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Violating the Fundamental Rights to Life, Liberty and Security of the Person: Bill C-2 and its Implications on Supervised Consumption Sites in Canada

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Abstract

In 2015, the Conservative federal government passed Bill C-2, the *Respect for Communities Act*— amending the requirements of applications for exemption from the *Canadian Controlled Drugs and Substances Act*. These exemptions allowed for supervised consumption sites to legally operate within Canada. The guiding principle behind such services is to promote and protect health through a variety of means, such as: reducing incidence rates of Human Immunodeficiency Virus (HIV), Hepatitis C, and other sexually-transmitted and blood-borne infections; and reducing mortality rates from substance overdose. The reform sought to regulate the exemption application, however, it created an onerous process which made it substantially more difficult to obtain exemptions. The bill was a direct outcome of the ruling of *Canada (Attorney General) v. PHS Community Services Society* due to the failure by the then Minister of Health, Tony Clement, to grant an extension to Insite, Canada’s first legally-exempted supervised consumption site. Within two years, another bill was introduced in an attempt to remove unnecessary barriers created by Bill C-2. As a result of the swift amendments to Bill C-2, there was no formal evaluation conducted to assess the impacts of this reform. Many opponents of Bill C-2 argued that this legislation made it more difficult to develop new or maintain existing supervised consumption sites and as a result violated the rights of the users of these services.

En 2015, le gouvernement fédéral a adopté le projet de loi C-2, aussi connu sous le nom de la Loi sur le respect des collectivités. Cette loi modifiait les critères pour la demande d'exemption de la Loi réglementant certaines drogues et autres substances. Cette exemption rendait possible l'opération légale des sites de consommation supervisée, qui visent à réduire les taux de mortalité dus aux surdoses. La réforme avait pour but de réglementer les demandes d'exemption. Or, cette réforme a créé un processus d'application ardu qui a rendu l'accès à ces exemptions considérablement plus difficile. Le projet de loi C-2 est survenu en réaction au verdict qui a été rendu lors du procès Canada (AG) c. PHS. Le refus par le Ministre de la santé, Tony Clement d'accorder une extension à Insite (le premier site de consommation supervisée au Canada) a conduit la Cour suprême à rendre un verdict qui imposait au gouvernement la codification d'un processus d'exemption formel. Deux ans après C-2, un autre projet de loi a été adopté afin de remédier aux barrières inutiles imposées par le projet de loi C-2. En conséquence des modifications rapides au projet de loi C-2, les répercussions de cette réforme n'ont jamais été formellement évaluées. Plusieurs adversaires du projet de loi C-2 soutenaient que cette législation violait les droits des usagers des sites de consommation supervisée car elle rendait la création de nouveaux sites et l'entretien d'anciens sites plus difficiles.

Key Messages

- Bill C-2 (the *Respect for Communities Act*) added an additional 26 levels of preconditions that required various documents for section 56.1 exemption applications to be considered. The 26th precondition was not a specific requirement, but rather an open-ended provision that allowed for the federal minister of health to add additional preconditions.
- During the time that the *Respect for Communities Act* was in effect, there were no exemptions granted to allow the legal operation of safe consumption sites in Canada.
- Within two years of receiving royal assent, Bill C-2's 26 preconditions were amended to five general elements through the introduction of Bill C-37.
- As of 21 October 2019, there are 42 supervised consumption sites across Canada that have an active exemption status by the federal minister of health under section 56.1. There are others that have received exemption status, but their operations are on hold, pending a final Health Canada site visit.

Messages-clés

- *Le projet de loi C-2 (Loi sur le respect des collectivités) a ajouté 26 niveaux de documentation obligatoire pour que la considération de demandes d'exemption soit possible. La 26e condition préalable n'était pas une exigence précise, mais plutôt une disposition non restrictive qui permettait au ministre d'ajouter des conditions préalables supplémentaires.*
- *Durant la période où le projet de Loi sur le respect des collectivités était en vigueur, il n'y a pas eu d'exemptions accordées afin de permettre l'opération légale de sites de consommation supervisée au Canada.*
- *Dans les deux ans suivant la sanction royale du projet de loi C-2, l'introduction du projet de loi C-37 a permis de réduire les vingt-six critères à cinq éléments.*
- *À la date du 21 octobre 2019, quarante-deux sites de consommation supervisée au Canada possèdent une exemption active du Ministre fédéral de la santé en vertu de l'article 56.1. D'autres ont également bénéficié d'une exemption, mais sont en*

attentes d'une visite finale de Santé Canada pour débiter leurs activités.

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1 BRIEF DESCRIPTION OF THE HEALTH POLICY REFORM

Bill C-2, also known as the *Respect for Communities Act*, was introduced by the Harper Conservative government and received royal assent (i.e., came into force) in June 2015. Prior to the introduction of Bill C-2, section 56 of the *Controlled Drugs and Substances Act* (CDSA) outlined the process for obtaining an exemption from prosecution for drug offences under the CDSA where the federal health minister was satisfied that this was warranted for “medical or scientific purposes” or, more generally, is “in the public interest.” The CDSA, passed in 1996, is Canada’s federal drug control statute. Exemption obtained through section 56 allowed for supervised consumption sites (SCS), their employees, and their clients to operate free from legal prosecution for charges of unauthorized possession of a controlled substance under the CDSA. Bill C-2 amended the pre-existing section 56 to no longer be applicable in the case of exemptions for SCS. It resulted in the creation of a new section 56.1 as the exclusive means for receiving an exemption for a “supervised consumption site”—simultaneously making it a restrictive regime. Section 56.1 outlined the addition of 26 requirements. If an application for exemption did not pass any of the 26 levels of the regulation process, it would prevent the minister from considering the application, thus allowing for the potential of the aforementioned prosecution.

A handful of the 26 required documents included: scientific evidence demonstrating the medical benefit of SCS; reports of consultations held with local community groups, and a report of the outlined steps to address their potential concerns; a letter from the respective provincial minister of health, the local municipal government, the lead health professional representing the provincial government, and the provincial minister of public safety with their opinion on the proposed site; and law enforcement research and statistics (Government of Canada 2015). They effectively created a bottleneck effect through the multitude of barriers that an application for exemption status must pass through. This demonstrates some of the negative impact that Bill C-2 had on the ability of the federal minister to use their discretionary power to grant exemptions for SCS (Canadian Bar Association 2014). Although working with communities can be beneficial for improving community attitude toward potential sites, this bill placed too much weight on opinions rather than scientific evidence (Kazatchkine, Elliott, MacPherson 2016). Compounding this concern is the stigmatization of substance users—which may lead to further negative biases and preconceptions.

2 HISTORY AND CONTEXT

Section 7 of the *Canadian Charter of Rights and Freedoms* has had an undeniable influence on facilitating the improvement and expansion of SCS across Canada. Section 7 guarantees that all Canadians have the right to life, liberty, and security of the person; individuals have the right not to be deprived of those rights except in accordance with the principles

of fundamental justice (Department of Justice n.d.).

Canada (Attorney General) v. PHS Community Services Society was a critical case for setting the importance of the development of SCS in Canada (*Canada (AG) v. Bedford, 2013 SCC 72, [2013] 3 SCR 1101*, n.d.). Insite, an SCS operated by PHS Community Services Society¹, applied for a renewal of their exemption, under section 56, from the other provisions within the CDSA, which would allow the site to continue its operations without the risk of prosecution for the drug offences set out in the CDSA. In 2008, the federal Conservative government refused to grant an exemption, after which two separate court actions were taken to the Supreme Court—one of which was initiated by the Vancouver Area Network of Drug Users and the other by PHS Community Services Society and two Insite users, Dean Wilson and Shelly Tomac. These two court actions were ultimately heard together. On the side of PHS Community Services Society were 18 other organizations and experts. It was argued that by failing to grant Insite its exemption, the minister of health violated the SCS users' constitutional rights. The key statement determined by the trial judge was that the “denial of access to the health services provided at Insite violates its clients' rights to life, liberty and security of the person” (Supreme Court of Canada 2011). In 2011, the Supreme Court of Canada ruled in favour of PHS Community Services Society and stated that:

where, as here, the evidence indicates that a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the minister should generally grant an exemption. [Paragraph 152]

3 GOALS OF THE REFORM

3.1 Stated

The stated goals of Bill C-2 were to: 1) create a separate exemption regime for activities at an SCS involving the use of a controlled substance or precursor that is obtained in a manner not authorized under this Act, 2) specify the purposes for which an exemption may be granted for those activities, and 3) set out the information that must be submitted to the minister of health before the minister may consider an application for an exemption in relation to an SCS (Government of Canada 2015).

3.2 Implicit

The implicit goals of Bill C-2 were to implement a rigorous process by adding onerous requirements that made it more difficult for new SCS to receive exemption status or for

¹PHS: Portland Hotel Society

existing sites to continue operations (Canadian Bar Association 2014). This was demonstrated through the 26 imposed requirements and the exemption regime which stated that an exemption may only be granted for a “medical purpose.” As previously mentioned, Bill C-2 created the potential for bottleneck effects by requiring extensive documents of opinion and support from various community stakeholders.

Bill C-2 aimed to perpetuate the “war-on-drugs” narrative through the language used throughout the legislation. It placed emphasis on prohibiting illicit substances, and in doing so, contradicted evidentiary support of the negative consequences of substance prohibition. Evidence indicates that criminalizing illicit substances does not reduce or contain their demand and use, but rather facilitates dangerous unregulated markets to take over these substances (Canadian Bar Association 2014).

Many of the principles in the bill, such as the statement that “organized crime profits from the use of illicit substances” and “criminal activity often results from the use of illicit substances,” as principles the minister was statutorily required to consider in making a decision about an exemption application, were irrelevant to the operation of harm reduction services and served as statutory language for a hostile government to use in court to defend decisions against exemptions (Canadian Bar Association 2014).

4 FACTORS THAT INFLUENCED HOW AND WHY

4.1 The issue came onto the government’s agenda

The issue of SCS was largely already on the agenda of the Harper Conservative government, as demonstrated by their opposition toward Insite. This was moved further up the agenda with the attention brought forth by *Canada (AG) v. PHS Community Services Society*. Soon after the Harper Conservative government came into power in 2006, Minister of Health, Tony Clement, failed to grant an extension to Insite’s exemption status which led directly to the PHS taking the federal government to the Supreme Court. The Supreme Court justices ruled 9-0 in favour of the continued operations of Insite and required the federal government to grant Insite the exemption status. Additionally, it also required that future decisions from the health minister regarding exemptions for SCS must consider the evidence surrounding factors, which included:

the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition.[Paragraph 153]

The ruling against the federal government represented the *problem* component of Kingdon’s Agenda-Setting Theory as it was this decision that prompted policymakers to prioritize this “problem.” The *policy* proposal appealed to Canadians with conservative views regarding

recreational substance use as it would give various groups of individuals (e.g., neighbourhoods, law enforcement, and politicians at provincial and municipal levels) more influence in whether an SCS would be able to receive an exemption, divorced from considerations about health need and impact. Those who opposed SCS often feared that the implementation of an SCS would result in decreased property value. The *politics* aspect of the theory was represented by the anti-drug, and more broadly anti-harm reduction, stance of the Harper Conservative government.

4.2 The final decision was made or not made

As described by Peter Hall's 3-I framework, policy development and decisions are guided by three key factors: institutions, interests, and ideas (Hall 1997). The main institution affecting the development of the policy was the Supreme Court case via its ruling in *Canada (AG) v. PHS Community Services Society*. By requiring the Canadian government to uphold the Charter, the Supreme Court safeguarded the rights of SCS clients and further reinforced the demonstrated importance of SCS in Canada.

The dominating interest that drove the development of this policy was that of the federal Conservative government, which publicly opposed SCS and Insite in particular (Pivot Legal Society 2014). Along with this major interest was that of the Canadian Police Association, one of the few organizations to publicly support Bill C-2, or its earlier version Bill C-65, with its president Tom Stamatakis stating that SCS "lead to an increase in criminal behaviour and disorder in the surrounding community and have a significant impact on police resources" (Library of Parliament 2015), despite the findings of scientific evidence stating otherwise (Health Canada 2018). Other organizations that were in support of Bill C-2 included: REAL Women of Canada, Safer Ottawa, and Canadian Association of Chiefs of Police (OpenParliament n.d.).

The main idea that guided the development of Bill C-2 was the Harper Conservative government's strong stance against harm reduction and substance use, which promoted the "war-on-drugs" ideology and continued the marginalization of the poorest populations (*CBC News* 2012; Cook and Roesch 2012; Khenti 2014). Former Prime Minister Stephen Harper claimed that his Conservative government's unmoving stance against drugs would "beat back the epidemic of guns, gangs and drugs that is plaguing our streets" (Harper 2006, Mandatory Minimum Sentences section, para. 2). The Harper Conservative government stood headstrong against SCS, despite the peer-reviewed literature and statistics presented by Insite that stated otherwise (Health Canada 2018).

The three elements of *institutions*, *interests*, and *ideas* facilitated the opening of an opportunity window and allowed for Bill C-2 to be tabled and placed on the decision-setting agenda. An additional element that facilitated the tabling of this bill was that a majority government was held by the Conservatives at the time. Through this, they were able to maintain a dominant role in the policy-making process.

5 HOW THE REFORM FAILED

5.1 The failure of Bill C-2 and the tabling of Bill C-37

Despite multiple advocacy groups advising against the very spirit of Bill C-2, the bill was passed, which put a halt to the scaling-up of SCS during the time of the Harper government. There were no exemptions granted in the timeframe of the existence of Bill C-2.

In October 2015, the transition of the federal government from the Harper Conservatives to the Trudeau Liberals caused a shift in the political climate and response of the government to SCS. Soon after coming into power, the Liberal government granted an exemption to the Dr. Peter Centre, which had not received exemption status for the 14 prior years of its operations (Kerr *et al.* 2017).

Through the coordinated efforts of lobbyists such as: Canadian HIV/AIDS Legal Network, Pivot Legal Society, and Canadian Association of People who Use Drugs, there was enough support to influence the government to make amendments to Bill C-2, and as a result, Bill C-37, *An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts*, was announced. This bill was a part of the Trudeau Liberal government's new national drug strategy. During a press release about Bill C-37, then Federal Health Minister Jane Philpott stated that "supervised consumption sites save lives and do not have a negative impact on crime rates" (*CBC News* 2016).

Bill C-37 went through its first reading on 12 December 2016 and later received royal assent on 18 May 2017 (Parliament of Canada 2017).

Bill C-37 changed the 26 requirements imposed by Bill C-2 to become five elements and required the minister of health to consider any evidence relating to the five elements. Additionally, it stated that an applicant for exemption was no longer required to provide these as a prerequisite and that the absence of any of evidence would not preclude the minister from making a decision on whether to grant exemption status. These five elements include: the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition (Health Canada 2017). These five elements align with the Supreme Court decision of *Canada (AG) v. PHS Community Services Society*.

6 EVALUATION

Bill C-2 was implemented by diffusing decision-making power among various stakeholders. It decreased the decision-making power of the federal health minister by only permitting the minister to consider granting exemptions under "exceptional circumstances," after having received the material required by the 26 preconditions and having mandatorily considered certain principles. It also required strenuous expert and community stakeholder consultation. Pivot Legal Society called these "needless restrictions" unconstitutional (Pivot Legal

Society 2014).

The Bill would give the minister the option to notify the public that an application for an exemption for an SCS had been submitted and then invite public comments for 90 days. Scientific evidence has demonstrated that SCS do not increase drug use and crime in the surrounding area (Health Canada 2018; Kazatchkine, Elliott, MacPherson 2016). This policy allowed for unnecessary subjective biases to enter a decision-making process and put the lives of Canadians, both those who do and do not inject drugs, at risk.

Bill C-2 created a series of barriers under the guise of a regulation process through consultation to make SCS implementation more difficult. The bill was highly criticized by many stakeholders such as members of parliament and advocacy groups—including the Canadian Nurses Association (Canadian Nurses Association 2015) and the Canadian Medical Association (Canadian Medical Association 2014).

The state has a responsibility to its citizens to ensure transparency in its decision-making processes. Included in this transparency should be internal and external evaluations of the actions and decisions it makes. Unfortunately, there was never an evaluation done on Bill C-2 and its effects on the concerns brought up, including: crime rate, overdose death, public safety, and illicit substance use.

Additionally, there has not been a formal *ad hoc* evaluation conducted by another institution. This may be due to Bill C-37 having repealed the *Respect for Communities Act* within two years of it becoming law.

7 STRENGTHS, WEAKNESSES, OPPORTUNITIES AND THREATS

Table 1: SWOT Analysis of Bill C-2

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> • Was created to regulate a process that allowed for informed decision-making from the federal minister of health. 	<ul style="list-style-type: none"> • Failed to recognize that SCS create a safe environment for harm reduction workers to provide care and made these safe spaces harder to access. As a result, this required workers to provide care on the streets, back alleys, and/or housing facilities (Kazatchkine, Elliott, MacPherson 2016). • Costly and ineffective in reducing illicit substance use and supply (Ti and Kerr 2014).

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> • Had the potential to incorporate community perspectives. 	<ul style="list-style-type: none"> • Facilitated a process that was easily coloured by misinformation and stigma against injection-drug users. • Made it more difficult to develop new SCS or maintain existing SCS, therefore contributing to unsafe injection practices and acting as a driver for the HIV/AIDS epidemic and other blood-borne infections. • Unfairly placed burdens on a population that was already disproportionately represented by persons of colour.
OPPORTUNITIES	THREATS
	<ul style="list-style-type: none"> • Violated section 7 of the <i>Charter of Rights and Freedoms</i>, as defined by <i>Canada (AG) v. PHS Community Services Society</i>. • Increase in overdose risks and overdose deaths. • Increase in blood-borne infections by potential needle sharing. • Increase in barriers to entering the care continuum for clients who would otherwise be referred to health and social services at the point of care. • Increase in public disorder by public consumption of illicit substances and public discarding of consumption equipment (Health Canada 2018).

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