

PRELIMINARY VERSION

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Legislative Summary

BILL C-5: AN ACT TO AMEND THE CRIMINAL CODE AND THE CONTROLLED DRUGS AND SUBSTANCES ACT

44-1-C5-E

17 December 2021

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Legislative Summary of Bill C-5
(Preliminary version)

44-1-C5-E

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LEGISLATIVE SUMMARY OF BILL C-5: AN ACT TO AMEND THE CRIMINAL CODE AND THE CONTROLLED DRUGS AND SUBSTANCES ACT

1 BACKGROUND

Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act,¹ was introduced in the House of Commons on 7 December 2021 by Minister of Justice David Lametti. It is almost identical to Bill C-22, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act, which was introduced in the 43rd Parliament, but did not pass before the end of that Parliament.² No Charter Statement for Bill C-5 has been tabled in the House of Commons, though the Charter Statement for Bill C-22 was tabled on 11 June 2021.³

Bill C-5:

- removes mandatory minimum sentences of imprisonment prescribed for certain offences under the *Criminal Code*⁴ (the Code) that relate to firearms and other weapons and the unauthorized sale of tobacco and tobacco products;
- removes all mandatory minimum sentences of imprisonment prescribed for offences within the *Controlled Drugs and Substances Act*⁵ (CDSA);
- removes limitations placed on the use of conditional sentences of imprisonment;⁶ and
- amends the CDSA to require that peace officers and prosecutors consider referring people to treatment programs or other support services, rather than charging or prosecuting them for simple drug-possession offences.

1.1 REPEAL OF MANDATORY MINIMUM SENTENCES OF IMPRISONMENT FOR OFFENCES INVOLVING FIREARMS, WEAPONS AND SUBSTANCES

Mandatory minimum sentences of imprisonment are legal requirements set out in criminal statutes that specify the minimum term of imprisonment for an offender convicted of an offence. Ordinarily, judges have broad discretion to determine an appropriate sentence for an offence; they are guided by the sentencing principles contained in the Code and give consideration to aggravating or mitigating factors and the circumstances of the particular offender.⁷ Mandatory minimum sentences of imprisonment limit judicial discretion by requiring a sentence of imprisonment of a particular length, regardless of these factors (though discretion to give a longer sentence up to the maximum sentence is maintained).

Mandatory minimum sentences have attracted some controversy and have been the subject of constitutional challenges in Canada. Proponents argue that mandatory minimum sentences allow for predictability in sentencing. They argue they can reduce disparities in sentencing by promoting similar terms for all offenders, and they can act as deterrents to criminal offending by enabling citizens to more accurately gauge the range of penalties they face if they commit an offence.⁸ Opponents argue that they unjustly limit judicial discretion, have little or no deterrent effect, and can result in disproportionate sentencing and over-incarceration, and the disproportionate imprisonment of marginalized populations.⁹

Bill C-5 removes mandatory minimum sentences for 14 offences in the Code and all offences in the CDSA. The offences in the Code for which mandatory minimum sentences are removed predominantly relate to firearms or other weapons.

A 2017 analysis by Statistics Canada showed that mandatory minimum sentences of imprisonment for specific firearms offences resulted in “a notable increase in the length of custody sentences”¹⁰ after longer mandatory minimum sentences were introduced, suggesting that mandatory minimum sentences do, in fact, have an impact on sentence length and can result in longer terms of imprisonment.

1.1.1 Constitutionality of Mandatory Minimum Sentences of Imprisonment

When sentencing a person convicted of an offence, judges are required by the Code to ensure that the sentence imposed is “proportionate to the gravity of the offence and the degree of responsibility of the offender.”¹¹ Chief Justice Beverley McLachlin, writing for the majority of the Supreme Court of Canada, expressed in *R. v. Lloyd*, that

mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence.¹²

This vulnerability to constitutional challenge is confirmed by data from the Department of Justice indicating that, as of 3 December 2021, they are tracking 217 Charter challenges of mandatory minimum sentences. This type of challenge accounts for 34% of all constitutional challenges to the Code that are being tracked by the Department.¹³ Furthermore, the Department of Justice reports that among these challenges tracked in the last decade, 69% of challenges to drug offences and 48% of challenges to firearms offences were successful. When a section of the Code is held to violate the *Canadian Charter of Rights and Freedoms*¹⁴ (the Charter), that section can be declared of no force and effect.¹⁵ This means that the unconstitutional provision,

to the extent of its inconsistency with the Charter, is no longer considered applicable law in the jurisdiction in which it was so declared. When such a declaration of invalidity is made by the Supreme Court of Canada, the unconstitutional provision is of no force and effect throughout Canada. Where an appellate court in a province makes such a declaration, the unconstitutional provision is of no force and effect in that province; however, it may continue to be applied in other provinces, making the application of the law inconsistent across the country.

In several cases, provisions imposing mandatory minimum sentences of imprisonment have been held to violate section 12 of the Charter, which guarantees that “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.”¹⁶ Where a mandatory minimum sentence provision would require a judge to impose a sentence that is “grossly disproportionate”¹⁷ to the gravity of the offence, the blameworthiness of the offender and the harm caused by the commission of the offence, that sentence may be held to violate section 12 of the Charter.¹⁸ Some of the mandatory minimum sentences of imprisonment repealed by Bill C-5 have previously been held to be unconstitutional and struck down by Canadian courts, including appellate courts.¹⁹ Other mandatory minimum sentences of imprisonment have been upheld following constitutional challenges.²⁰

1.1.2 Impact of Mandatory Minimum Sentences of Imprisonment on Indigenous and Racialized Persons

Concerns have been raised by some academics and civil society organizations that mandatory minimum sentences of imprisonment can have a disproportionate impact on Indigenous and racialized persons and may contribute to the over-incarceration of these populations.²¹

During the period 2007–2008 to 2016–2017, white offenders comprised 60% of all federal offenders, while Indigenous people comprised 23%, and Black and “other visible minority offenders” comprised 9% each of all federal offenders. Statistics Canada’s 2011 National Household Survey found that 2.9% of the Canadian population self-identified as Black, 4.3% as Indigenous and 16.2% as members of “another” visible minority group in that year.²²

One reason cited by the Department of Justice for removing mandatory minimum sentences through Bill C-5 is to

maintain public safety while ensuring that responses to criminal conduct are fairer and more effective. These proposed amendments are an important step in addressing systemic issues related to existing sentencing policies.²³

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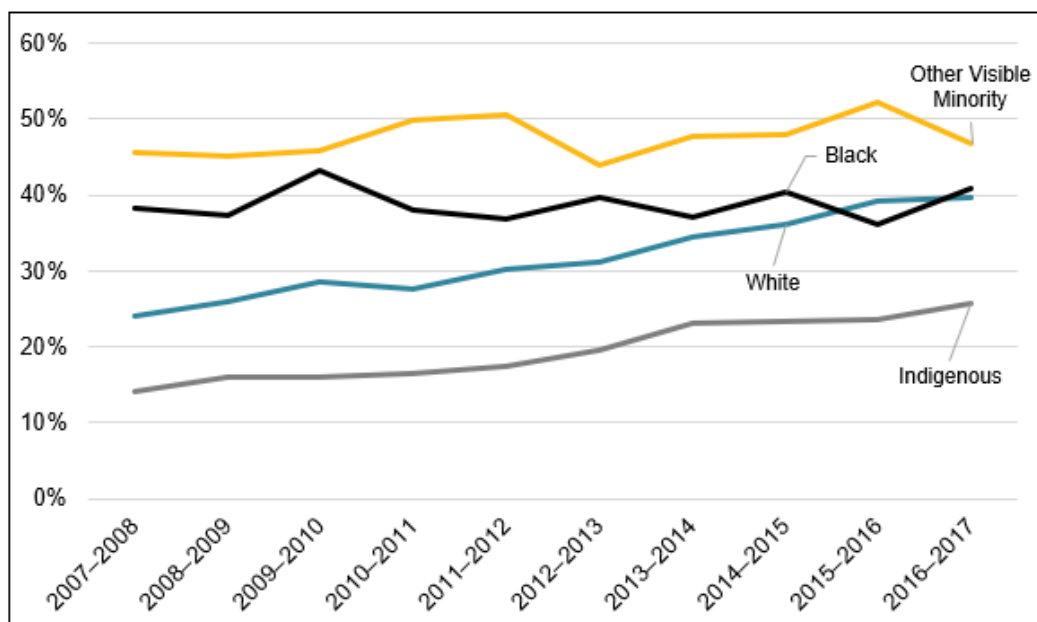
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According to data from Correctional Service Canada, over a 10-year period from 2007–2008 to 2016–2017, Black and other racialized offenders were disproportionately admitted into federal correctional facilities after receiving a mandatory minimum sentence of imprisonment. Over that 10-year period, the percentage of offenders admitted into custody who had received a mandatory minimum sentence of imprisonment varied considerably by race:

- 48% of visible minority offenders who were not Black;
- 39% of Black offenders;
- 31% of white offenders; and
- 20% of Indigenous offenders.

The proportion of Indigenous offenders admitted into a correctional facility for an offence that is subject to a mandatory minimum sentence of imprisonment increased over the same 10-year period from 14% to 26%, and the proportion of white offenders increased from 24% to 40% over the same period. The proportions of Black offenders and offenders from other racialized groups remained stable over this period.

Figure 1 – Proportion of Offenders in Each Race Group Admitted to Federal Custody for Offences Punishable by a Mandatory Minimum Sentence, 2007–2008 to 2016–2017



Source: Figure prepared by the Library of Parliament using data obtained from Department of Justice Canada, "[The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities](#)," *Just Facts*, October 2017.

Bill C-5 removes several mandatory minimum sentences of imprisonment for offences involving firearms and drugs. Indigenous and racialized offenders are overrepresented among those convicted of some drug- and firearm-related offences.

For example, with respect to drug offences, data from Correctional Service Canada compiled from 2007–2008 to 2016–2017 suggests that Black offenders were disproportionately admitted into federal correctional facilities during that period for violating section 6 of the CDSA on importing and exporting, which carries a mandatory minimum sentence that is removed by Bill C-5. Black offenders made up 42% of these admissions in the 10 years studied, with the proportion increasing over time from 33% in 2007–2008 to 43% in 2016–2017. Furthermore, the proportion of Indigenous people among offenders admitted into custody following a conviction under section 6 of the CDSA during the same period rose from 1% to 12.5%. At the same time, the proportion of white offenders decreased from 38% to 25%. White offenders were more likely to be admitted for trafficking under section 5 or production under section 7.²⁴

Table 1 – Proportion of Offenders Convicted of a *Controlled Drugs and Substances Act* Section 6 Drug Importing/Exporting Offence by Race, 2007–2008 to 2016–2017

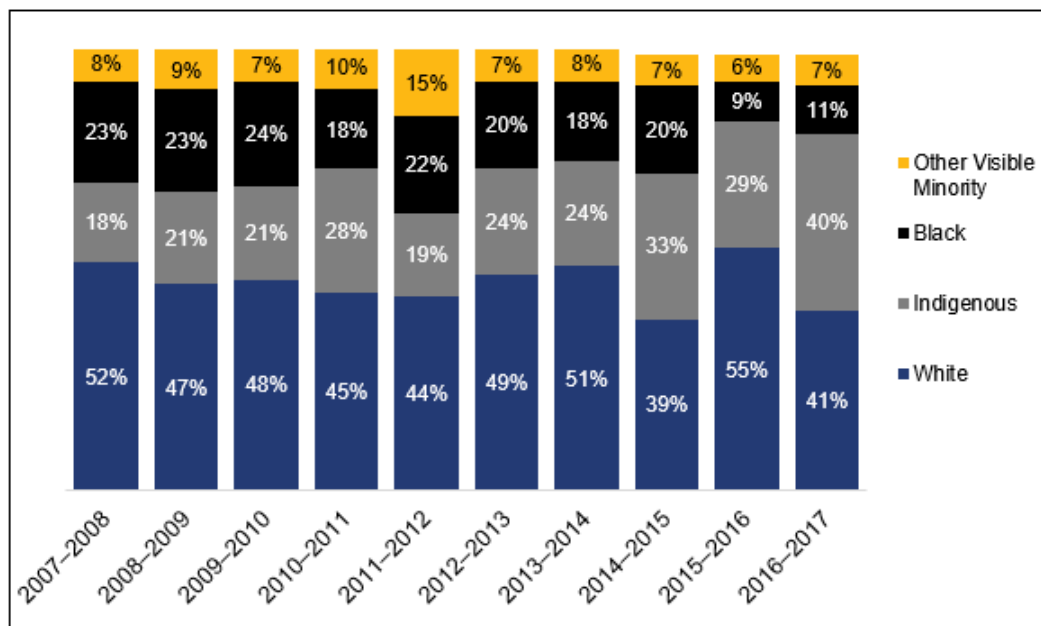
| Race | 2007–2008 (%) | 2016–2017 (%) | Average Over the Period (%) |
|------------|---------------|---------------|-----------------------------|
| White | 38 | 25 | 30 |
| Indigenous | 2 | 12 | Not available |
| Black | 33 | 43 | 42 |

Source: Table prepared by the Library of Parliament using data obtained from Department of Justice Canada, [“The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities,”](#) *Just Facts*, October 2017 (no statistics for other visible minorities were included on this topic in the publication).

With respect to firearms offences, data suggest that Black offenders admitted to federal correctional facilities were overrepresented among those convicted of various firearms offences that carry a mandatory minimum sentence, though to a lesser extent in the later years of the 10-year period from 2007–2008 to 2016–2017 than in earlier years. Many of the mandatory minimum sentences of imprisonment removed by Bill C-5 – including those contained in sections 85, 99, 100, 244 and 344 of the Code – are for offences for which Black offenders are disproportionately convicted. Indigenous offenders are also overrepresented among those serving federal time for a firearms offence that has an applicable mandatory minimum sentence of imprisonment. The proportion of Indigenous offenders in custody for firearms offences that carry mandatory minimum sentences of imprisonment rose from 17.5% in 2007–2008 to 40% in 2016–2017. In comparison, the proportion of white offenders decreased from 52% to 41% over the same period and the proportion of visible

minorities who were not Black fluctuated throughout the period, with that population making up a range of 6% to 15% of federal offenders admitted for firearm-related offences punishable by a mandatory minimum sentence depending on the year in question.²⁵

Figure 2 – Proportion of Federal Offenders Admitted for Firearm-Related Offences Punishable by a Mandatory Minimum Sentence, by Race, 2007–2008 to 2016–2017



Source: Figure prepared by the Library of Parliament using data obtained from Department of Justice Canada, "[The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities](#)," *Just Facts*, October 2017.

Because these mandatory minimum sentences of imprisonment disproportionately affect Indigenous, Black and other racialized offenders, these sentences can be expected to exacerbate the problem of over-incarceration among these populations.

1.1.3 Overrepresentation of Indigenous and Black Offenders in Correctional Facilities

Indigenous offenders are significantly overrepresented in Canadian correctional facilities. As of January 2020, Indigenous inmates comprised just over 30% of the adult population in federal correctional facilities even though Indigenous people comprise only 5% of the Canadian population.²⁶ Indigenous women were even more significantly overrepresented, accounting for almost 50% of women inmates in federal correctional facilities as of 17 December 2021.²⁷ The number of Indigenous

offenders has increased in the past decade.²⁸ Indigenous offenders are also more likely to be held in custody than non-Indigenous offenders are.²⁹

Black people are also overrepresented in the federal criminal justice system, making up 7.2% of the federal offender population in 2018–2019,³⁰ but only 3.5% of the Canadian population in 2016.³¹

In light of concerns about the overrepresented Indigenous and Black populations in the criminal justice system, Canadian courts have developed sentencing practices that aim to recognize the impacts of systemic racism and colonialism on Indigenous and Black offenders and promote sentencing without a term of imprisonment, where possible.

Section 718.2 of the Code lists sentencing principles to be considered by the judiciary when determining an appropriate sentence. Section 718.2(e) provides that:

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

In *R. v. Gladue* in 1999, the Supreme Court of Canada acknowledged the “serious problem of [A]boriginal overrepresentation in Canadian prisons”³² and interpreted section 718.2(e) of the Code to explicitly require sentencing judges to consider the particular circumstances of Indigenous offenders, including:

(A) The unique systemic or background factors which may have played a part in bringing the particular [A]boriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular [A]boriginal heritage or connection.³³

The use of *Gladue* reports, which detail these particular circumstances for the courts, has become an established means of informing sentencing decisions that involve Indigenous offenders. The Court, in *Gladue*, highlighted that

the unique circumstances of [A]boriginal offenders is that community-based sanctions coincide with the [A]boriginal concept of sentencing and the needs of [A]boriginal people and communities. ... Where these sanctions are reasonable in the circumstances, they should be implemented.³⁴

While *Gladue* reports are intended to address the over-incarceration of the Indigenous population, some evidence suggests that this strategy has not been particularly effective and *Gladue* reports are not universally accessible across Canada.³⁵

Some Canadian courts have also started taking into account the unique circumstances of Black offenders by using impact of race and culture assessments; these assessments provide information about the circumstances of Black offenders in light of the history of anti-Black racism in Canada.³⁶

For offences that carry a mandatory minimum sentence, judges do not have discretion to sentence Indigenous and Black offenders to community-based sanctions, even if a *Gladue* report or an impact of race and culture assessment indicates that it would be appropriate to do so. However, in contrast to concerns about the disproportionate impact of mandatory minimum sentences on offenders from marginalized groups, some argue that such sentences may protect those in marginalized communities who may be overrepresented among victims of crime by ensuring appropriate sentences for offenders.³⁷ Indigenous people, for example, have consistently been found to more frequently self-report criminal victimization than non-Indigenous people, suggesting they are disproportionately impacted as victims of crime.³⁸

1.2 EXPANDED AVAILABILITY OF CONDITIONAL SENTENCES FOR CERTAIN SERIOUS OFFENCES

A conditional sentence is one where an offender is sentenced to a term of imprisonment of less than two years, to be served in the community subject to particular conditions,³⁹ rather than in a correctional facility. Since offenders are often required to serve all or part of their conditional sentence in their home, these sentences are sometimes referred to as “house arrest.”⁴⁰ Conditional sentences are intended to serve both punitive and rehabilitative aims.⁴¹ Section 742.1 of the Code sets out limitations⁴² on their application, allowing it only where:

- such a sentence “would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing” provided in the Code (section 742.1(a));
- the offence committed does not carry a minimum term of imprisonment (section 742.1(b));
- the offence committed is not one prosecuted by indictment and for which the maximum sentence is 14 years’ imprisonment or life (section 742.1(c));
- the offence committed is not a terrorism offence or an organized crime offence prosecuted by way of indictment for which the maximum term of imprisonment

- is 10 years or more (section 742.1(d)) or another offence listed in section 742.1(e) of the Code, prosecuted by indictment, for which the maximum sentence is 10 years' imprisonment; and
- the offence committed is not one of several offences prosecuted by indictment listed in section 742.1(f) of the Code.

Clause 14 of Bill C-5 amends section 742.1 of the Code, lifting the prohibition on conditional sentences of imprisonment for offences that carry 10- or 14-year maximum sentences in the situations described above, and for the specific offences previously listed as ineligible for conditional sentencing in section 742.1(f).

Consequently, Bill C-5 makes conditional sentences applicable to a larger number of criminal offences. Furthermore, since Bill C-5 removes some mandatory minimum sentences of imprisonment, persons convicted of these offences are no longer ineligible for conditional sentences.

1.2.1 Constitutionality of Limits on Conditional Sentencing

Some of the limitations on conditional sentences that are removed by Bill C-5 have been subject to constitutional challenges in the courts,⁴³ including an ongoing legal challenge to be heard by the Supreme Court of Canada. In *R. v. Sharma*, the majority of the Ontario Court of Appeal held that sections 742.1(c) and 742.1(e)(ii) of the Code violated sections 7 and 15 of the Charter.⁴⁴

Sharma involves a young Indigenous woman, Cheyenne Sharma, who pleaded guilty to the offence of importing cocaine contrary to section 6(1) of the CDSA and received a sentence of 17 months of imprisonment. At her sentencing hearing, Ms. Sharma challenged the constitutionality of the mandatory minimum sentence of imprisonment in section 6(3)(a.1) of the CDSA, and the provision was struck down by the court as a violation of her section 12 Charter rights.⁴⁵ She also challenged the constitutionality of sections 742.1(b), 742.1(c) and 742.1(e)(ii) of the Code, which limit the use of conditional sentences to situations in which:

(b) the offence is not an offence punishable by a minimum term of imprisonment;

(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

...

(e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that

...

(ii) involved the import, export, trafficking or production of drugs[.]

The defence argued that sections 742.1(b), 742.1(c) and 742.1(e)(ii) of the Code deprived Ms. Sharma of her right to liberty under section 7 of the Charter and her right to equality under section 15(1) of the Charter. The sentencing judge decided that sections 742.1(c) and 742.1(e)(ii) did not violate Ms. Sharma's rights under sections 7 and 15 of the Charter.

The decision was appealed and the majority of the Ontario Court of Appeal held that sections 742.1(c) and 742.1(e)(ii) had a disproportionate and negative impact on the claimant as an Indigenous woman, given the over-incarceration of Indigenous people in Canada and the remedial effect that conditional sentencing can have on over-incarceration.⁴⁶ It held that Ms. Sharma's equality rights under section 15(1) of the Charter had been violated. It also held that the impugned sections violated her section 7 liberty rights, as the provisions were overly broad, and consequently, not consistent with the principles of fundamental justice. The infringements of Ms. Sharma's section 7 and section 15 rights were held not to be consistent with section 1 of the Charter. The Ontario Court of Appeal consequently held that sections 742.1(c) and 742.1(e)(ii) were of no force and effect.

On 14 January 2021, the Supreme Court of Canada granted leave to appeal in this case, and consequently, the final determination as to the constitutionality of these limitations on conditional sentencing is pending.

1.3 DIVERSION MEASURES FOR SIMPLE DRUG-POSSESSION OFFENCES

1.3.1 Opioid Crisis

Canada is experiencing an ongoing public health crisis of opioid overdoses and deaths.⁴⁷ Opioids are medications that can help to relieve pain; they include drugs such as fentanyl, morphine, oxycodone and hydromorphone. Pharmaceutical opioids are manufactured by a pharmaceutical company and approved for medical use in humans. These drugs are legal when used as prescribed by a health professional to treat pain. Opioids are considered illegal when they have been made, shared or sold illegally. Examples include opioids used by someone other than the person to whom the drugs were prescribed and opioids obtained from someone other than a registered practitioner.⁴⁸

Opioid use is considered problematic when it has harmful effects on a person's health and life or when it involves illegal opioids. Problematic use can become a

substance use disorder or addiction when it involves regular use despite continued negative consequences.⁴⁹

Opioid and other drug-related overdose deaths have increased dramatically in recent years.⁵⁰ Factors that contribute to the crisis include a high incidence of opioid prescribing, the emergence of dangerously potent synthetic opioids like fentanyl and carfentanil in the illegal drug supply, and the impossibility of knowing, without equipment, the quantity of such opioids that has been mixed into illegal drugs.⁵¹

Between January 2016 and June 2021, approximately 24,626 apparent opioid-toxicity deaths occurred in Canada, and from April to June 2021, there were approximately 19 deaths per day.⁵² The 1,792 deaths that occurred between January and March 2021 represent the highest quarterly total recorded since national surveillance began in 2016.⁵³

The COVID-19 pandemic has further worsened this crisis, with fatal and nonfatal opioid-overdose levels reaching historic highs.⁵⁴ The closure of the Canada–United States border disrupted drug-supply chains and has led to the increased toxicity of the illegal supply. Social-distancing guidelines, self-isolation measures, the increased use of substances as a means of coping with stress and reduced access to supports and services have contributed to these historic rates. In particular, social-distancing and self-isolation measures have created situations in which people have died from overdoses alone in their own homes.⁵⁵

Increases in fatal overdoses have been observed throughout the country, although western Canada remains the most affected region.⁵⁶ For instance, the British Columbia Coroners Service reported 201 suspected illicit drug toxicity deaths in October 2021, the highest number of such deaths it had ever recorded in a month. This number represents about 6.5 deaths per day. The data also revealed an increase in the number of deaths involving extreme concentrations of fentanyl after April 2020.⁵⁷

1.3.2 Disproportionate Effects and Overrepresentation in the Criminal Justice System

The drug overdose crisis in Canada disproportionately affects Indigenous peoples.⁵⁸ Recent figures from British Columbia, for example, showed that between January and May 2020, 16% of all overdose deaths in that province were of First Nations people, who represent only 3.3% of the province's population. In that same time period, the rate of death among First Nations people was 5.6 times higher than among other British Columbians. In particular, the number of First Nations women who died of an overdose was 8.7 times higher than for other women in that province in 2019.⁵⁹

Moreover, many people dealing with opioid-related harms also experience other mental disorders.⁶⁰ Factors frequently noted among those who have died of opioid- and other drug-related overdoses include: a history of mental health concerns, trauma and stigma; a lack of available help at the time of the overdose; a lack of social support; and a lack of comprehensive, coordinated health care and social service follow-ups.⁶¹ In particular, stigma around substance use is a barrier to obtaining help, health care and social services.⁶²

In 2012, Statistics Canada's Canadian Community Health Survey⁶³ showed that Canadians with a mental or substance use disorder were more likely to be arrested than those without a disorder, and they were more likely to come into contact with police for problems with their emotions, mental health or substance use.⁶⁴ A report emerging from that survey concluded that "[t]he presence of a mental or substance use disorder was associated with increased odds of coming into contact with police, even after controlling for related demographic and socioeconomic factors."⁶⁵

1.3.3 Current Law Under the *Controlled Drugs and Substances Act*

The CDSA regulates certain drugs and associated substances, as listed in the Schedules of that Act. Schedule I lists drugs such as opioids, cocaine and methamphetamine. Schedule II covers synthetic cannabinoids, and Schedule III includes lysergic acid diethylamide (LSD), psilocybin and mescaline.

The *Narcotic Control Regulations*⁶⁶ (NCR), made under the CDSA, regulate certain narcotics, including oxycodone, opium, codeine and morphine. The NCR outline the circumstances in which activities like possessing those narcotics are permitted.⁶⁷ Otherwise, where not authorized under the NCR, simple possession of a substance included in Schedule I, II or III is considered an offence under section 4(1) of the CDSA.⁶⁸ The punishment for the offence of simple possession under that provision depends on the schedule in which the relevant substance is classified. In the case of a Schedule I substance, an offence under section 4(1) can lead to a term of imprisonment not exceeding seven years.⁶⁹

1.3.4 Public Health Approaches to Addressing the Opioid Crisis and Substance Use

The federal government's Canadian drugs and substances strategy is meant to be a "collaborative, compassionate and evidence-based approach to drug policy."⁷⁰ It focuses on harm reduction, prevention, treatment and enforcement, among other objectives.

In its legislative responses to the opioid crisis, the federal government has implemented a number of changes. For instance, it has introduced legislation that amends the CDSA to simplify the application process for supervised consumption

sites⁷¹ and to change offences and penalties for opioid use.⁷² In 2017, Parliament adopted the *Good Samaritan Drug Overdose Act*,⁷³ which seeks to encourage Canadians to get help during an overdose and save lives. For people who experience or witness an overdose, this Act may protect them from charges for possession under section 4(1) of the CDSA and for breaches of conditions relating to simple possession of controlled substances.⁷⁴ The NCR have also been amended to facilitate the prescription of methadone, an opioid substitution treatment.⁷⁵

Moreover, on 17 August 2020, the Director of Public Prosecutions issued a guideline to prosecutors on the approach to take with simple possession cases under section 4(1) of the CDSA.⁷⁶ Prosecutors are generally to pursue a criminal prosecution only in the most serious cases that raise public safety concerns. Otherwise, they are to pursue alternative measures, such as Indigenous restorative justice,⁷⁷ and divert cases away from the criminal justice system. In this sense, “diversion” refers to the approach used to address the conduct of an alleged offender through measures outside of the traditional court process.⁷⁸ Notably, prosecutors are to consider alternatives to prosecution where the possession relates to a substance use disorder and the alleged offender is “enrolled in a drug treatment court program or a course of treatment provided under the supervision of a health professional, including those involving Indigenous culture-based programming.”⁷⁹ The guideline recognizes that “substance use has a significant health component” and that criminal sanctions are of a limited effectiveness as deterrents or “as a means of addressing the public safety concerns when considering the harmful effects of criminal records and short periods of incarceration.”⁸⁰

2 DESCRIPTION AND ANALYSIS

Bill C-5 contains 20 clauses. Key clauses are discussed in the following section.

2.1 REMOVAL OF MANDATORY MINIMUM SENTENCES OF IMPRISONMENT FOR SPECIFIC OFFENCES INVOLVING FIREARMS OR OTHER WEAPONS (CLAUSES 1 TO 8 AND 10 TO 13)

Clauses 1 to 8 and 10 to 13 make changes to the Code to remove mandatory minimum terms of imprisonment previously provided for several indictable offences involving firearms or other weapons. The changes made do not change the prescribed maximum sentence for any offences, nor do they impact the designation of an offence as indictable, summary or hybrid.

Clause 2 amends section 85(3) of the Code to remove mandatory minimum sentences of one year (or three years in the case of reoffending) for offenders convicted of using a firearm in the commission of an offence (section 85(1)) or of using an imitation firearm

in the commission of an offence (section 85(2)). These offences apply to persons who use a firearm or imitation firearm in the commission or attempted commission of specific indictable offences, or during flight following the commission of such offences.⁸¹

Clause 3 amends section 92(3) of the Code to remove mandatory minimum sentences of one year (for a second offence) and two years less a day (for a third or subsequent offence) for offenders convicted of possessing a firearm knowing its possession is unauthorized (section 92(1)) or possessing a prohibited weapon, device or ammunition knowing its possession is unauthorized (section 92(2)).

Clause 4 amends section 95(2)(a) of the Code to remove the mandatory minimum sentences of three years for a first offence and five years for a second or subsequent offence for offenders convicted of possessing a prohibited or restricted firearm with ammunition (section 95(1)), where the Crown elects to proceed by indictment.⁸² The mandatory minimum sentences of imprisonment removed through this amendment have previously been held to be unconstitutional by the Supreme Court of Canada and are consequently of no force and effect throughout the country.⁸³

Clause 5 amends section 96(2)(a) of the Code to remove the mandatory minimum sentence of imprisonment of one year for offenders convicted of possessing a weapon obtained by the commission of an offence, where the Crown elects to proceed by indictment. Although the mandatory minimum sentence of imprisonment removed through this amendment has previously been held to be unconstitutional by some Canadian courts, it has also been upheld following constitutional challenges by others.⁸⁴

Clause 6 amends section 99(3) of the Code to remove the mandatory minimum sentence of imprisonment of one year for offenders convicted of weapons trafficking (section 99(1)), except where the object in question is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited device, any ammunition or prohibited ammunition.⁸⁵ The mandatory minimum sentence of imprisonment removed by this amendment has previously been held to be unconstitutional by a Canadian court of appeal.⁸⁶

Clause 7 amends section 100(3) of the Code to remove the mandatory minimum sentence of imprisonment of one year for offenders convicted of possession for the purpose of weapons trafficking (section 100(1)), where the object in question is not a prohibited firearm, restricted firearm, non-restricted firearm, prohibited device, any ammunition or any prohibited ammunition.⁸⁷ The mandatory minimum sentence of imprisonment removed through this amendment has previously been held to be unconstitutional by some Canadian courts of appeal.⁸⁸

Clause 8 amends section 103(2.1) of the Code to remove the mandatory minimum sentence of imprisonment of one year for offenders convicted of importing or exporting knowing the object is unauthorized (section 103(1)), where the object in question is not a prohibited firearm, restricted firearm, non-restricted firearm, prohibited device or any prohibited ammunition.⁸⁹

Clause 10 amends section 244(2)(b) of the Code to remove the mandatory minimum sentence of imprisonment of four years for offenders convicted of discharging a firearm with intent (section 244(1)), where the offence does not involve the use of a restricted or prohibited firearm and is not committed for the benefit of, at the direction of, or in association with a criminal organization.⁹⁰ The mandatory minimum sentence removed by this amendment has previously been subject to unsuccessful constitutional challenges in some Canadian courts.⁹¹

Clause 11 amends section 244.2(3)(b) of the Code to remove the mandatory minimum sentence of imprisonment of four years for offenders convicted of discharging a firearm recklessly (section 244.2(1)), where the offence does not involve the use of a restricted or prohibited firearm and is not committed for the benefit of, at the direction of, or in association with a criminal organization.⁹² The mandatory minimum sentence of imprisonment removed through this amendment has previously been the subject of both successful and unsuccessful constitutional challenges in some Canadian courts.⁹³

Clause 12 repeals section 344(1)(a.1) of the Code to remove the mandatory minimum sentence of imprisonment of four years for offenders convicted of robbery, where the offence is committed with a firearm that is not restricted or prohibited, and where the offence is not committed for the benefit of, at the direction of, or in association with a criminal organization.⁹⁴ The mandatory minimum sentence of imprisonment removed through this amendment has previously been the subject of both successful and unsuccessful constitutional challenges in some Canadian courts, including courts of appeal.⁹⁵

Clause 13 repeals section 346(1.1)(a.1) to remove the mandatory minimum sentence of imprisonment of four years for offenders convicted of extortion (section 346(1)), where a firearm that is not prohibited or restricted was used in the commission of the offence, and the offence was not committed for the benefit of, at the direction of, or in association with a criminal organization.⁹⁶

2.2 EXPANSION OF THE AVAILABILITY OF CONDITIONAL SENTENCES (CLAUSE 14)

Bill C-5 also amends the Code to expand the availability of conditional sentences for a wider range of criminal offences.

Existing section 742.1(c) of the Code prohibits the use of a conditional sentence for an offence prosecuted by way of indictment for which the maximum term of imprisonment is 14 years. Clause 14(1) amends this section to lift the prohibition against using a conditional sentence for offences that carry a maximum term of 14 years, and replaces it with a prohibition against using a conditional sentence for three serious offences:

1. attempt to commit murder (when prosecuted under section 239(1)(b));⁹⁷
2. torture (section 269.1); and
3. advocating genocide (section 318).

Clause 14(2) repeals sections 742.1(e) and 742.1(f), removing two further limitations on the availability of conditional sentences. The first limitation removed by this clause precludes the use of a conditional sentence for offences prosecuted by indictment where the maximum term is 10 years of imprisonment and the offence: resulted in bodily harm; involved the import, export, trafficking or production of drugs; or involved the use of a weapon. The second limitation removed by this clause precludes conditional sentencing for the following offences, if prosecuted by indictment:

- prison breach (section 144);
- criminal harassment (section 264);
- sexual assault (section 271);
- kidnapping (section 279);
- trafficking of persons for material benefit (section 279.02);
- abduction of a person under the age of 14 (section 281);
- motor vehicle theft (section 333.1);
- theft over \$5,000 (section 334(a));
- breaking and entering a place other than a dwelling-house (section 348(1)(e));
- being unlawfully in a dwelling-house (section 349); and
- arson for a fraudulent purpose (section 435).

By removing some limitations on the use of conditional sentences contained in current sections 742.1(c), 742.1(e) and 742.1(f) of the Code, clause 14 expands the availability of conditional sentencing. While these amendments mean that conditional sentences are now available as potential sentences for several serious offences, such sentences continue to be prohibited in some circumstances:

- where a term of imprisonment longer than two years less a day is imposed (section 742.1);
- where the offence for which the offender was convicted carries a minimum mandatory sentence of imprisonment (section 742.1(b));
- where the offence committed is a terrorism or organized crime offence that carries a maximum sentence of imprisonment of 10 years or more and is prosecuted by indictment (section 742.1(d)); and
- if such a sentence can “endanger the safety of the community,” limiting the applicability of conditional sentences for some violent offenders (section 742.1(a)).

An appellate level constitutional challenge has succeeded in Ontario, and leave to appeal to the Supreme Court of Canada was granted, as noted above.⁹⁸ Consequently, some of the sections of the Code removed by clause 14 may be declared unconstitutional and of no force and effect by the Supreme Court.

2.3 REMOVAL OF MANDATORY MINIMUM SENTENCES OF IMPRISONMENT FOR DRUG- AND SUBSTANCE-RELATED OFFENCES (CLAUSES 9 AND 15 TO 17)

Bill C-5 amends the Code and the CDSA to remove some mandatory minimum sentences for offences pertaining to drugs and substances. This bill removes all mandatory minimum sentences of imprisonment from the CDSA. The changes made do not change the prescribed maximum sentence for any offence, nor do they impact the designation of an offence as an indictable, summary or hybrid offence.

Clause 9 amends section 121.1(4)(a) and repeals section 121.1(5) of the Code to remove mandatory minimum sentences of imprisonment for the offence of selling tobacco products and raw leaf tobacco, not packaged or stamped.

Clause 15 amends section 5(3)(a) of the CDSA to remove the mandatory minimum sentences of imprisonment for the offences of trafficking in a substance (section 5(1)) and possession for the purpose of trafficking (section 5(2)). Some of the mandatory minimum sentences of imprisonment removed by this amendment have previously been held to be unconstitutional and struck down by Canadian courts.⁹⁹

Clause 16 amends section 6(3)(a) and repeals section 6(3)(a.1) of the CDSA to remove mandatory minimum sentences of imprisonment for the offences of importing and exporting a substance (section 6(1)) and possession of a substance for the purpose of exporting (section 6(2)), where the substance in question is listed in Schedule I or II. Some of the mandatory minimum sentences of imprisonment removed through these changes have previously been held to be unconstitutional and struck down by Canadian courts.¹⁰⁰

Clause 17 amends section 7(2)(a) and repeals sections 7(2)(a.1) and 7(3) of the CDSA to remove mandatory minimum terms of imprisonment for the offence of production of a substance (section 7(1)).

2.4 EVIDENCE-BASED DIVERSION MEASURES (CLAUSE 20)

Clause 20 of Bill C-5 seeks to address the opioid crisis by supporting a public health approach to simple drug possession.¹⁰¹ The same clause adds a new Part I.1 to the CDSA after section 10 on sentencing. This new part introduces evidence-based diversion measures and opens with a new provision, section 10.1, which declares a set of principles. The principles are meant to guide the interpretation of the remaining provisions in Part I.1 and lay out the government's public health approach to problematic substance use, recognizing that:

- it should be addressed primarily as a health and social issue;
- interventions should be founded on evidence-based best practices, protect health, dignity and human rights, and reduce harm;
- criminal sanctions for simple drug possession can increase stigma and are inconsistent with established public health evidence;
- interventions should address the root causes of problematic substance use; and
- judicial resources should be reserved for offences involving a risk to public safety.

Against the backdrop of these principles, the remaining provisions introduced by clause 20 describe the diversion measures that peace officers and prosecutors must consider.

Under new sections 10.2, 10.4 and 10.5, instead of laying charges against a person in cases of simple possession, a peace officer must consider doing nothing, issuing a warning, or with the person's consent, referring the person to a treatment program. In determining which measure to take, officers must keep in mind the principles set out in section 10.1. However, an officer's failure to consider those alternative measures does not invalidate any charges that may be laid. Although an officer's police force

may keep records of warnings or referrals made, information about a warning, referral, officer's decision to take no further action and the offence itself may not be entered as evidence in court of a person's past offending behaviour.

New section 10.3 establishes directives for prosecutors that are consistent with the guideline issued by the Director of Public Prosecutions. A prosecutor initiates or continues a prosecution for simple possession under section 4(1) of the CDSA only if, after considering the principles set out in section 10.1 of that Act, the prosecutor is of the view that the use of a warning or a referral under section 10.2, or the use of other alternative measures as defined in section 716 of the Code is not appropriate, and that in the circumstances, prosecution is appropriate. Under section 716 of the Code, "alternative measures means measures other than judicial proceedings under this Act used to deal with a person who is eighteen years of age or over and alleged to have committed an offence."

NOTES

1. [Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act](#), 44th Parliament, 1st Session.
2. [Bill C-22, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act](#), 43rd Parliament, 2nd Session.
3. Government of Canada, [Bill C-22, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act](#), Charter Statement, 11 June 2021.
4. [Criminal Code](#) (the Code), R.S.C. 1985, c. C-46.
5. [Controlled Drugs and Substances Act](#) (CDSA), S.C. 1996, c. 19.
6. A conditional sentence is one in which the offender is sentenced to a term of imprisonment but permitted to serve that sentence in the community, subject to particular conditions. See [Criminal Code](#), R.S.C. 1985, c. C-46, s. 742.1.
7. For additional information about sentencing in Canada, see Julia Nicol, [Sentencing in Canada](#), Publication no. 2020-06-E, Library of Parliament, 22 May 2020.

The principles a judge is to take into account when sentencing an offender are listed at section 718 of the Code. Aggravating and mitigating circumstances are characteristics of a case that inform a judicial interpretation of the seriousness of the offence and the offender's level of responsibility. Aggravating circumstances suggest a greater seriousness and more responsibility, whereas mitigating circumstances suggest relatively lesser seriousness and less responsibility. For a non-exhaustive list of aggravating circumstances, see [Criminal Code](#), R.S.C. 1985, c. C-46, s. 718.2.
8. See, for example, Lincoln Caylor and Gannon G. Beaulne, [Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences](#), Macdonald-Laurier Institute, May 2014.
9. See, for example, Benjamin L. Berger, "A More Lasting Comfort?: The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, Vol. 47, No. 1, 2009.
10. Mary Allen, "Mandatory minimum penalties: An analysis of criminal justice system outcomes for selected offences," *Juristat*, Statistics Canada, 29 August 2017, p. 17.
11. [Criminal Code](#), R.S.C. 1985, c. C-46, s. 718.1.
12. [R. v. Lloyd](#), 2016 SCC 13, para. 3.

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13. Department of Justice Canada, [Mandatory Minimum Penalties and the Courts](#), Backgrounder, 7 December 2021.
14. [Canadian Charter of Rights and Freedoms](#) (the Charter), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
15. *Ibid.*, s. 52(1).
16. *Ibid.*, s. 12.

Note that while the most common argument in constitutional challenges of the mandatory minimum is that this minimum violates section 12 of the Charter, some challenges have alleged violations of sections 7 and 15 of the Charter.
17. [R. v. Nur](#), 2015 SCC 15, para. 39.
18. *Ibid.*, para. 43, citing [R. v. M. \(C.A.\)](#), [1996] 1 S.C.R. 500, para. 80.

For more information about the approach used to determine whether a mandatory minimum sentence violates section 12 of the Charter, see Charlie Feldman, “Mandatory Minimum Sentences and Section 12 of the *Canadian Charter of Rights and Freedoms*,” *HillNotes*, Library of Parliament, 28 April 2015.
19. See, for example, [R. v. Nur](#), 2015 SCC 15; and [R. v. Lloyd](#), 2016 SCC 13.
20. Examples of cases in which the mandatory minimum sentence of imprisonment was either upheld in a constitutional challenge or held to be unconstitutional and deemed of no force and effect are provided in the notes to section 2 of this Legislative Summary.
21. See, for example, Jonathan Rudin, “[Despite soaring Indigenous incarceration, minimum sentencing persists](#),” *Policy Options*, 27 January 2020; Raji Mangat, [More Than We Can Afford: The Costs of Mandatory Minimum Sentencing](#), Report, British Columbia Civil Liberties Association; and Canadian Association of Social Workers, [Ending Mandatory Minimums for Drug Offences](#), 2020 Position Statement, March 2020.
22. Department of Justice Canada, “[The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities](#),” *Just Facts*, October 2017.
23. Department of Justice Canada, [Bill C-5: Mandatory Minimum Penalties to be repealed](#), Backgrounder.
24. *Ibid.* Note that the data concerning minimum mandatory sentence (MMS) in general address the proportion of each race group which receives a sentence for an offence with an MMS, whereas the data concerning MMS for drug offences address the proportion of all offenders with such a sentence by race.
25. *Ibid.* Note that the data concerning MMS in general address the proportion of each race group which receives a sentence for an offence with an MMS, whereas the data concerning MMS for firearms address the proportion of all offenders with such a sentence by race.
26. Office of the Correctional Investigator, [Indigenous People in Federal Custody Surpasses 30% – Correctional Investigator Issues Statement and Challenge](#), News release, 21 January 2020.
27. Office of the Correctional Investigator, [Proportion of Indigenous Women in Federal Custody Nears 50%: Correctional Investigator Issues Statement](#), 17 December 2021.
28. Public Safety Canada, [2019 Annual Report – Corrections and Conditional Release: Statistical Overview](#), September 2020, pp. 69–70.
29. *Ibid.*, pp. 59–60.
30. *Ibid.*, pp. 55 and 56.
31. Statistics Canada, “[Canada’s Black population: Growing in number and diversity](#),” *Infographics*, 6 February 2019.
32. [R. v. Gladue](#), [1999] 1 S.C.R. 688, para. 59.
33. *Ibid.*, para. 66. Also see [R. v. Ipeelee](#), 2012 SCC 13.
34. [R. v. Gladue](#), [1999] 1 S.C.R. 688, para. 74.

For more information about sentencing and Indigenous offenders, see Graeme McConnell, [Indigenous People and Sentencing in Canada](#), Publication no. 2020-46-E, Library of Parliament, 22 May 2020.

35. For a discussion about some concerns with the application of *Gladue*, see Department of Justice Canada, [Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System](#), September 2017.
36. Although the use of the impact of race and culture assessment was first introduced in *R. v. "X"*, Canadian courts had already acknowledged the importance of taking into account systemic racism and the particular circumstances of Black offenders in several earlier cases. See *R. v. "X"*, 2014 NSPC 95 (CanLII). Also see *R. v. Anderson*, 2021 NSCA 62 (CanLII); and *R. v. Morris*, 2021 ONCA 680 (CanLII).
- For additional information about impact of race and culture assessments, see Maria C. Dugas, "[Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders](#)," *Dalhousie Law Journal*, Vol. 43, No. 1, 2020.
37. Raji Mangat, [More Than We Can Afford: The Costs of Mandatory Minimum Sentencing](#), Report, British Columbia Civil Liberties Association.
38. Jillian Boyce, "[Victimization of Aboriginal People in Canada, 2014](#)," *Juristat*, Statistics Canada, 28 June 2016.
39. Some conditions are mandatory for all conditional sentences, whereas others are discretionary. See [Criminal Code](#), R.S.C. 1985, c. C-46, s. 742.3(1).
40. Legal Aid Ontario, "Conditional sentence ('house arrest')," *LawFacts*.
41. *R. v. Proulx*, 2000 SCC 5, para. 22.
42. The fundamental purpose and principles of sentencing are described at sections 718 to 718.2 of the Code.
43. Clause 14 amends section 742.1(c) and repeals sections 742.1(e) and 742.1(f) of the Code.
44. *R. v. Sharma*, 2020 ONCA 478 (CanLII), para. 186.
45. *R. v. Sharma*, 2018 ONSC 1141 (CanLII), para. 225.
46. *R. v. Sharma*, 2020 ONCA 478 (CanLII), paras. 66–132.
47. Government of Canada, *Opioid- and Stimulant-related Harms in Canada*, December 2021.
48. Government of Canada, [Opioids and the opioid crisis – Get the facts](#); and Government of Canada, [Opioid-related harms and mental disorders in Canada: A descriptive analysis of hospitalization data](#).
49. Government of Canada, [Opioids and the opioid crisis – Get the facts](#).
50. Special Advisory Committee on the Epidemic of Opioid Overdoses, [Highlights from phase one of the national study on opioid- and other drug-related overdose deaths: insights from coroners and medical examiners](#), Public Health Agency of Canada, September 2018 (updated in October 2019).
51. Government of Canada, "Problematic opioid use," [Opioids and the opioid crisis – Get the facts](#).
52. Government of Canada, *Opioid- and Stimulant-related Harms in Canada*, December 2021.
53. Ibid.
54. Government of Canada, [Data, surveillance and research on opioids and other substances](#).
55. Alexa Norton and Thomas Kerr, "[Applying the lessons of COVID-19 response to Canada's worsening opioid epidemic](#)," *EClinicalMedicine*, Vols. 29–30, 2020; and Government of Canada, [Modelling opioid-related deaths during the COVID-19 outbreak](#).
56. Government of Canada, *Opioid- and Stimulant-related Harms in Canada*, December 2021.
57. British Columbia Coroners Service, *Illicit Drug Toxicity Deaths in BC: January 1, 2011 – October 31, 2021*, 9 December 2021.
58. Public Health Agency of Canada, [Government of Canada supports efforts to better understand how substance use affects Indigenous communities](#), News release, 25 July 2019; and Jennifer Lavalley et al., "[Reconciliation and Canada's overdose crisis: responding to the needs of Indigenous Peoples](#)," *Canadian Medical Association Journal*, Vol. 190, No. 50, 17 December 2018.
59. First Nations Health Authority, [First Nations in BC and the Overdose Crisis](#), June 2020.
60. Government of Canada, [Opioid-related harms and mental disorders in Canada: A descriptive analysis of hospitalization data](#).

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61. Special Advisory Committee on the Epidemic of Opioid Overdoses, [*Highlights from phase one of the national study on opioid- and other drug-related overdose deaths: insights from coroners and medical examiners*](#), Public Health Agency of Canada, September 2018 (updated October 2019).
62. Government of Canada, [*Stigma around drug use*](#).
63. Statistics Canada, "[Canadian Community Health Survey: Mental Health, 2012](#)," *The Daily*, 18 September 2013.
64. Jillian Boyce, Cristine Rotenberg and Maisie Karam, "[Mental health and contact with police in Canada, 2012](#)," *Juristat*, Statistics Canada, 2 June 2015.
65. *Ibid.*, p. 3.
66. [*Narcotic Control Regulations*](#), C.R.C., c. 1041.
67. *Ibid.*, s. 3.
68. "Possession" in the CDSA has the same meaning as given at section 4(3) of the Code. See [*Controlled Drugs and Substances Act*](#), S.C. 1996, c. 19, s. 2(1). See also [*Criminal Code*](#), R.S.C. 1985, c. C-46, s. 4(3).
69. [*Controlled Drugs and Substances Act*](#), S.C. 1996, c. 19, s. 4(3).
70. Government of Canada, [*Canadian drugs and substances strategy*](#).
71. For more information about supervised consumption sites, see Health Canada, [*Supervised consumption sites and services: Explained*](#).
72. [*An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts*](#), S.C. 2017, c. 7.
73. [*Good Samaritan Drug Overdose Act*](#), S.C. 2017, c. 4.
74. Government of Canada, [*About the Good Samaritan Drug Overdose Act*](#).
75. [*Regulations Amending the Narcotic Control Regulations and the New Classes of Practitioners Regulations \(Diacetylmorphine \(Heroin\) and Methadone\)*](#), SOR/2018-37, 7 March 2018, in *Canada Gazette*, Part II, 21 March 2018, p. 441.
76. Public Prosecution Service of Canada, "[5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4\(1\) of the Controlled Drugs and Substances Act](#)," *Public Prosecution Service of Canada Deskbook*, 17 August 2020.
77. For more information about restorative justice, see Larry Chartrand and Kanatase Horn, [*A Report on the Relationship between Restorative Justice and Indigenous Legal Traditions in Canada*](#), Prepared for the Department of Justice Canada, October 2016.
78. Public Prosecution Service of Canada, "[3.8 Alternative Measures: 1.2 Section 717 of the Criminal Code](#)," *Public Prosecution Service of Canada Deskbook*, 1 March 2014.
79. Public Prosecution Service of Canada, "[5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4\(1\) of the Controlled Drugs and Substances Act: 3. Applicable Principles](#)," *Public Prosecution Service of Canada Deskbook*, 17 August 2020.
80. Public Prosecution Service of Canada, "[5.13 Prosecution of Possession of Controlled Substances Contrary to s. 4\(1\) of the Controlled Drugs and Substances Act: 2. Context](#)," *Public Prosecution Service of Canada Deskbook*, 17 August 2020.
81. Section 85(1) of the Code does not apply if the offender commits an indictable offence under any of the following sections: 220 (criminal negligence causing death), 236 (manslaughter), 239 (attempted murder), 244 (discharging a firearm with intent), 244.2 (discharging firearm – recklessness), 272 (sexual assault with a weapon), 273 (aggravated sexual assault), 279(1) (kidnapping), 279.1 (hostage taking), 344 (robbery) and 346 (extortion). See [*Criminal Code*](#), R.S.C. 1985, c. C-46.

Although section 85(3)(a) of the Code has been the subject of constitutional challenges, it has been upheld by the courts in several cases. For examples of appellate decisions that uphold the constitutionality of section 85(3)(a), see [*R. v. Stephenson*](#), 2019 ABCA 453 (CanLII); [*R. v. Superales*](#), 2019 ONCA 792 (CanLII); and [*R. v. Al-Isawi*](#), 2017 BCCA 163 (CanLII).

82. Hybrid criminal offences allow the Crown attorney who is prosecuting an offence to determine whether to proceed by indictment or summarily. This determination is generally based on the relative seriousness of the offence, and the penalties available are higher. The accused chooses the mode of trial, either by judge alone or by judge and jury. Note that the trial procedures and applicable rules differ where the Crown elects to proceed by indictment.
83. [R. v. Nur](#), 2015 SCC 15.
84. For examples of a successful constitutional challenge of section 96(2)(a) of the Code, see [R. v. Robertson](#), 2020 BCCA 65 (CanLII); and [R. v. Foster](#), [2017] O.J. No. 471 (SCJ).
- For examples of an unsuccessful constitutional challenge of section 96(2)(a) of the Code, see [R. v. Chislett](#), 2016 CanLII 85360 (ON SC); [R. v. Bressette](#), 2010 ONSC 3831; and [R. v. Carranza](#), [2004] O.J. No. 6041 (SCJ).
85. The mandatory minimum sentences of three years for a first offence of weapons trafficking and five years for a second or subsequent offence are retained where the object in question is a prohibited firearm, restricted firearm, non-restricted firearm, prohibited device, any ammunition or any prohibited ammunition. See [Criminal Code](#), R.S.C. 1985, c. C-46, s. 99(2).
86. [Ayotte c. R.](#), 2019 QCCA 1241 (CanLII).
87. The mandatory minimum sentences of three years for a first offence and five years for a second or subsequent offence of possession for the purpose of weapons trafficking are retained where the object in question is a prohibited firearm, restricted firearm, non-restricted firearm, prohibited device, any ammunition or any prohibited ammunition. See [Criminal Code](#), R.S.C. 1985, c. C-46, s. 100(2).
88. [Ayotte c. R.](#), 2019 QCCA 1241 (CanLII); and [R. v. McInnis](#), 2017 NSCA 79 (CanLII).
89. The mandatory minimum sentences of three years for a first offence and five years for a second or subsequent offence are retained for the offence of importing or exporting an object knowing it is unauthorized, where the object in question is a prohibited firearm, restricted firearm, non-restricted firearm, prohibited device or any prohibited ammunition. See [Criminal Code](#), R.S.C. 1985, c. C-46, s. 103(2).
90. The mandatory minimum sentence of five years in the case of a first offence and of seven years for a second or subsequent offence are retained for the offence of discharging a firearm with intent, where the firearm is restricted or prohibited, or where the offence was committed for the benefit of, at the direction of or in association with a criminal organization. See [Criminal Code](#), R.S.C. 1985, c. C-46, s. 244(2)(a).
91. [R. v. MacNeil](#), 2021 NSPC 4 (CanLII); [R. v. Reis](#), 2017 ONSC 1961 (CanLII); [R. v. Sheppard](#), 2011 CanLII 41607 (NL PC); and [R. v. Roberts](#), 1998 CanLII 12247 (NB CA).
92. The mandatory minimum sentence of five years in the case of a first offence and of seven years for a second or subsequent offence are retained for the offence of discharging a firearm recklessly, where the firearm is restricted or prohibited, or where the offence was committed for the benefit of, at the direction of, or in association with a criminal organization. See [Criminal Code](#), R.S.C. 1985, c. C-46, s. 244.2(3)(a).
93. For examples of a successful constitutional challenge of section 244.2(3)(b) of the Code, see [R. c. Neeposh](#), 2020 QCCQ 1235 (CanLII); [R. v. Valade](#), 2019 ONSC 3033 (CanLII); [R. v. Nungusuituq](#), 2019 NUCJ 6 (CanLII); [R. v. Kakfwi](#), 2018 NWTSC 13 (CanLII); [R. c. Vézina](#), 2017 QCCQ 7785 (CanLII); and [R. c. Gunner](#), 2017 QCCQ 12563 (CanLII).
- For examples of an unsuccessful constitutional challenge of section 244.2(3)(b) of the Code, see [R. v. Hills](#), 2020 ABCA 263 (CanLII); [R. v. Ookowt](#), 2020 NUCA 5 (CanLII); [R. v. Itturiligaq](#), 2020 NUCA 6 (CanLII); [R. v. Oud](#), 2016 BCCA 332 (CanLII); and [R. v. Crockwell](#), 2013 CanLII 8675 (NL SC).
94. The mandatory minimum sentence of five years for a first offence and of seven years for a second or subsequent offence are retained for the offence of robbery involving a restricted or prohibited firearm, or where the offence is committed for the benefit of, at the direction of, or in association with a criminal organization. See [Criminal Code](#), R.S.C. 1985, c. C-46, s. 344(1)(a).
95. For examples of a successful constitutional challenge, see [R. v. Hilbach](#), 2020 ABCA 332 (CanLII); and [Her Majesty the Queen v. Ocean William Storm Hilbach, et al.](#), 2021 CanLII 18043 (SCC).
- For examples of an unsuccessful constitutional challenge, see [R. v. Bernarde](#), 2018 NWTCA 7 (CanLII); [R. v. Hailemolekote et al.](#), 2013 MBQB 285 (CanLII); [R. c. Perron](#), 2016 QCCQ 13089 (CanLII); and [Caron c. R.](#), 2014 QCCQ 10603 (CanLII).

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96. The mandatory minimum sentences of five years in the case of a first offence and seven years for a second or subsequent offence are retained for the offence of extortion involving a restricted or prohibited firearm or where the offence was committed for the benefit of, at the direction of, or in association with a criminal organization. See [Criminal Code](#), R.S.C. 1985, c. C-46, s. 346(1.1)(a).
97. Where an attempt to commit murder involves a firearm (including prohibited and restricted firearms), it is prosecuted under section 239(1)(a) or 239(1)(a.1) of the Code. These offences continue to carry mandatory minimum sentences of imprisonment, making conditional sentences inapplicable to them.
98. In *Sharma*, the Ontario Court of Appeal struck down sections 742.1(c) and 742.1(e)(ii) of the Code as violations of sections 7 and 15(1) of the Charter. However, the Supreme Court of Canada has granted leave to appeal this decision. See [R. v. Sharma](#), 2020 ONCA 478 (CanLII); and [Her Majesty the Queen in Right of Canada v. Cheyenne Sharma](#), 2021 CanLII 1101 (SCC).
99. For examples of an appellate-level decision that strikes down the mandatory minimum sentence of imprisonment for the offences of trafficking in substance and of possession for the purpose of trafficking, see [R. v. Lloyd](#), 2016 SCC 13; and [R. v. Dickey](#), 2016 BCCA 177 (CanLII) (sections 5(3)(a)(ii)(A) and 5(3)(a)(ii)(C) of the CDSA declared of no force and effect).
- For examples of a lower court decision in which the mandatory minimum sentence of imprisonment for the offences of trafficking of a substance and of possession for the purpose of trafficking is struck down, see [R. v. Jackson-Bullshields](#), 2015 BCPC 411 (CanLII); [R. v. Jackson-Bullshields](#), 2015 BCPC 414 (CanLII) (section 5(3)(a)(i)(C) of the CDSA declared of no force and effect); and [R. v. Robinson](#), 2016 ONSC 2819 (CanLII) (section 5(3)(a)(ii)(A) of the CDSA held to violate section 12 of the Charter, no decision on section 1 of the Charter).
- However, in contrast, section 5(3)(a)(ii)(B) of the CDSA has faced constitutional challenges and been upheld in lower courts. See [R. v. Carswell](#), 2018 SKQB 53 (CanLII); and *R. v. Boucher*, 2017 NLTD(G) 111, 2017 CarswellNfld 265.
100. For examples of a lower court decision in which the mandatory minimum sentences of imprisonment for the offences of importing and exporting and of possession for the purpose of exporting are struck down, see [R. v. Duffus](#), 2017 ONSC 231 (CanLII) (section 6(3)(a)(i) of the CDSA declared of no force and effect); and [R. v. Sharma](#), 2018 ONSC 1141 (CanLII) (section 6(3)(a.1) of the CDSA declared of no force and effect). For examples of cases appealed and the sentence set aside, but the holding of unconstitutionality of the mandatory minimum sentence was not subject to appeal, see [R. v. Sharma](#), 2020 ONCA 478 (CanLII); and [Her Majesty the Queen in Right of Canada v. Cheyenne Sharma](#), 2021 CanLII 1101 (SCC) (leave to appeal granted).
101. Department of Justice Canada, [Rooting out systemic racism is key to a fair and effective justice system](#), News release, 7 December 2021; and Department of Justice Canada, [Bill C-5: Promoting Health Responses to Simple Drug Possession](#), Background.