Court File No.: 33556

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

BETWEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF HEALTH FOR CANADA

Appellants
(Appellants / Cross-Respondents)

AND:

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

Respondents
(Respondents / Cross-Appellants)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent
(Respondent)

AND:

ATTORNEY GENERAL OF QUEBEC

Intervener

FACTUM OF THE RESPONDENT ATTORNEY GENERAL OF BRITISH COLUMBIA

(*Pursuant to Rule 42 of the Supreme Court of Canada Rules*)

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Part I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. At its most fundamental, this case asks which level of government has the final say on the local delivery of vital health care services within a provincially-authorized health care facility. The Attorney General of British Columbia (the "BC Attorney") says that, in a constitutional democracy grounded in cooperative federalism, the answer to that question must remain as determined by the majority of the British Columbia Court of Appeal – the provinces are properly responsible for such decisions. Where specific provisions of a valid federal law – in this case, ss. 4(1) and 5(1) of the *Controlled Drugs and Substances Act* (the "*CDSA*")[1] – conflict with a legitimate provincial decision to deliver supervised injection services as part of a provincial hospital's continuum of care, then the principle of interjurisdictional immunity renders the *CDSA* provisions inapplicable to those particular health care services.

2. However, the BC Attorney says that this Court need not consider the formal application of interjurisdictional immunity if the *CDSA* provisions do not apply to Insite. The BC Attorney says that, properly interpreted, the *CDSA* prohibitions do not restrict medically-supervised injections at Insite, following the analysis of this Court in *Attorney General (Canada) v. Law Society of British Columbia*[2] ("*Jabour*"). The BC Attorney says the Court of Appeal could and should have reached its decision by applying the principles of that case.

3. The BC Attorney's submissions in this Court are restricted, as in the court below, to the division of powers issue. He makes no submissions with respect to the appeal and cross-appeal on the application of s. 7 of the *Charter* to the present case.

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[1] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "*CDSA*").
[2] *Attorney General (Canada) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 ("*Jabour*").

4. On the issue of costs raised by the Appellants, the Attorney General of Canada and the Minister of Health for Canada (collectively referred to hereafter as "Canada"), the BC Attorney agrees that an award of costs, special or otherwise, against the Attorneys General when defending legislation is only justified, if ever, in *exceptional* circumstances. Such circumstances may exist where the degree of public significance is well beyond that generally present in public interest litigation, and where, balanced against other factors, the court considers the matter to warrant the exercise of discretion for costs: *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue).*[3] One consideration must be the vital function both federal and provincial Attorneys General serve by defending legislation, and, even in public interest litigation, an award of costs should remain the exception. The BC Attorney takes no position on how the principles should be applied in this case, but agrees with Canada that some direction from this Court is needed.

B. Statement of Facts

5. The BC Attorney agrees with and adopts the essential framework of facts as set out by Canada at paragraphs 5 to 38 of its Factum, except paras. 12 and 13 to the extent that those paragraphs infer that the concept of a safe injection facility was never really in the forefront of provincial and local health authority planning. The BC Attorney also adds the following facts with respect to the exemption granted to Insite under s. 56 of the *CDSA*.

6. On May 2, 2008 the Vancouver Coastal Health Authority ("Coastal Health") applied for an extension of the s. 56 exemption that was set to expire June 30, 2008. The application noted that the provincial Minister of Health considered Insite a critical element in "[Coastal Health's] program for the treatment of certain addictions and communicable diseases, and for delivering necessary health services to a particularly

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[3] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38, 2007 SCC 2, at paras. 33-37 ("*Little Sisters*").

disadvantaged class of persons."[4] On May 6, 2008, the provincial Minister of Health provided a separate letter in support of the application, calling Insite "an important component of the health-based approach to the treatment of addiction that the Province of British Columbia has developed along with municipalities, health authorities, non-governmental organizations and others."[5]

7. On December 19, 2008, Health Canada responded to Coastal Health's application for an extension, advising that, as a result of the trial judge's decision in this case, "a section 56 exemption is not required at this time."[6] To date, no further extension or exemption has been issued and Insite remains in operation.

[4] Appellant's Record ("Record"), Vol. XX, Affidavit of Nancy Reimer, p. 116, para. 3, and Exhibit "A" (Letter dated May 2, 2008, seeking extension of exemption for Insite), p. 120.
[5] Record, Vol. XX, Affidavit of Nancy Reimer, p. 116, para. 4, and Exhibit "B" (Letter from Provincial Health Minister to Federal Health Minister dated May 6, 2008), p. 122.
[6] Record, Vol. XX, Affidavit of Nancy Reimer, p. 116, para. 5, and Exhibit "C" (Letter regarding Insite's exemption December 19, 2008), p. 123.

Part II – ISSUES

8. The BC Attorney appears in this Court only with respect to the division of powers question, which he would characterize as follows:

> Do ss. 4(1) and 5(1) of the *CDSA*, properly interpreted, apply to restrict medically-supervised injection of controlled drugs at Insite, a hospital and provincially-authorized and regulated health care undertaking?

9. On September 2, 2010, the Chief Justice stated five constitutional questions with respect to this case.

10. As a Respondent, the BC Attorney is not restricted to submissions on the constitutional questions. However, to the extent he does so, he addresses only the first of those questions, namely:

a. Are ss. 4(1) and 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, constitutionally inapplicable to the activities of staff and users at Insite, a health care undertaking in the Province of British Columbia?

11. The BC Attorney agrees with the costs issue as stated by Canada.

Part III – ARGUMENT

A. Insite and its Services are Core Provincial Activities

12. The present case centres around the activities at the Insite safe injection facility located in Vancouver's Downtown Eastside. It is uncontroversial that the Downtown Eastside is Canada's most harm-stricken neighbourhood. It has historically been a centre of poverty, addiction, mental illness and near-epidemic incidence of disease.

13. Insite is located in the heart of the Downtown Eastside. Its services are a central aspect of the "four pillar" harm-reduction strategy that aims to reduce the human and social costs associated with a concentrated population of injection drug addicts, many of whom suffer also from serious diseases and mental illness.[7]

14. Since the *Constitution Act, 1867*[8] came into force, health care has been recognized as a provincial responsibility under three distinct heads of exclusive provincial power: s. 92(7) (jurisdiction over the establishment, maintenance and management of hospitals and health-related institutions); s. 92(13) (jurisdiction over property and civil rights); and s. 92(16) (all matters of a merely (i.e. purely) local or private nature). The Court of Appeal correctly found that the health care delivered at Insite comes within all three: Insite is a hospital (s. 92(7)), providing health care services adults are entitled to select (s. 92(13)), which are delivered by provincially-regulated health care professionals at a provincial facility (s. 92(16)).[9]

15. This Honourable Court previously considered the broad scope of provincial jurisdiction over health in *R. v. Morgentaler*:

> The provinces have general legislative jurisdiction over hospitals by virtue of s. 92(7) of the *Constitution Act, 1867*, and over the medical profession and the practice of medicine by virtue of ss. 92(13) and

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[7] Record, Vol. I, Reasons for Judgment of the Trial Judge, pp. 13-14, 16-17, paras. 25, 28-31, 33-40.
[8] *Constitution Act, 1867,* (U.K.), 30 & 31 Victoria, c. 3.
[9] Record, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 94-95, paras. 133-134.

> (16). Section 92(16) also gives them general jurisdiction over health matters within the province: *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 137.
>
> [...]
>
> In addition, there is no dispute that the heads of s. 92 invoked by the appellant confer on the provinces jurisdiction over health care in the province generally, including matters of cost and efficiency, the nature of the health care delivery system, and privatization of the provision of medical services.[10]

16. As noted by Huddart J.A., numerous other cases demonstrate the predominance of provincial legislation with respect to health,[11] and the federal government has never claimed the *delivery* of health care as a national responsibility.[12] This Court confirmed in *Chaoulli v. Quebec (Attorney General)* that the provinces have exclusive jurisdiction to choose the types of health care systems to implement.[13]

17. In turn, as the Court of Appeal found, the authority to determine which services to deliver is at the very heart of provincial jurisdiction over health care:

> It would be difficult to envisage anything more at the core of a hospital's purpose, than the determination of the nature of the services it provides to the community it serves. Indeed, it would be difficult to envisage anything more at the core of the province's general jurisdiction over health care than decisions about the nature of the services it will provide.[14] [citations omitted, emphasis in original]

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[10] *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 490-491.

[11] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 83, para. 98, citing *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 at p. 761; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, at paras. 16-24 ("*Chaoulli*"); and *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326, 2006 SCC 7, at paras. 31-36 ("*Mazzei*").

[12] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 95, para. 134.

[13] *Chaoulli*, per McLachlin C.J., at para. 107: "...the decision about the type of health care system Quebec should adopt falls to the Legislature of that province..."

[14] Record, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 101-102, para. 157; and p. 104, para. 166, citing *Mazzei*, at paras. 31, 34-35, for the proposition that "hospitals' treatment plans and practices are excluded from federal legislative authority".

18. Further, there is explicit recognition that the treatment of narcotic addiction as a health issue is centrally located within the core of exclusive provincial jurisdiction over health under s. 92(16).[15] Writing for the majority of this Court in *Schneider v. The Queen*,[16] Dickson J. said at p. 132:

> I do not think the subject of narcotics is so global and indivisible that the legislative domain cannot be divided, illegal trade in narcotics coming within the jurisdiction of the Parliament of Canada and the treatment of addicts under provincial jurisdiction.

19. Again, at pp. 137-138, Dickson J. found:

> The medical treatment of drug addiction is a *bona fide* concern of the provincial legislature under its general jurisdiction with respect to public health...
>
> ...narcotic addiction is not a crime but a physiological condition necessitating both medical and social intervention. <u>This intervention is necessarily provincial.</u> [emphasis added]

20. Smith J.A., in the Court below, succinctly summarized the scope and sources of provincial jurisdiction over Insite as a health facility:

> The provincial legislature is constitutionally responsible for the delivery of health services. That mandate includes the treatment of narcotics addiction and the prevention of infectious diseases among addicts. Insite, operating as a hospital, provides health services to heroin addicts.[17]

21. The trial judge, at paras. 13-46 of his decision, set out in some detail the process by which the harm-reduction strategy in the Downtown Eastside was developed, and the "health emergency" at which it was aimed. In 2002, the provincial Minister of Health transferred responsibility for adult drug treatment services to the

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[15] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 81, para. 93, citing *R. v. Hauser*, [1979] 1 S.C.R. 984; *Schneider v. The Queen*, [1982] 2 S.C.R. 112 ("*Schneider*"); and *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571.

[16] *Schneider*, at pp. 132, 137-138.

[17] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 124, para. 243; see also p. 86, para. 103, per Huddart J.A.

several Health Authorities. Insite, a key part of meeting that responsibility, was a Coastal Health initiative.

22. Coastal Health, which is established by and operates pursuant to the *Health Authorities Act*,[18] has the power, under s. 5 of that statute, to determine which regional health services to provide and how they will be delivered. Insite is also further regulated by a complex network of provincial health legislation and regulations, as the Court of Appeal recognized.[19]

23. Having reviewed the history leading to its creation and the evidence regarding its operations,[20] both the BC Supreme Court and the Court of Appeal unequivocally found that Insite is a provincial health care undertaking,[21] and that its services constitute health care:

> The users of Insite do not use it directly to treat their addiction, but the assistance and services they receive at Insite virtually eliminate the risk of overdose that is a feature of their illness and they avoid the risk of being infected or of infecting others by injection. Insite also provides them with access to counselling and consultation that may lead to abstinence and rehabilitation. All of the services provided to addicts at Insite constitute health care.[22] [emphasis added]

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[18] *Health Authorities Act*, R.S.B.C. 1996, c. 180.

[19] Record, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 86-87, paras. 104-106, citing *Public Health Act*, S.B.C. 2008, c. 28 (broad powers to address health hazards like infectious disease); *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, ss. 3-4 (rights to select and consent to health care); the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 (medical insurance benefits); the *Personal Service Establishments Regulation*, B.C. Reg. 202/83 (requiring sanitary equipment and clean water, and that facilities operate in accordance with the *Public Health Act*); and the *Health Professions Act*, R.S.B.C. 1996, c. 183, and *Social Workers Act*, S.B.C. 2008, c. 31 (regulation of various health care workers).

[20] Record, Vol. I, Reasons for Judgment of the Trial Judge, pp. 12-18, paras. 13-46, citing Record, Vol. II, Affidavit of Donald MacPherson, pp. 54-183; and Record, Vols. V, p.123 – Vol. IX, p. 74, Affidavit of Heather Hay.

[21] Record, Vol. I, Reasons for Judgment of the Trial Judge, p. 30, para. 117; Record, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 101-102, para. 157.

[22] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 64, para. 27. See also Record, Vol. I, Reasons for Judgment of the Trial Judge, p. 34, para. 136.

24. It is evident that the province, both independently and acting through Coastal Health, has determined that Insite and its services are not only part of provincial health care efforts, but are in fact necessary to them.[23] Rowles J.A. found at para. 62:

> In this province, there is no longer any serious debate about the need for Insite as a health care facility... All of the provincial authorities, including the Attorney General of British Columbia and the Vancouver Police, agree that Insite is a necessary component in dealing with the scourge of addiction in the [Downtown Eastside].

25. The provincial Minister of Health, in supporting Coastal Health's application for an extension of the s. 56 exemption, specifically identified the province's need to "be flexible and innovative in [its] responses to health challenges such as addiction." The Minister confirmed that the province had found "Insite to be an effective treatment tool within an overall continuum of care" and believed "it should continue operating in the public interest."[24]

26. Both Courts below characterized Insite's supervised injection services as "vital" or "essential" to its functioning as a health care facility.[25]

B. Insite's Activities are Unrelated to Any Valid *Federal* Interest

27. The BC Attorney says that the continued operation of Insite is a matter entirely peripheral to federal criminal law interests. Canada insists that this is not so. Yet from the beginning, when challenged to provide the rationale for maintaining that provincial addiction-treatment initiatives are subject to the criminal law, Canada's counsel has relied principally on an argument for uniformity:

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[23] Record, Vol. XX, Affidavit of Nancy Reimer, p. 116, para. 3, and Exhibit "A" (Letter dated May 2, 2008, seeking extension of exemption for Insite), p. 120: "...the continued operation of the Supervised Injection Site is an important component of [Coastal Health's] program for the treatment of certain addictions and communicable diseases, and for delivering necessary health services to a particularly disadvantaged class of persons." [emphasis added]

[24] Record, Vol. XX, Affidavit of Nancy Reimer, p. 116, para. 4, and Exhibit "B" (Letter from Provincial Health Minister to Federal Health Minister dated May 6, 2008), p. 122.

[25] Record, Vol. I, Reasons for Judgment of the Trial Judge, p. 30, para. 117; Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 77, para 80; p. 86, para. 102; pp. 101-102, para. 157; and p. 103, para. 161.

> To hold a validly enacted criminal law constitutionally inapplicable to a provincial matter or undertaking... has the potential to seriously diminish the uniform applicability of the criminal law.[26]

28. This argument for uniformity, at least as Canada postulates it, is directly and irreconcilably inconsistent with *Jabour*, the leading case on the criminal law's built-in exemption from application to provincially-authorized activities and undertakings. If the criminal law is as constrained as the Supreme Court of Canada found in *Jabour*, then at least to that extent, its application can never be perfectly uniform. Or, to look at it another way, the application of the criminal law can *become* completely uniform only when it is properly read to exclude application to provincially-authorized matters.

29. Canada also raises something of an *in terrorem* argument. Repeatedly asserted in the courts below and again woven through Canada's present argument is a claim that criminal law enforcement efforts will be undermined by the operation of Insite. Canada says variously that immunity of the safe injection facility means the "current national regime, which guarantees rigorous national standards of drug approval and access, would become a patchwork quilt of local decision-making";[27] would "represent a significant departure from the jurisprudence regarding the scope of the criminal law power";[28] would "absolve[...] drug users of responsibility for the choices they make";[29] and would "carve out an exception... for addicts who most frequently run afoul of the drug laws".[30]

30. But there is simply no evidence to suggest that the operation of Insite threatens the federal interest in criminal law enforcement. At para. 51 of its Factum, Canada asserts that "[p]ublic safety demands that access to drugs be carefully controlled". However, as Huddart J.A. noted at para. 160 of her reasons, there is no suggestion here that "any provincial government has or should have the authority to import, or

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[26] Appellants' Factum, Supreme Court of Canada, p. 27, para. 73; see also p. 30, para. 80.
[27] Appellants' Factum, Supreme Court of Canada, p. 27, para. 72.
[28] Appellants' Factum, Supreme Court of Canada, p. 27, para. 73.
[29] Appellants' Factum, Supreme Court of Canada, p. 35, para. 97.
[30] Appellants' Factum, Supreme Court of Canada, p. 38, para. 105.

produce" drugs. All governments have failed in their efforts to prevent the importation, production and distribution of injection drugs.

31. Canada has a recognized interest in the protection of public health and safety. That federal interest, however, remains distinct from the provincial interest in the delivery of health care services.[31] And, crucially, that (or indeed any) federal interest is *not* undermined by the activities at Insite:

> Insite interacts with the patient at the limited point in time where possession of an illegal drug has been achieved, and the addiction compels its use. Insite's services address the activity and consequences of use in a health care setting. A supervised drug injection service does not undermine the federal goals of protecting health or eliminating the market that drives the more serious drug-related offences of import, production and trafficking. It presupposes, but does not encourage, the possession of drugs.[32] [emphasis added]

32. Canada chose to tender no evidence in support of its position that Insite undermines legitimate federal objectives. Perhaps none could be mustered given that Insite has been operating exempt from the general provisions of the *CDSA* for a number of years, without any negative impact upon the federal narcotics control efforts.

33. The real federal ambition here appears to be in controlling health policy under the guise of concerns for the uniform application of the criminal law. As Canada demonstrates at paras. 91 and 118 of its Factum, there is a fundamental difference of opinion about what should constitute "treatment" for addicts.

34. In a prepared statement read to the House of Commons Standing Committee on Health on May 29, 2008, the federal Minister of Health made it clear that his opposition to Insite was based, in significant part, on his belief that other health programs were more legitimately "medical", and offered more value for money:

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[31] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 104, para. 166.
[32] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 105, para. 169.

> ...I want to talk about the ethics of diversion. Every dollar spent on the supervised injection site diverts a dollar away from treatment leading to full recovery. Let me do the math by giving you an example.
>
> The 20 bed treatment centre I announced May 14 will be able to treat 80 women per year, or 400 women over its 5 year lifespan. With just this amount alone, one in four female sex workers in the Downtown Eastside will now have the opportunity to escape the cycle of addiction, of violence, victimization, crime, and abuse...
>
> ...if the $3 million per year now used to operate Insite were to offer treatment beds instead of injection, 1200 more female sex workers could receive help over the same five year period...
>
> Female sex workers now make up 38 per cent of the visits to Insite. Is it wise or ethical to use this money to help keep them on drugs instead of getting them off the streets? Is this compassion? I would assert that it is not...
>
> In my opinion, supervised injection is not medicine – it does not heal the person addicted to drugs... Programs to support supervised injection divert valuable dollars away from treatment. And, government-sponsored supervised injection sends a very mixed message to young people who are contemplating the illicit use of drugs.[33]

35. But as *Schneider* confirms, it is not the appropriate role of the federal government to decide what is or isn't "medicine", or which health care services are "wise" and "ethical". Nor is it of federal concern whether a provincially-authorized health care facility "divert[s] valuable dollars away from [other] treatment". While questions regarding what would happen if "the $3 million per year now used to operate Insite were to offer treatment beds instead of injection" are suitable for political discussion, they should not be part of the legal or constitutional framework that this Court is asked to apply.

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[33] Record, Vol. XX, Affidavit of Nancy Reimer, p. 117, para. 8, and Exhibit "F" (Minister Clement's statement to Standing Committee on Health, May 29, 2008), pp. 130-131.

36. Obviously, medical supervision of injection drug use is key to Insite's mission to reduce overdose deaths and the transmission of disease. Yet Canada continues to argue for some sort of severance. At para. 77 of its Factum, Canada asserts that since the impugned supervised injection service is simply one among several of the health services offered at Insite, the facility could (and in their view ought to) function without it. This argument was considered and properly rejected by the Court of Appeal, which recognized, at para. 161, that:

> [t]he lure of safe injection gets those addicts into Insite so health care may be delivered... supervised injection is an essential element of Insite's health care delivery program. [emphasis in original]

37. Rowles J.A. dismissed the severance argument at para. 42, saying:

> To argue, as Canada does, that other options or choices are available to minimize such risks ignores the judge's undisputed findings about the nature of addiction, combined with his findings about the multiple problems facing the addicts who inhabit the [Downtown Eastside].

38. Huddart J.A. agreed at para. 102:

> While the appellants argue that Insite could operate without the supervision of drug injection, the trial judge's finding that supervised injection is "a vital part of a provincial health care undertaking" is supported by undisputed evidence.[34]

39. Insite's supervised injection services cannot be severed without fundamentally interfering with the delivery of health services which the province has determined are necessary in the public interest. Through this argument, however, Canada reveals beyond any shadow of a doubt the extent to which it is attempting to influence the very decisions *Morgentaler* identified as going to the heart of the provincial authority: "matters of cost and efficiency, [and] the nature of the health care delivery system." To

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[34] The trial judge accepted the findings of the federal Expert Advisory Committee that 80% of daily visits at Insite were for injecting and 20% for other support services: Record, Vol. I, Reasons for Judgment of the Trial Judge, pp. 23-24, para. 85.

repeat: the federal government cannot use the criminal law to impose its view on what constitutes the most efficacious treatment of addicts in the Downtown Eastside.

40. Canada urges this Court to deference at para. 123 of its Factum. The BC Attorney agrees that deference is owed, but submits that where the question at issue relates to matters within exclusive provincial competence, deference is properly paid *to the provinces*, which must be free to make decisions concerning the delivery of health services and the rationing of scarce resources between competing health demands at the local level.

C. The *CDSA*, Properly Interpreted, Does Not Apply

41. If the *CDSA* did not exist, the Parliament of Canada could not legitimately legislate with respect to a provincial health authority's response to a local health crisis, like addiction in the Downtown Eastside. The Court of Appeal recognized at para. 146 that the blanket application of the offence provisions of the *CDSA* would permit "intrusion into the provincial authority over health care, indeed to the core of that provincial responsibility." [emphasis added]

42. In the Court of Appeal, the BC Attorney argued that resort to either interjurisdictional immunity or paramountcy is unnecessary in the present case, as the matter can be resolved, following the reasoning first set out in *Jabour*, by interpreting the *CDSA* provisions not to apply to Insite. The BC Attorney argued that, pursuant to the analysis at paras. 31-32 of *Canadian Western Bank v. Alberta*,[35] the principle of "reading down" (perhaps an inapt term because the principle is aimed at giving effect to, rather than frustrating, Parliament's legitimate intent in a cooperative federal state) should be the first step in the constitutional analysis, before questions of interjurisdictional immunity or paramountcy are considered.

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[35] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 ("*Canadian Western Bank*").

43. There have been a number of cases in which this Court has "read down" a statute so as to avoid interference with the legislative authority of the other level of government. The outcome in those cases – interpreting the law so as not to interfere with the other government's constitutional jurisdiction – is indistinguishable in effect from the result of the application of the interjurisdictional immunity doctrine. That is to say, the result is that the protected undertaking is held immune from the application of the competing law, which remains valid in its general application.[36]

44. There is a procedural distinction, however, between "reading down" as a technique of constitutional interpretation and the doctrine of "interjurisdictional immunity". The latter, like "paramountcy", is to be applied *after* the relevant federal and provincial laws are, for constitutional purposes, characterized. The "reading down" technique is, instead, a part of the characterization process itself. That is to say, it is an interpretive device that, when successfully employed, avoids, rather than resolves, interjurisdictional disputes.[37]

45. And crucially, unlike the "interjurisdictional immunity" doctrine, which has historically worked exclusively for the benefit of the federal side of division of powers disputes, the "reading down" principle is clearly of reciprocal application: it protects provincial core jurisdiction from federal encroachment (including by the criminal law) as equally as the reverse, and it always has.[38]

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[36] In fact at one point the doctrines were considered by some to be one and the same. "[I]t is difficult to see", Professor Elliot wrote in 1988, "a plausible basis for distinguishing the 'reading down doctrine' from the 'doctrine of interjurisdictional immunity'. The two doctrines seem simply to be different ways of describing the same phenomenon": R. Elliot, "*Ontario Public Service Employees Union v. Attorney-General for Ontario*" Case Comment (1988) 67 Can. Bar. Rev. 524, at p. 536. The distinction urged here was not made clear until *Canadian Western Bank*.

[37] Canada asserts, at paras. 79-80 of its Factum, that this is not the case – that "reading down" does not precede consideration of the other constitutional doctrines and that the Court at para. 31 of *Canadian Western Bank* saw the doctrine as a means of determining "exclusivity"" rather than as part of the "pith and substance" analysis. But in the context of the full paragraph from *Canadian Western Bank*, which is entirely focused on the pith and substance analysis, this assertion does not ring true. Further, the Court of Appeal, per Smith J.A. at para. 208, clearly agreed that "reading down" occurs at the first stage of constitutional analysis, and is a "technique of statutory interpretation": Record, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 114-115, para. 208.

[38] Professor Elliot noted (Elliot, at p. 542):

> Federal legislation is as susceptible to being 'read down' as provincial legislation. In fact, the first example Professor Hogg provides of a case in which the 'reading down doctrine' has been

D. The *Jabour* Analysis

46. In *Jabour*, the province had authorized the Law Society of British Columbia, through its Benchers, to make rules for the governance of the legal profession in the province and to enforce those rules through the establishment of a Discipline Committee. The Committee had instituted proceedings against a member for "conduct unbecoming" – advertising in contravention of the Law Society's strict guidelines. The Law Society's enforcement of these restrictions was said, on its face, to be in violation of the criminal law in the form of federal statute of the day which regulated unfair competition *Combines Investigation Act*.[39] The Benchers, in essence, were said to be conspiring in restraint of trade when they acted in furtherance of their provincially-assigned regulatory duties.

47. The ratio in *Jabour* can be reduced to two presently applicable principles. First, the federal criminal law power is implicitly constrained to operate consistently with the public interest and will be interpreted as such. And second, the question of *what* is in the public interest is not an exclusively federal decision: indeed, the provinces' authorization of particular activities is presumptively determinative of that question.

48. As a result, where a province has authorized an activity in the public interest, the federal criminal law is presumed not to have been intended to apply against that activity, and it will be interpreted and applied accordingly. Writing for the unanimous Court in *Jabour*, Estey J. put the matter concisely:

> So long as the [*Combines Investigation Act*], or at least Part V, is styled as a criminal prohibition, proceedings in its implementation and enforcement will require a demonstration of some conduct contrary to the public interest. It is this element of the federal legislation that, these cases all conclude, can be negated by the authority extended by a valid provincial regulatory statute.[40]

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applied, *Quebec North Shore Paper Co. v. Canadian Pacific*, involved federal legislation. So too did one of the other examples he cites, the *Stevedore* reference. And these are by no means the only such examples that could be given.

[39] The version of the *Combines Investigation Act* at issue in *Jabour* was R.S.C. 1970, c. C-23.

[40] *Jabour*, at p. 354.

49. When determining the limits of the application of the federal criminal law in the "public interest", the Court in *Jabour*, at p. 351, relied on Chief Justice Kerwin's decision in *Reference re The Farm Products Marketing Act*.[41] There, his Lordship had written at pp. 205-06:

> [I]t cannot be said that any scheme otherwise within the authority of the Legislature is against the public interest when the Legislature is seized of the power and, indeed, the obligation to take care of that interest in the Province.

50. It is important to remember that, in *Jabour*, there was no provincial statute *explicitly* authorizing the contravention of the federal criminal law. Rather, the province had simply assigned to a body (the Law Society) the responsibility for determining what rules and actions should be taken in the public interest in the course of governing the provision of legal services.

51. The analogy in the case at bar is exact. The operation of Insite is authorized by a body empowered by statute to deliver health services in British Columbia, and to determine both the type of services offered and the facilities in which they will be delivered. The province has determined what the public interest requires, and according to *Jabour*, the federal law must be interpreted so as not to interfere with those valid provincial decisions.

52. Since *Jabour*, this Court has equivocated somewhat, recognizing perhaps that an overly broad provincial exception to the federal criminal law was, as with blanket federal immunity, offensive to the purposes of cooperative federalism and gave too much power to the provinces to constrain valid federal objectives.

53. Thus at paras. 74-79 of *Garland v. Consumers' Gas Co.*,[42] this Court rejected the "regulated industries defence." The Court did confirm that there was no "principled reason why the defence should not be broadened to apply to cases outside the area of

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[41] *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198.
[42] *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25.

competition law". However, relying on its earlier decision in *R. v. Jorgensen*[43] (where a similar defence had been raised), the Court in *Garland* imported a requirement that the language of the statute in question must plainly demonstrate Parliament's intention to limit its application with regard to the public interest.

54. At para. 78 of its Factum, Canada argues that the decision in *Garland* (particularly paras. 75-79) means that "reading down" is not available unless the particular offence provision itself includes language qualifying its application. In other words, Canada argues that as ss. 4 and 5 of the *CDSA* do not specifically use the phrases "unduly" or "against the public interest", the reasoning from *Jabour* is not applicable.

55. The BC Attorney says it is an open question whether *Garland* and *Jorgenson* apply to restrict the reasoning in *Jabour* where it is actually a provincial *undertaking* within the core of provincial constitutional jurisdiction that is in potential conflict with the statute, and not simply a defendant operating under a provincial regulatory scheme who seeks to avoid a prosecution. In cases like that at bar, where a federal prohibition could so plainly affect core provincial activities, Parliament ought to at least be required to be explicit in ousting a provincial role. Parliament ought not to be able to so fundamentally affect a core provincial activity indirectly.

56. In any event, even if language indicating a regard for the public interest *is* necessary to trigger the protections offered by *Jabour*, that requirement is made out here by the inclusion in the *CDSA* of s. 56. At para. 77 of *Garland*, this Court stated:

> ...Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. [emphasis added]

[43] *R. v. Jorgensen*, [1995] 4 S.C.R. 55.

57. The BC Attorney says that the ability to create exemptions from the application of ss. 4 and 5, framed as it is in s. 56 of the *CDSA*, is plainly the type of indication the Court sought in *Garland*. To insist that the necessary language be housed in the precise provision is too formalistic an approach.

58. Section 56 of the *CDSA* establishes *one particular way* in which ss. 4 and 5 can be constrained in the public interest, certainly, but its existence is of broader import: it *confirms* that a consideration of the public interest is an element of ss. 4 and 5. Nothing in s. 56 suggests that its mechanisms are exhaustive of the ways in which the public interest can affect the interpretation of ss. 4 and 5. And since Parliament has confirmed that ss. 4 and 5 *are* subject to the public interest, it cannot, constitutionally, prohibit the provinces from playing their appropriate role within their exclusive jurisdiction, and it cannot delegate to a federal official the exclusive right to override that provincial prerogative.

59. Nor is there any violence done to federal legislative intent in such an interpretation. In *Jabour*, it was logical to assume that the *Combines Investigation Act* was not meant to restrict the freedom of provincial law societies to govern the profession. Similarly, in the present case it could hardly be asserted that the *CDSA* was implemented to restrict the provinces from providing necessary health programs at the local level. Indeed, had it been so intended, it would certainly be *ultra vires* as extending beyond the legitimate federal criminal law interest.[44] While federal criminal law can have as a purpose the protection of public health, that aspect of the federal power does not extend to deciding whether provincial medical professionals may supervise the injection of particular drugs in provincially-authorized health care programs or in provincial hospitals.

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[44] See for instance *Boggs v. R.*, [1981] 1 S.C.R. 49. In *Boggs*, a section of the *Criminal Code* imposing punishment for driving without a license was found to be unconstitutional. Because the law added criminal sanctions for a class of behaviours that were only violations of provincial statutes and regulations (such as failure to pay certain civil judgments), the law was seen as extending beyond the legitimate federal public interest in the ability to drive or the safety of the highways in the nation.

60. Finally, the BC Attorney submits that even if s. 56 *were* exhaustive of the manner in which the public interest (and thus provincial authorization) can be taken into account, the principle of cooperative federalism requires that the ultimate result for Insite must be the same. If the "public interest" referred to in s. 56 of the *CDSA* includes aspects of the provincially-regulated public interest, then the federal Minister of Health cannot but defer to his provincial counterpart's determination of whether Insite should receive an exemption.[45] For the purposes of this appeal, applying the constitutional interpretive technique of "reading down", the words "the Minister may" in s. 56 are properly read, with reference to applications endorsed by the province and its appropriately empowered delegates, as "the Minister must".

61. To put the matter more positively, it would be consistent with the principle of administrative co-operative federalism[46] for the federal Minister of Health, in response to a formal request from his provincial counterpart, to grant a s. 56 exemption in order to meet provincial goals in relation to the provincial aspect of the matter. Although the present case is not a judicial review of the federal Minister's decision, if the BC Attorney's submission on this point is accepted it is nevertheless open to this Court to dismiss the appeal on the basis that it is legally futile, because the Minister in fact has no power to refuse to grant the exemption sought.[47] The courts must serve as arbiter where governments fail to achieve the intended balance in the distribution of constitutional powers.[48]

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[45] See *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 ("*Hydro-Québec*").
[46] This principle has been repeatedly affirmed by this Court, most recently in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, at paras. 42-44. See also *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 87, 2007 SCC 23, at paras. 36-40, 87-90; and *Hydro-Québec*, at paras. 130-131, 151-153.
[47] *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-229.
[48] *Canadian Western Bank*, at paras. 21-24.

E. The Court of Appeal's Treatment of Interpretation

62. In the Court below, Canada argued, and the Court of Appeal apparently agreed, that, based on the reasoning from *Garland*, the *Jabour* principle could only be invoked if the prohibitions in the *CDSA* were explicitly or impliedly deferential to provincial decision-making. With the greatest of respect, that is far too narrow a reading of *Jabour* or *Garland*.

63. The Court of Appeal's analysis is framed this way at para. 145: if, "the *CDSA*, properly interpreted, is intended to apply to provincially-regulated health care professionals at provincially-regulated health care facilities", then *Jabour* cannot apply and the exemption cannot be read in:

> ...The [*CDSA*] can be read only as reflecting a clear intention to control the production, import, and use of all potentially dangerous drugs and other substances at all times and all places throughout Canada, including in provincially-operated hospitals and by provincially-regulated health care practitioners, including doctors and pharmacists, subject only to those exceptions the federal executive council provides by regulation or the federal Minister of Health provides by exercise of the discretion Parliament granted that office-holder by s. 56.[49]

64. But this is surely incomplete. Nothing in the scheme of the *CDSA* prohibitions indicates that it is designed to capture legitimate health activities *except the provisions for their exemption*. The true question is whether the exemptions are, in these circumstances, exhaustive. In other words, having recognized a place for public health initiatives, surely the *CDSA* cannot be interpreted as intending to frustrate, or even limit, those initiatives when taken in the provincial public interest.

65. The Court of Appeal might have framed the analysis another way by asking if the *CDSA* evinces "a clear intention to control the production, import, and use of all potentially dangerous drugs and other substances at all times and all places

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[49] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 96, para. 139.

throughout Canada, including in provincially-operated hospitals and by provincially-regulated health care practitioners *performing provincially-mandated local delivery of health services*". Had the question been framed this way, the answer would have been (or at least ought to have been) very different.

66. Parliament recognized in the overall scheme of the *CDSA* that its exercise of the criminal law power over narcotic drug use must accommodate public health initiatives. But Parliament also recognized that it could not foresee every situation in which health initiatives should be paramount. This recognition is manifest in the s. 56 exemption, and also in the regulation-making power, both assigned to the federal Executive.[50]

67. But the *assignment* of the exemption decision is not what is determinative here; rather, it is the very presence of s. 56 that has constitutional importance. Where there is a *provincial* public interest in the exemption of provincial health initiatives, then the *CDSA* foresees one of two things: either the s. 56 authority *will* be exercised with regard to the provincial interest, or, if it is not, and if the failure would impair or nullify the very thing that the exemption scheme is designed to protect, then as a matter of statutory interpretation, the offence provisions would not apply.

68. The s. 56 exemption provides a mechanism whereby the federal Minister can yield to provincial determinations regarding legitimate provincial health activities. It sets out a process by which public health exemptions will be *recognized* by the federal government – it is not exhaustive of the circumstances in which they are *created.* Here, the Constitution mandates that the provinces be at liberty to determine the public interest within their legitimate spheres, and particularly within the very core of their most centrally important activities. The federal Parliament cannot simultaneously recognize a public interest exemption (advancing the constitutional principle of

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[50] It is of significance that it is the federal Minister of *Health* who is granted the exemption power under the *CDSA*. If the statute foresaw the necessity of health yielding to criminal enforcement, rather than health being paramount, then surely it would have been the law-enforcement elements of the federal Executive who should hold the power.

cooperative federalism by acknowledging limits on the law's application to provincial core activities) and then assign the determination of what is in the public interest to the federal government exclusively, frustrating those very same principles.

69. To vest that kind of exclusive power in the federal Minister of Health would be beyond the proper reach of both the criminal law power and the residuary federal health power. Much as this Court found a municipal bylaw purporting to remove aviation activities from a significant part of the municipality of Sacre Coeur to be invalidly directed at aeronautics,[51] such an exclusive vesting of power would, in pith and substance, be equally invalid as directed at the provincial delivery of health care through a provincially-sanctioned health facility.

F. The Doctrine of Interjurisdictional Immunity Applies

70. If the BC Attorney is incorrect and the "reading down" doctrine cannot save Insite from federally-imposed closure, then the Court of Appeal was surely correct in explicitly applying the doctrine of interjurisdictional immunity reciprocally for the first time, that is, for the benefit of the provincial power.[52]

71. The Court of Appeal's reasons are full on this point, and the gist is straightforward. There will be instances – no doubt very rare – where an activity is so central to the heart of the provincial power, and where the intrusion is so unnecessary for the preservation of the federal power, that the intrusion simply cannot, in a system that relies on cooperative federalism, be allowed.

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[51] *Quebec (Attorney General) v. Lacombe*, [2010] 2 S.C.R. 453, 2010 SCC 38, at paras. 20-30, 47, 57-58 ("*Lacombe*").

[52] The BC Attorney adopts the comments of Justice Deschamps in dissent in *Lacombe* at para. 111. To limit the doctrine of interjurisdictional immunity to situations already covered by precedent, and thus to categorically exclude its application to protect provincial legislative power, would be to perpetuate the asymmetrical federalism criticized by the majority in *Canadian Western Bank*, at para. 45. See also Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 100, para. 155, per Huddart J.A.: "Judicial concern that legislative enclaves have been encouraged by the doctrine of interjurisdictional immunity, to the disadvantage of provincial activities touching on federal undertakings, has ignored the effect that this desire to encourage cooperative federalism has on provincial policies when a collision gives rise to federal paramountcy, regardless of the extent of the impact of the provincial activity on the federal power."

72. This is such a case. The Court of Appeal explicitly recognized the 'core provincial' nature of Insite's operations at para. 167:

> Insite exists...The provision of health care services is what makes a hospital a hospital, what makes health care a provincially-regulated activity. It is the indisputable intrusion of the federal government into the provision of medical services *at the level of doctor and patient* that is happening at Insite. Could Parliament legislate to effectively prohibit a doctor from using a scalpel?[53] [emphasis in original]

73. The Court of Appeal also recognized the peripheral character of the restriction on the federal power, even suggesting that, on the evidence, Insite *advances* the legitimate federal goals:

> To the extent that the criminal law treats possession for personal use as an offence because of its role in creating an illegal "supply and demand" market, that role has already run its course when an addict enters Insite or a comparable facility... A supervised drug injection service does not undermine the federal goals of protecting health or eliminating the market that drives the more serious drug-related offences of import, production and trafficking. It presupposes, but does not encourage, the possession of drugs. In fact, the service, as the trial judge found, assists in eliminating the market for illegal drugs, by encouraging addicts to seek services consistent with the long-term goal of the criminal prohibition against possession for personal use.[54]

74. The principles of co-operative federalism and subsidiarity weigh in favour of the application of both the "reading down" and interjurisdictional immunity doctrines in the present case. The *CDSA*, and indeed the Constitution, foresee close co-operation between federal and provincial authorities in the area of health. But it is the province, and its local designates, who are in the best position to respond to local health crises; the federal government's interests are in broader, national questions of uniformity, policy, funding, and access.

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[53] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 104, para. 167; see also pp. 104-105, paras. 168-169.

[54] Record, Vol. I, Reasons for Judgment of the Court of Appeal, p. 105, para. 169.

75. In this case, co-operative federalism has collapsed. Huddart J.A. observed at para. 92:

> As will become apparent, the federal executive's concern to protect the federal legislative power to prohibit possession and use of scheduled drugs... in order to protect the health and security of all Canadians appears to have overtaken respect for difficult decisions made by British Columbia as to the delivery of health care services to injection drug users in a province long and deeply troubled by drug abuse.

76. This case illustrates the difficulty of assigning too many local decisions to federal decision-makers. Huddart J.A. suggested that co-operative federalism must be infused with an appreciation of subsidiarity, writing at para. 174:

> The crisis that brings the issue to this Court is a local one. Only provincial authorities have the power to respond to this crisis. Their practical response to one of "the worst, if not the worst, health outcomes for injection drug use of any city in the developed world in the last 25 years" is to permit supervised self-injection of illegally-obtained drugs in a carefully-controlled health care facility. Co-operative federalism in this case is furthered by the application of interjurisdictional immunity so that the impugned provisions of the *CDSA* do not apply to Insite or to the premises of other similarly-controlled service providers.

77. From the Courthouse in Vancouver where the trial and appeal took place, one could walk entirely around the Downtown Eastside and be back before the lunch break was over. The unique problems in that community are visceral to British Columbians and their government in a way that has no federal equivalent. British Columbians remember years in which hundreds of addicts died of overdoses in the streets and flophouses, and when hundreds more died from easily-preventable blood-borne diseases such as HIV/AIDS.

78. As for Canada's perception of the tragic problems of the Downtown Eastside, the federal Minister of Health chose to read to the Parliamentary Standing Committee, with obvious approval, a letter from a police-officer who lamented the opening of Insite.

Fixated on the fact that "[l]attes and T-shirts were given out to addicts" at Insite's opening in September 2003, the officer apparently saw these actions as contributing to what he repeatedly derided as "the culture of entitlement" among the drug addicts of the Downtown Eastside. The Minister lauded the letter in his presentation to the Standing Committee, describing the officer as someone who "is not writing in an Ivory Tower... he speaks the plain truth."[55]

79. The plain truth is that, if Canada's arguments in this case prevail, then the federal government can expand any area of legitimate federal criminal law interest into an authority for the federal executive to effectively wipe out core areas of provincial jurisdiction. The constitutional division of powers in 1867 was designed to avoid precisely such an outcome. If ever there were a case for a protected "enclave" of provincial and local legislative authority, this is it.

G. The Costs Issue

80. The awards of special costs made in this case (on full indemnity and two-thirds solicitor-client bases respectively) are a significant departure from the usual rule that costs follow the event and are to be assessed on a party and party basis: *Supreme Court Civil Rules*, Rules 14-1(9) and 14-1(1).[56]

81. Courts have a broad discretion to depart from the usual rule where circumstances justify a different approach. It is generally recognized that public interest litigation often raises unique policy considerations that may, in exceptional circumstances, warrant a departure from the ordinary costs rules: *British Columbia (Minister of Forests) v. Okanagan Indian Band*,[57] *Victoria (City) v. Adams*.[58]

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[55] Record, Vol. XX, Affidavit of Nancy Reimer, p. 117, para. 8, and Exhibit "F" (Minister Clement's statement to Standing Committee on Health, May 29, 2008), pp. 128-129.
[56] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as amended, Rules 14-1(9) and (1).
[57] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71, at para. 22.
[58] *Victoria (City) v. Adams*, 2009 BCCA 563, at paras. 180-181 ("*Victoria (City)*").

82. While the usual basis for an award of special costs is a finding of reprehensible conduct, even absent such conduct, special costs have been awarded as "an instrument of policy to encourage access to justice": *Victoria (City)*, at para. 182.

83. At para. 183 of *Victoria (City)*, the BC Court of Appeal specifically noted that "comparatively little guidance has emerged to assist courts in regard to whether special costs are appropriate for successful litigants in completed public interest litigation." As a result, courts in BC have relied on the principles articulated in the context of interim costs awards: *Okanagan Indian Band*, at para. 40; reframed in *Victoria (City),* at para. 188.

84. Should this Honourable Court confirm this as the correct approach, the BC Attorney General submits that even where the articulated factors may be present, an award of special costs should not be an automatic outcome in public interest litigation. Rather, such an award should remain "the exception rather than the norm" and "access to justice considerations must be balanced against other important factors": *Victoria (City)*, at para. 191, citing *Finney v. Barreau du Québec*,[59] and *Little Sisters*.[60]

85. In the circumstances of this case, the BC Attorney submits that any access to justice considerations should properly have been balanced against recognition of the important and necessary statutory roles which the provincial and federal attorneys general play in defending legislation within their respective spheres. It is unclear whether this factor was adequately considered by the courts below.

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[59] *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, 2004 SCC 36, at para. 48.
[60] *Little Sisters*, at para. 35.

Part IV – COSTS

86. The BC Attorney does not seek costs.

Part V – NATURE OF ORDER SOUGHT

87. The BC Attorney seeks an order dismissing the appeal, and answering the first constitutional question as follows:

a. Are ss. 4(1) and 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, constitutionally inapplicable to the activities of staff and users at Insite, a health care undertaking in the Province of British Columbia?

Answer: This question need not be answered, as, properly interpreted, the *CDSA* sections do not restrict the provincially authorized health care services at Insite.

In the alternative, if the sections do restrict these activities, then the answer to the question is "Yes."

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Victoria, British Columbia, this 1st day of February, 2011.

CRAIG E. JONES KARRIE WOLFE

Counsel for the Respondent, Attorney General of British Columbia

Part VI – TABLE OF AUTHORITIES

	Cited at Paragraphs
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British Columbia (Attorney General) v. Lafarge Canada Inc., [2007] 2 S.C.R. 87, 2007 SCC 23	FN 46 (para 61)
British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 2003 SCC 71	81, 83
Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, 2007 SCC 22	42, FN 36 (para 43), FN 37 (para 44), FN 48 (para 61), FN 52 (para 70)
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Part VII – STATUTES and REGULATIONS

Tab 1 *Constitution Act, 1867,* (U.K.), 30 & 31 Victoria, c. 3, ss. 91, 92

Tab 2 *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ss. 4, 5, 56

THE CONSTITUTION ACT, 1867

30 & 31 Victoria, c. 3. (U.K.)

(Consolidated with amendments)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

(*29th March 1867*)

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:[1]

I. PRELIMINARY

Short title

1. This Act may be cited as the *Constitution Act, 1867*.[2]

2. Repealed.[3]

II. UNION

Declaration of Union

3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada;

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[1] **The enacting clause was repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). It read as follows:**

> Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

[2] **As enacted by the *Constitution Act, 1982*, which came into force on April 17, 1982. The section, as originally enacted, read as follows:**

> 1. This Act may be cited as The British North America Act, 1867.

[3] **Section 2, repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), read as follows:**

> 2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

VI. Distribution of Legislative Powers

Powers of the Parliament

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

1. Repealed.[44]

1A. The Public Debt and Property.[45]

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.[46]

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

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[44] **Class I was added by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.). That Act and class I were repealed by the *Constitution Act, 1982*. The matters referred to in class I are provided for in subsection 4(2) and Part V of the *Constitution Act, 1982*. As enacted, class I read as follows:**

> 1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

[45] **Re-numbered by the *British North America (No. 2) Act, 1949*.**

[46] **Added by the *Constitution Act, 1940*, 3-4 Geo. VI, c. 36 (U.K.).**

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.[47]

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[47] **Legislative authority has been conferred on Parliament by other Acts as follows:**

1. The *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.).

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

3. The Parliament of Canada may from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

Exclusive Powers of Provincial Legislatures

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —

1. Repealed.[48]
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

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5. The following Acts passed by the said Parliament of Canada, and intituled respectively, — "An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada"; and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of "the Province of Manitoba", shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

The *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.) (repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.)) had previously conferred similar authority in relation to Rupert's Land and the North Western Territory upon admission of those areas.

2. The *Constitution Act, 1886*, 49-50 Vict., c. 35 (U.K.).

1. The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

3. The *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.).

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. Under section 44 of the *Constitution Act, 1982*, Parliament has exclusive authority to amend the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons. Sections 38, 41, 42 and 43 of that Act authorize the Senate and House of Commons to give their approval to certain other constitutional amendments by resolution.

[48] **Class I was repealed by the *Constitution Act, 1982*. As enacted, it read as follows:**

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

Section 45 of the *Constitution Act, 1982* now authorizes legislatures to make laws amending the constitution of the province. Sections 38, 41, 42 and 43 of that Act authorize legislative assemblies to give their approval by resolution to certain other amendments to the Constitution of Canada.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

   (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

   (*b*) Lines of Steam Ships between the Province and any British or Foreign Country:

   (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(*a*) exploration for non-renewable natural resources in the province;

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(*a*) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

"Primary production"

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.[49]

Education

Legislation respecting Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not

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[49] **Added by the *Constitution Act, 1982*.**

CANADA

CONSOLIDATION

CODIFICATION

Controlled Drugs and Substances Act

Loi réglementant certaines drogues et autres substances

S.C. 1996, c. 19

L.C. 1996, ch. 19

Current to December 31, 2010

À jour au 31 décembre 2010

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit:

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

An Act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the Narcotic Control Act in consequence thereof

[*Assented to 20th June 1996*]

Loi portant réglementation de certaines drogues et de leurs précurseurs ainsi que d'autres substances, modifiant certaines lois et abrogeant la Loi sur les stupéfiants en conséquence

[*Sanctionnée le 20 juin 1996*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

Short title

1. This Act may be cited as the *Controlled Drugs and Substances Act*.

TITRE ABRÉGÉ

Titre abrégé

1. *Loi réglementant certaines drogues et autres substances.*

INTERPRETATION

Definitions

2. (1) In this Act,

"adjudicator" « *arbitre* »

"adjudicator" means a person appointed or employed under the *Public Service Employment Act* who performs the duties and functions of an adjudicator under this Act and the regulations;

"analogue" « *analogue* »

"analogue" means a substance that, in relation to a controlled substance, has a substantially similar chemical structure;

"analyst" « *analyste* »

"analyst" means a person who is designated as an analyst under section 44;

"Attorney General" « *procureur général* »

"Attorney General" means

(*a*) the Attorney General of Canada, and includes their lawful deputy, or

(*b*) with respect to proceedings commenced at the instance of the government of a province and conducted by or on behalf of that government, the Attorney General of that province, and includes their lawful deputy;

DÉFINITIONS ET INTERPRÉTATION

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

« analogue » "*analogue*"

« analogue » Qualifie toute substance dont la structure chimique est essentiellement la même que celle d'une substance désignée.

« analyste » "*analyst*"

« analyste » Personne désignée à ce titre en application de l'article 44.

« arbitre » "*adjudicator*"

« arbitre » Personne nommée ou employée sous le régime de la *Loi sur l'emploi dans la fonction publique* et exerçant à ce titre les attributions prévues par la présente loi et ses règlements.

« bien infractionnel » "*offence-related property*"

« bien infractionnel » Bien situé au Canada ou à l'extérieur du Canada, à l'exception des substances désignées, qui sert ou donne lieu à la perpétration d'une infraction désignée ou qui est utilisé de quelque manière dans la perpétration d'une telle infraction, ou encore qui est destiné à servir à une telle fin.

"controlled substance" « *substance désignée* »

"controlled substance" means a substance included in Schedule I, II, III, IV or V;

"designated substance offence" « *infraction désignée* »

"designated substance offence" means

(*a*) an offence under Part I, except subsection 4(1), or

(*b*) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (*a*);

"inspector" « *inspecteur* »

"inspector" means a person who is designated as an inspector under section 30;

"judge" « *juge* »

"judge" means a judge as defined in section 552 of the *Criminal Code* or a judge of a superior court of criminal jurisdiction;

"justice" « *juge de paix* »

"justice" has the same meaning as in section 2 of the *Criminal Code*;

"Minister" « *ministre* »

"Minister" means the Minister of Health;

"offence-related property" « *bien infractionnel* »

"offence-related property" means, with the exception of a controlled substance, any property, within or outside Canada,

(*a*) by means of or in respect of which a designated substance offence is committed,

(*b*) that is used in any manner in connection with the commission of a designated substance offence, or

(*c*) that is intended for use for the purpose of committing a designated substance offence;

"possession" « *possession* »

"possession" means possession within the meaning of subsection 4(3) of the *Criminal Code*;

"practitioner" « *praticien* »

"practitioner" means a person who is registered and entitled under the laws of a province to practise in that province the profession of medicine, dentistry or veterinary medicine, and includes any other person or class of persons prescribed as a practitioner;

"precursor" « *précurseur* »

"precursor" means a substance included in Schedule VI;

"prescribed" *Version anglaise seulement*

"prescribed" means prescribed by the regulations;

"produce" « *production* »

"produce" means, in respect of a substance included in any of Schedules I to IV, to obtain the substance by any method or process including

« fournir » "*provide*"

« fournir » Procurer, même indirectement et notamment par don ou transfert, en échange ou non d'une contrepartie.

« infraction désignée » "*designated substance offence*"

« infraction désignée » Soit toute infraction prévue par la partie I, à l'exception du paragraphe 4(1), soit le complot ou la tentative de commettre une telle infraction, la complicité après le fait à son égard ou le fait de conseiller de la commettre.

« inspecteur » "*inspector*"

« inspecteur » Personne désignée à ce titre en application de l'article 30.

« juge » "*judge*"

« juge » Juge au sens de l'article 552 du *Code criminel* ou tout juge d'une cour supérieure de compétence criminelle.

« juge de paix » "*justice*"

« juge de paix » S'entend au sens de l'article 2 du *Code criminel*.

« ministre » "*Minister*"

« ministre » Le ministre de la Santé.

« possession » "*possession*"

« possession » S'entend au sens du paragraphe 4(3) du *Code criminel*.

« praticien » "*practitioner*"

« praticien » Personne qui, en vertu des lois d'une province, est agréée et est autorisée à exercer dans cette province la profession de médecin, de dentiste ou de vétérinaire. Y sont assimilées toute autre personne ou catégorie de personnes désignées par règlement.

« précurseur » "*precursor*"

« précurseur » Substance inscrite à l'annexe VI.

« procureur général » "*Attorney General*"

« procureur général »

a) Le procureur général du Canada et son substitut légitime;

b) à l'égard des poursuites intentées à la demande du gouvernement d'une province et menées par ce dernier ou en son nom, le procureur général de cette province et son substitut légitime.

« production » "*produce*"

« production » Relativement à une substance inscrite à l'une ou l'autre des annexes I à IV, le fait de l'obtenir par quelque méthode que ce soit, et notamment par :

a) la fabrication, la synthèse ou tout autre moyen altérant ses propriétés physiques ou chimiques;

b) la culture, la multiplication ou la récolte de la substance ou d'un organisme vivant dont il peut être extrait ou provenir de toute autre façon.

(*a*) manufacturing, synthesizing or using any means of altering the chemical or physical properties of the substance, or

(*b*) cultivating, propagating or harvesting the substance or any living thing from which the substance may be extracted or otherwise obtained,

and includes offer to produce;

"provide" « *fournir* »

"provide" means to give, transfer or otherwise make available in any manner, whether directly or indirectly and whether or not for consideration;

"sell" « *vente* »

"sell" includes offer for sale, expose for sale, have in possession for sale and distribute, whether or not the distribution is made for consideration;

"traffic" « *trafic* »

"traffic" means, in respect of a substance included in any of Schedules I to IV,

(*a*) to sell, administer, give, transfer, transport, send or deliver the substance,

(*b*) to sell an authorization to obtain the substance, or

(*c*) to offer to do anything mentioned in paragraph (*a*) or (*b*),

otherwise than under the authority of the regulations.

Interpretation

(2) For the purposes of this Act,

(*a*) a reference to a controlled substance includes a reference to any substance that contains a controlled substance; and

(*b*) a reference to a controlled substance includes a reference to

(i) all synthetic and natural forms of the substance, and

(ii) any thing that contains or has on it a controlled substance and that is used or intended or designed for use

(A) in producing the substance, or

(B) in introducing the substance into a human body.

Interpretation

(3) For the purposes of this Act, where a substance is expressly named in any of Schedules I to VI, it shall be deemed not to be included in any other of those Schedules.

1996, c. 8, s. 35, c. 19, s. 2; 2001, c. 32, s. 47.

Y est assimilée l'offre de produire.

« substance désignée » *"controlled substance"*

«substance désignée» Substance inscrite à l'une ou l'autre des annexes I, II, III, IV ou V.

« trafic » *"traffic"*

«trafic» Relativement à une substance inscrite à l'une ou l'autre des annexes I à IV, toute opération de vente — y compris la vente d'une autorisation visant son obtention — , d'administration, de don, de cession, de transport, d'expédition ou de livraison portant sur une telle substance — ou toute offre d'effectuer l'une de ces opérations — qui sort du cadre réglementaire.

« vente » *"sell"*

«vente» Y est assimilé le fait de mettre en vente, d'exposer ou d'avoir en sa possession pour la vente ou de distribuer, que la distribution soit faite ou non à titre onéreux.

Interprétation

(2) Pour l'application de la présente loi :

a) la mention d'une substance désignée vaut également mention de toute substance en contenant;

b) la mention d'une substance désignée vaut mention :

(i) de la substance dans ses formes synthétiques et naturelles,

(ii) de toute chose contenant, y compris superficiellement, une telle substance et servant — ou destinée à servir ou conçue pour servir — à la produire ou à l'introduire dans le corps humain.

Interprétation

(3) Pour l'application de la présente loi, les substances figurant expressément dans l'une ou l'autre des annexes I à VI sont réputées exclues

de celles de ces annexes dans lesquelles elles ne figurent pas expressément.

1996, ch. 8, art. 35, ch. 19, art. 2; 2001, ch. 32, art. 47.

Interpretation

3. (1) Every power or duty imposed under this Act that may be exercised or performed in respect of an offence under this Act may be exercised or performed in respect of a conspiracy, or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under this Act.

Interprétation

3. (1) Les pouvoirs et fonctions prévus par la présente loi relativement à toute infraction à celle-ci s'appliquent tout autant à l'égard du complot ou de la tentative de commettre une telle infraction, de la complicité après le fait à son égard ou du fait de conseiller de la commettre.

Interpretation

(2) For the purposes of sections 16 and 20, a reference to a person who is or was convicted of a designated substance offence includes a reference to an offender who is discharged under section 730 of the *Criminal Code*.

Interprétation

(2) Pour l'application des articles 16 et 20, la mention d'une personne reconnue coupable d'une infraction désignée vaut également mention d'un contrevenant absous aux termes de l'article 730 du *Code criminel*.

1995, c. 22, s. 18; 1996, c. 19, s. 3.

1995, ch. 22, art. 18; 1996, ch. 19, art. 3.

PART I

OFFENCES AND PUNISHMENT

Particular Offences

PARTIE I

INFRACTIONS ET PEINES

Infractions particulières

Possession of substance

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

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.

Obtaining substance

(2) No person shall seek or obtain

(*a*) a substance included in Schedule I, II, III or IV, or

(*b*) an authorization to obtain a substance included in Schedule I, II, III or IV

from a practitioner, unless the person discloses to the practitioner particulars relating to the acquisition by the person of every substance in those Schedules, and of every authorization to obtain such substances, from any other practitioner within the preceding thirty days.

Obtention de substances

(2) Il est interdit d'obtenir ou de chercher à obtenir d'un praticien une substance inscrite aux annexes I, II, III ou IV ou une autorisation pour obtenir une telle substance, à moins que la personne en cause ne dévoile à ce dernier toute substance inscrite à l'une de ces annexes et toute autorisation pour obtenir une telle substance qui lui ont été délivrées par un autre praticien au cours des trente jours précédents.

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

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,

Punishment

(7) Every person who contravenes subsection (2)

(*a*) is guilty of an indictable offence and liable

(i) to imprisonment for a term not exceeding seven years, where the subject-matter of the offence is a substance included in Schedule I,

(ii) to imprisonment for a term not exceeding five years less a day, where the subject-matter of the offence is a substance included in Schedule II,

(iii) to imprisonment for a term not exceeding three years, where the subject-matter of the offence is a substance included in Schedule III, or

(iv) to imprisonment for a term not exceeding eighteen months, where the subject-matter of the offence is a substance included in Schedule IV; 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.

Peine

(7) Quiconque contrevient au paragraphe (2) commet:

a) soit un acte criminel passible:

(i) dans le cas de substances inscrites à l'annexe I, d'un emprisonnement maximal de sept ans,

(ii) dans le cas de substances inscrites à l'annexe II, d'un emprisonnement maximal de cinq ans moins un jour,

(iii) dans le cas de substances inscrites à l'annexe III, d'un emprisonnement maximal de trois ans,

(iv) dans le cas de substances inscrites à l'annexe IV, d'un emprisonnement maximal de dix-huit mois;

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.

Determination of amount

(8) For the purposes of subsection (5) and Schedule VIII, the amount of the substance means the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance.

Interprétation

(8) Pour l'application du paragraphe (5) et de l'annexe VIII, « quantité » s'entend du poids total de tout mélange, substance ou plante dans lequel on peut déceler la présence de la substance en cause.

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.

Possession for purpose of trafficking

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

Possession en vue du trafic

(2) Il est interdit d'avoir en sa possession, en vue d'en faire le trafic, toute substance inscrite aux annexes I, II, III ou IV.

Punishment

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

(*a*) subject to subsection (4), where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an in-

Peine

(3) Quiconque contrevient aux paragraphes (1) ou (2) commet:

a) dans le cas de substances inscrites aux annexes I ou II, mais sous réserve du para-

dictable offence and liable to imprisonment for life;

(*b*) where the subject-matter of the offence is a substance included in Schedule III,

(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.

graphe (4), un acte criminel passible de l'emprisonnement à perpétuité;

b) dans le cas de substances inscrites à l'annexe III :

(i) soit un acte criminel passible d'un emprisonnement maximal de dix ans,

(ii) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois;

c) dans le cas de substances inscrites à l'annexe IV :

(i) soit un acte criminel passible d'un emprisonnement maximal de trois ans,

(ii) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal d'un an.

Punishment in respect of specified substance

(4) Every person who contravenes subsection (1) or (2), 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 VII, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day.

Peine — cas particuliers

(4) Quiconque contrevient aux paragraphes (1) ou (2) commet, dans le cas de substances inscrites à la fois à l'annexe II et à l'annexe VII, et ce pourvu que la quantité en cause n'excède pas celle mentionnée à cette dernière annexe, un acte criminel passible d'un emprisonnement maximal de cinq ans moins un jour.

Interpretation

(5) For the purposes of applying subsection (3) or (4) in respect of an offence under subsection (1), a reference to a substance included in Schedule I, II, III or IV includes a reference to any substance represented or held out to be a substance included in that Schedule.

Interprétation

(5) Dans le cadre de l'application des paragraphes (3) ou (4) à l'égard d'une infraction prévue au paragraphe (1), la mention d'une substance inscrite aux annexes I, II, III ou IV vaut également mention de toute substance présentée ou tenue pour telle.

Interpretation

(6) For the purposes of subsection (4) and Schedule VII, the amount of the substance means the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance.

Interprétation

(6) Pour l'application du paragraphe (4) et de l'annexe VII, « quantité » s'entend du poids total de tout mélange, substance ou plante dans lequel on peut déceler la présence de la substance en cause.

Importing and exporting

6. (1) Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI.

Importation et exportation

6. (1) Sauf dans les cas autorisés aux termes des règlements, l'importation et l'exportation de toute substance inscrite à l'une ou l'autre des annexes I à VI sont interdites.

Possession for the purpose of exporting

(2) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, III, IV, V or VI for the purpose of exporting it from Canada.

Possession en vue de l'exportation

(2) Sauf dans les cas autorisés aux termes des règlements, il est interdit d'avoir en sa possession, en vue de son exportation, toute substance inscrite à l'une ou l'autre des annexes I à VI.

Punishment

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

(*a*) where 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;

(*b*) where the subject-matter of the offence is a substance included in Schedule III or VI,

(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 or V,

(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.

Peine

(3) Quiconque contrevient aux paragraphes (1) ou (2) commet :

a) dans le cas de substances inscrites aux annexes I ou II, un acte criminel passible de l'emprisonnement à perpétuité;

b) dans le cas de substances inscrites aux annexes III ou VI :

(i) soit un acte criminel passible d'un emprisonnement maximal de dix ans,

(ii) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois;

c) dans le cas de substances inscrites aux annexes IV ou V :

(i) soit un acte criminel passible d'un emprisonnement maximal de trois ans,

(ii) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal d'un an.

Production of substance

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

Production

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

Punishment

(2) Every person who contravenes subsection (1)

(*a*) where the subject-matter of the offence is a substance included in Schedule I or II, other than cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for life;

(*b*) where the subject-matter of the offence is cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years;

(*c*) where the subject-matter of the offence is a substance included in Schedule III,

(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

Peine

(2) Quiconque contrevient au paragraphe (1) commet :

a) dans le cas de substances inscrites aux annexes I ou II, à l'exception du cannabis (marihuana), un acte criminel passible de l'emprisonnement à perpétuité;

b) dans le cas du cannabis (marihuana), un acte criminel passible d'un emprisonnement maximal de sept ans;

c) dans le cas de substances inscrites à l'annexe III :

(i) soit un acte criminel passible d'un emprisonnement maximal de dix ans,

(ii) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois;

d) dans le cas de substances inscrites à l'annexe IV :

member of a police force to direct the commission of an act or omission — that would otherwise constitute an offence under Part I or the regulations and, without restricting the generality of the foregoing, may make regulations

(*a*) authorizing the Minister of Public Safety and Emergency Preparedness or the provincial minister responsible for policing in a province, as the case may be, to designate a police force within their jurisdiction for the purposes of this subsection;

(*b*) exempting, on such terms and conditions as may be specified in the regulations, a member of a police force that has been designated pursuant to paragraph (*a*) and other persons acting under the direction and control of the member from the application of any provision of Part I or the regulations;

(*c*) respecting the issuance, suspension, cancellation, duration and terms and conditions of a certificate, other document or, in exigent circumstances, an approval to obtain a certificate or other document, that is issued to a member of a police force that has been designated pursuant to paragraph (*a*) for the purpose of exempting the member from the application of Part I or the regulations;

(*d*) respecting the detention, storage, disposal or other dealing with any controlled substance or precursor;

(*e*) respecting records, reports, electronic data or other documents in respect of a controlled substance or precursor that are required to be kept and provided by any person or class of persons; and

(*f*) prescribing forms for the purposes of the regulations.

— ou à en ordonner la commission — qui constituerait par ailleurs une infraction à la partie I ou aux règlements, et notamment :

a) autoriser ce ministre ou le ministre responsable de la sécurité publique dans une province à désigner, pour l'application du présent paragraphe, un ou plusieurs corps policiers relevant de sa compétence;

b) soustraire, aux conditions précisées, tout membre d'un corps policier désigné aux termes de l'alinéa *a*) ou toute autre personne agissant sous son autorité et sa supervision à l'application de tout ou partie de la partie I ou des règlements;

c) régir, aux conditions précisées, la délivrance, la suspension, la révocation et la durée des certificats ou autres documents — ou, en cas de situation d'urgence, des approbations en vue de leur obtention — à remettre à un membre d'un corps policier désigné aux termes de l'alinéa *a*) en vue de le soustraire à l'application de tout ou partie de la partie I ou des règlements;

d) régir la rétention, l'entreposage et la disposition des substances désignées et des précurseurs;

e) régir les registres, rapports, données électroniques ou autres documents que doit tenir, établir ou fournir, en rapport avec les substances désignées ou les précurseurs, toute personne ou catégorie de personnes;

f) déterminer les imprimés ou formules à utiliser dans le cadre des règlements.

Incorporation by reference

(3) Any regulations made under this Act incorporating by reference a classification, standard, procedure or other specification may incorporate the classification, standard, procedure or specification as amended from time to time, and, in such a case, the reference shall be read accordingly.

1996, c. 19, s. 55; 2001, c. 32, s. 55; 2005, c. 10, s. 15.

Incorporation par renvoi

(3) Il peut être précisé, dans les règlements d'application de la présente loi qui incorporent par renvoi des classifications, normes, procédures ou autres spécifications, que celles-ci sont incorporées avec leurs modifications successives.

1996, ch. 19, art. 55; 2001, ch. 32, art. 55; 2005, ch. 10, art. 15.

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

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 pré-

Exemption par le ministre

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.

sente loi ou de ses règlements toute personne ou catégorie de personnes, ou toute substance désignée ou tout précurseur ou toute catégorie de ceux-ci.

Powers, duties and functions of Minister or Minister of Public Safety and Emergency Preparedness

57. The Minister's powers, duties or functions under this Act or the regulations — and those of the Minister of Public Safety and Emergency Preparedness under the regulations — may be exercised or performed by any person designated, or any person occupying a position designated, for that purpose by the relevant Minister.

1996, c. 19, s. 57; 2005, c. 10, s. 16.

Exercice des attributions du ministre ou du ministre de la Sécurité publique et de la Protection civile

57. Les attributions conférées au ministre aux termes de la présente loi ou de ses règlements peuvent être exercées par la personne qu'il désigne à cet effet ou qui occupe le poste qu'il désigne à cet effet; il en va de même des attributions conférées aux termes des règlements au ministre de la Sécurité publique et de la Protection civile.

1996, ch. 19, art. 57; 2005, ch. 10, art. 16.

Paramountcy of this Act and the regulations

58. In the case of any inconsistency or conflict between this Act or the regulations made under it, and the *Food and Drugs Act* or the regulations made under that Act, this Act and the regulations made under it prevail to the extent of the inconsistency or conflict.

Incompatibilité

58. Les dispositions de la présente loi ou de ses règlements l'emportent respectivement sur les dispositions incompatibles de la *Loi sur les aliments et drogues* ou de ses règlements.

Offence of making false or deceptive statements

59. No person shall knowingly make, or participate in, assent to or acquiesce in the making of, a false or misleading statement in any book, record, return or other document however recorded, required to be maintained, made or furnished pursuant to this Act or the regulations.

Déclarations fausses ou trompeuses

59. Nul ne peut sciemment, dans un livre, registre, rapport ou autre document — quel que soit son support matériel — à établir aux termes de la présente loi ou de ses règlements, faire ou consentir à ce que soit faite une déclaration fausse ou trompeuse, participer à une telle déclaration ou y acquiescer.

Amendments to Schedules

Modification des annexes

Schedules

60. The Governor in Council may, by order, amend any of Schedules I to VIII by adding to them or deleting from them any item or portion of an item, where the Governor in Council deems the amendment to be necessary in the public interest.

Pouvoir

60. Le gouverneur en conseil peut, par décret, modifier l'une ou l'autre des annexes I à VIII pour y ajouter ou en supprimer tout ou partie d'un article dont l'adjonction ou la suppression lui paraît nécessaire dans l'intérêt public.

PART VII

TRANSITIONAL PROVISIONS, CONSEQUENTIAL AND CONDITIONAL AMENDMENTS, REPEAL AND COMING INTO FORCE

PARTIE VII

DISPOSITIONS TRANSITOIRES, MODIFICATIONS CORRÉLATIVES ET CONDITIONNELLES, ABROGATION ET ENTRÉE EN VIGUEUR

Transitional Provisions

Dispositions transitoires

References to prior enactments

61. Any reference in a designation by the Minister of Public Safety and Emergency Preparedness under Part VI of the *Criminal Code* to an offence contrary to the *Narcotic Control Act* or Part III or IV of the *Food and Drugs Act* or any conspiracy or attempt to commit or being an accessory after the fact or any counselling in relation to such an offence shall be

Mentions

61. La mention, dans une désignation établie par le ministre de la Sécurité publique et de la Protection civile aux termes de la partie VI du *Code criminel*, soit d'une infraction à la *Loi sur les stupéfiants* ou aux parties III ou IV de la *Loi sur les aliments et drogues*, soit du complot ou de la tentative de la commettre, de la complicité après le fait à son égard ou du fait de conseiller