



RESEARCH ARTICLE / ARTICLE DE RECHERCHE

# Prosecuting Overdose: Manslaughter Charges Against People Who Use, Share, and Sell Drugs in Canada\*

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## Abstract

This study examines the recent proliferation of manslaughter charges and subsequent prosecutions brought against people who have shared, sold, or provided drugs that have led to overdose death in Canada. It presents a documentary analysis of news media coverage, court decisions, and Access-to-Information and Freedom-of-Information requests of materials from criminal legal institutions. The analysis finds that the vast majority of those who face manslaughter charges are engaged in the lowest tiers of the drug trade, are themselves people who use drugs, and are often intimately known to the deceased. Messaging by police, prosecutors and the courts mobilize the overdose crisis as rationale for these charges and prosecutions, positioning them as a form of redress to impacted communities. This phenomenon illustrates how punitive criminal legal responses to the overdose crisis have deepened alongside the retreat of criminal law in other circumstances, contradicting claims of a therapeutic turn in Canadian drug policies.

**Keywords:** access to information; freedom of information; drug enforcement; punishment; law reform

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## Résumé

Cette étude examine la récente prolifération d'accusations d'homicide involontaire et autres poursuites criminelles intentées contre des personnes qui ont partagé, vendu ou fourni des drogues ayant entraîné des décès par surdose au Canada. Elle présente une analyse documentaire de la couverture médiatique, des décisions de justice et des documents reçus à la suite de demandes d'accès à l'information auprès des institutions juridiques. L'analyse révèle que la grande majorité des personnes accusées d'homicide involontaire appartiennent aux échelons les plus bas du commerce de la drogue, sont elles-mêmes des consommateurs de drogues et sont aussi souvent intimement connues de la personne décédée. Les messages de la police, des procureurs et des tribunaux mobilisent la crise des surdoses comme justification de ces accusations et poursuites, les présentant comme une forme de réparation pour les communautés touchées. Ce phénomène illustre à quel point les réponses pénales punitives à la crise des surdoses se sont intensifiées parallèlement au retrait du droit criminel dans d'autres circonstances, contredisant de ce fait les affirmations d'un tournant thérapeutique dans les politiques canadiennes en matière de drogues.

**Mots clés:** accès à l'information; lutte contre la drogue; sanction; réforme du droit

## Introduction

Jurisdictions across Canada have seen a rapid expansion in charges and prosecutions that are brought against people who share, sell, or provide drugs that have led or contributed to fatal overdose. While many of such prosecutions are based on drug trafficking charges under section 5 of the *Controlled Drugs and Substances Act* (CDSA 2018), an increasing number of cases are based on charges of unlawful act manslaughter (sections 222 and 236 of the *Criminal Code*) and criminal negligence causing death (section 220 of the *Criminal Code*). Both are referred to here as “manslaughter prosecutions” for ease of reference.<sup>1</sup> The laying of such manslaughter charges across Canada has increased from three cases prior to 2016 to 135 in 2021, representing an increase of 700 percent (Haines et al. 2021). As of 2021, Ontario was responsible for eighty-eight of those cases, representing 65 percent of the charges that were laid across Canada (ibid.). Many of these cases are currently before the courts; as a result, the rates of conviction are not currently known.

There is scarce mention in Canadian scholarship of overdose-related manslaughter charges and prosecutions, as these are emerging phenomena. Several existing areas of research provide some background and context that are instructive in examining this issue. The first is US research on cases of overdose-related manslaughter, which is generally referred to as “drug-induced homicide” and is much more entrenched and long-standing (Beletsky 2019; Carroll et al. 2021; Drug Policy Alliance 2017). Some US jurisdictions employ specific “drug delivery resulting in death” charges, unlike Canadian jurisdictions, which make use of more general homicide and related *Criminal Code* provisions (2018). This

<sup>1</sup> Both unlawful act manslaughter and causing death by criminal negligence are regarded by the *Criminal Code* as culpable homicide (s 222).

body of scholarship emphasizes the wide-ranging harms that are generated by such measures, most notably how they contribute to overdose mortality by creating disincentives to seeking support from first responders for fear of criminal charges (*ibid.*). The second area of research that is relevant here, which focuses on people's participation in the drug trade, is diverse with respect to discipline and methodological approach, but emphasizes the embeddedness of social practices of drug sharing, trading, and selling within existing social, familial, and economic networks; the exclusion of people who are engaged in social activities that are designated as drug trafficking from formal labour markets; and how processes of racialization and racial targeting by criminal legal institutions are historically interwoven with the construction of "drug dealing" and its corresponding social and legal meanings (Bourgois and Schonberg 2009; Bucerius 2014; Harris 2016; Ward 2020). This scholarship tends to stop short of an engagement with the inner workings of criminal legal institutions. An important and growing subset of this literature in Canada focuses on how people who sell drugs access and interact with health and harm reduction programmes in the context of the overdose crisis—a body of scholarship that is focused primarily on health outcomes and emerging health-care interventions (Kolla and Strike 2020; Bardwell et al. 2019; Betsos et al. 2021).

The study presented here engages this research while aiming to fill the current gaps in existing scholarship by examining overdose-related manslaughter prosecutions in Canada. The study maps emerging investigative and prosecutorial practices—identified through a documentary analysis of news media, access-to-information and freedom-of-information (ATI/FOI) disclosures, and court records—against the broader social context evidence regarding the unregulated drug trade, and ongoing tensions between punitive and therapeutic approaches to drugs governance in the Canadian policy and legal environment.

Building upon these findings, this article asks the following: When examining charges and prosecutions for overdose-related manslaughter within the context of the social and relational dynamics of people who are involved in the drug trade, what tensions or contradictions emerge? What do the charging and prosecution of individuals who supplied drugs resulting in fatal overdoses signify regarding the evolving legal governance of drugs, drug consumption, and those engaged in the drug trade? What does the social location of those who experience these charges reveal with respect to the fault line between the stated functions and the objectives of criminal legal processes (e.g., attend to drug-related harms, apprehend high-level drug traffickers) and the empirical contexts in which drug procurement and overdoses occur?

The findings point out emerging practices in how overdose deaths are treated at the local level by law enforcement; concerted coordination efforts among prosecutors in the pursuit of such charges; and the extent to which the current public health crisis and overdose mortality are mobilized by law enforcement, prosecutors, and judges as motivating the pursuit of these charges and resulting convictions.

The article begins with a description of the methodological approach and empirical sources used, in addition to some reflections on the contributions of

ATI/FOI requests to critical sociolegal scholarship. The next section provides background on Canadian drug policy, recent reforms, and the place of people involved in the drug trade in this arrangement. The final section maps the findings of a documentary analysis with respect to enforcement, prosecution, the courts, and those impacted.

## Methods

The research presented here comprises a documentary analysis (Grant 2018; Bowen 2009) of three textual sources, including news media coverage, ATI/FOI disclosures, and court records (e.g., criminal trial rulings and sentencing decisions). Documentary analysis was chosen for several reasons. First, it is attuned to questions of framing, conditions of emergence, and the social and institutional construction of knowledge forms. This makes it well suited to the exploration of social practices that constitute trafficking under law and why they are designated in this way. Second, it provides a framework for the triangulation of results and for moving through sources of tension and contradiction that emerge across different sources of knowledge. For example, conflicts arising from drug use as constituted as a crime or as a disease, depending on how particular institutions are oriented to the issue. Third, it is attentive to the question of absence and “things we might not have been able to observe” (Grant 2018, 23). In this respect, documentary analysis is useful for the interrogation of prosecutorial strategy, which tends to be safely guarded. The documentary analysis method complements sociolegal traditions that explore the gap between law on the books and law in action (Halpérin 2011) and the tensions that arise between institutional texts and everyday experiences of social worlds. The findings presented here are provided in the context of the methodological difficulties that stem from the availability and quality of empirical legal data—a common challenge in sociolegal research (Millar et al. 2017).

## News Media Coverage

The identification of a definitive number of overdose-related manslaughter charges and related prosecutions is challenging for several reasons, including discrepancies in data-gathering practices across institutions or jurisdictions (ibid.). Given that not all charges result in prosecutions, court records alone would not capture the extent of this issue; further, many proceedings are unreported. An analysis of news media sources presents a partial solution to these challenges and has been employed by other sociolegal scholars who have examined emerging trends and shifts in criminal legal governance (Millar and O’Doherty 2020), including methods that monitor online news trends (see e.g., Beletsky 2019). In addition to the identification of cases in which charges are later dropped/withdrawn, stayed, or in which there is a plea bargain, news media sources can also identify cases that have not yet made their way through the courts. Further, news media coverage often provides biographic or demographic details that are not always captured in court records, such as the relationship of

the person charged to the deceased, the racial background of the person charged and/or the deceased, or whether the person charged is identified as a person who uses drugs. As not all charges or prosecutions receive news media coverage (e.g., in cases of publication bans), news media sources should not be relied upon exclusively to determine the scope of the phenomenon.

I gathered Canadian news media coverage by using the *Canadian Major Dailies* database (articles dated from January 2015 to October 2023) as well as through Google News alerts (articles dated from October 2021 to October 2023). This article presents findings that are based primarily on forty separate cases that were identified through both of these means. Many of these cases have not yet been settled by the courts. Inclusion criteria consisted of cases in which at least one charge was laid for either manslaughter or criminal negligence causing death. Cases that included the intentional administration of drugs by one person to another (e.g., if someone has difficulty self-injecting), accidental ingestion, and allegations of intent to cause harm were excluded. As a more comprehensive analysis of news media coverage is ongoing, this selection represents a partial snapshot of the issue at hand based on convenience sampling and, for these reasons, any findings that are provided here should be interpreted as suggestive of overall trends and not as the results of a definitive quantitative analysis.

### ATI and FOI Requests

ATI and FOI requests<sup>2</sup> were employed to gather information on prosecutorial and investigative practices, ascertain the existence of prosecutorial guidelines or similar policies, and attempt to identify whether the increase in overdose-related manslaughter cases was being driven primarily by policing agencies or federal and provincial prosecutors.

The analysis of ATI/FOI disclosures has several benefits. Methods that are limited to public-facing textual sources risk limiting the analytic focus to representational practices of institutions or recirculating the narrative and epistemic claims of state institutions. By contrast, methods that integrate ATI/FOI disclosures provide insights into the “backstage” functions of institutions, as well as where institutional claims and institutional practice diverge (Piché et al. 2017). Further, the integration of ATI/FOI requests into the research process provides an opportunity to identify emerging governmental practices that have not yet entered public dialogue (Walby and Larsen 2012). Limitations of this method include substantial delays and sweeping exemptions in ATI/FOI legislation that effectively provide near blanket secrecy to the practices of prosecutors, and law-enforcement and criminal legal institutions more broadly (Piché 2012).

ATI/FOI requests were conducted, or are in process, with the federal Public Prosecution Service of Canada (PPSC), the Ontario Attorney General, and several

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<sup>2</sup> Access to information (ATI) refers to requests that are directed to the federal government. Freedom of information (FOI) refers to requests that are directed to provincial or municipal levels of government, or public institutions that fall under provincial or municipal jurisdiction (e.g., local police services).

Ontario provincial and local police services. Walby and Larsen's (2012, 32) notion of "textual trails" guided the iterative process of the conduction of ATI/FOI requests in which specific information in one disclosure helped to inform subsequent requests, identify documents that were relevant for the purposes of this study, or locate supplemental publicly available material.

This study relies upon these three documentary sources and the knowledge that arises through their interaction; the strengths of one textual source account for the shortcomings of the other. The social context and biographical details of news media counteract some of the tunnel-vision or legalist tendencies of court records, while the ATI/FOI disclosures shed some light on the institutional drivers of such cases, in contrast with media accounts that can characterize such a phenomenon as merely arising absent of contributing drivers.

### **Court Records**

The analysis of court records is long-standing in critical sociolegal research, ranging from analyses of judicial decision-making, to examinations of sentencing ranges, to the uses of expert evidence in legal proceedings (Creutzfeldt et al. 2019; Banakar and Travers 2005). An analysis of court records, including trial judgment and sentencing decisions, can yield critical insights regarding shifts in judicial interpretation or the influence of broader societal shifts (e.g., overdose mortality) on legal proceedings. Further, court records can provide crucial contextual information that is not available through other sources, such as news media coverage.

The outcomes of many cases are unknown, as many are currently before the courts. Inclusion and exclusion criteria for the cases that were examined were the same as those for the news media coverage that was studied (detailed above). Only trial decisions and sentencing rulings were included; other proceedings such as those regarding the admission of evidence were excluded. Based on these criteria, a total of eighteen cases from 2004 to 2023 were examined. This selection was based on the convenience sampling of publicly accessible records through the Canadian Legal Information Institute. Accordingly, similarly to the analysis of news media coverage, the findings that are provided here should be interpreted as suggestive of overall trends.

### **Canadian Drug Policy and Legal Governance of People Who Use Drugs**

An understanding of the conditions of the emergence of overdose-related manslaughter charges and prosecutions requires an examination of the broader context that surrounds the legal governance of people who use drugs. This section discusses the enduring tensions between punitive and therapeutic approaches in Canadian drug policy, overdose mortality, the growing momentum for drug law reforms, and where people who sell drugs are positioned within Canadian drug laws.

### **“Bifurcated” Drug Policy: Enduring Tensions Between Punitive and Therapeutic Approaches**

The drug policy landscape in Canada is characterized by many tensions. The Canadian Drugs and Substances Strategy (CDSS) combines substance use supports, such as harm reduction and treatment, with substance control measures, such as enforcement efforts, in response to possession and distribution. In so doing, the CDSS positions punitive and therapeutic measures as complementary rather than conflicting. Within this framework, a “balanced” drug policy is presumed to reconcile the criminalization of drug sellers with the deployment of health measures for users (Kerr et al. 2008). Despite a rhetorical shift towards more humane responses to drug use in recent years, particularly at the federal level, as well as a scale-up of health-based interventions in certain jurisdictions (Health Canada 2023a, 2023b), enforcement predominates with respect to the resources that are deployed, representing 58 percent of all federal government spending on substance use interventions (Health Canada 2023b). The enduring place of enforcement in Canadian drug policies is illustrated by the historic use of mandatory minimum sentencing for drug offences, the ongoing possibility of criminalization for simple possession in most jurisdictions, and extreme racial stratification in drug law enforcement, with federal and provincial prisons that are overwhelmingly populated by Black and Indigenous people who are convicted of drug-related crimes (Department of Justice Canada 2021; Owusu-Bempah et al. 2021; Owusu-Bempah and Luscombe 2021).

Canadian drug policies are also characterized by substantial regional unevenness and contests between levels of government regarding the value and legality of emerging harm reduction and health interventions (Hyshka et al. 2017). This bifurcation (Fischer et al., 2016)—particularly between competing approaches—has been referred to by some scholars as a “productive incoherence” by providing “ideological elasticity” to governing institutions, offering a measure of cover to criminal legal institutions when faced with critique (Kaye 2020).

### **Overdose Mortality and Drug Law Reforms**

These long-standing tensions in Canadian drug policy unfold against a backdrop of exponentially increasing mortality from overdose and drug toxicity. There were 42,494 opioid overdose deaths between January 2016 and September 2023 (Health Canada 2024). Racial disparities in overdose deaths are also substantial and, although race-based health data are lacking in most jurisdictions, in British Columbia, First Nations people died at 5.9 times the rate of other BC residents in 2022, with disparities that were especially pronounced among First Nations women (FNHA, 2022). Fentanyl has saturated the drug market across Canada over the past decade, almost entirely displacing the availability of heroin and emerging as a drug of choice for many (Centre on Drug Policy Evaluation 2021).

The devastation that is wrought by overdose death from unregulated drugs has contributed momentum to drug law reform efforts. One such reform is the *Good Samaritan Drug Overdose Act* (GSDOA 2017), which was introduced to address the reluctance among people who use drugs to call first responders due to the risk of arrest. In many Canadian jurisdictions, police continue to be routinely

dispatched on overdose calls (Xavier et al. 2021). The legal protections that are provided by the GSDOA are limited to immunity from charges for simple possession and do not provide protection for drug trafficking, warrants, or other criminal charges (Pivot Legal Society 2017). Significant disincentives to the seeking of medical assistance remain, which stem from both the limited protections of the GSDOA itself and experiences of routine interrogation, arrest, and extralegal action by the police (Michaud et al. 2024b). For these reasons, civil society organizations have widely called for full amnesty from charges and police non-attendance policies at overdose events (van der Meulen et al. 2021).

Despite the reigning logic that drives such enforcement practices, drug seizures and the arrest of those who are engaged in trafficking by law enforcement do not reduce the availability of unregulated drugs, nor do they impact demand (Spooner et al. 2004; Hernandez and El-Sabawi 2020). Supply interdiction efforts have been found to generate wide-ranging public health impacts (Kerr et al. 2005), including increasing rates of overdose due to the displacement of known drug procurement networks, with one study finding that fatal and non-fatal overdoses doubled in the vicinity after police seizures (Ray et al. 2023).

Other reforms have similarly attempted to temper the impacts of the enforcement and prosecution of drug laws. These reforms include the introduction of guidelines by the PPSC in 2020 that encourage the consideration of alternatives to simple possession prosecutions (PPSC 2020), as well as a 2021 law that expands conditional sentences for certain criminal offences and encourages law enforcement to consider providing a warning or referral in lieu of a simple possession charge (*An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 2021, Bill C-5, s 10.2). Growing calls for decriminalization have culminated in a three-year pilot initiative in British Columbia that decriminalizes the personal possession of certain substances in quantities of less than 2.5 grams under certain circumstances (Health Canada 2022) as well as limited depenalization schemes in certain jurisdictions (Greer et al. 2022b), though some of these initiatives have faced recent rollbacks.

While a critical appraisal of these reforms remains beyond the scope of this study, it is worth noting that each of these reforms has been the object of substantial critique by drug law reform advocates due to the limited scope of their protections, the ways in which they sustain and, in some cases, extend police and prosecutorial discretion, and position law enforcement as therapeutic actors through referrals to health services (Greer et al. 2022a; Michaud et al., 2024c; Pivot Legal Society 2021).

### **People Who Sell Drugs in Canadian Law and Enhanced Penalties in the Fentanyl Era**

While questions of simple drug possession and drug use are the object of long-standing debates regarding the role of punitive versus therapeutic means of governing, questions of drug selling are met with a uniformly punitive frame of reference. Under the CDSA, trafficking is broadly defined as “to sell, administer, give, transfer, transport, send or deliver the substance” or to offer to do any of those things (CDSA, s 2(1)). Various courts have reaffirmed decidedly broad



interpretations of drug trafficking which stipulate that trafficking includes the sharing of drugs with other persons, including for social purposes, regardless of whether the person who is sharing receives any compensation (see *R v Kernaz* 2019). Such a legal regime contrasts with some other jurisdictions internationally in which a recognition of “social supply” or the “non-commercial drug supplying, or sharing, among friends and acquaintances for little or no profit” at sentencing is more developed, such as in the case of the United Kingdom (Ferencz 2020, 198) and as recognized in Canada in the *Cannabis Act* (ibid.). Law reform proponents have called for sentencing and prosecutorial guidelines for trafficking offences (Pacey 2017) as well as an overhaul of Canadian drug-trafficking laws, in light of the ways in which they infringe rights that are protected under section 7 of the *Canadian Charter of Rights and Freedoms* (Ferencz 2020).

Overdose mortality has become routinely cited in legal rulings as a premise for harsher punishment in drug-trafficking cases in recent years. In 2017, all three appellate judges of the British Columbia Court of Appeal agreed that sentencing ranges for fentanyl trafficking should be increased from a range of six to twelve months to a range of eighteen to thirty-six months, “as a result of the public health crisis” (*R v Smith* 2017, para 48). In 2019, the Alberta Court of Appeal set a nine-year starting point for “wholesale” fentanyl trafficking (*R v Felix* 2019)—a decision that was upheld by the Supreme Court of Canada (*R v Parranto* 2021). In *R v Parranto*, the decision notes that “the time has come for the perception of the gravity of largescale trafficking in fentanyl to accord with the gravity of the crisis it has caused” (*R v Parranto* 2021, para 15). *Felix* and *Parranto* focus on trafficking in large volumes and are not representative of the majority of trafficking charges that focus on low-volume or subsistence amounts (Coomber et al. 2019; 2022). Cases that involve high volumes are more likely to yield longer sentences that push the limits of established sentencing ranges. I raise several “wholesale” cases here, nonetheless, as they indicate an inflection point in penalties for drug trafficking and related criminal offences in the fentanyl era. Similar trends for drug trafficking that involves fentanyl hold for lower-volume cases as well (Hrymak 2018), as demonstrated in the case of *R v Smith*.

Critiques of the principle of both general and individual deterrence are longstanding within criminology and criminal law scholarship, particularly in relation to sentencing. Critics argue that there is no relationship between crime prevention and lengthier sentences (Webster and Doob 2012). In a critical appraisal of enhanced deterrence in the context of Canadian drug laws, Hrymak notes that “to the extent individuals are deterred, it is largely through the existence of the sanction and not the severity of the sanction” (Hrymak 2018, 161). The principle of deterrence is particularly questionable in instances of drug trafficking, in part because the majority of those charged with trafficking engage in it to support their own drug use or are motivated by subsistence or survival (Hrymak 2018; Shane 2022)—a recognition that is affirmed by the courts in *R v Preston* (1990).

### **Where Are the Drug Dealers? The Relational Economies of People Who Sell, Share, or Provide Drugs**

Canadian courts and legislators have been reluctant to contend with the significant representation of people who use drugs among those charged and prosecuted for drug trafficking. This overrepresentation stems from the street-level drug trade as constituting the overwhelming focus of enforcement and prosecutorial activity (Spooner et al. 2004). To highlight the disjuncture between the social practices of drug distribution and the legal categories, I employ the term “relational economies.” This term draws our attention to the embeddedness of economic activity and labour practices in human (often intimate) relationships (Block 2012) and emphasizes how drug distribution practices do not strictly adhere to market logics. For instance, much drug distribution and sharing are motivated by efforts to mitigate withdrawal as experienced by a friend or loved one (Bardwell et al. 2021), which is reflected in some of the cases that are analyzed below.

The notion of relational economies challenges the economic rationalism that permeates legal assumptions with regard to the drug trade and that are ascribed to drug sellers who are often represented as singularly “profit-driven” in ways that are presumed to preclude care or concern. The figure of the “drug dealer” is constituted by legal practice and media representation as inherently predatory, morally bereft, explicitly racialized, or racially coded, motivated by commercial profit, incapable of expressions of care, and positioned as external to social, familial, or communal bonds (Dwyer 2011; Ferencz 2020; Kolla and Strike 2020). This framing both makes possible and propels punitive modes of governance that are particularly reliant on criminal law and provides the discursive foundation of extremely broad trafficking laws and enhanced penalties for drug-trafficking offences. It also functions as a prerequisite for the dehumanization of people who are involved in the drug trade in media and popular discourse (Michaud et al. 2024a) and stands in stark contrast to understandings of participation in illicit or subsistence economies as a form of labour among those who are excluded from formal economies (Venkatesh 2006).

Social science and public health research, however, have provided a more fulsome portrait of those who are involved in the drug trade and the dynamics of activities that are legally designated as drug trafficking (Ferencz 2020). A substantial proportion of people who are involved in drug selling also meet the diagnostic criteria for substance use disorder and motivations for drug selling overwhelmingly include the obtaining of drugs for personal use (Kerr et al. 2008; Stanforth et al. 2016). In an analysis of street-level trafficking cases, Hrymak (2018, 149) found that twelve out of fourteen people were engaged in drug selling to support their own drug dependency. Such practices are sometimes referred to as subsistence drug dealing, or necessity trafficking (HIV Legal Network 2022).

Social inquiry into drug trade dynamics has also pointed to the existence of long-standing and trusting relationships between people who use drugs and people who sell drugs, and the embeddedness of practices of care within both commercial and non-commercial drug distribution. This includes practices such as the communication of information regarding potency and quality,

participation of drug sellers in formal drug-checking programmes to check for contaminants, refusal to sell drugs that are considered too potent, support for the procurement of quality drugs to avoid withdrawal or recourse to an unknown source, and other diverse consumer protection methods (Bardwell et al. 2019; Betsos et al. 2021; Carroll et al. 2020; Kolla and Strike 2020).

Taken as a whole, this social context—largely absent from the relevant laws and legal decisions—interrupts entrenched narratives of the predatory figure of the “drug dealer” that is prominent in criminal legal settings (Coomber 2006). Stemming from a recognition of this social context, some legal scholars note that people who engage in drug selling to sustain their own drug use should be exempt from punitive sanctions and drug selling of this nature should be incorporated into Canadian drug-trafficking law (Ferencz 2020)—a call that is echoed by many national human rights and civil society organizations (HIV Legal Network 2022).

### **Punitive Entrenchment: Where Does the Punitive Turn Thesis Fit with Regard to Canadian Drug Policy?**

The ongoing reliance on criminal legal sanctions for low-level drug trade participation is reflective of the punitive orientation of Canadian drug laws (Pacey 2017). The “punitive turn” has often been used to characterize shifts in legal and/or penal governance over the past forty-odd years, referring to a post-welfarist renewal of the tough-on-crime sentiment in the policies of criminal legal institutions and the governance of social issues more generally (Garland 2001). The punitive turn is generally characterized by the relegation of rehabilitative principles, a renewed investment in retributive responses to crime and disorder, and risk management as a means of stratifying populations, often in starkly racial terms (*ibid.*). While the punitive turn thesis might be critiqued for its deference to the US sociopolitical context (and mass incarceration in particular), there are several elements of the theory and its critiques that come to bear on Canadian drug policy.

The rapid acceleration of overdose prosecutions and enhanced penalties for fentanyl trafficking in both the United States and Canada (Carroll et al. 2021; Hrymak 2018) certainly provide strong evidence for punitive entrenchment. Yet, critics of the punitive turn thesis have pointed out that, while the theory might correctly point out certain overarching trends in Western legal governance, the reality is much more uneven. For instance, it does not account for the enduring place of so-called rehabilitative and therapeutic objectives in practices of penalty, as evidenced by drug treatment courts, among other measures (Moore and Hannah-Moffat 2005). Similarly, the repeal of mandatory minimum sentences for certain drug-related crimes after being struck down by the courts (Bill C-5 2021) and the implementation of prosecutorial guidelines for simple possession charges (PPSC 2020) (however contingent and haphazard such reforms may be) provide further evidence of the unevenness of the punitive turn in the Canadian context. Recent shifts provide evidence of both the acceleration of criminalization (e.g., enhanced penalties, bail reform) as well as the deceleration

of criminalization (e.g., the expansion of depenalization and decriminalization measures).

These uneven developments in Canadian drug laws and drug policies are organized around an increasingly rigid fault line between “users” and “dealers”—a distinction that is animated by racialized symbolic mechanisms that are rooted in cultural pathology, with victimhood racialized as White (Rosino and Hughey 2018; Johnston 2020). This fault line further presumes a clear delineation between people who *use* drugs and people who *traffic* drugs, based on legal categories that do not cohere with the lived experience and social and relational practices of people who use, share, and sell drugs.

### “Textual Trails”: Mapping the Findings from a Documentary Analysis

This section considers the social practices and relational economies of drug distribution that have elaborated upon until now against the “textual trails” (Walby and Larsen 2012) from news media coverage on overdose-related manslaughter cases, the ATI/FOI disclosures, and court decisions (trial judgments and sentencing rulings). Taking cues from Seear’s (2020) analysis—that legal practices do not merely describe or address realities, but constitute them—the insights provided here point out the extent to which legal practices assemble specific and partial understandings of drug use and drug trafficking, redress to overdose death, and, in the process, materialize certain effects—effects that are felt most acutely by communities of people who use drugs who are subject to criminal legal governance.

### Insights Relative to Practices of Law Enforcement

In most jurisdictions in Canada, police continue to be routinely dispatched to overdose events following calls to 911, including since the passage of the GSDOA. Civil society groups, human rights advocates, and researchers have decried the GSDOA as providing a false sense of security to people who use drugs due to the limited scope of its protections (HIV Legal Network 2020). Both investigative procedures at the policy level as well as police discretion at a practice level play determining roles in what charges are laid and under what circumstances, including at overdose events.

Haines et al.’s (2021) reporting provides crucial insights into the distribution of overdose-related manslaughter cases across Canada. Most cases to date have taken place in Ontario, with a handful of cases in other jurisdictions. The number of provinces and territories that are pursuing these charges is expanding, with the Yukon recently laying its first charge (Lang 2023). Certain police forces are responsible for laying a substantial proportion of charges, resulting in large discrepancies across jurisdictions. If we take Ontario, which is the province with the highest rates of overdose-related manslaughter prosecutions, as an example, the Barrie and Niagara regions are heavily represented, with only a handful of reported manslaughter charges laid in Toronto, the most populous city of the province. This suggests that the trend is largely driven by shifts in investigative

approaches and practices at the local level, rather than changes in provincial prosecutorial policy or practice alone. Previous reporting has indicated that the Ontario Provincial Police (OPP) is responsible for laying the majority of manslaughter charges in that province (Haines et al. 2021).

The leading role of the OPP in laying such charges is confirmed in a 2019 report entitled *Opioids and Overdoses: Impacts and Strategies* by the Organized Crime Enforcement Bureau of the OPP. The report details the implementation of a new investigation framework that mandates officers who attend overdose occurrences to “conduct a thorough investigation” and “source the substances causing harm and hold traffickers accountable through enforcement” (OPP 2019, 21). Significantly, the investigative framework further requires that the Criminal Investigation Branch should be notified following any overdose death within the OPP jurisdiction. This administrative requirement effectively transforms overdose-related health emergencies into criminal investigations that facilitate the laying of charges against people who are suspected of having provided the drugs (Miller 2022). In certain instances, police engagement in overdose-related fatalities is initiated by an individual who calls for emergency medical assistance, during which police arrive at the overdose event alongside or in addition to paramedics. In other scenarios, police involvement transpires through a subsequent investigation into the fatality.

It is worth noting that, in addition to explicit changes in investigative practices and the treatment of overdose events, one of the main components of the OPP opioids and overdoses strategy is the promotion of the GSDOA through police-led outreach, social media campaigns, and partnerships with community-based organizations. This is significant, as the act of calling for emergency medical assistance following an overdose is among the main pathways that activate police involvement and subsequent manslaughter investigation or potential charges.

Police promotion of the GSDOA to community members, including to people who use drugs, families and friends, and the general public (OPP 2019, 16), suggests that enforcement actors have leveraged the limited protections of the GSDOA and the false sense of security that it provides to people who use drugs as a tool to pursue trafficking and manslaughter charges. This implies a shift in the role of the GSDOA from being originally designed as a policy tool to facilitate access to emergency medical services and to decrease overdose fatalities, to now functioning as an enforcement instrument for the pursuit of trafficking and manslaughter charges against individuals who have shared, traded, or sold drugs.

The 2019 OPP report indicates an increase of 500 percent in trafficking and trafficking-related charges over the previous two years—twenty-one manslaughter and twelve criminal negligence causing death charges were laid in a three-year period (OPP 2019, 23). The report also details active outreach to “educate the courts” through an expert witness programme that provides testimony at overdose-related manslaughter legal proceedings (OPP 2019, 21).

The rapid proliferation of charges across policing agencies raises questions regarding the means through which enforcement practices and policies spread to other jurisdictions. While the OPP does not oversee municipal police forces, it

appears that the changes in investigative practice at overdose events that are detailed in the 2019 report provided inspiration for similar shifts in practice at other Ontario municipal police agencies in the years that followed, suggestive of “policy mobilities” in which policies and practices are transferred or diffused across diverse geographic and political jurisdictions (McCann 2011). The extent to which law enforcement may use the threat of manslaughter charges as leverage to extract information from individuals or recruit police informants remains unknown.

### *Insights Relative to Prosecutorial Practice*

The decision to prosecute in the Canadian legal context is based on public interest and the reasonable prospect of conviction; within this framework, prosecutorial discretion is central (PPSC 2020). More serious charges typically involve a high degree of coordination between prosecutors and the investigating police force, including for the purposes of preparing warrants, the interrogation of witnesses, the decision to lay charges, and the collection of evidence (PPSC 2020).

The findings presented here are based primarily on news media coverage and ATI/FOI disclosures. The ATI/FOI disclosures that have been received to date include material that is primarily from the PPSC, the Ontario Ministry of the Attorney General, and the Toronto Police Service. As such, the findings that are presented here are not generalizable to the prosecutorial practice of other provinces and territories. Given the sweeping exemptions that exist under federal ATI and provincial FOI legislation, the received ATI disclosures were significantly redacted under section 16 (information relating to crime, information relating to the enforcement of Canadian law), section 21 (advice or recommendations), and section 23 (solicitor–client privilege). The received FOI disclosures were subject to redactions under similar exemptions.

In 2015, the federal prosecution service (PPSC) created a national working group to coordinate strategies that were related to fentanyl-related prosecutions of CDSA offences, including the coordination of prosecutorial materials (e.g., factums, case law) and the gathering of expert evidence. Based on the materials that are received, prosecutors rely heavily on expert evidence that comes primarily from epidemiologists (e.g., on overdose mortality rates), toxicologists (e.g., on fentanyl toxicity and potency), and medical examiners (e.g., cause-of-death determinations). The materials that are contained in the disclosures indicate a high degree of coordination in such cases, between both prosecutors across regions, and prosecutors and law enforcement.

A separate FOI disclosure revealed a 2020 memorandum, which was sent by the Ontario Ministry of the Attorney General to police agencies across Ontario, that indicates the range of potential charges that can be brought for the purposes of opioid overdose death prosecutions, including manslaughter and criminal negligence causing death. The memorandum notes that manslaughter charges can apply “in cases of not for profit trafficking.” The disclosure also included recommendations to coordinate with Crown attorneys and forensic pathologists to assist with such prosecutions. The extent to which this memorandum is the

reason for the increase in the number of overdose-related manslaughter charges laid is an open question, though the uptick in charges following 2020 in jurisdictions across Ontario suggests that it played a causal role.

Some prosecutors' offices have elected to pursue trafficking charges alone rather than pursuing a manslaughter charge. This can be explained in part by the higher rates of conviction and comparable sentences from trafficking charges, as well as what is often a more onerous task of securing a conviction for manslaughter from an evidentiary standpoint (Miller 2022). Further research is needed to better understand the reasons why the pursuit of manslaughter charges is common in certain jurisdictions but rare in others.

The volume of news media reports relative to the number of criminal trial proceedings indicates that a substantial number of cases do not make it to trial. In a significant proportion of cases that were examined, manslaughter charges were withdrawn following the entry of a guilty plea for lesser charges. Journalists tracking such prosecutions noted that “many end in a guilty plea on lesser charges” (Miller 2022, para 22). According to the PPSC, joint prosecutions—in which federal and provincial prosecutors partner to pursue cases that involve both CDSA drug offences and *Criminal Code* offences such as manslaughter—are increasingly common. While plea bargains are commonplace in Canadian criminal proceedings (Scott 2018), this is suggestive of “charge layering,” in which “multiple charges are laid for the same conduct [...] while capitalizing on three potential benefits that encourage defendants to plead guilty: more certainty, lower sentences, and dropped charges” (Skolnik 2021, 637–38)—a practice that is especially commonplace in drug enforcement (McCorkel 2020).

### **Insights Relative to the Courts and Judicial Decision-Making**

An analysis of trial decisions and sentencing rulings revealed several elements relative to the courts and judicial decision-making that are worth noting. The section above detailing the increase in sentencing ranges for fentanyl trafficking notes the extent to which enhanced penalties are premised on an appeal to the public health emergency represented by overdose mortality. Overdose-related manslaughter cases are similarly positioned by prosecutors—and, in the case of convictions, by judges—as a form of redress to communities and families impacted by loss from overdose death more broadly.

Across the cases examined, three assumptions were commonplace: first, that decisions pertaining to drug trade involvement are necessarily motivated by rational choice; second, that people involved in the street-level drug trade are able to exercise control over what is in the drug supply; and third, that they are aware of what they are distributing. Such assumptions are reflected in the remarks of the presiding judge in one case in which they state “the time has come for this Court to ensure that trafficking in fentanyl does not gain a foothold in this province, and to send a message to traffickers that this is not a place where they would wish to do business” (*R v White* 2020, para 104). The assumption on the part of judges and prosecutors that harsher penalties have a deterrent effect has been referred to as a foundational myth in drug-induced homicide cases in the United States (El-Sabawi et al. 2023).

These assumptions sit in stark contrast to the established social context evidence on four counts: (1) that drug trade involvement is often motivated by subsistence or exclusion from formal labour markets, particularly at the street level (Kerr et al. 2008); (2) that the actions of people who are involved in the street-level drug trade are constrained due to their level of social and economic capital and position within an economic hierarchy (Betsos et al. 2021); (3) that they are frequently unaware of the content and potency of what they are distributing (Kolla and Strike 2020); and (4) the reality that fentanyl has saturated the unregulated drug market and displaced the availability of other opioids (CDPE 2021).

In some cases, expressions of concern or efforts to mitigate overdose risk on the part of the person who is providing the drugs is cited as evidence of increased culpability. In *R v Adams* (2022), the defendant provided naloxone (an opioid overdose antidote) and asked the person to whom he had provided the drugs to check in with him after—both strategies are widely practised among people who use drugs and are recommended by health service providers to mitigate overdose risk. Adams was found guilty on three counts, including trafficking, criminal negligence causing death, and manslaughter. In a separate case, the defendant communicated information about the potency of the drugs being provided, which was later cited as an indication of his knowledge of the health risks and thus evidence of his culpability (*R v Walker* 2019).

### **Insights Relative to People Impacted by Charges**

While news media that cover crime tend to rely heavily on police press releases and thus often reproduce law-enforcement narratives of such events (Hastings 2022), they can be generative on several counts. For example, news media coverage is particularly well placed to identify new charges prior to trial or the striking of a plea bargain. The findings presented here draw primarily on news media coverage (forty cases in which charges were laid) as well as trial and sentencing decisions (eighteen cases) and should be interpreted as indicative of overall trends.

Among the eighteen court decisions examined, fifteen defendants are identified as a person who uses drugs (e.g., “substance user,” “addict”), with the substance use of the remaining three not mentioned. Among the ten court records examined that characterized the defendants’ level of drug trade participation, only one defendant was characterized as a “high-level” actor, with five characterized as “low-level”/“small-scale”/“non-commercial” actors and four characterized as having procured drugs as a favour, with no money being exchanged. Among the eighteen court decisions examined, in ten instances, the defendant was intimately known to the deceased (as either a friend, family member, or intimate partner), with two who were not intimately known to one another beyond the context of the drug transaction; in the remaining six, the nature of the relationship was either unclear or not mentioned. In eight of the eighteen cases analyzed, drugs were obtained for the defendant and the deceased to use together.



In some cases, individuals were prosecuted for having provided their prescribed medication to the deceased (see *R v Knapp* 2018), including one case in which medication was shared to help mitigate withdrawal and no money was exchanged (*R v Pheasant* 2014). The lawyer of a North Bay woman charged with manslaughter described her case as follows: “She shared a substance in the context of two people who were both dependent on a substance experiencing significant discomfort from very serious withdrawal” (McKee 2023). In a separate case in Walkerton in which manslaughter charges were laid, the defendant traded drugs in exchange for cigarettes and lottery tickets (Dunn 2023).

It is unlikely that these factors would enter into consideration at trial, as they do not have a bearing on legal guilt or innocence in relation to the charge. Rather, they are likely only to be considered at sentencing if they may be treated as mitigating or aggravating factors. The fact that people in the lowest tiers of the drug trade are overwhelmingly represented among such cases is not surprising. This can be attributed in part to the evidentiary requirements of overdose-related manslaughter prosecutions (e.g., the need to establish a chain of custody of drugs between the person providing them and the person receiving them). And yet, these biographical insights also stand in stark contrast to the public statements of investigating agencies and prosecutors who claim that such charges target kingpin and high-level actors who are trafficking in commercial quantities.

## Conclusion

Recent years have seen a rapid increase in charges and prosecutions of people who have shared, sold, or provided drugs that have led to overdose deaths in jurisdictions across Canada, with the bulk of cases in Ontario. The majority of those who face manslaughter charges are engaged in the lowest tiers of the drug trade, and the majority are themselves people who use drugs. In a substantial proportion of cases, they are intimately known to the deceased. These findings correspond with the social profile of those who are the targets of drug-induced homicide investigations and prosecutions in the United States (Carroll et al. 2021; Beletsky 2019; Beety et al. 2018). Further, the pursuit of these cases instantiates a clear delineation between people who use drugs and people who traffic drugs based on legal categories that do not cohere with the lived experience and relational practices of people who are involved in the drug trade. Police investigative practices and changes in policy have contributed to the transformation of overdose events as medical emergencies into criminal investigations that are used to facilitate the laying of serious criminal charges against people who use, share, and sell drugs. The rapid acceleration of such charges across law-enforcement jurisdictions is suggestive of high levels of policy transfer among police agencies. The backstage activities of prosecutors indicate concerted and coordinated practices to pursue such cases and secure convictions. Significant variations regarding the decision to lay charges and proceed with prosecutions exist between jurisdictions.

The pursuit of overdose-related manslaughter cases is positioned as a form of redress for communities that are impacted by overdose and as being consistent with other therapeutic shifts in drug policies. The positioning of these cases as commensurable with therapeutic and health-based objectives is expressed through the mobilization of epidemiological and public health evidence in legal proceedings, as well as public outreach efforts that promote the GSDOA and encourage people to call paramedics as a means of activating law-enforcement involvement. In so doing, police and prosecutors are able to frame such investigations and prosecutions as an effective means of addressing overdose mortality.

These claims stand in stark contrast to the substantial epidemiological, public health, legal, policy, and social science evidence that underscores the impacts of the criminalization of people who are involved in the drug trade and the protective measures that are commonly undertaken by individuals who are providing or distributing drugs (Carroll et al. 2020). Overdose-related manslaughter charges layer the existing harms of street-level drug trade policing on several fronts. First, they further disincentivize the seeking of emergency medical assistance in the event of an overdose (Carroll et al. 2021; Beletsky 2019; Beety et al. 2018). Second, such prosecutions risk exacerbating drug market volatility and aggravating overdose risk by interrupting and destabilizing social and economic networks, generating unpredictable fluctuations in drug quality and potency for users following the arrest of their provider (Carroll et al. 2021; Ray et al. 2023). Third, such practices contribute to the consolidation of criminal legal actors in drug governance and the regulation of people who are involved in the street-level drug trade, disproportionately racialized and living in poverty (Boucher et al. 2022) and further entrench tough-on-crime policy narratives that work at cross-purposes to addressing the causes of overdose mortality, including, most significantly, a highly volatile unregulated supply. The reclassification of overdose deaths as homicides also has the effect of significantly inflating homicide numbers (Carruthers 2022) and increased rates of overdose and overdose-related manslaughter investigations are cited by police agencies as evidence of the need to increase police budgets (Keown 2023).

While the analysis presented here is not limited to the province of Ontario, given that the majority of the ATI/FOI requests that were conducted were directed to Ontario agencies, further research is needed to uncover the prosecutorial and law-enforcement investigative practices in other jurisdictions. Findings that are presented from the analysis of trial decisions and sentencing rulings are limited by the availability of data. Future inquiry into overdose-related manslaughter investigations and prosecutions would benefit from a focused analysis on elements that are unknown at this time, including: an analysis of potential racial disparities in charges laid, rates of conviction, and at sentencing; the extent to which plea bargains are employed to secure guilty pleas to other charges; an analysis of successful and unsuccessful litigation strategies; and knowledge of these legal risks among communities of people who use drugs, including adaptive strategies that are employed to mitigate such risks.

The findings presented here are supportive of policy recommendations that have been made elsewhere, including the overhaul of existing trafficking laws, support for the introduction of “social supply” or similar frameworks, as well as police non-attendance policies at overdose events (Ferencz 2020; van der Meulen et al. 2021). This phenomenon underscores recourse by the police and prosecutors to additional legal tools in drug enforcement. It further illustrates how criminal legal responses to the overdose crisis have deepened alongside the partial retreat of criminal law under other circumstances, contradicting claims of a “therapeutic” turn in Canadian drug policies (Gilmore 2021).

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## Legislation

- An Act to amend the Criminal Code and the Controlled Drugs and Substances Act, 2021, Bill C-5, 43rd Parliament, 2nd Session.
- Controlled Drugs and Substances Act, SC 1996, c 19, § 4 (2018).
- Criminal Code of Canada, 1985 RSC, c C-46, § 319 (2018).
- Good Samaritan Drug Overdose Act (GSDOA), SC 2017, c 4 § 2 (2018), <http://laws-lois.justice.gc.ca/eng/acts/g-2.7/>.

## Case law

- R v Adams, 2022 ONCJ 517.
- R v Felix, 2019 ABCA 458.
- R v Kernaz, 2019 SKCA 37.
- R v Knapp, 2018 ONSC 2923.
- R v Parranto, 2021 SCC 46.
- R v Pheasant, 2014 ONSC 1923.
- R v Preston, 1990 BCCA 576.
- R v Smith, 2017 BCCA 112.
- R v Walker, 2019 ONCJ 132.
- R v White, 2020 NSCA 22.

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