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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

Intervener

MEMORANDUM OF ARGUMENT
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, APPLICANT
(Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

British Columbia Civil Liberties Association,
Applicant

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PART I: STATEMENT OF FACTS

1. These proceedings concern the constitutional status of Insite, a "Safe Injection Site" in the Downtown Eastside of Vancouver, and the constitutional rights of the addicted drug users for whom the site exists. At trial and on appeal, the British Columbia Civil Liberties Association (the "BCCLA") was granted intervener status to make submissions in support of Insite. Now, before this court, the BCCLA yet again seeks leave to intervene.

A. *The Nature of the Proceedings*

2. Canada appeals from a decision of the Court of Appeal for British Columbia, in which a majority of the court concluded that Insite is constitutionally immune on division of powers grounds from the application of ss. 4(1) and 5(1) of the *Controlled Drugs and Substances Act* (the "*CDSA*"). Sections 4(1) and 5(1) of the *CDSA* ban the possession and trafficking of controlled substances. The majority judges of the Court of Appeal also were in "general agreement" (see para. 199) that ss. 4(1) and 5(1) are contrary to s. 7 of the *Charter* by reason that those provisions prevent drug addicts from accessing the services provided at Insite.

3. The Chief Justice stated the following constitutional questions on September 2, 2010:

1. 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?

2. 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*?

3. 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*?

4. 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*?

5. 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*?

B. *The BCCLA's Interest in the Proceedings*

4. The affidavit of Grace Pastine, Litigation Director of the BCCLA, sets out in detail the nature of the BCCLA's interest in the proceedings, and its experience and expertise with respect to civil liberties issues, including specifically civil liberties issues that involve matters of drug and health care policy. What follows is drawn from that affidavit.

5. Ms. Pastine deposes:

> The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963 pursuant to the British Columbia *Society Act*. The objects of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada. [para. 3]

6. To that end, the BCCLA prepares position papers, engages in public education, assists individuals who complain about violations of their rights, and, most importantly for present purposes, takes legal action as a plaintiff or as an intervener (Pastine affidavit, para. 6). In this court, the BCCLA has been granted intervener status in some 23 cases concerning civil liberties and human rights in the past decade alone, making it one of this court's most frequent non-governmental interveners (Pastine affidavit, para. 12).

7. The findings of fact made by the trial judge, Pitfield J., indicate that these proceedings engage a number of the interests that the BCCLA is committed to protecting and advancing. First, Pitfield J. concluded that the impugned provisions of the *CDSA* risk the lives and security of the person of drug addicts by "prevent[ing] healthier and safer injection [at Insite] where the risk of mortality resulting from overdose can be managed, and forces the user who is ill from addiction to resort to unhealthy and unsafe injection in an environment where there is a significant and measurable risk of morbidity or death" (para. 140). Second, Pitfield J. found that drug addiction was an illness (see para. 142). In the BCCLA's view, this finding brings to the

fore concerns about the adequacy of the law's treatment of persons disabled by their illness. Finally, because the *CDSA* makes imprisonment available, the liberty interest of drug addicts is engaged as well (para. 143). In sum, it is apparent that in this case the life, liberty, security of the person and dignity interests of drug addicts in the Downtown Eastside hang in the balance. That is why the BCCLA's drug policy chair wrote to Prime Minister Harper in support of Insite (see the Pastine affidavit, at para. 9), why the BCCLA intervened in the proceedings at trial and on appeal, and why the BCCLA now seeks leave to intervene in this court.

8. As noted, the BCCLA also maintains a specific interest in civil liberties issues implicating drug and health policy, reflected in its extensive record of advocacy pertaining to these subjects in a variety of *fora* (Pastine affidavit, para. 7). Examples of the BCCLA's advocacy in these areas include:

(i) tendering submissions to the LeDain Commission in 1969 concerning the criminalization of non-medical drug use;

(ii) issuing a response to the Joint Advisory Committee in 1986 on the Treatment Uses of Methadone advocating for continued use of methadone for addiction treatment;

(iii) tendering submissions to the Senate Standing Committee on Legal and Constitutional Affairs regarding Bill C-7, the *Controlled Drugs and Substances Act*;

(iv) tendering submissions in *R. v. Malmo-Levine, R. v. Caine*, [2003] 3 S.C.R. 571, and *R. v. Clay*, [2003] 3 S.C.R. 735, arguing that prohibiting cannabis for personal use falls within Provincial jurisdiction and thus is *ultra vires* Parliament;

(v) tendering submissions to the Special Committee on the Non-Medical Use of Drugs (Bill C-38) challenging the continued prohibition of cannabis as contrary to the principles of freedom and personal autonomy;

(vi) giving presentations and submissions on drug and medical treatments for the terminally ill, and on assisted human reproduction legislation;

(vii) providing a comprehensive submission to Health Canada concerning Canada's medical marijuana program and the need to recognize the legal operation of compassion clubs in Canadian law, to reduce harm to medical marijuana users and improve public safety; and

(viii) hosting a by-invitation forum for four police forces, public health officers from across B.C., police oversight bodies and service providers to discuss implementing a monitored alcohol program for chronic alcoholics.

9. Accordingly, the BCCLA's mandate, goals, and activities give it a direct interest in the subject of this appeal. The BCCLA's execution of its mandate, and pursuit of its goals, will be impeded if it is not permitted to provide the Court with its perspective on the questions of whether ss. 4(1) and 5(1) of the *CDSA* unconstitutionally interfere with the life, liberty, or security of the person of drug addicts, and whether those same provisions unconstitutionally impede the delivery of health services by local health authorities. The Court's treatment of those questions will not only determine the fate of Insite; it will also chart a jurisprudential course that will affect the degree to which life, liberty and security of the person are protected in future cases. These are all matters in which the BCCLA is profoundly interested.

PART II: QUESTIONS IN ISSUE

10. The issue raised by this motion is whether the BCCLA should be granted leave to intervene.

PART III: ARGUMENT

11. Rule 57(2) requires an applicant such as the BCCLA to:

> set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

12. There are three elements to the sub-rule. The BCCLA must (1) set out its submissions; (2) explain their relevance to the proceeding; and (3) provide reasons to believe the submissions will be useful and different from those of the parties.

13. Each of those elements will be addressed in turn.

A. *The BCCLA's Proposed Submissions*

14. Subject to review and consideration of the respondents' facta, and factum space permitting, the BCCLA's argument will remain that which it advanced in the court below. (The Pastine affidavit attaches the BCCLA's Court of Appeal factum as Exhibit "A".) The BCCLA's submission consisted of four points, which were described as follows at para. 5 of its factum:

(1) ss. 4 and 5 of the *CDSA* deprive persons addicted to intravenous drug use of life, liberty and security of the person;

(2) the deprivation caused by ss. 4 and 5 of the *CDSA* is contrary to the principle of fundamental justice that laws shall not be overbroad;

(3) the deprivation caused by ss. 4 and 5 of the *CDSA* is contrary to the principle of fundamental justice that disabilities must be reasonably accommodated; and

(4) Insite is constitutionally immune from the application of ss. 4 and 5 of the *CDSA*, by reason that Insite is a "Hospital" within the meaning of s. 92(7) of the *Constitution Act, 1867*.

15. The focus of the BCCLA's submissions in this court will be the third point – that there is a principle of fundamental justice that disabilities must be reasonably accommodated, and that ss. 4(1) and 5(1) of the *CDSA* are disrespectful of that principle. The BCCLA will submit that, while not recognized in the s. 7 jurisprudence to date, the accommodation principle should be recognized as a principle of fundamental justice for the first time in this case.

16. D. Smith J.A., the dissenting judge in the Court of Appeal, rejected this argument on the basis that "this proposed principle would not satisfy the framework for the identification of principles of fundamental justice set out in *Malmo-Levine* and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76" (para. 305), but she undertook no further analysis of the point.

17. The framework mentioned by D. Smith J.A. is as follows:

> for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. [*Malmo-Levine*, para. 113]

18. The BCCLA will submit that the accommodation principle is a legal principle recognized in constitutional and human rights law, both domestically and internationally; that the accommodation principle is a fundamental principle that is deeply entrenched in our legal traditions and that is closely connected to the protection of human dignity; and that the accommodation principle yields a manageable standard, and indeed is routinely applied by human rights tribunals across the country. The accommodation principle meets the criteria set out by this court in *Malmo-Levine*, and is therefore a principle of fundamental justice.

19. Further particulars of the BCCLA's accommodation argument can be found at paras. 26-43 of its Court of Appeal factum.

B. *The Relevance of the Submissions to the Proceedings*

20. The plaintiffs (respondents in this court) submit that the doctrine of interjurisdictional immunity shields Insite from the application of the *CDSA*. Huddart J.A., speaking for the majority of the Court of Appeal, accepted this submission. The BCCLA's submissions with respect to interjurisdictional immunity will be supportive of Huddart J.A.'s analysis, and that of the plaintiffs.

21. The plaintiffs submit further that ss. 4(1) and 5(1) of the *CDSA* are contrary to s. 7. At trial, Pitfield J. accepted their submission that the impugned provisions bring about deprivations of life, liberty and security of the person, and are contrary to the principles of fundamental justice in that they are arbitrary, overbroad, and are a grossly disproportionate response to the harm they seek to prevent. On appeal, Rowles J.A. reached the same ultimate conclusion, but with resort only to the principle of fundamental justice that the laws must not be overbroad. As noted, Huddart J.A. expressed "general agreement" with the reasons of Rowles J.A. Again, the

BCCLA's s. 7 submissions – in particular its submission that ss. 4(1) and 5(1) are unconstitutionally overbroad – will support and complement the reasoning of Rowles J.A.

22. However, the BCCLA's submissions will go further than the reasons of the majority, and further than the submissions of the plaintiffs, in advancing the accommodation principle as a principle of fundamental justice. The accommodation principle provides an alternative means of resolving the question of whether the impugned provisions of the *CDSA* are contrary to the principles of fundamental justice. If the accommodation principle is accepted as a principle of fundamental justice, it will follow inexorably that ss. 4(1) and 5(1) of the *CDSA* are contrary to s. 7 of the *Charter*. As the BCCLA submitted at paras. 42-43 of its appeal factum:

> "Addiction is an illness." That is what the trial judge found. As a result, fundamental justice requires laws that would deprive persons of their s. 7 interests by reason of their addiction to provide some reasonable accommodation. On the facts of this case, there is a direct correspondence between the deprivation of drug addicts' life and security of the person (by denying access to a safe injection facility) and what reasonable accommodation of their addiction requires (lawful access to a safe injection facility). For this reason, to recognize that the accommodation principle is a principle of fundamental justice is to immediately vindicate the respondents' position on the s. 7 issue. In this way, the accommodation principle gives force under the Charter to that which the trial judge recognized:
>
> > Society cannot condone addiction, but in the face of its presence it cannot fail to manage it [...].
> >
> > Simply stated, I cannot agree with the Canada's [*sic*] submission that an addict must feed his addiction in an unsafe environment when a safe environment that may lead to rehabilitation is the alternative. [paras. 144, 146]
>
> Sections 4 and 5 are entirely unaccommodating. The blanket prohibitions they set up are the antithesis of accommodation. This Court has recognized that when it comes to accommodation, "zero tolerance" drug policies do not pass muster: see *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115* (2006), 264 D.L.R. (4th) 495, 2006 BCCA 58, at paras. 46-47. At the same time, there would be no undue hardship in crafting an exemption for health facilities akin to Insite. As the EAC found, there is no evidence that Insite leads to increases in relapses or in

> drug-related crime (trial judge, para. 85). It follows that ss. 4 and 5 of the *CDSA* violate s. 7 of the *Charter*.

23. The submissions proposed by the BCCLA are thus directly relevant to the constitutional questions raised in this case.

C. *The Submissions Will be Useful and Different*

24. The BCCLA's submissions will be useful because they will provide a different perspective on the constitutional questions before the Court, from an intervener with a proven track record in constitutional cases.

25. The BCCLA's perspective will of course be different from that of Canada, with whom the BCCLA is opposed in interest. And, as the proposed submissions set out above indicate, the BCCLA's submissions will also differ from those of the parties with whom the BCCLA is aligned.

26. Both the similarities and differences between the position of the plaintiffs and that of the BCCLA are worth highlighting. The plaintiffs argued that ss. 4(1) and 5(1) were contrary to the principles of fundamental justice, but did not argue that the principle that disabilities must be reasonably accommodated is one such principle. In this way, the BCCLA's argument will provide a different and distinctive take on the s. 7 issue.

27. Similarly, in the court below the plaintiffs argued that Insite enjoyed interjurisdictional immunity from the *CDSA*. The plaintiffs did not emphasize, as the BCCLA will likely argue in this court and argued in both courts below, that Insite is especially deserving of interjurisdictional immunity because it is a species of provincially-regulated undertaking – namely, a "Hospital" – that is expressly said in the *Constitution Act, 1867* to fall within provincial jurisdiction.

28. There is also a more fundamental difference between the plaintiffs and the BCCLA. The plaintiffs have a case to win, and the BCCLA does not. The BCCLA wishes to intervene to guide the development of the law in a manner consistent with the organization's philosophical commitment to civil liberties and human rights. While the BCCLA's perspective brings its

stance on this case generally into alignment with the plaintiffs, as an intervener the BCCLA will be able to approach the issues in a more neutral and dispassionate way.

29. In short, the BCCLA's take on the issues is unique. The Court will therefore benefit from hearing it.

PART IV: SUBMISSIONS REGARDING COSTS

30. In accordance with this court's usual practice, all parties should bear their own costs of this application. If leave to intervene is granted, the BCCLA will seek no order as to costs, and will ask that no award of costs be made against it.

PART V: ORDER SOUGHT

31. The BCCLA seeks an order granting it intervener status in these proceedings, including the right to file a factum that will not exceed 10 pages in length, and the right to make oral argument for up to 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 7th day of January, 2011.

Ryan D.W. Dalziel

"D. A. Webster"

Daniel A. Webster, Q.C.

PART VI: TABLE OF AUTHORITIES

CASE	PARAS. CITED
R. v. Clay, [2003] 3 S.C.R. 735	8(iv)
R. v. Malmo-Levine, R. v. Caine, [2003] 3 S.C.R. 571	8(iv), 17, 18
STATUTES	
Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4(1) and 5(1)	throughout

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.