

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

**ATTORNEY GENERAL OF CANADA and  
MINISTER OF HEALTH FOR CANADA**

Appellants/Cross-Respondents

AND:

**PHS COMMUNITY SERVICES SOCIETY,  
DEAN EDWARD WILSON, SHELLY TOMIC and  
VANCOUVER AREA NETWORK OF DRUG USERS (VANDU)**

Respondents/Cross-Appellants

AND:

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

Respondent

AND:

**ATTORNEY GENERAL OF QUEBEC, DR. PETER AIDS FOUNDATION,  
VANCOUVER COASTAL HEALTH AUTHORITY, CANADIAN CIVIL LIBERTIES  
ASSOCIATION, CANADIAN HIV/AIDS LEGAL NETWORK, INTERNATIONAL  
HARM REDUCTION ASSOCIATION AND CACTUS MONTREAL, CANADIAN  
NURSES ASSOCIATION, REGISTERED NURSES' ASSOCIATION OF ONTARIO  
AND ASSOCIATION OF REGISTERED NURSES OF BRITISH COLUMBIA,  
CANADIAN PUBLIC HEALTH ASSOCIATION, CANADIAN MEDICAL  
ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,  
BRITISH COLUMBIA NURSES' UNION and REAL WOMEN OF CANADA**

Interveners

---

**FACTUM OF THE INTERVENER  
CANADIAN PUBLIC HEALTH ASSOCIATION**

---

**Stockwoods LLP Barristers**

Royal Trust Tower  
77 King Street West  
Suite 4130, P.O. Box 140  
Toronto-Dominion Centre  
Toronto ON M5K 1H1

**Owen M. Rees** LSUC#: 47910J

owenr@stockwoods.ca  
Tel: 416-593-2494  
Fax: 416-593-9345

Counsel for the Intervener, Canadian Public  
Health Association

**Nelligan O'Brien Payne LLP**

Suite 1500  
50 O'Connor St.  
Ottawa ON K1P 6L2

**Dougald E. Brown**

Dougald.Brown@nelligan.ca  
Tel: 613-231-8210  
Fax: 613-788-3661

Agent for the Intervener, Canadian Public  
Health Association

**TO:**

Roger Bilodeau, Q.C.

**REGISTRAR**

SUPREME COURT OF CANADA

**AND TO:**

**Deputy Attorney General of Canada**

Department of Justice  
Bank of Canada Building, East Tower  
1161 - 234 Wellington Street  
Ottawa ON K1A 0H8

**Robert J. Frater**

robert.frater@justice.gc.ca  
Tel: 613-957-4763  
Fax: 613-954-1920

Counsel for the Appellant/Respondent on  
Cross-Appeal, the Attorney General of  
Canada and the Minister of Health for  
Canada

**Public Prosecution Service of Canada**

Robson Court

900 - 840 Howe Street  
Vancouver, BC V6Z 2S9

**W. Paul Riley**

paul.riley@ppsc-sppc.gc.ca  
Tel: 604-666-0704  
Fax: 604-666-1599

Counsel for the Appellants, Attorney General  
of Canada and Minister of Health for Canada

**Arvay Finlay**

1350 - 355 Burrard Street  
Vancouver BC V6C 2G8

**Joseph J. Arvay, Q.C.**

jarvay@arvayfinlay.com  
Tel: 604-689-4421  
Fax: 604-687-1941

Counsel for the Respondents/Cross-  
Appellants, PHS Community Services  
Society, Dean Edward Wilson and Shelly  
Tomic

**Ethos Law Group LLP**

1124 - 470 Granville Street  
Vancouver BC V6C 1V5

**Monique Pongracic-Speier**

monique@ethoslaw.ca  
Tel: 604-569-3022  
Fax: 1-866-591-0597

Counsel for the Respondents, PHS  
Community Services Society, Dean Wilson  
and Shelly Tomic

**McMillan LLP**

300 - 50 O'Connor Street  
Ottawa ON K1P 6L2

**Jeffrey W. Beedell**

jeff.beedell@mcmillan.ca  
Tel: 613-232-7171  
Fax: 613-231-3191

Agent for the Respondents/Cross-Appellants,  
PHS Community Services Society, Dean  
Edward Wilson and Shelly Tomic

**Conroy & Company**

**Gowling Lafleur Henderson LLP**

2459 Pauline St  
Abbotsford, British Columbia  
V2S 3S1

**John W. Conroy, Q.C.**  
jconroy@johnconroy.com  
Tel: 604-852-5110  
Fax: 604-859-3361

Counsel for the Respondent/Cross-  
Appellant, Vancouver Area Network of Drug  
Users (VANDU)

**Ministry of the Attorney General of  
British Columbia**  
1001 Douglas Street, 6th floor  
P.O. Box 9280, Stn. Prov. Govt.  
Victoria BC V8V 1X4

**Craig E. Jones**  
craig.jones@gov.bc.ca  
Tel: 250-387-3129  
Fax: 250-356-9154

Counsel for the Respondent, Attorney  
General of British Columbia

**Procureur général du Québec**  
1200 Route de l'Église, 2e étage  
Ste-Foy QC G1V 4M1

**Hugo Jean**  
hjean@justice.gouv.qc.ca  
Tel: 418-643-1477  
Fax: 418-644-7030

Counsel for the Intervener, Attorney General  
of Quebec

2600 - 160 Elgin St  
P.O. Box 466, Stn "D"  
Ottawa ON K1P 1C3

**Henry S. Brown, Q.C.**  
henry.brown@gowlings.com  
Tel: 613-233-1781  
Fax: 613-788-3433

Agent for the Respondent/Cross-Appellant,  
Vancouver Area Network of Drug Users  
(VANDU)

**Burke-Robertson**  
70 Gloucester Street  
Ottawa Ontario  
K2P 0A2

**Robert E. Houston Q.C.**  
rhouston@burkerobertson.com  
Tel: 613-566-2058  
Fax: 613-235-4430

Agent for the Respondent, Attorney General  
of British Columbia

**Noël & Associés**  
111, rue Champlain  
Gatineau QC J8X 3R1

**Pierre Landry**  
p.landry@noelassocies.com  
Tel: 819-771-7393  
Fax: 819-771-5397

Agent for the Intervener, Attorney General of  
Quebec

**Fasken Martineau DuMoulin LLP**  
2900 – 550 Burrard Street  
Vancouver, British Columbia V6C 0A3

**Andrew I. Nathanson**

Tel: 604-631-4908  
Fax: 604-631-3232

Counsel for the Intervener, Dr. Peter AIDS  
Foundation

**Bull, Housser & Tupper LLP**  
3000 – 1055 West Georgia Street  
Vancouver, British Columbia V6E 3R3

**Ryan D. W. Dalziel**

rdd@bht.com  
Tel: 604-641-4881  
Fax: 604-646-2671

Counsel for the Intervener, British Columbia  
Civil Liberties Association

**Davis LLP**  
2800 Park Place  
666 Burrard Street  
Vancouver, British Columbia V6C 2Z7

**Shelia Tucker**

stucker@davies.ca  
Tel: 604-643-2980  
Fax: 604-605-3781

Counsel for the Intervener, Vancouver  
Coastal Health Authority

**Fasken Martineau DuMoulin LLP**  
1300 – 55 Metcalfe Street  
Ottawa, Ontario K1P 6L5

**Scott M. Prescott**

spreScott@fasken.com  
Tel: 613-236-3882  
Fax: 613-230-6423

Agent for the Intervener, Dr. Peter AIDS  
Foundation

**Gowling Lafleur Henderson LLP**

2600 - 160 Elgin St  
P.O. Box 466, Stn "D"  
Ottawa ON K1P 1C3

**Brian A. Crane, Q.C.**

brian.crane@gowlings.com  
Tel: 613-233-1781  
Fax: 613-563-9869

Agent for the Intervener, British Columbia  
Civil Liberties Association

**McMillan LLP**

300 - 50 O'Connor Street  
Ottawa ON K1P 6L2

**Marie-France Major**

marie-france.major@mcmillan.ca  
Tel: 613-232-7171  
Fax: 613-231-3191

Agent for the Intervener, Vancouver Coastal  
Health Authority

**Fasken Martineau DuMoulin LLP**

2400 - 333 Bay Street  
Bay Adelaide Centre, Box 20  
Toronto, Ontario M5H 2T6

**Paul F. Monahan**

pmonahan@fasken.com  
Tel: 416-366-8381  
Fax: 416-364-7813

Counsel for the Intervener, Canadian Civil Liberties Association

**Fasken Martineau DuMoulin LLP**

1300 – 55 Metcalfe Street  
Ottawa, Ontario K1P 6L5

**Julia Kennedy**

jkennedy@fasken.com  
Tel: 613-236-3882  
Fax: 613-230-6423

Agent for the Intervener, Canadian Civil Liberties Association

**McCarthy Tétrault LLP**

1300 – 777 Dunsmuir Street  
Vancouver, British Columbia V7Y 1K2

**Michael A. Feder**

mfeder@mccarthy.ca  
Tel: 604-643-5983  
Fax: 604-622-5614

Counsel for the Intervener, the Canadian HIV/AIDS Legal Network, International Harm Reduction Association and CACTUS Montréal

**McCarthy Tétrault LLP**

200 – 440 Laurier Avenue West  
Ottawa, Ontario K1R 7X6

**Brenda C. Swick**

Tel: 613-238-2000  
Fax: 613-563-9386

Agent for the Intervener, the Canadian HIV/AIDS Legal Network, International Harm Reduction Association and CACTUS Montréal

**Ogilvy Renault LLP**

3800 – 200 Bay Street  
Toronto, Ontario M5J 2Z4

**Rahool P. Agarwal**

ragarwal@ogilvyrenault.com  
Tel: 416-216-3943  
Fax: 416-216-3930

Counsel for the Intervener, Canadian Nurses Association, Registered Nurses' Association of Ontario and Association of Registered Nurses of British Columbia

**Ogilvy Renault LLP**

1500 – 45 O'Connor Street  
Ottawa, Ontario K1P 1A4

**Sally A. Gomery**

sgomery@ogilvyrenault.com  
Tel: 613-780-8661  
Fax: 613-230-5459

Agent for the Intervener, Canadian Nurses Association, Registered Nurses' Association of Ontario and Association of Registered Nurses of British Columbia

**Victory Square Law Office**  
500 - 100 West Pender Street  
Vancouver, British Columbia V6B 1R8

**Marjorie Brown**  
mbrown@vslo.ca  
Tel: 604-684-8421  
Fax: 604-684-8427

Counsel for the Intervener, British Columbia  
Nurses' Union

**Sack Goldblatt Mitchell LLP**  
500 – 30 Metcalfe Street  
Ottawa, Ontario K1P 5L4

**Colleen Bauman**  
cbauman@sgmlaw.com  
Tel: 613-235-5327  
Fax: 613-235-3041

Agent for the Intervener, British Columbia  
Nurses' Union

**Maclaren Corlett**  
1625 - 50 O'Connor Street  
Ottawa, Ontario K1P 6L2

**Michael A. Chambers**  
mchambers@macorlaw.com  
Tel: 613-233-1146  
Fax: 613-233-7190

Counsel for the Intervener, Real Women  
Canada

**Borden Ladner Gervais LLP**  
1100 – 100 Queen Street  
Ottawa, Ontario K1P 1J9

**Guy J. Pratte/Nadia Effendi**  
Tel: 613-237-5160  
Fax: 613-230-8842

Counsel for the Intervener, Canadian  
Medical Association

**Maclaren Corlett**

50 O'Connor Street, Suite 1625  
Ottawa, Ontario, K1P 6L2

**Michael A. Chambers**

mchambers@macorlaw.com  
Telephone: (613) 233-1146  
Fax: (613) 233-7190

Counsel for the Intervener,  
REAL Women of Canada



---

**FACTUM OF THE INTERVENER  
CANADIAN PUBLIC HEALTH ASSOCIATION**

---

**TABLE OF CONTENTS**

	<b>PAGE</b>
<b>PART I - Statement of Facts</b> .....	<b>1</b>
A. Overview .....	1
B. CPHA’s Interest in the Appeal .....	1
C. CPHA’s Position on the Facts .....	2
<b>PART II - CPHA’s Position on the Questions in Issue</b> .....	<b>3</b>
<b>PART III - Statement of Argument</b> .....	<b>4</b>
A. The Public Health Context of this Appeal.....	4
B. The Proper Analytical Framework .....	5
C. Application of the Principles of Fundamental Justice in this Case .....	6
i. Purpose of subsection 4(1) of the <i>CDSA</i> .....	6
ii. Subsection 4(1) of the <i>CDSA</i> is overbroad.....	6
iii. The prohibition on possession at Insite is arbitrary .....	8
iv. The effect of the prohibition on Insite’s users is grossly disproportionate to its objective .....	9
D. Conclusion .....	9
<b>PART IV - Costs</b> .....	<b>10</b>
<b>PART V - Order Requested</b> .....	<b>10</b>
<b>PART VI</b>	
<b>LIST OF AUTHORITIES</b> .....	<b>11</b>
<b>PART VII</b>	
<b>RELEVANT STATUTES</b> .....	<b>12</b>

## **PART I - STATEMENT OF FACTS**

### **A. Overview**

1. In Insite’s nearly eight years of operation, it has proven to be a necessary and effective part of British Columbia’s response to injection drug use and the harms associated with addiction in Vancouver’s Downtown East Side. Despite this, persons who are dependent on Insite’s safe-injection services to reduce their risk of serious illness or death are at the mercy of the uncertain exercise of executive discretion exempting drug users at Insite from the application of s. 4(1) of the *Controlled Drugs and Substances Act*<sup>1</sup> (“CDSA”). No further exemptions appear to be forthcoming.

2. By denying access to safe-injection services, the application of s. 4(1) to drugs users at Insite violates s. 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Subsection 4(1) deprives Insite’s users of their life, liberty and security of the person in a manner that is overbroad, arbitrary and grossly disproportionate. The “unfettered discretion” of the Minister to grant or refuse an exemption under s. 56 of the *CDSA* does not remedy the violation of s. 7 of the *Charter*.<sup>2</sup> The infringement is not saved by s. 1 of the *Charter*.

3. Prohibiting the possession of controlled substances at Insite deprives its users of their s. 7 rights without furthering the government’s objective of protecting public health and safety. Discouraging the use of safe-injection services actually harms individual and public health and safety. By preventing persons addicted to injection drugs from accessing the safe-injection services provided by Insite, s. 4(1) increases their risk of serious illness and death.

### **B. CPHA’s Interest in the Appeal**

4. The Canadian Public Health Association (“CPHA”) was founded in 1910, as a national, independent, not-for-profit, non-partisan, voluntary membership association representing public health practitioners and public health interests in Canada, with connections to the international public health community. It is the only Canadian non-governmental organisation focused

---

<sup>1</sup> SC 1996, c 19

<sup>2</sup> *R v Parker* (2000), 49 O.R. (3d) 481 (CA), ¶¶ 184-187

exclusively on public health. CPHA's primary purpose is to advocate for the improvement and maintenance of individual and community health in Canada according to the public health principles of disease prevention, health promotion and protection, and healthy public policy. In this regard, it encourages and contributes to the development of sound, evidence-based public policy, legislation, regulations, strategies, programs and practices that protect and promote health and prevent illness and death. The majority of CPHA's members are front-line public health providers who work within the country's 115 public health units, many of whom regularly provide health services to persons addicted to injection drugs.

### C. CPHA's Position on the Facts

5. CPHA relies on the factual findings of Pitfield J in the Supreme Court of British Columbia. The following facts are relevant to the overbreadth, arbitrariness and gross disproportionality analyses under s. 7 of the *Charter*:

- Addiction is an illness. The compulsive need to obtain drugs by injection is a material part of the illness.<sup>3</sup>
- Through the health care services provided at Insite, persons addicted to drugs reduce their risk of overdose; avoid the risk of being infected or infecting others by injection; and can access counselling and consultation which may lead to abstinence and rehabilitation.<sup>4</sup>
- Drugs that are consumed by injection do not cause Hepatitis C or HIV/AIDS. Rather, the use of unsanitary equipment, techniques, and procedures for injection permits the transmission of those infections from one individual to another.
- The risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals.<sup>5</sup>
- Insite did not increase drug-related loitering.
- It did not increase drug dealing.
- It did not increase crime in the areas around Insite or in the Downtown East Side.
- It did not increase drug use in the community.<sup>6</sup>

---

<sup>3</sup> BCSC Reasons, ¶¶ 87, 135

<sup>4</sup> BCSC Reasons, ¶ 136

<sup>5</sup> BCSC Reasons, ¶ 87

- o Insite has not sent a message that drug use is acceptable. Quite the contrary.<sup>7</sup>

## **PART II - CPHA'S POSITION ON THE QUESTIONS IN ISSUE**

6. CPHA intervenes on the question of whether s. 4(1) of the *CDSA* violates s. 7 of the *Charter*. CPHA's position is that s. 4(1), in its application to users at Insite, works to impair rather than to promote the objectives of protecting the public and promoting public health, which are the central objectives of s. 4(1). It is not saved by s. 1 of the *Charter*.

7. To be clear, it is not the position of CPHA that s. 4(1) is unconstitutional in all applications or that Parliament cannot legitimately prohibit the possession of psychoactive drugs. Rather, CPHA argues that s. 4(1) is unconstitutional as it applies to the health care services, particularly the safe-injection services, delivered on Insite's premises. This narrow application of s. 4(1) deprives individuals of their life, liberty and security interests in a manner that is not in accordance with the principles of fundamental justice.

8. The public health context is central to this appeal. Insite is an essential component of strategies aimed at reducing the harms associated with drug addiction in the Downtown East Side. The blanket prohibition in s. 4(1) fails to achieve the state interest of protecting the public from the harms associated with drug use. The provision is overbroad, arbitrary, and grossly disproportionate and thus violates s. 7 of the *Charter*.

9. CPHA takes the position that the actions of Insite's users and staff under the operating protocol<sup>8</sup> do not amount to trafficking in a controlled substance. Accordingly, it will refer only to s. 4(1) in its submissions. In the event that the Court concludes that the actions under the operating protocol constitute trafficking, CPHA submits that s. 5(1) is contrary to s. 7 of the *Charter* and is not saved by s. 1, and CPHA relies on the reasons of Pitfield J and Rowles JA and the submissions of PHS Community Services, Wilson and Tomic in this respect.

---

<sup>6</sup> BCSC Reasons, ¶ 85

<sup>7</sup> BCCA Reasons, ¶ 64

<sup>8</sup> BCSC Reasons, ¶¶ 71-77

### **PART III - STATEMENT OF ARGUMENT**

10. CPHA agrees with the analyses and conclusions of Pitfield J, Rowles JA and Smith JA in the courts below<sup>9</sup> that there has been a deprivation of the interests protected by s. 7 of the *Charter* and that there is a sufficient causal connection between the deprivation and the impugned legislative provisions to engage s. 7. In this regard, CPHA adopts the submissions of the Appellants by Cross-Appeal in this Court, VANDU, PHS Community Services, Wilson and Tomic. This factum will focus on whether the deprivation accords with the principles of fundamental justice.

#### **A. The Public Health Context of this Appeal**

11. This case is, fundamentally, one about protecting public health. The important public health context of the case plays a central role in the constitutional analysis.

12. The application of s. 4(1) to users at Insite prevents those suffering from an illness from accessing medical care that can diminish, if not eliminate, the risk of morbidity and mortality that accompanies their illness.<sup>10</sup> The services provided at Insite are health care.<sup>11</sup> The medical interventions available at Insite prevent and treat overdoses, practically eliminating the risk of death by overdose; offer injection equipment that is free of blood-borne and other infectious agents, reducing the risk of transmission of infections; and treat injection-related conditions.<sup>12</sup> The absolute prohibition in s. 4(1) of the *CDSA* prevents persons addicted to drugs, who suffer from a recognised illness, from obtaining that health care.

13. *Charter* cases often involve a clash between individual rights and collective societal interests, which the Court has to mediate. Sometimes, individual rights justifiably give way to public health concerns relating to members of a group or to society. But, in this case, individual rights and collective interests are aligned. Permitting Insite to operate promotes both individual rights to life, liberty and security of the person *and* the health of the broader public. Subsection 4(1) in its application to users at Insite does not reduce harm to either society or to the individual.

---

<sup>9</sup> BSSC Reasons, ¶¶ 138-147; BCCA Reasons, ¶¶ 28-46; 255-269

<sup>10</sup> BCSC Reasons, ¶ 144

<sup>11</sup> BCCA Reasons, ¶ 27

<sup>12</sup> BCSC Reasons, ¶ 136

A criminal provision such as s. 4(1) that imposes a risk to life and health on individuals is especially constitutionally suspect when it also impairs the health of the broader public.

14. If s. 4(1) is upheld (or if the Minister does not grant an exemption), Insite will cease to operate. The individuals who use Insite's safe-injection services would be deprived of potentially life-saving interventions.

## **B. The Proper Analytical Framework**

15. The principles of fundamental justice engaged in this case are the principles against arbitrariness, overbreadth and gross disproportionality. All three have been previously recognised as principles of fundamental justice. This case presents an opportunity for the Court to clarify their meaning and proper application.

16. *Arbitrariness* looks at the relationship between the state's objective and the means chosen to achieve it. If the measure adopted to remedy a problem bears no real connection to the problem, the measure will be arbitrary.<sup>13</sup> When the effects of a law are inconsistent with its objective, or that actually causes a problem that it was enacted to remedy, it will be arbitrary.

17. *Overbreadth* also looks at the relationship between ends and means. It, however, is concerned with whether the means go beyond what is necessary to achieve the state's objective (even if the means have some connection to the objective). A law is overbroad if "the means are too sweeping in relation to the objective".<sup>14</sup> An overbroad law may be arbitrary or disproportionate in some of its applications, but it is more accurate to characterise the law itself as overbroad because there is a real connection between some aspects or applications of the law and the objective. The problem with an overbroad law is that it creates the potential for a deprivation of life, liberty or security of the person in circumstances when the deprivation is not necessary to achieve the state's purpose.

18. By contrast, *gross disproportionality* does not look at the relationship between ends and means. Rather, it looks at the impact of a law on the s.7-protected interests of individuals or

---

<sup>13</sup> *Chaoulli v Quebec*, [2005] 1 SCR 791 ¶¶ 131, 134, McLachlin CJ and Major J; ¶¶ 231-233, Binnie and LeBel JJ

<sup>14</sup> *R v Heywood*, [1994] 3 SCR 761 at 792

groups. It then asks whether those effects are grossly disproportionate to the law's objective. The effects of a grossly disproportionate law are so extreme as to be *per se* disproportionate to the state's interest.<sup>15</sup>

19. These three principles of fundamental justice are distinct.<sup>16</sup> Nevertheless, more than one may be engaged in a particular case.

### **C. Application of the Principles of Fundamental Justice in this Case**

20. Subsection 4(1) is most suitably analysed against the principle of overbreadth. However, CPHA agrees with VANDU, PHS Community Services, Wilson and Tomic that s. 4(1) violates s. 7 for all three reasons (overbreadth, arbitrariness and gross disproportionality).

#### **i. Purpose of subsection 4(1) of the CDSA**

21. The analysis of whether s. 4(1) complies with the principles of fundamental justice begins with identifying its purpose. CPHA accepts that the objective of s. 4(1) of the *CDSA* is the protection of public health and safety.<sup>17</sup> A secondary objective may be curtailing international drug trafficking. When those purposes are assessed against the actual impacts of applying s. 4(1) to *Insite*, it becomes apparent that the federal government's position in this appeal is not based on scientific facts, but rather on notions of morality that have nothing to do with an evidence-based approach to public health.

#### **ii. Subsection 4(1) of the CDSA is overbroad**

22. On the evidence and the findings of the trial judge, the impugned provisions go "beyond what is needed to accomplish the governmental objective."<sup>18</sup> Section 7 of the *Charter* permits the state to deprive individuals of their rights to life, liberty and security of the person in order to achieve valid objectives, when the deprivation accords with the principles of fundamental justice. Section 7 will tolerate deprivations of life, liberty and security when the measure meets some

---

<sup>15</sup> *R v Marmo-Levine; R v Caine*, [2003] 3 SCR 571 ¶ 143

<sup>16</sup> Unfortunately, some confusion may have arisen over the years as courts have conflated them. See, for example, *Cochrane v Ontario (Attorney General)*, 2008 ONCA 718, 92 O.R. (3d) 321 ¶ 18 and see discussion that follows at ¶¶ 20-36

<sup>17</sup> BCSC Reasons, ¶ 116

<sup>18</sup> *Heywood, supra*, at 794; *R v Demers*, [2004] 2 SCR 489 ¶ 43

societal goal. However, when the deprivation is caused by a measure that goes beyond what is necessary to achieve that objective, s. 7 will be breached because the individual's rights will have been infringed for no reason.<sup>19</sup>

23. Subsection 4(1) is a blanket prohibition. Except as authorised in the regulations,<sup>20</sup> “no person shall possess” a Schedule I, II or III substance. The question is whether that blanket prohibition goes beyond what is necessary to achieve the state's objectives.

24. Criminalising possession in a facility designed to give medical assistance to those with addictions does not further the objective in any way and is unnecessary to achieve the objective behind s. 4(1). Instead, the law can be narrowed so as to exclude from its ambit possession by persons addicted to drugs in a designated facility that provides addiction-related medical services under appropriate government controls.

25. It is spurious to suggest that the continued operation of Insite undermines Canada's international obligations with respect to drug trafficking or somehow condones or encourages the use of illegal drugs. There is absolutely no evidence that Insite facilitates or increases drug use;<sup>21</sup> rather, persons addicted to drugs would continue to use and obtain drugs without Insite (and indeed their chances of rehabilitation might be lower without Insite). Thus, the goal of reducing the international trade in illicit drugs or reducing the use of drugs is not furthered by criminalising possession of drugs for personal use at Insite.

26. CPHA accepts that targeted prohibitions, and use of enforcement to implement them, have a role to play in reducing the use of some drugs and some of the harm caused by drug use. In fact, enforcement is one of the recognised “Four Pillars”.<sup>22</sup> There may be some connection between legislation that prohibits possession of drugs and the objective of public protection. However, the evidence shows that criminalizing possession by users at Insite would not reduce drug consumption or addiction, or the spread of social ills that accompany drug use. Rather, as the trial judge found, injection in the presence of qualified health professionals as occurs at Insite

---

<sup>19</sup> *Heywood, supra*, at 793

<sup>20</sup> Or by Ministerial exemption under s. 56 of the *CDSA*

<sup>21</sup> BCSC Reasons, ¶ 85, BCCA Reasons, ¶ 64

<sup>22</sup> BCSC Reasons, ¶ 34



reduces the risk of morbidity and mortality, and the spread of infectious disease, associated with addiction and injection.<sup>23</sup>

27. If permitting the possession of controlled substances in a facility such as Insite does not increase drug consumption or addiction or the associated harms, then prohibiting it deprives people of their right to life, liberty, and security of the person without furthering the objective of protecting public health and safety. The state's objective would be better served by a narrower prohibition that exempts possession on Insite's premises.

28. The prohibition in s. 4(1) is thus overbroad because it prohibits *all* possession. As a blanket prohibition that fails to account for circumstances in which possession can promote public health and reduce harm, the impugned provision deprives individuals of their life, liberty and security of the person in a manner that does not accord with the principles of fundamental justice.

### **iii. The prohibition on possession at Insite is arbitrary**

29. CPHA does not take the position that s. 4(1) is arbitrary in all its applications. It is arbitrary insofar as it applies to Insite.

30. The evidence before and findings of the trial judge show that Insite's services reduce the risk of overdose; reduce the risk of injection-related infections; and provide persons addicted to drugs with access to counselling and consultation that may lead to therapy, abstinence, recovery and rehabilitation, and reduced public transmission of infections.<sup>24</sup> All of these measures *protect* public health and *reduce* harm. Thus, not only is prohibition of possession at Insite not necessary to accomplish the state's objective – it actually undermines that objective and therefore deprives individuals of their life, liberty and security of the person for no valid state purpose.<sup>25</sup> As the trial judge found, instead of being rationally connected to a reasonable apprehension of harm, the blanket prohibition in s. 4(1) contributes to the very harm it seeks to prevent. It is incompatible

---

<sup>23</sup> BCSC Reasons, ¶ 87

<sup>24</sup> BCSC Reasons, ¶¶ 85, 87

<sup>25</sup> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 594; *AC v Manitoba (Director of Child and Family Services)*, [2009] 2 SCR 181 ¶ 222, Binnie J

with the stated purpose of fostering individual and community health and preventing death and disease in the community.<sup>26</sup>

31. In its application to users at Insite, s. 4(1) lacks a rational connection between the infringement of an individual's rights and the beneficial purposes intended by the government. The application of the impugned provisions to persons possessing drugs at Insite is thus arbitrary.<sup>27</sup>

**iv. The effect of the prohibition on Insite's users is grossly disproportionate to its objective**

32. Finally, assuming the Court finds some connection between the application of s. 4(1) to users at Insite and the objective of protecting the public, the effects of s. 4(1) on Insite's users are grossly disproportionate in light of that objective.<sup>28</sup> Imprisonment is always a risk for Insite's users, given the penalties for violating s. 4(1).<sup>29</sup> However, the effects are much more severe: by preventing persons addicted to injection drugs from accessing the safe-injection services provided by Insite, s. 4(1) increases their risk of serious illness and death.<sup>30</sup> In this respect, this case is very different from *Malmo-Levine*, which involved the recreational use of marijuana and did not engage similar public health considerations.

33. The deprivations to life, liberty and security of the person that result from the impugned provision are severe. Even affording some deference to Parliament in assessing the utility of its chosen responses to perceived social ills, the extreme effects of s. 4(1) for individuals who want to use Insite's services are grossly disproportionate to the state's interest. The deprivation is not in accordance with the principles of fundamental justice.

**D. Conclusion**

34. The application of s. 4(1) to users at Insite is overbroad: prohibiting the possession of controlled substances at Insite deprives its users of their right to life, liberty and security of the

---

<sup>26</sup> BCSC Reasons, ¶ 152

<sup>27</sup> *Chaoulli, supra*, ¶ 131, McLachlin CJ and Major J

<sup>28</sup> *Malmo-Levine, supra*, ¶ 169

<sup>29</sup> *CDSA*, ss. 4(3)-(6)

<sup>30</sup> See BCSC Reasons, ¶ 87

person without furthering the government's objective of protecting public health and safety. Moreover, the application of s. 4(1) to users at Insite is arbitrary: it lacks a rational connection between the infringement of Insite's users' rights and the government's objective of protecting public health and safety. Discouraging the use of safe-injection services actually harms individual and public health and safety. Finally, the application of s. 4(1) to users at Insite is grossly disproportionate: by preventing persons addicted to injection drugs from accessing the safe-injection services provided by Insite, s. 4(1) increases their risk of serious illness and death.

35. It necessarily follows that the infringements are not saved by s. 1 of the *Charter*.

#### **PART IV - COSTS**

36. CPHA does not seek costs and asks that no costs be ordered against it. Further to the order of Fish J of March 14, 2011, CPHA will pay to the appellants and respondents any additional disbursements occasioned to the appellants and respondents by its intervention.

#### **PART V - ORDER REQUESTED**

37. CPHA requests permission to make oral submissions for no more than 10 minutes at the hearing of the appeal and cross-appeal.

38. CPHA requests that the Court decide the Constitutional Questions relating to s. 4(1) as follows: Subsection 4(1) of the *CDSA* infringes the rights guaranteed by s. 7 of the *Charter*. The infringement not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of April, 2011.

---

Owen M. Rees  
Andrea Gonsalves  
Fredrick Schumann  
Stockwoods LLP

Counsel for the **Intervener**  
**Canadian Public Health Association**

**PART VI  
LIST OF AUTHORITIES**

<b>Authority</b>	<b>Paragraph(s)</b>
<i>AC v Manitoba (Director of Child and Family Services)</i> , [2009] 2 SCR 181	30
<i>Chaoulli v Quebec</i> , [2005] 1 SCR 791	16, 31
<i>Cochrane v Ontario (Attorney General)</i> , 2008 ONCA 718, 92 O.R. (3d) 321	19
<i>R v Demers</i> , [2004] 2 SCR 489	22
<i>R v Heywood</i> , [1994] 3 SCR 761	17, 22
<i>R v Marmo-Levine; R v Caine</i> , [2003] 3 SCR 571	18, 32
<i>R v Parker</i> (2000), 49 O.R. (3d) 481	2
<i>Rodriguez v British Columbia (Attorney General)</i> , [1993] 3 SCR 519	30

**PART VII  
RELEVANT STATUTES**

***Controlled Drugs and Substances Act, SC 1996, c 19, ss 4(1), 5(1)***

Possession of substance

4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

Punishment

(3) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule I

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years; or

(b) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

Punishment

(4) Subject to subsection (5), every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day; or

Possession de substances

4. (1) Sauf dans les cas autorisés aux termes des règlements, la possession de toute substance inscrite aux annexes I, II ou III est interdite.

Peine

(3) Quiconque contrevient au paragraphe (1) commet, dans le cas de substances inscrites à l'annexe I :

a) soit un acte criminel passible d'un emprisonnement maximal de sept ans;

b) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible :

(i) s'il s'agit d'une première infraction, d'une amende maximale de mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines,

(ii) en cas de récidive, d'une amende maximale de deux mille dollars et d'un emprisonnement maximal d'un an, ou de l'une de ces peines.

Peine

(4) Quiconque contrevient au paragraphe (1) commet, dans le cas de substances inscrites à l'annexe II mais sous réserve du paragraphe (5) :

a) soit un acte criminel passible d'un emprisonnement maximal de cinq ans moins un jour;

(b) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

#### Punishment

(5) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VIII is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both.

#### Punishment

(6) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule III

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years; or

(b) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

b) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible :

(i) s'il s'agit d'une première infraction, d'une amende maximale de mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines,

(ii) en cas de récidive, d'une amende maximale de deux mille dollars et d'un emprisonnement maximal d'un an, ou de l'une de ces peines.

#### Peine — cas particuliers

(5) Quiconque contrevient au paragraphe (1) commet, dans le cas de substances inscrites à la fois à l'annexe II et à l'annexe VIII, et ce pourvu que la quantité en cause n'excède pas celle mentionnée à cette dernière annexe, une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'une amende maximale de mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

#### Peine

(6) Quiconque contrevient au paragraphe (1) commet, dans le cas de substances inscrites à l'annexe III :

a) soit un acte criminel passible d'un emprisonnement maximal de trois ans;

b) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible :

(i) s'il s'agit d'une première infraction, d'une amende maximale de mille dollars et d'un emprisonnement

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

maximal de six mois, ou de l'une de ces peines,

(ii) en cas de récidive, d'une amende maximale de deux mille dollars et d'un emprisonnement maximal d'un an, ou de l'une de ces peines.

#### Trafficking in substance

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

#### Trafic de substances

5. (1) Il est interdit de faire le trafic de toute substance inscrite aux annexes I, II, III ou IV ou de toute substance présentée ou tenue pour telle par le trafiquant.

#### Exemption by Minister

56. The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

#### Exemption par le ministre

56. S'il estime que des raisons médicales, scientifiques ou d'intérêt public le justifient, le ministre peut, aux conditions qu'il fixe, soustraire à l'application de tout ou partie de la présente loi ou de ses règlements toute personne ou catégorie de personnes, ou toute substance désignée ou tout précurseur ou toute catégorie de ceux-ci.