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Canadian Drug Policy and the Reproduction of Indigenous Inequities

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Abstract

Canada's federal drug policy under the Harper government (2006 to present) is "tough on crime" and dismissive of public health and harm reduction approaches to problematic drug use. Drawing on insights from discourse and critical race theories, and Bacchi's (2009) poststructural policy analysis framework, problematic representations in Canada's federal drug policy discourse are examined through proposed and passed legislation, government documents, and parliamentary speaker notes. These problem representations are situated within their social, historical, and colonial context to demonstrate how this policy is poised to intersect with persistent racial inequalities that position Indigenous peoples for involvement with illicit substances and markets, and racialized discourses and practices within law and law enforcement that perpetuate Indigenous over-representation in the criminal justice system.

Keywords

policy analysis, drug policy, poststructural, Indigenous over-incarceration, racialization

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Canadian Drug Policy and the Reproduction of Indigenous Inequities

Since 2006, in line with its “tough on crime” agenda, Canada’s Conservative federal government under Stephen Harper has advanced a drug policy that is decidedly dismissive of public health and harm reduction approaches to problematic drug use. One manifestation of this agenda is the Safe Streets and Communities Act, which, in addition to implementing restrictions on community-based conditional sentences and changes to conditions of pardons, introduced minimum mandatory prison terms for certain drug offences (Bennett & Bernstein, 2013; Department of Justice Canada, 2012a). The anti-harm reduction sentiment in Harper’s drug policy has been demonstrated by the removal of harm reduction from the National Anti-Drug Strategy of 2007; federal funding cuts to harm reduction programs (Webster, 2012); the denial of a renewed exemption to section 56 of the Controlled Drugs and Substances Act for Vancouver’s safe injection site, InSite, in 2011, leading to a Supreme Court ruling that deemed the denied exemption unconstitutional (Small, 2012); and the passing of Bill C-2: Respect for Communities Act (2013), which sets out extensive criteria required by an applicant requesting a Criminal Code exemption for the purpose of establishing a supervised drug consumption facility.

First Nations, Inuit, and Métis peoples in Canada have experienced distinct histories of colonization and cultural oppression, which have led to substantial burdens of social and health inequalities. These inequalities are connected to a high burden of drug-related harms and drug-related structural violence, including over-representation in the criminal justice system for drug offences (Bennett & Bernstein, 2013); high rates of blood-borne infections related to injection drug use (Public Health Agency of Canada, 2010); high reported rates of illicit substance use and substance use disorders among Indigenous youth (Currie & Wild, 2012; Elton-Marshall, Leatherdale, & Burkhalter, 2011); and multiple social damages to First Nations communities caused by the illegal drug trade (Comack, Deane, Morrissette, & Silver, 2013).

This article aims to explore some of the modalities through which Canadian drug policy can intersect with extant Indigenous inequities and racialized practices and discourses operating in Canadian society. Racialization is understood as the process of creating difference based on racial categories, identities, and meanings, and can be used to legitimize the domination of one racial group over another (Block & Galabuzi, 2011; Hall, 1997; Wallis & Fleras, 2009). Discourses act as sites in which symbolic power is exercised to produce a racialized knowledge of the “Other,” and are deeply implicated in operations of power and knowledge construction (Foucault, 1980, 1982; Hall, 1997). For example, a significant artifact of colonial discourse is the notion that Indigenous people have a predilection toward addiction, a discourse that can be traced back to the 1869 Act for the Gradual Enfranchisement of Indians under which it was illegal to sell intoxicating substances to Indigenous peoples (Government of Canada, 1869; see also De Leeuw, Greenwood & Cameron, 2010). Salmon (2007) demonstrated how Canadian fetal alcohol prevention policy discourses construct Indigenous mothers of children with fetal alcohol effects as unproductive citizens and a risk to First Nations people. Campbell (2000) argued that policy discourses produce women’s drug use as a greater crime than men’s because the birth of a drug-affected infant can be construed as a crime against humanity. Further, according to De Leeuw et al. (2010), these discourses perpetuate colonial relations in that they “simultaneously produce non-Indigenous peoples as legitimate and necessary agents of care, protection, and improvement” (p. 283) and, thus, have significant outcomes on lived experience and material conditions.

Exploring the troubling relationship between the Harper government’s drug policy and Indigenous peoples in Canada calls for an interrogation of the “drug problems” the policy seeks to address while

locating the policy in its broader social and historical context. To do so, I draw from Bacchi's (2009) poststructural policy analysis framework, which attends to problem representations inferred within a policy and salient contradictions embedded in the policy discourse. In Bacchi's method, social problems are understood to be constructions from interpretations of real and often deeply troubling social issues, and it is through these problem constructions that governing processes take form. The following questions guide the discourse analysis in Bacchi's method (2009):

1. What is the "problem" represented to be?
2. What presuppositions or assumptions underlie this representation of the "problem?"
3. How has the representation of the "problem" come about?
4. What is left unproblematic in the "problem" representation?
5. What effects are produced by this representation of the "problem?"
6. How/where has this representation of the "problem" been produced, disseminated and defended? How could it be questioned, disrupted and replaced? (xii)

The first three questions guide my analysis of the "drug problems" implicit or explicit in the discourse of current Canadian drug policy, drawing from proposed and passed legislation, government documents, and parliamentary speaker notes from January 2007 to January 2014. Questions 4 and 5 are addressed by situating representations of drug-use problems within the Canadian context of racialized inequities that position Indigenous peoples for involvement with illicit substances and markets, and racialized discourses and practices within law and law enforcement that perpetuate Indigenous overrepresentation in the criminal justice system. Finally, question 6 is addressed through exploring the state of the drug policy debate, opportunities to destabilize problem representations, and promising practices and policy recommendations.

Canadian Drug Policy Problematizations

The Department of Justice Canada, Evaluation Division (2012) has outlined three National Anti-Drug Strategy pillars— enforcement, prevention, and treatment—with the largest funding allotment (\$205.9 million plus \$67.7 million set aside for the components under mandatory minimum penalties) devoted to the Enforcement Action Plan, representing 70% of the overall budget (DeBeck, Wood, Montaner, & Kerr, 2009). There are no components of the Enforcement Action Plan that specifically target Indigenous peoples, while several components of the Prevention and Treatment Action Plans target Indigenous youth and offenders, particularly treatment and crime prevention initiatives.

With enforcement prioritized, the illicit drug use problem is understood as a problem of criminality, resting on the conflation of illegal drug use with crime and social disorder. As stated in one government document: "These substances may pose serious risks to the health of individuals, and their use often affects public safety and may support organized crime" (Health Canada, 2013, para. 1). Even though Canada reports the lowest crime rate in 40 years (Perreault, 2012) and the greatest burden of health and social drug harms can be attributed to alcohol and tobacco (Canadian Public Health Association, 2011), illicit drug use is widely fused with addiction, abuse, danger, and public disorder throughout the policy discourse. For instance, Rob Nicholson, Minister of Justice and Attorney General of Canada, stated in

support of Bill C-10, “the proliferation of drugs and violent crime is, unfortunately, a reality in this day and age and it is our job as parliamentarians to deal with criminals, to protect society and do whatever we can to deter crime” (Canada, 2012, Hon. Rob Nicholson section, para. 4).

The largest proportion of funding in the enforcement plan is dedicated to clandestine lab and illegal marijuana grow-operations (Department of Justice Canada, Evaluation Division, 2012). This agenda therefore locates the source of illicit drugs from within Canada, and remains silent on the state’s weak ability to intercept illicit substances and precursor chemicals flowing into Canada (Oscapella, 2012) and the increased availability of cocaine, marijuana, and heroin in recent decades (Werb et al. 2013).

Harsher penalties by way of minimum mandatory sentences come by way of amendments to the Criminal Code through Bill C-9 (2007) and Bill C-10 (2012), which have eliminated the availability of judicial discretion for conditional and community-based sentences for a range of drug-related offences, including criminal organization-related offences, and import and export, trafficking, or production of drugs offences. These legislations undermine much of the potential brought in 1996, when Bill C-41 (1995) was passed, adding section 718.2(e) to the Criminal Code. Under the principles governing section 718.2(e), judicial discretion in sentencing should consider the unique systemic and background factors that position Indigenous offenders before the law (*R v Gladue*, 1999). Conversely, within the current drug policy, harsher punishments are expected to act as deterrents to drug-related criminal behaviour, treating all equally before the law regardless of social and historical background factors that impact the offender’s social location. In this way, the Enforcement Action Plan is essentially “colour blind,” consistent with the liberal ideals of egalitarianism and individualism (Henry, Tator, Mattis, & Rees, 2009), which runs contrary to the social realities of Indigenous peoples’ lives and their over-incarceration in Canada.

Three core assumptions are implicit in the Treatment Action Plan: illicit substance use requires treatment, all people who engage in problematic substance use desire or will engage in treatment, and treatment is effective. Treatment itself is framed as a means to prevent risk to communities, which is stated explicitly in the Strategy as a key issue of concern: “lack of treatment capacity for those who pose risk to community” (Government of Canada, 2013, para. 2). The largest funding component (\$125 million) is dedicated to urban drug treatment, with \$35 million to National Native Alcohol and Drug Abuse programs on reserve. A number of other components under the treatment agenda fall within the purview of corrections or law enforcement, such as youth justice initiatives, drug treatment courts, and diversionary sentencing. Those illicit substances users that do not seek treatment or do not see their drug use as problematic are not addressed in this action plan, unless they are mandated into treatment.

Among the goals of the federal Prevention Action Plan is “to prevent youth from using illicit substances by enhancing their awareness and understanding of the harmful social and health effects of illicit drug use” (Government of Canada, 2013, para. 1). This demonstrates an assumption that youth drug use is the result of lack of knowledge regarding drug-related harms, leading to poor individual choices. Approximately \$30 million of this budget has been allocated to federal social marketing campaigns, specifically the *drugsnot4me* campaign, with videos depicting illicit drug harms in middle-income settings. Drug strategy community initiatives receive the greatest funding allotment at \$55 million, with a number of regional and national projects targeting Indigenous populations, focused on improving capacity to avoid illicit drug use through knowledge and skill development, increasing awareness of the

negative consequences of illicit drugs, and promoting healthy lifestyle choices (Department of Justice Canada, Evaluation Division, 2012).

The Prevention Action Plan allocates \$32 million to national crime prevention and drugs and organized crime awareness services, with several components targeting Indigenous populations. These strategies involve awareness and education programs, primarily delivered under the purview of the Royal Canadian Mounted Police (RCMP) or regional police departments. Additionally, the Drug Endangered Children initiative of the RCMP culminated in the document, *Drug Endangered Children: Equating Child Abuse with Drug Activity* (RCMP, 2010). This initiative follows a series of provincial legislative amendments to Child and Family Services Acts permitting child apprehension on the grounds of child exposure to illicit drug activity. For example, the Province of Alberta's (2006) Drug-Endangered Children Act preamble states: "WHEREAS children exposed to illegal manufacturing of drugs, indoor cannabis grow operations, trafficking and other forms of illegal drug activity are victims of abuse" (p. 2). The conflation of illicit substance activity with child abuse can further the racial inequities in child protection placements, given that Indigenous families are much more likely to be under the surveillance of child protection agencies than non-Indigenous families (Brownell, Roos, & Fransoo, 2006; De Leeuw et al., 2010).

Consistent with the emergence of neoliberal governance—with its emphasis on freedom of choice, the predominance of the market, a retreat from social welfare, and encouraging responsible individual choices (Broad & Antony, 2006; Larner, 2000; Rose, 2000)—Canada's current drug policy holds citizens responsible and accountable for their involvement with illegal drugs and seeks to deter poor choices through education and harsh punishments. According to Keane (2002), "the production of human beings as autonomous individuals is central to operations of power in modern societies" (p. 3). Wacquant (2009) demonstrated how the expansion of the punitive arm in of the state is a key characteristic of U.S. neoliberalism, with the "right hand" of the government punishing and regulating African American men in the penal system, and the "left hand" of the state regulating and monitoring African American women on welfare or workfare. Canada's Anti-Drug Strategy appears keenly positioned in this punitive policy turn with the potential to produce similar racialized and gendered effects.

Dividing practices are described by Foucault (1982) as those dichotomies that cause the subject to divide within himself or herself, or divide from others, and are integral to the creation of power relations by way of legitimizing categories of good and bad. The dichotomy of the criminal drug dealer versus the vulnerable addict is an important element of the governmental discourse. As stated on a government's website: "The National Anti-Drug Strategy focuses on prevention and access to treatment for those with drug dependencies, while at the same time getting tough on drug dealers and producers who threaten the safety of our youth and communities" (Government of Canada, 2013, para 1). For many who lack the funds to support an addiction, options are reduced to trafficking or property crimes (Canadian Bar Association, 2011). Involvement in illegal drug markets can similarly be driven by the need to meet basic life requirements.

This policy discourse, however, is dislocated from social, structural, and historical contexts in which it operates, especially as these pertain to Indigenous peoples. The following sections situate this policy accordingly to demonstrate what has been left unproblematic in the policy discourse, and the effects produced by the problem representations the current policy seeks to address.

Illicit Substance Involvement and Social Location

A complex of intersecting historical, structural, and social pathways have positioned First Nations, Métis, and Inuit peoples in Canada at greater risk for illicit substance involvement and greater surveillance of illicit substance use. The surveillance and documentation of Indigenous peoples have been a longstanding component of the Canadian colonial project (De Leeuw et al., 2010). These colonizing practices have involved the appropriation of traditional lands, interrupting the self-determined path of Indigenous peoples, and disparaging Indigenous ways of life, resulting in social and economic exclusion and generations of cultural oppression and dislocation (King, 2012; Monture, 2006; Monture-Angus, 1995; Royal Commission on Aboriginal Peoples, 1996; York, 1990).

The legal roots of colonization can be traced to the Indian Act of 1876, whereby Indigenous people were dispossessed of their land, confined to small reserves, and stripped of rights enabling self-determination (Government of Canada, 1876; see also Hamilton & Sinclair, 1991). Shortly thereafter, traditional ceremonies, languages, and practices were banned; residential schools were created to systematically remove Indigenous children from their families and “civilize” them; and Indigenous children were widely adopted out to non-Indigenous families in the “Sixties Scoop,” furthering family and social dislocation (Hamilton & Sinclair, 1991). This legacy is perpetuated today by the extremely high placement of Indigenous children into child welfare (Blackstock, Cross, George, Brown, & Formsma, 2006; Native Women’s Association of Canada, 2012), which in turn is associated with high rates of homelessness and street-involvement among Indigenous youth aging out of the child welfare system with inadequate system supports (Baskin, 2007; Bounajm, Beckman, & Thériault, 2014; Evenson & Barr, 2009; Gaetz & Scott, 2012).

The systematic marginalization and cultural oppression of Indigenous peoples has resulted in racialized social inequities in Canadian society (Reading & Halseth, 2013). Indigenous people experience poor housing quality in First Nations and urban communities, food insecurity, high unemployment, and lower income if included in labour force (Loppie Reading & Wien, 2009; Reading & Halseth, 2013). Fifty percent of Indigenous youth will drop out, or be pushed out, of high schools in Canada, reproducing conditions for economic and employment exclusion (Loppie Reading & Wien, 2009). Self-reported major depressive episodes are nearly double for Indigenous versus non-Indigenous Canadians (Loppie Reading & Wien, 2009), while the Canadian Centre on Substance Abuse (2009) reported that more than 50% of people seeking addictions treatment have been diagnosed with a mental illness.

Substance use has been cited as the most important challenge facing First Nations communities (Assembly of First Nations, Native Addictions Partnership Foundation Inc., 2011). There is poor access to any addictions services in First Nations, Métis, and Inuit communities, and poor access to culturally appropriate services in general (Carter & McPherson, 2013; Loppie Reading & Wien, 2009). Indigenous people are overrepresented as service recipients at harm reduction programs in Canada, comprising from 13% to over 50% of the population served (Leonard, 2010; Saskatchewan Ministry of Health, 2008; Tyndall et al., 2006). According to Wilkinson and Marmot (2003), “drug use is both a response to social breakdown and an important factor in worsening the resulting inequalities in health” (p. 24). Although most substance use is not harmful, social dislocation, trauma, and poverty can create conditions for problematic drug use, defined as “use that has become habitual and compulsive despite negative health and social effects” (Carter & MacPherson, 2013, p.16). Problematic substance use among First Nations peoples is linked to cultural oppression and erosion, economic exclusion, and the intergenerational impacts of trauma borne from colonial practices such as the residential school system (Assembly of First

Nations, Native Addictions Partnership Foundation Inc., 2011; Chansonneuve, 2005; Chiefs of Ontario, 2010). Moreover, for many people coping with social dislocation, poverty, homelessness, and mental health issues, substance use can be a solution to pain, loss, and boredom, and provide a means to self-medicate (Nadew, 2012). When substance use is framed as the problem, rather than a response to socially inflicted pain, the social and environmental drivers of inequities and trauma that lead to problematic substance use become obscured.

Another contemporary manifestation of colonialism is the advent of Indigenous street gangs, especially in the Prairie Provinces. Comack et al. (2013) locate the proliferation of street gangs as a form of resistance to colonialism and to the racialized and spatialized poverty that permeates inner city communities. Indigenous youth are pushed and pulled toward gang recruitment due to social dislocation, economic exclusion, and the prevalence of street gang involvement among proximal social relations. The street skills of Indigenous youth are an asset in the illicit drug trade, and a liability in most legal employment arenas, as demonstrated in other racialized drug markets (Bourgois, 1998). Further, Indigenous street gangs largely restrict drug sales to Indigenous people in the inner city and reserve communities where “impoverished and colonized spaces, already deprived of financial resources, are further drained by the activity of the illegal drug market” (Comack et al., 2013, p. 133). As such, Indigenous street gangs in Canada have made illicit drugs more accessible to Indigenous communities (Department of Justice Canada, Evaluation Division, 2012).

The Safe Streets and Communities Act (Bill C-10, 2012) specifically targeted street gangs and the illicit drug trade. Street gangs are included in the definition of a “criminal organization” provided in section 467 of the Criminal Code:

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

As Rob Nicholson, Minister of Justice and Attorney General of Canada, proclaimed when the Targeting Serious Drug Crime component of the Act came into force,

The production and trafficking of illicit drugs is one of the most significant sources of money for gangs and organized crime in Canada. Today our message is clear that if you are in the business of producing, trafficking, importing or exporting drugs, you’ll now face jail time. (Department of Justice Canada, 2012b, para. 2)

Under the Safe Streets and Communities Act, the Controlled Drugs and Substance Act was amended to provide “mandatory minimum penalties for serious drug offences [production and trafficking; possession for the purpose of trafficking; importing and exporting] when they are carried out for organized crime purposes, or if they involve targeting youth” (Legislative Summary: Bill C-10, 2012, p. 37). The intention of the legislation was to “support the National Anti-Drug Strategy’s efforts to combat illicit drug production and distribution and help disrupt criminal enterprises by targeting drug suppliers” (Department of Justice Canada, 2013, Tackling crime section, para. 4). Aggravating factors to be considered on sentencing include an offence committed for the benefit of organized crime, involving the

use or threat of violence or weapons, committed in a prison, and involving youth in the commission of the offence, selling to youth, or near an area normally frequented by youth.

The primary business of street gangs is the illegal drug trade, a business that is inherently violent because, unlike “legitimate” profit-building enterprises sanctioned by law, the state does not ensure the conditions for profit accumulation, nor provide regulatory and judicial dispute resolution processes (Comack et al., 2013; Oscapella, 2012). As such, prohibitive drug policies have relevant implications for shaping the nature of the street drug industry (Oscapella, 2012). A systematic review by Werb et al. (2011) found a significant association between drug law enforcement and violence in the illicit drug market. The causative mechanisms that explain this link remain theoretical; however, evidence supports the notion that illicit drug-related violence is more structurally mediated (i.e., through drug law enforcement and prohibition) than can be explained by behavioural or psycho-pharmaceutical theories (Resignato, 2000; Werb et al., 2011).

The discourse that promotes harsher punishments as deterrents to drug-related crime has been widely questioned. Bennett and Bernstein (2013) challenge the notion that people undertake a cost–benefit analysis prior to engaging in illicit drug-related crime, especially for people who are dependent upon drugs, economically marginalized, or struggling with the impacts of prior incarceration. According to Oscapella (2012), “there is abundant evidence that minimum mandatory sentences do not deter as predicted or reduce harms associated with drug use” (p. 4). Comack et al. (2013) demonstrated how Canadian penitentiaries are sites where street gangs are produced and reproduced, as gang involvement becomes beneficial for protection and social inclusion in prison, and a significant amount of the illegal drug business is run from inside the penal system. They argue that incarceration is not a deterrent, but something that street gang members aspire to: “In the street gang business of illegal drug sales, it is a necessary step on a successful career path” (p. 118). Bringing drugs into jail can be a lucrative act, reimbursed with large monetary sums and minimal risk. Further, prison terms allow time to plot and conduct illegal drug business maneuvers, and shipping gang members to other provinces with the intent of disrupting gang activity has enabled Indigenous street gangs to exploit new markets (Comack et al., 2013). In this way, incarceration through harsher punishments can foster rather than deter the conditions for street gang activity, the illegal drug trade, and the violence associated with it.

The relationship between racialized inequities, illicit substance involvement, and problematic substance use is more complex than structural determinism. Without underplaying the agency and self-determination of Indigenous peoples and the ability to mitigate the outcomes of unjust social conditions, and the multiple life trajectories that may arise from a history of cultural oppression, the research suggests that problematic substance use and involvement in illegal substance markets are highly socio-structurally mediated. Gang involvement appears to be a powerful agentic response that reframes criminal justice system involvement as a rational risk among limited employment options, while reproducing damages to Indigenous communities.

Racialized Policing and Legal Discourses

While Indigenous peoples comprise approximately 4% of the Canadian population, the federal inmate population is approximately 23% Indigenous (Office of the Correctional Investigator, 2013). Indigenous over-incarceration is even more acute in the Prairie Provinces. In 2007 to 2008, Indigenous people made up 10% of the adult population in Saskatchewan but 81% of those admitted to provincial jails. In

Manitoba, where 15% of the adult population is Indigenous, they represented 69% of admissions to provincial jails (Perreault, 2009).

Legal processes must be considered in the context of law enforcement practices, which help determine which subjects come before the law. Racialized spaces often become associated with violence and disorder (Razack 2002, 2007), and accordingly become heavily policed. In this way, policies that are “tough on crime” become inevitably tough on racialized spaces and the individuals found therein. These associations result in the over-surveillance of the “usual suspects,” whereby Indigenous young men are very frequently stopped, questioned, searched, and detained because they “fit the description” (Comack, 2012). Indigenous peoples are more likely to experience residential instability and homelessness, and homeless people who use drugs have been found more likely to use public spaces for drug use (Gaetz, Donaldson, Richer, & Gulliver, 2013; Gessler, Maes & Skelton, 2011; Marshall, Kerr, Montaner, & Wood, 2010), producing a vulnerability to police surveillance and arrest. The reproduction of adversarial relationships between Indigenous peoples and the police leads to police becoming part of the problem of Indigenous overrepresentation in the criminal justice system.

Comack and Balfour (2004) demonstrated how racist ideological representations of Indigenous offenders, victims, criminal acts, and the spaces in which they occur make their way into legal case-building strategies. These representations resonate with judges, juries, and the wider society to affect sentencing decisions. Bail releases for Indigenous defendants are seen to provide opportunities to build up social attributes valuable to mainstream society, such as drug treatment or other morally sanctioned conduct. Social events attended by Indigenous people and involving alcohol become reduced to “drinking parties,” framing Indigenous substance use as reckless and chaotic. Legal discourses that construct Indigenous people as poor witnesses in court persist, without recognition of transportation challenges, language, and cultural differences operating in court proceedings, or the social stresses involved in testifying against someone from one’s own family or community. These representations become understood by legal actors as problems “with” Indigenous people—and not as problems stemming from systemic discrimination or colonial oppression (Comack & Balfour, 2004; Hamilton & Sinclair, 1991).

Canadian law has been ineffective at redressing the systemic discrimination of Indigenous peoples in the criminal justice system, even when equipped with tools for this purpose. In 1996, Bill C-41 (1995) was passed, adding section 718.2(e) to the Criminal Code to provide judicial discretion in the sentencing of Indigenous offenders. In 1999, the case of Jamie Gladue was brought before the Supreme Court, providing an opportunity for an analysis of section 718.2(e) (*R v Gladue*, 1999). The Court held that judges are to consider the unique background factors that helped position the offender before the court, and consider the Indigenous heritage of the offender in sentencing. Gladue reports, designed to facilitate judges’ legal analysis for Indigenous offenders, have not redressed Indigenous over-incarceration, and the resources required to produce Gladue reports can be prohibitive (April & Orsi, 2013; Milward & Parkes, 2014; Roach, 2009). Further, conditional sentences have not been successful in reducing Indigenous overrepresentation in the Canadian penal system. Conversely, these sentencing alternatives appear to have resulted in net widening, whereby more offenders have received intrusive sanctions than before (Roach, 2000). The length of conditional sentences can exceed the term of imprisonment for offences, and breach of conditions often results in incarceration (Roach, 2000; Taillon, 2006). The legacy of racialized discourses, policies, and practices is evident in the inimical burden of legal sanctions placed on

Indigenous people in Canada, and attempts to redress systemic discrimination must clearly extend beyond the criminal justice system.

Resisting the Conservative Drug Policy Agenda and Promising Ways Forward

Canadian drug policy is a highly contested terrain of political and moral agendas. Some of the pressures that shape the Canadian drug policy are derived from the international drug control system, including the bodies that interpret and enact international treaties (Elliott, 2012)—a system that has unintentionally resulted in the marginalization and moral stigmatization of users of illicit substances, record incarceration rates, and the subordination of public health to law enforcement approaches to problematic drug use in many jurisdictions (United Nations Office on Drugs and Crime, 2008). The current Canadian government drug policy discourse holds individuals responsible for the drug-related harms they experience while “too little attention is paid to the suffering and loss caused by criminalizing those who use drugs” (Oscapella, 2012, p. 23). Why many Canadians support this neoliberal drug policy agenda over human rights and evidence-informed policies is uncertain, but it is possible that because Indigenous peoples experience such a high burden of drug-related harms drug use problems have come to be understood to be the problems of the “Indigenous Other,” resulting in less identification and empathetic social response from the non-Indigenous majority. This othering process may be explained in terms of what Henry et al. (2009) refer to as “democratic racism,” whereby many Canadians hold racist beliefs, recognized as socially unacceptable, and champion democratic values of egalitarianism—and “colour blind” drug policies—while undermining those values through practices of racism that reinforce Indigenous inequities.

The critical response to Canadian drug policy is extensive, suggesting the potential for resistance (Bennett & Bernstein, 2013; Canadian Bar Association, 2011; Carter & McPherson, 2013; Cavalierri & Riley, 2012; Oscapella, 2012). Bennett and Bernstein (2013) point to opportunities to disrupt the sanctions brought by the Safe Streets and Communities Act (Bill C-10, 2012) through challenges under section 7 of the Charter, which, whether successful or not, may disrupt the prevailing discourse that exonerates the state from its role in producing drug-related harms. The case of *Canada (Attorney General) v. PHS Community Services Society* (2011) marks a historic act of Canadian drug policy resistance employing a section 7 Charter challenge. This resulted in a landmark decision in which the Minister of Health’s denied exemption of section 56 of the Controlled Drugs and Substances Act, required for the operation of Vancouver’s InSite, was deemed unconstitutional. However, engagement with the law also carries the potential for what Smart (1989) refers to as “juridogenesis,” whereby relying upon the law to redress social inequities can compound problems by increasing the level of legal interference into the already highly regulated lives of people who use drugs. Charter challenges may produce legal rulings that are misinterpreted and misappropriated into legislation that represents the same neoliberal agenda as, for example, Bill C-2 (2013). With ample evidence that the law is not neutral, impartial, and objective, the outcomes of engaging the law are unpredictable.

Indigenous stakeholders and organizations in Canada must be key partners in shaping Canada’s drug policy. The Native Addictions and Mental Health Regional Research Consultation/Forum (2011) called for the development of a culturally relevant evidence base that values Indigenous worldviews and ways of being in order to understand and plan policy and programmatic responses to substance use and addictions. They stated that the substance use knowledgebase to date is largely grounded in Eurocentric and scientific worldviews, which lack and understanding and acceptance of cultural beliefs and the spiritual influence in everyday life, and tend to oversee the historic and structural production of the

conditions for problematic substance use. The National Native Addictions Partnership Foundation (n.d.) cites harm reduction as a guiding principle that is at times the most important and realistic course of action to be taken. Some First Nations in Canada under self-government have developed their own local policies to deal with substances, law enforcement, and health care, including legislation banning alcohol, and the provision buprenorphine outside of the Non-Insured Health Benefits program (National Advisory Committee on Prescription Drug Misuse, 2013). However, Reading, Kmetz, and Gideon (2007) stated “. . . policies linked to the political economy of nation-states create strong forces which undermine First Nations peoples’ legitimate aspiration for self-determination and impose change necessary to ensure survival” (p. 6). This arose, and continues, through settler colonial interests in appropriating land and resources from Indigenous peoples in the interests of economic development (Reading et al., 2007). In this way, there is a historically constituted tension between the market fundamentalism of the Canadian neoliberal state and Indigenous self-determination.

Worldwide, punitive law enforcement drug policies have resulted in increased violence, larger prison populations, erosion of governance around the world, and exacerbated drug harms. A number of recommendations from the Global Commission on Drug Policy (2014) can inform ways forward for Canadian drug policy reform:

1. Put health and community safety first by reorienting policy and resources away from law enforcement and toward social intervention such as meaningful employment, appropriate education, adequate housing, harm reduction, and access to culturally appropriate substance treatment and mental health services.
2. Cease criminalization for illegal drug possession and mandatory drug treatment for possession of drugs, which are not evidenced to reduce drug use levels but promote unsafe drug use practices and divert law enforcement away from serious criminality at great public expense.
3. Use alternatives to incarceration for non-violent low-level participants in illegal drug markets—including those involved in production, transportation, and street sales. Focus on longer-term socioeconomic development to reduce economic inequality.
4. Focus enforcement efforts on reducing the power of criminal organizations and the resultant violence and insecurity. Governments should be held accountable for human rights abuses committed in the pursuit of drug law enforcement.
5. Encourage and experiment with legal regulation of currently illegal drugs. Lessons learned from the regulation of alcohol, tobacco and pharmaceutical drugs can help inform restricted access to substances currently only available in illegal markets.

Education, harsh punishments, and drug treatment are a grossly inadequate response to illegal substance use. In addition to incarceration reproducing criminal activity and gang involvement, criminal records disable people in the employment arena (Oscapella, 2012), single parents are created, and generations of families are disassociated (Bennett & Bernstein, 2013; Comack et al., 2013). While the national Anti-Drug Strategy intensifies the government’s legal response to illicit drug use, harm reduction programs that provide supportive services to many Indigenous peoples are being actively opposed and constructed

as threats to community harmony and in need of regulation by citizens (for example, Bill C-2). Law, policy, and mainstream media are forms of cultural production that structure lived experience and interpretations of drug use. Accordingly, these “get tough” discourses, while reinforcing neoliberal governance, have distinct material effects upon the health and wellbeing of Indigenous peoples. Indigenous peoples in Canada have been socially positioned for involvement with illicit substances and markets through racist social, historical, and legal practices, creating the conditions for problematic drug use, high surveillance, and criminal justice system encounters related to illicit drug offences. The current drug policy produces an image of the drug user as an uninformed, deviant citizen, which is positioned to resonate with mainstream cultural logics that overlook the broad historical, social, and structural processes that shape problematic substance use and drug markets.

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