Court File No. CV-24-00732861-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE NEIGHBOURHOOD GROUP COMMUNITY SERVICES, KATHARINE RESENDES and JEAN-PIERRE AUBREY FORGUES

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

- and -

HIV LEGAL NETWORK AND HIV & AIDS LEGAL CLINIC ONTARIO

Interveners

FACTUM OF THE INTERVENERS, HIV LEGAL NETWORK and HIV & AIDS LEGAL CLINIC ONTARIO

February 27, 2025

HIV & AIDS LEGAL CLINIC ONTARIO
1400 – 55 University Ave
Toronto, ON M5J 2H7

Sean LaPrairie (85541K)
Email: sean.laprairie@halco.clcj.ca
Tel: (416) 340-7790 ext. 4049

Ryan Peck (45407H)
Email: ryan.peck@halco.clcj.ca
Tel: (416) 340-7790 ext. 4047

Counsel for the Interveners, HIV &
AIDS Legal Clinic Ontario and the
HIV Legal Network

TO: **ATTORNEY GENERAL OF ONTARIO**
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

S. Zachary Green (LSO# 48066K)
Email: zachary.green@ontario.ca
Tel: (416) 992-2327

Andrea Bolieiro (LSO# 60034I)
Email: andrea.bolieiro@ontario.ca
Tel: (437) 551-6263

Emily Owens (LSO# 80144G)
Email: emily.owens@ontario.ca
Tel: (416) 937-3687

Of counsel for the Respondent,
His Majesty the King in Right of Ontario

AND TO: **LAX O'SULLIVAN LISUS GOTTLIEB LLP**
145 King Street West Street West, Suite 275
Toronto, ON, M5H 1J8

Rahool P. Agarwal (LSO# 54528I)
Email: ragarwal@lolg.ca
Tel: (416) 645-1787

STOCKWOODS LLP
77 King Street West, Suite 4130
Toronto, ON, M5K 1H1

Carlo Di Carlo (LSO# 62159L)
Email: carlodc@stockwoods.ca
Tel: (416) 593-2485

Olivia Eng (LSO# 84895P)
Email: oliviae@stockwoods.ca
Tel: (416) 593-2495

NANDA & COMPANY
10007 80 Avenue NW
Edmonton, AB, T6E 1T4

Avnish Nanda (LSA# 18732)
Email: avnish@nandalaw.ca
Tel: (780) 916-9860

Counsel for the Applicants

AND TO: **RICKETTS HARRIS LLP**
250 Yonge Street, Suite 2200
Toronto ON, M5B 2L7

Andrea J. Sanche (LSO# 51406F)
Email: asanche@rickettsharris.com
Tel: (416) 642-4301

Harleen Pentlia (LSO#87042J)
Email: hpentlia@rickettsharris.com
Tel: (647) 260-2202

Counsel for the Intervener, Leslieville Neighbours for Community Safety and Niagara Neighbours for Community Safety

AND TO: **CITY SOLICITOR'S OFFICE**
City of Toronto, Legal Services
Station 1260, 26th Floor
Metro Hall, 55 John Street
Toronto, ON, M5V 3C6

Fred Fischer (LSO# 51284I)
Email: fred.fischer@toronto.ca
Tel: (416) 392-7224

Cara Davies (LSO# 60406B)
Email: cara.davies@toronto.ca
Tel: (416) 397-7715

Counsel for the Intervener, Board of Health for the City of Toronto Health Unit

AND TO: **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
155 Wellington Street West 35th Floor
Toronto, ON, M5V 3H1

Mariam Moktar (LSO# 64527T)
Email: mariam.moktar@paliareroland.com
Tel: (416) 646-6327

Greta Hoaken (LSO# 87903I)
Email: greta.hoaken@paliareroland.com
Tel: (416) 646-6357

Counsel for the Interveners, Barbara Hall and John Sewell

AND TO: **ADDARIO LAW GROUP LLP**
30 Duncan Street, 5th Floor
Toronto, ON, M5V 2C3

Andrew Max (LSO #65624J)
Email: amax@addario.ca
Tel: (416) 649-5049

Tabir Malik (LSO# 85565F)
Email: tmalik@addario.ca
Tel: (416) 646-1018

Counsel for the Intervener, Harm Reduction Service Providers Coalition

AND TO: **ABORIGINAL LEGAL SERVICES**
Unit 500 – 211 Yonge Street
Toronto, ON, M5B 1M4
info@aboriginallegal.ca

Emily R. Hill (LSO# 46899Q)
Email: emily.hill@als.clcj.ca
Tel: (416) 408-4041/(416) 408-3967

Counsel for the Intervener, Aboriginal Legal Services

AND TO: **THE BLACK LEGAL ACTION CENTRE**
180 Dundas Street West Suite 1509
Toronto, ON M5G 1Z8

Selwyn Pieters (LSO# 50303Q)
Email: selwyn@selwynpieters.com
Tel: (416) 787-5928

Demar Kemar Hewitt (LSO# 73860M)
Email: info@blac.clcj.ca
Tel: (647) 674-6400

Counsel for the Intervener, Black Legal Action Centre

AND TO: **CANADIAN DRUG POLICY COALITION**
312 Main Street
Vancouver, BC V6A 2T2

Amita Vulimiri (LSBC# 510003, LSO# 73739E)
Email: mvamita@gmail.com
Tel: (604) 356-1325

DJ Larkin (LSBC# 509224)
Email: dj_larkin@sfu.ca
Tel: (236) 308-3725

Counsel for the Intervener, Harm Reduction Policy Coalition

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PART I - OVERVIEW

1. People living with and affected by HIV, including people who use drugs, women and gender-diverse people, and people who are homeless are overrepresented among people who access the life-serving care provided by supervised consumption services ("SCS"). SCS are evidence-based health services that provide a safe, hygienic environment where people can use drugs under the supervision of trained staff or volunteers, while reducing the spread of blood-borne infections such as HIV and hepatitis C ("HCV"). SCS provide harm reduction education, services and supplies, and contribute to improved health outcomes by linking clients to health and social services. SCS also provide clients safety via spaces where they do not experience stigma and discrimination — both of which act as significant barriers to health care for marginalized people who use drugs.[1]

2. The HIV Legal Network and HIV & AIDS Legal Clinic Ontario ("HIV Coalition") intervene jointly in this case to address the direct, deadly, and disproportionately adverse impact of ss. 2 and 3 of the *Community Care and Recovery Act, 2024*, S.O. 2024, c. 27, Sch. 2 ("impugned provisions") on the rights of diverse communities of people living with and affected by HIV. The HIV Coalition's core submission is this: in assessing the Applicants' ss. 7 and 15 *Charter* claims, it is critical to consider the impacts of the SCS closures and restrictions, including on other key health and harm reduction interventions, on people who use drugs, taking into account a web of intersecting grounds that include HIV, gender, and homelessness.

3. By forcing SCS to close in Ontario, including in localities where no other SCS exist, and by imposing new legal barriers to SCS implementation, the impugned provisions increase the risk of HIV and HCV infection and create barriers to HIV and other health services, violating the s. 7 rights of SCS users, with a particular focus on those living with HIV, women and gender-diverse SCS users, and those who are homeless. The closure of SCS and the introduction of new legal barriers to their implementation also exposes these populations to increased risk of discriminatory conduct and violence. These deprivations,

[1] Affidavit of Ahmed Bayoumi, sworn January 8, 2025, Exhibit "A" (Bayoumi Affidavit), Application Record Volume 2 (AR2), Tab A, pg. 682, at para. 72.

that must be analyzed through an intersectional lens, are arbitrary and grossly disproportionate, and not in accordance with the principles of fundamental justice, as confirmed by Canadian and international law.

4. The impugned provisions also violate the equality guarantee of s. 15 of the *Charter*. In considering the Applicants' s. 15 claim, the Court must give effect to substantive equality by adopting a flexible approach to assessing the evidence to demonstrate discrimination and by conducting a structural, intersectional analysis.

PART II – FACTS

5. The HIV Coalition accepts and adopts the facts as stated by the Applicants and specifically rely on the evidence set out below.

A. Impact of SCS closures and new legal barriers to implementation on HIV prevention, treatment, care, and support

6. Rates of HIV and HCV among people who inject drugs are much higher than among the general population.[2] HIV and HCV are bloodborne infections that can be transmitted via used drug consumption equipment, and risks of transmission increase with the use of shared or non-sterile drug consumption equipment, when injecting in public, and in contexts of rushed injection.[3]

7. Harm reduction is an evidence-based, public health approach that aims to reduce the negative health, social, and economic impacts of substance use-related harms, including HIV, HCV, and other sexually transmitted and blood-borne infections ("STBBIs"). Harm reduction includes a myriad of interventions such as needle and syringe programs and SCS and is recognized as a vital component of the HIV and other STBBI response in Canada.[4]

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[2] Affidavit of Bill Sinclair, sworn January 9, 2025, Exhibit "E" (Sinclair Affidavit), Application Record Volume 1 (AR1), Tab 3, at pg. 120.
[3] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 679, at para. 62.
[4] See, for example, Canada, Public Health Agency of Canada, *Government of Canada's Sexually Transmitted and Blood-Borne Infections (STBBI) Action Plan 2024-2030* (2024),

8. Research in Canada and internationally shows that SCS reduce the risks of HIV and HCV transmission and contribute to increased access to HIV, HCV, and STBBI testing and prevention.[5] In addition, many SCS also provide referrals to care, treatment, and support for HIV, HCV, and other STBBIs.[6]

9. Among the range of positive outcomes associated with SCS, systematic reviews of evidence have concluded that they reduce injection practices that are associated with the transmission of bloodborne infections, such as syringe sharing, with one meta-analysis finding that SCS was associated with a 69% reduction in sharing, lending, and borrowing drug injecting equipment.[7] Similarly, a 2018 Ontario provincial government report on SCS concluded that "SCS have had a positive influence on high risk behaviours, including reduced needle sharing, the disposal of used equipment, requests for harm reduction education, and awareness of hygienic injection practices" and "SCS use may result in fewer Human Immunodeficiency Virus (HIV) and Hepatitis C Virus (HCV) infections."[8]

10. In a cohort study of SCS clients in Vancouver, SCS use was also associated with increased safer sex practices which prevent transmission of sexually transmitted infections including HIV[9] — a particularly important means of HIV prevention among people who use drugs and engage in sex work. As described in the record, a systematic review of 14 quantitative studies on SCS found that involvement in sex work was reported by 10 to 39% of clients.[10]

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https://www.canada.ca/content/dam/phac-aspc/documents/services/publications/diseases-conditions/sexually-transmitted-blood-borne-infections-action-plan-2024-2030/government-of-canada-stbbi-action-plan-final-en.pdf (accessed on 27 February 2025).

[5] Sinclair Affidavit, Exhibit "E", AR1, Tab 3, pg 123; Sinclair Affidavit, Exhibit "O", AR1, Tab 3, pgs. 189, 190, and 201; Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 775.

[6] Sinclair Affidavit, Exhibit "O", AR1, Tab 3, pg. 201; Affidavit of Holly Gauvin, sworn January 8, 2025 (Gauvin Affidavit), AR1, Tab 8, pg. 324, at para. 11; Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 775.

[7] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 681, at para. 72.

[8] Affidavit of Lin Sallay, sworn January 9, 2025, Exhibit "E" (Sallay Affidavit), AR1, Tab 9, pg. 404.

[9] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 681, at para. 72.

[10] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 683, at para. 77.

11. Notably, a 2010 cost-benefit analysis found that one Vancouver SCS, Insite, saved over $6 million per year by preventing HIV infection and death.[11]

12. The record is clear that SCS are vital access and referral points for HIV, HCV, and other STBBI prevention, screening, treatment, and care.[12] SCS closures and new legal barriers to implementation in Ontario will thus lead to increased risk of HIV and HCV transmission among their clients, while bans on the distribution of sterile injection equipment at Homelessness and Addiction Recovery and Treatment ("HART") Hubs will further contribute to this increased risk of transmission.[13]

B. Impact of SCS closures and new legal barriers to implementation on women and gender-diverse people

13. HIV disproportionally affects women who use drugs in Canada. In 2022, the proportion of reported HIV cases among girls and women 15 years and older attributable to injection drug use was 36.1% compared to 13.1% for boys and men.[14] Gender dynamics such as gender-based violence increase the vulnerability of women who use drugs to drug related harm, including HIV and HCV transmission.

14. Women who use drugs also experience gendered barriers to seeking care, such as fear that knowledge of their drug use will result in the removal of their children into state care.[15] Women who use drugs are overrepresented in SCS,[16] meaning SCS closures and limits to their implementation will disproportionately impact their access to health care. As described in Dr. Ahmed Bayoumi's expert report, in a cohort study of people who use

[11] Affidavit of Lauren Costoff, affirmed January 10, 2025, Exhibit "K" (Costoff Affidavit), AR1, Tab 10, pg. 653.
[12] Sinclair Affidavit, Exhibit "O", AR1, Tab 3, pg. 201; Gauvin Affidavit, AR1, Tab 8, pg. 324, at para. 11.
[13] Affidavit of Dan Werb, sworn January 9, 2025, Exhibit "A" (Werb Affidavit), AR2, Tab A, pgs. 910, 933, and 935.
[14] Canada, Public Health Agency of Canada, *HIV in Canada, Surveillance Report to December 31, 2022* (2024), https://www.canada.ca/content/dam/phac-aspc/documents/services/publications/diseases-conditions/hiv-canada-surveillance-report-december-31-2022/hiv-in-canada-surveillance-report-to-december-31-2022-en.pdf (accessed 27 February 2025), pg. 31.
[15] Sallay Affidavit, AR1, Tab 9, pg. 356, at para. 18.
[16] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 671 at para. 18.

Toronto sites, 30.9% of all clients and 38.1% of clients who accessed SCS for all or most injections were cisgender women.[17]

15. Trust and safe environments are especially important for women and are enhanced in environments with staff with living experience of drug use. In a systematic review of 29 qualitative research studies, SCS were identified as important refuges from structural and everyday violence, where individuals felt protected from the danger associated with street-level drug use.[18] As described in one of the reviewed studies, "[SCS] is a unique controlled environment where women who inject drugs are provided refuge from violence and gendered norms that shape drug preparation and consumption practices. Further, by enabling increased control over drugs and the administration of drugs, the [SCS] promotes enhanced agency at the point of drug consumption."[19] In his report, Dr. Bayoumi describes distinct features of SCS such as their federal exemption from certain drug laws, the absence of police, the employment of people with lived experience of drug use as peer workers, and the incorporation of harm reduction principles. Dr. Bayoumi concludes "no other service for people who use drugs has a similar structure or capacity to provide such services."[20]

16. Moreover, studies show that those who require help injecting are at an elevated risk of injection-related injury and blood-borne infections and that women more often than men require assistance with injection,[21] a need that is met in SCS which are authorized to permit peer assistance for injection.[22]

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[17] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 686, at para. 86.
[18] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 682, at para. 72.
[19] Fairbairn N, Small W, Shannon K, Wood E & Kerr T, "Seeking refuge from violence in street-based drug scenes: Women's experiences in North America's first supervised injection facility" (2008) 67:5 *Social Science & Medicine*, pgs. 817-823, as cited in McNeil R & Small W, "'Safer environment interventions': a qualitative synthesis of the experiences and perceptions of people who inject drugs" (2014) 106 *Social Science & Medicine*, pgs. 151-158; see Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 697, at para 33.
[20] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 692, at para. 117.
[21] Werb Affidavit, Exhibit "A", AR2, Tab A, pg. 953, at para. 22, citing Mitra S, Kolla G, Bardwell G, Wang R, Sniderman R, Mason K, Werb D & Scheim A, "Requiring help injecting among people who inject drugs in Toronto, Canada: Characterising the need to address sociodemographic disparities and substance-use specific patterns" (2022) 41:5 *Drug & Alcohol Review*, pgs. 1062-1070.
[22] Sinclair Affidavit, Exhibit "E", AR1, Tab 3, pg. 126; Sinclair Affidavit, Exhibit "G", AR1, Tab 3, pg. 141; Sinclair Affidavit, Exhibit "O", AR1, Tab 3, pgs. 178, 179, 186, and 187; Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 678, at para. 49.

17. As reported by Street Health's Executive Director Lin Salley, women who access the SCS at Street Health have most often experienced trauma in their lives, and their female clients report feeling safer at their smaller site and supported well by the high number of staff who also identify as female.[23] In a 2019 evaluation of the SCS operated by the Applicant The Neighbourhood Group Community Services and Street Health, clients expressed a strong preference for the small, quiet SCS, and the authors concluded that this is particularly relevant for people who use stimulants, women, and members of 2SLGBTQI+ communities.[24]

18. The closure of SCS and legal barriers to establishing new sites when and where needed undoubtedly means there will be fewer settings that accommodate the specific needs of women and gender-diverse people. Moreover, with fewer SCS available, there will be increased pressure for sites that remain open to accommodate clients who were previously "restricted" due to behavioural concerns, which may put other clients' safety at risk, particularly those who are women and non-binary people, and sexual minorities.[25]

C. Impact of SCS closures and new legal barriers to implementation on homeless people

19. SCS are used most frequently by people who experience intersecting forms of marginalization, particularly homelessness.[26] In Toronto, for example, the record confirms that SCS "are overwhelmingly accessed by people who are homeless or unstably housed."[27] Many SCS offer critical housing support and referrals to housing and shelter services.[28] Among those who are homeless and/or unstably housed, recent SCS use has been associated with a 50% reduction in the prevalence of high-frequency public injecting,

[23] Sallay Affidavit, AR1, Tab 9, pg. 356, at para 18.
[24] Sinclair Affidavit, Exhibit "O", AR1, Tab 3, pg. 180.
[25] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 691, at para. 111.
[26] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pgs. 671 and 682; Werb Affidavit, Exhibit "A", AR2, Tab A, pgs. 910, 928, and 930.
[27] Sallay Affidavit, Exhibit "E", AR1, Tab 9, pg. 423.
[28] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pgs. 775 and 783; Sinclair Affidavit, AR1, Tab 3, pg. 44; Sinclair Affidavit, Exhibit "E", AR1, Tab 3, pgs. 119, 121; Sinclair Affidavit, Exhibit "O", AR1, Tab 3, pg. 201; Salley Affidavit, AR1, Tab 9, pg. 352; Werb Affidavit, Exhibit "A", AR2, Tab A, pg. 929.

strongly suggesting that ensuring access to SCS among the people most likely to inject in public (i.e., those without stable housing) leads to reduced public injecting.[29]

20. When using drugs outside or in public spaces, people are forced to rush, which compromises their ability to use safer injection practices and puts them at higher risk for harms, including overdose and infection. In a Toronto study of people who use drugs, being homeless was associated with a higher rate of having overdosed more than once in the past month (35% vs. 17%).[30] Research also demonstrates that individuals are unlikely to travel far distances to use SCS,[31] a factor that is particularly relevant for people experiencing homelessness because of the structural barriers they face in obtaining transportation.[32]

21. Not only do SCS offer supervision and support with safer substance use practices and access to additional wrap-around services, they provide people experiencing homelessness — who face an elevated risk because of their increased visibility to law enforcement — protection from criminalization.[33] The evidence is thus clear that SCS closures and limits to their implementation will invariably lead to increased drug use-related injury and death and increased risk of criminalization and incarceration for people who use drugs who are homeless or unstably housed, which will in turn have further, negative impacts on their health.

PART III - STATEMENT OF ISSUES, LAW, AND ANALYSIS

Section 7

22. For s. 7 to be engaged, an individual must be deprived of life, liberty, or security of the person and the deprivation must not be in accordance with the principles of fundamental justice.

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[29] Sallay Affidavit, Exhibit "E", AR1, Tab 9, pg. 412.
[30] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 682, at para 75.
[31] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 683, at para 79.
[32] Bayoumi Affidavit, Exhibit "A", AR2, Tab A, pg. 683, at para 80.
[33] Sinclair Affidavit, Exhibit "O", AR1, Tab 3, pgs. 181 and 208.

23. The Court should apply a s. 15 intersectional equality lens to the s. 7 analysis. The Supreme Court has described the equality guarantee as "the broadest of all guarantees," one which applies to, strengthens, and supports all other rights guaranteed by the *Charter*.[34] The *Charter* rights to life, liberty, and security of the person should thus be interpreted in a manner that is consistent with equality principles to ensure that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15.[35] In the present case, the Court must assess the impugned provisions' impact on life, liberty, and security of the person with regard to the realities of persons who access SCS.

24. Closing SCS across Ontario and imposing unjustified barriers to the establishment of new sites will prevent thousands of people living with or affected by HIV and HCV from accessing essential health care and exposes them to a significantly increased risk of overdose, infection, and other drug use related harms. For the disproportionate number of SCS users who are homeless and/or are women, SCS are also an important refuge from structural and everyday violence, where individuals feel protected from danger associated with street-level drug use and from criminalization. For people living with or at risk of HIV, HCV and other STBBIs, SCS are a vital access point for HIV, HCV, and STBBI prevention, treatment, and care.

25. The impugned provisions deprive SCS users of their life by exposing them to an increased risk of death by way of overdose that use of SCS would reduce or eliminate. As the Supreme Court of Canada concluded in *Canada (Attorney General) v PHS Community Services Society*, the inability to continue to provide the supervised services at an SCS deprived the site's clients of "potentially lifesaving medical care, thus engaging their rights to life and security of the person."[36] The Court observed: "where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer."[37] In 2025 compared to 2011, the risk to life for people who use drugs is accentuated by the toxic

[34] *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 185.
[35] *New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 S.C.R. 46 at paras. 112 and 115; *R v Williams*, [1998] 1 S.C.R. 1128, at paras. 48-49; *R v Boudreault*, 2018 SCC 58 at paras. 54-55.
[36] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para. 91.
[37] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para. 93.

drug crisis that kills an average of 21 people per day in Canada[38] and has taken more than 1250 lives between January to June 2024 in Ontario alone.[39] The risk to life is further accentuated for people who use drugs who are homeless because among people who use drugs, being homeless is associated with a significantly higher rate of overdose.

26. The impugned provisions also deprive people living with or at risk of HIV and HCV of their security of the person by hampering their access to sterile drug consumption equipment and safer sex supplies, thereby exposing them to serious dangers to their health including infection with HIV, HCV, and other STBBIs, as well as soft tissue injuries that use of SCS would reduce or eliminate. The Supreme Court in *PHS* acknowledged this fact, quoting Justice Pitfield in the trial decision: "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."[40] Ontario has also banned needle and syringe distribution and safe supply from HART Hubs, a model to which some SCS could transition, despite the fact that sterile drug equipment is necessary to prevent HIV and HCV transmission.

27. Security of the person is also engaged because SCS provide a refuge from various forms of violence that people who use drugs, and particularly people experiencing homelessness and women and gender-diverse people, may experience on the street. Their closure will increase the risk of violence, including gender-based violence, in the context of their drug use and will, in turn, increase their vulnerability to drug-related harms.

28. Finally, the impugned provisions deprive people living with or affected by HIV and HCV of their liberty by exposing them to the punishment of imprisonment even as they seek to protect their health and to minimize the risks of injury, illness, and death by using

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[38] Canada, Federal, provincial, and territorial Special Advisory Committee on Toxic Drug Poisonings, *Opioid- and Stimulant-related Harms in Canada* (2024) https://health-infobase.canada.ca/substance-related-harms/opioids-stimulants (accessed on 27 February 2025).
[39] Canada, Federal, provincial, and territorial Special Advisory Committee on Toxic Drug Poisonings, *Opioid- and Stimulant-related Harms in Canada* (2024) https://health-infobase.canada.ca/substance-related-harms/opioids-stimulants (accessed on 27 February 2025).
[40] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para. 27.

a health facility. This deprivation is particularly pronounced for people who are homeless and will no longer have access to private, indoor, and federally exempted spaces in which to consume drugs safely without risking arrest or incarceration.

29. Applying a s. 15 intersectional equality lens to the s. 7 analysis makes it all the more apparent that these deprivations are not in accordance with the principles of fundamental justice because they are arbitrary — bearing no relation to, or being inconsistent with, the claimed public safety objective that lies behind the impugned provisions, and grossly disproportionate. This is borne out by the vast array of empirical evidence and evaluations associated with SCS in Canada and globally establishing, as recognized by the Supreme Court of Canada and amplified by the current toxic drug crisis, that SCS are vital to people who use drugs in Canada, including in Ontario. SCS closures and limits to implementation will lead to increased public drug use and public intoxication, thus undermining the safety of the broader public with no demonstrated benefits.

International Law

30. The presumption of conformity with sources of international law to which Canada is bound is a firmly established interpretive principle for the *Charter*[41] and courts should be guided by these sources in delineating the content and breadth of s. 7.[42] The arbitrariness of ss. 2 and 3 of the *CCRA* is clearly confirmed by reference to international law and practice, according to which harm reduction is an integral part of the right to health.

31. The right to health is recognized in numerous international instruments by which Canada is bound, including Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, ratified by Canada in 1976, which recognizes the right of everyone to

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[41] *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 at para. 31, citing *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para. 65; *India v Badesha*, 2017 SCC 44 at para. 38; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, at para. 64; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, at para. 150; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para. 23; *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para. 70.
[42] *United States v Burns*, 2001 SCC 7.

the enjoyment of the highest attainable standard of physical and mental health, without discrimination and requires Canada "to take steps… including particularly the adoption of legislative measures" that are necessary for, among other things, "the prevention, treatment and control of epidemic … diseases" and the "creation of conditions which would assure access to all medical services and medical attention in the event of sickness."[43]

32. As described by the United Nations ("UN") High Commissioner for Human Rights, "the right to the highest attainable standard of health applies equally in the context of drug laws, policies and practices, and includes access, on a voluntary basis, to harm reduction services."[44] States therefore have a legal obligation to provide harm reduction services to progressively realize the right to health. The UN High Commissioner for Human Rights further confirmed that "the General Assembly, the Human Rights Council, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment have all considered that harm reduction measures are essential for people who use drugs."[45] The UN Committee on Economic, Social and Cultural Rights, in particular, has repeatedly called on States to provide harm reduction services and eliminate

[43] United Nations General Assembly, *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 999 UNTS 171, (entered into force 3 January 1976), arts. 2 and 12. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

[44] Office of the United Nations High Commissioner for Human Rights, *Human rights challenges in addressing and countering all aspects of the world drug problem. Report of the Office of the United Nations High Commissioner for Human Rights,* Human Rights Council, Fifty-fourth session, 11 September–6 October 2023, A/HRC/54/53, 15 August 2023, https://docs.un.org/en/A/HRC/54/53 at para 11.

[45] United Nations High Commissioner for Human Rights (OHCHR), *Implementation of the Joint Commitment to effectively Addressing and Countering the World Drug Problem with Regard to Human Rights*, A/39/39, September 2018, https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session39/Documents/A_HRC_39_39.docx at para. 17.

obstacles that limit access, especially to the most disadvantaged and marginalized people who use drugs.[46]

33. Similarly, Article 12 of the *Convention on the Elimination of All Forms of Discrimination against Women*, ratified by Canada in 1981, requires Canada to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services."[47] In 2016, the UN Committee on the Elimination of Discrimination against Women ("CEDAW Committee"), tasked with assessing Canada's compliance with the *Convention on the Elimination of All Forms of Discrimination against Women*, looked specifically at access to SCS. In its Concluding Observations, the CEDAW Committee expressed its concerns with "the significant legislative and administrative barriers women face to access supervised consumption services, especially in light of the ongoing nation-wide opioid overdose crisis." The CEDAW Committee thus called on Canada to "define harm reduction as a key element of its federal strategy on drugs, and reduce the gap in health service delivery relating to women's drug use by scaling up and ensuring access to culturally appropriate harm reduction services." The CEDAW Committee further recommended that Canada "establish a transparent process for exemptions permitting the operation of supervised consumption services without risk of criminal prosecution of clients or service providers,"[48] recognizing the right to access SCS for women who use drugs in Canada as an essential element of their right to equal access to health care.

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[46] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Switzerland*, UN Doc. E/C.12/CHE/CO/4, 18 November 2019, https://digitallibrary.un.org/record/3865450/files/E_C.12_CHE_CO_4-EN.pdf at paras 50–51.

[47] United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979*, UN Doc. A/RES/34/180, 18 December 1979, https://www.ohchr.org/sites/default/files/cedaw.pdf, art. 12.

[48] Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, UN Doc. CEDAW/C/CAN/CO/8-9, 18 November 2016, https://docs.un.org/en/CEDAW/C/CAN/CO/8-9 at paras. 44-45.

34. Access to overdose prevention sites has also been recommended by the UN Special Rapporteur on the Right to Health in the context of the COVID-19 pandemic, because these "are essential for the protection of the right to health of people who use drugs."[49]

Section 15

35. To establish a *prima facie* violation of s. 15(1), which guarantees every individual equal protection under the law and freedom from discrimination, a claimant must first demonstrate that the impugned law, "on its face or in its impact", creates a "distinction based on an enumerated or analogous ground".[50] This requires the Court to assess whether the impugned law creates or contributes to a disproportionate impact on the claimant group based on a protected ground.[51]

36. Substantive equality is the "animating norm" of s. 15 of the *Charter*, requiring courts to pay "attention to the 'full context of the claimant group's situation', to the 'actual impact of the law on that situation', and to the 'persistent systemic disadvantages [that] have operated to limit the opportunities available' to that group's members."[52]

37. A robust application of substantive equality requires an intersectional analysis focusing on how the impugned provisions reinforce and perpetuate the disadvantages that affect s. 15 claimants.[53] The Supreme Court has confirmed the importance of a "robust

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[49] United Nations Human Rights Office of the High Commissioner, *Statement by the UN expert on the right to health* on the protection of people who use drugs during the COVID-19 pandemic*, 16 April 2020, https://www.ohchr.org/en/statements/2020/04/statement-un-expert-right-health-protection-people-who-use-drugs-during-covid-19; see also, United Nations General Assembly, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover*, UN Doc.A/65/255 (2010), https://documents.un.org/doc/undoc/gen/n10/477/91/pdf/n1047791.pdf.

[50] *R. v Sharma*, 2022 SCC 39 at para. 28; *R. v C.P.*, 2021 SCC 19 at paras. 56 and 141; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para. 27.

[51] *R. v Sharma*, 2022 SCC 39 at para. 31.

[52] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para. 42, citing *Withler v Canada (Attorney General)*, 2011 SCC 12, at para 43.

[53] Coined by law professor Kimberlé Williams Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chicago Legal F 139:1(8), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf. Intersectionality is a

intersectional analysis" because grounds of discrimination may intersect, compounding an individual's disadvantage.[54] An intersectional approach takes into account the historical, social, and political context and recognizes the unique experience of the individual based on the intersection of all relevant grounds. The approach allows for "fuller appreciation of the discrimination involved."[55]

38. In the present case, the impugned provisions violate s. 15 by imposing differential and discriminatory treatment on people who use drugs, particularly people living with HIV, those experiencing homelessness, and women. Already, people who use drugs — some of whom are living with a substance use disability — are historically disadvantaged, politically marginalized, subject to criminalization for their substance use, face tremendous stigma and discrimination from many health care providers, and uniquely vulnerable because their access to essential health care, including in the form of SCS, is contingent on concerns related to "public safety" that are not applied to other health care services. As the Supreme Court in *PHS* found with respect to the SCS in question, "Insite saves lives. Its benefits have been proven."[56] Despite this finding more than 13 years ago, and decades of empirical evidence since confirming the lifesaving care that SCS provide, people who use drugs continue to be arbitrarily and discriminatorily denied access.

39. The impugned provisions reinforce, exacerbate, and perpetuate disadvantages faced by people who use drugs by closing SCS and contributing to even more inequitable access to health care, including overdose prevention and other harm reduction services, while exposing people who use drugs to increased risk of stigma, violence, and criminalization.

40. The discriminatory and disproportionate effects of the impugned provisions are borne more deeply by individuals who belong to intersecting protected groups. Shuttering SCS and limiting their implementation will impede access to HIV treatment, care, and

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lens to understand how multiple grounds of identity or structural inequalities intersect and compound to form the unique experience of inequality and discrimination.

[54] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras. 116 and 123; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 58; *R. v Sharma*, 2022 SCC 39 at para. 196.

[55] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para. 116.

[56] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para. 133.

support for people who use drugs and are also living with HIV, who represent the protected ground of disability and are among the most stigmatized and marginalized people who use drugs. Without access to SCS, women who use drugs — who face immense barriers to gender-sensitive care — will lose vital spaces that are safe from gender-based harassment and violence. People who use drugs who are experiencing homelessness will also face disproportionately higher risks of overdose and will be forced to consume drugs in public because they have no access to private space, where they are more vulnerable to criminalization and the corresponding loss of liberty.

41. In sum, the impugned provisions violate the s. 15 rights of people who use drugs by perpetuating stigma, inequality, and exacerbating health inequities especially among the most marginalized people who use drugs by treating SCS users as a class undeserving of lifesaving care.

Section 1

The violations of ss. 7 and 15 are not in accordance with the principles of fundamental justice and cannot be saved by section 1. As described in the preceding sections, the impugned provisions are arbitrary and will have grossly disproportionate effects on life, liberty, and security of the person.

PART IV – ORDER SOUGHT

42. The HIV Coalition seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of February, 2025.

SCHEDULE "A" - LIST OF AUTHORITIES

Case Law

No.	Authority	Paragraph Reference
1.	*Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143	185
2.	*New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 S.C.R. 46	112, 115
3.	*R v Williams*, [1998] 1 S.C.R. 1128	48, 49
4.	*R v Boudreault*, 2018 SCC 58	54, 55
5.	*Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44	91, 93, 133
6.	*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32	31
7.	*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54	65
8.	*India v. Badesha*, 2017 SCC 44	38
9.	*Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4	64
10.	*Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62	150
11.	*Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47	23
12.	*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27	70
13.	*United States v Burns*, 2001 SCC 7	
14.	*R. v. Sharma*, 2022 SCC 39 at p. 28, 31	

15.	*R. v. C.P.*, 2021 SCC 19	56, 116, 141, 196
16.	*Fraser v. Canada (Attorney General)*, 2020 SCC 28	27, 42, 116, 123
17.	*Withler v Canada (Attorney General)*, 2011 SCC 12	43, 58

Secondary Sources

No.	Authority	Reference
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2.	Canada, Public Health Agency of Canada, *HIV in Canada, Surveillance Report to December 31, 2022* (2024), https://www.canada.ca/content/dam/phac-aspc/documents/services/publications/diseases-conditions/ hiv-canada-surveillance-report-december-31-2022/hiv-in-canada- surveillance-report-to-december-31-2022-en.pdf (accessed 27 February 2025).	Pg. 31.
3.	Fairbairn N, Small W, Shannon K, Wood E & Kerr T. "Seeking refuge from violence in street-based drug scenes: Women's experiences in North America's first supervised injection facility", (2008) 67:5 *Social Science & Medicine.*	Pgs. 817-823
4.	McNeil R & Small W. "'Safer environment interventions': a qualitative synthesis of the experiences and perceptions of people who inject drugs" (2014) 106 *Social Science & Medicine.*	Pgs. 151-158
5.	Canada, Federal, provincial, and territorial Special Advisory Committee on Toxic Drug Poisonings, *Opioid- and Stimulant-related Harms in Canada* (2024) https://health-infobase.canada.ca/substance-related-harms/ opioids-stimulants (accessed on 27 February 2025).	
6.	United Nations General Assembly, *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 999 UNTS 171, (entered into force 3 January 1976). https://www.ohchr.org/en/instruments-mechanisms /instruments/international-covenant-economic-social-and-cultural-rights.	Articles 2, 12
7.	Office of the United Nations High Commissioner for Human Rights, *Human rights challenges in addressing and countering all aspects of the world drug problem. Report of the Office of the United Nations*	Para. 11.

	High Commissioner for Human Rights, Human Rights Council, Fifty-fourth session, 11 September–6 October 2023, A/HRC/54/53, 15 August 2023, https://docs.un.org/en/A/HRC/54/53	
8.	United Nations High Commissioner for Human Rights (OHCHR), *Implementation of the Joint Commitment to effectively Addressing and Countering the World Drug Problem with Regard to Human Rights*, A/39/39, September 2018, https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session39/Documents/A_HRC_39_39.docx at para. 17.	Para. 17
9.	Committee on Economic, Social and Cultural Rights, *Concluding Observations: Switzerland*, UN Doc. E/C.12/CHE/CO/4, 18 November 2019, https://digitallibrary.un.org/record/3865450/files/E_C.12_CHE_CO_4-EN.pdf	Paras. 50, 51
10.	United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979*, UN Doc. A/RES/34/180, 18 December 1979, https://www.ohchr.org/sites/default/files/cedaw.pdf.	Article 12
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12.	United Nations Human Rights Office of the High Commissioner, *Statement by the UN expert on the right to health* on the protection of people who use drugs during the COVID-19 pandemic*, 16 April 2020, https://www.ohchr.org/en/statements/2020/04/statement-un-expert-right-health-protection-people-who-use-drugs-during-covid-19	
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