File No. 33556

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

BETWEEN:

ATTORNEY GENERAL OF CANADA and MINISTER OF HEALTH FOR CANADA
Appellants / Respondents on Cross-Appeal
(Appellants / Respondents on Cross-Appeal)

and

PHS COMMUNITY SERVICES SOCIETY, DEAN EDWARD WILSON, and SHELLY TOMIC
Respondents
(Respondents / Appellants on Cross-Appeal)

and

VANCOUVER AREA NETWORK OF DRUG USERS (VANDU)
Respondent / Appellant on Cross-Appeal
(Respondent / Appellant on Cross-Appeal)

and

ATTORNEY GENERAL OF BRITISH COLUMBIA
Respondent
(Respondent)

and

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

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(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF FACTS

1. "Addiction is an illness." That is what the trial judge found (para. 87). The nature of the illness is that it creates a "continuing need or craving to consume the substance to which the addiction relates." As Vancouver's Chief Coroner put it as far back as 1994, drug addiction "has an overwhelming power over the body and mind of the addict", over which an addict has "no control". He will simply "do anything to obtain his next fix" (Record, Vol. V, pp. 157-158).

2. The blanket prohibitions in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, against possession and trafficking of certain drugs go too far when they criminalize conduct that drug addiction compels, and, what is worse, deny addicts access to health services that protect those individuals from the very death and disease the law seeks to prevent (trial judge, at para. 152).

3. It is unconstitutional to criminally sanction conduct over which an individual has "no control". That has been the law in this country for at least 10 years, since the Court's decision in *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687, in which the principle of moral voluntariness was first recognized as a principle of fundamental justice. Applied to the drug addiction context, this principle means that for many users of Insite, it is unconstitutional to criminalize their purchase and possession of heroin, cocaine and methamphetamine, the ferociously addictive substances that are injected safely on the site's premises.

4. In this light, Insite's constitutional status seems clear. If Parliament cannot criminalize purchase and possession that is compelled by addiction, neither can it criminalize the delivery of health services to the addicted persons whose lives and personal security may depend upon receipt of those services. To do the latter would be irrational, and would bring about grossly disproportionate consequences for drug addicts and health workers alike.

PART II: POINTS IN ISSUE

5. This factum will focus on three points:

   A. The *CDSA* would deprive addicts of their life, liberty and security of the person interests, and would deprive health care workers at Insite of their liberty. Both

species of deprivation must be consistent with the principles of fundamental justice.

B. It is a principle of fundamental justice that criminal liability may not be imposed on persons whose conduct is physically or morally involuntary, *per Ruzic*. Addiction makes the acquisition and consumption of hard drugs morally, if not physically, involuntary. Section 7 therefore precludes the criminalization of the very conduct that an addiction compels.

C. Section 4 of the *CDSA* is unconstitutionally overbroad to the extent it imposes criminal liability upon health care workers at Insite. Those workers do no more than provide life-saving health care services to persons whose consumption at Insite cannot itself be criminalized. By criminalizing health care workers' conduct at Insite, the *CDSA* would deprive addicts of their life and security of the person interests, and deprive the workers themselves of their liberty, for no legitimate purpose. The overall deleterious effects of the *CDSA* on s. 7-protected interests are thus grossly disproportionate to their contribution to the legitimate purposes of the law, in its application to health care workers.

PART III: ARGUMENT

A. *The* CDSA *Deprives Both Addicts and Health Workers at Insite of Section 7 Interests*

6. In this case there is not one group of persons whose section 7 interests are infringed, but two. There are drug addicts whose life, liberty and security of the person are threatened by the *CDSA*'s bans, and there are health care workers – mostly nurses and paramedic staff – who for their actions at Insite may face imprisonment.

7. In *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, Gonthier and Binnie JJ. said, "[w]e say at once that the availability of imprisonment for the offence of simple possession is sufficient to trigger s. 7 scrutiny" (para. 84). Any law by which persons may be imprisoned must comport with fundamental justice. The possession and trafficking offences created by the *CDSA* make imprisonment available, and thereby infringe the liberty interest protected by s. 7.

8. Liberty was the only protected interest at play in *Malmo-Levine*, which considered the constitutionality of the ban on possession of marihuana. By contrast, in this case, the circumstances of addicts in the Downtown Eastside establish that ss. 4 and 5 of the *CDSA* bring about a much more severe violation of the interests that s. 7 guards, when applied to hard drugs for which injection use is common. By criminalizing the provision of health services that permit

safe injection, the *CDSA* puts the lives and physical and psychological integrity of addicts at risk. Banning marihuana brings about no similar harm, outside the medical marihuana context.

9. Criminalizing a health service deprives individuals of life and of security of the person, where the absence of that health service would pose or enhance a risk of death, or a risk to those individuals' bodily integrity. That is what the Court first held in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, and since affirmed in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791. Conspicuously, neither of these cases is discussed or even cited in the portion of the appellants' factum impugning the lower courts' findings of s. 7 deprivations (see paras. 84-102).

10. In *Morgentaler*, Dickson C.J. (writing for himself and Lamer J., of a seven-judge panel) held that "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person" (p. 56). In his view, restricting access to a "generally safe medical procedure", with resulting loss of personal control and emotional stress, sufficed to establish a deprivation (see pp. 56-57). Beetz J. (joined by Estey J.) reached the same conclusion by expressly articulating a right of access to health care without criminal sanction:

> "Security of the person" within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. [p. 81; emphasis added]

11. In *Chaoulli*, six of seven judges endorsed this approach to the first stage of s. 7: see para. 118 (*per* the Chief Justice and Major J.) and para. 205 (*per* Justices Binnie and LeBel). The Court thus was able to conclude that a law banning private health insurance deprived Quebecers of life and security of the person, on the basis that it had the effect of dangerously delaying access to important medical services such as heart surgeries (see para. 112).

12. Ultimately, this case is indistinguishable from *Morgentaler*, so far as the deprivation stage of s. 7 is concerned. The bodily integrity and psychological well-being of Dr. Morgentaler's patients were threatened because the criminal law had the effect of restricting their access to a safe medical procedure, with consequential risks of harm to their physical and psychological integrity. Equally, here, the bodily integrity and psychological well-being of drug

addicts – and even their lives – are threatened by a criminal law that would foreclose the opportunity to inject with clean equipment in safe circumstances, and receive treatment in the event of overdose.

13. This suffices to establish that ss. 4 and 5 of the *CDSA* bring about deprivations of life and security of the person that are attributable to state action (see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 60). The appellants attempt to evade this conclusion by way of essentially two points.

14. First, they say that the *Charter* question is short-circuited by their federalism argument, in that "[t]here cannot be a constitutional right of access to a service that the province has no legal capacity to offer" (para. 92). The logic of this position is not sound. Assuming the appellants' federalism argument is right, it is the *CDSA* – not any provision of the Constitution – that would prevent the Vancouver Coastal Health Authority from operating Insite, and that would thereby jeopardize the lives and health of addicts. All statutes must comply with the *Charter*, and that means that if the effect of the *CDSA* is to limit access to health services, the limitations it imposes must be consistent with fundamental justice. Moreover, the *CDSA* would preclude not just provincially-undertaken safe injection sites, but also would eliminate private sites that fulfill the same life-saving function as Insite. The supervised injection services offered by the intervener Dr. Peter AIDS Foundation are a convenient example. In short, the appellants' position is tantamount to saying that the government can by banning something eliminate any *Charter* scrutiny of the effects of the ban. That line of analysis is contrary both to the purposes of the *Charter* and to common sense.

15. Second, the appellants say that the risks of death and disease are "attributable to the use of the substances themselves, not to the law" (appellants' factum, para. 99; emphasis removed). This is akin to submitting that the risks of pregnancy are attributable to the foetus – or, more callously, attributable to the use of back alley abortionists – not to a law that denies access to abortion. Canada's conception of the "state action" requirement would entrench in our law a theory of causation that the Court has never recognized, whereby the presence of any contributing cause of harm extrinsic to the challenged state action (like drug use, or pregnancy) suffices to exonerate government action that bars access to health services. Instead, the

jurisprudence shows that it is enough that the impugned law or government action contributes to the plaintiff's harm. Taking *Morgentaler*'s lead, the *Chaoulli* Court did not hold that persons with heart disease who smoke have a lesser right of access to health care than persons with heart disease who do not. Rather, regardless of the origin of the risk to health, the Court affirmed that s. 7 is triggered whenever the state erects a barrier to necessary health services.

16. Viewed through this lens, the fact that in some sense drug injection involves a "choice made by the consumer" (appellants' factum, para. 100) is irrelevant. The initial choice to consume drugs – or any other risky choice that ultimately gives rise to a need for health care – does not disqualify drug addicts from being s. 7 claimants, any more than choosing to light a cigarette or engage in sexual intercourse disqualifies those who later come to need heart surgeries and abortion procedures. The fact of the matter is that once addicted to intravenous drug use, the addict is physically compelled to continue using those drugs, with all the attendant health hazards. The need to continue consuming is every bit as inexorable as the growth of a cancer or a foetus. This truth is in no way diminished by the fact that, through tremendous effort and endurance of physical and psychological suffering, some drug addicts manage to free themselves from the clutches of their addiction, nor by the fact that not all drug addicts are so disadvantaged that their addiction jeopardizes their health. Those facts serve only to narrow the class of persons for whom ss. 4 and 5 infringe life and security of the person, to those addicts that are disadvantaged and are as yet unable to stop using, and hence require access to the services provided at Insite and any comparable facilities.

17. In sum, by multiple ways and means, ss. 4 and 5 of the *CDSA* deprive individuals of their life, liberty, and security of the person. It is therefore necessary to move to the second stage of the s. 7 analysis, and determine whether the deprivations effected by the law are in accordance with fundamental justice. At the second stage, for reasons that will become clear below, it is desirable in this case to analyze the position of drug addicts independently, before turning to the position of health workers at Insite.

B. *The CDSA's Bans are Unconstitutional When Applied to the Purchase and Consumption of Addictive Drugs by Drug Addicts*

18. The Court need not break any new constitutional ground to resolve the fundamental justice analysis in favour of the respondents. In *Ruzic*, *supra*, the Court held that it is a principle of fundamental justice that criminal conduct must be both physically and morally voluntary. Justice LeBel described the principle this way, on behalf of a unanimous court:

> It is a principle of fundamental justice that only voluntary conduct – behaviour that is the product of a free will and controlled body, unhindered by external constraints – should attract the penalty and stigma of criminal liability. Depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice. The ensuing deprivation of liberty and stigma would have been imposed in violation of the tenets of fundamental justice and would thus infringe s. 7 of the *Charter*. [para. 47; emphasis added]

19. *Ruzic* considered a challenge to s. 17 of the *Criminal Code*, which limited the defence of duress to circumstances involving "threats of immediate death or bodily harm" made by "a person who is present when the offence is committed". Ms. Ruzic was a Serbian woman who flew to Toronto with three packages of heroin strapped to her body. She did so at the instruction of a gangster named Mirkovic, who told Ms. Ruzic that if she failed to comply with his demands, he would harm her mother. Her evidence was that she believed the only way to protect her mother was to obey Mirkovic's orders.

20. Because Ms. Ruzic could not satisfy the immediacy and presence requirements of s. 17, she challenged the provision. This Court struck it down. In finding that s. 7 requires physical and moral voluntariness before criminal sanctions may be imposed, the Court surveyed the cases that developed the principles of fundamental justice in the mental disorder and intoxication contexts, to demonstrate the deep roots of the voluntariness principle in our law. Paragraph 43 is illustrative:

> As Dickson J. stated in *Rabey v. The Queen*, [1980] 2 S.C.R. 513, at p. 522, "it is basic principle that absence of volition in respect of the act involved is always a defence to a crime. A defence that the act is involuntary entitles the accused to a complete and

> unqualified acquittal." Dickson J.'s pronouncement was endorsed by the Court in *R. v. Parks*, [1992] 2 S.C.R. 871. The principle of voluntariness was given constitutional status in *Daviault, supra*, [an intoxication case] at pp. 102-3, where Cory J. held for the majority that it would infringe s. 7 of the *Charter* to convict an accused who was not acting voluntarily, as a fundamental aspect of the *actus reus* would be absent. More recently, in *R. v. Stone*, [1999] 2 S.C.R. 290, the crucial role of voluntariness as a condition of the attribution of criminal liability was again confirmed (at para. 1, *per* Binnie J., and paras. 155-58, *per* Bastarache J.) in an appeal concerning the defence of automatism.

21. The voluntariness principle has close links to other basic and essential principles of criminal liability. Two of these principles are the requirement that a wrongful act must be intentional (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486), and the requirement that the offender possess the capacity to choose (see *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1396, *per* McLachlin J.). These rules, like the voluntariness principle itself, flow from the "fundamental organizing principle of our criminal law" that criminal offenders are "rational, autonomous and choosing agents" (*Ruzic*, at para. 45).

22. Where, for whatever reason, an individual's "will is overborne", such that his or her "conduct is not, <u>in a realistic way</u>, freely chosen" (*Ruzic*, at para. 44; emphasis added), it is fundamentally unjust, and thus unconstitutional, to impose criminal liability. That is precisely the case for many persons who are addicted to hard drugs such as heroin, cocaine, and methamphetamine. These people are left with no realistic choice but to purchase and consume drugs as a result of the unrelenting grip of their addiction.

23. Diminished choice is the very definition of addiction: the Canadian Society of Addiction Medicine describes it as a "chronic disease, characterized by <u>impaired control</u> over the use of a psychoactive substance" (trial judge, at para. 48; emphasis added). The absence of any realistic choice for thousands of persons in the Downtown Eastside of Vancouver is borne out by the horrors that many there endure to satisfy their drug craving, from prostitution to abject poverty to the use of dirty needles filled with dirty water in squalid conditions. The reason they are prepared to "do anything to obtain their next fix" is because their addiction, coupled with the severe physical and psychological consequences of failing to consume, has so compromised their autonomy that they no longer make a meaningful choice to keep using. Ultimately, the record in

this case makes clear that the Constitution ought not to differentiate between the person who carries heroin on an airplane out of fear for her mother's safety, and many of the profoundly disadvantaged persons who inject heroin at Insite.

24. Of course, not everything that addicts do should receive constitutional protection. There are many ways to raise money for the purchase of drugs – including ordinary, lawful employment – so as a general matter it would not be right to say that theft or prostitution or for-profit trafficking is conduct that is compelled by addiction. For many addicts, though, what is inescapable is the purchase and possession for consumption purposes of the drugs to which they are addicted. It is that conduct that the *CDSA* may not constitutionally proscribe.

25. To recognize that the voluntariness principle shields addicted persons from criminal sanctions for the conduct their addiction compels is in keeping with the equality principles enshrined in s. 15 of the *Charter*. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, L'Heureux-Dube J. (joined by Gonthier and McLachlin JJ.) observed that "*Charter* rights strengthen and support each other", and concluded:

> The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7. [para. 112]

26. Addiction is an illness that is physically disabling. The *CDSA*'s bans marginalize drug addicts and perpetuate their already-severe disadvantages, contrary to the norm of substantive equality (see *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, and *Withler v. Canada (Attorney General)*, 2011 SCC 12). In this way, equality principles serve to confirm that an appropriate interpretation of "fundamental justice" is one that does not countenance the absolute and inflexible application to addicts of the prohibitions set out in the *CDSA*.

C. *The* CDSA*'s Bans are Unconstitutional in their Application to Health Workers at Insite*

27. It follows inexorably from the foregoing that a further violation of s. 7 results from the criminalization of health workers' services at Insite. If Parliament cannot criminally sanction the conduct of addicts who inject at Insite, to nevertheless apply the *CDSA* to health workers for

their involvement in that conduct is contrary to the principle of fundamental justice that the law must not be overbroad.

28. The overbreadth principle was recognized and discussed in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, and *R. v. Heywood*, [1994] 3 S.C.R. 761. In *Heywood*, Cory J. held that a law will violate s. 7 where it is "clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective" (p. 794; emphasis added). In that case, the Court struck down the provisions of the *Criminal Code* that punished sex offenders for loitering near a school ground, playground, public park or bathing area.

29. The *Heywood* Court acknowledged that "a measure of deference must be paid to the means selected by the legislature" (p. 794). In *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, the companion case to *Malmo-Levine*, the Court refined *Heywood*'s holding, and defined the "appropriate degree of deference" as follows:

> Overbreadth in [its s. 7] respect addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is *grossly* disproportionate to the state interest the legislation seeks to protect. [para. 38; italics in original; underlining added]

Similarly, *Malmo-Levine* directs us to ask whether "the use of the criminal law [has been shown] to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused" (para. 169; emphasis added).

30. The majority's references to the effects on "accused persons" and "individuals subject to [the law's] strictures" cannot have been intended to be exhaustive. If the harmful effects of a law are grossly out of proportion with the law's objective, it ought not to matter whether the persons who suffer those effects are accused persons or some other group. The point of the principle is to ensure that life, liberty and security of the person are not deleteriously affected to a degree that is manifestly unjustifiable when compared to the objective of the impugned law. Where criminalization of one person's conduct threatens the life of another, all such negative effects of the law must factor into the proportionality inquiry. And, on the other side of the scales, only lawful legislative objectives ought properly to be considered. That is of significance here, given

that it is unconstitutional for Parliament to intend to criminalize the purchase and consumption of drugs by addicted persons.

31. Applying these principles to this case, overbreadth has been established. To criminalize the delivery of health services at Insite would, as the trial judge found, "contribut[e] to the very harm [the ban] seeks to prevent", and would be "inconsistent with the state's interest in fostering individual and community health" (para. 152), while doing nothing to advance the legitimate objectives of the *CDSA*. If the conduct of addicts at Insite cannot be proscribed, what legitimate purpose could possibly be attributed to proscribing that of health care workers? It is simply irrational to lock up nurses and paramedics for doing no more than help addicts to stay alive and healthy. Health workers are not drug traffickers and are at little risk of consuming the drugs they encounter at Insite. Moreover, criminalizing their conduct needlessly places in jeopardy persons whose conduct at Insite may not itself be punished.

32. Since Parliament cannot take away an addict's liberty for doing that which his addiction compels, neither should Parliament be able to deprive him of his life or security of the person by denying him access to services that mitigate the health risks of his addiction. That is the bottom line.

PART IV: SUBMISSIONS REGARDING COSTS

33. The BCCLA does not seek costs and asks that no award of costs be made against it.

PART V: ORDER SOUGHT

34. The appeal should be dismissed, VANDU's cross-appeal allowed, and the constitutional questions answered accordingly.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 13th day of April, 2011.

Ryan D.W. Dalziel	**Daniel A. Webster, Q.C.**

PART VI: TABLE OF AUTHORITIES

CASE	**PARAS. CITED**
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PART VII: STATUTORY PROVISIONS

Sections 4(1) and 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19

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

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

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.

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.