

**REPORT ON BILL C-5, *An Act to
Amend the Criminal Code and the
Controlled Drugs and Substances Act***

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November 22, 2022

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I. INTRODUCTION

Bill C-5, *An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act*¹ received Royal Assent on November 17, 2022. This ambitious, yet understated piece of legislation is an attempt by the Minister of Justice to address the overrepresentation of Black and Indigenous Canadians as well as other marginalized communities within all aspects of the criminal justice system, but in particular, in convictions and incarceration.

Hidden within the provisions of Bill C-5 is cannabis amnesty.

On May 5, 2018, Cannabis Amnesty launched a petition calling upon Parliament to immediately enact legislation granting amnesty to all individuals for the offence of simple possession of cannabis. We argued that for amnesty to be effective, it must be free, automatic, and permanent—we fought for expungement. After years of advocacy and measures by the federal government that simply did not go far enough, we finally have through Bill C-5, amnesty for simple cannabis convictions that is free, automatic and permanent. The bill requires that all records of a conviction for simple possession of cannabis must automatically be kept separate and apart from other records of convictions by November 17, 2024, at no cost to the individual. While Bill C-5 does not style the treatment of these records as “expungements”, the record sequestration regime created by the bill will have a comparable effect of permanency. Unlike record suspensions granted under the *Criminal Records Act*, there is no legislative authority to revoke the automatic record sequestrations granted under Bill C-5.

The achievement of true cannabis amnesty through legislation is incredibly significant. It represents the culmination of the work of our organization. Yet, it does not address all of the collateral consequences of criminal records for cannabis possession and other convictions. To that end, we encourage continued reforms to Canada’s criminal records regime.

¹ 1st Sess, 44th Parl, 2022 (assented to 17 November 2022), SC 2022, c. 15.

II. OVERVIEW OF CANNABIS AMNESTY

A. OUR MISSION

Cannabis Amnesty strives to achieve justice and equity for the most vulnerable communities by educating, inspiring and mobilizing on issues related to the impact of historic cannabis convictions. It was founded in April 2018 in response to the absence of federal legislation addressing the serious consequences of criminal convictions for actions that would no longer be illegal under the new *Cannabis Act*. Since then, Cannabis Amnesty has been fighting for those who continue to carry the burden of a criminal conviction for simple possession of cannabis long after their sentence has been served. We pressed the federal government to enact legislation to delete criminal records relating to the simple possession of cannabis, launched public education campaigns to fight the stigma associated with cannabis convictions and worked on criminal justice reform to make sure that the legal structures that allowed Black and Indigenous communities to be overrepresented in cannabis prosecutions are dismantled. Central to our mission is the belief that legislation must be passed to undo the harms caused by the criminalization of cannabis as well as its unequal enforcement.

B. OUR APPROACH

Cannabis Amnesty prioritizes the following principles in its analysis of legislation and policy:

- **Adopting a Racial Justice Lens:** Cannabis Amnesty deploys a racial justice lens in all advocacy efforts. Despite similar rates of use across racial groups, Black and Indigenous people are disproportionately stopped, searched, arrested, prosecuted and incarcerated for cannabis possession offences.² The insidious ways that cannabis regulation has historically been a vehicle for systemic racism in Canada requires any meaningful redress to employ a racial justice framework. Cannabis Amnesty's racial justice lens pays close attention to the unequal exercise of discretion and acknowledges the necessity of systemic transformation in order to enact real and meaningful change.
- **Prioritizing Public Health and Harms Reduction:** Cannabis Amnesty believes that drug use should be approached as a social and health issue. Compassionate and health-based solutions support the individual and, in turn, support society and facilitate pro-social outcomes. Public safety efforts around

² See Rachel Browne, "[Black and Indigenous people are overrepresented in Canada's weed arrests](#)" (18 April 2018), online: Vice News.

drug use should prioritize treatment and prevention at their core, not criminalization and punishment.

The persistence of criminal records not only impedes reintegration and places unnecessary socio-economic burdens on law-abiding Canadians, but also disproportionately impacts Black and Indigenous persons due to disproportionate enforcement.³ Records have a significant reach. They impact many aspects of a person's daily life. These include limiting travel, access to social services, loan qualifications, parental rights and much more.⁴ Maintaining criminal records for actions that are no longer illegal or long after an individual's debt to society has been paid does nothing for public safety. Indeed, the maintenance of criminal records can contribute to recidivism and ultimately makes the public more unsafe.⁵

Research shows that there is a link between the maintenance of criminal records and the rates of recidivism with employment opportunities being the link between the two.⁶ The impact a criminal record has on an individual's ability to obtain and keep gainful employment is incredibly difficult to overcome. Research from Ontario demonstrates that more than 60% of employers require a criminal record check for potential employees and almost 60% of respondents indicated they would never knowingly hire a person with a criminal record.⁷ If post-conviction reintegration is truly one of the objectives of our penal system, then our criminal record regime should facilitate that reintegration instead of continuing to punish individuals long after they have served their debt to society. Unemployment is an important risk factor contributing to future criminal behaviour.⁸ The persistence of criminal records stands in the way of many Canadians who could meaningfully contribute to the economy and society at large.

The reality for many Black and Indigenous communities from coast to coast to coast is that they are more likely to have encounters with the criminal justice system than other Canadians. These communities are overpoliced, they overpopulate correctional institutions and they are overrepresented in the Canadian criminal justice system—both

³ *Ibid.*

⁴ See Brian McGlashan, "[Consequences of Having a Criminal Record in Canada](#)" (24 February 2022), online: McGlashan Law.

⁵ Ericka B. Adams, Elsa Y. Chen & Rosella Chapman, "Erasing the mark of a criminal past: Ex-offenders' expectations and experiences with record clearance" (2016) 19:1 *Punishment & Society* at 23.

⁶ Megan Denver Garima Siwach & Shawn D. Bushway, "A New Look at the Employment and Recidivism Relationship Through the Lens of a Criminal Background Check" (2017) 55:1 *Criminology* at 174.

⁷ John Howard Society Ontario "[The Invisible Burden](#)" (21 February 2019), online. John Howard ON.

⁸ Robert Apel & Julie Horney, "How and why does work matter? Employment conditions, routine activities, and crime among adult male offenders" (2017) 55:2 *Criminology* at 307.

as accused persons and as victims.⁹ The existence of systemic racism in our justice system – a phenomenon recognized by our federal government – allows for the over-representation of Black and Indigenous persons in drug and firearm arrests.¹⁰ Research indicates racial bias exists throughout the administration of the Canadian criminal justice system from law enforcement to the courts.¹¹ These communities experience the collateral consequences of a criminal record and the barriers to advancement in society that come with it.

III. OVERVIEW OF BILL C-5

A. WHAT DOES BILL C-5 ACCOMPLISH?

Bill C-5 touches on three main areas: (1) Eliminating mandatory minimums of certain non-violent firearm and drug offences; (2) providing additional discretionary powers to law enforcement to choose alternative responses to drug use; and (3) implementing the automatic sequestration of drug possession charges within a two-year time period.

The Bill also introduces a Declaration of Principles as s. 10.1 of the *Controlled Drugs and Substances Act* (CDSA).¹² These principles represent a fundamental reorientation towards drug offences, seeking to redirect them out of the criminal justice system and towards an approach that views problematic substance use as a social and health issue. The principles provide a framework for compelling law enforcement and prosecutors to consider whether the individual can be diverted away from the criminal justice system.

B. ANALYSIS OF BILL C-5

Three central legislative transformations characterize Bill C-5. They will be analyzed from the perspective of Cannabis Amnesty's core principles explained above, namely, an approach which recognizes the vulnerability of marginalized and racialized communities, the need for harm reduction approaches to drug use and the need for amnesty to be free, automatic, and permanent.

⁹ Akwasi Owusu-Bempah, "Race, Crime and Criminal Justice in Canada" in *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford: Oxford University Press, 2014).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² See Appendix A.

1. MANDATORY MINIMUMS

What does this law do: Bill C-5 amends and repeals several sections of the *Criminal Code* and the *CDSA* that impose mandatory minimum sentences for certain firearm and prohibited substances trafficking convictions. It also eliminates some of the requirements to determine eligibility for conditional sentences for these convictions.¹³

Why is this significant: Cannabis Amnesty is in favour of the elimination of mandatory minimum sentences. Courts have previously affirmed that mandatory minimums can induce grossly disproportionate sentences relative to the offence and can contravene the protections the constitution affords Canadians.¹⁴ Allowing trial judges to depart from mandatory minimums and restrictions on the use of conditional sentences provides the opportunity for more humane, proportionate and case-specific sentences to be crafted by judges. Mandatory minimums place Black and Indigenous people in a vulnerable position and are a cause for the disproportionate representation of these communities in Canadian prisons. Additionally, the removal of mandatory minimums for drug possession charges supports the fundamental reorientation of substance use as a public health concern. These offences should and are being taken out of the criminal justice system and prosecutors and the police are encouraged to treat them as social and health issues.

2. DISCRETION

What does this law do: The reliance on discretion afforded in Bill C-5 to law enforcement is of great concern to Cannabis Amnesty. Clause 20 of Bill C-5 amends the *CDSA* to include section 10 on diversion measures for the enforcement of drug laws. Sections 10.2 to 10.5 of the proposed amendment to the *CDSA* provides discretionary powers to police. Yet, social science research has consistently shown that at every stage of our criminal justice system, where a state actor has discretion, it results in the disproportionate criminalization of Black and Indigenous people in Canada.¹⁵ They are more likely to get arrested, and less likely to receive bail. They are treated worse while in custody and have fewer second chances. As a result, relying on the discretion of state actors is not enough.

Why is this significant: Although this legislation gives police and prosecutors the option to divert those arrested for simple possession; it does not require them to do so.

¹³ See Appendix B for a list of these amendments.

¹⁴ *R v Lloyd*, [2016] SCJ No 13, *R v Nur*, [2015] SCJ No 15, *R v Safarzadeh-Markhali*, [2012] OJ No 3563.

¹⁵ Owusu-Bempah, Akwasi, and Scot Wortley, 'Race, Crime, and Criminal Justice in Canada', in Sandra M. Bucerius, and Michael Tonry (eds), *The Oxford Handbook of Ethnicity, Crime, and Immigration* (2014; online edn, Oxford Academic, 1 Apr. 2014), <https://doi.org/10.1093/oxfordhb/9780199859016.013.020>, (accessed 20 Nov. 2022).

All it requires is for them to *consider* diversion. Police are under no obligation to divert a particular individual and the legislation provides no remedy if that discretion is exercised in a way that exacerbates racism. A charge cannot later be invalidated on the ground that the officer did not make adequate consideration under the declaration of principles. In short, there is nothing in this proposed legislation that *requires* criminal justice system actors to treat Indigenous, Black and marginalized people any differently than they are currently being treated. As a result, there is no guarantee that this legislation will lead to change.

Removing discretion and incorporating mechanisms to hold police officers accountable is required if the law wants to make any real impact on the disproportionate effect which is the result of exercises of police discretion. In the interim, Cannabis Amnesty advocates for the government to implement a policy of keeping national, race-based criminal justice data on the exercise of the discretion granted through these amendments. Maintaining such data will provide insight into whether the exercise of discretion disproportionately disfavours Black and Indigenous people in Canada.

3. AUTOMATIC SEQUESTRATION REQUIREMENT

What does this law do? The addition of Section 10.6 was introduced during the third reading as an amendment proposed by NDP justice critic Randall Garrison.¹⁶ This section provides for the free, automatic and permanent sequestration of conviction records relating to the possession of all drugs, not just cannabis.¹⁷

Section 10.6 separates conviction records into two categories: (1) records of a conviction that occurred before the bill came into effect and (2) records of a conviction that occurred after the bill came into effect. Both of these categories benefit from the automatic sequestration of criminal records, with subtle differences. Records for convictions that occurred before the coming into force of the law must be kept separate and apart from other records of convictions within two years after the day the law came into force, that is, they must be sequestered before November 17, 2024. This provision would apply to all conviction records related to simple cannabis possession, as those offences pre-date the coming into force of Bill C-5.

Records respecting convictions that occurred after the bill came into effect also must be sequestered, and sequestration must occur two years after the conviction or two years after the expiry of any sentence imposed for the offence, whichever is later. Additionally,

¹⁶ Parliament of Canada, 44th Parliament, 1st Session Edited Hansard No.088 (14 June 2022).

¹⁷ See Appendix C for these provisions.

for this second category of offences, the person convicted of the offence is deemed never to have been convicted of that offence in the first place.

The inclusion of a deeming provision in s. 10.6(2) is significant because it provides enhanced protections for individuals relative to the present regime of record suspensions. The present regime of record suspensions only provides for the setting apart of records. To the extent that Bill C-5 provides not only for the setting apart of records, but also deems a conviction never to have taken place, it provides a remedy that is closer to what an expungement would enable. Under the *Expungement of Historically Unjust Convictions Act*¹⁸ when an individual receives an expungement, the person convicted of the offence is deemed to never have been convicted of that offence. This may not represent a significant distinction in Canada where our human rights legislation prohibits someone from being discriminated against where they have received a pardon for a conviction, this distinction is significant for those who wish to cross the border to the United States.

The United States does not recognize Canadian pardons and, therefore, a person who has received a record suspension or pardon from the Canadian government may still be barred from entry into the United States. This means that even when an individual is able to go through the lengthy and difficult process of obtaining a pardon, they still deal with the collateral consequences of that conviction. In practice, the deeming provision would allow individuals to claim that under Canadian law, they have never been convicted of an offence. This has practical benefits beyond those that can be provided by a record suspension and has the potential to provide Canadians crossing the border to the United States with greater peace of mind.¹⁹

Legislating cannabis amnesty: Bill C-5 creates a regime that provides for free, automatic and permanent conviction sequestration, effectively legislating cannabis amnesty. The instruments it employs (automatic sequestration and deeming provisions) can also provide a foundation for other progressive reforms to Canada's criminal records program.

Additionally, unlike records suspensions granted under the *Criminal Records Act*, there is no legislative authority to revoke automatic record sequestrations granted under Bill C-5. The *Criminal Records Act*²⁰ specifies instances in which a record suspension granted under it can be revoked. These instances are (1) if the individual commits a subsequent offence (2) if the individual is no longer of good conduct and (3) if the individual knowingly made a false statement in their pardon application. Bill C-5, however, has no

¹⁸ See *Expungement of Historically Unjust Convictions Act*, S.C 2018, c.11, at s.5(1).

¹⁹ This analysis does not constitute legal advice with respect to the laws of the United States.

²⁰ See *Criminal Records Act*, R.S.C., 1985, c. C-47) at s.7.

provisions which would authorize the reinstatement of sequestered records for any reason.

What are the shortcomings of this amendment? There are a few shortcomings with the automatic sequestration regime created by Bill C-5.

1. **Deeming provision not retroactive:** The deeming provision in section 10.6(2) is only applicable to future conviction records. It does not apply to any record of a conviction that occurs before the day on which this section comes into force in respect of an offence under subsection 4(1) of the *CDSA*. As a result of this restriction, no records for the simple possession of cannabis would be captured by the deeming provision. This is because Bill C-45, which took effect on October 17, 2018, eliminated the offence of simple possession of cannabis under s. 4(1) of the *CDSA*, and as a result, all convictions for simple possession of cannabis would predate the coming into effect of Bill C-5. Conviction records for simple possession of cannabis are captured by section 10.6(1), which provides that historic records will be sequestered within the two years, but they will not benefit from the implementation of the deeming provisions.
2. **No record destruction:** A second shortcoming is that this stronger criminal record suspension regime does not provide for record destruction. The mechanism proposed by this legislation to deal with records (i.e. “sequestration”), appears to employ the same mechanism for dealing with records as used by the current record suspension regime. Drug possession records on a forward-going basis will not be destroyed or removed in the repositories and systems of the RCMP, federal departments or federal agencies. This remedy still only exists as part of the *Expungement of Historically Unjust Convictions Act*.²¹

IV. CONCLUSION

Cannabis Amnesty applauds the steps taken by the Government of Canada to decrease the impact that the blunt instrument of criminal law has on Indigenous, Black and vulnerable people in Canada. Bill C-5 also represents an approach to drug consumption that prioritizes health and social outcomes over the moralization and criminalization of drugs. The incorporation of the Declaration of Principles in the *CSDA* allows for the possibility of helping countless Canadians if implemented appropriately.

²¹ See *Expungement of Historically Unjust Convictions Act*, at s. 16 - 19.

Many of the reforms Bill-5 proposes are recommendations Cannabis Amnesty has been calling for since the legalization of cannabis. The achievement of true cannabis amnesty through legislation is incredibly significant. The automatic sequestration provision is a direct response to the lobbying efforts of Cannabis Amnesty and our partners who have been calling on this government to address the barriers created by the persistence of criminal records, particularly those for simple drug possession offences. It represents the culmination of the work of our organization. Yet, it does not address all of the collateral consequences of criminal records for cannabis possession and other convictions. To that end, we encourage our partners and allies to continue to advocate for broader reforms to Canada's criminal record regime.

APPENDIX A: DECLARATION OF PRINCIPLES ADDED TO *CSDA*

Declaration of principles

10.1 The following principles apply in this Part:

- (a)** problematic substance use should be addressed primarily as a health and social issue;
- (b)** interventions should be founded on evidence-based best practices and should aim to protect the health, dignity and human rights of individuals who use drugs and to reduce harm to those individuals, their families and their communities;
- (c)** criminal sanctions imposed in respect of the possession of drugs for personal use can increase the stigma associated with drug use and are not consistent with established public health evidence;
- (d)** interventions should address the root causes of problematic substance use, including by encouraging measures such as education, treatment, aftercare, rehabilitation and social reintegration; and
- (e)** judicial resources are more appropriately used in relation to offences that pose a risk to public safety.

APPENDIX B: ELIMINATION OF MANDATORY MINIMUMS AND CONDITIONAL SENTENCING REQUIREMENTS

Firearm Related Offences in the *Criminal Code*

1. Use of a firearm in commission of an offence which had a minimum sentence of 1 year for a first offence and three years for any subsequent offences (Bill C-5; clause 2).
2. Possession of a firearm knowing its possession is unauthorized with a minimum sentence of (Bill C-5; clause 3)
3. Possession of a prohibited or restricted firearm with ammunition with a mandatory 3 year sentence for a first offence and 5 years for any subsequent offences (Bill C-5; clause 4)
4. Possession of a weapon obtained by the commission of an offence with a minimum sentence of 1 year (Bill C-5; clause 5)
5. Weapons trafficking that is not a firearm, prohibited or restricted weapon or ammunition with a minimum sentence of 1 year (Bill C-5; clause 6)
6. Possession of a weapon for the purpose of trafficking that is not a firearm, prohibited or restricted weapon and ammunition with a minimum sentence of 1 year (Bill C-5; clause 7)
7. Knowingly importing or exporting parts exclusively for the manufacturing of firearms with a 1 year minimum sentence (Bill C-5; clause 8)
8. Discharging a firearm with intent with a 4 year minimum sentence (Bill C-5; clause 10)
9. Recklessly discharging a firearm with a 5 year minimum sentence (Bill C-5; clause 11)
10. Robbery with the use of a firearm with a four year minimum sentence (Bill C-5; clause 12)
11. Extortion with the use of a firearm with a four year minimum sentence (Bill C-5; clause 13)

Other Offences and Section Amendments in the *Criminal Code*

1. Selling, transporting or distributing raw tobacco leaf and tobacco products with 90 day minimum sentence for a second offence, 180 days for a third offence and two years for a fourth or subsequent offence. (Bill C-5; clause 9)
2. Removes three disqualifying factors to allow individuals to receive a conditional sentenced that can be served in their community: (1) Offences with a 14 year maximum sentence (2) Offences with a 10 year maximum sentence where the offense resulted in bodily harm or involved drugs or weapons and (3) several other indictable offences including prison breach, motor vehicle theft and criminal harassment. (Bill C-5; clause 14)

Amendments and repeals to the *Controlled Drugs and Substances Act* include:

1. Possession of a prohibited substance for the purpose of trafficking with a minimum 1 or 2 year sentence depending on the circumstances of the offence. (Bill C-5; clause 15)
2. Possession of prohibited substances for the purpose of importing or exporting with a minimum sentence of one year. (Bill C-5; clause 16)
3. Production of prohibited substances with a minimum punishment of 1 and 3 years or 18 month based on the surrounding circumstances. (Bill C-5; clause 17)

APPENDIX C: AUTOMATIC SEQUESTRATION CLAUSES ADDED TO THE *CSDA*

Conservation of record — conviction

10.6 (1) Any record of a conviction that occurs before the day on which this section comes into force in respect of an offence under subsection 4(1) must be kept separate and apart from other records of convictions within two years after that day.

Conservation of record — deeming

(2) A conviction that occurs after this section comes into force in respect of an offence under subsection 4(1) is kept separate and apart from other records of convictions two years after the conviction or two years after the expiry of any sentence imposed for the offence, whichever is later, and the person convicted of the offence is deemed never to have been convicted of that offence.