

Amended Pursuant to Rule 24.1(a)
Original filed 30th August 2006

File No. S065587
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

COPY

VANCOUVER AREA NETWORK OF DRUG USERS (VANDU)

Plaintiff

And:

ATTORNEY GENERAL OF CANADA and
MINISTER OF HEALTH FOR CANADA

Defendants

AMENDED STATEMENT OF CLAIM

1. 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.

2. 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.
3. 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.
4. 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.

5. 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.

Vancouver Supervised Injecting Facility ("SIF")

6. 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.
7. 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.
8. 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.
9. 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.

10. 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.

The CDSA offences

11. Controlled drugs are brought by the IDUs 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 IDUs from their continued use by the activities and information provided in the post-injection room.

12. 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***.

13. The IDUs clearly do so possess a controlled drug, both before and during their presence on the site contrary to s. 4 of the ***Act***.

S. 56 CDSA Exemption

14. 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.

15. 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.

16. 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.

17. 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.

18. 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 elicited purposes. The terms of the exemption also provide for revocation for cause, and reasonable inspection of the site is authorized to ensure compliance.

19. 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.

Injection Drug Users (IDUs)

20. Injection drug users ("IDUs") 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.
21. 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***.
22. While the illegal trade in narcotics or controlled drugs is a federal constitutional responsibility under s.91(27) of the ***Constitution Act, 1867***, the federal 'criminal law' power, the treatment of addicts is a provincial responsibility, and the medical treatment of drug addiction is a *bona fide* concern of the provincial legislature under its general constitutional jurisdiction with respect to public health arising from either s.92(7),(13) and (16) of the BNA Act or any combination thereof. Addiction is a physiological condition, the treatment of which is a medical concern to be dealt with by the provincial legislature. Medical and social intervention in relation to the physiological condition of addiction is necessarily a provincial responsibility.
- 23a. The British Columbia Legislature and the Vancouver Coastal Health Authority, the operator of the SIF, may, pursuant to the Provinces' exclusive authority with respect to hospitals, seek to treat persons found to be in a state of psychological or physical dependence on a controlled drug as sick and not criminal, and to endeavour to cure their medical condition as opposed to punish their criminal

activity. The SIF provides medical equipment, medical staff, and medical treatment for the purpose of treating addiction and alleviating its harmful effects.

23b. The delivery of health services to addicted persons, including the delivery of health services through the SIF, is a provincially-regulated activity or undertaking that is a basic, minimum and unassailable part of the provincial power over health under section 92 of the **Constitution Act, 1867**. As such, the federal criminal law cannot apply in such a way as to extinguish or impede the operation of the SIF. Federal criminal law, including without limitation the CDSA, the Regulations issued thereunder, and the conditions of any s. 56 exemption, are inapplicable to the SIF to the extent that they would ban or regulate the health-related activities carried out therein.

24. 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.

25. The Plaintiff says that these threats to the liberty and security to the person of the IDU by this prohibition are not in accordance with the principles of fundamental justice and are therefore in violation of s. 7 of the **Canadian Charter of Rights and Freedoms**.

26. The Plaintiff says that this criminal law prohibition causes the IDU as a sick and disabled person to have to choose between their liberty and the security of their person and their health, precluding them or discouraging them from making a decision of fundamental personal importance, namely, choosing harm reduction by medical intervention and treatment to alleviate the effects of their illness or addiction that can carry with it life-threatening and other serious health consequences.

Consequently, the state action in imposing this prohibition has the grossly disproportionate effect of impairing the IDUs health, thereby affecting the life, liberty, and the security of their persons, otherwise than in accordance with the principles of fundamental justice, contrary to s.7 of the **Charter**.

27. The Plaintiff says that the right to the "security of the person" under s.7 of the **Charter** protects against serious and profound effects on a person's psychological integrity, and that the Defendants in depriving, by means of a criminal sanction, access to medical treatment or intervention reasonably required for their medical condition that threatens their life or health, constitutes a deprivation of the "security of the person" due to a serious interference with both physical and psychological integrity and is grossly disproportionate to any legitimate government interest. As such, it is not in accordance with principles of fundamental justice.

28. The Plaintiff says that the prohibition against the possession of the controlled drug is therefore unconstitutional generally, or in the alternative, at least when the IDU is in the process of seeking *bona fide* medical or social intervention for his or her addiction or illness.

S. 56 CDSA Process

29. The Plaintiff says that s. 56 of the **Controlled Drugs and Substances Act**, which authorizes the Minister, in his discretion, to grant exemptions from the law for medical or research purposes, or for purposes otherwise in the public interest, is unconstitutional because it contains no criteria or standards for the exercise of the Minister's discretion, enabling the Minister to deprive an individual of their right to life, liberty and the security of their person according to his or her personal predilections and that this is not in accordance with the principles of fundamental justice and is in violation of s. 7 of the **Charter**.

30. The Plaintiff says that, in addition, the right to make decisions that are of fundamental personal importance include the choice of medical or social intervention to alleviate the effects of addiction that can carry with it life-threatening and other serious health consequences including high levels of psychological stress, and it is an unconstitutional violation of s. 7 of the **Charter** to give an unfettered discretion to the Minister, that would enable the Minister to avoid a person's constitutional rights at whim or based on personal predilections.

Relief Claimed

31. The Plaintiff claims as follows:

- (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;
- (a2) A declaration pursuant to s.52(1) of the **Constitution Act, 1982** that the **Controlled Drugs and Substances Act**, the **Regulations** issued thereunder, 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;
- (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;

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

(f) Costs of this action, including special costs, goods and services tax, and provincial sales tax on costs;

(g) Such further and other relief as this honourable Court may deem just.

Place of Trial: Vancouver, British Columbia.

Dated: August 30, 2006



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