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Brief to the Standing Committee on Justice and Human Rights on Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*

Overview

The Federation of Asian Canadian Lawyers (British Columbia) Society (FACL BC) is a diverse coalition of Asian Canadian legal professionals in British Columbia. FACL BC includes legal professionals who practice in many areas of law, including both Crown and defence counsel. FACL BC is pleased to share its position on Bill C-5.

If passed, Bill C-5 would repeal 20 mandatory minimum sentences and would remove certain restrictions on the imposition of conditional sentence orders (CSOs), which allow for a term of imprisonment to be served in the community.[1] Both categories of amendment would increase judicial discretion in sentencing by repealing statutes that require judges to impose terms of incarceration regardless of the circumstances in which the offence was committed or the characteristics of the individual offender.

FACL BC supports the passage of Bill C-5 for three reasons. First, because mandatory minimum sentences and restrictions on CSOs disproportionately affect racialized communities, particularly Indigenous and Black communities with whom FACL BC stands in solidarity. Second, because the provisions to be repealed restrict judicial discretion to impose proportionate sentences. And third, because the provisions to be repealed not only restrict judicial discretion but also the discretion of Crown and defence counsel to craft dispositions that are appropriate in the circumstances.

1. Effects on racialized communities

Mandatory minimum sentences and restrictions on the impositions of CSOs are disproportionately borne by racialized offenders, particularly Indigenous and Black offenders.

In 2017, the Department of Justice released a fact sheet on the impact of mandatory minimum sentences on racialized offenders, concluding that Black and "other visible minority" offenders were more likely to be admitted to federal custody on a mandatory minimum sentence, as compared to admission to federal custody on a non-mandatory-minimum sentence.[2] That fact sheet also showed that Black and Indigenous offenders are, in general, significantly overrepresented in federal custody: from 2007/08 to 2016/17, 23% of federal admissions were Indigenous offenders and 9% were Black offenders. In the total Canadian population, 4.3% identified as Indigenous and 2.9% identified as Black.

[1] *Criminal Code*, R.S.C. 1985, c. C-46, s. 742.1

[2] Department of Justice Canada, "The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities" (2017) at pp. 1-2.

CSOs were introduced along with other sentencing reforms in 1996 to reduce incarceration rates, particularly among Indigenous offenders.[3] As the Court of Appeal for Ontario recently observed:

> The overincarceration of Aboriginal people is one of the manifestations of that substantive inequality, which prompted Parliament to create the community-based conditional sentence and direct sentencing judges to consider that sanction, along with all others that do not involve imprisonment, when determining an appropriate punishment for Aboriginal offenders. The conditional sentence is one means of redressing the substantive inequality of Aboriginal people in sentencing.[4]

Between 2005/06 and 2015/16, Indigenous offenders were more likely to receive a CSO than their White counterparts, suggesting that Indigenous offenders are more likely to be affected by the absence of CSOs as a sentencing option.[5]

The Department of Justice's statistical survey revealed that Indigenous offenders are disproportionately affected by mandatory minimum sentences for firearm-related offences.[6] Bill C-5 would repeal some, but not all, mandatory minimum sentences for firearm-related offences.[7]

For these reasons, FACL BC supports the passage of Bill C-5 but also suggests that the government consider repealing other mandatory minimum sentences that would also disproportionately affect racialized offenders. As explained below, repealing mandatory minimum sentences would not prevent serious offences from attracting serious sentences. But it would protect those for whom the mandatory minimum would be a disproportionate sanction, especially racialized offenders who are most likely to be subject to those sanctions.

2. Restricting judicial discretion

Ordinarily, sentencing is a highly individualized process that correspondingly imports a high degree of judicial discretion. The fundamental principle of sentencing is proportionality — a sentence must be proportionate to the gravity of the offence and the moral blameworthiness of the offender.[8]

This is significant because many offences capture a broad swath of conduct. For example, fraud over $5,000 (ineligible for a CSO by operation of s. 742.1(c), which Bill C-5 would repeal) encompasses a "broad range of dishonest commercial dealing",[9] from a $5,001 false cheque to a multi-million dollar Ponzi scheme. Trafficking in a controlled substance (for which there is a one-year mandatory minimum sentence that Bill C-5 would

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[3] *R. v. Proulx*, 2000 SCC 5 at para. 92; *Criminal* Code, s. 718.2(e).

[4] *R. v. Sharma*, 2020 ONCA 478 at para. 70.

[5] Charbel Saghbini, Angela Bressan, and Lyslane Paquin-Marseille, "Indigenous People in Criminal Court in Canada" (Department of Justice Canada, 2021) at p. 24.

[6] Department of Justice Canada, "The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities" (2017) at p. 3.

[7] For example, s. 244(2)(a) creates a five-year mandatory minimum sentence for discharging a firearm with intent, s. 279(1.1)(a) creates a five-year mandatory minimum sentence for kidnapping with a firearm, and s. 344(1)(a.1) creates a four-year mandatory minimum sentence for robbery with a firearm. Bill C-5 would not repeal any of these mandatory minimum sentences.

[8] *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 40.

[9] *R. v. Théroux*, [1993] 2 S.C.R. 5 at p. 25.

repeal[10]) is also very broad: "It targets not only people selling drugs, but all who 'administer, give, transfer, transport, send or deliver the substance' (s. 2(1)), irrespective of the reason for doing so and regardless of the intent to make a profit. As such, it would catch someone who gives a small amount of a drug to a friend, or someone who is only trafficking to support his own habit."[11]

When an offence is broadly defined, almost any mandatory minimum sentence will be disproportionate for some offenders, regardless of the seriousness of the offence in the abstract. For example, in one case, the Court of Appeal for British Columbia found a 90-day mandatory minimum sentence for possession of child pornography to be grossly disproportionate, noting that the offence "is extremely broad", as it "captures not only actual photos and videos, but also drawings and cartoons".[12]

It is important to bear in mind that preservation of judicial discretion does not mean that serious offences will not be punished by incarceration, including long periods of incarceration. Judges who are faced with grave offences will sentence offenders to serious time in prison. If they do not, they can be overturned on appeal.[13]

3. Restricting the discretion of counsel

In addition to restricting judicial discretion, mandatory minimum sentences and restrictions on CSOs prevent Crown and defence counsel from doing justice in individual cases by agreeing to proportionate sentences. Counsel are often forced to recast the offender's conduct in terms of other offences without mandatory minimum sentences or for which a CSO is available. When possible, counsel regularly consent to re-laying charges in a different form or facilitate guilty pleas to lesser offences in order to make CSOs available or to avoid mandatory minimum sentences.

For example, the Crown may re-lay indictable charges and instead proceed summarily to allow defence counsel to seek a CSO in contested sentencing proceedings or to agree on a joint submission of a CSO. As the Court of Appeal for Ontario observed in one case, "the appellant benefitted by the re-election procedure because his trial counsel could seek a conditional sentence of imprisonment that was legally unavailable to him if the Crown proceeded by indictment."[14] In a case in British Columbia, the parties jointly proposed a CSO after the Crown re-laid several indictable counts of sexual assault as summary charges.[15]

Counsel may also facilitate a just result by agreeing to a plea to an offence or offences that do not accurately describe the offending conduct. For example, an offender who is factually guilty of kidnapping (ineligible for a CSO by operation of s. 742.1(f)(iv), which Bill C-5 would repeal) may instead plead guilty to forcible confinement and ultimately receive a CSO.[16]

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[10] This mandatory minimum sentence was found to be unconstitutional in *R. v. Lloyd*, 2016 SCC 13, but remains in the text of the *Controlled Drugs and Substances Act*.

[11] *R. v. Lloyd*, 2016 SCC 13 at para. 30.

[12] *R. v. Swaby*, 2018 BCCA 416 at para. 97.

[13] *R. v. Friesen*, 2020 SCC 9 at paras. 26-27.

[14] *R. v. D.M.E.*, 2014 ONCA 496 at para. 27.

[15] *R. v. Witvoet*, 2020 BCPC 128 at para. 3.

[16] *R. v. Zhang*, 2018 BCPC 306; *R. v. Bone*, 2015 BCSC 1484.

Proceeding in this manner has serious flaws. It leaves a matter of considerable importance — defence counsel's ability to seek a particular sentence — in the nearly unreviewable discretion of Crown counsel,[17] who may choose not to consent to re-laying charges or not to accept a plea for almost any reason. When counsel do consent to proceeding in a way that preserves the availability of a CSO or a sentence below the mandatory minimum, the public record of the offender's conviction, including on their criminal record, will not accurately reflect the extent of the offending conduct.

Conclusion

For the above reasons, FACL BC supports the passage of Bill C-5. Bill C-5 would re-introduce much-needed discretion in sentencing, which would allow judges and counsel to reduce incarceration rates through the principled application of that discretion. This is of vital importance to racialized communities that are disproportionately affected by carceral sentences, particularly Black and Indigenous communities with whom FACL BC stands in solidarity.

FACL BC suggests that the government consider repealing other mandatory minimum sentences, particularly those relating to firearm offences, as Indigenous offenders are disproportionately subject to those sentences.[18]

We hope you find this brief useful.

[17] *R. v. Anderson*, 2014 SCC 41.

[18] Department of Justice Canada, "The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities" (2017) at p. 3.