Mandatory Minimum Incarceration for Drug Offences: Bad public policy

Submission to the Department of Justice

July 2017

Published by the
Canadian HIV/AIDS Legal Network
1240 Bay Street, suite 600
Toronto, Ontario
Canada M5R 2A7

Telephone: +1 416 595-1666
Fax: +1 416 595-0094

www.aidslaw.ca

The Canadian HIV/AIDS Legal Network promotes the human rights of people living with, at risk of or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education and community mobilization.

Le Réseau juridique canadien VIH/sida fait valoir les droits humains des personnes vivant avec le VIH ou le sida et de celles qui sont à risque ou affectées autrement, au Canada et dans le monde, à l'aide de recherches et d'analyses, d'actions en contentieux et d'autres formes de plaidoyer, d'éducation du public et de mobilisation communautaire.

Contents

Introduction

For many years, Canada's Drug Strategy explicitly acknowledged that problematic substance use was primarily a health issue rather than an issue for law enforcement.[1] In 2001, Health Canada issued an official response to a detailed report by the Canadian HIV/AIDS Legal Network ("Legal Network") 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,[2] confirming that "injection drug use [IDU] is first and foremost a health issue" and that "fundamental changes are needed to existing legal and policy frameworks in order to effectively address IDU as a health issue."[3] Following that, 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 — led to a new *National Framework for Action to Reduce the Harms Associated with Alcohol and Other Drugs and Substances in Canada*.[4] This national framework explicitly reaffirmed, as its first principle, that problematic substance use is a health issue, and 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.

In a marked departure from the commitment to addressing substance use as a health issue, then Prime Minister Stephen Harper officially unveiled in October 2007 the *National Anti-Drug Strategy*, promising to crack down on what he termed "drug criminals." By eliminating harm reduction as a pillar and emphasizing law enforcement activities, this new national strategy shifted Canada's approach to illegal drugs even further away from an evidence-based health approach toward a "law-and-order" agenda.[5] Reflecting this new framework, in 2012, the federal government passed the *Safe Streets and Communities Act*, a law that introduced for the first time mandatory minimum sentences for the offences of trafficking; possession for the purpose of trafficking, importing and exporting; and production of substances set out in Schedules 1 and 2 of the *Controlled Drugs and Substances Act* (CDSA).[6] This law exacerbated the already damaging imbalance in Canada's response to drug use — heavily oriented to law enforcement initiatives — by removing judicial discretion regarding sentencing and requiring minimum prison terms for a range of drug offences, including non-violent offences. [7] In announcing the tabling of this legislation in November 2007, then Minister of Justice Rob Nicholson characterized it as "another step in our government's plan towards tackling crime and strengthening the security of Canadians."[8]

Yet there is no evidence that mandatory prison time for people convicted of drug offences reduces the problems associated with drug use, or drug use itself. Justice Canada's own review of the evidence in 2002 concluded that mandatory minimum sentences are "least effective in relation to drug offences" and that "drug consumption and drug-related crime seem to be unaffected, in any measurable way, by severe mandatory minimum sentences."[9] There is also no evidence from other jurisdictions — including the U.S., where mandatory minimum sentences for drug offences have been in place for some time —establishing that crime rates decrease as a result of increasing incarceration, including for drug-related offences. Incarceration does not diminish drug-related street activity, violence or petty crime. On the contrary, drug law enforcement practices aimed at disrupting drug markets may have the unintentional effect of increasing levels of drug-market violence.[10]

At the same time, there is a growing body of evidence that mandatory minimum sentences wreak terrible damage on individuals (particularly those who are dependent on drugs), families and communities, and exacerbate the harms to public health associated with problematic drug use. By effectively preventing judges from considering the individual circumstances of a case when imposing a sentence (including a person's Indigenous heritage or connection, as prescribed by the *Criminal Code*[11] and the Supreme Court of Canada in *R. v. Gladue*[12]), mandatory minimum sentences hurt the most vulnerable members of our communities, who are more likely to be caught in the vast net of these sentences. Mandatory minimum sentences are also at odds with fundamental sentencing principles and are constitutionally suspect. Finally, they lead to a tremendous waste of resources, resulting in staggering health, social and economic costs that go well beyond the burden of the individual sentence.

Targeting "drug dealers": What does this mean in practice?

The CDSA imposes mandatory prison sentences for the offences of *trafficking*, *possession for the purposes of trafficking*, *importing*, *exporting*, and the *production* of drugs listed in CDSA Schedules 1 and 2 when certain "aggravating factors" are present. As simple possession is not subject to the requirement of a mandatory minimum sentence, some have suggested that this legislation targets only "drug dealers" and not people with drug dependence or others who use drugs. However, careful scrutiny shows this distinction cannot be drawn so simplistically.

Studies have shown that of the most vulnerable, street-involved people who use drugs, many are involved in low-level tasks such as carrying drugs and steering buyers towards dealers.[13] Those serving jail time for drug offences are more frequently individuals working as "mules" and street dealers, since the real profiteers in the drug market distance themselves from visible drug-trafficking activities and are rarely captured by law enforcement efforts. In the U.S., where mandatory minimum sentences for drug offences have a substantial history, only 11% of federal drug defendants are high-level drug dealers.[14] A 2013 study of people who use drugs in Vancouver also found that for people with drug dependence, criminal activity was related to survival, and that their involvement in criminal activity would trigger mandatory minimum sentences under the *Safe Streets and Communities Act*.[15] As the Supreme Court of Canada acknowledged most recently in *R. v. Lloyd*, the imposition of a minimum penalty of one year in prison for anybody who has, within the 10 preceding years, been convicted of a "designated substance offence"[16] has the potential to capture drug-dependent people involved in small-scale, street-level drug distribution to support their drug use.[17] Incarceration does nothing to address problematic substance use, but contributes to the marginalization of people who use drugs.

Discriminatory impact of mandatory minimum sentences for drug offences

Mandatory minimum sentences thus open the door to widespread discrimination against already marginalized groups, particularly drug-dependent people, people living in poverty, Indigenous people and other people of colour, and women.[18] As noted above, mandatory minimum sentences deny Indigenous people their right to more culturally appropriate and restorative alternatives to

incarceration[19] — a decidedly troubling development when federally incarcerated Indigenous people are more likely to present a history of substance use and dependence, as well as mental health concerns.[20] In 2015, the Truth and Reconciliation Commission of Canada issued calls to action which included recommendations to federal, provincial and territorial governments to commit to eliminating the overrepresentation of Indigenous people in custody, to amend the *Criminal Code* to allow trial judges to depart from mandatory minimum sentences and restrictions on the use of conditional sentences, and to establish measurable goals to identify and close the gaps in health outcomes between Indigenous and non-Indigenous communities.[21] Eliminating mandatory minimum sentences for drug offences is a necessary element of acting on these recommendations.

Moreover, as the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* found, "persons described as black are most over-represented among prisoners charged with drug offences, obstructed justice and weapons possession."[22] Mandatory minimum sentences for drug offences will undoubtedly intensify the overrepresentation of Black people in prison in Canada, at a time when almost 20% of Black federal prisoners were incarcerated for a drug-related offence and Black people are one of the fastest growing sub-populations in federal corrections.[23]

The experience in the U.S. should also give policy-makers pause on another front: in the U.S., the number of women imprisoned for drug-related offences has also increased rapidly as a result of mandatory minimum sentences.[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.[25] Because mandatory minimum sentences put power in the hands of prosecutors (who can offer deals to those who provide evidence to support prosecutors' cases against others), women who are small-scale users are disadvantaged because they are unlikely to have the kind of evidence that prosecutors in these circumstances seek, and are often unlikely to want to turn in a sexual partner. In particular, women in violent relationships may have a well-justified fear of betraying a sexual partner in this way. Major dealers are more likely to escape prosecution in this system as they are more likely to have information to trade.

In Canada, federally incarcerated women are twice as likely as men to be serving a sentence for drug-related offences, with Indigenous and Black women more likely than White women to be in prison for that reason.[26] In 2014, one-quarter of women in federal prisons were serving time for a drug-related offence.[27] Among Black women, this figure rises to 53%, including many who were carrying drugs across borders as a way to alleviate their situations of poverty.[28] A significant percentage of women in prison are also mothers of minor children,[29] many of whom were sole caregivers to their children prior to arrest. Incarceration thus carries the societal costs of afflicting families and children.

Mandatory minimum sentences are likely to apply also to many young people and students for experimenting with drugs. The CDSA imposes a mandatory minimum of two years in prison for trafficking or possession for the purpose of trafficking 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."[30] This broad formulation could encompass anyone who committed the offence in the vicinity of a park, store, theatre, restaurant or any number of other places where youth are often present. Youth need not be involved or targeted in any way by the conduct being prosecuted, but the imposition of a mandatory minimum sentence solely because of the location means more young people, including those with no previous criminal records, will serve jail time for a non-violent offence such as selling small amounts of drugs to their classmates or friends. As the B.C. Court of Appeal noted in striking down this aspect of mandatory minimum sentences, "while the section has a pressing and substantial objective, being the protection of young people from the drug trade, it cannot be said that it is proportional to that objective because … the section does not constitute a minimal impairment of the right infringed and the deleterious and salutary effects of it are not proportional."[31]

Greater incarceration of people who use drugs is bad public health policy

Drug policy that relies heavily on law enforcement has produced record incarceration rates of people who use drugs for non-violent offences.[32] Not only does imprisoning people who use drugs not address problematic substance use, but also, as the Global Commission on Drug Policy has noted, such mass incarceration is ill-advised from a public health perspective because it drives those who use drugs away from health services and because of the widespread inadequacy of HIV and hepatitis C (HCV) prevention measures behind bars.[33] A 2007 national study conducted by Correctional Service Canada (CSC) revealed that almost 60% of men and women used drugs in the months immediately preceding their incarceration.[34] Research also shows that the incarceration of people who inject drugs is a factor driving Canada's HIV and HCV epidemic. According to a 2003 Vancouver study, incarceration more than doubled the risk of HIV infection of people who use illegal drugs.[35] An independent evaluation of this study also suggested that 21 percent of all HIV infections among people who inject drugs in Vancouver may have been acquired in prison.[36]

In spite of significant investments made in drug interdiction measures over the past decade, drugs continue to enter prisons. In CSC's national survey, 34% of men and 25% of women reported using non-injection drugs during the past six months in prison, while 17% of men and 14% of women reported injecting drugs.[37] The imprisonment of people who use drugs also leads to initiation of injection drug use while in prison among people who did not previously use illegal drugs.[38] Several studies have revealed high rates of syringe-sharing among people who use drugs in Canada's prisons, resulting in part from their lack of access to sterile injection equipment behind bars.[39] Already, HIV and HCV prevalence are considerably higher in prison than they are in the community as a whole. A 2016 study indicated that about 30% of those in federal facilities and 15% of men and 30% of women in provincial facilities are living with HCV, and 1–2% of men and 1– 9% of women (in all correctional facilities) are living with HIV.[40] Given the lack of sterile injection equipment in Canada's prisons, the potential for HIV and HCV transmission in prison is high. There is ample evidence from numerous countries of outbreaks of HIV and HCV infection related to drug-injection equipment shared by multiple prisoners.[41] Since most prisoners are eventually released back into the community, the public health implications of imprisoning people who use drugs — not to mention the massive cost of a larger prison population living with chronic infections — cannot be ignored.

Mandatory minimum sentences are at odds with fundamental sentencing principles and raise constitutional concerns

Mandatory minimum sentences fly 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 proportional to the gravity of the offence and the degree of responsibility of the person being sentenced.[42] Mandatory minimum sentences 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 constitutes **cruel and unusual punishment**, contrary to the *Canadian Charter of Rights and Freedoms* (section 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.[43]

In *R. v. Smith*, the Supreme Court of Canada invalidated a mandatory minimum sentence of seven years for importing or exporting a narcotic that 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.[44] Similarly, in *R. v. Lloyd*, the courts had to consider the constitutionality of a provision in the CDSA mandating a minimum prison term of one year if a person is convicted of possessing a Schedule 1 or 2 drug for the purpose of trafficking and also has a previous conviction for a "designated substance offence" (or has served time in prison within the previous 10 years for such an offence). Ultimately, the Supreme Court of Canada held that the mandatory minimum sentence in question cast "a wide net" that risks catching "not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy."[45] In holding that the mandatory minimum sentence violated the constitutional guarantee against cruel and unusual punishment, the Court noted: "The reality is this: mandatory minimum sentence provisions that apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are constitutionally vulnerable."

As has been recognized in these and other cases, removing judicial discretion from the sentencing process can result in unintended and unjust consequences, including unduly harsh penalties. For example, mandatory imprisonment could be excessively harsh and unjust in cases involving people who are unwitting participants in a drug offence, a person with a reasonable apprehension of harm for not participating in an offence (e.g., in the case of a woman unwillingly participating in her boyfriend's dealings out of fear of violence or abuse), youth who dabble in drugs briefly, or people living in extreme poverty or with dependence on drugs who feel drug activities are a viable option to earn some money needed for survival.

Punishing "serious crimes" such as those presumably contemplated by the CDSA's "aggravating factors" need not require curtailing judicial discretion through legislating mandatory minimum sentences. For example, in the event that violence is committed in connection with a drug offence, applicable charges under the *Criminal Code* (e.g., assault or firearms offences) may be laid. Similarly, existing criminal offences with respect to organized crime could be used if the offence was committed for the benefit of organized crime. But in the case of individuals convicted of trafficking, importing or exporting, or producing small quantities, where there is no such violence, 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 that incarceration should be a punishment of last resort.

Notably, mandatory minimum sentences shift discretion from judges to prosecutors, thus increasing the likelihood that individuals charged with offences carrying mandatory minimum sentences will be under great pressure to plead guilty to charges for offences without minimum sentences — regardless of their culpability. As the BCCLA has noted, "in a justice system that is no stranger to wrongful conviction, the prospect that prosecutors may leverage mandatory minimum sentences for guilty pleas is especially egregious."[46] Justice will be seen to be done only if judges are able to consider the circumstances of each crime and each individual and exploit the panoply of sentencing options available to arrive at the best individual and societal outcomes.

Mandatory minimum sentences may also violate the Charter by **unconstitutionally depriving people of their liberty and security of the person** (guaranteed by section 7) contrary to "principles of fundamental justice." Mandatory terms of imprisonment are obviously a deprivation of liberty and lead to further harms to the bodily integrity of those imprisoned. When they do so contrary to fundamental sentencing principles aimed at ensuring fairness and proportionality in the criminal law, they are at odds with principles of fundamental justice.

Furthermore, legislating mandatory minimum sentences also **infringes the guarantee of equal protection and equal benefit of the law without discrimination**, including on the basis of disability (section 15). Canadian legislatures and courts have long recognized that drug dependence (including on a controlled substance) is a health issue and constitutes a disability for some purposes at law (e.g., protection against discrimination).[47] People living with drug dependence constitute a disadvantaged group against whom the state must not unjustifiably discriminate, yet they disproportionately bear the adverse consequences of mandatory minimum sentences to liberty and to health. As noted above, mandatory minimum sentences for drug offences undermine the health of individual prisoners (and public health more broadly) by exposing people in prison, particularly those who are living with drug dependence, to increased risks of contracting blood-borne infections such as HIV and HCV. This amounts to a (further) deprivation of security of the person because mandatory minimum sentences preclude a sentencing judge from considering a person's health condition and the serious health risks they face if imprisoned. Moreover, Indigenous people (who would otherwise have the conditions of their lives and their communities considered at sentencing pursuant to section 718.2(e) of the *Criminal Code* and *R. v. Gladue*), Black people and women, who may embody multiple and intersecting grounds of discrimination recognized by the Charter, are also likely to be disproportionately affected by mandatory minimum sentences for drug offences. This, in turn, exposes them to the greater health risks of incarceration.

While the CDSA features a clause that allows those charged with a designated offence to avoid a mandatory term of imprisonment by participating in an approved drug treatment court program,[48] to date there is but a handful of operational drug treatment courts in Canada. Furthermore, these interventions raise concerns. While operational details of such courts vary, including across jurisdictions, at base the programs operate on a principle of coercive, abstinence-oriented treatment with only limited tolerance for relapse. The focus on abstinence, however, ignores the

substantial body of research that drug use disorder is a chronic condition, shaped by many behavioural and social-contextual characteristics, not infrequently involving a return to use.[49] As a result, those individuals with the most severe drug dependence are at the highest risk of "failing" drug treatment court programs, which under the provisions of the CDSA would mean that they are sent back to the judicial system and subject to mandatory minimum prison terms.

Emerging research has also illuminated that drug treatment courts are less accessible to women, Indigenous people, some other racialized communities and youth, and have difficulty retaining these groups in treatment once they have entered. A 2015 evaluation by the Department of Justice found that drug treatment courts are largely helping white males over the age of 30.[50]As the Supreme Court noted in *Lloyd*, the exception to a mandatory minimum sentence provided by a drug treatment court is "too narrow to cure the constitutional infirmity. First, it is confined to particular programs, which a particular offender may or may not be able to access. … Second, to be admissible to these programs, the offender must usually plead guilty and forfeit his right to a trial. One constitutional deprivation cannot cure another. Third, the requirement that the offender successfully complete the program may not be realistic for heavily addicted offenders whose conduct does not merit a year in jail. Finally, in most programs, the Crown has the discretion to disqualify an applicant."[51]

Imposing unjust sentences: A waste of public resources

Mandatory minimum sentences preclude judges from evaluating the evidence in each particular case to impose an appropriate (and possibly less onerous) sentence, such as a conditional sentence, a restorative justice intervention or a more minimal jail sentence, all of which are less expensive. For example, in 2014–2015, it cost CSC over $115,000 to maintain one person in a federal prison (where people serve a sentence longer than two years) for one year, compared to $35,000 to accommodate and supervise a person in the community.[52] In 2015–2016, the average cost of incarcerating someone for one year in a provincial or territorial prison (where people serve a sentence that is less than two years) was just under $75,000.[53]

At the same time, higher incarceration rates ultimately lead to higher rates of infectious disease — more likely to occur when non-sterile and often makeshift equipment is used to inject drugs and is shared by multiple people. The result is greater health-care costs. For example, bacterial infections among people who inject drugs can result in lengthy and expensive hospitalization. HIV and HCV also exact high costs. In addition to great human suffering, a 2011 study estimated that each new HIV infection carries an economic loss of $1.3 million per person,[54] while HCV treatment costs will balloon with the advent of a new generation of direct-acting antiviral (DAA) medications with much higher curative capacity, but also far higher prices. Prison authorities cannot ignore the fact that their budgets will bear a disproportionate burden of the costs of treating such infections, given the much higher prevalence of HIV and HCV in prison. For example, in 2012–2013, CSC spent a total of $20 million on prescription drugs, while total health-care expenditure was $9,700 for a male prisoner and $26,200 for a federally incarcerated woman on a per capita basis.[55] In 2011–2012, CSC spent over $2.5 million on HCV medication and over $2.6 million on HIV medication, figures that precede the introduction of more costly DAA medications and do not include the cost of blood work and other health-care costs associated with HIV and HCV.[56]

Massive public costs stemming from policing, prosecution and incarceration, and subsequent treatment of HIV and HCV infections and other harms related to drug use in prisons make mandatory sentencing an extremely expensive investment with very little return. The science in this area is compelling: Alternatives to enforcement and imprisonment have been shown to be many times more effective in improving health and reducing the fiscal costs associated with illegal drug use.[57]

Recommendations

The societal, fiscal and health-related costs of imprisonment are much too high to be imposed automatically as part of intensifying a "war on drugs" — a campaign that is already failed and costly, and that is increasingly being questioned as unsound and harmful. Judges need flexibility in order to ensure that sentences are tailored to a particular individual, the unique circumstances and a specific offence. By casting the net of incarceration so widely as to encompass a significant number of people convicted of non-violent offences or offences that could be managed better in the community, mandatory minimum sentences will put some of the most vulnerable people in our society behind bars, as well as young people and others far removed from any violent or high-profit drug trade. Sentencing people who use drugs to conditions of imprisonment that prevent access to essential harm reduction tools such as sterile injection equipment also unjustifiably infringes their human rights, and violates prisoners' constitutional rights (e.g., to security of the person, to freedom from cruel and unusual punishment and to equality in access to health services, under sections 7, 12 and 15 of the Charter).

Mandatory minimum sentences are an inefficient and counter-productive misuse of public funds that could be better spent on evidence-based prevention, treatment and harm reduction programs that respect human rights and improve public health. The considerable public funds spent to harshly penalize people who use drugs or people living in poverty should be invested instead in services and programs that build healthy individuals and communities, including stable housing, early childhood development, employment opportunities, quality childcare and education programs. These interventions would address drug use more appropriately as a health and social issue, and help fulfill the decades-old promise of reducing the harms associated with substance use based on knowledge and evidence of what works and respect for human rights.

Therefore, we recommend a repeal of all the mandatory minimum sentences in the CDSA, including the following:

- Section 5(3)(i): minimum 1 year sentence for trafficking or possession for the purpose of trafficking if a person committed the offence in the context of a criminal organization, violence, weapons, or had a previous designated substance offence

- Section 5(3)(ii): minimum 2 year sentence for trafficking or possession for the purpose of trafficking if the offence is committed near school grounds or a public place frequented by persons under 18, in prison, or with services of a person under 18

- Section 6(3)(a) and (a.1): minimum 1 year or 2 year sentence for importing or exporting

and possession for the purpose of exporting based on various factors, including type and amount of substance, and whether offence was committed for trafficking, in the context of a position of trust or authority, or in a restricted area

- Section 7(2)(a), (a.1) and (b): minimum 6 month to 3 year sentence for production based on various factors, including type and amount of substance; whether production was for trafficking; the property used; whether production constituted a security, health or safety hazard; and whether a trap was used

We also call on the federal government to ensure that a full costing of the mandatory minimum sentences in the *Safe Streets and Communities Act* is carried out, as per section 9 of the CDSA, which requires "a comprehensive review of the provisions and operation of this Act, including a cost-benefit analysis of mandatory minimum sentences" to be undertaken by 2017 by any Senate or House of Commons committee (or both) that may be designated or established for that purpose, and a report within one year of this review to Parliament including a statement of any changes that the committee recommends.

---

[1] Health Canada, *Canada's Drug Strategy*, 1998.
[2] Canadian HIV/AIDS Legal Network, *Injection Drug Use and HIV/AIDS*, 1999.
[3] Health Canada, *Injection Drug Use and HIV/AIDS: Health Canada's Response to the Report of the Canadian HIV/AIDS Legal Network*, 2001.
[4] Government of Canada and Canadian Centre Substance Abuse, *National Framework for Action to Reduce the Harms Associated with Alcohol and Other Drugs and Substances in Canada*, 2005.
[5] A. Symington, "Conservative government announces new anti-drug strategy," *HIV/AIDS Policy & Law Review* 12, 2/3 (2007): 27–28.
[6] *Safe Streets and Communities Act*, SC 2012, c 1. Schedule 1 substances include heroin, fentanyl, opium, codeine, cocaine, amphetamine and methamphetamine. Schedule 2 substances include cannabis and its various derivatives.
[7] *Controlled Drugs and Substances Act*, SC 2012, c. 1.
[8] Speaking Notes for the Honourable Rob Nicholson, P.C., Q.C., M.P. for Niagara Falls, Minister of Justice and Attorney General of Canada for the Announcement of Tabling of Legislation on Mandatory Prison Sentences for Serious Drug Crimes, Ottawa, November 20, 2007.
[9] T. Gabor and N. Crutcher, *Mandatory minimum penalties: Their effects on crime, sentencing disparities, and justice system expenditures*, Justice Canada (Research and Statistics Division), January 2002.
[10] See, for example, D. Werb et al., "Effect of drug law enforcement on drug market violence: a systematic review," *International Journal of Drug Policy* 22,2 (March 2011): 87–94.
[11] *Criminal Code*, s. 718.2(e).
[12] *R v. Gladue*, [1999] 1 SCR 688.
[13] L. Maher and D. Dixon, "Policing and public health: Law enforcement and harm minimization in a street-level drug market," *British Journal of Criminology* 39,4 (1999): 488–412; E. Wood et al., "The impact of police presence on access to needle exchange programs," *Journal of Acquired Immune Deficiency Syndromes* 34,1 (2003): 116–118; R. N. Bluthenthal et al., "Collateral damage in the war on drugs: HIV risk behaviours among injection drug users," *International Journal of Drug Policy* 10 (1999): 25–38; Canadian HIV/AIDS Legal Network, *Do Not Cross: Policing and HIV Risk Faced by People Who Use Drugs*, 2007, and sources cited therein.
[14] U.S. Sentencing Commission, *Mandatory Minimum Penalties: Executive Summary*, 2011.
[15] Pivot Legal Society, *Throwing Away the Keys: The human and social cost of mandatory minimum sentences*, 2013.
[16] *Controlled Drugs and Substances Act*, SC 1996, c. 19, s. 5(3)(i)(d).
[17] See *R. v. Lloyd*, 2016 SCC 13 at para. 33: "Another foreseeable situation caught by the law is the following. A drug addict with a prior conviction for trafficking is convicted of a second offence. In both cases, he was only trafficking in order to support his own addiction."

[18] Pivot Legal Society, *Throwing Away the Keys: The human and social cost of mandatory minimum sentences*, 2013, and R. Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing*, BCCLA, 2014.
[19] *Criminal Code* s. 718.2(e); *R. v. Gladue*, [1999] 1 SCR 688; *R. v. Ipeelee*, [2012] 1 SCR 433.
[20] The Correctional Investigator of Canada, *Annual Report 2015–2016 of the Office of the Correctional Investigator*, 2016.
[21] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015.
[22] Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995), 69–70.
[23] Office of the Correctional Investigator, *A Case Study of Diversity in Corrections:The Black Inmate Experience in Federal Penitentiaries Final Report*, 2013.
[24] L. Lapidus et al., *Caught in the Net: The Impact of Drug Policies on Women and Families* (New York: American Civil Liberties Union, Break the Chains: Communities of Colour and the War on Drugs, and The Brennan Center at NYU School of Law, 2005).
[25] M. Eliason, J. Taylor and R. Williams, "Physical Health of Women in Prison: Relationship to Oppression," *Journal of Correctional Health Care* 10,2 (2004): 175–203 at 190.
[26] The Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015.
[27] Public Safety Canada Portfolio Corrections Statistics Committee, *2014 Corrections and Conditional Release Statistical Overview* (Ottawa, ON: Public Safety Canada, April 2015).
[28] The Correctional Investigator Canada, *Annual Report 2012–2013 of the Office of the Correctional Investigator*, 2013.
[29] According to the *Annual Report 2014–2015 of the Office of the Correctional Investigator*, more than 70% of women in federal prisons are mothers to children under the age of 18 and are more likely than men to be supporting dependents on the outside.
[30] *Controlled Drugs and Substances Act*, SC 1996, c. 19, s. 5(3)(ii)(a).
[31] *R. v. Dickey*, 2016 BCCA 177.
[32] E. Wood et al., *Recent incarceration independently associated with syringe sharing by injection drug users*, *Public Health Rep* 120,2 (March–April 2005): 150–156.
[33] Global Commission on Drug Policy, *The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic*, June 2012.
[34] D. Zakaria et al., *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey*, Correctional Service Canada, 2010.
[35] M.W. Tyndall et al., "Intensive injection cocaine use as the primary risk factor in the Vancouver HIV–1 epidemic," *AIDS* 17,6 (2003): 887–893.
[36] H. Hagan, "The relevance of attributable risk measures to HIV prevention planning," *AIDS* 17,6 (2003): 911–913.
[37] D. Zakaria et al.
[38] E. Wood, R. Lim and T. Kerr, "Initiation of opiate addiction in a Canadian prison: A case report," *Harm Reduction Journal* 3,11 (March 2006).
[39] E. van der Meulen, "'It Goes on Everywhere': Injection Drug Use in Canadian Federal Prisons," *Substance Use & Misuse* 22 (February 2017); D. Zakaria et al., *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey*; E. Wood et al., *Recent incarceration*; C. Hankins, "Confronting HIV infection in prisons," *Canadian Medical Association Journal* 151,6 (1994): 743–745; C.A. Hankins et al., "HIV infection among women in prison: An assessment of risk factors using a non-nominal methodology," *American Journal of Public Health* 84,10 (1994): 1637–1640.
[40] F. Kouyoumdjian et al., "Health status of prisoners in Canada," *Canadian Family Physician* 62 (2016): 215–222.
[41] Canadian HIV/AIDS Legal Network, *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*, 2nd ed., April 2006.
[42] *Criminal Code*, s. 718.1.
[43] *R. v. Nur*, 2015 SCC 15.
[44] *R.* v. *Smith*, [1987] 1 SCR 1045.
[45] *R*. v. *Lloyd*, 2016 SCC 13.
[46] R. Mangat, *More Than We Can Afford: The Costs of Mandatory Minimum Sentencing*, BCCLA, 2014.
[47] See, for example, "disability" in *Canadian Human Rights Act*, RSC 1985, c. H-6, s. 25; *Ontario (Director, Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, [2010] OJ No 3812 [HBA Tab 4]; *Canada*

(Human Rights Commission) v. Toronto-Dominion Bank, [1998] 4 FCR 205, [1998] FCJ No 1036 (CA) [HBA Tab 2].

[48] *Controlled Drug and Substances Act*, s. 10(4) and (5).

[49] P. Allard, T. Lyons and R. Elliott, *Impaired Judgment: Assessing the appropriateness of drug treatment courts as a response to drug use in Canada*, Canadian HIV/AIDS Legal Network, 2012; D. Werb et al., "Drug treatment courts in Canada: An evidence-based review," *HIV/AIDS Policy & Law Review* 12, 2/3 (2007): 12–17; J. Csete and D. Tomasini-Joshi, *Drug Courts: Equivocal Evidence on a Popular Intervention* (New York: Open Society Foundations, 2015).

[50] Department of Justice of the Government of Canada, *Drug Treatment Court Funding Program Evaluation*, 2015.

[51] *R. v. Lloyd*, 2016 SCC 13 at para. 34.

[52] Correctional Service Canada, *CSC statistics – key facts and figures*, January 2017.

[53] Julie Reitano, *Adult correctional statistics in Canada, 2015/2016*, Statistics Canada, March 1, 2017.

[54] J. Kingston-Riechers, *The Economic Cost of HIV/AIDS in Canada*, Canadian AIDS Society, 2011.

[55] The Correctional Investigator of Canada, *Annual Report 2013–2014 of the Office of the Correctional Investigator*, 2014.

[56] Access to Information Request to CSC dated August 17, 2012, on file with the Canadian HIV/AIDS Legal Network.

[57] E. Wood et al., "The impact of police presence"; E. Wood et al., "Displacement of Canada's largest public illicit drug market in response to a police crackdown," *Canadian Medical Association Journal* 170,10 (2004): 1551–1556; D. Buchanan et al., "Ethical dilemmas created by the criminalization of status behaviors: case examples from ethnographic field research with injection drug users," *Health Education & Behaviour* 29,1 (February 2002): 30–42; T. Rhodes et al., "Situational factors influencing drug injecting, risk reduction and syringe exchange in Togliatti City, Russian Federation: A qualitative study of micro risk environment," *Social Science & Medicine* 57,1 (July 2003): 39–54; W. Small et al., "Impacts of intensified police activity on injection drug users: Evidence from an ethnographic investigation," *International Journal of Drug Policy* 17,2 (2006): 85–95; S.R. Friedman et al., "Relationships of deterrence and law enforcement to drug-related harms among drug injectors in U.S. metropolitan areas," *AIDS* 20,1 (2006): 93–99; M.V. O'Shaughnessy et al., "Deadly public policy," *International Conference on AIDS* 12 (1998): 982 (abstract no. 44233); R.N. Bluthenthal et al., "Impact of law enforcement on syringe exchange programs: A look at Oakland and San Francisco," *Medical Anthropology* 18,1 (1997): 61–83; K. Dovey, J. Fitzgerald and Y. Choi, "Safety becomes danger: Dilemmas of drug-use in public space," *Health & Place* 7,4 (2001): 319–331; D. Best et al., "Assessment of a Concentrated High-Profile Police Operation: No discernible impact on drug availability, price or purity," *British Journal of Criminology* 41 (2001): 738–745; C. Aitken et al., "The impact of a police crackdown on a street drug scene: Evidence from the street," *International Journal of Drug Policy* 13 (2002): 193–202; R.N. Bluthenthal et al., "Collateral damage in the war on drugs: HIV risk behaviours among injection drug users," *International Journal of Drug Policy* 10 (1999): 25–38; C.P. Rydell et al., "Enforcement or Treatment? Modeling the Relative Efficacy of Alternatives for Controlling Cocaine," *Operations Research* 44,5 (September–October 1996): 687–695; P. Jacobs et al., "Cost Effectiveness of Streetworks' Needle Exchange Program of Edmonton," *Canadian Journal of Public Health* 90,3 (May–June 1999): 168–171.