

# THROWING AWAY The Keys

The human and social cost  
of mandatory minimum  
sentences



**PIVOT**  
equality lifts everyone

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Every legal problem is unique. The legal analysis in this report is general and provided for informational purposes only. If you are facing a legal problem speak to a lawyer.

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# CONTENTS

<b>Executive Summary</b>	<b>v</b>
<b>1. Introduction</b>	<b>01</b>
<b>2. The SSICA: Low-income drug users and Canada's new legal landscape</b>	<b>04</b>
a. Mandatory minimum sentences for drug offences	04
b. Changes to the <i>Youth Criminal Justice Act</i>	05
c. Changes to conditional sentence provisions	06
d. Criminal records and record suspensions	07
<b>3. Canada's new crime bill and the realities of drug users' lives</b>	<b>09</b>
a. New mandatory minimums and low-income drug users	09
b. The youth criminal justice system and adult criminality	11
c. The effects of incarceration	12
d. Conditional sentences as an alternative to incarceration	17
e. Mandatory minimums and deterrence	18
<b>4. Life stories of drug users in context: A review of the literature</b>	<b>21</b>
a. Goals and effectiveness of mandatory minimums for drug crimes	21
b. The impacts of imprisonment: individuals, families, and communities	23
c. The role of Drug Treatment Courts	23
d. The financial costs of "tough on crime" measures	24
<b>5. Charter implications of the SSICA</b>	<b>27</b>
a. Engagement of <i>Charter</i> rights	27
b. Section 12	27
c. Section 7	29
d. Section 15	33
e. Section 1	35
<b>6. Conclusion</b>	<b>39</b>
<b>Endnotes</b>	<b>41</b>



*One reason it is hard to go to jail is, if you are a parent, you get separated from your kids. They go to a social service foster home. So your kids get traumatized by that, it's a life experience that can't be reversed.*

—Jaqueline, p. 12





## EXECUTIVE SUMMARY

Crime rates in Canada are at their lowest point since 1972, yet last year Canada's federal government introduced sweeping legislative reforms to our criminal justice system. The stated goal of these expansive and expensive measures is to increase the safety and security of Canadians by getting "tough on crime" and holding offenders accountable.

The *Safe Streets and Communities Act* (SSCA), alternately known as Bill C-10 and the "Omnibus Crime Bill," was passed by Parliament on March 12, 2012. When the SSCA was debated in Parliament, Canadians were told that many provisions of the *Act*, including the introduction of mandatory minimum sentences for a number of drug offences, would target "serious organized drug crime" rather than people struggling with drug dependence. Many well-respected commentators, including the Canadian Bar Association, the Canadian Centre for Policy Alternatives, and the Assembly of First Nations have argued, however, that these amendments will affect a spectrum of drug offenders, including people involved in the sale and/or production of illicit substances as a result of their struggle with drug dependence.

Pivot Legal Society undertook this research in order to assess the potential scope and nature of the effects of the *Safe Streets and Communities Act* on low-income drug users. We also sought to examine whether new criminal law provisions were likely to raise constitutional issues, particularly when applied to members of *Charter*-protected groups, such as Aboriginal people and people with disabilities (including drug dependence).

**Our conclusion is that several provisions of the SSCA, including mandatory minimum sentences for certain drug offences, are unlikely to achieve their stated goals of deterrence and disruption of organized crime.** Our findings also suggest that these "tough on crime" measures will be costly, both economically and socially, and will have disproportionate negative effects for people living with drug dependence, Aboriginal people, and youth in or leaving the foster care system. Finally, we make the argument that the application of a number of provisions of the SSCA may result in violations of the *Charter* rights of low-income drug users and other protected groups and may therefore be vulnerable to constitutional challenge.

## STUDY OVERVIEW

The SSCA is an enormous piece of legislation that combines nine previous crime bills into one *Act*. We began this project by analyzing the legislation to determine which particular provisions were likely to affect the very low-income illicit drug users that we work with at Pivot Legal Society. This analysis was supplemented by the insights and experiences of low-income drug users. We identified four components of the SSCA that we believe are of particular concern for this demographic:

- The introduction of mandatory minimum sentences for a number of drug offences;
- Restrictions of the use of conditional sentences;
- Changes to the conditions under which pardons (now called record suspensions) can be granted; and
- Changes to the *Youth criminal Justice Act*.

Through conversations with impoverished drug users about their experiences with the criminal justice system, we were able to evaluate whether these legislative changes might affect people in their position, and what the implications of more frequent or longer stretches of imprisonment might be for people with living with drug dependence.

In total, we conducted 19 *life story* interviews with low-income drug users in Vancouver and Victoria during June and July of 2012. We then looked to the scholarly literature on mandatory minimum sentencing and penal policy, as well as economic analyses of the costs of some of the new provisions, to place drug users' stories and perspectives in context. Finally, we analyzed various issues raised in the life stories of participants in light of current interpretations of the *Canadian Charter of Rights and Freedoms*. We concluded the report by presenting a number of possible avenues for challenging certain provisions of the SSCA on behalf of drug dependent and other marginalized people who are likely to be affected.

## KEY FINDINGS

- The provisions of the SSCA we analyzed are likely to affect many marginalized people, including people living both with drug dependence and in deep poverty. Given that the provisions of the SSCA have only been in force for a short time, quantitative data is not yet available on the number of low-income drug users impacted by the legislation. However, the life stories shared by participants, including patterns of arrest and conviction, suggest that this demographic group is likely to be affected by many provisions of the SSCA including new mandatory minimum sentences for some drug crimes.
- “Tough on crime” measures, including mandatory minimum sentences are not an effective deterrent for people experiencing poverty and drug dependence. Both the life stories of participants in this study and the relevant literature suggest that the assumption that people engage in a cost/benefit analysis before committing a crime is faulty when applied to people who are dependent on drugs, who are very economically marginalized or who are struggling with the social and psychological effects of past imprisonment.
- The application of these provisions will negatively affect the health and well-being of drug dependent people and marginalized communities more broadly. The effects of longer and more frequent periods of incarceration include deepening drug dependence, transmission of diseases, psychological harms, failure to develop healthy coping and interpersonal skills, learned dependence on the prison institution, loss of supportive and protective relationships, loss of future employment opportunities, and elevated rates of recidivism.
- **There is a lack of support for successful re-integration into community for people who have been in prison.** Re-integration challenges are compounded by longer and more frequent prison sentences, parole conditions that do not take into account homelessness, drug dependency, and by the presence of a criminal record. The lack of support for individuals released from prison also places a disproportionate burden on their families and communities.
- **There will be heavy economic costs associated with provisions of the SSCA analyzed in this report.** These costs are both economic and social. The economic costs

will be borne largely by the provinces and run the risk of diverting resources away from poverty reduction and other prevention and treatment strategies that address the root causes of criminal justice system involvement.

## CHARTER IMPLICATIONS OF RESEARCH FINDINGS

A key goal of this project was to look at whether harms associated with more forceful criminal justice system responses to people living with drug dependence have the potential to violate *Charter* rights.

The *Charter of Rights and Freedoms* is a constitutional document that both guarantees and describes limits on the fundamental rights of people in Canada. Any law passed by the government must be in accordance with the rights that are spelled out in the *Charter*. Three sections of the *Charter* are potentially engaged by mandatory minimum sentences and other changes brought into force through the SSCA:

- *Section 12* (Right to not be subjected to cruel and unusual treatment);
- *Section 7* (Right to life, liberty, and security of the person and the right to not be deprived of these unless in accordance with the principles of fundamental justice); and
- *Section 15* (Right to equal treatment and protection under the law for historically disadvantaged groups).

Since the *Charter* came into force in 1982, challenges to sentencing provisions have largely been based on the protection against being subjected to cruel and unusual treatment or punishment found in *Section 12*. However, the standards set by judges deciding cases under this provision are very difficult to meet. While Parliament’s ability to craft various punishments is not absolute, courts generally respect the separation of powers and exercise restraint by deferring to Parliament in most cases. As a result, in practice, a finding of cruel and unusual punishment is a rare event.

In this report we make the case that *Sections 7* and *15* of the *Charter*, in contrast, open new avenues for challenging the constitutionality of the amendments brought about by the SSCA. When viewed contextually through the lens of marginalized, drug dependent offenders – often people with other characteristics that compound their marginalization, such as poverty or mental health issues – mandatory minimum



sentences are likely to unconstitutionally deprive people of their liberty and security of the person, and/or discriminate against them in their application.

The courts have not yet opined on how mandatory minimums might stand up to challenges brought under *Charter* Section 7; however, the life stories of the participants describe conditions by which the provisions of the SSCA are likely to engage this *Charter* right. Given the courts' expansive use of *Section 7* of the *Charter* in protecting the rights of marginalized communities in recent years, including the rights of homeless persons, sex workers, and injection drug users, *Section 7* may prove to be the most fruitful avenue for challenging the provisions brought in by the SSCA, including mandatory minimum sentences.

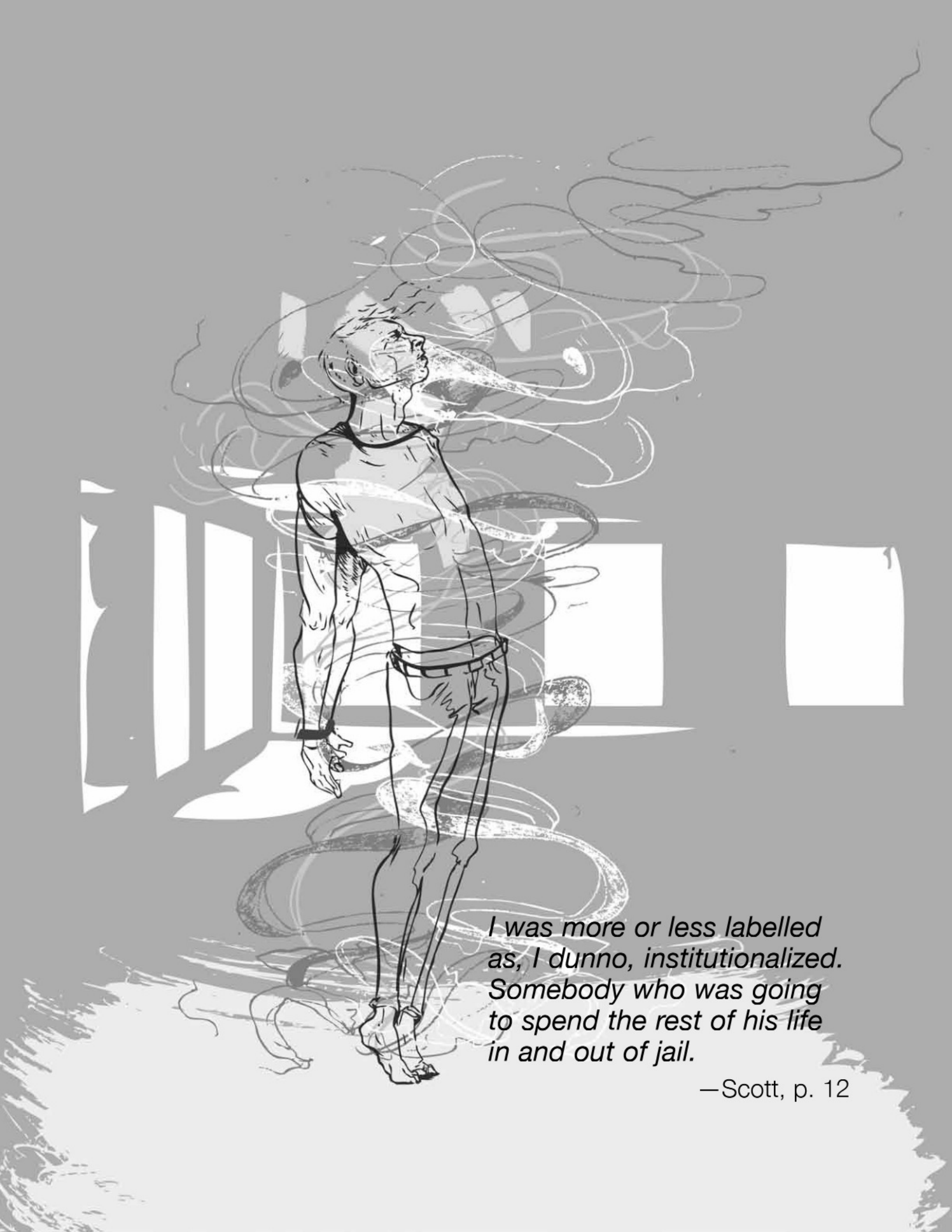
The life stories in this report demonstrate that prison sentences can have very different consequences for different populations. Young people, mothers separated from their children, Aboriginal offenders, and people with disabilities (including mental health issues and drug dependency) are disproportionately negatively affected by prison. Based on the stories of participants, as well as legal and social scientific research, it is reasonable to conclude that this new legislation may compromise the *Charter* rights of members of vulnerable communities whose equality rights are guaranteed under *Section 15*.

Either of these lines of legal argument would have to pass a number of rigorous juridical tests. However, as the life stories of the participants in the report clearly demonstrate, if left unchallenged, the SSCA is likely to intensify already discriminatory trends in our criminal justice system that endanger the security of the person of some of our society's most vulnerable members.

## A "CALL TO ARMS" FOR THE LEGAL PROFESSION

Legislation that is discriminatory and infringes the *Charter* rights of the most marginalized people in our society cannot be allowed to stand. One effective way to reverse this misguided legislation is for lawyers representing people captured by these provisions to challenge them in court using some or all of the grounds discussed in this report. With the support of the legal community and non-governmental organizations working in partnership, we can overturn these mandatory minimum sentences and restore more balance to the justice system for people who live on the margins of our society.





*I was more or less labelled  
as, I dunno, institutionalized.  
Somebody who was going  
to spend the rest of his life  
in and out of jail.*

—Scott, p. 12



## CHAPTER 1: INTRODUCTION

The *Safe Streets and Communities Act* (SSCA), alternately known as Bill C-10 and the “Omnibus Crime Bill,” was passed by Parliament on March 12, 2012. When the SSCA was debated in Parliament, Canadians were told that many provisions of the SSCA, including proposed legislative amendments that introduced mandatory minimum sentences for some drug offences, would target “serious organized drug crime” rather than people with addictions and other low-income people involved in criminal activity as a means of survival.

However, a number of well-respected commentators, including the Canadian Bar Association,<sup>1</sup> The Canadian Centre for Policy Alternatives,<sup>2</sup> and the Assembly of First Nations<sup>3</sup> have taken the position that these amendments, including changes to the *Controlled Drugs and Substances Act*, will affect a spectrum of drug offenders, including people involved in the sale and/or production of illicit substances to support an addiction.

Pivot Legal Society undertook this project in order to assess the potential effects of the *Safe Streets and Communities Act* on low-income people who are dependent on drugs and to explore whether the new criminal law provisions in the SSCA might raise potential *Charter* rights violations, particularly when applied to members of *Charter*-protected groups, including people with disabilities (including dependency on drugs). In taking on this project, we set out to answer four questions:

1. Are provisions of the SSCA, including mandatory minimum sentences for certain drug offences, likely to apply to drug dependent drug users who engage in criminal activity to support a dependency?
2. If so, how might drug users, and marginalized communities more generally, be affected by these new sentences and other changes resulting from the SSCA?
3. Are the potential impacts of these new provisions likely to engage the liberty, security of the persons, and/or equality rights of impacted communities?
4. If so, are any of these new laws vulnerable to a constitutional challenge?

In this report, we look at several of the changes that the SSCA introduced to the *Controlled Drugs and Substances Act* (CDSA), the *Youth Criminal Justice Act* (YCJA), the

*Criminal Code of Canada* (“*Criminal Code*”), and the *Criminal Records Act* (CRA) through the lens of drug users’ life stories. We also look to the scholarly literature on mandatory minimum sentencing, drug policy, and penal policy and outcomes, as well as economic analyses of the costs of some of the new provisions to place drug users’ stories and perspectives in context.

Based on the findings of this research, we take the position that the provisions of the SSCA considered in this report, including mandatory minimum sentences for drug offences, are unlikely to achieve their stated goals of deterrence of criminal behaviour or addressing organized crime. We also take the position that they are very likely to be costly for society as a whole and to have disproportionate negative outcomes for people living with drug dependency, Aboriginal people, and youth in or leaving the foster care system. Finally, we make the argument that the application of a number of provisions introduced as part of the SSCA may result in violations of the *Charter* rights of low-income drug users and other protected groups and that these provisions may, in some instances, be vulnerable to constitutional challenge.

## REPORT OVERVIEW

To better understand the potential implications of the *Safe Streets and Community Act*, we began this project by analyzing the legislation to determine which particular provisions were likely to affect the very low-income illicit drug users that we work with at Pivot Legal Society. We initially identified three components of the SSCA that we believed were of particular concern:

- The introduction of mandatory minimum sentences for a number of drug offences;

- Restrictions of the use of conditional sentences; and
- Changes to the conditions under which pardons (now called record suspensions) can be granted.

When we sat down one-on-one with marginalized drug users living in Vancouver and Victoria, British Columbia, to discuss their past criminal charges, their experiences of incarceration, and their reflections on the role of the criminal justice system in addressing drug dependency, we identified a fourth area of law that was of concern to this community: changes to the YCJA. We chose to include this aspect of the SSCA because, when viewed through the lens of drug users' life stories, we saw that the impact of the youth criminal justice system could not be separated from drug dependency and future involvement in the adult criminal justice system. Relevant amendments in these four areas of law are laid out in Chapter 2 of this report.

Chapter 3 of this report focuses on the experiences and perspectives of low-income drug users who have been, or are currently, involved with the criminal justice system. In total, we conducted 19 *life story*<sup>4</sup> interviews in June and July of 2012. All of the 19 interview participants were recruited through groups run by and for drug users. The interviews took place in locations that participants considered familiar and supportive spaces. Through conversations with impoverished drug users about their experiences with the criminal justice system, we were able to evaluate whether these legislative changes might affect people in their position, and what the implications of more frequent or longer stretches of imprisonment might be for people dependent on illicit drugs.

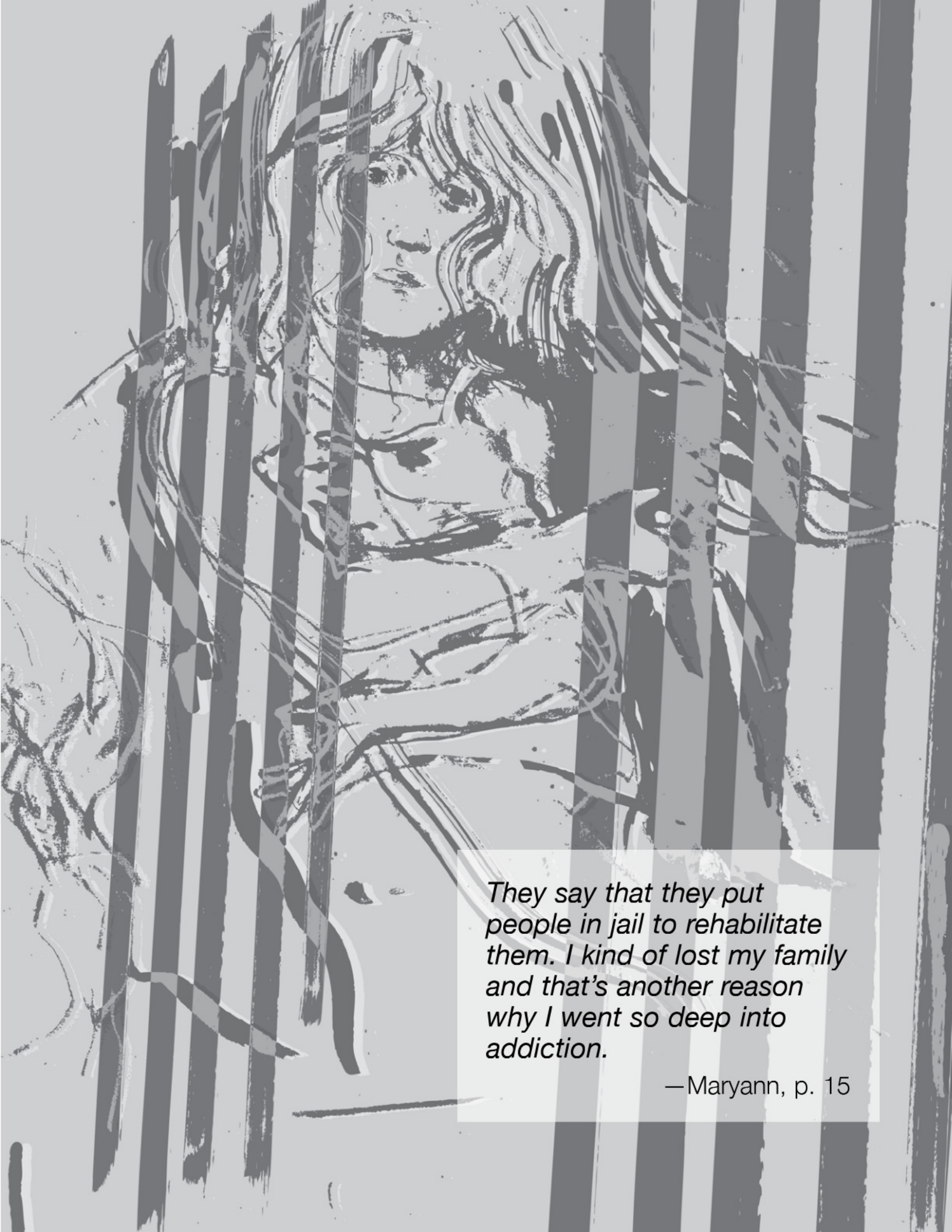
Once we had identified aspects of the SSCA that are most likely to have impacts on the lives of low-income people

who use drugs in Canada and their broader communities, and what drug users believed those impacts might look like, we turned to the social science and economic literature. We explored the impacts of similar criminal justice policies for people affected by them and the potential costs of these policies both socially and financially. Chapter 4 of this report provides a brief overview of some of that large body of literature. The themes that emerged through our interviews mirror the consensus of social science, medical and legal literature: imprisonment has a limited ability to address the causes of crime; drug dependency is not responsive to criminal penalties; there is a long shadow of harm cast by incarceration on low income communities, families, and children; lengthy prison sentences produce pathologies of trauma in individuals; and offenders experience challenges in being reintegrated into society.

In undertaking this project, we were interested in whether a case could be made that in some instances mandatory minimum prison sentences and other legislative measures explored in this research may constitute discriminatory treatment, be cruel and unusual punishment, and/or be an otherwise unjustified threat to the liberty and security of those sentenced, particularly when those sentenced are marginalized people. In Chapter 5 of this report, we look at potential ways in which aspects of the SSCA that we have looked at in this research may result in infringements of *Charter* rights and values. We also lay out potential avenues for challenging the constitutionality of particular provisions of the SSCA as they relate to low-income people who use drugs and other marginalized communities that are disproportionately represented in Canada's prison population.







*They say that they put people in jail to rehabilitate them. I kind of lost my family and that's another reason why I went so deep into addiction.*

—Maryann, p. 15

## CHAPTER 2: THE SSCA: LOW-INCOME DRUG USERS AND CANADA'S NEW LEGAL LANDSCAPE

When the SSCA was introduced, one of the most notable aspects of the legislation was its breadth. The SSCA is the result of a single “omnibus” bill that packaged together nine previous federal bills that had been introduced to Parliament at various points but had never been successfully enacted into law. In order to make this project manageable, we began by analyzing the legislation to determine which of the many changes to Canadian law resulting from the SSCA were most likely to affect low-income people who use drugs, their families, and their communities.

We identified four broad areas of legal change that we believe might negatively impact the communities we work with:

- The introduction of mandatory minimum sentences for some drug offences
- Changes to the *Youth Criminal Justice Act*
- Restrictions on the use of conditional sentences
- New provisions related to criminal records and record suspensions (pardons)

In this chapter, we lay out and explain some of the specific changes introduced by the SSCA in each of these four areas which are likely to impact the participants in this study and people in similar situations, and touch briefly on why we have identified these amendments as being of concern for low-income drug users.

### A. MANDATORY MINIMUM SENTENCES FOR DRUG OFFENCES

When the SSCA was being debated in Parliament and in the media, some of the most controversial aspects of the legislation were the changes to sentencing laws. The SSCA introduced mandatory minimum sentences for a number of new offences. Included in these changes are Canada’s only mandatory minimum sentences for drug offences under the *CDSA*, the statute governing illicit and licit drugs that are regulated by the federal government. Some specific clauses of the SSCA that altered the *CDSA* are as follows:

**Clause 39** amended s. 5(3)(a) of the *CDSA*. It created a mandatory minimum sentence of one year in prison for trafficking or possession for the purpose of trafficking of any Schedule I or II drug, including marijuana, if one of these four aggravating factors identified is met:

- Involvement with organized crime;
- Threat or use of violence;
- Use, threat of use, or possession of a weapon; or
- The person was convicted of a “designated substance offence” (DSO) or had served a term in prison for a DSO within the past decade.<sup>5</sup>

Many people living with long-term drug dependency have been convicted of a DSO in the past. Given that drug dependency is a chronic condition, and that prison has the potential both to intensify drug dependency and to limit future employment opportunities, this aggravating factor, as we will see in subsequent chapters, is likely to be the major reason that low-income drug users will be subject to mandatory minimum sentences, but not the only reason.

Section 467.1 of the *Criminal Code of Canada* defines a criminal organization as a group, however organized, that:

- (a) is composed of three or more persons in or outside Canada; and,
- (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.<sup>6</sup>

Involvement with organized crime is defined so broadly that many low-income drug users who engage in some form of trafficking or production-related activities to support their drug dependency or meet other basic needs run the risk of being caught under this provision, as we will see in Chapter 3.

The amendments to the *CDSA* also set out another set of aggra-



vating factors that attract a mandatory minimum sentence of two years for trafficking or possession for the purpose of trafficking. These include cases where a trafficking offence is:

- Committed near a school or other public place frequented by minors;
- Committed in prison; or
- The person used the services of a minor in committing the offence.<sup>7</sup>

These location factors, which attract an even longer mandatory minimum sentence, are also likely to catch many people who sell drugs as a result of drug dependency. The factor “near a school or any other public place frequent by minors,” for example, is vague, and participants believed that it could be applied to almost any location in their communities.

The SSCA also amended the CDSA to include mandatory minimum sentences related to the production of substances scheduled under the CDSA. For example, Clause 41 of the bill amended s. 7(2)(a) and (b) of the CDSA, adding a mandatory minimum of six months imprisonment for the offence of growing six marijuana plants, with larger numbers of plants generating longer mandatory minimum sentences.<sup>8</sup> The SSCA also set out provisions that increase penalties if someone is convicted of producing marijuana on someone else's property, which is likely to adversely affect poor people who are more likely to rent their living accommodations.

Our focus in this project was on people who are dependent on opiates or stimulants, which are commonly viewed as “hard drugs.” As a result, when we began this project we were not planning to look at the potential impacts of new mandatory minimum sentences related to production of marijuana, believing these provisions would not significantly affect low-income drug users. However, while interviewing participants, we realized that many had been involved in small-scale production in the past and that the effects of incarceration precipitated substance misuse for some offenders. Taken together, these changes are expected to result in a substantial increase in Canada's prison population.

The SSCA did offer one potential remedy to the concern that the legislative changes will result in the incarceration of a large number of people who are dependent on drugs:

- **Clause 43(2)** added parts to s.10 of the CDSA. It allowed a

court to order an offender into a Drug Treatment Court (DTC) program in lieu of a mandatory minimum sentence.<sup>9</sup>

Advocates of the SSCA have responded to concerns about longer periods of incarceration for people dependent on drugs by pointing out that the changes to the CDSA provide a sentencing court with the option of delaying sentencing to enable the offender to participate in an approved DTC, or attend a treatment program under subsection 720(2) of the *Criminal Code*.<sup>10</sup> Drug treatment courts are judicially supervised drug dependency treatment alternatives to incarceration for individuals experiencing addiction. If the individual successfully completes either of these programs, the court is not required to impose the minimum punishment for the offence for which the person was convicted. Unsuccessful participants, including those who drop out or are expelled from the program, are returned to the regular court system.<sup>11</sup> An in-depth discussion of the availability and efficacy of these programs is provided in Chapter 4.

## B. CHANGES TO THE YOUTH CRIMINAL JUSTICE ACT

The SSCA included extensive changes to the ways in which the criminal justice system engages with young offenders. The YCJA – which governs the application of criminal and correctional law to those 12 years old or older, and younger than 18 at the time of committing the offence – came into force in 2003, replacing the *Young Offenders Act*. The YCJA was developed, in part, to address Canada's very high use of custodial sentences for young offenders, particularly for less serious and non-violent offences and for young persons who are not serious repeat offenders. Despite the reality of stagnating youth crime rates since the YCJA came into force, the SSCA amends the YCJA in order to address a perceived laxity in the system that is threatening public safety. The Canadian Bar Association describes these changes to the YCJA as a “major overhaul” that will have serious consequences both for society and individuals because more youths will be going to jail and will be incarcerated for longer periods.<sup>12</sup>

The YCJA contains a number of provisions that can be used to divert youth out of the criminal justice system and lessen the impact of stigma attached to involvement in the criminal

justice system. Through extrajudicial measures, youth may be placed into community programs instead of being the subject of criminal sanctions. Two of the amendments to the YCJA included in the SSCA rolled back those provisions:

- **Clause 173** treated diversions like convictions, authorizing the court to impose a prison sentence on a young offender as a result of past diversions.
- **Clause 190** required police to keep a record of any extrajudicial measures imposed on young persons so that their criminal histories can be documented and used in the event of future offences.<sup>13</sup>

The changes to the YCJA were introduced with the stated goal of “holding youth accountable.” One of the rationales for separate legislation addressing crimes committed by young offenders, however, is that youth have lesser culpability than adult offenders. The changes also undermine the concepts of a “diminished blameworthiness” among young offenders, of rehabilitation being the core of government response to youth offenders, and of using extrajudicial measures to divert youth out of the criminal justice stream entirely. The YCJA was drafted to focus on rehabilitation over punishment and to allow for discretion in sentencing. Two amendments to the YCJA from the SSCA eroded these principles:

- **Clause 172** added individual deterrence and denunciation of unlawful conduct as sentencing principles for youth. These were not previously part of youth sentencing principles but are similar to the principles provided in the adult criminal justice system.
- **Clause 183** restricted the factors the youth court is to consider (including a youth’s background) when making a decision whether or not to impose adult sentences for serious offences.<sup>14</sup>

The changes to the YCJA imposed through the SSCA have largely been justified as targeting a group of “serious” or “violent” young offenders who currently endanger Canada’s public safety with impunity. Rather than targeting the most violent crimes, however, the SSCA greatly broadens the scope of what constitutes a serious offense:

- **Clause 167** expanded the case law definition of what constitutes a serious offence and broadens the definition of violent offence to include reckless behaviour endangering public safety.

- **Clause 169** made it more likely that youth will not be released on bail by amending the rules for pre-sentencing detention (also called “pre-trial detention”) to facilitate the detention of young persons accused of crimes against property punishable by a maximum term of five years or more and those with a history of outstanding charges or findings of guilt.<sup>15</sup>

With these changes, it is reasonable to assume more youth will be sent to correctional facilities, receive adult sentences and be exempted from publication bans to protect their privacy.

## C. CHANGES TO CONDITIONAL SENTENCE PROVISIONS

One important way that Canada’s criminal justice system helps to avoid, or at least lessen, the high costs and negative outcomes associated with incarceration is through the use of community-based corrections programs, including conditional sentences to be served in the community.

A conditional sentence, as laid out in S. 742.1 of the *Criminal Code*, means that an offender is allowed to serve “prison” time under community supervision rather than in an institution. Prior to the SSCA, the sentencing judge had the power to order such a conditional sentence of imprisonment in cases where:

- the court imposed a period of incarceration of less than two years;
- the offence did not involve serious personal injury, terrorism, or a criminal organization; and
- the court was satisfied that the individual did not pose a threat to the community.

The SSCA added new exceptions to eligibility for a Conditional Sentencing Order. The amendments rendered offenders ineligible, where prosecuted by way of indictment, in the following new circumstances:

- offences where the maximum term of imprisonment for the offence is 14 years or life; and
- offences where the maximum term of imprisonment for the offence is ten years and the offence resulted in bodily harm, involved the trafficking, import/export, or production of drugs, or involved the use of a weapon; and certain listed offences.<sup>16</sup>

As before, conditional sentencing is not available for offences that carry a mandatory minimum sentence and, as described in this report, the SSCA introduced several new mandatory minimum sentences for drug offences that would preclude a conditional sentence.

Two additional amendments related to community corrections will exacerbate these issues and make it more likely that drug users who are eligible for conditional sentences will end up back in prison. By imposing more probation demands on individuals, the likelihood of their being taken back into custody is greatly increased:

- **Clause 92** added s.137.1 to the *Corrections and Conditional Release Act (CCRA)*, which allows a peace officer to arrest someone without a warrant if they are on conditional release and have breached a condition of their parole.
- **Clause 64** added s.57.1 to the *CCRA*, which allows the Correctional Service to demand that an offender wear a monitoring device to demonstrate compliance with parole, statutory release, or work-release in cases where they are restricted from having access to a person or geographical area, or required to be in a certain area.<sup>17</sup>

The Parliamentary Budget Office estimated that the new restrictions on eligibility for conditional sentences under the SSCA would render approximately 4,500 offenders no longer eligible for a conditional sentence that would allow them to serve their time in the community. Offenders would instead face a prison sentence.<sup>18</sup> This shift has the potential to greatly increase the number of drug dependent people in

prisons and reduce funds available for treatment and other supportive programs for people inside prison.

## D. CRIMINAL RECORDS AND RECORD SUSPENSIONS

Under the provisions of the SSCA, more people are going to be living with criminal records for longer periods of time. The term “pardon” is now replaced with “record suspension,” a linguistic shift that was introduced based on the concept that the government cannot “forgive” a criminal (and thus pardon them) only a victim can. Along with the name change, the conditions under which such an application can be granted have been restricted:

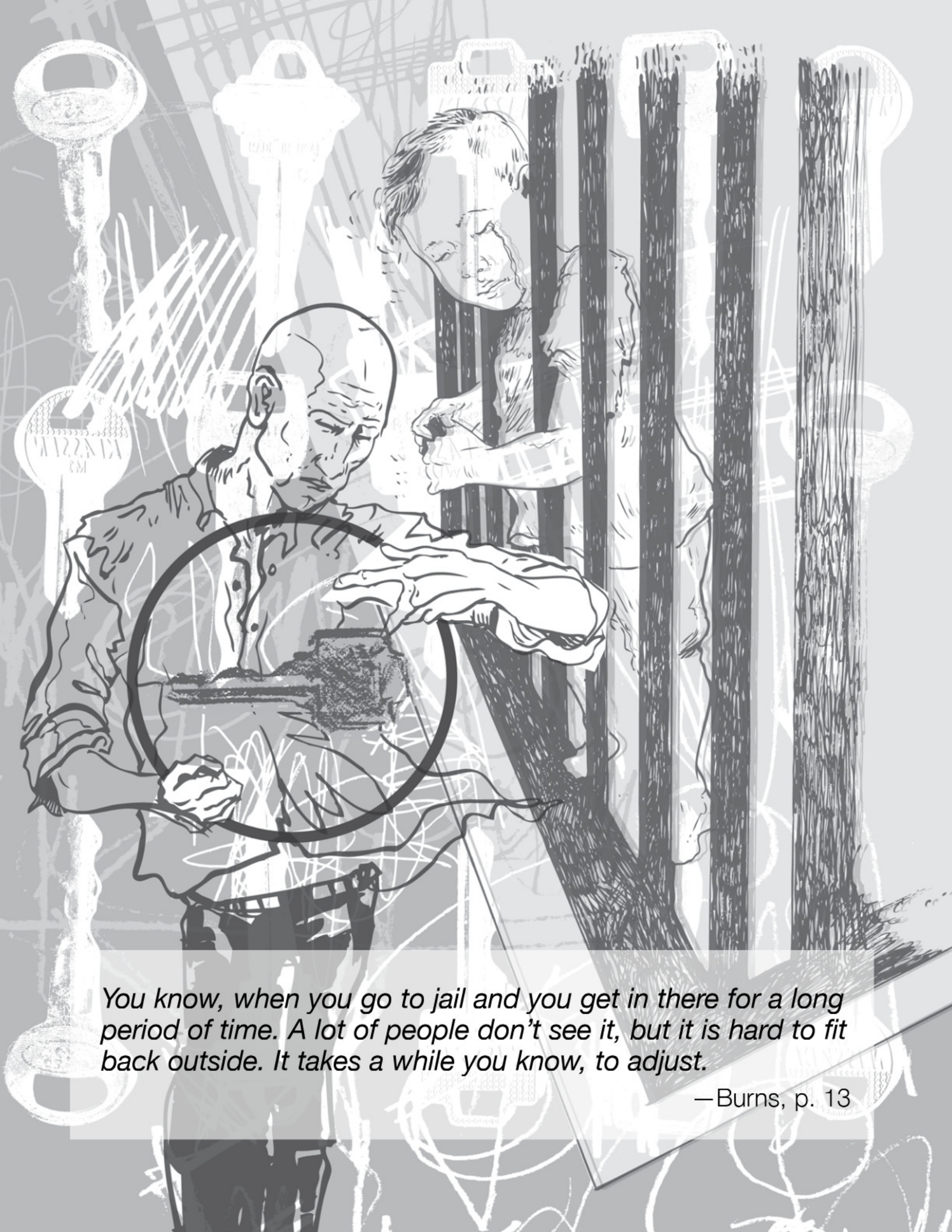
**Clause 115** amended ss. 4 and 4.01 of the *Criminal Records Act* to change the time when persons may apply for record suspension:

- If an indictable offence or one that is punished with more than six months in prison, ten years; and
- If a summary conviction offence, five years.<sup>19</sup>

This replaced the former time limits, which had been ten years for a “serious personal injury” offence, five years for other indictable offence and three years for a summary conviction offence. There has also been an increase to the financial cost of applying for a record suspension, meaning that low-income people will face a disproportionate barrier to accessing record suspensions with implications for future employability.







*You know, when you go to jail and you get in there for a long period of time. A lot of people don't see it, but it is hard to fit back outside. It takes a while you know, to adjust.*

—Burns, p. 13



## CHAPTER 3: CANADA'S NEW CRIME BILL AND THE REALITIES OF DRUG USERS' LIVES

In June and July 2012, we conducted 19 interviews with drug users in Vancouver and on Vancouver Island about their criminal histories, their experiences with incarceration and their views on the link between incarceration and drug dependency in order to assess whether or not the changes to Canadian law outlined in the last chapter are likely to affect low-income drug users.

Participants were recruited through our community partners in Vancouver and Victoria.<sup>20</sup> Participation was voluntary and participants were given a twenty-dollar stipend for their time. These were semi-structured “life story” interviews supplemented by a short list of key interview questions. The standard interview questions focused on the lived experience of prison and on the impact of prison on participants’ lives after the fact. Interviews ranged in length from half an hour to nearly two hours, depending on the depth of engagement and breadth of experience of participants.

All but one of the interviews were recorded and transcribed.<sup>21</sup> The resulting transcriptions were coded to sort experiences along a set of loosely defined topical areas. While practical limitations to our methods and sample size mean that our findings cannot be construed as being *statistically* significant, the stories collected provide a good representation of experiences. Care and reflexivity was employed throughout the research project to ensure that our respondents reflected a diverse set of backgrounds and life experience. Interviews were conducted with the informed consent of participants, following protocols approved by Simon Fraser University’s Office of Research Ethics.<sup>22</sup>

All of the interviewees were living in poverty and four were without housing at the time of the interview. Six interviewees self-identified as members of First Nations. Most of the interviewees reported health concerns, including Hepatitis C, chronic mental illness, back and bone conditions, and brain injuries. Participants could not always recall exactly how long they spent in jail at different points in their lives, but a conservative estimate based on their recollections suggests that interviewees spent an average of 4.6 years of their lives behind bars. Although we did not conduct any interviews with drug users who were currently in prison, many of the people we interviewed were on probation or living under other court-imposed conditions.

While the goal of talking to drug users for this project was to determine whether or not the SSCA was likely to have impacts on this population and what those impacts might be, these interviews also provided an opportunity for drug users to share their stories. In doing so, they present an alternative to punitive labels—such as “serious drug offender,” “gang member,” or “violent youth” — that dominate the government discourse related to the SSCA. The stories we heard through this project reveal that those classifications are both inaccurate and misleading, failing to acknowledge the complex factors that lead people to break the law. Each one of these life stories speaks to a legacy of institutional failures, poverty, and systemic marginalization, which entrench people in drug dependency and create the very populations that this legislation targets.

### A. NEW MANDATORY MINIMUMS AND LOW-INCOME DRUG USERS

A central research question for this project was whether or not the SSCA, and particularly the introduction of mandatory minimum sentences for some drug offences was, in fact, likely to capture low-income drug users, and, if so, what we might expect the outcome of this criminal justice response to be.

All of the participants were living in deep poverty at the time of their interviews. For most, any criminal activity is related to survival as a person with drug dependency. Many of the interviewees explained that they, and others in their community, engaged in criminal activity that would now trigger mandatory minimums.

Many participants had been convicted of Designated Substance Offences, or DSOs in the past, which would make them vulnerable to mandatory minimum sentences.

One homeless participant named George, who struggles with an opioid addiction explains his trajectory:

*Provincial, that was my first time I was in for seven days I think. Like I said, it was my first time but I was convicted again for trafficking and had more pot on me the second time and basically I got double the time so it was like two weeks the second time and then I got caught again with you know pot and a couple weapons, a knife, a butterfly knife which was considered illegal in itself and had more time so and then I got released but. A third time was thirty days.*

George would now be subject to at least a year in prison if he is caught for a trafficking offence as a result of those conditions.

None of the participants in this study self-identified as “organized criminals,” nor do any of them fit popular images of gang members. However, the concept of organized crime, as defined in the *Criminal Code*, could capture many drug users involved in street level drug sales for survival purpose and result in a mandatory minimum sentence being imposed. One participant, Eddy, explained:

*Disorganized crime [laughs]. Three people then you'll be doing mandatory time. So that's going to cost them million. So many people down here selling ten dollars worth of drugs... just like to keep the heat off them, one guy will hold it on the corner and attract the customer and walk around going up down, and people go up saying “Ok I want this,” and they'll say, “Ok, go see that guy to get the shit” and they just... what's it called? Distraction.*

Participants opined that, given the structures of the drug trade, the organized crime provisions would allow higher-level drug traffickers to continue escaping arrest and prosecution while leaving easily replaceable street-level dealers to potentially face longer sentences. Margaret said:

*There are a few that organize lesser people. And that bunch of people are usually addicted and they're just doing it for their addiction money. And I don't think they should be suffering for that the people up above and pushing them into because the people above know that they're addicted and are using them as guinea fowl.*

Another participant, Jaqueline, shared a similar opinion:

*Most people who get caught up in that kind of crime are supporting a drug habit. I don't think the big dealers put themselves in the situation where they are going to get caught. It is the workers who are going to get caught. The big dealers are still going on.*

One participant explained how these laws might have affected him had they been in force when he was younger. Eddy said:

*[Organized criminals] are smart. They get other people like me to sit in the grow house or sell the dope on the street for them. All the players aren't going to get caught. They pay people to take their fall for them. I was the fall guy, the guy was a dealer for me. The house was in my name, hydro in my name, marijuana it was 50/50, but when we get busted I get busted he doesn't get busted, so organized crime doesn't get caught... They way it is now they say people get off with house arrest, they call it a [Conditional Sentencing Order] and pay back hydro for the money that they say I stole for theft of hydro. With this new crime bill if that goes through I'd be doing five years. For 500 plants they want to give you five years. There is no way the jail can hold us there are so many people right now that are being charged for growing alone. They'd need a whole new jail just for the growers.*

Eddy's story illustrates that, instead of targeting the higher up players in organized crime, the new legislative changes could have the most impact on those working for producers. Without the means and resources to protect themselves from being exploited by organized crime, drug users caught up in the production of drugs in this way will likely bear the brunt of criminal punishment.

As noted in Chapter 2, the amendments to the CDSA also set out another set of aggravating factors that attract a mandatory minimum sentence of two years for trafficking or possession for the purpose of trafficking, including “near a school or any other public place frequented by minors,” or in prison. Participants believed that the broad location restriction related to minors could describe just about any place in their communities. Some of the participants had also committed drug offences in prison. Scott, a First



Nations man in his early 30s, explained why he took that risk in prison:

*So with me being able to get my day passes, I was able to smuggle in cigarettes and a little bit of pot once in a while, which really helped me go from being victimized more than anything. Until I started bringing the cigarettes in and the odd joint they would team up and pile on me. Beat the shit out of me.*

## B. THE YOUTH CRIMINAL JUSTICE SYSTEM AND ADULT CRIMINALITY

The majority of our study participants have extensive experience with the juvenile detention system and made a clear connection between their experiences with the youth criminal justice system and both their subsequent involvement with the adult criminal justice system and their struggles with substance use.

### THEODORE – THE STORY OF A “SERIOUS DRUG OFFENDER”

Were he a young man today, Theodore, who is now in his late 40s and sober, would have been a prime candidate for mandatory minimums.

*From the first time I smoked pot, at about 13 or 14, I liked it, and it slowly progressed to selling drugs, doing acid and mushrooms. At 17, I started robbing drug stores and started actually trying the product. Narcotics, the first time I did it, it just eased every psychological, emotion, physical pain that I had. It just seemed at the time, it made me feel whole.*

*That is also when I started getting in trouble with the police. First of all, at 16, I got three charges for simple possessions. Then at 17, I got busted outright selling. When I was 20 I got convicted for possession for the purpose, now this was Dilata, a narcotic.*

Theodore only served nine months, which he considered lucky, but his drug dependency spiraled out of control. When he got out, he had to sell more drugs to manage it:

*My drug habit kicked in full force, I was making 1,500 dollars a day, but it was all going up my arm.*

He eventually managed to reduce his drug use and was still using but was no longer selling. He began working in the construction industry. Unable to support his dependency through legal work, he committed a number of robberies and went back to jail, for two and then three and a half years.

He continued to use drugs in jail, but eventually, with the support of his family, was able to get off drugs during his last stay in prison in the 1990s. He finished his grade 12 education and learned to weld.

He says it would have been more difficult to make the change in his life if he knew he would be serving a longer sentence, and he feels grateful for the times that judges showed leniency.

*I am very lucky, for some things I could have definitely gotten a worse sentence. Because they did not have to follow those mandatory minimums, they were able to look at the broader scope, and that was always a positive thing.*

Despite having managed to get off drugs while in prison, Theodore is not supportive of mandatory minimums or longer sentences for drug users who engage in production or trafficking to support their habit:

*I would say the longer you are in there, the more you become accustomed to the jail house mentality, so I don't think its helpful to keep anyone in for an overabundance of time. I think getting rid of flexibility for the judges is the worst thing. He is able to look at all the different dimensions of a person. Once you take that away, you are not looking at a person, a human being, you are looking only at a number, or at the worst things in a person's life. We are all different you know, so our sentences should be on a different scale.*

The accounts of interview participants make clear that there are many contextual factors that lead some youth to come into conflict with the law. These include poverty, involvement with the foster care system, abuse, and racism. Children in foster care are more than seven times as likely to be charged with criminal offences than other children.<sup>23</sup> Jaqueline, a mother of five, reflected on the relationship between incarceration of adults for drug offences and youth criminal justice:

*Jaqueline: One reason it is hard to go to jail is, if you are a parent, you get separated from your kids. They go to a social service foster home. So your kids get traumatized by that, it's a life experience that can't be reversed.*

Given the sweeping nature of the reforms to Canada's criminal justice system, it is important to look at the effect of youth imprisonment in terms of adult criminal behaviour. For some participants, juvenile detention did provide benefits, offering better food and more structure than their impoverished families could provide.

*Gerry: I get that [the food is] pretty good in there [juvenile detention] right, and exercise and they had programs in there for sports like baseball and what not. I enjoyed them. I don't have any bad experiences as a juvenile, it's when you graduate...*

Such views are in the minority. The majority of participants stated that their time in the youth criminal justice system was detrimental, and that it only prepared them for a life in and out of the adult correctional system:

*Ricky: Being in the juvie detention fucked me right up. And once you go bad they didn't give me any chances to get back on track. All the time I spent in jail I should have been working or something or getting an education, which I don't have. That's the way the public looks at you that you don't have the education.*

*Scott: I dunno, I guess after being in jail... I was more or less labelled as, I dunno institutionalized. Somebody who was going to spend the rest of his life in and out of jail.*

Neal, a 34 year old participant dependent on heroin and methamphetamine, who has served several multi-year sentences in federal prison, describes his trajectory:

*All the other kids at school had parents, like a mom and a dad, but my aunt raised me. She had a lot of older kids, so I got their clothes and stuff like that. So I would go to the mall and steal clothes. Eventually, I would steal other shit. I got caught and went to jail. I ate better there. I made friends in there, and when I got out, before you know it, I was back in jail doing six months. I got in a lot of fights and stuff, picked on, beat up, but it kind of made me tougher in a sense. By the time I was 19, I had four years in and out of jail. Then, when I was 20, I did a year of dead time and then I got a three-year federal sentence.*

Overall, participants in this study took the position that putting young people in jail more often or for longer periods of time will never work if the goal is to divert them out of the criminal justice system as adults.

## C. THE EFFECTS OF INCARCERATION

Loss of freedom is not the only result of incarceration. Rather than experiencing prison as an opportunity for rehabilitation and reflection, many participants in this study pointed to unintended consequences of incarceration that negatively changed their lives. The result is that prison often pushed people deeper into drug dependency and resultant criminality. As well as having negative effects on the person sentenced to prison, there are also repercussions for their families and broader communities.

### VIOLENCE, IDENTITY AND THE CULTURE OF PRISON

Participants in our study talked frequently about the culture of violence inside prison, and how it alters ways of behaving and relating to others. Ned said:

*You start living by this whole different law, and it's the jailhouse law, you know. And how the simplest little things, like whistling even can get your lights punched out. And, you know I guess starting from a younger*



## BURNS – REFLECTIONS OF A VIOLENT YOUNG OFFENDER

*I have a drug addiction. I started using drugs before that but I started shooting heroin at 14. We used to sniff [solvent] in a bag with toilet paper. They say that I'm a violent person. Which, I'm far from violent.*

*I came from a tough background. Like my dad would come home and make us fight with each other the first one to draw blood gets a dollar. And makes us go around town beating up kids that are bigger than us. He would go up and say my boys can take you. And if we didn't win he'd take us home and show us how to win.*

*The first time I went to jail, when I was a kid, I got three months for [break and enter charges]. I hated it because out here even being raised the way I was like a fighter, out here I have the option of walking away. But you are just locked in, it is like taking two bunches of pit bulls and putting them in the same cage you know there is going to be a problem. So every morning you get up and you pull your mask on and you stand there with your tough look and you do what you have to do.*

*What he learned at home and in the correctional system followed him when he was outside and led him to spend much of his youth and young adulthood in the prison system where he felt violence was the only way to survive.*

*When I got my four years, I was 17. I got into a fight with a wounding with intent to maim.*

*Once I was inside, this guy, he pulled me into ...an empty cell that they used as a washroom. I went in there I'm telling you my knees were knocking. Scared? If anybody had asked me to talk I would have burst into tears. But, I wasn't going to be a doormat. I went in the cell and I give it to him and he went down. He and I was lucky. He [fell] in between the wall and the toilet and I just leapt on him and worked him. And he started saying "hey kid get off me the guards are coming, six man." I came out, tears in my eyes. And this guy comes out and goes; "hey kid he is going to stab you." And I said*

*if he is going to stab me you tell him to make sure that the kills me because if he stabs me tell him I'll make him look like a fucking pin cushion.*

*While he had hated many things about prison, when it was time to leave, after his first long sentence, Burns didn't want to go:*

*And the older guys in there that I had gotten to know from doing all that time. They said no, it is time you got out, we got our time and we got to do ours. I felt like if I was leaving my friends behind. I felt guilty of them. Giving me a parole yeah, crazy.*

*You know, when you go to jail and you get in there for a long period of time. A lot of people don't see it, but it is hard to fit back outside. It takes a while you know, to adjust. I got out and went to Abbotsford. I would go to the mall and I would just get out of there right away. Did I pass, no? I just felt like everybody was staring at me like everybody knew where I was from. I was just ripped right out. Not an ounce of fat on me. Twenty inch guns. Tell me that didn't go to my head.*

*Burns has struggled with drug dependency, and moved in and out of prison his whole life. He believes there needs to be more support and an understanding of the mental toll that prison takes:*

*They don't do anything to help you. You know, they put you in there and ah kind of treat you like, a prisoner I guess. It has affected me mentally, there is a lot of violence, and you see a lot when you're inside. A lot you don't want to see.*

*Today, I am not educated, can't whip my addiction. Because drugs are an addiction if you get caught you accept that, OK, I'm going to go to jail. It is not going to stop, jail is not the answer. I'm dead against mandatory sentences because there is a reason why people are doing everything. And I think that reason should be learned. Each person it's different. You should hear what the situation is.*

*age I knew this code and what to do so I always survived pretty good. I've only been in two fights, you know, where some guys have two fights a day.*

*Oh, just the desperation like in Matsqui, I've seen guys almost get killed, beat to death almost, over a [small] drug debt. They were trying to sell drugs when they weren't supposed to. People killed, I've seen two murders when I was in there. Violence over stupid drug debts, eh?*

Participants described a prevailing “victimize or be victimized” mentality, which has negative physical and psychological consequences for people in prison. Brent described this mentality:

*I know for a fact that when people know you are new to jail they'll gang up on you and just give you a beat down just cause they can. Or if they check you into [protective custody], it's like a sport like nowadays, “watch this I'm going to check this guy in”... It's just the overall damage it causes to a person's mental and physical well-being is its very damaging.*

Upon leaving prison, some men describe getting caught up in a culture where status is accorded to those who have done “hard time.” A participant named Tim explained:

*It was like an ego boost. People were like, “You've been to jail, man you've done your time” and I was like “Yeah, yeah man.” They said “How was it?” I'd say “OK man” you get like a big image. “Tim done his time, Tim did jail, Tim did this” and people would talk about you. It really builds your ego. While your inside you think to yourself, I'm never going here again, I'll get a second chance and never do bad things. It's like a politician during the election while you're running for office you got all these promises right. And then once the politician makes his seat or whatever, he forgets about his promises he made to the people.*

The insights of participants about the consequences of prison on identity and behaviour are mirrored in the academic research cited in Chapter 4.

A number of participants suggested that the emergence of an identity based on toughness and indifference to negative

consequences begins in the youth criminal justice system and then extends into adulthood. Some participants shared stories about the result that their time in juvenile correctional facilities had on their personalities and their relationship to violence:

*Eddy: Juvie was rough because there were bigger kids, like 200 pound kids, and I was little. You had to fight for your food or they would take it from you. You had to prove yourself, it was like gladiators.*

*Jeremy: you had to prove yourself physically in a fight with somebody to be like part of the clique or whatever inside the jail. And sometimes you had four guys that were jumping you at the same time, stuff like that. Just my attitude got really really twisted. I'm not a violent person or I wasn't at that time. And all of the sudden I had to defend myself from all angles. It was too overwhelming for me.*

This form of identity creation, particularly when it begins early on in life, has the potential to produce the very “serious and violent” offenders that proponents of the SSCA claimed the new legislation would protect society from. An inevitable result being dire consequences not only for these individuals and their families, but also for communities facing disproportionate levels of incarceration.

## INSTITUTIONALIZATION

Another outcome of spending time in prison, particularly longer stretches of time, is what is referred to by both participants in this study and in the academic literature as “institutionalization.”

Rather than promoting responsibility and motivating people to obey the law in order to maintain their freedom upon release, there was consensus among the people we talked to that the longer people spend in prison, the more accustomed they become to that environment:

*Eddy: Yeah, people give up. I mean I didn't give up in there but that's what I felt like when I came out. I was too comfortable in there. It gets too easy, after about two to three years in there. I was in a routine and I thought this is horrible man how easy this is. How time just passes, you're in your own little routine in there. It's sad though because you're not*

*a part of your family, I wasn't a part of their life. It's just how it happens, eh?*

People who are living in abject poverty and dealing with homelessness are particularly vulnerable to the effects of institutionalization:

*Jeremy: It just felt more natural and more comfortable for me to be inside an institution than it did for me on the streets, struggling and sleeping in ditches and doing whatever I needed to do. In jail they tell you when to go sleep and eat when to go to work, when to workout, when to have fun. You never have to think, no one has to think in jail... I got arrested again. I think that sentence was like a year. So I worked every day, worked out on the weights, had lots of friends, and I guess, because it was such a good place, I wanted to go back again. So that basically started my revolving door.*

After a short stay in a woman's correctional facility, Jaqueline made a decision that she would never go back to prison. However, through her family members who have spent more time in prison, she has seen the process of institutionalization unfold. In her experience, people who have spent a lot of time inside almost seem to welcome going back:

*Jaqueline: ...it does affect, but I'd say in a negative way. Well, because after my son and my brother, they are in and out, and it just seems like after awhile they got used to it. They just get really mad before the cops come and start grinding their teeth and say I don't care, I'll do three squares and a bed.*

This process of institutionalization, whereby prisoners become accustomed to, or dependent on the institutional structure of prison, is very well documented in the social science literature and will be discussed further in Chapter 4.

## DRUG DEPENDENCY

Many participants in this study felt that there is a direct link between their experiences with incarceration and their dependency on drugs. For example, Ricky, a First Nations participant, shared that he has felt suicidal since the age of ten. He has suffered intensely as a result of the years he spent in juvenile detention, which he refers to as "juve":

*Ricky: It encouraged [drug dependency] because when you're in juve that's all you want, to get rid of that feeling of being in juve and what the detention centre was doing to you, so you tried to find as much chemicals as you could to numb the pain. I remember that so well.*

Maryann feels that the combination of the lack of appropriate supports in prison, the psychological and social impacts of imprisonment, and the lack of planning for re-integration into the community results in intensified dependency on illicit substances:

*Maryann: You're [sent to jail] and basically you're sick, you're suffering or whichever. And it didn't help me in any way, to make me a better person. In fact, the first thing I did every time I got out of jail was that I got off that bus and went and smoked dope. They say that they put people in jail to rehabilitate them. I kind of lost my family and that's another reason why I went so deep into addiction.*

Drug dependency continues on the outside as a result of lack of support for re-integration. As violent and traumatic as prison can be, the world outside can also be a harsh and confusing place, especially for individuals grown accustomed to the routines of a "total institution." Deskilled, lacking in support, and struggling with drug dependency, the gulf between prison and the community can be wide enough that many find themselves stuck either in prison or in a "revolving door," as Brent describes:

*They give me a ticket to get Downtown and I usually have a welfare check in my hand. I have nowhere to go and no supports in place. There was no work. There is no mechanism in place to have people, you know, set up when they leave in terms of housing or support or anything of that nature that's going to help someone when they get out of jail. I think that's the predominate reason why in the past ten years I've been in and out of jail. It is the reason why I got stuck in that cycle, because I've gone from jail to the streets. And right back to my addiction and with a few more tools because I've learned a few more tricks of the trade in the criminal world to better keep myself in drugs.*



Another common theme that emerged in interviews was the availability of drugs in prison. As a result of this availability, participants felt that the use of prison as a detox or treatment mechanism was misguided. Eddy said:

*Yeah, like in Matsqui, in Federal, they are more available. Some of the street dealers come and get the heroin off the people in Matsqui because it was better heroin from the guy inside.[...] It's all over the penitentiary, drugs, yeah.*

Gerry talked about the consequences for people who get caught using drugs in jail:

*Oh yeah they're all over the place and you'd get disciplined for that, you get extra time, take your good time away, you know you gotta do 2/3 of your time. One injection, gone.*

When asked how people who are caught using drugs in prison respond to the consequences, Gerry describes a vicious cycle:

*More drugs, what else can you do, add more time? You know, only if you get caught for using you've lost your good time, so you just use more and more...*

Drugs are regularly found in Canadian prisons. Even in American jurisdictions where expensive, punitive, and invasive policies have been put in place which have limited, although not eradicated, the availability of drugs in prison, the idea that keeping people away from substances while in prison will address their drug dependency is not borne out in the literature. Instead, the underlying conditions that lead to substance misuse are often exacerbated by life in prison, and when the artificial controls of the prison are removed most prisoners resume or even intensify their drug use.<sup>24</sup>

## IMPRISONMENT AND OUTSIDER STATUS

One of the most compelling aspects of many participants' stories was the effect that imprisonment had on their sense of self and their relationships. They did not associate prison with rehabilitation. Instead, they experienced prison as a loss of all that they valued in life, including family and friends. Margaret said:

*I guess being in jail and trying to contact my family and them not contacting me back or communicating back with me in jail and them not having much to do with me in jail. I didn't like that so much, cause I felt like I was being shut out or disowned maybe I guess.*

Losing ties to existing supports, including family, intensifies the challenges of re-integration and makes it harder for people dependent on drugs to stay out of prison. Neal explained:

*For me, when I got out of jail I was on my own, not knowing where I was going. I'd end up back in jail very quickly. If I was getting out and going to my family, my parents, to a job I would have stayed out for longer. That matters more.*

The feeling of being an outsider, shunned by family and by the community at large is intensified by a criminal record. Participants in this study talked at length about the extent to which the stigma of a criminal record makes it harder for individuals to make changes in their lives:

*Jeremy: Nothing positive about a jail sentence, the people you meet, the things you learn, there is absolutely nothing positive about it. It messes your life up totally. I'm 53 now. I'm living in a shelter. I had a career as an apartment building manager. That's what I did in Ottawa for like 15 years, and now I can't do nothing with it. Because of my record.*

*Maryann: You're an outcast. It doesn't even matter why, or how long, or what you're in for or even if you did do something to rehabilitate yourself. Now that you've been in jail and that's shown on any of your references.*

The consequence of increased restrictions and added costs for accessing record suspensions will likely mean more people dependent on drugs living with the restrictions and stigma associated with a criminal record. This would also include those who have overcome their dependency, who – despite that success – would continue to be stigmatized.

## D. CONDITIONAL SENTENCES AS AN ALTERNATIVE TO INCARCERATION

Some participants believed in the power of conditional sentences to help people take responsibility for their behaviour while avoiding the harms associated with incarceration.

Jaqueline, who served a conditional sentence, compared that experience with prison:

*I had a [Conditional Sentencing Order], I wasn't allowed in certain alleys, and we had to do, like, community work, which was OK. We got bag*

### BRENT – DRUG DEPENDENCY AND IMPRISONMENT

Brent first began getting in trouble with the law when he was 18. At that point, he now understands, he already had a problem with substance use. He was arrested for possession, theft over \$5,000, and stealing a vehicle. As this was his first offence, he was sentenced to 35 days in prison.

*It was overcrowded, they were triple bunking. It was my first time in jail and it was horrifying.*

The negative impacts continued on the outside:

*It had a profound negative psychological impact on me. There is no question in my mind. I had low self-esteem, low morale. I found it hard answering questions, like, where have you been, even though it hadn't been very long. It's a small town, and it's hard to explain. I felt people discriminated against me applying for jobs.*

Eventually, Brent moved.

*I started using drugs and became wired on heroin. And my first charge out here [in BC] was about a year after that.*

*Again, they didn't have any programs. No emphasis on rehabilitation.*

Brent struggled with his dependency for ten years, in and out of prison.

*And every subsequent time, I never received any treatment, on the inside or on the outside either.*

While in prison, he did not have access to harm reduction measures:

*There was no needles in jail whatsoever. We were using these needles that were like ten years old.*

*They were disgusting. But at the time when I first went in I was coming off of heroin. You know... my buddy had some heroin so it doesn't matter what the needle looked like, I just wanted to get unsick. So I used this needle that had dried blood on it. And it was like trying to put a dull knife in my arm it was so dull. You know what I mean. The lack of clean supplies in jail is detrimental to people's health. I'm sure that's just a breeding ground for infectious diseases.*

Brent explained that over the past ten years he has been in and out of jail, and in total has spent a third to half of the past decade inside. He believes that the longer a person is inside, the harder it is to make it on the outside. He also feels that the idea of deterrence doesn't work when there is an addiction.

*A person in the grip of addiction will do anything to get their next fix.*

He continued:

*I'm a little surprised that the whole system, didn't they recognize addiction for what it is? They know the people, they see their faces come in and out of jail all the time. Why is there never any intervention? Are they just happy giving them jail sentences and when the time is up, they release them back to themselves...*

*Jail, I am trying to word this correctly, jail, it aggravates the situation and it somehow reinforces itself. The addict starts believing they deserve it. After a while they believe they deserve to be jailed and there is no hope, and it just reinforces the whole lifestyle. It reinforces the addictive behaviour when there is no mechanism in place to help them with their disease.*

*lunches. Plus we ended up cleaning up alleys that we would have gone to anyways. Picking up empties. So it was alright. It was a good experience to do the community service. I like it better than being thrown in jail... You can feel like you are doing something good for the community. I felt better about myself doing it. I think CSOs are good compared to jail.*

Despite the belief of some participants that a conditional sentence offers greater potential than imprisonment to help a person make a change in their life, others made the case that in order for a conditional sentence to be effective it must be designed with the realities of very poor people and people dependent on drugs in mind.

For people who are homeless, getting to an appointment with a probation officer is a significant barrier to being successful when serving a sentence in the community or out on parole. The number of charges the individual is facing increases when they breach conditions set by the court. Many homeless and marginalized drug users are caught in such a cycle, as described by Maryann:

*I was homeless for many, many years here in Victoria so it was very hard for me even to make probation appointments, much less anything else because I'm transient. I had nowhere to go. I was in addiction and it was hard enough to get through one day and to decide where the heck I was going to get my food for that day or if I was so tired I couldn't work that night, where I was going to sleep if I couldn't get into a shelter or whatever. It was just hard to focus on anything that had to do with maintaining conditions on the probation.*

A further concern surrounds the inclusion of an area restriction as a part of a conditional sentence or parole order, which prevents people from accessing low-income housing, supportive services and friends and family. George, who panhandles and volunteers at community organizations with his peers, talks about a practice known among drug users in Victoria as red zoning:

*I had conditions to follow and abide, keep the peace, be of good behaviour, a red zone. And the red zone was terrible because it was wintertime*

*and it was pretty well the whole downtown and the drop-in center within my red zone. So my access to essential services such as the drop in to stop and get coffee to have a shower find clothing, any of that was nil... I kept getting caught within the red zone and breaching my conditions and it was basically a set up for failure and it sucked because they kept dinging me and I had court for the breaches and it sucked...and also there was I had a fucking, a curfew. OK. A curfew. On top of everything, and I'm homeless. OK, now what the FUCK is up with that I was telling my lawyer right when I was in jail, what the fuck is the matter with these people they just set me up to fail, they just want me back in here.*

A conditional sentence has the potential to limit reliance on the penal system to address crime, to save money, and to help a drug user to connect with community services and opportunities for community engagement. However, the reality of reduced eligibility, combined with the ongoing problem of placing movement restrictions on drug dependent people, without regard to their circumstances, have limited the usefulness of this option.

## E. MANDATORY MINIMUMS AND DETERRENCE

There was a strong sense among participants that longer prison terms will not deter people living in deep poverty and people with active addictions from committing crimes. Instead, participants largely shared the opinion that longer prison stays intensify harms and negative outcomes including recidivism rates. Margaret explained her perspective:

*When you're thinking of stealing, you're not thinking of what the guilt is going to be or anything...you just do it. Probably because of necessity you know. I really think it [longer prison terms] would make it harder because it tends to make you more, I don't know what you call it. Where you think everything is out to get you, everybody is out to get you. And you're just gonna get stepped on anyway. So jab the other guy before they jab you.*

For Margaret, a First Nations elder who has been in prison, the experience is associated with feelings of guilt and shame



that fuelled her drug dependency. When asked to reflect on the impact of prison in her life she explains:

*It's part of the reason, one of the many reasons, I drink. Because of depression and guilt...I've been sober four months now because I have learned to forgive myself, and that was a toughie. Oh what a struggle that was.*

She believes that longer prison sentences will not help people who are dealing with drug dependency:

*Because there's drugs and alcohol in jail. Simple as that...and if you get them so hardened that they see they're going to be stepped on anyway, they figure what the hell? What's the point to being straight. Some of them get so depressed that they do it, the addictions, just so they don't have to think about how shitty their lives are.*

Perhaps most importantly, participants in this study did not believe that longer sentences would result in drug dependent people making different choices in terms of whether or not to break the law. Maryann explained that she would not have been deterred by mandatory minimum sentences when she was in her dependency. When asked if a longer mandated jail term would have changed her behaviour she said:

*I would have to have to say no. I was doing it because of my addiction so I don't think that's going to make a difference at all because it's an addiction.*

While participants did not feel that the changes introduced by the SSCA will help address drug dependency or the reasons why poor people who use drugs commit crimes, they did have suggestions for more effective interventions that they believe would have made a difference in their lives and prevented them from committing crimes.

Participants like Maryann have a clear sense of what may work to make real change in the lives of drug dependent people who are living in poverty:

*Maryann: Somebody who is constantly being thrown back in jail for stupid things, for petty, like a small drug charge, back to back to back. Pretty soon that's all that person knows. They don't really know how to grow and exist with the real world. You become institutionalized and you can't actually do it on the outside. You'll end up going back all the time. You'll screw up. You always will and that is why anyone that does federal time or consecutive time, and I have many friends like this, will continue to go back. It's a very hard cycle to break. And they're going back on the same charges, over and over and over and over again... I think that if people would come together and really address this issue and realize that it's a disease and get the clinics and needle injection sites open to help people. I think that then maybe, and only then, will we be able to minimize half the people that are in jail.*

Participants stated that appropriate interventions to address the reasons why people drink and use drugs would be beneficial in terms of keeping people out of jail. Members of Jaqueline's family have been in and out of jail her whole life. She believes that if a more effective intervention was used with her family members, they would have the capacity to stop the cycle:

*But if we had got the help, me and my brothers, it's mostly drinking and abuse things like that. If they had dealt with that...*

While participants grew up in different decades and in different places, there was a strong sense among the interviewees that the more that can be done to keep drug dependent youth and adults out of institutions, the better for them, their families, and their communities. While they are speaking from personal experience, their views about the efficacy and consequences of imprisonment, and the efficacy of mandatory minimum sentences and other tough on crime legislation are well supported by the scholarly evidence explored in the next chapter.



*You're an outcast. It doesn't even matter why, or how long, or what you're in for or even if you did do something to rehabilitate yourself. Now that you've been in jail and that's shown on any of your references.*

—Maryann, p. 16





## CHAPTER 4: LIFE STORIES OF DRUG USERS IN CONTEXT: A REVIEW OF THE LITERATURE

There is a rich body of scholarly and community-based research addressing many of the issues raised by participants in this study. This chapter does not provide a comprehensive survey of that literature, but instead highlights a range of compelling studies that suggest that Canada's new "tough on crime" legislation, particularly as it relates to drug crimes, is unlikely to achieve the stated goals of disrupting organized crime and creating safer communities.

We begin this chapter with a brief review of the literature on mandatory minimum sentences. Research demonstrates that similar legislation in other jurisdictions, most notably the United States, has resulted in the widespread incarceration of low-level drug offenders and has not effectively disrupted organized criminal networks or translated into lower rates of recidivism among people who use drugs. We also consider the literature on the consequences of imprisonment on offenders, their families, and on marginalized communities generally. Notably, the existing research touches on many of the same themes raised in the life stories of our participants: disconnection from social values and norms, drug and alcohol dependence, institutionalization, disruption of relationships, and difficulties re-integrating into the community.

In this chapter, we also document the literature on the effectiveness of Drug Treatment Courts (DTCs) for people dependent on drugs. These programs have been held out by the Government of Canada as a safety valve for ensuring that people struggling with drug dependence are not negatively affected by mandatory minimum sentences. However, the literature on DTCs, as well as evaluations of current programs, suggests that DTCs are not nearly as available or as effective as asserted by the government rhetoric. Finally, we examine several economic studies from government sources, not-for-profit organizations and academia that, taken together, caution that the profound costs of the legislative changes brought on through the SSCA will not only be social costs, but financial ones as well.

### A. GOALS AND EFFECTIVENESS OF MANDATORY MINIMUM SENTENCES FOR DRUG CRIMES

Canada is by no means the first country to employ "tough

on crime" tactics, including mandatory minimum sentences, in an attempt to stamp out the illicit drug trade. Although often touted as targeting drug kingpins, these types of enforcement efforts, on a local and global level, have mainly captured drug users, who may also be involved in low-level trafficking.

The most thoroughly studied example of the use of mandatory minimums to address drug offences is the United States, with over three decades of data. In his recent book *The Plague of Prisons*, American epidemiologist Ernest Drucker notes that there was an explosion of incarceration in the United States that followed the 1973 enactment of the Rockefeller Drug Laws. In thirty-five years, the prison population in the United States increased tenfold, from 250,000 in 1970 to 2.5 million by 2009. Notably, few of those incarcerated could be characterized as "kingpins."<sup>25</sup>

Proponents of mandatory minimum sentences argue that despite the harmful impact to low-level offenders dealing with drug dependence, these sentences are good public policy because they generally and specifically deter individuals from committing crimes. When deterrence is not borne out by the evidence, they argue that this type of enforcement serves to incapacitate offenders, to expose them to drug treatment programs, and to create fairness in sentencing by setting standards. None of these assertions are supported by the research, however.

One case that is made in favour of incarceration of drug offenders is that imprisonment provides a venue to connect an individual with drug and alcohol counseling. The Global Commission on Drugs, though, found that in the United States, there is a *negative relationship* between the number of people brought into prison for drug offences as a result of mandatory sentencing provisions and the availability of drug treatment: the increasing costs of mass imprisonment have



eliminated funds for treatment and counseling services. In 1991, one in three prison inmates was receiving treatment while incarcerated; today the rate is down to one in seven.<sup>26</sup> Conversely, the Global Commission found that when public health options are made available to prisoners, there are dramatic declines in drug dependence, mortality and overdose.<sup>27</sup>

Rather than serving as a deterrent, international research demonstrates that incarceration of low-level drug offenders increases the likelihood of recidivism and ongoing criminal behavior.<sup>28</sup> Studies using a variety of methodologies seriously question the value of the ‘war on drugs’ approach, given drug consumption and drug related crime seem to be unaffected in any measurable way by mandatory minimum sentencing.<sup>29</sup> A Canadian study of 300,000 offenders looking at recidivism rates concluded that the longer someone is in prison, the more likely he was to commit another offence upon release. This relationship was most pronounced among low risk-offenders.<sup>30</sup>

One Canadian study makes the case that “the belief that longer sentencing leads to deterrence is based upon a ‘bedrock economic model’ of the sort now recognized as neo-liberal. If you increase the price of something, the demand for it goes down. Crime is regarded in the same way as any other market.”<sup>31</sup> Thus, the argument goes, that as the “price of crime” increases in the form of longer prison sentences, fewer people will choose to commit crimes. As noted by many participants in this study, that model does not reflect the reality or decision-making context of many low-income drug users, who have limited choice and opportunities in terms of employment, are suffering the impacts of poverty, child welfare and involvement in the youth criminal justice system, and are dealing with drug dependence.

The findings of this study about decision-making among people who commit crimes as a result of drug dependence and poverty are in line with a series of studies, cited in a research briefing prepared for Canada’s Department of Justice in 2002. According to these studies, only a small proportion of incarcerated offenders are “calculators,” who perform careful cost benefit analysis before committing a crime. In fact, many prisoners do not differentiate between a three and five year sentence, and incarceration does not reduce re-offending when compared to offenders who have received non-custodial sanctions.<sup>32</sup> Perhaps most importantly, in the context of our report, researchers have

determined that the deterrent effect of mandatory minimum sentences may be crime specific. In preparing their research for the Canadian Department of Justice, the authors of that report conclude that, “from a utilitarian point of view, incapacitating casual or low-rate offenders for long periods is a waste of justice system resources.” The authors assess the relative effectiveness of mandatory minimum sentencing in relation to various categories of crimes, arguing that such sentencing “seem[s] to be least effective in relation to drug offences.”<sup>33</sup>

A final rationale for mandatory minimum sentences is that excessive judicial discretion in sentencing results in unacceptable disparities in sentencing between offenders found guilty of the same crime. While fairness and consistency in sentencing are eminently legitimate goals for government to pursue, mandatory or determinate sentencing is not required in order to achieve appropriate uniformity in Canadian sentencing. In 1973, American Judge Marvin Frankel wrote a book called *Criminal Sentences: Law Without Order*.<sup>34</sup> Frankel was concerned that race and poverty might illegitimately factor into longer prison terms. Frankel described highly discretionary, indeterminate sentencing as a “non-system in which every judge is a law unto himself or herself and the sentence a defendant gets depends on the judge he or she gets” and further, that, “individualized justice is *prima facie* at war with... equality, objectivity, and consistency in the law.”<sup>35</sup> However, unlike the United States, where appellate sentence review is constrained, Canada’s appeal courts regularly review sentences to ensure that they are fair and consistent across cases and crimes. Unwarranted disparities are routinely overturned on appeal.

What is relevant to the Canadian context, though, is that the experience with mandatory minimums in the United States has shown that reducing judicial discretion does not create consistency; it merely shifts discretion towards police and prosecutors. The police have the power to arrest an individual or release that person with a warning. Prosecutors have the power to proceed, dismiss, or stay a charge and, in some cases involving hybrid offences, they also have the option to proceed summarily and avoid mandatory minimum sentences altogether. In the United States, some commentators have argued that by removing discretion from the sentencing process the sentencing rules have “succeeded only in shifting it... from the judge, in public proceedings conducted on the record in the courtroom, to the prosecu-

tor's office, off the record and behind closed doors."<sup>36</sup> In fact, the resulting lack of openness and accountability of charging and plea negotiation processes that are given increased importance with mandatory sentences may undermine the integrity of the entire sentencing process.<sup>37</sup>

## B. THE IMPACTS OF IMPRISONMENT: INDIVIDUALS, FAMILIES, AND COMMUNITIES

The effects of imprisonment described by participants in this study include internalizing an aggressive and defensive persona, institutionalization, increased drug or alcohol use, loss of personal connections, and challenges in securing housing and employment. These impacts are well documented in academic literature. Ernest Drucker notes that individuals who come into contact with the prison system are not just deprived of their liberty for a set period of time, but they also often become incapacitated for life. They are unable to find decent work, get proper housing, participate in the political system, or have a normal family life.<sup>38</sup>

What participants in this study had to say about institutionalization after spending time in prison is well supported in the criminological and psychological literature on imprisonment.<sup>39</sup> In extreme cases of institutionalization, prisoners lose their ability to make independent decisions or even to regulate their own behaviour once outside the external controls of the institution.<sup>40</sup> These effects are most pronounced among longer-term prisoners and people who enter the correctional system at a young age, suggesting that both the changes to the YCJA and the introduction of mandatory minimums for drug offences will exacerbate this outcome.

Imprisonment and the lack of re-integration services is not only a problem for offenders who have been released from prison. In the United States, the lack of re-integration services has affected families and communities in a number of ways. Among the most significant consequences has been the reliance on family members and community resources to absorb the psychological costs of imprisonment. Community agencies that are already struggling to meet the basic needs of individuals and engage in preventative work are further expected to dedicate scarce time and resources to meet the needs of prisoners facing poverty,

trauma, a diminished sense of self-worth, disrupted attachments, and dysfunctional behaviours.

The challenges facing individuals upon release from prison are also well documented. Evidence from the U.S. demonstrates that a criminal record diminishes the ability of a former prisoner to make meaningful changes in his or her life. One American study found that employers seeking to hire for entry-level positions were 50 percent more likely to select an individual without a criminal record in the first phase of elimination.<sup>41</sup> For African-American applicants, employers were three times more likely to call back the candidate without a criminal record. This suggests that restrictions on pardons will not only have negative consequences on the economic and social re-integration of offenders, but will also likely have disproportionate ramifications on vulnerable populations. This post-release outcome cannot be underestimated, as now it will be harder, if not impossible, for people who have been in prison to clear their criminal record, even years after their debt to society is paid.

Drucker notes that while the American "epidemic" of imprisonment is nationwide, the social effects of imprisonment have been most deeply experienced in the poorest urban neighborhoods. In some communities, over 90 percent of families have a member who had been incarcerated. The children of families affected by imprisonment have lower life expectancy than other American children, and are six to seven times more likely than other children to end up in prison themselves.<sup>42</sup> This has led to a widespread cycle of intergenerational imprisonment in the United States that Canada is now at risk of replicating.

## C. THE ROLE OF DRUG TREATMENT COURTS

As noted in Chapter 2, the SSCA does contain a provision that would allow a drug dependent offender to be diverted into a Drug Treatment Court (DTC) program. On first read, this provision mitigates concerns about the lack of judicial discretion in sentencing marginalized people who are involved with the criminal justice system as a result of poverty and drug dependence. However, these programs present serious accessibility problems. Perhaps even more importantly, they are rooted in a flawed understanding of drug use that ignores the realities of substance dependence



as a health issue and other important contextual factors in marginalized people's lives.

Geographical accessibility is a major limitation of Canada's federal DTC program. As of May 2012, DTC programs were only operating in Toronto, Vancouver, Edmonton, Winnipeg, Ottawa, and Regina.<sup>43</sup> By way of comparison, in 2003 there were 700 drug treatment courts in the United States with an additional 400 in the planning stage.<sup>44</sup> There is also a question about how many drug dependent people who are at risk of mandatory minimum sentences would be found to be eligible for the DTC program. Eligibility is determined on a case-by-case basis. However, individuals who are charged with violent offences or who have a history of violent offences generally do not qualify at all for the program.<sup>45</sup> Similarly, a "major trafficking charge" disqualifies people from entering the DTC program.<sup>46</sup> With the broadening of the definition of "serious drug offences," this potential alternative to incarceration may be much weaker than it seems.

The most significant deficit of DTCs may be built in to the underlying philosophy of these programs. Some experts argue that DTCs are actually *contraindicated* for people genuinely dependent on drugs and for members of disadvantaged groups that have traditionally filled prisons as part of the war on drugs.<sup>47</sup> Timothy Christie and John F. Anderson, of the British Columbia Centre for Excellence in HIV/AIDS, argue that, "drug treatment courts are fundamentally flawed because they rest upon a basic misunderstanding about the nature of addiction."<sup>48</sup> According to the U.S. Department of Justice, drug treatment courts take a comprehensive approach "intended to reduce the number of crimes committed to support drug dependence through judicial supervision, comprehensive substance abuse treatment, random and frequent drug testing, incentives and sanctions, clinical case management, and social services support."<sup>49</sup> Yet, the criminal justice system, in designing both criminal laws and drug treatment courts, has taken the position that drug dependence is a matter of free will rather than a complex medical condition.<sup>50</sup> These underlying rationales hold equally true for Canada. In the view of Judge Paul Bentley, of Toronto's DTC, individuals "should only be going to drug treatment court if they want to be drug-free. If they want anything else, [they should not] come to drug treatment court."<sup>51</sup>

The length of DTC programs is approximately one year. They are generally outpatient programs, which require the

offender to attend both individual and group counseling, and to appear personally in court on a regular basis. Further conditions can be imposed, including staying away from certain areas and refraining from contact with certain people, including others receiving court services.<sup>52</sup> Given what participants in our research study had to say about their struggles with court-imposed conditions, including mobility restrictions and challenges in making multiple appointments when homeless, it does not appear that these programs have been designed to take into account the realities of those struggling with the dual burdens of drug dependence and economic marginalization.

This may be one factor explaining the very low completion rate for DTC programs. Department of Justice figures released in 2009 placed the range of graduation rates from a low of six percent in Toronto to a high of 36 percent in Winnipeg. Between 2001 and 2005, a total of 322 people were admitted into the Vancouver DTC program, with 34 people graduating, for a completion rate of 10.6 percent.<sup>53</sup> An evaluation of the Winnipeg DTC has found that the program's design means that marginalized people are at a significant disadvantage in terms of their ability to succeed. This bias is reflected in the disproportionately low rates of graduation among First Nations people, who make up the majority of program participants.<sup>54</sup> An evaluation of the first 18 months of Toronto's DTC project found that First Nations women were among the least likely to participate in drug treatment court programs, and that males who were older and had a more robust employment history were disproportionately represented among those who completed programs successfully.

In order to participate in a DTC program, the accused must give up the right to plead not guilty. Given that the majority of DTC program participants do not graduate and are diverted back into the traditional justice system, this raises concerns related to the due process rights of people struggling with drug dependence.

## D. FINANCIAL COSTS OF "TOUGH ON CRIME" MEASURES

In addition to the extensive social costs of mandatory minimum sentences outlined above, it is inevitable that there will also be major economic costs associated with the changes brought about by the SSCA. These new costs will



come at a time when Canada's criminal justice spending is already on the rise. According to Canada's Office of the Parliamentary Budget Officer, over the last 11 years, national criminal justice expenditures have increased in real terms and as a percentage of GDP. Since 2002, *per capita* spending, in real terms, has increased 23 percent. During the same period, Canada's crime rate has declined 23 percent.<sup>55</sup> We can expect spending to continue to increase at a dramatically quicker pace, as the SSCA will have a direct impact on rates of incarceration.

The Correctional Service of Canada is predicting an eight percent increase in inmates per year. At the provincial level, the increase will likely be three or four times higher, given that the vast majority of minimum sentences will be served as "provincial time."<sup>56</sup> Added to that, the provinces will see an increase in remand wait times, as mandatory minimums make plea bargains less attractive, causing more cases to proceed to trial.<sup>57</sup> Incarceration of offenders is extremely expensive, costing anywhere from \$65,000 to \$130,000 a year to house a single Canadian inmate. These are just the operating costs. Increasing inmate populations will also mean increased capital expenditures in the form of new prisons.

In February of 2012, The Office of the Parliamentary Budget Officer released a 97-page report titled "The Fiscal Impact of Changes to Eligibility for Conditional Sentences of Imprisonment in Canada." The Budget Officer predicted that just one element of the SSCA – changes to eligibility for conditional sentences – will affect 4,500 offenders and will result in a 16-fold increase in cost per offender from \$2,600 to \$41,000. Without taking into account capital expenses related to building new prison spaces, this change alone is predicted to cost the federal government an additional eight million dollars. Costs for the provinces and territories are predicted to increase by 137 million dollars.<sup>58</sup>

It is instructive to again look to the United States, with their decades of experience with mandatory minimum sentences, in order to understand the cost implications of the SSCA. According to the Elizabeth Fry Society, the

onset of mandatory minimums in California resulted in a 250 percent increase in the costs of imprisonment.<sup>59</sup> In an effort to prevent similar spending patterns in Canada, more than two dozen members of the American advocacy group Law Enforcement Against Prohibition sent a letter to the Prime Minister, urging the Canadian government to reconsider mandatory minimum sentences for "minor" marijuana offences under its "tough-on-crime bill" and suggest that a better approach would be to legalize marijuana under a policy of taxation and regulation.<sup>60</sup> They wrote:

*"We are ... extremely concerned that Canada is implementing mandatory minimum sentencing legislation for minor marijuana-related offences similar to those that have been such costly failures in the United States... These policies have bankrupted state budgets as limited tax dollars pay to imprison non-violent drug offenders at record rates instead of programs that can actually improve community safety."*

While the federal government has exclusive jurisdiction to make criminal laws, the provinces, for the most part, bear the burden of enforcing and administering criminal justice. The Parliamentary Budget Officer has recently shown that criminal justice expenditures are roughly split 27/73 between the federal government and the provinces (\$5.5 billion and \$14.8 billion, respectively).<sup>61</sup> This means that the costs associated with the SSCA will be largely borne by provincial governments. It is estimated that \$30 million more will be needed annually just to incarcerate the 500 additional marijuana growers who will go to jail in British Columbia each year.<sup>62</sup>

In a joint report, the Canadian Centre for Policy Alternatives and the John Howard Society of Manitoba make the case that the Province of Manitoba could better spend the estimated \$90 million per year that the SSCA is expected to cost that province in order to address the root causes of crime and drug dependency.<sup>63</sup> By investing in new social housing and child care spaces rather than prison cells, and investing in employment, education, and drug dependency supports rather than correctional staff, they make the case that we really could build safer streets and communities for everyone.





*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.*

—British Columbia Provincial Health Officer p. 35



## CHAPTER 5: *CHARTER* IMPLICATIONS OF THE SSCA

Given that the provisions of the SSCA have only been in force for just over a year, quantitative data is not yet available on the number of low-income drug users affected by the legislative changes. However, the life stories shared by participants, including patterns of arrest and conviction, suggest that low-income drug users present a useful sample of the types of offenders who will be impacted by many of the provisions introduced under the auspices of the SSCA.

This includes the new mandatory minimums for *CDSA* offences, restrictions on the use of conditional sentences, changes to the *YCJA*, and new restrictions on securing record suspensions. Based on the stories of participants, as well as legal and social scientific research, we now turn our attention to the ways in which this new legislation may compromise the *Charter* rights of members of vulnerable communities, including low-income drug users, Aboriginal people and at-risk youth.

### A. ENGAGEMENT OF *CHARTER* RIGHTS

The *Charter* is a constitutional document that both guarantees and describes limits on the fundamental rights of people in Canada. Any law passed by the government must be in accordance with the rights that are spelled out in the *Charter*. Three sections of the *Charter* are potentially engaged by mandatory minimum sentences and other changes brought into force through the SSCA:

- Section 12 (Right to not be subjected to cruel and unusual treatment);
- Section 7 (Right to life, liberty, and security of the person, and the right to not be deprived of these unless in accordance with the principles of fundamental justice); and
- Section 15 (Right to equal treatment and protection under the law).

Since the *Charter* came into force, challenges to sentencing provisions, and in particular mandatory minimums, have largely been based on the protection against being subjected to cruel and unusual treatment or punishment found in Section 12. However, the standards set by judges deciding cases under this provision are very difficult to meet. While Parliament's ability to craft various punishments is not

absolute, courts generally respect the separation of powers and exercise restraint by deferring to Parliament in most cases. As a result, in practice, a finding of cruel and unusual punishment is a rare event. However, given the expectation that the new laws will capture marginalized offenders, there may be some potential for the minimum sentences to meet this high hurdle, particularly because judges are constrained in considering the context of the offender and the conditions of imprisonment that the offender will experience.

Sections 7 and 15, in contrast, open new avenues for challenging the constitutionality of the amendments brought about by the SSCA. They also hold more promise than Section 12 in successfully convincing a court that these laws reach too far. Simply put, the legal hurdles to demonstrate a Section 7 or 15 infringement may not be as substantial as those of Section 12. Therefore, when viewed contextually through the lens of marginalized, drug dependent offenders – often people with other characteristics that compound their marginalization, such as poverty or mental health issues – mandatory minimum sentences are likely to unconstitutionally deprive people of their liberty and security of the person, and/or discriminate against them in their application.

### B. SECTION 12

Section 12 of the *Charter* protects the rights of individuals not to be subject to cruel and unusual treatment at the hands of the state. Sentences will be found to be “cruel and unusual” if they are “grossly disproportionate” to the offence that incurred the sentence.

Although there have been few successful challenges to mandatory minimum sentences under the auspices that the sentences were “cruel and unusual punishment,” one possible avenue for a Section 12 challenge is on the grounds



that the *Charter* requires consideration of the specific prison conditions that would be faced by an offender. Mandatory sentences remove the ability of the sentencing judge to make this consideration, and could lead to punishment which is grossly disproportionate to the offence and contrary to the *Charter*.

Generally, principles of sentencing found in the *Criminal Code* support the idea that sentences should not be unduly harsh, and that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.<sup>64</sup> The *CDSA* incorporates a set of additional sentencing principles, which include encouraging rehabilitation, treatment of offenders in appropriate circumstances, and acknowledgement of harm done to victims and to the community.<sup>65</sup> In short, both the *Criminal Code* and the *CDSA* recognize both punitive and restorative aspects to sentencing for offences.

The *Criminal Code* sets out that the “fundamental principle” of sentencing is proportionality, as defined in section 718.1:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.<sup>66</sup>

The Supreme Court of Canada (SCC) has explained that “the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender.”<sup>67</sup> The Court has also spelled out that sentencing decisions “must proceed on an individual (or case-by-case) basis.”<sup>68</sup> What’s more, the Court has said that sentences must fall within the rights protected by the *Charter*; a sentence cannot be “fit” for an offender “if it does not respect the fundamental values enshrined in the *Charter*.”<sup>69</sup>

Mandatory minimum sentences and restrictions on the use of conditional sentences largely reflect the punitive elements of sentencing, such as deterrence, denunciation of behaviour<sup>70</sup> and incapacitation of offenders.

Mandatory minimums are possibly vulnerable to s. 12 challenges because they are inflexible, and thus restrict the ability of the judiciary to consider contextual factors, particularly the conditions under which the sentence is applied. As explained by the SCC, the protection afforded by Section 12 “governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed.”<sup>71</sup> Despite this inflexibility, Canadian

courts have upheld numerous mandatory sentences. For example, the SCC upheld a sentence of life and 25 years without parole for first-degree murder,<sup>72</sup> life sentence and ten years with no parole for second-degree murder,<sup>73</sup> and seven days in prison for knowingly driving with a suspended license.<sup>74</sup> In each of these cases, the courts found that the sentence was not grossly disproportionate in relation to the seriousness of the offence.

The first case in which s. 12 was considered by the SCC, and also the only case that has resulted in the successful challenge of a Canadian mandatory minimum sentence in Canada’s highest court, was *R. v. Smith*,<sup>75</sup> which involved a conviction for importing drugs scheduled under the *CDSA*.<sup>76</sup> In *Smith* the mandatory minimum prison sentence of seven years was not struck down on the basis that it was grossly disproportionate in the case of Edward Smith, an alleged cocaine dealer, but rather because it was conceived that a young person bringing a small amount of marijuana across the border would be caught under the same net.

The decision in *Smith* provides some guidance as to how to measure the impact of the sentence on the offender to determine whether the sentence is “grossly disproportionate” in its effect, rather than merely excessive. As described by Chief Justice Laskin, a grossly disproportionate sentence “is so excessive as to outrage standards of decency.”<sup>77</sup> In *Smith*, the SCC lists the factors a court should consider in assessing whether a sentence is grossly disproportionate:

- the gravity of the offence;
- the personal characteristics of the individual; and
- the particular circumstances of the case.

In this context, a court then determines the appropriate range of sentences to “punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.”<sup>78</sup> Notably, the deterrence of other potential offenders is irrelevant at this stage of the inquiry, but may be considered under a Section 1 analysis seeking to justify a *Charter* infringement. Determining whether a particular sentence is grossly disproportionate – and a violation of *Charter* Section 12 – means that the resulting sentence must not be grossly disproportionate to what *this offender* deserves.

The Court in *Smith* noted that the “effect of the sentence” is more than just its length. Instead, it includes its nature

and the conditions under which it is applied. The effect of a sentence, then, is “a composite of many factors,” which must be considered by a sentencing judge.<sup>79</sup> Of course, mandatory sentences remove the ability of a judge to give any meaningful effect to this requirement. Regardless of the nature and conditions of the sentence imposed, the SSCA removes the ability of judges to “fit” the sentence to the offender.

Incarceration involves more than spending time cut off from the broader community. Particularly for young offenders, as evidenced by the life stories of participants in this study, incarceration leaves an indelible mark on the person that has profound effects on future ability to integrate into society, find meaningful work, and avoid future conflicts with the law. Sentencing provisions that rely primarily on the punitive purposes of the criminal law while eliminating steps that offer youth reasonable opportunities to modify behaviour and develop skills to integrate positively in society could be argued to have practical implications for young offenders and young adults that are out of proportion with the seriousness of the crime.

The decision in *Smith* suggests that the courts recognize the importance of considering both “diminished blameworthiness” as a result of youth and the disproportionate impact of a long jail term for a young person in sentencing decisions. As noted by some participants of our research, there are also broader impacts of incarceration related to parenting and families, including children being placed into foster homes. Were non-custodial sentences an option for judges, these outcomes could likely be avoided.

Sentencing issues have also been recognized by the courts as having unique practical implications for individual Aboriginal offenders, who are protected by specific provisions of the *Criminal Code* that recognize the disproportionate impacts of imprisonment on Aboriginal communities.

There is reason to believe that the courts will continue to remain reasonably deferential to Parliament in the face of Section 12 claims. However, despite the relatively short length of mandatory sentences brought in by the SSCA, the impacts on women offenders, offenders with drug dependency or mental health issues, and Aboriginal offenders will likely be profound. In *Smith*, a mandatory sentence in and of itself was not offensive to *Charter* Section 12, but rather the combination of the mandatory sentence “examined in light of

the wide net cast” by the legislation. The legislative changes brought in by the SSCA also cast a wide net and capture activity that is quite commonplace in our society. Removing the ability of a judge to consider the circumstances of the offender and the conditions of the sentence in these cases could prove to be sufficient for a finding of gross disproportionality and a *Charter* Section 12 infringement.

## C. SECTION 7

The courts have not yet opined on how mandatory minimums might stand up to challenges brought under *Charter* Section 7. However, the life stories of the participants describe conditions by which the provisions of the SSCA are likely to engage this *Charter* right. Taking into account the circumstances of marginalized persons being caught in the net of the new legislation, there are several bases for which the legislation is vulnerable to challenge under this ground. Plus, given the courts’ expansive use of Section 7 of the *Charter* in protecting the rights of marginalized communities in recent years, including the rights of homeless persons,<sup>80</sup> sex workers,<sup>81</sup> and injection drug users,<sup>82</sup> Section 7 may prove to be the most fruitful avenue for challenging the provisions brought in by the SSCA, including mandatory minimum sentences.

Section 7 of the *Charter* enshrines the right to life, liberty, and security of the person, and the right to not be deprived of life, liberty or security of the person unless done so according to the principles of fundamental justice. The government can – and does – deprive persons of liberty in accordance with these principles on a regular basis through the criminal justice system. Imprisonment is, by one definition, a deprivation of a person’s liberty, after all. However, what has been less discussed in criminal justice circles is that imprisonment may also lead to increased risk to the security of the person of marginalized persons, such as those with mental health issues, the disability of drug dependency, or those experiencing poverty. For example, given the lack of sterile needles in prison, a drug dependent person would be at an increased risk of contracting HIV or Hepatitis C while incarcerated, as opposed to an offender serving a sentence in the community with available harm reduction equipment.<sup>83</sup> Or, as set out in a recent report from the University of Toronto’s Human Rights Program titled, “*Cruel, Inhuman and Degrading? Canada’s treatment*



of federally sentenced women with mental health issues,” a woman with mental health issues who is incarcerated in a federal prison is unlikely to receive adequate care, and will likely receive treatment that violates her human rights including her right to health and access to justice.<sup>84</sup>

In order to demonstrate an infringement of the rights protected under Section 7, one must prove, on a balance of probabilities, that there was a deprivation or risk of deprivation of life, liberty and/or security of the person. One must also prove that this deprivation was done in a way that was contrary to the principles of fundamental justice. Thus, infringement of these rights that is done through laws that are arbitrary, overbroad, vague or grossly disproportionate in effect, for example, will be unconstitutional.<sup>85</sup>

Since the introduction of the *Charter*, the courts have identified several principles of fundamental justice – or core values of the legal system – that are relevant to a Section 7 analysis. As articulated by the SCC, a proposed principle of fundamental justice must meet three criteria: (1) It must be a legal principle; (2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate; and (3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.<sup>86</sup> Following are principles of fundamental justice that may potentially be raised in a challenge to the SSCA provisions.

## ARBITRARINESS

It is a principle of fundamental justice that laws should not be arbitrary. That is, the state cannot limit an individual's rights where “it bears no relation to, or is inconsistent with, the objective that lies behind [it].”<sup>87</sup> When Parliament enacted the *Safe Streets and Communities Act*, the Department of Justice described the SSCA as fulfilling its June 2011 Speech from the Throne commitment to “move quickly to re-introduce comprehensive law-and-order legislation to combat crime and terrorism.” In a press release, the government of Canada stated that with the SSCA it is demonstrating its commitment to ensuring criminals are held fully accountable for their actions and that the safety and security of law-abiding Canadians and victims comes first in Canada's justice system. The department of Justice also states that the legislation “supports the National Anti-Drug

Strategy's efforts to combat illicit drug production and distribution and help disrupt criminal enterprises by targeting drug suppliers.”<sup>88</sup>

While there is fundamental debate in the criminological community about the efficacy of criminal prohibitions in “combat[ing] illicit drug production and distribution” or of longer prison sentences in promoting the safety of “law-abiding citizens,” there is a more immediate question as to whether or not the specific provisions of the SSCA can be reasonably connected to the stated objectives of the legislation, including disrupting criminal enterprises by targeting drug suppliers. Based on the stories gathered for this study, it is clear that the legislation will likely capture low-income, drug dependent people and not the “drug kingpins” it was touted at targeting.

One of the enumerated aggravating factors that now trigger a mandatory minimum of one year in jail is that “the person committed the offence for the benefit of, at the direction of or in association with a criminal organization, as defined in subsection 467.1(1) of the *Criminal Code*.” A criminal organization, as defined in the *Criminal Code*, is three or more persons whose main activity is the commission of an offence for a benefit.

A clear theme that emerged from this study is that many drug dependent people who engage in street-based drug dealing or work for drug producers will likely be caught by the new mandatory minimum legislation by virtue of past criminal convictions for drug related offences, the degree to which they engage in illegal activities in public space, and the organization of drug-trafficking operations. A number of participants in this study explained the way in which they, or other drug users they know, coordinate to sell drugs to support their dependency, as well as the way that drug producers employ lower-income people in their operations. This accords with research findings related to the organization of drug trafficking operations in Vancouver. Dr. Thomas Kerr, of the BC Centre for Excellence in HIV/AIDS, testified before the Senate Committee on Legal and Constitutional Rights that this definition will catch a large number of addicts involved in street-level drug dealing:

“...We found that drug dealers who were users typically worked within a system involving a minimum of three individuals. There is an individual, typically a woman, who steers individuals to someone selling the drugs. The seller refers the individual to



someone who collects the money. There is then a fourth individual who actually holds the supply. You have a steerer, a seller, a holder and a collector. That is four individuals. These are all positions typically occupied by the most severely addicted, street based individuals. The importers or large-scale traffickers do not assume these roles. These roles are held by addicted individuals, the most severely addicted individuals, and the basic system of drug dealing at the street level requires the involvement of a minimum of three but in most cases four individuals and, hence, a criminal organization as defined by this bill.”<sup>89</sup>

This organization of drug production and trafficking operations simultaneously puts low-income drug users at risk of being sentenced to a mandatory term of imprisonment on the basis of being involved in “organized crime” and protects “serious drug traffickers” from being charged themselves. Legislation targeting “criminal organizations” that are, in essence, comprised of poor people who engage in criminal activity to support their dependency on drugs, while in effect allowing the high-level drug traffickers to escape prosecution, is the very definition of arbitrariness. Such a scheme cannot be said to further any legitimate government objective of combatting drug trafficking, as it exacerbates – or at a minimum does nothing to diminish – the very problem it is intended to address.

## VAGUENESS

A second principle of fundamental justice is that laws cannot be overly vague. While absolute precision is not required, a law is unconstitutionally vague if it does not have clarity enough to provide fair notice to citizens about the type of behaviour that is captured under the law, and precision to constrain law enforcement discretion so that a conviction will not automatically flow from prosecuting an offence.<sup>90</sup> For a law to be constitutional there must be clarity of purpose and subject matter to provide an adequate basis for legal debate.<sup>91</sup> One provision of the SSCA, an aggravating factor that triggers a mandatory minimum sentence in certain drug trafficking and production cases, has been identified as being particularly vague:

- The offence was committed in or near a school, on school grounds or “near any other public place usually frequented by persons under the age of 18 years”

This clause, on its face, is unclear about exactly what would be captured as a place frequented by minors. Is it sufficient

that there is, incidentally, one minor person in the vicinity of an offence, or does it more aptly apply to a school, where minors congregate regularly? Is a shopping mall captured in this definition? In one reading, this clause could be interpreted to capture just about every piece of public property and spaces commonly experienced as public, with the exception of bars and casinos, or other places that specifically prohibit minors. Without much effort, it is clear to see that this provision may not effectively delineate a specific area of risk to a person.

According to police-reported crime statistics, in the year 2008, nearly half of all trafficking offences were in a public place, nine percent were in a commercial establishment, six percent were in a public institution, and three percent were in a school.<sup>92</sup> All of these appear to fit the definition in this aggravating factor that triggers a mandatory minimum sentence, as they are all places where one is likely to encounter a minor.

## OVERBREADTH

A third principle coming into play with this argument is overbreadth. Overbreadth is a principle of fundamental justice requiring that laws be precise in the means of their application. This principle requires that the *means* used to achieve a societal purpose or objective must be reasonably necessary.<sup>93</sup> Laws that “capture too much” are typical of overbreadth. “If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual’s rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.”<sup>94</sup> “Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual.”<sup>95</sup>

Overbreadth may or may not be related to the vagueness of a law. For example, a law that is wholly unintelligible would be vague, but not necessarily overbroad. However, a law that captures “too much” because of its lack of clarity, such as the example above regarding minors frequenting public spaces, could be both vague and overbroad.<sup>96</sup> Poor drug users who also sell drugs and younger people employed selling drugs are disproportionately outdoors in public space. They would likely be caught under an overbroad provision that encompasses the entirety of public space. In effect, this provision will

operate to put people in jail for at least two years where previously the sentence would have been far less harsh as a result of vague and overbroad “aggravating factors.”

Such laws may also be arbitrary and disproportionate against marginalized groups. Analysis of statistical trends in drug arrests led the Canadian HIV/AIDS Legal Network to conclude that “[r]ather than penalizing profiteers engaged in large-scale trafficking, it is likely to be primarily the most marginalized people with addictions and/or living in poverty, engaged in small-scale trafficking often related to their drug dependence, who will bear the brunt of such mandatory incarceration on provisions.”<sup>97</sup> The SSCA amendments to the CDSA are potentially overbroad in that they will likely capture small-time drug users in the wide net they cast for the stated purpose of targeting organized crime. Penalties equally meted out against people dependent on drugs and those involved in organized crime will be sweeping in their impact and disproportionately affect marginalized persons.

### MORAL CULPABILITY OF YOUTH

Another principle of fundamental justice is the principle that “young people are entitled to a presumption of diminished moral culpability” compared to adult offenders.<sup>98</sup> This principle was described by the SCC in the 2008 case of *R. v. D.B.*, where the Court stated that this principle is derived from the fact that, because of their age, young people “have heightened vulnerability, less maturity and a reduced capacity for moral judgment.”<sup>99</sup> That is why there is a separate legal and sentencing regime for them. One result of this finding is that the *Youth Criminal Justice Act* could not create a presumption of an adult sentence upon youths.

However, changes to the *YCJA* that were enacted through the SSCA seem to run counter to this principle. These changes include rhetorical amendments, such as the decision to highlight the protection of society as a fundamental principle of the *YCJA* and add “specific deterrence and denunciation” to the principles of sentencing of youth. The SSCA also added definitional changes, such as the re-definition of “violent offence” to include behaviour that endangers the life or safety of others. There are also concrete changes such as simplification of pre-trial detention rules to help ensure that, when necessary, violent and repeat young offenders are kept off the streets while awaiting trial, and a measure that requires the Crown to consider seeking adult

sentences for youth convicted of the most serious violent crimes. These changes all point to a shift away from the notion of “diminished culpability” among youth. They also point away from related sentencing options such as diversion and rehabilitation, which aim to keep young people out of prison. As more young people are tried under the new provisions, the question will be whether or not in practice those amendments result in a youth justice system that strays so far from the principle of diminished moral culpability as to infringe on the *Charter* Section 7 rights of youth charged with crimes. These new laws affecting youth, along with many other provisions of the SSCA dealing with adult offenders, may also be vulnerable to *Charter* challenges when the negative impacts are disproportionately felt by already marginalized groups including people with disabilities and Aboriginal people.

### PROPORTIONALITY

The principles of fundamental justice are based on legal principles that evolve as claims are brought and adjudicated in the courts, and reflect the changing morals and standards of society. Thus, new principles of justice may come to be recognized by the courts and be avenues for rights determination under Section 7. One such evolving new principle may be proportionality of sentencing. Although proportionality has been a factor in a *Charter* Section 12 analysis in order to determine if a sentence is grossly disproportionate to the committed offence, as was discussed above, it has not yet been part of a Section 7 claim. However, as one noted legal scholar suggests, there is a strong argument that proportionality is now a recognized principle of fundamental justice that could be used to strike down a mandatory sentence and would be recognized by the courts as such.<sup>100</sup> There is some logic to structuring a legal claim challenging mandatory sentences as applied to marginalized communities under Section 7. As recounted above, the judicial history of striking down mandatory minimums under Section 12 is quite sparse. In contrast, there have been some notable cases brought under Section 7 that have upheld the life, liberty and security of the person rights of marginalized people. Additionally, in a case focusing on the impacts of the criminal law to marginalized drug users, Section 7 provides a useful frame of discussion around human rights and injustice that may not be available in discussing impacts under Section 12.



## D. SECTION 15

*Charter* Section 15(1) – the equality guarantee – may also prove a fruitful avenue for challenging the constitutionality of mandatory minimum sentences and changes brought about by the *SSCA*. Section 15(1) guarantees equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Section 15(1) serves to guarantee “substantive” equality, rather than just formal equality. This recognizes that not everyone in society starts from the same place and with the same advantages or disadvantages. Treatment that is discriminatory is “a distinction, whether intentional or not, based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages... not imposed upon others...”<sup>101</sup>

Section 15(1) requires the government to exercise caution in making express or direct distinctions in its legislation, and must also take into account differences between individuals to ensure, as far as possible, that the legislation will not have a greater impact on certain classes of persons due to personal characteristics. The government must take into account the possible impact of the laws on already disadvantaged classes of persons,<sup>102</sup> or persons subject to vulnerability, prejudice, and negative social characterization.<sup>103</sup>

In order for a claimant to be successful under Section 15(1), a court must find that the impugned law creates a distinction based on an enumerated or analogous ground, and that the distinction creates a disadvantage by perpetuating prejudice or stereotyping.<sup>104</sup> In addition to the grounds of discrimination enumerated in the *Charter* (i.e. race, national or ethnic origin, etc.), an analogous ground could be one recognized by the courts in the past (e.g., sexual orientation), or a proposed new ground.

The courts have said that s. 15(1) protects against adverse effects discrimination, which occurs where a law is facially neutral, but has a disproportionately negative impact on a particular group.<sup>105</sup> In the context of a disability, for example, the focus of a *Charter* claim under this section would be whether a law has failed to take into account the adverse effect it would have on persons with disabilities, rather than whether it singles out people with disabilities for explicitly discriminatory treatment.

The duty imposed by s. 15(1) on the government to avoid adverse effects discrimination was adopted by the SCC in *Eldridge*.<sup>106</sup> Canada has recognized that part of the purpose of s. 15(1) is to ameliorate the position of disadvantaged groups in Canadian society by ensuring that laws do not further entrench disadvantage by failing to take it into account.<sup>107</sup> While this purpose does not require the government to take positive action to eliminate discrimination, it does require that “government not be the source of further inequality.”<sup>108</sup>

Most of the provisions of the *SSCA* are, in fact, facially neutral.<sup>109</sup> Therefore, in order to successfully advance a Section 15(1) claim, the rights claimant would be required to demonstrate that the burden of the law will disproportionately fall on those who are drug dependent such that adverse-effects discrimination is established. That this is the case is supported by the personal stories of the participants and by the social science evidence documenting marginalized communities’ experience with the criminal justice system.

According to Canada’s Correctional Investigator, nearly all of the population growth in Canada’s jails over the last decade has been from Canada’s marginalized populations: Aboriginal people, visible minorities, people struggling with drug dependency and the mentally ill. In his testimony before the House of Commons Standing Committee on Justice and Human Rights, the correctional investigator said that the *SSCA* was almost certain to have a disproportionate impact on these marginalized populations.<sup>110</sup>

### *DISCRIMINATION ON THE BASIS OF DISABILITY*

It is rare that the government will single out disabled people for discriminatory treatment.<sup>111</sup> Where the basis of an equality claim is disability, the focus of the inquiry is generally whether a law has failed to take into account the adverse effect it will have on people with particular disabilities, as mentioned above. Avoidance of discrimination on disability grounds will frequently require that distinctions be made to take into account the situation of disabled people.<sup>112</sup>

There does not appear to be any Section 15(1) jurisprudence on drug dependency as a specific analogous ground of discrimination.<sup>113</sup> However, there is a strong argument that drug dependency is not just an analogous ground, but



indeed part of the enumerated ground of physical disability. Human rights case law has established that drug dependency is a physical disability,<sup>114</sup> Human Rights tribunals across Canada have recognized drug dependence as a physical disability, and the *Canadian Human Rights Act* defines “disability” as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.”<sup>115</sup> With respect to *Charter* litigation, the federal government conceded in court that addiction is an illness in a Section 7 challenge to the impending closure of Vancouver’s supervised injection site, *Insite*.<sup>116</sup> Therefore, although there is not yet clear Section 15(1) jurisprudence around drug dependence as a physical disability, human rights and *Charter* case law strongly supports this argument. Provided that it can be demonstrated that mandatory minimum sentences adversely affect drug dependent individuals, it will not be difficult to establish the first requirement of the *Charter* test for Section 15(1). That drug dependent populations are subject to pre-existing disadvantage seems so obvious that it almost treads on the type of fact of which judicial notice may be taken. Indeed, it is difficult to find a metric by which disadvantage can be measured that doesn’t indicate an entrenched position of vulnerability on the part of drug dependent people.

Rights claimants have generally demonstrated that a law results in a disproportionate negative impact for a particular protected group by contrasting the impact for that group with a “comparator group.” In the *Withler* case, the SCC removed the formalistic requirement for a claimant to use such a comparator and instead mandated a contextual analysis of the factors present in the claim.<sup>117</sup> However, comparing the claimant’s position to others remains useful in illustrating the context of the claim. There are a number of possible comparator groups to use in these circumstances, including people with non-criminalized disabilities, or prisoners who are not dependent on drugs. These would allow rights claimants to demonstrate the potentially disproportionate impact of the *SSCA* on people who are disabled as a result of drug dependency.

Canadian data demonstrate that drug dependent people are currently jailed for *CDSA* offences, including those that now carry mandatory minimum sentences, at a higher rate than the Canadian population of non drug dependent people. According to the Canadian Alcohol and Drug Use Monitoring Survey, in 2010 only 1.8 percent of Canadians reported

past-year use of any one of cocaine, crack, speed, ecstasy, hallucinogens or heroin.<sup>118</sup> The proportion of drug dependent people in the population is likely even smaller, as that number includes one-time and casual use. In 2008, there were 8,000 guilty findings in adult criminal court cases with one *CDSA* section 5, 6 or 7 charge (trafficking, importing and producing controlled substances, respectively).<sup>119</sup> Assuming that, at most, one percent of the Canadian population is drug dependent, if the effect of drug laws were proportionate, then only 80 of these cases would have involved a drug dependent accused person. This is not the case and the reason is directly tied to the disability in question. There is ample evidence that many drug dependent people engage in selling drugs in order to finance their dependence.<sup>120</sup> A 2001 non-randomized sample of 114 untreated illicit opiate users in Toronto revealed that 67.5 percent of this population of opiate users was involved in the sale, distribution or manufacture of illegal drugs in the previous 30 days.<sup>121</sup> More recent results from the OPICAN study, which looked at untreated adults who have used illicit opioids on most days of the week for the last year, show that 31 percent of federal inmates were drug dependent and for 15 percent of those people their most serious crime was a drug crime.<sup>122</sup> The study also showed that 43 percent of inmates in provincial jails are drug dependent.

Information from the Vancouver Injection Drug Users Study showed that in 2007, drug dealing was the most frequently reported prohibited source of income among injection drug users, with 27 percent of injection drug users reporting dealing drugs in the 30 days prior to being asked.<sup>123</sup> The study also indicated that the likelihood of dealing drugs increased with higher-intensity drug dependency.<sup>124</sup> A 2009 study by the British Columbia Centre for Excellence in HIV/AIDS reported that: “most Vancouver drug users have historically been incarcerated as a result of drug-related crimes.”<sup>125</sup> This makes the one-year mandatory minimum for people with a designated drug conviction in the past ten years particularly problematic, since it appears likely to mainly catch people who are drug dependent selling drugs to fuel their dependency. Indeed, one prominent criminologist suggested that the effect of this particular provision will be to put hundreds of people in jail who would be better off in treatment or being supported in accessing harm reduction services.<sup>126</sup>

The data and accounts from our research participants support the claim that people who are drug dependent

receive treatment under the criminal law that is markedly different than that received by others. However, the fact that a law creates a distinction on an enumerated or analogous ground is not enough to support an infringement of Section 15(1) rights. The claimant must also show that the law has an “impact amounting to discrimination,” which has been interpreted by the SCC as perpetuating a disadvantage.<sup>127</sup>

In *Law v. Canada*, the SCC outlined several contextual factors that can help determine if discrimination exists, including whether the claimant group has suffered pre-existing disadvantage, vulnerability, stereotyping or prejudice.<sup>128</sup> There is a strong body of case law supporting these characteristics in respect to people with disabilities, though not people who suffer from drug dependence specifically.<sup>129</sup> However, numerous empirical and social science studies document that people who use drugs experience many pre-existing disadvantages in health, housing, interactions with the criminal law, income, and safety that will be exacerbated by incarceration. One such study conducted by Urban Health Research Initiative, with a population that is demographically very similar to the participants in this study, found that injection drug users who are incarcerated are twice as likely to become infected with HIV.<sup>130</sup> On release, injection drug users have a higher chance of a non-fatal overdose and higher HIV risks.<sup>131</sup> Liberty is one of the fundamental rights guaranteed in the *Charter*. Depriving drug dependent people of their liberty undoubtedly worsens their position in society. In the most extreme circumstances, these provisions may endanger and threaten the lives of drug users.

## ABORIGINAL PEOPLE

In addition to people considered disabled as a result of drug dependency, the SSCA is also expected to have disproportionate impact on Aboriginal people. Discrimination on the basis of national or ethnic origin is expressly prohibited by Section 15(1). That the criminal justice system exacerbates historical disadvantage experienced by Aboriginal people is such a well-established fact, the *Criminal Code* itself highlights that sentencing judges *must* consider an Aboriginal offender's special circumstances in crafting an appropriate sentence.<sup>132</sup> Recognizing that the situation of Aboriginal people in Canada is unique, the SCC noted that the purpose of this provision is to take into account the over-representation of aboriginal people in prisons. Mandatory minimum sentences erode this ameliorative provision by removing the

ability of a judge to consider historical disadvantage and other relevant factors.

A March 2013 Special Report by the British Columbia Provincial Health Officer recognized the importance of the interaction of multiple social factors in magnifying the harms of incarceration to individuals. It noted the specific harm to the health of Aboriginal people that will likely result from the enactment of the SSCA:

*Changes introduced by the Act have the potential to overturn progressive steps emphasizing reparation and reconciliation for Aboriginal people in BC and Canada. 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.*<sup>133</sup>

In the first of nine recommendations in the report, the Provincial Health Officer calls on the federal government to revoke or amend the SSCA to ensure that the legislation considers the health and well-being of Aboriginal offenders and recognizes the unique history and context of Aboriginal people in Canada.<sup>134</sup> Over and over, sources confirm that the SSCA will have a discriminatory impact on Aboriginal offenders and other marginalized groups, including people who use drugs and those with mental health issues.

However, a finding that a provision of the SSCA creates a distinction that amounts to discrimination for Aboriginal people and/or drug dependent people does not end the inquiry into the constitutionality of the law in question. Even where a law is found to be discriminatory such that it infringes the rights protected by Section 15(1), it is open to the government to argue that the law is justified under Section 1 of the *Charter*.

## E. SECTION 1

Section 1 of the *Charter* provides that all of the fundamental rights are guaranteed, subject to such limitations as can be justified in a free and democratic society. A law that is found to be cruel and unusual punishment (Section 12) or violates the principles of fundamental justice (Section 7) will rarely be justified in a free and democratic society, so often the Section 1 analysis becomes superfluous in those cases. However, Section 1 is often quite relevant in an analysis of



a Section 15 equality claim. The Court has said that there are two functions to Section 1: first, Section 1 “guarantees the rights which follow it,” and second, it “states the criteria against which justifications for limitations on those rights must be measured.”<sup>135</sup> The meaning of “free and democratic society” is interpreted to include “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”<sup>136</sup>

Section 1 analysis is undertaken when an infringement of another *Charter* right has been proven by a claimant on a balance of probabilities. Then, it is the state’s burden to demonstrate – also on a balance of probabilities – that the right was infringed within the constraints of Section 1. The analysis has two parts: first, a court determines whether the legislation has a “pressing and substantial” objective. Next, the court considers whether the means chosen by the government are proportionate. Proportionality involves a three-part test to 1) decide whether the purpose of the legislation is rationally connected to its stated aims; 2) determine whether the law impairs the *Charter* right as little as possible; and 3) evaluate whether the disproportionate impacts of the right infringement are proportional to the benefits to the state in having the law in place.<sup>137</sup>

Judges have generally accepted governmental objectives as pressing and substantial with the exception of objectives that are themselves discriminatory or antagonistic to fundamental freedoms, objectives which are at odds with the proper division of powers, or where there is no stated objective at all. For the *Safe Streets and Community Act*, the stated overarching purpose for the legislation is to create safer streets and communities for Canadians. There is little doubt the courts would find that the legislation has a pressing and substantial stated public purpose. However, in order to justify a limitation of *Charter* right, the law must also have a *rational connection* to Parliament’s objective. The means used must be carefully designed to achieve the objective. They must not be arbitrary, unfair, or based on irrational considerations. As discussed above under Section 7, there is a strong argument to be made that the legislation is, in fact, arbitrary in its design and implementation.

In defense of provisions of the SSCA that capture drug dependent people, the government would likely argue that

this population will necessarily be caught by laws enacted for the purpose of reducing drug crime. This argument expands the publically stated objective of the legislation, as the government has repeatedly stated that the purpose of the mandatory sentencing provisions was to target high-level, serious drug dealers. As Justice Minister Rob Nicholson told a Senate committee, “We are targeting those who profit from the vulnerabilities of those addicted to drugs. We are targeting organized crime.”<sup>138</sup> All of our interviewees relied on some form of social assistance as their primary source of income. As current and former drug users living in poverty, many are driven to engage in small time street level drug dealing to support their dependency. Based on what they told us about their criminal activity and convictions, it is reasonable to suggest that they, and others in similar positions will be charged, convicted and imprisoned by the mandatory sentences put in place by this legislation. When looking at this legislation as it currently stands, there does not appear to be a rational connection to the government’s stated purpose in enacting it. If “targeting those who profit from the vulnerabilities of those addicted to drugs” was truly the purpose of the mandatory minimum sentencing provisions, then it is irrational not to include a discretionary clause for judges to exempt offenders who do not meet the targeted profile.

## MINIMAL IMPAIRMENT

The minimal impairment test examines whether a less intrusive means could be used to secure the reasonable governmental objective. Changes to the CDSA, and to the *Criminal Code* more broadly, will result in more people going to jail and people staying in jail for longer periods of time. Prior to the introduction of the SSCA, adult jail terms were common for importing/exporting convictions, rare for production convictions and meted out in about half of trafficking convictions.<sup>139</sup> Only 52 percent of adults and 14 percent of youth found guilty of trafficking in 2006-2007 were sentenced to custody. The remainder were given non-custodial sentences. Importing/exporting convictions resulted in jail terms for 78 percent of adults and 67 percent of youth, while only 17 percent of adults and zero percent of youth convicted of production were sentenced to jail time.<sup>140</sup>

Based on these statistics, it is clear that a majority of drug crime convictions to date merited either non-custodial sentences or jail terms under 12 months. It is impossible



to say exactly how many of these convictions would have attracted a mandatory minimum jail sentence under the new regime resulting in more jail time, since it is also not clear precisely what proportion of these crimes contained aggravating factors that would have triggered a mandatory minimum. However, other statistics show that it is likely that a majority of these non-custodial or sub-12-month sentences would now merit a mandatory minimum. Access to parole and to records suspensions will also be curtailed. In short, people convicted of particular crimes will face greater impairment than they would have previously.

In order to justify this increased impairment, the government must prove that it could not secure its objective of creating safer communities and supporting victims of crimes without these changes.

If required to make such a case, the government will likely argue that the new legislative scheme entails safety valves that address issues of overbreadth and alleviate any discriminatory impacts for drug dependent people. The provision of the SSCA that allows a judge to exempt an offender from a mandatory minimum sentence upon successful complement of a drug treatment court program is one obvious example of such a safety valve.<sup>141</sup> However, there are three problems with this assertion. First, as noted earlier, only six Canadian cities have drug treatment courts.<sup>142</sup> There are no drug treatment programs in Quebec, the Maritimes or the North, and the Minister of Justice has expressed that he has no plans to open more drug courts.<sup>143</sup> A look at the distribution of drug charges by city and area shows that the majority of people charged simply will not have the option of participating in a drug court treatment program.<sup>144</sup> In reality, this “safety valve” is non-existent for most of the people adversely affected by the law. Secondly, as noted earlier, these programs, where they do exist, do not address drug dependence as a disability but rather as a personal choice. Thus, as evaluations show, these programs do not accommodate the needs of people with profound dependency, including the inevitability and normality of one or more relapse events in the course of drug treatment. Aboriginal people who are

dependent on drugs, particularly Aboriginal women who are dependent on drugs, are also not accommodated by these programs in a way that addresses the unique circumstances of a person’s experience that relates to the drug dependency. Finally, this “safety valve” is simply not good enough to constitute a minimum impairment of rights. The minimum safety valve that would have been required to avoid discrimination would have been a clause allowing sentencing judges to exempt drug dependent offenders from the mandatory minimum, where to impose such a sentence would not properly account for, or would exacerbate, their disability.

There is evidence the government was not wholly concerned with ensuring that the rights of drug dependent people were minimally impaired. When *Bill C-15*, one of the predecessor bills to the SSCA, was studied by the Standing Senate Committee on Legal and Constitutional Affairs, the committee expressed significant concern that the bill as drafted was going to incarcerate too many drug dependent people. As a result, they amended the bill so that the mandatory minimum for having a previous drug conviction would be triggered only when the previous conviction had netted a sentence of one year or more.<sup>145</sup> That is the way *Bill C-15* passed the Senate, but it died on the order paper. When the clause was revived in the SSCA, the triggering aggravating factor had been changed back to any previous designated drug conviction, with the effect of capturing lower-level drug offenders.

The SSCA establishes a legislative scheme that will capture the most marginalized persons in society and, should they be convicted of an applicable offence, incarcerate them. The consequences of this scheme disproportionately affect people who are drug dependent and of Aboriginal heritage, and the scheme is thus discriminatory. The context of the implementation of these new provisions, including the stories related to us by the participants of this research and the fact that this legislation cannot withstand a Section 1 justification, support the argument that the SSCA is vulnerable to challenge under Section 15(1).



The children of families affected by imprisonment have lower life expectancy than other American children, and are six to seven times more likely than other children to end up in prison themselves.

—p. 23





## CHAPTER 6: CONCLUSION

Despite the rhetoric that the new crime bill targets serious, violent offenders and organized crime, our interviews demonstrate that the legislative changes will primarily affect marginalized drug users. Had the legislative changes brought about by the SSCA been in effect when they went through the criminal justice process, most of our interviewees would be subject to heightened punishment, whether through longer imprisonment, loss of community corrections opportunities, or added barriers to accessing a “record suspension.”

Their stories show that the path to recovery from drug dependence does not involve a lengthy jail sentence. Instead, jail terms are disruptive life events that serve to further marginalize individuals and compound the very harms they ostensibly seek to eradicate. Many of the changes embodied in the SSCA that are explored in this study will have serious negative repercussions for Canadian society, including very high economic costs.

Our brief analysis, however, suggests that some of the provisions of the SSCA are vulnerable to legal challenge, particularly on the basis that they are contrary to the *Charter*. Although a Section 12 challenge would be difficult, the mandatory minimums in the SSCA could possibly be struck under this provision. Sections 7 and 15(1) offer promising avenues for articulating the human rights of people who are drug dependent to have access to medical treatment, rather than punishment under the criminal justice system. The foundations of our Canadian society – premised on justice, equality, and a government that may not act arbitrarily and heavy-handed towards its population – demand this.

Already, actions are underway to challenge other aspects of the SSCA not covered in this research. When the SSCA came into force, it abolished the provision that allowed low-risk offenders to seek accelerated parole. The federal government made the new law retroactive and thus the provision encompassed offenders who were already serving their sentences. Some of the offenders affected by this change took the issue to the British Columbia Supreme Court, which ruled in favour of the affected offenders. The Court held that delaying a prisoner’s parole eligibility is essentially a second punishment. The federal government appealed, arguing the changes would restore public confidence in the justice system and would reflect the actual

sentences the court imposed. The three-member B.C. Court of Appeal rejected all of the government’s arguments, stating that while the sentencing management objectives are important, “they do not rise to such significance that justifies implementing them in a manner that deprives the respondents of their constitutional rights.”<sup>146</sup>

We do not yet know the full extent of the impacts of this new crime legislation for marginalized communities, but as sentences begin to be handed down it will be important for the legal community, the drug law reform community, and human rights organizations to come together and marshal our collective resources to support vulnerable people interested in mounting constitutional challenges. The costs of inaction are too great. In the 2000 decision of *R. v. Morrisey*, the SCC upheld a four-year mandatory minimum sentence for an accidental killing by a first-time offender with alcohol problems.<sup>147</sup> At the SCC hearing, four provincial Attorneys General intervened in favour of upholding the mandatory sentence. No one other than the offender spoke against the sentence or provided relevant social context to the Court.<sup>148</sup> In order to prevent the inevitable injustice to marginalized groups that will come from the legislative changes of SSCA, it is imperative that social justice-minded lawyers and organizations collaborate to ensure that there are meaningful interventions into court proceedings whenever such claims are brought forward. These interventions should focus on the context of the communities that suffer the most from these laws, and the harms brought upon them by unfairness and injustice in their circumstances. When the government of Canada effectively “throws away the keys” on members of marginalized communities, it is the responsibility of those who believe in human rights and justice to stand up for those caught by this legislation.



*Pretty soon that's all that person knows.  
They don't really know how to grow and  
exist with the real world. You become  
institutionalized and you can't actually do  
it on the outside.*

—Maryann, p. 19





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