

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.

* This article comprises chapter two of my LLM thesis at the University of British Columbia entitled "The Opioid Crisis as Health Crisis, Not Criminal Crisis: Implications for the Criminal Justice System". While I am thankful to many people for their assistance and support, I would like to specifically acknowledge the insightful feedback of the anonymous reviewers, the editors at the *Manitoba Law Journal*, Kyle McCleery, Catherine Highman, Casey St. Germain, and Professor Debra Parkes. The author is a Crown Attorney with the Public Prosecution Service of Canada. The views expressed in this article are the author's alone and do not represent the views or positions of the Public Prosecution Service of Canada or the Government of Canada.

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.¹ The current opioid crisis in British Columbia has the courts calling for enhanced deterrence and lengthier prison terms.² Over forty years of empirical evidence shows no relationship between increasing sentences and preventing crime.³ 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.⁴ 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

¹ BC Gov News, "Provincial health officer declares public health emergency" (April 14, 2016) online: <<https://news.gov.bc.ca/10694>>; Health Canada, "Government of Canada Actions on Opioids: 2016 and 2017" online: www.canada.ca (2017). *R v Butler*, 2017 BCPC 315 at para 22, 142 WCB (2d) 575 [*Butler*].

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

³ Cheryl Webster & Anthony Doob, "Searching for Sasquatch: Deterrence of Crime Through Sentence Severity" in Joan Petersilia & Kevin R Reitz, eds, *The Oxford Handbook of Sentencing and Corrections*, (New York, : Oxford University Press, 2012) at 2 [*Webster & Doob*].

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.”⁵ 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.⁶ This number is a

⁵ Debra Parkes, “Women in Prison: Liberty, Equality, and Thinking Outside the Bars” (2016) 12 *JL & Equal* 127.

⁶ British Columbia, Ministry of Public Safety & Solicitor General (Office of the Chief Coroner), British Columbia Coroners Service, “Illicit Drug Overdose Deaths in BC January 1, 2008- May 31, 2018” (2018) at 3-4 [BC Coroner]; Estefania Duran & Richard Zussman, “B.C. Marks 2017 as Deadliest O.D. Death Year in Provincial History”, *Global*

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

News (31 January 2018) online: <<https://globalnews.ca/news/3979853/b-c-saw-1422-overdose-deaths-in-2017>> [Duran & Zussman].

⁷ BC Coroner, *supra* note 6 at 3-4.

⁸ BC Centre for Disease Control, *The BC Public Health Opioid Overdose Emergency: March 2017 Update* (British Columbia: Observation Population and Public Health, 2017) at 1.

⁹ Webster & Doob, *supra* note 3.

¹⁰ BC Gov News, "Provincial health officer declares public health emergency" (April 14, 2016) online: <<https://news.gov.bc.ca/10694>>; Health Canada, "Government of Canada Actions on Opioids: 2016 and 2017" online: <www.canada.ca>; Butler, *supra* note 1 at para 22.

¹¹ British Columbia, Report to the Chief Coroner, *BC Coroners Service Death Review Panel: A Review of Illicit Drug Overdoses* (5 April 2018) at 18.

¹² Duran & Zussman, *supra* note 6.

¹³ *R v Toth*, 2017 BCSC 501 at para 35, 138 WCB (2d) 287 [*Toth*]. See also News 1130 Staff, "National Opioid Overdose Numbers Show Crisis Is Hitting the West Hardest" *News 1130* (6 June 2017), online: <www.news1130.com/2017/06/06/national-numbers-opioid-epidemic-show-hitting-west-hardest/>.

¹⁴ *R v Smith*, 2016 BCSC 2148 at para 24, 134 WCB (2d) 510 [*Smith BCSC*].

¹⁵ *R v Smith*, 2017 BCCA 112, 138 WCB (2d) 605 [*Smith BCCA*].

higher potency than heroin.¹⁶ 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.¹⁷ Fentanyl is legally available in patches, sublingual tablets, and intravenous and lozenge form.¹⁸ These forms assist in dealing with chronic pain by administering low levels of fentanyl into the body over a period of several days.¹⁹ 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.²⁰

Drug traffickers are able to drastically increase their profit margin by cutting their substances with fentanyl.²¹ 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.²² 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.²³ 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.²⁴ 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.²⁵ People who overdose from fentanyl die

¹⁶ *Ibid* at para 16.

¹⁷ James Shorthouse, *A Dictionary of Anesthesia*, 2nd ed (Oxford: Oxford University Press, 2017).

¹⁸ Julie Worley, “A Primer on Heroin and Fentanyl” (2017) 55:6 *J Psychosocial Nursing & Mental Health Services* 16 at 17.

¹⁹ *R v McCormick*, 2017 BCPC 22 at paras 32-37, 136 WCB (2d) 712.

²⁰ Worley, *supra* note 18 at 17.

²¹ Tamsyn Burgmann, “Fentanyl Brought to BC by Organized Crime, Experts Say,” *CBC News* (6 August 2015), online: <www.cbc.ca/news/canada/british-columbia/fentanyl-brought-to-b-c-by-organized-crime-experts-say-1.3182229>.

²² Claude Solnik, “The Fentanyl Factor”, *Long Island Business News* (9 November 2017), online: <<https://libn.com/2017/11/09/the-fentanyl-factor/>>.

²³ Donald Ashley, “The Price of Crossing the Border for Medications: Letter” (2017) 377:14 *New England J Medicine* 1699.

²⁴ Worley, *supra* note 18.

²⁵ Justine Hunter, “British Columbia Police Prepare for Growing Fentanyl Crisis,” *The Globe and Mail* (14 June 2016), online: <<https://www.theglobeandmail.com/news/british-columbia/british-columbia-police->

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.²⁶ 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.²⁷ 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.²⁸ 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.²⁹ 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

prepare-for-growing-fentanyl-crisis/article30461855/>.

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.

²⁸ Frederick Desroches, “Research on Upper Level Drug Trafficking: A Review” (2007) 37:4 J Drug Issues 827 at 828; see also *R v Mann and Mann*, 2017 BCPC 401 at para 42 [Mann].

²⁹ *Mann*, *supra* note 28 at para 43.

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.³⁰ These traffickers are considered the lowest rung in the drug hierarchy and are more likely to be detected by law enforcement.³¹ 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.³² 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.”³³ This range is a step up from the six to eighteen-month range for trafficking in other schedule I substances in British Columbia.³⁴ 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

³⁰ *Ibid* at para 42.

³¹ *R v Henry*, 2017 BCSC 1627 at para 44, 141 WCB (2d) 513; Thomas Kerr et al, “Characteristics of Injection Drug Users Who Participate in Drug Dealing: Implications for Drug Policy” (2008) 40:2 J Psychoactive Drugs 147 at 150.

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.³⁵

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 2015.³⁶ The new lengthier range can be applied to individuals if they are trafficking past January 2015.³⁷

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.³⁸

It is an established rule of law that lack of knowledge of the substance is not a mitigating factor.³⁹ 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.

⁴⁴ *R v Porter*, 2017 BCPC 330 at para 69, 142 WCB (2d) 834 [*Porter*]; *R v Joon*, 2017 BCPC 301; *R v Naccarato*, 2017 BCSC 645 at para 93, 138 WCB (2d) 604.

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.⁴⁵ *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.⁴⁶

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.⁴⁷

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.⁴⁸ 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.⁴⁹ 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

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.⁵⁰ Below is a summary of the three exceptional cases and the factors the court considered in finding exceptional circumstances.⁵¹

Case	What the Courts said made the case Exceptional ⁵²
Mr. Joon ⁵³	<ul style="list-style-type: none"> ● <u>Not a drug user</u>; 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 ⁵⁴	<ul style="list-style-type: none"> ● Exceptional because “in his early attempt at age 18 to <u>take control of his own life and his own addiction</u>; that he was able to remain sober throughout his 20s...”⁵⁵ ● A supporter from the treatment facility Mr. Porter attended described that his rehabilitation was so effective that he was “<u>not the same guy</u>” as he was no longer affected by his addiction.⁵⁶
Ms. Naccarato ⁵⁷	<ul style="list-style-type: none"> ● 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.”⁵⁸

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

⁵¹ Emphasis throughout the chart is my own.

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.

⁵³ *R v Joon*, 2017 BCPC 301.

⁵⁴ *Porter*, *supra* note 44 at para 72

⁵⁵ *Ibid.*

⁵⁶ *Ibid* at para 34.

⁵⁷ *R v Naccarato*, 2017 BCSC 645 at para 9, 138 WCB (2d) 604.

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.”⁵⁹ Yet, the remaining people who were motivated by their addiction to engage in street-level drug trafficking were sentenced to custodial sentences.⁶⁰ 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.”⁶¹ 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.⁶² 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.⁶³

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

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.⁶⁴ 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.⁶⁵ There are two forms of deterrence: specific and general.⁶⁶ 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.⁶⁷ Imposing general deterrence will often result in a harshening of the sentence.⁶⁸ As a result, when courts focus on deterrence it tends to result in

⁶⁴ Webster & Doob, *supra* note 3 at 175.

⁶⁵ *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*.

⁶⁶ *Criminal Code*, RSC 1985, c C46, s 718(b).

⁶⁷ 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.

⁶⁸ *BWP*, *supra* note 65 at para 36.

the imposition of prison sentences or an increase of the length of jail sentences.⁶⁹ 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.⁷⁰ Deterrence through severity, or “DTS,” is the theory that crime may be decreased if the severity of punishment is increased.⁷¹ Research indicates harsher sentences do not achieve even a marginal effect on the deterrence of crime.⁷² 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.⁷³

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.⁷⁴ This encapsulates the same view economists have that “higher prices lower the demand, and that human beings are rational decision-makers.”⁷⁵ Highway traffic offences, including speeding tickets may coincide with this, but this rational decision making does not align with the reality of most crimes.⁷⁶ Crimes are frequently committed under the influence of intoxicants, “powerful emotions, or situational pressures.”⁷⁷ Further, the more serious crimes are considered morally wrong and most

⁶⁹ *Ibid.*

⁷⁰ Webster & Doob, *supra* note 3 at 2.

⁷¹ *Ibid.*

⁷² Michael Weinrath & John Gartrell, “Specific Deterrence and Sentence Length” (2001) 17:2 *J Contemporary Criminal Justice* 105.

⁷³ Webster & Doob, *supra* note 3 at 7.

⁷⁴ *Ibid* at 8.

⁷⁵ *Ibid.*

⁷⁶ Jeffrey Howard, “Punishment as Moral Fortification” (2017) 36:1 *L & Philosophy* 45 at 48.

⁷⁷ Webster & Doob, *supra* note 3 at 9.

people would not commit them regardless of the penalty.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.⁷⁹

The evidence that deterrence through severity is ineffective was referred to in the Supreme Court of Canada decision of *R v Nur*.⁸⁰ As discussed by Debra Parkes, the Supreme Court's decision in *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."⁸¹ The Supreme Court acknowledged the literature to ultimately say, "mandatory minimum sentences do not, in fact, deter crimes."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.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."⁸⁴

⁷⁸ *Ibid.*

⁷⁹ Daniel S Nagin, Francis T. Cullen & Cheryl Lero Jonson, "Imprisonment and Reoffending" (2009) 38 Crime & Justice 115.

⁸⁰ *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 [*Nur*].

⁸¹ *Ibid* at para 113 as cited in Debra Parkes, "Punishment and Its Limits" Forthcoming in (2018) Supreme Court Law Review.

⁸² *Nur*, *supra* note 80 at para 114.

⁸³ Webster & Doob, *supra* note 3 at 9.

⁸⁴ *Ibid.*

The Four Main Requirements of Deterrence and the Corresponding Reality ⁸⁵				
Requirement	Individuals will be aware that the punishment for trafficking for fentanyl is harsher.	The potential offender will evaluate their actions and weigh the consequences prior to engaging in criminal activity. ⁸⁶	Individual offenders will view the increased penalty as costly or punitive. ⁸⁷	Individuals will believe they are likely to get arrested for the offence and receive the punishment.
Reality	Public opinion polls show that most individuals are unaware of the maximum sanctions for offences, and what crimes have mandatory minimums. ⁸⁸ Further research shows that people are generally unaware of the punishment levels in their communities. ⁸⁹	Many offences are committed in the “heat of the moment” or are guided by impulse or sway of emotion. ⁹⁰ Individuals are often motivated by their circumstances including poverty and substance abuse.	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. ⁹¹	Individuals perceive the probability of being arrested as low, and the statistics of reported crimes reflect this.

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at 10.

⁸⁷ *Ibid.*

⁸⁸ *Ibid* at 9.

⁸⁹ *Ibid* at 10 citing Anothony Doob and Julian Roberts, “Crime and the Official Response to Crime: View of the Canadian Public” (1982) Ottawa: Department of Justice, Canada.

⁹⁰ *Ibid.*

⁹¹ *Ibid* citing Stephen Baron et al., “Deterrence and Homeless Male Street Youths” (1998) 40:1 Can J Crim 27. See also Dr. Evan Wood Expert Opinion Letter to BC Courts

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.⁹² 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.⁹³ 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.⁹⁴ 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.”⁹⁵ 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.”⁹⁶ In a study conducted in the Downtown Eastside,

dated September 2017.

⁹² American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders*, 5 Ed (DSM-5), (Arlington, VA: APA, 2013).

⁹³ Jiang Yu, Peggy Chin Evans & Lucia Perfetti Clark, “Alcohol Addiction and Perceived Sanction Risks: Deterring Drinking Drivers” (2006) 34:2 J Criminal Justice 165.

⁹⁴ *Ibid* at 172.

⁹⁵ *R v Preston*, 1990 BCCA 576 at 15, 47 BCLR (2d) 273.

⁹⁶ Pivot Legal Society, “Prosecuting Fentanyl Trafficking Offences” (2017), online: <www.pivotlegal.org/fentanyl_sentencing>.

there were 412 Intravenous Drug Users who participated and 68, or 17%, of them disclosed they had dealt drugs during the previous six months.⁹⁷ 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."⁹⁸ 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 2006.⁹⁹ 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.¹⁰⁰ Scholars have noted that this approach did "little to address the root causes of crime."¹⁰¹ 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.¹⁰² Illicit drug use was emphasized as a criminal problem and not a public health issue.¹⁰³ 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*.

¹⁰¹ Susan Boyd, Connie Carter & Donald MacPherson, *More Harm Than Good: Drug Policy in Canada* (Halifax: Fernwood Publishing, 2016) at 36.

¹⁰² Shelley Marshall, "Canadian Drug Policy and the Reproduction of Indigenous Inequities" (2015) 6:1 *Intl Indigenous Policy J* 1 at 2.

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 severe¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹

Canada in support of Bill C-10).

¹⁰⁴ Susan C Boyd & Connie Carter, “Killer Weed: Marijuana Grow Ops, Media, and Justice” (Toronto: University of Toronto Press, 2014) at 5.

¹⁰⁵ Statistics Canada, “Police-Reported Crime Statistics in Canada,” by Samuel Perreault, in *Component of Statistics Canada*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2012), online: <www.statcan.gc.ca/pub/85-002-x/2013001/article/11854-eng.pdf>, as cited in Marshall, *supra* note 102 at 2.

¹⁰⁶ *Ibid.*

¹⁰⁷ Parkes, *supra* note 5 at 131.

¹⁰⁸ 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.

¹⁰⁹ 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

Reduction" (2015) 38:2 Dalhousie LJ 448.

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.

¹¹¹ Pivot Legal Society, *Throwing Away the Key: The Human and Social Cost of Mandatory Minimum Sentences* (Vancouver: Pivot Legal Society, 2013) at 1.

¹¹² Durrant, Fisher & Thun, *supra* note 67 at 150. Robert J MacCoun, "Moral Outrage and Opposition to Harm Reduction" (2013) 7:1 Crim L & Philosophy 83 at 86, 91.

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.”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.¹¹⁶ Members of the public who are provided context, as well as a choice, do not necessarily favour a punitive sentence.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. *The Crisis of Stigmas*

The message to reduce stigma experienced by people who use drugs is an important response to the opioid crisis.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.¹¹⁹ There have been no recorded deaths at

Policy Ramifications” (2005) 8:11 *Nature Neuroscience* 1431 at 1431. See also, Heather Henderson, *I Am More Than My Addiction: Perceptions of Stigma and Access to Care in Acute Opioid Crisis* (MA Thesis, University of South Florida College of Arts and Sciences, 2018).

¹¹⁵ Webster & Doob, *supra* note 3.

¹¹⁶ Kimberly Varma & Voula Marinou, “Three Decades of Public Attitudes Research on Crime and Punishment in Canada” (2013) 55:4 *Can J Corr* 549.

¹¹⁷ *Ibid* at 551.

¹¹⁸ See Boston University School of Public Health, Dean’s Seminar Series on Contemporary Issues in Public Health, “The Opioid Epidemic: Why Cops are Sending People with Addiction to Treatment instead of Jail” (16 March 2016), online: <www.bu.edu/sph/news-events/signature-programs/deans-seminars/deans-seminar-series-on-contemporary-issues-in-public-health/deans-seminar-series-on-contemporary-issues-in-public-health-2015-2016/the-opioid-epidemic-why-cops-are-sending-people-with-addiction-to-treatment-instead-of-jail/>.

¹¹⁹ BC Coroner, *supra* note 6 at 12.

the overdose prevention sites or supervised consumption sites in BC.¹²⁰ The majority of overdose deaths are of men, and individuals between the ages of 30-49.¹²¹

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.”¹²² 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.¹²³ While research has advanced dramatically to allow for a comprehensive understanding of addiction, the criminal justice system lags behind.¹²⁴ Individuals with addiction issues face custodial sentences at a high rate. Statistics show that 90% of people in Canadian federal

¹²⁰ Vancouver Coastal Health, “Insite user statistics” (February, 2018) online: <http://www.vch.ca/public-health/harm-reduction/supervised-injection-sites/insite-user-statistics>.

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.¹²⁵ In 2002, Canada reached an all-time high for charges recorded under the *Controlled Drugs and Substances Act*: 93,000.¹²⁶ The evidence shows that people who use drugs are overrepresented within the justice system.¹²⁷

In the *PHS Community Services Society* case, the operation of the safe injection site, Insite, was ultimately upheld by the Supreme Court.¹²⁸ 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.¹²⁹ 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.¹³⁰

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.¹³¹

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

¹²⁵ Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2015-2016*, by Howard Sapers (Ottawa: Office of the Correctional Investigator, 2017) [OCI Report 2015-2016].

¹²⁶ Thomas, *supra* note 123.

¹²⁷ Weber et al., "Treatment and Punishment of Drug-Addicted Offenders: Insights from a Quantitative Empirical Survey" in Richard Soyer & Stefan Schumann, eds, *Treatment Versus Punishment for Drug Addiction: Lessons from Austria, Poland, and Spain* (Austria: Springer, 2015) at 39.

¹²⁸ *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 at para 7, [2011] 3 SCR 134 [*PHS*].

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.

¹³⁴ *Ibid* citing *R v Johnson*, (1996), 112 CCC (3d) 225 at para 29, [1996] BCJ No 2508 (QL). [emphasis added].

¹³⁵ *Ibid*.

particularly impact individuals in vulnerable groups, including Indigenous people and individuals who use substances.¹³⁶

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?”¹³⁷ 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.¹³⁸

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.¹³⁹ 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.¹⁴⁰

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.¹⁴¹ 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.¹⁴² In

¹³⁶ Webster & Doob, *supra* note 3 at 17-18.

¹³⁷ 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.

¹³⁸ *Ibid*; Parkes, *supra* note 5 at 142; OCI Report 2015-2016, *supra* note 125.

¹³⁹ *R v Gladue*, [1999] 1 SCR 688 at para 53, [1999] SCJ No 19 (QL) [Gladue].

¹⁴⁰ *House of Commons*, Sub-Committee on the Penitentiary System in Canada [Ottawa: Minister of Supply and Services, 1977] (Chair: Mark MacGuigan).

¹⁴¹ OCI Report 2015-2016, *supra* note 125 at 4.

¹⁴² Howard, *supra* note 76 at 59-60.

particular, people who are incarcerated for drug offences have higher recidivism rates than other offenders.¹⁴³ 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%.¹⁴⁴ 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 is 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

¹⁴³ Don Andrews & Craig Dowden, "Managing Correctional Treatment for Reduced Recidivism: A Meta-Analytic Review of Programme Integrity" (2005) 10:2 *Legal & Criminological Psychology* 173 at 177.

¹⁴⁴ B.C. Civil Liberties Association, *Justice Denied: The Causes of B.C.'s Criminal Justice System Crisis* (Vancouver: BCCLA, 2012) at 29, citing The John Howard Society of Toronto, *Homeless and Jailed: Jailed and Homeless* (Toronto: The John Howard Society of Toronto, 2010).

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.¹⁴⁵

There has been a significant increase in the overrepresentation of Indigenous people in Canada's prison system and this overrepresentation continues to grow.¹⁴⁶ While Indigenous people made up 3% of the adult population of Canada between 1995-1996, Indigenous people accounted for 16% of people sentenced to custody during that time.¹⁴⁷ In the most recent report from statistics Canada, analyzing the years 2016-2017, Indigenous adults "accounted for 28% of admissions to provincial/territorial correctional services and 27% for federal correctional services, while representing 4.1% of the Canadian adult population."¹⁴⁸ Canada's Correctional Investigator attributes the growth in the prison population in the past decade to the incarceration of Canada's marginalized populations, including Indigenous people and people struggling with addictions.¹⁴⁹

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

¹⁴⁵ 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.

¹⁴⁶ *R v Williams*, [1998] 1 SCR 1128 at para 58, [1998] SCJ No 49 (QL), as cited in *Gladue*, *supra* note 139 at para 61.

¹⁴⁷ In 2011-12 that number had grown to 28% of all admissions to sentenced custody. Micheline Reed & Julian V Roberts, "Adult Correctional Services in Canada 1996-1997" (1998) 18:3 *Juristat* 1 at 7; TRC, *supra* note 145 at 170.

¹⁴⁸ Jamil Malakieh, Canadian Centre for Justice Statistics, "Adult and Youth Correctional Statistics in Canada, 2016/2017" Statistics Canada, June 19, 2018. See also: Statistics Canada, Canadian Centre for Justice Statistics, *Adult Correctional Statistics in Canada: 2015/2016*, Julie Reitano, Catalogue No 85-002-X, (Ottawa: Statistics Canada 2017).

¹⁴⁹ Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2014-2015*, by Howard Sapers (Ottawa: Office of the Correctional Investigator, 2015), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx>.

the residential school system.”¹⁵⁰ 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.¹⁵¹

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.¹⁵² 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.’”¹⁵³

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.¹⁵⁴ A Special Report by the British Columbia Provincial Health Officer noted the specific harm to

¹⁵⁰ Marshall, *supra* note 102 at 5-6.

¹⁵¹ First Nations Health Authority, “Overdose Data and First Nations in BC: Preliminary Findings” (2017) at 7 online: <http://www.fnha.ca/newsContent/Documents/FNHA_OverdoseDataAndFirstNationsInBC_PreliminaryFindings_FinalWeb.pdf>.

¹⁵² Marshall, *supra* note 102 at 5. See also Pan et al., “The Cedar Project: Impacts of Policing Among Young Aboriginal People Who Use Injection and Non-injection Drugs in British Columbia, Canada” (2013) 24:5 *Intl J of Drug Policy* at 449.

¹⁵³ Elizabeth Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police* (Winnipeg: Fernwood Publishing, 2012).

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 over-incarceration of Indigenous people in prison, and have been struck down by the courts for being unconstitutional.¹⁵⁵

The Supreme Court of Canada offered a response to the mass incarceration of Indigenous people through the decision of *R v Gladue*.¹⁵⁶ *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.”¹⁵⁷ The Supreme Court of Canada’s decision in *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.¹⁵⁸ All areas of the criminal justice system need to apply the principles set out within *Gladue* to develop culturally appropriate sanctions and prison should be a last resort.¹⁵⁹ While there are problems with the implementation of *Gladue*, the decision to apply longer sentences for fentanyl traffickers does not account for the mass incarceration of Indigenous people in Canada.¹⁶⁰

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.”¹⁶¹ In setting

¹⁵⁵ TRC, *supra* note 145 at 170; *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130.

¹⁵⁶ *Gladue*, *supra* note 143.

¹⁵⁷ *Criminal Code*, *supra* note 66 at s. 718 (2)(e).

¹⁵⁸ *Gladue*, *supra* note 139. More recently, in *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.

¹⁵⁹ *Gladue*, *supra* note 139 at para 48.

¹⁶⁰ Beckerman & Fontana, *supra* note 124.

¹⁶¹ 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.”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.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.¹⁶⁴ There is significant research pertaining to how addiction may be caused, including biogenetic predispositions; early life traumatic experiences; and personality.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.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.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.

¹⁶⁴ Paul Smith, “The human cost of the prison system’s failure to deal with drug addiction and mental illness” (2007) 27:37 *Insite Out Prison Health*.

¹⁶⁵ Bettinardi-Angres & Angres, *supra* note 124.

¹⁶⁶ Dackis & O’Brien, *supra* note 114; Weber et al., *supra* note 127 at 39.

¹⁶⁷ Emily Van Der Meulen, “‘It Goes on Everywhere’: Injection Drug Use in Canadian Federal Prisons” (2017) 52:7 *Substance Use & Misuse* 884.

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.¹⁶⁸ Individuals who are incarcerated are at an increased risk of overdoses and therefore, meaningful prevention interventions need to be employed.¹⁶⁹ 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.

¹⁶⁸ Jonathan K. Burns, "Mental Health and Inequity: A Human Rights Approach to Inequality, Discrimination and Mental Disability" (2009) 11:2 *Health and Human Rights* at 19.

¹⁶⁹ Stuart A Kinner et al, "Incidence and Risk Factors for Non-Fatal Overdose Among a Cohort of Recently Incarcerated Illicit Drug Users" (2012) 37:6 *Addictive Behaviors* 691.