# Comments and observations of the Barreau du Québec

## Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act

April 2022

## Mission of the Barreau du Québec

To protect the public, the Barreau du Québec oversees the practice of the profession, promotes the rule of law, advances the profession and supports members in the practice of the law.


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## INTRODUCTION

Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act (the bill) endeavours to address the disproportionate incarceration of Indigenous peoples, Black Canadians and members of other marginalized communities by repealing a number of mandatory minimum sentences of imprisonment. According to the government, "[t]hese proposed amendments are an important step in addressing systemic issues related to existing sentencing policies."[1]

The Barreau du Québec welcomes any legislative measure that strengthens the independence of the courts, promotes judicial discretion and, ultimately, gives full effect to the principle of proportionality in sentencing.[2]

Nevertheless, the Barreau urges Parliament to consider undertaking a comprehensive reform of the *Criminal Code*. This would be preferable to piecemeal reforms because it would provide an opportunity to reduce inconsistencies and level the playing field, while increasing public confidence in legal institutions.

## The importance of granting judicial discretion in sentencing

The Barreau du Québec has long been opposed to minimum sentences, especially for imprisonment, except in the most serious cases such as murder. Minimum penalties strip workers on the front lines of the justice system (prosecutors, defence counsel and trial judges) of the flexibility they need to properly apply the principle of proportionality in sentencing.

Imposing minimum penalties can give the impression of promoting deterrence and, thus, may give the public a sense of safety in the short term.[3] However, numerous studies have shown that Canadians are in favour of greater flexibility in sentencing, including minimum sentences of imprisonment, and trust the courts to determine the most appropriate penalty in light of the circumstances.[4]

[1] Backgrounder on Bill C-5, Department of Justice Canada, Bill C-5: Mandatory Minimum Penalties to be repealed - Canada.ca.

[2] The principle of proportionality in sentencing could aptly be described as a principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*. *R. v. Ipeelee*, [2012] 1 S.C.R. 433, para. 36.

[3] In *Nur*, the Supreme Court of Canada notes that mandatory minimum penalties are not effective in achieving general deterrence. *R. v. Nur*, [2015] 1 SCR 773, para. 114.

[4] "In the past eight years or so, it has been suggested that Canadians like and want mandatory minimum penalties. The studies summarized [below], however, suggest that they may say that they like mandatory minimum penalties, but given a choice they would like these penalties not to be mandatory. In essence, members of the public appear to want flexibility in sentencing." Overview of the Research Summaries on Public Confidence in the Criminal Justice System, Anthony N. Doob, Centre for Criminology and Sociolegal Studies, University of Toronto, 2014. See also Roberts, J. V., Crutcher, N. and Verbrugge, P., 2007, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings," *Canadian Journal of Criminology and Criminal Justice*, 49(1), 75–107; Roberts, Julian V., 2003, "Public Opinion and Mandatory Sentencing," *Criminal Justice and Behavior*, 30, 483–508.

Moreover, those measures are counterproductive to the justice system for the following reasons.

First, prosecutors have less incentive to seek a guilty plea from an accused when the circumstances surrounding the commission of the offence warrant a penalty that is less severe than the mandatory minimum. Conversely, in cases where the prosecution is justified in seeking a penalty that is slightly more severe, the courts tend to hold to the mandatory minimum penalty. Mandatory minimum penalties also call into question how much confidence Parliament truly has in front-line justice workers.

Second, minimum sentences of imprisonment tend to perpetuate systemic issues related to existing sentencing policies, particularly with respect to Indigenous peoples. These penalties could actually infringe on the equality rights[5] guaranteed under section 15 of the *Canadian Charter of Rights and Freedoms*,[6] because they deprive Indigenous peoples of the specific method of analysis established[7] by the Supreme Court of Canada, as interpreted in *Gladue*[8] and *Ipeelee*.[9]

> [C]ourts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.[10]

Section 718.2(e) of the *Criminal Code* was enacted to reduce the overrepresentation of Indigenous peoples in the prison system. Parliament's decision to include a specific reference to Indigenous peoples in section 718.2(e) is due to the fact that the criminal justice system gives rise to systemic discrimination against Indigenous peoples. Therefore, section 718.2(e) is a remedial provision to address the violation of the equality guarantee, as recognized by Parliament.[11] Eliminating a provision intended to achieve substantive equality or address discrimination is, in and of itself, a violation of section 15.[12]

Third, there is a real risk that minimum penalties could lead to inappropriate, excessive and unreasonable sentencing in numerous cases.

The fact of the matter is that mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence.[13]

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[5] A violation of section 15 of the Charter occurs when the impugned law creates a distinction based on an enumerated or analogous ground and when the distinction creates a disadvantage by perpetuating prejudice or stereotyping. See *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, para. 30.
[6] The *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*,1982, c 11 (UK).
[7] R.S.C. 1985, c. C-46, section 718.2(e).
[8] *R. v. Gladue*, [1999] 1 S.C.R. 688.
[9] *R. v. Ipeelee*, [2012] 1 S.C.R. 433.
[10] Id., para. 60.
[11] Prev., footnote 8, paras. 61 and 65; Id., paras. 65 and 67.
[12] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, paras. 38 to 51.
[13] *R. v. Nur*, [2015] 1 S.C.R. 773; *R. v. Lloyd*, [2016] 1 S.C.R. 130, para. 3.

The Barreau du Québec is disappointed that the bill does not include a broad application provision that would allow the courts to fully exercise their judicial discretion in sentencing.[14] The bill provides an ideal opportunity to do away with these types of sentences once and for all, given that they do not support the efficient and flexible administration of criminal justice.

It is worth noting that two bills designed to give the courts this discretion were introduced in a previous Parliament: Bill S-251, An Act to amend the Criminal Code (independence of the judiciary) and to make related amendments,[15] and Bill C-407, An Act to amend the Criminal Code (sentencing).[16] A provision seeking to give courts the discretion provided for in these two bills could be included in Bill C-5, thus resolving the issue of mandatory minimum penalties.

| **Clause 1 of Bill S-251** |
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| **Degrees of punishment**<br><br>**718.3 (1)** If an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, despite the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.<br><br>**Discretion respecting punishment**<br><br>**(2)** If an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, despite the limitations prescribed in the enactment, including a punishment declared to be a minimum punishment, in the discretion of the court that convicts a person who commits the offence.<br><br>**Minimum punishment or parole ineligibility**<br><br>**718.5 (1)** A court shall, prior to imposing a minimum punishment of imprisonment or period of parole ineligibility under a provision of this Act,<br><br>**(a)** consider all available options, other than the minimum punishment of imprisonment or period of parole ineligibility; and<br><br>**(b)** determine that there is no alternative to the minimum punishment of imprisonment or period of parole ineligibility that is just and reasonable. |

[14] The Prime Minister of Canada requested a similar measure in his mandate letter to the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada. Notably, in the letter, the Prime Minister asks the Minister of Justice and Attorney General of Canada to undertake modernization efforts including the “exploration of sentencing alternatives.” It has become clear that the interpretation given to this expression does not include the elimination of minimum penalties of imprisonment. The Right Honourable Justin Trudeau, Minister of Justice and Attorney General of Canada Mandate Letter, November 12, 2015, online: https://pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-justice-and-attorney-general-canada-mandate-letter.

[15] Bill S-251, An Act to amend the Criminal Code (independence of the judiciary) and to make related amendments (consideration in committee), 42nd Parliament, 1st session (Can).

[16] Bill C-407, An Act to amend the Criminal Code (sentencing) (introduction and first reading – June 5, 2018), 42nd Parliament, 1st session (Can).

This approach, widely adopted in other countries,[17] provides a way of resolving the tension between Parliament's right to choose the appropriate range of sentences for an offence, and the constitutional right to be free from cruel and unusual punishment.[18]

Participants in the justice system are entitled to this constitutional protection. In addition, accused would no longer have to bear the burden of a constitutional challenge that must make its way to the Supreme Court.[19] Data from the Department of Justice Canada clearly show that constitutional challenges of mandatory minimum sentences of imprisonment have been successful.[20]

**Charter challenges**

**More than 210 challenges to the constitutionality of mandatory minimum penalties (MMPs)**

MMPs continue to be the subject of many Charter challenges in courts across Canada.

As of December 3, 2021, the Department of Justice Canada was tracking 217 Charter challenges to MMPs. This represents a little over a third (34%) of all Charter challenges to the *Criminal Code* that are being tracked by the department. For example:

- There are 24 challenges—five at the appellate court level and 19 at the trial court level—to MMPs for firearms offences.
- There are two challenges—two at the trial court level—to MMPs for drug offences, including trafficking, import/export and production.

**Success rates of Charter challenges**

Of all Charter challenges to MMPs tracked by Justice Canada in the last decade:

- 69% of the constitutional challenges to MMPs for drug offences were successful
- 48% of the constitutional challenges to MMPs for firearms offences were successful

[17] When minimum sentences of imprisonment are in place, courts are provided with discretion to sentence below the minimum when mitigating circumstances exist. For example, Swedish criminal law allows courts to sentence below the statutory minimum and to impose less severe punishment than imprisonment when mitigating circumstances are present. For an analysis of "judicial discretion" clauses in common law countries, see Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models, Research and Statistics Division, Department of Justice Canada.

[18] *R. v. Lloyd*, [2016] 1 S.C.R. 130, para. 3.

[19] For example, see *R. v. Lloyd*, [2016] 1 S.C.R. 130, and *R. v. Nur*, [2015] 1 S.C.R. 773.

[20] Id., footnote 1.

The Barreau du Québec submits that Parliament should immediately amend the *Criminal Code* to grant the courts residual discretion so that they do not have to impose mandatory minimum sentences of imprisonment. In some cases, mandatory minimum penalties can be profoundly unjust because the only available penalty is imprisonment. Furthermore, the circumstances specific to each case warrant consideration because other penalties may be more in line with rehabilitation, thereby reducing the offender's risk of reoffending. In other words, the most suitable penalty is usually the one assessed by the courts in each specific case.

Accordingly, it is important to have confidence in judges' ability to apply the law justly and fairly, in accordance with the objectives and principles set out in sections 718 and 718.2 of the *Criminal Code*, ensuring that sentences are proportionate to both the gravity of the offence and the degree of responsibility of the offender.

## Conclusion

In closing, the Barreau du Québec applauds the initiative behind the bill to promote judicial discretion in convictions and to address systemic racism in Canada's criminal justice system, by repealing some of the mandatory minimum penalties in the *Criminal Code* and the *Controlled Drugs and Substances Act*.

The Barreau is of the view, however, that leaving certain mandatory minimum penalties intact will not give decision-makers the latitude and discretion they need to determine the most appropriate sentence based on the unique circumstances of each case.

Therefore, the Barreau urges Parliament to eliminate the mandatory minimum sentences of imprisonment set out in the *Criminal Code* (except the mandatory minimum penalty in respect of murder). Failing that, Parliament should provide for residual discretion in the *Criminal Code* so that judges do not have to impose mandatory minimum sentences of imprisonment. Nevertheless, the Barreau wishes to reiterate the need for a comprehensive reform of the *Criminal Code*.