File No. S065587
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

VANCOUVER AREA NETWORK OF DRUG USERS (VANDU)

Plaintiff

And:

ATTORNEY GENERAL OF CANADA and
MINISTER OF HEALTH FOR CANADA

Defendants

AMENDED OUTLINE

PART I

The following relief will be sought at the hearing:

31.(a) A declaration that the conduct of the staff in the ordinary course of business at the SIF does not amount to or involve the commission of any offences at law and, as such, an exemption from any law under s. 56 of the ***CDSA*** or otherwise is not required or necessary.

31.(a2) A declaration pursuant to s.52(1) of the ***Constitution Act, 1982*** that the ***Controlled Drugs and Substances Act***, the ***Regulations*** issued there under, and the conditions of any s.56 exemption do not apply to the medical treatment at the SIF of persons addicted to a controlled drug, and all related matters necessarily incidental thereto.

31.(b) A declaration of constitutional invalidity, pursuant to s.52 of the ***Constitution Act, 1982,*** as the appropriate and just remedy under s.24(1) of the ***Charter*** for the breach of s.7 of the ***Charter***, that the offence of the possession of all addictive drugs as set out in Schedule 1 of the ***CDSA***, their preparations, derivatives, alkaloids or salts, contrary to s. 4(1) of the ***CDSA***, is unconstitutional in that in its effects it imposes a level of state-imposed psychological stress that is constitutionally cognizable, and that is grossly disproportionate relative to its objects and that it therefore violates s. 7 of the ***Canadian Charter of Rights and Freedoms*** as affecting liberty and the security of the person in a manner that is inconsistent with the principles of fundamental justice. In the alternative, that the aforesaid offences are at least

unconstitutional when an IDU is onsite at the SIF, engaged in seeking *bona fide* medical and social intervention for his or her addiction.

31.(c) A declaration of constitutional invalidity, pursuant to s.52 of the ***Constitution Act, 1982***, as the appropriate and just remedy under s.24(1) of the ***Charter*** for the breach of s.7 of the ***Charter***, that s. 56 of the ***CDSA*** is unconstitutional to the extent that it vests an unfettered discretion in the Minister, enabling the Minster to deprive an individual of their right to liberty and their right to security of their person in a manner that does not accord with the principles of fundamental justice;

31.(d) An interlocutory order granting an interim constitutional exemption to the staff and IDUs at the SIF, pending the decision of this honourable Court at the conclusion of these proceedings;

31.(e) If this honourable Court determines that some form of exemption from the law is required, either for the staff at the SIF or the IDUs or both, and agrees that s. 56 of the ***CDSA*** is unconstitutional as aforesaid, then the Plaintiff seeks a court-ordered constitutional exemption for the staff and/or IDUs at the SIF, to be continued until such time as the Defendants put in place a valid constitutional process for the obtaining of exemptions that will enable the Province of British Columbia to carry out its constitutional health jurisdiction in a manner that is not subject to the unfettered discretion of the Defendant Minister of Health, and will enable IDUs to access such medical interventions without fear of arrest and prosecution, and that s. 56 be declared to be unconstitutional pursuant to s.52 of the ***Constitution Act, 1982***, leaving it to the Defendant Minister of Health to enact regulations that will enable a constitutional exemption process to be put in place.

31.(f) Costs **in any event of the cause, including special costs**

PART II

Basis for seeking relief:

The factual basis asserted by the Plaintiff is set out in the Amended Statement of Claim filed August 28th, 2007, the original Statement of Claim having been filed August 30th, 2006. **In addition the plaintiff relies upon the affidavits of Dean Wilson, Ann Livingston, sworn September 1st, 2006 and the affidavits of Doctors Thomas Kerr and Gabor Mate sworn the 31st day of August, 2006 and filed in these proceedings. The Plaintiff VANDU also relies upon all of the affidavits filed in the parallel proceedings brought by the PHS Society that is being heard at the same time.**

1. The basis for the relief claimed under paragraph 31(a) of the Amended Statement of Claim is based on the facts asserted in paragraphs 1, 4, 5, 6 – 8, 11, 12, 22, 23(a) and 23(b) of the Statement of Claim. In addition the Plaintiff relies on the affidavit of Ann Livingston (supra) and the affidavit of Dr. Thomas Kerr(supra) and in particular at paragraphs 3 – 6.

This Plaintiff will rely on the submissions of counsel for the Plaintiff PHS Community Services Society in the related proceedings on the division of powers constitutional argument and will be adopting those submissions in this respect as substantiating the assertions in paragraphs 22, 23(a) and 23(b) of the Statement of Claim.

The Plaintiff says that the conduct of the staff in the ordinary course of business at the Safe Injection Facility (SIF) do not amount to the commission any offences under the ***Controlled Drugs and Substances Act.*** In particular the Plaintiff says that their ordinary conduct does not amount to conduct falling within the definition of "possession" as set out in s.2 of the ***Controlled Drugs and Substances Act*** which by its definition brings into play s.4(3) of the ***Criminal Code of Canada*** and taking into account the further definition in s.2(2) of the ***Controlled Drugs and Substances Act*** that extends the definition of a "controlled substance", provided one bears in mind the definition of a "device" in s.2 of the ***Food and Drugs Act***.

The Plaintiff says that the staff at the SIF are not involved in producing, trafficking or possessing for the purpose of trafficking or any other offences set out in the ***Controlled Drugs and Substances Act*** and the only one that raises a question is that of simple possession pursuant to s.4(1) of that ***Act***. The Plaintiff says that the case law interpreting the meaning of s.4(3) of the ***Criminal Code of Canada*** requires the person to not only have knowledge of the existence of the substance and what it is and requiring an element of custody of the substance, but also requires some element of "control" over the substance. Further, the staff member never has an intention to control the substance for an illicit purpose or to deal with it in some prohibited manner and the absence of the existence of a blameworthy state of mind is a defence to any charge. Further the Plaintiff says that the "parties" section (s.21 of the ***Criminal Code of Canada***) has no application to the circumstances in the context of the administration of the SIF. The conduct of the staff falls under the rubric of "public duty" for an innocent and laudable purpose in accordance with the Province's jurisdiction over health and a blameworthy state of mind does not arise. They act no differently than doctors, nurses and other health care professionals and staff in hospitals and other facilities providing health care.

The cases that the Plaintiff relies upon in support of this position are ***R. v. Dyck*** (1969), 68 W.W.R. 437 (BCCA); ***R. v. Kushman*** (1949), 93 C.C.C. 231 (BCCA); ***Beaver v. R*** [1957] S.C.R. 531 (SCC); ***R. v. Christie*** (1978), 41 C.C.C. (2d) 282 (NBCA); ***R. v. York***, [2005] B.C.J. No. 250; (2005) 193 C.C.C. (3d) 331

2. The basis for the relief under Statement of Claim paragraph 31(a2), is based upon the assertions in paragraphs 22, 23(a) and 23(b) of the Statement of

Claim, namely the division of powers constitutional argument. As stated above, in this regard this Plaintiff will rely upon the submissions of Plaintiff's counsel in the related action of PHS Community Society et al. and will adopt those submissions. The Plaintiff also relies on the affidavits of Dr. Thomas Kerr (supra) and Dr. Gabor Mate (supra) as well as the affidavit of Dean Wilson (supra).

This Plaintiff in addition relies on the decisions of the Supreme Court of Canada in ***R. v. Schneider,*** [1982] 2 S.C.R. 112 and ***R. v. Malmo-Levine: R. v. Caine***, [2003] 3 S.C.R. 571 (S.C.C.)

3. **The basis for the relief in sought in Statement of Claim paragraph 31(b) is based on the assertions of fact set out in the Statement of Claim at paragraphs 1, 4, 5, 13, 20-23(a), 24-28, 30.The Plaintiff also relies in particular on the affidavit of Dean Wilson (supra) and the affidavit of Danielle Lukiv sworn the 18th day of April and filed and in particular the exhibits A and B to that affidavit consisting of the 2007 CCENDU Report and the Vancouver Police Overdose Response Policy.**

The Plaintiff says that the means taken by Parliament in the prohibition of addictive drugs, like heroin and cocaine in particular, to achieve its objective of protecting persons from the harms potentially caused by addictive drugs, has created a law that is so grossly disproportionate in its effects on those addicted persons, that it is contrary to the principles of fundamental justice and s.7 of the ***Canadian Charter of Rights and Freedoms***. The Plaintiff says that the effects of this prohibition affects the life and threatens the liberty and the security of those addicted persons in a manner that is not in accordance with the principles of fundamental justice. The Plaintiffs say that this prohibition has the opposite effect from its intent and actually causes harm including death, the avoidance of primary health care and treatment and imposes serious levels of psychological stress that are constitutionally cognizable. On the other hand a non-criminal harm reduction approach prevents death or saves lives, provides primary health care and introduces and makes available treatment options and reduces serious levels of psychological stress.

The cases relied upon by the Plaintiff in support of this relief are the decisions of the Supreme Court of Canada in ***R. v. Morgentaler***, [1988] 1 S.C.R. 30 (SCC), ***Suresh v. Canada (Minister of Citizenship and Immigration)***, [2002] 1 S.C.R. 3, 2002 S.C.C. 1; ***R. v. Monney***, [1999] 1 S.C.R. 652; ***New Brunswick (Minister of Health and Community Services) v. G. (J.)***, (1999) 177 D.L.R. (4th) 124 (SCC), and ***R. v. Malmo-Levine: R. v. Caine***, [2003] 3 S.C.R. 571 (S.C.C.), and in particular paragraphs 88 and 141-143 thereof.

4. The basis for the relief sought in paragraph 31(c) of the Statement of Claim relies upon the facts asserted in paragraphs 1, 4, 5, 6-10, 14 – 19 and 29, 30. The Plaintiff also relies in particular on the affidavit of Dr. Thomas Kerr in this regard as well as the exemption letters themselves set out in the material supplied by the Defendants in the PHS action, namely the affidavit of Nathan Lockhart sworn the

7th day of April and filed in those proceedings and in particular paragraphs 3 through 12 thereof.

The Plaintiff says that s.56 is unconstitutional because it provides an absolute unfettered discretion in the Minister and provides no criteria or legislated standard and therefore does not satisfy the "principles of fundamental justice" when liberty or the security of the person protected by s.7 of the ***Charter*** is at stake.

The plaintiff relies in particular on the decision of the Ontario Court of Appeal in ***R. v. Parker*** [200] O.J. No. 2787 (Ont.C.A.) which found s.56 of the ***Controlled Drugs and Substances Act*** to be unconstitutional. The Federal Crown did not appeal or seek leave to appeal that decision to the Supreme Court of Canada. The Plaintiff says that s.56 does not provide an adequate legislated standard to enable the Provinces to carry out their constitutional health jurisdiction in relation to the treatment of addicts without being subject to the whims, and possible personal predilections of the Minister arising out of his absolute and unfettered discretion with respect to the granting of an exemption. The same discretion exists with respect to the nature of the terms and conditions to be imposed and similarly does not provide an adequate legislated standard for the protection of the security of the person of those addicted persons seeking treatment through a Provincially established facility providing medical and social intervention. S.56 places and unfettered discretion in the hands of the Minister to determine what is in the best interest of addicts and leaves it to the Minister to avoid a violation of the addicts security of the person.

The cases relied upon on this point are ***R. v. Parker*** [2000] O.J. No. 2787 (Ont.C.A.); ***Hitzig et al v. The Queen*** (2003), 177 C.C.C. (3d) 449 (Ont. CA); ***R. v. Monney***, [1999] 1 S.C.R. 652; ***New Brunswick (Minister of Health and Community Services) v. G. (J.)***, (1999) 177 D.L.R. (4th) 124 (SCC)

Further, the Plaintiff submits that if the granting of the s.56 exemption was valid when the Minister initially formed the opinion that such an exemption was necessary for a scientific purpose, the further issue arises as to whether the Minister has jurisdiction to impose arbitrary terms and conditions and in particular to impose an arbitrary termination date without retracting the statutorily mandated opinion upon which the grant of the exemption is based. Furthermore if the Minister does have jurisdiction is he not required in retracting that opinion and imposing a termination date, to ensure that the process is substantively in accordance with the principles of fundamental justice to comply with s.7 of the ***Charter***. The Plaintiff submits that the Minister has no such jurisdiction for two **alternative** reasons.

Firstly, as the terms and conditions of the s.56 exemption are all contingent upon the statutorily mandated opinion of necessity, then pursuant to the *noscitur a sociis* principle of statutory interpretation, s. 56 should be read as follows:

> **"If, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest, the**

> **Minister may, on such terms and conditions as the Minister deems necessary (and are not inconsistent with the Minister's opinion), exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations." (emphasis added)**

The phrase "on such terms and conditions as the minister deems necessary" should be interpreted in light of the phrase "If, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest". Once the Minister has a specific opinion that an exemption is necessary (thereby triggering the operation of the terms of s. 56), the phrase "on such terms and conditions as the Minister deems necessary" should be restricted in its effect so that the "terms and conditions" of the exemption cannot contradict the "scientific purpose" opinion. In other words, the Minister cannot hold an opinion that an exemption is necessary for a scientific purpose while at the same time stipulating that the exemption will terminate at a particular "arbitrary" date, where that date is unrelated to or contradicts the fulfillment of the scientific purpose. This interpretation is consistent with the principle set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27, at para 21:

> **"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."**

The letter of exemption here illustrates that the termination date is not related to the fulfillment of the scientific purpose. The stipulated termination dates are in each case incompatible with the prerequisite opinion of the Minister upon which they depend for their legitimacy. This applies whether the exemption is for a medical or scientific purpose or is otherwise in the public interest. While the initial exemption here was based on an opinion that it was necessary for a scientific purpose, the two extensions to December 31st, 2007 and June 30th, 2008 **both** appear to be based on an exemption being necessary for the site to be operated without contravening the ***Controlled Drugs and Substances Act***, **without mentioning it being necessary** for a scientific purpose. Neither of the opinions has been retracted.

The second **(alternative)** reason the Minister has no jurisdiction to impose an arbitrary termination date arises from the plain wording of s.56 itself. There is no express provision in s.56 or elsewhere in the ***Controlled Drugs and Substances Act*** giving the Minister jurisdiction to revoke, terminate, or to stipulate an expiry date for an exemption, either at the time the exemption is granted or at any time thereafter. **The only way that jurisdiction could exist would be if it were implied in the words "on such terms and conditions as the Minister deems necessary"**, which in turn, in order to have any effect, are dependent upon the Minister having at least one of the three statutorily

mandated opinions. Since the power to impose a termination date can only be implied from those words, then if they are interpreted that broadly, they would amount to the granting of an absolute discretion to the Minister. This creates a standard that is vague and incomprehensible, and the unfettered discretion invested in the Minister undermines the reasonableness and predictability of the provision's application. Such an unfettered and unstructured discretion of the Minister is not consistent with s.7 principles of fundamental justice.

The cases relied upon by the Plaintiff are ***Commonwealth of Canada v. Canada*** [1991] S.C.R. 139 and ***R. v. Parker*** [2000] O.J. No. 2787 (Ont.C.A.) **and *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27. The Plaintiff will also refer to the dissenting opinion in Canada *(Attorney General) v. Pacific International Securities Inc.* 2006 BCCA 303 and will seek to distinguish *National Bank of Greece (Canada) v. Katsikonouris* [1990] 2 S.C.R. 1029 in light of *Rizzo Shoes.***

(paragraph deleted)

5. The basis for seeking the relief under paragraph 31(d) was initially to ensure that an exemption remain in place to operate the SIF until the Court renders judgment in the matter. Currently that would mean that if the Court is unable to come to a decision on or before June 30th, 2008, that an interlocutory order granting and interim constitutional exemption to the staff and Injection Drug Users(IDUs) at the SIF be made to last until the decision of the Court in these proceedings. If the Court determines that some form of exemption is required and agrees that s.56 of the *CDSA* is unconstitutional, the Plaintiff seeks a Court ordered permanent constitutional exemption until Parliament enacts constitutionally valid legislation replacing s.56. This is dealt with in the relief sought under 31(e) which is addressed below.

6. The basis for seeking the relief under paragraph 31(e) is that if the Court determines that some form of exemption from the law is required, either for the staff at the SIF or the IDUs or both and agrees that s.56 of the *CDSA* is unconstitutional, then a Court ordered constitutional exemption for the staff and/or IDUs at the SIF is sought as set out in the prayer for relief at paragraph 31(e).

In ***Parker (supra)*** the Trial Judge through the combination of s.24(1) of the ***Charter*** and s.52 of the ***Constitution Act, 1982*** stayed the charges against Parker and declared that the marihuana possession and cultivation prohibitions in both the ***Narcotic Control Act*** and the ***Controlled Drugs and Substances Act*** be read down to exempt "persons possessing or cultivating cannabis marihuana for the personal medically approved use". The Court of Appeal varied the remedy and declared the marihuana prohibition in s.4 of the ***Controlled Drugs and Substances Act*** to be invalid, but suspended the declaration of invalidity for a period of 12 months from the release of the Reasons for Judgment. The Respondent Parker was declared to be exempt from the marihuana prohibition in s.4 of the ***Controlled Drugs and Substances Act*** during the period of

suspended invalidity for possession of marihuana for his medical needs. Here, if the Court does not accept the Plaintiff's submission under the relief sought under paragraph 31(b) and therefore finds that some exemption is required, the Plaintiff says that following ***Parker***, this Court should grant remedies through the combination of s.24(1) and s.52 of the ***Charter*** by striking down s.56 of the ***CDSA*** but suspending that declaration for a period of 12 months to provide Parliament with the opportunity to fill the void and grant the SIF, its operators and staff and patients or IDUs a continued exemption during the period of declared invalidity until the Parliament of Canada enacts a valid exemption scheme.

Dated: April 21st, 2008

JOHN W. CONROY, Q.C.
Solicitor for the Plaintiff