

COURT OF APPEAL OF ALBERTA

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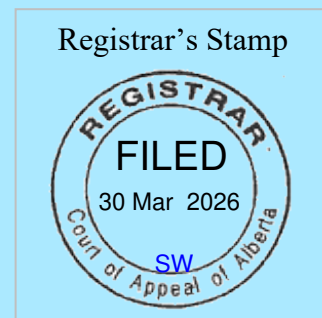
APPLICANT: AARON BROWN

STATUS ON APPEAL: APPELLANT

RESPONDENT: HIS MAJESTY THE KING IN
RIGHT OF ALBERTA and
RECOVERY ALBERTA:
MENTAL HEALTH AND
ADDICTION SERVICES

STATUS ON APPEAL: RESPONDENTS

DOCUMENT: **INTERVENOR FACTUM**



Appeal from the Decision of
The Honourable Justice D.A. Yungwirth
Dated the 26th day of August, 2025
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**FACTUM OF THE INTERVENOR
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PART I - FACTS

A. Overview

1. This Court granted British Columbia Civil Liberties Association (“**BCCLA**”) leave to intervene in this appeal to address a specific topic: “whether the government’s decision to eliminate a particular health care service – once established and relied upon – can constitute an action that deprives individuals of life, liberty, or security of the person or that is discriminatory”.
2. BCCLA’s submissions have three parts. First, the withdrawal of government services can cause a deprivation under section 7 of the *Charter*. When the government enters the field, provides life-saving services to a vulnerable population, and individuals come to depend on those services for their survival, the government’s deliberate decision to eliminate those services is state action capable of causing a deprivation under section 7.
3. That principle was confirmed in *PHS* in the specific context of supervised consumption services for addiction drug users. There is no meaningful distinction between *PHS* and this case – in both, the state’s action has the intended effect of terminating supervised consumption services. Accordingly, there is no rational basis for a different outcome in this case.
4. Second, whether a *Charter* claim has a “positive” character is not determinative and in fact irrelevant. The bright line distinction between positive and negative rights that Alberta attempts to draw is not supported by the jurisprudence and does not assist the Court in determining whether the state action at issue – the elimination of the Red Deer Overdose Protection Site (“**OPS**”) – violates section 7 or 15.
5. Third, the existence of a constitutional right to health care is not a precondition to successfully compel the continuation of a health care service under the *Charter*. The right at stake is not the right to health care or health care services, but the right to life and security of the person. The claim here is specific to the life-saving health benefits of supervised consumption services, which *PHS* affirmed are protected by section 7.

B. Statement of relevant facts

6. BCCLA adopts the facts as set out in the Appellant's factum.

PART II - ARGUMENT**A. Withdrawal of government services can cause a section 7 deprivation**

7. In 2018, Alberta made the conscious decision to authorize and fund the Red Deer OPS. That decision led to extraordinarily positive health outcomes. The users of the Red Deer OPS came to rely and depend on its services to prevent the loss of life and the transmission of infectious diseases.¹

8. There is no dispute that Alberta's decision to "transition out of Red Deer OPS"² – whether described as the elimination of a health service, the withdrawal of funding, the "non-provision of funding", or a "funding-related policy decision" – is "state action" and subject to *Charter* scrutiny. Alberta concedes this point.³

9. Accepting that the impugned conduct in this appeal is state action, the analysis that follows should be straightforward: does the state action cause a deprivation of life, liberty or security of the person? The only possible answer is "yes". With provincial funding, the service continues and along with it all the health benefits associated with supervised consumption – preventing death by overdose and decreasing the health risks associated with injection drug use. Without funding, the service is gone and so are all the associated health benefits – thus causing a direct threat to the lives and security of the site's users.

10. That was the same answer the Supreme Court came to in *PHS*.⁴ *PHS* similarly dealt with a governmental "non-decision" – in that case, a failure to renew the exemption necessary for Insite to continue operating. The result of that decision was identical. Without the exemption,

¹ Factum of the Appellant, Aaron Brown at paras. 12-16.

² [Brown v Alberta, 2025 ABKB 495 at para 18](#).

³ Memorandum of Argument of the Respondent, His Majesty the King in Right of Alberta at para 22 [Intervenor Memorandum].

⁴ [Canada \(Attorney General\) v PHS Community Services Society](#), 2011 SCC 44 [*PHS*].

Insite would be shuttered and supervised consumption services terminated. Three levels of Court concluded that Canada's failure to renew the exemption breached section 7 of the *Charter*.

11. Alberta's factum goes to great lengths to distinguish *PHS* from the case at bar. There are no doubt differences; they are two different cases. But the differences are not material for the purposes of *Charter* analysis.

12. In *PHS*, Canada entered the field and took action by granting an exemption that was necessary to establish a supervised consumption site. A new government decided to withdraw from the field and terminate the service – to return to the pre-Insite state of affairs. That action was held to be unconstitutional because the removal of the service caused a risk of loss of life and the spread of infectious diseases.

13. It makes no difference that in *PHS* the state action was the failure to renew an exemption, whereas in this case the state action is the withdrawal of funding. Both are actions by the state that must comply with the *Charter*. Again, Alberta concedes its decision was state action.

14. Alberta argues that “[i]n contrast to the federal government in *PHS*, Alberta has done nothing to prevent anyone, including the Appellant, from accessing health care.”⁵ That argument does not square with the evidence:

- (a) Alberta regulates the operation of supervised consumption sites. Site operators need licences granted by the province.⁶ Accordingly, Alberta, through its funding and regulatory control, was a necessary instrument in permitting the Red Deer OPS to exist and operate;
- (b) Alberta's September 23, 2024, press release declared that the “the drug consumption site will be transitioned out of Red Deer”;⁷ and

⁵ Factum of the Respondent, His Majesty the King in Right of Alberta at para 54.

⁶ Appellant's Extracts of Key Evidence [EKE], Tab 1, p. 13 at para 40.

⁷ Appellant's EKE, Tab 4, p. 57.

- (c) Natasha Stagg, the Manager of the Red Deer OPS, testified that the decision to transition out of Red Deer was “given to Recovery Alberta by the Government of Alberta.”⁸

15. Accordingly, regardless of how the decision is characterized, it was Alberta that closed the Red Deer OPS and thus denied access to supervised consumption services in the region. There is no material distinction between Canada’s decision to not renew the section 56 exemption in *PHS* and Alberta’s decision to discontinue funding the Red Deer OPS. Alberta’s authorization and funding of the Red Deer OPS was necessary to its existence in the same way that Canada’s s. 56 exemption was necessary for Insite.

B. Positive/negative rights distinction is immaterial to *Charter* analysis

16. A central part of Alberta’s submission is that the state action is the “non-provision” of funding and the Appellant’s claim is therefore a “positive rights claim”.⁹ Accordingly, the Appellant’s section 7 and 15 claims cannot succeed because the *Charter* “does not place positive obligations on the state”¹⁰ and “does not require the state to act positively”.¹¹

17. Alberta is drawing a bright line where no bright line exists. There is no rule that the *Charter* only protects negative rights and “does not require the state to act positively”. To the contrary, it is well-settled that *Charter* rights can and do compel positive action by the state:

- (a) section 15 is routinely invoked to compel state action. In cases dealing with underinclusive programs or schemes where the exclusion of a person or group is found to be discriminatory, the remedy is to require the government to extend the benefit to the excluded group (see eg., *Fraser*, *Eldridge* and *Kanyinda*);¹²
- (b) under section 7, the state is often compelled to remedy a breach by taking positive action. In *PHS*, Canada was directed to provide an exemption to Insite. In

⁸ Appellant’s EKE, Tab 5, p.63 at lines 5-6.

⁹ Factum of the Respondent, His Majesty the King in Right of Alberta at para 35.

¹⁰ Factum of the Respondent, His Majesty the King in Right of Alberta at para 40.

¹¹ Factum of the Respondent, His Majesty the King in Right of Alberta at para 74.

¹² *Fraser v Canada (Attorney General)*, 2020 SCC 28; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7.

Bedford and *Carter*, the government was required to implement regulatory schemes to ensure compliance with the *Charter*;¹³ and

- (c) even under section 2, a claim asserting a positive right – i.e., asking the government to take steps to facilitate expressive activity – can succeed provided the claim satisfies the *Dunmore* criteria.¹⁴

18. The difficulty of drawing a bright line between positive and negative rights was squarely addressed by the Federal Court of Appeal in *La Rose*, where the Court overturned a decision of the Federal Court striking the plaintiffs’ claim on the basis that the plaintiffs were seeking a positive right under the *Charter*:¹⁵

[101] Regardless of which side of the debate is to be preferred, there is one point on which there is agreement: the line between positive and negative rights is at times difficult to draw. The traditional distinction asserts that positive claims require positive governmental action, whereas negative claims require the government to refrain from acting in some way (*Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#), 462 D.L.R. (4th) 1 at para. 20 [*Toronto (City)*]). However, some rights have both positive and negative elements; others have gone further in writing that “no right can exist without some form of corresponding obligation to do or not do something”...

[102] Many rights exist on the margins. Take, for example, the right to a fair trial, which requires the state to *refrain* from breaching certain procedural guarantees, but also to *provide* an adequate court system. Consider also the right to accessibility: an individual with disabilities requires an assistive device, but only because the state has constructed inaccessible programs and infrastructure. The right at issue appears positive, but it was only brought about because the state failed to refrain from breaching existing negative rights...

[103] This at times false dichotomy has been recognized judicially. Abella J.’s dissent in *Toronto (City)* noted that “[a]ll rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus” and that “[a]ppropriate verbal

¹³ [Canada \(Attorney General\) v Bedford](#), 2013 SCC 72; [Carter v Canada \(Attorney General\)](#) 2015 SCC 5.

¹⁴ [Baier v Alberta](#), 2007 SCC 31 at para 30.

¹⁵ [La Rose v. Canada](#), 2023 FCA 241.

manipulations can easily move most cases across the line” (*Toronto (City)* at para. 153, citing S. F. Kreimer, “Allocational Sanctions: The Problem of Negative Rights in a Positive State” (1984), 132 U. Pa. L. Rev. 1293, at 1325); put otherwise, a right may be seen as negative or positive depending simply on the perspective taken. The majority in *Toronto (City)* relied on the distinction between state action and state restraint for the purposes of their freedom of expression analysis, but they too acknowledged that the distinction between positive and negative entitlements is “not always clearly made, nor... always helpful” (*Toronto (City)* at para. 20, citing *Haig v. Canada*, [1993] 2 S.C.R. 995, [1993 CanLII 58 \(SCC\)](#)).

[104] Mactavish J. (as she then was) acknowledged the difficulty in characterizing a claim as either “exclusively positive or exclusively negative” in the context of a section 7 analysis in *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, [2014 FC 651](#), [2015] 2 F.C.R. 267 at para. 520 [*Canadian Doctors*]. Mactavish J. noted that “section 7 jurisprudence has demonstrated that the fact that a particular claim may involve a request that the government spend money in a particular way is not necessarily fatal to the claim” (*Canadian Doctors* at para. 522). Indeed, the Supreme Court has found section 7 rights violations within this blurred zone. For example, the right to state-funded counsel was recognized in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, [1999 CanLII 653 \(SCC\)](#); and the right to be exempted from prohibitive legislation in *PHS*. Both may be conceptualized depending on the perspective taken, as positive rights claims. [Emphasis added]

19. In short, whether a claim seeks to compel state action or to restrain state action is not determinative of its merits. The only question is whether there is state action and, if so, does that state action cause a deprivation? Alberta concedes that there is state action. Given that concession, Alberta’s arguments about the claim seeking a positive right are of little analytical assistance on this appeal and are ultimately a distraction.

C. Constitutional right to health care not a precondition to Appellant’s *Charter* claim

20. The Chambers Judge relied on *Flora*¹⁶ for the proposition that, “in the absence of a constitutional right requiring the government to act in the first place (fund specific health

¹⁶ [Flora v. Ontario Health Insurance Plan](#), 2008 ONCA 538.

services), there can be no constitutional right to the continuation of measures that were voluntarily taken.”¹⁷ Alberta endorses that proposition on appeal.¹⁸

21. *Flora* is distinguishable for two key reasons. First, there was no health service on which the claimant or anyone else had come to rely upon to prevent death and disease. The claim in *Flora* was for reimbursement for a novel liver transplant procedure that was not performed in Ontario at the time. Second, the state action was not denying access to the service but rather denying reimbursement for a service that had never been provided by the state.

22. The Appellant has affirmed, unequivocally, that he is not seeking a free-standing right to health care or to supervised consumption as a specific health service. But, contrary to the reasons of the Chambers Judge, the absence of a free-standing right to health care or supervised consumption does not defeat a claim for breach of section 7.

23. Regardless of whether there is no constitutional entitlement to supervised consumption services, there is, unequivocally, a right to not to be deprived of life and security of the person. Properly understood, the Appellant’s claim is not for a constitutional entitlement to supervised consumption *per se* – rather, it seeks to prevent state action that results in foreseeable and preventable harms, such as death by overdose and the spread of infectious disease, harms that directly engage and impair life and security of person.

24. The scope and content of *Charter* rights are continually evolving. For over three decades, a bedrock of *Charter* jurisprudence is that the *Charter* is “a living tree capable of growth and expansion”.¹⁹ This applies expressly to section 7: as Chief Justice McLachlin (as she then was) commented in majority decision in *Gosselin*, “[i]t would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases”.²⁰

25. *PHS* illustrates the evolving nature of section 7. Prior to the establishment of Insite, it would have been difficult to see how failure to provide supervised consumption services was a breach of section 7. At that time, no such services were provided by any level of government; as

¹⁷ [Brown v Alberta](#), 2025 ABKB 495 at para 66.

¹⁸ Factum of the Respondent, His Majesty the King in Right of Alberta at para 51.

¹⁹ [Toronto \(City\) v. Ontario \(Attorney General\)](#), 2021 SCC 34 at para 179.

²⁰ [Gosselin v Québec \(Attorney General\)](#), 2002 SCC 84 at para 82.

Chief Justice McLachlin explained in *PHS*, “it was launched as an experiment”.²¹ The efficacy of supervised consumption services was still up for debate.

26. But the experiment was a success. The health outcomes were extraordinary. Supervised consumption “saved lives and improved health”.²² The termination of Insite would therefore, necessarily, result in an increased risk of death and disease. That, the Court unanimously held, caused a deprivation under section 7.

27. *PHS* thus developed the scope and content of section 7. We now know, after *PHS*, that the removal of supervised consumption services for addiction drug users causes a deprivation of life and security of the person.

28. Alberta raises a concern that compelling the government under section 7 or 15 to continue to fund the Red Deer OPS would “constitutionalize the prior regime”.²³ Similarly, the Chambers Judge expressed concern that granting the claim would create a “chilling effect on innovation and flexibility in public policy”, “require governments to permanently fund any program that benefits a vulnerable population”, and “improperly entrench policy choices and undermine the separation of powers”.²⁴

29. These concerns should be addressed at the section 1 stage; in any event, they are overstated. The circumstances giving rise to a *Charter* breach in this case are fact-specific: a health program that incontrovertibly prevents death and reduces disease, the absence of which will incontrovertibly lead to an increased risk of death and disease. There should be little risk that a rational government would view a decision requiring the continued funding of the Red Deer OPS as a reason to stop innovating and making policy choices that are in the best interests of the population.

PART III - ORDER REQUESTED

30. BCCLA requests an order consistent with the above submissions.

²¹ *PHS* at para 19.

²² *PHS* at para 19.

²³ Factum of the Respondent, His Majesty the King in Right of Alberta at para 53.

²⁴ *Brown v Alberta*, 2025 ABKB 495 at para 80.

TABLE OF AUTHORITIES

1	<u>Baier v Alberta</u> , 2007 SCC 31
2	<u>Brown v Alberta</u> , 2025 ABKB 495
3	<u>Canada (Attorney General) v Bedford</u> , 2013 SCC 72
4	<u>Canada (Attorney General) v PHS Community Services Society</u> , 2011 SCC 44
5	<u>Carter v Canada (Attorney General)</u> , 2015 SCC 5
6	<u>Eldridge v British Columbia (Attorney General)</u> , [1997] 3 SCR 624
7	<u>Flora v. Ontario Health Insurance Plan</u> , 2008 ONCA 538.
8	<u>Fraser v Canada (Attorney General)</u> , 2020 SCC 28
9	<u>Gosselin v Québec (Attorney General)</u> , 2002 SCC 84
10	<u>La Rose v Canada</u> , 2023 FCA 241
11	<u>Quebec (Attorney General) v. Kanyinda</u> , 2026 SCC 7
12	<u>Toronto (City) v Ontario (Attorney General)</u> , 2021 SCC 34