Honourable Senators, the purpose of Bill S-208 is to accord judges the discretion to not impose minimum penalties where they consider it just and reasonable.

Bill S-208 echoes other proposed legislation aimed at ensuring that minimum penalties do not impede judges in their duty to deliver fair and fit sentences. Notable examples include bills introduced by former Minister of Justice Irwin Cotler in 2015,[1] then–Green Party leader Elizabeth May in 2016,[2] and former NDP MP Sheri Benson in 2018.[3]

Debate on a previous version of this bill[4] last Parliament emphasized the need for legislative action to correct ongoing injustice. This urgent need was also underscored by related discussions during the Legal Committee's study of court delays and of Bill C-75.

We owe the Canadian public the timely referral of this bill to committee for consideration. Each passing day of inaction leaves a system in place that we know:

- interferes with the right of an accused to a proportionate sentence
- causes some prisoners to be subjected to cruel and unusual punishment;
- perpetuates delays and costs within the court and legal systems;
- discriminates against those most marginalized and racialized, particularly Indigenous Peoples, women, and those with disabling mental health issues;
- contributes to miscarriages of justice;
  and
- undermines public safety.

What is a mandatory minimum penalty? Mandatory minimum penalties limit the types of sentences judges can consider.

At first blush, some might think the idea of using a "one-size-fits-all" approach to sentencing sounds fair and equal. In reality, however, mandatory minimum penalties eradicate the ability of judges to craft fair sentences based on individual circumstances. Bill S-208 provides a safety valve to enable judges to exercise their expertise to not apply mandatory minimum penalties when to do so would be unjust or inappropriate.

To be clear, judicial discretion with regard to mandatory minimum penalties does not give judges free reign to act arbitrarily.

Judges are obligated to provide reasons for their sentencing decisions, in accordance with section 726.2 of the *Criminal Code*: "When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings."

Their decisions must be rooted in legal principles, and they are subject to scrutiny from the general public, the legal community, and other judges -- through appeal processes. Such

[1] https://www.parl.ca/LegisInfo/BillDetails.aspx?Bill=C669&Mode=1&Parl=41&Ses=2&Language=E
[2] https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8175262
[3] https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9895902
[4] https://www.parl.ca/Content/Bills/421/Private/S-251/S-251_1/S-251_1.PDF

transparency is in sharp contrast to what occurs in cases where mandatory minimum penalties exist. Mandatory minimums often shift discretion from judges to others with virtually no accountability either to the public or to the appeal process.

For example, by determining what charges to lay and whether to pursue a charge with a mandatory minimum penalty, Crown prosecutors in effect make key sentencing decisions. Their reasons may have little to do with legal principles. For instance, such practices are too often used as bargaining chips when authorities are seeking to extract guilty pleas to lesser charges.

Additionally, although Bill S-208 would not prevent judges from imposing mandatory minimum sentences, consistent with s. 718.2(e) of the Criminal Code – often referred to as Gladue factors, it would merely require judges to reflect on and provide reasons justifying the fairness of imposing a mandatory minimum.

Mandatory minimum penalties prevent justice from being done.

The 1987 Canada Sentencing Commission found that 9 in 10 judges concluded that mandatory minimum penalties had interfered with their ability to render a just sentence.[5] In the decades since then, the number of mandatory minimum penalties in Canada has grown exponentially. At the time of the Sentencing Commission, there were about 10 types of convictions which would yield a mandatory minimum.[6] The Department of Justice now list 72![7]

Colleagues, here are 10 reasons we need this bill.

Proportionality, Gross Disproportionality and Constitutional Challenges

1. The proliferation of mandatory minimums is an aberration, at odds with historical, non-partisan consensus against them.

First, the proliferation of mandatory minimum penalties is fundamentally at odds with the long-recognized principle that individuals have a right—and judges have a duty -- to craft sentences that are proportionate in the circumstances of each case. Section 718.1 of the *Criminal Code* requires that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility" of the person being sentenced. In ruling a mandatory minimum penalty unconstitutional in 2015, the Supreme Court reminded us that sentencing must be a "highly individualized exercise."[8] Mandatory minimum penalties are by definition the opposite: a universal standard set in advance with zero flexibility.

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[5] http://johnhoward.ca/wp-content/uploads/2016/12/1987-KE-9355-A73-C33-1987-J.R.-Omer-Archambault.pdf at 178, 180.

[6] Nicole Crutcher, "The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada," 39 Osgoode Hall LJ (2001) at 273.

[7] Department of Justice, Research at a Glance: Mandatory Minimums (March 2018) at 1 (currently 72 MMPs in total).

[8] *R v Nur*, 2015 SCC 15 at paras 42, 43.

There has long been a non-partisan consensus regarding the need to repudiate mandatory minimum penalties. To give just one example, in 1976, as they debated replacing the death penalty with mandatory life sentences, Parliamentarians on both sides of the aisle questioned what Conservative MP David MacDonald called the "trade-off" of "one barbarous, cruel and unacceptable punishment for one that is not equally as bad but is certainly moving in that direction."[9]

When Senator Wetston spoke to the previous version of this bill, he quoted Professor Kent Roach, who described mandatory minimums as flawed because they are "... blind to whether [individuals] ... live in abject poverty, have intellectual disabilities or mental-health issues, have experienced racism and abuse in the past, or have children who rely on them. The mandatory-minimum sentence does not allow a judge to decide if incarceration is necessary to deter, rehabilitate or punish."[10]

Anatole France once wrote that "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." His words remind us that if sentences are to do justice, rather than perpetuate injustice, we need to consider the circumstances and behaviour of individuals in the context of the choices available to them.

Intuitively, this is something that all of us know. Research has demonstrated that members of the public who, initially, appear to support mandatory minimum penalties, will characterize even mandatory life sentences as unjust and unfit once they are provided with factual details about individual cases.[11]

2. Courts are increasingly ruling mandatory minimum penalties unconstitutional and disproportionate.

The second reason we need this legislation is that courts are increasingly ruling mandatory minimum penalties unconstitutional. As Senator Plett noted when he spoke to the previous version of this bill, in some cases—such as the recent *Nur* and *Lloyd* decisions of the Supreme Court—mandatory minimum penalties have been found so grossly disproportionate that they violate constitutional guarantees against cruel and unusual punishment. I agree with his assessment that "this is not acceptable and should be addressed, as recommended by the Supreme Court of Canada."[12]

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[9] House of Commons Debates, May 5, 1976, 30th Parliament, 1st Session, Vol. 13, 13210. Liberal Senator George McIlraith, a former Solicitor General, was critical of the mandatory 25-year parole ineligibility period for first-degree murder, and remarked: "I hope in the course of a few years, after some have been sentenced under this provision, that the government will look to amending this clause and coming forward with a better provision."Senate Debates, July 15 1976, 30th Parliament, 1st Session, Vol. 3, 2435.

[10] https://sencanada.ca/en/content/sen/chamber/421/debates/231db_2018-09-27-e?language=e

[11] Barry Mitchell & Julian Roberts, "Sentencing for Murder: Exploring Public Knowledge and Public Opinion in England and Wales" (2012) 52 British Journal of Criminology 141 at 151-52.

[12] "However, colleagues, the Supreme Court has ruled on more than one occasion that in some cases, mandatory minimums have the potential to be "grossly disproportionate" and violate a person's constitutional rights. This is not acceptable and should be addressed, as recommended by the Supreme Court of Canada": https://sencanada.ca/en/content/sen/chamber/421/debates/252db_2018-11-27-e?language=e

It is for Parliament to act, not to wait for the courts to strike down these sentences one by one. That would be an abdication of our responsibility.

The Supreme Court, in *Lloyd* observed that "the reality 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 almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence."[13]

Canadian courts have found a significant number of minimum penalties invalid on such grounds. Nearly half -- some 31 of the 72 minimum penalties currently in force -- have been found unconstitutional by at least one court. Of these, about 25 mandatory minimums have been struck down as invalid in various provinces. In 11 cases, a court that struck down the mandatory minimum was a court of appeal or the Supreme Court of Canada.[14] The consequence of these frequent constitutional challenges is the confusing and inconsistent patchwork referred to by Senator Wetston in his speech last Parliament.

This hodge-podge exists, because, in the absence of legislation such as Bill S-208, mandatory minimum penalties have to be challenged one by one before the courts, tying up significant court and government resources and requiring individual Canadians to shoulder the heavy burden of mounting constitutional challenges. In too many cases, those facing a potentially unconstitutional minimum simply do not have the means to defend their rights.

At the same time, for those with sufficient means, mandatory minimum penalties incentivize drawn out litigation, including constitutional challenges. Individuals have nothing to lose and everything to gain by going to trial and trying every avenue to avoid a harsh sentence, rather than seeking early resolution. The report of the Standing Senate Committee on Legal and Constitutional Affairs on court delays identifies the strain that mandatory minimums place on scarce judicial resources and the pressing issue of trial delay. During the study, at least eleven different criminal justice experts singled out minimum penalties as a factor contributing to overall delays and inefficiencies in the court system.[15]

3. Canada's rigid and harsh mandatory minimum penalties have made us an outlier among Western democracies

The third reason we need this legislation is that Canada's rigid and harsh approach to mandatory minimums has made us an outlier internationally. The current situation in Canada can be contrasted with the experiences of other democracies whose laws include mandatory minimum penalties. Most, including England and Wales, New Zealand, South Africa, Australian jurisdictions and even a number of US states have taken steps to ensure the integrity and

[13] *R v Lloyd*, 2016 SCC 13 at 3.

[14] Numbers generated through manual counts of case data provided by https://mms.watch/; current to January 19, 2020.

[15] Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* n 125

constitutionality of their laws and the rights of their citizens by allowing some form of judicial discretion.[16] In most cases, this judicial discretion extends to even the most serious life sentences.[17]

In its 2016 decision in *Lloyd*, the Supreme Court drew attention to Canada's precarious position with respect to mandatory minimums and called on Parliament to "build a safety valve that would allow judges to exempt [from the application of minimum penalties] outliers for whom the mandatory minimum will constitute cruel and unusual punishment."[18] Bill S-208 will implement this recommendation by offering such an outlet: it allows judges the discretion to not impose a mandatory minimum.

Discrimination

4. Judicial discretion regarding mandatory minimum penalties was one of the government's campaign promises made to Canadians, particularly to further reconciliation with Indigenous Peoples.

Reason number four why we need this legislation is that it represents one of the commitments the government made to reconciliation with Indigenous Peoples. Bill S-208 is responsive to the Calls to Action[19] of the Truth and Reconciliation Commission (TRC) and the Calls for Justice[20] of the National Inquiry into Missing and Murdered Indigenous Women and Girls.

The work of these commissions established clear links between the trauma and marginalization that are the legacy of residential schools and other colonial policies, and the current over-representation of Indigenous Peoples as victims, accused and prisoners. As Niigaan Sinclair pointed out yesterday—the same day a court denounced the arrest of an Inuk woman who was seeking protection from an abuser[21]—Indigenous Peoples too often get jails instead of justice; instead of addressing trauma; instead of reducing the number of Indigenous children in care of

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[16] *Firearms Act 1968* (U.K.), 1968, c. 27, s. 51A(2); *Violent Crime Reduction Act 2006* (U.K.), 2006, c. 38, s. 29(4); *Powers of Criminal Courts (Sentencing) Act 2000* (U.K.), 2000, c. 6, ss. 110(2) and 111(2); *Sentencing Act* (N.T.), s. 78DI; *Sentencing Act 1991* (Vic.), s. 10(1); *Sentencing Act 2002* (N.Z.), ss. 86E, 102 and 103; *Criminal Law (Sentencing) Act 1988* (S.A.), s. 17; 18 U.S.C. § 3553(f) (2012).

[17] European Commission, Study on Minimum Sanctions in the EU Member States (Brussels, 2015), at 42 (11 countries out of 28 EU member states have a life sentence), online: https://publications.europa.eu/en/publication-detail/-/publication/1226bed2-be78-11e5-9e54-01aa75ed71a1/language-en; Inês Horta Pinto, *Punishment in Portuguese Criminal Law: A Penal System without Life Imprisonment*, in Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment and Human Rights* (Oxford: Hart, 2016); *S v Dodo*, 2001 ZACC 16 at para 40; *Criminal Law Amendment Act*, 105 of 1997, s 51(3)(a).

[18] *R v Lloyd*, 2016 SCC 13 at 36.

[19] "32. We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences."

[20] "5.14: We call upon federal, provincial and territorial governments to thoroughly evaluate the impact of mandatory minimum sentences as it relates to the sentencing and over-incarceration of Indigenous women, girls, and 2SLGBTQQIA people and to take appropriate action to address their over-incarceration."

[21] R. v. A.(M.), 2020 NUCJ 04

the State; instead of dealing with poverty and the lack of food, shelter and other basic necessities.[22]

In 2015, the government's election platform included a promise to implement the Calls to Action of the TRC. In 2019, the Minister of Justice's mandate letter reiterated the need for progress toward this goal and toward implementation of the Calls for Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls. Both demand that minimum sentences be remedied.

Instead of redress and reconciliation, , however, the situation has worsened. New statistics released by the Office of the Correctional Investigator (OCI) indicate that 30 per cent of all federally sentenced prisoners and 42 per cent of federally sentenced women are Indigenous. This rate has increased by 43% since 2010. During the same period, rates of non-Indigenous incarceration decreased by 14%.[23] The OCI pointed to the ongoing failure of the criminal legal system to respond to "needs, histories and social realities" of Indigenous Peoples as the root of these high rates of criminalization. Mandatory minimum penalties make it impossible for the court to follow section 718.2(e) of the *Criminal Code* to ensure "Gladue" factors are taken into account.

5. They discriminate against those who are marginalized and result in a less fair and just society for all.

This brings us to the fifth reason why we need this legislation: mandatory minimum penalties discriminate against those who are marginalized and result in a less fair **and** just society for all. In 1995, concerns about discrimination against Indigenous Peoples led Parliament to enact section 718.2(e) of the *Criminal Code*.[24]

This provision requires judges to consider "all available sanctions, other than imprisonment" at sentencing, and to direct particular attention to the circumstances of Indigenous Peoples, which "… may specifically make imprisonment a less appropriate or less useful sanction."[25] Mandatory minimum penalties make it impossible to ensure this provision has its intended effect.

6. They undermine legal certainty and the rule of law by encouraging wrongful guilty pleas.

The sixth reason is closely related: Mandatory minimum penalties undermine the rule of law by encouraging wrongful guilty pleas. The harshest minimum penalty in the Criminal Code is life in prison. In the past decade, 45 per cent of women sentenced to life in prison were Indigenous.[26] That is a staggering number. The conviction review by the Department of Justice, overseen by Justice Lynn Ratushny, revealed an apparent and appalling connection between mandatory life

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[22] https://www.winnipegfreepress.com/local/indigenous-people-get-jails-instead-of-help-they-need-567608022.html

[23] https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx

[24] Bill C-41 (assented to July 13, 1995): https://www.parl.ca/Content/Bills/351/Government/c-41/c-41_4/c-41_4.pdf

[25] R v Gladue at para 68.

[26] Public Safety Canada, *2016 Annual Report: Corrections and Conditional Release Act Statistical Overview* at 58.

sentences and criminalization of survivors of abuse. After reviewing the cases of 98 women convicted of using lethal force to protect themselves or their children from abusers, Justice Ratushny determined that far too many women had pleaded guilty to lesser charges—such as manslaughter—despite having a potentially valid claim of self-defence.[27]

Faced with circumstances ranging from limited financial resources, to navigating a legal system that had failed to protect them from violence, to fears of having to put their children through the harrowing process of testifying in criminal court, the "choice" of abused women not to risk going to trial was propelled by the spectre of a mandatory life sentence.

While mandatory minimums are often advertised as being "tough on crime", in reality, they are too often toughest on those who are already most marginalized and victimized.

Ineffectiveness and Public Safety Objectives

The *Persad* decision rendered last month in Ontario reminds us that one function of sentencing is to communicate "values which ought to be important to the community."[28] The court reduced the length of the sentence due to abhorrent conditions in pre-trial custody: including, frequent lockdowns; cell-confinement for up to seven days at a time without access to fresh air, showers or telephone calls; clothing, bedding and towels that were stained with urine, faeces or blood; and prisoners having to sometimes go for months without a change of clothes.

Citing Professor Allan Manson, the court reflected that the consideration of an individual's circumstances for the purposes of sentencing also required consideration of "society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society."[29]

Where a minimum penalty applies, judges are constrained in how much they can reduce a sentence to take into account inhumane conditions in pretrial detention, as well as police misconduct. Bill S-208 would ensure that judges could craft a just and appropriate sentence which, according to Justice Lebel in the *Nasogaluak* decision "includes society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society."[30]

Time and again, mandatory minimums have led to the increased criminalization and imprisonment of individuals who are impoverished, women who have experienced lifetimes of violence, those who live with disabling mental health issues, and those who are racialized—especially Indigenous Peoples.

When we think of the purpose of a sentence—from people taking responsibility and being held accountable for their actions to working through the factors that led to their criminalization, to

[27] Justice Lynn Ratushny, *Self defence review: final report* at 23-24.
[28] https://www.canlii.org/en/on/onsc/doc/2020/2020onsc188/2020onsc188.html
[29] https://www.canlii.org/en/on/onsc/doc/2020/2020onsc188/2020onsc188.html
[30] R v Nasogaluak, [2010] 1 SCR 206 at para 49 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7845/index.do.

integrating into and contributing to the community—inhumane prison conditions and repeated human rights violations are not supposed to be part of the penalty.

In his speech on the previous version of this bill, Senator Dean noted that "we know that criminalization causes significant social harms to individuals and their families, and as the Law Reform Commission of Canada has pointed out, longer sentences with harsher penalties are not an effective means of preventing crimes."[31]

7. Mandatory minimum penalties do not deter crime

This is reason number seven why this legislation is urgently needed: in addition to all the harm they cause, minimum penalties do not deter crime. In the *Nur* decision, the Supreme Court of Canada summarized a significant body of literature on mandatory minimum penalties and crime prevention in just 13 words:

"Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes."[32] At least 50 years of research and evidence[33] indicate that in fact we should focus instead other factors such as appropriate, non-criminal-justice interventions and the certainty of being held accountable.[34]

8. They do not serve the interests of victims

Reason number eight? Mandatory minimum penalties also fail to serve the interests of victims. A representative of the victims' advocate group, Mothers Against Drunk Drivers Canada testified to the Senate Legal Committee that: "As a mom, as a stepmom, as a victim, I can't support [mandatory minimum sentencing]. There's no evidence to support that this will actually make a difference. We know once we bury our children or bury a loved one, it is too late. We need to focus on deterring it before it actually happens."[35]

In my years of working with those convicted in relation to homicides, I can tell you that it is the rare person who would not give up her life if it would bring back the person who died. No sentence can do this, so we try to do our best to otherwise remedy such wrongs by providing other ways for people to pay their debts and provide future positive contributions to society.

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[31] https://sencanada.ca/en/content/sen/chamber/421/debates/235db_2018-10-16-e?language=e

[32] *R v Nur*, 2015 SCC 15 at para 114 (McLachlin CJ): https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15272/index.do

[33] See Anthony Doob and Cheryl Webster, "Sentencing Severity and Crime: Accepting the Null Hypothesis" (2003) 30 Crime and Justice 143; Webster, Cheryl Marie and Anthony N. Doob (2012) Searching for Sasquatch: Deterrence of Crime Through Sentence Severity. *Oxford Handbook on Sentencing and Corrections*. Edited by Joan Petersilia and Kevin Reitz. New York: Oxford University Press (pages 173-195); Anthony N. Doob, Cheryl Marie Webster, Rosemary Gartner (2014), Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation (Research Summaries Compiled from Criminological Highlights), online: http://criminology.utoronto.ca/wp-content/uploads/2013/09/DWG-GeneralDeterrenceHighlights14Feb2013.pdf.

[34] Steven N Durlauf & Daniel S Nagin, "Imprisonment and crime: Can both be reduced?" (2011) *Criminology and Public Policy*, https://doi.org/10.1111/j.1745-9133.2010.00680.x.

[35] Standing Committee on Justice and Human Rights, 42nd Parl, 1st Sess, No 65 (September 25, 2017) at 9, http://www.ourcommons.ca/Content/Committee/421/JUST/Evidence/EV9108281/JUSTEV65-E.PDF.

9. They carry enormous and needless financial costs.

Longer prison sentences too often represent the least effective and most costly way of achieving these goals. Reason nine why we need this legislation now is the enormous and needless financial cost of minimum penalties.

For those convicted and sentenced to a mandatory minimum penalty, the cost to taxpayers of administering a harsher than necessary sentence is significant. For a woman in federal prison, for example, each additional year of her prison sentence was estimated by the Parliamentary Budget Officer to needlessly cost taxpayers between $343,000 and $600,000.[36] By contrast, the cost of supporting a woman for a year while she serves a sentence in the community is $18,000,[37] which also increases her chances of reintegrating successfully into that community and thereby decreases her likelihood of being criminalized again in the future.[38]

Twenty-five percent of those in federal prisons are seniors[39]-- oftentimes as a result of life sentences. Many live with disability and illness, including dementia. Caring for individuals in provincial health care systems is not cheap, but it is significantly less costly than keeping them in prison. We must ask ourselves if paying hundreds of thousands of dollars per person per year for the label of being "tough on crime" is worth it, when we know that mandatory minimums do not achieve the safer society that they promise.

10. The majority of Canadians support judicial discretion

This brings us to the tenth and final reason why, in my humble opinion, we so urgently need legislation to address mandatory minimum penalties: the majority of Canadians know it is the just thing to do.

Last Parliament, the Minister of Justice and his predecessor were mandated to "review of the changes in our criminal justice system and sentencing reforms" with the outcomes of the process to "include increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians."[40]

The work of the Department of Justice included public consultations in which 9 in 10 Canadians supported judges having the discretion to not impose mandatory minimums.[41] Unfortunately, no legislation resulted from this process. Minister Lametti, to his credit, has recently reiterated that

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[36] Parliamentary Budget Office, *The Funding Requirement and Impact of the "Truth in Sentencing Act" on the Correctional System in Canada*, (Ottawa, 2010), at 94; Parliamentary Budget Office, *Update on Costs of Incarceration*, (Ottawa, 2018).

[37] Parliamentary Budget Office, *Update on Costs of Incarceration*, (Ottawa, 2018) at 4.

[38] 2017 Fall Reports of the Auditor General of Canada to the Parliament of Canada Report 5—Preparing Women Offenders for Release—Correctional Service Canada, 5.111, 5.112 http://www.oag-bvg.gc.ca/internet/English/parl_oag_201711_05_e_42670.html

[39] https://oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20190228-eng.aspx

[40] https://ajc-ajj.net/files/library/44_-_Press_Monitoring_November_10th_to_16th_20152.pdf

[41] National Justice Survey 2017: Issues in Canada's Criminal Justice System Executive Summary Prepared for: The Department of Justice http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/justice_canada/2018/012-17-e/summary.pdf p.8

there is a "great deal of scholarly literature on the benefits of judicial discretion"[42] and that "sentencing reform is a critical part" [43] of his responsibility as Minister.

Since the precursor to Bill S-208 was first introduced in 2018, the overrepresentation of Indigenous Peoples in prisons has continued to increase steadily by several percentage points, representing too many people, per year.

At least fifty new cases have been released by courts finding various minimum penalties unconstitutional. Witnesses testifying to the Senate Legal Committee on Bill C-75, including Aboriginal Legal Services,[44] the Canadian Bar Association,[45] the *Barreau du Québec*[46] and the

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[42] https://www.infomedia.gc.ca/parl/en/2019/12/13/224716352

[43] https://www.nationalmagazine.ca/en-ca/articles/people/q-a/2020/interview-with-david-lametti

[44] https://sencanada.ca/en/Content/SEN/Committee/421/lcjc/61ev-54773-e: "Given how comprehensive the bill purports to be and how many issues big and small it addresses, it is baffling to us how it avoids the issue that is the elephant in the room, the proliferation of mandatory minimum sentences and the unjustified restrictions on access to conditional sentences. This has been the largest single change to the Canadian criminal justice system in the 21st century. It is something that this government explicitly committed to changing. Yet, it is not addressed at all in this bill.

One of the purposes of the bill is to increase efficiency and unclog the courts. Yet, there are many Charter challenges currently under way and many being contemplated to the many mandatory minimums that litter the Criminal Code. Having been involved in some of these Charter challenges, I can tell you that they take up a lot of court time.

Legal scholars often talk about the concept of dialogue, the way judges and legislators speak to each other. In 2016, in Lloyd, the Supreme Court of Canada implored the government to come up with a process that would relieve courts of having to adjudicate the constitutionality of each and every mandatory minimum. The legislature has not entered into the dialogue about this pressing issue. Instead, it is engaged in wilful deafness."

[45] https://sencanada.ca/en/Content/SEN/Committee/421/lcjc/60ev-54744-e: Canadian Bar Association: "Senator McIntyre: Other than the bill, what other initiatives could the federal government implement to respond to the Supreme Court of Canada decisions in R. v. Jordan and R. v. Cody? Do you believe that a national law reform commission would be an ideal way to get things going?

Mr. Paisana: There are three things. One is the one you just mentioned. That is a great suggestion, and one the CBA has been in favour of for a long time.

The second point is the repeal of mandatory minimums. They have been contributing to delays at an increasing rate for a number of years at this stage."

[46] https://sencanada.ca/en/Content/SEN/Committee/421/lcjc/61ev-54773-e: "However, we are disappointed to see that the bill includes no measures on mandatory minimum sentences of imprisonment. The Barreau du Québec reiterates its opposition to minimum penalties, especially prison sentences, except in the most serious cases. Minimum sentences remove the flexibility for front-line legal officers, such as Crown prosecutors, defence counsel and trial judges, to properly apply the principle of proportionality of sentencing.

Imposing minimum sentences may provide a sense of security for the public in the short term, but, in the long term, these measures are counterproductive to the justice system. Crown prosecutors lose an incentive to have an

Canadian Association of Chiefs of Police[47] have taken pains to reiterate the need for urgent action to fix the harmful consequences of mandatory minimum penalties.

Conclusion

Bill S-208 responds to the recommendations, concerns and priorities set out by such authorities as the Supreme Court of Canada, the Senate Legal Committee, and many other committees,

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accused plead guilty when the circumstances of the offence justify a sentence that would be below the mandatory minimum. Conversely, when the prosecution asks for a sentence in a case where slightly more than the minimum sentence would be justified, the courts tend to stick with it.

The bill would have been a good opportunity to get rid of this type of sentence, which does nothing for the efficient and flexible administration of the criminal justice system. Unfortunately, we see that we will have to wait until next time.

The Barreau du Québec believes that it is urgent for the government to amend the Criminal Code to give courts the residual discretion not to impose a mandatory minimum sentence.

Individuals are entitled to this constitutional protection. In addition, each accused would no longer have to bear the heavy burden of a constitutional challenge to the Supreme Court. Mandatory minimum sentences can be profoundly unfair in some cases, as the only possible penalty is imprisonment, while other solutions may sometimes facilitate rehabilitation and thus reduce the risk of recidivism. Judges must be trusted to apply the law fairly and equitably, so that the sentences imposed are proportionate to the seriousness of the offence and the degree of responsibility of the offender."

[47] https://sencanada.ca/en/Content/SEN/Committee/421/lcjc/60ev-54744-e: Canadian Association of Chiefs of Police: "The second area of concern is around mandatory minimum sentences. I believe Bill C-75, as an omnibus bill, missed a significant opportunity to fix a common sense mistake that exists in sentencing. Police officers are, appropriately, subject to the most rigorous oversight regime of any profession in Canada. While incidents involving the use of force are extremely rare — less than 1 per cent of interactions, according to Canadian statistics — there are occasionally cases where police personnel have been held accountable for what courts have deemed unlawful uses of force.

Sections 220 and 236 of the Criminal Code of Canada provide for mandatory minimum sentences of four years when an individual is convicted of manslaughter or criminal negligence causing death where a firearm has been used in the commission of the offence. While the original goal of these minimum sentences was to act as a deterrent with respect to the proliferation of firearms, unfortunately these minimum sentences failed to take into account the unique nature of the duties of police personnel who are required to carry a firearm as part of their regular uniform and can deploy that firearm as part of the recognized use-of-force continuum.

I would like to take this opportunity today to ask you to consider further amendments to Bill C-75, particularly to the framework with respect to sections 220 and 236 of the Criminal Code of Canada. It should be recognized that police personnel are authorized, and at times required, to use their firearms in the course of their duties and officers should be exempt from the mandatory minimum sentences prescribed in the current Criminal Code of Canada. The judiciary should be given the discretion to recognize that even in circumstances where police officers are being held accountable, the officers themselves may have been acting in good faith as they discharge their duties."

commissions and inquiries, including the Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls.

Colleagues, this bill is not a replacement for systemic review and reform of sentencing. We still need a sentencing and/or law reform commission to review the overall system. Three out of four Canadians said this to the Department of Justice during 2018 consultations.[48] Urgent action is needed prevent injustices associated with mandatory minimum penalties. This legislation is admittedly a small but important step. I look forward to us working together to send this bill to committee and to deliver long-overdue legislative action on mandatory minimum penalties.

Miigwetch, merci, thank you

[48] Department of Justice, *Research at a Glance: Sentencing Commissions and Guidelines* https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/mar05.html