reintegration, that must be given great weight, that is a goal we should seek if we can.[5]

Justice Fraser has been stretching himself to reach this goal for many years searching for and crafting sentencing options which restore, rehabilitate and make victims, communities and offenders "safer".

The Ontario Court of Appeal has said many times "the more violent and serious the offence committed, the greater the likelihood that the terms of imprisonment imposed on aboriginal and non-aboriginal offenders will be close to or coincide with each."[6]

CONDITIONAL SENTENCES

A Conditional Sentence is a jail sentence served in the community under strict surveillance. It is a half-way house between Jail and Probation.

I cite, below, four cases from our jurisdiction which highlight this. Each case involved an offence committed prior to the changes to the Criminal Code in 2007 which prevented judges from imposing a Conditional Sentence for crimes of violence including Assault with a weapon, Assault Causing Bodily Harm, Aggravated Assault and Sexual Assault—when proceeded with by Indictment.

In each case the offender was convicted of Aggravated Assault; in each case the Crown proceeded by Indictment; in three of the four cases the offender pleaded guilty; in each case the Sentencing Judge imposed a term of imprisonment; in each case it was open to the Court to impose a Conditional Sentence; in each case the Ontario Court of Appeal affirmed the Sentence imposed.

The offences included assaults where the offender broke vertebrae, ribs and the collarbone of his domestic partner (*Kakegamick*[7]); where the female offender seriously disfigured another during a drinking party (*Chickekoo*[8]); where the offender caused brain damage to her infant child (*Whiskeyjack*[9]); and where the offender shot at police officers (*Fobister*[10]).

These cases demonstrate that obtaining a Conditional Sentence is a "tough sell". Judges need a lot of convincing.

What are we left with?

The choice now is between Jail and Probation. In *Peters*[11], a Toronto case, during a night of drinking at a bar, an Aboriginal woman smashed a beer glass and seriously cut the victim on the face. The Court of Appeal affirmed a sentence of Probation. Because of an amendment made to the Code in 2007 which said that crimes of violence were not eligible for a Conditional Sentence, the choice before the Sentencing Court was Jail or Probation.

Such a result is very rare.

And I note that in *Peters* Justice Watt, disagreed with his colleagues. He would have imposed a "real" jail Sentence on Ms. Peters. I wonder what Justice Watt would have said, had a Conditional Sentence been available?

This case shows that Judges will not always agree on a result. That is what discretion is all about.

WHY SHOULD OFFENCES SPECIFIED BY C-10 AND PROCEEDED WITH BY INDICTMENT BE ELIGIBLE FOR CONDITIONAL SENTENCES?

WHO WILL BE CAUGHT?

We hear that C-10 is designed for *repeat offenders*. However, *first offenders* and those who commit assaults under the influence of intoxicants, or by accident, or who lack foresight, who act out of mental illness, or in self-defence but go too far, will be caught.

In addition to catching first offenders, C-10 will create the situations where offenders who have participated in treatment, rehabilitation and *restorative justice* programs, *prior to sentence* will not be able to obtain a Conditional Sentence.

Once the decision to proceed by Indictment is made, the sentencing position is locked in, and a Conditional Sentence is not available.

"Crown elections to proceed summarily or by indictment are usually made at an early stage of proceedings, when the Crown is not always in possession of all the facts."[12]

When a charge is laid, the Crown may not be sure of the strength of its case: the investigation may not be complete.

The assessment of the case is ongoing. When the Crown proceeds by Indictment, the Accused is entitled to a Preliminary Hearing. This allows Defence and Crown to assess the strength of the case, by hearing from the chief Crown witnesses.

HOW CAN CONDITIONAL SENTENCES OFFER GREATER CONTROL AND MAKE COMMUNITIES "SAFER"?

Judges often will make a Conditional Sentence longer than a "real" jail sentence, in order to ensure compliance with conditions imposed.[13]

Remission does not apply to a Conditional Sentence. The sentence must be served in full.

Rehabilitative conditions are standard, for example, drug or alcohol treatment, orders to reside where directed by a probation officer, release from house arrest to work or attend school or for medical emergency but for no other reason, and strict and frequent reporting conditions.

A combination of a Conditional Sentence followed by Probation, offers better community control than a prison sentence. For example, if an offender gets a twenty month Conditional Sentence followed by three years Probation, that Sentence offers better community control than a three year penitentiary term.

Conditional Sentences recognize rehabilitative work an offender has done *prior to sentence*. If an offender is engaged in rehabilitation, and to continue with that rehabilitation offers the best chance to reduce the risk of re-offending, *the offender and the community are both better off: both are "safer."*

WHEN WILL A CONDITIONAL SENTENCE BE A FIT SENTENCE FOR SEXUAL OFFENCE?

Rupert Ross, a Crown Attorney from Kenora, whose name is well known to those who practice Restorative Justice, retired after twenty-six years of prosecuting and studying Restorative Justice programs throughout the country.

He has made a Submission to the Senate on C-10.

I wish to borrow from what he has to say.

In the case of Sexual Assault, especially against a child, a Crown has but little choice than to proceed by Indictment. Proceeding by Indictment is a signal that the Crown will be seeking a penitentiary Sentence.

However, often, in the case of Sexual Assault, it has been the experience in the north that victims do not want to come forward. They feel shame and the pressures of small, tightly knit communities where speaking up will disrupt family ties or create hostility.

Victims of sexual assault are sometimes fragile; they may not be willing to testify or be able to endure the court process.

It was the experience of Mr. Ross that to offer a Conditional Sentence would induce an offender to plead guilty.

A guilty plea provides the victim with affirmation that he or she is telling the truth and is believed. This is important healing medicine.

The plea is also the beginning of rehabilitation for the offender. It acknowledges that he or she needs and wants help

What kind of help?

RESTORATIVE JUSTICE

Restorative Justice includes any process which provides for restitution and reintegration.

In its ideal form, it allows offenders and victims to come together with support persons, where the victim can express how the offence has affected his or her life—to express anger, pain and suffering, even hopelessness; where the offender can acknowledge the harm he or she has caused and where the members of the circle can make a contract outlining a plan for the offender to make amends and get help.

In his submission, Mr. Ross refers to his experience observing Hollow Water First Nation in Manitoba, where offenders usually convicted of intra-familial sexual abuse participate in a healing process, involving the offender, the victim and their families. Sentencing is delayed until offenders have completed their work and are then placed on three years Probation.

We are not close to implementing the Hollow Water example in Northwestern Ontario, but there is no reason why we can not work towards that model.

What I have seen in our territory, is a judge impose a Conditional Sentence for a sex offender, requiring him to make the long journey from Sioux Lookout to Thunder Bay, to attend a sex offender treatment program over a period of nine months.

He met in a group once a week with other men to discuss his offending, gain insight and learn tools to prevent repetition.

A Conditional Sentence can also include exile, where an offender is required to live outside his community.

I had a case recently where an elderly offender from Pikangikum was put on a Conditional Sentence. He had been convicted of sexual touching a grand-child and obstruction of justice. He was mentally ill; he had many serious health problems: he was on dialysis. There is no place for single men to live in Pikangikum. There is no way he could get dialysis there. Within a few months of his sentence, he died in Kenora, away from his family. He had once been a police officer in Pikangikum and a member of the Band Council.

Restorative Justice programs are taking root in Northwestern Ontario but will take much time, energy and money to flower and incorporate Aboriginal beliefs and values.

LOCAL RESTORATIVE JUSTICE PROGRAMS

In our District we have a Mental Health Court which diverts offenders with mental health problems out of jails and give them support in the community; Partner Assault Programs which allows men and women to attend sessions over several months after which offenders can expect a reduced sentence. A police officer is considering bringing a drug court to Kenora.

In Grassy Narrows and Whitefish Bay we have Community Justice Programs which require offenders, charged with property offences, to meet with elders and counselors and perform community service work. The Ne-Chee Friendship Centre in Kenora also offers what is called community conferencing, which brings offenders and victims together, to handle property offences. Eventually, these programs will be able to handle assaults.

Nisnawbe-Aski Legal Services, a branch of Legal Aid Ontario, now has workers in the northern reserves who are working to set up healing circles. We have yet to see the potential of this program.

A WORD ON VICTIMS

There is an assumption running through C-10 that victims want harsher sentences.

That is not always the case.

I represented a young offender convicted of breaking into several houses. He participated in a community conference with the homeowners of the one of the homes. They were impressed. They did not want my client to go into custody.

However, the judge on the case had already sentenced two co-accused to custody; he felt he had no choice but to do the same with my client.

Another example involves a man in his fifties from Pikangikum convicted of assaulting his wife. The Crown wanted "real" jail. My client wanted to go out on their trap line, which they did by tradition in the fall. His wife came to court and told the judge that this is what she wanted. The judge imposed a Conditional Sentence that my client leave the community, go to his trap line and not return for three months.

A WORD ON JAILS

Imagine being locked up in the Kenora Jail, where over ninety percent of inmates are Aboriginal.

If you are from the north, your family and friends live at a great distance. Inmates can not phone home because their families can not accept collect phone calls and can not afford to travel to Kenora. Plane fare is expensive, costing hundreds of dollars.

There is no family visiting area. Visitors line up behind a glass partition and speak to their loved ones by phone.

WHAT ARE THE EFFECTS OF NARROWING OPTIONS ON JUSTICE PARTICIPANTS AND ABORIGINAL COMMUNITIES?

C-10 will frustrate judges, crown attornies and defence lawyers.

C-10 will stultify the growth of Restorative Justice programs unless offenders have a real incentive to participate—like a Conditional Sentence option.

The system, from which Aboriginal people are alienated, will seem more remote, more uncaring, harsher and devoid of compassion. People will become more angry and despairing.

To make a justice system work in the northwest of Ontario, we need Aboriginal communities to buy into it. We need to provide encouragement and resources to do so.

WHAT IS TO BE DONE?

C-10 incorporates a safety valve for drug crimes. The Bill provides that a court can delay sentencing while an offender goes to treatment; and provided that the offenders completes treatment, the court "is not required to impose" the mandatory minimum.

Why not provide judges with a similar escape clause for all the offences which C-10 will make ineligible for a Conditional Sentence. Permit judges to delay sentencing to allow an offender to participate in Restorative Justice program. Upon completion of the programs, permit judges to have the option of imposing a Conditional Sentence.

At the very, very least, I urge the Senate to ask the government to spend one dollar in Restorative Justice, rehabilitation, crime prevention and victim services for every dollar spend on building new prison cells.

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BIOGRAPHIES

Sharon Scharfe, B.A., B.A. (Hons.), M.A., LL.B. holds three degrees from Carleton University, in criminology, law and human rights. Her Master's thesis was published as a book, entitled "Complicity: Human Rights and Canadian Foreign Policy – The Case of East Timor." Ms Scharfe worked with the United Nations in East Timor for 3 ½ years, first as a gender advisor then with the National Parliament, responsible for a staff of 39 Timorese and assisting with the process of developing national laws and the constitution for East Timor. Ms. Scharfe returned to Canada to attend law school in Manitoba, where she was recognized for her community involvement involving the status of women in Canada and worldwide. She now practices in the areas of criminal and mental health law in Kenora, Ontario. Ms. Scharfe is active in the Kenora community, volunteering with several organizations, including the executive of the Kenora District Law Association.

Reid Thompson, B.A., LL.B. holds a degree in Economics from Carleton University and received his LL.B. from the University of Manitoba. In addition, he has a wide range of experience including college and university certificates in small business counseling, mediation and dispute resolution.

In obtaining his Law Degree Mr. Thompson was nominated as a Trial Advocacy finalist at the University of Saskatchewan, selected as a Solomon Greenburg Finalist in Trial Advocacy at Robson Hall, University of Manitoba and he represented Manitoba in the prestigious Laskin Moot in appellant advocacy.

Prior to obtaining his Law Degree, Mr. Thompson's work experience included serving as District Officer for Ontario's Ombudsman and Constituency Assistant to Members of Provincial Parliament in the ridings of Kenora Rainy River and Ottawa Rideau. Mr. Thompson initially worked at Grand Council Treaty #3 beginning in 1997 and was promoted to Executive Director in 1999 and served in this capacity until 2004. He was responsible for negotiating self-government agreements and advising on a wide variety of Treaty and Aboriginal Rights Issues.

Robert Sinding, LL. B. has been practicing law since 1999. He graduated from University of Ottawa Law School with a combined Masters degree at the Norman Paterson School of International Affairs. He practiced aboriginal law in Kenora, Ontario and then was Crown Counsel with the Ministry of Labour in Toronto for two years before returning to Lake of the Woods. He currently resides in Kenora where he runs an employment, criminal and civil litigation practice.

Mr. Sinding acts as an Adjudicator for unjust dismissal complaints under the Canada Labour Code. He has litigated at the Ontario Court of Appeal, Federal Court – Trial Division, and Federal Court of Appeal, Manitoba Court of Queen's Bench, Superior Court of Justice, Ontario Court of Justice, and various tribunals including the Federal and Provincial Human Rights Tribunals, Canada Labour Code Adjudication Tribunals, Ontario Labour Relations Board, Criminal Injuries Compensation Board and Immigration and Refugee Board.

Caitlyn Smith H.B.A, J.D. holds an Honours Specialist degree in Political Science from the University of Toronto and acquired her Juris Doctor from Osgoode Hall Law School. She is member of the Anishinabek Nation and grew up near her home community of the Chippewas of Georgina Island, located on the shores of Lake Simcoe in Ontario, Canada.

Prior to completing her law degree, Ms. Smith worked for the Aboriginal Healing and Wellness Strategy (AHWS) in Queen's Park as the Team Lead for Policy and Research. As the largest and most comprehensive joint health and family violence initiative between the Government of Ontario and fourteen Provincial/Territorial Organizations and Independent First Nations, AHWS entrenched and defined Ms. Smith's unwavering dedication towards provision of culturally-appropriate and accessible services for First Nations, Métis and Inuit in Canada.

At Osgoode Hall Law School, Ms. Smith continued to advocate for indigenous rights and spent a semester overseas working for the Ngai Tahu Maori Law Centre in Dunedin, New Zealand where she gained experience and exposure to the legal environment of Maori lands, trusts, searches and succession, foreshore and seabed claims. In her final year, Ms. Smith competed for and was accepted into Osgoode Hall's Mediation Intensive Clinical Program to learn the intricacies of alternative dispute resolution and became an active mediator in civil and criminal disputes for the Jane/Finch community in Toronto.

Ms. Smith is currently articling for Legal Aid Ontario in Kenora in criminal and family law.

Peter Kirby, LL. B. practices family and criminal law. He came to Kenora in 1978 to run the Kenora Legal Clinic (now the Northwest Community Legal Clinic). In 1986 he went into private practice. He is a Children's Lawyer panel member and represents children in child welfare and custody cases and is on the Legal Aid mental health panel, assisting clients before the Consent and Capacity Board.

In the 1980s, he brought a series of successful *habeas corpus* applications before the Superior Court of Justice seeking the release of Aboriginal people held under warrants under the Ontario *Liquor Licence Act* for unpaid fines (see *R. v. Hill*, [1990] O.J. No. 2027).

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[1] The Office of he Chief Coroners' Death Review of the Youth Suicides at the Pikangikum First Nation 2006 — 2008 http://provincialadvocate.on.ca/documents/en/coroners_Pik_Report.pdf at pp. 41 and 44, 105, 109 and 112 to 114

[2] *R. v. Gladue* 1999 CanLII 679 (SCC) http://www.canlii.org/en/ca/scc/doc/1999/1999canlii679/1999canlii679.html

[3] Id at para. 88

[4] *R. v. Kakekagamick*, 2006 CanLII 28549 (ON CA) http://www.canlii.org/en/on/onca/doc/2006/2006canlii28549/2006canlii28549.html at para. 34

[5] *R. v. Chartrand*, [2006] O. J. No. 2095 (O.C.J.) at para. 11

[6] *R. v. Peters*, 2010 ONCA 30 (CanLII) http://www.canlii.org/en/on/onca/doc/2010/2010onca30/2010onca30.html

[7] *R. v. Kakekagamick*, 2006 CanLII 28549 (ON CA) http://www.canlii.org/en/on/onca/doc/2006/2006canlii28549/2006canlii28549.html at para. 34

[8] *R. v. Chickekoo*, 2008 ONCA 488 (CanLII) http://www.canlii.org/en/on/onca/doc/2008/2008onca488/2008onca488.html

[9] *R. v. Whiskeyjack*, 2008 ONCA 800 (CanLII) http://www.canlii.org/en/on/onca/doc/2008/2008onca800/2008onca800.html

[10] *R. v. Fobister*, 2009 CanLII 31987 (ON SC) http://www.canlii.org/en/on/onsc/doc/2009/2009canlii31987/2009 canlii31987.html aff'd 2010 ONCA 7

[11] *R. v. Peters*, 2010 ONCA 30 (CanLII) http://www.canlii.org/en/on/onca/doc/2010/2010onca30/2010onca30.html at para. 41

[12] *R. v. Nur*, 2011 ONSC 4874 (CanLII) http://www.canlii.org/en/on/onsc/doc/2011/2011onsc4874/2011onsc at para. 117

[13] *R. v. Proulx*, 2000 SCC 5 (CanLII) http://www.canlii.org/en/ca/scc/doc/2000/2000scc5/2000scc5.html where the Supreme Court stated:

> "8. A conditional sentence can provide significant denunciation and deterrence. As a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be. There may be some circumstances, however, where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future." (para. 127)