Drug Policy and Human Rights: The Canadian Context and Recommendations to OHCHR

Submission to the Office of the UN High Commissioner for Human Rights pursuant to UN Human Rights Council Resolution A/HRC/RES/37/42 (2018)
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I. Human rights and drug policy

Canada is a party to the three main UN drug control conventions to control illicit drugs. Canada must also fulfill its domestic constitutional obligations under the *Canadian Charter of Rights and Freedoms* and under international human rights law. In its 2015 study on the impact of the world drug problem on the enjoyment of human rights, the Office of the High Commissioner for Human Rights (OHCHR) reported persisting challenges and human rights violations globally in relation to drug policy. The OHCHR made important recommendations, including some of particular relevance for Canada.[1] In 2016, Member States convened for the UN General Assembly Special Session (UNGASS) on "the world drug problem," at which time they unanimously adopted an outcome document (hereinafter the "UNGASS 2016 Outcome Document") declaring "we reaffirm our unwavering commitment to ensuring that all aspects of demand reduction and related measures, supply reduction and related measures, and international cooperation are addressed in full conformity with the purposes and principles of the Charter of the United Nations, international law and the Universal Declaration of Human Rights (…)."[2]

Repressive drug control laws and policies around the world have fueled the HIV and hepatitis C (HCV) epidemics and contributed to mounting human rights violations against people who use drugs. The upcoming Ministerial Segment of the 62nd session of the UN Commission on Narcotic Drugs (CND) in March 2019 represents another important opportunity for Member States to finally move away from the harmful "war on drugs" and focus instead on approaches based on a commitment to evidence, to public health and to human rights. The OHCHR and the Human Rights Council both have important roles to play in this discussion. We welcome the March 2018 resolution of the Human Rights Council (Resolution 37/42) requesting the OHCHR to prepare a report on the implementation of the UNGASS 2016 Outcome Document, and are pleased to submit this commentary regarding Canada.

[1] Human Rights Council, Study on the impact of the world drug problem on the enjoyment of human rights: Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/30/65, September 4, 2015, paras. 61 and 65.
[2] UN Office on Drugs and Crime, Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem: Our joint commitment to effectively addressing and countering the world drug problem, Thirtieth Special Session General Assembly, April 2016, p. 2.

II. Drug policy in Canada: the context

For many years, Canada has expanded its punitive approach to drug policy with dramatic consequences for both individuals and society at large. However, following the election of a new federal government in October 2015, welcome steps have been taken to move toward "a comprehensive public health approach." [3] In particular, this federal government has restored harm reduction as a key pillar of Canada's drug strategy, has taken measures to prevent fatal overdoses and facilitate access to treatment for problematic drug use, and is in the process of legalizing and regulating the non-medical sale and use of cannabis.

These efforts are commendable, but insufficient. Canada is facing an unprecedented epidemic of opioid overdose,[4] but its dominant approach to drugs of criminal prohibition continues to undermine an effective response to this "national public health crisis."[5] In 2016, nearly 3,000 Canadians died from opioid-related causes. In 2017, the number of deaths grew;[6] it will continue to rise without more profound changes in course.

III. Canada and the implementation of the UNGASS 2016 Outcome Document

Operational recommendations on demand reduction and related measures, including prevention and treatment, as well as other health-related issues

In response to the current overdose epidemic in Canada, both federal and provincial authorities have taken measures to facilitate access to **naloxone**, as called for in **paragraph 1(m)** of the UNGASS 2016 Outcome Document. Prescriptions are no longer required to access naloxone.[7] Other measures have also been taken to reduce the risk of fatal overdoses. In May 2017, the ***Good Samaritan Drug Overdose Act*** was passed to protect both overdose victims and witnesses from charges related to drug possession when seeking emergency help.[8]

In March 2018, the Canadian government took measures to facilitate **access to treatment**, as urged in **paragraphs 1(i), 1(o), 2(a) and 2(d)** of the UNGASS 2016 Outcome Document, by removing regulatory barriers to the prescription of methadone and diacetylmorphine (heroin).[9]

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[3] Notes for an Address by Hilary Geller during the General Debate on the Special Session of the UN General Assembly on the World Drug Problem at the 59th Session of the United Nations Commission on Narcotic Drugs, March 15, 2016. Available at www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/Statements_15_March_AM/Canada.pdf.

[4] The epidemic is exacerbated with the emergence of illegally manufactured fentanyl. See, Global Commission on Drugs, *The opioid crisis in North America*. October 2017.

[5] A term used by the government itself to describe the current situation. See www.canada.ca/en/health-canada/services/substance-abuse/prescription-drug-abuse/opioids/federal-actions.html.

[6] Ibid. According to Health Canada, from January to September 2017, there were at least 2,923 apparent opioid-related deaths.

[7] This change was made in March 2016. See www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/announcements/narcan-nasal-spray-frequently-asked-questions.html

[8] See www.canada.ca/en/health-canada/services/substance-abuse/prescription-drug-abuse/opioids/about-good-samaritan-drug-overdose-act.html

[9] Government of Canada, "The Honourable Ginette Petitpas Taylor, Minister of Health, announces new measures to reduce barriers to treatment and $231 M to address the opioid crisis," news release, Ottawa, March 26, 2018.

Also in keeping with **paragraph 1(o)** of the UNGASS 2016 Outcome Document, the federal government has removed some legal barriers to the establishment of new legally protected supervised consumption sites (SCS),[10] and 23 such sites are currently operating (up from only two in 2016).[11] But remaining barriers and political opposition can represent insurmountable obstacles. Community members have been forced to implement unsanctioned sites to save lives.[12] Rather than require onerous case-by-case assessments of specific sites, Canada should consider legislating a blanket exemption from prosecution for drug possession for any person while accessing health services (including SCS) — and it should not be forgotten that creating such exemptions are only made necessary by the continued criminalization of drug possession for personal use, which the OHCHR recommend against.

Additional efforts are urgently required to ensure **non-discriminatory access to health in prison** as called for in **paragraphs 1(k), 1(o), 4(b) and 4(m)** of the UNGASS 2016 Outcome Document. Canada is failing to provide prisoners — a population that is disproportionately Indigenous and Black, and highly affected by HIV and HCV[13] — with sterile injection equipment. Moreover, numerous provincial and territorial prisons still do not offer opioid substitution therapy (OST) (or limit the ability to initiate OST while incarcerated) and access to naloxone in prisons remains limited.[14] Denying access to health services in prison is a human rights violation.[15] A constitutional challenge against the federal government is currently underway in an attempt to secure implementation of prison-based needle and syringe programs (PNSP).[16] On May 14, 2018, the federal government conceded the effectiveness and value of PNSPs and announced it would phase in the implementation of PNSPs. However, essential program details remain to be determined and advocates will keep the pressure on the government until it implements PNSPs in *all* federal prisons, in accordance with the evidence and public health principles.[17]

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[10] Canadian HIV/AIDS Legal Network, "Bill C-37 a welcome step forward for life-saving supervised consumption sites and sound drug policy in Canada," news release, December 12, 2016. Note that in 2011, the Supreme Court of Canada ordered the Ministry of Health to grant an exemption recognizing the rights of people who use drugs to access SCS. See, *Canada (Attorney General) v. PHS Community Services Society,* [2011] 3 SCR 134.

[11] See www.canada.ca/en/health-canada/services/substance-abuse/supervised-consumption-sites/status-application.html#app.

[12] M. Kupfer, "Unsanctioned 'overdose prevention site' to pop up in Ottawa, group says," CBC News (online), August 23, 2017. Such mobilization has prompted the government of Canada to find a way to authorize, under specific legal regimes and in collaboration with provincial authorities, some overdose prevention sites to operate for up to six months. In Ontario, overdose prevention sites provide supervised injection, harm reduction supplies and naloxone.

[13] The Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System,* 1995, pp. 69–70; Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report*, 2013. Available at www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx; F. Kouyoumdjian et al., "Health status of prisoners in Canada," Canadian Family Physician 62(3) (March 2016): 215–222; Correctional Service Canada, "Health Services Quick Facts: Human Immunodeficiency Virus (HIV) Age, Gender and Indigenous Ancestry," September 2016.

[14] Canadian HIV/AIDS Legal Network, HALCO, PASAN, *Health care in provincial correctional facilities – Joint submission to the Ministry of Health and Long-Term Care and the Ministry of Community Safety and Correctional Services,* May 3, 2018.

[15] Supra Note 1, at para 6 and paras. 21-23; see also United Nations Standard Minimum Rules on the Treatment of Principles (the Nelson Mandela Rules), Rules 3, 5 and 24.

[16] For more information, see www.prisonhealthnow.ca/learn-more/about-the-lawsuit.php.

[17] Correctional Services of Canada, "Correctional Service Canada announces a Prison Needle Exchange Program," news release, Ottawa, May14, 2018.; Canadian HIV/AIDS Legal Network, "Advocates welcome major concessions in Government of Canada's prison needle exchange announcement," news release, Toronto, May 14, 2018.

Operational recommendations on cross-cutting issues: drugs and human rights, youth, children, women and communities

Paragraph 4(l) of the UNGASS 2016 Outcome Document calls for proportionate national sentencing policies. In its 2015 study, the OHCHR criticized the use of **mandatory minimum sentences** (MMS) and long sentences for drug-related offences, which have contributed to over-incarceration.[18] It was also critical of the discriminatory impact on women, who are imprisoned for drug-related offences more than for any other crime.[19] Canada's punitive approach to drugs over the past decade has resulted in the disproportionate incarceration of Black and Indigenous women;[20] the past decade has also seen the introduction of MMS for drug-related offences. Despite its stated concern, this federal government has yet to repeal MMS.[21] Meanwhile, Canadian courts, including the Supreme Court of Canada, have declared MMS unconstitutional in a number of circumstances (including a key ruling in relation to drug-related offences[22]) and the UN Committee on the Elimination of Discrimination Against Women (CEDAW) recommended that Canada repeal MMS for minor, non-violent drug-related offences.[23] Canada should also **expand alternatives to incarceration** for people who use drugs, in keeping with **paragraph 1(j)** of the UNGASS 2016 Outcome Document, and **decriminalize the possession of all drugs for personal use** (as is permitted under the correct interpretation of the UN drug control conventions and as a number of countries have done).[24]

The legalization and regulation of (non-medical) cannabis in Canada will help reduce convictions and incarceration, but Canada should go further and examine models for the **legalization and regulation of *other* illegal substances** as part of a public-health approach to drug policy — the toxicity of the supply in the illegal opioid market, as evidenced by the ongoing overdose crisis, is just another urgent reminder of the need to consider alternatives to the failed approach of prohibition.[25]

On the international level, in keeping with **paragraph 1(j)** of the UNGASS 2016 Outcome Document, Canada spearheaded the adoption by the **UN Commission on Narcotic Drugs (CND) of its first-ever resolution addressing stigma against people who use drugs**, including in health and other social services.[26] This is an important development and its operational paragraphs require UNODC to prepare a report to the CND on the implementation of the resolution at its 63rd session (in March 2020). The OHCHR should welcome such a development and highlight the critical importance of countries addressing stigma and discrimination against people who use drugs as a fundamental human rights issue, and, of course, as a necessary part of any effective response to HIV, viral hepatitis, overdoses

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[18] Supra Note 1, at para 45.
[19] Ibid, at para. 52.
[20] The Correctional Investigator of Canada, *Annual Report 2014–2015 of the Office of the Correctional Investigator*, 2015; The Correctional Investigator of Canada, *Annual Report 2012–2013 of the Office of the Correctional Investigator*, 2013 .
[21] "Globe editorial: Parliament needs to cut back Canada's excessive minimum-sentencing laws," *The Globe and Mail*, March 6, 2018.
[22] See *R. v. Lloyd,* [2016] 1 SCR 130. The Supreme Court of Canada ruled that MMS was unconstitutional because it violated the right to be free from cruel and unusual punishment.
[23] UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016, para. 45.
[24] Supra Note 1, at para. 61; Release, *A Quiet Revolution: Drug Decriminalisation Across the Globe* (2nd ed.), 2016. Available at www.release.org.uk/publications/drug-decriminalisation-2016.
[25] A. Kwasniewski and A. Grover, "Why legalize pot, but shy away from addressing opioids?", *The Globe and Mail*, May 13, 2017.
[26] UN Commission on Narcotic Drugs, *Removing stigma as a barrier to the availability and delivery of health, care and social services for people who use drugs*, UN Doc. E/CN.7/2018/L.11/Rev1 (as adopted on April 16, 2018).

and other health challenges. The OHCHR should be sure to collaborate with UNODC in the preparation of its report to the CND.

Finally, in keeping with **paragraph 4(a)** of the UNGASS 2016 Outcome Document, we note the ongoing need for human rights–based guidance for Member States (and in particular policymakers and relevant national authorities) on how to ensure national drug policies fully respect human rights.[27] The development of **International Guidelines on Drug Policy and Human Rights**, with the active involvement of OHCHR collaborating with other UN agencies, human rights experts and civil society organizations, should be a substantial contribution to the implementation of this part of the UNGASS 2016 Outcome Document.

IV. Recommendations

Both positive developments and remaining challenges at country level should inform the OHCHR's report on the implementation of the UNGASS 2016 Outcome Document. In particular:

- The Human Rights Council should affirm strongly that drug policies, and their implementation, must be consistent with human rights principles, protecting and promoting the rights of people who use drugs and other marginalized populations currently disproportionately affected by punitive approaches.
- The High Commissioner for Human Rights should actively engage in the 2019 Ministerial Segment of the CND, and the preparatory process leading up to it, to ensure that all aspects of drug control conform to Member States' human rights obligations and to promote a human rights–based approach to drug policy.
- The High Commissioner for Human Rights should support greater, formal human rights oversight of the existing drug control infrastructure and of States' actions in the implementation of drug policy, including by existing human rights treaty bodies.
- The High Commissioner for Human Rights should continue to endorse the development of international guidelines on drug policy and human rights, and to be actively engaged in their development and launch, and then in supporting their application by States and by UN human rights mechanisms, in consultation with experts in drug policy, human rights and health, including those from civil society organizations.

[27] R. Lines et al., "The Case for International Guidelines on Human Rights and Drug Control," *Health & Human Rights Journal* 2019; 17(1). Available at http://sites.sph.harvard.edu/hhrjournal/wp-content/uploads/sites/125/2017/06/Lines-Editorial.pdf; M. Golichenko et al., "Addressing Human Rights Abuses against People Who Use Drugs: A Critical Role for Human Rights Treaty Bodies and Special Procedures," *Journal of Human Rights Practice* 2018. Available at https://doi.org/10.1093/jhuman/huy011.