S.C.C. 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, SHELLY TOMIC and VANCOUVER AREA NETWORK OF DRUG USERS (VANDU)

RESPONDENTS
(Respondents / Cross-Appellants)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS
(Respondent)

- and -

ATTORNEY GENERAL OF QUEBEC

INTERVENER

FACTUM OF THE RESPONDENTS PHS COMMUNITY SERVICES SOCIETY, DEAN EDWARD WILSON and SHELLY TOMIC

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

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PART I: OVERVIEW AND STATEMENT OF THE FACTS

1. The Downtown Eastside is the epicentre of a long-standing addiction and injection drug use problem in Vancouver. In the 1990s, that addiction problem grew to epidemic levels, creating a health emergency marked by mortality and morbidity from overdose, rampant rates of HIV and Hepatitis C infection, and chronic injection-related conditions such as endocarditis, septicaemia and abscesses. The epidemic has had tragic consequences for individuals and significantly burdened the local health care system.

2. In 2003, cooperative federalism paved the way for Insite, Vancouver's supervised injection site, to open. A provincially-regulated health care facility, Insite is a controlled environment where injection drug users from the Downtown Eastside inject themselves using clean equipment, under the supervision of nurses and paramedical staff. Insite's clients also have access to health care and social services, including addictions counseling and on-demand detoxification.

3. The cooperative response to the tragedy of addiction in the Downtown Eastside was short lived, however. By 2007, growing federal opposition to the facility prompted the Respondents to seek constitutional protection for Insite and its clients. In May 2008, the British Columbia Supreme Court held that ss. 4(1) and 5(1) of the *Controlled Drugs and Substances Act*[1] infringe the rights of life, liberty and security of the person of Insite's users, contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*. In January 2010, the Court of Appeal held ss. 4(1) and 5(1) of the *CDSA* inapplicable to supervised injection at Insite under the doctrine of interjurisdictional immunity, and affirmed the Trial Judge's *Charter* rulings.

4. The Appellants now challenge the holdings of the Court of Appeal, asserting a theory of the criminal law so broad that it has the potential to exert a stranglehold on the provincial health care power, and imperil the rights – and lives – of some of Vancouver's most disenfranchised residents.

5. At issue in the appeal is nothing less than the ability of the province to respond to an epidemic, and the rights of injection drug users to try to survive it.

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[1] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "*CDSA*"), Appellants' Factum, pp. 50-81

A. The Downtown Eastside and the Origin of Insite[2]

6. The Downtown Eastside of Vancouver is home to approximately 4,600 injection drug users with chronic addictions. Most have been incarcerated for their drug use; most are living in poverty; and many are homeless, have no or poor access to transportation, and limited access to primary health care. A significant number of injection drug users in the Downtown Eastside are urban Aboriginals with tenuous, if any, links to their home communities; many have histories of sexual and physical abuse; and many have resorted to the survival sex trade or other criminal activity.[3]

7. Population health in the Downtown Eastside is poor. The HIV infection rate in the Downtown Eastside hovers at close to 20 percent.[4] Close to 90 percent of injection drug users in the Downtown Eastside (including the Respondents Wilson and Tomic) are infected with Hepatitis C. There have been outbreaks of transferable tuberculosis, syphilis and Hepatitis A and B in the neighbourhood.[5] Rates of chronic mental illness are high.[6] Common health issues among the patients at the Portland Hotel medical clinic include HIV, Hepatitis C, internal organ and soft tissue infection, malnutrition, depression, anxiety and psychiatric and thought disorders, such as schizophrenia.[7]

8. Over time, a public health emergency arose in the Downtown Eastside due to injection drug use.[8] Indeed, the Downtown Eastside is characterised by some of "the worst, if not the worst, health outcomes for injecting drug use of any city in the developed world in the last 25 years."[9] In 1994, a Task Force headed by the Chief Coroner reported an 800 percent increase

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[2] Appellants' Record ("*Record*"), Vol. I, Reasons for Judgment of the Trial Judge, pp. 12-18, ¶¶13-46; see also, Vol. II, Affidavit #1 of Donald MacPherson ("MacPherson #1") and Ex. A-C, pp. 54-183; see also, Vol. V, Affidavit #1 of Heather Hay ("Hay #1") and Ex. A, pp. 123-95; Vol. VI, Ex. A-L, p. 1 - Vol. IX, p. 74

[3] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 12, ¶¶15-16

[4] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 12, ¶16

[5] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 14, ¶29; Vol. II, Affidavit #1 of Shelly Tomic ("Tomic #1"), p. 38, ¶12; Vol. II, Affidavit #1 of Dean Wilson ("Wilson #1"), p. 43, ¶5

[6] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 13, ¶25; Vol. IV, Affidavit #1 of Elizabeth Evans ("Evans #1"), pp. 82-84, ¶8

[7] *Record*, Vol. III, Affidavit #1 of Dr. Gabor Maté ("Maté #1"), pp. 2-3, ¶6

[8] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 13-14, ¶26; Vol. V, Hay #1, p. 126, ¶8

[9] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 106, ¶174; Vol. IV, Affidavit #1 of Dr. Alex Wodak ("Wodak #1"), p. 111, ¶19

in overdose deaths in British Columbia between 1988 and 1993. Sixty percent of the reported deaths occurred in Vancouver. The Task Force described the rate of overdose as an "epidemic."[10]

9. In 1996, Vancouver's Medical Health Officer reported that injection drug use was seriously taxing the city's medical system, causing increased hospital and emergency service utilization for conditions such as HIV-related disease, septicaemia and endocarditis; increased pressure on all community-level outreach, nursing and medical services; an increasing need for community level palliation and hospice; and worsening consequences for conditions associated with addiction, such as mental illness.[11]

10. In early 1997, with an HIV prevalence rate of 27 percent, health care researchers reported an HIV/AIDS epidemic among injection drug users in the Downtown Eastside.[12] The Chief Medical Health Officer declared a public health emergency in the Downtown Eastside in September 1997.[13]

11. In 1999, the Vancouver/Richmond Health Board (the "Health Board"), which was later succeeded by the Vancouver Coastal Health Authority (the "Health Authority"), determined that the Downtown Eastside was gripped by "a prolonged public health emergency"[14] at the base of which was an injection drug use epidemic that had to be the "primary focus" of an integrated health approach in the area.[15]

12. In March 2000, Canada, British Columbia and Vancouver entered into the Vancouver Agreement. The Agreement envisioned a "Comprehensive Substance Misuse Strategy" for the Downtown Eastside including a "continuum of approaches to reducing harm" from injection drug use.[16]

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[10] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 66-67, ¶37; Vol. V, Hay #1, p. 126, ¶9, and Ex. A, pp. 146 - Vol. VI, p. 68; NB: the correct date for the Task Force's report is 1994, not 1995 as stated in Hay #1, ¶9

[11] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 13, ¶22; Vol. V, Hay #1, pp. 126-27, ¶10 and Vol. VI, Ex. B, pp. 69-97

[12] *Record*, Vol. V, Hay #1, p. 127, ¶11 and Vol. VI, Ex. C, pp. 98-104; "'prevalence rate' refers to the percentage of the population with detectable levels of HIV in blood samples" (p.127, ¶11)

[13] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 13-14, ¶26; Vol. V, Hay #1, p. 128, ¶14

[14] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 14, ¶¶28-29; Vol. V, Hay #1, pp. 129-31, ¶¶16-20

[15] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 14, ¶30; Vol. V, Hay #1, p. 131, ¶21

[16] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 14-15, ¶¶31-32; Vol. V, Hay #1, pp. 131-32, ¶23; Vol. II, MacPherson #1, p. 56, ¶10 and Ex. A, pp. 60-71

13. On May 15, 2001, Vancouver City Council adopted "A Framework for Action – A Four Pillars Approach to Drug Problems in Vancouver" as the City's plan to address drug problems in the Downtown Eastside.[17] One of the "Four Pillars" was the adoption of a harm reduction approach to the impact of addiction on communities and individuals.[18] The plan called for the establishment of a multi-sectoral task force to consider the feasibility of supervised consumption/injection sites.[19]

14. In June 2001, the directors of the Health Board voted to support supervised injection sites as "a vital and necessary part of the continuum of the health care system."[20] In December 2001, the Health Authority replaced the Health Board.

15. On March 1, 2003, the directors of the Health Authority approved a staff proposal for a supervised injection site in the Downtown Eastside to "assist [the Health Authority] to meet its health care mandate in providing appropriate and necessary health care to all populations it serves."[21] In May 2003, the Health Authority applied to the federal Minister of Health for an exemption from ss. 4(1) and 5(1) of the *CDSA*. The exemption was granted on September 12, 2003 for a period of three years under s. 56 of the *CDSA*, which confers on the Minister of Health discretion to allow exemptions to the *CDSA* if they are necessary for a medical or scientific purpose or are otherwise in the public interest. The exemption for Insite was granted for the purpose of scientific research.[22]

16. Insite opened on September 21, 2003.[23] It has, since its opening, been operated jointly by the Health Authority and the Respondent PHS Community Services Society ("PHS") through a contractual agreement between them.

17. Insite's exemption under s. 56 of the *CDSA* was twice extended, first to December 31, 2007, then to June 30, 2008.[24] The *PHS* action went to trial about 10 weeks before the extension

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[17] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 16-17, ¶¶33-40; Vol. II, MacPherson #1, p. 56, ¶11 and Ex. B, pp. 73-181
[18] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 16, ¶36; Vol. II, MacPherson #1, Ex. B, pp. 134-39
[19] *Record*, Vol. II, MacPherson #1, Ex. B, p. 138, ¶32
[20] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 17-18, ¶¶43-44; Vol. V, Hay #1, pp. 136-37, ¶35
[21] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 18, ¶45; Vol. V, Hay #1, pp. 136-37, ¶¶35-37
[22] *Record*, Vol. V, Hay #1, p. 138, ¶¶38-40
[23] *Record*, Vol. V, Hay #1, p. 139, ¶42
[24] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 78, ¶¶82-83; Vol. V, Hay #1, p. 139, ¶41

was to expire.[25] During the trial, the Health Authority applied for a further extension to the exemption, with the support of the provincial Minister of Health.[26] The application was returned to the Health Authority on December 19, 2008 with a letter noting that a letter was not "required at this time" in light of the Trial Judge's grant of a constitutional exemption until June 30, 2009.[27]

B. The Nature of Addiction[28]

18. Drug addiction is an illness. It is a chronic disease and can be progressive, relapsing and fatal. As the Trial Judge found, one aspect of the illness is the continuing need or craving to consume the substance to which the addiction relates. Addiction is partly explained by neuro-chemical effects of addictive substances, but may also be influenced by genetic factors and psychological and social determinants such as stress, trauma, sexual and physical abuse, parental neglect and the effects of behavioural conditioning.

19. "Hard core" addicts are at a high risk of relapse when they attempt abstinence. For addicts such as those in the Downtown Eastside, the route to long-term abstinence can be a long and difficult process characterized by many treatment attempts and a high life-long risk of relapse.

C. The Petitioners Wilson and Tomic[29]

20. The Respondents Wilson and Tomic are long term injection drug users who have struggled with addiction for much of their lives.

21. Ms. Tomic was born addicted, further exposed to drugs as a child and became an active injection drug user as a teen. She has struggled with injection drug use throughout her adulthood. Prior to the opening of Insite, Ms. Tomic had a history of injecting in other people's hotel rooms and in alleys. These are practices associated with increased morbidity and, in the event of overdose, mortality. Ms. Tomic has a history of local infections and endocarditis from injection

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[25] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 78, ¶83
[26] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 78-79, ¶84
[27] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 79, ¶¶85-86. In light of the history, the Appellants are mistaken in suggesting, at ¶45 of their Factum, that the *CDSA* exemption "lapsed" at some time, bringing Insite "into conflict with the *CDSA*."
[28] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 18-20, ¶¶47-59; see also Vol. IX, Affidavit #1 of Dr. David Marsh ("Marsh #1"), pp. 77-86, ¶¶6-25
[29] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 20-21, ¶¶60-70

drug use. In her evidence, Ms. Tomic deposed to the importance of Insite in her efforts to manage the harmful effects of injection drug use; she attributes her ability to start and continue methadone treatment to her attendance at Insite.[30]

22. Mr. Wilson deposed to a nearly 40 year history of drug addiction and injection drug use, resulting in, among other things, a history of serious overdoses and multiple unsuccessful attempts to withdraw from drug use. Aware of the risks of injection drug use, Mr. Wilson has chosen to inject at Insite to mitigate the physical and mental harm that accompanies his addiction. Mr. Wilson credits Insite with building a climate of trust between the clients and staff, thereby encouraging injection drug users to return to Insite, to receive health care and support.[31]

D. The Operation of Insite[32]

23. Insite operates under strict protocols approved by Health Canada in 2003. Users are provided with clean injection equipment upon entry and monitored by nurses and paramedical staff during injection. Treatment is provided in the event of an overdose; first aid is provided for routine wounds, soft tissue injuries and other injection-related conditions. Nurses instruct users in injection hygiene to reduce conditions such as endocarditis and abscesses and prevent the transmission of blood-borne diseases. Insite also provides counselling and referrals for drug withdrawal and addictions treatment, among other services. Since the fall of 2007, staff at Insite have been able to refer users to "Onsite," an on-demand detoxification centre located above Insite.[33]

24. The Trial Judge found as fact that Insite provides health care to users:

> While users do not use Insite to directly treat their addiction, they receive services and assistance at Insite which reduce the risk of overdose that is a feature of their illness, they avoid the risk of being infected or of infecting others by injection, and they gain access to counseling and consultation that may lead to abstinence and rehabilitation. All of this is health care.[34]

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[30] *Record*, Vol. II, Tomic #1, pp. 36-41
[31] *Record*, Vol. II, Wilson #1 and Ex. A, pp. 42-53
[32] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 21-22, ¶¶71-77
[33] *Record*, Vol. V, Hay #1, pp. 139-43, ¶¶42-52
[34] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 34, ¶136

E. The Assessment of Outcomes[35]

25. It is uncontroversial that Insite delivers benefits to the injection drug users that attend there. The risks of morbidity and mortality from injection drug use is ameliorated by injection in the presence of qualified health professionals. Insite improves users' personal health through injection hygiene education, first aid treatment and wound care. It helps to control disease by virtually eliminating the risk of transmission of HIV and Hepatitis C on site. Insite's staff and peer counsellors facilitate access to social services and treatment options, leading to an increased uptake in treatment services among users.[36]

PART II: STATEMENT OF POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS

26. The Appellants have correctly set out the constitutional questions stated by the Chief Justice on September 2, 2010. The Respondents answer those questions 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: Yes.

b. Does s. 4(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*? Answer: Yes.

c. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*? Answer: No.

d. Does s. 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*? Answer: Yes.

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[35] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 22-25, ¶¶78-89

[36] Record, Vol. III, Affidavit #1 of Dr. Thomas Kerr ("Kerr #1") and Ex. A-F, pp. 53-94; Vol. III, Affidavit #1 of Dr. Julio Montaner ("Montaner #1"), pp. 95-99, and Ex. B-C, pp. 164-85; Vol. III, Affidavit #1 of Dr. Evan Wood ("Wood #1") and Ex. A, pp. 186-206, and Vol. IV, Ex. B-Q, pp. 1-79

e. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*? Answer: No.

27. The Appellants also ask whether the Trial Judge erred in awarding costs to the Respondents. The Trial Judge committed no error in granting costs.

PART III: STATEMENT OF ARGUMENT

The Federalism Issue

28. The first question on appeal is whether ss. 4(1) and 5(1) of the *CDSA* are constitutionally inapplicable to injection drug users and health care workers participating in the supervised injection program at Insite. Through Insite, some of the most profoundly addicted residents of the Downtown Eastside gain access to responsive health care to treat and mitigate their addictions - health care that only the Province of British Columbia is constitutionally competent to provide. The Government of Canada disagrees with British Columbia's response to the Downtown Eastside's public health crisis. The issue is: which level of government will determine how to address addiction in Vancouver's poorest neighbourhood?

The Federal Legislative Scheme

29. Section 4(1) of the *CDSA* prohibits possession of the illicit drugs most commonly injected at Insite – heroin, cocaine and methamphetamine – as well as other substances identified in schedules to the *Act*. The *CDSA* adopts the definition of "possession" from s. 4(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended), as follows:

> 4(3) For the purposes of this Act,
>
> (a) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

30. Section 5(1) of the *CDSA* prohibits "trafficking" in scheduled substances. The meaning of "traffic" includes to sell, administer, give, transfer, transport, send or deliver a scheduled substance.[37]

31. Section 55(1)(z) of the *CDSA* allows for exemptions to the *Act* by regulation; s. 56 of the *CDSA* allows for exemptions by the exercise of ministerial discretion for a scientific, medical, or public interest purpose.

32. The validity of ss. 4(1) and 5(1) of the *CDSA* is common ground between the parties. The provisions are in pith and substance penal legislation within federal competence under s. 91(27) of the *Constitution Act, 1867*.

The Nature of the Provincial Activity

33. Insite is a health care undertaking created by the Health Authority.[38] The Health Authority is a regional health board under the *Health Authorities Act*, R.S.B.C. 1996, c. 180. Its purposes include planning, programming and delivering health services, including the type, size and location of facilities in its region.[39] The Health Authority is empowered to deliver services through its employees or by entering into service agreements with public or private bodies.[40] The Respondent PHS participates in the operation of Insite through such an agreement.

34. It is common ground that addiction is a physiological condition, the medical and social intervention for which is within the exclusive purview of the provinces.[41] Insite was created as part of the Health Authority's plan for a "continuum of care" approach to addiction in the Downtown Eastside.[42]

35. It is also common ground that Insite is a provincial health care facility and a "hospital" for constitutional purposes.[43] As Huddart J.A. held, the operation of Insite falls within the province's exclusive jurisdiction under ss. 92(7) (hospitals, asylums, charities and eleemosynary

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[37] *CDSA*, s. 2 "traffic", Appellants' Factum, pp. 50-81
[38] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 101-02, ¶157
[39] *Health Authorities Act*, s. 5(1)(a), Appellants' Factum, pp. 92-95
[40] *Ibid*. ss. 5(1)(d), Appellants' Factum, pp. 92-95
[41] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 81, ¶93; *Schneider v. The Queen*, [1982] 2 S.C.R. 112 [*Schneider*], p. 137, Appellants' Book of Authorities ("CANBoA") Vol. IV, Tab 57
[42] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 17, ¶43
[43] Appellants' Factum, ¶44; *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 86, ¶103

institutions), 92(13) (property and civil rights) and 92(16) (matters of a merely local or private nature) of the *Constitution Act, 1867*.[44] This conclusion is consistent with the jurisprudence of this Court concerning health matters and the division of powers.[45] Public health,[46] medical services and treatment decisions,[47] including treatment for addiction,[48] and health care facilities[49] have been consistently held to be exclusively provincial matters.

36. While Insite's status as a health care facility readily links it to provincial jurisdiction under s. 92(7) of the *Constitution Act, 1867*, it is important to bear in mind the relationship of Insite to the province's powers under s. 92(16). As a matter of fact, Insite responds to a peculiarly localized problem, namely injection drug use and addiction in a *city neighbourhood*. Vancouver's addiction epidemic is defined by the street map: its locus is "the area bounded by the waterfront along Burrard Inlet on the north, Clark Drive on the east, Pender and Terminal Streets on the south, and Richards Street on the west."[50] As a matter of law, competence over "medical and social intervention" for addiction is classified under s. 92(16) of the *Constitution Act, 1867*.[51]

Supervised Injection at Insite is Protected by Interjurisdictional Immunity

A. The Trial and Appellate Findings

37. The Trial Judge found, and the Court of Appeal affirmed, that supervised injection is "vital" to the operation of Insite;[52] at the "core" of its purpose;[53] and "an essential element of

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[44] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 95, ¶134; per Smith J.A., dissenting, p. 124, ¶243. Smith J.A. implicitly agreed that Insite is a health care facility within provincial jurisdiction, but did not specify the applicable head of power.

[45] e.g. *Bell Canada v. Québec (Commission de santé et de la sécurité du travail du Québec)*, [1988] 1 S.C.R. 749 [*Bell (1988)*], ¶18, Respondent's Book of Authorities ("PHSBoA") Tab 4; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 [*Chaoulli*], ¶¶18 and 23, CANBoA Vol. I, Tab 11

[46] *Schneider*, p. 137, CANBoA Vol. IV, Tab 57

[47] *R. v. Morgentaler*, [1993] 3 S.C.R. 463 [*Morgentaler*], p. 33, PHSBoA Tab 16; *Mazzei v. British Columbia (Director of Adult Forensic Services Psychiatric Services)*, [2006] 1 S.C.R. 326, 2006 SCC 7 [*Mazzei*], ¶¶31 and 34, PHSBoA Tab 12

[48] *Schneider*, p. 137, CANBoA Vol. IV, Tab 57

[49] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [*Reference re Assisted Human Reproduction* Act], ¶260 per LeBel and Deschamps JJ. , PHSBoA Tab 18; *Mazzei*, ¶¶31 and 34, PHSBoA Tab 12

[50] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 12, ¶15

[51] *Schneider*, p. 138, CANBoA Vol. IV, Tab 57

[52] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 30, ¶117; Reasons for Judgment of the Court of Appeal, pp. 101-02, ¶157

[53] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 101-02, ¶157

Insite's health care delivery program."[54] Huddart J.A., writing for herself and Rowles J.A., noted:

> **[161]** The trial judge's finding that supervised injections are vital to Insite's health delivery program is well grounded in the evidence. Liability to arrest and prosecution for possession while on its premises will undermine the low threshold nature of Insite, a key part of its design, so that services might be delivered to high-risk injection drug users at the core of the health care crisis in the area it serves. The lure of safe injection gets those addicts into Insite so health care may be delivered, including detoxification treatment at Onsite. The only possible conclusion to be drawn from the evidence is that supervised injection is an essential element of Insite's health care delivery program.
>
> **[162]** If the federal executive, in exercising or failing to exercise authority granted to it by Parliament, can effectively prohibit a form of health care vital to the delivery of a provincial health care program, that means Parliament has an effective veto over provincial health care services, to the extent its use of the criminal power can be justified by the potential for harm to public health or safety. That is just the sort of intrusion into a provincial domain that constituted an impermissible intrusion into the federal domain in *Bell Canada (1988)*...[55]

38. The Court of Appeal held that ss. 4(1) and 5(1) of the *CDSA* impair - indeed sterilize - the essential elements of the undertaking at Insite.[56] In the result, the Court concluded that Insite qualifies for limited immunity from ss. 4(1) and 5(1) of the *CDSA*, pursuant to the doctrine of interjurisdictional immunity.

B. The Test for Interjurisdictional Immunity

39. This Court should confirm that ss. 4(1) and 5(1) of the *CDSA* are inapplicable to Insite if, like the majority below, it answers the following two questions in the affirmative. First, do the federal laws encroach on the protected core of a provincial competence? Second, is the effect of the federal laws on the exercise of the protected provincial power sufficiently serious to invoke interjurisdictional immunity?[57]

40. The test under the first question, above, is whether the subject (supervised injection) comes within the essential jurisdiction - the "basic minimum and unassailable content" - of the

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[54] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 103, ¶161
[55] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 103, ¶¶161–62 [emphasis in original]
[56] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 104-05, ¶168
[57] For this formulation of the test, albeit applied solely in relation to federal heads of power, see *Quebec (Attorney General) v. Canadian Owners and Pilots Association* (2010), 324 D.L.R. (4th) 692, 2010 SCC 39 [*COPA*], ¶27, CANBoA Vol. II, Tab 24.

legislative power in question (health care) as expressed in the context of a health care undertaking.[58]

41. Decisions about treatment and health care services are undoubtedly within the core mandate of provincial health care undertakings; to paraphrase *Bell (1988)*, the ability to make such decisions is what makes a health care undertaking of specifically provincial jurisdiction.[59] This is because the provincial power over health care includes the power to determine: the nature of the health care delivery system;[60] matters of cost and efficiency in health care delivery;[61] and the nature of the medical treatment to be delivered at hospitals and other health care facilities.[62] As Huddart J.A. observed, "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."[63]

42. Safe injection lies at the core of, and is indispensible to, the health care provided at Insite. The evidence conclusively demonstrates that supervised injection is the essential ingredient of Insite's low threshold access model. As Huddart J.A. noted, it draws in those injection drug users who are otherwise unlikely to voluntarily participate in health care interventions for their addictions.[64] Engaging with users through the very behaviour that is problematic from a health care and disease prevention point of view is central to the health care delivery system for Insite's target population of drug consumers. Withdrawing supervised injection from the services offered at Insite would vitiate the very nature of this health care undertaking.

43. Moreover, the Appellants' contention that Insite could dispense with supervised injection and continue to offer other services is ill-founded.[65] If the delivery of health care for addiction and the control of infectious disease lie at the core of the provincial power over health care, then there is no room to debate the means chosen to deliver those services. The focus on the inquiry is

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[58] *Bell (1988)*, ¶254, PHSBoA Tab 4; *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 [*CWB*], ¶50, CANBoA Vol. I, Tab 10
[59] see also *CWB*, ¶51, CANBoA Vol. I, Tab 10
[60] *Chaoulli*, ¶23, CANBoA Vol. I, Tab 11
[61] *Morgentaler*, pp. 33-34, PHSBoA Tab 16
[62] *Mazzei*, ¶¶31 and 34, PHSBoA Tab 12
[63] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 101-02, ¶157 [emphasis in original]
[64] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, per Huddart J.A., p. 86, ¶102; p. 103, p. 161; see also Vol. V, Hay #1, pp. 134-35, ¶32
[65] see Appellants' Factum, ¶77

on the power itself, not its particular application.[66] The observation made at paragraph 77 of the Appellants' factum that no provincial law requires Insite to offer supervised injection services is thus unhelpful. The fact that a health care undertaking is brought about by decision of a statutory decision-maker, rather than by legislation *per se*, makes it no less a matter at the core of the power over the delivery of health care in the province.[67]

44. On the question of whether the effect of the federal law is sufficiently serious to justify invoking the doctrine of interjurisdictional immunity, the conclusion of the Court of Appeal is sound. The application of ss. 4(1) and 5(1) of the *CDSA* at Insite would not only impair, but *sterilize* the essential element of Insite's health care program.[68] This point was driven home in the Court of Appeal with the suggestion by the Appellants that, while unlikely, health care providers at Insite (or similar facilities) might face prosecution for possession or even trafficking under the *CDSA* simply by delivering the health care services they are mandated by the province to provide.[69]

45. Aside from the suggestion that Insite could abandon supervised injection and still offer other health care services, the Appellants do not join issue with the Court of Appeal's conclusions as to the "vital" or "core" nature of supervised injection to Insite's health care programming; nor do they contest the extent to which the federal law encroaches upon the provincial undertaking. Rather, the Appellants' arguments are more broadly pitched.

C. Expansion of Provincial Powers

46. The Appellants argue, *in terrorem*, that if this Court upholds the finding that the *CDSA* impermissibly intrudes upon the core of provincial jurisdiction over health care, that will place decisions as to which drugs may be possessed for which health services "entirely in provincial hands", "entirely preclud[ing]" a federal role.[70] However, the constitutionality of the whole of the *CDSA* is not in issue in the proceedings. The general constitutionality of ss. 4(1) and 5(1) is not even at issue. The only conduct at issue is the possession of illegal drugs at Insite by injection drug users, who, being addicted and having obtained the drugs on their own outside of

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[66] *COPA*, ¶48, CANBoA Vol. II, Tab 24
[67] *Vide COPA* and federal executive control over the placement of aerodromes
[68] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 104-05, ¶168
[69] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 88, ¶112

the facility, bring them to Insite so that they can be supervised while they inject those drugs,[71] and the supervision of the injections by health care workers at Insite.[72] The inapplicability of ss. 4(1) and 5(1) of the *CDSA* within the walls of Insite for the purposes of supervised injection does not invite, let alone mandate, exclusive provincial regulation of prohibited substances or controlled pharmaceuticals in other contexts.

D. Limiting the Application of Interjurisdictional Immunity

47. The Appellants go on to urge that resort to interjurisdictional immunity in this case ignores the injunction of this Court in *CWB* that the doctrine should be used sparingly, and limited to situations already covered by precedent.[73]

48. While it is true that Binnie and LeBel JJ. in *CWB* counselled that interjurisdictional immunity is of "limited application and should *in general* be reserved for situations already covered by precedent" they continued by saying:

> **77** … This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensible or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division or powers as a whole, or what is *absolutely indispensible or necessary to enable an undertaking to carry out its mandate in what makes it specifically of* federal (or *provincial*) jurisdiction….[74]

49. The application of interjurisdictional immunity to this case falls squarely within the third category described in *CWB*.

E. The Doctrine and Double Aspect Matters

50. The Respondents agree with the Appellants that the case engages a subject matter with a double aspect; this matter is best described as "injection drug use." The *CDSA* addresses this matter through the criminal prohibition on illicit drugs. British Columbia addresses this matter through health care interventions for addiction. Both are valid exercises of the governments' respective constitutional powers. However, neither government can act outside of its area of

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[70] Appellants' Factum, ¶72
[71] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 22, ¶72
[72] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 102-03, ¶160
[73] Appellants' Factum, ¶71

jurisdiction: the federal government has no power to provide addiction-based health care in the provinces, and the provincial governments have no power to enact criminal law against addiction. So, the case raises no concern about the " excessive creation of 'core' jurisdictions";[75] each level of government is limited to its own, recognised, area of competence.

51. Further, the case law confirms that while *caution* may be warranted when considering the applicability of the doctrine to double aspect matters, there is *no prohibition* on applying interjurisdictional immunity to such matters. Thus, in *COPA*, McLachlin C.J. emphasized that the "argument that interjurisdictional immunity cannot apply to laws possessing a double aspect is, at bottom, a challenge to the very existence of the doctrine of interjurisdictional immunity."[76]

F. Limitations on the Criminal Law

52. The Appellants also urge that the application of interjurisdictional immunity in this case has the potential to unduly limit the criminal law and diminish its uniform application. The Appellants say that Parliament's ability to legislate in relation to health concerns under its criminal law power may be hampered by the finding in this case that ss. 4(1) and 5(1) of the *CDSA* are inapplicable to supervised injection at Insite.[77]

53. The Appellants' analysis confuses questions of validity with questions of applicability. The conclusion that ss. 4(1) and 5(1) of the *CDSA* are inapplicable to the core health care service at Insite has no bearing on Parliament's ability to enact valid criminal legislation in relation to health concerns. Indeed, it is only because ss. 4(1) and 5(1) of the *CDSA are* valid criminal law that an applicability issue arises. While the criminal law power is frequently described as "plenary" in nature, this language describes the range of subjects in relation to which Parliament may enact valid legislation, not the application of the law.[78]

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[74] *CWB*, ¶77 [emphasis added], CANBoA Vol. I, Tab 10
[75] Appellants' Factum, ¶71
[76] *COPA*, ¶58, CANBoA Vol. II, Tab 24; see also *Quebec (Attorney General) v. Lacombe* (2010), 324 D.L.R. (4th) 625, 2010 SCC 38, ¶150 per Deschamps J., dissenting, CANBoA Vol. II, Tab 25
[77] Appellants' Factum, ¶¶73-75
[78] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*], ¶32, CANBoA Vol. IV, Tab 56; see also *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 [*Hydro-Quebec*], ¶128, PHSBoA Tab 14

54. This Court has repeatedly recognised that the criminal law power, though broad, "is not unlimited."[79] Valid criminal law may have incidental effects upon areas of provincial competence,[80] but the jurisprudence has never suggested that the criminal law can so encroach upon areas of exclusive provincial concern as to impair core provincial powers or, *a fortiori*, provincial undertakings. Rather, the converse is true: the criminal law "cannot be used to eviscerate the provincial power to regulate health."[81] As such, the tendency in the cases has been to recognise that the criminal law power must be subject to some limits to afford the provinces "adequate breathing room" in the exercise of their jurisdiction, and to safeguard the balance of Canadian federalism.[82]

G. Interjurisdictional Immunity is Reciprocal

55. The Appellants do not contend that interjurisdictional immunity is a doctrine that only protects federal powers. The Appellants are correct in this respect. *CWB* points out that the doctrine of interjurisdictional immunity arises from the recognition that the classes of subjects in ss. 91 *and* 92 of the *Constitution Act, 1867* "must be assured a 'basic, minimum and unassailable content'."[83] It acknowledges that the doctrine is rooted in the references to exclusivity throughout ss. 91 *and* 92, and its modern application "expresses a continuing concern about the risk of erosion of provincial *as well as* federal competences."[84] The Court cautions that while it does not favour "an intensive reliance on the doctrine," interjurisdictional immunity still has "a proper part to play in appropriate circumstances."[85] The circumstances of this case are entirely appropriate to the application of the doctrine, as outlined below.

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[79] *Reference re: Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31 [*Firearms Reference*], ¶30, PHSBoA Tab 20
[80] *Hydro-Quebec*, ¶129, PHSBoA Tab 14; *Morgentaler*, PHSBoA Tab 16; *Firearms Reference*, ¶¶48-49, PHSBoA Tab 20
[81] *Reference re Assisted Human Reproduction Act*, ¶77 per McLachlin C.J., PHSBoA Tab 18
[82] *Hydro-Quebec*, ¶153, PHSBoA Tab 14
[83] *CWB*, ¶33, quoting from *Bell (1988)*, ¶254, CANBoA Vol. I, Tab 10
[84] *CWB*, ¶34, CANBoA Vol. I, Tab 10
[85] *CWB*, ¶47, CANBoA Vol. I, Tab 10; see also Robin Elliot, "Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: the Supreme Court Muddies the Doctrinal Waters - Again" (2008), 43 S.C.L.R. (2d) 433; *Lacombe*, per Deschamps J. (dissenting) and LeBel J. (concurring with Deschamps J. on the nature of the doctrine of interjurisdictional immunity), PHSBoA Tab 27

H. Interjurisdictional Immunity for Insite Supports the Values of Canadian Federalism

56. In her reasons, Huddart J.A. explained in detail why the application of interjurisdictional immunity in the case serves, and does not undermine, Canadian federalism. In their factum, the Appellants have not taken issue with any aspect of Huddart J.A.'s analysis.

57. In *CWB*, Binnie and LeBel JJ. identified several concerns about interjurisdictional immunity. These include a history of the doctrine having "an unintentional centralising tendency,"[86] leading to "somewhat asymmetrical results"[87] in application; the ability of the doctrine, as traditionally applied, to undermine the principles of subsidiarity;[88] the risk of its creating "serious uncertainty" by defining, in the abstract, indeterminate core areas of jurisdiction;[89] the risk of creating "legal vacuums" or gaps, since the laws of one level of government cannot have even an incidental effect on core areas of jurisdiction;[90] and the apparently superfluous nature of the doctrine,[91] at least insofar as its application to federal powers is concerned.

58. The application of interjurisdictional immunity in favour of a provincial health care undertaking does not raise any of these concerns. Applied in relation to the provincial health care power, the doctrine does not tend to have a centralising influence, nor is it superfluous because paramountcy cannot be invoked in favour of the provinces to resolve jurisdictional tensions. It also does no violence to the principle of subsidiarity; rather, it supports subsidiarity. Applied in relation to a supervised injection facility, in particular, interjurisdictional immunity does not produce any legal vacuums, gaps or uncertainties because it is not necessary to *define* the core of the health care power in the abstract; it is only necessary to *acknowledge* that supervised injection falls within that core, whatever else it may comprise.[92]

59. Moreover, the application of interjurisdictional immunity to protect the province's ability to provide supervised injection at Insite fosters a constitutionally appropriate interpretation of the provincial health care power in the Canadian federal state. As this Court has stressed, the

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[86] *CWB*, ¶45, CANBoA Vol. I, Tab 10
[87] *CWB*, ¶35, CANBoA Vol. I, Tab 10
[88] *CWB*, ¶45, CANBoA Vol. I, Tab 10
[89] *CWB*, ¶43, CANBoA Vol. I, Tab 10
[90] *CWB*, ¶44, CANBoA Vol. I, Tab 10
[91] *CWB*, ¶46, CANBoA Vol. I, Tab 10

Constitution must be interpreted so as to remain responsive to the actual needs of citizens.[93] Our Constitution is thus "a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[94]

60. The multi-faceted problem of addiction in the Downtown Eastside is one of the ugliest realities Vancouver faces. The magnitude of the public health crisis created and fed by injection drug use in this neighbourhood starkly demonstrates the pressing need for a practical constitutional response to a modern epidemic. As was noted in *CWB*, to remain vital, "the very functioning of Canada's federal system must continually be reassessed in light of the fundamental values it was designed to serve."[95] Interjurisdictional immunity in favour of Insite supports a progressive and realistic view of the health care power. It deserves the endorsement by this Court.

Paramountcy is Not at Issue in the Case

61. If the Court agrees that supervised injection at Insite should be immunized from the application of ss. 4(1) and 5(1) of the *CDSA*, then it is unnecessary to go further with the federalism analysis; the case is resolved under the doctrine of interjurisdictional immunity.

62. Nonetheless, the Appellants argue that if there is a conflict between the operation of Insite and the *CDSA*, the *CDSA* must prevail.[96] However, the Appellants also concede that a traditional paramountcy analysis does not "neatly captur[e] the problem in this case."[97] In fact, there is no paramountcy problem in this case.

63. As McLachlin C.J. recently reaffirmed in *COPA*, "paramountcy is relevant where there is conflicting federal and provincial legislation."[98] In *COPA*, the federal law was a broad, permissive statute that permitted private entities to build aerodromes, but did not prescribe their locations. Similarly, in the case at bar, the *Health Authorities Act* is enabling legislation. It

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[92] *CWB*, ¶42, CANBoA Vol. I, Tab 10
[93] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶57, PHSBoA Tab 22
[94] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79, ¶22, PHSBoA Tab 21
[95] *CWB*, ¶23, CANBoA Vol. I, Tab 10
[96] Appellant's Factum, ¶65
[97] Appellants' Factum, ¶46
[98] *COPA*, ¶62 [emphasis added], CANBoA Vol. II, Tab 24; see also *CWB*, ¶69, CANBoA Vol. I, Tab 10; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, ¶11, PHSBoA Tab 24

empowers the Health Authority to develop and implement a regional health plan to deliver health services, including the type, size and location of facilities, but it does not mandate rights or create prohibitions. The statute does not give rise to an operational conflict in which complying with the provincial law means defying the federal law, as that dynamic is understood in the authorities.[99]

64. Paramountcy might also be applied if Insite were to frustrate the legislative purpose of ss. 4(1) and 5(1) of the *CDSA*, the protection of public health and safety.[100] However, the Appellants do not allege a conflict of purpose, and there is no evidence that Insite does anything to undermine public health or public safety. To the contrary, the evidence accepted by the Trial Judge showed that Insite has had no negative effects in its operations.[101] As Huddart J.A. confirmed:

> **[169]** … A supervised injection service does not undermine the federal goals of protecting health or eliminating the market that drives the more serious drug-related offenses 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 provision against possession for personal use.[102]

65. The Appellants have not established a proper footing on which to invoke paramountcy in the case. Neither legislative conflict nor conflict of purpose is present. In these circumstances, to invoke the doctrine of paramountcy would "impermissibly mingl[e] the distinct doctrines of interjurisdictional immunity and paramountcy", contrary to the Court's warning in *COPA*.[103]

66. It is true that there is a jurisdictional tension surrounding Insite. Something must give way at the door, but it is not provincial legislation. Rather, the choice is between the health care offered at Insite and the application of ss. 4(1) and 5(1) of the *CDSA* to supervised injection within its walls. Interjurisdictional immunity is the analysis that applies to that sort of clash, and ss. 4(1) and 5(1) of the *CDSA* were correctly held to be inapplicable to supervised injection at Insite. The remedy ought to be upheld. As Huddart J.A. wrote:

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[99] *COPA*, ¶65, CANBoA Vol. II, Tab 24
[100] see Appellants' Factum, ¶50
[101] see *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 23-24, ¶85
[102] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 105, ¶169
[103] *COPA*, ¶52, CANBoA Vol. II, Tab 24

> **[176]** If interjurisdictional immunity is not available to a provincial undertaking on the facts of this case, then it may well be said the doctrine is not reciprocal and can never be applied to protect exclusive provincial powers….[104]

The Relationship Between the Division of Powers and *Charter* Claims

67. The Appellants say "failure to succeed on [the division of powers] argument means that there cannot be any s. 7 *Charter* 'deprivation' based on access to Insite."[105] There is no merit to this submission.

68. The Appellants' submission on federalism was that the "provincial program" (offered at Insite) was "necessarily limited by the operation of the duly enacted federal law regulating controlled substances" or, alternatively, that if Insite is a product of a provincial law then that provincial law clashes with the federal law which is paramount.[106]

69. If either of these propositions is accepted, it would still be the federal law that prohibits supervised injections at Insite. It is that federal law that must therefore comply with the *Charter*.

70. The answer to the Appellants' assertion that "there cannot be a constitutional right of access to a service that the province has no legal capacity to offer,"[107] is that, but for the federal law, the province has full capacity to offer the service.[108]

71. The Appellants say their claim is a "novel variation on the rule that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution."[109]

72. The claim is not a novel variation of the rule but an outright distortion of it. It has long been recognized that Parliament's competence to legislate with respect to any matter does not alleviate the need for it to comply with the *Charter* in carrying out its powers.[110]

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[104] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 106, ¶176
[105] Appellants' Factum, ¶93
[106] Appellants' Factum, ¶46
[107] Appellants' Factum, ¶92
[108] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 86, ¶103; see also ¶¶103-11 and 134, which the Appellants assert that they do not "take issue with" (Appellants' Factum ¶44)
[109] Appellants' Factum, ¶93
[110] *Reference re Bill 30, an Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, ¶80, PHSBoA Tab 19; *Adler v. Ontario*, [1996] 3 S.C.R. 609, ¶138, PHSBoA Tab 1

Section 7

73. Sections 4(1) and 5(1) of the *CDSA* (the "Impugned Provisions"), in their application to Insite, create an impermissible barrier between persons afflicted with the serious and debilitating illness of drug addiction and access to the health care services offered at Insite. These services reduce, and perhaps eliminate, the risk of death from overdose and the risk of contracting serious and life-threatening diseases. The application of the Impugned Provisions to health care delivery at Insite deprives the Respondents and others similarly situated of their s. 7 rights in a manner contrary to the principles of fundamental justice.

The Deprivation Issue

74. All judges in the Courts below held that the Impugned Provisions deprive the Respondents of their life, liberty and security of the person.[111] The Respondents adopt these reasons as their submissions on this threshold issue.[112]

75. The Appellants persist in claiming the Impugned Provisions do not deprive injection drug users of life or security of the person because any risk of death or illness they face is caused by drugs they inject and not the law.[113]

76. The Appellants' claim misses the point. Injecting hard drugs is bad for one's health but when the injection occurs in unsafe environments there is an immediate risk of death from overdose, and an increased risk of infections and transmission of blood-borne disease. These risks are not caused by the drug, but by the use of unsanitary and unsafe equipment, techniques and procedures.[114] When addicts inject at Insite, these risks diminish or disappear.[115]

77. Deprivation is sufficiently made out because the law creates this "risk."[116]

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[111] This unanimity includes Smith J.A. in dissent in the Court of Appeal.
[112] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 34-35, ¶¶138-47; Reasons for Judgment of the Court of Appeal, per Rowles J.A., p. 65-69, ¶¶28-46; per Huddart J.A., p. 112, ¶199; and per Smith J.A., pp. 127-31, ¶¶255-69
[113] Appellants' Factum, ¶99
[114] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 24, ¶87, #2
[115] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 24, ¶87, #3, and p. 35, ¶144
[116] *Chaoulli*, per Deschamps J., ¶43, per McLachlin C.J. and Major J., concurring, ¶¶118-19, 124, CANBoA Vol. I, Tab 11

78. The Appellants say the Respondents seek "a right to carry out criminal activity in a safer way."[117] That is a gross distortion of the case before the Court. While it is true that the Impugned Provisions criminalize all safe injections, they are challenged only on the narrow basis that they criminalize access to a health care facility operated by trained medical staff and pursuant to valid provincial legislation and a protocol approved by Health Canada in 2003.[118]

79. The Appellants say, "Nothing about the law prevents 'safe' injection… Unsafe injection or, for that matter, consumption by injection at all, is a choice made by the consumer."[119] The Appellants' claim of "choice," underscores a stubborn refusal to accept the uncontroverted fact that the users of Insite are *addicted* and one aspect of addiction is "*the continuing need or craving* to consume the substance to which the addiction relates."[120] As the Trial Judge held, "the subject with which these actions are concerned has moved beyond the question of choice to consume in the first instance."[121]

80. The Chief Coroner underlined this in his influential 1994 report:

> ... The addiction has an overwhelming power over the body and mind of the addict. As one recovering addict indicated, he would do anything to obtain his next fix. His wife, children, job, friends – nothing was more important than getting his next fix. It was an all consuming power over which he had no control.[122]

81. The Appellants say, speciously, that 95 percent of injections in the Downtown Eastside do not take place at Insite, and this belies the suggestion that addicts cannot make choices.[123] That some addicts do not attend Insite has no bearing on whether they can choose not to use drugs. The difficulty in making a choice to withdraw from a substance to which one is addicted, such as heroin or cocaine, is not comparable with the ability to make any choice at all. The choice to inject under supervision is vitally important for injection drug users, but it is available to them only if Insite is open to receive them.

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[117] Appellants' Factum, ¶85
[118] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 86, ¶102
[119] Appellants' Factum, ¶100
[120] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 24, ¶87, #1 [emphasis added]; see also ¶135
[121] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 35, ¶142
[122] *Record*, Vol. V, Hay #1, Ex. A, pp. 157-58
[123] Appellants' Factum, ¶100

82. Moreover, 95 percent of injections still occur outside Insite because the site is operating at capacity at 18 hours a day, seven days a week.[124] More facilities like Insite are needed, not more specious assertions about choice and addiction.

83. The Appellants say that if one accepts the premise that "addicts are incapable of making a rational choice… no addict would ever be cured."[125] The fact is that for most addicts that cure is long in the making, and may require multiple attempts.[126] Meanwhile, Insite is, as Dr. Maté put it, a "life raft" in what is otherwise a sea of misery.[127]

84. The Appellants say, falsely, "the law prevents addicts from possessing addictive drugs, not from accessing measures necessary to treat their addiction."[128] Addicts have the drugs; the law has not prevented this. It prevents them from accessing health care services, including conventional forms of treatment,[129] but even more significantly, services that ensure safer drug use, and a pathway to more lasting addiction treatment.

85. Insite is the critical first link to any hope of abstinence-based treatment for its target population, the "hard to house, hard to reach or hard to treat."[130] The Impugned Provisions prevent access to the health care service that, in practice, addicts in the Downtown Eastside most need, and the only that some will perhaps ever use.[131]

86. Dr. Gabor Maté explained it this way:

> 13. Another beneficial feature of Insite is a little bit more difficult to convey, namely, that the facility puts drug users into regular contact with health personnel who are able to address their other medical problems and, crucially, with counselors who can support them in dealing with their drug addiction. This is a difficult population to work with. Because of their uniformly tragic early childhood histories they do not well know how to take care of

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[124] See also: *Record*, Vol. XVII, Affidavit #1 of Dr. Alan Ogborne ("Ogborne #1"), Ex. C (Andresen and Boyd Report), p. 7

[125] Appellants' Factum, ¶100. There was no evidence tendered by the Appellants to show that any addict from the Downtown Eastside has been "cured." The Respondents hope and assume that possibility remains.

[126] *Record*, Vol. IX, Marsh #1, p. 79, ¶9, and pp. 85-86, ¶25

[127] *Record*, Vol. III, Maté #1, p. 6, ¶14

[128] Appellants' Factum, ¶91

[129] *Record*, Vol. IX, Marsh #1, p. 88, ¶31; see also: Vol. V, Hay #1, pp. 140-41, ¶¶47-48

[130] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 10, ¶4

[131] in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler (1988)*], ¶¶25-33, PHSBoA, Tab 15, women were not denied, in theory, access to hospitals; but in practice they were; see also *Chaoulli*, ¶138, CANBoA Vol. I, Tab 11, where the Chief Justice emphasized the importance of a realistic and not just theoretical approach to constitutional issues

> themselves and they do not readily seek help from health providers. Insite is a link – for some their only link – between their street lives and the health care system and, for many, it is one of the first institutions they have encountered where they feel treated in a supportive, humane way. For the physically and emotionally wounded people they are, that is no small matter. Since Insite opened, I have visited it several dozen times at the request of Insite staff. Typically, I am called by staff who are concerned about a client who they believe to needs to see a doctor, but who is unlikely to do so on his or her own. Several patients have come into my practice who are now receiving proper medical care only because their involvement with Insite. But for that contact, some of these people would be severely ill or, possibly, no longer alive.[132]

87. A unique innovation at Insite is the post-injection "chill out lounge" where injection drug users can speak with peer and addiction counselors and gain on-demand access to "Onsite," the detoxification facility upstairs from Insite.[133]

88. The peer-reviewed studies of Insite show that users who inject at Insite are 30 percent more likely than the general population of injection drug users in the Downtown Eastside to enter detoxification and treatment. Entry into treatment directly correlates to a reduction in injection drug use and a reduction in use of Insite. Creating more facilities like Insite remains the most logical choice for accomplishing the Appellants' stated aim to "cure" drug addiction in the Downtown Eastside.[134]

89. The Appellants' argument reverts to a simplistic mantra – all addicts have to do is "say no to drugs." That might work elsewhere,[135] but it does not work in the Downtown Eastside.

90. The Appellants say there is no deprivation because s. 7 does not guarantee positive rights.[136] This Court need not decide in this case whether s. 7 guarantees positive rights. The Province provided this health care service and the Respondents seek to prevent the federal state from interfering with access to it.

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[132] *Record*, Vol. III, Maté #1, p. 5, ¶13; see also Vol. II, MacPherson #1, Ex. B, p. 114. MacPherson was the Drug Policy Coordinator for the City of Vancouver and one of the principal architects of the City's Four Pillars strategy. The 2001 report "A Framework for Action" states: "Treatment refers to a series of interventions and supports that enable individuals to deal with their addiction problems, make healthier decisions about their lives, and eventually resume their places in the community. To successfully help an individual through this process, a continuum of treatment with multiple points of contact is required for treatment to be effective."

[133] *Record*, Vol. V, Hay #1, p. 142, ¶51

[134] *Record*, Vol. IV, Wood #1, Ex. K, pp. 42-45; see also Ex. J, pp. 39-41

[135] See *Record*, Vol. XVI, Affidavit #1 of Dr. Frank Evans, p. 138, ¶19

[136] Appellants' Factum, ¶90

91. The Appellants attempt to distinguish cases like *Rodriguez*[137] and *Morgentaler (1988)*,[138] saying that in those cases, unlike the present, the claimant did not choose to break the law. Rather, "the deprivation was due to the manner in which the law limited the claimant's choice in treatment for a pre-existing medical condition or situation."[139]

92. There is no such distinction. In this case, as in *Rodriguez* and *Morgentaler (1988)*, the constitutional issue is not the *cause* of the medical condition, but whether the law interferes with the claimant's ability to seek health care *for* her condition, however it arose. For those in the Downtown Eastside, addiction typically arises from a complex mix of "personal, governmental and legal factors."[140] Once addicted, the injection drug user feels compelled to - and will use - the drug to which she is addicted. This compulsion to use is the "pre-existing medical condition or situation" that gives rise to the need to attend Insite. The fact that the manifestation of the injection drug user's disease involves criminal conduct does not sever the link between the state's conduct and the deprivation of the injection drug user's rights.[141]

93. It is disingenuous for the Appellants to assert that the rule of law is imperilled by the decision of the Courts below on the theory that a law becomes unconstitutional merely by persistent and frequent violations of it.

94. The law is not unconstitutional because it is flouted by injection drug users. It is unconstitutional because it denies addicted injection drug users their only real chance of survival. The ineffectiveness of the *CDSA* with respect to the Downtown Eastside, however, tells of its lack of salutary effect and failure to meet the objective of Parliament.[142]

The Trafficking Issue

95. Canada says that the "trafficking law" should not have been struck down as it could not cause any deprivation of the addict's s. 7 rights. The Appellants say that "persons who hold

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[137] *Rodriquez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriquez*], PHSBoA, Tab 23
[138] *Morgentaler (1988)*, PHSBoA, Tab 15
[139] Appellants' Factum, ¶102
[140] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 24-25, ¶¶88-89; see also: Vol. II, Tomic #1, p. 36, ¶3. Ms. Tomic was born to an addicted mother and, as a result, was born addicted.
[141] See: *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, per Smith J.A., pp. 127-28, ¶¶256-58
[142] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 74-75, ¶70

contraband solely for the purpose of turning it over to the police commit no crime" and that the exemption afforded under s. 56 was not necessary as a matter of law.[143]

96. This appears to be at odds with the Appellants' resistance at trial to the declaration sought by VANDU that the "activities of the staff do not constitute possession or trafficking for the purpose of the *CDSA*."[144]

97. The Trial Judge was correct to include s. 5(1) of the *CDSA* in his order, because without such an order, it would be "possible that staff who handle used equipment contaminated by controlled substances, or staff who take possession of any controlled substance for delivery to police, could be alleged to be engaged in 'trafficking,' which is broadly defined by the *CDSA* to the administration or transfer of a controlled substance."[145] It is of no comfort to staff at Insite that the Appellants now say that this would not happen, or that the issue will be resolved by prosecutorial discretion.[146]

Principles of Fundamental Justice

98. The principles of fundamental justice of arbitrariness, overbreadth and gross disproportionality are arguably similar to the requirements under s. 1 of the *Charter* that laws be rationally connected to Parliament's objective, that they minimally impair, and that they be proportionate. As such, the s. 1 jurisprudence is of assistance in elucidating these principles. And while this Court has held that the onus under each part of s. 7 remains on the claimant,[147] it is submitted that the more serious the deprivation of life, liberty or security of the person, the less onerous ought to be that burden. In *Chaoulli*, this idea is captured by the Chief Justice when she says (in the context of the principle of arbitrariness), "*the more serious the impingement on the person's liberty and security, the more clear must be the connection*."[148] The same approach ought to apply to the overbreadth principle and the gross disproportionality principle. Indeed just as the Crown's obligations under s. 1 become more difficult to discharge as one works through

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[143] Appellants' Factum, ¶95
[144] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 25, ¶90
[145] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 36, ¶153
[146] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, per Rowles J.A., p. 68, ¶43
[147] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74 [*Malmo-Levine*], ¶97, CANBoA Vol. III, Tab 38; and *Chaoulli*, ¶¶30, 131, CANBoA Vol. I, Tab 11
[148] *Chaoulli*, ¶131, CANBoA Vol. I, Tab 11

the *Oakes*[149] test from rational connection to disproportionality, the claimants' obligations under s. 7 ought to be easier to discharge as one works through the principles of fundamental justice from arbitrariness, overbreadth and to gross disproportionality.

99. What will also become apparent in these submissions is that whereas s. 1 tends to be analyzed on the basis of the law on its face, in the context of s. 7 it needs to be analyzed in its application and for that reason the claimant's onus under s. 7 (to prove, e.g., that the law is arbitrary) can be discharged even when under s. 1 it is said that for the government proving a rational connection, "is not particularly onerous."[150]

Arbitrariness

100. All of the judges in the Courts below applied the well known description of the arbitrariness principle:

> A law is arbitrary where it bears no relation to, or is inconsistent with the objective that lies behind it….[151]

101. In the context of a criminal law, it is proper to incorporate a "manifest unfairness" test[152] and even the "unnecessary" test [153] especially when, as here, the law criminalizes access to health care.[154]

102. Smith J.A., in dissent, concluded that the claimants had not proved the Impugned Provisions were arbitrary for both evidentiary and conceptual reasons.

103. Smith J.A. held there was no evidence "presented to show that the blanket prohibition of possession of illegal drugs is not rationally connected to or is inconsistent with the overall state interest in health and public safety."[155]

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[149] *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*], PHSBoA Tab 17
[150] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, ¶228, PHSBoA, Tab 9
[151] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 36, ¶152
[152] *Chaoulli* ¶¶132, 180, CANBoA Vol. I, Tab 11
[153] *Chaoulli* ¶234, CANBoA Vol. I, Tab 11
[154] *Chaoulli* ¶260, CANBoA Vol. I, Tab 11
[155] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 137, ¶291

104. The conclusion is difficult to understand. Smith J.A. accepted the Trial Judge's findings that "prohibiting access to safe injection sites increases the risk of death from overdose and the risk of receiving or transmitting communicable diseases for injection users" and "this consequence, it may be argued, is seemingly inconsistent with the state interest in the protection of health."[156]

105. The Trial Judge went even further and held that the "blanket prohibition contributes to the very harm it seeks to prevent."[157] It is difficult to imagine a better example of an arbitrary law than one that is self-defeating.

106. Justice Rowles upheld this conclusion on the evidence:

> **75** … Without Insite, addicts will be forced back into the alleys and flophouses where they will continue to inject hard drugs, but in squalid conditions, thereby risking illness and death, not only to themselves but also to others in the community who become infected through the sharing of dirty needles or through intimate contact with an infected person.[158]

107. Yet Smith J.A. held that if one characterizes the "*broader state interest in the health and public safety of all Canadians (not just the intravenous drug users),*" then "it cannot be said that the evidence supports the conclusion that s. 4(1) of the *CDSA* bears no relation to or is inconsistent with these broader interests, or even that the prohibition as it applies is not necessary to protect these interests."[159]

108. Smith J.A. held further that although the application of the Impugned Provisions may cause death or deadly disease they are not arbitrary even "as they appl[y] to addicts"[160] because they have, and are rationally connected to, the purpose of deterring first time or continued use of the drug, diminishing the demand and, hence, supply of the drug and protecting the users and the larger public from drug-related crime.

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[156] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 135-36, ¶286
[157] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 36, ¶152
[158] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 76, ¶75
[159] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 136, ¶287 [emphasis added]
[160] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 136, ¶287

109. With respect, the reasoning is faulty. A law so directly and causally related to the risk of death or deadly disease is not saved from arbitrariness merely because there is a theoretical connection between its provisions and one of its objects.

110. As the Chief Justice said in *Chaoulli*:

> **131** In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. *The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals*.[161]

111. The Respondents have proved there is no real connection between measures that put the injection drug user's life at risk and the broader legislative goals of the *CDSA*. Applied to the Downtown Eastside, the Impugned Provisions do not achieve any of their goals. They do not deter use, they do not diminish demand and they do not reduce drug-related crime.

112. Contrary to Smith J.A.'s conclusion, "the prohibition as it applies to addicts is not necessary to protect these interests"[162] because leaving the prohibition to apply to *all non-addicts* will achieve the state's objectives. If the Impugned Provisions did not apply to Insite, more lives would be saved and disease avoided without any increase in use, demand or drug-related crime. This was proven on the evidence.[163]

113. Smith J.A. said there was a "plausible relationship between the state interest and the law."[164] A "plausible relationship" is not the close relationship required by *Chaoulli*.[165]

114. If, as we submit, the requirements of s. 1 are analogous to the principles of fundamental justice at issue in this case, the best statement of a rational connection for the purpose of this

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[161] *Chaoulli*, ¶131 [emphasis added], CANBoA Vol. I, Tab 11
[162] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 136, ¶287
[163] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 73-74, ¶¶63-64
[164] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 135, ¶285
[165] *Chaoulli*, ¶131, CANBoA Vol. I, Tab 11

appeal is what Cory J. said in *Delisle* which applies *a fortiori* when it is the application of the law that is in question.

> **124** The question which arises is this: *if it is equally logical to assume that a legislative provision actually causes a problem as it is to assume that it remedies the problem, is there really a rational connection sufficient to satisfy this element of the Oakes test?* Generally speaking, where this Court has been faced with contradictory evidence of causation for the purpose of the rational connection inquiry, the difficulty has been simply in deciphering whether the evidence supported a causal link. This case raises the somewhat unusual situation that some of the evidence not only does not support a causal link between the legislative objective and the means used to achieve that objective, but it supports precisely the reverse conclusion, namely that the means chosen engender the very mischief sought to be cured. *It seems contrary to the purpose of s. 1 of the Charter to find that the state has demonstrably justified its law in circumstances where it is equally probable that the law causes the very social harm it purports to target***.**[166]

115. In *Parker*, the Crown argued that prohibiting possession or cultivation of marijuana would advance state objectives such as "Canada's international treaty obligations and to control the domestic and international trade in illicit drugs."[167] The Court concluded "the blanket prohibition on possession and cultivation, without an exception for medical use, does little or nothing to enhance the state interest."[168] So too in this case: the blanket prohibition on possession (and trafficking) of drugs in the context of supervised injection at Insite, will do little or nothing to enhance the broader state interests identified by Smith J.A.

116. The second reason Smith J.A. held the law was not arbitrary was conceptual.

117. Smith J.A. said the Trial Judge's analysis "would seem to suggest that if *any effect* of an impugned law is inconsistent with the state interest, the law itself will be arbitrary." She said "this cannot be the test."[169] Similarly, the Appellants' submission on the arbitrariness principle (as with the other principles of fundamental justice to be discussed below) assumes that the constitutionality of criminal laws must be judged in the broad applications of those laws.

118. The approach taken by Smith J.A. and the Appellants raises the question: can the principle that laws not be arbitrary only be applied to a "facial challenge" or can it be used when the law in

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[166] *Delisle v. Canada (Deputy Attorney General),* [1999] 2 S.C.R. 989, ¶124, per Cory J. (dissenting) [emphasis added], PHSBoA, Tab 6
[167] *R. v. Parker* (2000), 188 D.L.R. (4th) 385 (Ont. C.A.) [*Parker*], ¶143, CANBoA Vol. III, Tab 42
[168] *Parker*, ¶144, CANBoA Vol. III, Tab 42

certain applications may be arbitrary? It also raises the question of the appropriate remedy when a law has certain unconstitutional applications.

119. Significantly, it was the position of the Crown in *Parker* that if the Court found a violation of s. 7 because the legislation failed to provide adequate exemptions for medical use "the 'only available remedy' is to strike down those provisions and suspend the finding of invalidity for a sufficient period of time to allow Parliament to craft satisfactory medical exemptions."[170] It was thus arbitrary in its application.

120. This Court took essentially the same view in *Ferguson*[171] and it is the approach followed by the Trial Judge and Court of Appeal in this case. The Respondents submit it is the correct approach.

121. The claim in *Malmo–Levine* that the *CDSA* was arbitrary was a facial challenge. This Court left open the question of the constitutionality of the law "if marijuana was required for medical purposes."[172]

122. Perhaps of greater significance are *Morgentaler (1988)* and *Chaoulli*, the two most important cases where laws were found to be arbitrary even though the impugned laws only deprived some persons in some situations of their s. 7 rights. In *Chaoulli*, Binnie, LeBel and Fish JJ. emphasized that the law put only "some Quebeckers" in "some circumstances" at risk.[173]

123. Even if a court should not hold a law to be arbitrary because of "one inconsistent effect,"[174] the evidence here does not show such a trifling impact. The Impugned Provisions affect the lives and health of as many as 4,600 people in the Downtown Eastside alone. This is a significant population for whom the law has an arbitrary application both quantitatively and qualitatively. Smith J.A.'s treatment of the evidence in this case is inconsistent with her treatment of *Parker*

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[169] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 136, ¶288
[170] *Parker*, ¶198, CANBoA Vol. III, Tab 42
[171] *R. v. Ferguson*, [2008] 1 S.C.R. 96, 2008 SCC 6, PHSBoA, Tab 13
[172] *Malmo-Levine*, ¶88, CANBoA Vol. III, Tab 38
[173] This Court did not suspend the declaration of invalidity in either of those cases to allow Parliament to craft a law more tailored to the state objective but that re-crafting was an option for Parliament. In any event, this fact does not detract from the proposition that the principle of arbitrariness did not require that the law be arbitrary in every application.
[174] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 136, ¶288

where the law was held to be arbitrary because, in her words, "the number of persons that could claim to need marihuana as treatment for an illness was very small."[175]

124. To the extent the criminal law requires a more nuanced treatment, the Appellants say the *CDSA* provides the needed flexibility since it allows for permission of some controlled substances in some circumstances for medical or scientific purposes. The Appellants argue that the question of whether Parliament should have allowed for an exemption in this case is a matter of policy rather than constitutional law.

125. The argument cannot be accepted. The courts, not Parliament, are the final arbiters of the reach of the criminal law. The exemptions provided by Parliament implicitly acknowledge that the criminal law cannot be overbroad and indiscriminate, but they do not sufficiently accommodate the *Charter* rights and freedoms at stake here. To paraphrase the majority in *Chaoulli*, when the government fails in its constitutional duties then life, liberty and security of the person must prevail.[176]

Overbreadth

126. The Impugned Provisions are clearly overbroad, as held by the Trial Judge and the majority of the Court of Appeal.[177]

127. There is no doubt that the overbreadth principle applies to the law in its application. As this Court said in *Heywood*: "[t]he effect of overbreadth is *in some applications* the law is arbitrary or disproportionate." Thus, overbreadth "looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad a court must ask the question: are those means necessary to achieve the State objective?"[178]

128. In this case, the question is whether blanket prohibitions on possession and trafficking of controlled substances within the confines of Insite are necessary to achieve the state objectives of public health and safety.

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[175] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 36, ¶152; Reasons for Judgment of the Court of Appeal, p. 137, ¶292
[176] *Chaoulli*, ¶158, CANBoA Vol. I, Tab 11
[177] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 76, ¶77
[178] *R. v. Heywood*, [1994] 3 S.C.R. 761, pp. 792-93, CANBoA Vol. III, Tab 33

129. The overbreadth principle is akin to the minimal impairment branch of the *Oakes* analysis. As the majority of this Court cautioned in *Hutterian*, and adapting those comments to s. 7, claimants need not prove the alternative to the blanket prohibition would *exactly* achieve the government's objective so long as it would achieve it in *a real and substantial manner*.[179] This test incorporates the necessary deference to Parliament.

130. Smith J.A. said the "respondents… provided no evidence upon which a court could find the means [i.e. a blanket prohibition] employed by Parliament to protect the health and public safety of all Canadians from such dangerous, addictive and harmful drugs, was overly broad or could be achieved by some alternative and narrower legislative means."[180] The Respondents respectfully disagree.

131. Insite is proof that the law could be less broad and still achieve its purpose. A law allowing Insite or a similar facility to operate in accordance with provincial laws and, if necessary, federally approved protocols, is an obvious means by which Parliament can protect the health and safety of all Canadians. Insite – not the Impugned Provisions – protects the health and safety of injection drug users in the Downtown Eastside. Depriving addicts of the health care Insite provides does nothing to promote the health and safety of the rest of Canada.

132. Smith J.A. says "[t]he answer to this would involve a complex balancing of interests and policy choices…"[181]

133. There are no competing interests to mediate. The only "policy" choice Parliament has left for addicts of the Downtown Eastside is to cease to be addicted. However, the Impugned Provisions do not require, let alone provide for, treatment. Even if treatment is the implied "policy decision" underlying the blanket prohibition, it is for the province to determine the nature and kind of treatment that will work. It has done so. The Health Authority has determined that Insite provides the only realistic hope of treatment or rehabilitation in the Downtown Eastside.

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[179] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37 [*Hutterian*], ¶55, PHSBoA, Tab 2
[180] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 140, ¶303
[181] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 139-40, ¶302

134. Taking up the specious invitation to "defer to Parliament" here would amount to an abdication of the judicial function.

135. It cannot be said that the government needs more time. As the Trial Judge noted, the situation of addicts in the Downtown Eastside results from, *inter alia*:

> **[89]** … the inability, despite serious and prolonged efforts, of municipal, provincial and federal governments, as well as numerous non-profit organizations, to provide meaningful and effective support and solutions; and the failure of the criminal law to prevent the trafficking of controlled substances in the DTES as evidenced by the continuing prevalence of addiction in the area.[182]

136. It cannot be said that more scientific evidence is needed. Dr. Evan Wood observes:

> It is important to put into context the degree of scientific productivity associated with the study of the SIF. I am not aware of any public health program in the history of Canada, and likely North America, that has been subjected to this level and intensity of scientific scrutiny. I am not aware of any program evaluation that has produced the amount of research data produced by the SEOSI studies in such a short period of time. It is important to stress that all of our research has been subject to external review, and that much of it has been published in the world's most competitive scientific periodicals including *The Lancet, The British Medical Journal*, and the *New England Journal of Medicine*. The external review by the Editors and peer-reviewers of the journals attests to the strengths of the science. Internal safeguards were put in place in the SEOSI studies to ensure the research findings would withstand the highest level of scrutiny.[183]

137. While Smith J.A. stated that the Minister of Health's Expert Advisory Committee (the "EAC") "identified some of the problems with the research on this issue,"[184] it is important to note how insignificant those "problems" were. The Trial Judge described the EAC's criticisms of the research on Insite as "benign."[185] Indeed, the EAC essentially agreed with all the studies commissioned about Insite and merely expressed caution about using "mathematical modeling for assessing the cost-benefit analysis."[186]

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[182] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 24-25, ¶89
[183] *Record*, Vol. III, Wood #1, p. 188, ¶6; see also Vol. IV, Wodak #1, p. 114, ¶21
[184] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 135-36, ¶286
[185] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 24, ¶86
[186] *Record*, Vol. XVI, Ogborne #1, Ex. B, p. 154; The study included by Professors Boyd and Andresen ("*A Cost-Benefit and Cost-Effectiveness Analysis of Vancouver's Safe Injection Facility*") said, if anything, the cost benefit analysis was conservative and while they held that the benefits outweighed the costs - more than the EAC summary reported, 2.87 lives saved not 1.08 - it was likely that with more Insites the benefits would be even more so: see Vol. XVII, Ogborne #1, Ex. C, pp. 6-7, 45, 48, 57-58, and 61.

138. It needs to be brought home that although this particular federal government may not favour Insite,[187] harm reduction is entirely consistent with Canada's drug policy which, notwithstanding the *CDSA*, has long recognized its importance.[188]

139. The Appellants say the law is not overbroad because it does not prevent addicts from accessing health services like counseling, detoxification and drug treatment and only puts addicts at risk of arrest if they possess drugs while accessing such services.[189] They say "an addict cannot insist on access to a service that is designed to facilitate consumption, one of the very harms the statute seeks to eradicate."[190]

140. This submission conflates the terms of the statute with its objectives. As Huddart J.A. observed, there is no evidence that supervised injection undermines Parliament's public health and safety objectives.[191]

141. The Appellants' submission also ignores the fact that s. 4(1) of the *CDSA* captures the staff at Insite because it criminalizes the "supervision of an addict's self-injection."[192] The criminalization of supervision - the most vital part of Insite's health care program - can only be described as overbroad. Supervision by health care professionals does not undermine public health and safety.

142. The Appellants also say "it would be a daunting task to design an exemption facilitating consumption by those who are so addicted as to be unable to comply with the law…."[193] The answer is that Parliament can provide an exemption that leaves to health care professionals, trained in addiction medicine, the operational questions, with or without regulations or prescribed protocols, just as is presently the case with Insite.

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[187] for reasons the Respondents say are based on pure ideology
[188] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 75-76, ¶¶71-74
[189] these submissions made on the minimal impairment branch of the *Charter*, s. 1 test, Appellants' Factum, ¶119
[190] Appellants' Factum, ¶119
[191] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 105, ¶169
[192] The staff are captured because of the definition of "possession" in the *Criminal Code* and incorporated by reference into the *CDSA*.
[193] Appellants' Factum, ¶119

Gross Disproportionality

143. Whereas the arbitrariness and overbreadth principles might be said to be "anchored in an assessment of the law's purpose," the disproportionality principle "takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'."[194]

144. This Court has said that when considering whether the law is grossly disproportionate under s. 7, the Impugned Provisions' effects are balanced with the government's interest or objective. It is not disproportionality as between the deleterious effects and the salutary effects of the Impugned Provisions that is assessed, as is the case under s. 1.[195] This distinction between the treatment of the disproportionality principle under s. 7 and s. 1 underlines that s. 7 is concerned with the application of the law and not simply its facial validity.

145. Accepting that the government's objective is to protect public health and safety, the effects of applying the Impugned Provisions to staff and users of Insite are so extreme – being a significant risk of increased rates of death and disease – that gross disproportionality is made out.

146. Smith J.A. accepted that the effect of the law on the claimants' rights is increased risk of disease or death but said the claimants had not discharged their onus because they "provided no evidence to show that Parliament could prevent increased drug use, addiction, and associated crime by something other than a blanket prohibition."[196]

147. This is simply not so. The EAC accepted as sound the conclusions of scientific studies that notwithstanding Insite, and thus without a blanket prohibition, there was no increased drug use, addiction or associated crime.[197]

148. Smith J.A. also misapplied the gross disproportionality principle by factoring in the salutary effects of the blanket prohibition contrary to the approach articulated by the majority of this Court in *Malmo-Levine*. That she did so is most apparent from the comment that "it cannot be said the law... causes more harm than it prevents."[198]

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[194] *Hutterian*, ¶76, PHSBoA, Tab 2
[195] *Malmo-Levine*, ¶169, CANBoA Vol. III, Tab 38
[196] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 138, ¶297
[197] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 73, ¶¶63-64
[198] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 138, ¶297

149. However, even if salutary effects do factor into the gross disproportionality principle (and assuming there is any s. 1 case to consider), there is no evidence of a salutary effect of a blanket prohibition, at least amongst the relevant population - injection drug users in the Downtown Eastside.

150. The Appellants' submissions on disproportionality are made more fully in their submissions under s. 1 than s. 7. Under this rubric, the Appellants say that a number of assumptions are required to conclude that the net effect of the law is negative.[199]

151. No assumptions are necessary. Each of the purported "assumptions" is a fact, fully supported by the evidence. When the Appellants question whether users would or could choose to use rather than refrain from using, they ignore the incontrovertible evidence that addiction is a disease that effectively robs addicts of choice. When the Appellants suggest users would choose to consume by means other than injection, they ignore the findings of the Trial Judge that "need to obtain the substance by injection is a material part of the illness…"[200] When the Appellants say it is an unproven assumption that users would choose an unsafe form of injection, the epidemic of HIV and Hepatitis C in the Downtown Eastside is telling and tragic proof of that fact.[201]

152. The Appellants' claim that the law is proportionate is based on not only the profoundly naive view that allowing the Impugned Provisions to operate will encourage users to quit but completely ignores the evidence to the contrary. To suggest, as the Appellants do, that deference to Parliament is required in this case, is to elevate an abstract proposition to a place of greater importance than life itself.

Section 1

153. The Respondents agree with the Appellants where it is submitted that s. 1 of the *Charter* is "rendered largely irrelevant in these proceedings" and for the reason that the principles of

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[199] Appellants' Factum, ¶122 ("However, to conclude that the net effect of the law would be negative, we would have to assume that: (a) absent the existence of supervised injection sites, the user would choose to consume by injection, rather than in some other fashion; (b) the user would choose to use, rather than refrain from using; and, (c) the user would choose an unsafe form of injection.")

[200] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 34, ¶135

[201] And the evidence of Shelly Tomic and Dean Wilson is also vivid and specific proof of this fact: *Record*, Vol. II, Tomic #1, pp. 38-39, ¶12; Wilson #1, Ex. A, pp. 50-51, ¶¶17-32

fundamental justice bear a close similarity to the components of the *Oakes* test under s. 1 excepting that the onus is now on the government which it cannot discharge.

Remedy for *Charter* Breach

154. The Respondents submit that the remedy ordered by the Trial Judge at paragraphs 158-59 is the appropriate remedy allowing for a further period of suspension as is reasonable.

PART IV: COSTS SUBMISSION

155. The Court has broad discretion to award costs.[202] Likewise, this Court should defer to the discretionary costs decisions of the Courts below.[203]

156. The Appellants seek to have the costs orders below set aside even if the appeal is dismissed in whole or in part. The Attorney General says that he has performed a duty by defending Parliament's laws and that, in the result, no special costs or indeed any costs award against him is warranted.[204] This argument is remarkable and without precedent. If accepted, it would mean that no public interest litigant could ever receive her costs in a constitutional challenge, if the Attorney General defended the case, and even when the government was unsuccessful. This result is plainly inconsistent with the law of costs in Canada.

157. The Respondents seek costs on a solicitor-client basis[205] throughout and in any event of the cause. Indeed, it is precisely in cases such as this, "where individual litigants of limited means seek to enforce their constitutional rights" that costs awards departing from the norm of indemnity upon success are warranted.[206] It is not necessary that there be a finding of reprehensible conduct for there to be an award of solicitor-client costs.[207] This matter has been a

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[202] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 47

[203] *Record*, Vol. I, Reasons for Judgment of the Trial Judge (PHS Costs Judgment), pp. 45-50; Reasons for Judgment of the Court of Appeal, pp. 111-12, ¶¶194-98; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13, ¶¶85-87, PHSBoA, Tab 11

[204] Appellants' Factum, ¶128

[205] In British Columbia, solicitor-client costs are called "special costs." See *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 112, ¶198; see also *Victoria (City) v. Adams* (2009), 313 D.L.R. (4th) 29, 2009 BCCA 563, ¶¶167-93, PHSBoA, Tab 26

[206] On the principles for awarding costs in public interest cases, see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71, PHSBoA, Tab 5, and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38, 2007 SCC 2, PHSBoA, Tab 10

[207] This is clearly the case in the courts in British Columbia, as the decisions of the Courts below reveal (see also *Barclay (Guardian ad litem of) v. British Columbia* (2006), 57 B.C.L.R. (4th) 63, 2006 BCCA 434, PHSBoA, Tab 3). For instances in which solicitor-client costs have been awarded on a public interest basis by the Supreme

highly exceptional proceeding that "fits squarely within the scope of public interest litigation."[208] An award of costs on a solicitor-client basis is appropriate to the circumstances.

158. The Respondents, a non-profit society and two indigent injection drug users, brought the litigation in the B.C. Supreme Court, without financial assistance and with *pro bono* counsel, to "preserv[e] the operations of a publicly-funded facility"[209] in one of Vancouver's most downtrodden and drug-ridden neighbourhoods. The Respondents now find themselves in this Court so that the federal and provincial Ministers of Health can know "with certainty what their legal authority is with respect to the operation of Insite".[210] If any case qualifies as public interest litigation warranting costs on a full indemnity basis and in any event of the cause, this is it.

PART V: NATURE OF ORDER SOUGHT

159. The Respondents seek the following orders:

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

b. A declaration that ss. 4(1) and 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* and that such infringement is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms.*

Court of Canada, see *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, 2004 SCC 36, ¶48, PHSBoA, Tab 7, *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, p. 89, PHSBoA, Tab 8, and *Schachter v. Canada*, [1992] 2 S.C.R. 679, p. 59, PHSBoA, Tab 25

[208] *Record*, Vol. I, Reasons for Judgment of the Trial Judge (on costs), p. 49, ¶24

[209] *Record*, Vol. I, Reasons for Judgment of the Trial Judge (on costs), p. 49, ¶24

[210] Appellants' Leave Memorandum, ¶23

c. Costs on a solicitor-client basis throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: February 4, 2011

Joseph J. Arvay, Q.C.
Monique Pongracic-Speier
F. Andrew Schroeder and
Scott Bernstein
Counsel for the Respondents,
PHS Community Services Society,
Dean Edward Wilson and Shelly Tomic

PART VI: TABLE OF AUTHORITIES

Paragraph(s)

OTHER

PART VII: STATUTORY PROVISIONS

Paragraph(s)

http://laws.justice.gc.ca

ss. 1, 7

***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**

***Charte canadienne des droits et libertés*, partie I de la *Loi Constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.)m 1982, c. 11**

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Life, liberty and security of person

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

Vie, liberté et sécurité

7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

http://laws.justice.gc.ca

ss. 91, 92

***Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5**

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.

1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.

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

4. The borrowing of Money on the

***Loi Constitutionnelle De 1867* (R.-U.), 30 & 31 Vict., c. 3, reproduite dans L.R.C. 1985, app. II, n°5**

VI. DISTRIBUTION DES POUVOIRS LÉGISLATIFS

Pouvoirs du parlement

Autorité législative du parlement du Canada

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

1. Abrogé.

1A. La dette et la propriété publiques.

2. La réglementation du trafic et du commerce.

2A. L'assurance-chômage.

3. Le prélèvement de deniers par tous modes ou systèmes de taxation.

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.
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.

4. L'emprunt de deniers sur le crédit public.
5. Le service postal.
6. Le recensement et les statistiques.
7. La milice, le service militaire et le service naval, et la défense du pays.
8. La fixation et le paiement des salaires et honoraires des officiers civils et autres du gouvernement du Canada.
9. Les amarques, les bouées, les phares et l'île de Sable.
10. La navigation et les bâtiments ou navires (*shipping*).
11. La quarantaine et l'établissement et maintien des hôpitaux de marine.
12. Les pêcheries des côtes de la mer et de l'intérieur.
13. Les passages d'eau (*ferries*) entre une province et tout pays britannique ou étranger, ou entre deux provinces.
14. Le cours monétaire et le monnayage.
15. Les banques, l'incorporation des banques et l'émission du papier-monnaie.
16. Les caisses d'épargne.
17. Les poids et mesures.
18. Les lettres de change et les billets promissoires.
19. L'intérêt de l'argent.
20. Les offres légales.
21. La banqueroute et la faillite.
22. Les brevets d'invention et de découverte.

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.

23. Les droits d'auteur.

24. Les Indiens et les terres réservées pour les Indiens.

25. La naturalisation et les aubains.

26. Le mariage et le divorce.

27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.

28. L'établissement, le maintien, et l'administration des pénitenciers.

29. Les catégories de sujets expressément exceptés dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

Et aucune des matières énoncées dans les catégories de sujets énumérés dans le présent article ne sera réputée tomber dans la catégorie des matières d'une nature locale ou privée comprises dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

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.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

Pouvoirs exclusifs des législatures provinciales

Sujets soumis au contrôle exclusif de la législation provinciale

92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

1. Abrogé.

2. La taxation directe dans les limites de la province, dans le but de prélever un revenu pour des objets

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.

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:

provinciaux;

3. Les emprunts de deniers sur le seul crédit de la province;

4. La création et la tenure des charges provinciales, et la nomination et le paiement des officiers provinciaux;

5. L’administration et la vente des terres publiques appartenant à la province, et des bois et forêts qui s’y trouvent;

6. L’établissement, l’entretien et l’administration des prisons publiques et des maisons de réforme dans la province;

7. L’établissement, l’entretien et l’administration des hôpitaux, asiles, institutions et hospices de charité dans la province, autres que les hôpitaux de marine;

8. Les institutions municipales dans la province;

9. Les licences de boutiques, de cabarets, d’auberges, d’encanteurs et autres licences, dans le but de prélever un revenu pour des objets provinciaux, locaux, ou municipaux;

10. Les travaux et entreprises d’une nature locale, autres que ceux énumérés dans les catégories suivantes:

    a. Lignes de bateaux à vapeur ou autres bâtiments, chemins de fer, canaux, télégraphes et autres travaux et entreprises reliant la province à une autre ou à d’autres provinces, ou s’étendant au-delà des limites de la province;

    b. Lignes de bateaux à vapeur entre la province et tout pays

(*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.

dépendant de l'empire britannique ou tout pays étranger;

c. Les travaux qui, bien qu'entièrement situés dans la province, seront avant ou après leur exécution déclarés par le parlement du Canada être pour l'avantage général du Canada, ou pour l'avantage de deux ou d'un plus grand nombre des provinces;

11. L'incorporation des compagnies pour des objets provinciaux;

12. La célébration du mariage dans la province;

13. La propriété et les droits civils dans la province;

14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;

15. L'infliction de punitions par voie d'amende, pénalité, ou emprisonnement, dans le but de faire exécuter toute loi de la province décrétée au sujet des matières tombant dans aucune des catégories de sujets énumérés dans le présent article;

16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.

ss. 2, 4(1), 5(1), 55(1)(z), 56

***Controlled Drugs and Substances Act*, S.C. 1996, c. 19**

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;

"controlled substance"
« substance désignée »

***Loi réglementant certaines drogues et autres substances*, L.C. 1996, c. 19**

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.

« fournir »
" provide

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

"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

« 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 "

(*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

(*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,

« 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.

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

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

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.

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.

Possession of substance

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

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.

Regulations

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

…

(z) exempting, on such terms and conditions as may be specified in the regulations, any person or class of persons or any controlled substance or precursor or any class thereof from the application of this Act or

Possession de substances

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

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.

Règlements

55. (1) Le gouverneur en conseil peut, par règlement, prendre les mesures nécessaires à l'application de la présente loi, y compris en matière d'exécution et de mesures de contrainte ainsi qu'en matière d'applications médicales, scientifiques et industrielles et de distribution des substances désignées et des précurseurs, et notamment:

…

z) soustraire, aux conditions précisées, toute personne ou catégorie de personnes ou toute substance désignée ou tout précurseur ou toute catégorie de ceux-ci à l'application de tout ou partie de la présente loi ou

the regulations;

Exemption by Minister

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

de ses règlements;

Exemption par le ministre

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

s. 4(3)

***Criminal Code*, R.S.C. 1985, c. C-46**

Postcard a chattel, value

Possession

4. (3) For the purposes of this Act,

(*a*) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(*b*) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

***Code criminel*, L.R.C. 1985, c. C-46**

Une carte postale est un bien meuble

Possession

4. (3) Pour l'application de la présente loi :

a) une personne est en possession d'une chose lorsqu'elle l'a en sa possession personnelle ou que, sciemment :

(i) ou bien elle l'a en la possession ou garde réelle d'une autre personne,

(ii) ou bien elle l'a en un lieu qui lui appartient ou non ou qu'elle occupe ou non, pour son propre usage ou avantage ou celui d'une autre personne;

b) lorsqu'une de deux ou plusieurs personnes, au su et avec le consentement de l'autre ou des autres, a une chose en sa garde ou possession, cette chose est censée en la garde et possession de toutes ces personnes et de chacune d'elles.

http://www.bclaws.ca

ss. 5(1)(a), 5(1)(d)

Purposes of a board

5 (1) The purposes of a board are as follows:

(a) to develop and implement a regional health plan that includes

(i) the health services provided in the region, or in a part of the region,

(ii) the type, size and location of facilities in the region,

(iii) the programs for the delivery of health services provided in the region,

(iv) the human resource requirements under the regional health plan, and

(v)the making of reports to the minister on the activities of the board in carrying out its purposes;

…

(d) to deliver regional services through its employees or to enter into agreements with the government or other public or private bodies for the delivery of those services by those bodies;

…

s. 47

***Supreme Court Act*, R.S.C. 1985, c. S-26**

Payment of costs

47. The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed.

R.S., c. S-19, s. 49.

***Loi sur la Cour suprême*, L.R. 1985, ch. S-26)**

Paiement des frais

47. La Cour a le pouvoir discrétionnaire d'ordonner le paiement des dépens des juridictions inférieures, y compris du tribunal de première instance, ainsi que des frais d'appel, en tout ou en partie, quelle que soit sa décision finale sur le fond.

S.R., ch. S-19, art. 49.