

**COURT OF APPEAL**

BETWEEN:

PHS COMMUNITY SERVICES SOCIETY, DEAN EDWARD WILSON, and  
SHELLY TOMIC

Respondents/Cross-appellants  
(Plaintiffs)

AND:

ATTORNEY GENERAL OF CANADA

Appellant/Cross-respondent  
(Defendant)

AND BETWEEN:

VANCOUVER AREA NETWORK OF DRUG USERS (VANDU)

Respondent/Cross-appellant  
(Plaintiff)

AND:

ATTORNEY GENERAL OF CANADA and MINISTER OF HEALTH FOR CANADA

Appellants/Cross-respondents  
(Defendants)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA, BRITISH COLUMBIA CIVIL  
LIBERTIES ASSOCIATION, VANCOUVER COASTAL HEALTH AUTHORITY and DR.  
PETER AIDS FOUNDATION

Interveners

---

**FACTUM OF THE INTERVENER,  
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

---

Attorney General of Canada and  
Minister of Health for Canada

**Robert Frater**  
**W. Paul Riley**

Department of Justice (Canada)  
Federal Prosecution Service - BC Region  
900 - 840 Howe Street  
Vancouver, BC V6Z 2S9

PHS Community Services Society,  
Dean Edward Wilson, and Shelly Tomic

**Joseph J. Arvay, Q.C.**

Arvay Finlay  
1350 - 355 Burrard Street  
Vancouver, BC V6C 2G8

and

**F. Andrew Schroeder**  
**Monique Pongracic-Speier**

Schroeder Speier  
500-525 Seymour Street  
Vancouver, B.C. V6B 3H7

Vancouver Area Network of Drug Users  
(VANDU)

**John W. Conroy, Q.C.**

Conroy & Company Law Corporation  
2459 Pauline Street  
Abbotsford, BC  
V2S 3S1

Attorney General of British Columbia

**Craig E. Jones**

Ministry of Attorney General  
6th Floor, 1001 Douglas Street  
P.O. Box 9280, Stn Prov Govt  
Victoria, BC  
V8W 9J7

[counsel continue over page]

British Columbia Civil Liberties  
Association

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

Bull, Housser & Tupper LLP  
3000-1055 West Georgia Street  
Vancouver, BC  
V6E 3R3

Vancouver Coastal Health Authority

**Sheila M. Tucker**

Davis LLP  
2800-666 Burrard Street  
Vancouver, BC V6C 2Z7

Dr. Peter AIDS Foundation

**Andrew I. Nathanson**  
**Maia Tsurumi**

Fasken Martineau DuMoulin LLP  
2900-550 Burrard Street  
Vancouver, BC V6C 0A3

## INDEX

## **CHRONOLOGY OF RELEVANT DATES IN THE LITIGATION**

The British Columbia Civil Liberties Association (“BCCLA”) adopts the chronology included in the factum of the respondents, PHS Community Services Society, Dean Edward Wilson and Shelly Tomic (the “PHS respondents”). A loose copy of that chronology has been included with this factum.

## OPENING STATEMENT

It is axiomatic that the application of any absolute rule will, in some circumstances and for some persons, result in an injustice. In a society as complex and diverse as ours, even essentially fair laws, passed with the best of intentions, can become starkly unfair in their application to certain individuals or groups.

This case is about one such law. It may well be that the *Controlled Drugs and Substances Act* fairly punishes and suppresses drug trafficking, and effectively deters the majority of the Canadian population from sampling the dangerous wares that the law prohibits. Yet the CDSA's blanket prohibitions on possession and trafficking of certain drugs go too far when, as the trial judge found in this case, they deny drug addicts access to services that protect those individuals from the very death and disease the law seeks to prevent (para. 152).

The courts are not powerless when confronted with a case like this one. The constitution ensures that there are some interests over which the government cannot run roughshod, no matter how stern the government's disapproval of certain practices may be, and no matter where the government may have chosen to draw its bright line. A law that impairs an individual's life, liberty and security of the person while doing nothing to advance the interests of the state is a law that is unconstitutionally overbroad. A law that impairs an individual's life, liberty and security of the person without making any attempt to accommodate that individual's serious illness is a law that is unconstitutionally contrary to fundamental justice. And a law that would ban a health facility designed to treat those illnesses is a law that unconstitutionally sterilizes provincial authority over "Hospitals".

These principles provide different lenses through which to view one essential proposition: that it is unconstitutional for Canada to impose serious criminal sanctions, including imprisonment, for the use or operation of a health facility that has as its purpose the alleviation of harm caused by addictive substances.

## PART 1: STATEMENT OF FACTS

1. The size of the record in this case discloses that the parties have left few stones unturned in their respective investigations of the nature of Insite, its efficacy, and the social context from which it emerged. What follows are the essential findings of fact. Other findings and evidence will be referred to as needed in Part 3.

2. The relevant matrix of facts begins with the three “incontrovertible conclusions” reached by the trial judge at para. 87 of his reasons:

- (1) Addiction is an illness. One aspect of the illness is the continuing need or craving to consume the substance to which the addiction relates.
- (2) Controlled substances such as heroin and cocaine that are introduced into the bloodstream by injection do not cause Hepatitis C or HIV/AIDS. Rather, the use of unsanitary equipment, techniques, and procedures for injection permits the transmission of those infections, illnesses or diseases from one individual to another; and
- (3) The risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals.

3. The trial judge summarized the way in which Insite, in particular, achieves the amelioration of the harms caused by drug addiction:

While users do not use Insite to directly treat their addiction, they receive services and assistance at Insite which reduce the risk of overdose that is a feature of their illness, they avoid the risk of being infected or of infecting others by injection, and they gain access to counselling and consultation that may lead to abstinence and rehabilitation.  
[para. 136]

4. Insite is staffed by a combination of PHS staff, Vancouver Coastal Health Authority nurses and physicians, and community workers (trial judge, para. 71). The “services and assistance” provided at Insite include clean injection equipment, staff monitoring during injection, treatment in the event of an overdose (including contacting

a physician or ambulance services, as needed), treatment of injection-related conditions such as skin disease and abscesses, and referrals to Health Authority and other services (trial judge, paras. 73-76).

## **PART 2: ISSUES ON APPEAL**

5. This factum will advance four arguments. Three relate to s. 7 of the *Charter*, and a fourth is directed at the division of powers:

- (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*.

## **PART 3: ARGUMENT**

### I. Section 7 of the *Charter*

#### A. *The CDSA Effects Deprivations of Life, Liberty, and Security of the Person*

6. 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 Supreme Court of Canada first held over 20 years ago in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, and since affirmed in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35. Conspicuously, neither of these cases is cited or discussed in the portion of the

Appellants' Factum impugning the trial judge's findings of s. 7 deprivations. The appellants' ability to argue that there has been no deprivation of life or security of the person seems to depend, first and foremost, on ignoring the two Supreme Court cases that are closest to point.

7. 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]

8. In *Chaoullii*, six of seven judges endorsed this approach to the first stage of s. 7: see para. 118 (*per* McLachlin C.J. and Major J.) and para. 205 (*per* Binnie and LeBel JJ.). 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).

9. A straightforward application of these cases compels the conclusion that by banning Insite and other similar facilities, ss. 4 and 5 of the *CDSA* trigger s. 7 scrutiny. The dispositive element is that ss. 4 and 5 ban not just drug use, but Insite itself. That is why Insite needed an exemption to function in the first place. The result is that the *CDSA* denies drug addicts a service that ameliorates the risks of morbidity and mortality that arise from their condition.

10. This case is indistinguishable from *Morgentaler*. Dr. Morgentaler's patients' bodily integrity and psychological well-being 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.

11. This suffices to establish the requirement that deprivation of a s. 7 interest be attributable to state action. Canada's attempt to evade this conclusion depends primarily on its assertion that in this case, the risks of death and disease are "attributable to the use of the substances, not to the law" (Appellants' Factum, para. 62). It is akin to submitting that the risks of pregnancy are attributable to the foetus – or, more callously still, attributable to the clumsiness of backalley abortionists – not to a law that denies access to abortion. Canada's "state action" argument would entrench in our law a theory of causation that the courts have never recognized, wherein 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. In so doing, the Supreme Court ensured that smokers and pregnant women – and even drug addicts – enjoy the same s. 7 protections as the rest of us.

12. Viewed through this lens, the fact that in some sense drug injection involves a "choice made by the consumer" (Appellants' Factum, para. 63) is irrelevant. First, it goes without saying that the courts are not the venue for a philosophical discussion about the nature of choice and free will. In any event, the 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 foetus or a cancer. This truth is in no way diminished by the fact that, through tremendous effort and endurance of physical and psychiatric 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. 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 Insite's services.

13. All of that said, there is a more simple basis on which to find a "deprivation" for purposes of s. 7. In *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, Gonthier and Binnie JJ. declared emphatically, "[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.

14. 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 determine whether the deprivation effected by the law is in accordance with fundamental justice.

15. In this case, two principles of fundamental justice have been violated. The first – that the laws must not be overbroad – has been recognized in the jurisprudence. The second principle – that the laws must reasonably accommodate disabilities – has not yet been recognized, but should be. Each will be addressed below.

B. *Sections 4 and 5 are Unconstitutionally Overbroad*

16. 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 Supreme 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.

17. Not just any amount of overbreadth will suffice to violate the principle. The *Heywood* Court acknowledged that “a measure of deference must be paid to the means selected by the legislature” (p. X). In *R. v. Clay*, [2003] 3 S.C.R. 735, 2003 SCC 75, the companion case to *Malmo-Levine*, the Court purported to clarify *Heywood’s* holding, and define 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]

18. Left unspecified by the Court in *Clay* were the proper comparators for the gross disproportionality-based approach to overbreadth. The reference to “the adverse effect of a legislative measure on the individuals subject to its strictures” does not tell us which group of individuals is to be placed on the scales – is it all persons that are obliged to comply with the law, or is it merely that group of persons whose individual circumstances are before the court?

19. It ought to be the latter, for two reasons. First, if the overbreadth principle compares the degree to which a law generally achieves the state interest that underpins it, with the degree to which the law generally has adverse effects on persons subject to it, then the overbreadth principle is nothing more than a renamed version of the gross disproportionality principle announced in *Malmo-Levine*. On that view, overbreadth as a

principle of fundamental justice would have effectively been abolished by *Clay*. If that had been Gonthier and Binnie JJ.'s intent, one would have expected them to say so.

20. The second reason relates to the purposes of s. 7 in general, and of overbreadth-based review in particular. The purpose of s. 7 is the protection of every individual's most sacrosanct personal interests – namely life, liberty and security of the person. It is a right that, like the protections of freedom of expression and conscience in s. 2, is inherently individualized.

21. The purpose of the overbreadth principle is to ensure that laws which legitimately advance state interests in the majority of their applications nevertheless do not apply to some persons in ways that disproportionately deprive those persons of their life, liberty or security of the person. In keeping with the spirit of s. 7 as a whole, it is a principle that it is intended to protect individuals from laws that may be just and fair in the majority of their applications, but become unacceptably unfair in their application to a few. In applying the gross proportionality analysis directed by *Clay*, what should therefore be considered is whether the harm caused by a particular application of the impugned law outweighs the degree to which that application of the law advances the state's interest.

22. To apply that principle here is to invalidate ss. 4 and 5 of the *CDSA*.

23. The analysis begins with the state interest identified by the government. One curious feature of the appellants' argument is how reluctant they appear to be to identify the state interest underpinning ss. 4 and 5. No clear articulation of the reason for the ban appears until para. 90 (in the context of s. 1, of all things), where it is said that the law of possession is "aimed at an important state interest, namely prevention of harm and protecting vulnerable groups" (emphasis added).

24. Yet the central thrust of the trial judge's factual findings is that to apply the *CDSA* to Insite is to prevent the prevention of harm, and leave vulnerable groups unprotected. As Pitfield J. found, the threat to life and security of the person caused by banning drug use at Insite "contributes to the very harm [the ban] seeks to prevent", and "is inconsistent with the state's interest in fostering individual and community health" (para.

152). In other words, application of ss. 4(1) and 5(1) to Insite inflicts harm to the life and security interests of drug addicts, while doing nothing to advance the state's interests. This must amount to gross disproportionality. In this regard, the contrast with *Clay* is telling:

The evidence indicated that a narrower prohibition would not be effective because the members of at least some of the vulnerable groups and chronic users could not be identified in advance. In any event, the effects of a psychoactive drug like marijuana on users in the acute phase, where for example operation of motor vehicles or other complex machinery by any user constitutes a public danger (which to some extent is more problematic than alcohol intoxication because of the absence of a simple and effective screening device for detection), lay a rational basis for extending the prohibition to all users should Parliament consider it good public policy to do so. [para. 40; emphasis added]

The facts of this case present no similar justification for a blanket application of the law.

25. In the result, ss. 4 and 5 of the *CDSA* are unconstitutionally overbroad and thereby invalid, even if Canada succeeds in convincing this Court that ss. 4(1) and 5(1) are not contrary to the principle that the laws must not be arbitrary.

C. *The Principle that Laws Must Reasonably Accommodate Disabilities*

26. Since the earliest days of *Charter* jurisprudence, it has been said that “the principles of fundamental justice are to be found in the basic tenets of the legal system” (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503). As is the case with other parts of the *Charter*, the courts' understanding of these principles has evolved and matured with time. The principles of fundamental justice, like the categories of negligence, are not closed.

27. The Supreme Court's recent decision in *R. v. D.B.*, 2008 SCC 25, provides a convenient example of the process by which fundamental justice is incrementally elaborated upon. *D.B.* recognized for the first time that it is a principle of fundamental justice that young offenders are to be presumptively sentenced differently than adults.

As a result, the provisions of the *Youth Criminal Justice Act* that designated certain offences for presumptive sentencing as an adult were found to be unconstitutional.

28. The time has come for the courts to recognize that the principle that disabilities must be reasonably accommodated is a principle of fundamental justice. This case, about the right of disabled persons to avoid criminal sanction for engaging in conduct that their disability compels, brings that principle to the fore.

(1) The Content of the Principle

29. It is a principle of our constitutional and human rights law that persons with disabilities must be accommodated to the point of undue hardship.

30. The last word on this principle from the Supreme Court of Canada can be found in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15. At para. 121 of *VIA Rail*, Abella J. succinctly stated the principle as follows:

The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right.

31. The concept of “reasonable accommodation”, like many other fundamental principles, has been considerably fleshed out by the jurisprudence. In the accommodation context, the “undue hardship” standard has guided the application of the principle. Abella J. summarized the “undue hardship” jurisprudence in *VIA Rail*, at para. 130:

The jurisprudence of this Court reveals that undue hardship can be established where a standard or barrier is “reasonably necessary” insofar as there is a “sufficient risk” that a legitimate objective like safety would be threatened enough to warrant the maintenance of the discriminatory standard [...]. The point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain. [emphasis added]

## (2) The Fundamental Justice Criteria

32. In *Malmo-Levine*, the majority articulated three criteria for the recognition of a principle of fundamental justice, at para. 113:

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.

33. The accommodation principle satisfies all three criteria.

34. First, the accommodation principle is a legal principle. A principle will be a legal principle when it can be found in domestic or international law: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 9; *D.B.*, at paras. 47-60. The purpose of this requirement is to avoid bringing matters of pure policy within s. 7's scope: *Canadian Foundation for Children*, at para. 8.

35. The accommodation principle is entrenched in Canadian law (at both federal and provincial levels), and in international law as well. In Canadian law, the principle finds expression in both human rights legislation, and in s. 15 of the *Charter*. Every province has enacted human rights legislation, in which the reasonable accommodation principle is built into the anti-discrimination provision. (Sometimes the duty to accommodate is made explicit: see, for instance, Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19, ss. 11(2) and 24(2).) Canada, through s. 5 of the *Canadian Human Rights Act*, has done the same. Although the "undue hardship" standard may be expressed in these statutes in various terms – the *Canadian Human Rights Act* speaks of "bona fide justification", as does B.C.'s *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 8 – the courts have adopted "undue hardship" as a unifying standard by which to understand the myriad forms of statutory language that express the principle: see *VIA Rail*, at paras. 127, 129, following *British Columbia (Superintendent of Motor Vehicles) v. British*

*Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (a B.C. human rights case), at para. 21.

36. The *Charter*, by way of s. 15, has given constitutional recognition to the anti-discrimination principles set out in human rights legislation. *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624, illustrates the existence of a duty on the part of the state, recognized under s. 15, to accommodate disabilities. In that case, hospitals were obliged to provide sign language interpreters to accommodate patients with hearing disabilities.

37. International law has echoed and affirmed the state's obligation to accommodate disabilities. For decades, international declarations and other instruments have reflected the accommodation principle: see the *Declaration on the Rights of Disabled Persons* (1975), articles 2, 3, 6, and 8, and the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (1993), Rules 14 and 15. On March 30, 2007, Canada signed (but has not yet ratified) the *Convention on the Rights of Persons with Disabilities*. Under Article 5 of that Convention, "States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided." "Reasonable accommodation" is defined to mean "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden" (emphasis added). Thus, in international law, as in Canadian law, the undue burden standard provides the benchmark by which states' obligation to accommodate will be measured.

38. Second, the accommodation principle is a vital and fundamental principle. The accommodation principle is constitutional (in s. 15), and quasi-constitutional (in human rights legislation). With respect to the latter, in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14, the Supreme Court fittingly described human rights legislation as "fundamental, quasi-constitutional law" (para. 33). The importance and special status of human rights principles in our legal system is such that where human rights legislation is in conflict with other legislation, the human rights legislation will prevail: *VIA Rail*, at para. 115. Moreover, as discussed

above, international law corroborates the respect for the accommodation principle that our domestic law amply demonstrates see, similarly, *D.B.*, at paras. 61-68.

39. The close connection between the accommodation principle and human dignity lends further support for this conclusion. As Sopinka J. observed for the majority in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 592, “human dignity is the genesis for many principles of fundamental justice”, even if it is not a principle of fundamental justice in and of itself. Human dignity lies at the heart of the requirement that disabilities be accommodated to the point of undue hardship. We, as Canadians, accommodate disabilities to ensure that disabled persons have the same ability to participate in our society, the same power of self-fulfillment, as every other member of our society. Without accommodation, disabled persons can only feel marginalized and excluded from their communities and from society as a whole, at great cost to dignity.

40. Confirmation of the fundamental nature of the accommodation principle, particularly as it relates to disabilities, is found two aspects of the Canadian criminal law. First, Part XX.1 of the *Criminal Code* is designed to accommodate mental disability. Part XX.1 provides a special code of criminal procedure for persons suffering from mental disorder. Its goal is to dispel stereotypical attitudes with respect to mental disability, and replace them with a treatment-based approach. This is quintessentially accommodation: see *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at paras. 39 and 41. Second, the *Marihuana Medical Access Regulations*, SOR/2001-227, create certain exemptions for possession of marijuana for medical purposes, and in so doing accommodate rather than criminalize the treatment of illness. These legislative and regulatory steps show the degree to which Parliament is capable of accommodation, and indeed has accommodated, not only within the criminal law sphere but indeed with respect to the *CDSA* itself. These regimes constitute a legislative recognition that persons whose disabilities compel proscribed conduct cannot with any measure of justice be deprived of their liberty without regard for their disability.

41. Third and finally, the accommodation principle presents a manageable standard. This requirement is clearly satisfied, by virtue of the principle's frequent application in the human rights context. Like the principle announced in *D.B.*, it is "a principle that has been administered and applied to proceedings [...] for decades in this country" (para. 69).

(3) A Blanket Prohibition is not Accommodation

42. "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]

The solution to the drug epidemic in the downtown eastside is not absolute prohibition; it is accommodation.

43. 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*.

II. Insite is Constitutionally Immune from the *CDSA*, Under s. 92(7)

44. The application of ss. 4 and 5 of the *CDSA* to Insite is contrary to the division of powers because the Provinces enjoy exclusive legislative authority with respect to “the Establishment, Maintenance, and Management of Hospitals”. This portion of the factum will argue that Insite is a “Hospital” as the constitution comprehends that term.

45. To apply ss. 4 and 5 of the *CDSA* to Insite would be to effectively ban the facility. The impact of the law is not merely severe; it is the total extinguishment of the health service. In these circumstances, although ss. 4 and 5 are in pith and substance valid federal law, in their specific application to Insite those sections cross the line into exclusively provincial domain. Those provisions become, by virtue of the severity of their effects, law in relation to “Hospitals”. Since the federal Parliament lacks the power to make such laws, ss. 4 and 5 of the *CDSA* must be read down so as not to apply to Insite.

A. *The Nature of the Issue*

46. It is obvious that Parliament and the VCHA have different ideas about the best response to the epidemic in the Downtown Eastside. Voluminous evidence and argument has been adduced by the parties in support of their respective views. However, the question for federalism purposes is not who is right. The question is, who gets to decide?

B. *Provincial Jurisdiction over “Hospitals” and Health*

47. Section 92(7) of the Constitution Act, 1867 provides that:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[...]

7. The Establishment, Maintenance, and Management of Hospitals [...]. [emphasis added]

48. The Legislature's power with respect to "Hospitals" is expressly made "exclusive". This power, together with provincial jurisdiction over "Property and Civil Rights in the Province" and matters of a "local or private Nature", provide the underpinnings of the Provinces' general health jurisdiction: see *Schneider v. The Queen*, [1982] 2 S.C.R. 112.

49. *Schneider* recognized that the provinces maintain "general jurisdiction over health matters" (p. 137). The contours of this general jurisdiction, which must allow for a limited federal jurisdiction with respect to matters such as the criminal law, are not "closely drawn" (*Schneider*, at p. 134). Neither the constitution nor the cases have described with any clarity the line between that which is "health", and that which is "criminal". However, one aspect of health jurisdiction has been placed with crystal clarity in the exclusively provincial purview. That is the power over "Establishment, Maintenance, and Management of Hospitals", which Dickson J. said "provide[d] for the physical facilities of provincial health care" (p. 136; emphasis added).

50. "Hospitals" thus are among the ranks of those specifically enumerated species of undertakings that are singled out for exclusive assignment to one level of government or the other. The "Postal Service" (s. 91(5)), interprovincial or international "Ferries" (s. 91(13)), "Banks" (s. 91(15)), "Prisons" (s. 92(6)), and interprovincial "Works and Undertakings" (s. 92(10)) provide further examples in this vein.

51. The Supreme Court's interjurisdictional immunity jurisprudence explains the consequences of the Framers' decision to designate "Hospitals" for exclusively provincial regulation.

C. *Insite is a “Hospital”*

52. In *Schneider*, as noted, Dickson J. described “Hospitals” as “physical facilities of provincial health care”. That case established further that “medical treatment of drug addiction is a *bona fide* concern of the provincial legislature under its general jurisdiction with respect to public health” (p. 137). There is thus no room for the argument that Insite is not a “Hospital” because of the nature of the health services it provides.

53. Insite is a facility operated by the health authority, VCHA, in which health services are provided for health purposes. Its aim is both to improve the health of individual users of the facility, and relieve the health care system as a whole from some of the pressures caused by addiction in the Downtown Eastside. Health care by way of harm reduction may not involve X-rays and surgeons, but it remains health care all the same. Indeed, from the perspective of health care delivery, harm reduction is just a more efficient means of keeping the population healthy. The business case for Insite is that it is a relatively small expenditure on health that saves much larger health expenditures later – in particular, the monies required for treatment of HIV (and AIDS), Hepatitis, and other serious illnesses spread by unhygienic intravenous drug use. In this sense, the Insite facility is an integrated component of VCHA’s larger health care delivery system. Even taken in isolation, then, it seems clear that Insite is a “Hospital”. A facility that provides health services for health purposes must be what the Framers contemplated by the use of that word.

54. The social context in which Insite is situated confirms that view of the facility. Insite was created in response to a public health emergency arising from epidemic levels of drug use-related disease. Although Insite may be a somewhat unconventional health facility, its distinctive or unusual features are readily explained by the crisis context from which it emerged, and the special needs of the population that it serves.

D. *Interjurisdictional Immunity With Respect to “Hospitals”*

55. The basic rule of ss. 91 and 92 is that the enumerated matters are assigned “exclusively” to the respective legislative bodies. Section 92, as quoted above, provides

that “the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated”. The exclusivity principle is not absolute. As the language of the constitution suggests, the line is drawn at “Laws in relation to” the relevant head of power.

56. In a system where legislative authority is divided according to subject matter, it is a fact of life that valid legislation of one level of government will have incidental effects on subjects within the jurisdiction of the other level. Depending on the circumstances, the constitution may be unoffended by incidental effects of this kind. But where the effects are of a sufficient degree that the law does not merely “affect” or “touch upon” the subjects within another level’s head of power, but bears upon that head of power with sufficient directness or severity that the law may be said to be “in relation to” the head of power, then the express text of the constitution has been violated. As Binnie and LeBel JJ. explained in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, the interjurisdictional immunity doctrine is essentially textual in its origins:

The doctrine is rooted in references to “exclusivity” throughout ss. 91 and 92 of the Constitution Act, 1867. The opening paragraph of s. 91 refers to the “exclusive [l]egislative [a]uthority of the Parliament of Canada” in relation to matters coming within the listed “[c]lasses of [s]ubjects” including “Banking, Incorporation of Banks, and the Issue of Paper Money” (s. 91(15)). [...] Equally, s. 92 (headed “Exclusive Powers of Provincial Legislatures”) is introduced by the words “In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated”, including “Property and Civil Rights in the Province” (s. 92(13)) and “Generally all Matters of a merely local or private Nature in the Province” (s. 92(16)). [para. 34]

This is why, for almost a hundred years, our constitutional law has recognized that “in certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level”: *Canadian Western Bank*, at para. 32.

57. As the trial judge correctly observed (at para. 118), the exclusivity principle is reciprocal in that it applies to both federal and provincial heads of power: see *Canadian Western Bank*, at para. 35. This flows naturally from the fact that the constitution stipulates that both federal and provincial authority are exclusive in nature. It necessarily follows that “Hospitals” are immune from federal law, to the same degree that federally-regulated undertakings (like banks and railroads) have historically been immune from provincial law.

58. While the trial judge paid lip service to the concept of exclusive legislative authority, his analysis effectively assumed it out of existence. He decided that this is “a classic case of ‘double aspect’”, and that therefore “the doctrine of interjurisdictional immunity cannot be applied” (para. 117). The problem with that analysis is that if Insite enjoys interjurisdictional immunity from the *CDSA*, then by definition there is no double aspect because authority over the subject is exclusive, not shared. Thus, in discovering a “double aspect” before considering whether or to what degree to which Insite is constitutionally immune from the criminal law, the trial judge assumed the conclusion to the very question he was obliged to ask himself.

59. The trial judge was obliged to ask, to what degree are “Hospitals” immune? In other words, at what point do the effects of a federal law become sufficiently direct or severe that the federal law would be a “Law in relation to... Hospitals”? *Canadian Western Bank* and its companion case, *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23, provide the answer to these questions. In the latter of those cases, Binnie and LeBel JJ. set out the applicable principles at paras. 42-43. The appropriate inquiry was described in a number of ways: whether the law affects an “absolutely indispensable or necessary” component of the undertaking; whether the law bears upon the undertaking “in what makes it specifically of [provincial] jurisdiction”; or whether immunity is “essential to make the [provincial] powers effective for the purposes for which they were conferred”.

60. It follows that in order for the constitution to require an immunity for a “Hospital” from federal law, the law must impair the “Hospital” in a manner that is absolutely

indispensable or necessary to its function, or that provides the provincial power over the undertaking from being effective for the purposes for which it was conferred. This is a heavy burden, but in this case, it has been met.

E. *Application of the CDSA Would Extinguish Insite*

61. The undertakings jurisprudence to date helpfully illustrates how the interjurisdictional immunity doctrine is to be applied. The cases establish, for instance, that land-use regulation cannot control the expansion or operation of an airport: *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.). A bus service is immune from a licensing scheme that would control who gets on or off of the service's buses: *Attorney General for Ontario v. Winner*, [1954] 4 D.L.R. 657 (J.C.P.C.). A municipality cannot regulate the construction of a communications undertaking's conduits, poles, and cables: *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; see also *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749.

62. In each of these cases, the common ingredient was that the law of one level of government would impair the very aspect of the undertaking that the constitution expressly assigned to the other level of government: in *Greater Toronto Airports Authority*, the power over aeronautics; in *Winner*, the power over interprovincial transportation; and in *Toronto Corporation*, the power over interprovincial communication. As Binnie and LeBel JJ. put it at para. 57 of *Canadian Western Bank*, the Provinces' and Parliament's respective interests:

exten[d] not only to the management of the undertaking but also to ensuring that the undertaking can fulfill its fundamental mandate "in what makes them specifically of federal jurisdiction" (*Bell Canada* (1988), at p. 762).  
[emphasis added]

63. What makes Insite specifically of provincial jurisdiction is that it provides health services for health purposes, thereby bringing it within the power over "Hospitals". A federal law that would prevent the delivery of Insite's health services by criminalizing the activities of both patients and staff is thus a law from which Insite must enjoy

interjurisdictional immunity. Because ss. 4 and 5 of the CDSA purport to prohibit the provision and receipt of Insite's health services, their application would not merely impair, but would extinguish, this "Hospital". On a straightforward application of *Canadian Western Bank* and its predecessors, Insite is therefore entitled to immunity from ss. 4 and 5 of the CDSA.

F. *Co-operative Federalism*

64. At bottom, interjurisdictional immunity (like all principles of federalism), is to be applied so as to "facilitate, not undermine" what the Supreme Court has called "co-operative federalism": *Canadian Western Bank*, at para. 24. Co-operative federalism celebrates the working together of federal and provincial authorities, for the better governance of citizens who, at the end of the day, will generally be expected to abide by laws passed at both levels: see, for instance, *Lafarge Canada Inc.*, at paras. 86-88.

65. The division of powers must "reconcile the legitimate diversity of regional experimentation with the need for national unity": *Canadian Western Bank*, at para. 24. Insite is a local solution to a local crisis, and represents precisely the "regional experimentation" that Confederation was intended to preserve. By contrast, the notion of a paddy wagon filled with nurses in cuffs, facing jail time for their work at Insite, is difficult to square with the Supreme Court's vision of co-operative federalism. Yet that is what application of the CDSA to Insite could permit. There is, quite simply, nothing co-operative about a federal law that would brand as criminal the provision of health services by the Vancouver Coastal Health Authority and its employees.

**PART 4: NATURE OF ORDER SOUGHT**

66. The appeal should be dismissed and the cross-appeal allowed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 5<sup>th</sup> day of February, 2009.

---

**Ryan D.W. Dalziel**

---

**Daniel A. Webster, Q.C.**



## LIST OF AUTHORITIES

CASE	PARAS. CITED
<i>Attorney General for Ontario v. Winner</i> , [1954] 4 D.L.R. 657 (J.C.P.C.)	16, 17
<i>Baier v. Alberta</i> , [2007] 2 S.C.R. 673, 2007 SCC 31	47
<i>Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)</i> , [1988] 1 S.C.R. 749	16
<i>British Columbia (Attorney General) v. Lafarge Canada Inc.</i> , [2007] 2 S.C.R. 86, 2007 SCC 23	12
<i>British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)</i> , [1999] 3 S.C.R. 868	39
<i>Canada (Human Rights Commission) v. Toronto-Dominion Bank</i> (1998), 163 D.L.R. (4th) 193 (Fed. C.A.)	51
<i>Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)</i> , [2004] 1 S.C.R. 76, 2004 SCC 4	19, 38, 45
<i>Canadian Union of Postal Workers v. Canada Post Corporation</i> , 2008 BCSC 338	51
<i>Canadian Western Bank v. Alberta</i> , [2007] 2 S.C.R. 3, 2007 SCC 22	3, 9, 10, 12, 14, 15, 18
<i>Charkaoui v. Canada (Citizenship and Immigration)</i> , [2007] 1 S.C.R. 350, 2007 SCC 9	30, 57
<i>Council of Canadians with Disabilities v. VIA Rail Canada Inc.</i> , [2007] 1 S.C.R. 650, 2007 SCC 15	33, 34, 35, 42
<i>Eldridge v. British Columbia</i> , [1997] 3 S.C.R. 624	34, 40
<i>Entrop v. Imperial Oil Ltd.</i> (2000), 189 D.L.R. (4th) 14 (Ont. C.A.)	51
<i>Greater Toronto Airports Authority v. Mississauga (City)</i> (2000), 50 O.R. (3d) 641 (C.A.)	16, 17
<i>Hodge v. Canada (Minister of Human Resources Development)</i> , [2004] 3 S.C.R. 357, 2004 SCC 65	49

<i>Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115</i> (2006), 264 D.L.R. (4th) 495, 2006 BCCA 58	51, 52
<i>Law v. Canada (Minister of Employment and Immigration)</i> , [1999] 1 S.C.R. 497	49
<i>R. v. Clay</i> [2003] 3 S.C.R. 735, 2003 SCC 75	23, 24, 26
<i>R. v. Heywood</i> [1994] 3 S.C.R. 761	22, 23, 24,25
<i>R. v. Malmo-Levine</i> [2003] 3 S.C.R. 571, 2003 SCC 74	24, 25, 36, 45
<i>R. v. Nova Scotia Pharmaceutical Society</i> [1992] 2 S.C.R. 606	22
<i>Re B.C. Motor Vehicle Act</i> , [1985] 2 S.C.R. 486	30, 48, 57
<i>Rodriguez v. British Columbia (Attorney General)</i> , [1993] 3 S.C.R. 519	43, 45
<i>Schneider v. The Queen</i> , [1982] 2 S.C.R. 112	5, 6, 7, 8
<i>Toronto Corporation v. Bell Telephone Co. of Canada</i> , [1905] A.C. 52	16, 17
<i>Tranchemontagne v. Ontario (Director, Disability Support Program)</i> , [2006] 1 S.C.R. 513, 2006 SCC 14	42
<i>Winko v. British Columbia (Forensic Psychiatric Institute)</i> , [1999] 2 S.C.R. 625	44