

**COURT OF APPEAL FOR BRITISH COLUMBIA**

Citation: ***VANDU v. Attorney General of Canada,***  
2009 BCCA 151

Date: 20090317  
Docket: CA036158; CA036159

Docket No.: CA036158

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**

Intervenor

And

**British Columbia Civil Liberties Association**

Intervenor

And

**Vancouver Coastal Health Authority**

Intervenor

And

**Dr. Peter AIDS Foundation**

Intervenor

Docket No.: CA036159

Between

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

Respondent/Cross-Appellants  
(Plaintiffs)

And

**Attorney General of Canada**

Appellant/Cross-Respondent  
(Defendant)

And

**Attorney General of British Columbia**

Intervenor

And

**British Columbia Civil Liberties Association**

Intervenor

And

**Vancouver Coastal Health Authority**

Intervenor

And

**Dr. Peter AIDS Foundation**

Intervenor

**The text of the judgment has been corrected at para. [4]  
where changes were made on May 26, 2009.**

Before: The Honourable Mr. Justice Chiasson  
(In Chambers)

**Oral Reasons for Judgment**

W. P. Riley	Counsel for the Appellants, AG Canada and Minister of Health for Canada
C.E. Jones	Counsel for the Respondent, AG BC
K. Wolfe	
R. Dalziel	Counsel for the Respondent, BCCLA
F.A. Schroeder	Counsel for the Respondent, PHS Community Services Society
A. I. Nathanson	Counsel for the Intervenor, Dr. Peter AIDS Foundation
M. Tsurumi	
Place and Date of Hearing:	Vancouver, British Columbia

16 March 2009

Place and Date of Judgment:

Vancouver, British Columbia  
17 March 2009

[1] **CHIASSON J.A.:** The Attorney General of Canada and the Minister of Health for Canada apply to strike certain portions of the factums of the Attorney General of British Columbia and the Dr. Peter Aids Foundation and to deny those parties leave to tender fresh or new evidence at the hearing of the appeals which is scheduled to begin April 27, 2009.

[2] The Attorney General of British Columbia is party to these proceedings by reason of a notice served pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. The Attorney filed an appearance in the Supreme Court proceedings, but took no part. The Foundation was granted intervenor status in these appeals by Saunders J.A. on November 6, 2008.

### **Fresh evidence**

[3] I shall deal firstly with the applications for leave to adduce fresh or new evidence because, in my view, they materially affect a consideration of the applications to strike paragraphs in the factums.

[4] The applications of the Attorney General of British Columbia and the Foundation are returnable at the hearing of the appeals on April 27, 2009. The Foundation seeks leave to file the affidavit of Maxine Davis sworn September 19, 2008 and filed to support the Foundation's intervenor application. The affidavit is described by the Foundation in its motion as "further evidence". The Attorney General of British Columbia seeks leave to file the affidavit of Nancy Reimer sworn January 30, 2009. Both applications are brought under Rule 31.

[5] The evidence sought to be introduced by the Foundation consists mainly of background information concerning the Foundation, its origin, purpose and operations. For the most part, the evidence proposed by the Attorney General of British Columbia consists of public information that was not available or not practically available at the time of the Supreme Court hearing.

[6] The applicants before me rely on Rule 31 and assert I should exercise my discretion under that rule to deny leave. The Rule states:

31 (1) With leave of the court or a justice, a party may adduce evidence that was not before the court appealed from.

(2) A party applying for leave under this rule must ensure that

(a) the notice of motion is made returnable on the date set for the hearing of the appeal, unless a justice otherwise orders, and

(b) the notice of motion and supporting material are served,

(i) at least 30 days before the hearing of the appeal, if the application is to be heard at the time of the hearing of the appeal, or

(ii) at least 2 days before the hearing of the application, if the application is to be heard by a justice in advance of the appeal.

(3) A party wishing to file an affidavit in opposition to an application for leave under this rule must, at least 7 days before the application is set to be heard by the court,

(a) file 4 copies of that affidavit for use by the court plus such additional copies as are required for the purposes of paragraph (b), and

(b) serve one filed copy of the affidavit on each of the other parties.

[7] In its notice of motion seeking intervenor status, the Foundation also sought an order it be at liberty to “file the Affidavit of Maxine Davis in the Appeals”. That request was not addressed in the reasons of Madam Justice Saunders. Her formal order has not been entered.

[8] The evidence applications of the Attorney General of British Columbia and the Foundation are returnable April 27, 2009. It is not clear to me on what basis I could dismiss applications that have not been brought before me.

[9] I do not think Rule 31 is of assistance on the application that is before me. It gives me the authority to decide whether to grant leave to adduce fresh or new evidence, but I do not think it gives me the authority to prevent a party from asking a division of this Court to grant leave to adduce fresh or new evidence.

[10] The usual practice is for applications to adduce fresh or new evidence to be brought before the division that hears an appeal. In some circumstances, it is considered necessary to deal with the application at the outset of the hearing, but usually the division takes the application under advisement, dealing with it after it has heard the appeal on the merits.

Occasionally, a party may consider it desirable to bring such an application before a single justice of the Court in advance of the hearing. That justice may hear and decide the applications or it may be referred to the division hearing the appeal.

[11] The reasons for the usual practice are both pragmatic and substantive. It is very difficult for a justice in Chambers to ascertain the extent to which fresh or new evidence may be of assistance to the division hearing an appeal and it is essential that the division have available to it all proper information that may be of assistance.

[12] I dismiss the applications to deny the Attorney General of British Columbia and the Foundation leave to adduce fresh or new evidence on the basis they are not before me and have been set by the applicants to be dealt with by the division that hears this appeal or otherwise addressed on April 27, 2009.

[13] Rule 31 requires the Attorney General of British Columbia and the Foundation to deliver material supporting their applications 30 days before April 27, 2009. I do not know whether they intend to deliver more than their motions and the relevant affidavits, which is the extent of the material presently filed, but I direct they provide to the Attorney General of Canada and the Minister of Health a short statement of the basis on which they will contend this Court should grant leave to adduce the proposed evidence.

#### **Motion to strike**

[14] I have the authority to strike paragraphs from the factums of the Attorney General of British Columbia and the Foundation.

[15] In *Perron v. R.J.R. MacDonald Inc.* (1996), 81 B.C.A.C. 2 (Chambers), Legg J.A. held that this power was pursuant to s. 29 of the *Court of Appeal Act*; in *Orange Julius Canada Ltd. v. Surrey (City)*, 1999 BCCA 430 (Chambers) Southin J.A. stated she would have found this

authority in either ss. 9(1)(c) or 10(2)(a). She further stated such an order could be made to ensure “proceedings in the court shall be both just and efficient” (at para. 7).

[16] In *Perron*, Legg J.A. stated that the jurisdiction to strike out all or part of a factum should be exercised cautiously to ensure that the division hearing the appeal is not deprived of full argument on the issues properly raised. Similarly, in *Gould v. Sandhu*, 2004 BCCA 90 (Chambers) Saunders J.A. stated that “the jurisdiction to require a party to improve a factum will be used sparingly.”

[17] Recently, Donald J.A. expressed caution on the exercise of such jurisdiction: *Sharbern Holding Inc. v Vancouver Airport Centre Ltd.*, 2008 BCCA 387; confirmed on review 2008 BCCA 250.

[18] The applicants object to paras. 37 and 48 of the factum of the Attorney General of British Columbia because they refer to the fresh or new evidence for which the Attorney General of British Columbia seeks leave to adduce. The fate of these paragraphs would appear to depend on the application for leave. There is no proper basis on which I would accede to the request of the applicants.

[19] The applicants object to paras. 5 – 7, 10, 11, 15 – 18 and 29 of the Foundation’s factum because it refers to information in Ms. Davis’ affidavit. For the same reasons, I would not accede to the request to strike those paragraphs.

[20] Paras. 25 and 49 through 52 of the factum of the Foundation also are objected to by the applicants. They state:

25. Finally, the Foundation supports the position of the Respondents on the main appeal that the application of ss. 4(1) and 5(1) in the context of supervised injection violates s. 7 of the *Charter of Rights and Freedoms*. To the extent they do not permit the delivery of health care to needy persons, ss. 4(1) and 5(1) are arbitrary, overbroad, and do not accord with the principles of fundamental justice.

...

49. The Foundation also supports the position that the blanket prohibitions in ss. 4(1) and 5(1) offend s. 7 of the *Charter*.

50. The protocols for supervised injection at the Dr. Peter Centre were developed specifically to protect the interests of vulnerable participants who are already in precarious health. As the learned summary trial judge found, to prevent supervised injection threatens the very lives of those participants, depriving them of the rights to life, liberty and security of the person protected by s. 7 of the *Charter*. That deprivation is not in accordance with the principles of fundamental justice because ss. 4(1) and 5(1) are arbitrary, overbroad, and inconsistent with society’s interest in the health of its citizens. In the Foundation’s submissions, these conclusions apply with even greater vigour in the context of the health services delivered by the Dr. Peter Centre.

51. Moreover, ss. 4(1) and 5(1) must be considered arbitrary and overbroad when balanced against the provincial interest in ensuring the optimal health of its citizens as well as the specific initiatives approved by the colleges that govern health care professionals.

52. In the Foundation's submission, the summary trial judge was correct in holding that the blanket application of ss. 4(1) and 5(1) of the CDSA offend s. 7 of the *Charter*. The Foundation adopts the position of the Respondents on these issues.

[21] The applicants assert these paragraphs go beyond the boundaries of the intervention allowed by Saunders J.A. They contend she limited the Foundation to dealing with the constitutional division of powers whereas the paragraphs address the s. 7 *Charter of Rights* issue. Madam Justice Saunders stated in paras. 23 – 26 of her reasons:

[23] ... It says, in particular, that it will argue that the statutory provisions intrude into an area of exclusive provincial legislative competence: the power to regulate health professionals and the delegated power of the professional governing bodies to establish standards of practice. It says it will focus on the importance of the clinical relationship between nurse and client and the professional and ethical obligations of nurses to provide care to HIV-positive drug users.

[24] ... While some of the issues it would wish to address are dealt with in Mr. Justice Pitfield's reasons for judgment, and clearly will be dealt with more fully by the parties, the division of powers issue in relation to health professionals and their governing bodies, identified by the Dr. Peter AIDS Foundation, is an issue that is distinct to the Dr. Peter AIDS Foundation.

[22] In para. 25 Saunders J.A. concluded that the application of the Dr. Peter AIDS Foundation should be allowed, and she stated in para. 26:

[26] ... I would expect them [the Intervenor] not to cover ground covered by the party or parties they support, and in particular the Dr. Peter AIDS Foundation should focus upon the division of powers issue identified in these reasons for judgment.

[23] It will be up to the division that hears these appeals to determine the extent to which it finds the submissions of the Foundation helpful, but I do not read the reasons of Saunders J.A. as limiting the Foundation to the division of powers issue.

[24] Madam Justice Sanders granted the Foundation's application.

[25] As I read her reasons, her comments in paras. 23 and 24 are directed to whether there is an issue distinct to the Foundation.

[26] Her comments in para. 26 concern focus. No intervenor should repeat what the parties state and the Foundation should focus on the division of powers issue.

[27] As I read the impugned paragraphs, they simply confirm the Foundation supports the position of the Attorney General of British Columbia, but, of course, the division of this Court that hears these appeals will determine whether that is of any assistance to it.

[28] I dismiss the applications of the Attorney General of Canada and Minister of Health to strike paragraphs from the factums of the Attorney General of British Columbia and the Foundation.

### **Costs**

[29] The Attorney General of British Columbia, as a party under the *Constitutional Question Act*, generally neither pays nor is awarded costs. I do not understand the Attorney General of British Columbia to request the costs of these motions.

[30] The Foundation sought an order from Saunders J.A. that it not be awarded or be subjected to an order for costs. Saunders J.A. did not address that request. I am told that a draft order that provided for it was rejected by the Court Registry and a draft deleting it now is under circulation. I note also that the Foundation seeks immunity from costs in its application for leave to adduce evidence on the appeal, but, of course, that has not been addressed by this Court.

[31] Section 23 of the *Court of Appeal Act* provides that a successful party on an application is entitled to costs unless there is an order to the contrary. I see no basis on which I should deviate from the usual order in this case. There is some support for this in the decision of Prowse J.A. in *Faculty Association of the University of British Columbia v. University of British Columbia*, 2009 BCCA 56.

[32] I order that the Foundation is entitled to its costs of these applications and the Attorney General of British Columbia is not.