Submission 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

April 4, 2022

Prepared by the Black Legal Action Centre (BLAC), the Canadian Association of Elizabeth Fry Societies (CAEFS), and the Women's Legal Education and Action Fund (LEAF)[1]

[1] Kat Owens is a Project Director at LEAF, and the author of this submission. Contributors to this submission include (in alphabetical order): Emilie Coyle, Maria Dugas, Pam Hrick, Lisa Kerr, Nyki Kish, Jackie Omstead, Moya Teklu, and Reakash Walters. Kendra Barlow and Candice Szanizlo provided research support. BLAC, CAEFS, and

Table of Contents

LEAF would also like to acknowledge the work of counsel and case committee members in LEAF's interventions in *R v Sharma*, which helps inform much of this submission.

I. Introduction

The Canadian criminal justice system discriminates against members of marginalized communities, and in particular against Black and Indigenous women and gender-diverse people. Indigenous women face staggeringly high rates of incarceration, while the Canadian justice system simultaneously fails to protect them in the way it does non-Indigenous women. Black women, and in particular low-income Black women, face high levels of incarceration, and lengthy prison sentences for non-violent drug offences. For Black and Indigenous trans women and gender-diverse individuals, these harms are compounded by correctional operational practices grounded in transphobic views of sex and gender.[2]

This government rightly recognizes that this mass incarceration is shameful and unacceptable. The Black Legal Action Centre (BLAC), the Canadian Association of Elizabeth Fry Societies (CAEFS), and the Women's Legal Education and Action Fund (LEAF) are heartened to see that this government has acknowledged that mandatory minimums and restrictions on the availability of conditional sentences contribute to the overrepresentation of Black and Indigenous people in custody, and is taking action on the issue.

BLAC, CAEFS, and LEAF see Bill C-5 as an important first step to combating systemic discrimination in Canada's criminal justice system. However, several amendments are needed to fully realize the government's stated commitments to racial justice and reconciliation. The changes BLAC, CAEFS, and LEAF propose align with this government's goals for Bill C-5, its commitment to reconciliation and implementing the Truth and Reconciliation Commission of Canada's Calls to Action, and its long-standing efforts to champion gender equality.

BLAC, CAEFS, and LEAF urge Parliament to amend Bill C-5 so that it would:

1. Remove all mandatory minimums, or at least all those that have been found to be unconstitutional
2. Remove the ban on conditional sentences for offences with a mandatory minimum penalty
3. Fulfill the Truth and Reconciliation Commission of Canada's Call to Action 32, and allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences
4. Amend s. 718.2(e) of the *Criminal Code*[3] so that sentencing judges will have the information required to pass appropriate sentences on Black defendants
5. Fully decriminalize simple drug possession, and provide for the automatic expungement of criminal records for simple drug possession

BLAC, CAEFS, and LEAF support the call to send Bill C-5 to committee prior to the vote on second reading, to enable the Standing Committee on Justice and Human Rights to add these provisions to the Bill.

---

[2] For more information on the treatment of trans, Two Spirit, and gender-diverse individuals under the responsibility or jurisdiction of Correctional Services Canada, see this letter by the Morgane Oger Foundation and LEAF concerning the Commissioner's Directive 100, "Management of Offenders with Gender Identity or Expression Concerns."

[3] RSC, 1985, c C-46 [the *Criminal Code*].

II. Context for Bill C-5

The importance of Bill C-5, and the potential impact of BLAC, CAEFS, and LEAF's proposed changes to it, cannot be separated from the systemic discrimination perpetuated by Canada's criminal justice system against marginalized people in Canada, and in particular against Black and Indigenous women in Canada. It also must be understood in the light of the role and potential impact of conditional sentences.

(a) Systemic discrimination against Indigenous women

The criminal justice system's discrimination against Indigenous women is long-standing and multi-faceted. One key feature is the overwhelming, persistent, and increasing overrepresentation of Indigenous women in custody. In 2021, the Office of the Correctional Investigator released new data that show that the proportion of federally-incarcerated women who are Indigenous will soon constitute over half of the women in federal prisons, up from 30% in less than two years.[4] An important contributor to this is the criminal justice system's view of the impacts of systemic discrimination against Indigenous women – such as poverty and social marginalization – as weighing against a more lenient sentence or early release. This is reflected in the fact that Indigenous people are more likely to be held in higher security institutions, and serve more time before being released on parole.[5]

At the same time, the criminal justice system fails to protect Indigenous people in the ways it does non-Indigenous Canadians. Simply being an Indigenous woman is a risk factor for violent victimization, with Indigenous women experiencing nearly double the rate of violent victimization of Indigenous men and close to triple that of non-Indigenous women.[6] In the face of this reality, the failure of the Canadian justice system to protect Indigenous women is well-established and thoroughly documented.[7] The proliferation of mandatory minimums in the *Criminal Code* has not improved this situation.

(b) Systemic discrimination against Black women

There are limited data available on Black women in custody in Canada. Data from the early 2010s reflect high levels of incarceration. In 2011/2012, Black women made up 9.12% of federally-incarcerated women despite being only 3% of Canada's adult population.[8] A recent study examining

---

[4] Canada, Office of the Correctional Investigator, "Proportion of Indigenous Women in Custody nears 50%: Correctional Investigator Issues Statement" (17 December 2021).
[5] Public Safety Canada Portfolio Corrections Statistics Committee, *Corrections and Conditional Release Statistical Overview 2016* (Ottawa: Public Safety Canada, 2017) at 55, 91.
[6] Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Interim Report: Our Women and Girls are Sacred* (Vancouver: Privy Council, 2017) at 8.
[7] See Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1A* (Vancouver: Privy Council, 2019) at 717.
[8] Heather Lawson, *Decriminalizing Race: The case for investing in community and social support for imprisoned racialized women in Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2020) at 10; Canada, Office of the

2010 data found that Black women were almost three times more likely to be provincially incarcerated in Ontario than white women.[9] These women were also more likely to have come from low-income neighbourhoods than provincially-incarcerated white women and women from other racial backgrounds.[10]

More recent data show that the rates of Black women in custody are decreasing, at least at the federal level. In 2018/2019, Black women made up 4.8% of federally-incarcerated women,[11] down from 9.12% in 2011/2012.

Nonetheless, what is clear from the data is the impact of systemic discrimination based on race and income. The Office of the Correctional Investigator's 2011/2012 report on the "Black Inmate Experience in Federal Penitentiaries" noted that over half of federally-incarcerated Black women had been convicted for Schedule II drug offences, and in particular drug trafficking charges. In interviews, "[m]any indicated that they willingly chose to carry drugs across international borders, primarily as an attempt to rise above poverty".[12] Others explained that they had "been forced into these activities with threats of violence to their children and/or families".[13] Despite their non-existent risk to public safety, these women face lengthy terms of incarceration and separation from their families and communities.

(c) The role and potential impact of conditional sentences

When they are imposed and carried out lawfully, conditional sentences are a particularly important tool for combating systemic discrimination against Black and Indigenous women in the Canadian criminal justice system.

For Indigenous women convicted of an offence, a conditional sentence may be an option that better resonates with their sense of justice. Many if not all Indigenous legal traditions include "principles and mechanisms that can be described as promoting community healing, reconciliation, and the reintegration" of the person who has done wrong.[14] Conditional sentences allow sentencing judges to undertake a contextual approach that gives due consideration to these principles and other aspects of Indigenous legal orders.

Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries, Final Report* (Ottawa: Office of the Correctional Investigator, 2013) at para 18.

[9] Akwasi Owusu-Bempah et al, "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada", (2021) Race and Justice 1 at 6.

[10] *Ibid.*

[11] Canada, Ivan Zinger, *Office of the Correctional Investigator Annual Report 2018-2019* (Ottawa: Office of the Correctional Investigator, 2019).

[12] Canada, Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries, Final Report* (Ottawa: Office of the Correctional Investigator, 2013) at para 19.

[13] *Ibid.*

[14] Larry Chartrand and Kanatase Horn, *A Report on the Relationship between Restorative Justice and Indigenous Legal Traditions in Canada* (Ottawa: Department of Justice Canada, 2016) at 3.

More broadly, conditional sentences have the potential to provide Black and Indigenous women with the ability to remain connected to their communities and receive culturally appropriate supports. Custodial sentences produce a far different outcome. For example, federally-incarcerated Black women have reported significant disconnect from their family members, lack of access to culturally appropriate hygiene products, and inadequate religious and spiritual supports.[15] Federally-incarcerated Indigenous women face biased risk assessment tools, making them much more likely to receive both the highest security classification on arrival and the lowest reintegration score during their sentence.[16] This then negatively impacts their chances of being paroled.

Imposing custodial sentences on Black and Indigenous women who are mothers or caregivers of children has additional, devastating effects not only on them but also their children and communities. For instance, sixty-four percent of incarcerated Indigenous mothers are single parents.[17] Consequently, the over-incarceration of Indigenous women contributes to the overrepresentation of Indigenous children in the foster care system.[18]

III. Proposed changes to Bill C-5

This government rightly recognizes the context outlined above, and sees that mandatory minimums and restrictions on the availability of conditional sentences contribute to the overrepresentation of Black and Indigenous people in custody. Bill C-5 is an important first step to combating this reality, and should be recognized as such.

With five changes, however, Bill C-5 has the potential to have an even greater impact. The changes BLAC, CAEFS, and LEAF propose align with the government's stated goals for Bill C-5, its commitment to reconciliation and implementing the TRC's Calls to Action, and its long-standing efforts to champion gender equality.

---

[15] Canada, Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries, Final Report* (Ottawa: Office of the Correctional Investigator, 2013) at paras 19-20.

[16] Tom Cardoso, "For Indigenous women, systemic racial bias in prison leaves many worse off than men", *The Globe and Mail* (31 December 2020).

[17] Heather Lawson, *Decriminalizing Race: The case for investing in community and social support for imprisoned racialized women in Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2020) at 18.

[18] While Indigenous children make up only seven percent of all children in Canada, they account for 48 percent of all children in the foster care system (Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1A* (Vancouver: Privy Council, 2019) at 637). More Indigenous children are placed in foster care each year than attended residential school in any one year (Canada, Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada, vol 5, Canada's Residential Schools: The Legacy* (Montréal: McGill-Queen's University Press, 2015) at 53).

(a) Remove all mandatory minimums, or at least all those that have been found to be unconstitutional

BLAC, CAEFS, and LEAF support the repeal of **all** mandatory minimums in the *Criminal Code*.[19]

Mandatory minimum sentences do not deter crime.[20] At the same time, they contribute to the significant incarceration and over-policing faced by members of marginalized communities.[21]

This is particularly true for life sentences. As of 2018/2019, 24.3% of federally-incarcerated people were serving a life sentence and/or an indeterminate sentence.[22] From 2009/2010 to 2018/2019, Indigenous women made up 38% of women admitted to federal custody with a life and/or indeterminate sentence.[23] If ever released, "they are under the thumb of corrections for their entire life, such that they can have their parole revoked and be returned to prison at any time until they die".[24]

In addition, mandatory minimums are inconsistent with evolving *Charter* and sentencing jurisprudence. Under the framework established in *R v Nur*,[25] it is possible to come up with a "reasonable hypothetical" that would establish most if not all mandatory minimum sentences as grossly disproportionate. Mandatory minimum sentences also contradict the principles set out in s. 718.2(e) of the *Criminal Code* and recent case law[26] in which courts have taken judicial notice of systemic anti-Black racism, including over-incarceration, to achieve a sentence that reflects the purposes of sentencing as described in s. 718 of the *Criminal Code*.

If Parliament is not prepared to repeal all mandatory minimum sentences, BLAC, CAEFS, and LEAF call on it to amend Bill C-5 to repeal those mandatory minimums which have been found unconstitutional by superior and/or appellate courts, as outlined in Appendix A.

---

[19] In doing this, BLAC, CAEFS, and LEAF join the calls already made by individuals and groups including the British Columbia Civil Liberties Association, the Parliamentary Black Caucus and allies, Pivot Legal Society, Professor and Chair in Feminist Legal Studies Debra Parkes, and Unifor National Chair in Social Justice and Democracy Kikélola Roach.

[20] See e.g., Anthony N. Doob, Cheryl Marie Webster, and Rosemary Gartner, "Issues Related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation" (2014) Criminological Highlights.

[21] This is both through requiring longer sentences than might otherwise be imposed, and by putting pressure on individuals to plead guilty to a lesser offence even where they may have a viable defence. Debra Parkes, for example, points to women who kill abusive partners pleading guilty to manslaughter despite the existence of a viable self-defence claim to avoid the risk of the mandatory minimum sentence for murder (Debra Parkes, "Mandatory minimum sentences for murder should be abolished", *The Globe and Mail* (25 September 2018).

[22] Canada, Public Safety Canada, *Corrections and Conditional Release Statistical Overview 2019* (Ottawa: Public Safety Canada, 2019) at 47.

[23] *Ibid* at 64.

[24] Debra Parkes, "Starting with Life: Murder Sentencing and Feminist Abolitionist Praxis", forthcoming in Taylor & Struthers-Montfort, eds, *Building Abolition: Decarceration and Social Justice* (Routledge, 2021) at 7.

[25] 2015 SCC 15.

[26] See *R v Morris*, 2021 ONCA 680, and *R v Anderson*, 2021 NSCA 62.

Removing mandatory minimums for offences such as these would provide consistency across different jurisdictions, more effectively use judicial resources, and promote equitable sentencing.[27] It would increase the availability of conditional sentences, which (as discussed below) are currently unavailable for offences with a mandatory minimum penalty.

This change would, however, leave more work to be done. Multiple mandatory minimums would remain on the books for offences for which a disproportionate number of Black and Indigenous individuals are incarcerated.[28]

(b) Remove the bar on conditional sentences for offences with mandatory minimum penalties

As it stands, even if Bill C-5 is enacted, individuals who otherwise meet all requirements for a conditional sentence under s. 742.1 of the *Criminal Code* will be ineligible to serve their sentence in the community if the offence for which they are sentenced has a mandatory minimum penalty. This is the case even if the mandatory minimum penalty is a sentence that could be served intermittently.[29]

Allowing intermittent sentences but not conditional sentences for offences with mandatory minimum sentences perpetuates systemic discrimination and inequality. As The Advocates' Society observes, serving a sentence intermittently is often simply not possible for individuals living far from the nearest correctional institution.[30] In theory, a person who is convicted of a second "over 80" offence and receives the mandatory minimum sentence of 30 days imprisonment would be eligible to serve that sentence on an intermittent basis. They would be able to maintain ties to their family and community, continue employment during the week, and access available community supports. For an Indigenous woman living in a rural, remote, or fly-in community, the bar on conditional sentences for offences with a mandatory minimum penalty means the only real available option is jail.

Removing the bar on conditional sentences for offences with mandatory minimum penalties will broaden the availability of conditional sentences in appropriate situations. This will allow more women to serve their sentences in their communities, keeping families together and reducing the over-incarceration of Indigenous women in particular.

---

[27] See the Advocates' Society's January 6, 2022 letter to the Honourable David Lametti, Minister of Justice and Attorney General of Canada, regarding Bill C-5.

[28] According to the Department of Justice, Black individuals are disproportionately represented for offences including attempted murder, use of a firearm (s 239 of the *Criminal Code*), and firearms trafficking (s 100 of the *Criminal Code*). Indigenous individuals are disproportionately convicted of offences including sexual assault with a weapon (s 272 of the *Criminal Code*). Mandatory minimums would remain for these offences even if Bill C-5 were expanded to repeal all those which have been found unconstitutional. See Canada, Department of Justice Research and Statistics Division, "The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities" (2017).

[29] As set out in s 732(1) of the *Criminal Code*, sentences of 90 days or less may be served intermittently.

[30] See the Advocates' Society's January 6, 2022 letter to the Honourable David Lametti, Minister of Justice and Attorney General of Canada, regarding Bill C-5.

(c) Fulfill the Truth and Reconciliation Commission of Canada's Call to Action 32 to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences

Where mandatory minimum penalties and restrictions on the use of conditional sentences remain, injustice will inevitably result. The Truth and Reconciliation Commission of Canada (TRC)'s Call to Action 32 recognizes and responds to that reality, enabling judges to pass sentences proportionate to the circumstances of the offence and the degree of moral blameworthiness of the person before them.

Professor Debra Parkes provides the example of an 18-year-old Indigenous teenager who kills her abusive drug dealer, who could be convicted of second degree murder and face a mandatory life sentence without the possibility of parole for at least 10 years.[31] This would be so regardless of the constellation of *Gladue* factors which might be present in her life. With the implementation of this Call to Action, however, a judge would be able to meaningfully consider the systemic factors bringing this woman before the court and the type of sentence which might be appropriate given her Indigenous heritage.[32]

It is critical to note that the application of this Call to Action is not limited to Indigenous people. The broad wording could – and should – be applied to reduce all incarceration. This is particularly true for Black men, women, and gender-diverse people. As recently noted in *R v Anderson*, "while the history of Indigenous people in Canada is distinct, as is their place in our legal and constitutional framework, African Canadians have experienced many of the same effects of discrimination and marginalization."[33] Sentencing judges considering the impact of race and racism on a particular individual may reasonably conclude that the only fit sentence is one that departs from a mandatory minimum and/or limitation on the availability of conditional sentences.

(d) Amend s. 718.2(e) of the *Criminal Code* so that sentencing judges will have the information required to pass appropriate sentences on Black defendants

Since 1997, s. 718.2(e) of the *Criminal Code* has required that sentencing judges take into account the principle that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[34]

In response to this direction from Parliament, the Supreme Court developed the *Gladue* jurisprudence. Through *Gladue* reports, sentencing judges receive critical background information about the individual before them and the community and context in which that person lives. *Gladue* reports "can help put an individual's actions into proper context, which often includes the devastating

---

[31] Debra Parkes, "Mandatory minimum sentences for murder should be abolished", *The Globe and Mail* (25 September 2018).
[32] As set out in *R v Gladue*, [1999] 1 SCR 688 at paras 66, 77.
[33] *R v Anderson*, 2021 NSCA 62 at para 92.
[34] Though the term appears throughout the *Criminal Code*, LEAF and BLAC acknowledge that the use of "offender" is problematic. This is because it saddles someone with the permanent and derogatory identity of being an "offender", rather than a person who has been convicted of an offence.

effects of colonial state programs, dislocation and economic marginalization" and "can also tell a judge if the defendant comes from a community with a long history of restorative justice laws and practices."[35]

Courts are increasingly recognizing the existence and impact of "anti-Black racism, including both overt and systemic anti-Black racism",[36] and its role in sentencing.

Through Bill C-5, this government has the opportunity to amend the language of s. 718.2(e) so as to more explicitly establish that judges have an independent legal duty to seek out social context evidence in all cases involving Black defendants, as they do under the *Gladue* framework. The small change in language would enable sentencing judges to develop a deeper understanding of the impact of anti-Black racism, and impose more appropriate sentences. It would also deepen the impact of this government's investment in improved access to Impact of Race and Culture Assessments (IRCAs) for Black defendants.[37]

(e) Fully decriminalize simple drug possession, and provide for automatic expungement of records for simple drug possession

BLAC, CAEFS, and LEAF support this government's characterization of substance use as a public health matter, rather than a criminal one. The criminalization of drugs, and those who use them, harms public health, diminishes public safety, and wastes resources.[38]

Bill C-5's proposed diversion measures, however, are inconsistent with an understanding of substance use as a public health concern, and with the Bill's own text. Bill C-5 explicitly acknowledges that "criminal sanctions imposed in respect of the possession of drugs for personal use can increase the stigma associated with drug use and are not consistent with established public health evidence", while at the same time maintaining those criminal sanctions.

Only full decriminalization of simple drug possession will meaningfully help address the over-policing and over-incarceration of members of marginalized communities.[39]

---

[35] Lisa Kerr and Maria Dugas, "The federal bill to reduce mandatory minimum sentences is missing a few crucial words", *The Globe and Mail* (10 December 2021).
[36] *R v Morris*, 2021 ONCA 680 at para 1; see also *R v Anderson*, 2021 NSCA 62.
[37] Department of Justice Canada, "Pre-Sentencing Impact of Race and Culture Assessments receive Government of Canada Funding" (13 August 2021).
[38] For a thorough canvassing of the harms of the criminalization approach, see this February 10, 2021 letter sent to The Honourable Patty Hadju, then Minister of Health, by the HIV Legal Network, the Canadian Drug Policy Coalition, and Pivot Legal Society.
[39] In advocating for full decriminalization of simple drug possession, BLAC, CAEFS, and LEAF follow the lead of organizations already calling for this. These organizations include (in alphabetical order): The Advocates' Society, the BC Association of Aboriginal Friendship Centres, the British Columbia Office of the Provincial Health Officer, the Canadian Association of Chiefs of Police, the Canadian Association of People Who Use Drugs, the Canadian Drug Policy Coalition, the HIV Legal Network, Pivot Legal Society, the Thunderbird Partnership Foundation, Toronto Public Health, and the Vancouver Police Board.

Racism is embedded in policing and all aspects of the Canadian criminal justice system. Compared to non-racialized Ontarians, Black Ontarians are arrested four times more than expected for drug-related crimes, and twice as likely to be held overnight on suspicion of drug possession.[40] The reality is that Black and Indigenous users of drugs will be less likely to be referred out of the justice system, and more likely to have charges brought against them.

This discrimination is compounded by the barriers that Black and Indigenous people face in accessing health care.

The limited race-based data available in Canada show significant disparities in health care access and outcomes for Black women compared to white women. In Ontario, Black women are three times less likely to have a family doctor than non-racialized women.[41] In Canada, a 2016 study showed that 8.9% of Black women gave birth prematurely, compared to only 5.9% of white women.[42] Black women also have up to five times the rate of chronic illnesses such as diabetes and health disease compared to white women.[43]

Indigenous people face systemic discrimination in accessing health care. As Professor Brenda Gunn observes, "Indigenous people are often treated by the healthcare system as if they do not belong, or as if they are a problem that should be treated elsewhere."[44] In British Columbia, a recent report found that Indigenous peoples experience inequitable access to primary care, disproportionately rely on emergency services, and face poorer health outcomes.[45] For Indigenous women, this is reflected in a projected life expectancy of 78 – five years less than that of all women in Canada.[46]

As these statistics reflect, there is a significant risk that the health care sector will fail to provide adequate addictions-related health care to Black and Indigenous women. Simultaneously, the criminal justice system will continue to criminalize addiction and substance use rather than provide meaningful, evidence-based interventions.

Decriminalizing simple drug possession needs to be accompanied by amendments to Bill C-5 providing for the automatic expungement of criminal records for simple drug possession.

Criminal records further marginalize the most marginalized in Canadian society. They impose barriers to employment, rehabilitation, and community reintegration.

---

[40] Nan DasGupta, Vinay Shandal, Daniel Shadd, Andrew Segal, and in conjunction with CivicAction, "The Pervasive Reality of Anti-Black Racism in Canada" (14 December 2020).
[41] *Ibid.*
[42] Britt Mckinnon et al, "Comparison of black–white disparities in preterm birth between Canada and the United States" (2016) 188(1) CMAJ E19.
[43] Tayo Bero, "The Forces that Shape Health Care for Black Women", *Best Health* (20 October 2020).
[44] Brenda Gunn, "Ignored to Death: Systemic Racism in the Canadian Health Care System", Submission to the Expert Mechanism on the Rights of Indigenous Peoples (no date) at 4.
[45] Dr. M.E. Turpel-Lafond, *In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in B.C. Health Care, Summary Report* (British Columbia: 2020) at 25.
[46] Joe Friesen, "Mortality rates for First Nations young women and girls may have worsened: study", *The Globe and Mail* (26 May 2019).

At the same time, the process for accessing record suspension in Canada is slow, challenging, and too expensive. BLAC, CAEFS, and LEAF support the Fresh Start Coalition's call for a "spent regime" for criminal records more broadly.[47] In the interim, however, this government has the opportunity to truly embrace a public health and substantive equality-driven approach by automatically removing past criminal records for simple drug possession.

IV. Final considerations

Ending the criminalization and mass incarceration of Black and Indigenous people, and in particular Black and Indigenous women, will require additional considerations beyond the important provisions in Bill C-5.

The removal of mandatory minimums is an important step to allowing judicial discretion in crafting a fit sentence. But this discretion can only be meaningfully used when complemented by a full understanding of the person before the court and the contextual factors involved in getting them there. This government must ensure that sufficient resources continue to be provided for *Gladue* Reports and Impact of Race and Culture Assessments (IRCAs).

Conditional sentences must be used properly for them to meaningfully reduce incarceration, and not simply be "a revolving door to prison" through breaches. This means that judges must not impose more onerous conditions than necessary when crafting a conditional sentence. For example, judges must consider the impact of "red zones" or "no-go" areas, conditions which are commonly imposed and limit access to necessary support systems.[48] Conditional sentences should also not be imposed where a fine, suspended sentence and probation, or discharge would be appropriate. Finally, this government must invest in community interventions and supports to ensure that conditional sentences are in fact accessible to all people, particularly those in rural and remote communities.

V. Organizational backgrounds

(a) About BLAC and its expertise

BLAC is a not-for-profit specialty law clinic that was incorporated in 2017 to address individual and systemic anti-Black racism in the Province of Ontario. BLAC is the only legal clinic in Ontario that focuses specifically on anti-Black racism.

BLAC provides free legal assistance to low- and no-income Black people across Ontario, including summary legal advice, legal representation, and public legal education. BLAC also engages in community development and law reform activities.

By virtue of its role in the community, BLAC has specialized knowledge of how anti-Black racism in the justice system, and in the exercise of government policy, impacts members of Black communities, as a

---

[47] Under a spent regime, an individual's criminal record is automatically sealed after a certain period of time, without the need for that individual to submit or pay for an application (see Fresh Start Coalition, "The Solution – A Spent Regime" (no date).

[48] See e.g., Marie-Eve Sylvestre et al, *Red zones and Other Spatial Conditions of Release Imposed on Marginalized People in Vancouver* (2017).

result of the fraught – historically and ongoing – relationship between Black people, the justice system, and the government.

BLAC also has expertise and experience in the specific and unique role anti-Black racism plays in Ontario (and Canada). Present-day stereotypes and association between Blackness, criminality, and violence, for example, can be traced back to slavery and are deeply entrenched in Canadian institutions, policies and practice.[49] BLAC has experience in how these stereotypes and resultant anti-Black racism manifest in the current social, political and economic marginalization of Black people today. This includes unequal opportunities, lower socio-economic status, higher unemployment, significant poverty rates and disproportionate representation in the criminal justice system.[50]

Despite having only been incorporated in 2017, BLAC has developed extensive experience in advocating to advance the rights of low-and no-income Black Ontarians. BLAC intervened in *R v Morris*,[51] in which the Court of Appeal for Ontario addressed how systemic discrimination should impact the sentencing framework for Black Canadians. More recently, BLAC sought standing to intervene in *Canadian Alliance for Sex Work Law Reform, et al v AGC*, in which BLAC will seek to highlight the unequal impact of s. 213(1.1), s. 286.1(1), s. 286.2(1), s. 286.3(1), and s. 286.4 of the *Criminal Code* on Black women, including Black trans women.

(b) About CAEFS and its expertise

CAEFS was established in 1978.

Since its inception, CAEFS has worked to address the persistent ways in which women and gender-diverse people impacted by criminalization have been denied humanity and excluded from community. CAEFS advocacy utilizes a feminist rights-based approach that focuses on federally incarcerated women and gender-diverse people and upholds the mandates of several federal ministries by recognizing that, to create substantive equality, unique attention and approaches are needed to respond to incarcerated equity-deserving groups. CAEFS also represents the 24 self-governing Elizabeth Fry Societies located across the country, all of whom provide critical front-line services to women and gender-diverse people in their communities. In this way, CAEFS has a unique perspective that is equally informed by our work inside of the prisons designated for women and the community-based work of our membership.

CAEFS has mobilized our perspective to effect change on a national and international scale. CAEFS has appeared before the Supreme Court of Canada as an intervener on seven occasions to address the Court on legal issues of concern to criminalized people. CAEFS has also intervened in cases before the British Columbia Court of Appeal and the Ontario Court of Appeal. CAEFS is presently the complainant in a matter before the Canadian Human Rights Tribunal which was brought against the Correctional Services of Canada in 2010 on behalf of all federally sentenced women.

---

[49] Akwasi Owusu-Bempah et al, "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada", (2021) Race and Justice 1.
[50] *ibid.*
[51] 2021 ONCA 680.

CAEFS has provided equality-rights expert testimony with respect to the particular circumstances of transfer cases, Youth Court reviews under the Youth Criminal Justice Act, sentencing hearings, inquests, judicial reviews in Federal Court, and the Commission of Inquiry into Certain Events at the Prison for Women in Kingston as well as before Senate and House of Commons Standing Committees. CAEFS was also among the expert organizations invited to assist in the drafting of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) which was approved by resolution of the Third Committee of the General Assembly of the United Nations at its 65th session in October of 2010, and has made submissions to the United Nations on a number of other occasions on related issues. CAEFS was also co-creator of *Creating Choices: A Report on the Task Force on Federally Sentence Women*, which sets out the principles that are intended to guide Canada's approach to Corrections for women.

Most recently, in March 2022, CAEFS intervened at the Supreme Court in *R v Sharma*.[52] The submission highlighted the need for an analysis of how systemic inequities impact all levels of the justice system – a perspective and analysis that is equally relevant in this case.

Given this experience, CAEFS has special knowledge of and expertise on the criminalization, sentencing and incarceration of criminalized women and gender diverse people in Canada.

(c) About LEAF and its expertise

LEAF is a national, charitable, non-profit organization that works towards advancing the substantive equality of all women, girls, and people who experience gender-based discrimination through litigation, law reform, and public education. Since 1985, LEAF has intervened in over 100 cases – many of them before the Supreme Court of Canada – that have advanced equality in Canada.

LEAF's advocacy is often grounded in understanding the impact of the criminal justice system on marginalized women and gender-diverse people, and in particular on those who are Black and/or Indigenous.

LEAF has been involved in efforts to address the over-incarceration of Indigenous women in Canada. LEAF intervened before the Court of Appeal for Ontario in *R v Sharma*,[53] a case addressing two of the provisions Bill C-5 seeks to repeal, to highlight the discrimination faced by Indigenous women through the criminal justice system.[54] LEAF also intervened before the Supreme Court of Canada when it heard the Crown's appeal from that decision in March 2022.

LEAF has been involved in efforts to ensure that the criminal justice system meaningfully responds to the disproportionate victimization experienced by Indigenous women. Together with the Institute for the Advancement of Aboriginal Women (IAAW), LEAF intervened before both the Alberta Court of Appeal and the Supreme Court of Canada in *R v Barton*[55] to challenge the use of racist and dehumanizing myths and stereotypes about Indigenous women in criminal trials. LEAF had regional

[52] Decision reserved, Case Number 39346.
[53] 2020 ONCA 478.
[54] A majority of the Court of Appeal held that the limitations on conditional sentences infringed Ms. Sharma's ss 7 and 15 rights, and could not be saved under s 1 of the *Charter*.
[55] 2017 ABCA 216; 2019 SCC 33.

and national standing before the National Inquiry into Missing and Murdered Indigenous Women and Girls. In that capacity, the organization made specific legal recommendations to address the shortcomings of the legal system and its response to violence against Indigenous women.

In addition, LEAF has provided law reform submissions at the federal level on many different occasions. Most recently, this includes a September 2021 submission to Canadian Heritage on addressing harmful content online;[56] a February 2021 submission to the Standing Committee on Justice and Human Rights' Study on Controlling or Coercive Conduct within Intimate Relationships;[57] and a March 2020 submission to the Standing Committee on Justice and Human Rights concerning Bill C-5, An Act to Amend the *Judges Act* and the *Criminal Code*.[58]

[56] Women's Legal Education and Action Fund, "Submission to Canadian Heritage on the Federal Government's Proposed Approaches to Address Harmful Content Online" (25 September 2021).
[57] Women's Legal Education and Action Fund, "LEAF Submission on Coercive Control" (16 February 2021).
[58] Women's Legal Education and Action Fund, "Submission on Bill C-5 on judicial education" (23 March 2020).

Appendix A: Mandatory minimums that have been struck down by superior and/or appellate courts[59]

Firearms and Other Weapons Offences

Offence	Section	Mandatory Minimum Sentence	Jurisdictions where struck down	Cases
Weapons trafficking, firearm, first offence	s. 99(2)(a) *Criminal Code*	3 years	Alberta, Ontario, Quebec	*R c Lefrançois*, 2018 QCCA 1793 *R v Bajwa*, 2020 ONSC 185 *R v Ball*, 2019 ONSC 7162 *R v Bruce*, 2019 ONSC 5865 *R v Wetelainen*, 2019 ONSC 869 *R v De Vos*, 2018 ONSC 6813 *R v Sauve*, 2018 ONSC 7375 *R v Harriott*, 2017 ONSC 3393 *R v Friesen*, 2015 ABQB 717 *R v Hussain*, 2015 ONSC 7115
Importing weapons, first offence	s. 103(2)(a) *Criminal Code*	3 years	Quebec	*R c Lefrançois*, 2018 QCCA 1793
Recklessly discharge firearm[60]	s. 244.2(3)(b) *Criminal Code*	4 years	Ontario, Northwest Territories	*R v Valade*, 2019 ONSC 3033

[59] This appendix is based on the MMS.watch project carried out by Matthew Oleynik and rangefinder.ca, which is also included in The Advocates' Society's January 6, 2022 letter to the Honourable David Lametti, Minister of Justice and Attorney General of Canada, regarding Bill C-5.

[60] The mandatory minimum has been upheld by the Alberta Court of Appeal (*R v Hills*, 2020 ABCA 263), the Nunavut Court of Appeal (*R v Ookowt*, 2020 NUCA 5; *R v Itturiligaq*, 2020 NUCA 6), and the British Columbia Court of Appeal (*R v Oud*, 2016 BCCA 332).

				R v Kakfwi, 2018 NWTSC 13
Recklessly discharge firearm with restricted/prohibited firearm, or for crim org with any firearm, first firearm offence[61]	s. 244.2(3)(a)(i)	5 years	British Columbia, Northwest Territories	*R v Dingwall*, 2018 BCSC 1041 *R v Cardinal*, 2018 NWTSC 12
Manslaughter with firearm[62]	s. 236(a)	4 years	British Columbia	*R v Penner*, 2022 BCSC 175

Sexual offences

Offence	Section	Mandatory Minimum Sentence	Jurisdictions where struck down	Cases
Sexual interference – summary	s. 151(b) *Criminal Code*	90 days	British Columbia, Ontario	*R v CBA*, 2021 BCSC 2107 *R v Drumonde*, 2019 ONSC 1005
Sexual interference – indictable	s. 151(a) *Criminal Code*	1 year	Alberta, British Columbia, Ontario, Manitoba, Nova Scotia, Quebec	*R v Ford*, 2019 ABCA 87 *R v Scofield*, 2019 BCCA 3 *R v BJT*, 2019 ONCA 694 *R v JED*, 2018 MBCA 123 *R v Hood*, 2018 NSCA 18 *Caron Barrette c R*, 2018 QCCA 516
Inviting sexual touching – indictable	s. 152(a) *Criminal Code*	1 year	Ontario, Alberta	*R v Mootoo*, 2022 ONSC 384

[61] The Ontario Superior Court of Justice (*R v Jama et al.*, 2021 ONSC 4871; *R v Abdullahi*, 2014 ONSC 272) has upheld the mandatory minimum.
[62] The Supreme Court of Canada (*R v Ferguson*, 2008 SCC 6) previously upheld the mandatory minimum, as did various courts in British Columbia (*R v Birchall*, 2001 BCCA 356; *R v Walcot*, 2001 BCCA 342; *R v Penner*, 2017 BCSC 1688; *R v McMath*, 2015 BCSC 440).

				R v Reeves, 2020 ABQB 78 *R v Hussein*, 2017 ONSC 4202
Sexual exploitation – indictable[63]	s. 153(1.1)(a) *Criminal Code*	1 year	Yukon, Nova Scotia, British Columbia, Ontario	*R v EO*, 2019 YKCA 9 *R v Hood*, 2018 NSCA 18 *R v DM*, 2021 BCSC 379 *R v Cristoferi-Paolucci*, 2017 ONSC 4246, proceedings stayed 2018 ONCA 986
Making child pornography	s. 163.1(2) *Criminal Code*	1 year	Ontario, Alberta	*R v Joseph*, 2020 ONCA 733 *R v Esposito*, 2020 ABQB 165
Distributing child pornography[64]	s. 163.1(3) *Criminal Code*	1 year	Ontario, British Columbia	*R v Mootoo*, 2022 ONSC 384 *R v Walker*, 2021 ONSC 837 *R v Mollon*, 2019 BCSC 423 *R v Boodhoo and others*, 2018 ONSC 7207
Possessing child pornography – summary	s. 163.1(4)(b) *Criminal Code*	6 months	British Columbia	*R v Cole*, 2021 BCSC 293

[63] Two decisions have upheld the 1-year mandatory minimum: R v EJB, 2018 ABCA 239; and R v Reid, 2020 ONSC 5471.
[64] The Alberta Court of Appeal (*R v Gerbrandt*, 2021 ABCA 346) and the Quebec Court of Appeal (*R c Daudelin*, 2021 QCCA 784; and *Ibrahim c R*, 2018 QCCA 1205) have applied/upheld the mandatory minimum.

Possessing child pornography – indictable[65]	s. 163.1(4)(a) *Criminal Code*	1 year	Prince Edward Island, Ontario, British Columbia	*R v Jenkins*, 2021 PESC 6 *R v Walker*, 2021 ONSC 837 *R v Hamlin*, 2019 BCSC 2266
Accessing child pornography – summary	s. 163.1(4.1)(b) *Criminal Code*	6 months	Ontario	*R v Doucette*, 2021 ONSC 371
Accessing child pornography – indictable[66]	s. 163.1(4.1)(a) *Criminal Code*	1 year	Ontario, British Columbia	*R v Walker*, 2021 ONSC 837 *R v Hamlin*, 2019 BCSC 2266 *R v Rytel*, 2019 ONSC 5541
Child luring – summary	s. 172.1(2)(b) *Criminal Code*	6 months	Quebec	*R c HV*, 2022 QCCA 16
Child luring – indictable[67]	s. 172.1(2)(a) *Criminal Code*	1 year	Quebec, Nova Scotia, Alberta, British Columbia, Ontario	*R c Marchand*, 2021 QCCA 1285 *R v Hood*, 2018 NSCA 18 *R v Mootoo*, 2022 ONSC 384 *R v Jissink*, 2021 ABQB 102 *R v Melrose*, 2021 ABQB 73

[65] The Alberta Court of Appeal (*R v Gerbrandt*, 2021 ABCA 346) and the Quebec Court of Appeal (*R c Daudelin*, 2021 QCCA 784) have applied/upheld the mandatory minimum.
[66] The Quebec Court of Appeal (*R c Daudelin*, 2021 QCCA 784) has upheld/applied the mandatory minimum.
[67] The Supreme Court of Canada declined to address the mandatory minimum in *R v Morrison*, 2019 SCC 15, rev'g 2017 ONCA 582. The 1-year mandatory minimum has been upheld in Ontario in a 2:1 decision of the Court of Appeal (*R v Cowell*, 2019 ONCA 972), although this has not been followed in the three Ontario Superior Court decisions listed above.

				R v CDR, 2020 ONSC 645 *R v Faroughi*, 2020 ONSC 780 *R v BS*, 2018 BCSC 2044
Agreeing to or arranging sexual offence against a child – indictable[68]	s. 172.2(2)(a) *Criminal Code*	1 year	Ontario	*R v CDR*, 2020 ONSC 645
Sexual assault against child under 16	s. 271(a) *Criminal Code*	1 year	Newfoundland and Labrador, Northwest Territories, Yukon, British Columbia	*R v MacLean*, 2021 NLCA 24 *R v Lafferty*, 2020 NWTSC 4 *R v YH*, 2019 YKSC 28 *R v Plehanov*, 2017 BCSC 2176, var'd on other grounds 2020 BCCA 249 *R v ERDR*, 2016 BCSC 684 and 2016 BCSC 1759
Sexual assault with weapon, threats, or bodily harm against a child under 16	s. 272(2)(a.2) *Criminal Code*	5 years	Quebec, Alberta, Ontario	*R c Trottier*, 2020 QCCA 703 *R v Badger*, 2019 ABQB 551 *R v MJ*, 2016 ONSC 2769
Human trafficking	s. 279.01(1)(b) *Criminal Code*	4 years	Ontario	*R v Antoine*, 2020 ONSC 181 *R v Reginald Louis Jean*, 2020 ONSC 624
Human trafficking of a child under 18	s. 279.011(1)(b) *Criminal Code*	5 years	Ontario, Nova Scotia	*R v Ahmed et al*, 2019 ONSC 4822 *R v Webber*, 2019 NSSC 147 and 2019 NSSC 265

[68] An earlier decision (*R v Wheeler*, 2017 CanLII 86656 (ON SC)) upheld the mandatory minimum.

Obtaining a material benefit from child trafficking	s. 279.02(2) *Criminal Code*	2 years	Nova Scotia	*R v Webber*, 2019 NSSC 147 and 2019 NSSC 265
Purchasing sex from a child under 18, first offence[69]	s. 286.1(2)(a) *Criminal Code*	6 months	British Columbia, Ontario, Alberta	*R v JLM*, 2017 BCCA 258 *R v CDR*, 2020 ONSC 645 *R v Charboneau*, 2019 ABQB 882
Obtaining material benefit from child prostitution	s. 286.2(2) *Criminal Code*	2 years	Ontario	*R v Joseph*, 2020 ONCA 733 *R v Boodhoo and others*, 2018 ONSC 7207
Procuring child under 18 for prostitution	s. 286.3(2) *Criminal Code*	5 years	Ontario	*R v Safieh*, 2021 ONCA 643 *R v JG*, 2021 ONSC 1095 *R v Boodhoo and others*, 2018 ONSC 7207

[69] The Quebec Court of Appeal (*R c CM*, 2021 QCCA 543) has upheld the mandatory minimum.