

## Decriminalizing drug possession for personal use in Canada: Recent developments



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## Setting the Scene: Criminalization across Canada

### *Controlled Drugs and Substances Act*

#### Possession of substance

4 (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

Punishments range from a fine to terms of imprisonment 6 months – 7 years.



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## Setting the Scene: Criminalization across Canada



## Setting the Scene: Criminalization and Black & Indigenous communities

**Black and Indigenous communities are disproportionately charged, prosecuted and incarcerated for drug offences:**

- Data from Toronto police 2003-2013 indicate Black people with no history of criminal convictions 3 × more likely to be arrested for cannabis possession than White people with similar backgrounds (*Toronto Star*, 2017)
- 2018 report and 2020 study found that Black and Indigenous men and women overrepresented in cannabis possession arrests across Canada (*Vice News*, 2018; A. Owusu-Bempah & A. Luscombe, 2020).
- 2019 study of cases between 2007-2013 found that Black youth accused of cannabis possession in Ontario more likely to be charged than white youth and youth from other racial backgrounds (*K. Samuels-Wortley*, 2019).



## Setting the Scene: Criminalization and Black & Indigenous communities

- 2020 report found **Black and Indigenous people dramatically overrepresented in drug charges** recommended by Vancouver police: Black people accounted for 6.4% of trafficking & possession charges since 2014, but only 1% of city's population; Indigenous people faced 18% of trafficking & possession charges, but just 2.2% of city's population (*FOI request, 2020*).
- Almost 20% of Black federal prisoners are incarcerated for a drug-related offence (*Office of the Correctional Investigator*).
- in 2017, **54% of Black women in federal prisons were serving sentences for drug-related offences**. Federally sentenced women 2× more likely to serve sentence for drug-related offences as their male counterparts, while Indigenous and Black women are more likely than white women to be in prison for that reason (*Office of the Correctional Investigator*).



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## Setting the Scene: The \$\$\$ costs of enforcing criminal drug laws

- **More than \$6.4 billion of policing, courts and correctional costs in 2017 could be attributed to the use of criminalized substances:**
  - includes costs associated with enforcement of drug laws; &
  - "the impact of violent and non-violent crimes that would not have occurred without some substance use."  
(*Canadian Institute for Substance Use Research and the CCSA, 2020*)
- Does not single out costs of enforcing simple drug possession offence, but provides snapshot of the colossal financial burden of drug offences on the criminal legal system.
- Significant evidence from various jurisdictions outside of Canada that removing criminal sanctions for simple drug possession can result in direct savings to the criminal justice system.



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## Setting the Scene: October 2019 Federal Election

### Liberal Party

"Rather than pursuing decriminalization – which leading experts including Portugal's former head of drug policy have said is **not a silver bullet** to solve this crisis – we are focusing on a safe supply, which will ensure quality control."

### NDP

"We will declare a public health emergency and commit to working with all levels of government, experts and Canadians to **end the criminalization and stigma of drug addiction**, so that people struggling with addiction can get the help they need without fear of arrest."

### Greens

"Greens would **decriminalize possession**, and ensure people have access to a screened supply and the medical support they need to combat their addictions."



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## Setting the Scene: Private Members' Bills, February 2020

MP Nathaniel Erskine-Smith put forward 2 private members' bills last year and again this spring which move toward decriminalization:

**Bill C-235:** straight repeal of s. 4 of the CDSA.

**Bill C-236 ("evidence-based diversion measures"):** requires officers to consider measures other than judicial proceedings to deal with individuals in alleged possession of drugs for personal use. The measures are:

- "take no further action";
- a warning; or
- "refer the individual to a program, agency or other service provider in the community that may assist the individual".



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## CACP report, July 2020: “The compelling case for transformative change”

- Recognizes **substance use disorder as a public health issue**.
- Agrees that evidence suggests, and numerous Canadian health leaders support, **decriminalization for simple possession as an effective way to reduce the public health and public safety harms** associated with substance use.
- Agrees that evidence from around the world suggests **our current criminal justice system approach to substance use could be enhanced using health care diversion approaches** proven to be effective.
- Endorses **alternatives to criminal sanctions** for simple possession of illicit drugs, requiring integrated partnerships and access to diversion measures.

### Findings and recommendations report



**Decriminalization for Simple Possession of Illicit Drugs:**  
Exploring Impacts on Public Safety & Policing  
Special Purpose Committee on the Decriminalization of Illicit Drugs  
July 2020



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## Setting the Scene: Police forces across Canada

- Wayne Gallant, president of New Brunswick Association of Chiefs of Police & New Brunswick police chiefs
- Julia Cecchetto, president of Nova Scotia Chiefs of Police Association and the chief of the Kentville Police Service
- Scott Tod, North Bay Police Chief
- Inspector Dan Despatie, Sudbury Community Drug Strategy Group
- Regina Police Service
- Saskatoon Police Service
- Saskatchewan Association of Chiefs of Police
- Del Manak, Victoria Police Chief
- Vancouver Police Department



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## Setting the Scene: Federal Government, July 2020



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### Minister Open To Examining Drug Decriminalization

Saint John, NB, Canada / The Wave  
Sheri Levitski-Kotyk  
Jul 22, 2020 11:56 AM

The federal health minister is open to looking at decriminalizing small amounts of illegal drugs.

The request is coming from the Canadian Association of Chiefs of Police, something Patty Hajdu says they'll be having discussions about this in the future.

"To find out how we would do that in the best possible way, I'm excited to explore all possibilities to reduce the criminalization of people who use substances," Hajdu says.

Police want the enforcement of possession of illegal drugs to be replaced with a healthcare approach that doesn't punish someone addicted to substances.

"You know having been a person who worked in drug policy for a long time, I can tell you when you have the support of enforcement to take the next steps or affirm what you are doing, I think that's very important," Hajdu says.

Hajdu adds she will have to discuss the matter with other cabinet colleagues.



Federal Health Minister Patty Hajdu. (CPAC)

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*I'm excited to explore all possibilities to reduce the criminalization of people who use substances."*

- July 2020



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## Setting the Scene: B.C. government, July 2020

B.C. Premier John Horgan: "Criminal prohibitions are ineffective in deterring drug use and criminalization of drug possession leads to both individual and systemic stigma, and discrimination that prevents people from seeking services. ...

By making the necessary changes to section 4(1) of the CDSA to decriminalize possession of illegal drugs for personal use, the federal government would take an enormous step to reduce the systemic stigma associated with illicit drug use and support people to access the services that they need to stay safe and to start on their path to recovery."



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## Setting the Scene: Health authorities across country

- Dr. Bonnie Henry, PHO of B.C.
- Dr. Patricia Daly, chief MoH, Vancouver Coastal Health
- Winnipeg Regional Health Authority
- Dr. David Colby, MoH of Chatham-Kent
- North Bay Parry Sound District Health Unit
- Mylene Drouin, director, Montreal public health department
- Dr. Jennifer Russell, MoH of New Brunswick
- Dr. Eileen de Villa, MoH of Toronto
- **Dr. Theresa Tam, Canada's Chief Public Health Officer:** All approaches must be considered, including **"moving toward a societal discussion on decriminalization."** (*August 2020*)



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## Setting the Scene: PM Trudeau, September 2020

"I think in any crisis like this, there is **not one silver bullet**. ...

We're prioritizing the things that are going to make the biggest difference immediately. ...

**The opioid crisis is much more of a health issue rather than a justice issue."**

- PM Trudeau



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## What does “decriminalization” mean? CACP report, July 2020

### CACP report:

- “In a decriminalized regime, drug possession remains illegal, but the nature of the penalty for possessing a small or predetermined amount of drugs (for personal consumption) is either reduced/changed from a criminal conviction **to a fine or other type of sanction.**”
- “**...criminal penalties are still applicable to illegal drug manufacturers, dealers, and traffickers.**”
- **Police play a key role in diverting people with substance use disorder to treatment and other social support services:** “frontline officers would continue to be the first point of contact for any diversion model.”



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## What does “decriminalization” mean? PPSC Directive, August 2020

### 5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the CDSA

- PPSC responsible for prosecuting CDSA drug offences.
- Directs prosecutors to **focus on the “most serious cases” raising public safety concerns** for prosecution and to otherwise pursue “suitable alternative measures and diversion from the criminal justice system for simple possession cases.”
- Acknowledges that criminal sanctions, as a primary response, have “a limited effectiveness” as a deterrent and as a means of addressing public safety concerns when considering the “harmful effects of criminal records and short periods of incarceration.”



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## What does “decriminalization” mean? PPSC Directive, August 2020

“**Most serious manifestations of harms**” justifying criminal prosecution response:

- Poses risk to safety or well-being of children (e.g. in vicinity of children, or person in position of trust / authority in respect of children);
- Risks health or safety of others (e.g. driving, operating machinery, possessing weapon, performing activity posing a risk to public health or safety);
- Risks a community's efforts to address consumption of controlled substances in accordance with own community approaches (e.g. isolated or remote communities);
- Associated with another CDSA or *Criminal Code* offence;
- In a custodial facility, jail or penitentiary;
- Committed by a peace officer or public officer, where relevant to the discharge of their duties.



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## What does “decriminalization” mean in other countries?

Some countries (e.g., Russia) have specified **small quantities of various substances for which they have decriminalized personal possession**. If you are found in possession of less than this amount, there is no crime, because you are deemed or presumed to possess it for your own personal consumption.

- o *But in many of these countries, **drug possession remains an administrative offence**, which can come with fines or even jail time.*

In Portugal (Law no. 30/2000), possession of drugs up to **10 days' average individual consumption** (quantities defined in table / substance) is not a crime. If police have no suspicions that more serious offences are involved, drug will be seized and case transmitted to “Commission for the Dissuasion of Drug Addiction” (legal, health and social services officials), which meets person to evaluate their situation.



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## What else could “decriminalization” mean?

It is also possible to **decriminalize small-scale trafficking** (which would mean amending CDSA s. 5 in some way) — recognizing that:

- sharing a small quantity should not be criminalized;
- not uncommon that people who struggle with problematic drug use may engage in low-level dealing to others in their network as a means of livelihood and potentially to support their own dependent use; and
- not useful / good use of public resources to criminalize this form of trafficking (versus large-scale traffickers, e.g. the ‘kingpins’ or large cartels that profit immensely from the illegal drug trade).



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## How do we get there? *De jure* decriminalization

**Constitutional and supreme courts** around the world have determined that laws prohibiting possession and use of drugs violate human rights:

- In 2015, **Mexico**'s Supreme Court ruled that administrative bans on the recreational consumption of cannabis was unconstitutional.
- Courts in **Chile, Spain, Colombia** and **Argentina** have ruled that private use of drugs should not be subject to any state sanction.
- Last considered in **Canada** by Supreme Court in *R. v. Malmo-Levine* 2003 SCC 74: "Advancing the protection of [vulnerable individuals] through criminalization of the possession of marihuana is a policy choice that falls within the broad legislative scope conferred on Parliament. Equally, it is open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy."



### Federal law reform

- Bills C-235 or C-236?

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# How do we get there?

## *De facto* decriminalization

### **Moratoria** on enforcement of drug laws:

- U.S. cities and states in context of COVID pandemic (e.g. Baltimore State Attorney, Brooklyn District Attorney).
- *Partial* decriminalization in most provinces with PPSC Directive.
- Health Minister could issue nation-wide s. 56 federal exemption from s. 4 of CDSA, "in the public interest" (endorsed by Toronto Board of Health).
- Could also make *local* (e.g. municipal, provincial) request for s. 56 exemption from s. 4 of CDSA.



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## Thank you

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