Court File No. CV-12-464162

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

STEVEN SIMONS, CANADIAN HIV/AIDS LEGAL NETWORK, PRISONERS WITH HIV/AIDS SUPPORT ACTION NETWORK, CANADIAN ABORIGINAL AIDS NETWORK and CATIE

Applicants

- and -

MINISTER OF PUBLIC SAFETY, CORRECTIONAL SERVICE OF CANADA, COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA and ATTORNEY GENERAL OF CANADA

Respondents

- and -

REGISTERED NURSES' ASSOCIATION OF ONTARIO, CANADIAN NURSES ASSOCIATION, ASSOCIATION OF REGISTERED NURSES OF BRITISH COLUMBIA, CANADIAN ASSOCIATION OF NURSES IN HIV/AIDS CARE, CANADIAN PUBLIC HEALTH ASSOCIATION, ABORIGINAL LEGAL SERVICES, PIVOT LEGAL SOCIETY, WEST COAST PRISON JUSTICE SOCIETY, VANCOUVER AREA NETWORK OF DRUG USERS, and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I—OVERVIEW

1. The Respondents' legislative and regulatory regime infringes the section 7 *Charter* rights of prisoners who inject drugs, many of whom are addicted. But for the restrictions imposed by the Respondents, these vulnerable prisoners would be able to guard against dangerous infections like Hepatitis C ("**HCV**") and HIV by using sterile injection equipment ("**SIE**"). However, the Respondents prohibit almost all prisoners from accessing SIE, and

unauthorized possession constitutes a disciplinary offence with a punishment of up to 30 days in solitary confinement.[1]

2. The Respondents' prohibition forces prisoners to re-use and share non-sterile injection equipment, which vastly increases the risks of prisoners contracting serious infections.[2] This reality persists, despite the Prison Needle Exchange Program ("**PNEP**") that the Respondents introduced in 2018, which permits a very limited number of prisoners to access SIE.[3] The PNEP only exists in 6 of Canada's 43 federal prisons, and possession of SIE is otherwise prohibited.[4] More than a quarter of all applicants from those 6 prisons have been rejected from participating in PNEP without any clear rationale.[5] To date, only 24 prisoners out of more than 14,000 federally incarcerated prisoners have access to SIE.[6]

3. Prisoners without access to a PNEP are in grave danger of contracting a life-altering illness and the Respondents are preventing them from taking reasonable measures to protect their health.[7] This constitutes a deprivation of security of the person that is not in accordance with the principles of fundamental justice because it is arbitrary and overbroad. In the restrictive circumstances of a prison, the failure to offer access to SIE through a PNEP

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[1] *Corrections and Conditional Release Act*, SC 1992, c. 20 ("***CCRA***"), ss. 2(1), 40(i), 44(1)(f), Segregation, as it is practiced in federal institutions, is solitary confinement as that term is understood at international law: *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 ("***CCLA***), at para. 46, Intervener's Book of Authority ("**IBOA**") Tab 1; *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 ("***BCCLA v. AGC***"), at para. 137, IBOA Tab 2.

[2] See Farley Affidavit (Nov. 11), at para. 31, Applicants Supplementary Record ("**ASR**"), V.3, T 4, where Dr. Farley observes that approximately 20-40% of inmates of Canadian federal prisoners are infected with HCV compared to 1% in the general community; Supplementary Affidavit of Dr. Margaret Millson, sworn June, 2019, at para. 39.

[3] Supplementary Affidavit of Henry De Souza, sworn September 13 ("**De Souza Affidavit (September 13, 2019)**"), at paras. 3-5.

[4] De Souza Affidavit (September 13, 2019), at para. 3.

[5] Farley Affidavit (September 13, 2019**)**, Exhibit A at para. 4; Affidavit of Nick Fabiano, affirmed July 4, 2016 ("**Fabiano Affidavit**"), at para. 18, Respondents' Record ("**RR**"), V. I, T 1.

[6] Supplementary Affidavit of Dr. John D. Farley, sworn September 13, 2019, Exhibit A, ("**Farley Affidavit (September 13, 2019)**"), at para. 4.

[7] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 ("***Insite***"), at paras. 10, 11, 136, IBOA Tab 3; *R. v. Morgentaler*, [1988] 1 SCR 30 ("***Morgentaler***"), at pp. 59-60 (per Dickson J.), pp. 105-6 (per Beetz J.), IBOA Tab 4; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 ("***Chaoulli***") at paras. 117-118, IBOA Tab 5.

amounts to the deprivation of a negative right. In essence, the Respondents have prevented prisoners from helping themselves, contrary to section 7 of the *Charter*.

4. This deprivation is not justified by section 1 of the *Charter*. This Court should order a remedy under section 52(1) of the *Constitution Act, 1982* or under its inherent jurisdiction.

PART II—FACTS

5. Intravenous drug use is a fact of life in federal prisons. Prisoners are likely to enter prison with, or develop while incarcerated, drug use and addictions issues.[8] Up to 70-80% of the federal prison population, numbering roughly 11,200 prisoners, have identified substance use problems.[9]

A. *The Respondents' legislative regime prohibits the possession of SIE*

6. The *Corrections and Conditional Release Act* ("***CCRA***"), *Corrections and Conditional Release Regulations* ("***CCRR***") and the subordinate policy laid out in the Commissioner's Directives ("***CDs***") (collectively the "***Impugned Restrictions***") prohibit federally incarcerated prisoners from accessing SIE and impose disciplinary sanctions for unauthorized possession.[10] The *CCRA* defines SIE as "contraband", on the basis that it is either a weapon possessed without authorization, or "could jeopardize the security of a penitentiary or the safety of persons".[11] The *CCRA* authorizes disciplinary sanctions for possessing contraband.[12]

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[8] Affidavit of Andrea Moser, sworn September 19, 2016, ("**Moser Affidavit**") at para 3, RR V III, T 3(G).
[9] Moser Affidavit, at para. 3, RR, V. III, T3(G).
[10] *CCRA*, ss. 2(1), 40(i), 44(1)(f).
[11] *CCRA*, ss. 2(1) (a), (e); SIE is excluded from the list of items allowed as personal property: Commissioner's Directive 566-- *Framework for the Prevention of Security Incidents*, s. 6(a), Sched. B, T 12. Exhibit A to the Cross Examination of Fabiano Cx, Q. 47-57, Transcript Brief, V.4, TH.
[12] *CCRR*, SOR/92-620, ss. 35(1); 40(1); 71.

7. In 2018, shortly before the scheduled hearing of this application, the Respondents introduced the *Prison Needle Exchange Program: Application and Assessment Process Guidelines* (the "***PNEP Guidelines***"). A year and a half later, there are PNEPs in only 6 of the 43 federal prisons.[13] As of September 2019, 43 prisoners had applied to the PNEP program, of which only 24 were approved.[14] More than 25% of applicants have been rejected,[15] and the *PNEP Guidelines* do not require reasons for exclusion.[16] The vast majority of prisoners continue to have no access to a PNEP or SIE.

8. Owning non-PNEP SIE is still a punishable offence in the 6 institutions with a PNEP program and in the 37 institutions that have no program.[17] Furthermore, the *PNEP Guidelines* do not provide persons who are rejected from a PNEP with any means of accessing SIE. Consequently, some prisoners are barred from taking steps to protect their own health, and this fact will remain even if PNEPs become available at all institutions.[18]

B. ***The prohibition on SIE risks the lives of prisoners for no demonstrable benefit***

9. Prohibiting SIE increases the risks associated with intravenous drug use. The *Impugned Restrictions* increase the transmission of infections by forcing prisoners who use drugs to repeatedly use and share injection equipment.[19] This has contributed to federal prisoners having significantly higher rates of dangerous infections such as HIV and Hepatitis

[13] De Souza Affidavit (September 13, 2019), at para. 3.
[14] Affidavit of Dr. Henry de Souza, sworn July 8, 2019, at para. 4; Fabiano Affidavit, at para. 18, RR, V. I, T1.
[15] Farley Affidavit (September 13, 2019), Exhibit, A, at paras. 4-5.
[16] De Souza Affidavit (September 13, 2019), Exhibit D, at p. 4-5.
[17] De Souza Affidavit (September 13, 2019), Exhibit D, at p. 5.
[18] De Souza Affidavit (September 13, 2019), Exhibit D, at p. 4-5.
[19] Dr. John D. Farley Affidavit, sworn November 3, 2014 ("**Farley Affidavit (November 3, 2014)**") at paras. 31, 40-42, ASR, V.3, T4.

C. [20] These infections result in serious, life-threatening health issues that can require a lifetime of treatment and accompanying side effects.[21]

10. Compelling research from other jurisdictions demonstrates that access to SIE reduces risks related to intravenous drug use while improving prisoners' health.[22] The Respondents' affidavit evidence affirms that PNEPs do not affect prison security, and that "the availability of sterile needles and syringes does not result in an increased number of drugs injectors, an increase in overall drug use, or an increase in the amount of drugs in an institution."[23]

PART III—ISSUES

11. This factum addresses four issues:

(a) The infringement of the s. 7 *Charter* rights of federally incarcerated prisoners;

(b) The manner in which this infringement is arbitrary and overbroad;

(c) The *Impugned Restrictions'* lack of justifiability under section 1 of the *Charter*; and

(d) This Court's power to order a remedy under section 52(1) of the *Constitution Act, 1982*, or pursuant to this Court's inherent jurisdiction.

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[20] Affidavit of Dr. Margaret Millson, sworn August 7, 2014, para 41, ASR, V.1, T 3; Affidavit of Alba Dicenso, sworn September 21, 2012, para. 20-21, 24, AR, V.2, T4.
[21] Affidavit of Dr. Margaret Millson, sworn 2019, ("**Millson Affidavit**"), at para. 39.
[22] Supplementary Affidavit of Dr. Svetlana Doltu, sworn June 6, 2019, ("**Doltu Affidavit, 2019**") at paras. 48-59; Supplementary Affidavit of Dr. Heino Stöver, sworn July 30, 2019, ("**Stöver Affidavit, 2019**") at paras. 19-21; Supplementary Affidavit of Dr. Hans Wolff, sworn August 30, 2019, ("**Wolff Affidavit, 2019**"), at paras. 17-25.
[23] Affidavit of Henry de Souza Affidavit, sworn April 11, 2019, ("**De Souza Affidavit (April 11, 2019)**") "Exhibit L", at p. 108.

PART IV—ARGUMENT

C. The *Impugned Restrictions* infringe the section 7 *Charter* rights of federally incarcerated prisoners

i. The *Impugned Restrictions* infringe the *Charter* by prohibiting vulnerable individuals from taking steps to protect their health

12. The Respondents' failure to provide vulnerable individuals with the means to exercise their *Charter* rights infringes section 7. In *Insite,* which closely resembles the case at bar, the Supreme Court of Canada recognized that the failure to exercise statutory discretion so as to minimize death and disease in a vulnerable population is a violation of the *Charter* and may compel statutory discretion to be exercised in a manner that promotes *Charter* rights.[24]

13. In the context of other *Charter* rights, the Supreme Court of Canada has stressed that preventing vulnerable individuals from exercising their rights constitutes *Charter* infringing state action. In *Eldridge,* the Court recognized that "discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public."[25] In *Dunmore,* the Court held that the under-inclusiveness of legislation conferring labour rights was an unconstitutional infringement of agricultural workers' section 2(d) right to freedom of association, as workers were "substantially incapable of exercising their fundamental freedom to organize without the protective regime."[26]

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[24] *Insite,* at paras. 150, 152-153, IBOA Tab 3; See Matthew Rottier Voell, "PHS Community Services Society v Canada (Attorney General): Positive Health Rights, Health Care Policy, and S. 7 of the Charter", (2012) 31 WRLSI 41, at p. 62-63.
[25] *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 ("***Eldridge***"), at para. 78, IBOA Tab 6.
[26] *Dunmore v. Ontario (Attorney General),* 2001 SCC 94 ("***Dunmore***"), at para. 35, IBOA Tab 7.

14. In the absence of assistance from the Respondents, the vast majority of prisoners, particularly those rejected from the PNEP or those who live in one of the 37 prisons with no PNEP, are incapable of taking reasonable measures to protect their own security of the person. This constitutes a section 7 *Charter* infringement.

ii. Prisoners are uniquely vulnerable to infringements of their section 7 rights

15. The *Impugned Restrictions* infringe the negative *Charter* rights of federally incarcerated prisoners. A negative right describes individuals' "right to be free from some form of restriction or prohibition" and is "simply another way to describe a freedom."[27] For section 7, a negative right describes individuals' right to be free from restrictions or prohibitions that infringe on life, liberty or security of the person[28]. The right to security of the person protects individuals' physical integrity.[29]

16. The *Impugned Restrictions* expose prisoners to serious health issues in an environment where prisoners are already vulnerable to state interference. Section 7 is assessed contextually.[30] Prisoners are particularly vulnerable to infringement of their section 7 *Charter* rights. The Respondents have total control over every aspect of prisoners' daily lives, including their access to health care.[31] Prisoners rejected from a PNEP may never be able to access SIE and must assume the risk of contracting dangerous infections, which can cause serious suffering and death.

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[27] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, at para. 192, IBOA Tab 8.
[28] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, at para. 319, IBOA Tab 9.
[29] *BCCLA v. AGC*, at para. 275, IBOA Tab 2.
[30] *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 (*"**K.L.W.**"*), at para. 48, IBOA Tab 10.
[31] For example, even the ineffective bleach program currently employed by the Respondents' relies on the Respondents' providing adequate bleach: See Affidavit of Steven Simons, sworn September 19, 2012, at paras. 14-15. Applicant's Record, V.1, T2.

iii. Respondents' responsibility to not infringe the rights of vulnerable populations

17. The *Impugned Restrictions* bar prisoners from protecting their health. The vast majority of Canadian prisoners have no access to SIE. Prisoners who use drugs have no choice but to inject drugs in unsafe ways.[32]

18. Canadian courts have found an infringement of section 7 of the *Charter* where the state has limited the ability of vulnerable individuals to exercise their rights. For example:

(a) In *Chaoulli*, the Supreme Court determined that self-help by virtue of access to private health insurance was justified where the state had "denied a solution that would permit [the applicants] to avoid waiting lists".[33]

(b) In *Victoria (City) v. Adams*, the British Columbia Court of Appeal struck down a bylaw that prevented homeless persons from addressing their own needs by constructing temporary shelters when shelters were at capacity.[34]

(c) In *Hitzig v. Canada*, the state "placed barriers between [the claimants] and the marihuana necessary for their health" through administrative obstacles, and the Court of Appeal declared these obstacles to be of no force or effect.[35]

19. The *Impugned Restrictions* present a more complete prohibition than those considered in *Morgentaler* and *Chaoulli* as the vast majority of federal prisoners cannot access a PNEP and have *no means* of accessing SIE.[36]

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[32] Affidavit of Dr. John Farley Affidavit, sworn November 11, 2014, at paras. 40-42, ASR, V.3, T4.
[33] *Chaoulli*, at para. 44, IBOA Tab 5.
[34] *Victoria (City) v. Adams*, 2009 BCCA 563 ("***Victoria City***"), at paras. 74, 88, IBOA Tab 11.
[35] *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104 (Ont. C.A.), at paras. 54, 83, 95, 104, 176, IBOA Tab 12.
[36] *Chaoulli*, para. 45, IBOA Tab 5.

iv. The Respondents must provide an accessible PNEP

20. The deprivation at issue requires the Respondents to give prisoners a *meaningful* opportunity to protect their security of the person. The Respondents must provide an accessible PNEP in every prison. Providing an accessible PNEP is consistent with the Respondents' statutory obligation to provide prisoners with health care that "conform[s] to professionally accepted standards".[37]

21. The BCCLA does not ask this Court to dictate the specific parameters of the PNEP program. But the BCCLA does request that this Court affirm that there is a constitutional baseline which the Respondents must meet. A PNEP program that is only available in 6 prisons and that excludes a quarter of applicants is not an accessible program.

D. The *Impugned Restrictions* contravene principles of fundamental justice as they are overbroad and arbitrary

22. Even policy that is motivated by a laudable object or purpose, but which is arbitrary and overbroad in effect will contravene the principles of fundamental justice, resulting in a breach of section 7 of the *Charter*.[38] The *Impugned Restrictions* need only be overbroad or arbitrary in effect for one person to breach section 7.[39] As McLachlin C.J. held in *Chaoulli*, "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."[40]

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[37] *CCRA*, ss. 86(1)(a), 86(2).
[38] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, ("***Bedford***"), at para. 107, IBOA Tab 13.
[39] *Bedford*, at para. 123, IBOA Tab 13.
[40] *Chaoulli*, at para 131, IBOA Tab 5.

i. The *CCRA* has the object and purpose of preserving the safety of prisoners

23. The preservation of the health and safety of prisoners is one of the *CCRA*'s primary purposes.[41] In this regard, the *CCRA*'s purpose must be "taken at face value".[42]

24. In furtherance of this purpose, the *CCRA* provides a number of "principles that [guide] the Service", which include, *inter alia,* that measures employed are "limited to only what is necessary and proportionate to attain the purposes of this *Act*."[43] Likewise, the *CCRA* establishes that discretionary decisions regarding prisoners' custody, health care, and punishment should consider prisoners' health and safety.[44]

ii. The impugned restrictions are arbitrary and overbroad

25. In *Insite,* the Supreme Court of Canada held that an executive decision which has the effect of exposing people who use drugs to an increased and measurable risk of harm is arbitrary and will not comply with section 7 of the *Charter*.[45]

26. The *Impugned Restrictions* mirror *Insite* by arbitrarily increasing the risks to the health of prisoners who use drugs, while allowing prisoners to possess needles for other health care needs and for cultural programming. Prisoners have access to SIE for prescribed medication, including for HCV, insulin and for allergy treatment, and prisoners can possess this SIE without sanction.[46] These needles are directly comparable to SIE used for drug use, and prisoners currently resort to using old insulin equipment for injection of drugs.[47] Additionally,

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[41] *CCRA,* s. 3(a); which requires the "safe and humane custody and supervision of offenders".
[42] *Bedford*, at paras. 125, 131-132, IBOA Tab 13.
[43] *CCRA,* ss. 4(a), (c), (d), (g).
[44] *CCRA,* ss. 28, 70, 86, 87.
[45] *Insite,* at paras. 133, 136, IBOA Tab 3.
[46] Farley Affidavit (November 3, 2014), at paras. 43-48, ASR, V.3, T4.
[47] Affidavit of Dr. Peter M. Ford, sworn November 22, 2013, ("**Ford Affidavit, 2013**") at paras. 48-50, 59-74, ASR, V.3, T5.

the Respondents allow prisoners to possess needles for needs far less pressing than health care, such as for hobby crafting and cultural programming.[48] This undermines the Respondents' purported security concerns, and emphasizes the arbitrary risk that is being imposed on prisoners who are addicted to drugs.

27. Courts have found prohibitions to be overbroad where the state's purpose could be realized via less impairing alternatives.[49] In *Bedford* the Supreme Court of Canada held that the doctrine of overbreadth addresses situations "where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts."[50] This doctrine "allows courts to recognize that the law is rational in some cases, but that it overreached in others."[51]

28. The Respondents' prohibition of SIE is overbroad as there is no legitimate safety concern related to the PNEP. Dr. Hans Wolff, a physician who has spent decades researching PNEPs in jurisdictions throughout the world, reports that no syringe or needle has ***ever*** been used as a weapon in a prison where there is access to SIE through a PNEP.[52]

29. The prohibition on SIE is overbroad as it fails to address the health and safety needs of most prisoners. All parties' evidence establishes that NEPs in Canada and other jurisdictions reduce the risk of transmitting infectious diseases.[53] Studies of international prison-based programs demonstrate that they do not increase prisoner drug use, the quantity of available

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[48] Affidavit of Fallon Aubee, sworn June 5, 2019, at para. 33.
[49] *Carter v. Canada (Attorney General)*, 2015 SCC 5 ("***Carter***"), at paras. 85-88, IBOA Tab 14; *Victoria City*, at para. 116, IBOA Tab 11; see *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, IBOA Tab 15, which substantially adopted the *Adams* reasoning on overbreadth in similar factual circumstances; *R. v. Michaud*, 2015 ONCA 585 ("***Michaud***"), at paras. 73-74, IBOA Tab 16.
[50] *Bedford*, at paras. 112-113, IBOA Tab 13.
[51] *Bedford*, at paras. 112-113, IBOA Tab 13.
[52] Affidavit of Dr. Hans Wolff, sworn October 11, 2016, at para. 32, ARR, T4.
[53] Affidavit of Shaun Hopkins, sworn July 23, 2014, at paras. 30-43, ASR, V.8, T 12; Affidavit of Meaghan Thumath, sworn September 23, 2013, at paras. 23, 32, ASR, V.8, T 11; Doltu Affidavit, 2019 at paras. 48-59; Stöver Affidavit, 2019 at paras. 19-21, Wolf Affidavit, 2019 at paras. 17-25.

illicit substances or security risks.[54] The United Nations General Assembly unanimously adopted minimum standards for the treatment of prisoners that require treatment for drug dependence and infectious disease as would otherwise be available outside of prisons.[55] The Respondents' own affidavits point to "several papers' opinion on the benefits of PNEP and that [they] do not represent a safety risk to the prison environment".[56] The *PNEP Guidelines* have adopted this language.[57]

iii. Inaccessible PNEPs do not cure *Impugned Restrictions'* arbitrariness or overbreadth

30. The fact that a small number of prisoners can possess SIE through the PNEP, and that the program *may* be expanded to more prisons in the future does not preclude the *Impugned Restrictions* from being overbroad.[58] In *R. v. Appulonappa,* the Supreme Court of Canada found sections of the *Immigration and Refugee Protection Act* ("***IRPA***") that made it an offence to "organize, induce, aid or abet" immigration contrary to the *IRPA* overbroad, despite the requirement of Ministerial authorization for prosecutions. The Court held that the existence of ministerial discretion to act in a *Charter* compliant manner did not protect the section from scrutiny, and that "so long as the provision is on the books, and so long as it is

[54] Doltu Affidavit, 2019, at paras. 48-59; Ford Affidavit, 2013, at paras. 147-153; Affidavit of Dr. Hans Wolff, sworn February 20, 2015 ("**Wolff Affidavit, 2015**") at paras. 59-61, ASR, V.5, T 7; De Souza Affidavit (April 11, 2019), at para. 26.

[55] UNGA, 17th Sess, 3rd Comm, UN Doc A/RES/7-/175 (2015), rule 24(2); for application in Canadian law in see *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243 para. 23-25, IBOA Tab 17.

[56] De Souza Affidavit (September 13, 2019), Exhibit D, at p. 1.

[57] De Souza Affidavit (April 11, 2019), Exhibit D, at p. 3. "The safety of inmates and CSC staff is of utmost importance. According to published reports, among countries where PNEPs have been in place, there has been no strong evidence of increased security threats or increased injection drug use."

[58] *CCRA*, ss. 2, 40(j).

not impossible that the Attorney General could consent to prosecute", infringement remained a live issue. [59]

31. In the case at bar, *Charter* infringements are not hypothetical. The section 7 rights of prisoners rejected from a PNEP program and prisoners in the 37 prisons with no PNEP continue to be infringed on a daily basis. Only a small handful of prisoners have been granted discretionary access to SIE.

E. The infringement of prisoners' section 7 rights cannot be justified under section 1

i. *Prima facie* the *Impugned Restrictions* cannot be justified under section 1

32. The Supreme Court of Canada has found that infringements of section 7 are "not easily saved by section 1."[60] Section 1 will be relevant in cases that arise "out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[61] The quotidian regulation of a federal prison does not qualify as an "exceptional condition."

ii. In the alternative, the *Impugned Restrictions* disproportionately infringe section 7 *Charter* rights

33. Analyzing proportionality "requires both that the underlying objective of a measure and the salutary effects *that actually result* from the implementation be proportionate to the deleterious effects."[62]

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[59] *R. v. Appulonappa*, 2015 SCC 59, at para. 74 [emphasis added], IBOA Tab 18.
[60] *Carter* at para. 95, IBOA Tab 14; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 ("***Charkaoui***"), at para. 66, IBOA Tab 19; *R. v. Ruzic*, [2001] 2001 SCC 24 at para. 92, IBOA Tab 20; *K.L.W.*, at para. 42, IBOA Tab 10.
[61] *Charkaoui* at para. 66, IBOA Tab 18; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at para. 85, IBOA Tab 20; *Health and Community Services v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 99, IBOA Tab 22.
[62] *Thomson Newspapers co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, IBOA Tab 23, at para. 59 citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889.

34. The *Impugned Restrictions* have disproportionate deleterious impacts on prisoners' bodily integrity by exposing them to dangerous infections. By comparison, the *Impugned Restrictions'* salutary effects are negligible. The provisions are intended to protect the safety of the prison community.[63] Yet, the Applicants' and Respondents' evidence demonstrate that the provision of SIE in prisons does not increase addiction rates or increase violence, but does provide numerous health benefits to prisoners who use drugs. [64] The *Impugned Restrictions* have no impact on safety in prisons *but reduce the safety of prisoners who use drugs.*

35. *R. v. Michaud* is the only appellate case where a section 7 infringement was justified under section 1. In *R v. Michaud* the Court of Appeal for Ontario noted that a tiny subset of drivers were impacted by rules that would save innumerable lives.[65] By contrast, the Respondents rely on a purported risk that is unproven and contradicted by experts in order to justify risking the lives of thousands of prisoners who use drugs. The *Impugned Restrictions* cannot be justified under section 1.

F. This Court can order relief under section 52(1) or per its inherent jurisdiction

i. Section 52(1) should be used to order relief in this matter

36. Section 52(1) will apply if "the necessary result or 'effect'" of the *Impugned Restrictions* is to infringe the *Charter* in even a single instance.[66] It applies to any binding policy of general application adopted by a government entity. [67] This describes the legislative,

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[63] *CCRA*, s. 3(a); requiring the "safe and humane custody and supervision of offenders."
[64] Doltu Affidavit, 2019, at paras. 48-59; Stöver Affidavit, 2019, at paras. 19-21; Wolff Affidavit, 2019, at paras. 17-25; De Souza Affidavit (April 11, 2019), Exhibit K, at para. 26; Ford Affidavit, 2013, at paras. 126-127, ASR, V. 3, T5; Affidavit of Dr. Margaret Millson, sworn February 3, 2016, at para. 7, ASR (2nd), T 1(C).
[65] *Michaud,* at paras. 137-142, IBOA Tab 16.
[66] *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, ("***GVTA v. CFS***") at para. 83, IBOA Tab 24, citing *R v. Ferguson*, 2008 SCC 6, at para. 59.
[67] *GVTA v. CFS*, at paras. 87-90, IBOA Tab 24.

regulatory and policy components of the *Impugned Restrictions*. Section 52(1) will have effect even if the impugned behaviour is the product of ministerial discretion or the language of the legislative, regulatory and policy components of the *Impugned Restrictions* do not explicitly prohibit SIE.

37. Unlike in *Little Sisters* the defect here is inherent in the *Impugned Restrictions'* prohibition on the possession of SIE.[68] Section 52(1) is not limited to remedying express language in a law that is facially *Charter* infringing. Nor is the Court limited to excising *Charter* infringing language, and it may read in provisions that will cure the constitutional defects of the legislation.[69] This Court's authority under section 52(1) is predicated on a contextual analysis of the legislation even if the words of a law are not "insofar as it goes, problematic."[70]

38. Moreover, even if the *Impugned Restrictions* are a product of discretion, the availability of section 52(1) relief is determined by the substance of the statutory scheme rather than its form.[71] This case is similar to *Parker*, where a section 52(1) remedy was granted despite the availability of an exception.[72] As the Supreme Court of Canada held in *Bain*, "the protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown … rather the offending statutory provision should be removed."[73]

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[68] *Little Sisters v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, IBOA Tab 25.
[69] *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paras. 111-115, IBOA Tab 26.
[70] *R. v. Smith*, 2015 SCC 34, at para. 31, IBOA Tab 27.
[71] *Schachter v. Canada*, [1992] 2 S.C.R. 679, at para. 33: "It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. This is entirely inappropriate." See *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at para. 118, IBOA Tab 3, citing *R. v. Parker*, 2000 C 49 O.R. (3d) 481(Ont. C.A.) ("***Parker***"), at para. 174.
[72] *Parker*, at paras. 184-187, 195-210, IBOA Tab 30.
[73] *R v. Bain*, [1992] 1 S.C.R. 91, at para. 8, IBOA Tab 31.

ii. In the alternative, this Court should order declaratory relief

39. The Applicants, as public interest litigants, have standing to seek common law declaratory relief against unconstitutional state actions.[74] In *British Columbia Civil Liberties Association v. Canada (Attorney General)* the British Columbia Court of Appeal found that its inherent jurisdiction permitted declaratory relief for *Charter* infringement in the absence of an order under s. 52(1). [75]

40. The Court stressed that this power supports the "the principle of legality," and that public interest litigants should be granted "access to a broad array of remedial options." The Court found that public interest litigants should have standing to obtain, "on behalf of individuals who are often ill-positioned to bring their own lawsuits – declaratory relief that particular state conduct violated the Charter."[76]

41. If this Court will not strike down the *Impugned Restrictions* under section 52(1), it should nevertheless declare that prisoners have a right to meaningful access to SIE pursuant to section 7 of the *Charter,* and it should particularize the content of that right by mandating accessible PNEPs in all prisons.

G. Conclusion

42. The Respondents' legislative and regulatory regime deprives prisoners of the ability to avoid contracting dangerous infections through the use of SIE. Prisoners are particularly vulnerable, as they rely on the Respondents for the preservation of their health and wellbeing.

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[74] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228, at para. 264 ("***BCCLA v. AG***"), IBOA Tab 32, citing *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at para. 450.
[75] *BCCLA v. AG*, at para. 264, IBOA Tab 32.
[76] *BCCLA v. AG*, at para. 264, IBOA Tab 32.

The Respondents are obligated to help a vulnerable group, who, *because of the restrictions imposed by the Respondents,* cannot help themselves.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of October, 2019.

H. Michael Rosenberg / Christine Wadsworth / Simon G. Cameron

McCarthy Tétrault LLP

Lawyer for the Intervener,
the British Columbia Civil Liberties Association

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491.
2. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62.
3. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 133.
4. *R. v. Morgentaler*, [1988] 1 SCR 30.
5. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.
6. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.
7. *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94.
8. *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.
9. *Gosselin v. Québec (Attorney General)*, 2002 SCC 84.
10. *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48.
11. *Victoria (City) v. Adams*, 2009 BCCA 563.
12. *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104 (Ont. C.A.).
13. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.
14. *Carter v. Canada (Attorney General)*, 2015 SCC 5.
15. *Abbotsford (City) v. Shantz*, 2015 BCSC 1909.
16. *R. v. Michaud*, 2015 ONCA 585.
17. *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243.
18. *R. v. Appulonappa*, 2015 SCC 59.
19. *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.
20. *R. v. Ruzic*, 2001 SCC 24.
21. *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
22. *Health and Community Services v. G. (J.)*, [1999] 3 S.C.R. 46.

23. *Thomson Newspapers co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.
24. *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31.
25. *Little Sisters v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.
26. *R. v. Sharpe*, [2001] 1 S.C.R. 45.
27. *R. v. Smith*, 2015 SCC 34.
28. *Schachter v. Canada*, [1992] 2 S.C.R. 679.
29. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.
30. *R. v. Parker*, 2000 49 O.R. (3d) 481(Ont. C.A.).
31. *R v. Bain*, [1992] 1 S.C.R. 91.
32. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228.

SCHEDULE "B"
RELEVANT STATUTES

***Corrections and Conditional Release Act,* SC 1992, c. 20**

Definitions
2 (1) In this Part,
contraband means
(a) an intoxicant,
(b) a weapon or a component thereof, ammunition for a weapon, and anything that is designed to kill, injure or disable a person or that is altered so as to be capable of killing, injuring or disabling a person, when possessed without prior authorization,
(c) an explosive or a bomb or a component thereof,
(d) currency over any applicable prescribed limit, when possessed without prior authorization, and
(e) any item not described in paragraphs (a) to (d) that could jeopardize the security of a penitentiary or the safety of persons, when that item is possessed without prior authorization; (*objets interdits*)

Purpose of correctional system
3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

Principles that guide Service
4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:
(a) the sentence is carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process, the release policies of and comments from the Parole Board of Canada and information obtained from victims, offenders and other components of the criminal justice system;
(b) the Service enhances its effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about its correctional policies and programs to victims, offenders and the public;
(c) the Service uses the least restrictive measures consistent with the protection of society, staff members and offenders;
(c.1) the Service considers alternatives to custody in a penitentiary, including the alternatives referred to in sections 29 and 81;

(c.2) the Service ensures the effective delivery of programs to offenders, including correctional, educational, vocational training and volunteer programs, with a view to improving access to alternatives to custody in a penitentiary and to promoting rehabilitation;
(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;
(e) the Service facilitates the involvement of members of the public in matters relating to the operations of the Service;
(f) correctional decisions are made in a forthright and fair manner, with access by the offender to an effective grievance procedure;
(g) correctional policies, programs and practices respect gender, ethnic, cultural, religious and linguistic differences, sexual orientation and gender identity and expression, and are responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups;
(h) offenders are expected to obey penitentiary rules and conditions governing temporary absences, work release, parole, statutory release and long-term supervision and to actively participate in meeting the objectives of their correctional plans, including by participating in programs designed to promote their rehabilitation and reintegration; and
(i) staff members are properly selected and trained and are given
(i) appropriate career development opportunities,
(ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and
(iii) opportunities to participate in the development of correctional policies and programs.

Criteria for selection of penitentiary
28 If a person is or is to be confined in a penitentiary, the Service shall take all reasonable steps to ensure that the penitentiary in which they are confined is one that provides them with the least restrictive environment for that person, taking into account
(a) the degree and kind of custody and control necessary for
- **(i)** the safety of the public,
- **(ii)** the safety of that person and other persons in the penitentiary, and
- **(iii)** the security of the penitentiary;

(b) accessibility to
- **(i)** the person's home community and family,
- **(ii)** a compatible cultural environment, and
- **(iii)** a compatible linguistic environment; and

(c) the availability of appropriate programs and services and the person's willingness to participate in those programs.

Disciplinary offences
40 An inmate commits a disciplinary offence who
(a) disobeys a justifiable order of a staff member;
(b) is, without authorization, in an area prohibited to inmates;

(c) wilfully or recklessly damages or destroys property that is not the inmate's;
(d) commits theft;
(e) is in possession of stolen property;
(f) is disrespectful toward a person in a manner that is likely to provoke them to be violent or toward a staff member in a manner that could undermine their authority or the authority of staff members in general;
(g) is abusive toward a person or intimidates them by threats that violence or other injury will be done to, or punishment inflicted on, them;
(h) fights with, assaults or threatens to assault another person;
(i) is in possession of, or deals in, contraband;
(j) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner's Directive or by a written order of the institutional head;
(k) takes an intoxicant into the inmate's body;
(l) fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55;
(m) creates or participates in

- (i) a disturbance, or
- (ii) any other activity that is likely to jeopardize the security of the penitentiary;

(n) does anything for the purpose of escaping or assisting another inmate to escape;
(o) offers, gives or accepts a bribe or reward;
(p) without reasonable excuse, refuses to work or leaves work;
(q) engages in gambling;
(r) wilfully disobeys a written rule governing the conduct of inmates;
(r.1) knowingly makes a false claim for compensation from the Crown;
(r.2) throws a bodily substance towards another person; or
(s) attempts to do, or assists another person to do, anything referred to in paragraphs (a) to (r).

Disciplinary sanctions
44 (1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(i) and (j), to one or more of the following:

- **(a)** a warning or reprimand;
- **(b)** a loss of privileges;
- **(c)** an order to make restitution, including in respect of any property that is damaged or destroyed as a result of the offence;
- **(d)** a fine;
- **(e)** performance of extra duties; and
- **(f)** in the case of a serious disciplinary offence, segregation from other inmates — with or without restrictions on visits with family, friends and other persons from outside the penitentiary — for a maximum of 30 days.

Living conditions, etc.
70 The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.

Obligations of Service
86 (1) The Service shall provide every inmate with
(a) essential health care; and
(b) reasonable access to non-essential health care.

Standards
(2) The provision of health care under subsection (1) shall conform to professionally accepted standards.

Service to consider health factors
87 The Service shall take into consideration an offender's state of health and health care needs
(a) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative segregation and disciplinary matters; and
(b) in the preparation of the offender for release and the supervision of the offender.

2. *CCRR*, SOR/92-620

35 (1) The maximum number of days of privileges that may be lost by an inmate pursuant to paragraph 44(1)(b) of the Act is
(a) seven days, for a minor disciplinary offence; and
(b) 30 days, for a serious disciplinary offence.

40 (1) Subject to subsection (2), where an inmate is ordered to serve a period of segregation pursuant to paragraph 44(1)(f) of the Act while subject to a sanction of segregation for another serious disciplinary offence, the order shall specify whether the two periods of segregation are to be served concurrently or consecutively.
(2) Where the sanctions of segregation referred to in subsection (1) are to be served consecutively, the total period of segregation imposed by those sanctions shall not exceed 45 days.
(3) An inmate who is serving a period of segregation as a sanction for a disciplinary offence shall be accorded the same conditions of confinement as would be accorded to an inmate in administrative segregation.

3. UNGA, 17th Sess, 3rd Comm, UN Doc A/RES/7-/175 (2015)

Health-care services

Rule 24

1. The provision of health care for prisoners is a State responsibility. Prisoners should enjoy the same standards of health care that are available in the community, and should have access to necessary health-care services free of charge without discrimination on the grounds of their legal status.

2. Health-care services should be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care, including for HIV, tuberculosis and other infectious diseases, as well as for drug dependence.

Steven Simons et al. Applicants	and	Minister of Public Safety, et al. Respondents	Court File No: CV-12-464162

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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