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Urgent and Long Overdue: Legal Reform and Drug Decriminalization in Canada

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An RSC Policy Briefing

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Cover Art

Jim Russell, from the series entitled The Poetics of Proximity, (2020)

Watercolour on paper 11”x14”

The Poetics of Proximity investigates the mysterious and moving connections that are formed between humans, ideas and objects across distance and time. It examines how meaning emerges when subjects are placed close to each other, where mythologies, connections, and faith begin.

Land Acknowledgement

The headquarters of the Royal Society of Canada is located in Ottawa, the traditional and unceded territory of the Algonquin Nation.

The opinions expressed in this report are those of the authors and do not necessarily represent those of the Royal Society of Canada.

Background on the Policy Briefing Report Process

Established by the President of the Royal Society of Canada in April 2020, the RSC Task Force on COVID-19 was mandated to provide evidence-informed perspectives on major societal challenges in response to and recovery from COVID-19.

The Task Force established a series of Working Groups to rapidly develop Policy Briefings, with the objective of supporting policy makers with evidence to inform their decisions.

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Introduction: Employing a Human Rights Approach

The International Guidelines on Human Rights and Drug Policy recommend that States commit to adopting a balanced, integrated, and human rights-based approach to drug policy through a set of foundational human rights principles, obligations arising from human rights standards, and obligations arising from the human rights of particular groups.[1] Following two years of consultation with stakeholders, including people who use drugs, NGOs, legal and human rights experts, UN technical agencies and Member States, the Guidelines "do not invent new rights. Rather, they apply existing human rights law to the legal and policy context of drug control to maximise human rights protections, including in the interpretation and implementation of the drug control conventions."[2] In respect of the Guidelines and its obligations under UN human rights treaties, Canada must adopt stronger and more specific commitments for a human rights-based, people-centered and public health approach.[3] This approach must commit to the removal of criminal penalties for simple possession and a comprehensive health-based approach to drug regulation.[4]

The Impact of COVID-19

The COVID-19 pandemic has had a significant impact on substance use and access to related health and social services, reinforcing the call to center the voices of people who use drugs (PWUD) and adopt strong commitments to a human rights based approach.[5]There has been an increase in drug-related harms and drug poisoning deaths associated with a lack of access to necessary supports and services.[6] This has mobilized discussions and action across provinces and territories around harm reduction, safer supply (where a legal, regulated supply of drugs is provided as an alternative to the toxic illicit drug supply), and alternatives to criminal prohibitions. While PWUD may include people who use drugs casually and who may be people of privilege, the focus of this report is on those who are marginalized and are disparately impacted by the criminal law. The role of the criminal law in creating health and social harms emphasizes the need to shift legal frameworks out of criminal prohibition and towards human rights- and health-oriented regulation. Decriminalization is an important component of a shift away from criminal prohibition and an effective way to reduce the harms experienced by PWUD.

COVID-19: The Impact of the Pandemic on PWUD & Harm Reduction Efforts

The COVID-19 pandemic greatly impacted access to services across Canada. Stay-at-home orders and social distancing guidelines prevented many businesses from operating and reduced the capacity of those able to remain open. These included medical and treatment services, public transportation, shelters, and ports of entry, all of which were required to adapt to COVID-related health restrictions.[7] Canada was already in the midst of an overdose-related public health crisis stemming from the toxicity of the illicit drug market, largely driven by fentanyl.[8] The combination of these two overlapping public health crises has had a disproportionate effect on already at-risk populations, particularly people who use drugs.[9] As a result, Canada has experienced a dramatic rise in fatal and non-fatal overdoses resulting from an increasingly toxic illicit drug supply. Importantly, the negative effects of the COVID-19 pandemic will persist for years to come.

British Columbia (BC), the province most affected by the overdose crisis,[10] anticipated the negative effects of COVID-related public health measures on PWUD early in the pandemic, initiating several policy changes in early 2020. BC took a proactive approach by releasing temporary clinical guidelines for providing treatment and harm reduction services while complying with

COVID health measures which they termed 'risk mitigation.'[11] These included reducing barriers to access a 'safe supply' of drugs, which are pharmaceutical-grade regulated substances.[12] The new clinical guidelines facilitated the introduction of a safe supply of non-opioid-based drugs, including amphetamines and benzodiazepines.[13] This new addition was significant in light of the increasingly toxic supply of illicit drugs caused by the inclusion of fentanyl and other previously unseen adulterants in non-opioid-based drugs.[14] Regulations restricting the prescribing and provision of safe supply were loosened to facilitate access while reducing potential exposure to and spread of COVID.[15] This allowed PWUD to obtain multiple days' worth of a substance or have their substances delivered.[16] By the autumn of 2020, other provinces, such as Ontario and the federal government,[17] had followed suit, further reducing the structural barriers to treatment for PWUD.

Despite these attempts to alleviate the harms presented by COVID and a toxic drug supply, the harm faced by PWUD continued to rise. Before COVID-19 the pandemic, there was an average of 11 deaths per day nationwide from opioid toxicity.[18] By 2022, the rate of opioid-related deaths jumped to 21 per day, nearly twice the rate seen in 2018.[19] Fentanyl was involved in 85% of overdose deaths in Canada between January and March 2022, representative of a trend that permeated throughout the pandemic.[20] The roots of these harms were multifaceted, including issues stemming from the toxic drug supply, economic hardship, and reduced capacity in harm reduction services.There were disruptions in the supply chain. The quantity of illicit drugs entering Canada was reduced due to port closures and reduced import and distribution of goods at the beginning of the pandemic.[21] This had different effects in different regions of the country. Some areas experienced substance shortages forcing PWUD to experience unsupervised withdrawal and a resulting reduction in their tolerances.[22] Other regions faced quality reductions caused by the increased use of adulterants to 'cut' substances with.[23] Some adulterants are inert and relatively harmless to PWUD; however, they cause a decrease in the potency of the substance in question. Other adulterants, such as fentanyl and other psychoactive substances, pose risks to PWUD, who are unaware that their drugs are contaminated. Both the reduction in supply and reduced potency of substances can decrease tolerance and, therefore, increase the risk of overdose upon exposure to previously safe doses.[24] Further, the use of adulterants such as fentanyl in non-opioid-based drugs introduces the risk of overdose to individuals who have no or low tolerance to opioids. Indeed, approximately 44% of opioid poisonings involved polysubstance use, predominantly stimulants, further evidencing the toxicity of the illicit drug supply.[25] Research has partially attributed the toxic supply to the dramatic increase in overdose deaths in Canada within the first year of COVID measures.[26] The toxic supply is, however, only one of the factors that have contributed to the increased rate of morbidity and mortality amongst PWUD.

COVID-19 also resulted in increased economic hardship. The closure of businesses prevented many people from working and was felt particularly hard by under-housed and at-risk people. The increased price of illicit substances compounded financial difficulties in response to reduced supply. This resulted in many PWUD being forced into risky situations in order to facilitate their drug use, such as engaging in sex work or criminal activities. Additionally, many individuals found themselves having to live on the streets or in shelter systems due to an inability to pay rent,[27] which facilitated the spread of COVID-19 due to unsanitary practices and close-quarters living.[28] PWUD were faced with additional health-related harms due to their increased exposure to COVID-19.

Lastly, social isolation has disproportionately affected PWUD. Stay-at-home orders and social isolation have been found to have a negative effect on the mental health of individuals across all socio-economic classes.[29] The mental health effects of lockdown are especially important when considering PWUD, most of whom suffer from comorbid mental health conditions.[30] The mental health tolls of isolation led many people to initiate self-medication or relapse on to illicit substances.[31]

Additionally, stay-at-home orders and capacity limits imposed by provincial governments severely limited the ability of harm reduction and addiction treatment services to function. Harm reduction services, such as needle exchanges and safe consumption rooms, struggled to find the necessary resources to function.[32] This included staffing shortages, as well as supply chain issues sourcing essential medical supplies such as sterile syringes.[33] PWUD have reported that they were forced to re-use or share syringes due to the inability to obtain new ones,[34] which increases the risk of contracting communicable diseases such as HIV and hepatitis C. Resource scarcity further limited the ability for harm reduction services to operate, resulting in reduced operating times or the complete closure of facilities.[35] Capacity limitations restricted the number of clients that could enter harm reduction or treatment facilities, causing long wait times.[36] The reduced access to harm reduction services had the adverse effect of forcing individuals to use their drugs alone, greatly increasing the risk of fatal overdose.[37] Indeed, most fatal overdoses documented in Canada are of people who have used drugs in isolation.[38] Due to these factors, isolation is considered one of the major contributors to the increase in fatal overdoses between 2020 and 2022.

Although COVID-19 is still a present risk, this report reflects on how the pandemic exacerbated the harms for PWUD and lead to new and important conversations about the possibilities for law reform, including the decriminalization of simple drug possession in Canada.

Roadmap of the Report

In this report, we will first address the legal background of Canada's drug laws, to situate the country's past and ongoing approach to drug use. We show in this section that there is a range of alternatives to criminalization referenced in this report as *de facto* and *de jure* approaches. Next, we provide an overview of ongoing law reform proposals from civil society groups, various levels of government, the House of Commons, and the Senate. The report then analyzes the constitutional considerations embodied in these reform efforts in light of the harms experienced by people who use drugs. We explain why criminalizing the simple possession of drugs for personal consumption is likely unconstitutional and cannot be justified as a measure to protect public health and safety given the documented and measurable harms to people who use drugs. We end with a three-staged approach for reform and a series of targeted recommendations.

1. The Legal Context of Criminal Law

1.1 A Brief History of Canada's Drug Laws

In this section, we offer a brief history of Canada's drug laws from the initial introduction of the *Opium Act*[39] at the beginning of the 20th century through to the current *Controlled Drugs and Substances Act (CDSA)*[40] and the various initiatives that resulted in law reform in this field. The purposes underpinning the criminal law are examined, and we discuss how it is inappropriate to use the criminal law power to deal with minor drug offences such as simple possession. This section

also explores the distinction between criminalization, decriminalization, and legalization, as well as the different forms of decriminalization that exist in international jurisdictions. Tracing the complex history of drug laws in Canada is beyond the scope of this report. However, a number of critical milestones are worth noting here because they underpin Canada's criminalization approach:

- *Opium Act*: A starting point for Canada's criminalization approach can be found in the *Opium Act,* introduced by the federal Parliament in the early 20th century.[41] The primary focus of the *Act* was directed at the opium trade and shaped by efforts of media, politicians, and the church to portray opium use (smoking in particular) as a harmful practice that posed a threat to Canadian society.[42] As professor emeritus at the University of Victoria Susan Boyd points out in her book *Busted: An Illustrated History of Drug Prohibition in Canada,* the *Act* was, in fact, a "race-based legislation aimed at Chinese men who smoked opium."[43] As she discusses, this signaled the beginning of a racialized and classist system of drug laws by White settlers.[44] The *Act* also came on the heels of a widespread Temperance movement in Canada, that while originally directed at alcohol, spread to other drugs and psychotropic substances.[45]
- *Opium and Narcotic Drug Act*: Over time other substances such as heroin and cocaine were added to the *Opium Act* expanding the scope of Canada's non-medical drug prohibition, with restrictions on the unregulated use of these substances prohibited with the enactment of the *Opium and Narcotic Drug Act* in 1911[46] and successive amendments into the 1920s.[47]
    - In the early 1920s, cannabis was added to the *Act.*[48] In parallel to prohibitions on unregulated use, drug regulatory models shifted to pharmaceutical drug development and regulation of authorized drugs' safety, quality, and efficacy.[49] The implication of these regulatory models was a strengthened framework for the federal oversight and control of drugs and drug-related activities.
- *Narcotic Control Act*: With the introduction of the *Narcotic Control Act* in 1961, Canada gave additional tools to police and prosecutors to investigate and prosecute drug-related offences. The *Act* introduced mandatory minimum sentences for simple possession and a maximum penalty of life imprisonment for trafficking.[50] It also expanded the discretionary powers of prosecutors, police, and the judiciary in responding to drug-related activities. In the late 1960s, the federal government created two bodies which were charged with making recommendations related to drug regulation and corrections respectively: the Le Dain Commission and the Canadian Committee on Corrections. Notably, both recommended a shift away from criminal law penalties.
    - *Canadian Committee on Corrections*: In 1969, the Canadian Committee on Corrections, chaired by Quebec Superior Court Justice Robert Ouimet, was appointed by the federal government to "study the broad field of correction, in its widest sense and to recommend… what changes, if any, should be made in the law and practice resulting to these matters."[51] The Committee's final report (the Ouimet Report) proposed a shift away from a punitive approach towards a more rehabilitative approach to corrections generally, including for matters involving what it termed the "abuse" of drugs or the use of harmful drugs.

- *Le Dain Commission*: Shortly thereafter, the Commission of Inquiry into the Non-medical Use of Drugs, chaired by future Supreme Court of Canada Justice Gerald Le Dain, began its work.[52] The Le Dain Commission's mandate was to analyze specifically drug regulation and its impacts in Canada. It made a series of recommendations, including the withdrawal of criminal penalties associated with the nonmeical use of psychotropic drugs. Despite these recommendations, little change was made to the punitive focus of the *Narcotic Control Act*. Indeed, when legislative reform did occur, the punitive response to minor drug use was maintained.

- *Controlled Drugs and Substances Act*: In 1996, the federal government enacted the *CDSA*, repealing the *Narcotics Control Act*.[53] The *CDSA* maintains the prohibitionist regime for drug-related activities, with criminal penalties for offences such as simple possession, trafficking,[54] production, importing and exporting of substances listed under various schedules.[55] These multiple schedules replaced the single schedule originally used under the *Narcotic Control Act*. The new scheduling system categorizes substances based on their medical use (if applicable) and perceived potential for harm, such as risk of psychological dependency or diversion to the public.[56]
  - *Public Prosecutions Act*: On August 17, 2020, the Director of Public Prosecutions released a Guideline under Section 3(3)(c) of the *Public Prosecutions Act* detailing several principles for responding to simple possession of controlled substances under section 4(1) of the *CDSA*.[57] The Guideline's principles largely favour alternatives that do not involve prosecution. The Guideline reads, in part:

    > "The approach set out in this guideline directs prosecutors to focus upon the most serious cases raising public safety concerns for prosecution and to otherwise pursue suitable alternative measures and diversion from the criminal justice system for simple possession cases."[58]

  The Guideline calls for prosecutors to consider alternatives to prosecution "in all instances." "Resort to a criminal prosecution of the possession of a controlled substance contrary to s. 4(1) CDSA should generally be reserved for the most serious manifestations of the offence."[59] The Guideline identifies several circumstances where alternatives would be appropriate – for example, where:

  - the offence related to a substance use disorder;
  - the offender is an Indigenous person and their conduct can be addressed through an Indigenous restorative justice response; or
  - the offender's conduct can be addressed through a restorative justice response.[60]

  Although the Guideline requires consideration of alternatives to prosecution in all cases, it also identifies exceptions that justify a criminal justice response to possession offences – for example, where the conduct:

  - poses a risk to the safety or well-being of children or young persons;
  - puts at risk the health or safety of others; or
  - breaches rules of a regulated setting such as a custodial facility, jail or penitentiary.[61]

- *Cannabis Act*: Importantly, a significant recent shift in drug policy in Canada was the legalization and regulation of cannabis in October 2018. Focused on a single substance, the *Cannabis Act* and its Regulations implement a legal and regulatory framework for the

production, distribution, sale and possession of cannabis across Canada.[62] In doing so, the federal government created a framework for adults to access a legal and regulated supply of cannabis. However, it is important to note that while legalizing regulated cannabis, the *Act* maintains, and in some instances (re)introduces criminal penalties, which are in some cases more severe than under the *CDSA*, for those partaking in activities with unregulated cannabis and for minors. [63]

1.2 The Purposes of the Criminal Law

A fundamental principle underlying the criminal law is that it be used as an instrument of last resort. The limitations of the criminal law for curing societal ills and affecting social change are well understood. Recognition of these limitations has driven calls to move away from using the criminal law as a primary tool to address drug-related social and health issues. Three foundational documents are worth noting here as they provide important counter-arguments to the criminalization of such issues.

In 1969, the Ouimet Report[64] called for restraint in the use of the criminal law, including for offences for the use of drugs, which could be considered "offences without a direct victim," often called victimless crimes. The Ouimet Committee proposed the following criteria for the proper use of criminal law: [65]

- No act should be criminally proscribed unless its incidence, actual or potential, is substantially damaging to society.
- No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process. Public opinion may be enough to curtail certain kinds of behaviour. Other kinds of behaviour may be more appropriately dealt with by non-criminal legal processes, e.g. by legislation relating to mental health or social and economic condition.
- No law should give rise to social or personal damage greater than that it was designed to prevent.

The Ouimet report stipulated that designating certain conduct as criminal in an attempt to control anti-social behaviour should be a last resort. It noted that criminal law inherently involves the imposition of a sanction. The report concluded that this sanction, whether in the form of arrest, summons, trial, conviction, punishment or publicity should be employed only when it is an unavoidable necessity. Individuals may have their public and private lives irrevocably disrupted; families may be broken up; and, the state may be put to considerable expense. [66] "If there is any other course open to society when threatened, then that course is to be preferred."[67]

In 1982, the Government of Canada published *The Criminal Law in Canadian Society*.[68] In part, the report, signed by the then Minister of Justice, sought to articulate a statement of principles and objectives for criminal law based on an analysis of its basic purpose and functions.[69] It relied on existing works by the Law Reform Commission of Canada, the Ouimet Report, among others. Among the core principles was the following:

> [The] criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessarily for the attainment of its purpose.[70]

The commentary accompanying the statement of principle noted that this core principle embodies the concept of minimum necessary intervention:

> As the most serious form of social intervention with individual freedoms, the criminal law is to be invoked only where necessary, when the use of other means is clearly inadequate or would depreciate the seriousness of the conduct in question. As well, the Principle suggests that, even after the initial decision has been made to invoke the criminal law, the nature or extent of the response of the criminal justice system should be governed by considerations of economy, necessity and restraint, consonant of course with the need to maintain social order and protect the public.[71]

The *Criminal Law in Canadian Society* cautioned that restraint in the use of the criminal law should not be interpreted as a call for "laxity or leniency." The notion of restraint, it argued, "is properly understood as implying the need to carefully examine the appropriateness, the necessity, and the efficacy of employing the criminal law rather than … other, less intrusive, less coercive means of dealing with particular social problems."[72] It also addressed drug offences directly:

> In the boundary between criminal law and private morality, various concerns have been expressed about either decriminalizing or diverting from criminal prosecution many acts widely considered crimes of "going to Hell in one's own fashion", such as drug and gambling offences. Some of these offences are considered too minor to be treated with a heavy hand of the criminal law; others are thought to be more effectively dealt with through public education or regulation.[73]

As the analysis below makes clear, using the criminal law to make certain substances and certain drug-related activities illegal fails to pass this test. Historically, the criminal law has been invoked as an instrument of first, rather than last, resort. Beyond violating the repeatedly reiterated principles of the appropriate use of the criminal law, criminalization of substances magnifies the harms arising from drug use.

In his 1991 text, *High Society,* Professor and Director at the School of Criminology at Simon Fraser University Neil Boyd states:

> When we take drugs we do so to alter ordinary waking consciousness. The criminal control of a citizen's desire to alter consciousness is unnecessary. We have other at least equally useful and less punitive methods available for control: taxation, prescription, and prohibition of public consumption. But most important, we should confront our own hypocrisy. We can no longer afford the illusion that the alcohol drinkers and tobacco smokers of Canada are engaging in methods of consciousness alteration that are more safe or socially desirable than the sniffing of cocaine, the smoking or drinking of opiates, or the smoking of marijuana.

Boyd argues that:

> The answer is not to usher in a new wave of prohibitionist sentiment against all drugs, nor is the answer to allow the free-market promotion of any psychoactive. The middle ground is carefully regulated access to drugs by consenting adults, with no advertising, fully informed consumers, and taxation based on the extent and harm produced by use. There is a need for tolerance, for both tobacco and heroin addicts. And there is a need for control of the settings and social circumstances of drug use. There are no good, or bad,

> drugs, though some are more toxic, some are more likely to produce dependence, and some are very difficult to use without significant risks.... The task is to dismantle the costly and violent criminal apparatus that we have built around drug use and distribution, mindful that our overriding concern should be public health, not the self-interested morality of Western industrial culture.[74]

More than half a century after the Ouimet Report and almost four decades after the Government of Canada's statement on the appropriate use of the criminal law, debate in Canada about the appropriate role of the criminal law in dealing with drugs continues. But in many parts of the globe, including in Canada, calls for moving beyond the criminal law are growing. These calls have intensified in response to the surge in overdose deaths caused by a poisoned supply of drugs and barriers to care – both of which are, to a significant degree, consequences of criminalization.

The criminalization of drugs, and in particular simple possession, is both inconsistent with the purpose of the criminal law and magnifies a range of harms, including overdose deaths, for people who use drugs. There are many other reasons for ending such heavy reliance on the criminal law discussed in the remainder of this report.

1.3 Alternatives to Criminalization

The need to move away from criminalization towards a public health and a human rights-based approach, is now recognized by many in the international community.[75] In 2019, the UN Chief Executive Board, on behalf of the United Nations released its common position on drug policy, as adopted internally in 2018. Under the 'Directions for action' referenced in Annex I of the UN system common position, the UN promotes alternatives:

> To promote alternatives to conviction and punishment in appropriate cases, including the decriminalization of drug possession for personal use, and to promote the principle of proportionality, to address prison overcrowding and overincarceration by people accused of drug crimes, to support implementation of effective criminal justice responses that ensure legal guarantees and due process safeguards pertaining to criminal justice proceedings and ensure timely access to legal aid and the right to a fair trial, and to support practical measures to prohibit arbitrary arrest and detention and torture;[76]

In 2017, 12 UN entities issued a joint statement on stigma and discrimination within health-care settings and called on countries to review and repeal punitive laws:

> Review and repeal punitive laws that have been proven to have negative health outcomes and that counter established public health evidence. These include laws that criminalize or otherwise prohibit gender expression, same sex conduct, adultery, and other sexual behaviours between consenting adults; adult consensual sex work; drug use or possession of drugs for personal use; sexual and reproductive health care services, including information; and overly broad criminalization of HIV non-disclosure, exposure, or transmission.[77]

Canada is signatory to several international treaties which set out obligations for drug control, including the *Single Convention on Narcotic Drugs of 1961*, as amended by the *1972 Protocol;* the *Convention on Psychotropic Substances;* and the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.*[78] Some have argued that these

conventions preclude the Government of Canada from adopting an alternative approach to criminalization. A number of organizations agree with the UN common position, the HIV Legal Network, the International Guidelines on Drug Policy and Human Rights, and the Expert Task Force on Substance Use[79] - mandated in 2021 by the Minister of Health to provide the Government of Canada with independent, expert advice and recommendations; that these conventions do not preclude decriminalization of simple possession in Canada.[80] We also agree with this position. As the HIV Legal Network states, and is reiterated by the Expert Task Force in its report:

> Under international law, Canada has both important latitude under the drug control conventions, and important obligations under human rights treaties it has ratified. It can and should use that latitude in the realm of drug control to better respect, protect and fulfil the human rights it has pledged to uphold, and which are also embodied to various degrees in its own constitution.[81]

Further, as is discussed in more detail below, decriminalization of simple possession is consistent with the individual rights protected by the *Canadian Charter of Rights and Freedoms* (the *Charter*)[82] and the 2015 Truth and Reconciliation Commission of Canada: Calls to Action.[83]

2. Forms of Decriminalization

Broadly speaking, decriminalization refers to a change in the criminal status of a specific behaviour, specifically by removing or minimizing criminal prohibitions, and it functions as an umbrella term to describe varying types and forms of policy action.[84] "Decriminalization" does not represent a single approach, intervention, or model; rather it describes a range of principles, policies and practices that can be implemented or adopted by various levels of governments and stakeholders, depending on the jurisdiction and local context.[85] Drug decriminalization generally refers to the non-application of criminal and/or punitive penalties, mainly those directed at people who use drugs and often, in particular, the simple possession of drugs. In reference to use and simple possession, it does not inherently create the conditions for legally supplying drugs (a feature of legal regulation), although some expansive approaches to decriminalization have extended beyond simple possession (as noted below).

Over the years, a number of countries have moved away from criminal and other punitive penalties for certain drug-related activities, with over 30 jurisdictions adopting some form of decriminalization.[86] These developments have varied, with some countries formally eliminating specific drug-related crimes from their criminal laws, such as Portugal's removal of criminal penalties for personal use in 2001; others have implemented decriminalization informally, through practice and policy decisions such as the local police force electing not to charge people criminally for simple possession.[87] In other words, even within states there may be differences at the local level. Some decriminalization efforts focus on the removal of sanctions for a specific activity (e.g., simple possession) for all drugs, while others focus on decriminalizing numerous activities associated with a single drug (e.g., cannabis).[88]

Decriminalization efforts can be characterized as either ***de facto*** or ***de jure.*** In the case of ***de facto*** (in practice) decriminalization, drug-related crimes remain formally "on the books," but are not enforced in practice.[89] With ***de jure*** (in law) decriminalization, criminal and other punitive penalties for selected activities are formally removed through legal reforms.[90]

2.1 Distinction Between De Jure *(in law) &* De Facto *(in practice)*

International scholars have categorized at least six models of decriminalization represented across 50 jurisdictions internationally - *de facto* depenalization, *de facto* police diversion, *de jure* police diversion, decriminalization with civil penalties, decriminalization with targeted health and social referrals, and decriminalization with no sanctions. While there is latitude and some conflation between and among terminology used to signal various decriminalization models across jurisdiction and context, in this report we use the following.[91]

- ***De jure*** decriminalization involves the formal removal of criminal penalties associated with a specific activity and typically requires legislative amendments to a country's criminal and/or other laws.[92] Alternatively, *de jure* decriminalization can be achieved through the courts, in which certain criminal sanctions associated with specific activities are declared unconstitutional or otherwise invalid.[93] This has increasingly been the case with specific criminal laws associated with cannabis possession, with a number of higher-level courts in various countries finding these laws invalid.[94] *De jure* decriminalization can vary in scope, depending on the level of implementation, form of proposed change and context of local environment (e.g., political, cultural attitudes towards drug use). Some models replace criminal penalties with civil penalties (such as a fines) or administrative penalties (such as a ban on frequenting a designated area or even more intrusive restrictions on liberty), while others simply remove the criminal penalties associated with the activity and re-focus resources on community supports and/or other responsive health and social programming.[95]
- ***De facto*** decriminalization refers to the non-application of the criminal law, often through informal or discretionary practice.[96] The offence and associated penalties still exist formally "on the books," leaving an individual at risk of being criminally prosecuted and punished. However, the law may not necessarily be applied, or may be applied only in certain circumstances or against certain people. As with *de jure* decriminalization, there are various forms and ways in which *de facto* decriminalization can be implemented for drug-related offences. It can occur through the non-enforcement of the criminal law, such as through police discretion and informal police/prosecutorial guidelines, or through referral of individuals to education or treatment (e.g., pre-charge diversion programs, or some drug treatment courts).[97] However, it is important to note that in Canada, drug treatment courts remain embedded within the criminal legal system, with the use of possible criminal sanctions still operative and some requiring a guilty plea for participation.

2.2 National De Jure *Decriminalization*

2.2.1 Portugal

Portugal is a well-recognized example of *de jure* decriminalization.[98] In 2001, the national government enacted *Law 30/2000*, which removed criminal penalties for possession of up to a 10-day supply of all illegal drugs, including MDMA, cocaine, heroin, and ecstasy (where there is no suspicion of involvement in drug trafficking), reclassifying the activity as an administrative offence rather than a criminal one.[99] Individuals intercepted with drugs below the possession limit appear before a dissuasion committee comprised of health and legal experts.[100] Regarding possession, an individual can possess up to 25 grams of herbal cannabis, 1 gram of ecstasy, 1 gram of heroin or 2 grams of cocaine. The legal reform was part of the country's comprehensive shift in approach

to drug use that included substantial funding to harm reduction programs and other health and social services.[101]

Portugal's approach to drug possession can be viewed as an example of national *de jure* decriminalization through formal legislative change. Key parameters include thresholds (i.e. quantity of substances in one's possession) of 10 days' worth of substance for personal use; administrative penalties (fines) for those not involved in drug trafficking (no fine for first offence, option to be re-directed to services); referral to criminal court for those involved in drug trafficking and those identified with drugs in a situation with one or more aggravating factors (e.g. abused a position of trust, delivered to minors, involvement in other organized criminal activities of an international dimension). Police remain frontline decision-makers (at the scene), however if a person is charged with an administrative offence, the Commission for the Dissuasion of Drug Addiction is responsible for determining the disposition.[102]

In the two decades following Portugal's decriminalization efforts and broader shift in its approach to drugs, Portugal retains one of the lowest rates of drug use in Europe. Arrests, incarceration, disease, overdose rates and deaths, and other related harms have decreased.[103] The model remains the most well-studied internationally and since its implementation in 2001 has been adopted, in some form, by other jurisdictions, including by the state of Oregon in 2020.[104] While representing a change in model and approach, it is important to note that the shift from 'criminalizing responses and towards public health-oriented approaches' may in some instances merely replace criminal provisions with administrative provisions such as fines and/or coercive or involuntary measures.[105]

2.2.2 Spain

In Spain, the control of drug supply falls within the criminal sphere, with severe penalties for trafficking, supplying or selling drugs.[106] However, the country differs from most jurisdictions in that it is not considered a criminal offence to obtain, by purchase or cultivation, a prohibited drug for personal use – as long as it is not done to supply others. [107] Simple possession or use of small amounts of drugs has never been criminalized in Spain; rather, the consumption of drugs in public places, streets, establishments, or conveyances is punishable with an administrative fine, varying between EUR 601 and 30,000.[108] It is also not a criminal offence for a user to share a drug with friends or other habitual drug users if there is no danger of a wider dissemination and if the distribution is not done in public.[109] Indeed, Spain can be compared to Portugal in that drug use and possession for personal use do not generate criminal penalties.

While Spain does not have criminal sanctions associated with simple possession and use, the country's restrictive and severe administrative penalties associated with personal possession, mixed with the central government's hesitation to support sub-national drug policy initiatives, has led some to refer to the Spanish model as a watered-down version of decriminalization.[110] As with Canada, drug policy in Spain operates in a multi-level political structure with local, state (provincial) and central (federal) governments involved in providing various components of health and social service and oversight/enforcement of administrative penalties. While simple possession and the personal use of drugs may not be criminalized, the supply and traffic of drugs still is, which can create operational challenges for sub-national governments seeking to implement alternative drug policy measures such as safe consumption sites or cannabis clubs. [111]

2.3 National De Facto *Approaches*

2.3.1 Switzerland

Switzerland is well-recognized for its adoption of innovative harm reduction and drug policies aimed at supporting people who use drugs. Many of these policies were the result of grassroots efforts, with the bottom-up efforts eventually affecting national and global policy.[112] For example, the world's first supervised consumption site was opened in Berne, Switzerland in 1986, with one of the world's first heroin-assisted treatment pilots following in 1994.[113] These local initiatives faced important pushback. They were initially threatened with federal sanctions however, facing high rates of HIV prevalence, the Federal Office of Public Health would support more than 300 programs between 1991-1999 focused on public health as part of national trial model where the law was adapted to permit prescribing of heroin by qualified providers to patients.[114] The country also led the implementation of the four-pillar model of "prevention, treatment, harm reduction, and enforcement" that guides many jurisdictions' drug strategies, including Canada's current federal policy.[115]

In terms of legal framing, Switzerland maintains a broad prohibition on the simple possession of drugs under the country's federal *Narcotic Act.* However, in 2013, the country introduced a *de facto* model of decriminalization through the *Amendment to the Federal Act on Narcotic and Psychotropic Substances* (for all substances except cannabis*).*[116] Under the amendment, possession and use may still result in criminal penalty. However, for small quantities for personal use, a waiver of sentence or warning will be given. Enforcement of the Act is left largely to the responsibility of the cantons. As a result, local responses to drug use across the country may vary, with police determining whether possession is for personal use.[117]

2.3.2 Netherlands

In 1976, the Netherlands passed the *Opium Act Directive,* which instructed prosecutors not to prosecute possession of roughly a single dose of any drug for personal use. Neither civil nor criminal penalties applied to possession of amounts equal to or lesser than this threshold.[118] In 1979, the *Guidelines for Investigation and Prosecution* came into force, which set national guidelines related to prosecuting certain types of drug-related activity. For example, under these guidelines, the retail sale of cannabis to consumers was to be tolerated by enforcement and prosecution, as long as the dealer met the criteria of no advertising, no hard drugs, no nuisance, and no under-age clientele (and later no large quantities).[119] In effect, the directive enabled the regulated "coffee-shop" market currently operating in the country for cannabis (and other drugs), and a *de facto* decriminalization model of drug control.[120] The primary objective of the Netherlands decriminalization policy focuses on reducing harms that may be associated with drug use.[121]

3. Law Reform Proposals in Canada

In recent years, the Canadian government has been asked to decriminalize simple drug possession by several groups, organizations, and scholars. Organizations calling for drug decriminalization include, but are not limited to, the Canadian Association of People who Use Drugs (CAPUD), the Canadian Association of Chiefs of Police, and the Centre for Addiction and Mental Health (CAMH), mayors of several large cities, members of federal and provincial political parties, and in 2022

over twenty organizations released their civil society call for action including the Canadian Public Health Association, Canadian Mental Health Association, and the Canadian Nurses Association.[122]

In this section of the report, we first address a few examples of subnational decriminalization efforts in Canada. We then consider several law reform initiatives that have been proposed by various municipalities, individual senators, and members of parliament. Finally, we examine the claim that the current provisions of the *CDSA* are not consistent with the *Charter* given the substantial harms arising from criminalization.

3.1 Decriminalization Efforts in Canada

Under s.4, the CDSA imposes criminal penalties ranging from three to seven years for possessing (s.4(1)) or obtaining (s.4(2)) a listed substance. There have been both *de jure* and *de facto* efforts to decriminalize simple possession of drugs in Canada. For instance, as we note on page 5, the guideline released under Section 3(3)(c) of the *Director of Public Prosecutions Act* (DPP Act) in 2020 by the Director of the Public Prosecutors details several principles for responding to simple possession of controlled substances under section 4(1) of the *CDSA*, including when the use of alternatives would be appropriate.[123] The *CDSA* also permits activities relating to illicit drugs under certain circumstances. Section 55 allows the Governor in Council to make regulations for the medical, scientific and industrial applications relating to substances controlled under the *CDSA*. Furthermore, section 56(1) authorizes the federal Minister of Health to issue exemptions from the application of the *CDSA* for medical and scientific purposes or as otherwise deemed in the public interest. Section 56.1 allows the Minister to grant exemptions deemed "necessary for a medical purpose" to allow otherwise illegal activities to take place at a supervised consumption site.

In recent years, a number of exemptions have been granted pursuant to sections 56 or 56.1. Perhaps most notable are exemptions for medically necessary health services, such as safe consumptions sites. One of the most visible examples is Vancouver's PHS Community Services, also known as Insite, which was at the centre of the Supreme Court of Canada's decision regarding the proper exercise of the federal Minister of Health's discretion under then section 56, later replaced by sections 56(1) and 56.1 which considerably modified the process for obtaining ministerial exemptions.[124] Section 56.1 is the section that now governs exemptions relating to supervised consumption sites.

Section 56(1) provides a pathway for exemptions based on medical necessity, scientific research, or as otherwise deemed "in the public interest."[125] Section 56(1) exemptions have been expanded since 2018, including to allow for pharmacy-based distribution of controlled substances, access to psilocybin for terminally ill patients, and use of a controlled substance for clinical studies, among others.[126]

Some municipalities and provinces have also applied for or are considering seeking exemptions under section 56(1). In 2021, and as described further below, the City of Vancouver and the Province of British Columbia sought such exemptions for simple possession pursuant to this section. The Province of British Columbia was granted an exemption to remove criminal penalties for people who possess a small amount of certain illicit substances in 2022, with the exemption in effect from January 31, 2023 to January 31, 2026. Other cities are considering or have already submitted exemption requests, including the City of Toronto in January 2022.[127] To help in requesting an exemption, the HIV Legal Network has developed a primer outlining the process through which provincial and municipal governments can request an exemption under section 56(1).[128]

Another example of a partial form of drug decriminalization at the federal level is the *Good Samaritan Drug Overdose Act*[129] which offers some protection to those who experience or witness an overdose and seek emergency medical or law enforcement assistance. The *Act* amends the *CDSA* to exempt individuals who report overdoses from charges they may otherwise face for a simple possession offence under the *CDSA* if authorities find them in possession for their own use. The exemption does not, however, protect an individual from charges for drug trafficking or other *CDSA* offences, charges for other illegal activity beyond the *CDSA,* or enforcement of outstanding warrants, violations of bail, and/or sentencing conditions. [130]

3.2 Law Reform Proposals

In this section, we describe various law reform proposals at different stages of development.

3.2.1 City of Vancouver: The Vancouver Model

The City of Vancouver has taken steps to locally decriminalize simple possession. In November 2020, Vancouver's city council unanimously passed a motion seeking an exemption under section 56(1) of the *CDSA*. The city's final submission was sent to Health Canada in May 2021. Several other municipalities have indicated that they will also seek a section 56(1) exemption.

The proposal, referred to as the Vancouver Model, seeks to accomplish several goals.[131] It sets threshold volumes for different substances, below which adults will not be charged for simple drug possession and their drugs will not be confiscated when there is no evidence of drug trafficking. Individuals who possess drugs below the threshold may be given a referral to the Vancouver Coastal Health Overdose Outreach Team, a health care resource. Importantly, the proposed thresholds are 2 grams of opioids, 3 grams of cocaine, and 500 mg of prescription stimulants, among other substances.[132] In cases where a person may be found with an amount above the threshold, police will continue to use their discretion to not lay charges to and divert individuals to the health care pathway. The model provides that there are no administrative or other penalties for individuals possessing drugs below the threshold limits when there is no evidence of trafficking or another offence.

Criticisms include that the proposed model fails to prioritize the health and rights of those at the centre of the issue - people who use drugs. The Vancouver Area Network of Drug Users notes the City's failure to meaningfully consult with people who use drugs when developing the model. Pivot Legal Society, the HIV Legal Network, the Canadian Students for Sensible Drug Policy, and other organizations raised additional concerns about the setting of drug threshold amounts, the considerable role of the Vancouver Police Department in the initial development of the model, and failure to adequately consult with those the request seeks to encompass.[133]

3.2.2 Province of British Columbia

On November 1, 2021, the province of British Columbia submitted a proposal to Health Canada seeking an exemption under the *CDSA.*[134] The proposal seeks to "exempt all persons in British Columbia 19 years of age or older from the application of section 4(1) – the section prohibiting possession – on the condition that the amount of any controlled substance in their possession does not exceed the thresholds for 'personal possession' set out in a Schedule." The Schedule includes thresholds for a range of substances with the cumulative quantity outlined as 4.5 grams. Notably, the submission acknowledges that the proposed framework may be subject to change

as a result of ongoing dialogue and consultations between Health Canada and the provincial government.

On May 31, 2022 the Government of British Columbia announced it had been granted an exemption under subsection 56(1) of the CDSA by the federal Minister of Mental Health and Addictions and Associate Minister of Health. The exemption removes criminal penalties for people in possession of 2.5 grams of certain substances (e.g. opioids, cocaine, MDMA) for personal use. Those found in possession will instead be provided with information on local health and social services with voluntary referral services. The threshold of 2.5 grams is cumulative and will apply to adults aged 18 years of age. The exemption came into effect in January 31, 2023 and will run until January 31, 2026, applying throughout the Province of British Columbia.[135] As a pilot project, the exemption is time-limited and does not allow for possession in certain spaces (e.g. in and surrounding schools, airports) and does not apply to activities such as import or export, production, trafficking (e.g. sold, supplied, given away, etc.). The exemption and process for the exemption has been criticized, for its reliance on feedback from law enforcement in defining parameters of thresholds, length of time spent in review, among others.[136]

3.2.3 Federal Law Reform Proposals

- ***Bill C-5*** *An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act*[137]

  The Minister of Justice introduced Bill C-5 on December 7, 2021. It is the successor to Bill C-22, *An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act.* Bill C-22 had been introduced on February 26, 2021 but died on the Order Paper with the calling of the 2021 federal election. Part I.1 of Bill C-5 focuses on "Evidence-based Diversion Measures", which includes a Declaration of Principles. Among other things, these Principles acknowledge the stigma associated with criminalizing drug possession for personal use and seek to address drug use primarily as a health and social issue by adopting "evidence-based diversion measures."[138] Bill C-5 outlines several amendments to the *CDSA* that seek to reflect these principles. First, the Bill abolishes mandatory minimum sentences for all drug offences covered under the *CDSA*, in addition to other listed offences under the *Criminal Code*.[139] Second, it removes limitations placed on the use of conditional sentences.[140] Conditional sentences are sentences that are less than two years long that are served in the community and are sometimes referred to as "house arrest". Third, *Bill C-5* amends the *CDSA* to require police and Crown attorneys to consider alternatives to criminal charges and prosecution.[141] For peace officers, these alternatives include taking no further action, issuing a warning, or referring an individual to a treatment program with their consent. Prosecutors are only to initiate or continue a prosecution for simple possession where the prosecutor is of the view that a warning, referral, or other alternative measure (such as drug treatment court)[142] is not appropriate.

- ***Bill C-216:*** *An Act to amend the Controlled Drugs and Substances Act and to enact the Expungement of Certain Drug-related Convictions Act and the National Strategy of Substance Use Act*[143]

  On December 15, 2021, Gord Johns, M.P. (NDP, Courtenay-Alberni), introduced a private member's Bill C-216: *An Act to amend the Controlled Drugs and Substances Act and to enact the Expungement of Certain Drug-related Convictions Act and the National Strategy*

of Substance Use Act. The Bill aims to resituate Canada's approach to substance use and would: (1) repeal s. 4 of the *CDSA* which is a provision making it an offence to possess certain substances, and consequential amendments to other Acts; (2) establish a procedure for expunging certain drug-related convictions for simple possession and providing for the destruction or removal of judicial records of those convicted that are held in federal repositories and systems; and (3) require the Minister of Health to develop a national strategy to address harm caused by problematic substance use. [144] The Bill failed to reach Committee for review during its second reading on June 1, 2022 in a vote of 248 to 71.[145]

3.2.4 Expert Reports & Recommendations

Various expert bodies and task forces have recommended decriminalization of simple possession for personal use as part of their overall recommendations regarding controlled substances. Here we highlight the recommendations of two expert bodies comprising a range of voices in Canada affected by and implicated in drug reform efforts. These two bodies are representative of a wider chorus of voices from domestic and international stakeholders involved in public health, public safety, criminal justice, and civil society, among others.

- ***Civil Society Platform on Drug Decriminalization***

  The Civil Society Platform on Drug Decriminalization consisting of representatives from over twenty civil society organizations including the Canadian Drug Policy Coalition, the HIV Legal Network, Pivot Legal Society and others, released a series of recommendations on decriminalization based on consultation with people who use drugs, their families, communities, front-line providers, and researchers. [146] The Platform made a number of recommendations that seek to protect and advance the health and human rights of people who use drugs. These included decriminalizing drugs for personal use via a full repeal of the prohibition on simple possession under section 4(1) of the *CDSA,* as well as decriminalizing necessity trafficking defined as sharing and selling of drugs for subsistence, to support personal drug use costs and to provide safe supply, via an amendment to section 5 of the *CDSA* which criminalizes trafficking and possession for the purposes of trafficking. Trafficking includes any act of selling, administering, giving, transferring, transporting, sending or delivering of a controlled substance – or offering to do any of these things – unless authorized by a regulation, whether for a profit or for free. The Platform further recommended that all sanctions and interventions associated with simple drug possession or with necessity trafficking be removed. These include administrative penalties; confiscation of substances, paraphernalia or medical supplies; geographic, drug use or personal contact restrictions or curfews; drug treatment courts as a coercive alternative to criminal sanctions; and other coerced or involuntary treatment or other health interventions. [147] The Platform also recommends a redirection of resources from criminalization into evidence-based health and other social services.

- ***Health Canada Expert Task Force on Substance Use***

  In 2021, Health Canada convened an Expert Task Force on Substance Use which was charged with providing independent expert advice on alternatives to criminal penalties for the simple possession of controlled substances and the federal government's drug policy set out in the *Canadian Drugs and Substances Strategy (CDSS)*.[148] The Task Force generated two reports containing recommendations regarding the federal government's

drugs policy and alternatives to criminal penalties. With respect to decriminalization, the Task Force unanimously recommended that the "Government of Canada end criminal penalties related to simple possession." Notably, the Task Force endorsed a much more significant change to the legal frameworks that govern substance use. It recommended the creation of a single legal framework governing all psychoactive substances, including currently illegal drugs, tobacco, cannabis and alcohol. This proposed legislative change would bring the *CDSA,* the *Tobacco and Vaping Products Act (TVPA)* and the *Cannabis Act* together under one statute.[149]

4. Constitutional Considerations

We now turn to consider the constitutionality of the current criminal prohibition on simple possession. On August 31, 2021, the Canadian Association of People Who Use Drugs (CAPUD), and individual plaintiffs[150] filed an application in the Supreme Court of British Columbia which claims that s. 4 and s. 5 (to the extent that it relates to necessity trafficking) of the *CDSA* which refer to drug possession infringe sections 7, 12 and 15 of the *Charter* and cannot be justified under section 1 of the *Charter*. [151] In light of this case, the arguments relating to the constitutionality of the *CDSA*'s criminal law regime are outlined below.

4.1 Section 7 of the Charter: The Right to Life, Liberty, and Security of the Person

Section 7 of the *Charter* guarantees everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[152] The courts apply a two-step test analysis to determine whether section 7 has been violated. First, the claimant must establish that a right to life, and/or liberty and/or security of the person has been violated. Second, the claimant must establish that the deprivation of these rights does not meet the requirements of fundamental justice.

In the *Insite* case, as discussed above, the claimants relied on section 7 to challenge the federal health minister's refusal to grant an exemption under the *CDSA*[153] that was necessary to enable Insite's staff to provide supervised injection services to its clients without risk of criminal prosecution.[154] The Supreme Court found that, without such an exemption, Insite's staff was at risk of imprisonment for illegal possession of drugs – an infringement of their right to liberty.[155] About Insite's clients, the Court ruled that: "To prohibit possession by drug users *anywhere* engages their liberty interests…"[156] The Court also held that the government had violated the claimants' section 7 rights to life and to security of the person.[157] Chief Justice McLachlin affirmed that: "Where a law creates a risk to health … a deprivation of the right to security of the person is made out …Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer."[158]

4.1.1 Criminalization & The Right to Liberty

Each year, thousands of people across the country are charged with possession of illegal drugs for personal use and face the threat of imprisonment for a period of up to seven years under section 4(1) of the *CDSA*. The Supreme Court's ruling in *Insite*, as well as its earlier judgment in *R v Malmo-Levine*; *R v Caine*,[159] establish that the threat of imprisonment for drug possession for personal use under section 4(1) of the *CDSA*, without more, likely infringes the right to liberty under section 7 of the *Charter*.[160]

4.1.2 Criminalization & the Right to Life and to Security of the Person

Criminalization interferes with the access of people who use drugs to health and social services, exposes them to a toxic unregulated illicit drug supply, worsens the inequities related to the social determinants of health and results in stigma and discrimination. As outlined below, social inequities arising because of the criminalization of substances are not equally distributed. Groups such as women, trans, non-binary identifying persons, Black, Indigenous, and other racialized minorities, and sexual minorities, face a disproportionate burden of harms related to unjust public health and criminal justice policy.[85-89]

Further, those imprisoned for contravening section 4(1) of the *CDSA* suffer not only a deprivation of liberty, but immediate and longer-term harms to life and security of the person.[161] Canada's Correctional Investigator found that, in 2014, 80% of people incarcerated in a federal prison had serious substance use problems and over half reported a link between alcohol or drug use and their crimes.[162] Despite this, health care and harm reduction services in Canada's prisons are egregiously substandard to the care and services provided in the community as a whole. As the Canadian Mental Health Association explains: "Contrary to the logic of criminalization, incarceration does not result in the cessation of substance use, nor does it prevent harm." [163] For those who use drugs in prisons, drug use is much riskier "because of the absence of sterile equipment for drug consumption, which … contributes to higher incidences of HIV and Hepatitis C virus (HCV). Furthermore, prisons are experiencing higher rates of poisonings with the contamination of substances with fentanyl and fentanyl analogues."[164] Naloxone access is also uneven, and in most prisons, the medication is only accessible via correctional staff. The Association notes that, beyond an immediate risk to life and health, "incarceration poses a significant barrier to recovery from substance use disorders, given that access to treatment is often limited for Canadians behind bars."[165]

Other serious threats to the life and security of those imprisoned for drug possession include exposure to physical violence and criminal subculture, trauma, aggravated mental illness, inadequate medical care, family separation, including separation from children, internalized stigma "which can cause acute mental suffering."[166] After release, the negative consequences of criminalization persist, including social stigma and a greatly increased risk of death from overdose and drug poisoning in the period immediately following release.[167] Over the longer term, "incarceration presents barriers to re-entry into general society, and increases a wide range of challenges from employment … to housing (that can directly and negatively affect health and well-being.)"[168]

Violations to the right to life and security of the person likely extend well beyond those who are imprisoned, to include persons who are charged and convicted but not incarcerated, and those who use and depend on illegal drugs more generally.[169] As University of Windsor professor of law emeritus, William A. Bogart explains: "If something is a criminal act, individuals are reluctant to admit to doing it for fear that they will be apprehended and punished. Prohibiting an activity can also stigmatize those engaged in such actions. Criminalizing [drug use] has driven users into the margins and created barriers to them receiving counselling and treatment they may need."[170]

In the context of Canada's highly toxic illegal drug supply, criminalization has done more than hinder drug users' access to health and other services, it has significantly increased their risk of death. Creating and reinforcing social, structural and internalized stigma results in deprivations

for people who use drugs. Dr. Bonnie Henry, British Columbia's Public Health Officer states, "Some people in possession of illegal drugs will not seek out supervised consumption, overdose prevention, or treatment services for fear of being arrested; instead, they will use drugs alone, increasing their risk of dying from a potential overdose."[171] When contrasted to the approach to prescription drugs, the impact of criminalization on the life and security of those who use and depend on illegal drugs is glaringly obvious:

> ... hospitals dispense opioids every day to relieve pain. These drugs are not killing people because the quality of the supply is regulated, the dosages are managed, ingestion is overseen and, should a problem arise, there are trained people on hand who can intervene and who are not made afraid by the spectre of criminalization and stigma. Proponents of harm reduction argue that context matters and shunting drug consumption out of sight while criminalizing and stigmatizing it does the opposite of keeping people safe.[172]

By any measure, the harm caused by section 4(1) of the *CDSA* to the physical and mental health and wellbeing of those who use and depend on illegal drugs almost certainly constitutes a violation of their section 7 rights to life, liberty and security of the person.

4.1.3 Criminalizing Possession for Personal Use: The Principles of Fundamental Justice

Section 7 prohibits any deprivation of life, liberty or security of the person that is not "in accordance with the principles of fundamental justice."[173] The Supreme Court has affirmed that "a criminal law that is shown to be arbitrary or irrational will infringe s. 7."[174] In *Malmo-Levine*, the Court found that prohibiting the possession of cannabis under section 4(1) of the *CDSA* did not offend the principles of fundamental justice because, in the majority's view, "criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug … and … the continuing view that its use should be deterred … The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm."[175]

In its subsequent judgment in *Chaoulli v Quebec (Attorney General)*, the Court set out two standards for determining arbitrariness: first, whether the deprivation of life, liberty or security of the person is "necessary" to achieve the government's objectives and, second, whether it is "inconsistent" with those objectives.[176] In *Insite*, the Court concluded that the failure to grant Insite an exemption from the *CDSA* was arbitrary under either approach, since it undermined rather than furthered the government's objectives of maintaining and promoting public health and safety.[177] In particular, the Court pointed to the fact that criminal prohibitions had done little to reduce drug use and that, while Insite was operating, the risks of death and disease for people who use drugs had been reduced.[178]

A criminal law that is grossly disproportionate will likewise infringe section 7 of the *Charter*. In *Malmo-Levine*, the Court also rejected the claimants' argument that the prohibition on possession of cannabis violated the principles of fundamental justice because its adverse effects were "grossly disproportionate" to its purposes.[179] In the majority's view, the impact of section 4(1) of the *CDSA* on accused persons, including the possibility of imprisonment and of having a criminal record, did not trigger a finding of gross disproportionality in that case.[180] In contrast, in the *Insite* case, the Court concluded that the Minister of Health's failure to grant an exemption from the *CDSA* was fundamentally unjust because the harm caused to Insite's clients was "grossly disproportionate

to the benefit that Canada might derive from presenting a uniform stance on possession of narcotics."[181]

In *R v Morgentaler*, Justice Wilson ruled that an interference with life, liberty or security of the person "which has the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles of fundamental justice"[182] and, in that case, that criminalizing women's access to abortion was fundamentally unjust because it violated their right to freedom of conscience under section 2(a) of the *Charter*.[183] The parallel argument that discriminatory violations of life, liberty and security of the person are fundamentally unjust in light of section 15's equality guarantee was reinforced by Justice L'Heureux-Dubé's affirmation, in *New Brunswick (Minister of Health and Community Services) v G (J)*, that: "The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society."[184]

As a result, a court may find that criminalizing possession of drugs for personal use under section 4(1) of the *CDSA* violates section 7 principles of fundamental justice because it is an arbitrary and grossly disproportionate infringement of the life, liberty and security of the person of those who use drugs.

Almost 20 years after the Supreme Court's decision relating to cannabis in *Malmo-Levine*, and consistent with its findings in relation to supervised injection services in *Insite*, there is a strong argument that prohibiting drug possession for personal use is inconsistent with the *CDSA*'s objectives of reducing the harms of illegal drug use, and of safeguarding individual and public health and safety. Health and human rights experts and those with lived experience have long argued, and more than half of Canadians now agree, that: "If the intention of a prohibition-based system was to protect individuals from harms inherent to substance use, then this policy approach has significantly failed to achieve this goal at an individual or population level. Evidence shows that this approach has had the opposite effect and has substantially increased harms."[185] As the Canadian Association of Chiefs of Police concludes: "We must adopt new and innovative approaches if we are going to disrupt the current trend of overdoses impacting communities across Canada. Merely arresting individuals for simple possession of illegal drugs has proven to be ineffective."[186]

There is no debate that criminalization "is the major cause of stigma related to drug use" and that, by creating and reinforcing social, structural and internalized stigma, section 4(1) of the *CDSA* seriously undermines the *CDSA*'s public health and safety purposes.[187] Toronto's Overdose Action Plan points out that: "Stigma is not a deterrent to drug use, it simply pushes people farther into isolation, marginalization and further harm."[188] As described above, the damaging effects of stigma caused by criminalizing drug possession are exacerbated in the context of Canada's toxic drug supply. B.C. Provincial Health Officer Dr. Bonnie Henry explains: "Stigma matters because it undermines the response to the overdose crisis … at every turn. It negatively impacts the lives of people and the ability of some individuals to receive or access basic health [needs] … and … influences public support for evidence-based strategies that save lives and link people to treatment, such as supervised consumption services."[189] In the words of Vancouver addiction medicine specialist Dr. Derek Chang, "addiction does not kill a person on its own. Stigma does."[190]

The federal government has acknowledged that: "Reducing stigma is key to effectively addressing problematic substance use and is a critical step in recognizing the fundamental rights and dignity

of all Canadians, including those who use substances."[191] As described above, the "Declaration of principles" for "evidence-based diversion measures," set out in Part I.1 [clause 20] of *Bill C-5*, affirms that:

1. problematic substance use should be addressed primarily as a health and social issue;
2. interventions should be founded on evidence-based practices and should aim to protect the health, dignity and human rights of individuals who use drugs and to reduce harm to those individuals, their families and their communities;
3. 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;
4. interventions should address the root causes of problematic substance use, including by encouraging measures such as education, treatment, aftercare, rehabilitation and social reintegration;
5. resources are more appropriately used in relation to offences that pose a risk to public safety[192]

The harmful impact of section 4(1) of the *CDSA* in Canada today is incontrovertible. A direct connection has been drawn between criminalization and the national epidemic of overdose injuries and deaths that began well before COVID-19, and that has only worsened since.[193] Criminalizing drug possession for personal use undermines rather than protects the "health, dignity and human rights" of people who use drugs, and criminalization increases, instead of reducing, harm to "those individuals, their families and their communities."[194] Given the federal government's avowal under *Bill C-5* that criminalization stigmatizes those who use illegal drugs, and that criminal sanctions are "not consistent with established public health evidence,"[195] it is no longer possible to maintain that section 4(1) is consistent with advancing the health and safety purposes of the *CDSA*.

Maintaining, *versus* abandoning, the criminal prohibition against drug possession for personal use under section 4(1) of the *CDSA* is likely an arbitrary means of realizing the government's objectives. In the words of the Canadian Mental Health Association: "The evidence strongly suggests that policies that punish and criminalize people who use illegal substances are ineffective … decriminalization will help treat problematic substance use as a health issue rather than a criminal one, will redirect resources from the criminal justice system into health care and will begin to address the stigma that acts as a barrier to treatment."[196] Put more simply: "Decriminalization is the first step towards reconciling a drug strategy that is at odds with itself."[197] In the *Insite* case, the Minister of Health's failure to grant an exemption from the criminal prohibitions in the *CDSA* was found to be an arbitrary violation of the section 7 rights of those benefitting from this health service. More than a decade later, the threat to the life, liberty and security of all persons using illegal drugs in Canada is, if anything, more severe and therefore the arbitrariness of section 4(1) of the *CDSA* appears to be more obvious.

In addition, it is likely a court would find section 4(1) of the *CDSA* contravenes section 7 principles of fundamental justice because criminalizing drug possession for personal use is "grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused" by illegal drug use.[198] The Canadian Public Health Association makes the point that: "Criminalization does not reduce the likelihood of illegal psychoactive substance use, and often results in stigmatization and other harms to those caught

in possession of small amounts of substances for personal use. The effect of this criminalization often does not reflect the severity of the crime." [199] Dr. Bonnie Henry decries the situation in her province: "The current regime has resulted in the criminalization of hundreds of thousands of British Columbians whose only 'crimes' were the desire or need to use illegal substances."[200] Instead of protecting them from harm, section 4(1) of the *CDSA* has resulted in increased illness, suffering and countless needless deaths of people who use illegal drugs across the entire country – a grossly disproportionate effect that likely does not accord with section 7 principles of fundamental justice.

4.2 Criminalizing Possession: Discrimination

Section 15 of the *Charter* states that: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 15 has been characterized as a substantive right, which reflects a commitment to promote equality and to prevent discrimination against members of disadvantaged groups within Canadian society.[201] A two-step analysis is used to determine if a law infringes section 15: first, whether the challenged law results in differential treatment based on an enumerated or analogous ground and; second, whether that differential treatment is discriminatory.[202]

4.2.1 Section 4(1) of the CDSA

A Canadian court would likely find that prohibiting possession for personal use has a discriminatory impact on people who depend on illegal drugs. The Supreme Court noted in *Insite* that the federal government has itself recognized that drug dependence is an illness, bringing it within the section 15 enumerated ground of disability.[203] The Le Dain Commission observed in its *Final Report* that: "The application of the criminal law against simple possession or use by one who is dependent on a drug … is akin to making dependence itself a crime."[204] As Toronto's Overdose Action Plan underscores: "There is no other group of people who are treated so poorly because of a health issue."[205]

As we underline throughout this Report and in detail below in section 5, criminalization is experienced disproportionately by members of marginalized groups in Canadian society. Researchers have demonstrated a pattern of overrepresentation of Black and Indigenous people in drug arrests, with some members of racialized communities experiencing racial profiling and higher rates of police stops, questioning and searches.[206] A 2019 report of the House of Commons Standing Committee on Health on the impacts of methamphetamine use in Canada identified the grounds of disadvantage most directly related to illegal drug use and dependence.[207] In particular, the Committee noted the co-occurrence of drug use and dependence and both diagnosed and undiagnosed metal health disorders, such as schizophrenia and related psychotic disorders, bipolar disorder, anxiety, and depression.[208] Witnesses testifying before the Committee explained that "prior or ongoing trauma is common" in people who use drugs and that, in many cases, drug use "is a direct response to experiences of physical and sexual abuse and trauma"[209] including childhood experiences of sexual abuse, emotional and physical abuse and neglect, and violence, substance use, mental illness, and incarceration within the household.[210] For Indigenous people, the Committee heard that drug use is in part a product of colonialism and intergenerational trauma arising from residential school experiences, the "Sixties Scoop," foster care, violence, incarceration, forced dislocation and cultural, social, and economic disempowerment.[211] Experts

also explained that homeless individuals use drugs to address unmet healthcare and other needs, such as women who are homeless using methamphetamine to stay awake at night to protect themselves.[212]

The Canadian Public Health Association observes that: "the current structure of fines and incarceration causes most harm to those at the lower end of the social gradient, which results in greater health inequity … [F]urthermore, these approaches have been demonstrated to systematically perpetuate socio-economic harm, especially against racialized communities."[213] The discriminatory impacts of criminalization are well documented, most recently in the HIV Legal Network and the Centre on Drug Policy and Evaluation's submission to the UN High Commissioner for Human Rights. The submission outlines the disproportionate impact of drug criminalization on Black people in Canada.[214] The submission points, among other evidence, to the 2017 *Concluding Observations* of the Committee on the Elimination of Racial Discrimination,[215] and the Ontario Human Rights Commission's 2020 findings that the disproportionate number of Black people accused of drug offences "raise concerns of systemic racism and anti-Black racial bias, because the over-representation of Black people in drug possession charges does not align with what is known about drug use within Black communities."[216] At the root of the constitutional guarantee of equality in section 15 of the *Charter* is the awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed.[217] The discriminatory effects of criminalization on Black, Indigenous and other marginalized populations in Canada and continued overrepresentation of these groups in Canada's criminal justice system is systemic and cyclic.[218]

For women, the direct relationship between drug use and mental illness, abuse, and trauma means there is also a gendered impact of criminalization under the *CDSA*.[219] Research suggests not simply a correlation but a causal relationship between women's experiences of physical and sexual violence and and subsequent mental health and substance use issues.[220] The stigma and risk of being criminalized for drug use have distinct gendered impacts, particularly for women who are mothers, and especially for women who are Indigenous, Black, or racialized, and/or living in poverty.[221] Canada's Correctional Investigator has reported that federally incarcerated women are "twice as likely [as men] to be serving a sentence for drug-related offences"[222] and "Indigenous and Black women are more likely than White women to be in prison for that reason."[223] Dr. Henry makes the point that incarcerating women with addictions "negatively impacts their families and children in a much greater way than incarcerating men" and that separating women from their children has both immediate and longer term destabilizing effects.[224] Women who are pregnant and dependent on drugs face particular difficulties if they are held in custody, even for a short time and, especially for street-involved women, conditions restricting where they can go and what they can do after they are released isolates them from social safety networks and puts them at increased risk of violence, illness, and death.[225]

Youth are also adversely affected by Canada's approach to drug use.[226] A 2018 Health Canada public consultation document reports that youth have the highest rate of problematic substance use nationally and are more likely than older adults to experience harms related to substance use.[227] High rates of substance use have been documented among Indigenous and Black youth, homeless or street-involved youth, youth in custody, and youth with co-occurring mental health problems,[228] as well as among gender diverse youth, "linked to social stigma, homophobic discrimination and violence."[229] Youth with a history of child welfare involvement "are particularly at risk, as the initial

transition out of foster care is associated with increased rates of problematic substance use."[230] This is especially true for Indigenous children and youth who experience disproportionate rates of child welfare involvement.[231] The British Columbia Centre on Substance Use (BCCSU) notes, with specific reference to methamphetamine, that the limited health interventions currently available for youth "are embedded within a highly criminalized approach to drug use … [that is] not effective and can lead to enhanced harms…."[232] As is the case with other groups that have experienced and are experiencing discrimination that section 15 seeks to remedy: "Drug prohibition has not only failed to protect [their] wellbeing … it has also failed to subvert rates of youth substance abuse."[233]

The Canadian Civil Society Working Group on UN Drug Policy lists the reasons why multiple international health and human rights agencies have called for decriminalization:

> There is now copious evidence of the harms of criminalizing simple possession particularly to vulnerable people. Since criminalization of drug possession directly leads to both individual and systemic stigma, it supports discrimination against people who use drugs and prevents people from seeking services. It also undermines the development of health services because needed resources are diverted to the criminal justice system (including correctional facilities) and because people with problematic drug use, when regarded as criminals, are not seen as deserving of services.[234]

4.3 Section 1 of the Charter

Section 1 declares that *Charter* rights are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[235] In its decision in *R v Oakes*, the Supreme Court has set out the 4-part analysis to be conducted under section 1 to determine if an infringement of a *Charter* right can be justified. The government must show that a legislative measure violating a *Charter* right has a sufficiently important objective; that it is rationally connected to achieving that objective; that it impairs the *Charter* right as little as possible; and that its positive benefits outweigh its negative effects.[236] In the *Insite* case, Chief Justice McLachlin concluded that: "If a s. 1 analysis were required, a point not argued, no s. 1 justification could succeed. The goals of the *CDSA*, as I have stated, are the maintenance and promotion of public health and safety. The Minister's decision to refuse an exemption bears no relation to those objectives; therefore they cannot justify the infringement of the complainants' s. 7 rights."[237]

The objectives of the *CDSA* – to maintain and promote public health and safety – are unquestionably important. However, in the same way that the criminal prohibition on simple possession under section 4(1) of the CDSA likely violates principles of fundamental justice contrary to section 7 of the *Charter*, a court would likely find the criminal prohibition on simple possession under CDSA section 4(1) fails the rational connection and proportionality requirements of section 1. As Dr. Bonnie Henry recaps:

> The current prohibitionist approach to drug policy has failed to achieve its stated ends: to prevent the growth of illegal drug markets, to curtail use of illegal substances, and to prevent harms associated with the use of these substances. Instead, harms have been magnified through the creation, in reaction to interdiction, of a highly toxic illegal drug supply, and the criminalization, stigmatization, and marginalization

> of individuals – many of whom have opioid use disorder, a known chronic, relapsing health condition. In addition, massive profits have been generated for violent criminal enterprises involved in the illegal drug market.[238]

Weighing against a prohibitionist approach are the health harms and stigma caused by criminalizing drug possession; its role in creating and maintaining Canada's illegal drug trade; and its lost-productivity, health care, criminal justice and other economic costs, amply documented by Dr. Henry and others.[239]

Further, it is unlikely that a court will find that section 4(1) of the *CDSA* can be justified as a minimal impairment of the section 7 and 15 *Charter* rights of those who use drugs. This is true whether or not *Bill C*-5 or similar amendments to the *CDSA* are ultimately adopted. As described earlier, under *Bill C-5* police and prosecutors would have the power to "consider whether it would be preferable" to use "warnings" or "referrals" to community programs or services, instead of charging and prosecuting those found in possession of illegal drugs for personal use.[240] Critics have pointed out that police and prosecutors must keep a record of such warnings and referrals, and can still choose to charge and prosecute violations of section 4(1).[241] *Bill C-5* does not remove the threat of criminalization and it does nothing to address the pervasive and disproportionate stigma it creates.

In summary, it is likely that a Canadian court will find that criminalization of possession is unconstitutional and section 4(1) of the *CDSA* should be repealed.

5. Ending the Harms Associated with Criminalization

As outlined above, the criminalization of illicit drugs in Canada places people who use drugs at a greater risk of several harms, which are disproportionately experienced by Indigenous, Black and other racialized Canadians, among others. In other words, the harms associated with criminalization are disproportionately experienced by those who are most marginalized in our society. The criminalization of illicit drugs not only results in long-lasting harms to life and health, but it generates stigma across systems and social spheres, which in turn increases shame, isolation, and the risk of further harms including overdose deaths. Criminalization also interferes with access to health care and social services by creating significant barriers and by generating harmful interactions with care and service providers.[242] At a policy and system level, criminalization deters implementation of, and access to, harm reduction services despite scientific evidence demonstrating that such services are effective at reducing harms, improving health, and saving lives. Further, criminalization empowers the growth of the illicit drug market, which in turn increases drug-related harms. Notably, the relationship between criminalization and harms for people who use drugs is manyfold and it produces a range of health inequities and injustices across generations. Most importantly, criminalization and deterrence through risk of incarceration or penalization does not result in the cessation or significant reduction of drug use, nor does it prevent drug-related harms.[243] A comprehensive review of harms associated with criminalization is beyond the scope of this report. We examine the most commonly cited harms, namely stigma, drug toxicity, barriers to accessing harm reduction services and programs resulting in more harms, and finally health and social inequities.

5.1 Stigma

A primary outcome associated with the criminalization is increased stigma. Stigma can be defined as "a social process that exists when labeling, stereotyping, separation, status loss, and discrimination occur within a power context". [244] As expressed by Professor Mark Hatzenbuehler (Professor of Psychology at Harvard University) and colleagues, stigma represents a core driver of health inequities. As a result of the criminalization of substance use, stigma is evident at macro, meso, and micro levels, especially in housing, healthcare, child welfare, and the public health systems. [245] Yang and colleagues[246] characterize three main mechanisms of how substance use-related stigma is manifested through (1) stereotyping, where society holds negative assumptions about drug use and people who use drugs; (2) emotional reactions, where society reacts poorly (e.g., disgust) towards people who use drugs; and (3) status loss and discrimination, where people who use drugs are labelled as less socially valuable compared to people who do not use drugs. Research indicates that criminally focused policies and norms "encode stigma" for people who use drugs, creating barriers to maintaining health and well-being. [247] As stated by Tyndall and Dodd[248] when speaking about opioid use, "criminalization puts the responsibility and blame for opioid use firmly on the individuals at risk". The relationship between criminalization and self-responsibility is pervasive across types of illegal substances (e.g., opioids, stimulants)[249] and contributes to greater stigma.[250] Given that criminalization-informed ideologies are embedded within diverse structures, people who use drugs may "internalize public stereotypes or prejudices" about them, influencing their quality of life, self-efficacy, and valuation of self. [251] Ultimately, the forms of stigma perpetuated by the criminalization of drug use infringe on the *Charter* rights of people who use drugs as outlined in the preceding section. [252]

5.2 Drug Toxicity

The criminalization of substance use drives rates of drug-related morbidities and mortality not only by creating barriers to accessing health services but also by empowering the growth of the illicit drug market. In fact, the "war on drugs" in Canada and globally has made the manufacturing, importing, and selling of substances more lucrative for producers and sellers, but more dangerous for people who use drugs. As a result of criminalization, the drug supply is unregulated.[253] The lack of regulation ("quality controls") of the current drug market has led both to the toxic supply and to drug-related systemic violence, which is defined as "traditionally aggressive patterns of interaction within the system of drug distribution and use". [254] As a result of the illegal nature of drug markets, providers and users do not have any legal protection or fair governance in how substances are procured or distributed, creating the potential for unintended harms such as violence resulting from underground market disputes, unknown quality and potencies of products, among others.[255] While research demonstrates that not all drug markets perpetuate systemic violence, when criminalized strategies are applied (e.g., police involvement), systemic violence increases. [256]

As mentioned above, the proliferation of fentanyl and its analogues in illicit drug market has led to a rise in drug contamination, which is currently driving opioid-related deaths across Canada. Primary drivers of the toxic drug supply have been the integration of fentanyl and fentanyl analogues, which have been reported to be much stronger than heroin even in smaller amounts. [257] The COVID-19 pandemic disrupted established drug markets and has contributed to the distribution and consumption of an increasingly contaminated supply resulting in increased deaths.[258] The

distribution of fentanyl and its analogues have risen tremendously since the pandemic as a result of the closure of borders which disrupted drug channels. The disruption of drug channels coupled with the criminalization of substance use and targeting of already marginalized people who use drugs has contributed to the increase in overdose deaths.[259] Gomes and colleagues report that fentanyl was present in most recorded opioid deaths in Ontario during the pandemic, following an increasing pattern of fentanyl prevalence in drug toxicity deaths.[260]

5.3 Barriers to Harm Reduction

In addition to the harms discussed above, criminalization is one of the main reasons why people use substances alone, without support or supervision (e.g., alone at home) and through methods which increases the risk of drug-related morbidity and mortality, such as sharing equipment or rushing.[261] In addition, criminalization creates significant barriers to the effective scale-up of some harm reduction services across Canada. As described earlier, the approval of harm reduction services for an exemption under the *CDSA* is an onerous and time-consuming process. As a result, diverse and geographically distributed communities of people who use drugs may lack access to harm reduction, including access to supplies (e.g., new syringes, safer inhalation kits) and services such as supervised consumption or overdose prevention sites, which require a *CDSA* exemption in order to operate without risk of prosecution, education about drug-related care (e.g., preventing and managing skin infections), and how to prevent HIV, hepatitis C, and other sexually transmitted and blood borne infections. [262] Finally, criminalization has also been shown to interfere with life-saving interventions such as calling emergency services in the event of an overdose. Fear that police will attend overdose calls and arrest people found there has been cited in recent Canadian studies as a major reason for not calling emergency services. [263]

At a system and program level, criminalization has also contributed to strict operational constraints that have hindered many innovative approaches to harm reduction programs. This has led to barriers in service provision and maintained the threat of criminalization.[264] For example, a person who uses drugs may be exempt from criminalization while accessing services at a federally/provincially authorized supervised consumption site, yet they still face criminalization outside of these controlled environments. Moreover, criminalization has also hindered the flexibility and creativity required when providing services to people who drugs and is responsible for maintaining policies that may create additional barriers in harm reduction services such as prohibitions on splitting drugs and assisting with injecting.[265]

5.4 Health and Social Inequities

Criminalization not only creates barriers to engaging with harm reduction or substance use related care, but also has implications for broader health and social service accessibility. Research indicates that the criminalization of drug use significantly limits people's ability to attain or maintain stable employment, housing, food, along with many other structural necessities.[266] Additional barriers created by criminalization include engaging with health services, such as HIV prevention and treatment interventions.[267] Criminalization's influence on these factors is multi-faceted and includes institutionally perpetuated stigma which creates barriers to accessing essential services, and through continual fear of being "outed" or harmed on the basis of substance use. For example, McNeil and colleagues[268] examined how criminalization and loss of housing creates intersecting barriers for those trying to navigate services (e.g., overdose prevention sites) or use substances (e.g., having to use alone in an alley).[269]

Social inequities arising from the criminalization of substance use are not equally distributed among diverse communities of people who use drugs. Groups who experience multiple forms of oppression, such as women, trans, or non-binary identifying persons, Indigenous, Black or other racialized Canadians, or sexual minorities, face a disproportionate burden of harms related to unjust public health and criminal justice policy. [270] Indigenous peoples are at greater risk of experiencing social and health-related inequities attributed to complex intersecting forms of stigma and discrimination and historical and contemporary legacies of colonization. [271] As we outline in the preceding section, this is especially evident in health disparities related to HIV and HCV where Indigenous people across Canada who use drugs experience relatively poorer health and treatment outcomes despite increased investments in prevention and treatment.[272]

Similarly, women who use drugs have been documented to be disproportionately involved with the criminal justice system. [273] This leaves this group vulnerable to experiencing housing precarity, child apprehension, and violence, while also increasing the likelihood of having to engage with options such as sex work to provide for themselves and their families.[274]

While the literature examining the relationship between gender and sexual diversity and the criminalization of substance use in Canadian is limited, the over-policing and criminalization of these communities is well documented[275] with particular considerations for those living with HIV whose substance use may factor into the criminalization of HIV non-disclosure.[276]

5.5 Harms Associated with Incarceration

In light of the harms discussed above, it is worth reiterating that incarceration, and the threat of incarceration, do not prevent harms from drug use nor do they reduce substance use.[277] As we have reviewed in the *Charter* analysis above harms are magnified given the lack of access to sterile equipment for drug consumption, lack of access to overdose prevention measures including naloxone and potential delays in emergency care, and inadequate access to and poor integration of harm reduction and health services. These contribute to higher incidence of HIV and HCV. The Global Commission on Drug Policy states, "criminalization carries devastating consequences for people who use substances, including high rates of HIV, HCV, and death, and it violates the principle of human rights and dignity." [278]

6. Decriminalizing to Reduce Harms

Canada has historically allocated most of federal resources for substance use to drug law enforcement.[279] Currently, a significant proportion of this enforcement activity targets possession offences under section 4 of the *CDSA*. The national rate of police-reported, non-cannabis drug possession offences has been increasing annually since 2010,[280] and in 2019, these offences accounted for 57% (or 30,464) of all non-cannabis drug offences (53,272 total) in Canada.[281] Publicly available data on completed court cases suggest that about one in three adult and youth possession cases involves a single charge only, meaning that the disposition of the case did not involve any other criminal violation.[282] It is therefore reasonable to assume that eliminating even a fraction of drug possession arrests in Canada will likely free up significant resources that would have otherwise been spent on policing, courts, probation, and custodial costs.[283] These resources could then be reallocated to bolster the availability of substance use-specific health and social supports, which are critical to supporting people who use drugs.

For those at risk of harm or those experiencing a substance use disorder, a variety of evidence-based harm reduction and treatment interventions exist. However, Canada's substance use service systems are highly fragmented; often siloed from mainstream health and social care; out-of-step with current evidence; and do not effectively address underlying structural factors (poverty, racism, homelessness, and colonization) known to increase risk of drug-related harm.[284] Reforming service systems to ensure that all people in Canada who require support are able to access effective, tailored substance use care in a timely manner is long overdue. A transfer of predictable operational funding from the criminal justice to the health sector could support the overall reorganization and improvement of current criminal justice (*e.g.* decrease backlogs in the criminal justice system) and health systems.[285] The creation of suitable health and social supports should not however be a prerequisite for drug decriminalization.

Beyond general service system improvement, there is an urgent need to expand access to programs designed specifically to reduce morbidity and mortality from the increasingly toxic drug supply. Decriminalization alone is not expected to alter markedly the quality or potency of the illegal drug supply nor rapidly reshape patterns of substance use.[286] Interventions to reduce Canadians' reliance on the illegal market will still be required. Oral and injectable opioid agonist treatment are proven treatments for people with opioid use disorder that improve health outcomes and reduce the need to engage in acquisitive crime,[287] yet many provinces and territories have not brought these interventions to scale. For people who use drugs who do not need or want these treatment options, safer supply programs are an emerging option designed to provide those engaged in illegal drug use with pharmaceutical alternatives to street drugs as a means to reduce the risk of drug poisoning from a toxic illegal supply.[288] Cost savings associated with decriminalizing drug possession in Canada could support the expansion of these programs as a novel component of the response to the national drug poisoning crisis.

6.1 Recommendations for Law Reform

6.1.1 Procedural Recommendations

For law reform to be meaningful and effective, it is imperative that lawmakers be attentive to the law reform process and ensure that the voices of those who are affected have an opportunity to be heard throughout the process. The importance and necessity of meaningfully including people who use drugs, most notably those who are most marginalized, in law and policy-making as well as developing harm reduction and other health services is well-established. Research demonstrates that greater involvement of people who use drugs results in more effective change because they are often best positioned to identify the problems to be solved and the solutions that will work best for people with similar lived experiences.[289] Meaningful engagement must happen at several stages of the law-making process – beginning with seeking input from people who use drugs prior to and in the drafting of proposed amendments, ensuring an opportunity for consultation once a Bill has been drafted, and providing an opportunity to respond to concerns within a proposed *Bill* once it has been tabled. It is essential for governments to be open to substantive changes brought forward throughout the law reform process, including more effective or useful ways to address the concerns underlying the Bill.

Meaningful consultation and engagement does not end with the introduction of new laws. It is imperative that a mechanism for a review of the legal amendments and accompanying recommendations be established. The federal government has required reviews in other contexts,

such as medical assistance in dying, assisted reproduction, and cannabis legalization. In addition to ensuring stakeholders are able to provide their perspective on the impact of the law, legislative reviews offer lawmakers an opportunity to consider feedback and to assess whether additional legislative changes are required.

6.1.2 Recommended Pillars of a Canadian Decriminalization Model

Below, we set out a series of recommendations regarding the components of a Canadian decriminalization model. These include implementing uniform requirements that are applied consistently across the country; reducing the discretion of police offers in relation to enforcement; accepting sharing and splitting of drugs in a wide range of settings both inside and outside SCS; addressing concerns about setting legal thresholds as a regulatory tool; and establishing a process for expungement of criminal records relating to drug use. Above all, it is critical that a decriminalization model addresses the needs of those who will be directly affected and meaningfully reduces contact with the justice system.

Pillar #1: Consistent Application of Uniform Requirements Across the Country

The federal government must adopt a national approach to decriminalization of drug possession for personal use. In the face of continuing federal inaction, some municipalities such as Vancouver and Toronto, as well as the province of British Columbia, have applied for section 56 exemptions under the *CDSA*. First, there is the very real prospect of a patchwork of legal models across the country which will create significant disparities for people who use drugs. Second, this section 56 exemption approach is inefficient, as it requires individual municipalities and provinces to file individual applications with Health Canada, a time-consuming, costly, and intensive process. For that reason, we support the recommendation by the HIV Legal Network, PIVOT, and others to issue a consistent, nationwide blanket exemption from section 4 of the *CDSA*, applying to all persons in the country and in relation to all substances currently criminalized under the *CDSA* and its schedules.[290]

Pillar #2: Reducing Opportunities for Discretionary Decision-making by Police and Prosecutors

We recommend that a Canadian decriminalization model should set clear and consistent guidelines that apply to all people in Canada and limit the opportunities for the police to exercise their discretion with respect to who is charged under any new or revised law. At minimum, this requires a full repeal of s. 4 of the CDSA so police and prosecutors can no longer charge people with the offence of simple possession. Measures such as Bill C-5 and prosecutorial guidelines merely enumerate principles and/or alternatives to criminal prosecution for police and prosecutors to consider, yet failure to consider them does not invalidate charges pursuant to s. 4. Current drug laws enable, and in many instances support the deployment of police discretion in their application. As the Canadian Association of Chiefs of Police state in their Decriminalization Findings and Recommendation Report, "simple possession of illicit drugs for personal use is subject to police discretion."[291]

Police officers and prosecutors across the country have *always* had the ability to use their discretion to prioritize the health and safety rights of people who use drugs, and to determine whether, when and against whom to lay charges. As we have outlined above, the harmful effects of Canada's prohibitionist drug policies have been, and continue to be, disproportionately experienced. The Ontario Human Rights Commission states that "systemic racial discrimination,

along with anti-Black and anti-Indigenous racism, lies at the core of many of our institutions."[292] As the BC Civil Liberties Association affirms, "…prosecutorial and police discretion and surveillance is unacceptable, given such discretion often targets Indigenous, Black, racialized, undocumented migrant, homeless, two spirit and trans drug users; furthermore, the use of the criminal legal system to enforce diversion measures or treatment is counter to the principles of evidence-based, trauma-informed, voluntary treatment."[293] A Canadian decriminalization model should seek to create and maintain clear and consistent guidelines that apply evenly to all people in Canada and that are free from potential systemically discriminatory police and prosecutorial bias in the exercise of their discretion.[294] While the prosecutorial Guidelines released in August 2020 under the *Public Prosecutions Act* represent a step forward in outlining principles for responding to the simple possession of controlled substances under section 4(1), including the call for prosecutor to consider alternatives to prosecution (see page 6 for an overview); section 4(1) remains in place, as an alternative to eliminating the offence altogether.

Pillar #3: Determining Thresholds: Setting Realistic Regulatory Policy

A Canadian decriminalization model must consider the implications of setting thresholds in distinguishing the quantities that a person is allowed to possess without facing possible criminal prosecution. Legal thresholds are used in some decriminalization models as a mechanism to differentiate smaller-scale possession that is legally allowed from larger-scale commercial activity.[295] Legal thresholds can also be used in the sentencing of drug offenders in cases of a trafficking conviction.[296] Under some models, such as that proposed by the City of Vancouver (discussed above in "Decriminalization efforts in Canada"), thresholds provide a ceiling to delineate the upper quantity an individual can possess for the purposes of personal use, with amounts over that threshold still subject to possible prosecution for trafficking and other offences, depending on the circumstances. When set in consultation with people who use drugs and reflective of the realities of current drug use pattern, thresholds "can provide clarity and advance the health and human rights of people who use drugs."[297]

While thresholds can provide a clear boundary in a decriminalization model for determining personal *versus* commercial activity, there is a lack of empirical evidence relating to the setting of optimal threshold levels. Ever-changing drug demand and supply dynamics exacerbate this challenge. Not surprisingly, "[i]nternational evidence, albeit scarce, has shown that drug thresholds may have unintended consequences: increasing for example the risk of disproportionate and unjust sanction."[298] This has been a key issue discussed in relation to Vancouver's proposed model. As Pivot Legal Society explains, "[t]he thresholds proposed by Vancouver are far too low, failing to reflect the realities of current patterns of drug use. Based on three studies, which Vancouver admits are dated, the proposed thresholds overlook that many people's drug tolerance and purchasing patterns have dramatically increased and that the drug market itself has changed because of COVID-19."[299]

When thresholds are set based on individual consumption patterns, they may fail to capture the range of auxiliary everyday activities by people who use drugs take part in that are related to personal drug use, as opposed to commercial in nature. Some of these purchasing patterns represent mechanisms that support safer use strategies (e.g., buying larger quantities/ greater volumes from a trusted source), or strategies to mitigate legal or other safety risk (e.g., purchasing a larger quantity but less frequently to minimize contact with illegal market); these should be considered if thresholds are used as a tool to differentiate between criminal and non-criminal

behaviour.[300] As noted in the literature and recently by the Canadian Drug Policy Coalition in reference to British Columbia's request to decriminalize simple possession up to a cumulative amount; there are significant risks of "net-widening" in defining a threshold that does not reflect real-world patterns of use.[301]

Pillar #4: Addressing 'Splitting and Sharing'

Sharing and splitting drugs for personal use are common practices,[302] and part of broader drug use culture that can support safer use practices (e.g., never using alone). In Canada, splitting and sharing of drugs for personal use was studied recently in the context of federally authorized opioid overdose prevention services and supervised consumption services.[303] In these settings, individuals can bring in and use their own drugs but they are restricted by the narrow scope of the site's CDSA exemption from splitting or sharing their personal drugs with others using the facility.[304] As a result, people using these services must go outside the sanctioned site to share, creating barriers to accessibility and heightening the risk of arrest. [305] Others face temporary bans from service access.[306] Recent discussions on splitting and sharing, highlight the need to ensure that drug policies and services that are developed accurately reflect community practices and incorporate the needs of those the policies seek to support. [307]

Pillar #5: Retroactive Expungement of Criminal Records

A Canadian decriminalization model must also include a mechanism to expunge the criminal records of those previously convicted of simple drug possession. There are significant harms associated with a criminal record, including reduced opportunities for housing and employment, travel restrictions and a negative impact on child custody. Having a criminal record also leads to ongoing stigma and discrimination. Two distinct legal mechanisms may be used to address previous convictions when the government determines that an activity is no longer criminal: a pardon or an expungement of the criminal record.[308]

The distinction between the two appears to lie in whether the criminalization of the underlying activity would be found to violate the *Charter*. Where this is the case, expungement is the appropriate approach. In 2018, the federal government put into place an expungement process for Canadians convicted of historically unjust offences through the enactment of the *Expungement of Historically Unjust Convictions Act*[309]. Offences listed in the schedule to the Act are those found inconsistent with the *Charter,* and include consensual same-sex intercourse and gross indecency (among others).[310] Given the discriminatory application of the *CDSA* and the strong likelihood, discussed above, that the provisions which prohibit simple possession for personal use violate sections 7 and 15 of the *Charter,* we do not believe that a pardon for a previous conviction is appropriate as only an expungement allows a person to claim that they do not have a criminal record. Instead, we recommend that the federal government enact legislation which would result in a low-barrier process for the expungement of a person's criminal records relating to simple possession.

6.1.3 Implementing a Canadian Decriminalization Model: An Incremental Approach

We recommend that the federal government adopt a three-stage approach to decriminaling drug possession for personal use. Stage one entails the immediate introduction of a series of policy changes that would result in the non-application of the criminal law in certain circumstances. Stage two consists of a series of amendments to sections 4 and 5 of the *CDSA*. Stage three endorses the

recommendation of the Expert Task Force's on Substance Use that all psychoactive substances be brought under one legislative framework. A staged approach recognizes that immediate action must be taken to protect the rights of people who use drugs and that the proposed legislative changes will take time. Although there is a clear imperative to improve substance use treatment and other services nationally, that need does not justify inaction on drug law reform. Criminalization compounds the challenges presented by the inadequacy of current systems of care, diverting resources from health, and driving overrepresentation of structurally vulnerable populations in justice and penal systems.

As outlined earlier in this report, a large body of international evidence demonstrates that criminalizing certain activities relating to substance use can deter people who use drugs from seeking help; promote stigma; and increase the risk of HIV, HCV, poisoning, and other negative health outcomes.[311] Maintaining criminal sanctions, uneven enforcement, and barriers to services violates individual autonomy and as argued above, likely infringes *Charter* rights. Decriminalization must proceed irrespective of ongoing efforts to expand or enhance harm reduction and treatment options.

Stage One: Immediate Policy Changes

At the first stage, the federal government must implement immediate changes to the prosecutorial guidelines regarding enforcement of simple possession. In particular, we call for the federal government to proceed with issuing a class exemption under section 56 of the *CDSA*, in the public interest, extending section 4 exemptions to all individuals in Canada as an immediate interim measure, in alignment with the approach recommended by the HIV Legal Network and other civil society organizations.[312]

Stage Two: Regulatory Amendments

At the second stage, we recommend the following amendments to the *CDSA*: First, section 4(1) of the *CDSA,* which prohibits personal possession and sets out the penalties associated with its breach should be repealed. Second, section 5 of the *CDSA*, which prohibits personal possession for the purpose of trafficking, should be amended to permit the sharing and selling of drugs under certain circumstances, in line with a human rights and public health-based approach and as recommended by the Civil Society Platform.[313]

To do so, the *CDSA* should define "possession for personal use" or "personal possession." In alignment with Pivot Legal Society, HIV Legal Network and the Canadian Drug Policy Coalition, such a change would mean that police can no longer arrest, charge, or approach an individual for simple possession, or personal use of drugs. Possession of a quantity above the defined threshold would not presumptively be considered possession for the purpose of trafficking. Rather, the legal burden of proof would remain on the Crown to establish that the possession was for the purpose of trafficking. It is also possible to introduce a model that, like the *CDSA*, does not set out threshold amounts in the actual regulations or schedules. But, we are concerned this may result in too much discretion for law enforcement which is often exercised in a discriminatory manner.

Finally, it is essential that a Canadian decriminalization model does not replace criminalization with other punitive provisions such as fines and/or coercive or involuntary measures.[314] A central concern, as noted in the Expert Task Force's first report to Health Canada and reiterated by civil society organizations, is that any reform short of full decriminalization without sanctions will always compromise the potential benefits of decriminalization *and* perpetuate the potential harms of

criminalization. The decriminalization model must meaningfully reduce marginalized persons' contact with the justice system. As noted in the Civil Society Platform, "To undo those harms, decriminalization must be done right."

Reflecting community voices, including those most directly affected by drug prohibition, and recommendations by an ever-expanding number of public health, human rights and other organizations and drug policy experts in Canada and elsewhere, our report presents a vision for the Canadian government to remove the harmful and unconstitutional threat of criminalization from the lives of people who use drugs.[315] Decriminalization is a transformative shift in legal approach to people who use drugs in Canadian society and, as such, must reflect the individuals and communities of people who use drugs. Canada's drug laws and prohibitionist approach are divorced from reality, and people who use drugs continue to suffer as a result. People who use drugs must see themselves reflected, respected, and acknowledged as key knowledge holders in decriminalization processes.

Stage Three: Introducing a New Comprehensive Legislative Framework

As the final stage in Canadian drug law reform, we recommend the federal government shift its approach to regulating substances by introducing a comprehensive legislative framework as recommended by the Expert Task Force. Decriminalization is only one component of the legal response. We agree with the Task Force's findings that we may mitigate harm more effectively by harmonizing the regulation of all substances with potential for harm, including alcohol, tobacco, and cannabis. We acknowledge that the harmonization of the *CDSA, the Tobacco and Vaping Products Act,* and the *Cannabis Act* will require a longer period of deliberation and drafting. The end result must be a fundamental re-orientation of Canada's historic approach, and as such will require appropriate consultation with stakeholders across Canada. We cannot foretell what the exact contours of this approach will be and have not sought to address these in this report. Rather, our report has highlighted and outlined the range of legal and policy components of decriminalization model(s), while summarizing the *Charter* dimensions and human rights grounding. But the need to abandon the *status quo* and to move quickly and decisively towards a model which puts an end to prohibition and more than a century of discrimination against people who use drugs is beyond doubt.

7. Conclusion

As our report has documented, Canada is experiencing a public health crisis with an estimated 20,000 overdose deaths between 2016 and 2020. As outlined previously, the criminalization of substance use is associated with unacceptable rates of drug-related morbidity and mortality as it facilitates stigmatization, creates barriers to accessing essential health and social services, and drives the growth of the illicit and toxic drug market. It contributes to well-founded fear and distrust of the criminal justice and other health and social systems needed by people who use drugs. As this report makes abundantly clear, criminalization of substance use has contributed to the public health crisis across Canada. The COVID-19 pandemic has not only deflected much needed public and government attention away from this health and human rights emergency, but it has also made things worse.

The COVID-19 pandemic has significantly contributed to the increase in overdose rates due to the decreased availability of harm reduction services that closed or limited their hours, the increased

likelihood of using drugs alone, and the increased volatility of the toxic drug supply. Gomes and colleagues document that in the first months of the pandemic, between March and June 2020, there was a 38% increase in opioid-related deaths in Ontario alone.[316] Following the initial stages of the pandemic, "the weekly number of opioid-related deaths increased 135%" compared to the previous year and preceding period, with 5,148 deaths occurring in Canada between April and December, 2020.[317] These effects of the pandemic on people who use drugs will persist for years to come. The criminalization of substance use, exacerbated by pandemic-related measures, has significantly contributed to the rise in overdose deaths and, two years in, remains an intractable barrier to minimizing harm associated with substance use across Canada.

Canada's comprehensive response to COVID-19 at the federal, provincial/territorial and local levels has demonstrated its ability to mobilize in response to a public health crisis. Canada has implemented wide ranging measures for preventing and controlling COVID-19. Over the course of the COVID-19 pandemic, Canada provided billions in targeted funding to aid in COVID-19 research and response and to procure vaccines and therapeutics. It has simultaneously provided rapid public health and medical infrastructure responses. Yet the opioid epidemic has seen no comparable investment or action by the federal or other governments. This is true notwithstanding the reality that more people died from accidental drug poisoning in 2020 in British Columbia and Alberta than from COVID-19. Ideologies associated with the criminalization of substance use have contributed to the lack of action to the overdose crisis from all levels of government in Canada. These ideological blockages must be eliminated. As our report argues, decriminalization is a matter of *Charter* and human rights imperative. But it is also a first step towards any meaningful change in how we value the lives of people who use drugs in Canada – one that is urgent and long overdue.

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