

**THE OPIOID CRISIS AS HEALTH CRISIS, NOT CRIMINAL CRISIS:  
IMPLICATIONS FOR THE CRIMINAL JUSTICE SYSTEM**

by

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## **Abstract**

The criminal justice system's response to the opioid crisis exacerbates risks faced by people using drugs and is harmful to public health. Through a literature review, caselaw analysis, and key-informant interviews in the Greater Vancouver area, this thesis analyzes elements of the criminal justice system's response to the opioid crisis and provides recommendations to reduce harms experienced by people who use drugs and to promote community health and safety.

An analysis of the British Columbia fentanyl trafficking sentencing decisions reveals that courts are emphasizing the need for enhanced deterrence as a response to the fentanyl crisis. In the street-level trafficking cases examined, 12 of the 14 people were motivated to traffic in order to support their own addiction. Interviews with 11 people including defence counsel, probation officers, and public interest lawyers and advocates, revealed challenges of working in the criminal justice system during the opioid crisis. Advocates described the main barrier as a fundamental misunderstanding of addiction within the criminal justice system. Advocates shared their insights into ways the criminal justice system can improve its approach. The key recommendation was for actors and policies within the criminal justice system to begin understanding the opioid crisis as a public health crisis and not a criminal crisis.

A review of the literature reveals that lengthening custodial sentences for people who are trafficking fentanyl will not deter street-level trafficking. Instead, the court's punitive approach will increase the number of individuals in custody, and disproportionately impact Indigenous people and those with substance abuse issues. Evidence-based harm reduction practices can be implemented in the justice system to reduce harm, from bail orders to prison conditions. There is a strong need for more rehabilitative options, community supports, and diversion opportunities to address the overrepresentation of people who use substances within custody.

## **Lay Summary**

My research examines the criminal justice system's response to the current opioid crisis. The caselaw shows a harsh response from the courts to fentanyl trafficking. Through interviews with advocates I learn the issues within the criminal justice system that are central to the health of people who use drugs. These problems are heightened during the opioid crisis. Advocates for people who use drugs recommend that the criminal justice system's response to the opioid crisis be framed as a health crisis and not a criminal crisis. To make this shift, this thesis recommends the criminal justice system find ways to incorporate the evidence-based harm reduction strategies in place in the Greater Vancouver area.

## **Preface**

This thesis is the original and independent work of Haley Hrymak. The author is a Crown Attorney with the Public Prosecutions Service of Canada. The views expressed in this paper are the author's alone and do not represent the views or positions of the Public Prosecution Service of Canada or the Government of Canada.

An earlier version of chapter two of this thesis will be published as Haley Hrymak, "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers" (2018) 41:3 Manitoba Criminal Law Journal. The ideas from chapter two will also be published within the UBC Journal "Ink" in Fall 2018. The remainder of the thesis remains unpublished.

This research included interviews with experts. All research was in compliance with UBC's Behavioural Research Ethics Board, certificate number - H17-02668.

## Table of Contents

|   |            |
|---|------------|
| <b>Abstract.....</b>  | <b>iii</b> |
| <b>Lay Summary .....</b>  | <b>iv</b>  |
| <b>Preface.....</b>   | <b>v</b>   |
| <b>Table of Contents .....</b>  | <b>vi</b>  |
| <b>List of Tables .....</b>   | <b>x</b>   |
| <b>Acknowledgments .....</b>  | <b>xi</b>  |
| <b>Chapter 1: Introduction .....</b>  | <b>1</b>   |
| 1.1    Research Focus and Scope .....   | 1          |
| 1.2    Methodology .....  | 2          |
| 1.2.1    Research Interviews .....  | 3          |
| 1.2.2    Recruitment.....   | 3          |
| 1.2.3    Qualitative Data Analysis .....  | 4          |
| 1.2.4    Limitations .....  | 5          |
| 1.3    Approach and Outline .....   | 6          |
| <b>Chapter 2: BC’s Emphasis on Deterrence and Increasing Prison Sentences for Street-Level<br/>Fentanyl Traffickers .....</b> | <b>9</b>   |
| 2.1    Introduction.....  | 9          |
| 2.2    Part One .....   | 10         |
| 2.2.1    The Fentanyl Crisis .....  | 10         |
| 2.2.2    Caselaw on Fentanyl Sentencing .....   | 12         |
| 2.2.3    The Range for Fentanyl Sentencing for Street-Level Traffickers .....   | 14         |
| 2.2.4    Exceptional Circumstances .....  | 14         |

|  |   |           |
|--|---|-----------|
| 2.2.5  | The “Enhanced” Need for Deterrence in Fentanyl Trafficking Cases.....                           | 18        |
| 2.3  | Part Two: Looking Deeper into Deterrence.....   | 19        |
| 2.3.1  | What is Deterrence?.....  | 19        |
| 2.3.2  | Emphasizing Deterrence Will Not Deter .....   | 20        |
| 2.3.3  | Deterrence and Addiction .....  | 23        |
| 2.3.4  | Street-Level Trafficking and Addiction.....   | 24        |
| 2.3.5  | Why Emphasize Deterrence if it is not a Research-Based Response?.....                           | 25        |
| 2.3.5.1  | Canadian Law on Drugs .....   | 25        |
| 2.3.5.2  | Stigma in Sentences .....   | 28        |
| 2.3.5.3  | The Crisis of Stigma .....  | 29        |
| 2.3.5.4  | The Challenges for Courts to Shift the Law .....  | 30        |
| 2.3.6  | Consequences of Misunderstanding and Continuing Deterrence Through<br>Sentencing Policies ..... | 31        |
| 2.4  | Part Three: Prison and Looking Beyond.....  | 32        |
| 2.4.1  | Responding to the Over-Incarceration of Indigenous People .....                                 | 33        |
| 2.4.2  | Prescribing Prison for Addiction .....  | 37        |
| 2.5  | Conclusion .....  | 38        |
| <b>Chapter 3: What do Advocates Say? .....</b> |   | <b>40</b> |
| 3.1  | Introduction.....   | 40        |
| 3.2  | Advocates’ Experience with People who Use Drugs .....   | 41        |
| 3.3  | Themes .....  | 43        |
| 3.3.1  | Lack of Understanding and Compassion .....  | 43        |
| 3.3.2  | Custodial Sentences and the Opioid Crisis .....   | 45        |

|   |  |           |
|---|--|-----------|
| 3.3.3                                   | Conditions and Breaches.....   | 48        |
| 3.3.3.1                                 | Abstain conditions .....   | 49        |
| 3.3.3.2                                 | Treatment Conditions .....   | 52        |
| 3.3.3.3                                 | Red Zone.....  | 55        |
| 3.3.3.4                                 | Impact of Conditions: Administrative Breaches.....   | 57        |
| 3.3.4                                   | Lack of Rehabilitative Opportunities and Resources.....  | 59        |
| 3.3.4.1                                 | Legal Aid and Lack of Resources.....   | 59        |
| 3.3.4.2                                 | Funding Generally .....  | 61        |
| 3.4                                     | Conclusion .....   | 62        |
| <b>Chapter 4: Recommendations .....</b> |  | <b>64</b> |
| 4.1                                     | Introduction.....  | 64        |
| 4.2                                     | The Responses to the Opioid Crisis Should be Based in an Understanding of Harm Reduction ..... | 66        |
| 4.2.1                                   | Listening and Learning from People with Lived Experiences.....                                 | 68        |
| 4.2.2                                   | Harm Reduction in the Community .....  | 70        |
| 4.2.3                                   | Insite.....  | 70        |
| 4.2.4                                   | Heroin Assisted Treatment .....  | 71        |
| 4.2.5                                   | Decriminalization.....   | 73        |
| 4.3                                     | Harm Reduction Practices Within the Criminal Justice System.....                               | 75        |
| 4.4                                     | Recommendation: Expand Community Supports and Diversion Programs.....                          | 77        |
| 4.4.1                                   | Funding of Community Organizations .....   | 78        |
| 4.4.2                                   | Employment Opportunities .....   | 79        |
| 4.4.3                                   | Housing.....   | 80        |



|                                    |  |            |
|------------------------------------|--|------------|
| 4.5                                | Recommendation: Harm Reduction in Prisons .....  | 83         |
| 4.5.1                              | Opioid Maintenance Therapy .....                 | 84         |
| 4.5.2                              | Naloxone .....                                   | 86         |
| 4.5.3                              | Prison Needle Exchange Program .....             | 86         |
| 4.6                                | Conclusion .....                                 | 87         |
| <b>Chapter 5: Conclusion .....</b> |  | <b>89</b>  |
| <b>Bibliography .....</b>          |  | <b>91</b>  |
| <b>Appendices .....</b>            |  | <b>101</b> |
| 5.1.1                              | Appendix A- Interview Questions .....            | 101        |
| 5.1.2                              | Appendix B- Invitation Letter .....              | 103        |
| 5.1.3                              | Appendix C- Consent Form .....                   | 105        |
| 5.1.4                              | Appendix D- Expert Letter of Dr. Evan Wood ..... | 109        |

## **List of Tables**

|   |    |
|---|----|
| Table 1: Exceptional Cases .....  | 17 |
| Table 2: The Four Main Requirements of Deterrence and the Corresponding Reality ..... | 23 |

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# Chapter 1: Introduction

## 1.1 Research Focus and Scope

Canada is in a crisis. The opioid crisis in Canada has hit BC the hardest; in April of 2016, the BC Provincial Health Officer, Dr. Perry Kendall, declared a public health emergency.<sup>1</sup> The number of overdose deaths continues to rise, from 525 in 2015 to 995 in 2016.<sup>2</sup> In 2017, 1,449 people in BC died from illicit drugs, with fentanyl detected in 83% of those deaths.<sup>3</sup> A further 620 people died between January and May 2018 from illicit drug overdoses.<sup>4</sup> These numbers do not account for the large number of people who survive overdoses and continue to be at risk.

People who use drugs regularly intersect with the criminal justice system given that the possession of illicit substances is a criminal offence. A disproportionate amount of people who are incarcerated have an addiction.<sup>5</sup> While research has advanced dramatically to allow for a comprehensive understanding of addiction, the criminal justice system lags behind.<sup>6</sup> The BC Coroner's office has directed that efforts to reduce the risk of death and injury from drug use be evidence-based, innovative, and compassionate.

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<sup>1</sup>BC Gov News, "Provincial health officer declares public health emergency" (April 14, 2016) online: <<https://news.gov.bc.ca/10694>>; Health Canada, "Government of Canada Actions on Opioids: 2016 and 2017" online: [www.canada.ca](http://www.canada.ca) (2017).

<sup>2</sup> British Columbia, Centre for Disease Control, *The BC Public Health Opioid Overdose Emergency: March 2017 Update* (British Columbia: Observation Population and Public Health, 2017) at 1.

<sup>3</sup> Ministry of Public Safety & Solicitor General (Office of the Chief Coroner), British Columbia Coroners Service, "Illicit Drug Overdose Deaths in BC January 1, 2008- May 31, 2018" (2018) at 3-4 [BC Coroner] at 3-4 [BC Coroner]; Estefania Duran & Richard Zussman, "B.C. Marks 2017 as Deadliest O.D. Death Year in Provincial History", *Global News* (31 January 2018) online: <<https://globalnews.ca/news/3979853/b-c-saw-1422-overdose-deaths-in-2017>> [Duran & Zussman].

<sup>4</sup> BC Coroner, *ibid*.

<sup>5</sup> Gerald Thomas, *Harm Reduction Policies and Programs for Persons involved in the Criminal Justice System* (Ottawa: Canadian Centre on Substance Abuse, 2005) at 2; for Special Populations in Canada" (2005) Canadian Centre on Substance Abuse 1-12; Richard Lippke, "Punishment Drift: The Spread of Penal Harm and What We Should Do About It" *Crim Law and Philos* (2017) 11:645-659.

<sup>6</sup> Adela Beckerman & Leonard Fontana "Issues of Race and Gender in Court-Ordered Substance Abuse Treatment" (2008) 33:4 *J Offender Rehabilitation* 45 [Beckerman & Fontana]; Kathy Bettinardi-Angres & Daniel Angres, "Understanding the Disease of Addiction" (2010) 1:2 *J Nursing Regulation* 31 [Bettinardi-Angres & Angres].

The courts' response to this devastating crisis requires analysis. While there is ample research on the public health approach to the crisis, which incorporates harm reduction evidence-based strategies, there is a gap in the literature analyzing the response from courts to crimes involving fentanyl. The criminal justice system's response to the crisis is problematic because it is uninformed by the public health response and worsening the crisis. Between January 1, 2016 and July 31, 2017, 333 people in BC died from illicit drug overdoses while under community corrections supervision or within 30 days of release from a correctional facility.<sup>7</sup> This thesis describes key challenges for individuals who use substances within the current criminal justice system, and how these challenges are exacerbated during the opioid crisis. This thesis concludes with recommendations for improving the criminal justice system's reaction to the opioid crisis in order to reduce harm towards people who use drugs.

## **1.2 Methodology**

This research focuses on BC; the “epicenter” of the opioid crisis.<sup>8</sup> This research employs doctrinal and qualitative methods. The doctrinal research reviews relevant scholarship primarily from law and public health disciplines, and provides a caselaw analysis of street-level trafficking sentencing decisions.<sup>9</sup> This thesis also employs qualitative methods to collect empirical data through expert interviews with advocates who work with people who use substances within the Greater Vancouver area. The interviews were semi-structured in nature to allow for fluidity in responses, and to account for the diversity of expertise within the study population.

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<sup>7</sup> Report to the Chief Coroner of British Columbia, “BC Coroners Service Death Review Panel: A Review of Illicit Drug Overdoses” April 5, 2018 at 18.

<sup>8</sup> *R v Toth*, 2017 BCSC 501 at para 35, 138 WCB (2d) 287 [*Toth*]. See also News 1130 Staff, “National opioid overdose numbers show crisis is hitting the West hardest” *News 1130* (6 June 2017), online: <[www.news1130.com/2017/06/06/national-numbers-opioid-epidemic-show-hitting-west-hardest/](http://www.news1130.com/2017/06/06/national-numbers-opioid-epidemic-show-hitting-west-hardest/)>.

<sup>9</sup> The methodology of this caselaw analysis is further described in chapter two.

### **1.2.1 Research Interviews**

I interviewed a total of 11 advocates either in-person or by phone, and each interview was approximately 45 minutes long. These interviews were semi-structured. When conducting in-person interviews, the interview took place at the advocate's workplace. While I asked every participant the same list of questions, as a result of follow-up questions and ensuing discussions, each interview was distinct in content.<sup>10</sup>

To conduct interviews for my research, I applied for and received Behavioural Research Ethics Board (BREB) approval.<sup>11</sup> In compliance with BREB requirements, all participants signed a consent form and were able to withdraw from the study at any time. My inclusion criteria for participants in this study was "Individuals in the Vancouver greater area who identify as advocates for individuals with substance abuse issues when they are involved within the criminal justice system." The participants, who I broadly defined as "advocates" in this study were defence lawyers, probation officers, lawyers working at social justice organizations, and advocates working at community organizations.

### **1.2.2 Recruitment**

To recruit participants, I emailed advocates, including probation officers, defence lawyers, social workers, and individuals who work within social justice organizations. In each email I attached an invitation letter<sup>12</sup> which included the background, purpose and content of the interview, as well as the consent form.<sup>13</sup> The consent form stated that the responses of all participants would be anonymous, and that participants could withdraw from the study at any

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<sup>10</sup> Appendix A: Interview Questions.

<sup>11</sup> I applied for BREB on December 1, 2017 and received this approval on January 16, 2018 certificate number H17-02668.

<sup>12</sup> Appendix B: Email Invitation.

<sup>13</sup> Appendix C: Consent Form.

time. The interviews were recorded using an audio recorder and I later transcribed the interviews for analysis. I recruited additional participants through the “snowball” method whereby participants recommended other individuals for the study.

### **1.2.3 Qualitative Data Analysis**

I conducted a thematic analysis from the interview responses. Thematic analysis is a method of analyzing qualitative data by deeply exploring the research question and responses to find themes within the data.<sup>14</sup> This research explored the barriers that exist within the criminal justice system for people who use drugs. Further, advocates were asked for insights on the impacts of these challenges, and how they address them in their work. While there were responses that were specific to each question, there were themes that transcended several questions. The discussions varied between participants depending on their experience. Therefore, analyzing the data to identify themes was the most fitting methodology.

The themes that were identified within the responses of the advocates were supported in the literature of the subject matter. In chapter 3, I discuss the themes that emerged from the advocates’ experiences and the support provided in the literature, giving context to the issue by presenting specific quotes when it is helpful.<sup>15</sup> I identified themes and coded the interviews manually. I had the opportunity to acquaint myself with the data of each interview for a minimum of four hours before identifying themes. This roughly breaks down into the time I spent conducting the interview; transcribing the interview; compiling the transcript with the other

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<sup>14</sup> Marie Crowe et al, “Conducting Qualitative Research in Mental Health: Thematic and content analyses” (2015) Australian & New Zealand Journal of Psychiatry 1 at 3.

<sup>15</sup>*Ibid.* Jennifer Fereday and Eimaer Muir-Cochrane, “Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development” (2006) 5:1 The International Journal of Qualitative Methods 1 at 3 citing M. Patton, Qualitative research & evaluation methods (3rd ed, Thousand Oaks: Sage, 2002) 33.

transcripts; and re-reading the material. It was my goal to analyze the data, not merely synthesize it.

#### **1.2.4 Limitations**

I am situated in this work as a non-Indigenous person who is learning and appreciating the continued impact of colonialism on Indigenous people.<sup>16</sup> At the heart of my concern about the criminal justice system's response to the fentanyl crisis is the impact this will have on furthering the over-incarceration of Indigenous people.<sup>17</sup> This work discusses concerns relating to the furthering of mass incarceration of Indigenous people and the justice system's failures in relation to Indigenous people. The disproportionate impact the opioid crisis is having on Indigenous people is also described.<sup>18</sup> However, a comprehensive analysis of the distinct challenges faced by Indigenous people in the criminal justice system is not within the scope of this work. Further research is needed to discuss the distinct impacts the criminal justice system's response to the opioid crisis has on the Indigenous population.

People who use drugs are at the forefront of this research, however, I did not undertake interviews with that population given time constraints and my focus on justice system responses. Within my recruitment, I did invite peers of people who use drugs to participate but was not successful. While one advocate self-identified as a drug user, I did not ask any advocates about their experiences with drug use as that was beyond the scope of the research. As a result of not successfully recruiting any peers of people who use drugs, I did not have the opportunity to ask

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<sup>16</sup> I felt this information was valuable to share particularly after reading the article by Patricia Barkaskas and Sarah Buhler, "Beyond Reconciliation: Decolonizing Clinical Legal Education" (2017) 26:1 Journal of Law and Social Policy.

<sup>17</sup> Jamil Malakieh, Canadian Centre for Justice Statistics, "Adult and Youth Correctional Statistics in Canada, 2016/2017" Statistics Canada, June 19, 2018.

<sup>18</sup> First Nations Health Authority, "Overdose Data and First Nations in BC: *Preliminary Findings*" (2017) online:<[http://www.fnha.ca/newsContent/Documents/FNHA\\_OverdoseDataAndFirstNationsInBC\\_PreliminaryFindings\\_FinalWeb.pdf](http://www.fnha.ca/newsContent/Documents/FNHA_OverdoseDataAndFirstNationsInBC_PreliminaryFindings_FinalWeb.pdf)>.



about the challenges and recommendations for change from people who are the true experts in this area. I draw on secondary sources that bring in the perspectives of people who use drugs, as well as reports written by drug user networks to mitigate the impact of this limitation on the overall thesis.

### **1.3 Approach and Outline**

I began my research with a pre-existing understanding that the criminal justice system's response to addiction is flawed.<sup>19</sup> Addiction is a *factor* for the justice system to consider and balance when determining an appropriate sentence. Tremendous weight is given to how an accused person makes rehabilitative steps between the commission of the crime and the sentence. This onus is on the accused would never be asked of people with other illnesses that contribute to their criminal involvement and conviction. While drug treatment courts and some diversion programs exist, they are limited.

As a Crown Attorney with the Public Prosecution Service of Canada, I am frequently involved in cases where a person's addiction is the motivating factor for the criminal charges, and lengthy custodial sentences are imposed. Before starting my Master of Laws, I observed an emerging trend of increased custodial sentences for crimes involving fentanyl. This thesis can be useful to those wanting to learn more about the criminal justice system's response to the opioid crisis, and the potential implications if the justice system truly viewed the crisis as a health crisis. Further, this thesis contains practical suggestions and recommendations for change that can be implemented within the justice system to reduce harm to people who use drugs.

The second chapter of this thesis reviews court decisions in BC over a one-year period and analyzes how addiction and rehabilitation are addressed. This analysis reveals in particular

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<sup>19</sup> Redonna Chandler, Bennet Fletcher, and Nora Volkow, "Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety" (2009) 301:2 JAMA 183.

how courts approach sentencing in cases involving street-level trafficking of fentanyl in the context of the opioid crisis. The caselaw analysis shows the current fentanyl crisis in BC has the courts calling for enhanced deterrence and lengthier prison terms.<sup>20</sup> Over forty years of empirical evidence shows no positive relationship between increasing sentences and preventing crime.<sup>21</sup> Particularly, deterrence theory is disconnected from an understanding of addiction. This thesis articulates the precedent being set by the courts in the province of BC where the effects of the opioid crisis have been the most devastating.<sup>22</sup> This thesis argues the courts' targeted response to harshen sentences related to fentanyl charges is exacerbating the opioid crisis.

Chapter three draws on the interviews with the 11 participants in my qualitative research. The questions asked within the interviews are broadly related to the difficulties that exist within the current criminal justice system for people who use drugs. This chapter is divided into the key themes identified within the interviews. These four key themes include: the criminal justice system's lack of understanding and compassion for people who use substances; prisons sentence as an appropriate means to address health issues; the disconnect between the conditions imposed on probation and bail orders for people who use substances and the realities of addiction; and the lack of rehabilitative opportunities and resources within the justice system for people who use substances. This chapter infuses background research with the advocates' responses to questions.

Chapter four outlines the recommendations from advocates for how the criminal justice system can more effectively respond to this crisis. The primary recommendation from advocates is for the criminal justice system to view this crisis as a health crisis, not a criminal crisis. The

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<sup>20</sup> *R v Creuzot*, 2017 BCSC 1075 at para 39, 140 WCB (2d) 692 at para 39.

<sup>21</sup> Cheryl Webster and Anthony Doob, "Searching for Sasquatch: Deterrence of Crime Through Sentence Severity" in Joan Petersilia & Kevin R Reitz, eds, *The Oxford Handbook of Sentencing and Corrections*, (New York, NY: Oxford University Press, 2012) at 2 [Webster & Doob].

<sup>22</sup> BC Coroner, *supra* note 4 at 4; See also News 1130 Staff. "National opioid overdose numbers show crisis is hitting the West hardest" *News 1130* June 6, 2017, online: <<http://www.news1130.com/2017/06/06/national-numbers-opioid-epidemic-show-hitting-west-hardest/>>.

response should be based in an understanding of harm reduction, and the need for further harm reduction strategies, community supports, and diversion opportunities to prevent people from being involved in the justice system. If people are incarcerated, prisons must employ evidence-based harm reduction initiatives to prevent further harm to people who use drugs. Lastly, chapter five summarizes the conclusions and findings from my thesis.

## **Chapter 2: BC's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers**

### **2.1 Introduction**

This chapter analyzes BC's judicial response to the fentanyl crisis and argues that relying on deterrence and increasing the prison sentences for street-level traffickers is not an evidence-based response to this public health crisis. Lengthier prison sentences do not promote public safety and ignore the fact that most street-level traffickers are substance users themselves. The courts' response may result in an increase in the number of individuals in prison, particularly Indigenous people and those with substance abuse issues.

Part one of this chapter looks at the current crisis in BC and the courts' response. The fentanyl crisis and the major findings from the jurisprudence of fentanyl sentencing decisions during the past few years in BC are examined. The sentencing range set by the Court of Appeal is a key focus of this chapter. This section also discusses the courts' findings with respect to the moral culpability of individuals trafficking in fentanyl, particularly when they do not know that fentanyl is contained within the drugs they are selling. Three exceptional cases that justify the court departing from the established sentencing range are examined. Lastly, the enhanced emphasis on deterrence in sentencing street-level fentanyl traffickers is discussed.

Part two of this chapter provides a full review of deterrence. The policy justification for deterrence as a sentencing principle, as well as the research showing the inefficacy of deterrence is explained. This chapter argues that the courts emphasis on deterrence for increasing the range for fentanyl traffickers will not have the effect of deterring other offenders, particularly those with addiction who are dealing at the street level. Theories for why the courts emphasize deterrence in light of the overwhelming research are proposed. The first theory is that the current

Canadian legal climate is particularly punitive towards drug offences. The second is the influence of negative stigma associated with individuals who use drugs and commit drug offences. The final theory is that the courts have limited available responses and are reluctant to accept that deterrence is ineffective, particularly during this difficult period of the fentanyl crisis. The effects of the courts' decision are explored and lead into a discussion of prison in part three.

Part three begins by discussing some of the realities of imprisonment in Canada, to ensure this chapter "...bear(s) witness to the violence of incarceration."<sup>23</sup> This chapter predicts that increased prison sentences may have a particularly detrimental impact on the Indigenous population and people with substance abuse issues, while failing to achieve their policy aims. Some of the critiques that surrounded the imposition of mandatory minimum penalties through the *Safe Streets and Communities Act*<sup>24</sup> are discussed, because of the parallel concerns that such punitive measures would disproportionately impact Indigenous offenders and substance users. This chapter outlines why the shift towards longer prison sentences for fentanyl traffickers is a misguided approach. This approach will increase the number of individuals incarcerated in Canada and put a vulnerable population at increased risk of harm.

## **2.2 Part One**

### **2.2.1 The Fentanyl Crisis**

The potency of fentanyl is at the center of the crisis; a dose the size of a grain of salt may be a lethal dose.<sup>25</sup> Fentanyl is a synthetic opioid that is designed to exhibit effects similar to morphine and heroin for treating pain.<sup>26</sup> It is markedly different from other opioids because it is

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<sup>23</sup> Debra Parkes, "Women in Prison: Liberty, Equality, and Thinking Outside the Bars" (2016) 12 JL & Equal 127.

<sup>24</sup> *Safe Streets and Communities Act*, SC 2012.

<sup>25</sup> *Toth*, *supra* note 8 at 35.

<sup>26</sup> *R v Smith*, 2016 BCSC 2148 at para 24, 134 WCB (2d) 510 [*Smith I*].

estimated to be 20 to 50 times more potent than heroin.<sup>27</sup> The drug is designed to be used in a medical setting for pain relief. It has a fast onset action because it is highly soluble.<sup>28</sup> Fentanyl is legally available in patches, sublingual tablets, and intravenous and lozenge form.<sup>29</sup> These forms assist in dealing with chronic pain by administering low levels of fentanyl into the body over a period of several days.<sup>30</sup> Prescription fentanyl can be abused by chewing or smoking the gel from the patches. A great deal of the fentanyl that is seen in the drug trade is manufactured illegally in China and smuggled internationally.<sup>31</sup>

Drug traffickers are able to drastically increase their profit margin by cutting their substances with fentanyl.<sup>32</sup> Traffickers can mix a small amount of fentanyl with substances including heroin, cocaine, oxycodone, or cutting agents like caffeine and icing sugar, and create a cheaper product with the same effect.<sup>33</sup> Due to its potency and the method of mixing fentanyl with other substances, traffickers can import a small amount of fentanyl and still stand to make revenue when it is inconspicuously sold to users.<sup>34</sup> It is difficult for law enforcement agencies to detect the smuggling of fentanyl because it is frequently imported in small quantities – another factor that makes this drug so pernicious.<sup>35</sup> When traffickers mix the fentanyl with a cutting agent, it does not break down evenly, meaning that some batches will contain more of the

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<sup>27</sup> *R v Smith*, 2017 BCCA 112, 138 WCB (2d) 605 [*Smith II*].

<sup>28</sup> James Shorthouse, *A Dictionary of Anesthesia*, 2<sup>nd</sup> ed (Oxford: Oxford University Press, 2017).

<sup>29</sup> Julie Worley, “A Primer on Heroin and Fentanyl” (2017) 55:6 J Psychosocial Nursing & Mental Health Services 16 at 17.

<sup>30</sup> *R v McCormick*, 2017 BCPC 22 at paras 32-37, 136 WCB (2d) 712.

<sup>31</sup> Worley, *supra* note 29 at 13.

<sup>32</sup> Tamsyn Burgmann, “Fentanyl Brought to BC by Organized Crime, Experts Say”, *CBC News* (6 August 2015), online: <[www.cbc.ca/news/canada/british-columbia/fentanyl-brought-to-b-c-by-organized-crime-experts-say-1.3182229](http://www.cbc.ca/news/canada/british-columbia/fentanyl-brought-to-b-c-by-organized-crime-experts-say-1.3182229)>.

<sup>33</sup> Claude Solnik, “The Fentanyl Factor”, *Long Island Business News* (9 November 2017), online: <<https://libn.com/2017/11/09/the-fentanyl-factor/>>.

<sup>34</sup> Donald Ashley, “The Price of Crossing the Border for Medications: Letter” (2017) 377:14 New England J Medicine 1699.

<sup>35</sup> Worley, *supra* note 17.

powerful substance than others.<sup>36</sup> Fentanyl overdoses lead to respiratory depression resulting in lethally low circulating oxygen levels. The drug Naloxone can reverse the effects of an overdose and its administration has reduced opioid overdose deaths in Canada.<sup>37</sup> While fentanyl is trafficked in a variety of methods and quantities, this chapter analyzes the reported caselaw to discuss the illicit trafficking of fentanyl at the street-level in BC.

### **2.2.2 Caselaw on Fentanyl Sentencing**

This chapter examines the reported sentencing decisions for street-level fentanyl traffickers in BC between January 1, 2016 and November 1, 2017 from the BC Provincial Court; BC Superior Court; and BC Court of Appeal.<sup>38</sup> The time period of 2016-2017 was selected to coincide near the declaration of the fentanyl crisis. The initial search for fentanyl sentencing decisions yielded 50 cases which were narrowed down to sentencing decisions specifically involving street-level fentanyl trafficking. The judgments were determined to be for street-level traffickers either when there was explicit reference from the court that the accused was a low-level or street-level trafficker, or if the applicable street-level range was imposed by the court.<sup>39</sup> From these reported decisions, 16 cases were found to involve street-level trafficking of

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<sup>36</sup> Justine Hunter, “British Columbia Police Prepare for Growing Fentanyl Crisis”, *The Globe and Mail* (14 June 2016), online: <<https://www.theglobeandmail.com/news/british-columbia/british-columbia-police-prepare-for-growing-fentanyl-crisis/article30461855/>>.

<sup>37</sup> Vancouver Coastal Health, “Insite User Statistics” online: <<http://www.vch.ca/public-health/harm-reduction/supervised-injection-sites/insite-user-statistics>> February 2018; Government of Canada, “Questions and Answers- Naloxone” <<https://www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/prescription-drug-list/questions-answers-naloxone.html>> March 22, 2017.

<sup>38</sup> This chapter does not include the unreported decisions of the courts of British Columbia. As a result, the trend in the reported decisions of the provincial court may not be representative of the courts across BC. The province is however, bound by the Court of Appeal decisions. Drug Treatment Courts (DTCs) in British Columbia are beyond the scope of this work, and because of the nature of DTCs there were no reported sentencing decisions.

<sup>39</sup> While Crown, Defence, and the Court were usually not in agreement about the sentence to be imposed, the street-level range was not in question for the cases reviewed in this chapter. The facts of the cases further supported that they were street-level given the quantity of fentanyl, the method of distribution, and the way the person came to be arrested.

fentanyl.<sup>40</sup> BC was selected because it is the epicenter of the fentanyl crisis in Canada and the province has been recognized for its multi-sectoral approach to the fentanyl crisis.<sup>41</sup>

Street-level traffickers, or “pushers”, are the individuals who sell directly to the purchaser for their personal use.<sup>42</sup> A street-level trafficker typically sells the product to the end user by walking or riding a bike in a particular area; being a participant in a dial-a-dope trafficking scheme (where people use a cell phone to take orders and deliver drugs); or using a residence described as a “crack shack”.<sup>43</sup> Drug trafficking works in a hierarchical fashion and street-level drug traffickers usually work under a mid-level drug trafficker who loads the individual with the drugs for distribution. Street-level dealers typically do not mix, cut, or package the drugs. The street-level trafficker does not carry a large volume of drugs at one time, given the potential impact on the drug trafficking operation if the drugs were seized by law enforcement or lost through theft.<sup>44</sup> These traffickers are considered the lowest level in the drug hierarchy and are the individuals most likely to be detected by law enforcement.<sup>45</sup> Individuals who are at a higher level of the trafficking operation – couriers, mid-level dealers, or high-level dealers – insulate themselves and are more difficult for police to detect.<sup>46</sup> An important topic from the sentencing jurisprudence was the establishment of the sentencing range for street-level trafficking of fentanyl.

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<sup>40</sup> These 16 decisions include both the provincial and appeal decisions for Mr. Rutter and Mr. Smith. It is therefore 14 different individuals, and 16 cases. *R v Rutter*, 2017 BCCA 193 at para 5, 139 WCB (2d) 114 [*Rutter I*]; *R v Rutter*, 2016 BCPC 321, 134 WCB (2d) 76 [*Rutter II*];

<sup>41</sup> *Ibid*.

<sup>42</sup> Frederick Desroches, “Research on Upper Level Drug Trafficking: A Review” (2007) 37:4 J Drug Issues 827 at 828; see also *R v Mann*, 2017 BCPC 401 at para 42 [*Mann*].

<sup>43</sup> *Mann*, *ibid* at para 43.

<sup>44</sup> *Ibid* at para 42.

<sup>45</sup> *R v Henry*, 2017 BCSC 1627 at para 44, 141 WCB (2d) 513; Thomas Kerr et al., “Characteristics of Injection Drug Users Who Participate in Drug Dealing: Implications for Drug Policy” (2008) 40:2 J Psychoactive Drugs 147 at 150.

<sup>46</sup> *R v Derycke*, 2016 BCPC 291 at para 28, 133 WCB (2d) 282 [*Derycke*].



### 2.2.3 The Range for Fentanyl Sentencing for Street-Level Traffickers

The sentencing range for fentanyl trafficking was defined by the BC Court of Appeal in *R v Smith*. *Smith* set the range for street-level trafficking of fentanyl to a prison sentence of “18-36 months and possibly higher”.<sup>47</sup> This range is higher than the six to eighteen-month range for trafficking in other schedule I substances in BC.<sup>48</sup> In appealing the sentence of six months, the Crown in the *Smith* appeal filed evidence of the “proliferation of fentanyl and the fatal consequences of its illegal sale and distribution” across Canada and particularly within BC.<sup>49</sup> The Court of Appeal dismissed the sentence appeal but accepted that the Court should establish a longer range for street-level trafficking of fentanyl to appropriately respond to the magnitude of the crisis. The law has made a pronouncement that trafficking in this harsh drug will lead to a harsh sentence.

### 2.2.4 Exceptional Circumstances

An accused individual must establish “exceptional circumstances” in order to be sentenced outside of the custodial range for a particular offence.<sup>50</sup> The “exceptional cases”, or people who establish they have “exceptional circumstances”, are typically sentenced to suspended sentences and avoid custodial dispositions. Suspended sentences are a non-custodial sentence whereby the sentenced person follows a probation order with conditions defined by the sentencing judge. The maximum length of a suspended sentence is three years.<sup>51</sup> Suspended

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<sup>47</sup> *Smith II*, *supra* note 27 at para 45. The maximum sentence for trafficking in a schedule I substance is life imprisonment.

<sup>48</sup> *R v Voong*, 2015 BCCA 285 at para 44, [2015] B.C.J. No. 1335 [Voong]. The *Controlled Drugs and Substances Act* is Canada’s Federal Drug Control Statute. Substances are classified in schedules I through IV, with schedule I being considered the most serious. Examples of schedule I substances include methamphetamine, heroin, and cocaine. Statutorily, the scope of sentence for trafficking in schedule I substance (including fentanyl) is from a suspended sentence to life imprisonment.

<sup>49</sup> *Smith II*, *supra* note 27 at paras 2 and 37.

<sup>50</sup> *Voong*, *supra* note 48 at para 59.

<sup>51</sup> *Criminal Code*, RSC 1985, c C-46, s 718(b) [Criminal Code].

sentences are non-custodial sentences but are still recognized as having the ability to specifically deter the individual being sentenced.<sup>52</sup> However, these sentences are understood as not sending a message of general deterrence, and partly for that reason, the courts can only give these non-custodial sentences in exceptional cases.<sup>53</sup>

As set out by the Court of Appeal in *Voong*, there are numerous factors that a court can consider in deciding whether a case is exceptional.<sup>54</sup> *Voong* provides a list of factors, but the main consideration is whether the person has made strides towards rehabilitation that have led them to truly turning their life around:

Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence.<sup>55</sup>

The BC Court of Appeal in *Smith* demonstrates that trafficking fentanyl will result in a period of time in jail unless there are numerous mitigating factors that lead the case to be defined as exceptional by the sentencing judge.<sup>56</sup>

Of the 14 different accused persons addressed in this chapter, only three individuals were found to have exceptional circumstances that took them outside the sentencing range: Mr. Joon, Mr. Porter, and Ms. Naccarato.<sup>57</sup> The set of cases examined in this chapter shows that addiction motivated nearly all of the individuals who were engaging in street-level trafficking, and yet only

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<sup>52</sup> *Voong*, *supra* note 48 at para 39.

<sup>53</sup> *R v Porter*, 2017 BCPC 330 at para 69, 142 WCB (2d) 834.

<sup>54</sup> *Voong*, *supra* note 48 at para 59.

<sup>55</sup> *Ibid*; *Voong*, *supra* note 48 at para 59.

<sup>56</sup> *R v Hambly*, 2016 BCPC 215 at para 12, 132 WCB (2d) 82.

<sup>57</sup> The British Columbia Court of Appeal reversed Mr. Rutter's suspended sentence, and the trial judge did not explicitly say that the sentence was being imposed because Mr. Rutter's circumstances were exceptional. There was a second case, *R v Ramstead*, that was addressed in the *R v Rutter* appeal that this chapter does not discuss because the trial decision was not reported.

three of the 14 people sentenced during January 1, 2016 and November 1, 2017 were given non-custodial sentences. Mr. Joon was one of the people who was not motivated by his addiction to engage in trafficking and his case was found to be exceptional. The mitigating factors the court relied upon demonstrate that the court gives Mr. Joon credit for his lack of addiction and finds that deterrence is not necessary.<sup>58</sup> The courts' position in this case appears to privilege people who do not have a pre-existing addiction, absolving them of the need for deterrence.

Mr. Porter and Ms. Naccarato came to their sentencing hearings after both going through intensive treatment for their addictions.<sup>59</sup> For the case of Mr. Porter and Ms. Naccarato, the court emphasized that their rehabilitation had effectively turned them into different people. The rehabilitative steps of Mr. Porter and Ms. Naccarato are not to be diminished, however it is problematic that the court relies on individuals to “truly turn... (their) life around” between their offence and sentencing date when the individual is affected by an addiction.<sup>60</sup> An underlying expectation that individuals overcome their addiction between their date of arrest and sentencing shows a fundamental misunderstanding of addiction.<sup>61</sup> Below is a summary of the three exceptional cases and the factors the court considered in finding exceptional circumstances.<sup>62</sup>

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<sup>58</sup> See table below.

<sup>59</sup> Only two of the fourteen accused were not motivated to traffic by their addiction.

<sup>60</sup> *Voong*, *supra* note 48 at para 59.

<sup>61</sup> Addiction is a relapsing and remitting disease that affects people in different ways with different rates of recovery.

<sup>62</sup> Emphasis throughout the chart is my own.

**Table 1: Exceptional Cases**

**Factors leading the Court to finding the three cases exceptional from the Courts**

| Case                        | Exceptional Circumstances Stated <sup>63</sup>  |
|-----------------------------|---|
| Mr. Joon <sup>64</sup>      | <ul style="list-style-type: none"> <li>● <b><u>Not a drug user</u></b>; in good health; had a positive upbringing. Trafficking in fentanyl was “out of character” for him</li> <li>● No need to specifically deter him or to protect the public</li> <li>● Very young (nineteen) at the time of trafficking</li> </ul>  |
| Mr. Porter <sup>65</sup>    | <ul style="list-style-type: none"> <li>● Exceptional because “in his early attempt at age eighteen to <b><u>take control of his own life and his own addiction</u></b>; that he was able to remain sober throughout his twenties...”<sup>66</sup></li> <li>● a supporter from the treatment facility Mr. Porter attended described that his rehabilitation was so effective that he was <b><u>“not the same guy”</u></b> as he was no longer affected by his addiction.<sup>67</sup></li> </ul> |
| Ms. Naccarato <sup>68</sup> | <ul style="list-style-type: none"> <li>● “...turned her life around”<sup>69</sup></li> <li>● Positive supports</li> <li>● <b>“a prison sentence</b> would likely expose her to persons in the drug trade and <b>would do more harm than good.</b><sup>70</sup></li> </ul>   |

The decisions in *Porter* and *Naccarato* both discuss that a custodial sentence would interfere with rehabilitation. By extension this implies the courts understand that prisons are not

<sup>63</sup> There are circumstances for Mr. Porter and Ms. Naccarato that may have contributed to the courts finding that their case was exceptional, but the portions selected for this chart were the most salient.

<sup>64</sup> *R v Joon*, 2017 BCPC 301.

<sup>65</sup> *Porter*, *supra* note 53 at para 72.

<sup>66</sup> *Ibid* at para 72.

<sup>67</sup> *Ibid* at para 34.

<sup>68</sup> *R v Naccarato*, 2017 BCSC 645 at para 9, 138 WCB (2d) 604.

<sup>69</sup> *Naccarato*, *supra* note 68 at para 93.

<sup>70</sup> *Ibid*.

the place to foster rehabilitation, and that they can “do more harm than good.”<sup>71</sup> Yet, the remaining individuals who were motivated by their addiction to engage in street-level drug trafficking were sentenced to custody.<sup>72</sup> The application of the exceptional circumstances to only three people shows that courts are reluctant to acknowledge the harms of incarcerating people who are struggling with addiction.

The next section of this work discusses the findings from the analysis of the other remaining sentencing decisions where the court found that it was not an exceptional case. In decisions that were not found to be exceptional a prison term was imposed, and the courts emphasized the enhanced need for deterrence when sentencing someone to trafficking in fentanyl.

### **2.2.5 The “Enhanced” Need for Deterrence in Fentanyl Trafficking Cases**

Drug trafficking cases in Canada emphasize deterrence and denunciation as paramount considerations; drug trafficking is seen as a “scourge on society.”<sup>73</sup> BC caselaw shows that the courts are increasing the sentences and finding there is an “enhanced” need for deterrence when the substance being trafficked is fentanyl.<sup>74</sup> This chapter argues that enhancing deterrence for fentanyl traffickers is an ineffective response to the fentanyl crisis that stands to cause more harm during this public health crisis. To understand the potential harms of the courts’ enhanced reliance on deterrence and denunciation, it is first necessary to revisit the intention of these sentencing principles.<sup>75</sup>

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<sup>71</sup> *Ibid.*

<sup>72</sup> Of the 11 remaining people who were not considered to have “exceptional circumstances” and therefore receive a custodial disposition, 10 were motivated to traffic because of their addiction.

<sup>73</sup> *Derycke*, *supra* note 46 at para 68.

<sup>74</sup> *R v Butler*, 2017 BCPC 315, 142 WCB (2d) 575 [*Butler*]. *R v Creuzot*, 2017 BCSC 1075 at para 39, 140 WCB (2d) 692

<sup>75</sup> *Smith II*, *supra* note 26 at para 26.

## 2.3 Part Two: Looking Deeper into Deterrence

Part one established that the courts in BC are responding to the fentanyl crisis by implementing longer prison sentences for fentanyl traffickers as a result of an emphasis on deterrence. Part two begins by identifying the assumptions underlying the sentencing principles of deterrence and shifts to summarizing the extensive research on deterrence. Research shows that, to the extent individuals are deterred, it is largely through the existence of the sanction and not the severity of the sanction.<sup>76</sup> Further, a significant consideration in this chapter is that deterrence and addiction are incompatible. Individuals' motivations may not be affected by the increase in the range of custodial sentence for dealing in fentanyl if they are dealing to support their habit. Many individuals engage in street-level trafficking to obtain the substance they are dependent on and cannot afford to otherwise purchase. This section of the chapter examines the reasons courts emphasize deterrence in the face of the research. The three explanations provided for the courts' response include the conservative trend in criminal justice in Canada; the stigma of drug users; and the challenges for the courts to shift.

### 2.3.1 What is Deterrence?

The purpose of deterrence is to discourage individuals from offending.<sup>77</sup> There are two forms of deterrence: specific and general.<sup>78</sup> Specific deterrence is aimed at the individual being sentenced: the punishment is meant to specifically deter that person from engaging in the offending behaviour in the future. General deterrence is intended to ensure that people do not

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<sup>76</sup> Webster & Doob, *supra* note 21 at 175.

<sup>77</sup> *R v BWP*, 2006 SCC 27 at para 2, [2006] 1 S.C.R. 94 [BWP]; *R v BVN*, 2004 BCCA 266, 196 BCAC 100.

Denunciation is not specifically addressed in this article, but it is also emphasized in the research. Denunciation is the court's way of communicating that the society condemns the offender's conduct. It is a symbolic message that the conduct will result in a punishment for conflicting with society's values as set out in Canada's Criminal Code.

<sup>78</sup> *Criminal Code*, *supra* note 51 at s 718(b).

become offenders in the first place. General deterrence is intended to send a preventative message to the public when individuals are sentenced: this is the punishment that will be met for this (serious) offence. The result is that the offender is often punished more severely to “send a message” to individuals who may be inclined to participate in related criminal activity.<sup>79</sup> Imposing general deterrence will often result in a harshening of the sentence.<sup>80</sup> As a result, when courts focus on deterrence it tends to result in the imposition of custodial sentences or an increase of the length of jail sentences.<sup>81</sup> These principles have been broadly applied to all individuals convicted of trafficking fentanyl, regardless of their personal circumstances or present addictions. However, research suggests that increasing the prison sentences for street-level traffickers is not an effective response to the fentanyl crisis.

### **2.3.2 Emphasizing Deterrence Will Not Deter**

Research suggests that increasing the sentence to deter future offenders is not effective at actually deterring future offenders.<sup>82</sup> Deterrence through severity, or “DTS” is the theory that crime may be decreased if the severity of punishment is increased.<sup>83</sup> Research indicates harsher sentences do not achieve even a marginal effect on the deterrence of crime.<sup>84</sup> While some judges are aware that harsher sentences may not deter the specific offender before them, there is a general misconception that harsher sentences may deter other offenders.<sup>85</sup>

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<sup>79</sup> Russel Durrant, Stephanie Fisher and Maria Thun, “Understanding Punishment Responses to Drug Offenders: The Role of Social Threat, Individual Harm, Moral Wrongfulness, and Emotional Warmth” (2011) 38 Contemporary Drug Problems 147 at 169.

<sup>80</sup> *BWP*, *supra* note 77 at para 36.

<sup>81</sup> *Ibid. Joon*, *supra* note 64 at para 52..

<sup>82</sup> Webster & Doob, *supra* note 21 at 2.

<sup>83</sup> *Ibid.*

<sup>84</sup> Michael Weinrath and John Gartrell, “Specific Deterrence and Sentence Length” (2001) 17:2 J Contemporary Criminal Justice 105.

<sup>85</sup> Webster & Doob, *supra* note 21 at 7.

The principle of deterrence, detached from research and an understanding of criminal behaviour, is rational: if people know they are going to receive a harsh sentence for a crime, they will think twice before committing it.<sup>86</sup> This encapsulates the same view economists have that “higher prices lower the demand, and that human beings are rational decision-makers.”<sup>87</sup> Knowledge of highway traffic offences, including speeding tickets may coincide with this logic, but this assumption of rational decision-making does not align with the reality of most crimes.<sup>88</sup> Crimes are frequently committed under the influence of intoxicants, “powerful emotions, or situational pressures.”<sup>89</sup> Further, the more serious crimes are considered morally wrong and most individuals would not commit them regardless of the penalty.<sup>90</sup> Incidents of homicide and the death penalty provide an example of the incorrect assumptions underlying deterrence as a sentencing principle. The implementation of the death penalty for individuals convicted of homicide in the United States did not have the expected deterrent effect, and States that enforce a death penalty for homicide do not have a lower incidence of homicide compared to other states.<sup>91</sup>

The evidence that deterrence through severity is ineffective was referred to in the Supreme Court of Canada decision of *R v Nur*.<sup>92</sup> As discussed by Debra Parkes, the Supreme Court’s decision in *Nur* includes a “candid discussion of the principle of deterrence as it relates to sentencing severity” and an acknowledgment that “doubts concerning the effectiveness of

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<sup>86</sup> *Ibid* at 8.

<sup>87</sup> *Ibid*.

<sup>88</sup> Jeffrey Howard, “Punishment as Moral Fortification” (2017) 36:1 L & Philosophy 45 at 48.

<sup>89</sup> Webster & Doob, *supra* note 21 at 9.

<sup>90</sup> *Ibid*.

<sup>91</sup> Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, “Imprisonment and Reoffending” (2009) 38 Crime & Justice 115.

<sup>92</sup> *R v Nur*, 2015 1 SCR 773.



incarceration as a deterrent have been longstanding.”<sup>93</sup> The Supreme Court acknowledged the literature to ultimately say, “mandatory minimum sentences do not, in fact, deter crimes.”

Increasing sentence severity does not result in a reduction in crime. A complex sequence of factors must be present in order for variation in sentence severity to have a potential deterrent effect on levels of crime.<sup>94</sup> Below is a table outlining the pre-conditions that must be present for a DTS theory to be successful. The table is divided into two rows. The bottom row titled “reality” outlines that the four requirements for DTS are not supported by empirical research; DTS is “empirically implausible.”<sup>95</sup> Emphasizing deterrence and increasing the prison sentences for street-level traffickers ignores that many of the street-level traffickers of fentanyl are substances users themselves who are motivated to traffic to support their own addiction.

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<sup>93</sup> *Ibid* at para 113 as cited in Debra Parkes, “Punishment and Its Limits” Forthcoming in (2018) Supreme Court Law Review.

<sup>94</sup> Webster & Doob, *supra* note 21 at 9.

<sup>95</sup> *Ibid*.

**Table 2: The Four Main Requirements of Deterrence and the Corresponding Reality**

|                                 |  |   |   |  |
|---------------------------------|--|---|---|--|
| <b>Requirement<sup>96</sup></b> | Individuals will be aware that the punishment for trafficking fentanyl is harsher.   | The potential offender will evaluate their actions and weigh the consequences prior to engaging in criminal activity. <sup>97</sup>   | Individual offenders will view the increased penalty as costly or punitive. <sup>98</sup>   | Individuals will believe they are likely to get arrested for the offence and receive the punishment.               |
| <b>Reality</b>                  | Public opinion polls show that most individuals are unaware of the maximum sanctions for offences, and what crimes have mandatory minimums. <sup>99</sup><br>-People are generally unaware of the punishment levels in their communities. <sup>100</sup> | Many offences are committed in the “heat of the moment” or are guided by impulse or sway of emotion. <sup>101</sup><br>- Individuals are often motivated by their circumstances including poverty, and substance abuse. | Individuals who are most at risk of criminal behaviour are often entrenched within a lifestyle where criminal behaviour is required or rewarded, and they have a reduced perception of risk within committing crime. <sup>102</sup> | Individuals perceive the probability of being arrested as low, and the statistics of reported crimes reflect this. |

### 2.3.3 Deterrence and Addiction

Deterrence and addiction are incompatible with each other. Addiction involves engaging in drug use on an ongoing basis despite the risk of harms or other negative consequences

<sup>96</sup> *Ibid.*

<sup>97</sup> Webster & Doob, *supra* note 21 at 10.

<sup>98</sup> *Ibid.*

<sup>99</sup> Webster & Doob, *supra* note 21 at 9.

<sup>100</sup> Webster & Doob, *supra* note 21 at 10 citing Anthony Doob, and Julian Roberts, “Crime and the Official Response to Crime: View of the Canadian Public.” (1982) Ottawa: Department of Justice, Canada.

<sup>101</sup> *Ibid.*

<sup>102</sup> Webster & Doob, *supra* note 21 at 10 citing Stephen Baron et al, “Deterrence and Homeless Male Street Youths.” (1998) Canadian Journal of Criminology 40(1): 27. See also Dr. Evan Wood Expert Opinion Letter to BC Courts dated September 2017 Appendix D.

associated with these behaviors.<sup>103</sup> The current model of sentencing views punishment and “sending a message” to the offender (and other offenders) as a solution, with addiction as a mere factor to balance on sentence. Understanding addiction and its specific impact on the crime at hand may assist in crafting sentences suited to reduce recidivism. The threat of an increased jail term does not dissolve an addiction.

Enhanced sentences for drinking and driving offences, including mandatory minimum sentences, have often been cited for their potential deterrent capabilities.<sup>104</sup> Research shows that the indicator of future offences related to drinking and driving for people with substance abuse issues was the presence of an alcohol addiction, not the perceived deterrence.<sup>105</sup> Research indicates that people with severe addictions will not be deterred by the imposition of stricter sanctions, and suggests that treatment should be provided. This was acknowledged by the British Columbia Court of Appeal in *R v Preston* in 1990, a case where the court discussed rehabilitation, deterrence, and addiction. In *Preston* the court said: “to speak of deterrence, specific or general, in respect to persons physically and uncontrollably addicted to an illegal substance may not be entirely an exercise in logic.”<sup>106</sup> Harsher sentencing principles are not likely to obtain a deterrent impact when there is an addiction present.

### **2.3.4 Street-Level Trafficking and Addiction**

Individuals engaged in street-level trafficking are often motivated by their addiction to sell drugs in order to access drugs for their own use; it is a “survival technique.”<sup>107</sup> In a study

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<sup>103</sup> American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders*, 5 Ed (DSM-5), (Arlington, VA: American Psychiatric Association, 2013).

<sup>104</sup> Jiang Yu, Peggy Chin Evans and Lucia Perfetti Clark, “Alcohol addiction and perceived sanction risks: Detering drinking drivers” (2006) 34:2 J Criminal Justice 165.

<sup>105</sup> *Ibid* at 72.

<sup>106</sup> *R v Preston*, 1990 BCCA 576 at 15, 47 BCLR (2d) 273.

<sup>107</sup> Pivot Legal Society, “Prosecuting Fentanyl Trafficking Offences” (2017), online: <[www.pivotlegal.org/fentanyl\\_sentencing](http://www.pivotlegal.org/fentanyl_sentencing)>.

conducted in the Downtown Eastside, 412 Intravenous Drug Users participated and 17%, of them disclosed they had dealt drugs during the previous six months.<sup>108</sup> The primary reasons the participants gave for trafficking was obtaining the drugs (49%) and getting money (36%). Unstable housing and recent incarceration were the factors positively associated with individuals involved in drug dealing. Further research shows that individuals who are targeted by enforcement are most commonly the individuals who "carry several markers of higher intensity addiction."<sup>109</sup> It is the people at the lowest level who are the most visible and in the most dangerous role of the drug-dealing hierarchy. Of the 14 different accused discussed in this chapter who were convicted of street-level trafficking of fentanyl, 12 were said to have addictions that motivated their offence.

### **2.3.5 Why Emphasize Deterrence if it is not a Research-Based Response?**

#### **2.3.5.1 Canadian Law on Drugs**

The courts in BC have responded to the fentanyl crisis within the current punitive framework set in Canada in 2006.<sup>110</sup> In 2006, the Conservative government took power in Canada and vastly changed the look of criminal justice. From 2006 to 2015 Parliament substantially changed criminal law, including sentencing provisions.<sup>111</sup> Scholars have noted that this approach did "little to address the root causes of crime."<sup>112</sup> Research reviewing the proposed and passed legislation, government documents, and parliamentary speaker notes from January 2007 to January 2014 found a blending of illicit drug use and danger to society throughout the

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<sup>108</sup> Kerr, *supra* note 45 at 149.

<sup>109</sup> *Ibid* at 149-150.

<sup>110</sup> Parkes, *supra* note 23 at 132.

<sup>111</sup> *Ibid*.

<sup>112</sup> Susan C Boyd, Connie Carter & Donald MacPherson, *More Harm Than Good: Drug Policy in Canada* (Halifax: Fernwood Publishing, 2016) at 36.

policy discourse.<sup>113</sup> Illicit drug use was emphasized as a criminal problem and not a public health issue.<sup>114</sup> Numerous “tough on crime” bills were passed, including ones that promised to keep the streets safe while removing rehabilitative options for specific offences. Critics of the *Safe Streets and Communities Act* had argued that Canadian drug laws were already severe<sup>115</sup> and further that there was a disconnect between the message of the Conservative government and the crime statistics; in 2012 Canada had its lowest crime rate in 40 years.<sup>116</sup>

In 2011, the principle of harm reduction was removed from the National Anti-drug Strategy, and there was a pronounced shift away from supporting harm reduction initiatives in Canada. In line with shifting away from harm reduction, the Federal Government allotted 70% of its overall budget, or \$273.6 million, to the Enforcement Action Plan.<sup>117</sup> Some legal scholars have described these legislative changes as part of a “Punishment Agenda”, in large part because of the addition of numerous mandatory minimum sentences for imprisonment, and stark limits on the availability of conditional sentences orders.<sup>118</sup>

The *Safe Streets and Communities Act* was implemented in 2012 and introduced numerous mandatory minimum sentences including those for drug crimes. Conditional Sentence Orders were introduced into the *Criminal Code* in 1996 by the Liberals as a way of reducing the use of imprisonment, and two separate bills were passed in 2007 and 2012 during the

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<sup>113</sup> Shelley Marshall, “Canadian Drug Policy and the Reproduction of Indigenous Inequities” (2015) 6:1 Intl Indigenous Policy J 1 at 2.

<sup>114</sup> *Ibid* at 6, citing Hon. Rob Nicholson (minister of Justice and Attorney General of Canada in support of Bill C-10).

<sup>115</sup> Susan C Boyd & Connie Carter, *Killer Weed: Marijuana Grow Ops, Media, and Justice*, (Toronto: University of Toronto Press, 2014) at 5.

<sup>116</sup> Statistics Canada, “Police-Reported Crime Statistics in Canada”, by Samuel Perreault, in *Component of Statistics Canada*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2012), online: <[www.statcan.gc.ca/pub/85-002-x/2013001/article/11854-eng.pdf](http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11854-eng.pdf)>, as cited in Marshall, *supra* note 113 at 2.

<sup>117</sup> *Ibid*.

<sup>118</sup> Parkes, *supra* note 23 at 131.

Punishment Agenda to severely restrict courts' use of Conditional Sentence Orders.<sup>119</sup> During the Punishment Agenda prisons were purported by the Conservative legislators to be an effective method for reducing criminal behaviour and alternatives to custodial sentences were reduced.<sup>120</sup> At this time, the availability of conditional sentence orders for individuals convicted of trafficking of a schedule I substance was removed.<sup>121</sup> Today the legacy of a Conservative and punitive sentencing regime exists within the criminal justice system despite Canada's new Liberal leadership. The shifts during the Punishment Agenda have affected the rate of incarceration within Canada and enforced a "tough on crime" mentality. This mentality has affected individuals charged with drug crimes, regardless of their potential substance abuse issues or mental health.

The emphasis in sentencing decisions on deterrence for fentanyl traffickers is congruent with the shift towards increased use of imprisonment in Canada in recent years. The "tough on crime" measures are socially and economically costly and are found to have a disproportionately negative effect on "people living with drug dependence, Indigenous people, and youth in or leaving the foster care system."<sup>122</sup> The impact of the "tough on crime" agenda to vulnerable populations will be discussed further later in this chapter.

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<sup>119</sup> Conditional Sentence Orders are a jail sentence served in the community. They are often called house arrest because the typical conditions require that the person remain in their home unless they are attending their education, employment, or appointments with their probation officer.

<sup>120</sup> Alana Klein, "Criminal Law and the Counter-Hegemonic Potential of Harm Reduction" (2015) 38:2 Dalhousie LJ 448.

<sup>121</sup> *The Safe Streets and Communities Act* amended s.742.1, the section that allows for imposing of conditional sentences, to exclude sentences that are indictable and prosecuted by indictment and carry a maximum term of imprisonment of 14 years or life.

<sup>122</sup> Pivot Legal Society, *Throwing Away the Key: The Human and Social Cost of Mandatory Minimum Sentences* (Vancouver: Pivot Legal Society, 2013) at 1 [Pivot: *Throwing Away the Key*].

### 2.3.5.2 Stigma in Sentences

The severe punishment that drug offenders receive is tied to the stigma associated with drug offenders and people who drug users as “deviant others.”<sup>123</sup> The stigma is dependent on the drug type, with low levels of stigma for marihuana, and higher levels for methamphetamine and heroin use. There is a propensity towards the punishment of individuals who use drugs because of the perception of the moral wrongfulness of drug use, and the perception of harm to both the individual and to others in society as a whole.<sup>124</sup> Further, addiction is often stigmatized by society as a problem related to self-control.<sup>125</sup> This “tough on crime” approach is not grounded in evidence. The opioid crisis is a notably difficult time for courts to shift to accepting the “null hypothesis [that] variation in the severity of sanctions is unrelated to levels of crime.”<sup>126</sup> Nevertheless, the public may be more receptive to a shift towards lower sentences if presented with the full context. When the public is provided with information about the effects, costs, and the eventual release of prisoners they are more likely to favour alternatives to prison.<sup>127</sup> Members of the public who are provided context, as well as a choice, do not necessarily favour a punitive sentence.<sup>128</sup> This chapter suggests that the stigmas surrounding drug offenders are factors that promote courts’ reliance on deterrence as a sentencing principle, despite the fact that the efficacy of this principle is not supported by research.

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<sup>123</sup> Durrant, *supra* note 79 at 150. Robert J. MacCoun, “Moral Outrage and Opposition to Harm Reduction” (2013) 7:1 Crim L & Philosophy 83 at 86 and 91 [MacCoun].

<sup>124</sup> *Ibid* Durrant at 167.

<sup>125</sup> Charles Dackis & Charles O’Brien, “Neurobiology of Addiction: Treatment and Public Policy Ramifications” (2005) 8:11 Nature Neuroscience 1431 at 1431 [Dackis & O’Brien]. See also, Heather Henderson, *I Am More Than my Addiction: Perceptions of Stigma and Access to Care in Acute Opioid Crisis* (MA Thesis, University of South Florida College of Arts and Sciences, 2018).

<sup>126</sup> Webster & Doob, *supra* note 21.

<sup>127</sup> Kimberly Varma & Voula Marinos, “Three Decades of Public Attitudes Research on Crime and Punishment in Canada” (2013) 55:4 Can J Criminology & Criminal Justice 549.

<sup>128</sup> *Ibid* at 551.

### 2.3.5.3 The Crisis of Stigma

Reducing stigma experienced by individuals who use drugs is an important response to the opioid crisis.<sup>129</sup> The stigmas associated with drug use affects people who use drugs' ability to access resources, get housing, have employment opportunities, and ultimately to be safe in society. The stigma of being a "drug user" leads people to use drugs alone, and it is the people using alone who represent the majority of people who are dying from fentanyl overdoses.<sup>130</sup> There have been no recorded deaths at the overdose prevention sites or supervised consumption sites in BC.<sup>131</sup> Between January 1, 2016 to July 31, 2017, four of every five deaths were male, and "about two-thirds of people dying from ... illicit drug overdoses between January 2016 and July 2017 had BC Corrections involvement at some time in their lives, or were currently under BC Corrections supervision".<sup>132</sup>

Problematic substance use is a complex medical condition, and an effective response to the opioid crisis requires compassion for those involved. On January 31, 2018, the BC Chief Coroner Lisa Lapointe, in discussing the number of deaths from fentanyl, urged that "if we truly want to save lives, we're all going to have to be willing to let go of old stereotypes, and old and sadly ineffective solutions."<sup>133</sup> The courts should be mindful of these stigmas and their

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<sup>129</sup> See Boston University School of Public Health, Dean's Seminar Series on Contemporary Issues in Public Health: Why Cops are Sending People with Addiction to Treatment instead of Jail (Mar. 17, 2016), online: <[www.bu.edu/sph/news-events/signature-programs/deans-seminars/deans-seminar-series-on-contemporary-issues-in-public-health/deans-seminar-series-on-contemporary-issues-in-public-health-2015-2016/the-opioid-epidemic-why-cops-are-sending-people-with-addiction-to-treatment-instead-of-jail/](http://www.bu.edu/sph/news-events/signature-programs/deans-seminars/deans-seminar-series-on-contemporary-issues-in-public-health/deans-seminar-series-on-contemporary-issues-in-public-health-2015-2016/the-opioid-epidemic-why-cops-are-sending-people-with-addiction-to-treatment-instead-of-jail/)>.

<sup>130</sup> BC Coroner, *supra* note 4 at 12.

<sup>131</sup> Vancouver Coastal Health, "Insite user statistics" (February, 2018) online: <http://www.vch.ca/public-health/harm-reduction/supervised-injection-sites/insite-user-statistics>.

<sup>132</sup> BC Coroners Service, "Illicit drug overdose Death Review Panel releases recommendations" (April 5, 2018) <online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/news/2018/2018pssg0019-000572.pdf>>.

<sup>133</sup> E Duran and R Zussman, *supra* note 3.



devastating potential in sentencing individuals trafficking fentanyl at the street-level who have an addiction, as they are among the most vulnerable to overdose death in this crisis.

#### **2.3.5.4 The Challenges for Courts to Shift the Law**

Individuals with addiction issues face custodial sentences at a high rate. Statistics show that 90% of individuals in Canadian federal penitentiaries are assessed as having substance abuse issues.<sup>134</sup> In 2002, Canada reached an all-time high for charges recorded under the *Controlled Drugs and Substances Act*: 93,000.<sup>135</sup> The evidence shows that individuals who use drugs are overrepresented within the justice system.<sup>136</sup>

In the *PHS Community Services Society* case, the continued operation of the safe injection site, Insite, was allowed by the Supreme Court of Canada.<sup>137</sup> In *PHS*, the court referred to evidence that many of the people accessing Insite to use intravenous drugs have histories of physical and sexual abuse, family histories of drug abuse, exposure to serious drug use, and mental illness. As the Supreme Court commented in *PHS*:

Many injection drug users in the DTES [Downtown East Side] have been addicted to heroin for decades, and have been in and out of treatment programs for years. Many use multiple substances and suffer from alcoholism. Some engage in street-level survival sex work in order to support their addictions. It should be clear ... that these people are not engaged in recreational drug use: they are addicted. Injection drug use is both an effect and a cause of a life that is a struggle on a day to day basis.<sup>138</sup>

Abstinence is what is expected and required under the current laws. Two cases from the BC Court of Appeal, discussed above, exemplify the court's resistance to change from its current

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<sup>134</sup> Office of the Correctional Investigator, Correctional Investigator Howard Sapers "Annual Report: 2015-2016" (2017) Ottawa: Ontario.

<sup>135</sup> Thomas, *supra* note 5.

<sup>136</sup> Weber et al, "Treatment and Punishment of Drug-Addicted Offenders: Insights from a Quantitative Empirical Survey" in Richard Soyer & Stefan Schumann, eds, *Treatment Cersus Punishment for Drug Addiction: Lessons from Austria, Poland, and Spain* (Austria: Springer, 2015) at 39.

<sup>137</sup> *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44, at para 7, [2011] 3 SCR 134 [*PHS*].

<sup>138</sup> *Ibid.*

sentencing approach that emphasizes deterrence. *Smith* sets the 18-36 month (and possibly higher) range for street-level fentanyl trafficking. Similarly, the Court of Appeal in *Rutter* overturned the trial Judge's imposition of a suspended sentence with a term of three years of probation for trafficking charges as being demonstrably unfit, and replaced it with a period of six months' incarceration followed by 24 months' probation.<sup>139</sup>

Mr. Rutter was motivated by his drug addiction to participate in trafficking, and at the time of his sentencing he had been abstinent for a year and employed for six months. The provincial court found that prison would put Mr. Rutter's rehabilitation at risk and stated "it is likely that, if sentenced to jail, Mr. Rutter will use drugs while in jail and will resume trafficking in them upon his release."<sup>140</sup> The Court of Appeal in *Rutter* discussed the trial judge's decision which did not impose jail for Mr. Rutter and decided "the sentencing judge lost sight of the presumptive effectiveness of jail as a general deterrent."<sup>141</sup> The Court of Appeal further added:

The principle of deterrence as a goal of sentencing is embedded in our law. The Supreme Court of Canada has said so in *C.A.M.*, the amendments to the *Criminal Code* specifically refer to it as a sentencing objective. We must assume that deterrent sentences have some effect. It is futile to ask whether a particular sentence will deter others. That question can never be answered.<sup>142</sup>

The courts continued reliance on deterrence as an effective principle in sentencing is creating a particularly pernicious climate for people who use drugs in the wake of the fentanyl crisis.

### **2.3.6 Consequences of Misunderstanding and Continuing Deterrence Through Sentencing Policies**

The emphasis on deterrence and the corresponding increase of the sentencing range for drug trafficking will have several impacts on the criminal justice system. The emphasis on

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<sup>139</sup> *Rutter I*, supra note 40 para 37.

<sup>140</sup> *Rutter II*, supra note 40 para 28.

<sup>141</sup> *Supra* note 36 *Rutter* at para 80.

<sup>142</sup> *Ibid* citing *R v Johnson*, [1996] 112 C.C.C. (3d) 225 at para 29, [1996] B.C.J. No. 2508. Emphasis my own.

deterrence puts judges in a difficult position of applying the law with consistency because of the essentially automatic 18-month custodial sentence which may follow even for a first-time offender and regardless of whether the person is from a vulnerable group.<sup>143</sup> Ultimately, such lengthy sentences will not have an impact on reducing recidivism and protecting society. The only tangible effect that will result from the courts' current response to the fentanyl crisis will be the increase in the prison population over time.<sup>144</sup> The final section of this chapter argues the increase in the imposition of prison sentences will particularly impact individuals in vulnerable groups including Indigenous people and individuals who use substances.<sup>145</sup>

## **2.4 Part Three: Prison and Looking Beyond**

The first portions of this chapter addressed how courts are responding to fentanyl traffickers, and the imposition of longer prison sentences. Writing more than 15 years ago, Michael Jackson lamented the absence of prisons from conversations about the criminal justice system, and asked the question "... is it not strange that lawyers and judges, as gatekeepers of the only process that can result in a sentence of imprisonment, know or care so little about what happens inside prisons?"<sup>146</sup> The imposition of a prison sentence has a severe impact on individuals because of the denial of their rights and liberties and because of the state of prisons in Canada.<sup>147</sup>

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<sup>143</sup> *Ibid.*

<sup>144</sup> Julie Bruneau et al, "Management of Opioid Use Disorders: A National Clinical Practice Guideline" (2018) 190:9 Canadian Medical Association J 247; Pivot Legal Society, "Prosecuting Fentanyl Trafficking Offences" (2017), online: <[www.pivotlegal.org/fentanyl\\_sentencing](http://www.pivotlegal.org/fentanyl_sentencing)>.

<sup>145</sup> Webster & Doob, *supra* note 52 at 17-18.

<sup>146</sup> Michael Jackson, "Change and Continuity in the Canadian Prison - Lessons From Scholarship" in Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 1.

<sup>147</sup> Parkes, *supra* note 4 at 142; *Ibid*; OCI Report, *supra* note 134.

Critiques of prison in Canada emerged at least as early as 1835, when the first penitentiary built in Canada was condemned for being unduly harsh, and ineffective at rehabilitation.<sup>148</sup> As stated by Michael Jackson: “Society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes -- correcting the offender and providing permanent protection to society.”<sup>149</sup>

Imprisonment does not reduce recidivism; instead, individuals who have spent time in custody are more likely to have a deeper involvement with criminal behaviour than those who have not.<sup>150</sup> In particular, people who are incarcerated for drug offences have higher recidivism rates than other offenders.<sup>151</sup> Prison sentences are only intended to be used when no other available sanction can achieve the fundamental purpose of sentencing. The impact that increased prison sentences stands to have on individuals who use substances – particularly Indigenous peoples – is a warranted discussion.

#### **2.4.1 Responding to the Over-Incarceration of Indigenous People**

Canada’s mass incarceration of Indigenous people is intrinsically connected to the conversation of increasing prison sentences for street-level fentanyl traffickers. Colonial laws and policies date back far into Canada’s history including the *Indian Act* of 1876.<sup>152</sup> As a result of this Act, Indigenous people were effectively stripped of their land, confined to reserves, and deprived of their rights to self-determination. Colonial structures sought to intentionally remove Indigenous culture from Canadian society by banning traditional ceremonies and languages. In

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<sup>148</sup> *R v Gladue*, [1999] 1 S.C.R. 688 at para 53, [1999] S.C.J. No. 19 [Gladue].

<sup>149</sup> Canada, Parliament, House of Commons, Sub-Committee on the Penitentiary System in Canada [Ottawa: Minister of Supply and Services, 1977] [Chairman: Mark MacGuigan] at 43.

<sup>150</sup> Howard, *supra* note 88 at 59-60.

<sup>151</sup> Don Andrews & Craig Dowden, “Managing Correctional Treatment for Reduced Recidivism: A Meta-Analytic Review of Programme Integrity” (2005) 10:2 *Legal & Criminological Psychology* 173 at 177.

<sup>152</sup> *Indian Act* RSC 1867, now cited as *Indian Act*, RSC 1985, c.I-5.

1886, the first prohibition in Canada was directed at Indigenous people when the *Indian Act* was amended to add a prohibition against Indigenous people buying or possessing alcohol. Today, Indigenous people are more likely to be sentenced to prison than non-Indigenous people.<sup>153</sup>

There has been a significant increase in the overrepresentation of Indigenous people, particularly Indigenous Women, in Canada's prison system over the past decades and this overrepresentation continues to grow.<sup>154</sup> While Indigenous people made up 4% of the adult population of Canada between 1995 and 1996, they accounted for 16% of the prison population during that time.<sup>155</sup> In the most recent report from statistics Canada, analyzing the years 2016-2017, Indigenous adults "accounted for 28% of admissions to provincial/territorial correctional services and 27% for federal correctional services, while representing 4.1% of the Canadian adult population."<sup>156</sup>

Canada's Correctional Investigator attributes the growth in the prison population in the past decade to the incarceration of Canada's marginalized populations, including Indigenous people and people struggling with addictions.<sup>157</sup> Problematic substance use among Indigenous

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<sup>153</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online:

<[www.trc.ca/websites/trcinstitution/File/2015/Honouring\\_the\\_Truth\\_Reconciling\\_for\\_the\\_Future\\_July\\_23\\_2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf)> at 170 [TRC]. See also Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act*, (Ottawa: Office of the Correctional Investigator, 2017) at 11.

<sup>154</sup> *R v Williams*, [1998] 1 SCR 1128 at para 58, [1998] S.C.J. No. 49, as cited in *Gladue*, *supra* note 148 at para 61. Office of the Correctional Investigator, "Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act" (October 22, 2012) <online: <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022-eng.aspx#TOC1>>: "From 2001-02 to 2010-11 the Aboriginal inmate population increased by 35% for men (from 2,129 to 2,875) and 86% for women (from 98 to 182)".

<sup>155</sup> In 2011-12 that number had grown to 28% of all admissions to sentenced custody. TRC, *supra* note 153 at 161.

<sup>156</sup> Malakieh, *supra* note 17 at 4. See also: Statistics Canada, Canadian Centre for Justice Statistics, *Adult Correctional Statistics in Canada: 2015/2016*, Julie Reitano, Catalogue no. 85-002-X, (Ottawa: Statistics Canada 2017).

<sup>157</sup> The Honourable Steven Blaney, Minister of Public Safety, "Annual report of the Correctional Investigator 2014-2015" (June 26, 2015) <online: <http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx>>. Between 2005 and 2015 the federal inmate population in Canada grew by 10%.

people is tied to the “cultural oppression and erosion, economic exclusion, and the intergenerational impacts of trauma borne from colonial practices such as the residential school system.”<sup>158</sup>

This colonial history and the continued systemic discrimination against Indigenous people results in the greater surveillance of Indigenous people and their potential illicit substance use. Indigenous peoples are more likely to experience higher rates of residential instability and homelessness, and individuals who use drugs and are homeless, are more likely to use drugs in a public space and be vulnerable to police detection.<sup>159</sup> Elizabeth Comack’s research on “racialized policing” reveals that Indigenous people are frequently subject to police surveillance and “stopped, questioned, searched, and detained because they ‘fit the description.’”<sup>160</sup>

This chapter argues that there is a risk of an adverse impact to Indigenous people resulting from the long custodial sentences in fentanyl trafficking cases. The predicted disproportionate impact parallels the impact on Indigenous people as a result of the imposition of mandatory minimum sentences for numerous offences including drug trafficking. The *Safe Streets and Communities Act* resulted in numerous mandatory minimum penalties (MMPs) for drug trafficking offences and the Act was highly criticized for its potential to disproportionately affect Indigenous people and other marginalized groups including people who use drugs.<sup>161</sup> A

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<sup>158</sup> Marshall, *supra* note 113 Marshall at 3; see also Pan et al., “The Cedar Project: Impacts of policing among young Aboriginal people who use injection and non-injection drugs in British Columbia, Canada” (2013) 24:5 Intl J of Drug Policy at 449.

<sup>159</sup> Marshall, *supra* note 113 at 5.

<sup>160</sup> Elizabeth Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police* (Winnipeg: Fernwood Publishing, 2012).

<sup>161</sup> British Columbia, Office of the Provincial Health Officer, *Health, Crime and Doing Time: Potential Impacts of the Safe Streets and Communities Act on the Health and Well-being of Aboriginal People in BC*, (Victoria: Office of the Provincial Health Officer, 2013) at xiv. Further, the Assembly of First Nations debated that the SSCA bill in Parliament would cause a particular harm to Aboriginal peoples in BC, and numerous organizations wrote reports regarding the harms of the MMPs including The Canadian Bar Association; BCCL; PIVOT Legal Services; and BC Health Ministry.

Special Report by the BC Provincial Health Officer noted the specific harm to the health of Indigenous people that could result from the enactment of the *Safe Streets and Communities Act*:

Instead of recognizing the history and context of Aboriginal people, amendments introduced in the Act create circumstances that will likely result in more Aboriginal youth and adults in correctional centres, and lower health status for Aboriginal populations.”<sup>162</sup>

Mandatory minimums ultimately did contribute to the over-incarceration of Indigenous people in prison, and some have been struck down by the courts as unconstitutional.<sup>163</sup>

The Supreme Court of Canada offered a partial response to the mass incarceration of Indigenous people through the decision of *R v Gladue*.<sup>164</sup> *Gladue* provided further guidance to the scope of section 718.2 (e) of the Criminal Code, which states that when sentencing an offender, a court must consider “all available sanctions, other than imprisonment” and pay “particular attention to the circumstances of Aboriginal offenders.”<sup>165</sup> The Supreme Court of Canada’s decision in *Gladue* called for judges to pay attention to the unique circumstances of Indigenous offenders in order to reduce the use of prison as a sanction and expand the use of restorative justice principles in sentencing. All areas of the criminal justice system need to apply the principles set out within *Gladue* to develop culturally appropriate sanctions and prison should be a last resort.<sup>166</sup> While there are problems with the implementation of *Gladue*, the decision to apply longer sentences for fentanyl traffickers does not account for the mass incarceration of Indigenous people in Canada.<sup>167</sup>

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<sup>162</sup> This chapter uses the term Indigenous people and uses “Aboriginal” when it is part of a quote.

<sup>163</sup> TRC, *supra* note 134 at 170; *R v Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130.

<sup>164</sup> Jurisdictions throughout BC have different successes with *Gladue* reports, and therefore describing the efficacy of the reports in the province is beyond the scope of this work.

<sup>165</sup> *Gladue*, *supra* note 148. More recently in *R v Ipeelee*, 2012 SCC 13 at para 87, [2012] 1 S.C.R. 433, the Supreme Court called upon judges to pay attention to the unique circumstances of Indigenous people.

<sup>166</sup> *Gladue*, *supra* note 148 at para 48.

<sup>167</sup> Beckerman & Fontana, *supra* note 6.

One of the Calls to Action made by the Truth and Reconciliation Commission was to “commit to eliminating the overrepresentation of Indigenous people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.”<sup>168</sup> In setting longer custodial ranges and a harsher sentencing regime for fentanyl street-level traffickers, courts may focus on deterrence and sentence Indigenous people without an understanding of the existence of systemic discrimination and mass incarceration against Indigenous people in Canada. When courts sentence Indigenous individuals and emphasize the principle of deterrence, there is little space to acknowledge the continued harm of colonization to the Indigenous community and the desperate need for alternatives to incarceration.

#### **2.4.2 Prescribing Prison for Addiction**

Addiction is an illness “characterized by a loss of control over the need to consume the substance to which the addiction relates.”<sup>169</sup> The same way individuals are not sentenced to prison to get medical treatment, individuals with substance abuse issues should not be given lengthy prison sentences and be expected to rehabilitate.<sup>170</sup> There is ample research pertaining to how addiction may be caused, including biogenetic predispositions; early life traumatic experiences; and personality.<sup>171</sup> Prescribing longer custodial sentences during the opioid crisis ignores the complexities of addiction and a vast amount of medical research.

Addiction should be at the heart of the conversation about individuals’ criminal involvement.<sup>172</sup> People who use drugs are often motivated to criminal behaviour in order to pay

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<sup>168</sup> TRC *supra* note 153 at page 3.

<sup>169</sup> *R v Hansen*, 2012 BCCA 142, 543 W.A.C. 40, citing PHS, *supra* note 137.

<sup>170</sup> Paul Smith, “The Human Cost of the Prison System’s Failure to Deal with Drug Addiction and Mental Illness” (2007) 27:37 *Insite Out Prison Health*.

<sup>171</sup> Bettinardi-Angres & Angres, *supra* note 6.

<sup>172</sup> Weber et al., *supra* note 136 at 39; Dackis & O’Brien, *supra* note 125.



for the substance they use, and as a result substance use is a strong predictor of recidivism. People who are sentenced to a period of incarceration will serve time within a Canadian prison where drugs are often readily available.<sup>173</sup> Research shows that individuals who are able to address their drug problems through substance abuse treatments are less likely to be repeat offenders.<sup>174</sup> The needs of people with substance abuse issues must be central to the criminal justice system.<sup>175</sup> Individuals who are incarcerated are at an increased risk of overdoses and therefore, meaningful prevention interventions need to be employed.<sup>176</sup> The courts should reconsider their approach to the fentanyl crisis in light of its potential to perpetuate harm.

## **2.5 Conclusion**

BC courts are responding to the opioid crisis with the imposition of increased prison terms. This increase is a result of the BC Court of Appeal's decision that trafficking in fentanyl requires an enhanced emphasis on deterrence to send a strong message to future offenders. BC courts' emphasis on deterrence for fentanyl trafficking during the opioid crisis is misplaced. Increasing sentence severity does not result in a decrease in the commission of crime through deterrence. Canada is currently taking a very punitive approach to drug crimes and the sentences are influenced in part by the stigmas associated with drug users, and the courts' reluctance to accept the inefficacy of deterrence. A significant impact of the courts' actions for fentanyl traffickers will be an increase in the number of individuals incarcerated in Canada, and this will have a particularly harsh impact on people with addictions and Indigenous people. The current

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<sup>173</sup> Emily Van Der Meulen, "'It Goes on Everywhere': Injection Drug Use in Canadian Federal Prisons" (2017) 52:7 Substance Use & Misuse 884.

<sup>174</sup> Chandler Redonna, "Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety" JAMA 2009; 301(2): 188 at 3.

<sup>175</sup> Jonathan K. Burns, "Mental Health and Inequity: A Human Rights Approach to Inequality, Discrimination and Mental Disability" (2009) 11:2 Health and Human Rights at 19.

<sup>176</sup> Stuart A. Kinner et al, "Incidence and Risk Factors for Non-Fatal Overdose Among a Cohort of Recently Incarcerated Illicit Drug Users" (2012) 37:6 Addictive Behaviors 691.

focus on punishment ignores that most street-level traffickers are substance users themselves.

Attempts to solve criminal justice problems that do not account for the complexities of addiction may be ineffective and harmful. In the following chapter, these topics are explored further through interviews with advocates.

## Chapter 3: What do Advocates Say?

### 3.1 Introduction

This thesis explores challenges presented by the criminal justice system for people who use substances. Given the ongoing opioid crisis in BC, now is a particularly important time to examine the justice system's impact on the health of people who use drugs. An objective of the research was to gain insights from advocates who work in the criminal justice system. This research focused on understanding the barriers and best practices from advocates working within the current justice system. Through conducting interviews with 11 advocates I learned the challenges associated with supporting and representing the rights of people who use substances.<sup>177</sup> This chapter summarizes the main themes found within the responses from advocates and the relevant literature relating to these themes.

This chapter begins with a discussion of the work experience of the advocates who were interviewed. Advocates explained that the current legal system does not accurately understand substance use and addiction. The challenges of working in the criminal justice system as an advocate for individuals who use drugs is discussed. Advocates explained that during the opioid crisis, those challenges exacerbate the risks to people who use drugs.

Analysis of interviews with the advocates identified four main themes.<sup>178</sup> First, the criminal justice system lacks understanding and compassion for people who use substances. Second, prison sentences are not appropriate to address health issues, like addiction, because prisons are not rehabilitative. Third, there is a disconnect between conditions of bail and

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<sup>177</sup> Again, I express my gratitude to all of the anonymous advocates who shared their valuable time and experiences with me. The responses from advocates are completely anonymous. Their responses are indicated with italics throughout and the pronoun used for everyone is "she." The quotes that are not in italic font are from secondary sources.

<sup>178</sup> Some of the themes mentioned in the interviews but not expanded on in this thesis included: policing; curfew conditions; reporting conditions; drug treatment courts; and the impact of gender.

probation orders, and the reality of the lived experiences for people who use substances.

Advocates spoke of a high volume of administrative breaches that stem from the imposition of these conditions, and the criminalization of substance use. Fourth, there is a lack of rehabilitative opportunities for people and a lack of resources for legal aid, rehabilitation and mental health support.<sup>179</sup> Present within all of these themes and the conversations with advocates, was the particular harm that is caused to Indigenous people who use substances, and how Indigenous people are disproportionately impacted by the challenges that exist within the justice system.

### **3.2 Advocates' Experience with People who Use Drugs**

The first background question asked the advocates if their employment led them to working with individuals who used substances. This research selected as its participants criminal defence lawyers, probation officers, or social justice lawyers or social justice advocates. While all participants answered that they worked with people who use substances, many elaborated about the alarming intersection of the criminal justice system with individuals who use substances. One advocate explained, *“I probably primarily work with people who have substance abuse issues because they seem to be primarily the people who get involved in the criminal justice system.”*

The literature also reflects the overrepresentation of people with drug use, mental illness, and addiction within the criminal justice system. The 2017 BC Corrections report showed that approximately 60% of people involved in the corrections system are diagnosed with substance abuse and/or a mental health diagnosis.<sup>180</sup> Research about people in custody in the BC provincial correction system found that 29% of people were classified as “mentally disordered” which is

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<sup>179</sup> Housing was also described as a challenge and is discussed in chapter four of this thesis.

<sup>180</sup> BC Corrections, Ministry of Public Safety and Solicitor General, *A Profile of BC Corrections – Protect Communities Reduce Offending*, (2017) at 32.

approximately twice the prevalence of the general population.<sup>181</sup> This is consistent across Canada, and other jurisdictions, including the United States where approximately one-half of all prisoners meet the “criteria for diagnosis of drug abuse or dependence.”<sup>182</sup>

The advocates explained that the current criminal justice system is not the appropriate place to deal with health problems, noting that it provides ineffective solutions. One article in a medical journal summarized the problem well: “it can be stated without exaggeration that substance use problems are endemic among prisoners, and co-occurring disorders appear to be the rule rather than the exception.”<sup>183</sup> The lack of community supports and services for people with problematic substance use and mental illness in Canada and in BC impacts their representation in the justice system.

The other background questions posed to advocates were to determine whether the courts were shifting towards understanding addiction in light of the known problem of people who use drugs in the system.<sup>184</sup> Other questions sought to adduce whether there were practices within the criminal justice system that incorporated an understanding of substance abuse. It was unanimous that there is still a great deal of work to be done within the current legal system to achieve a system that fully recognizes what it means to use substances and have an addiction. One advocate simply stated that “*we are doing a piss poor job.*” Another advocate explained that “*the current legal system has put people in an impossible position which is... significantly*

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<sup>181</sup> Julian Somers et al, “Comparative Analysis of Recidivism Outcomes Following Drug Treatment Court in Vancouver, Canada” (2014) 58:6 International Journal of Offender Therapy and Comparative Criminology 655.

<sup>182</sup> Louisa Degenhardt et al, “Engagement with the criminal justice system among opioid-dependent people: a retrospective cohort study” (2013) 108:12 Addiction 2152. Redonna *supra* note 174 at 1.

<sup>183</sup> Brian Rush et al, “Prevalence of Co-occurring Substance Use and Other Mental Disorders in the Canadian Population” (2008) 53:12 Can J Psychiatry: 800.

<sup>184</sup> Advocates spoke of two general positive pieces of the criminal justice system within the Greater Vancouver area: Drug Treatment Court and the Downtown Community District Court. These two court systems are not discussed in this work because advocates explained while they are positive models, DTCs deal with a limited number of people and DCD deals only with summary offences. They are positive models difficult to assess briefly and tangentially, and therefore are absent from this thesis.

*increasing risk to life and health.*” One advocate discussed that the criminal justice system is gaining a greater understanding of the issues that people who use substances face, but that there is still a large knowledge and practice gap. Despite the current opioid crisis, advocates explained that the courts are not shifting towards an understanding of substance use.

### **3.3 Themes**

#### **3.3.1 Lack of Understanding and Compassion**

Advocates described that the justice system and the actors within it often have a misunderstanding of addiction, substance use, and life as a vulnerable person. Advocates explained that the criminal justice system’s lack of understanding about addiction, and substance use creates a system with ineffective and sometimes harmful solutions. One advocate self-identified as a drug user and expanded on the lack of compassion and understanding from the actors in the justice system: *“I kind of find it mind- boggling how you can make a career out of sending people to jail for having addiction issues that you have no comprehension of.”* There is a propensity in the criminal justice system towards the punishment of individuals who use drugs because of the perception of the moral wrongfulness of drug use, and the perception of harm to both the individual and to others in society as a whole.<sup>185</sup>

Addiction is often stigmatized by society as a problem related to self-control and not as a disease.<sup>186</sup> Advocates made it clear that this stigma causes the justice system to further oppress people in vulnerable positions and is often counter-productive to the goals of public safety. Advocates attributed this disconnect to the fact that people who work within the system are not informed directly by drug users and front-line workers about the realities of drug use. The

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<sup>185</sup> MacCoun, *supra* note 123 at 86 and 91.

<sup>186</sup> Dackis & O’Brien, *supra* note 125.

Vancouver Area Network of Drug Users' website gives insight into the need for recognition of the complexities of drug use:

VANDU recognizes that the realities of poverty, racism, social isolation, past trauma, mental illness, and other social inequalities increase people's vulnerabilities to addiction and reduces their capacity for effectively reducing drug-related harm.<sup>187</sup>

The leading actors in the healthcare system echo the frustration of working against the stigmas of people who use substances, and the difficulty of translating the successes of addiction science into improvements for patients because of the stigma and the "default position to criminalize and punish persons struggling with this disease."<sup>188</sup>

A true understanding of substance use and the overrepresentation of people who use substances within the criminal justice system requires an understanding of some of the key factors that correlate with substance use, including experiences of trauma.<sup>189</sup> People who become involved in the criminal justice system are more likely to "have suffered adverse emotional, social, neurological, and developmental effects from traumatic experiences in childhood and adolescence, and some of these impacts also appear to be linked to offending behavior."<sup>190</sup> An advocate spoke of an example of the lack of compassion she overheard:

*I remember when I was a young lawyer, hearing a couple of Crowns saying, 'who even tries crack.... 'how can you wake up and one day think -oh I'm going to try crack?' And I just thought: if you can't wrap your head around someone being in so much emotional pain that they would do anything to end that at that moment, then you shouldn't be sending people to jail for it.*

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<sup>187</sup> "VANDU", online: VANDU <<https://vandureplace.wordpress.com/>>.

<sup>188</sup> Tony Kirby, "Evan Wood: Bringing change to Addiction Medicine." The Lancet Volume 386: Issue 10009, 28, November 4- December 2015, Page 2131. Dr. Evan Wood, Professor of Medicine at U.B.C.; Dr. Evan Wood is the Canada Research Chair in Inner City Medicine; Physician; Director for the B.C. Centre on Substance Use; Medical Director for Addiction Services; Physician Program Director for Addiction, Providence.

<sup>189</sup> William Lee et al, "Childhood Sexual Abuse and Syringe Sharing Among People Who Inject Drugs" (2015) AIDS Behav 19:1415 at 1455.

<sup>190</sup> Sam Wright, Mark Liddle and Pippa Goodfellow, "Developing Trauma-Informed Resettlement for Young Custody Leavers: a Practitioner's Guide" (2016) London: Beyond Youth Custody, online: [www.beyondyouthcustody.net](http://www.beyondyouthcustody.net) at 2.

Research shows that an understanding of trauma and its impacts leads to more adequate diagnosis and treatment planning.<sup>191</sup>

### **3.3.2 Custodial Sentences and the Opioid Crisis**

As explained in chapter two of this thesis, judges are responding to the current opioid crisis by increasing prison sentences for individuals convicted of trafficking fentanyl. The findings in chapter two demonstrate that most of the offenders sentenced on fentanyl trafficking charges were motivated to sell drugs to support their addiction. While the approach of imposing longer sentences is intended to deter future offenders, chapter two argued that this approach does not deter offenders, and is an approach which is harmful to people who use drugs. One of the harms of longer custodial sentences is the negative impact it has on substance users. Advocates were asked about the effects of incarceration, and about the sentencing approach being taken by the courts. The conclusion from the advocates was that the courts have it “*ass backwards*” and the imposition of longer prison sentences is both a harmful and an ineffective response to the opioid crisis.

There was an agreement amongst the advocates that prisons are not rehabilitative and in many instances are an impediment to rehabilitation for people who use drugs. Ten of the eleven advocates responded with “no” when asked if Canadian prisons are rehabilitative.<sup>192</sup> It is notable that most of the advocates laughed when asked this question before responding with their answer: “*No.*” One advocate stated:

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<sup>191</sup> Hunt et al, “Creating Evidence-Based Change Through a Trauma-Informed Lens: Translating Principles Into Practice” (2018) 9:1 International Journal of Child, Youth and Family Studies 54 at 54.

<sup>192</sup> One advocate began by responding that prisons “*may be*” rehabilitative and indicated that she had a few Indigenous clients who had attended Healing Villages, but clarified that regular prisons are not rehabilitative.



*You talk to anyone who has been through this (prison) cycle and you know it doesn't work. It is not rehabilitative... problematic substance use is a health issue and prison doesn't answer any of that.*

The imposition of a prison sentence is a restriction of a person's right to liberty, but this negative impact is further exacerbated by poor prison conditions, an unfortunate reality in Canada.<sup>193</sup> Current issues that exist in Canadian prisons include: limited treatment for individuals with addictions and mental health problems; overpopulation and overcrowding; use of solitary confinement; lack of skills training and vocational programs for inmates; and a decline in the quality of managing individuals and their cases.<sup>194</sup> Research shows that individuals who are incarcerated for drug offences have higher recidivism rates than other offenders.<sup>195</sup>

The health impact of incarceration on already vulnerable people is significant. The lack of support and resources available in custody means physical and mental health issues (including substance abuse), go untreated. One advocate stated:

*I think it is fundamentally not an appropriate forum ... I don't think substance use is a criminal matter; it is a health matter. The whole premise of it (incarceration) is wrong and not appropriate. Maybe there are some programs in prison that are helpful. It is the fact that they have to go to prison to begin with. If they are getting those services in prison- were they available to them outside of prison? Someone shouldn't have to go to prison to get the services they need.*

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<sup>193</sup> Andrews & Dowden, *supra* note 151 at 177.

<sup>194</sup> The Honourable Steven Blaney, Minister of Public Safety, "Annual report of the Correctional Investigator 2014-2015" (June 26, 2015) <online: <http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx>>.

<sup>195</sup> Geoffrey Cowper, "A Criminal Justice System for the 21<sup>st</sup> Century: B.C Justice Reform Initiative" (2002) Final Report to the Minister of Justice and Attorney General Shirley Bond at 3, as cited in Marie-Eve Sylvestre, and Nicholas Blomley, "Red Zones and other Spatial Conditions of Release Imposed on Marginalized People in Vancouver" at 26; Police Services Division, B.C Ministry of Public Safety and Solicitor General. BC Policing Jurisdiction Crime Trends 2015. Online: (<http://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-B.C./publications-statistics-legislation/crime-police-resource-statistics>); Vancouver Police Department, Project Lockstep: A United Effort to Save Lives in the Downtown Eastside. (February 4, 2009). Online: <http://vancouver.ca/police/assets/pdf/reports-policies/vpd-project-lockstep.pdf>. P26; John Howard, *supra* note 197 at 5.

There is a high number of offenders designated as Mentally Disordered Offenders (MDOs) which relates to the “lack of alternative measures for handling those with mental illness in the criminal justice system.”<sup>196</sup>

According to advocates, prison sentences are harmful to the health of people who use substances. If prisons are not rehabilitative to substance users, then their purpose becomes purely punitive. Often, an individual’s substance use is a contributing factor to their interaction with the law, and custodial sentences disrupt their lives and often exacerbate their substance abuse issues. Research in Toronto revealed that time in jail increased people’s risk of homelessness by 40%.<sup>197</sup> Prison sentences remove people from their community and whatever stability and supports they have established. Custodial sentences terminate employment and housing arrangements that are often difficult to find. They also disrupt delicate connections with family, friends or community resource workers such as doctors, health clinicians, support workers, and probation officers. These connections and supports for people living on the margins of society are important considerations to recidivism.

The negative impacts of incarceration are most drastic amongst Canada’s Indigenous population.<sup>198</sup> A discussion with an advocate involved the explanation of this mass incarceration and Canada’s continued legacy of colonization: “*Jail is so traumatic for people. It is the new residential school.*” BC has one of the most disproportionately high levels of Indigenous incarceration anywhere in Canada.<sup>199</sup> Recent research reveals that in BC Indigenous people are

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<sup>196</sup> *Ibid* at 3.

<sup>197</sup> B.C. Civil Liberties Association, “Justice Denied: The Causes of B.C.’s Criminal Justice System Crisis” (2012) [B.C. CLA Justice Denied] citing John Howard Society of Toronto “Homeless and Jailed: Jailed and Homeless” (August 2010) at 29 [John Howard].

<sup>198</sup> Discussion at Malakieh, *infra* note 156.

<sup>199</sup> Benjamin Perrin and Richard Audas, “Report Card on the Criminal Justice System #2” (March 2018) a Macdonald-Laurier Institute Publication at 35.

five times more likely than non-Indigenous people to experience an overdose event, and three times more likely to pass away.<sup>200</sup>

### 3.3.3 Conditions and Breaches

Problematic conditions on bail and probation orders, and the resulting breaches that stem from them, was continually emphasized by advocates as one of the biggest challenges in the criminal justice system. Bail orders are conditions or “terms of release” placed upon an individual when they are released from custody into the community pending their trial.<sup>201</sup> The *Charter* enshrines the right to reasonable bail, the right to the presumption of innocence, the right not to be arbitrarily detained, and the right to liberty and security of the accused.<sup>202</sup> The law is clear that conditions of bail should only be imposed to ensure that the person attends court and does not reoffend. As stipulated by the recent Supreme Court of Canada decision in *Antic*, “release is favoured at the earliest reasonable opportunity and on the least onerous grounds.”<sup>203</sup> However, a recent study conducted in Vancouver revealed that 97% of bail orders had conditions attached.<sup>204</sup> On average 4.39 optional conditions are imposed per each bail order in BC.

Probation Orders are court orders imposed upon sentenced individuals. The law clearly states that probation orders are intended to be rehabilitative and must not contain components that are punitive in nature. There are codified mandatory conditions that appear on all probation orders, and any additional conditions are decided by the court after hearing recommendations by defence and Crown. In a 2017 study, it was found that on average 3.9 optional conditions are

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<sup>200</sup> First Nations Health Authority, *supra* 18 at 7; see also TRC, *supra* note 153 at 161.

<sup>201</sup> Someone can be denied bail on three grounds: Primary Ground (to ensure the arrestee comes to court for their court dates); Secondary Ground: (for the protection of the public); Tertiary Ground: (to maintain confidence in the administration of Justice).

<sup>202</sup> *Canadian Charter of Rights and Freedoms* s 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11.

<sup>203</sup> *R v Antic*, SCC 2017 27 at para 64 and 41.

<sup>204</sup> Sylvestre, *supra* note 195 at 4.

imposed in addition to the 3 mandatory conditions of probation orders. Advocates spoke about how the “rehabilitative” intention of probation orders for people becomes punitive where an individual does not follow their conditions.

One of the strongest themes flowing from the interviews was advocates’ frustration with both the number of conditions of bail and probation orders, and the way those conditions set up an accused person to fail.<sup>205</sup> One advocate described bail conditions as the “best example” of how the criminal justice system does not understand addiction. Many individuals cannot meet the conditions to secure their release on bail. People who are low income, homeless, or suffering from mental health or substance abuse issues are more likely to be denied bail; often indirectly *because* of these issues. The instability of their lives is often seen to be part of the risk they present on bail.

The specific conditions that advocates raised as problematic for substance users included: abstinence conditions; treatment conditions; and red zone conditions. The interviews further revealed that the volume and nature of the conditions leads to breaches. Despite a decrease in the crime rate in Canada over the past decades, the number of people denied bail continues to rise.<sup>206</sup> The next section of this chapter outlines the individual conditions that advocates emphasized were most problematic for drug users within bail and probation orders.<sup>207</sup>

### **3.3.3.1 Abstain conditions**

An abstain condition is a court order for a person to abstain from the consumption and possession of alcohol and/or illicit drugs. Advocates reflected that the imposition of abstain

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<sup>205</sup> Myers, *supra* note 230 at 675.

<sup>206</sup> Jillian Rogin, “The Application of *Gladue* to Bail: Problems, Challenges and Potential” (2014) LL.M Graduate Thesis from York University at 1 citing Statistics Canada, “Police Reported Crime Statistics in Canada”, by Jillian Boyce in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2015) at 3, online: <[www.statcan.gc.ca/pub/85-002-x/2015001/article/14211-eng.htm](http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14211-eng.htm)>.

<sup>207</sup> Conditional Sentence Orders (CSOs) are not addressed in this work given that they are jail sentences served within the community and subject to mandatory conditions. Advocates did not raise any issues pertaining to CSOs.

conditions revealed a lack of understanding from the courts as to what the disease of addiction involves. An advocate explained that the imposition of abstain clauses on orders shows that the court or Crown has “...*no real understanding of addiction as a continuum and addiction as a chronic and recurring thing in people’s lives.*” Another described the difficulty of working with clients on abstinence conditions stating that “*as front-line staff we recognize that substance abuse is a situation that clients find themselves in often, and it’s not one we can just put conditions around and fix, and we recognize the hardships that people have in trying to get recovery.*” While advocates indicated that abstinence conditions have decreased in number over recent years, they are still imposed regularly by courts in BC.

Placing abstinence conditions on people who have an addiction was seen by advocates as resulting in harm. For example, a person may shift towards using substances in a private and covert manner to avoid a breach of an abstinence condition. This may mean they do not attend safe-injection sites or overdose prevention sites and therefore no longer have safe spaces to use drugs. Without a safe space to use drugs, people are at an increased risk of both overdosing, and of other forms of health risks, as explained in the 2011 Supreme Court Case of the *PHS*

*Community Services Society*:

Although many users are educated about safe practices, the need for an immediate fix or the fear of police discovering and confiscating drugs can override even ingrained safety habits. Addicts .... inject hurriedly in alleyways and dissolve heroin in dirty puddle water before injecting it into their veins. In these back alleyways, users who overdose are often alone and far from medical help... missing a vein in the rush to inject can mean the development of abscesses. Not taking adequate time to prepare can result in mistakes in measuring proper amounts of the substance being injected. It is not uncommon for injection drug users to develop dangerous infections or endocarditis. These dangers are exacerbated by the fact that injection drug users are a historically marginalized population that has been difficult to bring within the reach of health care providers.<sup>208</sup>

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<sup>208</sup>*PHS*, *supra* note 169 at para 10.

Abstention clauses also prevent rehabilitation by preventing people who use substances from being honest with their probation officer. Advocates spoke of abstinence clauses precluding people on probation from being truthful with their probation officer, because if they are using they may be breached, and potentially incarcerated. This inhibits the probation officer from assisting the individual without proper access to the resources they need. Fear of detection and criminal charges may prevent the user from being honest with other advocates such as lawyers and other social supports.

Advocates mentioned that what often corresponds with the abstain clause is a condition that the person must not possess any drug paraphernalia which may include needles, pipes, rolling papers, and syringes. The prohibition of drug paraphernalia in actuality can result in a prohibition of harm reduction equipment. One advocate explained that:

*(it) is completely counterproductive. We know that the health care system is spending millions of dollars on clean needles and exchange programs and we know that the science indicates that it is helpful and stops the exchange of disease and prevents the negative health impacts such as abscesses and infections, but court systems are still saying you are prohibited from carrying drug paraphernalia— so (it is) very clear that they are criminalizing harm reduction still within our court system.*

If a drug user is prohibited from carrying clean equipment, for example a clean needle, the health of the drug user and the community is impacted. It may lead a drug user to share needles with others, or look for discarded needles, rather than risk being caught by the police with a needle on them. The sharing of needles transmits HIV and hepatitis C, and other dangerous infections including endocarditis.<sup>209</sup> As one advocate explained, this condition criminalizes “...*behavior that is otherwise completely lawful and perhaps the safest thing for them at the moment.*”

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<sup>209</sup> *Ibid.*

### 3.3.3.2 Treatment Conditions

Advocates discussed various issues surrounding treatment conditions as part of court orders for people with problematic substance use within the criminal justice system. The first challenge advocates described was the over-imposition of rehabilitative conditions. Secondly, advocates described the difficulty in finding evidence-based treatment for people who are court ordered to attend or are seeking treatment themselves. Advocates explained the limited opportunities for effective recovery housing in the Greater Vancouver area. The lack of effective treatment, coupled with the insistence of rehabilitate conditions on bail, leads to further harm for people who use drugs.

As explained by the Supreme Court of Canada in *Antic*, the justice system's propensity towards trying to "fix" people's drug use should only rarely be a consideration and where it is, only to the "extent that (these conditions) are necessary to address concerns related to the statutory criteria for detention and to ensure that the accused can be released" not in order to "change an accused's person's behavior or to punish an accused person."<sup>210</sup>

The courts' overemphasis on rehabilitative bail conditions was recently examined by criminal legal scholar Jillian Rogin. Rogin's work found that "although legal actors are aware that rehabilitation should not be pursued at bail, in practice, the boundary between crime prevention and rehabilitation is often blurred."<sup>211</sup> Rogin has provided insightful critiques of bail conditions that are imposed upon Indigenous people who apply for judicial interim release, including where there is an attempt to bring a *Gladue* analysis to bail decisions. Rogin identifies a significant trend towards the requirement that Indigenous offenders have a bail plan that includes treatment as part of a necessary condition of their release plan. In addressing this trend

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<sup>210</sup> *Antic*, *supra* note 203.

<sup>211</sup> Rogin, *supra* note 206 at 64 citing Criminal Code, *supra* note 51 at s.515(4).

which takes the language of rehabilitation from the codified sentencing considerations she states that, “Although there may be situations where rehabilitative efforts made by the accused can achieve one of the three purposes of bail, any imposed condition requiring counselling or treatment of any kind must be directed to concerns that may have otherwise provided a foundation for detention.”<sup>212</sup> Rogan goes on to explain that the overuse of treatment conditions at bail is inappropriate and results in accused persons being seen as “presumptively guilty” which in turn “perpetuates systemic discrimination” for Indigenous people.<sup>213</sup> Further, she notes a trend towards courts identifying problems that exist for Indigenous people in Canada including poverty and addiction, attributing them to Indigenous “culture or heritage” without any attribution to the role of colonialism and colonial laws.<sup>214</sup>

Advocates explained there is a lack of available counselling, residential treatment, and options for people seeking help for their substance use. There is a significant lack of counselling available for drug users in the Greater Vancouver area, in particular individualized counselling such as “...*trauma informed counselling for women impacted by violence and counselling specific for Indigenous folks that has a level of understanding appropriate for residential school survivors and the very particular impacts of colonization on Indigenous people.*” Many of the advocates discussed examples of working with clients who were ready to seek treatment, and wanted to attend counselling, but were unable to access a program that fit their needs. One advocate explained that “*when someone asks for help we can almost never give it to them... so we just keep on re-arresting them.*”<sup>215</sup> People with addictions require options for specialized evidence-based treatment.

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<sup>212</sup> Rogin, *supra* note 206 at page 37.

<sup>213</sup> Rogin, *supra* note 206 at page 339.

<sup>214</sup> *Ibid.*

<sup>215</sup> Advocates spoke of extensive waitlists for the reputable treatment facilities in the Greater Vancouver area.



Advocates explained that when the court is crafting conditions for individuals who use drugs, there is a tendency to require the person be released to a recovery center, or to require that they attend treatment. Advocates explained that most centers in the Greater Vancouver area are not truly rehabilitative:

*We know there are a lot of “recovery houses” and I use that term lightly. People go there so that they can get released (from custody) because ... certainly people don’t want to stay in custody. However, the fact is that they are getting released with really strict conditions and that they are not really residing in a recovery house, (because it is) being run by a less than professional non-profit.*

These facilities are often privately run, and the person’s welfare cheque often goes directly to the houses after they have been admitted.

Advocates spoke of the recovery houses as problematic environments for people to live in. Advocates described the difficult position people who use substances are in when they are brought into custody, because they often are without homes and without rehabilitative options for release. Recovery houses are thus in high demand as they provide the court some (perhaps misguided) assurance of stability but are “...*not evidence-based recovery.*” To describe the recovery houses, advocates called them “...*crack houses designed as recovery, that are just money grabs where there is no actual work being done for recovery.*” Advocates explained that their clients have difficulties remaining in the recovery houses where drugs are readily available and there are “boot camp style” rules. The challenges of residing in these facilities are enhanced when the individual is impacted by FASD, a past of trauma, or other mental health issues.

The residential treatment facilities generally have a program that is for a fixed period of time – often 30 days. Transitioning out of the recovery centres can be a challenge as that transition is rarely facilitated by the centre. At the completion of the recovery centre program, that person is left without a residence and without programs that may have been available in the

facility. It is a systemic problem that people coming in to treatment have nowhere to go following the completion of the program. Advocates explained that often the court does not understand the circumstances people are put in after leaving treatment, often holding the false impression that following a treatment program, people move in to stable housing. Advocates explained this is not the reality: “...*you finish treatment and you’re on your own (it’s) a really short sighted viewpoint.*” One advocate explained that for her clients, the challenges of recovery facilities are often not worth their supposed benefits. She explained many of her clients feel:

*What the fuck is the point? ... you finish or you get kicked out, where do you end up? Back in the drug ghettos you came from. People coming through their programs just return to a place impossible to maintain sobriety.*

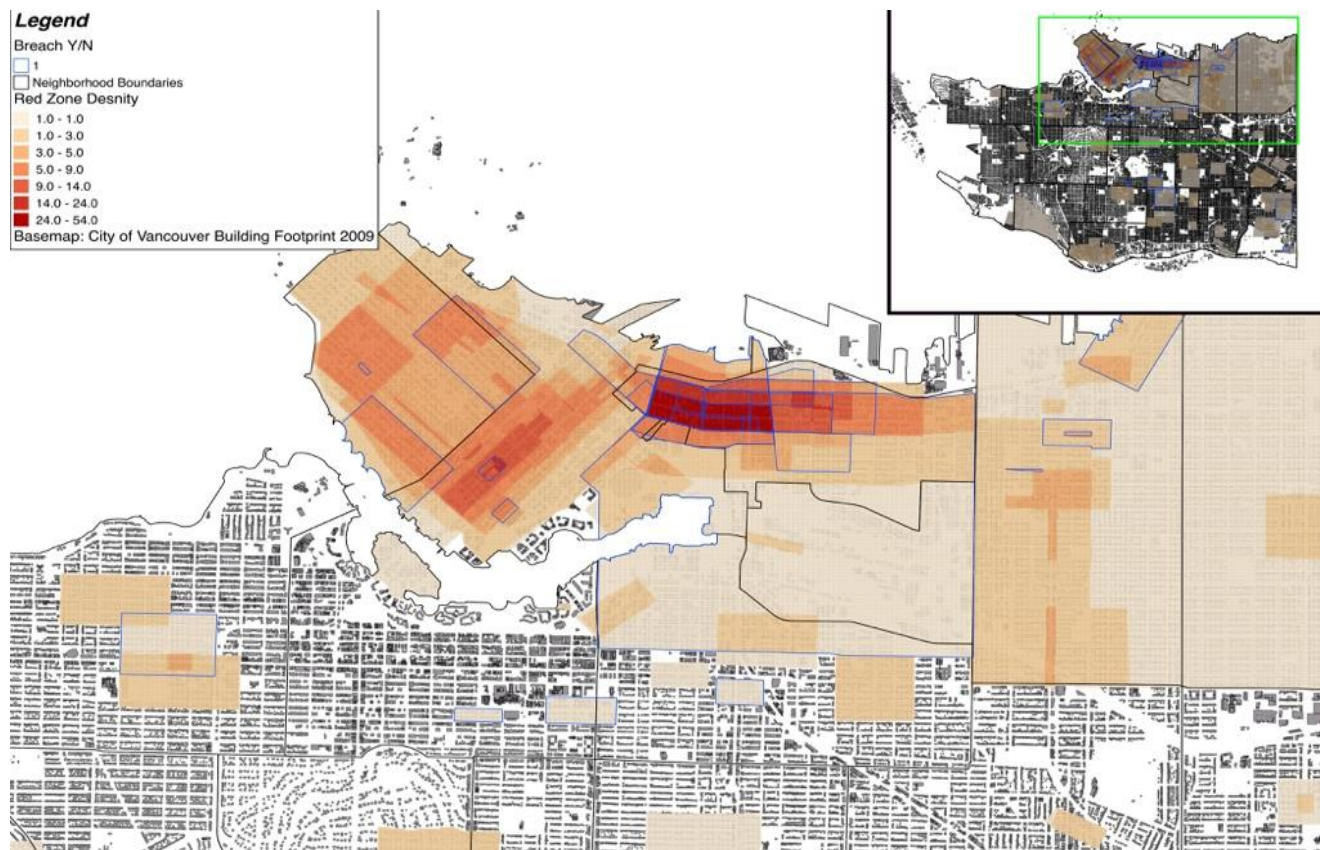
### **3.3.3.3 Red Zone**

Red zones on bail conditions or probation orders specify that given the alleged offence at hand, people are prohibited from entering a certain geographic area. Advocates discussed several challenges that result in the imposition of red zone conditions for people who use drugs. The challenges of these conditions are their overuse, that the area that is red zoned is far too broad, and there is harm caused to people who use drugs and are prohibited from certain areas. Red zone conditions are intended to protect public safety and be specific to the alleged offence or conviction. However, advocates explained that in many communities the red zone is used so frequently that people involved in the justice system can often draw the typical “red zone” area on a map; it is not tailored to the specific incident. Research by William Damon showed that despite the need for specifically oriented “no go” areas, “37% of all restrictions were centered in

the Downtown Eastside of Vancouver (DTES) with an additional 11% in the downtown area.”<sup>216</sup>

The map below shows the results of Damon’s research on the Red Zone Density in Vancouver.

Frequently when offences are committed by substance users in the DTES, the person is ordered to not attend within the area near the offence which includes the entire red-zoned area below.<sup>217</sup> The DTES coincides with the area where all the services are for people who use substances including, as an advocate explained, “*methadone; needle exchange; overdose prevention sites; supervised consumption sites; defence counsel; shelters; soup kitchens... everything.*” The conditions are therefore potentially increasing the rate of crime and increasing the “*risk of negative police encounters and detention.*”<sup>218</sup> Recent research examined cases from



<sup>216</sup> William Damon, *Spatial Tactics in Vancouver’s Judicial System*, M.A. Thesis, Department of Geography, Simon Fraser University, 2014 online: <http://wgdamon.com/images/gallery/BJC2Map.jpeg>, as cited in Sylvestre, *supra* note 195 at 45.

<sup>217</sup> *Ibid.*

<sup>218</sup> Sylvestre, *supra* note 195 at 4.

1982 to 2015 and found that red zones account for 20% of the conditions imposed within criminal proceedings, and disproportionately impact people who use drugs, showing that over half of the bail orders for drug offences included a red zone condition.<sup>219</sup> In interviews with people impacted by these red zones, Sylvestre and Blomey found that these conditions led to an inability to access resources; displacement; and emotional harm.<sup>220</sup>

#### **3.3.3.4 Impact of Conditions: Administrative Breaches**

There is a “significant disjuncture” between the conditions that are imposed, and the lives of individuals subject to these conditions.<sup>221</sup> Given the frequent imposition of abstain conditions, treatment conditions, and red zone conditions, charges of breaches of court orders are all too frequent. An advocate discussed the courts imposition of abstinence conditions and their misunderstanding:

*sometimes it sounds very good to a judge to put that abstinence in the order ... (but) we just add to the criminal record, without recognizing that that abstinence condition is actually setting them up for failure. I'm hard pressed to think of when an abstinence condition would actually be beneficial to a client or appropriate.*

An advocate described that if the release conditions are too numerous, or are not crafted to recognize the circumstances of the person's substance use, then they are “... *doomed to fail*” and the release conditions are a way of “... *basically creating crime.*”

Research shows that there has been a significant increase (10.8%) in completed criminal cases related to breaches of bail conditions and probation orders between 2005/2006 and 2013/2014.<sup>222</sup> In 2014, 79% of police-reported offences related to charges against the

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<sup>219</sup> *Ibid.* Damon's research found that the DTES related to 93% of area restrictions related to drug offences.

<sup>220</sup> *Ibid* at 70 and 71.

<sup>221</sup> *Ibid* at 4.

<sup>222</sup> Sylvestre, *supra* note 195 at 30. *Ibid* at 3.

administration of justice.<sup>223</sup> In 2014, breaches of probation and failures to comply with court orders represented 79% of all police-reported Administration of Justice Offences (AJO). In total, the AJO offences represented approximately one in ten of the Criminal Code offences Canada-wide that were reported by the police.<sup>224</sup> In 2013/2014 all completed cases in adult courts across Canada showed that 39% included at least one AJO, 50% of which were for failing to comply with conditions, and 33% involved a breach of probation charge.<sup>225</sup>

In BC in 2013/2014 the number of completed criminal cases that included at least one AJO has increased and now represents over 40% of all cases.<sup>226</sup> One advocate described the consequences of these breaches in the following way: “*most of our clients are being thrown in jail for failing to report... it is ridiculous. It is small things... non-violent... things.*” Charges involving AJO are more likely to result in guilty verdicts and more likely to result in custodial sentences than any other type of offence.<sup>227</sup> The median length of the sentences across Canada in 2008/2009 for breaches was 32 days for breach of probation and 20 days for breach of bail.<sup>228</sup>

People who are charged with a criminal offence and denied bail remain in custody at a facility for pre-trial detention or remand.<sup>229</sup> Research by Nicole Myers shows an increase in pre-trial detention in Canada over the years, which she attributes to the conditions imposed on release and the “shift in legal practices away from properly punishing the guilty to regulating and

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<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid* at 29; Department of Justice Canada - Research and Statistics Division, “The Justice System Costs of Administration of Justice Offences in Canada” (2009). Administration of justice offences include failure to comply with a court order, breach of probation, failure to appear, unlawfully at large, escapes or helps escapes from unlawful custody and other administration of justice offences.

<sup>225</sup> Sylvestre, *supra* note 195 at 30

<sup>226</sup> *Ibid* at 20.

<sup>227</sup> Sylvestre, *supra* note 195 at 30. “In 2008/2009 35% of all criminal offences were punished with custody compared to 56% of breach of probation and 45% of failure to comply offences.

<sup>228</sup> *Supra* note 195 Sylvestre at 30.

<sup>229</sup> They are presumptively innocent during this time as guaranteed by the *Charter of Rights and Freedoms*. S 11(3). Prison in this thesis refers to federal and provincial prisons, as well as pre-trial detention centers.

possibly punishing those who are supposed to be presumed innocent.”<sup>230</sup> People at pre-trial detention facilities have minimal access to events or programming. The conditions in remand prisons have been recognized as being so imbalanced to the conditions in other prisons that inmates are given 1.5 credit for every day they spend in remand custody. Remand facilities are notorious for their overcrowding and harsh conditions.<sup>231</sup> In 2015, the remand population exceeded the sentenced population, with individuals in remand accounting for 61% of the custodial population in BC.<sup>232</sup>

| Year      | Number of Remand Admissions | Average number of days in custody |
|-----------|-----------------------------|-----------------------------------|
| 1982/1983 | 4,705                       | 10 days                           |
| 2008/2009 | 13,518                      | 12 days                           |

### **3.3.4 Lack of Rehabilitative Opportunities and Resources**

#### **3.3.4.1 Legal Aid and Lack of Resources**

Legal aid funding was discussed by advocates as a challenge to best representing people who use drugs within the current legal system. From 2001 to 2004 the grant received by Legal Service Society, the organization in BC responsible for funding legal-aid, was cut by 41%.<sup>233</sup> In 2010, the grant was 36% less than it was in 2001. These budget cuts had impacts across the criminal justice system and led to a reduction in the number of people represented by legal

<sup>230</sup> Nicole Myers, “Eroding the Presumption of Innocence: Pre-Trial Detention and the use of Conditional Release on Bail” *Brit J Criminol* (2017) 67, 664 At 681.

<sup>231</sup> *R v Summers*, 2014 SCC 26 at paras 1-3 and 26.

<sup>232</sup> Statistics Canada, Canadian Centre for Justice Statistics, *Adult Correctional Statistics in Canada: 2015/2016* by Julie Reitano, Catalogue no. 85-002-X, (Ottawa: Statistics Canada 2017) at 4.

<sup>233</sup> *Supra* note 197 BCCLA at 21 citing Legal Service Society Annual Reports: [www.B.C.budget.gov.B.C..ca](http://www.B.C.budget.gov.B.C..ca).

aid.<sup>234</sup> One advocate stated that, “*Legal aid is starved. (Legal Aid lawyers are) burnt out, ... and making less pay than articling students at the big firms. They don’t have the time and energy to put it into a file.*” The lawyers who work for legal aid are notoriously underpaid for their work.

Advocates described the difficulties of addressing systemic problems facing individuals who use drugs, when the remuneration is limited.<sup>235</sup> Most legal aid matters are paid on a tariff system, in which lawyers are not paid per hour but per their conduct of a court proceeding such as bail hearing, sentencing, or trial.<sup>236</sup> The current tariffs for legal aid were set in 2006, and have not increased with inflation.<sup>237</sup> Given the markedly, counsel often refuse to take on clients through legal aid because they “...*simply can’t afford to do these cases anymore.*” As reported by the Canadian Bar Association, BC Branch, “Current rates, which have been increased just once since 1991, do not provide adequate compensation for the services needed to assist the low-income people who qualify for legal aid.”<sup>238</sup>

There is a large number of people who cannot afford a private lawyer but whose annual household incomes is too high to qualify for legal aid funding. This leads to many people representing themselves in their court matters. Advocates discussed the impact of self-represented litigants on the entire court system, saying it “...*increas(es) the length of stay for those in remand, and has contributed to court backlogs, lengthening the stay of all accused in remand.*”

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<sup>234</sup> The BCCLA report shows a reduction in the number of people represented by legal aid in 1999/2000 to 2010/11 by 26%.

<sup>235</sup> Breese Davies “Going Broke in Legal Aid” (November 20, 2016), online: *The Walrus* <<https://thewalrus.ca/going-broke-in-legal-aid/>>.

<sup>236</sup> Legal Services Society online:<[www.lss.B.C.ca](http://www.lss.B.C.ca)> [LSS].

<sup>237</sup> Legal Services Society, “Adequate Tariffs to Meet Client Needs” (May 11, 2018) online: <[https://lss.bc.ca/assets/media/newsReleases/2018-05-11\\_LSStariffInformation.pdf](https://lss.bc.ca/assets/media/newsReleases/2018-05-11_LSStariffInformation.pdf)>.

<sup>238</sup> The Canadian Bar Association, BC Branch, “An Agenda for Justice: Platform Considerations Presented by the Canadian Bar Association, BC Branch” February 2017.

As of May 7, 2018, two changes came to the legal aid Criminal law tariffs for sentencing matters. Firstly, there are now higher tariff fees paid to legal aid lawyers when a sentencing occurs in a recognized First Nations Court. Secondly, there is now a “*Gladue* Fee” that counsel can charge for when they have prepared and made *Gladue* submissions for bail or sentencing matters.<sup>239</sup> These changes will assist lawyers in taking time to ensure the appropriate information is available when Indigenous people are before the court. David Eby, Minister of Justice and Attorney General of BC commented that “I’m certainly in agreement ... that the justice system has been neglected for far too long, especially as it related to making sure that it is a system that makes sense to respond to serious issues like mental health, addiction and marginalization.”<sup>240</sup> In 2018, the BC government made a commitment to increasing the funding in the justice sector by \$56 million over the next three years.

#### **3.3.4.2 Funding Generally**

Beyond legal aid, the advocates I spoke to from social justice organizations discussed the difficulties of doing meaningful work with marginal financial compensation. The discussion centered on the lack of funding and that the “*ability to provide any kind of support or advocacy is contingent on the ability to raise funds to do so, and that is a tough go because from the perspective of donors they feel that is work that government should be investing in.*” According to one advocate, organizations that do criminal justice work receive considerably less charitable donations than other organizations and on average employ less people. One advocate commented

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<sup>239</sup> LSS, *supra* note 239; *Gladue*, *supra* note 148 at 53.

<sup>240</sup> Farrah Merali, “Lawyers Band Together to Call for Sweeping Changes to BC’s ‘Badly Broken’ Justice System (August 30, 2017), CBC news, <online: <http://www.cbc.ca/news/canada/british-columbia/lawyers-call-for-justice-reforms-1.4269001>>.



that it is difficult to do meaningful work to help the rights of people who use substances “*at a tiny organization; barely able to exist.*”

### **3.4 Conclusion**

In interviews with 11 advocates, key challenges to the rights of drug users were described along with the ways in which the criminal justice system negatively impacts the health of drug users and causes harm. The ideologies of the actors and the criminal justice system were seen as barriers preventing the entire justice system from moving towards an understanding of addiction. Advocates echoed the findings described in chapter two that the courts’ response to the fentanyl crisis is counterproductive and harmful. Advocates explained that prisons are not rehabilitative and are not an effective or compassionate answer to sentencing people whose substance use is problematic.

Advocates described two further themes which pose challenges to effective representation of individuals who use drugs. Firstly, the conditions imposed upon bail orders or probation orders, including abstain clauses; treatment conditions; and red zones conditions are over-imposed by courts, and negatively impact people who use substances. Advocates described these conditions as setting people up to fail, which results in further criminal charges from breaches of these orders. Secondly, advocates explained that there is a significant lack of resources within the justice system including: the severe lack of funding for legal aid; mental health supports; rehabilitative options; and housing.

Indigenous people who are overrepresented within the criminal justice system are most severely impacted by these challenges, and their overrepresentation within prison continues to rise. Now is a crucial moment for the criminal justice system to be aware of the potential harms caused to people who use drugs who come in contact with criminal law. In considering the

protection and safety of the public, the justice system should recognize the harms being caused through its current systems and look to advocates for recommendations on potential improvements. The next chapter of this thesis provides recommendations for how the criminal justice system can implement practices to reduce harm to people who use drugs within the Greater Vancouver area.

## Chapter 4: Recommendations

### 4.1 Introduction

What can the criminal justice system do within the current opioid crisis to prevent harm to the health of people who use substances and to the broader community? The 11 advocates I interviewed explained that the response from the criminal justice system during the opioid crisis could be improved by a focus on public health. A prominent recommendation was to treat addiction and substance use as a health issue, not a criminal one. In shifting to treat substance use as a health issue, advocates spoke of the need to implement further harm reduction strategies into the criminal justice system. There should be a “...*focus on harm reduction and rehabilitation rather than denunciation and deterrence.*”

To shift towards a harm reduction approach, actors in the criminal justice system can learn from people with lived experiences of drug use and criminal justice system involvement. Further, the criminal justice system can learn from the existing evidence-based harm reduction responses in the Greater Vancouver area. Advocates provide recommendations for tangible ways to incorporate harm reduction responses into the existing criminal justice system. Despite the numerous challenges, advocates emphasized that there are ways to change the criminal justice system to respect the rights of people who use drugs and improve public safety. This chapter addresses the critiques and challenges posed earlier in this thesis and expands on the advocates’ recommendations for change.

The primary recommendation was the need to treat addiction as a health matter and not a criminal matter. This need is particularly important as courts respond to the fentanyl crisis. The criminal justice system often perpetuates the health problems of people who use substances. One advocate with over twenty years of experience in the field explained that the courts should be

focusing on rehabilitation and not deterrence, “...*because (deterrence); it doesn’t work... the Nancy Reagan ‘just say no’ school of thought doesn’t work.*” Another explained “*we are just penalizing already vulnerable folks rather than (providing) any kind of solution.*” The general consensus was that courts should shift their focus away from deterrence and harsher penalties.

Advocates explained that there is a fundamental misunderstanding of addiction within the criminal justice system. The criminal justice system should treat people with addictions “like those with heart disease or cancer, recognizing a treatable illness not a stereotype.”<sup>241</sup> Advocates described the need for the criminal justice system to acknowledge and accept that they cannot “fix” health problems, nor are they the place for it. An advocate used one example of a recent review by PIVOT, which examined police investigations of heroin possession between 2011 and 2016 in the context of the trend of fatal overdoses.<sup>242</sup> The data from this review revealed that between 2011 and 2016 the number of police investigations increased 409% alongside the 334% increase in fatal overdoses. In referencing this data analysis conducted by Pivot, the advocate stated: “*we cannot draw a connection here... we would never say that increasing policing is having a causal effect on overdoses... all we can say is increasing policing around heroin possession is not having a deterrent effect. It’s not causal, but we know it is not working.*”

The criminal justice system has limited options for effectively addressing drug use and is not designed to improve public health. One advocate explained: “*For a particular group of people where there (are) intersections between poverty, substance use, often racialization, and trauma, the system is broken for them, so we end up with a system that treats them as criminal.*”

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<sup>241</sup> Kirby, *supra* note 188 at 2131.

<sup>242</sup>Peter Kim, “On the stereotype of the “drug kingpin”: Why tougher penalties for fentanyl trafficking won’t end the overdose crisis” October 23, 2017, PIVOT, online: [www.pivotlegal.org](http://www.pivotlegal.org).

The advocates recommended the courts implement evidence-based harm reduction practices for guidance on how to treat substance use as a health matter.<sup>243</sup>

## **4.2 The Responses to the Opioid Crisis Should be Based in an Understanding of Harm Reduction**

To understand the recommendations of advocates to treat the opioid crisis as a health crisis, and to implement harm reduction strategies, it is first necessary to discuss harm reduction principles. Harm reduction is the aimed goal of reducing negative health and social consequences associated with drug use without the predication on abstinence from the drug itself.<sup>244</sup> Harm reduction is the known alternative to the current criminal law enforcement and abstinence oriented health and criminal system.<sup>245</sup>

The language of harm reduction was first used to provide an alternative response to the attempt to curb the spread of HIV/AIDS among injection drug users.<sup>246</sup> It was after the First International Conference on the Reduction of Drug-Related Harm in 1990 in Liverpool that the term “harm reduction” became widespread.<sup>247</sup> The conference sought to bring together people who use drugs, public health officials, front-line workers, health professionals, and police officers to discuss reducing risky behaviours associated with drug use. This was a shift from the regular focus on reducing drug use itself. In the years following the conference in Liverpool, work to expand harm reduction principles to benefit public health continued worldwide.

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<sup>243</sup> Guidelines, *supra* note 144.

<sup>244</sup> Klein, *supra* note 120.

<sup>245</sup> *Ibid* Klein at 448 citing Patricia G Erickson et al, eds, *Harm Reduction: A New Direction for Drug Policies and Programs* (Toronto: University of Toronto Press, 1997) at 4 [Erickson et al, *New Direction*].

<sup>246</sup> Klein, *supra* note 120.at 451.

<sup>247</sup> Klein, *supra* note 120 at 448 citing Erickson et al, *New Direction*, *supra* note 245.

Harm reduction is based within the “four pillars” approach.<sup>248</sup> The four pillars are the prevention of drug use, the treatment of people suffering from addiction, the enforcement of drug laws, and the mitigation of harms incidental to drug use. The four pillars approach emphasizes a balance between each of the pillars, and scholars have described it as a momentous movement in the city’s efforts to address an injection induced HIV/AIDS epidemic.<sup>249</sup> This shift was intended to be a progressive departure from Vancouver’s failing approach of sanctioning drug users. Fundamental to this change was the need for an evidence-based approach rather than a punitive approach to drug use.

Harm reduction is a humanistic approach that has been lauded for providing a cost-effective, flexible alternative and ultimately save lives of individuals who use illicit drugs.<sup>250</sup> This approach is in sharp contrast to the criminal law approach which criminalizes and attempts to eradicate drug use and drugs. The “*War on Drugs*” was (and continues to be) a political movement seeking to eradicate drug use internationally. The “*War on Drugs*” has been ineffective in its purpose. Further, it has perpetuated the strong stigma to drug users within society.<sup>251</sup> With respect to the greater good of society, harm reduction principles are well understood to be in the best interests of everyone. The comments by Johnathan Cohen and Joanne Cstete summarize this well: “nothing in this approach ...undermines public welfare or democratic ideals; on the contrary, protecting the rights of vulnerable groups is consistent with the highest ideals of democracy and public welfare.”<sup>252</sup>

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<sup>248</sup> Mark Haden, “The evolution of the four pillars: Acknowledging the harms of drug prohibition” (2006) 17 *International Journal of Drug Policy* 124.

<sup>249</sup> Jonathan Cohen and Joanne Csete, “As strong as the weakest pillar: Harm reduction, law enforcement and human rights” (2006), 17:2, *International Journal of Drug Policy*, 101.

<sup>250</sup> Klein, *supra* note 120 at 448.

<sup>251</sup> *Ibid* at 452.

<sup>252</sup> Cohen, *supra* note 249 at 103.

A fundamental principle of harm reduction is to “meet people where they are at.”<sup>253</sup> To do that, the criminal justice system should begin by listening and learning from the lived experiences of people who use drugs and the Indigenous population. These groups can help to design the criminal justice system’s response to the opioid crisis, while informing the justice system’s actors why the current model is ineffective and harmful. Advocates also discussed the harm reduction supports that exist within the Greater Vancouver area, and the need for the court to better understand the efficacy of these evidence-based harm reduction initiatives.

#### **4.2.1 Listening and Learning from People with Lived Experiences**

To incorporate an understanding of harm reduction principles and effective practices, advocates emphasized the need for actors within the justice system to hear from people with lived experiences. The justice system could develop better responses to criminal involvement with people who use drugs if these responses were more aligned with their insights. One advocate expanded on these themes by saying that the:

*... absolute first thing is to hear from people who use drugs when they are not a defendant. They inform how the system works from the lens of a defendant. The judge will say something about your individual case, but giving peers a position of power to have feedback to how the system is working for them would be really powerful to having any kind of system of change because they are the experts, they are the ones who have been through the system for years and they know what works and what doesn’t. For the most part, they understand what people’s concerns are and they understand what would work better.*

Advocates recommended that training be provided from people with lived experiences to people within the justice system, including Crowns and judges.

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<sup>253</sup> Interior Health, “Guide to Harm Reduction: For the Frontline Staff Who Provide Service Delivery and Management of Harm Reduction Services” online:<  
<https://www.interiorhealth.ca/sites/Partners/HarmReduction/Documents/Guide%20to%20Harm%20Reduction%20-%20Manual.pdf>>. (October 2017) at 8.

There is an unfortunate trend that exists of excluding the voices of groups that are central to the conversation, from research and policy reform.<sup>254</sup> Groups have written about this exclusion, and the need for inclusive and collaborative approaches to benefit drug users and the broader community. The Canadian HIV/AIDS Legal Network publication “*Nothing About Us Without Us: Greater, Meaningful Involvement of People who Use Illegal Drugs: A Public Health, Ethical, and Human Rights Imperative*” outlines the negative impact on people when drug users are excluded from the conversation.<sup>255</sup> This book addresses the exclusion of people who use drugs from the development of studies and the negative impact of that exclusion.

To have meaningful training provided by people who use drugs, it is necessary to recognize their value and input as experts. Specifically, that involves having the people with lived experiences inform the conversations; help plan the agenda; paying them for their services; provide transport to the event; taking breaks; and other considerations that show that they are being valued in the same way other education providers would be valued. These steps demonstrate ways the criminal justice system might better listen and learn from people with lived experiences and to move towards practices within the justice system that incorporate harm reduction.

The need to better listen and learn is particularly acute with respect to the perspectives of Indigenous people. In addition to being a demographic most affected by the opioid crisis, they bear an additional burden of experiencing systemic racism by the justice system and its actors.<sup>256</sup>

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<sup>254</sup> The NAOMI Patients Association and Susan Boyd, “Naomi Research Survivors: (2012) Experiences and Recommendations” (NPA Report).

<sup>255</sup> Canadian HIV/Aids Legal Network, “‘Nothing About Us Without Us’ Greater Meaningful Involvement of People who Use Illegal Drugs: A Public, Health, Ethical, and Human Rights Imperative” (2005) online: [www.aidslaw.ca/Maincontent/issues/druglaws/greater\\_involvement.htm](http://www.aidslaw.ca/Maincontent/issues/druglaws/greater_involvement.htm) as cited in *Ibid* at page 6.

<sup>256</sup> Manitoba Public Inquiry into the Administration of Justice and Aboriginal People “Report of the Aboriginal Justice Inquiry of Manitoba” 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991) at 102, as cited in Rogin, *supra* note 206 at 93.



For example, scholar Jillian Rogan recommends that the “racial profiling, the rounding up of the ‘usual suspects’ and the heightened scrutiny faced by Aboriginal people by police should all be considered” by the courts when assessing the current and past charges of the accused.<sup>257</sup>

#### **4.2.2 Harm Reduction in the Community**

The key harm reduction initiatives within the Greater Vancouver area can inform the direction of the criminal justice system. Advocates spoke of the positive benefits of the evidence-based harm reduction initiatives such as Insite and the Heroin Assisted Treatment Projects, including the NAOMI project. Further, advocates explained the benefits of decriminalization of the possession of drugs and making safe substances available to people with addictions.<sup>258</sup> Within these conversations, the devastation of the opioid crisis was discussed. The community’s response to the opioid crisis can be seen through an increase in harm reduction strategies and initiatives. This thesis submits that the criminal justice system can take an active role in understanding the evidence-based harm reduction practices working within the community. This understanding may improve the criminal justice systems ability to reduce harm during the opioid crisis.

#### **4.2.3 Insite**

Advocates spoke of the positive impact that Insite has on the community within the DTES by reducing harm to people who use drugs. North America’s first safe injection facility, Insite, does not provide drugs. It provides clean injection equipment and health care staff who supervise drug consumption.<sup>259</sup> Since its inception in 2003, 3.6 million clients have injected illicit drugs at Insite, and there have been 6,440 overdose inventions and zero deaths. In the 12

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<sup>257</sup> *Ibid* (Rogin).

<sup>258</sup> The NAOMI Project is discussed *infra* text accompanying note 251.

<sup>259</sup> Vancouver Coastal Health, “Insite- Supervised Consumption Site” (2017) online: [www.vch.ca](http://www.vch.ca).

months between January 1 and December 31 of 2017, there were 2,151 overdose interventions at Insite. There is Onsite, a residential detox location beside Insite, and wrap around services provided in the same block on Hastings street. The lifesaving results that safe injection sites provide are imperative during the overdose crisis.<sup>260</sup> Insite operates under an exemption to the Controlled Drugs and Substances Act and is a regulated health facility. In 2011, the Supreme Court of Canada found that “Insite has been proven to save lives with no discernible negative impact on the public safety and health objectives of Canada.”<sup>261</sup> It is supported by the Vancouver police, and the Vancouver and BC governments.

Drug checking, the process of placing small amounts of a drug and water on a test strip to determine if fentanyl is present, is an available service for people at overdose prevention and supervised consumption sites in Vancouver.<sup>262</sup> One study from drug checking at Insite found that: “clients who checked prior to consuming the substance, and got a positive result for fentanyl, were 10 times more likely to reduce their dose, and clients who reduced their dose were 25% less likely to overdose.”<sup>263</sup> Advocates explained that courts should be mindful of the evidence of Insite. It is important for the justice system to not create barriers for people to access harm reduction sites, for example through Red Zone conditions as described in chapter three.

#### **4.2.4 Heroin Assisted Treatment**

Heroin-assisted treatment involves the prescription of pharmaceutical quality heroin (diacetylmorphine) within a supervised and specifically designed clinic. HAT was found to be a therapeutic option for “chronic, long-term, opioid injectors who remain outside of the current

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<sup>260</sup> There are 15 overdose prevention sites within Vancouver alone that provide similar services.

<sup>261</sup> PHS, *supra* note 137.

<sup>262</sup> VCH “Drug Checking”, *supra* note 259.

<sup>263</sup> *Ibid.*

addiction treatment system.” The North American Opiate Medication Initiative (NAOMI), was Canada’s first heroin-assisted treatment (HAT).<sup>264</sup> It was a randomized controlled trial where injectable heroin was provided to people with one of the purposes being the evaluation of HAT in Canada.<sup>265</sup> The recipients of the prescription were people who have been long term opioid injectors.

The study was effective at reaching people who had struggled to get treatment for years, and an improvement to both their physical and psychological health was evident from the study. There were no reported negative impacts on the neighborhood that surrounded where the NAOMI project was located. When participants were provided with safe heroin there was a marked reduction in their need to purchase illicit heroin. This resulted in a reduced crime rate for the participants who had previously turned to crime to pay for their illicit heroin.<sup>266</sup> The gains made by international trials with HAT are not short lived, as long-term HAT participants or patients have demonstrated better health outcomes than short term.<sup>267</sup>

In a report created by Naomi Patients Association (NPA), participants of the project detailed some of the benefits of the NAOMI research. One common theme within their responses was that having the heroin or hydromorphone provided to them removed the constant struggle to illegally obtain the drugs and get enough money to do that.

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<sup>264</sup> The project first began in February of 2005, and first ended in March of 2007. The model resembled other HAT studies done in Europe, and NAOMI was intended to be a trial run for research purposes. The trials in 2005 were conducted simultaneously in Vancouver, and Montreal. In Vancouver there were 192 participants, and in Montreal there were 59.

<sup>265</sup> Eugenia Oviedo-Joekes et al, “The North American Opiate Medication Initiative (NAOMI): Profile of Participants in North America’s First Trial of Heroin-Assisted Treatment” *Journal of Urban Health: Bulletin of the New York Academy of Medicine* 85:6.

<sup>266</sup> One of the project’s most notable successes was providing an alternative to a hard to reach population who had tried treatment, including methadone for a period of time without any reduction in offending.

<sup>267</sup> Netherlands HAT as cited in NAP at 21.

- “I didn’t have to worry about having to get up every morning and run all over hell’s half acre just like a chicken with my head cut off wondering where I was going to get the money to get better.”<sup>268</sup>
- “... I wasn’t sick, you know, I wasn’t running around trying to get \$10 all the time.”<sup>269</sup>

One lawyer described a client who had an 8-page criminal record that she represented for almost 20 years. The client stopped having criminal involvement once being a part of the NAOMI project: *“by giving him his heroin I haven’t been employed by him... last time I saw him he was working and doing well and the only thing that changed was they gave him his drugs.”*

Another advocate spoke of the success they have observed through their clients’ involvement within the NAOMI project. She described her observation from the project:

*We know from the NAOMI project that monitored use is great- and it means I’ll get housed and I’ll move on with my life and do other things, and we don’t need to talk about whether or not that person is going to stop using injectable heroin or hydromorphone because it’s kind of irrelevant and now they are engaged in a system that works. So maybe they will say ... that they identify as someone who has a disability, maybe they will chose to identify as someone who takes medication everyday, just like a whole bunch of other people.*

The results of the heroin-assisted therapy are positive for both the health of heroin users and the health of the community.

#### **4.2.5 Decriminalization**

Advocates spoke of the need for decriminalization of substances to *“...abolish prohibition.”* They explained that this movement for decriminalization should be seen in light of the efficacy of programs like NAOMI; *“...the genie is out of the bottle about how effective this*

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<sup>268</sup> NPA Report, *supra* note 254 at 24.

<sup>269</sup> *Ibid.*

is.” The general consensus was that decriminalization, and movement towards it, should be paramount at this time:

*Really, I think (the opioid crisis) is caused by prohibition. If these people that were addicted could get pharmaceutical grade drugs that were prescribed to them then they wouldn't be risking fentanyl overdoses- they would be in control. Prohibition causes more harm than the substances do themselves.*

Within the discussion surrounding decriminalization it is necessary to review the recommendations made by the NPA in their 2011 report.<sup>270</sup> The NPA report written by the patients within the NAOMI trial draws attention to the disproportionate impact prohibition has on people who are already vulnerable: “Prohibition fuels an illegal market and, unlike in more privileged neighborhoods, drug use and selling is more visible on the street in the DTES instead of hidden behind closed doors.”<sup>271</sup> The argued need for decriminalization has been particularly poignant during the opioid crisis. One advocate said: *“Even our politicians are talking about how we need to decriminalize drugs... we are there. We just need to actually do it. People are dying. There is no ... excuse at this point.”*

People in support of decriminalization argue that it would be a step in the right direction towards ending the opioid crisis, while saving thousands of lives, and millions of dollars. The movement for decriminalization is a stark contrast to the courts' response to the opioid crisis as seen in chapter two. As stated by one advocate: *“... to be perfectly honest if we don't start seeing a movement on a legislative front, I wonder if we will start seeing ... judicial activism on that front because incarcerating people simply doesn't work.”* These considerations demonstrate the distance between the justice system's current response, and the response advocates say is needed.

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<sup>270</sup> *Ibid* (NPA Report) at 16 citing: Senate, “Proceedings, Special Committee on the Traffic in Narcotic Drugs in Canada” (1955) 244.

<sup>271</sup> NPA Report, *supra* note 254.

Insite, the NAOMI Project, Salome, and Crosstown Clinic were all commended by advocates in this research.<sup>272</sup> One advocate summarized her response for how to best improve access to health for people who use substances:

*Give the people who are using heroin, cocaine, fentanyl... whatever... give them their drugs. And through INSITE, say 'here we are ready to help you'... and give (them) a bowl of soup too and give (them) a sandwich and... every once in a while say 'hey, we are here for you.'*

With a harm reduction approach, there is more room to offer kindness and humanity to a population that is systematically stigmatized.

### **4.3 Harm Reduction Practices Within the Criminal Justice System**

Probation officers can employ a harm reduction approach to their work. Probation officers described having a great deal of discretion about how they work and respond to situations and interpret court orders. For example, some recognize the disconnect between addiction and the imposition of abstinence conditions. Harm reduction ideologies are frequently practiced through the work of probation officers. The nature of probation work within the DTES is often aimed at harm reduction given the evidence that it is a more effective approach:

*... in the DTES... I think that as a whole in the community with all the agencies that work there the approach has been more harm reduction. I think in general there is an understanding that enforcement alone is never going to achieve much. I think that most of my colleagues would agree that it is best to go with harm reduction.*

A probation officer explained that files are assessed on a case by case basis and it is about reducing harm; reducing harmful habits; and reducing the possible causality behind the addiction.

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<sup>272</sup> The Providence Crosstown Clinic provides medical heroin and hydromorphone within a supervised clinic to chronic substance use patients. The Study to Assess Longer-term Opioid Medication Effectiveness (SALOME) is a clinical trial conducted at the Providence Crosstown Clinic comparing medically prescribed heroin with a pain medication (hydromorphone). Findings suggest that hydromorphone could be offered as an alternative treatment for patients with long-term opioid dependence. See more at Eugenia Oviedo-Joekes, Daphne Guh, and Suzanne Brissette, "Hydromorphone Compared with Diacetylmorphine for Long-term Opioid Dependence" (2016) 73:5 JAMA Psychiatry 447.

An example one advocate gave was about counselling conditions: “...*some people aren’t ready for counselling, for whatever reasons, so I might leave that alone for a while until possibly they are ready.*” Similarly, one advocate said “*we are not enforcement oriented when it comes to getting to recovery.*” Harm reduction perspectives can be incorporated into the justice system in a variety of ways, including the discretion regarding the charging of administrative breaches.

Police officers, probation officers, and Crown counsel all have discretion to recommend, lay, or enforce charges in certain circumstances. Breaches of court orders and probation orders are not always laid. Advocates recommended that perhaps more thought could be given to the probation orders that are criminalizing people and not helping them. Implementing a harm reduction approach involves being flexible with the probation orders instead of approaching drug use by telling people, as one advocate said, “...*it is either ‘yes you use’ or ‘no you don’t’ and we’d like you not to use.*” For the probation officers I interviewed, their practice is about harm reduction; understanding addiction and the management of harm.

Advocates spoke of the problem of the revolving door of criminalizing people for breaches of court orders. One advocate discussed how the treatment conditions and reporting conditions turn into a punitive measure “...*for no reason whatsoever other than just to keep an eye on this person.*” The difficulty with court-imposed treatment and abstinence was discussed along with the need for community support to be available to people. Appropriate treatment should be provided when people are ready to attend; “... *not forcing them, and then throwing them into jail when they show up.*”<sup>273</sup>

Sometimes an advocate’s primary goal is to reduce harm, and they speak with prosecutors to have conversations about their client’s addiction being a health issue.

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<sup>273</sup> Advocates explained that often people miss appointments and are arrested when they turn themselves in.

*I feel that what I have integrated to assist with that, is first a perspective that it doesn't come from enforcement. If someone admits to relapse and to ongoing use, we are grateful for that honesty and we don't punish it but we just together try to find ways to mitigate that and recognize that sometimes the goal is not abstinence but just harm reduction.*

#### **4.4 Recommendation: Expand Community Supports and Diversion Programs**

Advocates discussed the lack of community supports and diversion programs. The recommendation from all advocates was for an expansion of community supports for people to prevent their involvement within the criminal justice system in the first place. Within the recommendation for further community supports, there was a large focus on the need for increased access to housing and employment opportunities for people living on the margins. An advocate explained that people “...want to be making contributions to society but they just face such significant barriers to finding housing, employment, sustaining themselves... and of course the treatment piece.”

When people who use substances do come to be involved within the criminal justice system there can be an emphasis put on alternative possibilities aside from sending them to prison. This includes appropriate diversion programs that use the catchment of the criminal justice system to funnel people to more assistive health care solutions. If people do come to be incarcerated, prisons should offer harm reduction supplies.<sup>274</sup> In analyzing Advocates' answers, it is clear that no one person within the justice system can respond to the deficiencies, rather there is a need for a collaborative response. One way that actors in the justice system can respond is by recognizing the complexities of the factors that lead people who uses drugs to be overrepresented within the justice system.

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<sup>274</sup> A pilot study implementing prison needle exchanges is beginning in Canada. Discussed *infra* text accompany notes 292 and 293.



#### 4.4.1 Funding of Community Organizations

Within the interviews many advocates spoke of the need for support of organizations that have a harm reduction mandate. A lack of resources is a pressing issue for all social justice organizations, and particularly organizations that work with people who use substances or need mental health support. As stated in a recent report by the BCCLA, “an investment in mental health services and intervention programs is needed to direct those in crisis to services, rather than into the criminal justice system.”<sup>275</sup>

Advocates spoke of the need for wrap-around services and more established trauma informed practices. The call for the investment into the community to create a safer public has been emphasized for years throughout Canada. An example is the recommendations from a report by the Canadian Centre for Policy Alternatives and the John Howard Society of Manitoba, which was made in anticipation of the *Safe Streets and Community Act*:

The Province of Manitoba could better spend the estimated \$90 million per year that the SSCA is expected to cost ... to address the root causes of crime and drug dependency.<sup>63</sup> By investing in new social housing and child care spaces rather than prison cells, and investing in employment, education, and drug dependency supports rather than correctional staff, they make the case that we really could build safer streets and communities for everyone.<sup>276</sup>

Advocates explained that there is “...*even less funding*” for organizations operated on First Nations. In Canada, the Federal Government is responsible for the funding of services including healthcare and education on First Nations, and the provinces are responsible for funding the services outside of the First Nations. Further, there “...*is a lack of investment in Indigenous addictions treatment in a responsive way... so we are looking at people like they*

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<sup>275</sup> BCCLA Justice Denied, *supra* note 197.

<sup>276</sup> John Howard Society of Manitoba and Canadian Centre for Policy Alternatives, “Bill C-10: The Truth About Consequences” (2012), online: Canadian Center for Policy Alternatives [CCPA, “FAST FACTS”] as cited Canadian in Pivot: *Throwing Away the Key*, *supra* note 122.

*should go back to their band, or their band should pay for their treatment, and it is just kicking it around in a circle.”* There is a need to support the initiatives for health and prevention that come from Indigenous communities for Indigenous people.

Advocates also spoke of the need for further diversion programs in the community to prevent people from being incarcerated. Diversion programs and proper community supports recognize “...*the root causes of people’s addiction, rather than punishing people for having the addiction.*” Diversion programs are needed in a large part because of the harm caused to people who use drugs and are imprisoned. Advocates explained that prisons do not provide appropriate supports and rehabilitative opportunities for people who use drugs.

*If the thought on the front end is that we are sending people into prison to be rehabilitated- that is an unrealistic expectation and even if there are some improvements- thinking that prisons are therapeutic environments is just totally misguided.*

Stronger investments into employment opportunities and safe housing were described by advocates as essential components to addressing the rights of people who use drugs.<sup>277</sup>

#### **4.4.2 Employment Opportunities**

Advocates spoke of the need for employment opportunities for people whose current or prior criminal involvement makes it difficult to find employment. Unemployment and economic hardship correlate with the impact of drug use on people, as well as people’s ability to cope with their addiction. Research has shown that increasing employment opportunities or reducing the economic hardship of people can result in a reduction of drug use, particularly following treatment.<sup>278</sup> The current system effectively traps people in poverty given the difficulty of

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<sup>277</sup> Other themes that were raised for community supports included extensive trauma-informed counselling.

<sup>278</sup> Pivot: *Throwing Away the Key*, *supra* note 122 at 23 citing Craig Haney, “Mental health issues in long-term solitary and “supermax” Confinement” (2003) 49 *Crime and Delinquency* 124–56; see also Elizabeth Wahler, “Social Disadvantage and Economic Hardship as Predictors of Follow-Up Addiction Severity after Substance Abuse

securing work with a criminal record. In turn, unemployment and resulting economic hardship can predict higher drug addiction severity for criminal justice-involved participants.<sup>279</sup> Further research is required, but there is potential to reduce drug use and recidivism after treatment if people are provided with employment opportunities or ways of reducing economic hardship.

One advocate explained that to reduce recidivism, and people's involvement within the criminal justice system, people need to have income-generating opportunities.

*There... has to be employment opportunities for folks... (and) income assistance/disability assistance and that has to be at a rate where folks don't feel that they have to go out and commit crimes to support themselves. There are lots of folks that need supports to make that transition from years of substance abuse where they are not functional in their day to day lives and then to transition into employment.*

One example provided by an advocate was the potential of hiring women from the community who have had issues with substances as peer supports to other women in the community and be paid for their work. Overall, an advocate discussed the need to acknowledge people's "...lived experiences as adding value to organizations and (acknowledging) their contributions to society and the workplace."

#### **4.4.3 Housing**

Housing is fundamental to the overrepresentation of people who use drugs within the justice system. Harm often results from the lack of secure affordable housing. An advocate described that "...just having a safe home that you can afford is an important stabilizing force. We have seen that really work." Privacy, safety, and the right to health, are all fundamental to reducing harm to people who use drugs. Further, if people with mental health issues, or who have addictions are on the streets, they have no privacy from police intervention. One advocate

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Treatment: Does Referral to Treatment by the Criminal Justice System Matter?" (2015) 33:1 Alcoholism Treatment Quarterly 6.

<sup>279</sup> *Ibid* (Wahler).

expanded that “...they get involved in the justice system all the time; homelessness goes hand in hand with that.”

Research has shown the correlations between homelessness, mental and physical health problems and drug use for decades.<sup>280</sup> One study showed that “chronic heroin dependent individuals who are not reached by the addiction treatment system have urgent housing needs.” Further, “precarious housing lowers the chances of recovery from addiction, facilitates high risk behavior, limits access to social and health services, and leads to poorer engagement in treatment.”<sup>281</sup> In Vancouver, research reveals a disproportionate number of Indigenous people (38%) among the homeless population.<sup>282</sup>

Advocates discussed the difficulties people face finding affordable housing in the Greater Vancouver area, and that this contributes to few options for safe spaces for marginalized people to live. Homelessness is a significant problem facing many of the people who come to be involved in the justice system and the Greater Vancouver area has a particularly high population of people who are homeless.<sup>283</sup> The 2017 *Metro Vancouver Homeless Count* identified 3,605 people in the Greater Vancouver as homeless. This number was a 30% increase from the previous homeless count in 2012.<sup>284</sup> People who are unable to find treatment or be accepted into a treatment program are often held in custody, leading to an over-incarceration of people who use substances.

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<sup>280</sup> NAOMI, *supra* note 265 at 821 citing S Galea and D Vlahov, “Social determinants and the health of drug users: socioeconomic status, homelessness, and incarceration” (2002) 117:1 Public Health Rep.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*; NAOMI at 24.

<sup>283</sup> Sylvestre, *supra* note 195 at 24.

<sup>284</sup> BC Non-profit Housing Association and M. Thomson Consulting “2017 Homeless Count in Metro Vancouver” (2017). Prepared for the Metro Vancouver Homelessness Partnering Strategy Community Entity. Indigenous people accounted for 34% of the homeless population, as cited in Sylvestre, *supra* note 195.

Vancouver has the most unaffordable housing market in Canada, causing many people who are supported by welfare to live within single residency occupancy hotels (SROs). However, within recent years the housing crisis has impacted the ability of SROs to remain operational. Where they have stayed open, their rates have increased beyond the means of individuals receiving \$710 per month from income assistance.<sup>285</sup> As a result, these individuals are forced into shelters in the community. A report was released in the fall of 2016 by B. Pauly and G. Cross which outlined that the shelter occupancy rate in Vancouver was 97%.<sup>286</sup> In a 2012 report written by the British Columbia Civil Liberties Association (BCCLA) it was estimated that BC could decrease 79% of the inmates who have severe addiction and mental health problems if they were “properly housed and offered basic services.”<sup>287</sup> Advocates explained that the lack of evidence-based treatment houses in the Greater Vancouver area impacts people who use drugs’ ability to get bail, and ultimately impacts the length of time they spend in custody.

Stable housing is an essential component of the health and well-being of people and is shown to be a necessary component when discussing the rights and needs of people who use drugs.<sup>288</sup> While actors within the courts cannot build houses, advocates explained there needs to be recognition of how the housing crisis impacts people within the criminal justice system and to not further penalize people without appropriate housing supports. One advocate explained that

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<sup>285</sup> The welfare rate is \$710 per month after a recent increase of \$100 per month following a welfare freeze for a decade. CBC news, “BC government set to increase welfare rates and disability assistance” (July 20, 2017) Richard Zussman; Income Assistance Rate Table- Province of BC (2017) online:

<<https://www2.gov.bc.ca/gov/content/governments/policies-for-government/B.C.ea-policy-and-procedure-manual/B.C.-employment-and-assistance-rate-tables/income-assistance-rate-table>>.

<sup>286</sup> Bernie Pauly, Geoff Cross and Derek Weiss, “No Vacancy: Affordability & Homeless in Vancouver” (2016) <http://www.ugm.ca/affordability/> as cited in Sylvestre *supra* note 195 at 25.

<sup>287</sup> *Supra* note 197; Kevin Tilley (BCCLA), “Justice Denied: The Causes of BC’s Criminal Justice System Crisis” (2012) online:<[www.bccla.org](http://www.bccla.org)> at 18 citing Patterson et al., “Housing and Supports for Adults with Severe Addictions and/or Mental Illness in BC”, Simon Fraser University Centre for Applied Research in Mental Health and Addiction (2007): [www.health.gov.bc.ca](http://www.health.gov.bc.ca) at page 79.

<sup>288</sup> Research shows that the economics of housing people within custody in Canada is exorbitant. In 2008 it was estimated that the total cost of housing “remanded adult inmates in prison was over \$26 million.

courts and the criminal justice system are working within its means, stating: “*Judges have the power to send people to jail, they don’t have the power to send people to recovery houses that actually work, because there aren’t any or there aren’t enough.*” With the example of prison sentences, one advocate described it as a “*willful blindness*” on behalf of the judiciary when people are sentenced to prison because there are limited alternative opportunities for that person.

#### **4.5 Recommendation: Harm Reduction in Prisons**

Once a person is in custody the consideration of harm reduction services becomes even more explicit.<sup>289</sup> One advocate said, “*obviously we recognize that there is drug availability in jails.*” Canada has been reluctant to implement harm reduction services for people within prisons. This may be because harm reduction requires an acknowledgement of the prevalence of substances within prisons. However, the prevalence of drugs in custody is well known. Recently a man spoke to CBC about his experience within a BC prison and said, “*drugs act as a currency and there’s a market for everything from cigarettes to steroids.*”<sup>290</sup> The lack of harm reduction equipment within custody severely impacts the health of the prison population.<sup>291</sup> HIV and Hepatitis C are 10 to 30 times higher in prisons in Canada than anywhere else in the population, and when considering the rates among women and Indigenous inmates the numbers are worse.<sup>292</sup>

Advocates emphasized the need for three primary harm reduction measures to be available for people in custody who use drugs: opioid maintenance therapy, clean needles, and naloxone/Narcan. While these recommendations are geared towards the organization of provincial and federal custodial institutions, it is necessary for the actors within the criminal justice system to be mindful of the severe gaps within custodial institutions. As stated in previous

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<sup>289</sup> Advocates also spoke of the need for further treatment options and mental health services.

<sup>290</sup> CBC news, “Think Prison Forces an End to Drug Addiction? Think Again” (April 25, 2018) Rafferty Baker.

<sup>291</sup> OCI, *supra* note 134.

<sup>292</sup> *Ibid.*

chapters, prisons are not rehabilitative, and as described by advocates, prisons frequently lack the most basic harm reduction supplies to keep the prison population and the community safe.

#### **4.5.1 Opioid Maintenance Therapy**

Opioid use disorder is considered one of the most challenging forms of addiction; it is a chronic and relapsing condition with a serious risk of fatal overdoses.<sup>293</sup> However, what is equally as important, but less understood amongst actors in the justice system, is that appropriate treatment and follow-up can lead to “sustained long-term remission.”<sup>294</sup> Opioid substitution therapy (OST) is the use of prescribed medication for withdrawal management.<sup>295</sup> Results from OST show that it “reduces mortality, HIV-related injecting risk behavior, illicit heroin use, and criminal activity.”<sup>296</sup> The guidelines for effective intervention for the treatment of opioid use disorder, suggest that detoxification from substances must be accompanied by an immediate transition to long-term addiction treatment, like OST, because without it there is an increases risk of relapse and death.<sup>297</sup> These treatments can be available for people within prison, and there should not be barriers to seeking treatment while incarcerated.<sup>298</sup>

Prisoners’ Legal Services recently filed a complaint to the Canadian Human Rights Commission (CHRC) on behalf of 75 inmates regarding the wait times for people in custody to receive OST.<sup>299</sup> In a CBC article, an advocate with the Prisoners Legal Services, explained that she has spoken to “numerous prisoners who have waited months – and some more than a year for

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<sup>293</sup> Guidelines, *supra* note 144 at E247.

<sup>294</sup> *Ibid.*

<sup>295</sup> (NICE, 2007) as cited in Bobby Smyth, John Fagan, and Kathy Kernan, “Outcome of Heroin-Dependent Adolescents Presenting for Opiate Substitution Treatment” *Journal of Substance Abuse Treatment* 42 (2012) 35-44

<sup>296</sup> *Supra* note 144 Guidelines.

<sup>297</sup> *Ibid.* Suboxone is tablet that is taken by dissolving it under the tongue. Methadone is a liquid that is typically mixed with juice and the person drinks it.

<sup>298</sup> Buprenorphine became an available treatment option in 2005, and in 2007, Buprenorphine was combined with naloxone to create Suboxone.

<sup>299</sup> Filed on June 4, 2018.

OST (opioid substitution therapy) while in custody.”<sup>300</sup> PLS argues the wait times for OST amounts to inhumane treatment and discrimination on the basis of disability. Further details of the complaint show that inmates experience “involuntary tapering or sudden termination of their medications as punishment.” The complaint filed by PLS raises the concerns of OST within federal prisons and has the potential to improve the conditions within federal institutions for people with opioid use disorder.

Advocates explained that people within provincial institutions and pre-trial detention facilities are most at risk of harm. People are constantly transitioning in and out of a provincial institutions and particularly pre-trial detention facilities, and “...*the reality is that people are quite likely to be in a risk state.*” Providing OST to people within custody is vital to the health of people who use drugs and the broader community. This recommendation is in line with the medical research and is consistent with international recommendations and guidelines.<sup>301</sup>

The delays and difficulties for people in custody in receiving OST are often repeated when they are released into the community. People are often released without the resources to get their medication. One advocate provided an example of people who are released on a Friday evening without their prescription and being at a high risk of using and overdosing before being able to access their medication on Monday. An advocate working in a social justice organization explained that part of her job involves picking up people who have been released from custody “...*right from the gate as often as humanly possible to ensure we can try and get them linked up with the OST so that there is no falling off that is unintentional. So if someone is wanting to stay*

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<sup>300</sup> CBC news, “Human rights complaint filed over federal inmates’ access to opioid treatment” (June 4, 2018) Rafferty Baker.

<sup>301</sup> Sonali Jhanjee, “Providing Drug Abuse Treatment in Prison: A Call for Action” Asian Journal of Psychiatry 5 (2012) 114-115 citing K Dolan et al, “Prisons and Drugs: A Global review of Incarceration, Drug use and Drug Services”; see also Beckley Foundation Drug Policy Programme, “Prisons and Drugs: A global review of incarceration, drug use and drug services” (2007) Report Twelve <online:www.reformdrugpolicy.com>.



*clean over a period of time – then the system isn’t the reason why they are relapsing.”* The advocate works with a very specific population that is at high risk, and she explained that few organizations have the capacity to help people transition between the prison and community in a way that reduces harm.

#### **4.5.2 Naloxone**

Advocates explained that Narcan and naloxone should be available to people within custody. While naloxone is available within prisons, it is not available to the actual drug users during their stay within custody: “...users inside are given naloxone when exiting the jail, but the guys inside aren’t getting naloxone kits while they are inside. Officers do, guys don’t.” It is positive that some people upon release from custody are provided with naloxone, particularly if they are not using drugs within custody. The evidence is clear and reiterated in the national clinical practice guideline that relapse and risk of overdose is significantly higher after periods of abstinence.<sup>302</sup> One study found that people with opioid dependence released from custody were “12 times more likely to face that risk (of fatal overdose) in the two weeks following release.”<sup>303</sup>

#### **4.5.3 Prison Needle Exchange Program**

Advocates explained that clean needles, or prison needle exchange programs (PNEPs), are a fundamental need for people who use drugs in prisons. One advocate explained: “...we know they don’t have clean needle exchanges which is a huge problem because we know people are going in and out of our system who use drugs and who need access to clean harm reduction,

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<sup>302</sup> Guidelines, *supra* note 144 at E249.

<sup>303</sup> Hawk et al, “Reducing fatal opioid overdose: Prevention, treatment and harm reduction strategies” (2015) 88 Yale Journal of Biology and Medicine 235  
online:<[https://www.researchgate.net/publication/281513104\\_Reducing\\_Fatal\\_Opioid\\_Overdose\\_Prevention\\_Treatment\\_and\\_Harm\\_Reduction\\_Strategies](https://www.researchgate.net/publication/281513104_Reducing_Fatal_Opioid_Overdose_Prevention_Treatment_and_Harm_Reduction_Strategies)>.

*and that being in prison is a risk factor for contracting hepatitis C.”* PNEPs have been found to be safe and effective for people within custody who use drugs.

In May of 2018, after a court case with the Canadian HIV & AIDS Legal Network, CSC decided to implement two needle exchange programs at federal institutions.<sup>304</sup> This decision shows a “significant concession by the Federal Government on the importance of PNSPs.” This was a result of years of litigation against the Federal Government by agencies including the Canadian HIV/AIDS Legal Network.<sup>305</sup> The legal argument is built on the availability of the clean needle exchanges in the community and the unavailability of the same services in prison. The argument is that this equates to discrimination. The Federal Government’s implementation of two PNEP in two federal penitentiaries across the country does not account for the thousands of people using drugs in other federal institutions and in provincial institutions.

#### **4.6 Conclusion**

This chapter described the key recommendations made by advocates surrounding the criminal justice system’s response to the opioid crisis. Advocates explain that the criminal justice system needs to treat this as a health crisis, not a criminal crisis, and focus on harm reduction. To shift the focus of the criminal justice system, advocates recommended that training be provided from people with lived experiences. Further, the criminal justice system can learn from evidence-based harm reduction initiatives in the community such as Insite and the Naomi project, and the work of some probation officers who incorporate harm reduction practices into their work.

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<sup>304</sup> CBC news, “Needle Exchanges Coming to 2 Canadian Prisons” (May 14, 2018) Rafferty Baker.

<sup>305</sup> The lawsuit is being filed jointly by the Canadian HIV-AIDS Legal Network, Prisoners with HIV/AIDS Support Action Network (PASAN), an AIDS information group endorsed by Canada's Public Health Agency (CATIE) and the Canadian Aboriginal AIDS Network (CAAN) a coalition that provides support and advocacy for aboriginal people living with AIDS.

Advocates recommended the need for further community supports and diversion opportunities to prevent people from being involved within the criminal justice system. These supports include housing and employment opportunities for people with criminal justice background or involvement, or who are vulnerable to criminal behavior. Advocates emphasized that harm reduction models and practices in the community can prevent people from being involved in the justice system to begin with. If people do become involved in the justice system, more expansive diversion programs are needed. For people who come to be incarcerated, prisons need to have harm reduction services available for them to use drugs safely.

During the opioid crisis the limitations are exacerbated because people's involvement with fentanyl leads the courts to wanting to “...*do more, not less*” in terms of a response. This response has led to the increase in the length of prison sentences. The key recommendation is summarized well by this advocate's quote: “...*social policy wise – we need to treat addiction as a medical issue and not a criminal justice issue; provide health services to people in the community.*” If courts do not have the ability to provide options that are effective for the individual and for public safety, perhaps recognition of that is the first step.

## **Chapter 5: Conclusion**

This thesis investigates the criminal justice system's response to the opioid crisis. To understand how the courts in BC are responding to the opioid crisis I conducted an analysis of the caselaw for street-level fentanyl trafficking sentencing decisions. I found that the courts are calling for an enhanced emphasis on deterrence and imposition of longer custodial sentences with the hopes of curbing the trafficking of the illicit substance. This response is concerning because it overlooks the fact that many of the street-level traffickers are themselves substances users motivated to traffic the substance to support their own habit. Further, deterrence through severity has not been shown to correlate with the reduction in offending behaviour when it is imposed. This thesis submits that the courts' enhancement of deterrence will have a disproportionate impact on indigenous people and people who use drugs.

To explore the challenges the criminal justice system presents to people who use drugs, I conducted interviews with experts. These interviews provided original insights into the challenges of working in the current justice system. Advocates explained that there are several key challenges to representing people who use substances within the criminal justice system that are exacerbated during the opioid crisis. To begin with, there is a lack of understanding and compassion for people who use substances. Prison sentences for people with addiction are commonly imposed despite prisons being inappropriate institutions to address issues pertaining to addiction. Further, this disconnect between the realities of addiction and the criminal justice system's understanding is evident in the conditions imposed on bail and probation orders. Lastly, there is a lack of rehabilitative opportunities and resources to aid in their support. This includes legal aid, treatment, and mental health support.

There was a deep disconnect between the key findings from the caselaw and the approach that was emphasized from advocates. Advocates recommend that the response from the criminal justice system shift towards an understanding of the opioid crisis as a health crisis and focus on harm reduction. The criminal justice system can look to the efficacy of the harm reduction initiatives in the Greater Vancouver area including safe injection sites such as Insite, and heroin assisted treatment programs such as the NAOMI project. Advocates explain that in some instances harm reduction practices are being incorporated into the criminal justice system, for example through probation officers' discretion for enforcing abstain clauses. Advocates recommend further community supports to prevent people who use substances from becoming involved within the criminal justice system. Advocates explained that these recommendations include housing and employment opportunities for people. Overall, the criminal justice system does not appear to be responding effectively to the needs and circumstances for people who use drugs.

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## **Appendices**

### **5.1.1 Appendix A- Interview Questions**

#### **Interview Questions for Semi-Structured Interviews**

##### **Background Questions**

1. Do you work with individuals who have substance abuse issues? If so, in what ways?
2. Do you think the current legal system works to understand substance abuse issues?
3. Do you think the current system incorporates practices that recognize a full understanding of substance abuse issues?
4. Do you think prisons in Canada are rehabilitative for individuals with substance abuse issues?

##### **Working with individuals with substance abuse issues**

5. What are some of the challenges of working in the criminal justice system as an advocate for individuals with substance abuse issues? Specifically, what are some challenges with the law, the sentencing options, and the general court procedure?

##### **Creative Solutions/Best Practices**

6. In the line of your work what have been some of your best practices for addressing the needs of your clients, who have substance abuse issues, in navigating the criminal justice system?

##### **Indigenous Individuals**

7. Recognizing the disproportionately high number of incarcerated Indigenous individuals in Canada, what strategies would assist in reducing this mass incarceration, particularly for Indigenous individuals who have substance abuse issues?

##### **Opioid Crisis**



8. How do the issues pertaining to addiction and marginalization intersect with the current opioid crisis in Canada?
9. The courts in BC, and across Canada are emphasizing deterrence and denunciation for sentencing fentanyl traffickers and lengthening the custodial range. What if any impact do you think this will have on individuals with addiction involved in the drug trade?
10. What if any suggestions do you have for how the courts should deal with the opioid crisis? Particularly for street-level traffickers with addiction.

### **Future**

11. Looking forward, what changes do you think would help to best assist individuals with substance abuse issues going through the justice system achieve their right to health?
12. The hope is that the answers from these interviews will become a handbook for other advocates, as well as Judges, while being accessible to the public. What if anything would you like to share with these individuals in terms of the possible solutions?

### **Final Comments**

13. Anything else in terms of your employment experience that you would like to share that may be of benefit to educate and inform, and to make changes to the current system .

### **5.1.2 Appendix B- Invitation Letter**

#### **Email Invitation**

To Whom It May Concern;

I am a graduate student in the Faculty of Law at the University of British Columbia in Canada. I am conducting research on the challenges and best practices for advocating for individuals with addictions within the Canadian criminal justice system, specifically in Vancouver. I am interested in how advocates represent the best interests of individuals who use drugs, and their recommendations for working within the current system.

The title of the study is “Advocating in the Criminal Justice System for Individuals Who use Drugs: A Handbook Inspired by Advocates in the Greater Vancouver Area” and the Principal Investigator supervising this project is Professor Debra Parkes. Based on my preliminary research, it seems that this is an area you have some expertise in. I was therefore wondering whether you would be interested in being interviewed by me and having your responses included in my study. The interview would last approximately thirty minutes and would be audio recorded with your permission. If you are interested in being interviewed, you will remain completely anonymous.

The research I am conducting is for the purposes of completing my thesis, and I hope that my thesis will be published in an academic journal and as its own handbook. It is also my hope that the information I collect will go on to create training materials that are educational to lawyers, advocates, and judges, while being accessible to members of the public. The findings of the research will be specific to Vancouver; however, I anticipate the work to serve as a broader educational tool to be accessed by actors within the justice system across Canada.

Please find attached to this email the consent form and guidelines. If you are interested, please return to me the completed and signed consent form by email at haleymichelleh@gmail.com. I will follow up by email to ensure you have received these documents within thirty days, and when I receive the completed documents I will contact you to schedule an interview either by phone or in-person. If you are not interested in further contact, you may opt-out by replying to haleymichelleh@gmail.com.

I appreciate your time and consideration of this invitation.

Sincerely,

Haley Hrymak  
Master of Laws Student  
Peter A. Allard School of Law, University of British Columbia

Supervised by Principal Investigator:

Professor Debra Parkes  
Chair in Feminist Legal Studies  
Peter A. Allard School of Law, University of British Columbia

### 5.1.3 Appendix C- Consent Form



#### Consent Form

Advocating in the Criminal Justice System for individuals who use drugs: A Handbook inspired by Advocates in the Greater Vancouver area

#### I. STUDY TEAM

**Principal Investigator:** Debra Parkes, Chair in Feminist Legal Studies, UBC Faculty of Law

**Co-Investigator:** Haley Hrymak, Master of Laws student at UBC, Faculty of Law, 1-204-951-7106.

This research is for the graduate degree of Haley Hrymak, and will be part of her anticipated thesis. The thesis is intended to be published and made public.

#### III. INVITATION AND STUDY PURPOSE

- *You are being invited to take part in this research study because you have been identified as an advocate who works with individuals who use drugs.*
- *We want to learn more about how to help people who use drugs, and are facing criminal charges. This study will help us learn more about what options are available for individuals with substance abuse issues. We are inviting people like you who have experience working with individuals who use drugs, to help us.*
- *We are doing this study to learn more about what is working and what is not working within the current criminal justice framework, and potential suggestions for improvements on behalf of advocating for individuals with addiction.*

#### IV. STUDY PROCEDURES

*If you say 'Yes', here is how we will do the study:*

- *We will ask you about your experience as an advocate for individuals with addiction.*
- *If you decide to take part in this research study, we will set up a time to meet either in-person or by phone. The interview will take approximately 30 minutes and will be audio recorded. The responses will be transcribed and summarized to be included within the thesis. At the end of the study the thesis will be published. Your identity will be anonymized throughout the study, and your name will never be included within the work.*
- *The study will be conducted by the co-investigator within your workplace, at the University of British Columbia, or on the phone.*

## **V. STUDY RESULTS**

- *The results of this study will be reported in a graduate thesis and may also be published in journal articles and books.*
- *The main study findings will be published in academic journal articles and potentially become a handbook.*
- *If you wish to have access to the publication, the investigators will email you an attachment of the potential future public publications to enable you to see the study results.*

## **VI. POTENTIAL RISKS OF THE STUDY**

- *We do not think there is anything in this study that could harm you.*
- *The questions will pertain to your employment and experience and the successes within your employment in working with individuals who have substance abuse in the criminal justice system; the duties of your employment; and your insights.*
- *It is possible that participants in this study may have an involvement with substances or a past of substance abuse and therefore the questions we ask might upset you. Please let the co-investigator know if you have any concerns.*
- *You do not have to answer any question if you do not want to.*
- *At any point the interview can be stopped, and you are free to withdraw from the study at any time.*
- *If you withdraw from the study no notes will be transcribed from the recorder, and your responses will at no point be used within this research. The records of your responses will be destroyed with the rest of the data at a later date.*

## **VII. POTENTIAL BENEFITS OF THE STUDY**

- *We do not think taking part in this study will be of a direct benefit to you. However, in the future, others may benefit from what we learn in this study.*

## **VIII. CONFIDENTIALITY**

- *Your confidentiality will be respected. Information that discloses your identity will not be released.*
- *All documents will be identified only by code number and kept in a locked filing cabinet. Subjects will not be identified by name in any reports of the completed study.*
- *The principal and co-investigator of this study will be the only people with access to the audio recordings, and when not being used for the interviews, and the travel to and from, the recording device will remain in a secure location throughout the study and will be destroyed following the publication of the results.*
- *The data records will be kept on an encrypted computer hard drive and accessed only through a password protected laptop.*
- *The data files and the completed consent forms will be stored for 5 years within a UBC facility under the supervision of Principal Investigator Debra Parkes, as per the requirements of the University of British Columbia Policy.*
- *After 5 years, all study documents, written notes, electronic files, and hard copies of any transcriptions will be destroyed (hard copies shredded and files deleted).*

## **X. CONTACT FOR INFORMATION ABOUT THE STUDY**

- *If you have any questions or concerns about what we are asking of you, please contact Haley Hrymak, the co-investigator at [haleymichelleh@gmail.com](mailto:haleymichelleh@gmail.com) or [REDACTED].*

## **XI. CONTACT FOR COMPLAINTS**

***Who can you contact if you have complaints or concerns about the study?***

*If you have any concerns or complaints about your rights as a research participant and/or your experiences while participating in this study, contact the Research Participant Complaint Line in the UBC Office of Research Ethics at 604-822-8598 or if long distance e-mail [RSIL@ors.ubc.ca](mailto:RSIL@ors.ubc.ca) or call toll free 1-877-822-8598.*

## **XII. PARTICIPANT CONSENT AND SIGNATURE PAGE**

*Taking part in this study is entirely up to you. You have the right to refuse to participate in this study. If you decide to take part, you may choose to pull out of the study at any time without giving a reason and without any negative impact.*

- *Your signature below indicates that you have received a copy of this consent form for your own records.*
- *Your signature indicates that you consent to participate in this study.*

## **XII. FOLLOW UP ACTIVITIES**

Would you like us to provide you with a copy of any publications arising from the research?

Yes \_\_\_\_\_ No \_\_\_\_\_

If you answered yes, what is the best way to contact you?

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In consenting to be involved in this research, are you consenting to be contacted following the initial interview for potential clarifications to your answers, or follow-up questions arising out of your responses?

Yes \_\_\_\_\_ No \_\_\_\_\_

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Participant Signature \_\_\_\_\_ Date \_\_\_\_\_

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Printed Name of the Participant signing above \_\_\_\_\_

### 5.1.4 Appendix D- Expert Letter of Dr. Evan Wood



September 13, 2017

Karen Mirsky, JD  
Begie Court Law  
303-668 Carnarvon Street  
New Westminster BC V3M 5Y6

To the Honourable Judge or Justice of the Court:

Thank you for the opportunity to provide an expert opinion regarding the public health consequences of incarceration among individuals with substance use disorder (SUD) who are injection drug users and the relevance of existing research regarding the possible deterrence effect of sentencing duration on helping to address the fentanyl epidemic.

In brief, my qualifications are as follows: I am a qualified specialist physician and addiction researcher with a range of additional qualifications that are relevant to substance use care. In brief, my qualifications include a PhD in Clinical Epidemiology, during which time the focus of my dissertation was health outcomes for individuals with addiction. I subsequently undertook a post-doctoral fellowship during which time the focus of my research was the impacts of substance use and related concerns (e.g. incarceration) on HIV/AIDS treatment outcomes. I am also a medical doctor, having completed my MD at the University of Calgary and subsequently completing a residency training program in General Internal Medicine at UBC followed by a fellowship year at which time I did additional study in addiction medicine after which I wrote and passed the Canadian Royal College of Physicians and Surgeons Internal Medicine exams as well as the American Board of Addiction Medicine and Internal Medicine exams. I am a physician in good standing with the College of Physicians and Surgeons of British Columbia. In my current professional capacity, I am also a Professor of medicine at the University of British Columbia where I hold a Tier 1 Canada Research Chair. My research program is funded by the U.S. National Institute on Drug Abuse and the Canadian Institutes of Health Research through the Canadian Research Initiative in Substance Misuse (CRISM). Finally, I am an addiction medicine physician, the former Medical Director for Community Addiction Services at Vancouver Coastal Health and currently serve as the Director of the British Columbia Centre on Substance Use.

As written in *Rule 11-2 – Duty of Expert Witnesses* of the *B.C. Supreme Court Civil Rules*, I confirm that I am aware of my duty as an expert witness as per subrule (1), which is to assist the court and not to be an advocate for any party. I confirm that I have prepared this report in conformity with that duty, and will, if called on to give oral or written testimony, give that testimony in

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conformity with that duty. I also wish to confirm that I have not received any remuneration for preparing this report.

I will address the questions that have been posed to me below.

**1. What are the public health consequences of incarceration among individuals who are living with addiction, and particularly for individuals who are injection drug users?**

It is estimated that approximately 56–90% of people who inject drugs will be incarcerated at some stage during their life.<sup>1</sup> There is substantive evidence from a range of jurisdictions supporting that laws and policies prohibiting illegal drug use, including incarceration, can negatively impact health and social outcomes among persons living with addiction. For example, international research, as well as research funded by the U.S. National Institute on Drug Abuse and conducted by my own research team, has demonstrated that incarceration is associated with increased risk of blood-borne virus (e.g. HIV, Hepatitis C) acquisition and transmission as a result of elevated rates of syringe lending and borrowing and risky drug use in correctional settings.<sup>2,3</sup> In addition, incarceration has been associated with delays initiating and interruptions to evidence-based opioid addiction care including opioid agonist treatment (methadone, buprenorphine/naloxone) during incarceration and following release. For instance, our research has shown that recent incarceration is associated with a significantly lower likelihood of methadone use among both men and women who inject drugs in the community, even in the context of well-developed treatment programs in BC where methadone is provided through community pharmacies and available within local correctional systems.<sup>4</sup> Finally, incarceration has been associated with reduced tolerance to drugs resulting in a dramatically increased risk of fatal overdose upon release. It has been consistently demonstrated across a range of international jurisdictions that individuals who use drugs face a three- to eightfold increased risk of overdose death within the first two weeks of release from a correctional facility compared to subsequent time periods.<sup>5</sup> These risks are compounded in the current BC context of a fentanyl-adulterated and toxic drug supply.

**2. Does the overdose crisis have any relevance to the consequences of incarceration or vice versa?**

Research from our team has found that among people who use drugs, the most common reason for dealing drugs is to support their addiction.<sup>6</sup> Several markers of higher intensity or more severe addiction (recent overdose, frequent injection) predict drug dealing in this population,<sup>6,7</sup> and persons who use drugs tend to occupy the most visible and dangerous positions in the drug-dealing hierarchy (e.g., look-outs, couriers and street dealers at increased risk of violence).<sup>8-10</sup> Clearly, in the context of the overdose crisis, drug policies that target street-level drug dealers could potentially undermine any concurrent health-focused and harm reduction interventions for persons with addiction. It is important to note that engagement in addiction care, particularly opioid agonist treatment, is consistently and strongly associated with reductions in drug acquisitive crime and recidivism among men, women and youth who use drugs.<sup>11</sup>

Several international studies, including research conducted by our team, have reported that punitive drug law enforcement measures are not associated with reductions in frequency of drug use, injection cessation, or declines in frequency of injection drug use, contrary to intentions.<sup>12-14</sup> Further, our research has shown that periods of incarceration are associated with a range of significant harms to persons living with addiction, including barriers to accessing evidence-based opioid addiction treatment medications,<sup>4,15</sup> elevated risks of HIV and hepatitis C infection,<sup>2,16,17</sup> delays in initiating and interruptions in HIV treatment,<sup>18,19</sup> hazardous alcohol and polysubstance use,<sup>20,21</sup> inability to obtain formal/structured employment,<sup>22,23</sup> homelessness and eviction,<sup>24</sup> and increased risk of overdose upon release from correctional environments.<sup>25</sup> Therefore, there are important policy implications of implementing harsher sentencing and longer periods of incarceration for fentanyl-related drug charges, as these types of interventions have not been consistently associated with improvements to public health, order and safety, but have been shown to dramatically increase risk and harms in a highly marginalized population of individuals living with addiction, a chronic, relapsing disease.

**3. Are there any additional consequences if, in addition to living with addiction, the accused person is poor, homeless, Indigenous, female and/or racialized? What are they?**

Generally, individuals living with addiction who are Indigenous, women, street-involved youth, homeless, or who experience other forms of structural vulnerability and systemic discrimination face significant barriers to accessing evidence-based treatment for addiction and/or are more vulnerable to substance-related harms described above.<sup>26-28</sup> For example, our research has shown that Indigenous people are less likely to access opioid agonist treatment, and tend to access treatment in later stages of addiction, when harms and consequences of substance use are more severe.<sup>29</sup> In the current risk environment, this is of serious concern, as Provincial Coroner's Office data shows that Indigenous people are five times more likely to overdose, and three times more likely to die from an overdose than their non-Indigenous counterparts. While, overall, men are far more likely to die from an overdose, in Indigenous communities, overdose deaths are more evenly split between men and women. Adding to this, Indigenous people are more likely to be incarcerated than non-Indigenous people who use drugs, increasing likelihood of being involved with illegal income generating activities and the drug economy on release, creating a cycle of repeated involvement with the criminal justice system and accumulating risks of substance-related harms over time.<sup>5,13,17,30</sup> I hope you can appreciate that, by every metric, incarceration makes the health and social consequences of drug use worse. What is urgently needed is a functioning addiction treatment system that does not presently exist in B.C.

**4. Do you have an opinion on whether lengthier periods of incarceration would generally deter people from trafficking in fentanyl when they are trafficking drugs to support their own addiction(s)?**

As stated above, research demonstrates that persons with addiction who are involved in the drug-dealing economy often do so to support their own addiction. Recent incarceration, in



turn, is associated with loss of legal income, eviction and homelessness, and increased likelihood of being involved with alternative, higher-risk income generating activities such as sex work, acquisitive crime and drug dealing.<sup>6,13,17,22,24,31</sup> By definition, addiction is a disease that involves engaging in drug acquisition or drug use behaviours on an ongoing basis despite risk of harms or negative consequences associated with these behaviours.<sup>32</sup> Therefore, one would not expect that the potential of stiffer sentencing would have a consequential impact on behaviours like low-level involvement in the drug economy (e.g., drug-dealing) or other illegal income generating activities.

In terms of the research literature, although there is limited data on how law enforcement and criminal justice policy impacts trafficking of fentanyl, historically, supply side interventions have had limited effectiveness in disrupting trafficking of other drugs, like heroin, cocaine and methamphetamine. For example, in the U.S., at the height of the influx of crack cocaine into the illegal drug supply, federal cocaine sentencing policy was introduced that carried substantially heightened penalties for offenses involving crack cocaine compared to powder cocaine and other drugs.<sup>33</sup> These harsh federal sentences had little to no impact on the demand for or the availability of the drug, and have been criticized for their disproportionately severe impacts on persons with addictions who have low-level involvement in the illegal drug economy, as well as their inherent racially and socially discriminatory aspects.<sup>33</sup> This has immediate relevance to Indigenous populations in B.C.

Law enforcement policy and supply side interventions that target specific drugs can also have unintended consequences such as incentivizing traffic of other forms of drugs, including shifts towards more toxic or dangerous formulations. A well-known example of this phenomenon occurred in North America following removal and replacement of oxycodone with a tamper-resistant formulation. Drug supply and use patterns shifted from prescription oxycodone to higher potency opioids, including heroin and fentanyl, in response.<sup>34-36</sup> Although underlying circumstances of the current fentanyl situation in BC are different, in the past few months, we have already observed shifts from a predominantly fentanyl-adulterated supply to an increasing presence of more potent synthetic analogues (e.g., carfentanil, furanylfentanyl, etc.). As was the case when opioids once shifted from opium to heroin, it has been speculated that, in part, this shift towards more concentrated fentanyl analogues, which can be transported in smaller quantities and are more difficult to detect using available technology, may be one means of evading discovery from law enforcement and the criminal justice system.

**5. Would your opinion change if the person trafficking drugs was addicted to a different drug (i.e. crystal methamphetamine)?**

No. By definition, the disease of addiction is characterized by drug acquisition and use behavior that puts an individual at risk of serious health and social harms – and yet individuals will persist in these behaviours in the face of these harms and despite serious consequences. The nature of the addiction, whether it involves alcohol, tobacco, prescription or illicit drugs or a behavioural addiction such as pathological gambling disorder, is irrelevant.

**6. Is there research to suggest that stable housing in a drug free environment is required for addiction recovery to be successful? In your opinion, does a provincial institution or federal penitentiary constitute a “drug free” environment?**

A safe environment that is conducive to recovery from addiction may be critical to support long-term recovery. I should note that the “drug-free” aspect of the environment is not the key criterion but rather environments that can be conducive to supporting individuals in their pursuit of abstinence and recovery and to address underlying issues (e.g., trauma) that have contributed to their addiction. A classic evidence-based example of this kind of supportive environment is the therapeutic community. Therapeutic communities are (typically drug-free) residential treatment settings, whose goal is to support recovery through social rehabilitation of people who use alcohol or drugs. Therapeutic communities typically employ a peer-based hierarchical model, with treatment stages that reflect increased levels of personal and social responsibility.<sup>37</sup> Peer influence, mediated through a variety of group-based dynamic processes, is viewed as a critical element for the assimilation of new social norms and developing more effective social skills.<sup>37</sup> Studies have shown that therapeutic communities lead to reductions in substance use during and after program completion, although relapse rates reported in the scientific literature vary widely (20-100%) depending on the program type and due to the chronic, relapsing nature of addiction.<sup>37-39</sup>

Correctional environments do not constitute drug-free environments. The research evidence clearly demonstrates that drugs are often available in correctional settings.<sup>40</sup> Further, while it is outside my area of expertise, it is my understanding that substance use services in Canadian correctional environments are extremely limited and services like recovery-oriented wards and other environments that support addiction treatment and foster long-term recovery are essentially non-existent within correctional settings in B.C. This is an issue that the BC Centre on Substance Use plans to advocate for in the future as therapeutic community models within and outside correctional settings are urgently needed.

As requested, I have enclosed my curriculum vitae, and a bibliography of literature cited in this document is included below. I have also appended several key peer-reviewed publications for your reference.

Please do not hesitate to contact me if I can provide additional information.

Yours sincerely,



Evan Wood, MD, PhD, ABIM, FRCPC, ABAM diplomate  
Professor of Medicine & Canada Research Chair  
University of British Columbia  
Director, BC Centre on Substance Use

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