

Safe Supply Legal Brief

Revision 2.0

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On behalf of the Coalition of Peers Dismantling the Drug War

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Introduction

On Thursday, April 14, 2016, BC’s provincial health officer declared a public health emergency in response to the rise in drug overdoses and deaths.

Reference: <http://www.bccdc.ca/about/news-stories/stories/public-health-emergency-in-bc>

Overdoses numbers have remained relatively constant despite the government’s “best efforts”, and 7,422 people have died since 2016.

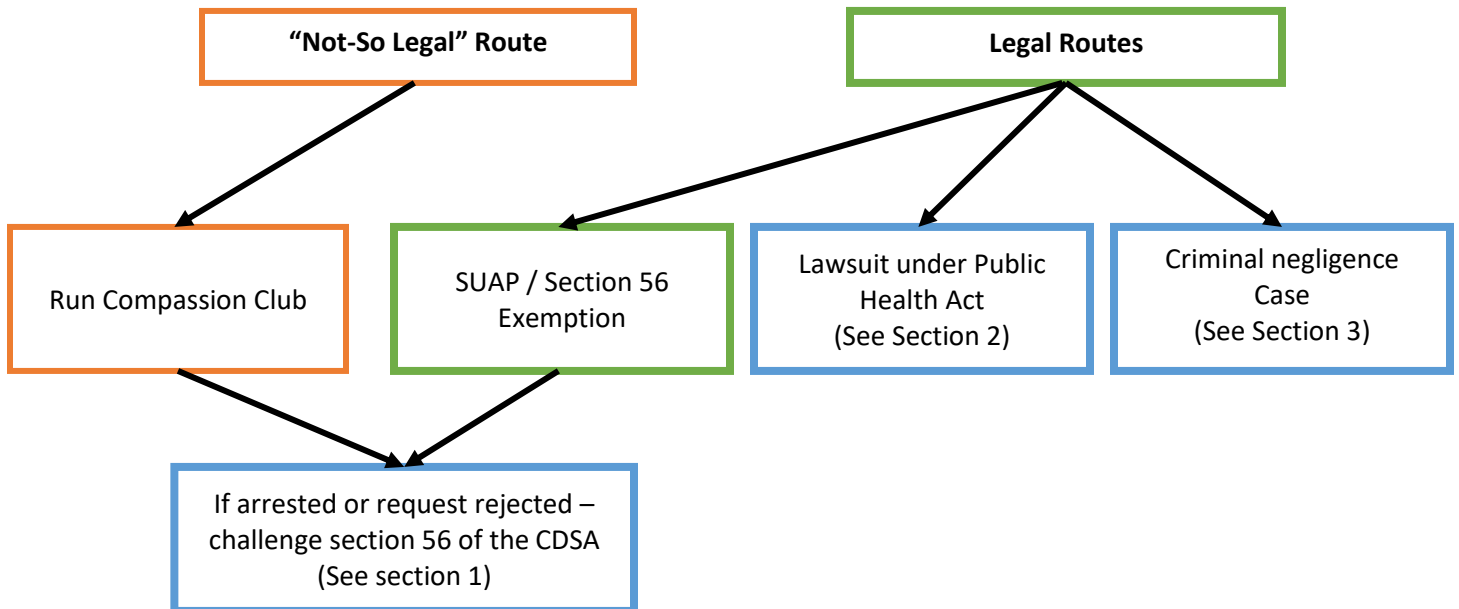
Reference: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/statistical/illicit-drug.pdf>

The issue remains one of *policy* and not one of individual choice. People are dying because of the unpredictability of the content of their drugs (i.e. when you buy drugs off the street the strength and content of the drugs varies **wildly** due to a lack of a stable and regulated market). Moreover, the rate of death has been compounded by COVID, the prison and housing systems, etc. There is a massively increased risk of opiate overdose if you are opiate naïve and are using stimulants, specifically crack cocaine and methamphetamine. Much of the cross-contamination and supply volatility happens at low level, and therefore it is difficult to prevent.

Medical models of so called “safe supply” are ineffective because individuals turn to street drugs if said models do not allow them to get as high as they would like. Decriminalizing possession won’t fix the problem, as it ultimately only causes one side of a transactional relationship to come above board (i.e. you can possess drugs but you can’t sell them).

Ultimately, we need quickly scaled up safe supply for all, and ideally, one that is accessible for people who have chaotic patterns of use, as well as those who do not.

Our “Options” in a “Nutshell”



Section 1 – Drug Distribution Model

The idea of distributing drugs to prevent opiate overdoses is simple. Primarily, people are dying because they do not know the content of the drugs they are using. Secondly, there is not enough of an education framework around how to use drugs safely while still getting high to one's satisfaction, this is most explicit if you examine the way most children are put in abstinence style education programs ("just say no"), which do not give them the knowledge or foresight to understand how drugs effect the human body. To combat this, drugs with a *stated and labelled content* must be distributed, and peer-to-peer support and education must be provided to folks who are using the drugs, especially for those with a chaotic pattern of use.

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[Alcohol is the most dangerous drug of all](#), but it is sold in a regulated and safe fashion, where it is labelled, controlled, and the public is educated about it. The prohibition of alcohol caused an increase in profits to organized crime, as well as mass toxicity in the alcohol supply, which was greatly reduced after it was legalized. This is not to say that alcohol does not kill people, it does, yet it remains legal to prevent the mass social harm caused by its prohibition. In a similar vein, tobacco is sold and regulated, yet rates of smoking are substantively lower than in the mid 20th century due to public education campaigns, and more recently, the way that it is marketed and sold in stores.

N.B. Could you imagine a world where you went into a liquor store and all the bottles and cans were unlabelled, some containing methanol, and some beer cans containing liquor, and vice versa? This is basically a direct comparison the way the illicit narcotic market operates currently.

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[Compassion clubs](#) are a model based around care for users, wherein the club distributes safe drugs to its members, and comes alongside them to ensure they are safe and using drugs in a way that feels good for them. Although this may be the easiest way to get a foothold in dismantling the regime of narcotic prohibition, it also does not allow folks to access drugs if they are not a screened member. This may mean that the barriers to access remain too high to prevent death in the general populace.

Ultimately, there two options for distributing drugs, and time is of the essence due to accelerating rate of death. One, which we shall call the "not-so legal route" involves distributing drugs illegally without the permission from the government. The other, which we shall call the "legal route", involves receiving a Section 56 exemption from the Controlled Drugs and Substances Act (CDSA) in order to distribute drugs to folks. Section 56 is the so-called "safety valve" of this peace of legislation should its parameters become more harmful to society than beneficial.

Dismantling the CDSA itself will prove difficult as its stated dual purpose is "the protection of public health and the maintenance of public safety".

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In order to receive a distribute drugs legally and gain an exemption, there are several routes:

1. Pressure is applied to the Canadian government, who under their inherent jurisdiction over all law, can permit low barrier poly-substance dispensation centres (using a storefront model) to open, which would ideally include collocated services (i.e. peer referrals to treatment or detox), as well as mail order services for folks who live rurally.
2. An application is written and submitted for a Section 56 exemption to distribute controlled legal narcotics from a storefront, if the exemption is not granted, challenge to the CDSA under Section 7 of the Charter of Rights and Freedoms.

Alternatively, one could run an illegal narcotic dispensary or illicit drug market without a Section 56 exemption. In this model, illicit and illegal drugs are tested and sold so that people know what is in them. This option is less palatable due to the increased probability of arrest and charges being laid, but could lead to a Section 7 Charter Challenge of the CDSA's clauses on trafficking and possession with intent. One also runs the risk of catching charges for acting as an organized criminal institution – which carry substantive jail sentences. Nevertheless, this may be the *ONLY* option left to keep people alive, given the governments inane and ignorant approach to the ongoing crisis.

The basic argument of either route is that, by not allowing an exemption for the safe controlled sale of ALL drugs, the government is infringing on people who use drug's charter right to their own lives and security of person. With this said, any direct Charter challenge against the sale or scheduling of drugs may prove ineffective, and will probably only cause the government to expand section 56 of CDSA. This opinion is grounded in Insite's Supreme Court case ruling:

“Indeed, if one were to set out to draft a law that combats drug abuse while respecting Charter rights, one might well adopt just this type of scheme —a prohibition combined with the power to grant exemptions. If there is a Charter problem, it lies not in the statute but in the Minister’s exercise of the power the statute gives him to grant appropriate exemptions.”

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Relevant sections of the law:

Controlled Drugs and Substances Act

Section 56

(1) The Minister may, on any terms and conditions that the Minister considers necessary, exempt from the application of all or any of the provisions of this Act or the regulations any person or class of persons or any controlled substance or precursor or any class of either of them if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

(2) The Minister is not authorized under subsection (1) to grant an exemption for a medical purpose that would allow activities in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act to take place at a supervised consumption site

Canadian Charter of Rights and Freedoms

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

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Other relevant Information:

One could use the administrative law and argue [Doré Charter values](#).

If the government requires a prescription model, and no prescribing doctors agree to come forward, then one could sue, arguing that the government has stonewalled the actual process of keeping folks safe.

Section 2 – Lawsuit under the Public Health Act

There are potential options for civil action and litigation, which may be very difficult to actualize. These civil actions could give money back to communities adversely affected by overdose and potentially push the government to grant an institution the opportunity to run a low barrier project as stated in Section 1. Examples of civil action include:

- 1) A civil suit against the government and other operators under Section 99 of B.C.'s Public Health Act.
- 2) A class action suit against the government for criminal negligence under the Canadian Criminal Code on behalf of overdose responders (see Section 3).

Important Note: Legally, the government of Canada has a presumption of good will and good faith – meaning that, if they have done anything at all (even circulating anti-drug “just say no” propaganda), it may be difficult to prove negligence or causation. Moreover, federal law – the CDSA – will generally trump provincial law – the Public Health Act – meaning that it may be difficult to sue the government for not providing a safe supply when regulations exist governing and preventing the provision of said supply in the interest of public safety.

On the face of things, it may be possible to sue the government for a “failure to prevent a health hazard” under the Public Health Act. As mentioned before, federal laws generally trump provincial laws. However, Canadian legal doctrine indicates that federalism is slightly more nuanced and that provincial health laws can trump criminal law. Ultimately, this issue comes down to paramountcy (impossibility of dual compliance). Moreover, we need to have a good example of the creation a health hazard, that is, where an institution created the hazard with bad health policy. The Court is likely to be deferential here. And one must choose their target - is it the government? Is it the Royal College of Physicians and Surgeons, or the College Canon of ethics? Etc.

See also: [Morgentaler/Nova Scotia Case](#)

Relevant Sections of the Law:

B.C. PUBLIC HEALTH ACT

Part 1 – Definitions and Interpretation

Definitions

"Health hazard" means

- (a) a condition, a thing or an activity that
 - (i) endangers, or is likely to endanger, public health,
- [...]

"Operator" means a person who performs a regulated activity, and includes any person who assists, directs, supervises or employs that person for the purpose of doing the regulated activity.

Interpretation

Section 2

- (1) Unless a contrary intention is expressed, a reference in this Act or a regulation made under it to:
 - (a) a building or structure, includes part of the building or structure, or

(b) a place, includes part of the place, any natural or artificial feature on or in the place, and any building or structure located on the place.

(2) If the context requires it, a reference to a person includes a person having authority under the common law or an enactment to make personal and health care decisions in respect of the person.

(3) For the purposes of this Act and the regulations made under it, a condition, situation or thing is caused by a person or another thing if the person or other thing

- (a) contributes beyond a minimal extent to the happening or existence of the condition, situation or thing, or
- (b) directly or indirectly causes the condition, situation or thing.

Minister may require public health plans

Section 3

(1) To promote and protect health and well-being, the minister may by order require a public body to make, in respect of a specific issue or geographic area, a public health plan.

(2) The minister may specify one or more of the following as the purposes of the public health plan:

- (a) to identify and address the health needs of particular groups within the population, including aboriginal peoples;
- (b) to monitor and assess the status of the health of the population, including through public health surveillance and monitoring indicators of, or factors influencing, the health of the population;
- (c) to prevent and mitigate the adverse effects of diseases and disabilities, syndromes, psychosocial disorders, injuries and health hazards;
- (d) to identify, prevent and mitigate the adverse effects of health impediments;
- (e) to facilitate or plan for the delivery of core public health functions;
- (f) to achieve a prescribed purpose.

Open Ended Questions: Does the government have to publish a health plan? Is this “BC’S OVERDOSE ACTION PLAN”? Why has no public health plan been released? Can an institution put pressure on the government to release a safe supply health plan?

Must not cause health hazard

Section 15

A person must not willingly cause a health hazard, or act in a manner that the person knows, or ought to know, will cause a health hazard.

Offences

Section 99

(1) A person who contravenes any of the following provisions commits an offence:

- (a) section 3 [failure to make a health plan];
- (b) section 4 (1) [failure to submit, revise or publish a public health plan];
- (c) section 8 (1) or (2) [failure to submit, revise or publish a public health plan];
- (d) sections 10 to 13 [failure to make reports, make records, take samples or do other required things; failure to perform diagnostic examinations];
- (e) section 14 (3) [failure to provide information];

- (f) section 16 [failure to take or provide preventive measures, or being in a place or doing a thing without having taken preventive measures];
- (g) section 17 (2) [failure to take steps to avoid transmission, seek advice or comply with instructions];
- (h) section 24 (3) [failure to comply with orders respecting inspections];
- (i) section 40 (4) [failure to comply with instructions];
- (j) section 41 (2) [removing, defacing or altering a posted order];
- (k) section 42 [failure to comply with an order of a health officer], except in respect of an order made under section 29 (2) (e) to (g) [orders respecting examinations, diagnostic examinations or preventive measures];
- (l) section 56 (2) or (3) [failure to take emergency preventive measures or comply with instructions], except in respect of an order to do a thing described in section 29 (2) (e) to (g);
- (m) section 57 [failure to make a report in an emergency];
- (n) section 94 [taking an adverse action against a person].

(2) A person who contravenes any of the following commits an offence:

- (a) section 18 [failure to prevent or respond to health hazards, train or equip employees, or comply with a requirement or duty];
- (b) section 22 [failure to comply with the regulations or train or equip employees]; (c) section 91 [unauthorized disclosure of personal information].

(3) A person who contravenes either of the following commits an offence:

- (a) section 15 [causes a health hazard];
- (b) section 26 [failure to provide a designated quarantine facility].

(4) A person who does either of the following commits an offence:

- (a) knowingly provides false or misleading information to a person who is exercising a power or performing a duty under this Act, or a person acting under the order or direction of that person;
- (b) wilfully interferes with, or obstructs, a person who is exercising a power or performing a duty under this Act, or a person acting under the order or direction of that person.

(5) A person who commits an offence under this Act may be liable for the offence whether or not an order is made under this Act in respect of the matter.

(6) A proceeding for an offence under this Act may not be commenced in any court more than 2 years after the facts on which the proceeding is based first come to the knowledge of the minister.

Purposes of sentencing

Section 106

- (1) In imposing a sentence, a sentencing judge may impose one or more penalties that, in order, achieve the following:
- (a) first,
 - (i) if harm was caused, remedy the harm or compensate a person who remedied or suffered the harm, including the government

Fines and incarceration

Section 108

- (1) In addition to a penalty imposed under section 107 [alternative penalties], a person who commits an offence listed in (a) section 99 (1) [offences] is liable on conviction to a fine not exceeding \$25 000 or to imprisonment for a term not exceeding 6 months, or to both,

(b) section 99 (2) or (4) is liable on conviction to a fine not exceeding \$200 000 or to imprisonment for a term not exceeding 6 months, or to both, or

(c) section 99 (3) is liable on conviction to a fine not exceeding \$3 000 000 or to imprisonment for a term not exceeding 36 months, or to both.

Section 3 – Criminal Negligence Lawsuit

Author's note: this is the part of the law I am most unclear on.

Ostensibly, one *could* sue the government for potential criminal/tort negligence due to wanton disregard of the mental health of overdose responders and their failure to show regard, based on existing evidence and clinical trials, for the lives and safety of drug users. With this said, private prosecutions of this type are rare. Nevertheless, suing the government over the opioid crisis for criminal negligence *COULD* be possible if it was a class action suit on behalf of support workers, and anyone responding to overdoses, against the government for emotional damages due to the opioid crisis. There are some particular incident examples that show where civil negligence (tort) might be effective. The case would be based around the principles of fiduciary duty; parens patriae; duty of care; etc.

Tort negligence occurs when the following concepts are not met:

1. Duty of care
 - a. Reasonably foreseeable that another individual will suffer harm
2. Standard of care
 - a. What would a reasonable person have done in a similar circumstance
3. Causation
 - a. That the defendant actually caused that injury
4. Remoteness
 - a. The resulting injury or damage could be reasonably foreseen at the time

Note: A group in Quebec recently sued the federal government over climate change. One could think about this as a parallel lawsuit with larger population of individuals.

Note: It is VERY difficult to prove, if not impossible to prove, that inaction implies criminal negligence.

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Relevant Sections of the Law:

Canadian Criminal Code

Criminal Negligence

Section 219

- (1) Every one is criminally negligent who
- (a) in doing anything, or
 - (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

Definition of duty

- (2) For the purposes of this section, duty means a duty imposed by law

<p>Note: "Willful and wanton disregard" suggests that the danger of an action is understood by an individual, and that they know it is likely to cause a substantial harm, yet they do it anyway.</p>
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Information, Summons and Warrant

Section 504

Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside, within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

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See also: [Ryan v. Victoria](#)

Author's note: I'm not actually sure how useful this is but there is precedent that says:

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury.

Other Potentially Useful Legal Information

Controlled Drugs and Substances Act

Regulations and Exemptions

Section 55

(1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including the regulation of the medical, scientific and industrial applications and distribution of controlled substances and precursors and the enforcement of this Act, as well as the regulation of designated devices and, without restricting the generality of the foregoing, may make regulations

(a) governing, controlling, limiting, authorizing the importation into Canada, exportation from Canada, production, packaging, sending, transportation, delivery, sale, provision, administration, possession or obtaining of or other dealing in any controlled substances or precursor or any class thereof;

(b) respecting the circumstances in which, the conditions subject to which and the persons or classes of persons by whom any controlled substances or precursor or any class thereof may be imported into Canada, exported from Canada, produced, packaged, sent, transported, delivered, sold, provided, administered, possessed, obtained or otherwise dealt in, as well as the means by which and the persons or classes of persons by whom such activities may be authorized;

Canadian Health Care Policy

Primary objective of Canadian health care policy

Section 3

It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

Insite Supreme Court Judgments

[136] The Minister made a decision not to extend the exemption from the application of the federal drug laws to Insite. The effect of that decision, but for the trial judge's interim order, would have been to prevent injection drug users from accessing the health services offered by Insite, threatening the health and indeed the lives of the potential clients. The Minister's decision thus engages the claimants' s. 7 interests and constitutes a limit on their s. 7 rights. Based on the information available to the Minister, this limit is not in accordance with the principles of fundamental justice. It is arbitrary, undermining the very purposes of the CDSA, which include public health and safety. It is also grossly disproportionate: the 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.

[156] The CDSA is constitutionally valid and applies to the activities at Insite. However, the Minister of Health's actions in refusing to exempt Insite from the operation of the CDSA are in violation of the respondents' s. 7 Charter rights. The Minister is ordered to grant an exemption for Insite under s. 56 of the CDSA.

Canadian Criminal Code

Instructing commission of offence for criminal organization

Section 467.13

(1) Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and **liable to imprisonment for life**.

Section 467.1

(1) The following definitions apply in this Act.

criminal organization means a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

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

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

serious offence means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.

Controlled Drugs and Substances Act

Trafficking in substance

Section 5

(1) No person shall traffic in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a substance.

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.

(3) Every person who contravenes subsection (1) or (2)

(a) if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to **imprisonment for life**, and

(i) to a minimum punishment of imprisonment for a term of one year if

(A) the person committed the offence for the benefit of, at the direction of or in association with a criminal organization, as defined in subsection 467.1(1) of the Criminal Code,

(B) the person used or threatened to use violence in committing the offence,

(C) the person carried, used or threatened to use a weapon in committing the offence, or

(D) the person was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years, or

(ii) to a minimum punishment of imprisonment for a term of two years if

(A) the person committed the offence in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years,

(B) the person committed the offence in a prison, as defined in section 2 of the Criminal Code, or on its grounds, or

(C) the person used the services of a person under the age of 18 years, or involved such a person, in committing the offence;

(b) if the subject matter of the offence is a substance included in Schedule III or V,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or

- (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; and
- (c) where the subject-matter of the offence is a substance included in Schedule IV,
 - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or
 - (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

Unanswered Questions

If we are going to DIY this, then where the fuck are we going to get enough heroin to meet the demand?

What in the heck are the Fair Price Pharma people doing?

How do we get heroin (diacetylmorphine) a Drug Identification Number (DIN) so that it can be manufactured in Canada?

- Does alcohol have a DIN?

What is the crossover between the Food and Drugs Act and all of this?