THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
New Brunswick Branch • Division du Nouveau-Brunswick

Submission re: Involuntary Treatment

I write on behalf of the New Brunswick Branch of the Canadian Bar Association (CBA NB). This submission was prepared by our Constitutional, Human Rights and Equity Section and approved by CBA NB Council. This submission follows our meeting with the Attorney General in October 2023, in which we were invited to make submissions concerning the proposal of Public Safety Minister Kris Austin to force persons with drug addictions to undergo treatment involuntarily.

CBA NB shares the Government of New Brunswick's concern regarding the number of people in our province with untreated drug and alcohol addictions. An estimated one in five New Brunswickers will experience a substance use disorder at some point in their lifetime.[1] Public Health NB statistics show that the rate of opioid deaths and the rate of all substance-related deaths in 2022 was the highest to date in our province.[2] There has also been an increase in drug-related hospitalizations.[3]

The per-person costs associated with substance use in New Brunswick are higher than the national average and amongst the highest in Canada; these include health care and lost productivity costs.[4] Minister Austin suggested in his public comments that part of the reason for the involuntary treatment proposal was the link between substance addictions and crime. While we acknowledge such a link, it is important also to note that criminal justice costs in our province attributable to substance use are amongst the lowest per-person in Canada.[5] There has also been a marked decrease in drug-related offences,[6] and drug-related offences currently constitute less than one percent of all reported criminal offences in New Brunswick.[7] Further, the relationship between crime and drug use is complex; whether an individual undergoes involuntary treatment has not been found to affect criminal recidivism.[8]

Above all else, whether the government proceeds with introducing legislation concerning involuntary drug treatment should be governed by the following principles:

- The legislation should be constitutionally compliant; specifically, it should not discriminate based on a prohibited ground (such as disability), and it should not restrict individuals' liberty or security of the person in a way that is fundamentally unfair or excessive; and

[1] Government of New Brunswick, "Mental Health and Substance Use Disorders in New Brunswick" (November 2016) Profiles on Health

[2] Public Health New Brunswick, "Opioid Related Harms in New Brunswick: Deaths, Overdoses and Take Home Naloxone Kits 2022 – Quarter 4" (May 2023).

[3] Government of Canada, "Opioid and Stimulant-Related Harms in Canada" (December 2023) Health Infobase.

[4] Canadian Centre on Substance Use and Addiction, "Canadian Substance Use Costs and Harms - 2007–2020" (Ottawa: CCSA, 2023) at 14, 25, and 33.

[5] *Ibid* at 41.

[6] RCMP, "New Brunswick RCMP 2021 Annual Report" (May 2023)

[7] *Ibid;* See also Government of New Brunswick, "Public Safety Crime Dashboards" Justice and Public Safety; and Statista, "Number of Drug Related Offences in Canada in 2021, by territory or province"

[8] D Werb, A Kamarulzaman *et al,* "The Effectiveness of Compulsory Drug Treatment: A Systemic Review" (2017) Int J Drug Policy 1 [Author Manuscript].

- Its approach should be evidence-based; that is, while we encourage governmental innovation in solving difficult problems, there should be a reasonable basis to believe that the proposal will work and result in successful outcomes for persons with addictions.

Regarding the latter point, we have serious concerns that there exists little evidence that involuntary treatment is effective on a long-term basis. A 2017 systemic review of existing studies found that the vast majority failed to detect any positive impact of involuntary treatment on drug use long-term.[9] Further, a 2022 study found that there was a significantly increased risk of death from overdose, particularly amongst young people.[10] We urge extreme caution in proceeding with this proposal, and if the government decides to move forward that it do so with the input of an expert advisory group of legal and medical personnel, as well as social workers who support persons with addictions.

The most obvious *Charter* right implicated by involuntary treatment regimes is section 7.[11] Where an individual's physical liberty is impeded (by being unable to leave a treatment facility or similar detention awaiting treatment), then the liberty interest is engaged. Further, life (and by implication security of the person) is engaged where state action enhances the risk of death.[12] As we have noted, there are studies that show an increased risk of death from involuntary treatment. Because it is obvious that life, liberty, and security of the person is engaged by involuntary treatment, the central question in determining whether it violates section 7 is compliance with "fundamental justice."

While fundamental justice does not necessarily require a particular type of process, it does require that the process be *fair* in light of the interests at stake. Here, physical liberty and potential risk of death engage the most fundamental interests of any person; therefore, it is likely a court would require that the government comply with a high degree of procedural fairness towards the person it seeks to force into treatment.

The US National Judicial Opioid Task Force suggests that the following are procedural elements that should be considered in deciding whether someone should be ordered into involuntary treatment [note: it assumed that all determinations would be made by a court]:

- Disclosure of all evidence that the state is relying upon to support an application for involuntary treatment (*e.g.* examinations by a psychologist or a psychiatrist; reports on the background and relationship of the individual requesting treatment; reports on any emergency committals of the person, etc.);
- Opportunity to secure an independent, professional evaluation from an expert of their choosing;
- The right to counsel;
- The right to be present at a hearing and to make submissions; and

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[9] *Ibid* at 9.

[10] Anders Ledberg and Therese Reitan, "Increased Risk of Death Immediately after Discharge from Compulsory Care for Substance Abuse" (2022) Drug and Alcohol Dependence 1.

[11] Section 7 reads: "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."

[12] *Carter v Canada*, [2015] 1 SCR 331.

- Adherence to time restrictions in the legislation (*i.e.* no illegal delays in bringing a matter to a hearing or *de facto* indefinite detentions without hearing).[13]

In *New Brunswick v G.(J),*[14] the Supreme Court of Canada ruled that given the significant interests at stake in child apprehension proceedings, a parent should be afforded state-funded counsel to represent their interests for a hearing to be fair. It is highly likely, therefore, that a court would require the government to extend legal aid to individuals the state seeks to detain for involuntary treatment.

In addition to procedural fairness, legal regimes must be substantively fair to comply with *Charter* section 7. In recent years, the Supreme Court of Canada has focussed on three elements of substantive fairness, namely, that the law cannot be arbitrary (the law has no connection to its objective), overbroad (the law catches some behaviour that aligns with its objective but goes too far), or grossly disproportionate (the deprivation of rights is totally out of sync with the objective of the measure, it has a "draconian" impact that does not accord with the norms of a free and democratic society).[15]

From Minister Austin's public statements, it appears that the objective of an involuntary treatment law would be to provide individuals with addictions appropriate treatment when the addiction itself precludes them from taking such steps, as well as to reduce criminality associated with substance use disorders. We have already noted that involuntary treatment laws have the potential to be arbitrary in that they heighten the risk of death in persons with addictions that they are purported to help and there is little evidence that they reduce criminal recidivism.[16] Whether such a law can avoid arbitrary, overbroad and grossly disproportionate results will depend on it being very carefully tailored to support persons with addictions who are not able to act in their own best interests to enter into voluntary treatment.

For instance, every US state that has legislation allowing for involuntary treatment, involuntary committal must be the least restrictive alternative (*i.e.* outpatient or medication-assisted treatment has not worked). As well, no jurisdiction permits an indefinite term of committal; typically such orders are for a maximum of 30 days (with the possibility of additional review and orders).[17] While the US Supreme Court has not directly ruled upon such schemes, it has suggested that its Constitution would require both proof of addiction and proof of dangerousness (to oneself or others). That is, the state cannot establish a *de facto* criminalization regime based simply on the status of individuals having addictions.[18]

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[13] National Judicial Opioid Task Force, "Involuntary Commitment and Guardianship Laws for Persons with a Substance Use Disorder" (October 2018) at 11.

[14] [1999] 3 SCR 46.

[15] *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

[16] See *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, for a similar case of arbitrariness found by the Supreme Court in relation to the federal government's decision not to approve safe injection sites for those suffering from addiction.

[17] National Judicial Opioid Task Force, *supra* note 13.

[18] *O'Conner v. Donaldson*, 422 U.S. 56 (1975); *Kansas v. Hendricks*, 521 U.S. 346 (1997); Caroline M. Parker, *et al*, "Involuntary Civil Commitment for Substance Use Disorders in Puerto Rico: Neglected Rights Violations and Implications for Legal Reform" (December 2022) 24(2) Health Hum Rts 59 .

In Canada, the Supreme Court has provided a similar opinion in the context of automatic, indefinite detention of persons acquitted as being "not criminally responsible" (NCR). There, the Court stated that the automatic, indeterminate detention of those found NCR was arbitrary because it did not require a hearing to assess the acquittee's present mental state and whether they remained dangerous.[19] Accordingly, the regime was unconstitutional for violating *Charter* sections 7 and 9 (the prohibition against arbitrary detention).

A regime of involuntary treatment also raises issues concerning compliance with the right to equality under *Charter* section 15. A recent decision of the Supreme Court of Canada struck down the mandatory placement on the sex offender registry of NCR individuals that were acquitted of sexual offences, without the possibility of applying to be exempted from the registry or the reporting requirements (unlike those found guilty). The Court found that the legislation made a clear distinction based on mental disability and the lack of access to an individualized assessment was discriminatory, perpetuating disadvantage faced by those with mental disabilities.[20]
Involuntary treatment regimes could be said to rely on a stereotype that those with addictions are incapable of making treatment decisions in their best interests. In fact, Minister Austin made comments to this effect in explaining his rationale for the legislation.[21] A 2019 US article on the subject concludes that:

> A few studies have assessed the decisional capacities of people with substance use disorders, and although the findings in this area are mixed, they do not conclusively establish that drug users are incapable of making competent treatment decisions on their own. There is a place for civil commitment, but without a judicial determination of incompetence, using civil commitment to confine drug users is a dangerous exercise of the *parens patriae* power.[22]

In fact, when law enforcement agencies establish diversion programs in which drug users are given the option to enter treatment without fear of arrest, three-quarters complete the treatment.[23] Here in Canada, "drug treatment courts" that provide accused persons with the option of court-supervised treatment rather than criminal convictions and potential incarceration have been effective at reducing recidivism.[24] This demonstrates the ability of persons with addictions to exercise personal autonomy to make good treatment decisions. Drug treatment courts do not exist in New Brunswick.[25]

A court would be more likely to find that such legislation relies on stereotype when the government has not allocated sufficient resources to ensure that everyone who wish to enter detox and treatment voluntarily may do so. Typically, approximately 3 months of treatment after detox is needed for someone to overcome addiction and to reduce susceptibility to overdose. Recently, ten detox beds in Moncton had to close permanently because of nursing shortages. Wait times for in-patient addiction

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[19] *R v Swain,* [1991] 1 SCR 933.

[20] *Ontario (Attorney General) v. G*, 2020 SCC 38.

[21] Aidan Cox, "N.B. pursuing legislation that could see drug users subject to involuntary treatment," (September 8, 2023), *CBC News.*

[22] Candice T. Player, "Involuntary Civil Commitment: A Solution to the Opioid Crisis?" (2019) 71(2) Rutgers UL Rev 589 at 630.

[23] Player, *supra,* note 22.

[24] Department of Justice Canada, "Drug Treatment Court Funding Program Evaluation," online: https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2015/dtcfp-pftdt/p5.html [Date modified: 2022-05-13].

[25] There is a "Healing to Wellness" Court limited to the Elsipogtog First Nations community.

treatment can be as long as six months, exacerbated by construction delays at the new Campbellton treatment centre.

Involuntary treatment regimes can be expected to further the disadvantage of those with addictions, who already experience stigma in accessing health care.[26] Indigenous peoples are disproportionately impacted by addiction. Given the historical experiences of Indigenous peoples with state coercion in their personal lives, from residential schools to child apprehension, as well as unwanted medical treatment through medical experimentation and forced sterilization, one could expect that involuntary treatment would have a particularly negative impact upon them.[27]
The Supreme Court of Canada has never found that legislation that deprives individuals of life, liberty, and security of the person in a fundamentally unjust manner can be justified under section 1. It is also rare that the Court finds that discriminatory legislation may impose a justifiable limitation of rights. At the very least, to constitute a reasonable limitation of rights, the government should be prepared to explain why the existing regime of involuntary commitment under the *Mental Health Act* is inadequate to address the issue of those suffering from addictions who pose a danger to themselves or others. We have not seen the Minister provide such an explanation in his public comments on involuntary treatment.

Conclusion

As noted above, we have serious concerns as to whether involuntary treatment is an effective approach to addressing the problem of addiction within New Brunswick communities. As an initial step, we would suggest convening a panel of legal, medical, and social work experts to provide an opinion to the government as to whether any such regime can be made effective and constitutionally compliant. We would also urge the government to address existing, long-term issues in the system that have resulted in significant delays for those with addiction to enter treatment voluntarily. The ability of those to engage voluntarily in government programs to address the problems they face before the state resorts to coercion undoubtedly will be a factor any court will consider in determining its constitutionality.[28]

We would be pleased to participate in the aforementioned panel; to discuss alternatives to involuntary treatment legislation;[29] or, if the government decides to proceed with legislation permitting involuntary treatment, to provide specific feedback on a confidential basis regarding the constitutionality any such legislative proposal.

Yours truly,

Dr. Kerri Froc

[26] James D. Livingston, PhD, "Structural Stigma in Health-Care Contexts for People with Mental Health and Substance Use Issues A Literature Review" (Ottawa: Mental Health Commission of Canada, 2020); Jennifer Barnable, "Opioid Harm Reduction: See the Person, Stop the Stigma," (June 27, 2022) Canadian Red Cross, online: https://www.redcross.ca/blog/2022/6/opioid-harm-reduction-see-the-person-stop-the-stigma#:~:text=Statistics%20Canada%20reports%20that%20almost,Canadian%20has%20a%20right%20to.

[27] BC Centre for Disease Control, "Detention-Based Services for People who use Drugs" (2021) [Fact Sheet].

[28] See, *e.g. Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84; *Victoria (City) v. Adams*, 2009 BCCA 563.

[29] Innovations that have met with success in other jurisdiction include establishing a regime of effective police referral to voluntary drug treatment ("A Police-Led Addiction Treatment Referral Program in Massachusetts" (December 22, 2016) 375 New England Journal of Medicine 2502.