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

ARGUMENT

PART I

Historical Overview

1. On August 30th, 2006, the Plaintiffs VANDU commenced an action (File No: S-06557) against the Attorney General of Canada and the Minister of Health of Canada by way of Writ of Summons with Statement of Claim attached. These documents were served on the Defendants on August 30th, 2006.

2. On September 1st, 2006, the Plaintiff filed a Notice of Motion in these proceedings, returnable September 8th, 2006, having obtained an Order for Short Leave from a Master on September 1st, 2006 because the exemption for the Safe Injection Facility (SIF) was set to expire on September 12th, 2006. The Motion sought an Order granting an interim constitutional exemption to the staff and the injection drug users at the safe injection facility (Insite) located at 139 E. Hastings Street, Vancouver, British Columbia, pending the decision of this Honourable Court at the conclusion of this action , plus costs of the Motion including special costs, goods and services tax and provincial sales tax on costs and such further and other relief as the Honourable Court may deem just. In support of the Motion were filed the Affidavits of Dr. Gabor Mate sworn the 31st day of August, 2006, Dr. Thomas Kerr sworn August 31st, 2006, Ann Livingston, Executive Program Director of VANDU sworn September 1st, 2006 and Dean Wilson an injection drug user and then President of the BC Association of Persons on Methadone and a former President of the Plaintiff, sworn September 1st, 2006.

3. Shortly after the Defendants were served with the materials set out above, a public announcement was made to the effect that the Minister had extended the

exemption to December 31st, 2007 and consequently the Motion that was scheduled for September 8th, 2006 was adjourned generally. It was recently reset to be heard during the proceedings set to commence April 28th, 2008.

4. A Statement of Defence was filed by the Defendants on January 19th, 2007. On August 28th, 2007 the Plaintiffs filed an Amended Statement of Claim pursuant to Rule 24(1)(a). On August 28th, 2007, the Plaintiff filed a Notice of Constitutional Challenge pursuant to s.8(2)(a) or (b) of the ***Constitutional Question Act*** [RSBC 1996] c.68 challenging the constitutionality of s.4(1) of the ***Controlled Drugs and Substances Act*** insofar as the section applied to the possession of all addictive drugs set out in Schedule I to the ***Controlled Drugs and Substances Act***, their preparations, derivatives, alkaloids or salts and the constitutionality of s.56 of the ***Controlled Drugs and Substances Act*** purporting to grant an unfettered discretion to the Minister of Health of Canada to grant exemptions from the ***Act***. Both sections, it is asserted, are contrary to s.7 of the ***Canadian Charter of Rights and Freedoms*** in their effects and consequences. The Defendants filed an Amended Statement of Defence on September 25th, 2007. In that Defence, the Defendant Attorney General of Canada admitted the following allegations as fact:

a. The Defendant, the Attorney General of Canada (the "Attorney General"), is named as the representative of Her Majesty the Queen in Right of Canada (the "Crown"), pursuant to s. 23(1) of the ***Crown Liability and Proceedings Act***, R.S.C. 1985, c. C-50. **(Paragraph 2 Amended Statement of Claim).**

b. The Defendant, the Minister of Health for Canada, is the "Minister" defined in the ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19 as amended, and as such has overall responsibility for the administration of the ***Act*** and, in particular, is authorized by s. 56 of the ***Act*** to, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor, or any class thereof, from the application of any or all of the provisions of the ***Act*** or the ***Regulations*** if, in the opinion of the Minister, the exemption is necessary for a medical or a scientific purpose or is otherwise in the public interest. **(Paragraph 3 Amended Statement of Claim).**

c. The Safe Injection Facility ("SIF") opened in Vancouver, British Columbia, on the 12th day of September, 2003, and is a twelve-seat injection room where injection drug users ("IDUs") can inject their own drugs under the supervision of trained medical staff and other designated health care workers. **(Paragraph 6 Amended Statement of Claim).**

d. After injection, IDUs move to a post-injection room, where staff can connect them with other onsite services, including primary care for the treatment of wounds, abscesses and other infections; addiction counselling and peer support; and referral to treatment services, such as

withdrawal management, opiate replacement therapy, and other services. **(Paragraph 8 Amended Statement of Claim).**

e. By letter dated September 12, 2003, the Defendant Minister of Health, through Health Canada, gave approval to the Vancouver Coastal Health Authority's (VCHA) application for an exemption under s. 56 of the ***Controlled Drugs and Substances Act*** (***CDSA***) for a scientific purpose for a pilot supervised injection site research project. **(Paragraph 14 Amended Statement of Claim).**

f. The exemption was granted under s. 56 of the ***Controlled Drugs and Substances Act*** on the basis that it is necessary for the scientific purpose of permitting research under the "Vancouver Supervised Injection Site Scientific Research Pilot Project Proposal" to be conducted without contravening the relevant provisions of the ***CDSA***. **(Paragraph 15 Amended Statement of Claim).**

g. The following classes of persons are exempted from the application of s. 4(1) of the ***CDSA*** as that provision applies to the possession of the controlled substances:

   i. all staff members are exempted, while they are within the interior boundaries of the site, from the offence of simple possession of any controlled substance in the possession of a research subject or that is left behind by a research subject within the interior boundaries of the site, if such possession is to fulfil their functions and duties in connection with the pilot research project;

   ii. research subjects are exempted, while they are within the interior boundaries of the site, from the offence of simple possession of a controlled substance intended for self-injection, if possession of the controlled substance is for the purpose of self-injection by the research subject; this exemption does not cover controlled substances that are self-administered by other means than injection, e.g. smoking, inhaling, etc. **(Paragraph 16 Amended Statement of Claim).**

h. The responsible person in charge (RPIC) and the alternate responsible person in charge (ARPIC) are also exempted from the application of s. 5(1) of the ***CDSA*** while they are within the interior boundaries of the site, but only to the extent necessary to allow them to transfer, give and deliver for disposal any controlled substances found at the site to a police officer in accordance with the procedure set out in the exemption. **(Paragraph 17 Amended Statement of Claim).**

i. The exemption may be suspended without prior notice if the Minister or her delegate under s. 56 deems that such a suspension is necessary to protect public health, safety or security, including, without limiting the generality of the foregoing, to prevent controlled substances from being trafficked or otherwise diverted within or from the site elicit purposes. The terms of the exemption also provide for revocation for cause, and reasonable inspection of the site is authorized to ensure compliance. **(Paragraph 18 Amended Statement of Claim).**

j. The exemption further provides that the Office of Controlled Substances, Drug Strategy and Controlled Substances Program of Health Canada ("OCS") may at any time change the terms and conditions of the exemption as deemed necessary by the Minister or her delegate under s. 56 of the ***CDSA***, and that notice in writing and the reason for the change will be provided. **(Paragraph 19 Amended Statement of Claim).**

5. Since that time, the exemption previously extended to December 31st, 2007 was further extended to June 28th, 2008.

6. The Plaintiff VANDU in its Amended Statement of claim seeks the following relief:

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. (**Paragraph 31(a) of the Statement of Claim)**

b. 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. **(Paragraph 31(a2) of the Statement of Claim)**

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 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. **(Paragraph 31(b) of the Statement of Claim).**

d. 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. **(Paragraph 31(c) of the Statement of Claim).**

e. 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. **(Paragraph 31(d) of the Statement of Claim).**

f. 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. (**Paragraph 31(e) of the Statement of Claim).**

g. Costs of this action, including special costs, goods and services tax, and provincial sales tax on costs. (**Paragraph 31(f) of the Statement of Claim).**

PART II

A. The Facts

The Plaintiff

7. The Plaintiff, Vancouver Area Network of Drug Users (VANDU) is a non-profit society operating from 2nd Floor- 50 East Hastings Street in the City of Vancouver. It

was incorporated in January of 1998 under the ***Society Act RSBC c.433*** and has as its purposes and objects:

a. To improve the quality of life for people who use illicit drugs.

b. To encourage the development of user based support and education programs.

c. To develop and encourage peer support training at all levels of education and outreach.

d. To develop local networks and coalitions of informed and empowered people who will work to ensure public policies and practices are favourable to people who use illicit drugs.

e. To provide support, training and information so that users and their families will have an understanding of and an impact on the systems that serve them.

f. To work independently and in partnership with individuals, associations, agencies and other user groups in the development and implementation of user defined harm reduction strategies and in developing positive public images of people who use illicit drugs.

g. To keep informed and to inform the public concerning the social, economic, health and treatment issues related to the use of illicit drugs.

h. To purchase, sell and/or lease property, equipment and materials that are deemed necessary to accomplish the society's purposes.

(Paragraph 1 Amended Statement of Claim)

8. The Plaintiff VANDU is committed to increasing the capacity of people who use drugs to live healthy, productive lives by affirming and strengthening people who use drugs to reduce harm to themselves and their communities. It organizes communities to save lives by promoting local, regional and national harm reduction education, interventions and peer support. It challenges traditional client/provider relationships and empowers people who use drugs to design and implement harm reduction intervention. It believes in every person's right to health and well-being, and that all people are competent to protect themselves, their loved ones and their communities from drug-related harm. It understands that drug use ranges from total abstinence to severe abuse, and that some methods of using drugs are clearly safer than others. It recognizes the realities of poverty, racism, social isolation, past trauma, mental illness and other inequalities that increase people's vulnerability to addiction and reduce their capacity for effectively reducing drug-related harm. **(Paragraph 4 Amended Statement of Claim).**

9. Many of the Plaintiff VANDU's members are Injection Drug Users ("IDUs") in Vancouver and regular users of the Safe Injection Facility ("SIF"). In addition, a number of members of the Plaintiff VANDU are employed as staff at the SIF. **(Paragraph 5 Amended Statement of Claim). See also the affidavit of Ann Livingston, Executive Director of Programs for VANDU and the Affidavit of Dean Wilson a former President of VANDU and an injection drug user(IDU)**

The Vancouver Supervised Injection Facility (SIF)

10. The Safe Injection Facility ("SIF") opened in Vancouver, British Columbia, on the 12th day of September, 2003, and is a twelve-seat injection room where injection drug users ("IDUs") can inject their own drugs under the supervision of trained medical staff and other designated health care workers. **(Paragraph 6 Amended Statement of Claim).**

11. At the "SIF", the "IDUs" have access to clean injection equipment, including spoons, tourniquets and water, aimed at reducing the spread of infectious disease, and the staff is available to provide resuscitation in the event of accidental overdoses. **(Paragraph 7 Amended Statement of Claim).**

12. After injection, IDUs move to a post-injection room, where staff can connect them with other onsite services, including primary care for the treatment of wounds, abscesses and other infections; addiction counselling and peer support; and referral to treatment services, such as withdrawal management, opiate replacement therapy, and other services. **(Paragraph 8 Amended Statement of Claim).**

13. The SIF has been, and continues to be, scientifically evaluated by Health Canada through the funding of an evaluation study, which includes external evaluators who are health scientists based at the University of British Columbia's Department of Medicine and the B.C. Centre for Excellence in HIV/AIDS in Vancouver, British Columbia. **(Paragraph 9 Amended Statement of Claim).**

14. A substantial amount of peer-reviewed research has established:

a. the impact of the SIF in attracting IDUs in the community who exhibit a number of characteristics that make them predisposed to elevated risk of HIV infection and overdose, as well as those IDUs who are more likely to be public drug users;

b. its responsibility for significant reduction in public drug use and public discarded syringes, as well as significant reductions in syringe sharing;

c. its association with elevated rates of initiation into detoxification programs amongst SIF users;

d. its operation as a central referral mechanism to a wide range of other community and medical resources, and as a key venue for safer injection education;

e. How it has not resulted in increased drug dealing in its vicinity, increases in drug acquisition crime or increased rates of new injection drug users and/or relapse injection use among former injectors.

(Paragraph 10 Amended Statement of Claim) See also the Affidavit of Dean Wilson generally and particularly at paragraphs 4 and 26 – 39.

***Controlled Drugs and Substances Act (CDSA)* Offences**

15. Controlled drugs are brought by the IDU's to the SIF. The clean injecting equipment is made available at the SIF site. The IDU is responsible for placing the controlled drug in the equipment and injecting the drug. The used equipment is then deposited in a container by the IDU for disposal. At no material time does the staff member exercise any control over the equipment when it contains a controlled drug or has a controlled drug in or on it. At no time does the staff encourage or assist the IDU in his or her possession of the controlled drug in any way and, to the contrary, they discourage the IDU's from their continued use by the activities and information provided in the post-injection room. **(Paragraph 11 Amended Statement of Claim).**

16. The Plaintiff asserts that at no time do the staff at the SIF "possess" any controlled drug within the meaning of that term in law and contrary to s. 4(1) of the ***Controlled Drugs and Substances Act***, nor do they traffic in or possess such drugs for the purpose of trafficking contrary to s. 5 of the ***Controlled Drugs and Substances Act***. **(Paragraph 12 Amended Statement of Claim).**

17. The IDU's clearly do so possess a controlled drug, both before and during their presence on the site contrary to s. 4 of the ***Act***. **(Paragraph 13 Amended Statement of Claim).**

S. 56 *CDSA* Exemption

18. By letter dated September 12, 2003, the Defendant Minister of Health, through Health Canada, gave approval to the Vancouver Coastal Health Authority's (VCHA) application for an exemption under s. 56 of the ***Controlled Drugs and Substances Act*** (***CDSA***) for a scientific purpose for a pilot supervised injection site research project. The letter granted an exemption until such time as the pilot research project was terminated or discontinued, the exemption was revoked, or its expiry on September 12, 2006. The exemption has never been revoked, the pilot research project continues, but the expiry date of September 12, 2006, is rapidly approaching and it is unknown whether or not the Defendants will extend the exemption at that time. **(Paragraph 14 Amended Statement of Claim).** The exemption was purportedly extended to December 31st, 2007 and then again to June 28th, 2008.

19. The exemption was granted under s. 56 of the ***Controlled Drugs and Substances Act*** on the basis that it is necessary for the scientific purpose of permitting research under the "Vancouver Supervised Injection Site Scientific Research Pilot Project Proposal" to be conducted without contravening the relevant provisions of the ***CDSA***. **(Paragraph 15 Amended Statement of Claim).**

20. The following classes of persons are exempted from the application of s. 4(1) of the ***CDSA*** as that provision applies to the possession of the controlled substances:

a. all staff members are exempted, while they are within the interior boundaries of the site, from the offence of simple possession of any controlled substance in the possession of a research subject or that is left behind by a research subject within the interior boundaries of the site, if such possession is to fulfil their functions and duties in connection with the pilot research project;

b. research subjects are exempted, while they are within the interior boundaries of the site, from the offence of simple possession of a controlled substance intended for self-injection, if possession of the controlled substance is for the purpose of self-injection by the research subject; this exemption does not cover controlled substances that are self-administered by other means than injection, e.g. smoking, inhaling, etc.

(Paragraph 16 Amended Statement of Claim).

21. The responsible person in charge (RPIC) and the alternate responsible person in charge (ARPIC) are also exempted from the application of s. 5(1) of the ***CDSA*** while they are within the interior boundaries of the site, but only to the extent necessary to allow them to transfer, give and deliver for disposal any controlled substances found at the site to a police officer in accordance with the procedure set out in the exemption. **(Paragraph 17 Amended Statement of Claim).**

22. The exemption may be suspended without prior notice if the Minister or her delegate under s. 56 deems that such a suspension is necessary to protect public health, safety or security, including, without limiting the generality of the foregoing, to prevent controlled substances from being trafficked or otherwise diverted within or from the site elicit purposes. The terms of the exemption also provide for revocation for cause, and reasonable inspection of the site is authorized to ensure compliance. **(Paragraph 18 Amended Statement of Claim).**

23. The exemption further provides that the Office of Controlled Substances, Drug Strategy and Controlled Substances Program of Health Canada ("OCS") may at any time change the terms and conditions of the exemption as deemed necessary by the Minister or her delegate under s. 56 of the ***CDSA***, and that notice in writing and the reason for the change will be provided. (**Paragraph 19 Amended Statement of Clai**m)

Injection Drug Users (IDU's)

24. Injection drug users ("IDU's") are so significantly addicted that they no longer are able to simply choose to be abstinent once their dependency has established, and they require both social and medical intervention that is designed to assist in terminating or diminishing the use or dependency. Addiction is a physiological condition raising a medical concern necessitating both medical and social intervention. **(Paragraph 20 Amended Statement of Claim).**

25. An IDU, while in "possession" of a controlled drug, commits a federal criminal offence under s. 4 of the ***Controlled Drugs and Substances Act*** and may, depending upon other conduct, possess that controlled drug for the purpose of trafficking, or may traffic in it, or may commit other related offences under the ***Controlled Drugs and Substances Act***. **(Paragraph 21 Amended Statement of Claim).**

26. Because of the criminal laws prohibition of controlled drugs that are addictive, and because the sanction for possession and other conduct includes imprisonment, the constant threat of the imposition of the law and imprisonment produces in the IDU a high level of psychologically induced stress, thereby resulting in threats to the life, liberty and the security of the person of the IDU that are constitutionally cognizable. **(Paragraph 24 Amended Statement of Claim).**

B. Argument

BI. The conduct of the staff in the ordinary course of business at the SIF does not involve the commission of any *CDSA* offences and therefore a s.56 exemption is unnecessary.

27. Under this heading, the Plaintiff seeks the following relief:

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.

28. The facts on which the Plaintiff relies in seeking this relief are set out in the Amended Statement of Claim in paragraphs 1, 4, and 5, 6-12. The ***CDSA*** process is set out in paragraphs 29 and 30 of the Amended Statement of Claim. The Defendants have admitted paragraphs 6 and 8. Further, the circumstances with respect to the s.56 ***CDSA*** exemption are of some relevance and the basic facts in that regard are set out in paragraphs 14-19 of the Amended Statement of Claim. All of these paragraphs are admitted by the Defendant except the second sentence in paragraph 14.

29. This Plaintiff's assertions with respect to the division of powers between the Federal government and the Provincial legislature are set out in paragraphs 22, 23(a) and 23(b) of the Amended Statement of Claim.

30. In addition, with respect to the conduct of the staff at the SIF, the Plaintiff relies on the following paragraphs from the following Affidavits in support; namely:

a. Affidavit of Dean Wilson sworn September 1st, 2006, paragraph 4, 26 – 33;

b. Affidavit of Ann Livingston sworn September 1st, 2006, paragraphs 2, 6-9;

c. Affidavit of Dr. Thomas Kerr sworn August 31st, 2006, paragraphs 2-6, 7-16.

31. In addition, this Plaintiff relies on materials filed in the PHS Community Services et al., action S075547 and the Affidavits files therein and the summary of that evidence presented by the Plaintiff in those proceedings in its Outline of April 18th, 2008 at Part II, paragraphs 1-64 (pages 2-21) and in particular those paragraphs dealing specifically with Insite commencing at paragraph 40-45, how Insite operates at paragraph 46-51 as well as paragraphs 52-56 setting out the ***CDSA*** offences and definitions and the particulars of the initial exemption under s.56.

32. This Plaintiff adopts the division of powers argument submitted by the Plaintiff in the PHS Community Services Society et al action commencing at page 21 of the Outline, paragraph 65 and continuing through page 27, paragraph 91. This Plaintiff says that that submission sets the context for the conduct of the staff at the SIF.

33. In addition, this Plaintiff says that in any event the conduct of the staff in the ordinary course of their duties at the SIF does not amount to the commission of any offences under either the ***Controlled Drugs and Substances Act*** or the ***Criminal Code of Canada***.

34. It is respectfully submitted that the conduct of the staff in the ordinary course of business at the Safe Injection Facility (SIF) does not amount to the commission any offences under the ***Controlled Drugs and Substances Act.*** In particular it is submitted 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*** R.S.N.L. 1990 c.F-21. If it is asserted that ss.462.1 and 462.2 of the ***Criminal Code of Canada*** dealing with instruments and literature for illicit drug use are in any way relevant, it is submitted that those sections are not relevant to the SIF and what users and workers do at that location. The relevant sections of the ***Controlled Drugs and Substances Act***, ***Criminal Code of Canada*** and the ***Food and Drugs Act*** are set out in Appendix A to this argument for ease of reference.

i. Sections 462.1 and 462.2 of the *Criminal Code of Canada*

35. It is respectfully submitted that s.462.2 and the definitions under 462.1 of the ***Criminal Code of Canada*** are simply not relevant to the SIF and the conduct of staff at that location. The offence under that section only applies to those who knowingly import, export, manufacture, promote or sell instruments or literature for illicit drug use. None of these activities are conducted at the SIF by staff. While the staff may possess an instrument, such as a needle, that might be used for safe injection and, therefore, for illicit drug use, "possession" of that instrument is not an offence. Further, in any event, the conduct of the staff in providing a clean needle in the circumstance falls within the definition of a "device" under s.2 of the ***Food and Drugs Act*** as an instrument for use in the treatment, mitigation, or prevention of a disease, disorder or abnormal physical state or its symptoms in human beings, as set out in s. 2(a) of the definitions under the ***Food and Drugs Act***.

36. If it is argued that making available injection kits or needles at the site amounts to promoting or selling such instruments, it is submitted that the definition of "sell" relative to s.462.1, while including distribution for free, nevertheless, in the context of the SIF, the instruments fall within the definition of a "device" in s.2 of the ***Food and Drugs Act*** as the purpose and context of the provision of the needle is paramount and this removes both the act and intent or the mental element required to constitute a criminal offence on the part of the staff. Further, no exemption exists or was sought with respect to Criminal Code offences nor has there been any suggestion by the police or others in law enforcement that this conduct by the staff at the SIF contravenes this section of the Criminal Code.

ii. Section 4(1) of the *Controlled Drugs and Substances Act*, Sections 4 and 21 of the *Criminal Code of Canada*

37. It is respectfully submitted that the offences of possession for the purpose of trafficking and trafficking (s.5 of the ***CDSA***), importing and exporting and possessing for that purpose (s. 6 of the ***CDSA***), and production of a substance (s. 7 of the ***CDSA***) have no application to the conduct of users or staff at the safe injection site. There is no suggestion of producing heroin, possessing it for the purpose of trafficking, trafficking in it, or attempting to import or export it or possess it for such a purpose on site. The exemptions for the RPIC and ARPIC in relation to s. 5(1) is similarly unnecessary due to their lack of intention to possess the drug for the purpose of trafficking or to traffic in it by simply picking it up to dispose of it. Consequently, the only relevant section is the possession section, which makes it an offence to possess a substance included in Schedule I, II or III, "except as authorized under the Regulations..." (s. 4(1) of the ***CDSA***). Punishment for such conduct is set out in subsection (3). If the Crown proceeds by indictment, the maximum penalty is seven years imprisonment. If the Crown proceeds by summary conviction, the penalty for a first offence is a fine not exceeding $1,000.00 or to imprisonment not exceeding six months or both, and for a subsequent offence a find not exceeding $2,000.00 or to imprisonment for a term not exceeding one year or both. If the offence relates to a Schedule III substance, the penalty on indictment

is a maximum of three years, and on summary conviction for a first offence the penalties are the same as for a Schedule I offence.

38. The other relevant section from the ***CDSA*** is s. 2, the definition section, which by its definition of "possession" brings into play s. 4(3) of the ***Criminal Code*** and its definition in s. 2(2)of the ***CDSA***, which says in paragraph (b) that:

> A reference to a controlled substance includes a reference to
>
> i. all synthetic and natural forms of the substance, and
>
> ii. anything that contains or has on it a controlled substance and that is used or intended or designed for use
>
> a. in producing the substance, or
>
> b. in introducing the substance into a human body.

39. This latter definition section, by saying that a "controlled substance includes anything that contains such a substance or has such a substance on it that is used or intended or designed for use in introducing the substance into a human body, would appear to include an injection device or needle that contains the heroin or controlled substance.

40. It is submitted that while the SIF and its staff mainly make available injection devices or needles, they do not contain any drug. The user attends at the site with the drug and takes the needle and fills it with the drug, and the user then disposes of the used needle in a disposal container. If a staff member picks up the used needle, he or she does so only for the purposes of disposing of it or turning it over to the police, in accordance with the policy manual provisions. Because on its face the staff member is in actual possession of the device, including the substance, by having custody, some measure of control and knowledge that the user has put a controlled substance in it, this conduct raises the question of the applicability of s. 4(3) of the ***Criminal Code*** and the definition of "possession".

41. It is submitted that while there is no doubt that the user addict (research subject) is in possession of a controlled substance while entering, while on site, and on possibly leaving the site. However, as noted above, the exemption only operates for the addict user while on site. Consequently, the important question is whether or not a staff member or other worker at the site thereby comes into "possession" as a matter of law. Clearly, the staff member does not have the substance in his or her personal possession, except for purposes of disposal. Nor does that staff member knowingly have it in actual possession or the custody of another person (the user), for the use or benefit of himself or herself, or even another person. It is the user who does so, not the staff member.

42. It is submitted that it is obvious that the staff member and the user both have knowledge and consent to the user having the drug and needle in the user's custody or possession, and arguably, s. 4(3)(b) deems the drug and needle to then be in the custody and possession of both of them. This appears on a plain reading of s. 4(3) of the ***Code***. However, the case law interpreting the meaning of this section and the meaning of "possession" at law includes not only having knowledge of the existence of the substance and what it is and having an element of custody of it but, most importantly, requires some element of "control" over the substance. It is this element that is lacking with respect to the staff member. Once the user has taken the needle to inject the substance, the staff member no longer asserts any control over the needle given, nor, of course, over any of the substance that the user puts in it. Consequently, there is no "control" at the material time when the needle is filled with the drug or thereafter.

43. It is further submitted that in addition, any possession by the staff member with no intention to control for an illicit purpose, and with no intent to deal with the item in some prohibited manner, and in the absence of the existence of a blameworthy state of mind, that staff member has a defence to any charge.

44. It is submitted that with respect to the "parties" section (s. 21) of the ***Criminal Code of Canada***, it is clear that when the research subject addict/user enters the site, he or she is already in possession of the controlled substance. The staff member does not actually commit the offence of possession, nor does he or she do something or omit to do anything for the purposes of aiding the user's commission of the offence of possession. The staff member is merely present and is under no obligation to remove the controlled substance from the user.

45. It is further submitted that the staff member does not abet the IDU (Research subject addict) in committing the offence of possession. The entire purpose of the site and the staff member's conduct and objectives must be taken into account. While the site may facilitate use and requires possession by the addict/user at the site, the intention is to prevent health problems for the user and others, to provide health care when required, including, in particular, if an overdose should occur, and to encourage continued contact by the addict with health care, including addiction, withdrawal and detoxification services, to name a few. The ultimate objective is to encourage the addict to seek treatment and to discontinue use and, therefore, possession. It is submitted that the conduct of the staff in the circumstances falls under the rubric of "public duty" for an innocent and laudable purpose, in accordance with the province's jurisdiction over health, and the staff member at no time possesses a blameworthy state of mind.

iii. The Case law

46. It is submitted that the case law establishes that in order to find "possession" as a matter of criminal law, the Crown is required to establish not only actual, constructive or joint custody of the substance, and knowledge of what it is, but also some measure of control over it. It is submitted that because the user attending a safe injection facility is

responsible for obtaining, holding and administering their drug without any assistance from the site employees, it is therefore unlikely that the employees would be in "control" sufficient to constitute possession in fact or "constructive possession" or "joint possession".

47. In ***R. v. Dyck*** (1969), 68 W.W.R. 437, the British Columbia Court of Appeal held that the mere presence of a person in a room with someone who had taken a fix of heroin was insufficient to connect that person with the possession of the heroin.

48. Also, in ***R. v. Kushman*** (1949), 93 C.C.C. 231, the same Court ruled that the mere fact that an accused accompanied an addict to a place where drugs were buried, and stood beside the addict while the latter got them from the ground, was not sufficient to support a charge of possession. The Court said some evidence was required indicating a previous arrangement for sale and delivery of the drugs, or showing that the accused had some right to exercise control over the parcel was required.

49. It is submitted that while one of the essential elements of "possession" is some form of control, knowledge of what the thing is, is also required. It is held that a mere manual handling of a drug or syringe, even if coupled with control, would be insufficient if the person handling the substance or object was unaware that they were handling something, the possession of which was illegal. All the elements must co-exist at one time with knowledge of what the thing is. However, if there is no intention to control an object, there is no "possession", even though one might assert a right of control over it and might know what it is (***Beaver v. R*** [1957] S.C.R. 531 (SCC) and ***R. v. Christie*** (1978), 41 C.C.C. (2d) 282 (NBCA)).

50. The decision in New Brunswick Court of Appeal in ***R.*** **v.** ***Christie*** (supra), was adopted by the British Columbia Court of Appeal as correctly setting out the law in ***R.*** **v.** ***York***, [2005] B.C.J. No. 250. In ***Christie*** the Court considered whether an accused who manually handles something with knowledge of its character, but who does not intend to exercise control over a thing, could be said to be in possession of that thing.

51. In ***Christie,*** the accused was charged with possession of marijuana for the purpose of trafficking. Police officers testified that following an automobile accident, in which the accused was involved, a quantity of marijuana was found in the trunk of her car. The accused testified that about one hour before the accident she had occasion to open the trunk of her car and saw the bag containing the marijuana. As soon as she realized it was marijuana she closed the trunk and began driving around looking for some friends to get advice, as she feared her children were involved in drugs and she was in a state of panic. On appeal by the Crown, the Court held that the appeal should be dismissed.

52. The Court of Appeal found that there can exist circumstances that do not constitute possession in law, even though there is a right of control with knowledge of the presence and character of the thing alleged to be possessed, as where it appears there is no intent to exercise control over it. Thus a person would not be guilty of

possession if he manually handled the drug solely for the purpose of destroying or reporting it to the police. In this case the trial Judge had a reasonable doubt as to whether the accused intended to exercise control over the narcotic and accordingly he did not err in acquitting her.

53. In ***R. v. York*** [2005] 193 C.C.C. (3d) 331, Oppal J.A. (as he then was) for the B.C. Court of Appeal expressly referred to Christie (supra) as accurately stating the law to the effect that the presence of the essential elements of manual handling, knowledge and control may not in all cases be sufficient to warrant a conviction. Oppal J.A. referred to the reliance by the New Brunswick Court of Appeal on the previous B.C. Court of Appeal decision in ***R. v. Hess (No. 1)*** (1948), 94 C.C.C. 48 (B.C.C.A.), as follows:

> [11] Thus, the offence of possession is made out where there is the manual handling of an object co-existing with the knowledge of what the object is, and both these elements must co-exist with some act of control. The classic definition of possession was stated by O'Halloran J.A. in ***R. v. Hess (No. 1)*** (1948), 94 C.C.C. 48 (B.C.C.A.), wherein he stated:
>
> > To constitute "possession" within the meaning of the criminal law it is my judgment, that where as here there is manual handling of a thing, it must be co-existent with knowledge of what the thing is, and both these elements must be co-existent with some act of control (outside public duty). When those three elements exist together, I think it must be conceded that under s. 4(1)(d) [of the *Opium and Narcotic Drug Act*, 1929 (Can.), c. 49] it does not then matter if the thing is retained for an innocent purpose.
> >
> > That view of the law was approved by the Supreme Court of Canada in ***Beaver v. The Queen*** (1957),118 C.C.C. 129.
>
> [12] In ***Hess*** the facts were as follows. A girl found a parcel on a sidewalk by a sign post. She brought it home. Her mother suspected drugs and telephoned the police. The police removed most of the drugs and put the parcel back at the same spot and kept watch from a distance. The following afternoon, the police observed the appellant, who was with another man, pick up the parcel that was in plain view. He commenced to open it when the police rushed the two men, knocking the appellant down. The parcel flew out of his hands. The court allowed the appeal from conviction for having drugs in his possession and entered an acquittal on the grounds that "there is nothing whatever in the record from which it may be legitimately inferred that Hess knew what was in the parcel before he picked it up" and further, that he did not exercise any act of control over the parcel.
>
> [13] It is apparent from the court's reasoning that had Hess, with the full knowledge that the parcel contained drugs, conveyed it to a third party or retained it for his own use, he would have been guilty of possession. However,

had Hess, with the full knowledge of the parcel's contents, given it to the police, he would not have been guilty of possession even though he may have exercised control with full knowledge because he would have been fulfilling a public duty to take drugs to the police and explain how he had come into possession of them. In ***Hess***, the appellant's intent to deal with the parcel in some prohibited manner was not in issue.

[14] The courts have generally examined possession offences in a global sense often without segregating the constituent elements that may overlap. In ***Hess***, *supra*, the court made note of the difficulty in formulating an all encompassing definition of possession. O'Halloran J.A. made the following comments at 51:

> It is not easy to find in the decisions any clear cut statement of what constitutes possession under all circumstances without exception. It may be extremely difficult to formulate any such description or definition which is universally embracing. But in my view the elements of possession to which I have referred are implicit in the statute as well as in the leading decisions which have had occasion to examine any of the many aspects of the subject. I do not find that the precise point in the form presented by this case has arisen in a leading decision. If knowledge of what the thing is were not an essential element, then we would have the ridiculous result that the children who found the parcel in the first place and brought it home to the mother, would by that act alone be automatically guilty of possession under s. 4(1)(d), and be compulsorily subject to a minimum of 6 months' imprisonment with a substantial fine. Even with knowledge of what the thing is, if some act of control (outside public duty) is not essential, then we would have the equally ridiculous result that the little girl's mother who received the parcel of drugs and telephoned the police, would be automatically guilty of possession under s. 4(1)(d) and compulsorily subject to imprisonment and a substantial fine.

[16] Similarly, in ***R. v. Glushek*** (1978), 41 C.C.C. (2d) 380, the Alberta Court of Appeal in upholding an acquittal stated that a brief handling of stolen goods with full knowledge of their character solely for the purpose of getting rid of them does not constitute possession within s. 3(4)(a) of the Criminal Code since the respondent's conduct was inconsistent with retaining or dealing with the goods. Possession is not made out where there is physical control without any co-existing intention to deal with the object in some deliberately personal manner. See also ***R. v. Spooner*** (1954), 109 C.C.C. 57 (B.C.C.A.) per O'Halloran J.A. at 61. This is because conduct may be characterized as criminal only where the Crown proves the existence of a blameworthy state of mind.

Oppal J.A. then went on to summarize the law as follows:

> [20] I think the law can be summarized as follows. Personal possession is established where an accused person exercises physical control over a prohibited object with full knowledge of its character, however brief the physical contact may be, and where there is some evidence to show the accused person took custody of the object willingly with intent to deal with it in some prohibited manner.

54. It is therefore respectfully submitted that the conduct of the staff at the SIF is analogous to that of the child finding drugs or the mother receiving it from the child who intends to take it to the police, and that such conduct falls under the "public duty" exception because the staff have no intention to deal with the used needle or any discarded drugs in some deliberately personal manner and there exists no blameworthy state of mind. It is therefore submitted that the staff at the SIF do not commit any offences when carrying out their ordinary conduct or business at the SIF and therefore do not require a s.56 exemption from the ***Controlled Drugs and Substances Act***.

55. 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.

B2. Division of Powers

56. Under this heading, the Plaintiff seeks the following relief:

> (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.

57. The factual basis for the relief under the amended Statement of Claim paragraph 31(a2), is based upon the assertions in paragraphs 22, 23(a) and 23(b) of the Amended 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), paragraphs 2-16 and Dr. Gabor Mate (supra), paragraphs 2-19, as well as the affidavit of Dean Wilson (supra), paragraphs 3, 5-39.

58. With respect the Plaintiffs PHS, we rely in particular on the following portions of their Outline of April 18th, 2008: paragraphs 4-12 as to the nature of addiction, paragraphs 13-19 as to IDU and overdose, paragraphs 20-23 as to personal health and complications of IDU, paragraphs 24-35 as to public health IDU and infectious disease, paragraphs 36-39 social context of Insite, paragraphs 40-45 as to the creation of Insite,

paragraphs 46-57 as to how Insite operates, and paragraphs 58-64 as to some outcomes of Insite.

B2. Argument

59. With respect to argument the Plaintiff Vandu adopts the division of powers argument put forward by the Plaintiff PHS Community Services Society in the parallel related action as set out at paragraphs 65 – 91 of their Outline dated April 18th, 2008 and any further written and oral submissions made by that Plaintiff.

60. It is submitted that the ***Constitution Act (1867)***, formerly the ***British North America Act*** or ***BNA Act***, is part of our constitution and sets out the division of powers between our federal government and our provincial governments or legislatures. Our federal drug laws have been recently upheld by the Supreme Court of Canada as being within the competent jurisdiction of the federal Parliament under its criminal law power (s. 91(27)). (See ***R. v. Malmo-Levine; R. v. Caine*** 2003 S.C.C. 74 (SCC).

61. Meanwhile, the provinces have jurisdiction in relation to "the establishment, maintenance and management of hospitals in and for the province" (s. 92(7)); "property and civil rights in the province" (s. 92(13)); and generally in relation to "all matters of a merely local or private nature in the province" (s. 92(16)). While "public health" is not specifically mentioned in either s. 91 or s. 92, it has nevertheless been traditionally seen as within provincial jurisdiction under s. 92(16), namely, as a matter of a merely local or private nature in the province. The provinces are therefore basically considered to be responsible for health and the federal government's involvement in the field is considered exceptional and usually is ancillary to some other express federal power.

62. It is submitted that it was formerly the case under the Supreme Court of Canada's decision in ***R. v. Hauser,*** [1979] 1 S.C.R. 984, that the federal Parliament's jurisdiction over "controlled drugs" (formerly known as narcotics), while legislation in relation to health, was nevertheless within the jurisdiction of the federal government under either the "peace, order and good government" power or the "criminal law" power. In its later decision in ***R. v. Schneider,*** [1982] 2 S.C.R.112, when the Court passed upon the constitutional validity of British Columbia's ***Heroin Treatment Act***, the Court indicated that if it had the opportunity to reconsider the matter it would say that while in relation to health, the federal power rests on the 'Criminal Law' power. The issue was revisited by the Court in the trilogy of cases heard in the Supreme Court of Canada in December of 2002, and in its decisions in ***Malmo-Levine and Caine***, [2003] 3 S.C.R. 571, and ***Clay***, [2003] 3 S.C.R. 735, the Supreme Court of Canada held that the ***Narcotic Control Act*** (now the ***CDSA***) was a valid exercise of the criminal law power and that it would not be consistent with that conclusion to uphold it under the branch of the peace, order and good government power that deals with "new" legislative subject matter not otherwise allocated. The Court to that extent disagreed with the view taken by the majority in ***Hauser*** (supra). The Court left open for another day whether the subject matter of drugs are narcotics could be said to go beyond local or provincial

concerns and must from there inherent nature be the concern of the country as a whole (paragraphs 69 – 72).

63. In ***Schneider*** (supra) the Supreme Court of Canada upheld the constitutional validity of the ***Heroin Treatment Act*** (1978) as being valid Provincial legislation relating to public health for the voluntary and compulsory treatment of those "who were and could have been psychologically or physically dependant upon a narcotic". The legislation was held not to be legislation in relation to "the control of narcotics" but rather as dealing with the "consequences of narcotic use from a provincial aspect". The question of the treatment of narcotic dependant persons did not arise in the previous ***Hauser*** case. The evidence before the Court disclosed that heroin addiction was a problem local to British Columbia and was not a national problem. It therefore did not attract the "peace, order and good government" residual federal power and it was not legislation in relation to "criminal law", simply because it provided for detention and compulsory treatment. The Court held that the Act in its dominant and most important characteristic (in its pith and substance) was public health.

64. In ***Schneider (supra)*** the Court referred to a ***1955 Special Committee of the Senate***, which said that the treatment of drug addicts was a provincial responsibility, as well as the ***1973 LeDain Commission Report***, which stated that it was a provincial responsibility to eliminate a medical condition and not to deter crime, and a 1977 B.C. report entitled ***A Plan for the Treatment and Rehabilitation of Heroin Users in British Columbia***, prepared by the Alcohol and Drug Commission for the provincial Minster of Health, to the same effect.

65. Bearing in mind the context of the case at bar, the Court in ***Schneider (supra)*** made the following significant comments:

- heroin users do not suffer from a disease in the traditional sense but, nevertheless, dependency once established, requires both social intervention and medical intervention (p.121);

- the purpose of the Act was to provide facilities and other means designed to assist in terminating or diminishing a "patients" use or dependency on the defined narcotic (p.128);

- while the illegal trade in narcotics is a federal responsibility the treatment of addicts is a provincial responsibility (p.132);

- the medical treatment of drug addition is a bona fide concern of the Provincial Legislature under its general jurisdiction with respect to public health (p.137);

- addiction ... is a physiological condition the treatment of which would seem to be a medical concern to be dealt with by the Provincial Legislature (p.137);

- addiction is not a crime but a physiological condition necessitating both medical and social intervention. This intervention is necessarily provincial (p.138);

- the British Columbia Legislature sought to treat persons found to be in a state of psychological or physical dependence on a narcotic as sick and not criminal. The Legislature is endeavouring to cure a medical condition, not to punish criminal activity.

66. It is therefore submitted that the Court concluded that "narcotic addiction" is not a crime but a physiological condition necessitating both medical and social intervention by the province, and that the problem with heroin addiction had neither reached a state of emergency giving rise to federal competence under the residual power, nor went beyond provincial concern to become by its nature a national concern.

67. This decision expressly goes to the constitutional validity of provincial legislation and would support the fact that the province can legislate in this area, or give the power to local government to do so if they do not already have that power under the ***Local Government Act.*** In addition, the decision sets the context for those working in a safe injection facility where the focus is public health in dealing with the consequences of controlled drug use in relation to a local problem as part of the treatment, namely social and medical intervention, required. It is submitted once again that the conduct is not "criminal", but conduct in furtherance of both public and private health – treating addiction.

68. With respect to International Treaties and Conventions, the decision of the Court in ***Schneider (supra)*** also points out that they are not a bar or concern and that, in fact, Article 38 of the ***1961 Single Convention on Narcotic Drugs*** expressly requires that special attention be given to treatment for addiction. Furthermore, International Treaties and Conventions do not form part of our domestic law. For the terms of a treaty to be implemented in our domestic law, passage of domestic implementing legislation is required. If an ambiguity is then found in that legislation, resort may be had to the international treaty or convention to aid the interpretation of the domestic legislation to show that it reflects our international obligations and is consistent therewith. All of those obligations are always subject to the provisions of our ***Constitution*** and thus ***Charter of Rights and Freedoms***.

B3. The unconstitutionality of s.4(1) of the *CDSA* generally or alternatively when at the SIF because it is grossly disproportionate in its effects in violation of s.7 of the *Charter*

69. Under this heading, the Plaintiff seeks the following relief:

(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;

69. The facts on which the Plaintiff relies in seeking this relief are set out in the Amended Statement of Claim in paragraphs 1, 4, 5, 6, 10, 13, 16(b), 20-28, 30. We also rely on the Affidavit of Dean Wilson sworn September 1, 2006, the Affidavit of Ann Livingston sworn September 1, 2006, paragraphs 2, 3, 4, 5, 6, the Affidavit of Gabor Mate sworn August 31, 2006, the Affidavit of Dr. Thomas Kerr sworn August 31, 2006. Other facts we rely on are the Affidavit of Danielle Lukiv sworn April 18th, 2007 and Exhibit "A": Canadian Community Epidemiology Network on Drug Use (CCENDU). "Vancouver Drug Use Epidemiology", June 2007 and Exhibit "B": Guidelines for Police Attending Illicit Drug Overdoses, Vancouver Police Overdose Response Policy and the Outline of PHS Community Services Society Outline, paragraphs 1-3, the nature of addiction paragraphs 4-12, IDU's and overdose paragraphs 13-19, personal health complications of IDU paragraphs 20-23, public health, IDU and infectious disease paragraphs 24-35, social context of Insite paragraphs 36-39, creation of Insite paragraphs 40-45, how it operates paragraphs 46-57, outcomes paragraphs 58-64

B3. Argument

70. Section 7 of the ***Charter*** provides:

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

71. Section 4 of the ***Controlled Drugs and Substances Act*** provides:

> **4.** (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.
>
> (2) No person shall seek or obtain
>
> (*a*) a substance included in Schedule I, II, III or IV, or

(*b*) an authorization to obtain a substance included in Schedule I, II, III or IV from a practitioner, unless the person discloses to the practitioner particulars relating to the acquisition by the person of every substance in those Schedules, and of every authorization to obtain such substances, from any other practitioner within the preceding thirty days.

(3) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule I

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years; or

(*b*) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

(4) Subject to subsection (5), every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day; or

(*b*) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

(5) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VIII is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one

thousand dollars or to imprisonment for a term not exceeding six months, or to both.

(6) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule III

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years; or

(*b*) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

(7) Every person who contravenes subsection (2)

(*a*) is guilty of an indictable offence and liable

(i) to imprisonment for a term not exceeding seven years, where the subject-matter of the offence is a substance included in Schedule I,

(ii) to imprisonment for a term not exceeding five years less a day, where the subject-matter of the offence is a substance included in Schedule II,

(iii) to imprisonment for a term not exceeding three years, where the subject-matter of the offence is a substance included in Schedule III, or

(iv) to imprisonment for a term not exceeding eighteen months, where the subject-matter of the offence is a substance included in Schedule IV; or

(*b*) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

(8) For the purposes of subsection (5) and Schedule VIII, the amount of the substance means the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance.

Schedule Offences

Schedule I:	Opiates, Cocaine
Schedule II:	Cannabis
Schedule III:	Amphetamines, LSD
Schedule IV:	Barbiturates, Steroids
Schedule V:	Propylhexadrine
Schedule VI:	Class A precursors, Class B precursors, mixtures

72. While s.4 contains the words "except as authorized under the Regulations, the section otherwise consists of an absolute prohibition on the possession of any of the substances set out in Schedules I – V. While the Regulations do authorize possession of a narcotic or controlled drug if obtained pursuant to the Regulations such as from a licensed dealer, a pharmacist or a practitioner (a doctor, dentist or veterinarian), an individual can only lawfully possess a controlled drug or a narcotic on prescription from a practitioner or other person authorized under the Regulations and assuming a legal source of supply. There is no provision to exempt an addicted person or IDU either generally or for purposes of attending at a safe injection site or facility, in the regulations.

73. When a similar question arose in relation to access to medical marihuana (cannabis sativa L in schedule II of the ***CDSA***), the Ontario Court of Appeal in ***R. v. Parker*** [2000] O.J. No. 2787 (Ont.C.A.) decided July 31st, 2000 that s.4(1) of the ***Controlled Drugs and Substances Act*** was unconstitutional to the extent that it caused a sick person to choose between their liberty and their health and that this was in violation of s.7 of the ***Charter***'s "principles of fundamental justice". The Court suspended the declaration of unconstitutionality for a period of 12 months and gave Parliament one year to try and make the law constitutional by filling the gap in the legislative scheme. At the time of the appeal, the government put forward s.56 of the ***Controlled Drugs and Substances Act*** as the solution to exempt those seeking access to medical marihuana and came up with a document entitled "Interim guidance document" pursuant to s.56. Ultimately the federal government did not appeal the decision of the Ontario Court of Appeal to the Supreme Court of Canada and instead brought into force on June 15th, 2001 the ***Marihuana Medical Access Regulations*** which sets out a scheme for authorizations to possess, personal production licences and designated production licences for users and growers of medical marihuana that have the support of their physicians. The Ontario Court of Appeal found s.56 of the ***Controlled Drugs and Substances Act*** to be unconstitutional because it provided an absolute discretion in the Minister with no criteria and therefore similarly did not satisfy

the "principles of fundamental justice" where the liberty or security of the person protected by s.7 of the ***Charter*** is at stake.

74. It is respectfully submitted 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***.

75. It is submitted 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. It is submitted 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.

76. In ***Parker (supra)***, Mr. Parker was a man suffering from severe epilepsy that was serious and potentially life-threatening. He had suffered from this since he was a child and had undergone various types of surgery and conventional medical approaches that did not work. He found that smoking marijuana substantially reduced the incidence of his seizures, but he had no legal source, so he grew for himself and was then charged with production and possession for the purpose trafficking. He argued that the law violated s. 7 of the ***Charter*** because he faced the threat of imprisonment in order to keep his health, and that this did not comply with "principles of fundamental justice", where liberty and the security of the person are affected. In the Ontario High Court, Mr. Justice Sheppard agreed, stayed the charges and granted him a constitutional exemption for "medically approved use". The Crown appealed to the Ontario Court of Appeal. That Court agreed that there was a s. 7 violation but disagreed with the remedy of "constitutional exemption". Instead, it declared s.4 of the ***Controlled Drugs and Substances Act*** to be unconstitutional, but suspended the declaration for one year to give the government an opportunity to try and make the law constitutional.

77. In coming to this conclusion, the Ontario Court of Appeal agreed that the prohibition against the possession of marihuana in question interfered with Mr. Parker's health and the security of his person and his liberty in that he faced the threat of criminal prosecution, an obvious threat to liberty, and he was also precluded from making a decision of "fundamental personal importance", namely choosing the medication he required to alleviate the affects of his illness that carried with it life threatening consequences.

78. In coming to this conclusion, the Ontario Court of Appeal referred to ***R. v. Monney***, (1999) 133 C.C.C. (3d) 129 (SCC), where the Supreme Court of Canada ruled

that any state action which has the likely effect of impairing a person's health engages the fundamental right under **section 7** to the security of one's person. It also referred to ***New Brunswick (Minister of Health and Community Services) v. G. (J.)***, (1999) 177 D.L.R. (4th) 124 (SCC), which held that the right to 'security of the person' does protect against serious and profound effects on a person's psychological integrity. The Court held that to deprive, by means of a criminal sanction, access to medication reasonably required for the treatment of the medical condition that threatens life or health, constitutes a deprivation of the "security of the person". It also constitutes a serious interference with both physical and psychological integrity. The Ontario Court of Appeal held that to prevent access to treatment by the threat of the criminal sanction constitutes a deprivation of the security of one's person. The Court also found s.56 of the ***CDSA*** to be unconstitutional and that aspect of the matter will be dealt with below under paragraph 4.

79. In ***R. v. Malmo-Levine; R. v. Caine*** [2003] 3 S.C.R. 571 (SCC), the Supreme Court of Canada held that even if Parliament acts pursuant to a legitimate state interest, the question still arises under s.7 of the ***Charter*** as to whether the government's legislative measures in response to the use of marihuana are "so extreme that they are per se disproportionate to any legitimate government interest" referring to its previous decision in ***Suresh v. Canada (Minister of Citizenship and Immigration)*** [2002] 1 S.C.R. 3 (at paragraph 47) where the Court accepted that the means taken by Parliament to achieve an objective can be so disproportionate to the desired ends so as to offend the principles of fundamental justice. The Court pointed out that the applicable standard was one of "gross disproportionality", the proof of which rests on the claimant.

> ***R. v. Malmo-Levine; R. v. Caine*** [2003] 3 S.C.R. 571 (SCC), paragraphs 141-144

80. On the question of the more general principle of disproportionality, the Court went on to say as follows:

> "As stated, the proportionality argument made by the appellants is broader than the mere disproportionality of penalty. They are correct to point out that interaction by an accused with the criminal justice system brings with it a number of consequences, not least among them the possibility of a criminal record. We agree that the proportionality principle of fundamental justice recognized in ***Burns*** and ***Suresh*** is not exhausted by its manifestation in s. 12. The content of s. 7 is not limited to the sum of ss. 8 to 14 of the *Charter*. See, for instance, ***R. v. Hebert***, 1990 CanLII 118 (S.C.C.), [1990] 2 S.C.R. 151; ***Thomson Newspapers***, *supra*. We thus accept that the principle against gross disproportionality under s. 7 is broader than the requirements of s. 12 and is not limited to a consideration of the penalty attaching to conviction. Nevertheless the standard under s. 7, as under s. 12, remains one of *gross* disproportionality. **In other words, if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of**

> **protecting them from the harm caused by marijuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*.**" (emphasis added)

R. v. Malmo-Levine; R. v. Caine [2003] 3 S.C.R. 571 (SCC), paragraphs 169

81. The Court further held that "security of the person" is also protected by s.7 of the ***Charter*** and includes "serious state imposed psychological stress" referring to its earlier decision in ***R. v. Morgentaler*** [1988] 1 S.C.R. 30 (SCC). However, because in ***R. v. Malmo-Levine; R. v. Caine*** the drug in question was cannabis sativa (marihuana) which the Appellants there contended was not addictive, the Court held that the prohibition against marihuana use or possession would not therefore lead to a level of stress that was constitutionally cognizable. The Court also said that if the marihuana was used for medical purposes a very different issue would arise.

R. v. Malmo-Levine; R. v. Caine [2003] 3 S.C.R. 571 (SCC), paragraph 88

82. It is respectfully submitted that in the case before the Court, the particular drugs in issue such as heroin, cocaine, including crack cocaine, are considered to be highly addictive and because it is an offence to possess such drugs, that person's liberty is at risk if charged with an offence as imprisonment is a potential consequence for such conduct.

83. It is submitted that it is also clear that the possession of and use of these addictive drugs can lead to loss of life and that this is so because the substances are prohibited by law and consequently injection drug users use unsafe injection practices in back alleys and elsewhere that frequently lead to death by overdose or otherwise and to a lack of primary and long term health care and infectious disease.

84. In addition, because these drugs are severely addictive and prohibited by law, the life and liberty of the addict is not only in issue, but also the addicts "security of the person" because the addiction and prohibition lead to a level of stress that is constitutionally cognizable as "serious state imposed psychological stress" because the addicts are unable to avoid bringing the consequences of the criminal justice system on to themselves, resulting in grossly disproportionate consequences when compared to the intent of the law itself.

85. It is respectfully submitted that when the possession and the use of an addictive drug is prohibited by sanctions that threaten liberty and the security of one's person, then the use of the criminal law results in "serious state imposed psychological stress" in the addict, who does not choose, like the non-addicted cannabis user, to bring the consequences of the criminal justice system on to themselves and in the result s.7 of the ***Charter*** is violated. Addicts, fearing the police and the law, avoid seeking health care when required and are in effect put in a position where they have to choose between their liberty and their health because the prohibition of the possession of such

a drug imposes serious levels of psychological stress that are constitutionally cognizable as affecting the "security of the person" and can frequently result in death.

86. It is submitted that the means taken by Parliament in these circumstances to achieve its objective is so disproportionate to the desired end so as to offend principles of fundamental justice. The use of the criminal law is "grossly disproportionate" in its effects on accused addicts when considered in light of the objective of protecting them from the harm caused by their drug use and therefore, it is submitted, that the prohibition is contrary to principles of fundamental justice and s.7 of the ***Charter***.

87. It is submitted therefore on behalf of this Plaintiff that s.4(1) of the ***Controlled Drugs and Substances Act*** as it relates to addictive drugs set out in Schedule I of the ***Controlled Drugs and Substances Act*** is unconstitutional as violating s.7 of the ***Charter*** due to its gross disproportionality. In the alternative, it is submitted that s.4 of the ***Controlled Drugs and Substances Act*** in relation to s.1 Schedule drugs is at least unconstitutional when an IDU is on site at the SIF engaged in seeking *bona fide* medical and social intervention for his or her addiction.

88. This Plaintiff also adopts the submissions of the Plaintiff PHS Community Services Society as set out in their Outline of April 18th, 2008 commencing at paragraph 92 and continuing through paragraph 133.

93. The high level of "serious state imposed psychological stress" arising from the threat to liberty and security of the person is clearly illustrated by the Vancouver Police Overdose Response Policy implemented in the Fall of 2003, where the police no longer attend an overdose ambulance call except in the case of a death. This police was taken in an effort to reduce overdose deaths and to remove the fear that police will attend and lay charges for drug possession at an emergency health service call. The policy restricts police attendances at overdose calls to those where public safety is at risk or they are requested by the emergency health services. It is apparently the first policy of this nature to be adopted by a police force in Canada and took three years to develop and implement.

Affidavit of Danielle Lukiv , paragraphs 2, 3 and Exhibits A and B

Exhibit "A": Canadian Community Epidemiology Network on Drug Use (CCENDU). "Vancouver Drug Use Epidemiology" , June 2007

Exhibit "B": Guidelines for Police Attending Illicit Drug Overdoses, Vancouver Police Overdose Response Policy

B4. The unconstitutionality of s.56 to the extent it vests an unfettered discretion in the Minister

Under this heading, the Plaintiff seeks the following relief:

(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;

89. The facts on which the Plaintiff relies in seeking this relief are set out in the Amended Statement of Claim in paragraphs 1, 4, 5, 6-10, 14-19, 29 and 30; in the Affidavit of Thomas Kerr sworn August 31, 2006 at paragraphs 2, 7-16; in the Affidavit of Nathan Lockhart sworn April 7th, 2008 at paragraphs 3-12 and Exhibits 1–9, paragraphs 3-12.

90. It is respectfully submitted 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.

91. In this regard, the plaintiff relies in particular on the decision of the Ontario Court of Appeal in ***R. v. Parker*** [2000] O.J. No. 2787 (Ont.C.A.) which found s.56 of the ***Controlled Drugs and Substances Act*** to be unconstitutional in the circumstances. No appeal was taken from that decision to the Supreme Court of Canada. Instead the government came up with a new legislative scheme with respect to medical marihuana exemptions from the ***Controlled Drugs and Substances Act***, namely the ***Medical Marihuana Access Regulations***.

92. It is submitted that s.56 does not provide an adequate legislative standard to enable the provinces to carry out their constitutional health jurisdiction in relation to the treatment of addicts without being subject to the possible whims and personal predilections of the Minister arising out of his or her 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.

93. Because s.56 contains no criteria and gives the Minister an absolute discretion, it is submitted that it does not comply with the "principles of fundamental justice" required by s.7 of the ***Charter*** where life, liberty and the security of the person are in issue.

94. In ***Parker (supra)***, the Ontario Court of Appeal said this about s.56 at paragraphs 184-185:

> "In view of the lack of an adequate legislated standard for medical necessity and the vesting of an unfettered discretion in the Minister, the deprivation of Parker's right to security of the person does not accord with the principles of fundamental justice. In effect, whether or not Parker will be deprived of his security of the person is entirely dependent upon the exercise of ministerial discretion. While this may be a sufficient legislative scheme for regulating access to marijuana for scientific purposes, it does not accord with fundamental justice where security of the person is at stake."

The Court continued at paragraph 187:

> "...the Court cannot delegate to anyone, including the Minister, the avoidance of a violation of Parker's rights. S. 56 fails to answer Parker's case because it puts an unfettered discretion in the hands of the Minister to determine what is in the best interests of Parker and other persons like him and leaves it to the Minister to avoid a violation of the patient's security of the person."

And on the question of "liberty" being affected, the Court said the following at paragraph 188:

> "If I am wrong and, as a result, the deprivation of Parker's right to security of the person is in accord with the principles of fundamental justice because of the availability of the s. 56 process, in my view, s. 56 is no answer to the deprivation of Parker's right to liberty. The right to make decisions that are of fundamental personal importance include the choice of medication to alleviate the affects of an illness with life-threatening consequences. It does not comport with the principles of fundamental justice to subject that decision to unfettered ministerial discretion..."

95. It is further submitted 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 s. 56 has the effect of allowing the Minister 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 in accordance with the principles of fundamental justice. The Plaintiff submits that to the extent s. 56 has that effect it is contrary to s. 7 of the ***Charter***.

96. 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('It is known from its associates' or 'the meaning of the word is or may be known from the accompanying words'), 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)

97. 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, in accordance with s. 7 principles of fundamental justice, be restricted in its effect so that the "terms and conditions" of the exemption cannot contradict the "scientific purpose" opinion.

98. The letters of exemption illustrate 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 contradiction remains.)

99. Secondly, even if s. 56 is interpreted so as to allow the Minister to simultaneously hold the opinion that the exemption is necessary for a scientific purpose and to impose a termination date that is unrelated to that opinion, the wording that allows the imposition of such a termination date is in itself a violation of s. 7 of the ***Charter***.

100. 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 phrase "on such terms and conditions as the Minister deems necessary" (which in turn, in order to have any effect, is dependent upon the Minister having at least one of the three statutorily mandated opinions).

101. This amounts to the granting of an absolute discretion to the Minister. It 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.

102. The cases relied upon by the Plaintiff are ***Committee for the Commonwealth of Canada v. Canada*** [1991] S.C.R. 139, ***R. v. Parker*** [2000] O.J. No. 2787 (Ont.C.A.) and ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27 at para. 21

B5. Interlocutory order granting an interim constitutional exemption

103. Under this heading, the Plaintiff seeks the following relief:

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

104. This interim interlocutory order is only sought if this matter does not proceed to a conclusion before June 30th, 2008 when the exemption is currently set to expire. If this Court determines that these proceedings are not suitable for determination under Rule 18A of the British Columbia Supreme Court Rules, then this remedy will be sought pending the conclusion of the trial that will occur at a later date.

105. 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(IDU's) 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.

B6. Permanent Constitutional Exemption

106. Under this heading, the Plaintiff seeks the following relief:

(e) A permanent constitutional exemption pending the enactment of a valid exemption scheme if required.

107. If this Honourable Court determines that some form of exemption from the law is required, either for the staff at the SIF or the IDU's 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 IDU's 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 IDU's 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

Parliament or the Defendant Minister of Health through the Federal Cabinet to enact regulations that will enable a constitutional exemption process to be put in place.

108. 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 IDU's or both and agrees that s.56 of the ***CDSA*** is unconstitutional, then a Court ordered constitutional exemption for the staff and/or IDU's at the SIF is sought as set out in the prayer for relief at paragraph 31(e).

109. It is submitted that 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.

110. It is submitted that 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, it is submitted 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.

111. It is submitted that the test for the granting of this relief either as an interlocutory or permanent order is the test for the granting of an injunction and the applicant must satisfy the Court of the following:

a. That there is a serious issue to be tried as opposed to a frivolous and vexatious claim;

b. That if the injunction is not granted the Applicant will suffer irreparable harm, that is harm that is not susceptible or that is difficult to compensate in damages; and

c. That the balance of convenience favours the granting of the relief sought in that the applicant will suffer greater harm from the refusal of an injunction than the Respondent pending the decision by the Court on the merits.

R.J.R. MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at p.334
British Columbia (Attorney General) v. Wale (1986), 9 B.C.L.R. (2d) 333 (B.C.C.A.)
Manitoba (Attorney General) v. Metropolitan Stores Ltd. [1987] 1 S.C.R. 110, paragraphs 31-35

112. It is submitted on behalf of the Plaintiff VANDU that there is a serious issue to be tried, that its members or some of them will suffer irreparable harm if either an interlocutory injunction or interim constitutional exemption is not granted pending the trial of these proceedings or a permanent constitutional exemption granted until the Court finally decides these matters or Parliament legislates a valid exemption process. It is submitted that the balance of convenience favours permitting the SIF to continue until there is a final decision of this Court or valid legislation implemented by Parliament.

a. Serious Question to be Tried

113. It is submitted that the threshold for this step is generally low requiring a determination as to whether the application is frivolous or vexatious. If the order will amount to in effect a final determination of the matter, a more extensive examination of the merits is required. In this regard the Plaintiff VANDU refers to and repeats the detailed arguments above. It is submitted that the merits of the Plaintiff VANDU's case is strong and that there are a number of serious questions to be tried which also favour the balance of convenience. The questions involve the division of powers between the Federal and Provincial governments and the constitutionality of at least two sections of federal legislation impacting upon the ability of the Province to treat those addicted through social and medical interventions.

b. Irreparable Harm will Result

114. Irreparable harm is usually described as harm that cannot be adequately compensated in damages. It relates to the nature of the harm suffered, not the degree of the harm. As the Supreme Court put it in ***RJR-MacDonald Inc.***:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from other.

115. The numerous evaluations of the SIF appear to indicate its value to public health and the health of individual members of the Plaintiff VANDU who are IDUs and who attend the site as a place where they can safely inject under the eye of a nurse or health

care worker who will assist them in the event of an overdose from dying or suffering complications. The VANDU members who are IDUs would otherwise avoid places where they might be observed by law enforcement and inject themselves in back alleys and other places and without regard to their health or the health of others. At the SIF they learn safe practices, use clean equipment, can obtain primary health care for abscesses and other infections and long term health care by way of treatment in various forms for their addiction with a long term objective of abstinence. They have the option of going into immediate detox in the facility upstairs called Onsite. It is respectfully submitted that this type of harm is irreparable as it cannot be adequately compensated in damages. Further, the harm that results to the public and to IDUs who do not use the Safe Injection Facility is also apparent and arguably the public health will continue to suffer irreparable harm as will individual IDUs if the SIF is closed.

c. The Balance of Convenience favours Granting of the Application

116. The question to determine the balance of convenience is to determine which party will suffer the greater harm from the granting or refusal of the injunction pending the decision of the Court on the merits.

> ***R.J.R. MacDonald Inc. v. Canada (Attorney General),*** [1994] 1 S.C.R. 311 at paragraph 62

117. The factors which must be considered in determining this question are numerous and will vary from case-to-case. Among the factors to be considered are the preservation of the status quo, the nature of the relief sought, the harm which the parties contend they will suffer, the nature of the legislation under attack and where the public interest lies.

> ***R.J.R. MacDonald Inc. v. Canada (Attorney General),*** [1994] 1 S.C.R. 311 at pages 342-347, 350

118. VANDU submits that the balance of convenience favours the granting of an interim or interlocutory injunction or an interim constitutional exemption pending the decision of this Court on the merits.

a. **Status Quo**: The Safe Injection Facility has now been in existence since 2003 and all evaluations including those conducted by the Respondents have indicated some value and public interest in its continued operation, not only for purposes of scientific research, but as a way of contacting and communicating with persons who are severely addicted and exposing them to social and medical interventions to assist them with their primary health and their addiction with a view to reducing the harm not only to them but to the public in both the short and long term.

b. **Strength of the case:** It is submitted that as set out above, the Plaintiffs submit that they have a strong case for the continued existence of the

Safe Injection Facility and points out that s.56 has already been held to be unconstitutional by the Ontario Court of Appeal in ***Parker (supra)***.

c. **Adequacy of Damages**: It is submitted that there is no remedy of damages available to VANDU should the interim injunction not be granted.

d. **Public Interest:** VANDU submits that maintaining the Safe Injection Site to complete all scientific research and to assist severely addicted persons by providing them with social and medical interventions and opportunities for treatment and detoxification and ultimately abstinence serve the public interest and reduce harm not only to these individuals, but to the public by of the spread of infectious diseases and other health related issues from the use by addicts of contaminated or unclean equipment, the use of unsafe injection practices and generally failing to look after their health while putting at risk the health of others.

119. The Plaintiff VANDU therefore submits that an interlocutory order or an interim constitutional exemption be granted to the staff and IDUs at the Safe Injection Facility to continue on the similar terms and conditions to the existing exemption save that it continue until the final decision of this Court on the merits of these proceedings.

120. All of which is respectfully submitted.

Dated: April 25th, 2008

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