Clean switch: the case for prison needle and syringe programs

In Canada and in many other countries, prisons have become incubators for the transmission of HIV and hepatitis C virus (HCV). Estimates of HIV and HCV prevalence in Canadian prisons are at least 10 and 20 times, respectively, the reported prevalence in the population as a whole[1] — and prevalence rates have been reported to be significantly higher for people who inject drugs.[2] Although people who inject drugs may inject less frequently while incarcerated, the risks of injection drug use are amplified because of the scarcity of sterile syringes and the sharing of injecting equipment in prison.[3] Making sterile injection equipment available to people in prison is an important response to evidence of the risk of HIV and HCV transmission through sharing syringes to inject drugs. In this article, Sandra Chu explains why the government is obligated under international human rights standards and Canadian correctional and constitutional law to provide prison-based needle and syringe programs (PNSPs).

PNSPs have been introduced in over 60 prisons of varying sizes and security levels in Switzerland, Germany, Spain, Moldova, Kyrgyzstan, Belarus, Armenia, Luxembourg, Romania, Portugal and Iran.[4]

In Canada, over 200 needle and syringe programs (NSPs) serve Canadian communities, and enjoy the support of all levels of government.[5] Despite numerous evaluations of NSPs demonstrating that they reduce the risk of HIV and HCV, are cost effective, and facilitate access to care, treatment and support services, no NSPs exist in Canadian prisons.[6]

Evaluations of PNSPs — including in 2006 by the Public Health Agency of Canada (PHAC) at the request of the Correctional Service of Canada (CSC) — have shown similar results. While these PNSPs have been implemented in diverse environments and under differing circumstances, the results of the programs have consistently demonstrated that PNSPs:

- decrease needle sharing among people in prison;
- increase referrals of users to drug treatment programs;
- decrease the need for health-care interventions related to injection-site abscesses;
- decrease the number of overdose-related health-care interventions and deaths;
- do not result in PNSP syringes being used as weapons;
- do not lead to increased institutional violence;
- do not lead to increased drug use or increased initiation by people in prison of injecting drug use;
- are effective in a wide range of institutions; and
- have effectively employed different methods of needle distribution, such as peer distribution by people in prison, distribution by prison health care staff or outside agencies, and automatic dispensing machines.[7]

In Canada, numerous bodies, including the Correctional Investigator of Canada,[8] the Canadian Medical Association,[9] the Ontario Medical Association[10] and the Canadian Human Rights Commission,[11] have recommended that CSC develop, implement and evaluate pilot NSPs in prisons. Further reinforcing the public-health imperative for PNSPs are compelling human rights and legal arguments, under both international and Canadian law, for such programs.

International health and human rights standards

In the context of PNSPs, two principles are particularly relevant to the rights of people in prison. First, the international community has generally accepted the "principle of retaining all rights," which means that people in prison retain all human rights that are not taken away as a result of the loss of liberty flowing from imprisonment.[12]

This includes the right to the highest attainable standard of health, which is recognized in the *International Covenant on Economic, Social and Cultural Rights*.[13] According to the U.N. Committee on Economic, Social and Cultural Rights, "States are under the obligation to respect the right to health by, *inter alia*, refraining from

denying or limiting equal access for all persons, including prisoners or detainees … to preventive, curative and palliative health services."[14]

Since HIV and HCV are potentially fatal diseases, the right to life is also relevant in considering states' obligation to take effective measures to prevent the transmission of blood-borne viruses in prisons. The U.N. Human Rights Committee has clarified that under the *International Covenant on Civil and Political Rights*, states are obligated to take "positive measures" in order to "increase life expectancy" and "eliminate … epidemics."[15]

Second, the "principle of equivalence" entitles people in detention to have access to a standard of health care equivalent to that available outside prison, including preventive measures comparable to those available in the general community. The right of people in prison to access health care equivalent to that available in the community is reflected in declarations and guidelines from the U.N. General Assembly,[16] the World Health Organization (WHO),[17] the U.N. Office on Drugs and Crime (UNODC)[18] and the Joint U.N. Programme on HIV/AIDS (UNAIDS).[19]

Moreover, numerous international health and human rights bodies support the position that, as a corollary to the right of people in prison to preventive health services, the state has an obligation to prevent the spread of contagious diseases in places of detention. Prison health standards and declarations from the WHO[20] and the World Medical Association,[21] for example, are clear that incarcerated people must be provided with measures to prevent the transmission of disease.

The specific issue of providing sterile syringes to people in prison as a means of preventing the spread of blood-borne viruses has also been considered and supported by numerous international organizations, as a matter of both sound public-health policy and human rights. For example, UNAIDS and the Office of the U.N. High Commissioner on Human Rights have called on prison authorities to "provide prisoners … with access to … condoms, bleach and clean injection equipment."[22]

The state has an obligation to prevent the spread of contagious diseases in places of detention.

The WHO affirms the principle of equivalence by recommending that in "countries where clean syringes and needles are made available to injecting drug users in the community, consideration should be given to providing clean injecting equipment during detention and on release to prisoners who request it."[23]

Similarly, UNODC, the WHO and UNAIDS recommend that prison systems "ensure the measures available outside of prisons to prevent transmission of HIV through the exchange of bodily fluids are also available to prisoners," and specifically recommend that sterile needles and syringes be accessible to incarcerated people in a confidential and non-discriminatory manner.[24]

Canadian correctional law

CSC — which is responsible for the administration of all federal prisons — is governed by the *Corrections and Conditional Release Act* (CCRA) and its accompanying regulations.[25] The CCRA obligates CSC to "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."[26] The CCRA also reflects the principle of retaining all rights by stipulating that "offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence."[27]

The CCRA mandates that the CSC must provide every incarcerated person with "essential health care" that will contribute to his or her rehabilitation and reintegration into the community.[28] Further, the CCRA stipulates that medical care for people in prison "shall conform to professionally accepted standards," thereby implying a right to comparable health care as offered in the community at large. This is confirmed by CSC *Commissioner's Directive 800* on "Health Services," which stipulates that people in prison "have reasonable access to other health services … which may be provided in keeping with community practice."[29]

While the principle of equivalence is not directly stated in the CCRA, the broad definition given to "health care" and the proviso to provide health services "in keeping with

community practice," are correctly interpreted as meaning that people in prison are entitled to equivalence of essential health services, including HIV prevention services, particularly in light of the CCRA's explicit statement that people in prison retain all rights except those necessarily limited by incarceration.

Canadian Constitutional Law

I. Charter, Section 7

Section 7 of the *Canadian Charter of Rights and Freedoms* (Charter) protects everyone's right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." [30] To establish an infringement of Section 7, one must demonstrate:

- an interest protected by the right to "life, liberty and security of the person";
- a "deprivation" by the state with respect to that interest; and
- that the deprivation is contrary to the principles of fundamental justice.[31]

Life

The right to life is concerned with state activity which can cause death to a person. Because HIV and HCV are potentially fatal diseases, the right to life is relevant in considering CSC's obligation to take effective measures to prevent the transmission of blood-borne viruses in prisons by, *inter alia*, the provision of sterile syringes.

In *PHS Community Services Society v. Attorney General of Canada*, the B.C. Supreme Court held that allowing the criminal prohibition on drug possession to extend to the premises of a supervised injection site would engage the right to life because it "forces the user who is ill from addiction to resort to unhealthy and unsafe injection in an environment where there is a significant and measurable risk of morbidity or death."[32]

Similarly, CSC's failure to provide PNSPs prevents safer injection by people in prison, which could lead to HIV and HCV infection and potentially death.

Liberty

In *Blencoe v. British Columbia*, Justice Bastarache, for the majority of the Supreme Court of Canada, affirmed that liberty in Section 7 applies whenever the law prevents a person from making "fundamental personal choices."[33] Accordingly, Section 7 has been applied to invalidate conditions imposed by the criminal justice system that interfere with a person's access to health care services.

For example, in *R. v. Parker*, a criminal prohibition against the use of marijuana to alleviate severe pain was considered a violation of the individual's liberty to choose a medically suitable course of treatment.[34] In *R. v. Reid*, the B.C. Provincial Court found that the blanket imposition of a "red zone" as a condition of probation for all people convicted of drug offences violated the rights to liberty and life because it was arbitrary, did not take into account the accused's need to access the NSP located within the "red zone" part of the city (which the order prohibited him from entering), and put the accused's life at risk because he was "effectively forbidden from accessing necessary health and other social services."[35]

Significantly, in *Reid*, Justice Gove weighed any perceived benefit of the red zone prohibition with the harms it causes. He observed that imposing "the 'red zone' condition as a means to stop the activity of street drug trafficking has not been demonstrated as being successful. To the limited extent that it may have some value, the effect on individual rights is greatly disproportionate to any perceived social gain."[36]

Denying incarcerated people access to sterile injecting equipment potentially has grave impact on their health, but has little or no impact on the use of drugs inside prisons.

In the context of PNSPs, denying incarcerated people access to sterile injecting equipment which is available to people outside of prison has a potentially grave impact on their health, with little or no impact on the use of drugs inside prisons.[37] The disproportionate effect of this deprivation lends further support to the argument that the infringement of incarcerated persons' liberty interest is unjustified.

Security of the person

The right to "security of the person" protects individuals' physical *and* psychological integrity[38] and is infringed by state action that has the

likely effect of seriously impairing a person's health.[39] In the prison context, the B.C. Supreme Court in *McCann v. Fraser Regional Correctional Centre* held that the short notice provided for a smoking ban could put incarcerated people "in danger as a result of aggressive behaviour of other inmates because they are suffering from [nicotine] withdrawals" and was therefore a "risk to the security of the inmates" and a breach of Section 7.[40]

In *PHS Community Services Society v. Attorney General of Canada*, the B.C. Supreme Court held that denying an addict access to a health-care facility "where the risk of morbidity associated with infectious disease is diminished, if not eliminated" threatened the security of the person.[41] Given the severe health consequences of HIV and HCV infection, the risk of harm posed by banning PNSPs qualifies as sufficiently "serious" to ground a violation of security of the person under Section 7.

Not only are actual impairments of life, liberty or security of the person violations of Section 7, but so too are risks of impairment. In *Singh v. Minister of Employment*,[42] the majority of the Supreme Court of Canada cited with approval *Collin v. Lussier*, in which the Court held that the security of a person is infringed when state action increases an individual's "anxiety as to his state of health" and "is likely to make his illness worse … by depriving him of access to adequate medical care."[43] Accordingly, an imminent deprivation of life, liberty or security of the person (i.e., one that has not yet occurred) is sufficient to establish a violation of Section 7.

Because HIV and HCV transmission among people in prison has been amply documented in numerous studies,[44] an applicant need not prove actual HIV or HCV infection in order to prove a violation of Section 7. Demonstrating a risk of infection is sufficient, and this risk has been recognized by numerous organizations, both within Canada and worldwide, and supported by studies of confirmed outbreaks of HIV in prison.[45]

Deprivation of these rights by the state

The violation of the right to life, liberty or security of the person must be the direct causal result of a state action.[46] In the context of PNSPs, the denial of clean needles by CSC, which exercises exclusive state control over people in prison, could not be more apparent.

As the Ontario Court of Appeal held in *R. v. Parker*, "[P]reventing access to a treatment by threat of criminal sanction" constitutes a deprivation of security of the person.[47] Similarly, the Federal Court (Trial Division) in *Covarrubias v. Canada (Minister of Citizenship and Immigration)* held that the state controlled "the quality of the medical services that would be available to [the incarcerated person] in the maximum security unit. The risk to the inmate's security interests, if established, would have been entirely caused by 'the state's conduct in the course of enforcing and securing compliance with the law.' "[48]

Although the government in *PHS Community Services Society* argued that the threat to life associated with drug injection resulted from an individual's choice to inject rather than state action, the B.C. Supreme Court rejected that argument and held that "the subject with which those actions are concerned has moved beyond the question of choice to consume in the first instance.... However unfortunate, damaging, inexplicable and personal the original choice may have been, the result is an illness called addiction."[49] Therefore, the Court held that a law that prevented access to health-care services that could prevent death engaged the right to life.[50]

Because people in prison are under the jurisdiction of CSC and are entirely dependent upon it for their health care, the nexus between CSC's refusal to implement PNSPs and their risk of HIV and HCV infection is clear. The absence of sterile needles and syringes has been proven in numerous studies to increase prisoners' risk of HIV and HCV infection, and evidence of actual outbreaks also directly link CSC's failure to implement PNSPs with increased risk of harm to incarcerated persons' life and security of the person.

Principles of fundamental justice

Depriving someone or a class of people of any of the rights to life, liberty or security of the person is a breach of Section 7 of the Charter only if the deprivation is "not in accordance with the principles of fundamental justice." In *Rodriguez v. British Columbia (Attorney General)*, the Supreme Court held that the principles of fundamental justice must be "capable of being identified with some precision and applied to situations in a manner which yields an understandable result"; and that a law or state action must not be so arbitrary "as to be no more than vague generalizations about what our society considers to be moral or ethical."[51]

Building upon the principles set out in *Rodriguez*, the court in *Chaoulli v. Quebec (Attorney General)* provided that a law is arbi-

trary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]."[52] Moreover, the Supreme Court has consistently ruled that where depriving a person or class of persons of any of the rights to life, liberty or security of the person does not enhance the state's interest, then a breach of fundamental justice will be made out, since the individual's interest has been deprived for no valid purpose.[53]

In the absence of any clear statement from the government as to why PNSPs have not been instituted, completing a Section 7 analysis must presume that CSC's objections reflect objections commonly raised by governments. These include claims that PNSPs:

- would undermine abstinence-based messages and programs by condoning drug use;
- would lead to increased violence and the use of needles as weapons;
- would lead to an increased consumption of drugs or an increased use of injection drugs among those who were previously not injecting; and
- do not necessarily work in Canada because other jurisdictions with successful PNSPs reflect specific and unique institutional environments.[54]

The first claim, that PNSPs condone drug use, is inconsistent in light of the availability of NSPs in the community. Despite the criminalization of illicit drug use in Canada, NSPs operate legally in the community, are recognized as a valuable harm reduction measure that reduces the risk of HIV and HCV transmission among people who inject drugs, and have the support of various orders of government. Community NSPs are not viewed by the federal government as undermining abstinence or condoning drug use.

As confirmed by the PNSP evaluations cited above, studies have refuted the assumptions that PNSPs lead to increased violence or the use of needles as weapons against other people in prison or staff, or lead to increased drug use or an increased use of injection drugs among those who were previously not injecting.

There is no support for the argument that prison-based needle and syringe programs would not work in Canada.

Finally, PNSP studies worldwide have demonstrated that they work in a variety of different institutions; thus, there is no support for the argument that PNSPs would not work in Canada. The positive public-health benefits of PNSPs observed from numerous evaluations, and the evidence disproving CSC's presumed concerns, confirm that the prohibition of PNSPs is arbitrary and does not enhance the "state's interest." As the Supreme Court of Canada held in *Chaoulli*, "]R]ules that endanger health arbitrarily do not comply with the principles of fundamental justice."[55] Where state action puts individuals' lives at stake, there must be a clear connection between that measure and its underlying legislative goals. In the case of PNSPs, there is no such connection.

II. Charter, section 15

Section 15(1) of the Charter provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court of Canada recently set out the analytical framework to assess Section 15 claims in *R. v. Kapp*.[56] In that case, the Court affirmed the framework set out in *Andrews v. Law Society of British Columbia* and held that in order to find a violation of the Charter's equality rights clause:

- there must be a distinction based on an enumerated or analogous ground; and
- the distinction must create a disadvantage by perpetuating prejudice or stereotyping.[57]

A distinction based on an enumerated or analogous ground

As discussed above, NSPs have enjoyed the support of the Canadian government at all levels, and constitute a benefit available to people injecting drugs outside prison. Denying clean needles to incarcerated people exposes them to increased risk of HIV and HCV infection, and reflects a clear distinction in treatment between people who inject drugs in the community and people who inject drugs in prison.

Since the status of prisoner is not an enumerated ground, it must be

determined whether this distinction is based on an analogous ground, for which a number of indicators have been identified by courts. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, the Supreme Court of Canada described an analogous ground as involving personal characteristics that are "immutable or changeable only at unacceptable cost to personal identity."[58]

Contextual factors that may be relevant to finding an analogous ground include whether the matter is important to the person's "identity, personhood, or belonging," whether people defined by the characteristic "are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked," and whether the ground is protected under federal or provincial human rights legislation.[59]

Previously, in *Sauvé v. Canada (Chief Electoral Officer)*, a minority of the Supreme Court of Canada took the position that "the status of being a prisoner does not constitute an analogous ground" under Section 15 of the Charter.[60] On a number of occasions, the Federal Court of Canada and Tax Court of Canada have both taken a similar view.[61] This position, however, has not been endorsed by a majority of the Supreme Court of Canada or by provincial appellate courts. These judgments are not binding on those courts, and the position they espouse should be reconsidered and rejected, for at least two reasons.

First, the overly simplistic reasoning underlying this conclusion leads logically to results at odds with the basic principles underlying the Charter and internationally accepted human rights principles. In the dissenting opinion in *Sauvé*, Justice Gonthier held that, because the unifying characteristic of people in prison is "past criminal behaviour,"[62] different treatment under the law is justifiable.

Under this analysis, past criminal behaviour disentitles prisoners as a class to any protection of rights under the equality rights provision of the Charter, and the state could single out incarcerated people for any number of arbitrary measures and would be immune from scrutiny under Section 15. This runs directly counter to the well-established principles of retaining all rights and of equivalence already noted above.

Second, the categorical denial of protection under Section 15 to people in prison ignores the specific characteristics of those who are incarcerated, including multiple intersecting grounds of disadvantage that are clearly of concern under Section 15. In *Law v. Canada (Minister of Employment and Immigration)*, the Supreme Court was clear in its disapproval of a mechanistic and formalistic approach to Section 15 that fails to address "the true social, political and legal context underlying each and every equality claim."[63]

The Court also recognized that grounds on which people have experienced discrimination can intersect.[64] To a great extent, prisons are home to people who have been socially marginalized. According to the Canadian Centre for Justice Statistics, the majority of people in prison come from disadvantaged backgrounds characterized by poverty, substance abuse, low levels of education and high levels of depression and attempted suicide.[65] While people who inject drugs in prison and those who inject outside share numerous characteristics, as a class the "pre-existing disadvantages" of people who inject drugs in prison are arguably more severe, and their vulnerability is ostensibly compounded by incarceration.

People in prison also disproportionately embody multiple immutable characteristics recognized as traditional grounds on which discrimination is prohibited.[66] In particular, the denial of PNSPs to people in prison disproportionately affects Aboriginal people, who are disproportionately represented in federal prisons.[67] In *Sauvé*, Justice McLachlin, writing for the majority of the Supreme Court, noted that the negative effects of the impugned provision prohibiting people in prison from voting in federal elections had "a disproportionate impact on Canada's already disadvantaged Aboriginal population."[68] Similarly, denying incarcerated people access to sterile needles and syringes would have a disproportionate impact on Aboriginal Canadians, who are already disproportionately represented among people who inject drugs and people living with HIV in the population as a whole.[69]

People with mental illnesses are also overrepresented among people in prison. In 2001, a CSC study found that, in the Pacific region, 84 percent of people in prison had at least one lifetime diagnosis of a mental disorder at entry, including substance abuse.[70] More broadly, the CSC recently reported that 12 percent of men and 26 percent of women in federal prisons had been identified with "very serious mental health problems";[71] 15 percent of men and 29 percent of women in federal prisons had previously been hospitalized for "psychiatric reasons";[72] and the percentage of people in federal prisons prescribed medication for

"psychiatric concerns" at admission had more than doubled from 10 percent in 1997–1998 to 21 percent in 2006–2007.[73]

Most people in prison come from disadvantaged backgrounds characterized by poverty, substance abuse and low levels of education.

The widespread incarceration of people who use drugs is also well documented, with over 20 percent of people admitted to federal prisons having at least one drug-related conviction.[74] Substance abuse is identified as a contributing factor to the criminal behaviour of 70 percent of the people admitted to federal prisons.[75] A significant number of people in prison who inject drugs are also addicted to drugs. According to PHAC, approximately 67 percent of people in federal prisons have substance abuse problems, of which 20 percent require treatment.[76]

People with addictions have been recognized by Canadian tribunals and courts as worthy of protection against discrimination on the basis of the disability of drug dependence,[77] and there is significant jurisprudence from labour arbitrators, human rights commissions and courts recognizing drug dependence as a disability requiring, among other things, a duty to accommodate, and awarding damages for discrimination.[78]

While people who inject drugs both inside and outside prison may share the experience of disability, as a group people who inject drugs in prison arguably suffer from a more severe dependency, because conflict with the law and incarceration are often a result of offences related to the financing of drug use or offences related to behaviours brought about by drug use.[79]

Denying access to sterile injection equipment also has a disproportionate impact on women. Though women constitute a minority of those incarcerated in Canada, a significant percentage of women in Canadian prisons were incarcerated for offences related to drug use, often linked to underlying factors such as experiences of sexual or physical abuse or violence.[80] As the Canadian Human Rights Commission has observed, "[A]lcohol and drugs tend to figure more prominently in the lives and criminal offences of incarcerated women, for whom income-generating crimes such as fraud, shoplifting, prostitution and robbery are often perpetrated to support their addictions."[81]

Moreover, a 2003 study of federally incarcerated women found that 19 percent reported injecting drugs while in prison;[82] and a previous history of injection drug use is consistently found more frequently among women than men in Canadian prisons.[83] In a number of studies, HIV and HCV prevalence has also been shown to be higher among incarcerated women than among incarcerated men in Canada.[84]

As the Commission concluded, "Although sharing dirty needles poses risks for any inmate, the impact on women is greater because of the higher rate of drug use and HIV infection in this population," an impact that "may be particularly acute for federally sentenced Aboriginal women."[85]

Considered from the broader social and historical context, denying people in prison access to PNSPs disproportionately affects people who represent an intersection of the Charter's enumerated grounds. As such, courts should recognize prisoner status as an analogous ground for which unjustifiable discrimination by the state is prohibited.

A distinction which creates a disadvantage by perpetuating prejudice or stereotyping

As noted above, community-based NSPs have demonstrated for many years their efficacy in reducing risk behaviour related to HIV and HCV transmission, an obvious benefit for people who inject drugs in the community. Correlatively, the failure to provide PNSPs in federal prisons creates a disadvantage for people who inject drugs in prison because they are forced to use non-sterile injection equipment.

The Supreme Court of Canada has repeatedly held that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner."[86] CSC's exclusion of people in prison from the full range of health benefits available to people in the general community creates an environment in which it is acceptable to treat people who inject drugs in prison as second-class citizens and to subject them to risks of irreparable harm. Insofar as the government provides, or allows access to, a service such as NSPs, it must provide it equally.

Further, denying access in prison to proven health services such as NSPs must be understood as existing under the following conditions

of inequality in Canadian society: "higher rates of poverty and institutionalized alienation from mainstream society" among Canada's Aboriginal population;[87] a significant proportion of people in prison suffering from, and receiving inadequate treatment for, mental illness;[88] a significant number of women in prison who struggle with addiction;[89] the routine experience of people who use drugs of negative stereotyping, social stigmatization and marginalization from members of society, social service agencies and health-care providers;[90] and the historical inadequacy of health services for persons who use drugs and for incarcerated people.[91]

"Once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner."

People who inject drugs are already identified with numerous negative stereotypes, including the view that drug users are of lesser moral value and, therefore, are less worthy of health care, a perception that is exacerbated by incarceration.[92] These attitudes and misconceptions have resulted in a variety of harms, including public apathy, undiagnosed mental illness and inaccessible treatment and rehabilitation programs.[93] As a group, people in prison are further disadvantaged by heightened vulnerability to disease and infection, and subject to pernicious prejudice and stigmatization.[94]

CSC's prohibition of PNSPs fails to take into account conditions of systemic inequality, imposes a serious health burden on people in prison, and perpetuates the stereotype that they are less worthy of recognition and value as members of Canadian society. The distinction in treatment is thus an unjustifiable infringement of the right of incarcerated people to equal protection and equal benefit of the law.

III. Charter, Section 12

Section 12 of the Charter provides that all individuals have a right "not to be subjected to any cruel and unusual treatment or punishment." In order to come within the protection of Section 12, an applicant must first demonstrate that he or she has been subject to "treatment" or "punishment" at the hands of the state. Numerous courts have referred to conditions of incarceration as "treatment" contrary to section 12,[95] including in the context of the state's failure to provide facilities which made adequate medical care available for detained people with HIV.[96] Clearly, CSC's failure to provide PNSPs falls within the ambit of "treatment" covered under Section 12. Whether CSC's inaction with respect to PNSPs constitutes "cruel and unusual" treatment depends on conditions which have been articulated over a number of section 12 cases — namely, whether such treatment is:

- "grossly disproportionate" for the incarcerated person;
- so excessive as to "outrage standards of decency"; and
- having regard to all contextual factors.

Whether the treatment is excessively or grossly disproportionate

Denying access to health services is not a legitimate objective of incarceration. Neither the *Criminal Code* nor the CCRA reflect a view of incarceration that denies health care to people in prison, and the principle of equivalence is clearly opposed to jeopardizing individuals' health by virtue of their incarceration. In *R. v. Smith*, Justice Wilson provided that she understood "grossly disproportionate" to mean that "no one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such a penalty. It was unanticipated in its severity either by him or them."[97]

The effect of CSC's inaction is incarcerated people's heightened risk of HIV and HCV infection, an outcome that is grossly disproportionate to any rationale for their incarceration. Not only people who inject drugs in prisons, but others in prison and the community as a whole face greater risk of grave illness when incarcerated people become increasingly infected with blood-borne viruses. Given the magnitude of this public health risk, CSC's prohibition of PNSPs is grossly disproportionate to any of its purported aims.

Whether the treatment is in accordance with public standards of decency

The impact of CSC's failure to provide PNSPs — an increased risk of infection with HIV and HCV — could be said to outrage a collective standard of decency. This is especially true if, as affirmed by the Supreme Court of Canada in *R. v. Goltz* and *R. v. Morrisey*, the specific characteris-

tics of the population most affected are considered.[98] Undoubtedly, people who inject drugs in prison are among the most marginalized of society, for whom sterile needles and syringes are crucial if they are to remain free of HIV or HCV infection. Further reinforcing their marginalization by subjecting them to unnecessary health risks (that are not imposed on the population as a whole) cannot be in accordance with public standards of decency.

Denying people in prison the right to protect themselves against HIV and HCV infection constitutes treatment that is contrary to minimum standards of decency and human rights.

Furthermore, people in prison retain all their rights and are entitled to access an equivalent standard of health care. These principles should inform "public standards of decency" with respect to the health of people in prison. In an environment where NSPs enjoy widespread support in the community, and there is significant evidence of the efficacy of PNSPs in reducing the use of non-sterile injection equipment, denying people in prison, particularly those who are addicted to drugs, the right to protect themselves against HIV and HCV infection constitutes treatment that is contrary to minimum standards of decency and human rights.

Contextual factors

A determination of whether treatment is "cruel and unusual" must not merely assess the government's refusal or failure to implement PNSPs, but also the effects of such action, considering the particular needs of incarcerated people, the actual effect of the treatment on them and the availability of adequate alternatives.[99] As noted above, the majority of people in prison come from disadvantaged backgrounds characterized by poverty, substance abuse, low levels of education and high levels of depression and attempted suicide. Thus, the actual effect of failing to provide PNSPs poses severe health risks, especially in view of the escalating rates of HIV and HCV in prisons.

For many people in prison suffering from addiction, the effect of prohibiting PNSPs is an even greater risk of HIV and HCV infection, a potentially fatal health outcome that is neither "decent" nor "proportionate" to the reasons for their incarceration. The "treatment" is senseless especially in light of the alternative of providing PNSPs, a move that would fulfill CSC's obligations under the CCRA and be in accordance with international health and human rights standards.

IV. Charter, Section 1

If violations under Sections 7, 15 or 12 have been established, it is theoretically still possible that the violation or violations could be justified under Section 1 of the Charter.[100] According to Section 1, the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The test to determine what can be accepted as "demonstrably justified" under this section has been outlined by the Supreme Court in *R. v. Oakes* and subsequent cases.[101] To justify the infringement of a Charter right by a law or government policy or action, the government must demonstrate that:

- the objective of the government measure is of sufficient importance to warrant overriding a constitutional right, meaning that, at a minimum, it must relate to concerns which are pressing and substantial;
- the government measure is rationally connected to achieving this objective, meaning it is not arbitrary, unfair or based on irrational considerations;
- the government measure impairs as little as possible the constitutional right(s) in question; and
- the harm done by limiting the right does not outweigh either the importance of the measure's objectives or the benefits of the measure.

Pressing and substantial purpose to justify limiting Charter rights

As noted earlier, principal objections raised by governments in response to PNSPs have included the notion that PNSPs condone drug use and lead to an increased consumption of drugs or an increased use of injection drugs among those who were previously not injecting; that PNSPs lead to increased violence and to the use of syringes as weapons against other people in prison and staff; and that PNSPs may not work in Canada

because other jurisdictions with successful PNSPs reflect specific and unique institutional environments.

Admittedly, concerns about drug use in prison and prison safety may be "pressing and substantial." However, the notion that PNSPs may not work in Canadian prisons is no justification for delaying their implementation, especially in view of the evidence worldwide demonstrating their efficacy in a range of institutions and the possibility of piloting PNSPs in select institutions.

Even if any of CSC's purported concerns are deemed "pressing and substantial," there is no nexus between those concerns and the prohibition of PNSPs.

Rational connection between measure and objective

Significantly, the government's objectives in refusing to implement PNSPs must be rationally connected to the means undertaken to achieve them. In this respect, the prohibition of PNSPs fails Section 1 scrutiny. The lack of access to sterile needles and syringes in prison undermines CSC's interest in mitigating the harms caused by injection drug use, an interest reflected in CSC's statutory obligation to protect the health and well-being of people in its custody.

In spite of the federal government's "zero tolerance" drug policy and interdiction efforts, there is undeniable evidence that drugs are being smuggled into prisons and used by people in prison, a fact that the government's own research demonstrates and that it acknowledges.[102] Numerous studies have indicated that, despite the absence of sterile injection equipment, people in prison inject drugs; non-sterile injection equipment is merely used more frequently because of the shortage of injecting equipment.[103]

While CSC may not wish to be seen to condone drug use, it already acknowledges injection drug use within prisons by making bleach available, with "instructions on the proper cleaning of syringes and needles."[104] Correspondingly, community NSPs operate within a legal environment where drug use is criminalized, yet NSPs are not accused of condoning drug use. As noted above, studies of PNSPs worldwide have indicated that drug consumption and the use of injection drugs among those who were previously injecting do not increase when PNSPs have been introduced, that PNSPs do not lead to increased violence, and that PNSP syringes have not been used as weapons against staff or other prisoners.

> A blanket prohibition on prison-based needle and syringe programs does little or nothing to advance the state's interest in protecting people in prison or the public.

Finally, PNSPs can be introduced in prisons of different sizes, regions and security levels. In Western European prisons, programs have proven effective in prisons where incarcerated people are housed in ranges of individual cells, similar to the Canadian situation.[105] PNSPs have also been successfully implemented in jurisdictions that are relatively well-resourced and well-financed (i.e., Switzerland, Germany, Spain), as well as in countries in economic transition that operate with significantly less funding and infrastructural support (i.e., Moldova, Kyrgyzstan, Belarus).[106]

Given the reality of injection drug use in prisons and the evidence invalidating the purported harms of PNSPs worldwide, a blanket prohibition on PNSPs does little or nothing to advance the state's interest in protecting people in prison or the public. There is, therefore, no rational connection between such objectives and the prohibition.

Minimal impairment of Charter rights

Under section 1 of the Charter, if rights are to be infringed, the level of infringement must not exceed the minimum required to fulfil the desired purpose. The requirement for minimal impairment is also reflected in the CCRA, which obligates CSC to "use the least restrictive measures consistent with the protection of the public, staff members and offenders."[107] Denying people in prison access to a form of health care poses a significant risk of HIV and HCV infection and contravenes the principle of retaining all rights and the principle of equivalence. Such impairment is far from "minimal," even if the prohibition of PNSPs could be said to be rationally connected to CSC objectives.

Proportionality between harms and benefits of the measure

Finally, under Section 1 of the Charter, the harm done by the government in limiting constitutional rights must not outweigh either the

importance of the legitimate government objective or the benefits achieved by the government's measure. Evidence confirms that denying people in prison access to sterile needles and syringes is not simply ineffective, but excessively harmful. In light of the extent of injection drug use in prisons, PNSPs are crucial to reducing the risks associated with non-sterile injection equipment.

Prohibiting sterile needles and syringes in prisons subjects people who inject drugs in prison to a significant risk of HIV and HCV infection, a harm that outweighs the purported "benefits" of the prohibition — benefits which are not supported by evidence from evaluations of PNSPs worldwide. In contrast, the health benefits of providing sterile needles and syringes actually advance the state's interest in reducing the harm to people in prison and to society of the use of harmful drugs.

Conclusion

Viewed in light of (a) the reality of HIV, HCV and injection drug use in prisons, (b) the well-established legal principles of retaining all human rights and of equivalence in health care standards, (c) the availability and general acceptance of NSPs in the community as a vital harm reduction measure, and (d) CSC's obligations to take effective measures to prevent the spread of infectious diseases among people in prison, the government's failure to provide PNSPs in Canadian prisons does not meet Canada's commitments to international health and human rights standards, its mandate under Canadian correctional legislation, or its obligations under the Charter.

With increasing HIV and HCV prevalence in Canadian prisons, the urgency for action is mounting: people's lives, both inside and outside prisons, are dramatically affected by the lack of clean needles every passing day. The dire need for safe access to clean needles within Canadian prisons must be met to ensure that the rights enshrined in Canadian and international law are not abstract values, but tangible rights to be enjoyed by all.

– Sandra Chu

Sandra Chu is a senior policy analyst with the Canadian HIV/AIDS Legal Network.

[1] See R. Lines et al, *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience, Second edition,* Canadian HIV/AIDS Legal Network, 2006, p. 6; S. Skoretz, G. Zaniewski and N.J. Goedhuis, "Hepatitis C virus transmission in the prison/inmate population," *Canada Communicable Disease Report* 30(16) (2004): 141–148 at 142; and R. Remis et al, *Estimating the Number of Blood Transfusion Recipients Infected by Hepatitis C Virus in Canada, 1960–85 and 1990–92*, report to Health Canada, 1998.

[2] Correctional Service of Canada (CSC), *Springhill Project Report,* 1999, p. 12.

[3] See, for example, the studies cited in footnote 22 of S. Chu and R. Elliott, *Clean Switch: The Case for Prison Needle and Syringe Programs in Canada*, Canadian HIV/AIDS Legal Network, 2009.

[4] R. Jürgens, *Interventions to Address HIV/AIDS in Prisons: Needle and Syringe Programmes and Decontamination Strategies,* WHO, UNODC and UNAIDS, 2007, p. 25.

[5] See, for example, footnotes 49–52 of S. Chu and R. Elliott, *Clean Switch* (supra).

[6] See, for example, studies cited in footnotes 53–56 of S. Chu and R. Elliott, *Clean Switch* (supra).

[7] See, for example, studies cited in footnote 60 of S. Chu and R. Elliott, *Clean Switch* (supra); and Public Health Agency of Canada (PHAC), *Prison Needle Exchange: Review of the Evidence*, report prepared for CSC, 2006.

[8] See, for example, Correctional Investigator of Canada (CI), *Annual Report of the Correctional Investigator 2003–2004,* 2004; CI, *Annual Report of the Office of the Correctional Investigator of Canada 2005–2006,* 2006; CI, *Annual Report of the Office of the Correctional Investigator 2006–2007,* 2007.

[9] Canadian Medical Association, 2005 Annual Meeting, Resolution 26.

[10] Ontario Medical Association, *Improving Our Health: Why is Canada Lagging Behind in Establishing Needle Exchange Programs in Prisons? A Position Paper by the Ontario Medical Association*, October 2004.

[11] Canadian Human Rights Commission (CHRC), *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*, 2004.

[12] U.N. General Assembly, *Basic Principles for the Treatment of Prisoners*, UNGAOR, 45th Sess., Supp. N 49A, UN Doc. A/45/49 (1990), Principle 5.

[13] See Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESCR].

[14] U.N. Committee on Economic, Social and Cultural Rights, "General Comment 14: The Right to the Highest Attainable Standard of Health," 22nd Sess., (2000) UN Doc E/C.12/2000/4, para. 34 [emphasis in original].

[15] U.N. Human Rights Committee, *General Comment No. 6:* "The Right to Life (Article 6)," 16th Sess., (1982) UN Doc. HRI\GEN\1\Rev.1, para. 5.

[16] U.N. General Assembly, *Basic Principles* (supra), para. 9.

[17] WHO, *WHO Guidelines on HIV Infection and AIDS in Prisons*, 1993.

[18] UNODC, WHO and UNAIDS, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an Effective National Response*, 2006, p. 10.

[19] UNAIDS, "Statement on HIV/AIDS in Prisons to the United Nations Commission on Human Rights at its Fifty-Second Session, April 1996," in *Prison and AIDS: UNAIDS Point of View* (Geneva: UNAIDS, 1997) p. 3.

[20] WHO, *WHO Guidelines* (supra).

[21] World Medical Association, *Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and Other Communicable Diseases*, 2000.

[22] Office of the High Commissioner for Human Rights and UNAIDS, *International Guidelines on HIV/AIDS and Human Rights, Consolidated Version*, UN Doc. HR/PUB/06/9, 2006, Guideline 4, para. 21(e).

[23] WHO, *WHO Guidelines* (supra), Guideline 24. More recently, the WHO reiterated that the range of services required for people in prison includes "clean needle and syringe provision": WHO, *Priority Interventions: HIV/AIDS Prevention, Treatment and Care in the Health Sector*, 2008, p. 25.

[24] UNODC, WHO and UNAIDS, *HIV/AIDS Prevention* (supra), Recommendation 60.

[25] *Corrections and Conditional Release Act* (CCRA), S.C. 1992, c 20; SOR/92-620; and *Corrections and Conditional Release Regulations*, SOR/92-620.

[26] CCRA, s. 70.

[27] CCRA, s. 4(e).

[28] CCRA, ss. 85–88.

[29] CSC, *Commissioner's Directive 800: Health Services*, 2004.

[30] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter).

[31] *Gosselin v. Quebec (Attorney General),* [2002] 4 S.C.R. 429 (Supreme Court of Canada), para. 75.

[32] *PHS Community Services Society v. Attorney General of Canada*, 2008 B.C.S.C. 661 (B.C. Supreme Court), para. 140. The Court therefore maintained, as a matter of constitutional entitlement, the exemption for Vancouver's Insite from Canada's criminal law prohibiting drug possession, ruling that access to this health service had to take priority over an inflexible application of the criminal law.

[33] *Blencoe v. British Columbia*, [2002] 2 S.C.R. 307.

[34] *R. v. Parker* (2000), 49 O.R. (3d) 481 (Ontario Court of Appeal).

[35] *R. v. Reid*, [1999] B.C.J. No. 1603, paras. 78 and 80.

[36] Ibid., para. 61.

[37] From 1998 to 2007, CSC spent significantly more time and money than it had in previous years on efforts to prevent drugs from entering prisons, yet drug use declined less than one percent during that period. See CI, *Annual Report of the Office of the Correctional Investigator 2006–2007* (supra), p. 12.

[38] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (Supreme Court of Canada).

[39] See *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Supreme Court of Canada); and *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 (Supreme Court of Canada) para. 123.

[40] *McCann v. Fraser Regional Correctional Centre*, [2000] B.C.J. No. 559, para. 15.

[41] *PHS Community Services Society* (supra), paras. 144–145.

[42] *Singh v. Minister of Employment*, [1985] 1 S.C.R. 177.

[43] *Collin v. Lussier*, [1983] 1 F.C. 218 (Federal Court Trial Division), p. 239.

[44] See, for example, studies cited in footnote 132 of S. Chu and R. Elliott, *Clean Switch* (supra).

[45] See, for example, outbreaks described on pp. 3–4 of S. Chu and R. Elliott, *Clean Switch* (supra).

[46] *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441 (Supreme Court of Canada), para. 102.

[47] *R. v. Parker* (2000), 49 O.R. (3d) 481, para. 97.

[48] *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1470, para. 86.

[49] *PHS Community Services Society* (supra), para. 142.

[50] Ibid.

[51] *Rodriguez* (supra), para. 141.

[52] *Chaoulli* (supra), para. 130.

[53] See, for example, *Rodriguez* (supra) and *R. v. Ruzic*, [2001] 1 S.C.R. 687 (Supreme Court of Canada).

[54] R. Lines., *Prison Needle Exchange* (supra), pp. 44–52.

[55] *Chaoulli* (supra), para. 133.

[56] *R. v. Kapp,* 2008 S.C.C. 4.

[57] Ibid., para. 17. See also, *Ermineskin Indian Band and Nation v. Canada*, 2009 S.C.C. 9 (Supreme Court of Canada), para. 188.

[58] *Corbiere v. Canada (Minister of Indian and Northern Affairs),* [1999] 2 S.C.R. 203, para. 13.

[59] Ibid., para. 60.

[60] *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519, paras. 189–206. The specific Section 15 issue was not addressed by the majority, which decided the case on other grounds; the minority was in dissent on those grounds.

[61] See cases cited in the dissenting opinion written by Justice Gonthier in *Sauvé*, ibid., para. 193.

[62] Ibid., para. 195.

[63] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, para. 110.

[64] Ibid., paras. 93–94.

[65] D. Robinson et al, *A One-Day Snapshot of Inmates in Canada's Adult Correctional Facilities*, Canadian Centre for Justice Statistics, 1998, p. 5. See also, Anonymous, "A Health Care Needs Assessment of Federal Inmates in Canada," *Canadian Journal of Public Health* 95 (2004): S12–S18.

[66] S. Galea and D. Vlahov, "Social determinants and the health of drug users: socioeconomic status, homelessness and incarceration," *Public Health Reports* 117 (Supp.1) (2002): 135–145; A. Palepu et al, "The social determinants of emergency department and hospital use by injection drug users in Canada," *Journal of Urban Health* 76(4) (1999): 409–18; R. Room, "Stigma, social inequality and alcohol and drug use," *Drug and Alcohol Review* 2 (2005): 143–155; and Canadian Association of Social Workers, *The Declining Health and Well-Being of Low Income Women in Canada,* 2006.

[67] In 2006–2007, Aboriginal people represented approximately 17 percent of people incarcerated in federal prisons but less than three percent of the adult population in Canada: Public Safety Canada Portfolio Corrections Statistics Committee, *Corrections and Conditional Release Statistical Overview 2007*, 2007, p. 57. This ratio is even more disproportionate for Aboriginal women in federal prisons, who comprise 28 percent of female prisoners: CSC, *Basic Facts about the Correctional Service of Canada,* 2005.

[68] *Sauvé* (supra), para. 60.

[69] National HIV estimates indicate that 53 percent of all new HIV infections among Aboriginal people in 2005 were attributable to injection drug use, a proportion considerably higher than the 14 percent of overall new HIV infections in this category: PHAC, *HIV/AIDS Epi Updates*, November 2007, p. 74.

[70] M. Daigle, "Mental health and suicide prevention services for Canadian prisoners," *International Journal of Prisoner Health* 3(2) (2007): 163–171 at 164.

[71] CSC, *Changing Offender Population: Quick Facts,* 2007.

[72] Public Safety Canada Portfolio Corrections Statistics Committee, *Corrections and Conditional Release Statistical Overview 2007*, 2007, p. 55.

[73] Ibid.

[74] PHAC, *Atlantic Region: Environmental Scan of Injection Related Drug Use, Related Infectious Diseases, High Risk Behaviours, and Relevant Programming in Atlantic Canada*, 2006, p. 39.

[75] Ibid., pp. 38–39.

[76] PHAC, *HIV/AIDS: Populations at Risk*, 2006. A subsequent report by the CSC Review Panel states, "About 4 out of 5 offenders arrive with a serious substance abuse problem, with 1 out of 2 having committed their crime while under the influence": *A Roadmap to Strengthening Public Safety*, Report of the CSC Review Panel, 2007, p. v.

[77] Under the *Canadian Human Rights Act,* for example, disability is defined as including previous or existing dependence on alcohol or a drug: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 25. See also, *Employment Equity Act*, S.C. 1995, c. 44, in conjunction with Human Resources Development Canada, *Defining Disability: A Complex Issue*, 2003, p. 16; *Human Rights Act* (Nova Scotia), R.S.N.S. 1989, c. 214, s. 3(l)(vii); and *Human Rights Act* (Nunavut), S.Nu. 2003, c. 12, s. 1.

[78] See, for example, cases cited in footnote 227 of S. Chu and R. Elliott, *Clean Switch* (supra).

[79] R. Lines, *Prison Needle Exchange* (supra), p. 9.

[80] J. Csete, *Do Not Cross: Policing and HIV Risk Faced by People Who Use Drugs*, Canadian HIV/AIDS Legal Network, 2007, pp. 36–37; and S. Boyd and K. Faith, "Women, illegal drugs and prison: views from Canada," *International Journal of Drug Policy* 10 (1999): 195–207 at 199.

[81] CHRC, *Protecting Their Rights* (supra), p. 7, citing Auditor General of Canada, *Correctional Services Canada — Reintegration of Women Offenders*, Public Works and Government Services Canada, 2003, para. 4.23.

[82] A. DiCenso et al, *Unlocking Our Futures: A National Study on Women, Prisons, HIV and Hepatitis C,* Prisoners' HIV/AIDS Support Action Network (PASAN), 2003.

[83] PHAC, *Final Report: Estimating the Number of Persons Co-Infected with Hepatitis C Virus and Human Immunodeficiency Virus in Canada*, 2001.

[84] See, for example, studies cited in footnote 233 of S. Chu and R. Elliott, *Clean Switch* (supra).

[85] CHRC, *Protecting Their Rights* (supra), p. 37.

[86] See, for example, *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 (Supreme Court of Canada), para. 73; and *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (Ontario Court of Appeal).

[87] See *Sauvé* (supra), para. 60; and Minister of Supply and Services Canada, *Report of the Royal Commission on Aboriginal Peoples*, 1996.

[88] See, for example, CI, *Annual Report of the Office of the Correctional Investigator 2006–2007* (supra) (regarding the need to build mental health-care capacity in federal prisons).

[89] See J. Csete, *"Vectors, Vessels and Victims": HIV/AIDS and Women's Human Rights in Canada*, Canadian HIV/AIDS Legal Network, 2005, p. 36; and PHAC, *Final Report* (supra).

[90] K. Blankenship and S. Koester, "Criminal law, policing policy, and HIV risk in female street sex workers and injection drug users," *Journal of Law, Medicine and Ethics* 30(4) (2002): 548–559 at 553; PHAC, *Resource Library: Hepatitis C Information for Health Professionals*, undated; R. Room, "Stigma…." (supra).

[91] E. Ritson, "Alcohol, drugs and stigma," *International Journal of Clinical Practice* 53(7) (1999): 549–551; P. Ford and W. Wobeser, "Health care problems in prisons," *Canadian Medical Association Journal* 162(5) (2000): 664–665; P. Ford et al, "HIV, hepatitis C and risk behaviour in a Canadian medium-security penitentiary," *QJM: An International Journal of Medicine* 93 (2000): 113–119.

[92] S. Hartwell, "Triple stigma: persons with mental illness and substance abuse problems in the criminal justice system," *Criminal Justice Policy Review* 15(1) (2004): 84–99.

[93] F/P/T Advisory Committee on Population Health, F/P/T Committee on Alcohol and Other Drug Issues,

F/P/T Advisory Committee on AIDS and F/P/T Heads of Corrections Working Group on HIV/AIDS, *Reducing the Harm Associated with Injection Drug Use in Canada*, 2001, p. 2.

[94] See, for example, N. La Vigne et al, *Voices of Experience: Focus Group Findings on Prisoner Reentry in the State of Rhode Island*, Urban Institute Justice Policy Center, 2004, pp. 13, 18, 33, 39, 48 and 51; D. Pager, "The mark of a criminal record," *American Journal of Sociology* 108(5) (2003): 937-975; and R. Small, *The Importance of Employment to Offender Re-Integration*, FORUM on Corrections Research, CSC, undated.

[95] See, for example, cases cited on pp. 32–33 of S. Chu and R. Elliott, *Clean Switch* (supra).

[96] See *R. v. Downey,* (1989) 42 C.R.R. 286 (Ontario District Court).

[97] *R. v. Smith*, [1987] 1 S.C.R. 1045 (Supreme Court of Canada), para. 112.

[98] *R. v. Goltz* [1991] 3 S.C.R. 485; *R. v. Morrisey*, [2000] 2 S.C.R. 90.

[99] See, for example, *Goltz*, ibid.; and *Morrisey*, ibid., paras. 27–28; and *R. v. Wiles,* [2005] 3 S.C.R. 895 (Supreme Court of Canada), para. 5.

[100] While it may be slightly artificial to group the Section 1 arguments and analyses for violations of Sections 7, 15 and 12 together, many of the arguments under each rights violation overlap. Section 1 justifications of Section 7 violations may have a higher threshold, in part because much of the Section 1 analysis occurs during a consideration of Section 7.

[101] *R. v. Oakes*, [1986] 1 S.C.R. 103. See also, *R. v. Edward Books and Art*, [1986] 2 S.C.R. 713 (Supreme Court of Canada); *Dagenais v. CBC*, [1994] 3 S.C.R. 835 (Supreme Court of Canada); and *Thompson Newspaper Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (Supreme Court of Canada).

[102] See, for example, Public Safety and Emergency Preparedness Canada, *Corrections Fast Facts 2: Drugs in Prisons*, undated.

[103] See, for example, studies cited in footnotes 284–285 of S. Chu and R. Elliott, *Clean Switch* (supra).

[104] CSC, *Commissioner's Directive 821-2: Bleach Distribution,* 2004, s. 7.

[105] R. Lines, *Prison Needle Exchange* (supra), p. 50.

[106] Ibid., p. 51.

[107] CCRA, s. 4(d).