A Bad Deal: British Columbia’s Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers

H A L E Y  H R Y M A K *

ABSTRACT

An analysis of the British Columbia fentanyl sentencing decisions reveals that courts are emphasizing the need for enhanced deterrence as a response to the opioid crisis. Increasing prison sentences is not an evidenced-based response to this public health crisis. In the street-level trafficking cases examined, 12 of the 14 people were motivated to traffic to support their own addiction. The courts’ response of lengthening custodial sentences for people who are trafficking fentanyl will not deter street-level trafficking. Instead, the court’s punitive approach will increase the number of people in custody, and disproportionately impact Indigenous people and those with substance abuse issues. Lengthier prison sentences should not be the prescribed response by the courts to deal with this public health crisis. The courts’ response to the opioid crisis exacerbates the present risks to people who use drugs and puts a vulnerable population at an increased risk of harm.

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Keywords: fentanyl; opioid crisis; deterrence; sentencing; public health; criminal law; street-level trafficking; exceptional circumstances; addiction; substance use; Indigenous people; stigma; British Columbia

I. INTRODUCTION

Across Canada an alarming number of fentanyl related deaths has resulted in a public health crisis. The current opioid crisis in British Columbia has the courts calling for enhanced deterrence and lengthier prison terms. Over forty years of empirical evidence shows no relationship between increasing sentences and preventing crime. The courts’ response may result in an increase in the number of people in prison, particularly Indigenous people and those with substance abuse issues. This article analyzes British Columbia’s judicial response to the fentanyl crisis and argues that relying on deterrence and increasing the prison sentences for street-level traffickers may be a harmful response. The imposition of lengthier prison sentences will not promote public safety and ignores the fact that most street-level traffickers are substance users themselves.

Part two of this article looks at the current crisis in British Columbia and the courts’ response. The fentanyl crisis and the major findings from the jurisprudence of fentanyl sentencing decisions during the past few years in British Columbia are examined. The sentencing range set by the Court of Appeal is a key focus of this article. This section also discusses the courts’ findings with respect to the moral culpability of people trafficking in fentanyl, particularly when they do not know that fentanyl is contained within the drugs they are selling. The three “exceptional cases” from the


2 R v Creuzot, 2017 BCSC 1075 at para 39, 140 WCB (2d) 692 [Creuzot].


4 The terms “opioid crisis” and “fentanyl crisis” are used interchangeably throughout this article.
jurisprudence are examined. Lastly, the “enhanced emphasis” on deterrence to street-level fentanyl traffickers is discussed.

Part three of this article provides a full review of deterrence. The intention for deterrence as a sentencing principle, as well as the research showing the inefficacy of deterrence is explained. This article argues that the courts’ emphasis on deterrence for increasing the range for fentanyl traffickers will not have the effect of deterring other offenders, particularly those with addiction who are dealing at the street level. Theories for why the courts emphasize deterrence in light of the overwhelming research are proposed. The first theory is that the current Canadian legal climate is particularly punitive towards drug offences. The second is the influence of strong stigmas for people who use drugs and commit drug offences. The final theory is that the courts have limited available responses and are reluctant to accept that deterrence is ineffective, particularly during this difficult period of the opioid crisis. The effects of the courts’ decision are expanded on and lead into a discussion of prison in part four.

Part four begins by discussing some of the problems with prison sentences in Canada, to ensure this article “bear(s) witness to the violence of incarceration.” This article predicts that the increased prison sentences may have a particularly detrimental impact on the Indigenous population and people with substance abuse issues. Some of the critiques that surrounded the imposition of mandatory minimum penalties through the Safe Streets and Communities Act are discussed, because of the parallel concerns that such punitive measures would disproportionately impact Indigenous offenders and substance users. This article clearly outlines why the shift towards longer prison sentences for fentanyl traffickers put a vulnerable population at an increased risk of harm.

II. THE FENTANYL CRISIS

In 2017, 1,449 people lost their lives in British Columbia to illicit drug deaths, with fentanyl detected in 83% of those deaths. This number is a


drastic increase from the 2016 statistics of 995,7 which was also a drastic increase from 525 in 2015.8 In the months from January to May of 2018, 620 people have lost their lives to fentanyl.9 As a result of the number of people who have died from fentanyl overdoses, in April 2016, the BC Provincial Health Officer, Dr. Perry Kendall, declared there to be a public health emergency.10 The courts’ response to this devastating crisis requires analysis. Between January 1, 2016 and July 31, 2017, 333 people in BC died from illicit drug overdoses while under community corrections supervision or within 30 days of release from a correctional facility.11

The BC Coroner’s office has directed that efforts to reduce the risks of deaths and injury be evidence-based, innovative, and compassionate.12 The potency and hidden nature of this drug has led to a national crisis. This article articulates the precedent being set by the court in British Columbia—where the opioid crisis has hit the hardest.13

The potency of the substance is at the center of this crisis; a grain of salt is a lethal dose.14 Fentanyl is a synthetic opioid that is designed to exhibit effects similar to morphine and heroin for treating pain.15 It is markedly different from other opioids because it is estimated to have a 20 to 50 times

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BC Coroner, supra note 6 at 3-4.


Webster & Doob, supra note 3.


Duran & Zussman, supra note 6.


R v Smith, 2016 BCSC 2148 at para 24, 134 WCB (2d) 510 [Smith BCSC].

R v Smith, 2017 BCCA 112, 138 WCB (2d) 605 [Smith BCCA].
higher potency than heroin. The drug is designed to be used in a medical setting for pain relief. It has a fast “onset action” because it is highly soluble. Fentanyl is legally available in patches, sublingual tablets, and intravenous and lozenge form. These forms assist in dealing with chronic pain by administering low levels of fentanyl into the body over a period of several days. Prescription fentanyl can be abused by chewing or smoking the gel from the patches. A great deal of the fentanyl that is seen in the drug trade is manufactured illegally in China and smuggled all over the world.

Drug traffickers are able to drastically increase their profit margin by cutting their substances with fentanyl. Traffickers can mix a small amount of fentanyl with substances including heroin, cocaine, oxycodone, or cutting agents, and create a cheaper product with the same effect. Due to its potency and the method of mixing fentanyl with other substances, traffickers can import a small amount of fentanyl and still stand to make revenue when it is inconspicuously sold to users. It is difficult for law enforcement agencies to detect the smuggling of fentanyl because it is frequently imported in small quantities - another factor that makes this drug so pernicious. When traffickers mix the fentanyl, it is difficult to break down evenly, which means that some batches will contain more of the powerful substance than others. People who overdose from fentanyl die

16 Ibid at para 16.
20 Worley, supra note 18 at 17.
24 Worley, supra note 18.
from respiratory depression resulting in lethally low-circulating oxygen levels.

A. Caselaw on Fentanyl Sentencing

This article looked at the reported sentencing decisions for street-level traffickers in British Columbia between January 1, 2016 to November 1, 2017. The time period of 2016-2017 was selected to coincide near the time the fentanyl crisis was declared. The initial search for fentanyl sentencing decisions yielded 50 cases, which were narrowed down to only the sentencing decisions involving street-level fentanyl trafficking. The judgements were determined to be for street-level traffickers either when there was explicit reference from the judge that it was a low-level or street-level trafficker, or if the applicable street-level range was imposed by the sentencing judge. From these reported decisions, 16 cases were found to involve street-level trafficking of fentanyl and there was a total of 14 different accused people. British Columbia was selected because it is the epicenter of the fentanyl crisis in Canada.

Street-level traffickers, or “pushers,” are the people who sell directly to the purchaser for their personal use. A street-level trafficker typically sells the product to the end user by walking or riding bikes in a particular area; being a participant in dial-a-dope trafficking schemes (where people use a cell phone to take orders and deliver drugs); or using a residence such as a crack shack. Drug trafficking works in a hierarchical fashion and street-level drug traffickers usually work under a mid-level drug trafficker who loads the individual with the drugs for distribution. Street-level dealers typically do not mix, cut, or package the drugs. The street-level trafficker

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

27 These 16 decisions include both the provincial and appeal decisions for R v Rutter and R v Smith. It is therefore 14 different individuals, and 16 cases.


29 Mann, supra note 28 at para 43.
A Bad Deal

A. Does not carry a large volume of drugs at one time given the potential impact on the drug trafficking operation if the drugs were seized by law enforcement or through theft. These traffickers are considered the lowest rung in the drug hierarchy and are more likely to be detected by law enforcement. Individuals at a higher level of the trafficking operation, either as couriers, mid-level dealers, or high-level dealers, insulate themselves from detection and are more difficult for police to detect. An important topic from the sentencing jurisprudence was the establishment of the sentencing range for street-level trafficking of fentanyl.

B. The Range for Fentanyl Sentencing for Street-Level Traffickers

The range of sentence available to courts for fentanyl trafficking was defined by the British Columbia Court of Appeal in R v Smith. Smith set the range for street-level trafficking of fentanyl to a prison sentence of “18-36 months and possibly higher.” This range is a step up from the six to eighteen-month range for trafficking in other schedule I substances in British Columbia. In appealing the sentence of 6 months, the Crown in the Smith appeal filed evidence of the tragic effects of the fentanyl crisis across Canada and particularly within BC. The Court of Appeal dismissed the sentence appeal but accepted that the Court should establish a longer range for street-level trafficking of fentanyl to appropriately respond to the magnitude of the crisis. The law has made an obvious pronouncement that trafficking in this harsh drug will lead to a harsh sentence, but many of the cases of fentanyl trafficking involve people who do not know they are

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30 Ibid at para 42.


32 R v Derycke, 2016 BCPC 291 at para 28, 133 WCB (2d) 282 [Derycke].

33 Smith BCCA, supra note 15 at para 45. The maximum sentence for trafficking in a schedule I substance is life imprisonment.

34 R v Voong, 2015 BCCA 285 at para 44, [2015] BCJ No 1335 (QL) [Voong]. The Controlled Drugs and Substances Act, SC 1996, c 19, is Canada’s federal drug control statute. Substances are classified in schedules I through IV, with schedule I being considered the most serious. Examples of schedule I substances include methamphetamine, heroin, and cocaine. Statutorily, the scope of sentence for trafficking in schedule I substance (including fentanyl) ranges from a suspended sentence to life imprisonment.
trafficking fentanyl. The Crown within the Smith appeal filed evidence of the tragic effects of the fentanyl crisis across Canada and particularly within British Columbia.  

C. Moral Culpability in Fentanyl Trafficking

The law has made an obvious pronouncement that trafficking in this harsh drug will lead to a harsh sentence, but the terms are less clearly defined for individuals who are unaware that they are selling fentanyl. As described, it is difficult for users to detect whether the substance contains fentanyl, and many street-level traffickers are unaware they are selling products that contain fentanyl. The Court of Appeal decided that public awareness of the dangers of fentanyl distribution were still emerging up until January of 2015, and after that date the public was more likely to be aware of the harms of fentanyl. As a result of the media, and the public health reports and initiatives creating a public awareness, the courts presume that people are aware of fentanyl and its harms following January 2015. The new lengthier range can be applied to individuals if they are trafficking past January 2015.

An important factor in the Smith decision is when the new range is to be applied. There is a presumption that before January of 2015, traffickers were not expected to know the harms of fentanyl and its potential presence in the drugs. After January 2015, traffickers are expected to have known the harms of fentanyl, and the potential for fentanyl to be present in their products. The Court of Appeal recognized that it would be within the discretion of the sentencing judge to determine if the time the offence was committed was a time when the fentanyl crisis was within the knowledge of the public, or if there was evidence that the trafficker knew their substance contained fentanyl.

It is an established rule of law that lack of knowledge of the substance is not a mitigating factor. However, this reasoning does not fully comprehend the inconspicuous nature of fentanyl, and the vulnerable

35 Smith BCCA, supra note 15 at para 2.
36 Smith BCSC, supra note 14 at para 32.
37 R v Rutter, 2017 BCCA 193 at para 5, 139 WCB (2d) 114 [Rutter BCCA], citing Smith BCCA, supra note 15 at paras 60-61.
38 Ibid.
39 Derycke, supra note 32 at para 65; Henry, supra note 31 at para 90.
position that street-level traffickers are often in. As described, people who sell drugs at the street level are typically supplied by mid-level traffickers.\(^{40}\) A key consideration that appears absent from the caselaw is that street-level traffickers typically receive their drug supply from someone else. Given the nature of their work, street-level dealers are not given large supplies of drugs and are typically not involved in the packaging or cutting of the drugs. The case of Mr. Aden Rutter gives context to the difficulty of imposing inherent moral culpability for fentanyl street-level traffickers. In this case, “Mr. Rutter said that he believed the fentanyl to be heroin, that it was described to him by his supplier as heroin, and that he described the fentanyl to his customers as heroin.”\(^{41}\) Part three of this article revisits this issue and suggests that it may be ineffective to try to deter people from trafficking fentanyl without acknowledging that street-level traffickers often do not know they are trafficking fentanyl. This range set out in Smith is intended to be imposed absent exceptional circumstances or exceptional cases.

D. Exceptional Circumstances

An accused individual must establish “exceptional circumstances” in order to be sentenced outside of the custodial range for a particular offence.\(^{42}\) The “exceptional cases,” or people who establish they have “exceptional circumstances,” are typically sentenced to suspended sentences and avoid custodial dispositions. Suspended sentences are a non-custodial sentence whereby the sentenced person follows a probation order with conditions defined by the sentencing judge. The maximum length of the suspended sentence is three years. Suspended sentences are non-custodial sentences but are still recognized as having the ability to specifically deter the individual being sentenced.\(^{43}\) However, these sentences are not able to send a message of general deterrence, and partly for that reason, the courts can only give these non-custodial sentences in exceptional cases.\(^{44}\)

\(^{40}\) Toth, supra note 13 at paras 16, 72; R v Rocha, 2009 MBCA 26 at paras 61-63, [2009] 6 WWR 37; R v Nazarek, 2017 BCSC 1909 at paras 67-69, 142 WCB (2d) 649.
\(^{41}\) R v Rutter, 2016 BCPC 321 at para 3, 134 WCB (2d) 76 [Rutter BCPC].
\(^{42}\) Voong, supra note 34 at para 59.
\(^{43}\) Voong, supra note 34 at para 39.
As set out by the Court of Appeal in Voong, there are numerous factors that the court can consider in deciding whether a case is exceptional. Voong provides a list of factors, but the main consideration is whether the person has made strides towards rehabilitation that have led them to truly turning their life around:

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

The British Columbia Court of Appeal in Smith clearly demonstrates that trafficking fentanyl will result in a period of time in jail unless there are numerous mitigating factors that lead the case to be defined as exceptional by the sentencing judge.

Of the 14 different accused persons addressed in this article, three cases were upheld to have exceptional circumstances that took them outside the sentencing range: Mr. Joon, Mr. Porter and Ms. Naccarato. The set of cases examined in this article shows that addiction motivated nearly all of the people who were engaging in street-level trafficking, and only the three people who came to their sentencing hearing either with no pre-existing addiction, or completely rehabilitated, were given non-custodial sentences. The rehabilitative steps of Mr. Porter and Ms. Naccarato are not to be diminished. However, it is problematic that the court relies on people to “truly turn their life around” between their offence and sentencing date when the individual is affected by an addiction. An underlying expectation that individuals overcome their addiction between their date of arrest and

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45 Voong, supra note 34 at para 59.
46 Ibid.
47 R v Hambly, 2016 BCPC 215 at para 12, 132 WCB (2d) 82.
48 The British Columbia Court of Appeal reversed Mr. Rutter’s suspended sentence, and the trial judge did not explicitly say that the sentence was being imposed because Mr. Rutter’s circumstances were exceptional. There was a second case, R v Ramstead (9 January 2017) Fort St. John 29639-1, that was addressed in the R v Rutter appeal that this article does not discuss because the trial decision was not reported.
49 Only two of the fourteen accused were not motivated to traffic by their addiction.
sentencing shows a fundamental misunderstanding of addiction.\textsuperscript{50} Below is a summary of the three exceptional cases and the factors the court considered in finding exceptional circumstances.\textsuperscript{51}

<table>
<thead>
<tr>
<th>Case</th>
<th>What the Courts said made the case Exceptional\textsuperscript{52}</th>
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| Mr. Joon\textsuperscript{53} | • Not a drug user; in good health; had a positive upbringing. Trafficking in fentanyl was “out of character” for him  
• No need to specifically deter him or to protect the public  
• Very young (19) at the time of trafficking |
| Mr. Porter\textsuperscript{54} | • Exceptional because “in his early attempt at age 18 to take control of his own life and his own addiction; that he was able to remain sober throughout his 20s...”\textsuperscript{55}  
• A supporter from the treatment facility Mr. Porter attended described that his rehabilitation was so effective that he was “not the same guy” as he was no longer affected by his addiction.\textsuperscript{56} |
| Ms. Naccarato\textsuperscript{57} | • Turned her life around; positive supports  
• “A prison sentence would likely expose her to persons in the drug trade and would do more harm than good.”\textsuperscript{58} |

\textsuperscript{50} Addiction is a relapsing and remitting disease that affects people in different ways with different rates of recovery.

\textsuperscript{51} Emphasis throughout the chart is my own.

\textsuperscript{52} There are circumstances for Mr. Porter and Ms. Naccarato that may have contributed to the courts finding that their case was exceptional, but the portions selected for this chart were the most salient.

\textsuperscript{53} \textit{R v Joon}, 2017 BCPC 301.

\textsuperscript{54} \textit{Porter, supra} note 44 at para 72

\textsuperscript{55} Ibid.

\textsuperscript{56} Ibid at para 34.

\textsuperscript{57} \textit{R v Naccarato}, 2017 BCSC 645 at para 9, 138 WCB (2d) 604.

\textsuperscript{58} Ibid.
The decisions in *Porter* and *Naccarato* both discuss that a custodial sentence would interfere with rehabilitation. By extension this implies the court understands that prisons are not the place to foster rehabilitation, and that they can “do more harm than good.” Yet, the remaining people who were motivated by their addiction to engage in street-level drug trafficking were sentenced to custodial sentences. The application of the exceptional circumstances solely to three people shows that the court is reluctant to acknowledge the harms of incarcerating people presently struggling with addiction, and arguably in the most need of support.

E. The “Enhanced” Need for Deterrence in Fentanyl Trafficking Cases

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

III. LOOKING DEEPER INTO DETERRENCE

Part two established that the courts in British Columbia are responding to the fentanyl crisis by implementing longer prison sentences for fentanyl traffickers as a result of deciding there is an enhanced need to emphasize deterrence. Part three begins by identifying the assumptions underlying the sentencing principles of deterrence and shifts to summarizing the extensive

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59 *Naccarato, supra* note 57 at para 9.

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

61 *Derycke, supra* note 32 at para 68.

62 *R v Butler, supra* note 1; *Creuzot, supra* note 2.

63 *Smith BCCA, supra* note 15 at para 26.
research on deterrence. Research shows that, to the extent individuals are deterred, it is largely through the existence of the sanction and not the severity of the sanction.\(^6^4\) Further, a significant consideration in this article is that deterrence and addiction are mutually incompatible. Individuals’ motivations may not be affected by the increase in the range of custodial sentence for dealing in fentanyl if they are dealing to support their habit. Many people engage in street-level trafficking to obtain the substance they are dependent on and there are often existing vulnerabilities within that population. This section of the work further looks at the reasons courts emphasize deterrence in the face of the research, including the conservative trend in criminal justice in Canada; the stigma of people who use drugs; and the challenges for the courts to shift.

A. What is Deterrence?

The purpose of deterrence is to discourage individuals from offending.\(^6^5\) There are two forms of deterrence: specific and general.\(^6^6\) Specific deterrence is aimed at the individual being sentenced, and it works to try and specifically deter that person from engaging in the offending behaviour in the future. General deterrence is intended to ensure that people do not become offenders in the first place. General deterrence is intended to send a preventative message to the public when individuals are sentenced. The result is that the offender is often punished more severely to send a message to people that may be inclined to participate in related criminal activity.\(^6^7\) Imposing general deterrence will often result in a harshening of the sentence.\(^6^8\) As a result, when courts focus on deterrence it tends to result in

\(^{6^4}\) Webster & Doob, supra note 3 at 175.

\(^{6^5}\) R v BWP, 2006 SCC 27 at para 2, [2006] 1 SCR 94 [BWP]; R v BVN, 2004 BCCA 266, 196 BCAC 100. Denunciation is not specifically addressed in this article but it is also emphasized in the research. Denunciation is the court’s way of communicating that society condemns the offender’s conduct. It is a symbolic message that the conduct will result in a punishment for conflicting with society’s values as set out in Canada’s Criminal Code.

\(^{6^6}\) Criminal Code, RSC 1985, c C-46, s 718(b).

\(^{6^7}\) Russel Durrant, Stephanie Fisher, & Maria Thun, “Understanding Punishment Responses to Drug Offenders: The Role of Social Threat, Individual Harm, Moral Wrongfulness, and Emotional Warmth” (2011) 38 Contemporary Drug Problems 147 at 169.

\(^{6^8}\) BWP, supra note 65 at para 36.
the imposition of prison sentences or an increase of the length of jail sentences. These principles are broadly applied to all people convicted of trafficking fentanyl, regardless of their personal circumstances or present addictions. However, research suggests that increasing the prison sentences for street-level traffickers is not an effective response to the fentanyl crisis.

B. Emphasizing Deterrence Will Not Deter

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

The principle of deterrence, detached from research and an understanding of criminal behaviour, is rational: if people know they are going to receive a harsh sentence for a crime, they will think twice before committing it. This encapsulates the same view economists have that “higher prices lower the demand, and that human beings are rational decision-makers.” Highway traffic offences, including speeding tickets may coincide with this, but this rational decision making does not align with the reality of most crimes. Crimes are frequently committed under the influence of intoxicants, “powerful emotions, or situational pressures.” Further, the more serious crimes are considered morally wrong and most

69 Ibid.
70 Webster & Doob, supra note 3 at 2.
71 Ibid.
73 Webster & Doob, supra note 3 at 7.
74 Ibid at 8.
75 Ibid.
77 Webster & Doob, supra note 3 at 9.
people would not commit them regardless of the penalty.\textsuperscript{78} Incidents of homicide and the death penalty provide an example of the incorrect assumptions of deterrence. The implementation of the death penalty for people convicted of homicide in the United States did not have the expected deterrent effect; lower rates of homicide do not exist in the states with the death penalty for homicide compared with those that do not.\textsuperscript{79}

The evidence that deterrence through severity is ineffective was referred to in the Supreme Court of Canada decision of \textit{R v Nur}.\textsuperscript{80} As discussed by Debra Parkes, the Supreme Court’s decision in \textit{Nur} includes a “candid discussion of the principle of deterrence as it relates to sentencing severity” and an acknowledgment that “doubts concerning the effectiveness of incarceration as a deterrent have been longstanding.”\textsuperscript{81} The Supreme Court acknowledged the literature to ultimately say, “mandatory minimum sentences do not, in fact, deter crimes.”\textsuperscript{82}

Increasing sentence severity does not show a reduction in crime. A complex sequence of factors must be present in order for variation in sentence severity to have a potential deterrent effect on levels of crime.\textsuperscript{83} Below is a table outlining the pre-conditions that must be present for a DTS theory to be successful. The table is divided into two rows. The bottom row titled “reality” outlines that the four requirements for DTS are not supported by empirical research; DTS is “empirically implausible.”\textsuperscript{84}

\begin{table}
\caption{Pre-conditions for Deterrence Through Severity (DTS) Theory for Success}
\begin{tabular}{|c|c|}
\hline
Pre-condition & Reality \hline
\end{tabular}
\end{table}

\textsuperscript{78} Ibid.
\textsuperscript{80} R v Nur, 2015 SCC 15, [2015] 1 SCR 773 [\textit{Nur}].
\textsuperscript{81} Ibid at para 113 as cited in Debra Parkes, “Punishment and Its Limits” Forthcoming in (2018) Supreme Court Law Review.
\textsuperscript{82} Nur, supra note 80 at para 114.
\textsuperscript{83} Webster & Doob, supra note 3 at 9.
\textsuperscript{84} Ibid.
### The Four Main Requirements of Deterrence and the Corresponding Reality

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Reality</th>
</tr>
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<tbody>
<tr>
<td>Individuals will be aware that the punishment for trafficking fentanyl is harsher.</td>
<td>Public opinion polls show that most individuals are unaware of the maximum sanctions for offences, and what crimes have mandatory minimums. Further research shows that people are generally unaware of the punishment levels in their communities.</td>
</tr>
<tr>
<td>The potential offender will evaluate their actions and weigh the consequences prior to engaging in criminal activity.</td>
<td>Many offences are committed in the “heat of the moment” or are guided by impulse or sway of emotion. Individuals are often motivated by their circumstances including poverty and substance abuse.</td>
</tr>
<tr>
<td>Individual offenders will view the increased penalty as costly or punitive.</td>
<td>Individuals who are most at risk of criminal behaviour are often entrenched within a lifestyle where criminal behaviour is required or rewarded, and they have a reduced perception of risk within committing crime.</td>
</tr>
<tr>
<td>Individuals will believe they are likely to get arrested for the offence and receive the punishment.</td>
<td>Individuals perceive the probability of being arrested as low, and the statistics of reported crimes reflect this.</td>
</tr>
</tbody>
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85 Ibid.
86 Ibid at 10.
87 Ibid.
88 Ibid at 9.
90 Ibid.
C. Deterrence and Addiction

Deterrence and addiction are incompatible with each other. Addiction involves engaging in drug use on an ongoing basis despite risk of harms or negative consequences associated with these behaviors. The current model of sentencing views punishment and “sending a message” to the offender (and other offenders) as a solution while addiction as a mere factor to balance on sentence. Understanding addiction and its specific impact to the crime at hand may assist in crafting sentences suited to reduce recidivism. The threat of an increased jail term does not dissolve an addiction.

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

D. Street-Level Trafficking and Addiction

People engaged in street-level trafficking are often motivated by their addiction to sell drugs in order to access drugs for their own use; it is a “survival technique.” In a study conducted in the Downtown Eastside, dated September 2017.

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94 Ibid at 172.
95 R v Preston, 1990 BCCA 576 at 15, 47 BCLR (2d) 273.
there were 412 Intravenous Drug Users who participated and 68, or 17%, of them disclosed they had dealt drugs during the previous six months. The primary reasons the participants gave for trafficking was obtaining the drugs (49%) and getting money (36%). Unstable housing and recent incarceration were the factors positively associated with people involved in drug dealing. Further research shows that individuals who are targeted by enforcement are most commonly the individuals who "carry several markers of higher intensity addiction." It is the people at the lowest level who are the most visible and in the most dangerous role of the drug-dealing hierarchy. Of the 14 different accused discussed in this article who were convicted of street-level trafficking of fentanyl, 12 were said to have addictions that motivated their offence.

E. Why Emphasize Deterrence in Fentanyl Sentences if it is Not a Research-Based Response?

1. Canadian Law on Drugs

The courts of British Columbia have responded to the fentanyl crisis within the current punitive framework set in Canada since 2006. In 2006, the Conservative government took power in Canada and vastly changed the look of criminal justice. From 2006 to 2015, Parliament substantially changed criminal law, including sentencing provisions. Scholars have noted that this approach did “little to address the root causes of crime.” Research reviewing the proposed and passed legislation, government documents, and parliamentary speaker notes from January 2007 to January 2014 found a blending of illicit drug use and danger to society throughout the policy discourse. Illicit drug use was emphasized as a criminal problem and not a public health issue. Numerous “tough on crime” bills were

97 Thomas Kerr et al, supra note 31 at 149.
98 Ibid at 149-150.
99 Parkes, supra note 5 at 132.
100 Ibid.
103 Ibid at 6, citing Hon. Rob Nicholson (Minister of Justice and Attorney General of
passed, including ones that promised to keep the streets safe while removing rehabilitative options for specific offences. Critics of the Safe Streets and Communities Act had argued that Canadian drug laws were already severe and further that there was a disconnect between the message of the conservative government and the crime statistics; in 2012 Canada had its lowest crime rate in 40 years.

During this time, harm reduction was removed from the National Anti-drug Strategy, and there was a pronounced shift away from supporting harm reduction initiatives in Canada. In line with shifting away from harm reduction, the federal government shifted to allot 70% of its overall budget, or $273.6 million, to the Enforcement Action Plan. Some legal scholars have described these legislative changes as “the Punishment Agenda,” in large part because of the addition of numerous mandatory minimum sentences for imprisonment, and stark limits on the availability of conditional sentences.

The Safe Streets and Communities Act was implemented in 2012 and introduced numerous mandatory minimum sentences including those for drug crimes. Conditional Sentence Orders were introduced into the Criminal Code in 1996 by the Liberals as a way of reducing the use of imprisonment, and two separate bills were passed in 2007 and 2012 during the Punishment Agenda to severely restrict courts’ use of conditional sentence orders. During the Punishment Agenda prisons were purported by the Conservative legislators to be an effective method for reducing criminal behaviour and alternatives to custodial sentences were reduced.

Canada in support of Bill C-10).


Ibid.

Parkes, supra note 5 at 131.

Conditional sentence orders are jail sentences served in the community. They are often called house arrest because the typical conditions require that people remain in their home unless they are attending their education, employment, or appointments with their probation officer.

Alana Klein, “Criminal Law and the Counter-Hegemonic Potential of Harm
During this time, the option for sentencing judges to implement a conditional sentence for individuals convicted for trafficking of a schedule one substance was removed.\(^{110}\) Today the legacy of a Conservative and punitive sentencing regime exists within the criminal justice system despite Canada’s new Liberal leadership. The shifts during the Punishment Agenda have affected the rate of incarceration within Canada and enforced a “tough on crime” mentality. This mentality has affected individuals of drug crimes, regardless of their potential substance abuse issues or mental health.

The emphasis in sentencing decisions on deterrence for fentanyl traffickers is in line with the shift towards increased use of imprisonment in Canada in recent years. The “tough on crime” measures are socially and economically costly and are found to have a disproportionately negative effect for “people living with drug dependence, Aboriginal people, and youth in or leaving the foster care system.”\(^{111}\) The impact of the “tough on crime” agenda to vulnerable populations will be further discussed later in this article.

2. *Stigma in Sentences*

The severe punishment that drug offenders receive is tied to the stigma of drug offenders and people who use drugs as “deviant others.”\(^{112}\) The stigma is dependent on the drug type, with low levels of stigma for marihuana, and higher levels for methamphetamine and heroin use. There is a propensity towards the punishment of people who use drugs because of the perception of the moral wrongfulness of drug use, and the perception of harm to both the individual and to others in society as a whole.\(^{113}\) Further, addiction is often stigmatized by society as a problem related to self-control or a moral failing.\(^{114}\) This “tough on crime” approach is not

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\(^{110}\) The Safe Streets and Communities Act amended s.742.1, the section that allows for imposing of conditional sentences, to exclude sentences that are indictable and prosecuted by indictment and carry a maximum term of imprisonment of 14 years or life.


\(^{113}\) Durrant, Fisher & Thun, *supra* note 67 at 167.

\(^{114}\) Charles Dackis & Charles O’Brien, “Neurobiology of Addiction: Treatment and Public
grounded in evidence. The opioid crisis is a notably difficult time for courts to shift to accepting the “null hypothesis [that] variation in the severity of sanctions is unrelated to levels of crime.”\textsuperscript{115} Nevertheless, the public may be more receptive to a shift towards non-custodial sentences if presented with the full context. When the public is provided with information about the effects, costs, and the eventual release of prisoners they are more likely to favour alternatives to prison.\textsuperscript{116} Members of the public who are provided context, as well as a choice, do not necessarily favour a punitive sentence.\textsuperscript{117} This article submits that the stigmas that surround drug offenders are a factor that leads the court to continue relying on deterrence as a sentencing method despite the fact it is not supported by research.

3. \textit{The Crisis of Stigmas}

The message to reduce stigma experienced by people who use drugs is an important response to the opioid crisis.\textsuperscript{118} The stigmas associated with drug use affect their ability to access resources, get housing, have employment opportunities, and ultimately to be safe in society. The stigma of being a “drug user” leads people to using drugs alone, and it is the people using alone and in private who represent the majority of people who are dying from fentanyl overdoses.\textsuperscript{119} There have been no recorded deaths at

\textsuperscript{115} Webster & Doob, \textit{supra} note 3.


\textsuperscript{117} \textit{Ibid} at 551.


\textsuperscript{119} BC Coroner, \textit{supra} note 6 at 12.
the overdose prevention sites or supervised consumption sites in BC. The majority of overdose deaths are of men, and individuals between the ages of 30-49.

On January 31, 2018 the BC Coroner Lisa Lapointe, in discussing the number of deaths from fentanyl urged that “if we truly want to save lives, we’re all going to have to be willing to let go of old stereotypes, and old and sadly ineffective solutions.” Problematic substance use is a complex medical condition with available evidence-based treatments. The courts should be mindful of these stigmas and their devastating potential in sentencing individuals trafficking fentanyl at the street-level who have addiction; they are among the most vulnerable to overdose death in this crisis.

F. The Challenges for Courts to Shift the Law

The criminal justice system has a significant amount of contact with people who use substances, and many come to be incarcerated within Canadian prisons. While research has advanced dramatically to allow for a comprehensive understanding of addiction, the criminal justice system lags behind. Individuals with addiction issues face custodial sentences at a high rate. Statistics show that 90% of people in Canadian federal

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121 Ibid at 1.
122 Duran & Zussman, supra note 6.
123 Gerald Thomas, Harm Reduction Policies and Programs for Persons Involved in the Criminal Justice System (Ottawa: Canadian Centre on Substance Abuse, 2005) at 2; Richard Lippke, “Punishment Drift: The Spread of Penal Harm and What We Should Do About It” (2017) 11:4 Criminal L & Philosophy 645.
124 Adela Beckerman & Leonard Fontana “Issues of Race and Gender in Court-Ordered Substance Abuse Treatment” (2008) 33:4 J Offender Rehabilitation 45; Kathy Bettinardi-Angres & Daniel Angres, “Understanding the Disease of Addiction” (2010) 1:2 J Nursing Regulation 31. This article does not address rehabilitative sentencing options because they are beyond the scope of the reported caselaw on street-level fentanyl trafficking decisions in BC. For information on alternative sentencing options see: James Lessenger & Glade Roper, Drug Courts: A New Approach to Treatment and Rehabilitation (New York: Springer, 2007); Canada, Department of Justice, Drug Treatment Court Funding Program Evaluation: Final Report, by the Corporate Services Branch’s Evaluation Division (Ottawa: Department of Justice Canada, 2015).
penitentiaries are assessed as having substance abuse issues. In 2002, Canada reached an all-time high for charges recorded under the Controlled Drugs and Substances Act: 93,000. The evidence shows that people who use drugs are overrepresented within the justice system.

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

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

Abstinence is what is expected and required under the current laws. The two cases from the British Columbia Court of Appeal exemplify the court’s resistance to change. Smith sets the longer range, and Rutter is a decision where the BCCA overturned the judge’s imposition of a suspended sentence for being demonstrably unfit and replaced it with a period of six months’ incarceration followed by 24 months’ probation.

Mr. Rutter was motivated by his drug addiction to participate in trafficking, and at the time of his sentencing he had been abstinent for a

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126 Thomas, supra note 123.
129 Ibid.
130 Ibid.
131 Rutter BCCA, supra note 37 at para 37. The sentencing judge in provincial court made no express finding that “exceptional circumstances” existed in this case.
year and employed for six months. The provincial court sentencing judge found that prison would put Mr. Rutter’s rehabilitation at risk and stated “it is likely that, if sentenced to jail, Mr. Rutter will use drugs while in jail and will resume trafficking in them upon his release.”132 The Court of Appeal in Rutter discussed the trial judge’s decision which did not impose jail for Mr. Rutter and decided “the sentencing judge lost sight of the presumptive effectiveness of jail as a general deterrent.”133 The Court of Appeal further added:

The principle of deterrence as a goal of sentencing is embedded in our law. The Supreme Court of Canada has said so in C.A.M., the amendments to the Criminal Code specifically refer to it as a sentencing objective. We must assume that deterrent sentences have some effect. It is futile to ask whether a particular sentence will deter others. That question can never be answered.134 The courts continued reliance on deterrence as an effective principle in sentencing is creating a particularly pernicious climate for people who use drugs in the wake of the opioid crisis.

G. Consequences of Misunderstanding and Continuing Deterrence Through Sentencing Policies

The emphasis on deterrence and the corresponding increase of the sentencing range for drug trafficking will have several impacts on the criminal justice system. The emphasis on deterrence puts judges in a difficult position of applying the law with consistency because of the essentially automatic 18-month custodial sentence which may follow even for a first-time offender and regardless of whether the person is from a vulnerable group.135 Ultimately the sentences imposed will not have an impact on reducing recidivism and protecting society. The only tangible effect that will result from the courts’ current response to the fentanyl crisis will be the increase in the prison population over time. The final section of this article argues the increase in the imposition of prison sentences will

132 Rutter BCPC, supra note 41 at para 28.
133 Rutter BCCA, supra note 37 at para 23.
135 Ibid.
particularly impact individuals in vulnerable groups, including Indigenous people and individuals who use substances.\footnote{Webster & Doob, supra note 3 at 17-18.}

### IV. PRISON AND LOOKING BEYOND

The first portions of this article addressed how courts are responding to fentanyl traffickers, and the imposition of longer prison sentences. Writing more than 15 years ago, Professor Michael Jackson lamented the absence of prisons from conversations about the criminal justice system, and asked the question “...is it not strange that lawyers and judges, as gatekeepers of the only process that can result in a sentence of imprisonment, know or care so little about what happens inside prisons?”\footnote{Michael Jackson, “Change and Continuity in the Canadian Prison - Lessons From Scholarship” in Michael Jackson, Justice Behind the Walls: Human Rights in Canadian Prisons (Vancouver: Douglas & McIntyre, 2002) at 1.} The imposition of a prison sentence has a severe impact on people because of the denial of their rights and liberties and because of the state of prisons in Canada.\footnote{Ibid; Parkes, supra note 5 at 142; OCI Report 2015-2016, supra note 125.}

Critiques of prison date back to the first penitentiary developed in Kingston in 1835 where imprisonment was condemned for being unduly harsh, and ineffective at rehabilitation.\footnote{R v Gladue, [1999] 1 SCR 688 at para 53, [1999] SCJ No 19 (QL) [Gladue].} As stated by Michael Jackson:

> Society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes – correcting the offender and providing permanent protection to society.\footnote{House of Commons, Sub-Committee on the Penitentiary System in Canada (Ottawa: Minister of Supply and Services, 1977) (Chair: Mark MacGuigan).}

Current issues that exist in Canadian prisons include: limited treatment for individuals with addictions and mental health problems; high volumes of use of force incidents; a lack of skills training and vocational programs within corrections; and a decline in the quality of managing individuals and their cases.\footnote{OCI Report 2015-2016, supra note 125 at 4.} Imprisonment does not reduce recidivism; instead, individuals who have spent time in custody are more likely to have a deeper involvement with criminal behaviour than those who have not.\footnote{Howard, supra note 76 at 59-60.}
particular, people who are incarcerated for drug offences have higher recidivism rates than other offenders. A longer period of incarceration is the answer the courts have to the fentanyl crisis, yet prison sentences are intended to be used when no other available sanction can achieve the fundamental purpose of sentencing.

People who use substances and have mental illness are disproportionately represented in Canadian prison populations. Often, an individual’s substance use is a contributing factor to their interaction with the law, and custodial sentences disrupt their lives and often exacerbate their substance abuse. Research in Toronto revealed that time in jail increased people’s risk of homelessness by 40%. Prison sentences remove people from their community and whatever stability and supports they have established. Custodial sentences terminate employment and housing arrangements that are often difficult to find. They also disrupt delicate connections with family, friends or community resource workers such as doctors, health clinicians, support workers, and probation officers. These connections and supports for people living on the margins of society are important considerations to recidivism.

The impact that increased prison sentences stands to have on people who use substances – particularly Indigenous peoples – is a warranted discussion, one of which I turn to next.

A. Responding to the Over-Incarceration of Indigenous People

Canada’s mass incarceration of Indigenous people in intrinsically connected to the conversation of increasing prison sentences for street-level fentanyl traffickers. Colonial laws began with the Indian Act of 1876. As a result of this Act, Indigenous people were effectively stripped of their land, confined to reserves, and deprived of their rights to self-determination. Colonial structures sought to intentionally remove Indigenous culture from the Canadian society by banning traditional ceremonies and languages. In

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1886, the first drug prohibition in Canada was directed at Indigenous people when the Indian Act was amended to add a prohibition against Indigenous people buying or possessing alcohol. Today, Indigenous people are more likely to be sentenced to prison than non-Indigenous people.\footnote{Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, (Winnipeg: TRCC, 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> at 170 [TRC]. See also Office of the Correctional Investigator, Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act, (Ottawa: Office of the Correctional Investigator, 2017) at 11.}


Problematic substance use among Indigenous people is tied to the “cultural oppression and erosion, economic exclusion, and the intergenerational impacts of trauma borne from colonial practices such as
the residential school system.”

Recent research reveals that Indigenous people in BC are five times more likely than non-Indigenous people to experience an overdose event, and three times more likely to pass away from overdose.

This colonial history and the continued systemic discrimination results in Indigenous people being under greater surveillance of illicit substance use. Indigenous peoples are more likely to experience a higher rate of residential instability and homelessness, and people who use drugs and are homeless are more likely to use drugs in a public space and be vulnerable to police detection.

Elizabeth Comack’s research on “racialized policing” reveals that Indigenous people are frequently subject to police surveillance and are more likely to be “stopped, questioned, searched, and detained because they ‘fit the description.’”

This article argues that there is a risk for an adverse impact to Indigenous people resulting from the increase in fentanyl sentencing. The predicted disproportionate impact parallels the impact recognized to Indigenous people through the imposition of mandatory minimum sentences for numerous offences including drug trafficking. The Safe Streets and Communities Act resulted in numerous mandatory minimum penalties (MMPs) for drug trafficking offences and the Act was highly criticized for its potential to disproportionately affect Indigenous people and other marginalized groups including people who use drugs.

A Special Report by the British Columbia Provincial Health Officer noted the specific harm to

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150 Marshall, supra note 102 at 5-6.


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

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

The mandatory minimums ultimately did contribute to the overincarceration of Indigenous people in prison, and have been struck down by the courts for being unconstitutional.\footnote{TRC, supra note 145 at 170; R v Lloyd, 2016 SCC 13, [2016] 1 SCR 130.}

The Supreme Court of Canada offered a response to the mass incarceration of Indigenous people through the decision of \textit{R v Gladue}.\footnote{Gladue, supra note 143.} \textit{Gladue} provided further guidance to the scope of s. 718.2(e) of the Criminal Code, which states that when sentencing an offender, a court must consider “all available sanctions, other than imprisonment” and pay “particular attention to the circumstances of Aboriginal offenders.”\footnote{Criminal Code, supra note 66 at s. 718 (2)(e).} The Supreme Court of Canada’s decision in \textit{Gladue} called for judges to pay attention to the unique circumstances of Indigenous offenders in order to reduce the use of prison as a sanction and expand the use of restorative justice principles in sentencing.\footnote{Gladue, supra note 139. More recently, in \textit{R v Ipeelee}, 2012 SCC 13 at para 87, [2012] 1 SCR 433, the Supreme Court called upon judges to pay attention to the unique circumstances of Indigenous people.} All areas of the criminal justice system need to apply the principles set out within \textit{Gladue} to develop culturally appropriate sanctions and prison should be a last resort.\footnote{Gladue, supra note 139 at para 48.} While there are problems with the implementation of \textit{Gladue}, the decision to apply longer sentences for fentanyl traffickers does not account for the mass incarceration of Indigenous people in Canada.\footnote{Beckerman & Fontana, supra note 124.}

One of the “Calls to Action” made by the Truth and Reconciliation Commission was to “commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.”\footnote{TRC, supra note 145 at 324.}
longer custodial ranges and a harsher sentencing regime for fentanyl street-level traffickers, courts may focus on deterrence and sentence Indigenous people without an understanding of the existence of systemic discrimination and mass incarceration against Indigenous people in Canada. When courts sentence Indigenous people and emphasize the principle of deterrence, they are shifting away from recognizing the continued harm of colonization to the Indigenous community and the desperate need for alternatives to incarceration.

B. Prescribing Prison for Addiction

Addiction is an illness and it is “characterized by a loss of control over the need to consume the substance to which the addiction relates.”\(^\text{162}\) The courts need to address the role that addiction plays in the crime and the need for rehabilitation when it comes to sentencing individuals who are committing crime to support their addiction.\(^\text{163}\) The same way individuals are not sentenced to prison to get medical treatment, individuals with substance abuse issues should not be given lengthy prison sentences and be expected to rehabilitate.\(^\text{164}\) There is significant research pertaining to how addiction may be caused, including biogenetic predispositions; early life traumatic experiences; and personality.\(^\text{165}\) Further, there are evidence-based treatments for addiction and effective strategies to reduce harm to people who use drugs. Prescribing longer custodial sentences during the opioid crisis ignores the complexities of addiction and the vast medical research.

Addiction should be at the heart of the conversation about individuals’ criminal involvement.\(^\text{166}\) People who use drugs are often motivated by financial gain to pay for the cost of the drug, and as a result substance use is a strong predictor of recidivism. People who are sentenced to a period of incarceration will serve time within a Canadian prison where drugs are often readily available.\(^\text{167}\) Research shows that individuals who are able to

\(^{162}\) R v Hansen, 2012 BCCA 142, 543 WAC 40, citing PHS, supra note 128.
\(^{163}\) Public Services Foundation of Canada, Crisis in Correctional Services: Overcrowding and Inmates with Mental Health Problems in Provincial Correctional Facilities, (2015) at 43.
\(^{165}\) Bettinardi-Angres & Angres, supra note 124.
\(^{166}\) Dackis & O’Brien, supra note 114; Weber et al., supra note 127 at 39.
address their drug problems through substance abuse treatments are less likely to be repeat offenders. The needs of people with substance abuse issues must be central to the criminal justice system. Individuals who are incarcerated are at an increased risk of overdoses and therefore, meaningful prevention interventions need to be employed. The courts should reconsider their approach to the opioid crisis in light of the potential to perpetuate harm.

V. CONCLUSION

BC courts are responding to the opioid crisis with the imposition of increased prison terms. This increase is a result of the British Columbia Court of Appeal’s decision that trafficking in fentanyl requires the enhanced emphasis on deterrence in order to send a strong message to future offenders. BC courts’ emphasis on deterrence for fentanyl trafficking during the opioid crisis is misplaced. Increasing sentence severity does not result in a decrease in the commission of crime through deterrence. Canada is currently taking a very punitive approach to drug crimes and the sentences are influenced in part by the stigmas associated with people who use drugs, and the courts’ reluctance to accept the inefficacy of deterrence. A significant impact of the courts’ actions for fentanyl traffickers will be an increase in the number of individuals incarcerated in Canada, and this will have a particularly harsh impact on people with addictions and Indigenous people. The current focus on punishment ignores that most street-level traffickers are substance users themselves. Attempts to solve criminal justice problems that do not account for the complexities of addiction are ineffective and harmful. This is a public health crisis, not a criminal crisis, and the courts’ current response may exacerbate the harms of the crisis.
