

LIDSTONE & COMPANY
BARRISTERS AND SOLICITORS

MEMORANDUM

TO: Clients
FROM: Recky Lai
DATE: February 15, 2023
RE: Decriminalization
FILE: 99999 - 044

The aim of this bulletin is to provide an overview of the federal exemption granted to the Province of BC to decriminalize the possession of certain illegal drugs. We also flag some impacts and risks this exemption may create for local governments.

1. Overview of the Exemption

In response to a request from the Province of British Columbia and pursuant to subsection 56(1) of the *Controlled Drugs and Substances Act (CDSA)*, the Federal Government has issued a “class exemption” from the prohibition on possession of certain controlled substances in subsection 4(1) of the *CDSA*. The exemption is in effect from January 31, 2023 to January 31, 2026 and enables adults (18 years of age and older) in BC to possess up to a cumulative total of 2.5 grams of opioids (such as heroin, morphine, or fentanyl), cocaine, methamphetamine, or MDMA for personal use (the “Exemption”). Under the Exemption, adults found in possession of the listed substances will not be subject to criminal charges but will be provided with information on available local health and social services. The Exemption is only applicable if the possession of the illegal substance is for personal use with no intention to traffic.

The Exemption does not apply in respect to childcare facilities, K-12 school premises, airports, or a motor vehicle or watercraft operated by a minor regardless of whether the motor vehicle or watercraft is in motion. Further, if the illegal substance is possessed on rail transportation, in a motor vehicle or on watercraft, the illegal substance must not be readily accessible to the driver or operator. The Exemption also does not apply to a Canadian Armed Forces member who is subject to the Code of Service Discipline.

2. Impacts on Local Government

Local governments have no “direct” jurisdiction over illicit drugs. The federal government has sole jurisdiction to regulate in relation to criminal law and legislation with respect to the possession and use of illicit drugs falls under the

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criminal law power. In other words, the federal government has sole authority over what conduct with respect to illicit drugs is criminal.

Although the federal government has exclusive jurisdiction over criminal law, local governments do have powers to create bylaws regarding matters that may have incidental effects on federal criminal law power if those bylaws have a valid municipal purpose and do not make it impossible for a citizen to comply with the federal law. This would include regulating businesses, prohibiting sales of the drugs, regulating smoking, and regulating nuisances and littering in public places. Section 8(3) of the *Community Charter* is authority for these regulatory bylaws. The bylaws must be crafted with care to ensure they do not frustrate the purpose of the federal law.

3. Risks to Local Governments related to Legislating Illegal Substances.

a. Paramountcy

Paramountcy is a constitutional doctrine that is invoked in cases where there is a conflict between federal and provincial (which includes local government) law. Where a qualifying conflict exists, the federal law prevails and can trump a municipal bylaw to the extent of the inconsistency. There are two types of conflicts that could trigger the paramountcy doctrine: 1) where it is impossible to comply with both the federal and provincial/municipal enactments and 2) where compliance with both enactments is possible but compliance with the provincial/municipal law undermines the federal law.

Arguably, where the federal government has given express permission to possess certain types and quantities of illicit drugs, but a local government bylaw precludes that very activity, it is arguable that the bylaw would frustrate the purpose of the federal law, such that the bylaw would not apply.

b. Human Rights Code/Charter of Rights and Freedom

Bylaws that limit the consumption, sale, or possession of illegal substances could create challenges under the *Human Rights Code* (the “Code”) or the *Canadian Charter of Rights and Freedom* (the “Charter”). Bylaws related to illegal substances could be seen to have disproportionate impacts on people experiencing homelessness or certain racial groups, which could lead to challenges under the *Code* or the *Charter*.

Enforcement of bylaws related to illegal substances could also result in challenges under the *Code* or the *Charter*. While local governments have discretion over how bylaws are enforced, they cannot exercise that discretion in a manner that is inconsistent with the *Code*. As a result, it is possible that an individual or group could challenge a municipality’s bylaw enforcement action on the basis that it discriminates against people with addiction (which is a disability under the *Code*). Further, without authority to seize the substance an individual is consuming, bylaw enforcement officers will have difficulty determining whether the substance is one that is included under the Exemption. This could result in claims of unreasonable search and seizure under section 8 of the *Charter*.

Enforcement of the federal criminal and drug laws is expected to be under the purview of peace officers.

In sum, despite the Exemption, local governments could still regulate illicit substances; however, there may be constitutional, human rights or *Charter* concerns. We think that regulation and enforcement would be least risky under bylaws of general application, and if it remains focused on matters that squarely fall within municipal jurisdiction.