HIV, Human Rights, and Drug Policy in Canada

Submission to the Office of the UN High Commissioner for Human Rights pursuant to Human Rights Council resolution 47/17 entitled "Human rights in the context of HIV and AIDS" (adopted July 13, 2021)

February 16, 2022

I. Introduction

The HIV 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. Since its inception, the HIV Legal Network has advocated for drug policies that uphold the human rights of people who use drugs, including those who are in prison. The Centre on Drug Policy Evaluation (CDPE) works collaboratively with governments, affected communities, and civil society to improve community health and safety by conducting research and outreach on effective and evidence-based policy responses to substance use. Founded in 2010 as the International Centre for Science in Drug Policy (ICSDP), the CDPE is now housed within the Li Ka Shing Knowledge Institute at St. Michael's Hospital in Toronto, Canada. We are grateful for the opportunity to make this submission to the Office of the High Commissioner for Human Rights (OHCHR) regarding "actions taken and to be intensified or initiated to meet the innovative targets on societal enablers, as recognized in the Political Declaration on HIV and AIDS adopted by the General Assembly in 2021, and to address the remaining gaps" and will focus on the context in Canada.

II. Human rights and drug policy

Repressive drug control laws and policies around the world have fueled the HIV epidemic and contribute to numerous human rights violations against people who use drugs. In its 2015 study on the impact of the "world drug problem" on the enjoyment of human rights, the OHCHR reported persistent challenges and human rights violations globally in relation to drug policy.[i] In 2016, Member States convened for the UN General Assembly Special Session (UNGASS) on "the world drug problem," at which they unanimously adopted an outcome document (hereinafter "UNGASS Outcome Document")[ii] — which the Human Rights Council's resolution on "Human Rights in the context of HIV and AIDS" (hereinafter "Resolution 47/17") endorses.[iii] Among other things, Resolution 47/17 also recognizes that combination HIV prevention includes harm reduction and enabling legal and policy environments, and urges States to "end all inequalities and human rights violations and abuses faced by persons living with, at risk of or affected by HIV"[iv] and "bring their laws, policies and practices … fully into compliance with their obligations under international human rights law, and to review or repeal those that are discriminatory or that adversely affect the successful, effective and equitable delivery of, and access to, HIV prevention, diagnosis, treatment, care and support programmes for all persons living with, presumed to be living with, at risk of or affected by HIV, including key populations."[v]

III. Canada's implementation of Resolution 47/17

Canada is facing an unprecedented drug poisoning epidemic, yet its dominant approach to drugs of criminal prohibition continues to undermine an effective response to this national "public health crisis."[vi] Between January 2016 and June 2021, nearly 25,000 people in Canada died from opioid toxicity and this number will continue to rise without profound changes in course.[vii] In response, and as called for in paragraphs 1(m) (recommending the "prevention and treatment of drug overdose") and 1(o) (recommending "medication-

assisted therapy programmes, injecting equipment programmes … and other relevant interventions that prevent the transmission of HIV") of the UNGASS Outcome Document, federal authorities have taken measures to facilitate access to **supervised consumption services** (SCS), which offer people who use drugs a safe setting, sterile drug use equipment, and connections with health and social services without fear of arrest or harassment.[viii] 38 federally exempted SCS are currently operating (up from only two in 2016),[ix] in addition to a number of provincially regulated overdose prevention services. Yet few SCS permit inhalation (despite increased evidence of overdose risk from inhaled substances) and none permit staff-assisted injection. Encouragingly, federal authorities recently signaled their willingness to permit splitting and sharing at SCS, though no site has yet been authorized to do so.[x] Onerous case-by-case assessments of specific sites, political opposition fueled by stigma against people who use drugs, and lack of funding from some provincial governments continue to represent significant barriers to further scale-up.[xi]

Other measures taken to reduce the risk of fatal drug poisoning include increasing access to **naloxone,** for which prescriptions are no longer required.[xii] Take-home naloxone is available at most pharmacies across Canada, and an increasing number of police forces and prison systems carry the medication. In May 2017, Canada also passed the ***Good Samaritan Drug Overdose Act*** to protect overdose victims and witnesses from charges related to drug possession when seeking emergency help.[xiii] **Drug checking services**, which provide people who use drugs with information on the chemical composition of their drug samples to facilitate more informed decision-making, have also been adopted in recent years in a small number of primarily urban settings across Canada.[xiv]

However, such incremental measures are inadequate in a context where drug possession remains criminalized, contributing to deadly stigma, pushing people to use their drugs in isolation and compromising their ability to take vital safety precautions, and deterring people from essential health care and HIV prevention services — resulting in significantly higher rates of HIV among people who inject drugs in Canada than among the population as a whole, with Indigenous Peoples particularly affected.[xv] In the Political Declaration on HIV and AIDS adopted in 2021, the General Assembly recognized that marginalization of and discrimination against people who use drugs, particularly those who inject drugs, through the application of restrictive laws hamper access to HIV-related services, and committed to increasing leadership and resources for enabling legal and policy environments.[xvi] In its 2015 study, the OHCHR criticized the use of **mandatory minimum sentences** (MMS) for drug offences[xvii] and the discriminatory impact of drug prohibition on women,[xviii] while paragraph 1(j) of the UNGASS Outcome Document recommends **alternatives to incarceration** for people who use drugs. Similarly, the UN Committee on the Elimination of Discrimination Against Women (CEDAW) recommended that Canada repeal MMS for minor, non-violent drug-related offences.[xix] **Decriminalization** is a critical societal enabler given the substantial evidence that criminalization has a negative effect on HIV prevention and treatment, including by posing significant barriers to accessing HIV services.[xx] A growing number of UN entities and human rights experts have expressed support for decriminalization, including in the UN system common position on drugs[xxi] endorsed by all 31 UN agencies, as well as the International Guidelines on Human Rights and Drug Policy.[xxii] Yet, Canada has yet to repeal MMS or decriminalize drug possession; between 2014 to 2020, police in Canada made more than 600,000 arrests for drug offences; 2/3 of those were for simple drug possession. In 2020 alone, police made 66,827 drug arrests.[xxiii] Not only has Canada's punitive approach to drugs resulted in the racial profiling and disproportionate arrest, conviction, and incarceration of Black and Indigenous people (with a particularly disproportionate impact on Black and Indigenous women),[xxiv] but exacerbated the HIV epidemic given the inadequate state of HIV prevention, diagnosis, treatment, and care programmes in prisons.

As such, additional efforts are urgently required to ensure **non-discriminatory access to health in prison** as called for in paragraphs 1(k), 1(o), 4(b), and 4(m) of the UNGASS Outcome Document, and to harm reduction in prisons, as recommended in Resolution 47/17 and in the Political Declaration on HIV and AIDS adopted in 2021. Canada is failing to provide prisoners — who are disproportionately Indigenous and Black — with equivalent

access to harm reduction measures, including needle and syringe programs, opioid agonist therapy (OAT), or safer tattooing equipment. A 2016 study indicated that about 1–9% of women and 1–2% of men in prison are living with HIV.[xxv] Federally incarcerated Indigenous women, in particular, have much higher rates of HIV than non-Indigenous prisoners, with reported rates of HIV of 11.7%.[xxvi] While Canada introduced a "Prison Needle Exchange Program" (PNEP) in some federal prisons in June 2018, the program remains inaccessible to many and implementation has been stalled, with only 9 (out of 43 federal prisons) operating a PNEP and no provincial or territorial prison system in Canada offering this health service. Moreover, numerous provincial and territorial prisons still do not offer OAT (or limit the ability to initiate OAT while incarcerated)[xxvii] and no prison system in Canada offers safer tattooing equipment.

Over the past four years, the Canadian government has taken measures to facilitate **access to treatment**, as urged in paragraphs 1(i), 1(o), 2(a), and 2(d) of the UNGASS Outcome Document, by removing regulatory barriers to prescribing or otherwise accessing methadone, diacetylmorphine (heroin),[xxviii] cocaine, and other restricted drugs.[xxix] Against the background of a worsening drug poisoning epidemic, Canada has also recently adopted measures to provide a **safer supply** of pharmaceutical grade medications that are of known quality and quantity to people who use drugs, with a focus on those at highest risk of overdose. Participants in these programs are more likely to benefit from safer supply options as opposed to traditional treatments, when measured by the metrics of increased treatment retention, lowered use of illegal drugs, and improved overall quality of life.[xxx] Such measures are available on a highly limited basis and Canada has yet to expand access to a regulated supply by engaging in the **legalization and regulation of controlled substances** as part of a public health approach to drug policy.

IV. Recommended actions

In her report, we call on the High Commissioner to make an unequivocal call for all Member States to:

- Decriminalize the possession of all drugs for personal use and the sharing or selling of drugs for subsistence, to support personal drug use costs, or to provide a safer supply, and remove all sanctions for such activities.
- Repeal all mandatory minimum prison sentences for drug offences and commit to implementing non-custodial alternatives for drug offences, in collaboration with Indigenous, Black, and other communities disproportionately affected by drug offences.
- Pass "Good Samaritan" legislation that protects overdose victims and witnesses from criminal charges for drug offences when seeking emergency help.
- Sustain and scale-up supervised consumption services (SCS) by providing adequate funding for these services (including funding that supports the provision of safer inhalation services) and exempting any person accessing SCS from prosecution for splitting or sharing drugs, or assisting with injection.
- Sustain and scale-up access to naloxone and to drug checking services, including by providing adequate funding and exempting any person accessing drug checking services from prosecution for drug possession.
- Remove regulatory barriers to prescribing or otherwise accessing illegal drugs for therapeutic use, and fund and support the expansion of a safer supply of drugs to curtail the harms of the unregulated drug market.
- Commit to exploring the legalization and regulation of all controlled substances.
- Implement, maintain, and scale-up the following health and harm reduction measures in prisons in accordance with best practices in public health and professionally accepted standards, and in consultation

with prisoner groups and community health organizations to ensure operational success, taking into account the need for culturally appropriate and gender-specific programs:

- needle and syringe programs;
- opioid agonist therapy;
- naloxone;
- supervised consumption services;
- safer supply;
- drug checking services;
- condoms and other safer sex supplies; and
- safer tattooing programs.

---

[i] Human Rights Council, *Study on the impact of the world drug problem on the enjoyment of human rights: Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/30/65, September 4, 2015, paras. 61 and 65.
[ii] UN Office on Drugs and Crime, *Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem: Our joint commitment to effectively addressing and countering the world drug problem*, Thirtieth Special Session General Assembly, April 2016.
[iii] Human Rights Council, "Human rights in the context of HIV and AIDS (Human Rights Council resolution 47/17)," July 13, 2021, para. 18.
[iv] Ibid, at para. 2.
[v] Ibid, at para. 7.
[vi] A term used by the government itself to describe the current situation. See Government of Canada, *Opioid- and Stimulant-related Harms in Canada*, December 2021: https://health-infobase.canada.ca/substance-related-harms/opioids-stimulants/.
[vii] Ibid.
[viii] Canadian HIV/AIDS Legal Network, "Bill C-37 a welcome step forward for life-saving supervised consumption sites and sound drug policy in Canada," news release, December 12, 2016.
[ix] See Government of Canada, *Supervised consumption sites: Status of applications*, December 9, 2021: https://www.canada.ca/en/health-canada/services/substance-use/supervised-consumption-sites/status-application.html.
[x] N. Touesnard & G. Kolla, "How Splitting and Sharing Got the OK at Canada's Overdose Prevention and Supervised Consumption Sites," *Filter*, September 29, 2021: https://filtermag.org/splitting-and-sharing-canada-scs/.
[xi] Canadian HIV/AIDS Legal Network, *Overdue for a Change: Scaling Up Supervised Consumption Services in Canada*, 2019: https://www.hivlegalnetwork.ca/site/overdue-for-a-change-full-report/?lang=en.
[xii] This change was made in March 2016. See www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/announcements/narcan-nasal-spray-frequently-asked-questions.html.
[xiii] *Good Samaritan Drug Overdose Act*, (S.C. 2017, c. 4).
[xiv] See Government of Canada, *Interactive map: Canada's response to the opioid crisis*, December 9, 2021: https://health.canada.ca/en/health-canada/services/drugs-medication/opioids/responding-canada-opioid-crisis/map.html.
[xv] See, for example, Public Health Agency of Canada, *Estimates of HIV incidence, prevalence and Canada's progress on meeting the 90-90-90 HIV targets*, 2020 and M. Trubnikov, P. Yan, C. Archibald, "Estimated Prevalence of Hepatitis C Virus infection in Canada, 2011," *Canada Communicable Disease Report*, Volume 40-19 (2014).
[xvi] UN General Assembly, Political Declaration on HIV/AIDS, June 2021, paras. 37 and 60a.
[xvii] Supra note 1, at para 45.
[xviii] Ibid, at para. 52.
[xix] UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016, para. 45.
[xx] K. DeBeck et al, "HIV and the criminalisation of drug use among people who inject drugs: a systematic review," *The Lancet HIV* 4(8), E357-E374 (2017).
[xxi] UN Chief Executives Board, *UN system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration*, January 2019.
[xxii] UNDP, WHO, UNAIDS, and International Centre on Human Rights and Drug Policy, *International Guidelines on Human Rights and Drug Policy*, November 2020.
[xxiii] Juristat, *Police-reported crime statistics in Canada, 2020*, Statistics Canada, 2021.
[xxiv] Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015; Correctional Investigator of Canada, *Annual Report 2012–2013 of the Office of the Correctional Investigator*, 2013.
[xxv] F. Kouyoumdjian et al, "Health status of prisoners in Canada: Narrative review," *Canadian Family Physician* 62:3 (March 2016): 215-222.
[xxvi] D. Zakaria et al., *Summary of emerging findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey, Research Report R-211*, 2010, Correctional Service of Canada
[xxvii] Canadian HIV/AIDS Legal Network, HALCO, PASAN, *Health care in provincial correctional facilities – Joint submission to the Ministry of Health and Long-Term Care and the Ministry of Community Safety and Correctional Services,* May 3, 2018.
[xxviii] Government of Canada, "The Honourable Ginette Petitpas Taylor, Minister of Health, announces new measures to reduce barriers to treatment and $231 M to address the opioid crisis," news release, Ottawa, March 26, 2018.
[xxix] Government of Canada, *Regulations Amending Certain Regulations Relating to Restricted Drugs (Special Access Program): SOR/2021-271 Canada Gazette, Part II, Volume 156, Number 1, Registration SOR/2021-271*, December 21, 2021: https://web.archive.org/web/20220204200154/https://www.gazette.gc.ca/rp-pr/p2/2022/2022-01-05/html/sor-dors271-eng.html.
[xxx] See Government of Canada, *Safer supply*, July 22, 2021: https://www.canada.ca/en/health-canada/services/opioids/responding-canada-opioid-crisis/safer-supply.html.