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

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

March 03, 2025

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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,

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[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

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[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

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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	
13.	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.	
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Court File No. CV-24-00732861-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE NEIGHBOURHOOD GROUP COMMUNITY SERVICES, KATHERINE RESENDES and JEAN-PIERRE AUBRY FORGUES

Applicants

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

and

BARBARA HALL AND JOHN SEWELL

Interveners

Application under Rule 14.05 of the Ontario *Rules of Civil Procedure*

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PART I. OVERVIEW

1. Nearly 14 years ago, the Supreme Court of Canada in *PHS Community Services* held that the termination of supervised consumption services violated section 7 of the *Charter.*[1] The case currently before this Court involves a challenge to the constitutionality of sections 2 and 3 of the C*ommunity Care and Recovery Act*[2] (the "**Impugned Provisions**" of the "**Impugned Legislation**"), which would result in the closure of many existing safe consumption sites and significantly restrict the establishment of new ones. The interveners, Barbara Hall and John Sewell, have been public advocates for safe consumption sites for decades. They are also former Mayors of the City of Toronto - the municipality containing half of the safe consumption sites that the Impugned Provisions will force to close upon its coming into force.[3]

2. Ms. Hall and Mr. Sewell intervene to make two main submissions. First, the Impugned Provisions will lead to an arbitrary deprivation of life, liberty, and security of the person. Although the Impugned Legislation aims to enhance public health and safety, it in fact undermines these objectives by increasing harm to users of safe consumption sites, who are members of the public. Second, equality is a fundamental principle in the analysis of section 7 of the *Charter.* The principle of substantive equality, which considers the real-life context of marginalized individuals, is essential in assessing the impact of the law on vulnerable groups, including those who use safe consumption sites.

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[1] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 ["***PHS***"].
[2] *Community Care and Recovery Act*, *2024*, S.O. 2024, c. 27, Sched. 4, ss. 2 and 3.
[3] Notice of Application, Application Record ["**AR**"], Tab 1, para. (qq), p. 16.

PART II. FACTS

3. Ms. Hall and Mr. Sewell take no position on the facts as stated by the parties.

PART III. ISSUES AND LAW

A. Arbitrariness as a principle of fundamental justice in the s. 7 analysis

4. A court determines whether an applicant's section 7 rights have been infringed in two parts. First, the Applicants must demonstrate a deprivation of at least one of the three protected interests: life, liberty, and/or security of the person. Here, they allege that the Impugned Legislation deprives individuals of all three interests.[4] Second, the Applicants must demonstrate that the deprivation is not in accordance with the principles of fundamental justice. The Applicants allege that the Impugned Legislation arbitrarily deprives individuals of these interests.[5]

5. Ms. Hall and Mr. Sewell's submissions solely concern the second step of the section 7 analysis. They submit that the Impugned Provisions are arbitrary because the purpose of the Impugned Legislation is to increase public health and safety, and the Impugned Provisions in fact work *against* these goals. Crucial to this analysis is the recognition that users of drugs are members of the public, and their safety is therefore material to what constitutes in the interest of public health and safety.

1. General principles of arbitrariness

6. A provision is arbitrary where its effects are unconnected to the law's object.[6] In conducting the arbitrariness analysis, the Court must ask "whether there is a direct

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[4] Notice of Application, AR, Tab 1, at para. (i), p. 6.

[5] Notice of Application, AR, Tab 1, at para. (i), p. 6.

[6] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para. 35 ["***Bedford***"]; see e.g. *Ewert v. Canada*, 2018 SCC 30, at para. 72; *Robertson v. Ontario*, 2024 ONCA 86, at paras. 76-77.

connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose".[7] In evaluating arbitrariness, a court must consider "not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts".[8] Where the impingement of a person's section 7 interests is more serious, the connection between the legislation and its objective must be more clearly demonstrated.[9]

2. The Purpose of the Impugned Provisions

7. Ms. Hall and Mr. Sewell submit that the purpose of the Impugned Provisions is to further public health and safety.

8. *Sharma* explains that a statement within the impugned legislation constitutes "[t]he most significant and reliable indicator of legislative purpose".[10] Absent such a pronouncement, "courts seeking to identify legislative purpose look to the text, context, and scheme of the legislation and extrinsic evidence, which can...include Hansard, legislative history, government publications and the evolution of the impugned provisions".[11] Statements of purpose that are "[o]verly broad [and] multifactorial…can artificially make impugned provisions unassailable to arguments of overbreadth or arbitrariness" and are to be avoided.[12]

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[7] *Bedford*, at para. 111.
[8] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 131 ["***Chaoulli***"].
[9] *Chaoulli,* at para. 131.
[10] *R. v. Sharma*, 2022 SCC 39, at para. 88 ["***Sharma***"].
[11] *Sharma,* at para. 88.
[12] *Sharma,* at para. 91.

9. The Impugned Provisions do not contain a statement of purpose. However, the preamble of the legislation containing the Impugned Provisions includes the following preamble which alludes to public health and safety:

> The Government of Ontario:
>
> Believes in keeping Ontario communities safe through supported and accountable policing and an efficient and effective justice system.
>
> Is taking action to protect children, families and people struggling with addiction by restricting supervised consumption sites, in line with its belief that addictions treatment is the best way to achieve lasting recovery.[13]

10. The record before this court also includes excerpts from Hansard containing following statements by Minister of Health Sylvia Jones regarding the Impugned Provisions which also evidence a focus on public health and safety:

> "In the communities where supervised consumption sites have been established, there have been reported concerns expressed about community safety."[14]
>
> "Parents are worried about the discarded needles that their children could pick up. Some parents no longer feel comfortable sending their children to the local elementary school or have pulled them out of their local daycare".[15]
>
> "The parents I talk to are desperate that more needs to be done. Our priority must always be to keep our community safe, especially when it comes to protecting our children."[16]
>
> "As we move ahead with this proposed legislation, I also note that our government is introducing new measures to enhance public safety for the remaining sites."[17]

11. Taken together, the legislative preamble and the Hansard-recorded statements of the Minister responsible for the Impugned Provisions all support that the applicable legislative purpose of the Impugned Provisions is to further public health and safety.

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[13] *Safer Streets, Stronger Communities Act*, 2024, S.O. 2024, c. 27 - Bill 223.

[14] Official Report of Debates (Hansard), Exhibit A to the Affidavit of Lauren Costoff, affirmed January 10, 2025 ["**Costoff Affidavit**"], AR, Tab 10A, p. 450.

[15] Official Report of Debates (Hansard), Exhibit A to the Costoff Affidavit, AR, Tab 10A, p. 450.

[16] Official Report of Debates (Hansard), Exhibit A to the Costoff Affidavit, AR, Tab 10A, p. 450.

[17] Official Report of Debates (Hansard), Exhibit A to the Costoff Affidavit, AR, Tab 10A, p. 450.

Indeed, the very naming of the legislation containing the Impugned Provisions as the "Safer Streets, Stronger Communities Act"[18] further supports this conclusion.

12. Defining the Impugned Provisions' purpose as being about "public interest" more generally would be an overly broad and multifactorial statement of purpose of the sort which the Court in *Sharma* warned "can artificially make impugned provisions unassailable to arguments of overbreadth or arbitrariness".[19] By contrast, defining the object of the Impugned Provisions as being for the protection of children specifically would be a "virtual repetition of the challenged provision, divorced from its context" which in turn would artificially guard the Impugned Provisions from review.[20]

13. That Ms. Hall and Mr. Sewell's definition of the Impugned Provision's purpose is at the appropriate level of generality is endorsed by the caselaw. In *PHS*, the Supreme Court considered the Minister of Health's denial of a request to grant a safe consumption site a statutory exemption to the application of the *Controlled Drugs and Substances Act* (CDSA) and its prohibition on possessing illegal drugs. The *PHS* court similarly identified the purpose of the CDSA as being to protect both public health and public safety.[21]

3. The Impugned Provisions are arbitrary

14. The Impugned Provisions arbitrarily deprive claimants of their rights to life, liberty, and security of the person because they impair – rather than enhance – public health and safety by substantially increasing the risk of harm to individuals who use drugs. In *PHS*,

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[18] The *Community Care and Recovery Act, 2024*, S.O. 2024, c. 27, Sched. 4 was passed as a schedule within the *Safer Streets, Stronger Communities Act, 2024*, S.O. 2024, c. 27 - Bill 223.
[19] *Sharma,* at para. 91.
[20] *Sharma,* at para. 87, citing *R. v. Safarzadeh-Markhali,* 2016 SCC 14*,* at para. 27.
[21] *PHS,* at para. 41.

the court similarly concluded that the Minister's denial of the exemption was arbitrary because the evidence suggested that "exempting [the facility] from the application of the possession prohibition does not undermine the objectives of public health and safety, but furthers them".[22]

15. As in *PHS*, the Impugned Provisions "[deprive] the clients of [these facilities] of potentially lifesaving medical care"[23] in a manner that clearly undermines – rather than furthers – health and safety. Crucially, users of drugs and those experiencing addiction are members of the community whose health and safety will be severely negatively impacted by the Impugned Provisions, as closure of safe consumption sites increases the overdose mortality rate, likelihood of "risky" drug use, and transmission of infections diseases.[24] The Impugned Provisions are thus arbitrary in respect of the goals of public health and safety.

16. Although the Impugned Provisions do not create a blanket ban on the operation of safe consumption sites on their face, they *de facto* create such a prohibition for large portions of the province. The evidence in the record demonstrates that, if the Impugned Provisions are upheld, existing safe consumption sites will be forced to close, and that some of these facilities represent the only safe consumption site in a given municipality, or even a broader geographic region. The sites that will be forced to close in Thunder Bay, Kitchener, Hamilton, and Guelph, represent the only such facilities in those

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[22] *PHS,* at para. 131.

[23] *PHS,* at para. 91.

[24] Expert Report of Dr. Ahmed Bayoumi, Exhibit A to the Affidavit of Dr. Ahmed Bayoumi, sworn January 8, 2025 ["**Bayoumi Affidavit**"], AR, Tab 11A, at paras. 107 and 111, pp. 689-90; Expert Report of Dan Werb, Exhibit A to the Affidavit of Dan Werb, sworn January 9, 2025 ["**Werb Affidavit**"], AR, Tab 12A, at p. 933.

respective cities (and, in the case of Thunder Bay, the entirety of Northern Ontario).[25] The record supports the finding that most clients of safe consumption sites will not be able to travel between cities to access treatment because the immediate and emergency nature of a relapse makes delay in obtaining safe consumption unfeasible.[26]

17. In areas where there are multiple safe consumption sites within a municipality – such as in Toronto – and the Impugned Provisions will only shutter some of those facilities, the impact will nonetheless be the same as an outright ban for many individuals because prolonged travel even within a municipality is not reasonably feasible in the circumstances. The record references "research that suggests that people who use drugs will only travel 500m to a [safe consumption site]".[27] This limitation is in large part due to the effects that addiction have had on the stability of clients' living situations, their access to resources, and, as explained above, the need for immediate treatment should relapse occur. The affidavit evidence of Bill Sinclair – the President and CEO of the Neighborhood Group Community Services – helps demonstrate this phenomenon. He explains:

> A significant proportion of [the Kensington Market Overdose Prevention site][28] clients live in the immediate neighbourhood. Very few of our clients travel more than 20-30 minutes walking distance to access KMOPS. There are homeless encampments in Bellevue Square Park, Alexandra Park, and in front of the St. Stephens in-the-Field Church at Bellevue Avenue and College Street, and many of our clients are living in those encampments. As noted above, approximately 80% of our KMOPS clients are experiencing homelessness.[29]

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[25] Notice of Application, AR, Tab 1, at para. (rr), p. 17

[26] Affidavit of Jean-Pierre Aubry Forgues, sworn January 3, 2025, AR, Tab 5, para. 32, p. 307.

[27] Affidavit of Lin Sallay, sworn January 9, 2025, AR, Tab 9, para. 30, p. 360.

[28] This site is operated by TNG, as set out at the Affidavit of Bill Sinclair, sworn January 9, 2025 ["**Sinclair Affidavit**"], AR, Tab 3, para. 3, p. 29.

[29] Sinclair Affidavit, AR, Tab 3, para. 106, p. 54.

18. Mr. Sinclair further explains that, if the Impugned Provisions take effect, the next closest supervised consumption site is located "an approximately 44-minute walk away", a distance which "is simply not tenable for the majority of KMOPS clients" to travel.[30] Consequently, while the Impugned Provisions do not on their face create a total ban on safe consumption sites, they *de facto* operate as such for many individuals.

19. That reality is further enforced by the fact that the existence of any safe consumption site would be inherently precarious because it would be contingent on a daycare or school not opening in their vicinity. This creates a proverbial "whack-a-mole" situation, where – either by strategic design or by happenstance – the addition of new schools or childcare centres to neighbourhoods will crowd out the existence of safe consumption sites. At a certain point, as a matter of logic, even if these facilities can afford the costs and other challenges of relocating – and many will not – the remaining facilities will be pushed further away from the communities they serve, thereby reducing access. This is particularly worrisome in dense urban settings, where daycares and schools are abundant to reflect the community needs.

B. Equality considerations must inform the section 7 analysis

20. Equality "applies to and supports all other rights guaranteed by the *Charter*".[31] The rights guaranteed by the *Charter* are particularized expressions of a "complex of interacting values" that are each fundamental to a free and democratic society.[32] It is

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[30] Sinclair Affidavit, AR, Tab 3, at para. 151, p. 66.

[31] *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 SCR 46, at para. 112 ["***G. (J.)***"].

[32] *R v. Lyons*, [1987] 2 SCR 309, at p. 326.

difficult to imagine a more fundamental value than that of equality—as such, it rightfully animates application of various *Charter* rights.[33]

21. Section 7 is no exception. Equality has long been established as both a foundational *Charter* right and a *Charter* value, representing a touchstone principle that is deeply integrated into Canadian jurisprudence. It is itself a "basic tenet of the legal system," capable of consideration as a principle of fundamental justice.[34] Indeed, the Supreme Court held in *Morgentaler* that an infringement of section 7 that has the effect of infringing another *Charter* right cannot be in accordance with the principles of fundamental justice.[35]

22. In *G.(J.)*, Justice L'Heureux-Dubé stated in her concurring decision that analysis of section 7 rights requires consideration of "the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of section 15."[36] Interpreting the rights of section 7 through the lens of section 15 requires most fundamentally that the law is responsive to the "realities and needs of all members of society [emphasis added]."[37]

23. Consideration of equality is particularly crucial when the impugned state law infringes section 7 in a way that further entrenches historical subjugation, as in the present

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[33] See Peter Hogg, "Equality as a *Charter* Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113.
[34] *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, at para. 31.
[35] *R. v. Morgentaler*, [1988] 1 SCR 30, at p. 175 ["***Morgentaler***"].
[36] *G. (J.)*, at para. 115.
[37] *G. (J.)*, at para. 115.

case. Equality, then, is a necessary consideration for a full understanding of the law's impacts on life, liberty, and security of the person.[38] There are cases, including the present case, where a lack of consideration of marginalization results in an impoverished and incomplete assessment of the facts.

1. Section 7 regularly interacts with and is informed by section 15

24. Courts have regularly taken an approach to section 7 analysis that is informed by section 15 considerations.

(a) In *Morgentaler*, Justice Wilson's determination on the question of whether the law infringed the liberty of the claimants was innately tied to their status as women, noting that the promise of individual liberty "extends to women as well as to men," and that protection of the right to choose was essential for protecting liberty equally for all.[39]

(b) In *G(J.)*, Justice L'Heureux-Dubé found that the interpretive lens of the equality guarantee should influence interpretation of other *Charter* rights, including section 7.[40] Particularly, issues of gender equality guaranteed under section 15(1) were engaged by child protection hearings, and that fairness was particularly important for the interests of parents who were members of other vulnerable groups.[41]

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[38] Kerri A. Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2011) 42:3 Ottawa Law Review 411, 2011 CanLIIDocs 76, at p. 20.
[39] *Morgentaler*, at pp. 170-71.
[40] *G. (J.)*, at para. 112.
[41] *G. (J.)*, at para. 114.

(c) In *Victoria (City) v. Adams*, the British Columbia Supreme Court found that a municipal bylaw prohibiting encampments for those experiencing homelessness imposed "significant and potentially severe additional health risks" on people "who are among the most vulnerable and marginalized of the City's residents."[42] The use of the word "additional" indicates the recognition of the claimant's context—that those experiencing homelessness already face health risks due to their marginalized position in society.

(d) In *R v. Boudreault*, the Court found that mandatory victim surcharges under the Criminal Code violated both section 7 and section 12 of the *Charter*, noting that the charges had a "significant impact on the liberty, security, equality, and dignity" of those charged.[43] Particularly, the Court noted that the charges disproportionately affected members of vulnerable groups—such as those living in poverty, those without housing, and those struggling with addiction—who were represented with "staggering regularity" in criminal courts.[44]

25. Equality considerations were particularly central in *PHS*. The Court's decision made central the vulnerability of Insite's clients, arising from poverty, drug addiction, mental illness (and the de-institutionalization of those suffering from mental illness), past

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[42] *Victoria (City) v. Adams*, 2008 BCSC 1363, at paras. 5 and 194 (aff'd with minor wording changes to the trial judge's order in 2009 BCCA 563).

[43] *R. v. Boudreault*, 2018 SCC 58, at para. 43 ["***Boudreault***"].

[44] *Boudreault*, at paras. 54-55.

sexual and physical abuse and associated trauma, and a lack of housing.[45] The Court's consideration of Insite's clients' innate characteristics and the effect of government policies on these marginalized people is the exact kind of contextual analysis demanded by section 15(1) and substantive equality generally.[46]

26. Each of the above cases involve the recognition that the position of the claimant in society has implications on the claim itself. A court approaching section 7 ignoring the vulnerability or marginalization of the claimant cannot guarantee the equal benefit and responsiveness of the law, as demanded by section 7 and the *Charter* as a whole.[47]

2. Analysis under section 7 must be informed by substantive, rather than formal, equality

27. Meaningful equality, as defined in Canadian jurisprudence, is substantive rather than formal in nature. As such, any approach to section 7 must be informed by substantive equality.

28. Formal equality demands that the similarly situated are similarly treated. This conception of equality is deficient because it assumes that identical application produces identical effects—the focus is on application of the law, ignoring the social context surrounding its application. That is, marginalized groups may need to be treated differently than dominant groups for true equality to be achieved. Substantive equality, conversely, demands attentiveness to the larger context of the claimant and their position

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[45] *PHS*, at paras. 4-8.

[46] See Suzy Flader, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice Under Section 7 of the *Charter*" (2020) 25 Appeal 43, 2020 CanLIIDocs 1668, at p. 50.

[47] *G. (J.)*, at para. 115.

in society, the impact of laws or state action on this position, and the "persistent systemic disadvantages" operating around them.[48]

29. The above cases illustrate the integration of substantive, rather than formal, equality into section 7 analysis. Each decision meets the claimants or affected individuals in the actual context of their lives. For example, Justice Wilson's decision in *Morgentaler*, based as it was on the fact that liberty extends to women and men equally, involves recognition that the "central part of the sphere of liberty" looks different to men and women. Thus, equal application and true protection of liberty requires thoughtful and contextual consideration of women's position in Canadian society and the impact of a law on their specific liberty interests.

3. The Impugned Provisions do not meaningfully consider the lived realities of safe consumption site users

30. As outlined above, Ms. Hall and Mr. Sewell submit that the Impugned Provisions are arbitrary. Applying the lens of section 15(1) to this determination illuminates that the law's arbitrariness in part stems from its lack of consideration for those who will most keenly feel its impact.

31. Those who experience the precarity of drug addiction, homelessness, poverty, and mental illness in Ontario are deeply aware of the ways that marginalization can affect every element of a person's life and become transformative to one's lived experiences. There is, of course, no neutral person receiving the care given in safe consumption sites, divorced from the larger context of their life. As the record indicates, those receiving such

[48] *Withler v. Canada (Attorney General)*, 2011 SCC 12, at para. 43.

care are "highly marginalized, and in particular disproportionately affected by poverty and homelessness."[49]

32. Testimony from those accessing safe consumption sites indicates their personal experience with abuse and struggles with mental illness, an entirely common occurrence for those who struggle with drug addiction.[50] As in the cases outlined above, this court must recognize the lived reality of clients at safe consumption sites, which heightens the law's effects on their section 7 interests. Where an impugned law has the potential to further marginalize those that are already vulnerable, an approach informed by substantive equality, involving consideration of the affected individuals' context and the law's effect on their situation, is required.

33. Such consideration in this case leads to the inevitable finding that the Impugned Provisions will have harmful effects on clients at safe consumption sites—who are themselves members of the communities in which they live—such that the law is not responsive to their realities and needs.

34. Equality demands that those who are historically disadvantage must be protected, and their position ameliorated wherever possible. Instead, the Impugned Provisions will operate to remove protection and further create further disadvantage in ways that are both at odds with substantive equality and infringe section 7 of the *Charter*.

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[49] Expert Report of Dr. Ahmed Bayoumi, Exhibit A to the Bayoumi Affidavit, AR, Tab 11, at para. 78, p. 683.

[50] Affidavit of Katharine Resendes, AR, Tab 4, at para. 7, p. 284; Affidavit of Nicole Horsford, AR, Tab 6, at paras. 3 and 7, p. 312-13; *PHS*, at paras. 4-8.

PART IV. ORDER REQUESTED

35. Ms. Hall and Mr. Sewell take no position on the disposition of this case.

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

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SCHEDULE "A"

LIST OF AUTHORITIES

Case Law

1. *Canada (Attorney General) v. Bedford*, 2013 SCC 72
2. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44
3. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35
4. *Ewert v. Canada*, 2018 SCC 30
5. *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 SCR 46
6. *R. v. Boudreault*, 2018 SCC 58
7. *R v. Lyons*, [1987] 2 SCR 309
8. *R. v. Morgentaler*, [1988] 1 SCR 30
9. *R. v. Safarzadeh-Markhali,* 2016 SCC 14
10. *R. v. Sharma*, 2022 SCC 39
11. *Robertson v. Ontario*, 2024 ONCA 86
12. *Victoria (City) v. Adams*, 2008 BCSC 1363 (aff'd in 2009 BCCA 563)
13. *Withler v. Canada (Attorney General)*, 2011 SCC 12

Secondary Sources

1. Flader, Suzy, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice Under Section 7 of the *Charter*" (2020) 25 Appeal 43, 2020 CanLIIDocs 1668
2. Froc, Kerri A, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2011) 42:3 Ottawa Law Review 411, 2011 CanLIIDocs 76
3. Hogg, Peter, "Equality as a *Charter* Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113

SCHEDULE "B"
RELEVANT LEGISLATIVE PROVISIONS

Safer Streets, Stronger Communities Act, 2024, S.O. 2024, c. 27 - Bill 223

Preamble
The Government of Ontario:
Believes in keeping Ontario communities safe through supported and accountable policing and an efficient and effective justice system.
Is taking action to protect children, families and people struggling with addiction by restricting supervised consumption sites, in line with its belief that addictions treatment is the best way to achieve lasting recovery.
Is committed to fighting auto theft and careless driving in Ontario with enhanced oversight of commercial motor vehicles and stronger penalties.
Is working to give police the tools that will assist them in keeping our communities safe from sex offenders.
Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

***Community Care and Recovery Act, 2024*, S.O. 2024, c. 27, Sched. 4**

Prohibition re location of supervised consumption site
2 (1) Subject to subsection (4), no person shall establish or operate a supervised consumption site at a location that is less than 200 metres, measured in accordance with subsection (2), from a designated premises.

Measurement
(2) Subject to the regulations, the distance mentioned in subsection (1) shall be measured in accordance with the following rules:

1. The distance shall be measured from the geometric centre of the building in which a supervised consumption site is located.
2. In the case of a school, the distance shall be measured to the door primarily used by the public to enter the building in which the school is located for the purpose of accessing the area where the school operates.
3. In the case of a private school, the distance shall be measured from,
    i. the centre of the building in which the school is located, as determined by the private school and made available on a Government of Ontario website, or
    ii. if the private school is located only in a portion of a building, the centre of the portion of the building in which the school is located,

as determined by the private school and made available on a Government of Ontario website

4. In the case of a child care centre or EarlyON child and family centre, the distance shall be measured to the geographic coordinates of the street address of the child care centre or EarlyON child and family centre, determined through the use of software or a web service that implements an address geocoding process.
5. In the case of a premises prescribed for the purposes of clause (e) of the definition of "designated premises" in section 1, the distance shall be measured to the point specified in the regulations.
6. If the measurement results in a number of metres that is not a whole number, the number shall be rounded up to the nearest whole number.

Geocoding

(3) If the regulations provide for a specific software or web service for the purposes of paragraph 4 of subsection (2), the distance to a child care centre or EarlyON child and family centre shall be measured using the prescribed software or web service.

Exception

(4) If a private school began providing instruction or a child care centre began operating after the day the *Safer Streets, Stronger Communities Act, 2024* received Royal Assent, subsection (1) does not apply to a supervised consumption site with respect to the private school or child care centre, as the case may be, until the day that is 30 days after the day the private school began providing instruction or the child care centre began operating.

Same

(5) Despite subsection (4), if the Minister specifies a day on which subsection (1) applies to a supervised consumption site, subsection (1) applies to the supervised consumption site as of that day.

Application for exemption to decriminalize

3 (1) Subject to such exceptions as may be prescribed, despite sections 7 and 8 of the *City of Toronto Act, 2006* and sections 9, 10 and 11 of the *Municipal Act, 2001*, a municipality or local board does not have the power to apply to Health Canada for an exemption under subsection 56 (1) of the *Controlled Drugs and Substances Act* (Canada) from any provision of that Act for the purpose of decriminalizing the personal possession of a controlled substance or precursor.

Applications related to supervised consumption sites, safer supply services

(2) Subject to such exceptions as may be prescribed, despite sections 7 and 8 of the *City of Toronto Act, 2006* and sections 9, 10 and 11 of the *Municipal Act, 2001*, a municipality or local board does not have the power, without the approval of the Minister, to do any of the following:.

1. Apply to Health Canada for an exemption or a renewal of an exemption to the *Controlled Drugs and Substances Act* (Canada) for the purpose of operating a supervised consumption site.
2. Apply to Health Canada for funding under Health Canada's Substance Use and Addictions Program or any other Health Canada program in respect of safer supply services, or enter into an agreement with the Government of Canada with respect to funding under such a program in respect of safer supply services.
3. Support, including by passing a by-law or making a resolution, an application made to Health Canada by any other person in respect of any matter described in paragraph 1 or 2.

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

Life, liberty and security of person

7 Everyone has the 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.

Equality before and under law and equal protection and benefit of law

15 (1) 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.

Court File No. CV-24-00732861-0000

THE NEIGHBOURHOOD GROUP COMMUNITY SERVICES et al.	**-and-**	**HIS MAJESTY THE KING IN RIGHT OF ONTARIO**
Applicants		Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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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 AUBRY FORGUES

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

FACTUM OF THE INTERVENER HARM REDUCTION SERVICE PROVIDERS COALITION

February 27, 2025

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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 AUBRY FORGUES

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

FACTUM

TABLE OF CONTENTS

PART I: OVERVIEW

1. The Harm Reduction Services Providers Coalition (the "**HRSPC**") is comprised of eight members representing sectors of the harm reduction community in Ontario: the Registered Nurses of Ontario, six health centres operating safe consumption sites that will remain open after the *Community Care and Recovery Act* ("**CCRA**") comes into force[1], and one safe consumption site that the CCRA will close.

2. The CCRA's *Charter* infringements reach beyond the safe consumption sites that the CCRA will close. This factum explains how the CCRA infringes the *Charter* rights of clients at safe consumption sites that will remain open. We focus on two aspects of these infringements.

3. First, by delaying access to life saving services, the CCRA implicates the section 7 life and security interests of clients of safe consumption sites that will remain open. The CCRA risks death, physical, and psychological injury even for clients of safe consumption sites that are not shuttered by the CCRA. The CCRA will strain safe consumption sites that remain open, especially in downtown Toronto, by closing nearby safe consumption sites. The safe consumption sites in Toronto that remain open do not have capacity to accommodate the expected influx of clients from the nearby closed sites. Unprecedented queuing will delay or prevent access to safe consumption services for present clients. Delayed access risks physical and psychological injury and death given the time sensitivity of safe consumption services and the risks of unsupervised drug use. 40 years of Supreme

[1] *Community Care and Recovery Act*, 2024, SO 2024, c27, Sch 4 ["**CCRA**"].

Court jurisprudence has held that state conduct implicates s.7 life and security interests when it delays access to health services, increasing risk of injury or death to the person.

4. Second, the effect on safe consumption sites that remain open illustrates the CCRA's overbreadth. Because the CCRA will overwhelm some safe consumption sites that remain open (i.e. that are more than 200 metres away from "designated entities"), the CCRA will prevent individuals from accessing care outside the purported geographic ambit of the CCRA. The CCRA will therefore affect safe consumption sites and individuals not connected to the law's purported purpose. The CCRA is consequently overbroad, and its infringement of the s. 7 rights of clients of open safe consumption sites is inconsistent with the principles of fundamental justice.

PART II: SUMMARY OF THE FACTS

A. The CCRA will close certain safe consumption sites in Ontario, including half of the sites in Toronto

5. Section 2 of the CCRA prohibits the operation of safe consumption sites within 200m from a school, childcare centre, and other designated entities.[2] In anticipation of the April 1, 2025 coming into force date, Ontario has identified ten safe consumption sites across Ontario that will close under s. 2 of the CCRA.[3]

6. The closures will leave some regions of Ontario without any access to safe consumption services. For instance, the CCRA will close the only safe consumption site in all of Northwestern

[2] CCRA, s 2.
[3] Application Record, Volume 2, Tab 11, Affidavit of Ahmed Bayoumi sworn January 8, 2025, Exhibit A, Report of Dr. Bayoumi at para 81, page 683, citing: https://news.ontario.ca/en/backgrounder/1004956/protecting-community-safety-and-connecting-more-people-to-addiction-recovery-care.

Ontario, Path 525, which is located in Thunder Bay.[4] The next closest safe consumption site is 1,200km away in Guelph, making it impracticable for the residents of Thunder Bay to access safe consumption services elsewhere.[5]

7. In Toronto – the most densely population region in the province – the CCRA will close half of the total safe consumption sites. Toronto presently has 10 safe consumption sites.[6] The CCRA will close five.[7]

B. The CCRA will strain safe consumption sites that remain open

8. When a safe consumption site closes, clients are likely to use an alternative site if there is one in very close proximity. This diversion of clients is anticipated at certain safe consumption sites located in downtown Toronto following the closure of nearby sites under the CCRA. The sites that will remain open in downtown Toronto – many of which are operated by members of the HRSPC – will be referred to collectively as "**Open SCSs**".

9. One example of an Open SCS is Street Health, a member of the HRSPC. Street Health operates a safe consumption site in an area of downtown Toronto associated with the most suspected opioid overdose calls to Toronto Paramedic Services.[8] The same area is serviced by three other safe

[4] Application Record, Volume 1, Tab 8, Affidavit of Holly Gauvin sworn January 8, 2025, at para 9.
[5] Application Record, Volume 1, Tab 8, Affidavit of Holly Gauvin sworn January 8, 2025, at paras 13-14.
[6] Application Record, Volume 2, Tab 11, Affidavit of Ahmed Bayoumi sworn January 8, 2025, Exhibit A, Report of Dr. Bayoumi at para 81, page 683
[7] Application Record, Volume 2, Tab 11, Affidavit of Ahmed Bayoumi sworn January 8, 2025, Exhibit A, Report of Dr. Bayoumi at para 81, page 683.
[8] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at paras 23-25.

consumption sites,[9] all of which the CCRA will close. The Street Health operated safe consumption site will remain open under the CCRA.

10. Street Health anticipates being overwhelmed by a deluge of clients from nearby safe consumption sites following the CCRA closures.[10] The closing safe consumption sites around Street Health are between three to ten times larger than Street Health's site.[11] Street Health is developing a contingency plan in anticipation of the increased demand, but believes that none of its steps will suffice.[12] It ultimately expects queues of clients lined out the doors of its safe consumption site.[13]

11. Street Health will have to divert its nursing or other staff to monitor for safe consumption and possible overdosing in the lineups.[14] Given Street Health's inability to accommodate the influx, it expects that clients waiting in queues will use drugs outdoors while waiting for services.[15] It expects its nursing and reception staff will need to respond to an increased number of overdoses outside as a result.[16] Street Health expects that its staff will suffer from considerable moral and emotional fatigue from the inevitable increase in overdose deaths in Street Health's community.[17]

12. Street Health is not the only Open SCS in this position. The safe consumption sites operated by HRSPC member Parkdale Queen West Community Health Care Centre anticipates a diminished

[9] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at paras 27-28.
[10] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at para 25.
[11] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at paras 32-34.
[12] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at para 36.
[13] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at para 37.
[14] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at para 37.
[15] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at para 37.
[16] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at para 37.
[17] Application Record, Volume 1, Tab 9, Affidavit of Lin Sallay sworn January 9, 2025 at para 38.

ability to service regular clients because of disproportionate pressure on its nursing staff following CCRA closures and the resulting influx of clients to its site.[18]

PART III: ISSUES & THE LAW

13. The HRSPC makes two submissions in respect of the *Charter* implications of the CCRA in relation to Open SCSs:

(i). the CCRA engages the s.7 life and security interests of present clients of Open SCSs, and

(ii). these s. 7 deprivations are overbroad because they are unrelated to the CCRA's purported purpose.

A. The CCRA engages the section 7 life and security interests of the Open SCSs' clients

14. The CCRA-caused influx at Open SCSs will delay services to clients who presently have immediate access to the site. The delay risks physical and psychological injury to clients which implicates their life and security interests.

1) The applicable law regarding delaying or restricting access to health services

15. Life interests are engaged where state action "imposes death or an increased risk of death on a person, either directly or indirectly."[19] Security interests are engaged by state inference with a

[18] Application Record, Volume 2, Tab 13, Affidavit of Gab Laurence affirmed January 9, 2025 at paras 32-35.
[19] *Carter v. Canada (Attorney General),* 2015 SCC 5 at para 62 [*Carter*].

person's physical or psychological integrity,[20] including state action that causes physical or serious psychological suffering.[21]

16. For 40 years, the Supreme Court of Canada has held that a law that creates a risk to health by preventing or delaying access to serves engages a person's s. 7 interests.

17. In *PHS v Canada*, the Supreme Court held that denying clients access to a safe injection site's health services violated their section 7 life, liberty, and security interests.[22] An issue before the court was whether the Minister's refusal to exempt a safe injection site, Insite, from offences under the *Controlled Drugs and Substances Act* violated the s. 7 interests of clients of the site.[23] The Supreme Court recognized a s. 7 breach because (1) clients needed to possess drugs at the safe injection site to make use of Insite's "lifesaving and health-protecting" services, and (2) without the exemption, it was illegal for clients to possess drugs at Insite. [24] Consequently, denying the exemption was to deny the clients access to life-saving services which implicated their security and life interests. The Supreme Court affirmed that "where a law creates a risk to health by preventing access to health care, a deprivation of the rights to security of the person is made out".[25] The same law will deprive the life interests of a person if it creates a risk of death.[26]

18. Prior to *PHS*, in the context of the Quebec *Charter*, the Supreme Court held in *Chaoulli v. Quebec (Attorney General)*[27] that the state prohibition on obtaining private insurance for public

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[20] *Carter* at para 64.
[21] *Carter* at para 64.
[22] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 4 at para 93 [*PHS*].
[23] *PHS* at para 116.
[24] *PHS* at paras 92 and para 126.
[25] *PHS* at para 93.
[26] *PHS* at para 93: "Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer."
[27] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*]

health care services violated the s. 7 life and security interests of the person. At issue were provisions of the *Health Insurance Act* that prohibited private health insurance for Quebeckers.[28] The applicants argued that the prohibition delayed access to treatment because it resulted in long wait lines at hospitals which could be avoided if patients could pay for private services.[29] The resultant delays in receiving treatment exacerbated conditions or could have resulted in death. [30] The Court held that the law infringed the security and life interests of Quebeckers by denying them a "solution" that would permit them to avoid long waitlists.[31] The Court acknowledged that "Canadian jurisprudence shows supports for interpreting the right to security of the person generously in relation to delays".[32]

19. The Supreme Court's legacy in striking down laws under s. 7 because they delayed access to health services goes as far back as 1988 to *R v Morgentaler*.[33] At issue were provisions of the *Criminal Code* that required people to obtain a certificate from a therapeutic abortion committee of an accredited hospital before they could seek abortion services. The process of obtaining a certificate delayed the abortion by one to six weeks, which created the risk of complications or death for the person.[34] The Supreme Court held that the delay infringed on the life and security interests of the person. For the majority, the infringement flowed from (1) the risk to health caused by delayed access to abortion services,[35] and (2) the psychological distress women experience when

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[28] *Chaoulli* at para 2.
[29] *Chaoulli* at para 2.
[30] *Chaoulli* at paras 40, 42.
[31] *Chaoulli* at para 45.
[32] *Chaoulli* at para 43.
[33] *R. v. Morgentaler*, 1988 CanLII 90 (SCC) [*Morgentaler*].
[34] *Morgentaler*, 1988 CanLII 90 (SCC) at page 58-59.
[35] *Morgentaler*, 1988 CanLII 90 (SCC) at page 59.

forced to wait for an abortion.[36] For the concurrence, the infringement flowed from the additional risk to health caused by delayed access to a service. [37]

20. The Supreme Court's jurisprudence cumulatively entails that state conduct that delays or restricts a person's access to existing health protecting services engages the person's section s. 7 interests. The security interest is engaged where the delay risks physical or psychological injury. The life interest is engaged when the delay results in death or creates an additional risk of death.

2) The CCRA's section 7 infringements

21. For present clients of Open SCSs, delayed access to the site from CCRA closures risks physical and psychological injury and death. The Supreme Court jurisprudence shows the CCRA, in causing these consequences, infringes on the s. 7 life and security interests of the clients of Open SCSs.

22. Safe consumptions sites provide time-sensitive and lifesaving services. The Supreme Court acknowledged this in *PHS* by affirming the trial judge's finding that safe consumption sites ameliorate the risk of "morbidity and mortality" associated with addiction and drug injection.[38] The risks associated with drug use include overdose which can cause death, irreversible brain injury, or cardiac disease.[39] To mitigate these risks, clients rely on access to safe consumption sites, which are

[36] *Morgentaler* at page 60.
[37] *Morgentaler* at page 101.
[38] *PHS* at para 93.
[39] Application Record, Volume 2, Tab 11, Affidavit of Ahmed Bayoumi, Exhibit A, Report of Dr. Bayoumi at para 63, page 680.

adept at monitoring and preventing overdoses.[40] Access to safe consumption must be timely to prevent the onset of withdrawal symptoms.[41]

23. Consequently, delayed access to a safe consumption site can:

(i). create additional risk to the person's health through overdose related injury;

(ii). create an additional risk of death for the person by increasing the risk of overdose; and

(iii). generate immense psychological distress in persons who need to consume opioids before withdrawal symptoms set in but cannot access their usual safe consumption site to consume safely.

24. The CCRA closures will delay present clients' access to their Open SCSs. As noted above, the closures will divert the clients of closing safe consumption sites to nearby Open SCSs, which are not equipped to service the increased volume of clients. The closures will therefore invariably lead to queuing outside the Open SCS, delaying clients' access to the safe consumption services.

25. The CCRA-caused delay will increase the risk of injury and death for clients as described above at para 23. In the context of s. 7, there needs to be a "sufficient causal connection" between the state conduct and the effect to make out a *Charter* deprivation.[42] This standard requires something more than a speculative link, but the state action need not be the only or dominant cause

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[40] See for instance the comprehensive overdose prevention and reversal protocol at the safe consumption site operated by Parkdale Queen West Community Health Centre, as described in Application Record, Volume 2, Tab 13, Affidavit of Gab Laurence affirmed January 9, 2025, at paras 22-28.
[41] Application Record, Volume 2, Tab 11, Affidavit of Ahmed Bayoumi, Exhibit A, Report of Dr. Bayoumi at para 80, page 683. Also see para 22 at page 673 and the associated footnote 1.
[42] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para 75 [*Bedford*].

of the deprivation.[43] A sufficient causal connection can be satisfied through a reasonable inference.[44] In this case, given the size of the closing safe consumption sites and the fact there are Open SCSs in close proximity to closing sites, it is reasonable to infer that the closure of safe consumption sites in downtown Toronto will in fact overwhelm nearby Open SCS. Given the time sensitive and lifesaving nature of safe consumption services, it is also reasonable to infer that the resulting delay of services at Open SCSs will cause injury or increase the risk of death for at least some clients.

26. Consequently, the CCRA, in causing the delay that will result in injury and increased risk of death, infringes on the security and life interests of present clients of Open SCSs. The weight of the Supreme Court jurisprudence limits Ontario from restricting or delaying clients' access to safe consumption sites that already exist.

B. The CCRA's *Charter* infringements are overbroad

27. The CCRA's s. 7 deprivations are overbroad and inconsistent with the principles of fundamental justice. In this section, we focus on the CCRA's overbreadth as it pertains to clients of safe consumption sites that will remain open.

28. A law is overbroad if it denies the rights of some individuals in a way that bears no relation to the law's objective.[45] Overbreadth is not concerned with broad social impacts. Rather, the inquiry focuses on the impact of the law on individuals whose s. 7 interests are trammelled.[46] A law that is

[43] *Bedford* at para 76.
[44] *Bedford* at para 76.
[45] *Carter* at para 85.
[46] *Carter* at para 85.

broadly drawn simply to make its enforcement more practical will be inconsistent with the principles of fundamental justice.[47]

29. The CCRA's purported purpose includes "taking action to protect children, families and people struggling with addiction by restricting supervised consumption sites, in line with its belief that addictions treatment is the best way to achieve lasting recovery."[48]

30. The CCRA purports to do so by closing all safe consumption sites that are within 200m of schools, childcare centers, and other designated entities – presumably on the flawed theory that safe consumption sites pose a safety risk within their immediate communities.

31. However, the CCRA's impacts on the Open SCSs are unrelated to the CCRA's purpose. They exceed its geographic ambit. Ontario attempted to avoid contravening the holding in *PHS* by purporting to legislate only in relation to a 200-metre radius around designated entities. The law is supposed to affect safe consumption sites near daycares and schools. However, because of the effects on safe consumption sites that will remain open, the CCRA closures violate the security and liberty interests of the clients of sites that are not within 200 metres of designated entities.

32. The CCRA's impacts on clients of Open SCSs are consequently overbroad, affecting people who have no relation to the law's purported objective. The CCRA's overbroad *Charter* infringements against clients of Open SCSs are therefore inconsistent with the principles of fundamental justice.

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[47] *Carter* at para 85.
[48] See preamble of the *Safer Streets, Stronger Communities Act*, 2024, S.O. 2024, c. 27, which is the Act creating the CCRA under Schedule 4.

PART IV: ORDER REQUESTED

33. HRSPC seeks no costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 27TH DAY OF FEBRUARY 2025

Per

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1. *Carter v. Canada (Attorney General)*, 2015 SCC 5.
2. *Canada (Attorney General) v. PHS*, 2011 SCC 44.
3. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.
4. *R. v. Morgentaler*, 1988 CanLII 90 (SCC).
5. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

THE NEIGHBOURHOOD GROUP COMMUNITY SERVICES et al.	-and-	**HIS MAJESTY THE KING IN RIGHT OF ONTARIO**
Applicants		Respondent

Court File No. CV-24-00732861-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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ONTARIO

SUPERIOR COURT OF JUSTICE

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KATHERINE RESENDES AND JEAN-PIERRE AUBRY FORGUES

Applicants

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

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> Rates of opioid-related harms are consistently higher among First Nations people, which is a result of trauma from colonization and residential schools, the erosion and destruction of First Nation languages and culture, and continued barriers faced when accessing health care services.[1]

1. In the unanimous Supreme Court decision *Canada (Attorney General) v. PHS Community Services Society*,[2] McLachlin C.J. movingly described how many people who relied on Insite's supervised injection site had a history of past trauma, saying, "Injection drug use is both an effect and a cause of a life that is a struggle on a day to day basis.[3]"

2. Today, almost 14 years since that decision, there is a better understanding that for a disproportionate number of people who depend on such sites, that shared history includes experiences unique to Indigenous people and that access to such services are an essential tool to "ensure the protection of the 'sacred breath of life'" of Indigenous community members.[4] This knowledge must inform the analysis in this case.

I. SUBMISSIONS OF ABORIGINAL LEGAL SERVICES

3. In these submissions, Aboriginal Legal Services (ALS) will make three arguments:

    1. Indigenous people are more affected by the opioid drug crisis and will be disproportionately affected by the closure of supervised consumption sites ("SCS") in Ontario;

    2. Sections 2 and 3 of the *Community Care and Recovery Act* ("*CCRA*") violates. 15 of *Canadian Charter of Rights and Freedoms* (the "*Charter*") in relation to Indigenous people who use SCS; and

    3. The implications of the *CCRA* on the equality rights of Indigenous people must inform this Honourable Court's interpretation of s. 7, particularly the determination

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[1] Ontario Drug Policy Network & Chiefs of Ontario, "Opioid Use, Related Harms, and Access to Treatment among First Nations in Ontario Annual Update, 2013 – 2021" (November 2023) https://odprn.ca/wp-content/uploads/2023/11/Opioid-Use-Among-First-Nations-Annual-Update-2023.pdf at p. 9; also appears as Exhibit A to the Affidavit of Brianna Olson Pitawanakwat, affirmed January 20, 2025 [*ODPRN*]

[2] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134, https://canlii.ca/t/fn9cf [*PHS*]

[3] *PHS* at para. 7

[4] *ODPRN* at p. 29

of whether there is a violation of s. 7 and whether the effects of the *CCRA* are grossly disproportionate to any legitimate government interest.

1. Indigenous people are more affected by the opioid drug crisis and will be disproportionately affected by the closure of SCS in Ontario

4. Ontario is home to the largest population of Indigenous people in Canada.[5] There are 133 First Nation communities. There are also significant Indigenous communities in urban centers including Thunder Bay, Ottawa, and Toronto.[6]

5. Brianna Olson Pitawanakwat's Affidavit accurately summarizes the evidence available in this case concerning Indigenous people and SCS:

    1. As a result of policies such as community displacement, residential schools, and removal of children by child welfare agencies, Indigenous people have higher rates of use of opiate drugs and experience higher rates of harm, including hospital visits and death;

    2. harm-reduction approaches, including SCS are protective for Indigenous people; and;

    3. in Ontario, SCSs are disproportionately used by Indigenous people.[7]

6. It is important to recognize the roots of Indigenous people's experiences with mental illness, including substance abuse disorders. As set out in the Affidavit of Ms. Pitawanakwat:

> Indigenous people have experienced unique harms as a result of colonization. These include forced attendance at residential and day schools, over-representation in the child welfare system, increased victimization, poverty, and homelessness. All of these increase people's vulnerability to drug-related harms."[8]

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[5] Canada, Indigenous Services Canada, *An update on the socio-economic gaps between Indigenous Peoples and the non-Indigenous population in Canada: Highlights from the 2021 Census* (October 2023) https://www.sac-isc.gc.ca/eng/1690909773300/1690909797208

[6] Canada, Indigenous Services Canada, *Indigenous Communities in Ontario* (November 2021) https://www.sac-isc.gc.ca/eng/1603371542837/1603371807037

[7] Affidavit of Brianna Olson Pitawanakwat, sworn January 20, 2025. Neither the Applicant nor the Respondent requested to cross-examine Ms. Pitawanakwat about her evidence.

[8] Affidavit of Brianna Olson Pitawanakwat, sworn January 20, 2025 at para. 9

7. One indicator of such harms is opioid-related hospital visits. A report produced by the Chiefs of Ontario and the Ontario Drug Policy Research Network found that in 2021 the rate of hospital visits for opioid –related toxicity by First Nations people was nine times higher than the rate for non-First Nations people.

8. The rate of such hospital visits was highest for people living outside of First Nation communities.[9] This is important because too often an assumption is made that First Nations people only live on remote reserves. This seems to be the view of Dr. Sharon Koivu, who in her expert report addresses the disproportionate impact of the opioid crisis on Indigenous communities, but appears to be only discussing northern Ontario.[10] In addition to Dr. Ahmed Bayoumi's critique that the comparisons Dr. Koivu draws between communities in this section of her Affidavit are "flawed" and rely on a "crude approach to data analysis"[11], her approach also fails to acknowledge the large Indigenous populations in urban centres throughout Ontario. This is especially significant in the case of drug-related harms, since not only was the rate of hospital visits higher among First Nations people living off reserve, but that rate increased more rapidly over time than it did on reserves.[12] This suggests that the opioid crisis as experienced specifically by Indigenous communities is more intense and getting worse faster in urban areas.

9. Tragically, the reality that Indigenous people bear a disproportionate amount of opioid-related harms is also reflected in rates of deaths, which are much higher and increased more rapidly among First Nations people. The Chiefs of Ontario report also found that in 2021 the

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[9] *ODPRN* at p.23
[10] Affidavit of Dr. Sharon Koivu, sworn January 24, 2025, Responding Record vol. 4, pp. 1867-1903 at para. 95
[11] Affidavit of Dr. Ahmed Bayoumi, sworn February 7, 2025, Reply Application Record, pp. 361-363 at paras. 44-45
[12] *ODPRN* at p.23

rate of opioid-related deaths was more than seven times higher among First Nations people compared to non-First Nations people.[13] Such losses have a profound impact on individuals[14] and leave communities dealing with more grief and trauma.[15]

10. The reality that Indigenous people experience increased harms as a result of the opioid drug crisis is recognized by the Ontario government. The press release announcing the HART hubs highlighted money earmarked for the Indigenous Supportive Housing Program[16] and, according to comments made by Health Minister Sylvia Jones in Hansard, two of the planned HART Hubs will be Indigenous-led.[17]

11. While increased services to Indigenous communities are sorely needed, situating these services in a model where harm reduction interventions will be denied to individuals[18] fails to recognize that in the devastating context of an epidemic of drug-related deaths, SCS play a vital and protective function for Indigenous people. In the government-funded review of one SCS, Dr. Bayoumi found that, "Indigenous cultural safety is promoted by access to traditional medicines, cultural activities, and the presence and expertise of staff who are Indigenous."[19] This approach is even more important since members of First Nation

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[13] *ODPRN* at p.25
[14] Affidavit of Brianna Olson Pitawanakwat, sworn January 20, 2025 at para. 6
[15] *ODPRN* at p.6
[16] Ontario, Ministry of Health (Communications Division), "Ontario Protecting Communities and Supporting Addiction Recovery with New Treatment Hubs" (August 20, 2024) https://news.ontario.ca/en/release/1004955/ontario-protecting-communities-and-supporting-addiction-recovery-with-new-treatment-hubs; also appears as Exhibit V to Affidavit of Bill Sinclair, sworn January 9, 2025, Application Record vol. 1, pp. 248-253
[17] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* 43rd Parl, 1st Sess (November 18, 2024) (S. Jones) https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2024/2024-12/18-NOV-2024_L181.pdf at p. 10395; also appears as Exhibit A to Affidavit of Lauren Costoff, affirmed January 10, 2025, Application Record vol. 2, pp. 434-500 at p. 451
[18] Affidavit of Dr. Ahmed Bayoumi, sworn February 7, 2025, Reply Application Record, pp. 361-363 at para. 38
[19] Unity Health Toronto, "South Riverdale Community Health Center Consumption and Treatment Service Review" https://www.ontario.ca/files/2024-08/moh-consumption-treatment-service-review-unity-health-en-2024-08-19.pdf at p.7; also appears attached to Expert Report of Dr. Ahmed Bayoumi, Exhibit A to Affidavit of Dr. Ahmed Bayoumi, sworn January 8, 2025, Application Record vol. 2, pp. 664-893 at p. 777

communities on reserve and Indigenous communities in urban settings often have less access to necessary health services[20] and face barriers including institutional racism.[21]

12. The use of harm reduction approaches can make health-care settings more welcoming to Indigenous clients. The report by Chiefs of Ontario and the Ontario Drug Policy Research Network explains that:

> [Harm reduction] programs work with a trauma-informed lens to take care of each other with kindness, compassion and acceptance to ensure the protection of the "sacred breath of life" [citation omitted]. By ensuring that First Nations people and communities have access to services such as safe consumption sites, drug checking services, and naloxone we are helping to keep our loved ones safer from the harms associated with opioid use.[22]

13. This approach appears to be working. The evidence presented in the record clearly establishes that people who make use of SCS are disproportionately Indigenous. One source of this evidence is the expert report of Dr. Bayoumi, which states that Indigenous people were one of the groups over-represented among people who access SCSs.[23] He points to a cohort study of people who used Toronto sites, which found that the proportion of all clients who identified as Indigenous was 33.6% when estimates of the proportion of the Toronto population that is Indigenous range from 0.7% to 3.1%.[24]

14. A 2021 report from the City of Toronto echoes this finding. First, the report found that Indigenous people were 15% of people experiencing homelessness while making up only 2%

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[20] Affidavit of Brianna Olson Pitawanakwat, sworn January 20, 2025 at para. 6; see also Lavalley, Kastor, Valleriani, & McNeil, "Reconciliation and Canada's Overdose Crisis: Responding to the Needs of Indigenous Peoples" (2018) 190:50 *Canadian Medical Association Journal*, https://www.cmaj.ca/content/cmaj/190/50/E1466.full.pdf at p. E1466 [Lavalley]
[21] Lavalley at p. E1467
[22] *ODPRN* at p.29
[23] Expert Report of Dr. Ahmed Bayoumi, Exhibit A to Affidavit of Dr. Ahmed Bayoumi, sworn January 8, 2025, Application Record vol. 2, pp. 664-893 at p. 671
[24] Expert Report of Dr. Ahmed Bayoumi, Exhibit A to Affidavit of Dr. Ahmed Bayoumi, sworn January 8, 2025, Application Record vol. 2, pp. 664-893 at p. 686

of Toronto's general population.[25] This over-representation is then compounded again: the survey determined that 20% of Indigenous people experiencing homelessness had used a SCS compared with 6% of non-Indigenous people experiencing homelessness.[26]

15. This reality is also true outside Toronto. The Auditor General's report, "Implementation and Oversight of Ontario's Opioid Strategy" found that "supervised consumption service sites in Northern Ontario serve a relatively large number of users, including those from the Indigenous population."[27] In Thunder Bay, 70% of the clients served by the AIDS Committee Thunder Bay, operating as Elevate, are Indigenous.[28] Elevate works closely with Path 525, the only SCS in Northern Ontario to ensure its clients who use drugs receive care.[29] While not all Elevate's clients have substance abuse disorders, the majority of their clients who have died of an overdose are Indigenous.[30]

16. It is the combination of the lethality of the opioid drug crisis for Indigenous people struggling to heal from the continuing impacts of colonialism and the disproportionate use of SCS that makes the threat of their closure across the province so devastating for Indigenous people. The two proposed Indigenous-led HART hubs may be able to meet some of the needs of Indigenous clients who live with mental health issues and substance abuse disorders, but in the words of Dr. Bayoumi, "Focusing exclusively on abstinence-based care will lead to very

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[25] City of Toronto, Shelter, Support and Housing Administration, "Indigenous Peoples' Experience of Homelessness in Toronto: 2021 Street Needs Assessment" (accessed February 26, 2025) https://www.toronto.ca/wp-content/uploads/2023/06/87ea-SNA-2021-Indigenous-Homelessness-June-12-2023-aoda.pdf at p.4; also appears as Exhibit B to the Affidavit of Brianna Olson Pitawanakwat, affirmed January 20, 2025 [*Street Needs Assessment*]
[26] *Street Needs Assessment* at p. 23
[27] Office of the Auditor General of Ontario, "Performance Audit: Implementation and Oversight of Ontario's Opioid Strategy" (2024) https://www.auditor.on.ca/en/content/annualreports/arreports/en24/pa_ONopioid_en24.pdf at p. 30 [*Opioid Strategy*]
[28] Affidavit of Holly Gauvin, sworn January 8, 2025, Application Record vol. 1, pp. 320-327 at paras. 6-7
[29] Affidavit of Holly Gauvin, sworn January 8, 2025, Application Record vol. 1, pp. 320-327 at para. 11
[30] Affidavit of Holly Gauvin, sworn January 8, 2025, Application Record vol. 1, pp. 320-327 at para. 8

many people not receiving necessary care and, subsequently, serious health consequences."[31] For Indigenous people – who are more likely to be homeless, more likely to be hospitalized and whose communities have buried too many of their family members because of the opioid crisis – not receiving the necessary care at a SCS makes a devastating crisis even worse.

17. The decision to remove SCS from the continuum of care provided to Indigenous people was made without consultation with Indigenous communities.[32] It stands in contrast to the vision for healing from the opioid drug crisis set out in the Chiefs of Ontario report in which community-led services and supports for the whole family unit[33] are offered alongside, rather than instead of, harm reduction programs. The report says that harm reduction programs are "essential for First Nation people and communities,"[34] because they provide resources to keep people alive.[35]

18. Indigenous communities should not have to choose between increased investment in Indigenous-led health services and life-saving, evidence-based harm reduction services. Rather, as set out in a commentary in the Canadian Medical Association Journal, an approach with more, not fewer, options is needed:

> A public health approach to better supporting Indigenous Peoples who use drugs will require a commitment to Indigenizing harm reduction and addiction treatment policies, practices and supports by incorporating traditional Indigenous values. It also requires recognizing the impacts of colonialism and institutional racism, while acknowledging the strengths, abilities and inherent rights of Indigenous Peoples, and addressing the underlying conditions that drive high rates of overdose, such as those related to family, housing and access to health care.[36]

2. The *CCRA* violates s. 15 the *Charter* by depriving Indigenous people access to SCS

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[31] Affidavit of Dr. Ahmed Bayoumi, sworn February 7, 2025, Reply Application Record, pp. 361-363 at para. 13
[32] *Opioid Strategy* at p. 4
[33] *ODPRN* at p. 30
[34] *ODPRN* at p. 9
[35] *ODPRN* at p. 8
[36] Lavalley at pp. E1466-E1467

a. The section 15 test

19. In *Fraser v. Canada*, Abella J., writing for the majority, set out how a seemingly neutral law, such as the *CCRA*, can nonetheless result in adverse impact discrimination. Such discrimination "violate[s] the norm of substantive equality which underpins this Court's equality jurisprudence[37]."

20. Adverse impact discrimination is established through the same two-part test found in all s. 15 jurisprudence. It requires the claimant to demonstrate that the impact (rather than the text) of an impugned law or state action:

    a) creates a distinction based on enumerated or analogous grounds, and

    b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[38]

21. In *Fraser*, the Court held that, "in order for a law to create a distinction based on prohibited grounds through its effects, it must have a disproportionate impact on members of a protected group. If so, the first stage of the s. 15 test will be met."[39] In this case, the first stage of the test is met since the closure of SCS required by the *CCRA* will have a disproportionately negative impact on Indigenous people who use the sites.

22. The second stage of the test is met because the evidence establishes that losing access to SCS will have the effect of reinforcing disadvantages already faced by Indigenous people. This occurs by removing a protective healthcare service from an already marginalized population which experiences harms related to opioid use, such as hospitalization and death, at higher rates, and who face very real barriers in other healthcare settings.

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[37] *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 SCR 113, https://canlii.ca/t/jb370 at para. 27 [*Fraser*]
[38] *R. v. Sharma*, 2022 SCC 39 https://canlii.ca/t/jssdp, at para. 28 [*Sharma*]
[39] *Fraser* at para. 52

b. Evidence in support of the first part of the test: disproportionate impact

23. *Fraser* notes that "Two types of evidence will be especially helpful in proving that a law has a disproportionate impact on members of a protected group. The first is evidence about the situation of the claimant group."[40] This type of evidence – about the barriers faced by a particular group – provide the "full context of the claimant group's situation"[41] and may be in the form of evidence from a claimant, from an expert witness or through judicial notice.[42]

24. In this case, all three types of evidence are available. In her Affidavit, Ms. Pitawanakwat, explains that she helped start Toronto Indigenous Harm Reduction because of a lack of services for urban Indigenous people dealing with substance use. Dr. Bayoumi's expert report outlines how SCS are disproportionally accessed by members of the Indigenous community and how their design better meets the needs of the community. Finally, this Honourable Court can take judicial notice of the myriad publically available reports provided in the record and referred to in this factum which articulate the severe nature of the harms – including rates of death seven time greater than the non-Indigenous population.

25. The second type of evidence described in *Fraser* is evidence about the results of the law."[43] Because this case is being brought to prevent the *CCRA* from taking effect, this evidence is necessarily speculative. However, the stark nature of the effect of the law makes the exercise relatively straightforward.

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[40] *Fraser* at para. 56
[41] *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 https://canlii.ca/t/2g0mf at para. 43
[42] *Fraser* at para. 57
[43] *Fraser* at para. 56

26. Between 2020 and 2024, 21,979 overdoses were reversed at SCS in Ontario.[44] Just as the Supreme Court held in *PHS* that "Insite saves lives. Its benefits have been proven"[45] so is it clear that Ontario SCS save lives and have proven benefits. Given the uncontroversial evidence that Indigenous people make up more of the group that use SCS, it is clear that the result of the law is that a disproportionate number of the people whose lives will not be saved if sites are closed as a result of the *CCRA* will be Indigenous.

27. This is not a case where the law leaves a gap between Indigenous people and non-Indigenous people unaffected which, as the Supreme Court held in *Sharma*, does not meet the 1st stage of the test.[46] Rather, the evidence supports the conclusion that the impact of the *CCRA* will exacerbate the disadvantage - the gap will grow wider for Indigenous communities than other communities. This is, in part, because as a community who disproportionately uses the SCS, the resulting absence of service will be felt more acutely in the Indigenous population. This is especially true since the data set out in the Chiefs of Ontario report suggests that the rates of hospitalization and death for Indigenous people are not only larger, but also increasing. It is therefore reasonable to conclude that the harm is likely to get progressively worse over time if SCS are closed. [47] Finally, Indigenous people face additional barriers in accessing health services.[48] Removing one vital low-barrier service which, in addition to supervising

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[44] Centre on Drug Policy Evaluation, "Supervised Consumption Services in Ontario: Evidence and Recommendations" (November 2024) https://cdpe.org/wp-content/uploads/2024/11/CDPE-SCS-Toronto-Nov-2024-.pdf at p. 8; also appears as Exhibit E to the Affidavit of Lin Sallay, sworn January 9, 2025, Application Record vol. 1, pp. 394-427 at p.408 [*CDPE*]
[45] *PHS* at para. 133
[46] *Sharma* at para. 40
[47] *ODPRN* at p.23, 25
[48] Lavalley at p. E1467

consumption, also acts as a gateway to other referrals[49] will have a greater impact on Indigenous community members.

28. In *Sharma*, the majority held that the evidence adduced by the Applicant failed to demonstrate that the impugned provisions of the *Criminal Code* created or contributed to a disproportionate impact for Indigenous people. The majority made clear that different evidence – including expert or statistical evidence –may have been able to meet the burden required at step one. [50] In this case, the evidence supporting the conclusion that the *CCRA* will have a disproportionate impact on Indigenous people who use the sites is clear and incontrovertible. In that way, this case is like *R v. Turtle*, where the Ontario Court of Justice held that the evidence established that a neutral law – the scheme for intermittent sentences in the *Criminal Code* – created a distinction between on-reserve band members of Pikangikum First Nation and others and thus met the first stage of the s. 15 test.[51]

c. Evidence in support of the second part of the test: exacerbating disadvantage

29. The closure of the SCS required by the *CCRA* exacerbates existing disadvantages faced by Indigenous people. This is especially true because expert evidence establishes that SCS are primarily used by those who, in addition to having a substance use disorder, experience other forms of marginalization, including homelessness and incarceration[52] - exactly the types of marginalization more often experienced by Indigenous people.

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[49] *CDPE* at p. iii
[50] *Sharma* at para. 46
[51] *R. v. Turtle*, 2020 ONCJ 429 https://canlii.ca/t/j9xmn at para. 59
[52] Expert Report of Dr. Ahmed Bayoumi, Exhibit A to Affidavit of Dr. Ahmed Bayoumi, sworn January 8, 2025, Application Record vol. 1, pp. 664-893 at p. 682. Dr Bayoumi also notes at p. 683 that a systematic review of qualitative studies of safer environment interventions including access to SCS found that participants were "highly marginalized" and especially affected by poverty and homelessness.

30. One of the primary consequences of the ongoing legacy of colonialism for Indigenous people are profound socio-economic disparities. A Statistics Canada's report that reviewed the 2021 Census data related to income, employment, education, housing, foster care and Indigenous languages found:

> Indigenous Peoples in Canada face significant and long-standing socio-economic gaps when compared to the non-Indigenous population. These gaps have been shaped by a long history of colonialism, discrimination and marginalization, which have had a profound impact on Indigenous people and continue to affect their lives today.[53]

31. It is relevant to the s. 15 analysis that the closure of the SCS sites will have a disproportionate impact on Indigenous people because of their marginalization which was directly caused by state action. The policies of government that affect Indigenous people – the *Indian Act*, residential schools, the Métis scrip system, the forced relocation of Inuit communities and many more - have shaped the gaps described by Statistics Canada and, in turn led to the marginalization of community members who receive support in SCS. This reality makes even more clear that the impact of the closure of SCS will be felt disproportionately by Indigenous people and that such closures will perpetuate an already immense disadvantage created by previous government actions.

32. Section 15 does not require governments to deliver specific services to address inequality. Where there are a number of valid approaches to a problem, such as the over-representation of Indigenous people who live with addictions, governments are given leeway to pick among the options. But that leeway does not extend so far as to enacting legislation that increases inequality. As set out above, while HART Hubs may provide beneficial services, the

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[53] Canada, Indigenous Services Canada, *An update on the socio-economic gaps between Indigenous Peoples and the non-Indigenous population in Canada: Highlights from the 2021 Census* (October 2023) https://www.sac-isc.gc.ca/eng/1690909773300/1690909797208

government's failure to provide a service that reduces harms, including death, in a context where Indigenous communities are so disproportionately affected, has the consequence of widening a gap, leading to a breach of s. 15.

3. Equality concerns are relevant to the interpretation of s. 7

33. The *Charter's* promise of equality is not limited to s. 15. In *Andrews v Law Society of British Columbia*, the Supreme Court held that the equality provisions of s. 15 apply to and inform all other rights guaranteed by the *Charter*, including s. 7.[54] This principle was reiterated in *New Brunswick (Minister of Health and Community Services) v G. (J.)*[55], which held that the rights in s. 7 must be viewed through the lens of s. 15 "to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society."

34. In this case, this Honourable Court is asked to determine whether the *CCRA* breaches the s. 7 rights of clients of SCS. The direction of the Supreme Court in *Andrews* and *G.(J.)* is that this analysis must consider the experiences of the particular communities affected. ALS submits that the fact that closure of SCS will disproportionally affect Indigenous people is directly applicable to the question of whether the *CCRA* engages s. 7 rights and the analysis addressing the question of gross disproportionality.

a. Applying the equality lens to the question of whether section 7 rights are engaged

35. In *PHS*, the Supreme Court held that withholding access to Insite created a risk to the health of clients which affected their security of the person rights and that "[w]here the law creates a

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[54] *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143, https://canlii.ca/t/1ft8q at p. 185

[55] *New Brunswick (Minister of Health and Community Services* v. G. (J.), 1999 CanLII 653 (SCC), [1999] 3 SCR 46, https://canlii.ca/t/1fqjw at para.115 [*G. (J.)*]

risk not just to the health but to the lives of claimants, the deprivation is even clearer."[56] In this case the evidence about the experiences of Indigenous people – that as a population they experience greater marginalization, face greater harms from the use of opiate drugs, and are more likely to use SCS - makes it even clearer that depriving them of a key intervention that the evidence establishes saves lives, amplifies their already increased risk and the *CCRA* engages s. 7 rights.

36. While the Ontario government points to the HART Hubs as the answer to the *CCRA*'s alleged violations of *Charter*-protected equality rights and legal rights under s. 7 and 12, HART Hubs are not part of the *CCRA*. They are created by funding agreements, which the current or future government may chose to vary or withdraw at their discretion. As set out by McLachlin C.J. on behalf of the majority in *R v Nur*,[57] that the state has the discretion to make a decision that is consistent with *Charter* principles is not sufficient to shield the impugned legislation from *Charter* review. Rather, it is the legislative or regulatory framework itself that must withstand *Charter* scrutiny.

b. Applying the equality lens to the question of gross disproportionality

37. The next step is to determine whether violations of s. 7 are in accordance with the principles of fundamental justice, including gross disproportionality. Gross disproportionality addresses legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest.[58]

38. The purpose of *CCRA* is protecting the public, which includes children, from anti-social behaviours associated with drug use. ALS submits that a correct balancing of this goal

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[56] *PHS* at para. 93
[57] *R. v. Nur,* 2015 SCC 15, [2015] 1 SCR 773, https://canlii.ca/t/gh5ms at para. 91
[58] *PHS* at para. 133

against protected s. 7 rights must consider the extreme impacts on Indigenous people who access SCS.

39. As set out in In *G. (J.)*, a correct s. 7 analysis "takes into account the principles and purposes of the equality guarantee."[59] In this case that means seriously considering that the harms experienced by those who use opiate drugs are higher for Indigenous communities. As part of the analysis into gross disproportionality in *PHS*, the court held "Insite saves lives[60]." The evidence in this case makes it clear that in Ontario, SCS save Indigenous lives.

40. In a commentary in the Canadian Medical Association Journal, health scholars wrote, "To ignore the experiences of Indigenous communities in the context of the overdose crisis is nothing short of a public health failure.[61]" In contrast, acknowledging these experiences as part of the s. 7 analysis ensures that the "interpretation of the Constitution responds to the realities and needs of all members of society."[62]

II. CONCLUSION

41. The interventions offered at SCS give members of the Indigenous community who would otherwise die the opportunity to live. Every time a person uses a SCS they send a message that despite the harms they have experienced, they are choosing to live. Against a backdrop of trauma resulting from a shared history of colonization, Indigenous people who use SCS put themselves in a place of safety, even as they manage a world of harms. Rather than acting as if their deaths are inevitable, defending their access to SCS demonstrates to Indigenous people that not only are their rights protected, their lives matter.

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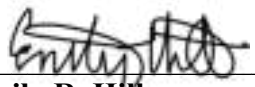
[59] *G. (J.)* at para. 115
[60] *PHS* at para. 133
[61] Lavalley at p. E1467
[62] *G. (J.)* at para. 115

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



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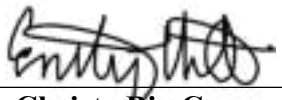

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SCHEDULE A: LIST OF AUTHORITIES

CASE LAW

1. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134, https://canlii.ca/t/fn9cf

2. *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 SCR 113, https://canlii.ca/t/jb370

3. *R. v. Sharma*, 2022 SCC 39 https://canlii.ca/t/jssdp

4. *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 https://canlii.ca/t/2g0mf

5. *R. v. Turtle*, 2020 ONCJ 429 https://canlii.ca/t/j9xmn

6. *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143, https://canlii.ca/t/1ft8q

7. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 SCR 46, https://canlii.ca/t/1fqjw

8. *R. v. Nur*, 2015 SCC 15, [2015] 1 SCR 773, https://canlii.ca/t/gh5ms

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2. Canada, Indigenous Services Canada, *An update on the socio-economic gaps between Indigenous Peoples and the non-Indigenous population in Canada: Highlights from the 2021 Census* (October 2023) https://www.sac-isc.gc.ca/eng/1690909773300/1690909797208

3. Canada, Indigenous Services Canada, *Indigenous Communities in Ontario* (November 2021) https://www.sac-isc.gc.ca/eng/1603371542837/1603371807037

4. Ontario, Ministry of Health (Communications Division), "Ontario Protecting Communities and Supporting Addiction Recovery with New Treatment Hubs" (August

20, 2024) https://news.ontario.ca/en/release/1004955/ontario-protecting-communities-and-supporting-addiction-recovery-with-new-treatment-hubs

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6. Unity Health Toronto, "South Riverdale Community Health Center Consumption and Treatment Service Review" https://www.ontario.ca/files/2024-08/moh-consumption-treatment-service-review-unity-health-en-2024-08-19.pdf

7. Lavalley, Kastor, Valleriani, & McNeil, "Reconciliation and Canada's Overdose Crisis: Responding to the Needs of Indigenous Peoples" (2018) 190:50 *Canadian Medical Association Journal*, https://www.cmaj.ca/content/cmaj/190/50/E1466.full.pdf

8. City of Toronto, Shelter, Support and Housing Administration, "Indigenous Peoples' Experience of Homelessness in Toronto: 2021 Street Needs Assessment" (accessed February 26, 2025) https://www.toronto.ca/wp-content/uploads/2023/06/87ea-SNA-2021-Indigenous-Homelessness-June-12-2023-aoda.pdf

9. Office of the Auditor General of Ontario, "Performance Audit: Implementation and Oversight of Ontario's Opioid Strategy" (2024) https://www.auditor.on.ca/en/content/annualreports/arreports/en24/pa_ONopioid_en24.pdf

10. Centre on Drug Policy Evaluation, "Supervised Consumption Services in Ontario: Evidence and Recommendations" (November 2024) https://cdpe.org/wp-content/uploads/2024/11/CDPE-SCS-Toronto-Nov-2024-.pdf

SCHEDULE B: LIST OF STATUTES, REGULATIONS, AND BY-LAWS

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

2. *Community Care and Recovery Act*, 2024, S.O. 2024, c. 27, Sched. 4

Court File No. CV-24-00732861-0000

THE NEIGHBOURHOOD COMMUNITY SERVICES GROUP, KATHERINE RESENDES, AND JEAN-PIERRE AUBRY FORGUES Applicants	-and-	**HIS MAJESTY THE KING IN RIGHT OF ONTARIO** Respondent

ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

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KATHARINE RESENDES and JEAN-PIERRE FORGUES

Applicants

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

and

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PART I – OVERVIEW

1. Black People Who Use Drugs ("BPWUD") are among the most vulnerable in our population. Systemic and structural anti-Black racism, poor allocation of resources, lack of opportunities, over-policing, and other prejudices within the criminal justice system are, cumulatively, the bundle of disadvantages to which BPWUD are exposed. The closure of supervised consumption sites makes them even more vulnerable in the context of these systemic and structural factors. These factors are crucial in the analysis to determine whether sections 2 and 3 of the *Community Care and Recovery Act*, 2024, SO 2024 c.27 ("CCRA") create a disproportionate impact on a vulnerable racial group, disproportionately exposes that group to unusual treatment and punishment, and imposes burdens which exacerbate, reinforce, or perpetuate disadvantage. The Black Legal Action Centre ("BLAC") submits that the impugned provisions (ss. 2 and 3 of the *CCRA*) perpetuate historic and ongoing anti-Black racism, disproportionately infringes the rights of BPWUD under sections 7, 12, and 15 of the *Charter of Rights and Freedoms,* and cannot be saved under section 1 of the *Charter*.[1]

2. BLAC has a genuine interest in this matter as the community it represents will be directly affected by the outcome of this case. Three of the proposed safe injection sites in Toronto are in significantly Black communities. The issues in this case are a matter of public interest as BPWUD's access to safe consumption sites is crucial to reduce their likelihood of being charged, penalized, incarcerated, and of overdosing in carceral facilities, resulting from the over-policing of Black people. The exercise of police powers to charge and fine drug users or those operating safe consumption sites in the areas prohibited by the legislation, is one avenue through which racial

[1] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27 [*Fraser*].

discrimination and stereotypes may be introduced as a consequence of the impugned legislative provisions taking effect.

3. Supervised injection sites are a proven successful response to the Canada-wide drug overdose crisis. In Ontario alone, between 202 and 2024, supervised injection sites served 178,253 people, made 533,624 treatment referrals, and reverse 21,979 overdoses.[2] This is an unambiguous positive public health outcome for the Province and for those battling addiction and substance use problems. Giving people who are suffering from addiction the space to consume drugs under the care and supervision of trained healthcare professionals, and particularly BPWUD, this dramatically reduces the risk of contract or transmitting infectious diseases and essentially eliminates the risk of fatal overdose. For these reasons, *inter alia*, the *Controlled Drugs and Substances Act,* S.C. 1996, c. 19 (*CDSA*) provides for Ministerial exemptions which allow people to use drugs at supervised sites without threat of sanctions or criminal prosecution. This serves the public interest and may be medically necessary.

4. These results and exemptions are especially important for the black community. While most demographic statistics on the usage of safe injection sites do not include a patient's race, a report from Public Health Ontario has outlined that black people are most affected by race-based inequities in access to health services due to a history of structural racism.[3]

[2] *Supervised Consumption Sites Dashboard*, Government of Canada, last updated November 22, 2024
[3] Public Health Ontario, "Rapid Review: Race-based Equity in Substance Use Services" Published June 2022, page 2.

PART II – FACTS

5. For the purposes of this intervention, BLAC adopts the facts as outlined in the Notice of Application.

PART III - ARGUMENTS

The *CCRA* impinges on the life, liberty, and security of BPWUD

6. BLAC argues that sections 2 and 3 of the *CCRA* are inconsistent with section 7 of the *Canadian Charter of Rights and Freedoms* (*"Charter"*) to the extent that they deprive Black people addicted to controlled substances of access to health care services that were otherwise available at a safe consumption site. Most safe injections sites allow for people who use drugs to consume the drugs they have in a safe, controlled environment without fear of criminalization or sanction under the law. The sites also often offer individuals the chance to verify that the drugs they will consume are not tainted with other or unknown substances, thereby further reducing risk to health and safety. Although the *CCRA* is framed as an Act to protect the community from persons who use drugs, applying the necessary context and pitting the *CCRA* against the *Charter* will show that the impugned provisions deprive BPWUD of life, liberty, and security of the person, inconsistent with the principles of fundamental justice.

7. The *CCRA* provisions are arbitrary, grossly disproportionate, or overbroad. The provisions are inconsistent with the Province's interest of fostering individual and community health, community safety, and preventing death and overdose. In their application, the *CCRA* impugned provisions will exacerbate the problems it intends to solve. BLAC submits that the provisions under the CCRA, namely s. 3, limiting the power of municipalities and local boards to apply to Health Canada for exemptions under the CDSA to criminalize the personal possession of

drugs, infringes on the liberty and security of black persons who may have drugs in their possession for personal consumption at an injection site. The Act further infringes on these rights by prohibiting municipalities from applying to Health Canada for renewal of an exemption to operate a safe injection site, or to apply for funding in respect of safer supply services.[4]

8. BPWUD, like others in the Black community, are impacted by anti-black racism, which often depicts people as exploitative and perpetrators of violence and crime. This is demonstrated by the City of Toronto's 2020 decision to address anti-black racism and the marginalization of that group as a public health crisis.[5] The Canadian Nurses' Association also in 2020, stated that anti-Black racism was a public health emergency in Canada.[6] These reports both found that the criminalization of black people, including those with low or no income, mental and other health issues, including BPWUD is already disproportionate to their population in the province and its biggest city. Thus the *CCRA,* when put into force, will disproportionately harm an already marginalized population by further denying them services, and by denying municipalities the power to apply for exemptions. This is contrary to the Province's intentions to bolster public health and safety, and additionally is contrary to recommendations and action items by the City of Toronto Board of Health, and the Canadian Nurses' Association.

9. In 2008, the Supreme Court in *Canada (Attorney General) v. PHS Community Services Society* found that the Minister of Health's decision not to extend the CDSA exemption of a supervised injection site in Vancouver violated s. 7 of the Charter. The court accepted the scientific data illustrating the success of the site and found that the prohibition on possession of

[4] *Community Care and Recovery Act*, 2024, S.O. 2024, c.27, Sched. 4, s. 3(1) and 3(2).
[5] City of Toronto, "*Addressing Anti-Black Racism as a Public Health Crisis in the City of Toronto*", HL17.9, 2020.
[6] Canadian Nurses' Association, "*Anti-Black Racism is a Public Health Emergency in Canada*", CNA News Room, 2020.

drugs by staff on site and by the clients of the site was a direct restriction of their section 7 rights.[7] The court reiterated that where a law creates a risk to a person's health by denying them access to healthcare, that further risks not just their health but their life and liberty in a clear deprivation of s.7 rights.[8] Furthermore, prohibiting municipalities and staff of safe consumptions sites from applying for exemptions respecting drug possession is a deprivation of their s. 7 rights, as they may be penalized for doing "prohibited acts" or "possessing drugs" for the purposes of storage within the safe injection facility for patients to use under supervision.

10. The prohibition also criminalizes patients for having drugs on their person and for using them within the controlled environment and as a proven form of healthcare. Patients must be permitted to possess drugs on the premises of a safe injection site so they can make use of the lifesaving services provided. With respect to BPWUD, this is a substantial infringement of their s. 7 rights as 3 of the proposed safe injection sites in a legislation are in predominantly Black communities. This legislation will only exacerbate the problems of overincarceration and over-policing that these communities already face.

11. In addition, while an argument can be made that possession and use of drugs is a choice and that people possess free will not to make that choice, including the BPWUD, the Supreme Court in *PHS Community Services* upheld the trial judge's finding that drug addiction is a legitimate illness and in fact, safe injection sites rely on people's free will to decide to use drugs in a safe, supervised environment in order to manage their disease and receive care.[9] It thereby follows that as there is a disproportionate number of BWUD compared to the rest of the population,

[7] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, paras 2-3, 86-92 [*PHS Community Services*].
[8] *Ibid* at para 93.
[9] *Ibid* at paras 100-101.

and drug addiction is an illness, that there is a disproportionate number of a certain demographic group suffering from illness who must not be denied care. Therefore, allowing an exemption for possessing drugs and allowing municipalities to apply for the exemption is necessary. To prohibit this by enacting the impugned provisions of the *CCRA* would be in violate of s. 7 of the *Charter.*

The Act subjects BPWUD to unusual treatment and punishment

12. Sections 2 and 3 of the *CCRA* violate BPWUD's section 12 *Charter* rights. The provisions subject BPWUD to unusual treatment through the denial of safe consumption services, and to punishment by the state as they are exposed to criminal liability for consuming substances outside a safe consumption facility. In *Chiarelli v Canada (Minister of Employment and Immigration)*[10], the Supreme Court of Canada suggested that section 12 of the *Charter* may be applied outside of a criminal context. In this matter, depravation of services comes within the scope of a "treatment" under section 12. Furthermore, to then punish BPWUD for coping in the only way they can in the face of a denial of health services is indeed unusual.

The termination of several safe injection sites will cause undue burden or denial of services to BPWUD

13. BPWUD are entitled to the same equality rights under section 15 of the *Charter* as others. Sections 2 and 3 of the CCRA violate those rights by providing a lesser level of access to healthcare and other services to meet their needs as compared to those services available to non-addicted persons. Removal of the services provided by safe injection sites perpetuates the disadvantage suffered by members of an already vulnerable, poor, and disadvantaged group.

[10] *Chiarelli v. Canada (Minister of Employment & Immigration),* [1992] 1 S.C.R. 711

14. The constitutionality of the impugned provisions is a racial justice issue and requires an intersectional analysis of the section 15 *Charter* claim. Such an analysis recognizes the unique impacts caused combing multiple oppressive systems and goes beyond searching for and conforming within a typical form of discrimination.[11] BLAC submits that this Court should account for multiple grounds of oppression and how these interact and collectively impact BPWUD. The *Charter* s. 15 intersectional analysis is based upon consideration of the historic, social, political, and economic disadvantage of Black claimant groups;[12] and acknowledges that various forms of targeting, stereotyping, and stigmatization, stemming from various grounds of discrimination, can be the source of discrimination.[13]

15. The purpose of section 15 is also to protect groups who suffer social, legal, political, and economic disadvantage due to the denial of opportunities which are generally available to other members of society. The City of Toronto, Public Health Ontario, and the Canadian Nurses' Association have accepted and stated that the Black community has been and continues to be the most disadvantaged in our society. As a result, the Province's intention to shut down safe injection sites will unduly exacerbate the societal burdens of the Black community, contrary to their section 15 rights.

16. Moreover, the court in *R v Morris*[14] found that anti-Black racism is perpetuated today by present-day stereotypes and associations between Blackness and criminality, violence, and immorality, which stems from the distinct legacy and history of colonialism, enslavement, and segregation in Canada. In *Morris*, the court recognized that this historical impact manifests in the

[11] *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp 645-646
[12] *Fraser*, *supra* note 1 at paras 56-57, 76-77
[13] *Corbiere v Canada (Minister of Indian and Northern Affairs*), [1999] 2 SCR 203, at para 61
[14] *R v Morris*, 2018 ONSC 5186 ["*Morris ONSC*"]

current social, political, and economic marginalization of the Black community and includes health and social inequity, such as lower socio-economic status, higher unemployment, significant poverty, and disproportionate involvement in child welfare and criminal punishment systems. Research since the 1970's, acknowledged by the courts, has shown that Black people are more likely to experience aggressive policing as opposed to other groups,[15] and are more likely to be stopped, carded, searched, and to experience violence, including being killed by police. This in turn leads to Black people experiencing disparities in pre-trial detention, sentencing, and release conditions,[16] leading to greater rates of incarceration.

17. With this context in place, an intersectional analysis can occur. The test for a section 15 violation was most recently outlined in *Fraser* 2020, which refined the test down to ask 2 key questions. The questions are as follows:

(a) Does the law, either on its face or in its impact, create a distinction based on enumerated or analogous grounds; and

(b) Does it impose a burden or deny a benefit with the effect of reinforcing, exacerbating, or perpetuating disadvantage?

This version of the test is also clarified to include that section 15(1) of the Charter protects against discrimination regardless of whether it is explicit in the law or is the result of negative effects stemming from that law.[17] In their analysis, the court explained that it is not necessary for every member of a group to face identical forms and effects of discrimination as the law is responsible

[15] *R v Le*, 2019 SCC 34, at paras 87, 90, 94-97 ["*Le"*]; *R v Grant*, 2009 SCC 32, at paras 154-155
[16] *Morris ONSC*, *supra* note 14 at para 22.
[17] *Fraser*, *supra* note 1 at paras 27-30

for the circumstances that affect the group and any intentional or causal discrimination which may occur.

18. In this matter, the *CCRA* does not explicitly discriminate against the Black population, however shutting down safe injection sites which provide low-barrier access to healthcare, supervision, and life-saving measures to drug users, a disproportionate number of them BPWUD, which adversely affect the population. This is reinforced by the fact that 3 of the proposed sites for closure are, as noted previously, in predominantly Black neighbourhoods. The court held that an act or provision that seems fair or reasonable in form, but is ultimately discriminatory in its practice and application, is a violation of fundamental rights and justice.[18] Furthermore, the Supreme Court noted that adverse or implicit discrimination is more prevalent than explicit discrimination, so recognizing this and employing a more intersectional analysis is key to address the limits on equality faced by marginalized groups, thereby better dealing with discrimination in all its forms.[19]

19. To apply the first part of the *Fraser* test, we must ask whether the law makes a distinction against a certain group. Where that is not explicit, the court must uncover whether the law has made an indirect distinction by way of the impact it has had on members of a group. The wording of the *CCRA* impugned provisions appear generally neutral, but in practice will likely have the effect of perpetuating that a supervised injection site is unsafe and is host to unruly, criminal behaviours and individuals. In this way, by perpetuating these stereotypes regarding black people and BPWUD, criminal law will continue to be used to exacerbate the ongoing

[18] *Ibid* at paras 32-33.
[19] *Ibid* at pars 40-47.

marginalization and mass criminalization of Black communities.[20] In proposing to shut down 3 safe injection sites in predominantly black communities, the *CCRA* does discriminate against BPWUD, who already face great barriers to accessing healthcare. The impugned provisions do discriminate against those battling addiction and indirectly discriminates against the black community, which is overrepresented among those suffering with addiction and those who are criminalized for using drugs.[21]

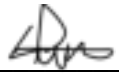
20. Moving on to step 2 of the analysis, we must ask whether the impugned law denies benefits in a way that will reinforce, perpetuate, or exacerbate disadvantage. Step 1 of the analysis establishes that the *CCRA* indirectly distinguishes the black community, thus will impose a further burden on BPWUD. BPWUD already suffer a greater mortality rate than other groups and are less likely to be given treatment and rehabilitation referrals, to be offered helpful medications, or to be administered lifesaving naloxone.[22] Terminating safe injection sites means that the black community will loss access to health care that they otherwise would not receive. Black people lack socio-economic capital, which a substantial determinate to health and wellbeing. As low income, addicted persons, BPWUD do not have the resources required to travel distances beyond their communities to seek treatment at other healthcare facilities. These barriers in turn expose them to a higher risk of mental health needs and further substance use problems to cope.

[20] For example, the "war on drugs" and mandatory minimum sentences. *R v Jackson*, 2018 ONSC 2527, at paras 40-47. ["*Jackson*"]. *R v Le*, 2019 SCC 34, at paras. 90-97
[21] City of Toronto, "*Addressing Anti-Black Racism as a Public Health Crisis in the City of Toronto*", HL17.9, 2020.
[22] Public Health Ontario, "Rapid Review: Race-based Equity in Substance Use Services" Published June 2022, pages 2-5.

PART IV – CONCLUSION

21. The use and operation of safe injection sites has proven itself to be an undeniable public health benefit and closure of these sites will reinforce the continued marginalization of Black people, including the existing economic, social, political, and health disadvantages. The life, liberty, and security of BPWUD will be infringed through the closure of safe injection site sand the prohibitions imposed regarding seeking exemptions to drug use and possession in the course of operating such sites. Denial of treatment and healthcare at safe consumption sites is unusual treatment and to criminalize BPWUD is punishment that is unconstitutional. Lastly, through an intersectional analysis of s. 15, using the two-part *Fraser* test, we determine that the impugned provisions of the *CCRA* and its likely impact in BPWUD is a violation of that communities s. 15 rights and is unconstitutional.

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



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SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *Fraser v Canada (Attorney General)*, 2020 SCC 28
2. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44
3. *Chiarelli v. Canada (Minister of Employment & Immigration),* [1992] 1 S.C.R. 711
4. *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554
5. *Corbiere v Canada (Minister of Indian and Northern Affairs*), [1999] 2 SCR 203
6. *R v Morris*, 2018 ONSC 5186 ["*Morris ONSC*"]
7. *R v Le*, 2019 SCC 34
8. *R v Jackson*, 2018 ONSC 2527

SCHEDULE "B"
RELEVANT STATUTES

***Community Care and Recovery Act,* 2024 SO 2024, C.27**

2 (1) Subject to subsection (4), no person shall establish or operate a supervised consumption site at a location that is less than 200 metres, measured in accordance with subsection (2), from a designated premises.

Measurement

(2) Subject to the regulations, the distance mentioned in subsection (1) shall be measured in accordance with the following rules:

1. The distance shall be measured from the geometric centre of the building in which a supervised consumption site is located.

2. In the case of a school, the distance shall be measured to the door primarily used by the public to enter the building in which the school is located for the purpose of accessing the area where the school operates.

3. In the case of a private school, the distance shall be measured from,

i. the centre of the building in which the school is located, as determined by the private school and made available on a Government of Ontario website, or

ii. if the private school is located only in a portion of a building, the centre of the portion of the building in which the school is located, as determined by the private school and made available on a Government of Ontario website.

4. In the case of a child care centre or EarlyON child and family centre, the distance shall be measured to the geographic coordinates of the street address of the child care centre or EarlyON child and family centre, determined through the use of software or a web service that implements an address geocoding process.

5. In the case of a premises prescribed for the purposes of clause (e) of the definition of "designated premises" in section 1, the distance shall be measured to the point specified in the regulations.

6. If the measurement results in a number of metres that is not a whole number, the number shall be rounded up to the nearest whole number.

Geocoding

(3) If the regulations provide for a specific software or web service for the purposes of paragraph 4 of subsection (2), the distance to a child care centre or EarlyON child and family centre shall be measured using the prescribed software or web service**.**

Exception

(4) If a private school began providing instruction or a child care centre began operating after the day the Safer Streets, Stronger Communities Act, 2024 received Royal Assent, subsection (1) does not apply to a supervised consumption site with respect to the private school or child care centre, as the case may be, until the day that is 30 days after the day the private school began providing instruction or the child care centre began operating.

Same

(5) Despite subsection (4), if the Minister specifies a day on which subsection (1) applies to a supervised consumption site, subsection (1) applies to the supervised consumption site as of that day.

Limit on power of municipalities, local boards

Application for exemption to decriminalize

3 (1) Subject to such exceptions as may be prescribed, despite sections 7 and 8 of the City of Toronto Act, 2006 and sections 9, 10 and 11 of the Municipal Act, 2001, a municipality or local board does not have the power to apply to Health Canada for an exemption under subsection 56 (1) of the Controlled Drugs and Substances Act (Canada) from any provision of that Act for the purpose of decriminalizing the personal possession of a controlled substance or precursor.

Applications related to supervised consumption sites, safer supply services

(2) Subject to such exceptions as may be prescribed, despite sections 7 and 8 of the City of Toronto Act, 2006 and sections 9, 10 and 11 of the Municipal Act, 2001, a municipality or local board does not have the power, without the approval of the Minister, to do any of the following:

1. Apply to Health Canada for an exemption or a renewal of an exemption to the Controlled Drugs and Substances Act (Canada) for the purpose of operating a supervised consumption site.

2. Apply to Health Canada for funding under Health Canada's Substance Use and Addictions Program or any other Health Canada program in respect of safer supply services, or enter into an agreement with the Government of Canada with respect to funding under such a program in respect of safer supply services.

3. Support, including by passing a by-law or making a resolution, an application made to Health Canada by any other person in respect of any matter described in paragraph 1 or 2.

THE NEIGHBOURHOOD GROUP COMMUNITY SERVICES et al. Applicants	- and -	**HIS MAJESTY THE KING IN RIGHT OF ONTARIO** Respondent	Court File No. CV-24-00732861-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at **TORONTO**

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BETWEEN:

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Applicants

-and-

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

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PART I – OVERVIEW

1. This case is about whether the Ontario government's restriction of supervised consumption sites breaches the *Charter* rights of people who use drugs, including their rights to life, liberty and security under section 7. Section 2 of the *Community Care and Recovery Act, 2024*, Sch. 4 to the *Safer Streets, Stronger Communities Act, 2024*, S.O. 2024, c. 27 (the "*CCRA*") prevents supervised consumption sites from operating less than 200 metres from locations which include schools, child care centres, and "other prescribed premises". Section 3(2) of the *CCRA* prevents municipalities and local boards from applying to Health Canada for an exemption or renewal of an exemption under the *Controlled Drugs and Substances Act*, SC 1996, c 19 ("*CDSA*") to establish a supervised consumption site.

2. The Preamble to the *Safer Streets, Stronger Communities Act* states the Ontario government's purposes or intents in enacting the *CCRA* – these purposes relate to public safety, including the safety of drug users, as well to public health, as shown by the Ontario government's preference for a recovery-oriented treatment model for people who use drugs. It states the Ontario government is

> … taking action to protect children, families and people struggling with addiction by restricting supervised consumption sites, in line with its belief that addictions treatment is the best way to achieve lasting recovery.

3. Interrogating this stated purpose *vis a vis* the *CCRA*'s impact on individual drug users is key to this Court's analysis of the section 7 rights at issue. In considering principles of fundamental justice such as arbitrariness or overbreadth, a court must assess whether there is a "rational connection" between an impugned law's stated purpose and the effects it imposes on life, liberty and security of the person, *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 111-113 (*Bedford*). In the case of gross disproportionality, a court must assess whether these effects are so grossly disproportionate that they cannot "rationally be supported", *Bedford* at para. 120.

4. An analysis of what is "rational" in this context may be more difficult where the legislation at issue relates to drug use, given the prevalence of stigma. Gascon J., in his dissenting reasons in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (para. 58), noted this in a human rights case about drug use:

> Drug dependence is a protected ground of discrimination in human rights law. Its status as such is settled, and none of the parties dispute this. Still, stigmas surrounding drug dependence — like the belief that individuals suffering from it are the authors of their own misfortune or that their concerns are less credible than those of people suffering from other forms of disability — sometimes impair the ability of courts and society to objectively assess the merits of their discrimination claims.

5. The Harm Reduction Policy Coalition submits that this quote is equally applicable with respect to the rights at issue in this case, and aims to provide guidance to this Court on its analysis of the principles of fundamental justice noted above. The Harm Reduction Policy Coalition is a coalition of four organizations – the Canadian Drug Policy Coalition, the Toronto Overdose Prevention Society, the Toronto Harm Reduction Alliance, and the Waterloo Region Drug Action Team – with extensive experience and expertise in public health policy and in providing services to people who use drugs which are based in current research and evidence.

6. In light of this background, the Harm Reduction Policy Coalition submits that in determining what is "rational" in relation to the purposes of the *CCRA* and its impacts on people who use drugs, this Court may be guided by a framework of four public health principles which are evidence based and grounded in international human rights law. This framework will assist this Court in interrogating both the *CCRA's* stated purposes and impacts to determine whether these impacts are arbitrary, overbroad or grossly disproportionate.

PART II – ISSUES / LAW / ARGUMENT

7. The Harm Reduction Policy Coalition takes no position on the outcome of this case. It intervenes to inform this Court's assessment of principles of fundamental justice at issue.

A. The Principles of Fundamental Justice: Contextualizing "Rationality" when assessing Arbitrariness, Overbreadth and Gross Disproportionality

8. The text of section 7 of the *Charter* reads as follows,

> Everyone has the 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.

9. This text, on its face, raises the question of how courts should define and interpret "principles of fundamental justice" where these principles then operate to limit the right to life, liberty and security. Lamer J., in *Reference Re: Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486, noted that the principles of fundamental justice "are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person" (para. 24). This definition of these principles – as a "qualifier of the right" – is central to how courts must interpret their meaning:

> … [this] meaning must, in my view, be determined by reference to the interests which those words of the section are designed to protect and the particular role of the phrase within the section. As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning given to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights. This latter result is to be avoided given that the rights involved are as fundamental as those which pertain to the life, liberty and security of the person, the deprivation of which "has the most severe consequences upon an individual" (R. v. Cadeddu, (1982), 40 O.R. (2d) 128 (H.C.), at p. 139). (para. 25)

10. Lamer J. therefore expanded courts' consideration of the principles of fundamental justice to include not only procedural fairness or natural justice, but what is "found in the basic tenets of our legal system" – these principles "do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardians of the justice system" (para. 30). Courts have since interpreted these "basic tenets" to encompass arbitrariness, overbreadth, and gross disproportionality, which the Harm Reduction Coalition submits are principles of fundamental justice relevant to this case.

11. While courts have provided definitions of the principles of arbitrariness, overbreadth,

and gross disproportionality respectively, courts must still interpret the scope and meaning of these principles. Specifically, as McLachlin C.J. stated in *Bedford* at para. 107,

> … arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls "failures of instrumental rationality" - the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" [citation removed]. As Peter Hogg has explained:
>
> > The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality", by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective**. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.**

12. McLachlin J. elaborated on this further with respect to each particular principle: arbitrariness results when there is no "rational connection" between the purpose of an impugned law and its impacts (para. 111); overbreadth occurs when there is no "rational connection" between the purpose of the law and some, but not all, of its impacts (para. 112); and gross disproportionality happens when a law's impacts are so grossly disproportionate to its purpose that these impacts cannot "rationally be supported" (para. 120). However, these definitions leave open the issue of what is rational when assessing whether a connection exists between a law's purpose and its impacts, or whether these impacts can be supported in relation to the purpose.

13. As with the principles of fundamental justice more broadly, "a single incontrovertible meaning" of "rationality" with respect to these specific principles is not necessarily apparent, and therefore this meaning should be determined with reference to the rights section 7 is designed to protect. As an example of this, McLachlin J. noted at para. 118 of *Bedford* that questions exist regarding what "lack of correspondence" between a law's purpose and impacts is arbitrary or overbroad:

> An ancillary question, which applies to both arbitrariness and overbreadth, concerns how significant the lack of correspondence between the objective of the infringing provision and its effects must be. Questions have arisen as to whether a law is arbitrary or overbroad when its effects are *inconsistent* with its objective, or whether, more broadly, a law is arbitrary or overbroad whenever its effects are *unnecessary* for its objective[.]

Determining this "lack of correspondence" is an evidentiary question, in consideration of "basic norms":

> Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence. (para. 119, emphasis in original)

14. However, what are the norms that inform this determination? What connection is "rational" within this assessment? The Harm Reduction Policy Coalition aims to assist the Court with these questions and submits that the Court may be guided by a contextual approach which is framed by principles of public health grounded in international human rights law.

15. This type of contextual approach is established in caselaw. For example, in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (*Suresh*), the Court used a "contextual approach" to assess what principles of fundamental justice were relevant in an extradition case (para. 45). This approach was

> … informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada's international obligations and values as expressed in "[t]he various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms"[.] (para. 46)

16. While in *Suresh*, the Court did not apply this approach to the specific principles of arbitrariness, overbreadth, and disproportionality, the Harm Reduction Policy Coalition suggests that this approach is relevant to these principles in this case, for the reasons outlined above. As the Court noted in *Suresh*, "in seeking the meaning of the Canadian Constitution, the courts may be informed by international law" (para. 60). The principles of fundamental justice "take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound." *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at para. 23 (*Khadr*).

B. An Approach Framed by Public Health Principles

17. Canada is a party to the *International Covenant on Economic, Social, and Cultural*

Rights, 16 December 1966, 999 at 171 (entered into force 3 January 1976) ("*ICESCR*"). Article 12 of the *ICESCR* recognizes, broadly, "the right of everyone to the highest attainable standard of physical and mental health", and has been interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) to be consistent with specific obligations or public health principles. There are four, more specific principles which stem from this, and which the Harm Reduction Policy Coalition submits are relevant to this Court's analysis of the context and norms underlying the principles of fundamental justice outlined above. These four principles are as follows:

a. **Harm prevention**: Preventing harm, injury, disease and unnatural death is fundamental to public health policy. Article 12(2)(c) of the *ICESCR* creates obligations on state parties to prevent, treat and control epidemic and other diseases, while Article 12(2)(d) requires state parties to create conditions ensuring access to medical services. Harm prevention obligations are reflected in domestic law – for instance, section 2 of the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 notes its purpose is to

> … provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario**.**

Such medical services must be "accessible to all, especially the most vulnerable or marginalized sections of the population", CESCR, General Comment 14: *Substantive Issues Arising in The Implementation of The International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 22nd Sess. UN Doc E/C.12/2000/4, 2000, para. 12(b) (*General Comment 14*).

b. **Clarity / certainty**: When dealing with public health concerns, clarity and certainty are crucial for effective local action. State conduct causing uncertainty or confusion about the scope of acceptable action hinders response and undermines public health objectives. This requirement for certainty is reflected in states' obligations when taking steps

towards fully realizing the right to health under Article 12 of the *ICESCR*. The steps taken "must be deliberate, concrete and targeted towards the full realization of the right to health" *General Comment 14* at para. 30. In part to support this, there is also a

> … strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives[.] (para 32)

c. **Evidence-based policy making**: Public health policy must be based on rigorous evidence and combat stigma. This is rooted in states' obligations to ensure both quality and accessibility of health services:

> As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality.
>
> (*General Comment 14* at para. 12(b))

As noted in the United Nations Economic and Social Council *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, E/CN.4/2005/51, 2005, para. 52. Stigma faced by marginalized individuals impacts accessibility of health services:

> Various forms of stigma and discrimination continue to undermine the realization of the right to health for persons with mental disabilities. For example, they often face discrimination in access to general health-care services, or stigmatizing attitudes within these services, which may dissuade them from seeking care in the first place.

d. **Alignment of public safety with public health**: Laws aimed at public safety must not harm individuals or communities by undermining their health – these laws may, to the contrary, be at odds with public safety goals when they reduce services that promote health, both at an individual and population level. This is reflected in the interaction between the Article 12's right to health and the limitations clause in Article 4 of the *ICESCR*, which restricts limitations on the rights set out in the *ICESCR* to those which are "solely for the purpose of promoting the general welfare in a democratic society." A state party

> […] which, for example, restricts the movement of, or incarcerates, people with transmissible diseases such as HIV/AIDS, refuses to allow doctors to treat presons believed to be opposed to a government, or fails to provide immunization against the community's major infectious diseases, **on grounds such as national security or the preservation of public order**, has the burden of justifying such serious measures in relation to each of the elements identified in Article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and **strictly necessary for the promotion of the general welfare in a democratic society**. [Emphasis added] (*General Comment 14* at para. 28)

18. Together, these principles provide a framework to assess whether there is a rational connection between the purposes and impacts of the *CCRA*, or whether the *CCRA*'s impacts can be rationally supported.

C. Applicability of these Principles to the *CCRA*

19. The *CCRA*'s stated public safety purpose is to "protect children, families and people struggling with addiction", while its stated public health purpose is to support the Government of Ontario's "belief that addictions treatment is the best way to achieve lasting recovery".[1] The *CCRA* seeks to further these purposes by restricting the geographic[2] and legislative[3] availability of supervised consumption services, and by prohibiting certain public health exemptions under the *CDSA*[4] as well as federal funding for certain medical interventions[5].

20. Are these impacts – the restrictions and prohibitions set out above – "rationally connected" to or "rationally supported" by the *CCRA*'s stated purposes? The four public health principles outlined above provide guidance as follows.

Harm Prevention

21. In *Bedford*, McLachlin C.J. determined that an assessment of whether a law creates harm

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[1] *Safer Streets, Stronger Communities Act*, 2024, S.O. 2024, c. 27 – Bill 223, Preamble
[2] See s. 1 definitions of "child care centre", "designated premises", EarlyON child and family centre", "prescribed", "private school" and "school", s. 2(1) 200m prohibition and s. 2(4) 30-day exemption for SCS where a private school or child care centre begins operating after Royal Assent.
[3] See ss. 3(2)(1) and 3(2)(3) restriction on applying for, renewing or supporting *CDSA* exemptions for supervised consumption services.
[4] See s. 3(1) prohibition on applying for an exemption under the *CDSA* to decriminalize a controlled substance or precursor.
[5] See s. 3(2)(2) restriction on seeking federal funding to support "safer supply" prescribed medication services.

is "qualitative, not quantitative" (para. 158) when determining whether the law's impacts are overbroad relative to its purpose. As she noted in relation to the laws restricting sex workers from screening their clients at issue in *Bedford*,

> If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established. (*ibid.*)

22. This quote emphasizes the importance of harm prevention in assessing whether a law's purpose justifies any harm it may create, particularly when the harm created may result in death of an individual. One potential death is enough to establish the "severity of the harmful effects" or impacts in relation to a law's purpose. This is particularly relevant to an assessment of the *CCRA* – the Respondent has argued that only a small percentage of consumption is supervised,[6] and that some people do not live within reach of supervised consumption sites.[7] Even if this Court finds the Respondent's evidence on these points reliable, these arguments are quantitative, not qualitative, and therefore not relevant when determining the severity of the *CCRA*'s impacts on people who use drugs. The Respondent does not appear to dispute that no overdose deaths have occurred at supervised consumption sites since these sites were established in Ontario.[8] As in *Bedford*, if these services prevent even one person who uses drugs from dying as a result of an overdose, the "severity of the harmful effects" of restricting these sites is established.

23. Further, in relation to the *CCRA*'s stated public health purpose regarding a recovery model of treatment, the Respondent advances evidence that harm is not only likely, but anticipated:

> The factors that enable people to overcome addictions include the experience of **negative consequences** and the availability of alternative sources of motivation and support.[9]

24. If the *CCRA* is intended to create these "negative consequences" by restricting

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[6] See Responding Application Record, Vol 4, Tab 32, p. 1894, para. 106.
[7] See Responding Application Record, Vol 4, Tab 31, p. 1804, para. 30.
[8] See e.g. Reply Record, Tab 26, p. 375, para. 23 and p. 384, para. 75. Notably, even the academic reference relied on by the Respondent's expert at Responding Application Record, Vol 4, Tab 31, p. 1804, para. 30 states "Nobody has succumbed to a fatal overdose inside an SCS. This is strong evidence of a positive effect".
[9] Responding Application Record, Vol 4, Tab 31, p. 1799, para. 11.

supervised consumption sites thus increasing the risk of overdose, then these impacts do not prevent harm, but instead result in the opposite. This must then undermine the *CCRA*'s stated public health purpose – the purpose cannot, in this case, be rationally connected to these impacts.

Clarity / Certainty

25. In addition to its listed geographic restrictions (section 2(1)), the *CCRA* allows for further "prescribed premises" to be defined through regulation (section 1(e)), includes prospective requirements that supervised consumption sites close within 30 days if a private school or child care facility begin operation after Royal Assent (section 2(4)), and creates limitations on applying, renewing and supporting exemptions (section 3). These restrictions, requirements and limitations are layered onto a broader policy context which imposes significant "additional measures" [10] on service providers and where funding for these services has been repeatedly delayed or denied.[11] Uncertainty created by these cumulative impacts may render the prospect of operating supervised consumption sites unviable, as noted by the President and Chief Executive Officer of the Neighbourhood Group Community Services ("TNG"):

> Moreover, no matter where in the city KMOPS [a supervised consumption site] attempted to relocate to, we would never have any assurance that we could actually operate a supervised consumption site there for any length of time, because the CCRA would require our site to close within 30 days if a school or childcare centre opened within 200 metres of it.
>
> The closure of KMOPS will at least for the foreseeable future mean that TNG will be unable to offer any supervised consumption services at all.[12]

26. In addition, the uncertainty created by the *CCRA* transcends this immediate legislative and service context. As noted in the evidence, "ahead of clinician and research efforts – front-

[10] These include requiring sites to: undertake a crime prevention through environmental design assessment every three years, and to update their safety and security policies and procedures; create new policies for reporting complaints and serious incidents, discouraging loitering, de-escalation, and service restriction; implement timelines for starting investigations into complaints; and, mandates the reporting of all complaints to the ministry regardless of substantiation or scope. They also require public health units to report all complaints regardless of whether or not they are substantiated. Applicant Record Vol. 1, Tab 3-W, pp. 255-256.
[11] See e.g. Applicant Record Vol. 1, Tab 3, pp. 46-47, paras. 61-75.
[12] Applicant Record Vol. 1, Tab 3, page 60, para 130-131.

line harm reduction workers have been engaging with people who use unregulated drugs to try to prevent overdose deaths".[13] That is, individuals in the community have acted to supervise consumption and provide overdose responses before supervised consumption sites were sanctioned in Ontario. Given this context, it is reasonable to conclude that these individuals will again engage in this conduct if supervised consumption sites are closed. This creates legal uncertainty for these individuals akin to the circumstances of the staff of supervised consumption sites where these sites are restricted, as discussed by the Court in *Canada (AG) v. PHS Community Services Society*, 2011 SCC 44 – these individuals in the community may not

> … buy drugs or assist with their injection. Yet their minimal involvement with clients' drugs may bring them within the legal concept of illegal possession of drugs, contrary to s. 4(1) of the [*Controlled Drugs and Substances Act*, SC 1996, c 19]. (para. 90)

27. This lack of clarity or certainty must be considered in determining whether there is a connection between these impacts and the *CCRA*'s purposes – are public health and public safety objects supported by a law that may result in supervised consumption sites closing altogether? Or are these impacts retrogressive[14] relative to the right to health in this context? Is the lack of certainty as to the ongoing availability of services inconsistent with the obligation to ensure efforts are "deliberate, concrete and targeted towards the full realization of the right to health"[15] for people who use drugs?

Evidence-based policy making

28. As mentioned above, evaluating legislation and policy involving drug use is not always straightforward because of pervasive stigma related to drugs and drug use. Feelings of fear and discomfort regarding drug use may be honestly and strongly held, even if these feelings are not factually supported as being indicative of actual risk or harm. Stigma can be reified both into

[13] Reply Tab 25, p. 342, para. 37.
[14] *General Comment No. 14*, para. 32.
[15] *General Comment 14* para. 30.

legislation[16] and decision making.[17] In this context, it is particularly important to ensure that legislation and policy involving drug use is evidence based. Legislation premised on stigma, and not on reliable evidence, cannot be considered to hold a rational connection to its stated purpose.

29. There are examples from the record of evidence illustrating the potential impacts and involvement of stigma in this case. For instance, stigma may be grounded in unproven assumptions about people who use drugs, and their drug use. The record of evidence shows assumptions that: all drug use is addiction, causing an "illness state", [18] without considering drug use that may be occasional or for other reasons such as pain management; and erratic behaviour or a person's appearance is sufficient basis to presume a person recently used drugs.[19] This record also contains assumptions about safety in relation to individuals either using drugs or simply living in poverty – that their appearance and activities necessarily present a risk to the safety of others without consideration for specific factual circumstances.[20]

30. There also appears to be assumptions with respect to the health of people who use drugs, as well as with treatment – specifically, that "recovery" means stopping all substance use, negating the need for supervised consumption sites,[21] or that providing supervised consumption services without a requirement to reach abstinence is synonymous with not supporting individuals who do seek treatment, abstinence based or not.[22] This calls into question whether

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[16] One approach to assist in identifying this is outlined in Bennett, D., Larkin, D. *Project Inclusion: Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia*, (Vancouver, Pivot Legal Society. 2019) at Part 3: Making Stigma Visible).

[17] See e.g. See Kiepek, N. "Discursively Embedded Institutionalized Stigma in Canadian Judicial Decisions". *Contemporary Drug Problems*, 2024 Aug 30. https://doi.org/10.1177/00914509241269439. Analyzing 129 criminal law decisions, Dr. Kiepek asks "How is the concept of harm constituted in case law pertaining to the importation, production, possession, and trafficking of drugs in Canada?", finding that moralizing language, including words and tropes that "cannot be interpreted as purely impartial" are entrenched and normalized in judicial decisions. Dr. Kiepek also identifies a number of decisions that eschew this pattern by avoiding moralization language and instead effectively draw on evidence-informed knowledge.

[18] E.g. Responding Application Record, Vol 4, Tab 32, p. 351-2. This generalization is challenged at Reply Tab 27, p. 404, para. 23.

[19] E.g. Responding Application Record, Vol 1, Tab 1-A, p. 17.

[20] E.g. Responding Application Record, Vol 4, Tab 31, p. 1808, Para. 41, and Vol 1, Tab 1, p. 5, para. 13 and Tab 1-A, p. 9-14.

[21] Responding Application Record, Vol 4, Tab 31, p. 1806, para. 35. See also Vol 4, Tab 32, p. 1900-1901, paras. 136-137, Vol 4, Tab 31, p. 1802 para. 21, p. 1806, para. 33, p. 1807-1808, para. 39-40. This is challenged at Reply Tab 26, page 367-368 paras. 5, 12, 13.

[22] Responding Application Record, Vol 4, Tab 32, p. 1900-1901, paras 136-137.

supporting a "recovery" oriented treatment model requires closing supervised consumption services.

31. Similarly, the record of evidence also shows assumptions that a perceived correlation of the existence of a supervised consumption site with certain activities must mean these activities are caused by the site.[23] These activities may instead indicate an existing need for supervised consumption services in a community[24] or may be related to other factors, including increasing impacts of the varying types of unregulated drugs and other social factors.[25]

Alignment of public safety with public health

32. Public health and safety are interrelated. Where legislation has a purpose related to public safety or public order, its impacts must be assessed to determine whether they decrease the presence of factors which create conditions of safety or health. Legislation aimed at managing public order is not justifiable where the legislation itself creates or exacerbates the issues it then seeks to control.

33. This principle can be understood by reference to the Respondent's evidence. The *CCRA* prohibits, restricts and removes not only supervised consumption services but also the authority to seek various exemptions under section 56 of the *CDSA* as well as funding for certain medical services. One of the Respondent's experts, however, acknowledges that

> … many regions of Canada must take substantial and overdue steps to provide community-based, recovery-oriented responses to the current crisis of poly-substance use, homelessness, unemployment and mental illness.[26]

34. Are these "substantial and overdue steps" supported by the *CCRA*'s prohibitions and restrictions? As noted above, in relation to stigma, the answer to this question is informed by evidence as to how supervised consumption services co-exist with and support other types of

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[23] Responding Application Record, Vol 1, Tab 2 p. 75, and Vol 1, Tab 1-A, p. 17, Vol 4, Tab 31, p. 258, para 38.
[24] See e.g: Applicant Record, Vol 1, Tab 3-A p. 72, Tab 3-F, p. 127; Tab 2, pp. 43-46, paras 10, 11, 12, 13, 16, and Reply Tab 1, pp. 7-11, paras. 4, 8, 12, 16, 18, 19, Tab 5, pp. 89-90, paras 5. See also Reply Tab 26, p. 385, para. 79.
[25] See e.g. Reply Tab 1, pp., 2-6, paras. 4-7, 9, 13-14, 16, 18 and Tab 24, p. 304-305, para. 32.
[26] Responding Application Record, Vol 4, Tab 31, p. 1802, para. 20.

responses and requires an evidence-based approach to determine.

35. In addition, to the extent that the *CCRA* is premised on concerns arising from drug use in public spaces, its effect is to decrease alternative options. As noted above, with respect to assumptions about correlation and causation, community concerns targeted at homelessness or poverty may be misunderstood or conflated with drug use at or in the general vicinity of a supervised consumption site – this could then decrease safety for people experiencing homelessness and poverty by characterizing their presence as inherently a risk to public safety.

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

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SCHEDULE "A" – LIST OF CITED AUTHORITIES

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Bennett, D., Larkin, D. *Project Inclusion: Confronting Anti-Homelessness & Anti-Substance User Stigma in British Columbia*, (Vancouver, Pivot Legal Society. 2019)	28
Kiepek, N. "Discursively Embedded Institutionalized Stigma in Canadian Judicial Decisions". *Contemporary Drug Problems*, 2024 Aug 30	28

THE NEIGHBOURHOOD GROUP OF COMMUNITY SERVICES et al. Applicants	-and-	HIS MAJESTY THE KING IN RIGHT OF ONTARIO Respondents

Court File No. CV-24-00732861

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE INTERVOR COALTION: HARM REDUCTION POLICY COALITION

(CANADIAN DRUG POLICY COALITION, TORONTO OVERDOSE PREVENTION SOCIETY, TORONTO HARM REDUCTION ALLIANCE, WATERLOO REGION DRUG ACTION TEAM)

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B E T W E E N:

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Applicants

-and-

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

APPLICATION UNDER Rule 14.05 of the *Rules of Civil Procedure*

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PART I – OVERVIEW

1. Does the *Community Care and Recovery Act, 2024* ("***CCRA***") adequately balance its objective and its effects?

2. The Toronto Board of Health ("**Board**") was granted intervenor status in this Application. The Board is responsible for programs and services in Toronto relating to harm reduction, infectious disease prevention and control, and population health assessment and surveillance.

3. The Court is being asked to consider the constitutional validity of the *CCRA*. Among other things, the Court is being asked to consider whether the *CCRA*'s prohibition on SCSs within 200 meters of child-centric locations breaches the right to life, liberty, and security of the person that is protected by section 7 of the *Charter*. The Board makes the following submissions to assist the Court in its task:

   A. When considering concerns of overbreadth under section 7, the Court should consider the ways in which the *CCRA* overreaches its legislative purpose by capturing harm reduction activities and sites (like drug checking and needle exchange programs in Toronto) that pose no harm to children;

   B. When considering gross disproportionality under section 7 and minimal impairment under section 1, the Court should carefully consider the unique vulnerabilities of the population using harm reduction services; and,

   C. When conducting the final proportionality balancing under the section 1, the Court should consider the high cost exacted by the *CCRA* on the drug using and broader populations of Toronto.

4. The Board anticipates the effect of reducing access to harm reduction services in Toronto in the middle of a drug toxicity crisis will be severe: more people will overdose and die. This is a very high cost for achieving the legislative objective of the *CCRA*.

PART II – FACTS

A. The Toxic Drug and Overdose Crisis in Toronto

5. Like many jurisdictions, Toronto is in the midst of a drug toxicity crisis that is characterized by high rates of fatal and non-fatal opioid overdoses.[1]

6. Per the Toronto Medical Officer of Health, "[d]rug toxicity deaths are in large part caused by the unregulated drug supply, where highly potent opioids are often combined with unexpected and concerning substances."[2]

7. Data collected through Toronto's Drug Checking Service ("**TDCS**") confirms that Toronto's unregulated opioid supply is increasingly composed of unexpected mixtures of highly potent opioids and other substances.[3] The unpredictable and toxic composition of street drugs defy the expectations of people who use them and complicate the pharmaceutical impact on them. The result can be deadly.[4]

8. In addition to being exposed to a toxic drug supply, people who use drugs in Toronto are also more likely to experience other vulnerabilities (like being homeless or underhoused, having a substance use disorder, etc.) that increase their risk of overdose and impact their ability to access healthcare services.[5]

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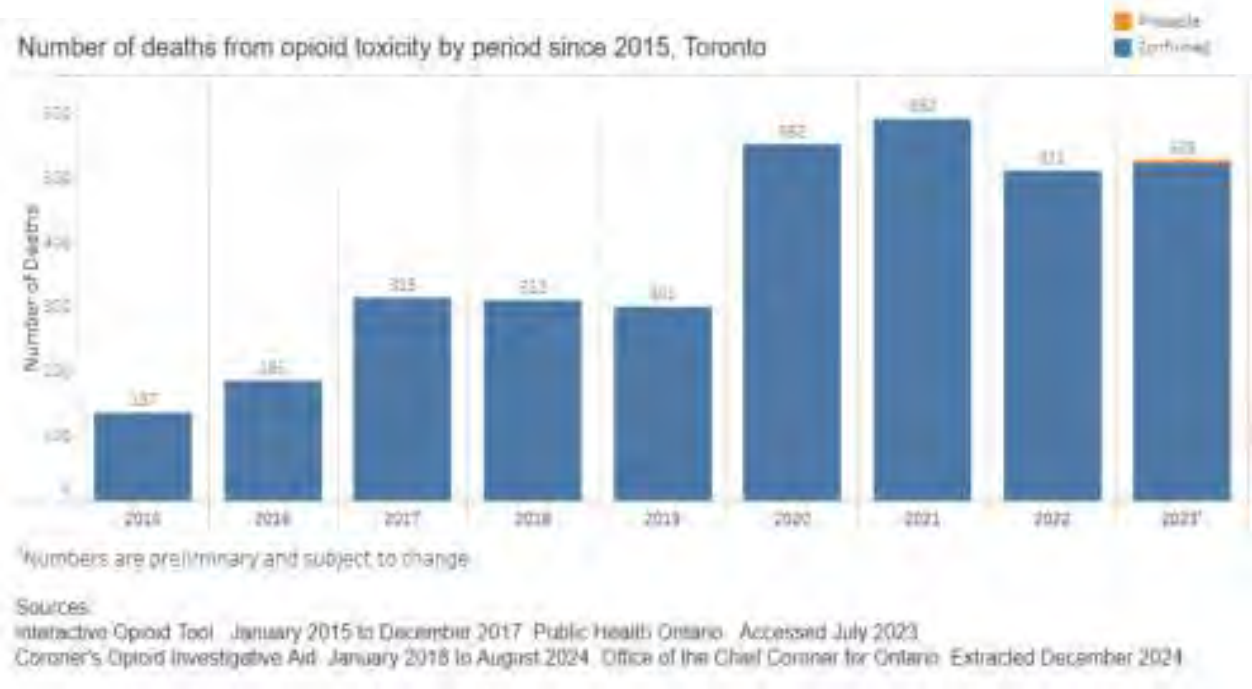
[1] "Actions to Respond to the Drug Poisoning Crisis in Toronto – MOH Report to Board of Health" (November 23, 2021), page 1, Application Record, Tab 10 - Affidavit of Lauren Costoff, affirmed January 10, 2025 ("**Costoff Affidavit**"), Exhibit K, Item 13, page 647; "OHOC Annual Progress Report, 2024," page 4, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 40, page 649.
[2] "OHOC Annual Progress Report, 2024," page 4, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 40, page 649.
[3] "OHOC Annual Progress Report, 2024," page 4, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 40, page 649.
[4] Toronto's Drug Checking Services – Graphs, "Factsheet on the Drug Toxicity Epidemic in Toronto (October 2024)," Application Record, Tab 10 - Costoff Affidavit, Exhibit K, page 657; "Factsheet on the Drug Toxicity Epidemic in Toronto (October 2024)," Application Record, Tab 10 - Costoff Affidavit, Exhibit K, page 653.
[5] In one study of people who used drugs in Toronto between November 2018 and March 2020, 91% were homeless or housed in unstable situations and 38% had been incarcerated in the past six months, both of which are risk factors for overdoseReport of Dr. Werb Final, Application Record, Tab 12 – Affidavit of Dan Werb, sworn January 9, 2025 ("**Dr. Werb Affidavit**"), Exhibit A, pages 930-931.

9. For 2023 alone, there were 2932 emergency department visits and 449 hospitalizations at Toronto hospitals due to opioid poisoning. For that same period, Toronto Paramedic Services attended 376 non-fatal and 24 fatal suspected overdose calls every month.[6] The Office of the Chief Coroner of Ontario reported 528 probable and confirmed opioid toxicity deaths in Toronto for 2023.[7] These numbers for a single year are startling.

10. The graph below depicts the year-to-year number of opioid toxicity deaths in Toronto since 2015 and paints a clear picture of an escalating epidemic:[8]



11. The Board and Toronto Medical Officer of Health have repeatedly recognized the overdose and toxic drug crisis as a public health crisis.[9]

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[6] "Factsheet on the Drug Toxicity Epidemic in Toronto (October 2024)," Application Record, Tab 10 - Costoff Affidavit, Exhibit K, page 658.
[7] Toronto Overdose Information System (TOIS) – Deaths [accessed February 24, 2025], Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 1, page 646.
[8] Toronto Overdose Information System (TOIS) – Deaths [accessed February 24, 2025], Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 1, page 646.
[9] "Actions to Respond to the Drug Poisoning Crisis in Toronto – MOH Report to Board of Health" (November 23, 2021), page 1, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 13, page 647.

B. Harm Reduction to Address the Public Health Crisis

12. As part of its integrated strategy to address drug use and the current toxic drug crisis, the Board has adopted and expressed its support for a comprehensive, evidence-based approach that integrates prevention, treatment, and harm reduction.[10]

13. Harm reduction is a set of practical strategies meant to reduce the harms associated with substance use. Effective harm reduction approaches are low barrier to account for the unique vulnerabilities of the population they serve; it is a population that is disproportionately suffering from substance use disorder, insecure housing, recent incarceration, among other things.[11]

14. The importance of harm reduction measures is heightened in the context of the unpredictable and toxic drug supply that has resulted in unprecedented levels of overdoses and deaths.[12]

15. Among other harm reduction measures, the Board has promoted SCSs.[13] SCSs are clinical spaces where people bring their own drugs to use in the presence of trained health professionals.[14] The primary goal of an SCS is to reduce the risks of using drugs, including the risk of overdose and the risk of transmission of HIV, Hepatitis B and C and other blood borne

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[10] Toronto Overdose Action Plan: Prevention and Response (March 2017); Agenda Item History - 2017.HL18.3; Agenda Item History – 2018.HL27.1; Agenda Item History - 2019.HL7.1; Agenda Item History - 2020.HL17.2; Agenda Item History -2021 .HL29.2; Agenda Item History - 2022.HL38.3, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Items 20, 22, 26, 32, 34, 36, and 38, pages 648 – 649.

[11] Sinclair Affidavit, paras 41-42, Application Record, Tab 3, page 38-39; "The Toronto Drug Strategy: A comprehensive approach to alcohol and drugs," Toronto Drug Strategy Advisory Committee (December 2005), page 6, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 5, page 646.

[12] Actions to Respond to the Drug Poisoning Crisis in Toronto – MOH Report to Board of Health (November 23, 2021), page 1, Tab 10 - Costoff Affidavit, Application Record, Exhibit K, Item 13, page 647.

[13] Toronto Overdose Action Plan: Prevention and Response (March 2017); Agenda Item History - 2017.HL18.3; Agenda Item History – 2018.HL27.1; Agenda Item History - 2019.HL7.1; Agenda Item History - 2020.HL17.2; Agenda Item History -2021 .HL29.2; Agenda Item History - 2022.HL38.3, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Items 20, 22, 26, 32, 34, 36, 38, Application Record, pages 225-228.

[14] Services Provided by The Works – City of Toronto, Application Record, Tab 10 – Costoff Affidavit, Exhibit K, Item 4, page 646.

infections.[15] SCSs also offer other important harm reduction services like drug checking and needle exchange programs.[16] An internal Ontario government review conducted in 2018 concluded that SCSs are effective at reducing overdose-related morbidity and mortality and result in fewer HIV and Hepatitis C infections.[17]

16. In 2023, there were a total of 94,872 client visits to the ten SCSs sites in Toronto. In that period, the staff of Toronto SCSs responded to 2,296 overdoses and collected 507,476 needles.[18]

C. Federal CDSA Exemptions for SCSs, Drug Checking and Other Sites

17. SCSs are permitted to operate pursuant to exemptions granted by the federal Minister of Health under the *Controlled Drugs and Substances Act* ("***CDSA***").[19] Exemptions granted pursuant to section 56.1 of the *CDSA* are specifically for SCSs and allow the possession of illicit drugs within an SCS.

18. Section 56(1) of the *CDSA* allows exemptions for broader purposes. A section 56(1) exemption may be granted where, "in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest."[20] Such exemptions could be granted to sites that offer supervised consumption services or to sites where drugs are handled but not consumed, including drug collection sites where illicit drugs are collected for testing, sites where illicit drugs are tested, and sites performing activities for some other scientific or public interest purpose.

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[15] Report of the Toronto and Ottawa Supervised Consumption Assessment Study ("TOSCA"), pages 5 & 11, Application Record, Tab 10 – Costoff Affidavit, Exhibit K, Item 6, page 647.
[16] Affidavit of Bill Sinclair sworn January 9, 2025 (**"Sinclair Affidavit**"), paras 95-96, Application Record, Tab 3, page 5.
[17] "Supervised Consumption Services in Ontario – Evidence and Recommendations," pages 3-4, Application Record, Tab 9 - Affidavit of Lin Sallay sworn January 9, 2025 ("**Sallay Affidavit**"), Exhibit E, page 403.
[18] "Factsheet on the Drug Toxicity Epidemic in Toronto (October 2024)," Application Record, Tab 10 - Costoff Affidavit, Exhibit K, page 658.
[19] *Controlled Drugs and Substances Act*, SC 1996, c 19, ss 56(1) and 56.1
[20] *Controlled Drugs and Substances Act,* SC 1996, c 19, s 56(1).

19. The TDCS is a drug testing service operating in Toronto under *CDSA* exemptions.[21] Samples of illicit drugs are collected – often at SCSs – and transported for testing to TDCS affiliated laboratories, like those at St. Michael's hospital.[22] Since launching in 2019, the TDCS has tested over 15,000 drug samples from Toronto's unregulated drug supply and has identified many novel substances in street drugs that have been directly linked to overdose.[23]

20. The TDCS provides people who use illicit drugs timely information about the composition and toxicity of their drugs so they can make more informed decisions about their substance use. It also provides information on Toronto's unregulated drug supply to community health workers, clinicians, first responders, public health units, policy makers, researchers and others, who use the data to develop evidence-based policies and responses to the current public health crisis.[24]

D. Impact of the CCRA on Harm Reduction Services in Toronto

21. The *CCRA* will shutter five out of the ten SCSs in Toronto and reduce the general availability of harm reduction services in the city.

22. Among other things, the *CCRA* prohibits the operation of a "supervised consumption site" within 200 meters of a school, childcare centre or other designated premises.[25] The prohibition comes into effect on April 1, 2025 or 30 days after any school or child care centre begins providing instruction or operating within 200 meters of an SCS, subject to some ministerial discretion.[26]

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[21] "About us", Toronto's Drug Checking Service, referenced in "OHOC Annual Progress Report, 2024, - MOH Report to the Board of Health," page 4, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 40, page 649.
[22] Sinclair Affidavit, paras 96-99, Application Record, Tab 3, pages 51-52.
[23] "Summary of fentanyl contamination for KMOPS – TCDS, December 2024", Application Record, Tab 3 - Sinclair Affidavit, Exhibit AA, page 276.
[24] "About us", Toronto's Drug Checking Service, referenced in "Our Health, Our City Annual Progress Report, 2024," page 4, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, "City of Toronto's City Solicitor's Office to…", Item 40:
[25] *Community Care and Recovery Act, 2024,* SO 2024, c 27, Sched 4, s 2 (1).
[26] *Community Care and Recovery Act, 2024,* SO 2024, c 27, Sched 4, s 2 (4) & (5).

23. On April 1, 2025, the date the prohibition comes into effect, the number of SCSs in Toronto will drop by half.[27] Supervised consumption, drug checking and needles exchange will become less available in Toronto. Given the challenges to opening an SCS (both securing a space and obtaining the necessary government approvals)[28] and given the Ontario government's current position that it will not permit new SCSs to open,[29] it is likely that the interruption in service and reduced availability of those harm reductions services will be permanent.

PART III – ISSUES

24. The Court is being asked to consider the constitutional validity of the *CCRA*. Among other things, the Court is being asked to consider whether the *CCRA*'s prohibition on SCSs within 200 meters of child-centric locations breaches the right to life, liberty, and security of the person that is protected by section 7 of the *Charter*. The Board makes the following submissions to assist the Court in that task:

A. When considering concerns of overbreadth under section 7, the Court should consider the ways in which the *CCRA* overreaches its legislative purpose by capturing harm reduction activities and sites (like drug checking and needle exchange programs in Toronto) that pose no harm to children; and,

B. When considering gross disproportionality under section 7 and minimal impairment under section 1, the Court should carefully consider the distinct vulnerabilities of the population using harm reduction services;

C. When conducting the final proportionality balancing under the section 1, the Court should consider the high cost exacted by the *CCRA* on the drug using and broader populations of Toronto.

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[27] Dr. Bayoumi Report, para 81, Application Record, Tab 11 - Bayoumi Affidavit, page 684.
[28] Sinclair Affidavit, para 32 and Exhibit H1: Exemption Application, September 2018, Application Record, Tab 3, Exhibit H, page 36 and 146.
[29] "CPAC video of the News Conference held by Ontario Ministers on November 18, 2024," min. 22:25, Costoff Affidavit, Tab 10, para 10 and Exhibit G, pages 431 & 624.

PART IV – LAW AND ANALYSIS

A. Overreach of the CCRA

25. The *CCRA* captures harm reduction services and sites, like drug checking and needle exchange programs, that are unconnected to the law's objective of protecting children.

26. In the context of a section 7 analysis, the fundamental principles of justice protect against laws that are so broad in scope that they capture *some* conduct that bears no relation to the law's purpose. Overbreadth is a distinct principal of fundamental justice that acknowledges that a law will offend our basic values where there is no connection between some of the law's effects and its objective.[30]

27. The CCRA overreaches in two ways. First, it prohibits harm reduction services offered at SCSs that are unrelated to supervised consumption; second, it captures other sites that perform activities unrelated to supervised consumption.

28. First, the *CCRA*'s 200-meter prohibition captures needle exchange programs and drug checking services provided at SCSs that require the handling of illicit drugs but that are unconnected to supervised consumption and pose no risk to children.

29. Drug checking is an important harm reduction service that allows users of drugs to better understand the make-up of the drugs they consume and make more informed decisions about their substance use. Because SCSs are required by Health Canada to provide or make referrals to drug checking services to check for drug content and toxicity,[31] Toronto SCSs serve as an important collection point for the TDCS.[32] The closure of five Toronto SCSs will interrupt and reduce access to the TDCS service, making it more difficult for users of that service to have their

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[30] *R v. Bedford,* 2013 SCC 72 (CanLII), para 112-119.
[31] Affidavit of Dr. Sharon Koivu, para 27, Responding Application Record, Tab 30, page 1581.
[32] Sinclair Affidavit, para 143-144, Application Record, Tab 3, pages 62 – 63; "About us", Toronto's Drug Checking Service, referenced in "OHOC Annual Progress Report, 2024, - MOH Report to the Board of Health," page 4, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 40, page 649.

drugs checked. This is especially problematic considering the characteristics of the population that use SCSs, which is generally less able to adapt to service barriers like service interruption, service relocation or reduced service availability.[33]

30. Second, the *CCRA* 200-meter proscription may also capture sites that do not offer supervised consumption services, including drug checking laboratories (like the TDCS at St. Michael's Hospital)[34] and scientific research. There is no suggestion that these sites pose a risk to children.

31. A "supervised consumption site" is a defined term under the *CCRA.* That definition is not limited to sites where drugs are consumed. Rather, a "supervised consumption site" is defined in the *CCRA* as any site in respect of which the federal Minister of Health has granted an exemption under section 56.1 for the purpose of a supervised consumption site ***or*** under section 56(1) where the exemption is necessary for a scientific purpose or otherwise in the public interest.[35] This broad definition of a "supervised consumption site" not only captures sites like Toronto's SCSs that provide supervised consumption services, but may also captures sites operating under *CDSA* exemptions like TDCS affiliated clinical laboratories[36] and sites that have been granted exemptions for a scientific or public interest purpose that requires them to handle unregulated drugs.

32. Given the broad definition, all these sites and their on-site activities (sample collection, sample testing and research) are swept into the *CCRA*'s 200-meter proscription, despite having no connection to supervised consumption and despite posing no conceivable risk to children.[37]

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[33] Sinclair Affidavit, para 143, Application Record, Tab 3, pages 62 – 63.
[34] "About us", Toronto's Drug Checking Service, referenced in "OHOC Annual Progress Report, 2024, - MOH Report to the Board of Health," page 4, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 40, page 649.
[35] *Community Care and Recovery Act, 2024,* SO 2024, c 27, Sched 4., s.1
[36] "About us", Toronto's Drug Checking Service, referenced in "OHOC Annual Progress Report, 2024, - MOH Report to the Board of Health," page 4, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 40, page 649.
[37] *Safer Streets, Stronger Communities Act, 2024,* SO 2024, c 27 – Bill 223, Preamble.

33. It is an overreach with consequence. Without collection and testing sites, the TDCS and other drug testing services will be more limited in their ability to provide drug information in Toronto to people who use drugs and for Toronto public health stakeholders and service providers who rely on the data for public health purposes.[38] The loss of exempted sites means people who use drugs in Toronto will be less informed about the composition and toxicity of their own drugs and the unregulated drug supply in Toronto more generally, which may impede their ability to make informed decisions about their substance use. It also means that the Board, researchers, public health officials, harm reduction service providers and other stakeholders will have less data available to develop evidence based responses and policies to combat the toxic drug crisis.[39]

B. Accounting for Unique Vulnerabilities of Effected Populations in Gross Disproportionality under s. 7 and Minimal Impairment under s.1

34. In considering whether the *CCRA's* negative impacts are grossly disproportionate to the legislative objective of protecting children, or whether those negative impacts do not minimally impair the section 7 rights of SCS clients, the Court must consider the unique characteristics of the population of people who use those services.[40] The *CCRA* impacts cannot be considered in a vacuum.

Gross Disproportionality

35. Section 7 of the *Charter* protects against laws whose effects are so severe that they are judged to be out of all proportion to the law's objective. In those cases, a law's effects are so grossly disproportionate that they cannot be rationally supported.[41]

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[38] Among other uses for the TDSC data, Toronto Public Health posts weekly results from the TDCS, combined and presented in graphs for use by community and healthcare stakeholders, as well as those who use drugs. See Toronto Overdose Information System (TOIS), Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 1, page 646.
[39] Sinclair Affidavit, para 96-99, Application Record, Tab 3, page 52; Toronto Overdose Information System (TOIS), Costoff Affidavit, Exhibit K, Item #1, Application Record Volume 2, Tab 10, page 225; "About us", Toronto's Drug Checking Service, Application Record, Tab 10 - Costoff Affidavit, Exhibit K, Item 40, : Our Health, Our City Annual Progress Report, 2024, page 4;
[40] *R v. Bedford,* 2013 SCC 72 (CanLII), para 120.
[41] *R v. Bedford,* 2013 SCC 72 (CanLII), para 120

36. The *CCRA* regulates SCSs in Ontario by prohibiting them from operating within 200 meters of designated child centric sites. This will result in the closure of half of the SCSs in Toronto.[42] To properly gauge the severity of that deprivation to users of the effected services, the Court must account for the vulnerabilities of populations who use them.

37. The users of SCSs and of harm reduction services more generally present with overlapping and compounding vulnerabilities – conditions and circumstances that heighten their susceptibility to harm and limit their ability to overcome service barriers.[43]

38. A vulnerability that all users of harm reductions services share is their drug use and, for many, a drug dependence.[44] Those who use SCSs and/or drugs are disproportionately unhoused, unemployed, previously incarcerated and suffering from mental illness.[45] Each of these vulnerabilities, and their overlap, create obstacles for accessing services. For this reason, harm reduction service providers use a low barrier approach to service delivery.[46]

39. The complex and overlapping vulnerabilities of SCS clients mean they are less able to adapt to service barriers like service interruption, service relocation or reduced service availability. For example, faced with an interruption in service, the populations who make up the clientele of harm reduction services are less likely to travel to re-establish access to services.[47] Thus, while the service barriers resulting from the CCRA's 200-meter proscription might more lightly impact populations living without vulnerabilities, they can be insurmountable to those living with them.

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[42] Sinclair Affidavit, para 144, Application Record, Tab 3, page 63; "Factsheet on the Drug Toxicity Epidemic in Toronto (October 2024)," Application Record, Tab 10 - Costoff Affidavit, Exhibit K, page 658.
[43] Report of Dr. Werb Final, Application Record, Tab 12 – Dr. Werb Affidavit, Exhibit A, pages 931.
[44] Report of Dr. Werb Final, Application Record, Tab 12 – Dr. Werb Affidavit, Exhibit A, pages 930-931.
[45] Report of Dr. Werb Final, Application Record, Tab 12 – Dr. Werb Affidavit, Exhibit A, pages 930-931; Report of Dr. Bayoumi, Application Record, Tab 12 – Dr. Bayoumi Affidavit, Exhibit A, pages 681-683.
[46] Sinclair Affidavit, paras 41-42, Application Record, Tab 3, page 38-39
[47] Sinclair Affidavit, para 143, Application Record, Tab 3, page 63; Report of Dr. Bayoumi, Application Record, Tab 12 – Dr. Bayoumi Affidavit, Exhibit A, pages 683

40. In short, service barriers like an interruption in service, service relocation, or reduced service availability that do not present as a disproportionate deprivation for populations living without vulnerabilities can be a grossly disproportionate deprivation for those who do.

Minimal Impairment

41. The minimal impairment requirement of section 1 requires a similar analysis, where the Court is asked to consider whether legislative limits imposed by the government impair an individual's rights no more than is reasonably necessary.[48] A law is not minimally impairing where there is "an alternative, less drastic means of achieving the objective in a real and substantial manner."[49] Although some deference to the government is permitted, the government cannot insist on measures that seek to achieve outcomes to an unrealistic degree.[50] Conversely, a measure that accounts for the vulnerabilities of service users is more likely to meet the minimum impairment requirement.

42. Consider the alternative means to address community safety concerns around SCSs that were proposed by the independent and external supervisor and reviewers appointed by the Province of Ontario to examine an SCS operated in Toronto, the South Riverdale Community Health Centre ("SRCHC"). In the reports they presented to the Province, the external supervisor and reviewers offered a myriad of options to address perceived community safety concerns, including:[51]

- Provisions for security personnel at SCSs proximate to child-centric sites;
- Expansion of the existing 15-meter needle sweep perimeter in place for SCSs that are proximate to child centric sites;
- Third-party assessments of SCSs to ensure compliance with federal and provincial guidelines;
- Improved community engagement reporting to the Province by SCSs;

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[48] *R v Oakes,* 1986 CanLII 46 (SCC), para 70.
[49] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), para 55.
[50] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), para 55.
[51] See Campbell, Jill. "South Riverdale Community Health Centre: Consumption and Treatment Services Supervisor Report" (April 2024), page 4, Respondent's Record, Tab 5, Exhibit "Q", page 495, and Unity Health Toronto. "South Riverdale Community Health Centre Consumption and Treatment Service Review" (February 2024), pages 38-39, Respondent's Record, Tab 5, Exhibit "Q", pages 808-809.

- Specific community-relevant indicators for SCSs;
- Clear community consultation and engagement mechanisms that are focused on the needs of children for SCSs proximate to child centric sites;
- Clarity around inspections of SCSs and the level of government responsible for collecting and reviewing community feedback and concerns;
- Additional risk assessment and mitigation strategies for SCSs;
- Annual risk reporting;
- Provisions of thoughtful security assessment for SCSs;
- Expansion of services offered at SCSs to include supervised inhalation services to decrease the number of people who use drugs outside those sites; and,
- Expansion of the operating hours at SCSs to provide greater access to those who might otherwise use drugs outside the site.

43. Like the *CCRA*'s 200-meter proscription, the measures proposed in the SRCHC reports are aimed at addressing perceived community safety concerns, including risks to children at nearby child centric sites. However, the recommendations avoid significant impacts on SCS healthcare service delivery. Having accounted for the vulnerabilities of the population that use harm reduction services, the recommended measures do not risk the health and lives of those who use those services and represent alternative, less drastic means of achieving the community safety objective of the *CCRA*. They are more likely to be minimally impairing.

C. The Negative Population Impacts to Consider in the Final Balancing under s. 1

44. An increase of overdoses and deaths among those who rely on SCSs and the predicted impacts on community health is a very high cost for achieving the legislative objective of the *CCRA*.

45. The final stage of any *Charter* analysis involves a balancing exercise between the benefits of the impugned legislation and the negative impacts of the law on individuals or groups.[52] An infringing law will not be saved by section 1 where the effects of the impugned law are not proportional to the objective.[53]

[52] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII) at para 76.
[53] *R v Oakes,* 1986 CanLII 46 (SCC), para 70.

46. The impact of the *CCRA* restrictions on Toronto's population who use SCSs and the community at large cannot be understated. The consequences of terminating, interrupting and reducing access to harm reduction services in the middle of a toxic drug public health crisis is predictable and severe.

47. The 200-meter proscription will result in the closure of five of the ten SCSs in Toronto – half of those in existence.[54] This will result in a reduction of supervised consumption services, drug checking services and needle exchange programs. The Board anticipates that these increased barriers to access will lead to serious consequences for the drug-using population of Toronto, namely an increase in overdoses,[55] an increase in the spread of blood borne diseases like HIV and Hepatitis B and C,[56] and an increase in deaths.[57]

48. There are also other predictable impacts on the health of Torontonians that warrant consideration in the final proportionality balancing:

- Less data and research will be available to the Board and others upon the closures of SCSs, drug checking collection and analysis sites, and other public health services operating pursuant to s.56(1) *CDSA* exemptions. This could hinder the development of evidence-informed public health policy that is needed to respond to the current toxic drug crisis.

- Public services (including fire, ambulance and police) will become increasingly strained when resources are diverted to respond to an increase of overdoses and

[54] Dr. Bayoumi Report, para 81, Application Record, Tab 11 - Bayoumi Affidavit, page 684.
[55] Dr. Bayoumi Report, para 18, Application Record, Tab 11 - Bayoumi Affidavit, page 251.
[56] See also the TOSCA Report (2012), page 11, Application Record, Tab 10 – Costoff Affidavit, Exhibit K, Item 6. The TOSCA Report identified 52% Hepatitis C prevalence among people who use drugs in Toronto and 60% prevalence in Ottawa.
[57] Affidavit of Dr. Bayoumi, para 18, Application Record Volume 2, Tab 11, page 251.

medical events in the community that would otherwise have been prevented or addressed by healthcare professionals at shuttered SCSs.[58]

- The increased spread of blood borne communicable diseases (HIV, Hepatitis B and C, etc.) among the drug using population is in itself a public health concern, but the increased incidence of these diseases in the community could also lead to increased spread among the general population, including among those who do not use drugs.

49. The Board therefore anticipates the effect of reducing access to harm reduction services in Toronto in the middle of a drug toxicity crisis will be grave: more people will overdose and die. The question before the Court is whether that high price is worth paying.

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

Fred Fischer

Cara Davies

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

[58] Consider that in 2023 alone there were 2,932 emergency visits to emergency rooms and 449 hospitalizations due to opioid poisoning in Toronto and 24 fatal overdose calls and 276 non-fatal falls attended by Toronto Paramedic Services. In that same period, SCS staff addressed 2,296 overdoses and 523 that required naloxone. See "Factsheet on the Drug Toxicity Epidemic in Toronto (October 2024)," Application Record, Tab 10 - Costoff Affidavit, Exhibit K, page 658.

Schedule "A" – Authorities Cited

1. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII)
2. *R v. Bedford,* 2013 SCC 72 (CanLII)
3. *R v Oakes,* 1986 CanLII 46 (SCC)

Schedule "B" – Statutes Cited

1. *Community Care and Recovery Act, 2024*, SO 2024, c 27, Sched 4

Definitions

1 In this Act,

….

"supervised consumption site" means a site in respect of which the federal Minister of Health has granted an exemption to allow activities at the site in relation to a controlled substance or precursor that is obtained in a manner not authorized under the *Controlled Drugs and Substances Act* (Canada),

(a) under section 56.1 of the *Controlled Drugs and Substances Act* (Canada), in circumstances where the federal Minister of Health is of the opinion that the exemption is necessary for a medical purpose, or

(b) under subsection 56 (1) of the *Controlled Drugs and Substances Act* (Canada), in circumstances where the federal Minister of Health is of the opinion that the exemption is necessary for a scientific purpose or is otherwise in the public interest. ("site de consommation supervisée")

Note: Section 2 comes into force on April 1, 2025.

Prohibition re location of supervised consumption site

2 (1) Subject to subsection (4), no person shall establish or operate a supervised consumption site at a location that is less than 200 metres, measured in accordance with subsection (2), from a designated premises.

….

Exception

(4) If a private school began providing instruction or a child care centre began operating after the day the *Safer Streets, Stronger Communities Act, 2024* received Royal Assent, subsection (1) does not apply to a supervised consumption site with respect to the private school or child care centre, as the case may be, until the day that is 30 days after the day the private school began providing instruction or the child care centre began operating.

Same

(5) Despite subsection (4), if the Minister specifies a day on which subsection (1) applies to a supervised consumption site, subsection (1) applies to the supervised consumption site as of that day.

2. ***Controlled Drugs and Substances Act*, SC 1996, c 19**

…

Exemption by Minister

56 (1) The Minister may, on any terms and conditions that the Minister considers necessary, exempt from the application of all or any of the provisions of this Act or the regulations any person or class of persons or any controlled substance or precursor or any class of either of them if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

Exception

(2) The Minister is not authorized under subsection (1) to grant an exemption for a medical purpose that would allow activities in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act to take place at a supervised consumption site.

Exemption for medical purpose — supervised consumption site

56.1 (1) For the purpose of allowing certain activities to take place at a supervised consumption site, the Minister may, on any terms and conditions that the Minister considers necessary, exempt the following from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical purpose:

(a) any person or class of persons in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act; or

(b) any controlled substance or precursor or any class of either of them that is obtained in a manner not authorized under this Act.

3. ***Safer Streets, Stronger Communities Act, 2024*, SO 2024, c 27 – Bill 223,**

CHAPTER 27

An Act to enact two Acts and to amend various Acts with respect to public safety and the justice system

Preamble

The Government of Ontario:

Believes in keeping Ontario communities safe through supported and accountable policing and an efficient and effective justice system.

Is taking action to protect children, families and people struggling with addiction by restricting supervised consumption sites, in line with its belief that addictions treatment is the best way to achieve lasting recovery.

Is committed to fighting auto theft and careless driving in Ontario with enhanced oversight of commercial motor vehicles and stronger penalties.

Is working to give police the tools that will assist them in keeping our communities safe from sex offenders.

Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

….

SCHEDULE 4
COMMUNITY CARE AND RECOVERY ACT, 2024

…

B E T W E E N :

Court File No. CV-24-00732861-0000

THE NEIGHBOURHOOD GROUP COMMUNITY SERVICES et al.	-and-	HIS MAJESTY THE KING IN RIGHT OF ONTARIO
Applicant		*Respondent*

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

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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 AUBRY FORGUES

Applicants

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

APPLICATION UNDER Rule 14.05 of the *Rules of Civil Procedure*

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ONTARIO
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B E T W E E N:

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

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> **"COMMUNITY"**: PEOPLE WHO RESIDE IN A LOCALITY IN MORE OR LESS PROXIMITY. A SOCIETY OR BODY OF PEOPLE LIVING IN THE SAME PLACE, UNDER THE SAME LAWS AND REGULATIONS WHO HAVE COMMON RIGHTS, PRIVILEGES AND INTERESTS.[1]

PART I - INTRODUCTION

1. The interveners, Leslieville Neighbours for Community Safety ("**LNCS**") and Niagara Neighbours for Community Safety ("**NNCS**") (collectively, the "**Community Groups**") submit that section 2 of the *Community Care and Recovery Act, 2024* (the "***Act***"),[2] which, in part, prohibits the operation of a supervised consumption site ("**SCS**")[3] within 200 metres of schools and childcare centres, survives the applicants' constitutional challenge.

2. Of course, the heart of this case are fundamental issues that arise when we deal with pressing social issues. Who speaks for, or as, a community? Who knows best what measures enhance public health and safety for a community; is it the experts, the legislators, or the people who live in it and define it?

3. When this court evaluates the constitutionality of the *Act*, the Community Groups ask it to consider and place substantial weight on their and other communities' members' evidence and experiences of harm and threats to safety. They are the *public* whose interests are at the heart of this analysis. Their children are the very children that the *Act* seeks to protec. Their stories are not fantasy or fiction, crafted by NIMBYists to evict "undesirables" from their neighbourhood. They detail the effects of the failure of institutional oversight and of blind adherence to theory over reports from the ground. Their stories matter.

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[1] Black's Law Dictionary, 4th revised ed., p. 350 under the heading "community".
[2] *Community Care and Recovery Act, 2024*, SO 2024, c27, Sch 4 [the "***Act***"].
[3] *Act, supra* note 2 at s. 1: "a site in respect of which the federal Minister of Health has granted an exemption to allow activities at the site in relation to a controlled substance".

PART II - THE FACTS

THE PURPOSE OF THE *ACT*: A BALANCING ACT

4. Legislative responses to social issues often evolve as facts emerge. The purpose of the *Act* is to ameliorate the deleterious effects of SCSs in the communities in which they were placed. The *Act* seeks to balance the interests of SCS clients with the interests of others in the community, with minimal impact on individual rights. It attempts to craft a solution that enables SCS clients to access services without sacrificing numerous other valid community interests, such as protecting family businesses and shared community spaces; ensuring people feel safe in their communities; and safeguarding children's healthy cognitive development and their perceptions of normalcy.

5. Sections 2 and 3 of the *Act* were enacted "to protect children, families and people struggling with addiction by restricting supervised consumption sites, in line with its belief that addictions treatment is the best way to achieve lasting recovery".[4]

6. The geographic limitation in section 2 of the *Act* is necessary to protect public safety and prevent harm to community members. Thus, the lived experiences of those living close to SCSs, including members of Community Groups, are integral to understand and define the type and degree of risk to public safety that makes these provisions in the *Act* appropriate.

THE NATURE OF THE HARM: COMMUNITY MEMBERS SPEAK

7. LNCS formed in the wake of the July 7, 2023 murder of Karolina Huebner-Makurat, a local mother and resident who, while out walking, was caught in the crossfire when three alleged drug dealers who frequented the SCS located at the South Riverdale Community Health Centre

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[4] *Safer Streets, Stronger Communities Act*, *2024,* S.O. 2024, c. 27, Preamble.

(the "**South Riverdale CHC**") drew handguns and opened fire.[5] Later that summer, two of those dealers were charged with second degree murder and manslaughter.[6] On December 18, 2024, an employee of the South Riverdale CHC, Khalila Mohammed, a young woman seemingly struggling with problematic substance use,[7] pleaded guilty to being an accessory to Ms. Huebner-Makurat's murder.[8]

8. This murder was the exclamation point to the desperate pleas of community members, who had only 3 days earlier met with the leadership of the South Riverdale CHC to yet again express their concerns about public safety. At that meeting, one frustrated and bereft community member asked, "What needs to happen for something to actually change? Does one of our children have to die?" [9] The community's grave concerns had been thereto (and were, thereafter) ignored, undermined, and trivialized. Yet, in the absence of data specific to their neighbourhood, the residents of one street in Leslieville acted.

9. Between May 27, 2023 and June 26, 2023, residents of Heward Avenue began gathering date of public safety-related activities relating to the SCS at the South Riverdale CHC. In that period, they reported 146 incidents arising from 90 unique submissions.[10] The street continued to record incidents until July 30, 2023.

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[5] Affidavit of Derek Finkle sworn January 14, 2025, Responding Record, Vol. 1, TAB 5 ("**Finkle Affidavit**"), at para. 82, p. 0106.
[6] Finkle Affidavit at para. 83-84, p. 0106.
[7] Affidavit of Tara Riley sworn January 14, 2025, Responding Record, Vol. 2, TAB 8 ("**Riley Affidavit**"), at para. 63, p. 0636.
[8] Finkle Affidavit at para. 86, p. 0106.
[9] Affidavit of Ashley Kea sworn January 14, 2025, Responding Record, Vol. 2, TAB 7 ("**Kea Affidavit**"), at para. 34, p. 0604.
[10] Affidavit of Andrea Nickel sworn January 21, 2025, Responding Record, Vol. 2, TAB 13 ("**Nickel Affidavit**") at para. 42, p. 0758.

10. In addition to murder, the residents recorded incidents they and their families experienced, including visible drug use, discarded drug paraphernalia, aggressive language/behaviour and fighting, drug use requiring medical attention, and drug trafficking.[11]

11. Following is a selection of specific representative incidents:[12]

> Thursday, April 12: [Mighty Kids Daycare, 14 Verral Ave.] A man was passed out at the bottom of our stairs just before pick-up time where all of our children, staff, and parents enter and exit. I called 9/11 to do a wellness check as we did not know if he was breathing. They came and helped him/escorted him off the property.
>
> Thursday, July 6, 2023: [Queen St. E. in front of South Riverdale CHC] I walked by the Centre at 8:25 with my son. There were 5 people congregated at west door of Centre. One was using. I made eye contact with one male on our way to get ice cream. After finishing our ice cream, my son and I went to the Morse Street school yard to play. The male with whom I made eye contact was in the school yard with another male. They were using in the small playground equipment for kindergarten kids. They left behind 2 vials/tubes and a wrapper in the wood chips directly under the equipment.
>
> July 26, 2023: [Morse Street Public School Playground] We have had numerous discussions with our daughter about not picking up things on the ground including needles and other items, and yet today while attending daycare camp - she did pick one up. She is a curious 5 year old, whose brain doesn't have the capacity to pause and reason as easily as adults do in these moments. This could have been anyone's child and it could have been a worse outcome. I've been informed by the daycare that she was "not pricked" by the needle so there is no need to worry, and that they will alert parents to speak to kids about not picking up such items and alert an adult instead. This is NOT OKAY.

12. Members of LNCS also captured the words of neighbourhood children, whose daily lives were perhaps most affected by the SCS. The neighbourhood children's lives revolve around the

[11] Nickel Affidavit at paras. 53-54, p. 0760.
[12] Exhibit "B" to the Nickel Affidavit, Responding Record, TAB 13, p. 0778.

streets and laneways near their homes; this is where they and their friends' play, where they learn, grow, and start to make sense of the world.[13]

> I was walking past the [South Riverdale CHC] home from the park and a group of men were swearing and acting aggressively. When I looked at them, one of them threw a beer can at my head. (Boy, age 11)
>
> I was playing basketball in the laneway behind my house. It is very close to the back of the [South Riverdale CHC]. A woman noticed me playing and started running towards me yelling and screaming with wide, scary eyes. I quickly ran into my garage and hit the button for the garage door to come down. I was so scared. Luckily it closed just before she got there. (Boy, age 13)

13. Children living near the SCS at the Riverdale CHC have found baggies of fentanyl and discarded needles.[14] They have witnessed drug deals, which have triggered panic attacks because they are afraid of getting shot, like Ms. Huebner-Makurat.[15] They have nightmares and cry themselves to sleep because of disturbing events they have witnessed around the SCS, including the erratic behaviour of those who are high on drugs.[16] They have been screamed at by drug-using adults,[17] chased, and witnessed fights.[18] They have experienced a heightened degree of violence, crime, and aggressive behaviour. These observations contribute to adverse childhood experiences ("**ACEs**").[19]

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[13] Exhibit "D" to the Nickel Affidavit, TAB 13, p. 0814.
[14] Kea Affidavit at para. 25, p. 0602.
[15] Kea Affidavit at para. 47, p. 0607.
[16] Affidavit of Samantha Spence sworn January 14, 2025, Responding Record, Vol. 2, TAB 10 ("**Spence Affidavit**") at para. 20, pp. 0653-0654.
[17] Affidavit of Curtis Priest sworn January 24, 2025, Responding Record Vol. 3, TAB 18 ("**Priest Affidavit**") at para. 15(c), p. 1192.
[18] Nickel Affidavit at paras. 25-26, p. 0755.
[19] Transcript of the cross-examination of Dr. Nancy Guerra, Amended Joint Supplementary Application Record, TAB 21 ("**Guerra Transcript**") at q. 119, p. 2216.

14. One of the "things that we do know" is that if children see these kinds of behaviour immediately in front of them on a regular basis (people using drugs, fighting, brandishing weapons), it is "bad for children".[20] It perhaps bears saying that children are much more likely to see negative events associated with an SCS if they live or go to school directly across from it.[21]

15. The experience of SCS clients also calls into question the refrain that SCSs save lives. They operate on bankers' hours, usually 9 a.m. to 5 p.m.[22] At the Riverdale SCS, the CEO conceded that there were more people using drugs outside the building than inside.[23] Confirmed overdoses in South Riverdale tripled between 2019 and 2022.[24]

16. Rather than save lives, the SCSs have given users and advocates the false security that someone is addressing the opioid crisis. This application is predicated on a false dichotomy; that the only options are to keep the SCSs that are less than 200 metres away from schools open or be complicit in people dying. The *Act* seeks to find a more effective approach to the opioid crisis that does not perpetuate a zero-sum game.

17. The risks to users are clear from the experiences of community members: with the SCS comes concentrated violence, theft, and other risks. With the advent of "soft-touch policing", users and residents are equally without recourse.[25]

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[20] Guerra Transcript, q. 125, p. 2224.
[21] Guerra Transcript, q. 51, p. 2118.
[22] Finkle Affidavit at para. 73, p. 0104; Affidavit of Diane Chester sworn January 14, 2025, Responding Record, Vol. 3, TAB 15, at para. 8, p. 1083.
[23] Transcript of the cross-examination of Derek Finkle, Amended Joint Supplementary Application Record, TAB 8 ("**Finkle Transcript**"), q. 198, p. 0920.
[24] Finkle Transcript, q. 109, p. 0873.
[25] Affidavit of Andrea Nickel at paras. 9, 33, 44, pp. 0751, 0757, and 0759, Finkle Affidavit at paras. 44-46, p. 0098.

18. The safety of children, and the public, has long been an objective of legislation that governs the use and distribution of substances that might be harmful to children.[26] Likewise, legislation often provides that certain licenses or permits will not be issued if doing so is "not in the public interest", including having regard "to the needs and wishes of the residents of the municipality in which the premises to be licensed are located".[27]

19. Even the City of Toronto acknowledged the need to protect children, especially, from the harms associated with proximity to drug use. In its 2022 application for a city-wide exemption to the crime of drug possession, the City of Toronto noted that possession would be prohibited near childcare facilities and K-12 schools "to maintain alignment with provincial legislation intended to prevent alcohol, cannabis, and unregulated drug use in these settings".[28]

20. The Supreme Court of Canada (the "**SCC**") has confirmed that children "are vulnerable members of Canadian society" and that lawmakers "act admirably when they shield children from psychological and physical harm", responding to the "the critical need of all children for a safe environment".[29]

21. The lawmakers who drafted the *Act* have similarly acted admirably. They have crafted a geographical restriction for the location of SCSs that meets the tests under ss. 7 and 1 of the

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[26] 11.(1) of General, O Reg 468/18 to the Cannabis Licence Act, 2018; s. 12(2) of the *Smoke-Free Ontario Act, 2017*, SO 2017, c 26, Sch 3.
[27] *Liquor Licence and Control Act, 2019*, SO 2019, c 15, Sch 22 at s. 3(6).
[28] Exhibit "K" to Finkle Affidavit, TAB 5, p. 0267.
[29] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76 at para. 58.

Charter. They have, in effect, balanced the claims of the applicants with the interests of some of society's most vulnerable constituents.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. S. 2 OF THE *ACT* DOES NOT VIOLATE S. 7 OF THE *CHARTER*

22. The applicants argue that the geographical restriction in s. 2 does not accord with the principles of fundamental justice.

23. The applicants have the burden of proving that this provision takes away "life, liberty, or security of the person in a way that runs afoul of our basic values."[30] These basic values include preventing laws that are arbitrary, overbroad, and grossly disproportionate to its object.[31]

24. When assessing the purpose of the law, the court must ask whether, when taken at face value, the purpose is connected to its effects. The law does not violate s. 7 if its effects are negative; the effects just cannot be grossly disproportionate to the law's purpose.[32]

25. The court's inquiry into the law's impact on life, liberty, or security of the person is not quantitative but qualitative. It does not matter if one or a million are affected. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7.[33]

26. In arguing that s. 2 of the *Act* breaches their s. 7 *Charter* rights, the applicants rely heavily on the decision in *Canada (Attorney General) v. PHS Community Services Society* ["***PHS***"].[34] In

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[30] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 96 ["***Bedford***"].
[31] *Bedford*, *supra* note 30 at para. 96.
[32] *Bedford*, *supra* note 30 at para. 125.
[33] *Bedford*, *supra* note 30 at para. 127.
[34] *PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 ["***PHS***"].

PHS, the applicants argued that the prohibition on possession of illegal drugs was grossly disproportionate to the law's objectives, which are the protection of public health and the maintenance of public safety.[35]

27. In its decision, the SCC wrote that the prohibition on possession engaged but did not violate s. 7 of the *Charter*. It observed, positively, that a "prohibition combined with the power to grant exemptions" was the type of law one might draft if intending to combat drug abuse while respecting *Charter* rights.[36] The availability of exemptions was a "safety valve" that prevented the law from applying where such application would be arbitrary, overbroad, or grossly disproportionate in its effects.

28. In *PHS*, the s. 7 infringement was not the wording or operation of the law but the government's use of its discretion to refuse to grant an exemption to the law for the purposes of operating an SCS.

29. In this application, the applicants argue that preventing SCSs from operating within 200 metres of schools and daycares violates their ability to access the lifesaving and health-protecting services offered at those SCSs.

30. To succeed in proving that their. 7 rights are violated, they must show that they are unable to access lifesaving and health-protecting services if SCSs are located 201 meters from a school or daycare. This argument is unsupported by the evidentiary record and defies common sense.

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[35] *PHS, supra* note 34 at para. 110.
[36] *PHS, supra* note 34 at para. 114.

31. As in *PHS*, the *Act* provides a "safety valve". It does not constitute or outright forbid SCSs. The *Act* provides only that SCSs cannot be located near schools and daycares. There is no prohibition on SCSs located an appropriate distance away from these vulnerable community members.

32. If the applicants are nevertheless successful in proving that their s. 7 rights are engaged, the law does not violate those rights, as it is not arbitrary, overbroad, or disproportionate.

(i) The Act *is not Arbitrary*

33. A law that imposes limits on life, liberty, or security of the person in a way that bears *no connection* to its objective arbitrarily impinges on those interests.[37] The *Act* is designed to protect children, families, and those struggling with addiction. The restriction in s. 2 of the *Act* is clearly connected to this objective as it restricts SCSs from places that children frequent or are legally required to be for extended periods of time, and not from other places, which children may be found (*i.e.*, restaurants, stores, etc.).

(ii) The Act *is not Overbroad*

34. A law that is overbroad "goes too far and interferes with some conduct that bears no connection to its objective".[38] In *R. v. Heywood*, the accused challenged a vagrancy law that prohibited those convicted of certain offences from "loitering" in public parks. The law's objective was to protect children from sexual predators. The SCC found that the law was overbroad insofar

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[37] *Bedford*, *supra* note 30 at para. 111.
[38] *Bedford*, *supra* note 30 at paras. 101, 112, citing R. v. Heywood, 1994 CanLII 34 (SCC).

as it (1) applied to offenders who did not constitute a danger to children; and (2) applied to parks where children were unlikely to be present.[39]

35. The prohibition in s. 2 applies only to SCSs. It does not apply to needle exchange programs, which do not require a federal exemption from the CDSA. The assertion, however, that other services provided by SCSs "pose no harm to children" is made without any scientific backing. It also brazenly disregards the words of children and parents who live near SCSs.

36. Drug checking entails the analysis of illegal drugs, which checks for toxicity and confirms drug content.[40] Individuals who have their drugs checked presumably go on to use those drugs. Community members who live, work, and attend school near SCSs that provide this service have given evidence that illegal drugs are sold and used in the immediate proximity of the SCS.[41] It is illogical, and defies first-hand evidence about conduct outside SCSs, that a drug user would obtain their drugs, receive confirmation that their drugs are safe and then wait several hours or walk hundreds of metres away from where their drugs were checked to another location to use those drugs.

37. The *Act* must properly target any activity that relates to illegal drug use, which may negatively affect children. Where there is drug testing and drug kits, there are drugs. The uncontroverted evidence on the record is that "people who go to supervised consumption sites are using drugs, and they're congregating in an area because you're drawing everybody there."[42]

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[39] *R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 SCR 761 at paras. 57-58 and 63.
[40] Affidavit of Dr. Sharon Koivu affirmed January 24, 2025, Responding Record, Vol. 4, TAB 32, para. 27, p. 1581.
[41] Riley Affidavit at paras. 26, 28, 29, 32, 33 and 35, pp. 0631-0632.
[42] Guerra Transcript at q. 64, p. 2192.

(iii) The Act *is not Disproportionate*

38. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure.[43] Gross disproportionality under s. 7 of the *Charter* does not consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law.[44]

39. The *Act* does not prohibit the operation of all SCSs, outright. SCSs that operate 201 meters or further from schools and daycares do and will continue to operate. It is true that an individual who wants to avail themselves of an SCS service will need to find an SCS that is 201 meters from a school or daycare. Nothing in s. 2 of the *Act* prohibits SCSs from relocating or opening at a location sufficiently far from these premises.

~~40.~~ The applicants have not submitted scientific data to support the claim that SCSs must be located near schools and daycares to prevent harm to the applicants and those similarly situated. Indeed, there is no scientific data on the geographical necessity of any of the current locations of SCSs.[45] Absent clear data as to the geographical requirements of users, a court cannot conclude that a geographical restriction is disproportionate.

41. On its face, s. 2 survives s. 7 *Charter* scrutiny.

B. THE PROVISION SATSIFIES THE REQUIREMENT OF PRESSING AND SUBSTANTIAL OBJECTIVE, AND PROPORATIONALITY

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[43] *Bedford*, *supra* note 30 at para. 120.
[44] *Bedford*, *supra* note 30 at para. 121, R. v. Malmo-Levine at para. 181.
[45] Finkle Affidavit at para. 28, p. 0094.

42. If this court finds that s. 2 of the *Act* infringes the applicants' s. 7 rights, which is denied, it must undertake a s. 1 analysis. Under s. 1, the court must determine whether the negative impact of the law on the rights of individuals is proportionate to the pressing and substantial goal of the law. The question of justification based on an overarching public goal is at the heart of s. 1.[46] Under a s. 1 analysis, the respondent bears the burden of showing that the *Act* can be justified having regard to the government's goal.[47]

(i) Public Safety is a Critical Legislative Objective

43. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial.[48] The SCC has found that "the objective of ensuring safety in schools is sufficiently important to warrant overriding a constitutionally protected right or freedom."[49] The Court has also found that shielding children from psychological and physical harm and responding to the critical need of all children for a safe environment are meritorious legislative objectives.[50]

44. The *Act* aims to achieve a reasonable level of safety by creating a "buffer zone" or reasonable distance between schools and daycares and SCSs. This distance of 200 metres carves out an area that can be easily monitored and secured. It also protects children, who are specifically cited as deserving of protection as an objective of the *Act*.

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[46] *Bedford*, *supra* note 30 at para. 125.
[47] *Bedford*, *supra* note 30 at para. 126.
[48] *Bedford*, *supra* note 30 at para. 126.
[49] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 45, citing *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868 at para. 45.
[50] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76 at para. 58.

(ii) The Beneficial Impact of the Law Outweighs the Negative Impact on Individuals' Rights

45. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on individuals' rights against the beneficial impact of the law in terms of achieving its goal for the greater public good.[51] The impacts are judged both qualitatively and quantitatively. The respondent is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.[52]

46. In *JTI Macdonald,* the SCC found that "the vulnerability of the young may justify measures that privilege them over adults in matters of free expression."[53] In *Irwin Toy*, the SCC upheld a stipulation that the late hour of advertising did not create a presumption that it was not aimed at children, finding that it "makes clear that children's product advertising, if presented in a manner aimed to attract children, is not permitted even if adults form the largest part of the public likely to see the advertisement."[54]

47. What children see affects them. This applies to advertising, indecent material, and the violence, threats, and other conduct that goes hand in hand with SCSs. In indecency cases, for example, the court is required to consider harm that "society formally recognizes as incompatible with its proper functioning".[55]

48. One type of harm that is "grounded in values recognized by our Constitution and similar fundamental laws" is harm to those whose autonomy and liberty may be restricted by being

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[51] *Bedford*, *supra* note 30 at para. 126.
[52] *Bedford*, *supra* note 30 at para. 126.
[53] *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 (CanLII), [2007] 2 SCR 610 at para. 93-94.
[54] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36 at para. 62.
[55] *R. v. Butler,* 1992 CanLII 124 (SCC), [1992] 1 SCR 452 at p. 485.

confronted with inappropriate conduct.[56] The SCC has found that community members are free to live within a zone that is free from conduct that deeply offends them.[57]

> The loss of autonomy and liberty to ordinary people by in-your-face indecency is a potential harm to which the law is entitled to respond. People's autonomy and enjoyment of life can be deeply affected by being unavoidably confronted with debased public sexual displays. Even when avoidance is possible, the result may be diminished freedom to go where they wish or take their children where they want. Sexual conduct and material that presents a risk of seriously curtailing people's autonomy and liberty may justifiably be restricted.
>
> Since the harm in this class of case is based on the public being confronted with unpalatable acts or material, it is essential that there be a risk that members of the public either will be unwillingly exposed to the conduct or material, or that they will be forced to significantly change their usual conduct to avoid being so exposed.[58]

49. This harm poses a "real risk that the way people live will be significantly and adversely affected by the conduct."[59] This type of harm is deserving of being avoided.

50. The facts in this application confirm the negative experiences of children who live and learn near SCSs. Implementation of the *Act*, particularly s. 2, is intended to and will ameliorate the level of exposure to the reported antisocial behaviours, which are detrimental to children's development.[60] The evidence provides that "there's enough of a negative impact [of SCSs] that even if there's a positive impact, there could still be a positive impact if it's 200 metres away.

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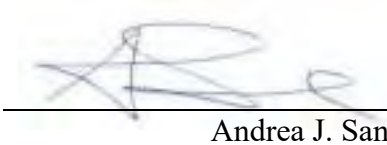
[56] *R. v. Labaye,* 2005 SCC 80 at para. 36 ["***Labaye***"].
[57] *Labaye, supra* note 56 at para. 40.
[58] *Labaye, supra* note 56 at para. 42.
[59] *Labaye, supra* note 56 at para. 57.
[60] Guerra Transcript, q. 63, p. 2190.

You're just reducing the negative impact on children who see it everyday when they come to and from school."[61]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of March, 2025.



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[61] Guerra Transcript, q. 257, p. 2275.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868.

2. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

3. *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 (CanLII), [2007] 2 SCR 610.

4. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76.

5. *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.

6. *PHS Community Services Society*, 2011 SCC 44.

7. *R. v. Butler,* 1992 CanLII 124 (SCC), [1992] 1 SCR 452.

8. *R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 SCR 761.

9. *R. v. Labaye,* 2005 SCC 80.

SCHEDULE "B"
STATUTES, REGULATIONS & BY-LAWS

Community Care and Recovery Act, 2024, SO 2024, c27, Sch 4.

Safer Streets, Stronger Communities Act, *2024,* S.O. 2024, c. 27.

Smoke-Free Ontario Act, 2017, SO 2017, c 26, Sch 3.

Liquor Licence and Control Act, 2019, SO 2019, c 15, Sch 22.

THE NEIGHBOURHOOD GROUP COMMUNITY SERVICES et al.
Applicant

-and-

HIS MAJESTY THE KING IN RIGHT OF ONTARIO
Respondent

Court File No.CV-24-00732861-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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RCP-F 4C (September 1, 2020)