Native Women's Association of Canada

L'Association des femmes autochtones du Canada

Brief on Bill C-5

An Act to amend the Criminal Code and the Controlled Drugs and Substances Act

Prepared for Standing Senate Committee on Legal and Constitutional Affairs

Dossier sur Projet de loi C-5

Loi modifiant le Code criminel et la Loi réglementant certaines drogues et autres substances

Préparé pour comité permanent des affaires juridiques et constitutionnelles

12 October 2022
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Summary

The Native Women's Association (NWAC) supports Parliament's efforts to dismantle systemic racism built into the criminal justice system through sentencing reform.

NWAC submits this brief to the Standing Senate Committee on Legal and Constitutional Affairs as it studies Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*. This Bill presents Parliament an opportunity to apply what it knows about how mandatory minimum sentences harm Indigenous Peoples and to honour Indigenous People's inherent right to engage their distinct legal orders. Bill C-5 is a meaningful step towards reconciliation.

As the late Dr. Maya Angelou taught us, when we know better, we do better.[1] Bill C-5 is a chance to right a wrong. Mandatory minimums are not making Canadians safer from crime. Mandatory minimums widen the gap between Indigenous People and other Canadians. Mandatory minimums are a tool that advance systemic discrimination against Indigenous People. The time for mandatory minimums to go is nigh.

Hanging in the balance of this debate are Indigenous women.

Indigenous women are overincarcerated. Working backwards, this is a complex issue driven by several factors. Parliament alone cannot control for each factor, but it can take steps to reduce how many Indigenous women are sent to jail. One such step is enacting criminal sentencing reforms.

Bill C-5 proposes several amendments to the *Criminal Code*, including repealing mandatory minimum sentences under s. 742.1(e)-(f). Currently, these sections provide that when certain offences carry a maximum penalty of 10 years or more, judges must impose a mandatory minimum prison term. Bill C-5 reflects Parliament's intention to repeal these mandatory minimum sentences, allowing judges to impose conditional sentences. This will immediately begin decrease Indigenous women's overincarceration rates. This is a step towards reconciliation.

Bill C-5 allows judges to meaningfully engage *Gladue* principles at sentencing. Mandatory minimums ask judges to consider an Indigenous person's unique and systemic background factors, then send them to jail regardless of their balancing

[1] Maya Angelou, speaking to Oprah Winfrey on "Lifeclass" (19 October 19 2011), *OWN TV*, Time stamp: 2:27, online, OWN: < http://www.oprah.com/oprahs-lifeclass/the-powerful-lesson-maya-angelou-taught-oprah-video>.

process' outcome. This is not what Parliament intended when it enacted *Criminal Code* s. 718.2(e)[2], and not what the SCC directed in *R v Gladue*[3] and *R v Ipeelee*[4].

Bill C-5 promotes Indigenous People's inherent right to engage their own sentencing practices. The *UN Declaration on the Rights of Indigenous People* (UNDRIP) and s. 35 of the *Constitution Act, 1982* provide Indigenous People have the right to practice their traditional rehabilitative and restorative practices. Mandatory minimums impede this right at the sentencing stage, severing the opportunity to practically engage an Indigenous person's right to their distinct Indigenous legal order.

Indigenous Criminal Sentencing: NWAC's Interests

NWAC is interested in reducing Indigenous women's overincarceration. This Committee wants to hear the impacts on Indigenous women if Parliament does not repeal mandatory minimum sentences under Bill C-5.

Earlier this year, the Office of the Correctional Investigator (OCI) told Canadians that while Indigenous women comprise four per cent of the population, they represent nearly half of all federally incarcerated women.[5] The National Inquiry into Missing and Murdered Indigenous Women and Girls tell us most Indigenous women in jail are single mothers, meaning their children are more likely to be place in foster care.[6] This, in turn, makes it statistically more likely those children will become involved in the criminal justice system.[7] The Ontario Court of Appeal (ONCA) called this the "child welfare to prison pipeline" in the *Sharma* appeal when it struck down the mandatory minimum sentences Bill C-5 seeks to repeal.[8]

The Supreme Court of Canada (SCC) reserved its decision in the *Sharma* appeal and may uphold the ONCA ruling.[9] This would strike down the mandatory minimums Bill C-5 seeks to repeal. In the meantime, Bill C-5 presents Parliament an opportunity to right a legal wrong once and for all.

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[2] Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess, 35th Parl (assented to 13 July 1995) [Bill C-41].
[3] *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].
[4] *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].
[5] Office of the Correctional Investigator, "Annual Report, 2020-2021" (Ottawa: OIC, 10 February 2022) [OCI Annual Report].
[6] Canada, *Reclaiming Power and Place: Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls,* vol 1a (Ottawa: 2019) [NIMMIWG], at 637.
[7] *Ibid.*
[8] *R v Sharma,* 2020 ONCA 478 [*Sharma*] at para 96.
[9] *Her Majesty the Queen in Right of Canada v Cheyenne Sharma* (2020 ONCA 478, leave to appeal granted, 2021 CanLII 1101, appeal heard 23 March 2022.

Bill C-5 advances reconciliation

If Parliament does not enact Bill C-5, Canada will miss an important opportunity to advance reconciliation with Indigenous women. Indigenous women have experienced a litany of inequities in the criminal justice system because they are Indigenous.[10]

Throughout Canada's history, Parliament enacted laws that treated Indigenous women worse than others. Canadian laws jailed Indigenous mothers who sought to keep their children from being taken to residential school.[11] Parliament enacted *Indian Act* membership laws that denied Indigenous women legal personhood, then denied their membership rights[12], and, until recently, denied them equal ability to pass status membership rights to their descendants.[13] The criminal justice system's built-in systemic discrimination against Indigenous women led to the cultural genocide captured within the pages of the National Inquiry into Missing and Murdered Indigenous Women and Girls final report.[14]

Bill C-5 presents an opportunity to act on what Canada knows about why Indigenous women and girls experience different outcomes than their non-Indigenous counterparts. Parliament heard studies, reports and inquiries connecting Canada's historic treatment of Indigenous women and today's overincarceration rates.[15]

If enacted, Bill C-5 would be the first time Parliament repeals a mandatory minimum sentencing provision. This meaningful action makes good on Canada's promise to reconcile with Indigenous Peoples.[16]

Bill C-5 fortifies Gladue *principles*

Bill C-5 also fortifies the legal principles Parliament enacted under *Criminal Code* s. 718.2(e)[17] and the SCC developed in *Gladue* and *Ipeelee*. The *Gladue* principles

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[10] See e.g. *R v Barton*, 2019 SCC 33; *McIvor v Canada (Registrar of Indian and Northern Affairs*), 2009 BCCA 153 [*McIvor*]; and *Larkman v Canada (Attorney General),* 2014 FCA 299.

[11] The Truth and Reconciliation Commission of Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) at 259.

[12] *McIvor, supra* note 10.

[13] Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, 1st Sess, 42nd Parl (assented 12 December 2017).

[14] *NIMMIWG, supra* note 6.

[15] See e.g. NIMMIWG supra note 6; and House of Commons, *Need for Federal Leadership to Reform Indigenous Women's Treatment in Canada's Justice and Correctional Systems: Supplementary Report by the New Democratic Party of Canada to the Standing Committee on the Status of Women* (June 2018) (Chair: Karen Vecchio), and OCI Annual Report, *supra* note 5.

[16] *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12 at para 37.

[17] *Criminal Code*, RSC 1985, c C-46,[*Criminal Code*] s 718.2(e).

mandate sentencing judges to look at an Indigenous person's unique and systemic background factors.

Section 718.2(e) engages judges in working backwards from the criminal conduct at issue to better understand the complex factors that led the Indigenous person to become involved in criminal activity. This sentencing practice recognizes the legal truth that Indigenous People commit criminal offences for very different reasons than non-Indigenous People.[18]

NWAC participated in the recent SCC appeal hearing in *R v Sharma*, a case that illustrates the real world impacts mandatory minimum sentences have on Indigenous women. In that case, a young Indigenous woman with no criminal record from the Saugeen First Nation was caught importing cocaine.[19] She immediately confessed, and explained she did it for the money, as she and her young daughter faced homelessness. Her sentencing judge said a conditional sentence would have been appropriate and maintain family unity.[20] Ms. Sharma's crime engaged a mandatory minimum sentence, so the judge had no choice but to send her to jail.

While the Supreme Court reserved its decision until a later date, Bill C-5 presents an important opportunity to restore relations with Indigenous women on Canada's journey to reconciliation.

Parliament and the Courts uphold the idea that a balanced sentence considers *Gladue* factors. In 1995, Parliament directed sentencing judges to avoid sending Indigenous People to jail, when crafting appropriate sentences.[21] Parliament also enacted sentencing minimums that, over time, have sent more Indigenous People to jail.[22]

Gladue sentencing principles and mandatory minimum sentences cannot operate simultaneously. Either the Indigenous person must serve a minimum jail term, or their sentencing judge is empowered to craft a more appropriate sentence, including time served in the community, at home. Both cannot be true at the same time for an Indigenous person convicted of certain crimes. Time is of the essence in rectifying this conflict; As the OCI's numbers indicate, Indigenous incarceration rates are climbing.[23]

Bill C-5 and the *Gladue* principles do not mandate judges to issue conditional sentences to every offender. The SCC clarified in *Ipeelee* that s. 718.2(e) does not

[18] *Ipeelee, supra* note 4 at para 59.
[19] *Sharma, supra* note 8 at paras 5-6.
[20] *Ibid* at 125.
[21] Bill C-41, *supra* note 2.
[22] Bill C-10, *Safe Streets and Communities Act*, 1st Sess, 41st Parl, 2012, cl 34 (assented to 13 March 2012).
[23] OCI Annual report, supra note 5.

operate as a “get out of jail free” card.[24] Rather, Bill C-5 and the *Gladue* principles empower judges to use their discretion to weigh each relevant factor, including an Indigenous persons’ unique and systemic background factors, to craft an appropriate and just sentence.

Those who commit serious offences, including those who abuse Indigenous women, may still go to jail, separated from society.[25] Removing mandatory minimum sentences signals Parliament’s trust in judges to craft balanced sentences.

The *Criminal Code* does not prescribe a one-size-fits all solution to sentencing an Indigenous person. Recently, the Saskatchewan Court of Appeal in *R v Bear* upheld a sentencing judge’s decision to balance an Indigenous offender’s *Gladue* factors with the criminal sanction that treats violence against Indigenous women as an aggravating factor.[26] The appeals court in that case reminds us that sentencing judges must be free to consider each relevant factor, on a case-by-case basis.

NWAC’s interest in Bill C-5 stems from its mandate to advocate for Indigenous women, girls and gender diverse people’s entitlement to equal treatment. Bill C-5 advances substantive equality because it recognizes that judges must be empowered to apply *Gladue* principles when sentencing Indigenous People.

Bill C-5 Creates Space for Indigenous Legal Traditions

Bill C-5 will not resolve Indigenous women’s overincarceration, but it respects Indigenous People’s inherent right to engage in restorative, rehabilitative and healing practices in their families and communities.

Indigenous legal traditions engage laws and traditions unique to each Indigenous governance system. They existed before colonization, survived assimilationist policies, and are reviving today.[27] The Truth and Reconciliation Commission of Canada recognized Indigenous People’s inherent right to develop and practice their own justice systems.[28] Case law guiding the application of s. 35 of Canada’s constitution[29] provides Indigenous People the right to practice the customs and traditions that are integral to their identities.[30] Canada’s recent decision to enact the UNDRIP also signals

[24] *Ipeelee, supra* note 4 at para 75.
[25] *Criminal Code, supra* note 17 at s 718.04
[26] *R v Bear*, 2022 SKCA 7, 2022 at para 44.
[27] John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 10.
[28] Canada, Truth and Reconciliation Commission, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (Ottawa: TRC, 2015) [TRC] at
[29] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[30] *R v Van der Peet,* [1996] 2 SCR 507 at para 51-52, 137 DLR (4th) 289.

Parliament's intention to honour Indigenous People's inherent right to maintain and strengthen their distinct legal institutions.[31]

Bill C-5 connects to these calls to recognize Indigenous People's rights to apply their distinct approaches to sentencing, including traditional restitution and rehabilitations practices. In repealing mandatory minimum sentences, judges are free to invoke Indigenous sentencing approaches as part of a conditional sentence. An Indigenous person in a federal institution cannot meaningfully engage their Indigenous legal orders because Correctional Services Canada maintains authority over the services inmates can access.

NWAC's Position: Bill C-5

NWAC supports Bill C-5 and recommends Parliament capitalize on this opportunity to advance reconciliation. Bill C-5 advances substantive equality for Indigenous People because it recognizes that judges must be empowered to apply *Gladue* principles when sentencing Indigenous People. Currently, s. 742.1 deprives judges their ability to pursue substantive equality for Indigenous People at sentencing.

NWAC's position is that paragraph 742.1(e) discriminates against Indigenous people because it can prevent sentencing judges from imposing conditional sentences in alignment with s. 718.2(e). Section 742.1 does not advance sentences that are commensurate with an Indigenous person's degree of culpability. Section 742.1 does not create similar impacts on non-Indigenous people.

Bill C-5 empowers allow judges to meaningfully realize the *Gladue* Principles. While this ability will not redress Indigenous women's overincarceration on its own, Bill C-5 is a meaningful step Parliament can take to dismantle systemic racism within the criminal justice system.

Each time a judge can sentence an Indigenous woman to a conditional sentence brings Canada closer to ending Indigenous family separation cycles.

NWAC's Recommendations: Bill C-5

NWAC recommends Parliament enact Bill C-5.

NWAC recommends this Committee improve Bill C-5 by recommending Parliament repeal all mandatory minimum penalties in the *Criminal Code*.

[31] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, Schedule 1, Article 5.

About NWAC

NWAC is a National Indigenous Organization representing Indigenous women, girls and gender diverse people in Canada, inclusive of First Nations on and off reserve, status and non-status, disenfranchised, Métis and Inuit. NWAC is an aggregate of Indigenous women's organizations from across the country. NWAC was founded on the collective goal to enhance, promote and foster Indigenous women's social, economic, cultural and political well-being within their respective communities and Canada societies.

Since 1974, NWAC's strong and lasting governance structures, decision-making processes, financial integrity and networks have helped achieve its overall mission and goals. Today, NWAC engages in national and international advocacy aimed at legislative and policy reforms that promote equality for Indigenous women, girls, Two-Spirit and gender diverse people, including LGBTQ+ people. Through this advocacy, NWAC works to preserve Indigenous culture and advance Indigenous women, girls and gender diverse people's well-being, as well as their families and communities.