

# ACT NOW!

## Decriminalizing Drugs in Vancouver



# ACKNOWLEDGEMENTS

The War on Drugs must be abolished. We know this from people who use drugs, and this is the goal that drives Pivot's drug policy campaign. We are grateful to our comrades for sharing their experiences, aspirations, and struggle. Special thanks to the Vancouver Area Network of Drug Users (VANDU) and the International Network of People who Use Drugs (INPUD).

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Pivot's office is located on the stolen lands of the x<sup>w</sup>məθk<sup>w</sup>əyəm (Musqueam), Skwxwú7mesh (Squamish), and səlilwətaʔ+ (Tsleil-Waututh) Nations. We are grateful to Indigenous Peoples for their continuous relationship with their lands and are committed to learning to work in solidarity as accomplices in shifting the colonial default.

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# EXECUTIVE SUMMARY

**As skyrocketing rates of overdose deaths across Canada demonstrate, prohibition-based drug policy is a veritable death sentence for people who use drugs.**

By every metric, drug prohibition has failed. The criminalization of drug possession for personal use (or “simple possession”)<sup>1</sup> has been ineffective in reducing the use and availability of illicit drugs; fuelled stigma against people who use drugs; targeted and incarcerated racialized communities and poor people; discouraged access to health and harm reduction services; and driven an unregulated market of unknown toxicity.<sup>2</sup> As skyrocketing rates of overdose deaths across Canada demonstrate, prohibition-based drug policy is a veritable death sentence for people who use drugs.

There is no single fix for the societal wreckage of Canada’s War on Drugs, but decriminalizing drug possession has proven far more effective than prohibition in jurisdictions around the world where decriminalization has been implemented.<sup>3</sup> The City of Vancouver acknowledges this fact, but has unfortunately failed to act, and primarily limited its activity to “calling on” the federal government to amend the *Controlled Drugs and Substances Act*.

Drug law reform is undoubtedly within the power of the federal government, however, municipal (and provincial) governments can act now to decriminalize locally, as this report proposes. This is key to shifting the national dialogue and propelling the very reforms that some jurisdictions (including Vancouver) have sought from above.

## Key Recommendation

**This report recommends that non-federal orders of government implement decriminalization locally, by applying to the federal government for an exemption against the offence of simple possession.** Though Vancouver is the focus, this recommendation is available to all jurisdictions in Canada, including provincial governments, and broad uptake is encouraged.

# THE VANCOUVER APPROACH TO SIMPLE POSSESSION

**“And for a long time, police were openly contemptuous of drug users. But here in Vancouver – sometime in the mid 2000s – they started changing how they talk. They said they were no longer against harm reduction. They wanted to seem progressive...But I’m skeptical. It doesn’t feel like things have changed all that much to me.”<sup>4</sup>**

– Garth Mullins, CRACKDOWN Podcast, Episode 7: Stand Down

The City of Vancouver has expressed support for decriminalization since at least 2010. It currently endorses “a public-health approach to substance use through evidence-based research and practice.”<sup>5</sup> In 2010, Council endorsed the Vienna Declaration, which underscores the harms of prohibition and calls on all governments to take an evidence-based approach to drug use and to decriminalize drug users.<sup>6</sup> In 2018, the City called on the federal government to decriminalize simple possession and simultaneously vowed to “convene a multi-sectoral task force to implement immediate decriminalization of personal possession of illicit drugs.”<sup>7</sup>

Regarding enforcement of simple possession, Vancouver Police Department (VPD) drug policy prioritizes the “context of drug use” over possession itself, supporting charges “only if the behaviour and circumstances of the person using drugs is harmful to that person, to others, or to property.”<sup>8</sup> In 2019, Deputy Chief Howard Chow claimed that VPD officers “do not arrest and charge people for simple possession.”<sup>9</sup> Despite the VPD’s apparent position on non-enforcement and the City’s historical support for progressive drug policy, decriminalization has never been formalized in Vancouver and the practical consequences for possessing illicit drugs remain ambiguous.

The VPD’s current, discretionary approach to certain behaviours and circumstances must be understood in the fulsome context of policing in Vancouver – where Black & Indigenous people have been disproportionately

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subjected to street stops,<sup>10</sup> people with mental health issues have experienced a “dramatic” increase in the number of interactions with VPD officers,<sup>11</sup> and limited police accountability tools exacerbate systemic bias within policing.

For example, residents of the Downtown Eastside neighbourhood (DTES) report that VPD officers *do* still arrest for simple possession—but presumably based on individual police temperaments, relationships between police and individuals, and stereotypes.<sup>12</sup> DTES residents also report a frequent police practice wherein officers discretionarily confiscate drugs and paraphernalia in lieu of making an arrest.<sup>13</sup> While the interaction (sometimes referred to as “jacking up”) results in no criminal record and is oftentimes undocumented by the officer,<sup>14</sup> the individual loses their drug supply and is forced to score elsewhere, sometimes from an unknown dealer and/or while experiencing withdrawal.<sup>15</sup> A 2019 study from the BC Centre on Substance Use (BCCSU) found that VPD officers commonly “harass” people who are using drugs outside; loiter outside and around overdose prevention sites (OPS); and stop and search individuals, “particularly Indigenous people and people of color, within the drug-scene and within the immediate areas surrounding OPS.”<sup>16</sup>

Data obtained this year via Freedom of Information request from the VPD Property Office affirms that VPD officers routinely seize small amounts of drugs.<sup>17</sup> From May 17, 2019 to June 9, 2020, there were approximately 700 documented seizures of small amounts of drugs (under 0.1 grams) and roughly 930 documented seizures of amounts between 0.1 and 0.2 grams. The data also reveals seizures of prescription drugs,<sup>18</sup> opioid maintenance drugs such as Suboxone and Methadone, the overdose-reversing drug Naloxone (Narcan), and small amounts of cash.

Evidently, VPD claims of non-enforcement regarding simple possession are false and misleading. Even if it were the case that VPD arrests and charges for simple possession have decreased, the demonstrated police behaviour of confiscation and harassment sustains significant harm. People who use drugs—particularly those who are poor and racialized, oftentimes living in the DTES—are still profiled, surveilled, and arrested, or continue to *fear* these outcomes for good reason.

In the absence of clear decriminalization, one thing is certain: people who use drugs in Vancouver will continue to face many of the same harms as they would under iron-clad prohibition.

# DECRIMINALIZATION

## Overview

Decriminalization refers to the removal of criminal sanctions for “simple possession” (the possession of drugs for personal use). Calls to decriminalize drug possession originate in communities of people who use drugs and have more recently been amplified by a nation-wide spectrum of organizations, government and political figures, media, medical professionals, and even police.

There is support for decriminalization in Vancouver, as well as at provincial and national levels. In April 2019, BC’s Provincial Health Officer Dr. Bonnie Henry called for *de facto* decriminalization in BC.<sup>19</sup> More recently, BC Premier John Horgan called on the federal government to decriminalize simple possession.<sup>20</sup> At the federal level, the Minister of Health has indicated a willingness to “explore all possibilities to reduce the criminalization of people who use substances.”<sup>21</sup> This comes after a 2019 recommendation from the House of Commons Standing Committee on Health that the Government of Canada decriminalize simple possession of small amounts of illicit drugs.<sup>22</sup> Finally, in July 2020, the Canadian Association of Chiefs of Police (CACP) issued a recommendation to end the criminalization of simple possession.<sup>23</sup>

Pivot continues to advocate for decriminalization through federal law reform. In the midst of an avoidable and lethal drug policy crisis, however, we call on lawmakers at all levels of government to take immediate actions that may work towards full decriminalization.

## Partial vs. Full Decriminalization

**‘[D]ecriminalisation’ must mean just that: not partial decriminalisation, not compulsory drug dissuasion committees, but full decriminalisation of people who use drugs, a full removal of all criminalising legislation and policy, as well as penalisation and sanctioning, related to people’s personal drug use.**<sup>24</sup>

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- International Network of People who Use Drugs 2018 Report: “Is Decriminalisation Enough? Drug User Community Voices from Portugal”  
(INPUD 2018 Report)

**Our call to action echoes that of drug user-led movements across Canada and around the world: We want *full* decriminalization now—no penalties, no sanctions.**

In Canada, some politicians and police are seemingly advocating for a regime more accurately described as partial decriminalization, under which criminal sanctions for drug possession are replaced with administrative penalties (i.e. fines, conditions, drug treatment court) and medical sanctions (i.e. compulsory treatment, medicalized interventions), as in the case of the Portugal Model.<sup>25</sup> In contrast to partial decriminalization, *full* decriminalization would eliminate all penalties and sanctions associated with simple possession, thereby removing substance use from the purview of the criminal justice system.

**Our call to action echoes that of drug user-led movements across Canada and around the world: We want *full* decriminalization now—no penalties, no sanctions.** For reasons detailed below, Pivot discourages the use of criminal and/or administrative regimes to address drug use.

## The Portugal Model: Pros and Cons

**“[T]o paint a picture of Portugal’s legislation and policy as perfect, as a magic bullet that addresses all drug-related harm and prioritises the rights, lives, and health of people who use drugs is, bluntly, simplistic and facile. We should not, in our advocacy, be asking for a blanket and unaltered application of the Portuguese model.”<sup>26</sup>**

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- INPUD 2018 Report

The successes and failures of the Portugal Model offer a critical learning opportunity for Canadian jurisdictions contemplating decriminalization.

After the country removed criminal sanctions for consuming, acquiring, and possessing small amounts of drugs for personal use in 2001, there were demonstrable improvements to the health and wellbeing of people who use drugs, including declining rates of HIV incidence, morbidity, and mortality.<sup>27</sup> Overall drug use did not increase.<sup>28</sup>

Despite positive outcomes associated with the legal regime in Portugal, accounts from people who use drugs in Portugal reveal the shortcomings and unintended harms of partial decriminalization. Drug users report experiencing many of the same practical harms as they did under



prohibition, in part because the goal of dissuading drug use remains the same, and largely because this goal is achieved through punitive, hyper-medicalized, and oftentimes non-consensual tactics (such as fines, medicalized interventions, and compulsory dissuasion):

*Those found to be in possession of drugs are sent to **dissuasion committees**, and must attend medicalised dissuasion appointments to encourage a cessation of drug use or accept a fine (and it bears repeating that people who use drugs are still punished for their drug use when found to be in possession of amounts over the decriminalised threshold). That people who use drugs continue to be mandated to attend involuntary rehabilitation, even under a model of decriminalisation, continues to undermine their agency and self-determination.*

[...]

*[A]ttempts to dissuade people from using drugs are fed by stigmatising constructions of people who use drugs as sick, undermine their agency and self-determination, and show Portugal to be a far cry from a country that no longer polices or controls the lives of people who use drugs.<sup>29</sup>*

Not surprisingly, experiences of over-policing, state-sanctioned violence, stigma, and discrimination are most common among poor and racialized drug users:

*[T]he most marginalised drug users in Portugal are still, for all intents and purposes, experiencing forms of criminalisation and police control. They are most likely to be stopped and searched, and although they are less able to afford more drugs, their drugs are confiscated and destroyed by the police. As with other wars on people who use drugs, the Portuguese model seemingly acts as a route through which to police, harass, and disrupt the lives of the most marginalised communities of people who use drugs.<sup>30</sup>*

When the firsthand accounts of people who use drugs in Portugal are used as a roadmap, law- and policymakers can better understand the pitfalls of partial decriminalization. By implementing drug laws that reflect

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## Rationale

To unlock the benefits of decriminalization (and end the harms of prohibition), penalties and sanctions of all kinds must be abolished with respect to simple possession. This is the best way to reduce harmful police interactions (and fear of these interactions); destigmatize drug use; and remove barriers to community, health, and social supports. At the same time, these latter supports, including safe supply, affordable housing, healthcare, harm reduction services, and culturally safe programming, must be scaled up and made accessible *without* the counter-productive involvement of police and courts as conduits or gatekeepers.

Globally, decriminalization is recognized as an effective means to alleviate the public health and safety harms associated with substance use under prohibition.<sup>31</sup> In Portugal, mere *partial* decriminalization had the following non-exhaustive impacts on public health and safety:

- Overdose deaths dropped by over 80%
- Prevalence rate of people who use drugs accounting for new diagnoses of HIV and AIDS dropped from 52% to 6%
- Rate of incarceration for drug offences dropped by over 40%<sup>32</sup>
- Per capita social cost of drug misuse decreased by 18%<sup>33</sup>

Since the onset of COVID-19, there is even more urgency to decriminalize. The pandemic, in tandem with BC's four-year-long opioid crisis, has thrust people who use drugs into precarity: harm reduction sites have been forced to close or reduce their scope of services, a crumbling drug supply chain has frustrated availability and spiked the cost of street drugs, and overdose deaths soar as people balance the need for supervised injection and "buddy systems" with directives to self-isolate.<sup>34</sup> In response, the Province of BC has announced interim clinical guidance for healthcare providers,<sup>35</sup> but pandemic prescribing has so far lagged and failed to curb staggering fatalities.<sup>36</sup>

Decriminalization outsteps clinical guidelines and risk mitigation strategies, protecting the health of people who use drugs, reducing unnecessary and harmful contact with police, and decreasing incarceration rates.

In addition to strong evidence for a national drug policy of decriminalization, there is also ample policy rationale for cities to immediately decriminalize at the *local* level.

## Promoting Consistency

For law enforcement to be reasonably consistent, laws and policies must be unambiguous, deterring subjective interpretation and bias. The ambiguity of Vancouver's approach to simple possession lends itself to enforcement that is varied, unpredictable, and not in line with VPD's progressive public statements. These inconsistencies undermine efforts to rid bias in policing and to uphold evidence-based approaches to drug use. For instance, in the DTES, injection drug users who are subject to discretionary policing practices (such as confiscating drugs without arrest) are disproportionately and structurally marginalized—i.e. those who are more likely to lend syringes, require assisted injection, and have recently been incarcerated.<sup>37</sup>

## Addressing Bias, Racism, and Anti-Poor Policing

In the wake of global movements calling attention to anti-Black and anti-Indigenous police violence, we must recognize racialized communities living at the intersections of drug use and criminalization. Racialized and poor communities are disproportionately policed in Canada, including for drug-related offences.<sup>38</sup> With Canadian police now admitting the harms of prohibition,<sup>39</sup> persistent criminalization of simple possession amounts to sanctioning sustained violence against certain people. Municipal decriminalization is a nominal step toward addressing anti-Black, anti-poor, and colonial policing at this time. This is especially important in Vancouver, where the VPD has a longstanding and ongoing history of violence against poor urban Indigenous communities living in the DTES.<sup>40</sup>

## Reducing Arrests

Decriminalization offers a pathway from harms that are part and parcel of drug prohibition, specifically cyclical criminalization, over-incarceration and, in the context of a global pandemic, increased risk of exposure to COVID-19 in prisons.<sup>41</sup> The Chiefs of Police report calls for an end to the

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criminalization of simple possession, in part because criminalization leads to criminal records, stigma, risk of overdose and blood-borne transmission of infections.<sup>42</sup> If enforcement policies surrounding simple possession continue to be informal, ambiguous, and discretionary, some people will inevitably still be cycled through the criminal justice system—and suffer the attendant harms.

## **Eliminating the Fear of Arrest**

Even if VPD officers are not routinely arresting for simple possession, the fact that they *may* do so (and evidently choose to do so at times) reinforces a fear of arrest that is similarly detrimental to people’s health and safety. The adverse impacts of this fear are well-documented.

In *Canada (AG) v PHS Community Services Society* (“PHS”), the Supreme Court of Canada affirmed that “[a]lthough many users are educated about safe practices, the need for an immediate **fix or the fear of police discovering and confiscating drugs can override even ingrained safety habits**. [People who use drugs] share needles, inject hurriedly in alleyways and dissolve heroin in dirty puddle water before injecting it into their veins.”<sup>43</sup> Studies show that “[w]ith regard to drug use patterns, intensified police presence prompted ‘rushed’ injections, injecting in riskier environments, discouraged safer injection practices, and increased unsafe disposal of syringes.”<sup>44</sup> The *Good Samaritan Drug Overdose Act*<sup>45</sup>—passed in 2017 by Parliament and resembling a VPD policy in effect since 2004—was enacted because “evidence shows that witnesses to an overdose often do not call 911 for fear of police involvement.”<sup>46</sup> Police presence at or near harm reduction services (such as OPS) has been found to deter access to those services and forces higher rates of overdose-related risk behaviours, including solo drug use and rushed injecting.<sup>47</sup> That the majority of illicit drug overdoses in BC—even in 2020 and across all health authorities, health service delivery areas, and age groups—occurred when the person used alone<sup>48</sup> supports the idea that fear of arrest may be a deterrent to using drugs in the company of others or at an injection site—despite the importance of these harm reduction measures in stemming the tide of fatal overdoses.

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If people who use drugs are afforded the certainty of decriminalization, they can use drugs more safely, as fear of arrest will no longer be an incentive to forgo life-saving harm reduction strategies. Societal destigmatization of simple possession (which would accompany decriminalization) would also likely assist in permitting people to avoid solo drug use.

## Transparency and Confidence in the Administration of Justice

Transparency is key to maintaining confidence in an administration of justice that is justifiably under attack for its targeting of poor and racialized people. People should know whether their actions will have criminal consequences, but as statistics and individual testimonies described above reveal, there is a disconnect between the VPD's public statements regarding simple possession and practical enforcement.

The need for transparency is not merely symbolic: when using drugs amid dual public health emergencies, risk of arrest is a significant factor that drug users must weigh in determining where to use and what services to access.<sup>49</sup> Penal uncertainty shouldn't be a factor in one's ability to use drugs as safely as possible—nor should police statements create false security that could potentially lead to an arrest.

## Police Accountability

Rates of small drug seizures by the VPD may appear relatively low (see page 6), but these figures do not capture the frequency of police interaction, drug confiscation, and harm to people who use drugs in Vancouver. As discussed earlier, the practice of drug confiscation alone mimics the health and safety harms associated with criminalization, and drug users are routinely harassed, stopped and searched, and discouraged from accessing harm reduction services due to police presence. In addition, drug possession continues to be a gateway for police to conduct otherwise illegal street stops, detentions, searches, and arrests. Because these practices are often undocumented, it is impossible to draw an accurate portrait of drug law enforcement in Vancouver or harmful policing patterns that fly below the radar. Likewise, it is considerably more difficult for individuals to file a police complaint or obtain recourse from a system already condemned for its inadequacy and inaccessibility.<sup>50</sup>

## Redirecting Resources toward Peer-led Initiatives and Health Services


Enforcing simple possession—whether through arrest, confiscation, or harassment—requires police time and expenditures. In recent years, the VPD budget has radically increased—from approximately \$180 million in 2008 to a planned \$340.4 million in 2020.<sup>51</sup> The latter figure comprises 21%

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of the City's total operating budget; 27% of the City's revenue was allocated to VPD.<sup>52</sup> A funding structure that favours police directly compromises the operations of public health and peer-led services, despite these being more effective in empowering and promoting the health and safety of people who use drugs. Prohibiting the enforcement of simple possession would facilitate a more equitable, evidence-based city budget that reflects the needs of drug users. It would terminate expenditures on a practice that is known to cause harm and recommended to be ceased by police themselves.



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### **Spurring Cross-Country and Federal Action**

The City of Vancouver and VPD claim to support decriminalization, but so far their support has been extremely limited. Proactive movement at the local level—at the same time as it saves lives—puts real pressure on other municipalities, the provinces and, most importantly, the federal government to take long-overdue action. One need only consider BC's implementation of OPS via Ministerial Order in 2016. This action (itself preceded by the direct action of people who use drugs) arguably paved the way for the federal government to permit OPS more broadly in the months following. In the context of decriminalization, local action will similarly speak louder than words.

# LEGAL BASIS

Section 56(1) of the federal drug law, the *CDSA*, gives the federal Minister of Health broad power to grant exemptions from the *CDSA*:

## Exemption by Minister


**56 (1)** The Minister may, on any terms and conditions that the Minister considers necessary, **exempt from the application of all or any of the provisions of this Act or the regulations any person or class of persons or any controlled substance or precursor or any class** of either of them if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

When Parliament drafted this legislation, it expressly wrote in the ability to modify the law's application in order to address emerging and local concerns. Indeed, section 56 exemptions already permit numerous decriminalized “zones” throughout Canada—and have done so, largely without issue, for years. For instance, section 56(1) exemptions are routinely used to exempt clinical drug trials and handlers of post-consumer drug returns,<sup>53</sup> and historically, patrons and staff of supervised consumption sites (SCS).<sup>54</sup> Most recently, the provision has been used to respond to the overdose crisis by granting class exemptions to provinces for temporary OPS in the public interest.

Though section 56(1) has yet to be used for exempting an entire geographic region from an offence, this use is not precluded by the legislation. The Minister of Health can grant an exemption “to any person or class of persons,” and “on any terms and conditions that [she] considers necessary.”

When BC's Provincial Health Officer strongly recommended that the Province decriminalize simple possession in 2019,<sup>55</sup> BC's Minister of Public Safety and Solicitor General, Mike Farnworth, swiftly dismissed the call on the basis of it being a federal issue and therefore outside the jurisdiction of the Province (and presumably a municipality) to address.<sup>56</sup> That statement was not then, and is not now, correct.

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A City-wide exemption under section 56(1) is within the jurisdiction of a municipal government to request and to receive. Certainly, the *CDSA* is within the federal purview, but an application for an exemption submitted by any other jurisdiction (whether successful or not) does not fundamentally alter the *CDSA* or the criminal law. As the arbiter of exemptions, the federal government does not delegate or relinquish control over the *CDSA*'s application, but uses the mechanism afforded to it by its own legislation to discern the application of criminal law. For instance, in the context of SCSs, it is evident that the federal government does not give up its control, but rather permits “micro jurisdictions” that have requested and received a federal exemption.

Even without the protection of an exemption, discretionary enforcement (including non-enforcement) of the criminal law is both legal and routine. Though simple possession is illegal under the *CDSA*, there is no legislation that positively obligates police to enforce all laws. Police exercise considerable discretion in determining whether to make arrests or recommend that charges be laid. Crown Counsel have similar discretion in determining whether to prosecute an accused person. Individual police department policies, provincial policing standards, Crown Counsel policy manuals, and Public Prosecution Service of Canada (PPSC) guidelines<sup>57</sup> all reflect varied and individual applications of the criminal law across the provinces and municipalities.

Finally, using section 56(1) may help to safeguard against what might otherwise be considered an unconstitutional application of criminal legislation: simple possession has long been criticized for violating the life, liberty, security, and equality interests of people who use drugs, contrary to the *Canadian Charter of Rights and Freedoms*.<sup>58</sup> This criticism has garnered new momentum in the context of dual public health emergencies. A City-wide exemption would reduce many of the health and safety harms wrought by drug laws in Vancouver, and its use may actually cushion against constitutionally suspect enforcement, much like the Supreme Court of Canada reasoned in *PHS*: “the availability of exemptions acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects.”<sup>59</sup>



# RECOMMENDATION

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**Pursuant to section 56(1) of the *Controlled Drugs and Substances Act*, the City of Vancouver should apply to the federal Minister of Health for an exemption that applies to all people in the City of Vancouver against section 4(1) of the *CDSA*, on the basis that it is necessary for a medical or scientific purpose or is otherwise in the public interest.**

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In order to address the totality of overdose deaths in Vancouver, the exemption should apply broadly in terms of population, geography, and drug. The exemption should apply:

- To any person who possesses drugs for personal use while in Vancouver and;
- In all instances meeting the offence criteria for simple possession, regardless of the substance in question.

People of all demographics and geographic regions of Vancouver are impacted by the opioid crisis. Though poor and racialized people are disproportionately impacted by law enforcement<sup>60</sup> (due to pre-existing state-sanctioned violence in the form of housing and income insecurity, police bias, and the like), street market toxicity means that all people who use drugs—however frequently or occasionally—are at risk of fatal overdose and in need of evidence-based drug policy.

Support for a broad exemption is also provided by the extent of contamination in Vancouver's street drug supply. In 2018, approximately 88% of tested street drug samples marketed as opioids tested positive for fentanyl. Fentanyl was found in samples believed to be depressants and stimulants alike.<sup>61</sup> Street drugs themselves are constantly changing, and a static narcotic schedule (like the *CDSA*) is bound to be eclipsed by the reality of new compounds being formulated and used over time. Decriminalizing the possession of some drugs and not others, or some people and not others, would be arbitrary and illogical during a time when the risks are extreme for anyone who relies on an (ever-evolving) street market, however infrequently.

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# CONCLUSION

In the face of staggering overdose deaths wrought by ongoing bureaucratic inaction, cities (and provinces) must act now to secure more localized forms of decriminalization. This can be done through applications to the federal Minister of Health for jurisdictional exemptions against section 4(1) of the *CDSA*. In doing so, non-federal governments will set themselves apart as leaders in drug policy informed by and for people who use drugs.

# WORKS CITED

- 1 *Controlled Drugs and Substances Act*, SC 1996, c 19. Section 4(1) states that “Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.”
- 2 See, for instance: Evan Wood et al, “The war on drugs: a devastating public-policy disaster” (2009) 373 *The Lancet* 989, online: [https://www.researchgate.net/publication/24196888\\_The\\_war\\_on\\_drugs\\_A\\_devastating\\_public-policy\\_disaster](https://www.researchgate.net/publication/24196888_The_war_on_drugs_A_devastating_public-policy_disaster); Mark Haden, “The evolution of the four pillars: Acknowledging the harms of drug prohibition” (2006) 17 *IDJP* 124, online: [https://www.researchgate.net/publication/237827968\\_The\\_Evolution\\_of\\_the\\_Four\\_Pillars\\_Acknowledging\\_the\\_Harms\\_of\\_Drug\\_Prohibition](https://www.researchgate.net/publication/237827968_The_Evolution_of_the_Four_Pillars_Acknowledging_the_Harms_of_Drug_Prohibition).
- 3 Release, *A Quiet Revolution: Drug Decriminalization Across the Globe*, March 2016, online: <https://www.release.org.uk/sites/default/files/pdf/publications/A%20Quiet%20Revolution%20-%20Decriminalisation%20Across%20the%20Globe.pdf>
- 4 CRACKDOWN Podcast, “Episode 7: Stand Down” (31 July 2019), online (transcript of episode): <https://drive.google.com/file/d/19DYkF2QBnR4LFwQM2XjL5n2bXiBRiUVO>
- 5 City of Vancouver, General Manager of Arts, Culture and Community Services, *Mayor’s Overdose Emergency Task Force Update*, RTS 13173 (25 June 2019) at 5, online: <https://council.vancouver.ca/20190723/documents/rr2.pdf>
- 6 *Ibid*, at 3, 5.
- 7 Travis Lupick “Vancouver issues call for Canada to ‘immediately’ drop criminal penalties for the personal possession of drugs”, *The Georgia Straight* (9 Mar 2018), online: <https://www.straight.com/news/1042671/vancouver-issues-call-canada-immediately-drop-criminal-penalties-personal-possession>
- 8 Canadian Association of Chiefs of Police (CACP), Special Purpose Committee on the Decriminalization of Illicit Drugs, *Decriminalization for Simple Possession of Illicit Drugs: Exploring Impacts on Public Safety & Policing* (July 2020) at 7, online: [https://www.cacp.ca/index.html?asst\\_id=2189](https://www.cacp.ca/index.html?asst_id=2189)
- 9 Travis Lupick “Vancouver police stats suggest a softer touch on drugs but users say it’s a different story on the streets”, *The Georgia Straight* (12 Mar 2019), online: <https://www.straight.com/news/1213101/vancouver-police-stats-suggest-softer-touch-drugs-users-say-its-different-story-streets>
- 10 Mychaylo Prystupa, “Blacks, Indigenous over represented in Vancouver police stops: 10 years of data”, *CTV Vancouver* (14 June 2018), online: <https://bc.ctvnews.ca/blacks-indigenous-over-represented-in-vancouver-police-stops-10-years-of-data-1.3973823> For statistics, see: <https://vancouver.ca/police/assets/pdf/foi/2018/vpd-street-check-data-2008-2017-by-gender-and-ethnicity-fields.pdf>
- 11 Superintendent Daryl Wiebe, Vancouver Police Department, *Vancouver Police Mental Health Strategy*, (8 July 2016) at 4, online: <https://vancouver.ca/police/assets/pdf/reports-policies/mental-health-strategy.pdf>

- 12 Lupick, "Vancouver police stats", *supra* note 9.
- 13 *Ibid.* See also: Alexandra B. Collins et al, "Policing space in the overdose crisis: A rapid ethnographic study of the impact of law enforcement practices on the effectiveness of overdose prevention sites" (Nov 2019) 73 IJDP 199-207, online: <https://www.sciencedirect.com/science/article/pii/S0955395919302361>
- 14 CRACKDOWN Podcast, *supra* note 4; Nick England, "German Researcher investigates violence in Downtown Eastside drug dealing", *The Vancouver Sun*, (8 Aug 2016), online: <https://vancouver.sun.com/news/local-news/german-researcher-investigates-violence-in-downtown-eastside-drug-dealing-scene>; Darcie Bennett and D.J. Larkin, *Project Inclusion: Confronting Anti-Homeless and Anti-Substance User Stigma in British Columbia*, (Vancouver: Pivot Legal Society, 2018) at 51, online: <https://d3n8a8pro7vnm.cloudfront.net/pivotlegal/pages/1986/attachments/original/1543969275/project-inclusion-digital.pdf>
- 15 Bennett, *supra* note 14; Daniel Werb et al, "Effects of Police Confiscation of Illicit Drugs and Syringes Among Injection Drug Users in Vancouver" (Aug 2008) 19:4 IJDP 332-338, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2529170/> which concluded that "confiscation of drugs and/or needles and syringes through discretionary policing practices have potential to exacerbate drug market activity or prompt increased syringe borrowing."
- 16 Collins, *supra* note 13.
- 17 Vancouver Police Department, "Records Access Request 20-0493A" (Freedom of Information Request dated 9 June 2020), (22 July 2020), online: <https://vancouver.ca/police/assets/pdf/foi/2020/seized-illicit-substances-may-17-2019-to-june-9-20.pdf>
- 18 Seized prescription drugs included anti-anxiety medication, seizure medication, and HIV/AIDS medication. It should be noted that these seizures may have occurred because the prescription was not in the name of the individual who possessed it. This practice, though technically lawful, highlights the double standard that poor and marginalized communities face. It is highly improbable, for instance, that a housed person would face criminal sanctions for having the another's prescription (say, that of an ex-partner or roommate) in one's medicine cabinet. From a harm reduction perspective, the fact of police confiscating prescription grade-drugs may in fact contribute to drug market toxicity and the scarcity of quality-controlled alternatives in the illicit market.
- 19 British Columbia, Office of the Provincial Health Officer, *Stopping the Harm: Decriminalization of People Who Use Drugs in BC*, (2019) at 5, online: <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/reports-publications/special-reports/stopping-the-harm-report.pdf>
- 20 The Canadian Press, "B.C. premier asks Trudeau to decriminalize drug possession as overdose deaths spike", *CBC News* (20 July 2020), online: <https://www.cbc.ca/news/canada/british-columbia/b-c-premier-asks-trudeau-to-decriminalize-drug-possession-as-overdose-deaths-spike-1.5656985>
- 21 "Minister Open to Examining Drug Decriminalization", *CKDR News* (20 July 2020), online: <https://www.ckdr.net/2020/07/20/minister-open-to-examining-drug-decriminalization/>
- 22 Canada, Parliament, House of Commons, Standing Committee on Health, *Impacts of Methamphetamine Abuse in Canada*, 42nd Parl., 1st Sess., No. 26 (June 2019) at 59, online: <http://www.ourcommons.ca/DocumentViewer/en/42-1/HESA/report-26/>
- 23 CACP, *supra* note 8.

- 24 International Network of People who Use Drugs (INPUD), *Is Decriminalisation Enough? Drug User Community Voices from Portugal*, (London: INPUD Secretariat, 2018) at 22, online: [https://www.inpud.net/sites/default/files/Portugal decriminalisation final online%20version%20-%20RevisedDec2018.pdf](https://www.inpud.net/sites/default/files/Portugal%20decriminalisation%20final%20online%20version%20-%20RevisedDec2018.pdf)
- 25 CACP, *supra* note 8; Joan Bryden, “Liberal MPs urge dropping criminal penalties for all illicit drug use”, *CTV News* (16 Jan 2018), online: <https://www.ctvnews.ca/politics/liberal-mps-urge-dropping-criminal-penalties-for-all-illicit-drug-use-1.3762070>
- 26 INPUD, *supra* note 24 at 20.
- 27 Drug Policy Alliance (DPA), *Drug Decriminalization in Portugal: Learning from a Health and Human-Centered Approach* (20 Feb 2019), online: [https://www.drugpolicy.org/sites/default/files/dpa-drug-decriminalization-portugal-health-human-centered-approach\\_o.pdf](https://www.drugpolicy.org/sites/default/files/dpa-drug-decriminalization-portugal-health-human-centered-approach_o.pdf)
- 28 Drug Policy Alliance, “Fact Sheet: Drug Decriminalization in Portugal: A Health Centered Approach”, (Feb 2015), online: [https://www.drugpolicy.org/sites/default/files/DPA\\_Fact\\_Sheet\\_Portugal\\_Decriminalization\\_Feb2015.pdf](https://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Portugal_Decriminalization_Feb2015.pdf)
- 29 INPUD, *supra* note 24 at 21 & 17.
- 30 *Ibid.* at 10.
- 31 See: “Joint United Nations Statement on Ending Discrimination in Health Care Settings” (2017), online: [https://www.unaids.org/sites/default/files/media\\_asset/ending-discrimination-healthcare-settings\\_en.pdf](https://www.unaids.org/sites/default/files/media_asset/ending-discrimination-healthcare-settings_en.pdf), which recommends reviewing and repealing punitive laws that have been proven to have negative health outcomes and that counter established public health evidence. These include laws that criminalize...drug use or possession of drugs for personal use.” See also: Anand Grover, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN General Assembly, 65th Session, UN Doc A/65/255, August 6, 2010; Anand Grover, Submission to the Committee against Torture regarding drug control laws, October 19, 2012; Anand Grover, Open letter by the Special Rapporteur on the right of everyone to the highest attainable standard of mental and physical health, Dainius Pūras, in the context of the preparations for the UN General Assembly Special Session on the Drug Problem (UNGASS), to UNODC Executive Director Yury Fedotov, December 7, 2015.
- 32 DPA, “Drug Decriminalization in Portugal”, *supra* note 27 at 6.
- 33 Ricardo Gonçalves, “A social cost perspective in the wake of the Portuguese strategy for the fight against drugs”, (Feb 2015) 26:2 *IJDP* 199-209, online: <https://pubmed.ncbi.nlm.nih.gov/25265899/>
- 34 Christopher Cheung, “Drugs Were Already Poisoned. Now COVID-19 Adds a New Threat”, *The Tyee* (24 Mar 2020), online: <https://thetyee.ca/News/2020/03/24/Drugs-COVID19-Coronavirus-Poisoned-Downtown-Eastside-Consumption/>; Pivot Legal Society, “Calls for Vancouver Police to stop undermining public health in the DTES” (2 April 2020), online: <https://www.pivotlegal.org/vpd-stop-undermining-public-health-in-dtes-amid-covid-19>
- 35 BC Centre on Substance Use, *Overview – COVID-19 Risk Mitigation Interim Clinical Guidance*, (Mar 2020), online: <https://www.bccsu.ca/overview-covid-19-risk-mitigation-interim-clinical-guidance/>
- 36 Alex Nguyen, “Drug decriminalization is a ‘no-brainer’ during COVID-19, say advocates”, *Ricochet Media* (May 28, 2020), online: <https://ricochet.media/en/3149/drug-decriminalization-is-a-no-brainer-during-covid-19-say-advocates>; Ministry of Public Safety and Solicitor General, BC Coroners Service, *Illicit Drug Toxicity Deaths in B.C.: January 1, 2010-July 31, 2020*, online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/statistical/illicit-drug.pdf>

- 37 Werb, *supra* note 15.
- 38 *R v Le*, 2019 SCC 34 [Le] at 97.
- 39 CACP, *supra* note 8 at 3.
- 40 See, for instance: Carol Muree Martin and Harsh Walia, *Red Women Rising: Indigenous Women Survivors in Vancouver's Downtown Eastside*, (Vancouver, Downtown Eastside Women's Centre: 2019) online: <https://dewc.ca/wp-content/uploads/2019/03/MMIW-Report-Final-March-10-WEB.pdf>.
- 41 DPA, "Drug Decriminalization in Portugal", *supra* note 27 at 2, 6-7; UN Office of the High Commissioner, "Statement by the UN expert on the right to health on the protection of people who use drugs during the COVID-19 pandemic", April 16, 2020, online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25797&LangID=E>, wherein it was recommended that to "prevent unnecessary intake of prisoners and unsafe drug consumption practices, moratoria should be considered on enforcement of laws criminalising drug use and possession."
- 42 CACP, *supra* note 8 at 3.
- 43 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [PHS] at para 10. [Emphasis added].
- 44 Will Small et al, "Impacts of Intensified police activity on injection drug users: Evidence from an ethnographic investigation" (2005) 17 IJDP 85.
- 45 *Good Samaritan Drug Overdose Act* SC 2017, c. 4.
- 46 Canada, News Release, "Good Samaritan Drug Overdose Act Becomes Law in Canada" (13 Aug 2018), online: [https://www.canada.ca/en/health-canada/news/2017/05/good\\_samaritan\\_drugoverdoseactbecomeslawincanada.html](https://www.canada.ca/en/health-canada/news/2017/05/good_samaritan_drugoverdoseactbecomeslawincanada.html)
- 47 Collins, *supra* note 13.
- 48 Ministry of Public Safety and Solicitor General, *supra* note 36 at 2.
- 49 Collins, *supra* note 13.
- 50 Bennett, *supra* note 14 at 64-72. See also: Eagland, *supra* note 14.
- 51 Vancouver Area Network of Drug Users, "VANDU: As VPD budget spirals out of control, defunding police is our community alternative to drug war", *The Georgia Straight* (2 Dec 2019), online: <https://www.straight.com/news/1332066/nathan-crompton-vpd-budget-spirals-out-control-defunding-police-our-community>
- 52 City of Vancouver, City Council, "Statement on Council vote regarding Vancouver Police Department Budget", (14 May 2020), online: <https://vancouver.ca/news-calendar/statement-on-council-vote-regarding-vancouver-police-department-budget.aspx>; City of Vancouver, "2020 Budget and Five-Year Financial Plan" (2020) at 6, online: <https://vancouver.ca/files/cov/2020-budget-book.PDF>
- 53 Government of Canada, "Exemptions", (Date modified: 20 Aug 2015), online: <https://www.canada.ca/en/health-canada/services/health-concerns/controlled-substances-precursor-chemicals/exemptions.html>

- 54 Provisions of the *CDSA* were amended in 2018 and SCS-related exemptions now fall under section 56.1.
- 55 British Columbia, *supra* note 19.
- 56 Michelle Ghossoub and Rhianna Schmunk, “Top health officer calls on B.C. to ‘urgently’ decriminalize possession of illicit drugs”, *CBC News* (24 April 2019), online: <https://www.cbc.ca/news/canada/british-columbia/bonnie-henry-decriminalization-report-1.5108463>
- 57 Guidance was recently set out in the PPSC Deskbook, which advises federal Crown Prosecutors to restrict prosecution of simple possession to “the most serious manifestations of the offence,” and to consider alternatives to prosecution in most instances. See: Public Prosecution Service of Canada (PPSC), PPSC Deskbook, 5.13 *Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the Controlled Drugs and Substances Act* (17 Aug 2020), online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch13.html>
- 58 In *PHS* (*supra* note 43), for instance, the Vancouver Area Network of Drug Users (VANDU) brought a cross-appeal that challenged the *CDSA*’s prohibition on drug possession on the basis that it limited the section 7 *Charter* rights of “all addicted drug users.”
- 59 *PHS*, *supra* note 43 at para 113.
- 60 *Le*, *supra* note 38 at 97.
- 61 BC Centre on Substance Use, “News Release: Drug checking reveals more than half of all substances on the street not what expected”, (17 May 2018), online: <https://www.bccsu.ca/blog/news-release/drug-checking-reveals-more-than-half-of-all-substances-on-the-street-not-what-expected/>

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