# Misleading and Misguided:
# Mandatory Prison Sentences for Drug Offences

Brief to the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-15, *An Act to amend the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*

April 27, 2009
Ottawa

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## 1. Executive summary

Bill C-15 creates minimum prison terms for a variety of drug offences (i.e., trafficking, possessing for the purpose of trafficking, importing or exporting, and producing) involving any quantity of controlled substances such as heroin, cocaine and amphetamines. Bill C-15 is presented as "getting tough" on "serious drug crimes", in particular by producers and traffickers of illegal drugs, and as ensuring the safety and security of neighbourhoods and communities. The objective of enhancing public safety and security is laudable. However, the means chosen are not, and it is misleading to present Bill C-15 in this simplistic light.

Furthermore, Bill C-15 is ill-advised on fiscal, public health and human rights grounds:

- It removes judicial discretion in sentencing and imposing prison terms for drug offences in a broad range of circumstances, including for non-violent offences, inviting sentences that are unjust in the circumstances of the offence.

- The available evidence indicates that mandatory minimum sentences, including imprisonment, for people convicted of drug-related offences do not reduce the problems associated with drug use (or drug use itself) — a conclusion confirmed by Justice Canada's own review.

- Incarceration is extremely expensive, including for the provincial governments that will bear the costs of incarcerating the significant number of people whose mandatory prison sentences for drug offences will fall under the 2-year threshold for incarceration in a federal prison.

- Incarceration carries the societal costs of disrupting families and children; when the net of incarceration is cast so widely as to encompass a significant number of people convicted of non-violent offences or offences that could better be managed in the community, this cost is that much more excessive.

- Increased incarceration generates poor health outcomes generally. Putting more people, including people with addictions, in prison for drug offences is particularly ill-advised as a matter of public health, given increased potential for the spread blood-borne diseases such as HIV and hepatitis C virus (HCV).

- Given the evidence that mandatory prison terms for drug offences have little effect in reducing crime, but impose significant human and societal costs while undermining public health, is an inefficient and counter-productive misuse of public funds that could be better spent on evidence-based prevention, treatment and harm reduction programs.

- Jurisdictions with first-hand experience of harsh mandatory minimum sentences for drug offences (e.g., in the U.S.) have recognized their ineffectiveness and the harms and costs they entail, and are now moving *away* from such approaches.

## Some examples of what Bill C-15 would mean:

***Criminalizing young people for non-violent offences***
Jane is a 20-year old university student. She gave her friend some cocaine that she had recently bought for both of them. Because Jane gave her the cocaine in a public park, or if she had handed over the drug in "any other public place usually frequented" by people under 18 (e.g., in a movie theatre, at an arcade), under Bill C-15 she will go to prison for at least 2 years.

***"Two strikes and you're out"***
John is 28 and has been using heroin for 8 years. To support his own addiction, he dabbles in selling small amounts of drugs to local contacts. Three years ago he was convicted of trafficking for selling 1 gram of heroin. He is charged again with possession of heroin for the purpose of trafficking. If convicted, under Bill C-15 he will spend at least a year in prison.

***Casting the net widely***
Sam is 36 and has been addicted to cocaine for 12 years. He is charged with trafficking cocaine, after he sold a "rock" to someone he knows to pay off some debts to another dealer he borrowed from. At the time he was arrested, he was carrying a jackknife, which he carries for his own protection because some situations have turned ugly before. Under Bill C-15, this "weapon" would be enough to trigger a minimum 1-year prison term.

***Disproportionately harsh penalties***
Ron occasionally smokes marijuana recreationally, and has three marijuana plants in his house. From time to time he shares some with a few friends. He is charged with unauthorized production for the purpose of trafficking. Under Bill C-15, a court would be forced to sentence him to a minimum of 6 months in prison (and, under amendments proposed by Bill C-15, the maximum penalty would double from 7 years to 14 years in prison).

***Not eligible for drug treatment court***
Under Bill C-15, Jane, John and Sam must each spend time in prison for the offences described above. Under Bill C-15, in some limited cases, a sentencing judge would have the discretion to delay sentencing to allow the person to participate in a drug treatment court program, and "successful completion" of that program would mean the minimum penalty of imprisonment could be avoided. However, none of these three people described above is eligible to participate in a drug treatment court program because of the factors listed in Bill C-15; instead, this bill would compel the sentencing judge to send each of them to prison for the minimum time specified in the bill. (Ron could participate in "treatment" in order to avoid prison, but he is not addicted, making his treatment a waste of public money and an inappropriate allocation of services.)

## 2. About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education, and community mobilization. The Legal Network is Canada's leading organization working on the legal and human rights issues raised by HIV/AIDS.

The Legal Network is a national non-governmental organization with over 180 members across Canada, many of whom are community-based AIDS service organizations. The Legal Network has been involved in extensive government and community consultations regarding a wide range of HIV/AIDS-related legal and policy issues, and has developed particular expertise on drug law and policy as they relate to people who are at risk of HIV infection as a result of injection drug use.

A body of research and analysis by the Legal Network, including publications in peer-reviewed research journals, has addressed a number of issues that are relevant to the debate regarding Bill C-15, *An Act to amend the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, including:

- wide-ranging recommendations for better addressing the HIV epidemic among people who inject drugs, including legal reforms to support more effective health-protection and promotion services for this vulnerable population;[1]

- extensive work on the need to address HIV in prisons as a matter of both sound public health practice and basic human rights, such as addressing the risk of HIV transmission through the use of contaminated drug injection equipment — including the most comprehensive international report on the successful experience of other countries in implementing sterile syringe programmes in prisons,[2] and the most comprehensive review of policies and programs in Canadian prisons aimed at preventing HIV and HCV infections (done jointly with the Prisoners HIV/AIDS Support Action Network and with the input of federal,

[1] E.g., *Injection Drug Use and HIV/AIDS* (1999); *Establishing Safe Injection Facilities in Canada: Legal and Ethical Issues* (2001); *Nothing About Us Without Us: Greater, meaningful involvement of people who use illegal drugs: A public health, ethical, and human rights imperative* (Canadian edition, 2005; International edition, 2008); *Legislating for Health and Human Rights: Model Law and Drug Use and HIV/AIDS* (2006); *Dependent on Rights: Assessing Treatment of Drug Dependence from a Human Rights Perspective* (2007); *Do Not Cross: Policing and HIV Risk Faced by People Who Use Drugs*, (2007); *A Helping Hand: Legal Issues Related to Assisted Injection at Supervised Injection Facilities* (2007). See also: D. Werb et al., "Drug treatment courts in Canada: an evidence-based review," *HIV/AIDS Policy and Law Review*, 12(2/3): 2008, all online via www.aidslaw.ca/drugpolicy; I. Malkin, R. Elliott & R. McRae, Supervised Injection Facilities and International Law, *Journal of Drug Issues* 2003; 33(3): 539.

[2] Canadian HIV/AIDS Legal Network, *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*, 2nd ed. (2006), online via www.aidslaw.ca/prisons.

provincial and territorial government officials in the fields of health and corrections);[3] and

- analyses of international drug control treaties and international human rights law as they relate to HIV prevention and other health services for people who use drugs.[4]

We appreciate the opportunity to comment on Bill C-15 and to draw the Committee's attention to certain elements which are particularly relevant from the perspective of public health and human rights.

## 3. Bill C-15 in context: HIV/AIDS and the need for evidence-based, health-focused drug policy in Canada

For many years, Canada's Drug Strategy explicitly acknowledged that problematic substance use is primarily a health issue, rather than an issue for law enforcement.[5] One critical health consideration in crafting illicit drug policy is the role of injection drug use in contributing to the spread of HIV — and how ill-considered laws that criminalize people with addictions make this situation worse, contributing further to the harms associated with unsafe drug use.

In 1999 the Legal Network issued a detailed report on the need for reforms to Canadian drug laws and policies to enable a more effective, evidence-based response to the HIV epidemic among people who use drugs.[6] In its official response in 2001, Health Canada affirmed that "injection drug use [IDU] is first and foremost a health issue", and that "fundamental changes are needed to existing legal and policy

[3] G. Betteridge & G. Dias, *Hard Time: HIV and Hepatitis C Prevention Programming for Prisoners in Canada* (Toronto: Canadian HIV/AIDS Legal Network & Prisoners' HIV/AIDS Support Action Network, 2008), online: www.aidslaw.ca/prisons.

[4] R. Elliott et al., "Harm Reduction, HIV/AIDS and the Human Rights Challenge to Global Drug Control Policy", *Health and Human Rights: An International Journal* 2005; 8(2): 104; J. Csete & D. Wolfe, "Dangerously Out of Step: The International Narcotics Control Board and HIV/AIDS", *Global AIDSLink* #105 (Sep/Oct 2007); Canadian HIV/AIDS Legal Network and International Harm Reduction Development Program (Open Society Institute), *Closed to Reason: The International Narcotics Control Board and HIV/AIDS* (2007); International Harm Reduction Association, Human Rights Watch, Canadian HIV/AIDS Legal Network & Beckley Foundation Drug Policy Programme, *Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy* (2008), all online via www.aidslaw.ca/drugpolicy.

[5] Health Canada, *Canada's Drug Strategy* (Ottawa, 1998).

[6] Canadian HIV/AIDS Legal Network, *Injection Drug Use and HIV/AIDS* (1999), online via www.aidslaw.ca/drugpolicy.

frameworks in order to effectively address IDU as a health issue".[7] Subsequently, an extensive, two-year national consultation — led by Health Canada, its federal partners (e.g., Public Safety and Emergency Preparedness Canada, Justice Canada), and the Canadian Centre on Substance Abuse — developed a new *National Framework for Action to Reduce the Harms Associated with Alcohol and Other Drugs and Substances in Canada*.[8] This national framework explicitly reaffirmed, as its first principle, that problematic substance use is a health issue. It also affirmed that efforts to reduce the harms associated with substance use should be based on knowledge and evidence of what works, as well as respect for human rights.

However, in a marked departure from the commitment to addressing substance use as a health issue, in October 2007, the Prime Minister officially unveiled a new National Anti-Drug Strategy, promising to crack down on what he termed "drug criminals."[9] Strikingly, the new Strategy omits harm reduction as one of the "pillars" of federal drug policy (even as this is widely recognized in many other countries and in provincial//territorial and municipal responses to drugs in Canada), and instead further emphasizes law enforcement activities. In essence, the National Anti-Drug Strategy shifts Canada's approach to illegal drugs even further away from an evidence-based, health approach.

As part of that Strategy, Bill C-15 would exacerbate the already damaging imbalance in Canada's response to drug use, by relying even more heavily on further extending the application of the criminal law and imposing yet harsher punishments in the form of mandatory minimum sentences for certain drug offences. For the reasons outlined here, the mandatory minimum sentences included in Bill C-15 are not sensible, evidence-based pragmatic public policy and raise serious public health and human rights concerns.

The Legal Network has prepared a briefing paper entitled ***Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses*** (April 2006) explaining, in general terms, why the approach of imposing mandatory minimum sentences for drug offences is ill-advised. A copy of that paper is enclosed as part of this submission. This brief to the Committee supplements that general analysis with some specific observations regarding the particular effects of Bill C-15 and explains why Bill C-15 should not be enacted by the Government of Canada.

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[7] Health Canada, *Injection Drug Use and HIV/AIDS: Health Canada's Response to the Report of the Canadian HIV/AIDS Legal Network* (Ottawa, 2001), online via www.aidslaw.ca/drugpolicy.

[8] Government of Canada & Canadian Centre Substance Abuse, *National Framework for Action to Reduce the Harms Associated with Alcohol and Other Drugs and Substances in Canada* (Ottawa, 2005), online: www.nationalframework-cadrenational.ca.

[9] A. Symington, "Conservative government announces new anti-drug strategy," *HIV/AIDS Policy & Law Review* 2007; 12(2/3): 27-28.

## 4. Bill C-15: Misleading and misguided

### *What Bill C-15 would do*

Currently, there are no mandatory minimum sentences for the offences set out in the *Controlled Drugs and Substances Act* (CDSA).

Bill C-15 would introduce mandatory minimum sentences for the offences of:

- trafficking and possession for the purpose of trafficking;
- importing, exporting and possession for the purpose of exporting; and
- unauthorized production

of any quantity of any of the substances listed in Schedule I of the CDSA, namely:

- opioids (e.g., codeine, morphine, heroin);
- cocaine,
- amphetamines (to be moved to Schedule I by Bill C-15),

of more than 3 kg of a substance listed in Schedule I of the CDSA (i.e., cannabis resin or marihuana).[10]

Furthermore, Bill C-15 would have the effect of imposing mandatory prison terms for these offences. The *Criminal Code* (s. 742.1) states that conditional sentencing (i.e., sentences served in the community subject to various conditions, in cases where the term of imprisonment imposed is less than 2 years and would hence normally be served in a provincial prison) are not an option in the case of "an offence punishable by a minimum term of imprisonment".

### *The simplistic characterization of Bill C-15 is misleading*

In re-introducing Bill C-15 in February 2009, the Government declared that it was "fighting back against gangs and other organized criminal groups" and "taking the necessary steps to crack down on crime and to ensure the safety and security of our neighbourhoods and communities."[11] The Minister of Justice stated that the legislation is "a proportionate and measured response designed to disrupt criminal

[10] Note that Clause 1 of Bill C-15 is ambiguously drafted and could be interpreted as imposing a mandatory minimum prison term for trafficking, or possessing for the purpose of trafficking, any quantity of cannabis. The Government's backgrounder states that a minimum penalty would only apply in the event the quantity exceeded 3 kg, but Clause 1(1)(a.1) should make this intention explicit so as to avoid confusion.

[11] "Government re-introduces legislation to fight serious drug crimes," News Release, Vancouver, February 27, 2009.

enterprise" and that "mandatory prison sentences are appropriate for those who commit serious drug offences threatening our society."[12]

Would the mandatory minimum sentences proposed in Bill C-15 contribute to a "strong, safer, better Canada"? Would they "disrupt criminal enterprises" as suggested by the Government in its Backgrounder on the bill?[13] Based on the available evidence, there is no reason to believe Bill C-15 will contribute to achieving these objectives, and in fact, the available evidence indicates it will be counter-productive. To quote Justice Michael A. Wolff of the Missouri Supreme Court and Chair of Missouri's Sentencing Commission, "If we put people in prison who do not belong there, we may well destroy their lives (and the life prospects of their children) – beyond what their own conduct has done – and make them worse individuals."[14]

We do not present here an exhaustive analysis of Bill C-15's provisions; however, we do wish to highlight three particular aspects of the Bill which we believe illustrate how it is misleading to simplistically suggest that it only targets "gangs and organized crime." Rather, Bill C-15 casts the net of mandatory imprisonment very widely, likely with negative results.

**First, we note that the factors which would attract a mandatory minimum sentence of imprisonment are overly broad, going well beyond violent offences or the activities of gangs or organized crime.**

- For example, clause 1(1)(a)(ii)(A) imposes a mandatory minimum of 2 years in prison if "the person committed the offence in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years." This broad formulation could encompass anyone who committed their offence in the vicinity of a park, store, theatre, restaurant or any number of other places where youth may be present. Youth would not necessarily be involved or targeted in any way by the offence. Moreover, this clause is likely to result in more young people serving jail time, including students with no criminal records caught selling small amounts of drugs to their classmates. Would this help Canada's young people avoid drug use and crime in their future?

- To take another example from the Bill, clause 1(1)(a)(i)(c) would impose a mandatory minimum sentence of one year in prison if "the person carried, used or threatened to use a weapon in committing the offence." This

[12] Ibid.

[13] Government of Canada, *Backgrounder: Mandatory prison sentences for serious drug crimes*, online via www.nationalantidrugstrategy.gc.ca.

[14] Justice M.A. Wolff, "Evidence-Based Judicial Discretion: Promoting Public Safety through State Sentencing Reform," The 14th Annual Justice William J. Brennan Jr. Lecture on State Courts and Social Justice, New York University School of Law, February 20, 2008, online via www.brennancentre.org.

provision casts the net far beyond those who commit violent offences, and would include someone who happened to have a jackknife in their backpack or someone who threatened to use a weapon but did not actually have one in their possession.

- Despite the Government's stated concern for people with addictions, in practice Bill C-15 would have the practical effect of imposing minimum prison terms on people who engage in small-scale trafficking precisely because of their own addiction. Clause 1(1)(a)(i)(D) would impose a minimum penalty of at least 1 year in prison for anybody who has, within the 10 preceding years, been convicted of a "designated substance offence", which includes trafficking any quantity of substances such as opioids, cocaine or cannabis (resin or marihuana).

**Second, by removing judicial discretion from the sentencing process, unintended and unjust consequences could result.**

Every crime is distinct, as is every person who offends. An appropriate sentence is proportional to the gravity of the crime and the degree of responsibility of the offender.[15] By better informing the exercise of judicial discretion, not by restricting it, sentences can be tailored to have the best possible outcomes. But removing flexibility from the sentencing process, as is proposed for the offences included in Bill C-15, invites unduly harsh penalties. For example, mandatory imprisonment is unduly harsh and unjust in cases such as those of the following people, all of whom could be caught by Bill C-15, as they have been caught by similar mandatory minimum sentencing laws for drug offences in the U.S.:

- an unwitting participant with little direct involvement in a drug offence;
- someone who faces a reasonable apprehension of harm for not participating in an offence (e.g., a battered woman charged as conspirator or accomplice to her boyfriend's dealings);[16]
- a young person who dabbles in drugs briefly, whose future is then damaged by incarceration, perhaps irreparably; or
- someone living in extreme poverty or with severe addiction, for whom small-scale trafficking (and possession) is a viable option to earn some money needed for survival.

Punishing "serious crimes", including those presumably contemplated by the "aggravating factors" included in Bill C-15, can equally be achieved without risking the potential unjust sentences that arise when judicial discretion is unduly curtailed. For example, in the event that violence is committed in connection with a drug

[15] *Criminal Code*, s. 718.1.

[16] E.g., see American Civil Liberties Union, Break the Chains and Brennan Center at NYU School of Law, *Caught in the net: The impact of drug policies on women and families* (New York, 2006).

offence, applicable charges under the *Criminal Code* (e.g., assault, firearms offences) may be laid. Similarly, existing criminal offences with respect to organized crime (e.g., under *Criminal Code* s. 467.11 – 467.13) could be used if the offence was committed for the benefit of organized crime. But in the case of non-violent offenders convicted of trafficking, importing/exporting or producing small quantities, there is little justification for departing from the basic sentencing principles in criminal law that the punishment should be proportional to the gravity of the crime and incarceration should be a punishment of last resort. Justice will only be seen to be done if judges are able to consider the circumstances of each crime and each offender, and exploit the panoply of sentencing options available today to arrive at the best individual and societal outcomes.

**Finally, Bill C-15's provisions on drug treatment courts are of limited value and, upon closer examination, do not fully square with the Government's stated concern of "getting tough" on serious criminals while helping people with addictions.**

At first glance, Bill C-15 offers some relief against mandatory minimum prison sentences. Clause 5(2) says that:

- a court sentencing a person for a drug offence may, with the consent of the prosecutor, delay sentencing so that the person may participate in an approved drug treatment court program; and

- if the person "successfully completes" the drug treatment court program, the court is not required to impose the minimum punishment.[17]

However, to date there are few operational drug treatment courts (DTCs) in Canada, and the evidence is equivocal at best about their effectiveness in contributing to long-term reduction in drug use and recidivism among participants and the cost-

[17] However, under Bill C-15 this option is not available in the event that any of several factors listed in the Bill are involved in the person's offence, including:

- carrying a weapon in committing the offence;
- committing the offence in or near a school, on or near school grounds, or in or near "any other public place usually frequented' by people under 18;
- involving a person under 18 in committing the offence.

Determining whether a drug treatment court program is appropriate should largely be based on an assessment of the prospect of yielding benefits, while avoiding the costs and harms associated with incarceration. In particular, a drug treatment court aims to address addiction or problematic substance use, the health issue underlying a significant number of offences, and thereby also reduce future criminal activity. However, the broad wording of various sections of Bill C-15 would operate to deny many people accused of non-violent drug offences access to a drug treatment court program and hence the possibility of relief against mandatory prison terms that would otherwise be imposed under Bill C-15.

effectiveness of the programs,[18] and whether such programs can, paradoxically, contribute to *widening* the net of the criminal justice system in dealing with drug offences.[19] The programs all operate on the same principle of coercive, abstinence-based addiction treatment with only limited tolerance for relapse. The focus on abstinence, however, ignores the substantial body of research that demonstrates that addiction is a chronic and relapsing condition, shaped by many behavioural and social-contextual characteristics.[20] As a result, those individuals with the most severe drug dependence are at the highest risk of "failing" DTC programs,[21] which under the provisions of Bill C-15 would mean that they are sent back to the judicial system and subject to mandatory minimum prison terms. This is directly at odds with the government's stated policy of helping people with addictions.

**As these three aspects of the bill highlight, the rhetoric and stated objectives of Bill C-15 as a component of the National Anti-Drug Strategy do not match the actual provisions as drafted.**

## 5. Mandatory imprisonment for drug offences: bad public policy

Insofar as the proposed legislation mandates incarceration for the designated drug offences — such as trafficking or producing even small quantities of drugs — it amounts to bad public policy for fiscal reasons, public health reasons and human rights reasons. We draw the Committee's attention to a number of considerations.

### (a) Targeting "drug dealers": What does this mean in practice?

Under Bill C-15, mandatory prison sentences would be imposed for the offences of trafficking and possession for the purposes of trafficking, importing and exporting, and production of Schedule I and Schedule II drugs when certain "aggravating factors" are present. As simple possession would not be subject to a mandatory minimum sentence, it might be suggested that this legislation is targeting "drug dealers" and not people with addictions or others who use drugs. However, this is disingenuous. Careful scrutiny shows this distinction cannot be drawn so categorically.

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[18] D. Werb, R. Elliott, B. Fischer, E. Wood, J. Montaner & T. Kerr, "Drug treatment courts in Canada: an evidence-based review," *HIV/AIDS Policy & Law Review*, 12(2/3) (2007), pp. 12-17.

[19] Justice Morris B. Hoffman, "The Drug Court Scandal," *North Carolina Law Review* 2000; 1477.

[20] Werb et al., *supra* note 18, p. 16.

[21] Ibid.

As noted in the enclosed companion briefing paper *Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses* (April 2006):

> This distinction is often artificial, particularly when harsh minimum sentences are mandated for dealing in any quantity of drugs. The real profiteers, who traffic large quantities of illegal drugs, distance themselves from more visible drug activities and are rarely captured by law enforcement efforts. Instead, it is those people who are addicted and involved in small-scale, street-level drug distribution to support their addictions who are much more easily targeted by law enforcement efforts and more commonly end up being charged with drug offences.
>
> Evidence for this result comes from the long-running Vancouver Injection Drug Users Study (VIDUS), which sampled of some of the most vulnerable, street-involved people who use illegal drugs. Twenty percent of those surveyed reported dealing drugs, usually on a very small scale. Furthermore, characteristics that are markers of the highest levels of addiction, such as high-intensity drug use, were associated with drug dealing. The most common drug-dealing roles assumed by VIDUS participants were low-level, dangerous dealing tasks, including direct street-level selling (82%), "middling" or carrying drugs (35%), and "steering" or sending addicts towards dealers (19%). The most common reasons given for dealing drugs included getting money either to support a drug addiction or to pay off debts related to drug use. A "get tough" approach with mandatory minimum sentences will serve primarily to penalize people who are themselves addicted, rather than large-scale traffickers. High-profile efforts to target drug traffickers also inevitably end up increasing HIV risks in the community.[22]

Tragically, the U.S. experience further illustrates that the brunt of mandatory minimum sentences, supposedly aimed at "getting tough on dealers", are not in fact borne by "drug kingpins". Mandatory minimum sentences for drug offences have a substantial history in the U.S., going back more than a quarter-century. Yet only 5.5% of federal crack cocaine defendants and 11% of federal drug defendants are high-level drug dealers. It is more frequently the low-level offenders such as mules and street dealers who have served jail time for drug offences.[23] The number of women imprisoned in the U.S. for drug-related offences has also increased rapidly

[22] L. Maher & D. Dixon, "Policing and public health: Law enforcement and harm minimization in a street-level drug market," *British Journal of Criminology* 1999; 39(4): 488-412; E. Wood et al., "The impact of police presence on access to needle exchange programs," *Journal of Acquired Immune Deficiency Syndromes* 2003; 34(1): 116-8; R. N. Bluthenthal et al., "Collateral damage in the war on drugs: HIV risk behaviours among injection drug users," *International Journal of Drug Policy* 1999; 10: 25-38; and *Do Not Cross: Policing and HIV Risk Faced by People Who Use Drugs* (Canadian HIV/AIDS Legal Network, 2007) and sources cited therein.

[23] Drug Policy Alliance, "Focal Point: Mandatory Minimum Sentencing," online via www.drugpolicy.org.

as a result of mandatory minimum sentencing provisions — in fact, during the time such laws have been in place, the incarceration of women for drug-related offences in state prisons in the U.S. has increased by a staggering 888 percent, the majority of this increase accounted for by women of colour and women living in poverty.[24] Because of their visibility "on the street," small-scale dealers in poor, inner-city neighbourhoods are often those who are arrested when the police "crack down" on drug use and drug dealing. Women are disproportionately represented at the bottom of the drug-dealing hierarchy and are highly vulnerable to arrest, hence the dramatic increase in the number of women imprisoned.[25]

In the Canadian context, the consequences for women of imposing mandatory prison terms for drug offences cannot be overlooked. Already in Canada, although women constitute a small minority of incarcerated persons, a significant percentage of women in Canadian prisons were incarcerated for offences related to drug use, often linked to underlying factors such as experiences of sexual or physical abuse or violence.[26] In other words, our current drug laws already play a disproportionate role in the incarceration of women, including women with addictions; imposing mandatory prison sentences will only exacerbate this impact.

As noted above, Bill C-15 precludes judges from evaluating the evidence in each particular case in order to impose an appropriate sentence, such as a conditional sentence, restorative justice intervention or more minimal jail sentence when appropriate. In practice, mandating minimum terms of imprisonment has the consequence of incarcerating some of the most marginalized people who use drugs — or even middle-class or wealthy teenagers who have dabbled in drug use — while doing little to penalize large-scale traffickers.[27] In other words, Bill C-15 will lead to the incarceration of the very people the federal Government has pledged to help through the National Anti-Drug Strategy.

Instead of wasting considerable public funds on a "get tough" approach that would harshly penalize people with addictions and/or people living in poverty, as well as people (including young people and students) who have engaged in non-violent offences, it would be more advisable to invest significantly in more cost-effective,

[24] ACLU et al., *Caught in the net*, p. 1.

[25] M. Eliason, J. Taylor and R. Williams, "Physical Health of Women in Prison: Relationship to Oppression," *Journal of Correctional Health Care* 2004; 10(2): 175-203 at 190.

[26] J. Csete, *"Vectors, Vessels and Victims": HIV/AIDS and Women's Human Rights in Canada* (Toronto: Canadian HIV/AIDS Legal Network, 2005), p. 36, online via www.aidslaw.ca/women; S. Boyd and K. Faith, "Women, illegal drugs and prison: views from Canada," *International Journal of Drug Policy* 10 (1999): 195–207 at 199.

[27] T. Kerr & E. Wood, "The public health and social impacts of drug market enforcement: A review of the evidence," *International Journal of Drug Policy* 2005: 16(4): 210-220.

proven addiction treatment services.[28] Moreover, employment opportunities may be a more cost-effective intervention for drug importers, producers and dealers who are underemployed. It makes more sense to direct our public resources towards services and programs that build healthy individuals and communities — including stable housing, early childhood development, employment opportunities, quality childcare and education programs — than towards building prisons to house drug offenders. These interventions would address illicit drug use more appropriately as a health and social issue.

**(b) Greater incarceration of people who use drugs is bad public health policy**

Greater incarceration of people who use drugs is ill-advised as a matter of both human rights and public health. Evidence indicates that incarceration of people who inject drugs contributes to Canada's worsening HIV epidemic. In Canada's federal prison system, the number of reported cases of HIV rose from 25 in 1989 to 170 in 1996 to 204 in 2005. The actual number of HIV-positive federal prisoners is likely to be even higher as not all HIV-positive prisoners will have reported their status to Correctional Services of Canada (CSC) or even be aware of it themselves.[29] Overall, HIV prevalence among federal prisoners is approximately 10 times higher than prevalence among the population as a whole, according to the most recent figures from CSC.[30] Levels of HIV are even higher in provincial prisons, with studies undertaken in British Columbia, Ontario and Quebec revealing HIV seroprevalence levels in prisons between 10 and 20 times higher than in the general population.[31]

Incarceration has been shown to lead to injection drug use among some prisoners who did not previously use drugs or use by injection.[32] CSC acknowledges that drugs enter prisons despite efforts to prevent this, and that a majority — an estimated 80% — of prisoners in federal penitentiaries have substance use problems.[33] Over a decade ago, a CSC study found that almost 40 percent of

[28] T. Gabor and N. Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures* (Ottawa: Justice Canada, 2002), pp. 17-18.

[29] Canadian HIV/AIDS Legal Network, *HIV and Hepatitis C in Prisons*, Fact Sheet #1: "HIV and hepatitis C in prisons: the facts," (2008) online via www.aidslaw.ca/prisons.

[30] Correctional Service Canada, data presented February 17, 2009.

[31] Canadian HIV/AIDS Legal Network, Fact Sheet #1, *supra* note 29; C. Poulin et al., "Prevalence of HIV and hepatitis C virus infections among inmates of Quebec provincial prisons," *Canadian Medical Association Journal* 177(3) (2007): 252-256; L. Calzavara et al., "Prevalence of HIV and hepatitis C virus infections among inmates of Ontario remand facilities," *Canadian Medical Association Journal* 177(3) (2007): 257-261.

[32] E. Wood et al., "Initiation of opiate addiction in a Canadian prison: a case report", *Harm Reduction Journal* 2006.

[33] Correctional Service Canada, *Corrections Fact Facts – Drugs in Prisons* (undated).

inmates in federal prisons reported having used drugs since arriving at their institution, 11 percent of whom indicated drug use by injection.[34] However, there is no access to sterile injection equipment in prisons, because correctional systems in Canada continue to refuse to implement needle exchange programs that have long been demonstrated to be an effective and crucial element of HIV prevention among people who inject drugs in Canada outside the prison setting.[35] Not surprisingly, a study undertaken in Vancouver revealed that incarceration more than doubled the risk of HIV infection of people who use illegal drugs and suggested that 21 percent of all HIV infections among Vancouver injection drug users may have been acquired in prison.[36]

Sentencing people with addictions to conditions of imprisonment that prevent access to health-protection tools such as sterile injection equipment unjustifiably infringes their human rights, and violates prisoners' constitutional rights (e.g., to equality in access to health services, to security of the person, and to freedom from cruel and unusual punishment under ss. 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*). Furthermore, it violates the state's statutory obligation to take reasonable care to safeguard the health of prisoners (e.g., *Corrections and Conditional Release Act*, s. 70).[37]

Moreover, incarcerating people who use drugs, or may have a greater vulnerability to initiating drug use, in a setting where drugs are available but sterile injection equipment is not, is a recipe for a public health disaster. There is ample evidence from numerous countries of outbreaks of HIV infection related to drug injection using contaminated equipment shared by multiple prisoners.[38] Most prisoners are

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[34] Correctional Service Canada, *1995 National Inmate Survey: Final Report* (Ottawa: CSC, 1996).

[35] There is ample evidence of the success of such programmes from numerous other countries and they have been endorsed from a wide range of experts: e.g., see *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*, *supra* note 2; Ontario Medical Association, *Improving Our Health: Why is Canada Lagging Behind in Establishing Needle Exchange Programs?* (Toronto: OMA, 2004); Canadian Medical Association, Resolution 26 of 17 August 2005, online: www.cma.ca/index.cfm/ci_id/45252/1.htm; Correctional Investigator of Canada, *Annual Report of the Correctional Investigator 2003-2004* (June 2004) and *Annual Report of the Office of the Correctional Investigator of Canada 2005-2006* (September 2006); World Health Organisation & UNAIDS. *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response* (Geneva, 2006), online: http://data.unaids.org/pub/Report/2006/20060701_HIV-AIDS_prisons_en.pdf; Public Health Agency of Canada, *Prison needle exchange: Review of the evidence* – Report prepared for Correctional service of Canada (April 2006) [on file].

[36] M.W. Tyndall et al., "Intensive injection cocaine use as the primary risk factor in the Vancouver HIV-1 epidemic," *AIDS* 2003; 17(6): 887; H Hagan, "The relevance of attributable risk measures to HIV prevention planning," *AIDS* 2003; 17(6): 911.

[37] S. Chu & R. Elliott, *Clean Switch: The Case for Prison Needle and Syringe Programs in Canada* (Toronto: Canadian HIV/AIDS Legal Network, 2008) (forthcoming).

[38] Canadian HIV/AIDS Legal Network, *Prison Needle Exchange: Lessons from a Comprehensive Review.*, *supra* note 2.

eventually released back into their communities, taking with them any infections they acquired while imprisoned; prison health is public health. From the perspective of both public health and human rights, mandating prison terms for drug offences is a misguided approach.

### (c) Mandatory minimum sentences for drug offences do not work

Mandatory minimum sentences for drug offences have been in place in the United States for some time and there is no evidence to support the claim that this has helped curb drug-related crime or problematic drug use. Rather, the vast increase in incarceration of non-violent drug offenders in U.S. prisons has taken a terrible human toll and led to enormous financial expenditure, while the drug problem in the U.S. has worsened. As a result, many U.S. states are now repealing or softening their mandatory sentencing laws — including Michigan, Hawaii, Washington state, Louisiana, Texas, North Dakota, Indiana, New Mexico, Connecticut, Maine and New York[39] — and multiple bills have been brought before the federal Congress to reform mandatory crack cocaine sentences.[40]

In Canada, after careful examination comparing mandatory minimum sentences for drug offences to similar policies for drunk driving and gun crimes, a report conducted for Justice Canada concluded that such an approach is "least effective in relation to drug offences" and that "blunt instruments" such as mandatory minimum sentences "do not appear to influence drug consumption and drug-related crime in any measurable way."[41]

On the other hand, prison terms can devastate individuals and families. What happens to an individual's children while they are imprisoned? How are their futures affected by their parent's imprisonment? Most prisoners are unable to make their child support payments or pay taxes while imprisoned, and have few employment prospects following a prison sentence. Mandatory minimum sentences for drug offences represent an approach that does not work for individual offenders or for society more broadly — an approach that has been tried for a quarter-century in the U.S. and has failed miserably, wreaking a terrible human and financial toll in the process.

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[39] K. Richburg, "N.Y. Governor, Lawmakers Agree to Soften Drug Sentencing Laws," *The Washington Post*, March 28, 2009, p. A02; M. Gray, "New York's Rockefeller Drug Laws," *TIME*, April 2, 2009.

[40] R. Foot, "Canada's drug crime bill brings calls for caution from U.S.," *Dose.ca*, April 25, 2008; M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums* (Families Against Mandatory Minimums, 2008), online: www.famm.org/Repository/Files/8189_FAMM_BoggsAct_final.pdf.

[41] Gabor & Crutcher, *Mandatory Minimum Penalties*, *supra* note 28.

### (d) Mandatory minimum sentences are at odds with fundamental sentencing principles and raise constitutional concerns

Bill C-15 flies in the face of long-established sentencing principles aimed at avoiding overzealous use of incarceration. The fundamental principle of sentencing in Canada is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (*Criminal Code*, s. 718.1). Mandatory minimum terms of imprisonment are *prima facie* at odds with this principle, because they deny judicial discretion to tailor the penalty to the circumstances of the case. The Supreme Court of Canada has ruled that a mandatory minimum sentence constitutes cruel and unusual punishment, contrary to the *Canadian Charter of Rights and Freedoms* (s. 12), if it is possible for the sentence, in a specific matter or reasonable hypothetical case, to be "grossly disproportionate," given the circumstances of that case. In fact, in *R. v. Smith*, the Court previously ruled that a mandatory minimum sentence of seven years for importing or exporting a narcotic constituted cruel and unusual punishment because it failed to take into account the nature and quantity of the substance, the reason for the offence, or the absence of any previous convictions. The Supreme Court therefore struck down the provision as unconstitutional.[42]

Under Bill C-15, any time a person is convicted of one of the designated offences and the broad aggravating factors are present — including merely having a previous conviction for a designated offence — they would have to serve a prison sentence, regardless of the circumstances of the individual case. In light of the decision in *Smith*, we question whether such an outcome of the law is constitutionally sound.

[42] *R.* v. *Smith*, [1987] 1 S.C.R. 1045.

## 6. Conclusions and recommendations

As drafted, Bill C-15 imposes mandatory incarceration for a number of drug offences when certain "aggravating factors" are present, even going so far as to impose a rule of "two strikes and you're out". However, as outlined above, this approach will not be an effective response to drug offences and raises constitutional concerns, particularly given that incarceration would be mandated for non-violent drug offenders. Rather than penalizing those profiteers engaged in large-scale trafficking, it is likely to be primarily the most marginalized people with addictions and/or living in poverty, engaged in small-scale trafficking often related to their drug dependence, who will bear the brunt of such mandatory incarceration provisions. Mandating greater incarceration of people who use drugs and are convicted of such small-scale trafficking, importing/exporting or production, without crimes of violence involved, is ill-advised from the perspective of protecting prisoners' and the public's health against the spread of blood borne pathogens such as HIV and hepatitis C.

**Given the absence of any significant benefit to be gained from imposing mandatory minimum sentences for drug offences and the very real adverse consequences of applying such a policy approach, the Canadian HIV/AIDS Legal Network urges that Bill C-15 should be abandoned.**