

A MISSED OPPORTUNITY: HOW THE BRITISH COLUMBIA COURT OF APPEAL COULD HAVE HELPED REFORM SENTENCING IN THE OPIOID CRISIS

CASE COMMENT: *R. v. TANYA LEE ELLIS*

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For many, the term “drug dealer” conjures a shadowy figure trafficking in human exploitation while living large off ill-gotten profits. It is a powerful, convenient image, but largely inaccurate, at least when it comes to who is being arrested and convicted on charges related to possession and trafficking at the street-level in Canada.¹

The case of *R. v. Tanya Lee Ellis*² set out to dismantle the false and insidious dichotomy between “villain” drug dealer and “victim” drug-user, and the correspondingly disproportionate sentences imposed for subsistence-based drug trafficking offences. *R. v. Ellis* was the first case of its kind in Canada to introduce leading expert evidence directly related to the efficacy and utility, or lack thereof, of punishment in deterring and denouncing street-level trafficking and drug use more generally.³

The expert evidence led in *Ellis* built on previous research findings from the British Columbia Centre on Substance Use that many people who deal drugs use drugs themselves.⁴ In fact, among people who use drugs, the most common reason for dealing is to pay for personal drug use.⁵ Ms. Ellis sought to prove that while the motivations behind dealing and concurrent use are complex, they do not include inherent criminality or immorality. Therefore, “tough on crime” approaches to drug-related offences, including trafficking, tend to be ineffective and outdated, especially amid the growing trend toward a “public health” approach to drug use.

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¹ Peter Kim, “On the Stereotype of the ‘Drug Kingpin’: Why Tougher Penalties for Fentanyl Trafficking Won’t End the Overdose Crisis” (23 October 2017), online (blog): [perma.cc/G9PA-GXR8]; Alexandra B Collins et al, “The Intersectional Risk Environment of People Who Use Drugs” (2019) 234 Soc Sci Med 1; Geoff Bardwell et al, “Trusting the Source: The Potential Role of Drug Dealers in Reducing Drug-Related Harms via Drug Checking” (2019) 198 J Drug & Alcohol Dependence 1; Gillian Kolla & Carol Strike, “Practices of Care Among People Who Buy, Use, and Sell Drugs in Community Settings” (2020) 17:1 Harm Reduct J 1.

² 2021 BCPC 280 [*Ellis PC*].

³ The authors use the term “leading” to recognize the prominence of Dr. Ryan McNeil’s qualitative and ethnographic research relating to illicit drug use and harm reduction. He is the Director of Harm Reduction Research and an Associate Professor of Medicine at Yale University. He is also a Research Scientist with the British Columbia Centre on Substance Use. His research has been “published extensively and he is an internationally recognized expert in his field” (*ibid* at para 50).

⁴ Kolla & Strike, *supra* note 1. Note that throughout this case comment, the authors use a variety of terms to refer to street-based trafficking, per section 5 of the *Controlled Drugs and Substances Act*, SC 1996, c 19, for example: “dealing,” “drug dealing,” “street dealing,” and “low-level dealing.”

⁵ Kolla & Strike, *ibid*.



Ellis was successful at the provincial court level: Judge Barbara Flewelling determined, via the *Canada (Attorney General) v. Bedford*⁶ analysis, that it was time to elevate the sentencing objective of rehabilitation over that of denunciation and deterrence in street-level trafficking offences, given the failure of the criminal justice system thus far to address core underlying factors. The decision was celebrated for ending a “Dickensian approach” to drug-related sentencing.⁷ In the advent of Justice Flewelling’s decision, it seemed that perhaps our most conservative democratic institutions were coming to grips with the notion that addressing drug use and related criminalized activities requires destigmatizing drug use and moving toward decriminalization.⁸

The Public Prosecution Service of Canada (PPSC) quickly appealed the ruling. The British Columbia Court of Appeal, rather than viewing the case of *Ellis* as providing fertile ground to reassess the value and utility of deterrence and denunciation, refused to meaningfully acknowledge the expert evidence led at the provincial court level and its implications for an archaic sentencing regime. Instead, the Court reverted to the short-sighted conclusion that “deterrence and denunciation properly carry substantial weight in these cases” and “a sentence of imprisonment will generally be required.”⁹ An opportunity was lost.

The purpose of this case comment is to critically analyze the reasoning behind the provincial and appellate court decisions. The hope is that the *Ellis* litigation offers a springboard for sentencing reform and a wider acknowledgment that incarceration has proven ineffective in deterring drug use and dealing. The carceral response to drug use and dealing must be replaced by comprehensive, integrated health care that addresses physical and mental health needs, provides addiction treatment, and offers individualized support in accessing necessary services, such as housing and harm reduction.¹⁰ The primary sentencing principle should therefore be rehabilitation.

I. THE OPIOID CRISIS AND THE JUDGMENT IN *R. v. SMITH*¹¹

The “range” of sentence for fentanyl trafficking was defined by the British Columbia Court of Appeal in *Smith*: a prison sentence of 18 to 36 months and possibly higher.¹² This range is a dramatic escalation of the 6 to 18 month range for trafficking in other Schedule I substances in British Columbia. In advocating for a higher sentencing range for street-level

⁶ 2013 SCC 72.

⁷ Ian Mulgrew, “Fentanyl Jail Terms a Dickensian Error Walked Back by B.C. Court,” *Vancouver Sun* (5 October 2022), online: [perma.cc/J9DW-T535].

⁸ Caitlin Shane, “R v Ellis: A New Frontier for Sentencing Drug Trafficking Offences” (7 December 2021), online (blog): *Pivot Legal* [perma.cc/Z3PN-7F5P].

⁹ *R v Ellis*, 2022 BCCA 278 at para 169 [*Ellis CA*].

¹⁰ Ryan McNeil, Marie Jauffret-Routside & Helena Hansen, “Reducing Drug-Related Harms and Promoting Health Justice Worldwide During and After COVID-19” (2022) 112:S2 *American J Public Health*; Valerie Giang et al, “Opioid Agonist Therapy Trajectories Among Street Entrenched Youth in the Context of a Public Health Crisis” (2020) 11 *SSM – Population Health* 1 at 11; Andrew Ivins et al, “Tackling the Overdose Crisis: The Role of Safe Supply” (2020) 80 *Intl J Drug Policy* 1; Ryan McNeil et al, “Navigating Post-Eviction Drug Use Amidst a Changing Drug Supply: A Spatially-Oriented Qualitative Study of Overlapping Housing and Overdose Crises in Vancouver, Canada” (2021) 222 *Drug Alcohol Dependence* 1.

¹¹ 2017 BCCA 112 [*Smith*].

¹² *Ibid* at para 45.

fentanyl dealers, the PPSC filed evidence of the tragic effects of the fentanyl crisis across Canada and particularly within British Columbia.

The Court of Appeal dismissed the sentence appeal but accepted it should establish a longer range for trafficking offences related to fentanyl (including at the street-level) to appropriately respond to the magnitude of the opioid crisis. Madam Justice Newbury, in her dissenting judgment, acknowledged PPSC's proposal as a means of "address[ing] the public's legitimate sense of moral outrage over the systematic distribution of a pernicious drug responsible for grievous loss of life, immense and unsustainable strain on our public health system, and devastating impacts on the safety and integrity of our communities."¹³

Justice Newbury impressed upon lower courts to consider "the proliferation of Fentanyl and the fatal consequences of its illegal sale and distribution. These consequences inform the 'circumstances of the offence' and the culpability of the offender."¹⁴ She also characterized lower-level custodial sentences for street-level dealers as "particularly troubling given that according to statistics prepared by the Canadian Centre on Substance Abuse (since renamed the Canadian Centre on Substance Use and Addiction), British Columbia has one of the worst, if not the worst, problems of Fentanyl abuse in Canada."¹⁵

She further referenced "various media campaigns, public alerts and outreach efforts by police and social workers who are involved in seeking to contain this scourge."¹⁶ However, she also acknowledged that "[f]entanyl abuse continues to claim lives every day in our communities. The danger posed by such a drug must surely inform the moral culpability of offenders who sell it on the street, and obviously increases the gravity of the offence beyond even the gravity of trafficking in drugs such as heroin and cocaine."¹⁷

The majority judgment similarly acknowledged the "public message campaign intended to increase awareness of fentanyl-related overdoses and recommended precautionary strategies."¹⁸ In the majority's view, "the inevitably heightened public awareness of the risks associated with illicit fentanyl must increase the responsibility or culpability of anyone dealing in the product."¹⁹

Scientific research adopted by physicians and addiction specialists, that addiction is a "chronic, relapsing brain disease,"²⁰ and that "drug addicts are essentially choiceless victims

¹³ *Ibid* at para 2.

¹⁴ *Ibid* at para 37.

¹⁵ *Ibid* at para 44.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Ibid* at para 62.

¹⁹ *Ibid*.

²⁰ Linda C Fentiman, "Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution" (2011) 14:2 U Pennsylvania JL & Soc Change 233 at 234, quoting Gene M Heyman, *Addiction: A Disorder of Choice* (Cambridge, Mass: Harvard University Press, 2009).

of their illness” was not considered.²¹ Nor could it have been; expert evidence was not tendered at the court of first instance.²²

A proliferation of cases from both trial and appellate courts across Canada have echoed the sentiments espoused by both the majority and minority judgments. There are now too many cases to list. However, the following serve as an example.

In *R. v. Frazer*, the Alberta Provincial Court, as it then was, noted that “[t]rafficking in fentanyl is almost the equivalent of putting multiple bullets in the chambers of a revolver and playing Russian roulette. It is the most efficient killer of drug users on the market today.”²³

In *R. v. Loor*, the Ontario Court of Appeal held that “fentanyl is a highly dangerous drug. Its widespread abuse, though recent, has quickly become entrenched in our country. Every day in our communities, fentanyl abuse claims the lives of Canadians.”²⁴ For this reason, “offenders . . . who traffic significant amounts of fentanyl should expect to receive significant penitentiary sentences.”²⁵

In *R. v. Fyfe*, the Saskatchewan Court of Queen’s Bench commented that the prevalence of fentanyl use and its contribution to deaths in Canada is “notorious.”²⁶ The Court directed that “[t]he presumption of incarceration should remain when dealing with hard drugs where the social costs and the potential for enormous profit in the retailing and wholesaling of the drug exists.”²⁷

More recently in *R. v. White*, the Nova Scotia Court of Appeal acknowledged the “mounting judicial alarm over the devastation caused by the illegal distribution of highly addictive and lethal opioids.”²⁸ The Court went on to conclude that “[t]he time has come for this Court to ensure that trafficking in fentanyl does not gain a foothold in this province, and to send a message to traffickers that this is not a place where they would wish to do business.”²⁹

Clearly, prior to the *Ellis* litigation, the opioid crisis in British Columbia (and across Canada) had “the courts calling for enhanced deterrence and lengthier prison terms.”³⁰ Indeed, the prosecution of *Ellis* called for three years of incarceration. The discourse surrounding the opioid crisis as contained in these judicial narratives positions incarceration

²¹ Fentiman, *ibid*; Yvette van der Eijk, “Towards a ‘Sociorelational’ Approach to Conceptualizing and Managing Addiction” (2016) 9:2 Public Health Ethics 198.

²² It is important to note that the Supreme Court of Canada has recognized addiction as a health condition requiring a public health approach. For example, in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 101, the following was held: “[A]ddiction is a disease in which the central feature is impaired control over the use of the addictive substance.” Canada did not contest that categorization in that case.

²³ 2017 ABPC 116 at para 11.

²⁴ 2017 ONCA 696 at para 33.

²⁵ *Ibid* at para 50.

²⁶ 2017 SKQB 5 at para 100.

²⁷ *Ibid* at para 123, quoting *R v McLeod* (1993), 81 CCC (3d) at 98.

²⁸ 2020 NSCA 33 at para 99.

²⁹ *Ibid* at para 104.

³⁰ Hayley Hrymak, “A Bad Deal: British Columbia’s Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers” (2018) 41:4 Man LJ 149 at 150, citing *R v Creuzot*, 2017 BCSC 1075.

as our solution. However, as explained by Dr. Ryan McNeil, empirical evidence shows *no* relationship between increasing sentences and the prevention of drug use and marginalized street-level dealing. In fact, by insisting on custodial sentences we are fueling an outcome that is both harmful and counter-productive.

II. THE IMPETUS FOR THE *ELLIS* LITIGATION

Criminal courts must re-envision their perceived role in addressing crime impacted by drug use. A failure to do so would constitute a failure to adapt to an ongoing and wide-spread re-reckoning of drug use currently underway in Canada among the general public, the health professions, the police, and various levels of government, including the federal government and Health Canada. In recent years, these entities have increasingly insisted upon a public health approach to substance use, rather than a criminal approach, to realistically address drug use and its social determinants.

This impetus was palpable in the context *Ellis* presented.

A. TANYA LEE ELLIS AND HER EXPERIENCE

In November of 2019, *Ellis* sold nominal amounts of fentanyl mixed with cocaine to an undercover Royal Canadian Mounted Police officer. At her sentencing hearing, she offered powerful testimony and insight into the complex socioeconomic reasons why people who use drugs engage in street-level dealing — all from the unique and under-represented standpoint of a mother who uses drugs whilst navigating poverty, precarious housing, challenges with mental health, and child custody.³¹

At the time of her sentencing, *Ellis* was 42 years old. In her testimony, she described a childhood fraught with challenges and a familial environment that included severe alcohol use and domestic violence. For these reasons, she told the Court she avoided being home as much as possible. She started associating with a group of friends that were experimenting with drugs. She quickly stopped attending school and was transitioned into an alternative education program.³²

By middle school she was smoking crack cocaine and experimenting with a host of other substances. She began a relationship with an older man who was also involved in criminal activity and substance use. She survived sexual and physical assault throughout that relationship.³³

She later began a relationship with the eventual father of her two children. Their relationship was marked by active addiction on both sides. She testified that the Ministry of Children and Family Development had been involved in her life and had a significant and

³¹ *Ellis* PC, *supra* note 2 (Transcript of the Proceedings) [*Ellis* PC Transcript]; *Ellis* CA, *supra* note 9 (Transcript of Proceedings) [*Ellis* CA Transcript].

³² *Ellis* PC Transcript, *ibid*; *Ellis* CA Transcript, *ibid*.

³³ *Ellis* PC Transcript, *ibid*; *Ellis* CA Transcript, *ibid*.

challenging impact on her. She recounted a 9-month period when she was incarcerated when the children were young. She described carrying “a lot of guilt” about that separation.³⁴

Ellis told the sentencing court that she had attended approximately seven different residential treatment centers over the course of her life. She further testified that she had been on the methadone program for nearly two decades, sporadically attended Alcoholics Anonymous and Narcotics Anonymous meetings, and received outpatient services from a variety of providers. The longest period of sobriety she believed she had achieved was two years.³⁵

During her testimony, she explained that she likely started using drugs to “numb the pain” associated with her home environment.³⁶ She also testified that she has struggled for decades with diagnosed depression, as did the father of her children. Ellis recounted an event just prior to their attendance at a reputable treatment program in 2019, where he was taken to hospital following significant self-harm. When the two returned from treatment in the summer of 2019, the couple returned to their prior living arrangements. A mere 48 hours later, Ellis found the father of her children dead from an apparent overdose.³⁷

Three months after her partner’s death, Ellis was apprehended by an undercover officer for selling small quantities of fentanyl and cocaine. She explained that selling drugs was a matter of survival: she needed the small profits from drug sales to support her own drug dependence. At sentencing, she described her client base as consisting of eight to ten people who she knew. She explained that she routinely tested the drugs she sold not only in the interests of her clients but also because she was oftentimes using from the same supply herself — a practice noted in Dr. McNeil’s evidence for providing a “protective” benefit to clients.³⁸ Her fentanyl supplier was one she trusted and from whom she had purchased for the last decade.³⁹ She testified she only sold to the undercover officer because a routine client “vouched” for her.⁴⁰ She ordinarily would not sell to people she did not know, communicating to the Court that she would be unaware of their tolerance level and the effect her drugs may have on them.

Ellis was asked at the sentencing hearing whether any money was left over at the end of each month, after she sold drugs and secured her own supply. Her answer was that if there was something left over, it was approximately \$100 if she was lucky.⁴¹ She explained that she could not find a legal and gainful line of employment, testifying that: “I’ve lived here my whole life and ... [p]eople don’t tend to forget ... I think I tried to get a job at McDonalds once and I couldn’t even get a job there.”⁴² She was then asked why she does not relocate to another city or town and she responded: “It’s not that simple. My kids are here. My only

³⁴ Ellis CA Transcript, *ibid* at 248.

³⁵ *Ibid* at 192, 206, 213.

³⁶ *Ibid* at 188.

³⁷ *Ibid* at 199.

³⁸ *Ibid* at 44.

³⁹ She explained that she purchased her cocaine elsewhere and very rarely sold cocaine in either crack or powdered form.

⁴⁰ Ellis PC, *supra* note 2 at para 134.

⁴¹ *Ibid* at para 27.

⁴² Ellis CA Transcript, *supra* note 31 at 231.

family is here.”⁴³ Her response evoked the testimony of Dr. McNeil, who noted the systemic barriers faced by people who use drugs and the attendant lack of formal employment opportunities for that population, particularly upon release from jail.⁴⁴

A lack of supports to address Ellis’ drug use realistically (and non-punitively), is an ongoing theme in her life. She described a lengthy history with probation services, noting that “they don’t help me ... they work with the police.”⁴⁵ Ellis’ characterization of police speaks to the existence of rigid power dynamics and violent histories between police and criminalized people, fear of criminalization, and mistrust and avoidance of law enforcement. Not once in the decades of being placed on an administrative court order did her probation officer facilitate a treatment plan for her.⁴⁶

Echoing the testimony of Dr. McNeil, Ellis also explained that criminalization fails to address drug use, that incarceration has not curtailed her addiction nor decreased her involvement in subsistence-based criminal activity. Instead, she comes back to the same town, “the same problems, the same struggles.”⁴⁷

III. THE EXPERT EVIDENCE AND ITS IMPLICATIONS FOR THE CRIMINAL JUSTICE SYSTEM’S SENTENCING REGIME

Dr. Ryan McNeil, Director of Harm Reduction Research at the Yale School of Medicine and a research scientist for the British Columbia Centre on Substance Use, provided expert testimony for the defence. He was qualified by the sentencing judge to provide expert testimony in several areas including: overdose risk, prevention, and harm reduction including the effect of criminalization on overdose risk and addiction treatment; demographics of drugs users in British Columbia, including socio-economic backgrounds of drug users and the intersection of drug use with other causes of marginalization; and, physiology of opioid addiction including the effect of opioid addiction on decision making and the effectiveness of denunciation and deterrence on drugs users.

Dr. McNeil began his testimony by explaining that there are key factors that lead people to use drugs and potentially develop addictions. He noted that these factors are “complex” and “varied.”⁴⁸ He listed socioeconomic marginalization, intersecting with histories of engagement with the child welfare system, substance misuse in the home, and physical, sexual, and emotional abuse as a child.⁴⁹ Throughout his research in British Columbia, Dr. McNeil has recognized certain life circumstances that people who experience drug addiction often share. He explained that a disproportionate number are Indigenous, living in extreme poverty, struggling with homelessness, involved in the criminal justice system, and facing significant barriers to engagement in formal employment and education.⁵⁰

⁴³ *Ibid.*

⁴⁴ *Ibid.*; Ellis PC Transcript, *supra* note 31.

⁴⁵ Ellis CA Transcript, *supra* note 31 at 213.

⁴⁶ In this context, it is important to consider a common request from the PPSC: probation is required in order to “assist” the offender with her addiction.

⁴⁷ Ellis CA Transcript, *supra* note 31 at 233.

⁴⁸ *Ibid.* at 143.

⁴⁹ *Ibid.* at 143; Ellis PC Transcript, *supra* note 31 at 38.

⁵⁰ Ellis PC Transcript, *ibid.*

A significant element of his testimony revolved around the intersection of poverty and the need to support “one’s [own] use” by way of criminalized income-generating activities, including drug trafficking.⁵¹ Dr. McNeil described the demographic of people experiencing addiction as severely marginalized and thus left with little options to access the drugs they need and ward off withdrawal.⁵² He underscored the paramourcy of this need as follows:

Within that kind of situated rationality of drug use, that need to ensure access to drugs and to effectively avoid going into withdrawal ... is so much more critical than any of the risks that may be associated with potentially being arrested or for selling again.⁵³

Dr. McNeil explained that it is common to learn of people who use drugs committing petty theft because in the face of barriers to formal employment, these are “the various ways that people can make money that are criminalized.”⁵⁴ Dr. McNeil testified that it is exceedingly common to learn that people who use drugs also sell drugs. Throughout the course of his own studies, Dr. McNeil found that 40 percent of people who use drugs also sell drugs. The rate could be as high as 50 percent.⁵⁵ Selling drugs for this demographic was described as one of the only means to access a form of income generation because “if someone is using they’re usually tied into a kind of broader networker scene and are able to access that as a form of employment.”⁵⁶

Dr. McNeil opined that society has developed a false dichotomy between the drug user victim and the drug dealer villain. He explained that if we, the criminal justice system participants, spent time with the a more realistic composite of the person who deals drugs to support personal use, we would realize how “unglamorous it is” and how it is oftentimes “wrapped up in very severe poverty and marginalization.”⁵⁷ The “reality for the person who’s on the ground, selling drugs, living in poverty, it’s a subsistence activity that ... generates ... barely enough money, if enough money, or drugs, to sustain one’s own use.”⁵⁸

In direct examination. Dr. McNeil explained how the dealer can even play a protective, public health function during the opioid crisis:

[We] found that when people were able to access the dealer that they trusted and that they had a strong relationship with, that that improved communication about what was in the drugs that they were purchasing, which better positioned people to mitigate their overdose risks.⁵⁹

⁵¹ *Ellis* CA Transcript, *supra* note 31 at 145.

⁵² *Ibid* at 118.

⁵³ *Ibid* at 118.

⁵⁴ *Ibid* at 145.

⁵⁵ *Ibid* at 174.

⁵⁶ *Ibid* at 146.

⁵⁷ *Ibid* at 147.

⁵⁸ *Ibid* at 148.

⁵⁹ *Ibid* at 151.

Dr. McNeil further explained that it is common for dealers to use the drugs they sell in order to assess content and potency prior to sale. He also confirmed that a large number of people selling drugs will access drug checking technology when it is available.⁶⁰

[W]hat we found is that people who were selling drugs were often accessing this drug checking technology that could tell them everything that was in the drugs that they were selling, A, so that they would better ... understand what they had; B, so they could communicate that information to the people that they were selling to, so that they could manage their risks by doing things like insuring someone was there while they were injecting; C, so that they could effectively avoid selling to people who they felt might not be experienced enough opioid users to use, for example, drugs with fentanyl, other concentrations that they ... ended up with.⁶¹

When the trusted dealer is removed from the street and placed into custody, Dr. McNeil worries most about people because customers are forced to “try to locate someone new to purchase drugs from. It’s going to typically be someone that they don’t have a relationship with that can facilitate communication in the same way, about what’s in the drugs.”⁶² He explained that a common piece of health advice is to “know your source.”⁶³ When the dealer is incarcerated, the risk of overdose amongst his customers grows, as well as for the dealer himself, post-custody, since people being released in the community are “marked by an incredibly elevated risk of overdose because of the lower tolerance.”⁶⁴

Incarcerating the dealer not only increases the risk of overdose to the dealer and his clientele, it also has little deterrent effect on the dealer regarding future instances of trafficking, as Dr. McNeil explained:

And I would say very specifically that the high prevalence of drug selling, especially after periods of engagement with the criminal justice system, would certainly suggest that that’s not serving as an effective deterrent for engagement in drug selling.⁶⁵

By contrast, the research demonstrates that evidence-based treatment such as methadone, buprenorphine, diacetylmorphine (heroin), and hydromorphone, is the more effective deterrent.⁶⁶ Jail, the research demonstrates, is “so poorly positioned to address the factors that push people into drug selling, especially where it stems from socioeconomic marginalization, limited opportunities, often severe and unmanaged substance use disorders, or opioid use disorder.”⁶⁷ The same applies to probation.⁶⁸

The rationale for Dr. McNeil’s response lies in the research: no amount of counselling is likely to address the actual systemic factors requiring the drug user to sell. Outpatient

⁶⁰ *Ibid* at 104.

⁶¹ *Ibid* at 104–105. See also A Bestsos et al, “‘I Couldn’t Live with Killing One of my Friends or Anybody’: A Rapid Ethnographic Study of Drug Sellers’ Use of Drug Checking” (2021) 87 *Intl J Drug Policy*; Kolla & Strike, *supra* note 1.

⁶² *Ellis* PC Transcript, *supra* note 31 at 47.

⁶³ *Ellis* CA Transcript, *supra* note 31 at 153.

⁶⁴ *Ibid* at 155.

⁶⁵ *Ibid* at 121.

⁶⁶ *Ibid* at 153–54.

⁶⁷ *Ibid* at 155.

⁶⁸ *Ibid* at 176.

counselling will not cure poverty. A six-week residential treatment program will not erase a history of trauma.⁶⁹

Drug use is complex, and so must be our approach to addressing it. On one point, Dr. McNeil expressed certainty: drug prohibition and criminalization are not the appropriate mechanism to deal with addictions and drug use.⁷⁰ Near the close of his testimony, Dr. McNeil opined as follows:

[T]o put it in really direct terms, if we're accepting that a substance use disorder or an opioid use disorder ... [is] a health thing, how and why are we there leading with the criminal justice system ... our current approach to drug use really does nothing but drive harm, including increasing overdose risks, while really not producing positive outcomes for people.⁷¹

Dr. McNeil pointed to leading research and findings associated with the United Nations Aids Program which advocates for a shift toward drug decriminalization, which would remove criminal sanctions for the offence of personal drug possession.⁷² Dr. McNeil's testimony revealed that criminal courts need to re-envision their perceived role in addressing crime impacted by drug use.

A. THE PROBLEM WITH DENUNCIATION, DETERRENCE, AND INCARCERATION

Deterrence is the keystone of the criminal law. The theory of deterrence contends that when applied appropriately, punishments can effectively shape behaviour so as to prevent future offending.⁷³ The assumption underlying deterrence as a goal of sentencing is that the threat or example of punishment discourages crime.⁷⁴ Based on the initial observations of Thomas Hobbes, Cesare Beccaria, and Jeremy Bentham, criminal deterrence theory implies that individuals evaluate the positive and negative outcomes of committing a crime before acting.⁷⁵

Deterrent sentences theoretically work on two levels. General deterrence targets society itself, including potential offenders, to demonstrate the consequences of committing the offence in question.⁷⁶ Specific or individual deterrence aims to prevent the offender from repeating the crime.⁷⁷

The assumption that an individual makes a rational, cost-benefit analysis prior to committing a given offence and only acts when the potential benefits are outweighed by the

⁶⁹ *Ibid* at 157, 169.

⁷⁰ *Ibid* at 120–21.

⁷¹ *Ibid* at 161–62.

⁷² *Ibid* at 161.

⁷³ Ronald L Akers, "Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken" (1990) 81:3 *J Crim L & Criminology* 653 at 653–54.

⁷⁴ Clayton Ruby, *Sentencing*, 4th ed (Toronto: Butterworths, 1994) at 7.

⁷⁵ Beccaria, *On Crimes and Punishments and Other Writings*, Richard Bellamy, ed, translated by Richard Davies (Cambridge, UK: Cambridge University Press, 1995); Jeremy Bentham, "Principles of Penal Law" in John Bowring, ed, *The Works of Jeremy Bentham, Principles of Penal Law* (Edinburgh: William Tait, 1843) 361 at 361; Thomas Hobbes, *Leviathan* (Minneapolis: Lerner Publishing Group, 2018).

⁷⁶ Ruby, *supra* note 74 at 11.

⁷⁷ *Ibid* at 13.

expected costs is misplaced. This perspective fails to account for the myriad socioeconomic factors known to impact decision-making processes, particularly in the case of an offender experiencing addiction. Due to the nature of drug use and the factors underlying it, people who use drugs are, in general, not accurately represented by the archetypal (and highly contestable) “rational man,” which problematically adopts classical deterrence theory as a one-size-fits-all response to any and all criminal behaviour, with disastrous effects and unequal application.

Research suggests that a punitive approach to drug use, or one that increases prison sentences for people who use drugs or who engage in street-level trafficking, is not an effective response to the opioid crisis. Addiction and drug use cannot be “cured” or necessarily prevented by the threat of punishment. It would be similarly acontextual and lacking an evidentiary basis to expect that the criminalization of drug-related activities — activities that were oftentimes undertaken in the first place by the individual to address addiction and other social determinants, per the evidence of Dr. McNeil — will prevent or deter the future commission of these offences.

As the evidence of both Ellis and Dr. McNeil attest, so long as the social factors underpinning drug use and drug dealing persist, so too will drug use and drug dealing themselves, regardless of how hard the criminal justice system comes down. As deterrence and addiction are incompatible, so too is “cracking down” on people who deal drugs to get by in the face of immense structural barriers and setbacks. “Tough on crime” approaches to drug trafficking also ignore the fact that street-based drug dealers oftentimes play a key role in harm reduction during the opioid crisis, as Dr. McNeil’s evidence demonstrates.

By contrast, and as Dr. McNeil’s evidence shows, extracting the street-based drug dealer from his role puts his clientele at greater risk of overdose and of purchasing supply of unknown toxicity from a lesser or unknown dealer. Criminalizing the drug dealer does not, as Ellis noted, deter the drug dealer from dealing again, much less deter either the dealer or his clientele from buying or selling drugs in future. Instead, it makes the dealer vulnerable to withdrawal and the likelihood of overdose upon release.

IV. THE SENTENCING JUDGE’S DECISION

In a courageous and principled display of judicial activism, the sentencing Court concluded that since the onset of the opioid crisis in 2016, and since *Smith*, there has been a fundamental shift in the societal understanding of drug addiction — the underlying causes, risk factors, and the best evidence-based treatment protocols and guidelines.⁷⁸ The sentencing Court further held that there has been a fundamental shift in understanding the consequences for those who are addicted — specifically the relationship between the addiction, the need to have access to a drug, the imperative to avoid the severe effects of withdrawal, and the low- or street-level trafficking of those drugs.⁷⁹ In Justice Flewelling’s reasoned decision, it was time for the criminal courts to revisit the sentencing range established in *Smith* for drug

⁷⁸ *Ellis PC*, *supra* note 2 at para 88.

⁷⁹ *Ibid.*

trafficking at the street-level and to reconsider the role of deterrence and denunciation in assessing a fit sentence for these individuals.

The sentencing Court placed emphasis on the principle of proportionality, holding that the principle was “best understood as an assessment of the gravity of the offence and the degree of responsibility of the offender and is one of the most fundamental tenets of our criminal justice system.”⁸⁰ The Court went on to explain “[t]hat is why people who commit offences while suffering from a mental disorder that renders them not criminally responsible, are not held criminally responsible for their actions.”⁸¹ Similarly, “mental health disorders that play a role in an offence are considered in assessing a fit and just sentence and will generally reduce the offender’s moral culpability.”⁸² In these cases, “emphasis is placed on rehabilitation and, in the context of the criminal justice system, doing the best it can to ensure that these offenders receive appropriate medical and psychiatric/psychological care.”⁸³ Rehabilitation of the offender was described as also serving “other objectives of sentencing, in particular, the protection of the community.”⁸⁴

While acknowledging that fentanyl is dangerous, ubiquitous, and that people are dying because of it, the Court acknowledged, echoing previous judgments from courts in British Columbia and elsewhere in Canada, “[t]here is a difference in the moral culpability of someone selling small quantities of drugs in an unsophisticated manner primarily to support their own substance use and, in contrast, the mid and high level, organized, sophisticated drug supplier/dealer who is not necessarily addicted, but profits substantially from the sale of these drugs.”⁸⁵

But as Ellis uniquely argued, these offenders are the rule and not the exception. The Court ultimately agreed that for those common offenders — those who experience addiction and who sell drugs as a means of subsistence — the range in *Smith* ought not apply. Ellis received a suspended sentence, the conditions of which were rehabilitative.⁸⁶ The PPSC quickly appealed, just as Ellis herself began to thrive. Following her sentence, indeed *because of* her sentence, she was receiving injectable opioid agonist treatment and had secured stable housing.

V. THE COURT OF APPEAL’S DECISION

The evidence of Dr. McNeil was largely ignored at the appellate level. Writing for the majority, Justice DeWitt-Van Oosten held that the sentencing range for fentanyl trafficking “reflects ‘judicial consensus on the *gravity of the offence*’ of street-level trafficking in fentanyl and is intended to ensure that the significant harms associated with this offence are

⁸⁰ *Ibid* at para 122.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at para 125.

⁸⁶ *Ibid* at paras 144–50.

‘consistently accounted for in sentencing’ ... this is done through an emphasis on deterrence and denunciation.’⁸⁷

The Court grounded its conclusion on sentencing range principles espoused in *Parranto*, wherein a majority of the Supreme Court held that sentencing ranges provide judges with a “place to start” in crafting a fit sentence.⁸⁸ These ranges do not factor in the characteristics of the offender.⁸⁹

The legal and factual contours of the *Ellis* decision showcase the problems of a sentencing framework based strictly on “offence-based considerations.”⁹⁰ First, while the sentencing jurisprudence holds that starting-points cannot be binding in either theory or practice,⁹¹ from a pragmatic perspective, the offender must convince the sentencing court *why* the prescribed range or “judicially imposed minimum sentence”⁹² is unfit in his or her case.

In asking the sentencing court to deviate from the prescribed range or starting point, the offender must establish that there are elements about his or her personal or background circumstances which cast them outside of the prescribed range. This exercise ultimately involves demonstrating that there is something “unique” or “exceptional” about the offender that warrants a unique sentence — a practice the Supreme Court and our appellate court has specifically rejected as “artificially constrain[ing]” a sentencing judge’s decision to impose a fit sentence.⁹³

The second problem of a sentencing framework based strictly on generalized “offence-based considerations” is that it fails to recognize the distinction between commercial trafficking for profit versus subsistence level drug-dealing. This is a distinction recognized by Justice Moldaver in *Parranto* where he held that his direction regarding the imposition of heavy penitentiary sentences “do not apply to sentences for street-level trafficking, or where traffickers are motivated by a need to support their own addiction.”⁹⁴ Instead, “the focus of this guidance is on the directing minds of largescale fentanyl trafficking operations.”⁹⁵

The effect of the analysis in *Ellis* is the prescribed range of 18 to 36 months jail is presumed to apply equally to commercial, profit-driven endeavours as it is to street-level, subsistence-based dealing. One of the key goals of the *Ellis* litigation — abolishing the range in *Smith* — was left unrealized. However, that disappointment was tempered by the generous gateway created for the future use of social context evidence. As set out below, the gradual

⁸⁷ *Ellis CA*, *supra* note 9 at 164, quoting *R v Parranto*, 2021 SCC 46 at para 20 [emphasis added] [*Parranto*].

⁸⁸ *Parranto*, *ibid* at para 16.

⁸⁹ *Ibid* at para 47.

⁹⁰ *Ibid*.

⁹¹ *R v Lacasse*, 2015 SCC 64; *R v Friesen*, 2020 SCC 9 [*Friesen*]; *R v Nasogaluak*, 2010 SCC 6; *R v McDonnell*, [1997] 1 SCR 948.

⁹² *R v Legerton*, 2015 ABCA 79 at para 12.

⁹³ *Parranto*, *supra* note 87 at para 40, quoting *Friesen*, *supra* note 91 at paras 111–12; *R v Choi*, 2022 BCCA 90 at para 22.

⁹⁴ *Parranto*, *ibid* at para 99.

⁹⁵ *Ibid*.

incorporation of substance use research in sentencing courts may pave the way for a more educated (and compassionate) response to the opioid crisis and the crime it generates.

A. GLIMMERS OF HOPE: THE OPENING OF A GENEROUS GATEWAY FOR SOCIAL CONTEXT EVIDENCE

The most valuable pronouncements in a decision that otherwise fell short pertain to the use of social context evidence. Justice DeWitt-Van Oosten held that the use of social context evidence is “consistent with long-standing sentencing practices and principles, and logically fits within the existing statutory and common law sentencing framework.”⁹⁶ The Court further held that:

As a matter of logic, common sense and inferential reasoning, a sentencing judge may find “some connection” between social context evidence and an offender’s personal circumstances based on information provided about that offender through the offender’s testimony, court-ordered or privately-retained reports specific to the offender, affidavit evidence, admissions or uncontested statements by counsel.⁹⁷

The *Ellis* Court’s acceptance of social context evidence was rooted in the analysis of the Ontario Court of Appeal in *R. v. Morris*.⁹⁸

In *Morris*, the Crown appealed a sentence imposed for a firearm offence. Mr. Morris, a 23 year old Black man submitted to the sentencing Court a report considered “a scholarly, comprehensive, and compelling description of the widespread and pernicious effect of anti-Black racism.”⁹⁹ A second report was also admitted, which included a review of Morris’ social history and sought to link Morris’ personal circumstances to the first report’s commentary on systemic racism.

The Ontario Court of Appeal held that the first report was admissible as social context evidence because it could assist the sentencing court in assessing moral blameworthiness and provide valuable insight for the application of denunciation and deterrence.¹⁰⁰ The Court of Appeal in *Ellis* appended several paragraphs from the judgment in *Morris* which emphasized the ways the in which social context evidence could give added weight to the objective of rehabilitation and less weight to the objective of specific deterrence, and allow the sentencing judge to obtain an accurate picture of the offender as a person and a member of society.¹⁰¹

Accordingly, the *Ellis* Court directed that moving forward, sentencing judges ought to leave a generous gateway for the admission of objective and balanced social context evidence.¹⁰² These pronouncements should encourage defence counsel to rely on social context evidence and corresponding scientific literature in challenging some of the commonly held assumptions about the opioid epidemic, and debunking the myths underlying

⁹⁶ *Ellis CA*, *supra* note 9 at para 78.

⁹⁷ *Ibid* at para 87.

⁹⁸ 2021 ONCA 680 [*Morris*].

⁹⁹ *Ibid* at para 42.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ellis CA*, *supra* note 9 at para 76 citing *Morris*, *supra* note 98 at paras 75–106.

¹⁰² *Ellis CA*, *ibid* at para 77.

legal, social, and policy issues that contribute to our current “tough on crime” approach to subsistence-based drug dealing.

Moreover, there is an ethical and moral *responsibility* on defence counsel who are confronted by clients generating crime as a result of a substance use disorder to educate the court about the evidence based approaches to rehabilitation and accordingly the “long term protection of the public.”¹⁰³ One of the goals of the *Ellis* litigation was to pave the way for voices like Dr. Ryan McNeil to feature more prominently in the sentencing of those offenders plagued by systemic vulnerabilities. Defence counsel can now rely on his findings and related research when informing the court about the value of traditional concepts of deterrence and denunciation when dealing with offenders similar to *Ellis*.

Good law requires good evidence. As Canada enters its seventh year of the opioid crisis, evidence of the inefficacy and harm of prohibition-based drug policy has never been stronger. Though *Ellis* missed an opportunity to restructure sentencing for the majority of people not served by our current and outdated approach, it did create the conditions for smarter sentencing at the individual level by prioritizing science over stigma. *Ellis* is the rule, not the exception; her legacy, in the form of this ruling, is just the beginning for a new frontier of sentencing.

¹⁰³ The Canadian *Criminal Code*’s primary sentencing goal (*Criminal Code*, RSC 1985, c C-46, s 718).

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