

Overdose prevention sites may be unsanctioned,  
but do not presume they are illegal or illegitimate

## GOOD SAMARITANS vs. BUREAUCRATS: WHICH SIDE ARE YOU ON?

Why “pop-up” overdose prevention sites are a legally justifiable and morally necessary response to the opioid overdose crisis and government inaction

Canada is in the middle of an ongoing crisis of opioid overdoses and related fatalities. In 2016, British Columbia recorded 978 overdose deaths; in the first half of 2017 alone, B.C. recorded 876 more lives lost.<sup>1</sup> In 2016, Ontario recorded 865 opioid-related deaths, up 19% over 2015—or 1 death every 10 hours.<sup>2</sup> By comparison, a death on Ontario’s roadways occurred every 17 hours. In 2016, more than 2800 people in Canada died from an opioid overdose.<sup>3</sup> Authorities and health workers fully expect deaths to increase again in 2017, as toxic fentanyl increasingly overwhelms the illegal drug market, and as there continues to be a chronic inadequacy of life-saving harm reduction programs and drug dependence treatment services.

Action by federal, provincial and municipal governments continues to fall far short of what is needed in the face of a worsening public health crisis. Despite urgent need for an expansion of interventions to reduce the risks of overdoses and fatalities, there continue to be deadly delays in granting federal ministerial exemptions for supervised consumption services under the *Controlled Drugs and Substances Act*, as well as unconscionable barriers to scaling up access to naloxone, an emergency medication that rapidly reverses opioid overdoses.

As our friends, family members and loved ones continue to die preventable deaths, concerned residents in various cities have organized a response where governments have so far failed to rise to the challenge; this has included the establishment of “pop-up” overdose prevention sites aimed at stopping the rising death toll. For example, in Ottawa, the community-led overdose prevention site at Raphael Brunet Park has had over 1,150 visits since it opened its doors on August 25<sup>th</sup>, with zero fatalities. Operators of the site are trained in overdose response and have created a low-barrier space that is well-used by people who may require assistance in the event of an overdose.

In some municipalities, political leaders have recognized the need for such interventions. Last year in B.C., in response to community volunteers setting up such sites, the Minister of Health declared a provincial public health emergency and later issued a ministerial order to provincial health authorities to establish overdose prevention services across the province.<sup>4</sup> Unfortunately, other jurisdictions have not welcomed these civic initiatives. In Ottawa, the nation’s capital, some city “leaders” have condemned the nurses, doctors, and community health workers (including peer volunteers with their own experience of drug use) who have stepped in to save lives. Moreover, they have misrepresented the life-saving work being done at these sites and have accused volunteers of irresponsible and illegal behaviour. Too often, the media has reported these simplistic criticisms without scrutiny or challenge. This panders to the stigma against people who use drugs that underlies not only the sluggish response to this health crisis, but the crisis itself.

It’s time to challenge the deadly discrimination and the shameful conduct of politicians who insist that bureaucratic “business as usual” is more important than saving lives in an emergency.

*Is it a crime to save a life?  
Overdose prevention sites can and must be defended.  
Shutting them down is not only misguided, it's unconstitutional.*

It is legally and ethically misguided to suggest that overdose prevention sites are illegal. Here's why:

- ***Overdose prevention sites do not change the laws around simple possession of drugs***

There's no dispute that, under the *Controlled Drugs and Substances Act* (CDSA, s. 4), possessing certain drugs without legal authorization (such as a prescription) is a criminal offence. People who are using such drugs—including heroin, methadone, fentanyl and other controlled opioids—face possible criminal charges of *possession*. This is the case whether or not they are present at an overdose prevention site. Setting up an overdose prevention site doesn't change this legal reality of criminalization faced by people who use drugs. But it does reduce the risk of someone dying from an overdose when using. This is good for individual and public health, and it's an ethically sound response to a foreseeable harm that can be prevented.

- ***Shutting down overdose prevention sites violates the constitutional rights of people who use drugs***

Because of this underlying criminalization of drug possession (even just for personal consumption), the CDSA also gives the federal Minister of Health the power to grant an exemption from criminal prosecution for possession for people on the premises of a supervised consumption site. According to the Supreme Court of Canada, the reasonable use of this power is essential for protecting the constitutional rights of people struggling with drug dependence. A decade ago, in the fight over Vancouver's supervised injection site (Insite), the Minister of Health at the time refused to renew the existing exemption from criminal prosecution for clients and staff at Insite. This left people exposed to the risk of criminal prosecution when accessing this health service. The Supreme Court concluded that the Minister's refusal violated the rights to life, liberty and security of the person guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*, and that this unjustifiable infringement of constitutional rights was arbitrary and the harm done was grossly disproportionate to any purported benefit of criminalizing people accessing a health service:

*[T]he potential denial of health services and the correlative increase in the risk of death and disease to injection drug users outweigh any benefit that might be derived from maintaining an absolute prohibition on possession of illegal drugs on Insite's premises.<sup>5</sup>*

At its most basic, the Supreme Court decision in *Insite* says that it is unconstitutional to extend criminal prosecutions for drug possession so far as to deny life-saving health services to a population that will, as a result, face an increased risk of death and disease.

A decision to force the shut-down of such a site would engage the same interests of the hundreds of people who have relied on Overdose Prevention Ottawa for life-saving health services. This is particularly true given the lack of adequate alternative spaces in the context of an overdose crisis. Currently there exists only one supervised consumption site in Ottawa with an exemption from the federal Health Minister; it has minimal capacity for two individuals at a time and long service delays. That site is inadequate to meet the needs of people at risk of dying: Overdose Prevention Ottawa remains an essential health service. The fatal consequences that could result from the site's closure are more pressing than any benefit that the City of Ottawa might derive from charging people criminally for drug possession when accessing the overdose

prevention site, or from prosecuting people or physically dismantling the site under the authority of municipal by-laws for using park space without a city permit.

When it comes to saving lives versus enforcing the criminal prohibition on drug possession, it's clear what is ethically more important—our Supreme Court has recognized this as well.

- ***The Good Samaritan Drug Overdose Act provides some legal protection to operators and users of overdose prevention sites***

The same basic principle underlies the *Good Samaritan Drug Overdose Act* recently enacted by Parliament. This new law aims to encourage people to call 911 in the event of an overdose without fear of arrest for offences such as drug possession—again, because protecting health and saving lives is more important than prosecuting people. Under the law, if an overdose occurred at the scene of an overdose prevention site and emergency services were called for assistance, no charges can be laid for simple *possession* of drugs (or for breaches of bail, parole or probation conditions prohibiting drug possession) against the person who called 911, the person who overdosed or “any person...who is at the scene upon the arrival of the emergency medical or law enforcement assistance.” This must include other people present and using the overdose prevention site, as well as the volunteer health workers who are operating the site.

- ***Volunteers at overdose prevention sites are not guilty of “constructive” possession of drugs***

Contrary to the allegations of some politicians, volunteers at overdose prevention sites are likely not guilty of “constructive” possession. Constructive possession refers to a situation in which an individual knows that a drug is present in some place over which they have sufficient control (such as a home, a business or other premises). Volunteers at an overdose prevention site are obviously aware of the presence of illegal drugs—indeed, they are there to prevent or minimize harm that might arise during or from drug consumption. However, volunteers at an overdose prevention site do not exercise control over a city's park property—as local politicians have pointed out when criticizing these volunteers for their initiative. Site volunteers do not control who enters or exits the park, nor do they have control over whatever drugs (or other items) people present in the park might possess. Volunteers at the overdose prevention site are present in the park (or other venue), with equipment at hand (e.g., naloxone) to intervene in the event someone overdoses, in order to prevent fatality. This is no different than any other Good Samaritan who happens to be present in a public space and intervenes if someone overdoses. There is nothing criminal in being ready and prepared to help someone else in an emergency. In fact, it's the ethical thing to do.

- ***Overdose prevention sites may not violate municipal by-laws, but if they do, they are justified***

It has also been suggested that overdose prevention sites may infringe on municipal by-laws. For example, the City of Ottawa “Parks and Facilities By-Law” prevents anyone, without a permit, from camping or constructing a tent or any other structure in a city park. While site volunteers do set up tents (e.g., to provide a modest degree of shelter from the elements), they only do so *temporarily* and during the park's opening hours, making sure to take down their tents every night and to clean the premises. As such, they are not camping, littering, making noise or damaging any property.

Moreover, just as other emergency services are exempted from needing a permit to operate in parks, so too should the overdose prevention site volunteers be exempted: they are “bona fide emergency service providers”, responding to an emergency in the locations where they will reach those at risk of harm. It is

unreasonable to assume that overdose prevention site operators can or should obtain a permit to save lives in an emergency setting.

If the overdose prevention site is in violation of this municipal by-law, that breach is constitutionally and ethically justified because of the life-saving services they provide.

With the growing death toll from the opioid overdose crisis, it is shameful that some politicians are not only opposed to clearly needed health services such as supervised injection sites, but even go on to condemn the community members who are demonstrating the leadership and compassion for their fellow residents that is so lacking in these city “leaders.”

*Instead of attacking volunteer health workers and shutting down overdose prevention sites, cities and law enforcement should support and encourage their life-saving efforts.*

- **Municipal governments and leaders should work with local community health workers to address the need for accessible, low-threshold harm reduction services, including overdose prevention sites and supervised injection sites, to prevent more overdose-related deaths.** This should include allocating funding in municipal health budgets for such health services.
- **The Ontario government should respond to the call from hundreds of health workers and declare a public health emergency.** This declaration should lead to orders, as in British Columbia, for health authorities to rapidly scale up health services such as supervised injection sites and overdose prevention sites, faster and more effective distribution and availability of naloxone, and the implementation of drug-checking services to help mitigate the risks of the toxic drug supply. As part of this emergency response, the government must commit the resources needed to support these services and programs, including ensuring that funding flows directly to the harm reduction and community outreach workers who are on the front lines of the crisis response, setting up pop-up overdose prevention sites.
- **The federal government should decriminalize the possession for personal consumption of all currently illegal drugs, thereby reducing a major structural barrier to getting health services to people who use drugs where and how they are needed.** Redirect the public resources saved from wasteful, ineffective prosecutions and prison terms to evidence-based health and social support services that are shown to help prevent harm, save lives and promote health. Learn from the experience of other countries, such as Portugal, that have done this for more than 15 years and achieved positive health outcomes (e.g., fewer overdose deaths, lower prevalence of infectious diseases such as HIV) as a result.

*Note: The information in this note is not legal advice. If you need legal advice about your particular situation, contact a criminal lawyer.*

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<sup>1</sup> BC Coroners Service. “Illicit Drug Overdose Deaths in BC, January 1, 2007 – July 31, 2017” (Burnaby, September 7, 2017).

<sup>2</sup> Public Health Ontario. “Opioid-related morbidity and mortality in Ontario.” (Last updated September 19, 2017).

<sup>3</sup> Health Canada. “Apparent opioid-related deaths in Canada in 2016.” (August 2017).

<sup>4</sup> British Columbia Minister of Health, Ministerial Order No. M488 (December 9, 2016).

<sup>5</sup> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.