COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15

Date: 20100115
Dockets: CA036159; CA036158

Docket: CA036159

Between:

PHS Community Services Society, Dean Edward Wilson and Shelly Tomic

Respondents/Cross Appellants
(Plaintiffs)

And:

Attorney General of Canada

Appellant/Cross Respondent
(Defendant)

And:

Attorney General of British Columbia, British Columbia Civil Liberties Association, Vancouver Coastal Health Authority and Dr. Peter AIDS Foundation

Intervenors

Docket: CA036158

- and -

Between:

Vancouver Area Network of Drug Users (VANDU)

Respondent/Cross Appellant
(Plaintiff)

And:

Attorney General of Canada and Minister of Health for Canada

Appellants/Cross Respondents
(Defendants)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Huddart
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, October 31, 2008 (*PHS Community Services Society v. Canada (Attorney General)*, Docket No. S075547) and May 27, 2008 and February 19, 2009 (*Vancouver Area Network of Drug Users (VANDU) v. Canada (Attorney General)*, Docket No. S065587)

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Place and Date of Hearing:	Vancouver, British Columbia April 27 – 29, 2009
Place and Date of Judgment:	Vancouver, British Columbia January 15, 2010

Concurred in by:
The Honourable Madam Justice Rowles

Written Reasons by:
The Honourable Madam Justice Huddart (Page 27, para. 80)

Dissenting Reasons by:
The Honourable Madam Justice D. Smith (Page 73, para. 200)

Reasons for Judgment of the Honourable Madam Justice Rowles:

Introduction

[1] I have had the privilege of reading in draft the reasons for judgment of Justices Huddart and Smith. Justice Huddart would allow the cross-appeal brought by PHS Community Services Society ("PHS"), Dean Edward Wilson and Shelly Tomic, from the order dismissing their application for a declaration that ss. 4(1) and 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*] do not apply to the Vancouver Safe Injection Site ("Insite") by reason of the application of the doctrine of interjurisdictional immunity. I agree with Justice Huddart's reasons on the cross-appeal as well as her reasons on the following issues: the question of standing; the suitability of the summary trial process; the admissibility of some but not all of the fresh evidence and the new evidence; and the trial judge's award of costs.

[2] Justice Smith has concluded that the appeal brought by the Attorney General of Canada ("Canada") from the trial judge's order allowing the alternative claim advanced by PHS based on s. 7 of the *Canadian Charter of Rights and Freedoms*, ought to be allowed. I respectfully disagree.

[3] While my concurrence with Justice Huddart's reasons makes consideration of PHS's alternative claim under s. 7 unnecessary, I will nevertheless consider the arguments made on Canada's appeal. The alternative claim was accepted by the trial judge and the issues on appeal from the resulting order were fully argued before us. In my opinion, the evidence establishes that the application of ss. 4(1) and 5(1) of the *CDSA* to Insite, operating as it does in the Downtown Eastside of Vancouver ("DTES"), would engage the s. 7 interests of life, liberty and security of the person of the personal respondents in the PHS action and others similarly situated and, further, that such application would not accord with the principles of fundamental justice because of overbreadth.

[4] In my opinion, Canada's appeal from the judge's order based on PHS's alternative claim under s. 7 of the *Charter* ought to be dismissed. My reasons for reaching that conclusion follow.

The relevant provisions of the *Controlled Drugs and Substances Act*

[5] Section 4(1) of the *CDSA* provides as follows:

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

[6] Under the *CDSA*, "possession" has the meaning assigned by s. 4(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended):

> 4(3) For the purposes of this Act,
>
> (a) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[7] Sections 5(1) and (2) of the *CDSA* provide:

> 5(1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.
>
> (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

[8] The word "traffic" is defined in s. 2(1) of the *CDSA*:

> "traffic" means, in respect of a substance included in any of Schedules I to IV,
>
> (a) to sell, administer, give, transfer, transport, send or deliver the substance,
>
> (b) to sell an authorization to obtain the substance, or
>
> (c) to offer to do anything mentioned in paragraph (a) or (b).

Background to the litigation and the nature of PHS's alternative claim

[9] The events that prompted this litigation are described at the outset of the trial judge's reasons which are indexed at 2008 BCSC 661. The Federal Minister of Health had granted exemptions under s. 56 of the *CDSA* so that, while within Insite's premises, drug users were not liable to prosecution for possessing a controlled substance contrary to s. 4(1) of the *CDSA*, and nor were the staff, for trafficking, contrary to s. 5(1). The section under which the exemptions were granted provides:

> 56. The Minister may, 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 all or any of the provisions of the Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

[10] The initial exemptions, based on necessity for a scientific purpose, were granted for a term of three years commencing 12 September 2003. The exemptions were subsequently extended to 31 December 2007, and then to 30 June 2008. When no further extensions appeared to be forthcoming, two separate actions were commenced, one by PHS and two of its clients, Mr. Dean Wilson and Ms. Shelly Tomic, and the other by the Vancouver Area Network of Drug Users (VANDU).

[11] PHS operates Insite under a contractual arrangement with the Vancouver Coastal Health Authority. PHS is a non-profit organization whose main purpose is to provide housing and support to individuals in the DTES. PHS describes its constituents as those who are homeless or at risk of homelessness due to multiple barriers to stable housing associated with a combination of unemployment, addiction, chronic illness and mental health problems.

[12] Mr. Wilson and Ms. Tomic are residents of the DTES, and representative users of Insite. Mr. Wilson is an injection drug user who has been addicted to heroin for approximately 38 years. He contracted Hepatitis C from injection drug use in approximately 1969 and is unemployed. Ms. Tomic has long been addicted to illicit drugs, including a 12-to 13-year addiction to heroin. She also has Hepatitis C and is disabled by depression and rheumatoid arthritis.

[13] In its action, PHS claimed that Insite is a health care undertaking, authority for the operation of which lies with the Province, and that the federal constitutional power to legislate with respect to criminal law cannot interfere with the provincial constitutional power with respect to health care because of the doctrine of interjurisdictional immunity. The trial judge rejected that claim but accepted PHS's alternative claim, which was that ss. 4(1) and 5(1) of the *CDSA* are unconstitutional and should be struck down because they deprive persons addicted to one or more controlled substances of access to health care at Insite and therefore violate the right conferred by s. 7 of the *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 [*Charter*] 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.

[14] VANDU, a non-profit society whose primary purpose as an advocate on behalf of drug users is to increase the capacity of addicts to live healthy lives by promoting local, regional and national harm reduction, education, intervention and peer support, sought the following declarations, none of which was granted by the trial judge (quoted at para. 6):

> 1. The conduct of the staff in the ordinary course of business at Insite does not involve the commission of any offences at law;
>
> 2. The *CDSA* and the regulations do not apply to the medical treatment at Insite of persons addicted to a controlled substance;
>
> 3. The offence of the possession of all addictive drugs as set out in Schedules I, II and III of the *CDSA* violates s. 7 of the *Charter*, and
>
> 4. Section 56 of the *CDSA*, which vests an unfettered discretion in the Minister to grant an exemption from the provisions of the *CDSA*, is unconstitutional.

[15] Canada opposed the granting of any of the relief claimed in either action. Canada argued that the impugned provisions of the *CDSA* are valid federal law and that the doctrine of interjurisdictional immunity has no application. On the constitutional challenge to the legislation based on s. 7 of the *Charter*, Canada argued that no interest in life, liberty or security of the person under s. 7 was engaged but, if a s. 7 interest were engaged, "the plaintiffs have not been deprived

of any such interest contrary to the principles of fundamental justice because the application of valid criminal prohibitions in respect of the possession and trafficking of illicit drugs to the plaintiffs is not arbitrary, overly broad, grossly disproportionate, or otherwise constitutionally objectionable" (quoted at para. 7). In the further alternative, Canada argued that if the plaintiffs' s. 7 rights were infringed, any such infringement would be saved by s. 1 of the *Charter*.

[16] The trial judge concluded that, in relation to the personal respondents in the PHS action and others who were similarly situated, all three interests protected by s. 7 were engaged. He further concluded that the deprivation of the right to life, liberty and security of the person which would result from the application of ss. 4(1) and 5(1) to the users and staff of Insite would not accord with the principles of fundamental justice. On the latter point, the trial judge held that, if applied in the context in which Insite operates, ss. 4(1) and 5(1) of the *CDSA* would be arbitrary, overbroad and grossly disproportionate in their effects. He further held that the impugned provisions could not be saved by s. 1 of the *Charter*.

The order

[17] The part of the trial judge's order made on 27 May 2008 that is relevant to PHS's alternative claim and Canada's appeal reads as follows:

> THIS COURT DECLARES AND ORDERS THAT
>
> ...
>
> 3. ss. 4(1) and 5(1) of the *Controlled Drug and Substances Act*, S.C. 1996, c. 19 are inconsistent with s. 7 of the *Charter*, are not justified under section 1 of the *Charter*, and are of no force and effect,
>
> 4. the effect of the declaration of constitutional invalidity is suspended until June 30, 2009, and
>
> 5. users and staff at Insite, acting in conformity with the operating protocol now in effect, are granted a constitutional exemption from the application of ss. 4(1) and 5(1) of the *Controlled Drug and Substances Act*, S.C. 1996, c. 19 until June 30, 2009; ...

[18] In light of the 2008 decision of the Supreme Court of Canada in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96 [*Ferguson*] at paras. 33-34, 37-38, 40,

46, 59-61, 65, 71-74, the appropriate remedy in cases where a law has an unconstitutional application is to declare the law of no force or effect and leave it to Parliament to decide whether to enact a new law that accords with the Constitution.

[19] By suspending his declaration of invalidity in this case, the trial judge ensured that ss. 4(1) and 5(1) continue to operate as they did in the past and in circumstances where there could be no constitutional objection. But, at the same time, it was necessary to exempt the users and staff at Insite (acting in conformity with the operating protocol then in effect from the application of ss. 4(1) and 5(1) of the *CDSA* in order to give effect) to their constitutional rights.

[20] I note that the approach the judge took is consistent with that of the Ontario Court of Appeal in *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.)[*Parker*], where the law prohibiting possession of marihuana was held to be contrary to s. 7 in its application to Mr. Parker. While *Parker* predated *Ferguson*, the approach taken was prescient of what the Supreme Court of Canada required in *Ferguson.*

[21] I further note that in *Parker* the Court held that the possibility of an exemption under s. 56 of the *CDSA*, depending as it does on the unfettered and unstructured discretion of the Minister of Health, is not consistent with the principles of fundamental justice. I agree with that opinion.

Framing the issues and some preliminary observations

[22] Canada has stated the issues on appeal as follows:

> Whether s. 4(1) of the *CDSA* infringes the rights guaranteed by s. 7 of the *Charter*, and if so, whether that law constitutes a reasonable limit on s. 7 rights; and
>
> whether s. 5(1) of the *CDSA* infringes the rights guaranteed by s. 7 of the *Charter*, and if so, whether that law constitutes a reasonable limit on s. 7 rights.

[23] In VANDU's submission, Canada has framed the issues too broadly and argues that a narrower statement of the issues, which indicates the context in which

the judge found the infringement of the rights protected by s. 7 would occur, would have been preferable.

[24] I agree that the way in which Canada has framed the issues and couched its arguments largely ignores the context in which PHS's s. 7 claim was advanced. It is with that in mind that I make two preliminary observations.

[25] The first is that the foundation for the trial judge's analysis and conclusions rests in part on three critical findings of fact the judge made that are not disputed by Canada:

> [87] Whatever the shortcomings in the science surrounding the assessment of outcomes at Insite, and however the disputes may be resolved among those who engage in the assessment of the efficacy of safe injection sites generally, or Insite in particular, all of the evidence adduced by PHS, VANDU and Canada supports some incontrovertible conclusions:
>
> 1. Addiction is an illness. One aspect of the illness is the continuing need or craving to consume the substance to which the addiction relates.
>
> 2. Controlled substances such as heroin and cocaine that are introduced into the bloodstream by injection do not cause Hepatitis C or HIV/AIDS. Rather, the use of unsanitary equipment, techniques, and procedures for injection permits the transmission of those infections, illnesses or diseases from one individual to another; and
>
> 3. The risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals.

[26] The trial judge went on to make the following critical findings concerning the residents of the DTES who are addicted to heroin, cocaine and other controlled substances:

> [88] What is less certain and more controversial are the root causes of addiction. The evidence adduced in these proceeding regarding the character of the DTES, many of its inhabitants, and the nature of addiction leads me to the following assessment.
>
> [89] Residents of the DTES who are addicted to heroin, cocaine, and other controlled substances are not engaged in recreation. Their addiction is an illness frequently, if not invariably, accompanied by serious infections and the real risk of overdose that compromise their physical health and the health of other members of the public. I do not assign or apportion blame, but I conclude that their situation results from a complicated combination of personal, governmental and legal factors: a mixture of genetic, .

> psychological, sociological and familial problems; the inability, despite serious and prolonged efforts, of municipal, provincial and federal governments, as well as numerous non-profit organizations, to provide meaningful and effective support and solutions; and the failure of the criminal law to prevent the trafficking of controlled substances in the DTES as evidenced by the continuing prevalence of addiction in the area.

[27] My second observation is that the trial judge found, unsurprisingly, that the facts in the case before him were not analogous to those found in *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 [*Malmo-Levine*], and that the issues decided in *Malmo-Levine* were not determinative of the issues he had to decide. In *Malmo-Levine*, the appellant used marihuana for recreation and pleasure, whereas those who inject drugs at Insite suffer from the illness of addiction to a drug or drugs proscribed in the *CDSA* and their need to inject the drug is a material part of their illness. The users of Insite do not use it directly to treat their addiction, but the assistance and services they receive at Insite virtually eliminate the risk of overdose that is a feature of their illness and they avoid the risk of being infected or of infecting others by injection. Insite also provides them with access to counselling and consultation that may lead to abstinence and rehabilitation. All of the services provided to addicts at Insite constitute health care. *Malmo-Levine* was concerned with the use of marihuana for purely recreational purposes, not the health care of addicts resorting to Insite's continuum of services. As the trial judge held at paras. 135-36 of his reasons, the *Malmo-Levine* decision does not resolve the issues raised by PHS's alternative claim under s. 7.

The interests protected under s. 7

[28] 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.

[29] It is clear from the trial judge's reasons that he used a contextual approach when determining that each of the three s. 7 interests was engaged in this case and in determining that the deprivation of those interests would not be in accordance with

the principles of fundamental justice.

[30] The trial judge's conclusions as to the interests engaged under s. 7 are amply supported by the evidence. As the trial judge's reasons are readily available, I will, for the most part, simply make reference to paragraphs in his decision to highlight the supporting evidence.

[31] A detailed description of the DTES and its multiple problems and the background leading to the establishment of Insite are contained in paras. 13-46 of the reasons.

[32] There was no dispute in the court below that drug addiction is an illness and that the definition of addiction given by the Canadian Society of Addiction Medicine is an accepted one (at paras. 47-48). The nature of the illness of addiction, as described by Dr. David Marsh, appears at paras. 50-55. Dr. Frank Evans, whose affidavit evidence was tendered by Canada, disputed little of Dr. Marsh's evidence, but Dr. Evans expressed a preference for an abstinence-based approach to treat addiction. A summary of the matters on which Dr. Evans disagreed with Dr. Marsh appears at paras. 57-58.

[33] The background and circumstances of the personal respondents, Mr. Wilson and Ms. Tomic, described as representative users of Insite, are set out at paras. 60-70 of the reasons.

[34] The judge's description of how Insite operates appears below:

> [71] Insite is located on East Hastings Street between Carrall and Main Streets. It is open daily from 10:00 a.m. to 4:00 a.m. the following day. The facility is known to DTES residents. Police refer addicts to it. Insite operates under an extensive and detailed operating protocol approved by Health Canada. It is staffed by a combination of PHS, Health Authority and community workers.
>
> [72] Users must be 16 years of age or over, must sign a user agreement, release and consent form, must agree to adhere to a code of conduct, and cannot be accompanied by children. Users must register at each visit to the site and each is asked to identify the substance that will be injected. No substances are provided by staff. It goes without saying that the substances brought to Insite by users have been obtained from a trafficker in an illegal

transaction. Users are obviously in possession of their substance en route to Insite. Approximately 60% of the drugs injected are opioids, of which two-thirds are heroin and one-third morphine or hydromorphone. Approximately 40% of injected drugs are stimulants, approximately 90% of which are cocaine and 10%, methamphetamine.

[73] Insite has 12 injection bays. Users are provided with clean injection equipment which is the only equipment that can be used at the site. Users are monitored by staff during injection. Nurses and paramedical staff provide treatment in the event of overdose and contact a physician and the ambulance service as necessary. Overdoses vary in severity and treatment.

[74] The protocol permits pregnant women to use Insite. They are required to undergo a more intensive assessment than others before being allowed access to the injection room. Those women are also referred to a clinic and child daycare facilities directly managed by the Health Authority, which provides pre- and post-natal care to pregnant women who are actively using illegal substances.

[75] Users who have completed an injection are assessed by staff. They may be discharged to the "chill-out" lounge or treated by a nurse in the treatment room for injection-related conditions. Users requiring extensive or ongoing care are referred to the closest primary care facility, either the Downtown Community Health Centre or the Pender Clinic.

[76] Staff and support workers interact with users at Insite on a one-to-one basis. Users are provided with health care information, counselling and referrals to Health Authority and other service providers. Records indicate that in 2005, 2006 and 2007, staff made 2,270, 1,828, and 2,269 referrals, respectively, to community clinic, hospital emergency, outpatient medical mental health, emergency shelter and community services; and to addiction counselling, housing, withdrawal, methadone treatment, drug recovery, and miscellaneous other services.

[77] Since the fall of 2007, the staff has also been able to refer users to "Onsite", a detox centre located above Insite which permits Insite to provide detox on demand. Onsite is a drug free environment supported by physicians who are addiction specialists and general practitioners, nurses and peers. Users may also be referred to residential detox and additional treatment services.

[35] The evidence of the personal respondents and the judge's findings on the nature and extent of the health care crisis and epidemic in the DTES reveals the impact of the application of ss. 4(1) of the *CDSA* on addicted persons in the DTES and how that is related to addicted persons engaging in unsafe practices, which result in overdoses and the spread of infectious diseases and other harms.

[36] The trial judge held that s. 4(1) engages the right to life, the right to liberty, and the right to security of the person with respect to the activities of addicts at

Insite. The evidence supporting each of his conclusions in that regard is overwhelming.

[37] The judge held that the right to life is engaged because the risk of mortality resulting from overdose can be managed within Insite whereas prohibiting injection within its confines would invite the opposite. In paragraph 20 of his reasons, he referred to the affidavit of Mr. Donald McPherson, who was the director of the Carnegie Centre, which is located in the heart of the DTES. Mr. McPherson, who later became Vancouver's Drug Policy Co-ordinator, described in an affidavit what he had observed about the increasing problems caused by addiction in the DTES and referred to a 1994 report prepared by Coroner J.V. Cain, entitled *Report on the Task Force into Illicit Narcotic Overdose Deaths in British Columbia*. The report was prompted by the coroner's investigation of overdose deaths in Vancouver which had risen from 16 in 1987 to 200 in 1993. In 1996, Dr. Whynot, then Vancouver's medical health officer, issued a report describing the major impacts of injection drug use on the health system in Vancouver. The judge's reasons provide details of the extensive life-threatening health problems in the DTES:

> [22] ... Dr. Whynot concluded that injection drug use was leading to an increased incidence and prevalence of symptomatic infectious disease including HIV/AIDS, Hepatitis A, B and C, and skin- and blood-borne infections; frequent drug overdoses resulting in significant morbidity and mortality; increased hospital and emergency service utilization such as treatment for HIV-related disease, septicaemia and endocarditis; increased ambulance responses and emergency room visits in response to drug overdoses; fetal exposure to addictive substances with both short-term and long-term consequences; increased pressure on all community-level outreach nursing and medical services; an increased need for community-level hospice palliative care; and worsening consequences for associated conditions such as mental illness.

[38] The judge referred as well to a report of an Expert Advisory Committee ("EAC")(at para. 16). The EAC had been struck to provide a report to the Federal Minister of Health, and in its report of 31 March 2008, it described the characteristics of approximately 1,000 users surveyed in the DTES, as follows:

- have been injecting drugs for an average of 15 years;
- majority (51%) inject heroin and 32% cocaine;

- 87% are infected with Hepatitis C virus and 17% with human immunodeficiency virus;
- 18% are aboriginal;
- 20% are homeless and many more live in single resident rooms;
- 80% have been incarcerated;
- 38% are involved in the sex trade;
- 21% are using methadone; and
- 59% reported a non-fatal overdose in their lifetime.

[39] In rejecting Canada's argument that such a risk is self-imposed, the judge held that the root cause of death derives from the illness of addiction, and therefore a law that prevents access to health care services that could prevent death engages the right to life (at paras. 140-42).

[40] The judge held that the right to liberty is engaged because the *CDSA* comprehends the possibility of prosecution and incarceration of Insite users for possession of controlled substances (at para. 143). The appellant does not dispute that the liberty interests of the respondents, Mr. Wilson and Ms. Tomic, and others similarly situated, are engaged because the penalty for commission of the offence of possession under s. 4(1) of the *CDSA* may be imprisonment.

[41] I note as well a second aspect of liberty that was recognized by the Ontario Court of Appeal in *Parker.* The first comes from a violation of the right to liberty through the act of the state imprisoning someone. The second comes when the state impedes the right to make decisions that are of fundamental personal importance through a threat of prosecution. As stated in *Parker* by Rosenberg J.A.:

> [103] To intrude into that decision-making process through the threat of criminal prosecution is a serious deprivation of liberty.... The evidence established that Parker's choice was a reasonable one. He has lived with this illness for many years.... In those circumstances, a court should not be too quick to stigmatize his choice as unreasonable.

[42] In this case, the application of s. 4(1) of the *CDSA* would have the effect of interfering with the liberty of the personal respondents and those who are similarly situated by foreclosing a choice to minimize the potentially life-threatening hazards

of overdose and other serious and life-threatening illnesses through the health services offered at Insite. To argue, as Canada does, that other options or choices are available to minimize such risks ignores the judge's undisputed findings about the nature of addiction, combined with his findings about the multiple problems facing the addicts who inhabit the DTES.

[43] Canada asserts on this appeal that under s. 5(1), the liberty interests of the staff at Insite are not engaged. However, that position appears to rest either on the assumption that prosecutorial discretion would be exercised against laying a charge or on the assumption that a defence to the trafficking charge was available. In my view, neither the hope of a favourable exercise of prosecutorial discretion nor the prospect of succeeding on an untested defence on the facts can displace the jeopardy which conviction for the offence of trafficking in a controlled drug obviously presents in loss of liberty to members of the staff at Insite.

[44] The judge found that security of the person is threatened because s. 4(1) of the *CDSA* would have the effect of denying access to a health care facility where the very serious health risks associated with addiction are diminished. The judge found that the nature of addiction is such that denying addicts health care services that would ameliorate the effects of their condition, and therefore management of the harm, engages security of the person (at paras. 144-46).

[45] Contrary to some of Canada's submissions, there was simply no conflict of substance in the evidence underpinning the judge's conclusion that all three interests referred to in s. 7 were engaged in the circumstances of this case.

[46] Justice Smith's point of disagreement with the trial judge's reasons is on the question of whether the right not to be deprived of the right to life, liberty and security of the person except in accordance with the principles of fundamental justice was made out on the evidence in this case. It is on that issue that I disagree with my colleague's analysis and it is to that issue that I now turn.

The right not to be deprived of the right to life, liberty and security of the person except in accordance with the principles of fundamental justice

[47] After finding that each of the interests referred to in s. 7 of the *Charter* were engaged, the judge went on to find the impugned provisions, in their application to Insite, to be arbitrary and, if not arbitrary, then grossly disproportionate or overbroad and hence not in accordance with the principles of fundamental justice (at paras. 148-53).

[48] The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 503. In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*], Sopinka J. said (at 591) that those principles must not be so broad "as to be no more than vague generalizations about what our society considers to be ethical or moral" and that the principles of fundamental justice "must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result."

[49] On the appeal, Canada advanced arguments to the effect that no principle of fundamental justice was at play in this case. Reference to the following paragraphs of Canada's factum is adequate to capture those arguments:

> It is certainly difficult to capture with any sort of precision what principle of fundamental justice may be at play here. Is it a rule based on the nature of addiction, or on the need to have flexible offences that differentiate between types of offenders? It is difficult to see how a rule intended to provide exemptions for addicts from drug laws would be:
>
> (a) susceptible to precise articulation (how addicted must you be before you lose the ability to choose?)
>
> (b) be vital to the operation of the justice system; or
>
> (c) promote respect for the rule of law, when the most frequent offenders of a law are excused from compliance.
>
> In fact, it is difficult to see this case as anything but a tenuous claim of constitutional overbreadth. The Respondents originally sought only narrow exemptions from the laws to permit the injection of drugs at Insite, suggesting their real complaint is that the laws are overbroad if they prevent addicts and other users from having a supervised injection site. Overbreadth analysis requires a large measure of deference to legislators. As pointed out previously, Parliament can justifiably cast the net broadly in addressing the harms of the drug trade.

[50] This is not a case in which the judge posited a new principle of fundamental justice. His reference to laws that are "arbitrary, or if not arbitrary, grossly disproportionate or overbroad" mirrors well-accepted principles of fundamental justice firmly rooted in our jurisprudence.

[51] A law is overbroad when the state uses means which are broader than is necessary to accomplish the state's objective: *R. v. Heywood*, [1994] 3 S.C.R. 761 [*Heywood*] at 792-94. In *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489 [*Demers*], the Court noted:

> [37] It is a well-established principle of fundamental justice that criminal legislation must not be overbroad: *R. v. Heywood*, [1994] 3 S.C.R. 761; *Winko*, *supra*; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

[52] While the Supreme Court of Canada referred to gross disproportionality as the test for overbreadth in *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735 at paras. 38-39, the Court reiterated the principles enunciated in *Heywood* in its more recent decision in *Demers* at paras. 37-43.

[53] In *Heywood*, the Supreme Court of Canada considered whether a section in the *Criminal Code* enacted for the purpose of protecting children from becoming victims of sexual offences was in accordance with the principles of fundamental justice. The impugned section made it a crime for persons convicted of specified offences to be "found loitering in or near a school ground, playground, public park or bathing area." There was no dispute that the liberty interest of the accused was engaged in *Heywood* because breach of the prohibition was punishable on conviction with imprisonment as a potential consequence. By way of overview to the question before the Court, Cory J. said at 790:

> The question this Court must decide is whether this restriction on liberty is in accordance with the principles of fundamental justice. The respondent [accused] conceded in oral argument that a prohibition for the purpose of protecting the public does not *per se* infringe the principles of fundamental justice. *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 327-34, held that the indeterminate detention of a dangerous offender, the purpose of which was the protection of the public, did not *per se* violate s. 7. In light of

> that decision this concession was appropriate. If indeterminate detention in order to protect the public does not *per se* violate s. 7, then it follows the imposition of a lesser limit on liberty for the same purpose will not in itself constitute a violation of s. 7. The question, then, is whether some other aspect of the prohibition contained in s. 179(1)(b) violates the principles of fundamental justice. In my opinion it does. It applies without prior notice to the accused, to too many places, to too many people, for an indefinite period with no possibility of review. It restricts liberty far more than is necessary to accomplish its goal.
>
> [Emphasis added.]

[54] What must be considered in an overbreadth analysis was further elucidated by Cory J. at 792-93:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
>
> ...
>
> In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator. It is true that s. 7 of the *Charter* has a wide scope. This was stressed by Lamer J. (as he then was) in *Re B.C. Motor Vehicles Act*, *supra*, at p. 502. There he observed:
>
> > Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice.
>
> However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.
>
> [Emphasis added.]

[55] It is also a well-recognized principle of fundamental justice that laws should not be arbitrary: *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1

S.C.R. 791 [*Chaoulli*], at para. 129; *Malmo-Levine*, at para. 135; *Rodriguez,* at para. 147. As noted by McLachlin C.J.C. and Major J. in *Chaoulli* (at para. 130):

> [130] A law is arbitrary when it "bears no relation to, or is inconsistent with, the objective that lies behind [it]. To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect."

[56] At para. 131, the Chief Justice and Justice Major added:

> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.
>
> [Emphasis added.]

[57] In *Chaoulli*, Justices Binnie and LeBel agreed (at para. 232) that a law which is arbitrary is not in accordance with the principles of fundamental justice and further agreed "that a law is arbitrary if 'it bears no relation to, or is inconsistent with, the objective that lies behind the [legislation].'" However, they were of the view that the Quebec law at issue in that case was not arbitrary. They were also of the view that, since the law was not a criminal law, the test in *Morgentaler* of "manifest unfairness" had no application.

[58] A law that is grossly disproportionate, even if not arbitrary, is also not in accordance with the principles of fundamental justice. The Supreme Court of Canada has said that the principle of fundamental justice which embodies the gross disproportionality principle is not limited to a consideration of the penalty attached to conviction; it includes a consideration of the law's effects on accused persons when considered in light of the objective of protecting them from the harm caused by the proscribed drug: *Malmo-Levine*, at paras. 141, 143, 169.

[59] On this appeal, Canada also argued that the respondents are trying to invent a new principle of fundamental justice such as the one that was tried and rejected in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657 [*Auton*] at para 66. In my view, this argument has no substance for it bears no relationship to the judge's findings or analysis in this case. *Auton* was a s. 15 *Charter* claim advanced on the ground that the Province had failed to provide funding for the treatment of autism. Section 7 was raised "fleetingly" in *Auton* and the principle of fundamental justice the petitioners said was violated by the failure to fund treatment was not clearly identified.

[60] Canada also asserts that the trial judge overstepped his judicial role and ruled on the wisdom of the *CDSA* rather than its constitutionality. Canada argues that the court converted a "policy dispute" into a legal one. In my view, this argument must also fail. If a law is determined to be not in accordance with the principles of fundamental justice, the court is performing its legitimate judicial role and is not trenching on matters of policy when declaring the law to be unconstitutional. On this point, I agree with the following submission made by PHS in its factum:

> ... once the Supreme Court of Canada determined that the framers of the Constitution decided that the principles of fundamental justice had a "substantive" component and not merely the "procedural component" as argued by the Attorneys General in *Reference Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 10-34, some blurring of the lines between the policy making function of the legislature and the adjudicative function of the Court has been inevitable. However, when a law meets the threshold of being arbitrary, grossly disproportionate or overbroad, there is no longer any deference required to the legislative policy making choices. This is now a matter for the judiciary.

[61] Canada argues that the question of whether safe injection sites such as Insite ought to exist in Canada is a "controversial one". That is not a reason to cause the court to fail to carry out its constitutional function and duty. There are many cases where the courts have intervened to invalidate laws that might be described as controversial: laws pertaining to abortion, gay and lesbian rights, private health care, collective bargaining and any number of criminal laws such as constructive murder. The fact that a law may be controversial law does not, for that reason

alone, bar judicial review and invalidation. Chief Justice McLachlin's comments in *Chaoulli*, at para. 107, are apposite:

> [107] While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. As this Court has said on a number of occasions, "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 497, per Lamer J. (as he then was), quoting *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, per Dickson J. (as he then was).
>
> [Emphasis added.]

[62] I would add that in this case, I doubt that the accuracy of the assertion that the operation of Insite is controversial in a policy sense. In this province, there is no longer any serious debate about the need for Insite as a health care facility, as Justice Huddart has explained in her reasons. All of the provincial authorities, including the Attorney General of British Columbia and the Vancouver Police, agree that Insite is a necessary component in dealing with the scourge of addiction in the DTES.

[63] What may have been debatable at Insite's inception was whether its presence might increase drug-related loitering, drug dealing or drug-related crime; however, the EAC Report commissioned by the federal government shows that none of these concerns have in fact materialized (trial judge's reasons at para. 85). Similarly, there might have been a concern that Insite would increase drug use in the community but the same EAC Report concluded that there is no evidence of that.

[64] There might also have been a concern that Insite would send a message that drug use is acceptable. Again, the EAC Report concluded that not only is this not a valid concern but the opposite is, in fact, the case. As noted in the Report, "... the publicity surrounding [Safe Injection Sites] serves mainly to draw attention to the dangers of addiction and the miseries of addicts."

[65] In my respectful view, Canada's arguments misstate the foundation and effect of the judge's decision. To say that "the effect of Pitfield J.'s judgment is to require Parliament to carve out an exception to the laws of possession and trafficking for addicts, the most frequent offenders of the drug laws" simply ignores the judge's findings, well-grounded in the evidence, about the effect of addiction on persons living in the DTES. Moreover, it is a gross exaggeration to suggest, as Canada does, that the implications of the judgment, which applies exclusively to Insite, are akin to "requiring an exception from the law of theft for kleptomaniacs", or "an exception from the impaired driving laws for alcoholics".

[66] In its factum, Canada also put forward the following argument:

> The trial judge's approach is inconsistent with basic principles that lie at the heart of the rule of law. The rule of law embraces at least three specific principles, one of which has been described as "the creation and maintenance of an actual system of positive laws which preserves and embodies the more general principle of normative order."
>
> The approach taken by the Respondents, and accepted by the trial judge, would effectively turn the rule of law on its head by dictating that where a particular individual breaks the law with such frequency and persistence that he or she becomes unable to comply with it, it is unconstitutional to apply the law to that person. Thus the Respondents contend that it is unconstitutional for a law which seeks to prevent the harms associated with drug use to be applied to those who have chosen to use such dangerous and harmful substances despite the legal prohibition. The Respondents then take this argument one step further, through their assertion that because the law cannot be constitutionally applied to those who cannot comply with it, the law cannot be applied to anyone. This argument, if accepted, would undermine the rule of law by effectively carving out an exception to the *CDSA* for those who most persistently disregard it, and then using that exception as a basis for invalidating the law itself.

[67] With deference, that argument misstates or misapprehends PHS's alternate claim, as set out in paragraph 13 of these reasons. The focus of the claim was on the effect of the provisions on the respondents' use of Insite; that is, to deprive persons addicted to one or more controlled substances of access to the health care provided at Insite.

[68] The question the trial judge had to determine was whether the respondents' "right not to be deprived of the right to life, liberty and security of the person except

in accordance with the principles of fundamental justice" had been established. As noted above, the findings of the trial judge support the view that ss. 4(1) and 5(1), as applied to Insite, would, in the words of Cory J. in *Heywood*, "infringe life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective."

[69] What Sopinka J. said in *Rodriguez* at 594, appears to me to be apposite in relation to all three of the rights engaged in this case:

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

[70] The respondents confined their alternative claim with respect to ss. 4(1) and 5(1) of the *CDSA* to the very specific context of Insite as a health care facility in the DTES and the trial judge directed his analysis to the claim that was made. The judge's reasons do not suggest that the impugned provisions of the *CDSA* should be found to be unconstitutional simply because they are ineffective or cannot be complied with. However, that does not mean that the ineffectiveness of the *CDSA* when it comes to the addicts in the DTES is irrelevant. The addicts in the DTES who use Insite are not flouting the law because it suits their "lifestyle" or because of some "personal preference" or in an act of "civil disobedience", as was the case in *Malmo-Levine*, at paras. 81, 86-87,174, 185. The import of the judge's analysis is that, by virtue of their long-term addictions to hard drugs combined with their poverty, mental and physical disabilities, histories of sexual and physical abuse, homelessness, genetic, psychological, sociological and familial problems, this very vulnerable population is one where the possession offence provisions of the *CDSA* have no salutary effect and fail to meet the objective of Parliament by its enactment.

[71] As to the objectives of the *CDSA*, it is important to note that harm reduction has been a component of Canada's drug strategy for many years. As early as 1984, the stated goal of Canada's Drug Strategy was "to reduce the harm associated with alcohol and other drugs to individuals, families and communities." In 2002, the

House of Commons Special Committee on the Non-Medical Use of Drugs recommended that "Canada's Drug Strategy identify harm reduction as a core component of Canadian drug policy that supports interventions to maintain the health of individuals and minimize the public health risks associated with substance use." ("Policy for the New Millennium: Working Together to Redefine Canada's Drug Strategy", Report of the Special Committee on Non-Medical Use of Drugs, December 2002, Recommendation #25).

[72] This same Committee rejected the dichotomy between harm reduction and an abstinence-based treatment model. The Committee noted: "According to Canada's Drug Strategy, harm reduction is a 'realistic, pragmatic, and humane approach' to substance abuse, 'as opposed to attempting solely to reduce the use of drugs'." The Committee stated (at FN 187):

> Evidence before the Committee clearly established that the definition of harm reduction is subject to debate and controversy. Some witnesses recognized that harm reduction is commonly misunderstood and often perceived as encouraging drug use, whereas most would agree that it is part of a continuum of care that can include the long-term goal of abstinence. The Committee believes it is unproductive to suggest a dichotomy between harm reduction and an abstinence-based treatment model, as both are essential to address the harmful use of substances and dependence.
>
> [Emphasis added.]

[73] The Committee specifically considered the creation of a safe injection facility in the DTES because it recognized that that community presented a "public health disaster." It recommended that there be experimental trials that include protocols for rigorous scientific assessment and evaluation. As a result, Insite was granted an exemption from the provisions of the *CDSA*.

[74] In my opinion, this is not a case which lacked the necessary evidentiary foundation from which the trial judge could conclude that ss. 4(1) and 5(1) of the *CDSA*, if applied to Insite, would be overbroad because the individual respondents and others similarly situated will have been deprived of their rights to life, liberty and security of the person for no valid reason.

[75] The trial judge held that in its application to Insite, the provisions of the *CDSA* were "inconsistent with the state's interest in fostering individual and community health, and preventing death and disease," and further, that the "blanket prohibition contributes to the very harm it seeks to prevent." (at para. 152) His conclusions in that regard are amply supported by the evidence. Without Insite, addicts will be forced back into the alleys and flophouses where they will continue to inject hard drugs, but in squalid conditions, thereby risking illness and death, not only to themselves but also to others in the community who become infected through the sharing of dirty needles or through intimate contact with an infected person.

[76] It is also my opinion that the evidence in this case establishes that application of ss. 4(1) and 5(1) of the *CDSA* to the health care facilities at Insite would not accord with the principles of fundamental justice because of the grossly disproportionate effect the application of those provisions would have on the addicts who avail themselves of Insite's safe injection site and health care. The effect of the application of the *CDSA* provisions to Insite would deny persons with a very serious and chronic illness access to necessary health care and would come without any ameliorating benefit to those persons or to society at large. Indeed, application of those provisions to Insite would have the effect of putting the larger society at risk on matters of public health with its attendant human and economic cost.

Principles of fundamental justice and section 1 of the *Charter*

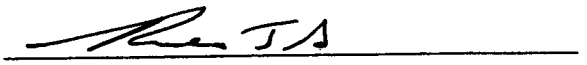
[77] My conclusion that ss. 4(1) and 5(1) of the *CDSA*, if applied to Insite, are not in accord with the principles of fundamental justice because they are overbroad leads me to the further conclusion that the impugned provisions cannot be saved by s. 1 because they fail the minimal impairment branch of the s. 1 analysis: *Heywood*, at 802-3.

Conclusion

[78] As stated at the outset of my reasons, I agree with Justice Huddart's reasons on the issue of interjurisdictional immunity and therefore agree with the result which

she reached which was to allow the PHS's cross-appeal, thus making Canada's appeal from PHS's alternative claim moot.

[79] However, on the footing that Canada's appeal from the judge's order on PHS's alternative claim is the only matter before the Court, I would dismiss Canada's appeal for the reasons I have stated.



The Honourable Madam Justice Rowles

Reasons for Judgment of the Honourable Madam Justice Huddart:

[80] The federal Minister of Health and the Vancouver Coastal Health Authority disagree about what the public interest requires to deal with the health crisis presented by injection drug use in Vancouver's Downtown Eastside. Their difference of opinion is narrow. They both accept that the provision of clean water and needles to chronic drug addicts by health care workers is legal and desirable to reduce the harm to users and those with whom they associate. They part company on whether the Health Authority can permit health care workers to provide those materials to chronic addicts in illegal possession of drugs in a provincially-authorized health care facility where those workers can supervise an addict's injection of those drugs as a vital part of the facility's health services to that population.

[81] In partnership with the respondent, PHS Community Services Society ("PHS"), and with the co-operation of the Vancouver Police Department, the Health Authority provides that injection supervision service at a facility known as Insite Supervised Injection Site ("Insite"). From 12 September 2003 to 30 June 2008, health care workers at Insite were exempted from prosecution for the offences of possession (s. 4(1)) and trafficking (s. 5(1)) under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*], by a ministerial order authorized by s. 56 of that *Act*. The exemption letter described the scope of the exemption this way:

> Scope of the Exemption
>
> This exemption is being granted under section 56 of the *Controlled Drugs and Substances Act* (*CDSA*), 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*.
>
> The following classes of persons are hereby exempted as set out below from the application of subsection 4(1) of the *CDSA* as that provision applies to the possession of the controlled substances specified below:
>
> - 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 [sic] their functions and duties in connection with the pilot research project;

- 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.

The [persons in charge] are also hereby exempted from the application of subsection 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 substance found at the site to a police officer in accordance with the procedures set out in paragraph 9 of the "Other Terms and Conditions" on page 6 of this letter.

[82] In March 2008, PHS and the other respondents set down for summary trial actions they had begun earlier. The Vancouver Area Network of Drug Users ("VANDU") began its action on 30 August 2006, 12 days before the original ministerial exemption was to expire. It then applied for an interim constitutional exemption. Before that motion was to be heard, the ministerial exemption was extended to 31 December 2007. PHS began its action in August 2007. At about the same time, the Minister established an expert advisory committee (the "EAC") to study the effectiveness of Insite and extended his exemption until 30 June 2008. The EAC released its final report on 11 April 2008.

[83] When these parties came to believe the federal Minister of Health was not going to grant a further extension and that Insite would have to close on 30 June 2008, they set their actions for summary trial. The trial of both began on 27 April 2008. The provincial Attorney General appeared as a party under s. 8 of the *Constitutional Questions Act*, R.S.B.C. 1996, c. 68. The Health Authority obtained intervenor status. Both supported the respondents on the division of powers issue.

[84] As a result of comments by counsel for PHS during the trial, on 2 May 2008, the Health Authority formally applied for a three-year extension of the exemption, so it might "complete the research goals of the Project" identified in the EAC's final report. In his letter accompanying the application, the Director of the Health Authority described its purpose as "to complete the full analysis of [the Project's] impact on the transmission of blood-borne infections, overdose fatalities, and impact on the acute

care system, including emergency departments." The provincial Minister of Health wrote a letter to the federal Minister of Health on 6 May 2008 in support of that application, noting:

> The Insite facility is an important component of the health-based approach to the treatment of addiction that the Province of British Columbia has developed along with municipalities, health authorities, non-governmental organizations and others. [...]
>
> British Columbia believes that we must be flexible and innovative in our responses to health challenges such as addiction. Senior officials at Vancouver Coastal Health and at the Ministry of Health, including British Columbia's Provincial Health Officer, Dr. Perry Kendall, have found Insite to be an effective treatment tool within an overall continuum of care and believe that it should continue operating in the public interest.

[85] The trial continued and, on 27 May 2008, Pitfield J. declared the impugned ss. 4(1) and 5(1) of the *CDSA* constitutionally invalid as inconsistent with s. 7 of the *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 [*Charter*]. He suspended the operation of his order for 12 months and granted a constitutional exemption to accord with the s. 56 ministerial exemption for this time period, writing at para. 159 (2008 BCSC 661, 293 D.L.R. (4th) 392, 85 B.C.L.R. (4th) 89):

> I suspend the effect of the declaration of constitutional invalidity until June 30, 2009. In the interim, and in accordance with the direction of the Supreme Court of Canada in *R. v. Ferguson*, 2008 SCC 6, 228 C.C.C. (3d) 385 at para. 46, I grant users and staff at Insite, acting in conformity with the operating protocol now in effect, a constitutional exemption from the application of ss. 4(1) and 5(1) of the *CDSA*.

[86] Six months later, on 19 December 2008, the Director General of the Drug Strategy and Controlled Substances Directorate of Health Canada returned the Health Authority's application noting in his accompanying letter that an exemption was not "required at this time" in view of the trial judge's order "that provided the users and staff of Insite with a constitutional exemption from the application of [the impugned provisions] until June 30, 2009." By then, the Attorney General of Canada and the Minister of Health for Canada had filed appeals from the trial judge's declaration and order for costs. The respondents then cross appealed both the dismissal of their applications for a declaration that ss. 4(1) and 5(1) of the *CDSA* do

not apply to Insite on the basis of the doctrine of interjurisdictional immunity as a "provincial health care facility or service under the exclusive jurisdiction of the Province of British Columbia, pursuant to ss. 92(7), (13) and (16) of the *Constitution Act, 1867*," and the dismissal of VANDU's further application for a declaration that s. 56 of the *Act* is unconstitutional as enabling the Minister of Health to deprive persons of their right to liberty and security of the person under s. 7 of the *Charter.*

[87] On this appeal, the Health Authority again intervenes in support of the cross appeals on the division of powers issue. The Attorney General of British Columbia agrees with the respondents on the division of powers issue, arguing it is for the Province alone to make decisions relating to the provision of health care services in response to local health needs. He seeks an order that "the *Controlled Drugs and Substances Act*, properly interpreted, does not restrict the delivery of supervised injection and other legitimate health services by a provincially-authorized and regulated facility such as Insite." The provincial Attorney considers that the federal Minister is using Parliament's prohibition of drugs and his discretionary control over exemptions to effect an unconstitutional end in circumstances where Canada's criminal law power is little affected, if at all, by British Columbia's health care decisions. In the Attorney's opinion, the federal Minister of Health is using his discretionary power not to further a criminal law interest, but to control the delivery of a local health service.

[88] The Dr. Peter AIDS Foundation intervenes on behalf of the accredited nurses it employs at the Dr. Peter Centre who provide, within the provincially-approved scope of nursing practice, supervised injection service as "an integral part of necessary primary health care for participants" who have a history of drug abuse and are struggling with addiction. The Foundation supports the provincial Attorney's interpretation of the impugned provisions and the respondents' positions on the appeal and cross appeals.

[89] The British Columbia Civil Liberties Association ("BCCLA") intervenes to support the respondents' positions on the appeal and the cross appeals as it did at

trial. Its essential point is that it must be unconstitutional for Canada "to impose serious criminal sanctions, including imprisonment, for the use or operation of a health facility that has as its purpose the alleviation of harm caused by addictive substances." Additionally, the Association advocates for reasonable accommodation as a principle of fundamental justice meriting protection under s. 7.

[90] I will consider this federal-provincial dispute by setting down the impugned legislation and discussing the provincial activity said to conflict with it. I will then briefly summarize the trial judge's reasoning on the two primary issues – division of powers and s. 7 of the *Charter*. Then I will undertake the analysis the authorities require and explain my reasoning and conclusion on the division of powers issues. I will begin that discussion with a consideration of the provincial Attorney's proposed interpretation of the *CDSA*. Finally, I will address the applications of the provincial Attorney and the Dr. Peter AIDS Foundation to adduce new and fresh evidence, respectively, and explain why I agree with the trial judge that a summary trial was appropriate in this case and why I have concluded the respondents meet the requirements for public interest standing. Because I have determined the legislation is inapplicable to Insite and similar provincially-authorized health care facilities on a division of powers analysis, I will not address the *Charter* issues raised by the appellants.

[91] In place of a lengthy discussion of the background facts that have little direct relevance to the legal issues before this Court, I commend the trial judge's excellent description of the health crisis that gave rise to the 2000 Vancouver Agreement between the three levels of government, and the subsequent executive decisions of Canada and British Columbia that have brought the parties and the intervenors to this place (at paras. 13-46). I will refer to the relevant facts, upon which there is no material disagreement, only as necessary for my discussion of the legal issues.

[92] At this point, however, I feel compelled to express my regret, after reading the evidence in these cases, that the co-operative federalism at the executive branch level, dating back to 1903 and most recently exemplified by the Vancouver

Agreement, has not been continued. As will become apparent, the federal executive's concern to protect the federal legislative power to prohibit possession and use of scheduled drugs (including the drugs of choice in the Downtown Eastside of Vancouver: heroin, cocaine and methamphetamine) in order to protect the health and security of all Canadians appears to have overtaken respect for difficult decisions made by British Columbia as to the delivery of health care services to injection drug users in a province long and deeply troubled by drug abuse. And this, although the provincial decisions impinge only marginally, if at all, on the federal criminal power, and despite Parliament's provision of vehicles to make room for such decisions by the grant of discretion to the federal Minister of Health in s. 56 of the *CDSA* and the regulatory power s. 55 grants the Governor General in Council.

[93] It is not necessary to review the history of the legislative aspects of that joint effort to prevent drug abuse. An understanding of the need for respectful federal and provincial co-operation can be had from reading the discussions in *R. v. Hauser*, [1979] 1 S.C.R. 984 [*Hauser*], *Schneider v. British Columbia*, [1982] 2 S.C.R. 112 [*Schneider*], and *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 [*Malmo-Levine*]. The first and third judgments concerned cannabis; the second, heroin. Cannabis has been deemed a narcotic under the *CDSA* and its predecessors since 1923, although, in *Malmo-Levine*, it was said to be better described as a psychoactive drug and not thought to be generally addictive. In these cases from Alberta and British Columbia, the Supreme Court of Canada accepted that narcotic addiction is not a crime, but a physiological condition necessitating both medical and social intervention by the province within its general competence over health matters. That intervention could include compulsory treatment and civil commitment.

[94] The opinion of Pigeon J. in *Hauser* is particularly helpful for his discussion (at 998 and 999) of the history of federal narcotic control legislation and the international treaties and conventions that encouraged that legislation since the first statute designed to put a few opium merchants in British Columbia out of business (*An act to prohibit the importation, manufacture and sale of opium for other than medicinal*

purposes, S.C. 1908, c. 50 (7-8 Edward VII)). At issue in *Hauser* was the role of the federal and provincial attorneys general in the enforcement of that legislation.

[95] In *Schneider*, Dickson J. (as he then was) distinguished the legislative roles – Parliament could legislate to "control narcotic drugs," as it did in the *Narcotic Control Act*, R.S.C. 1970, c. N-1 (predecessor to the *CDSA*), and a provincial legislature could deal with "the consequences of narcotic use from a provincial aspect" (at 130), as the British Columbia Legislature did in the *Heroin Treatment Act*, S.B.C. 1978, c. 24. At 131, he noted that "historically, between 60 and 70 percent of all known heroin addicts in Canada have resided in the Province of British Columbia" and that there was no evidence the "problem of heroin dependency as distinguished from illegal trade in drugs is a matter of national interest and dimension transcending the power of each province to meet and solve its own way." Then, he concluded, at 132:

> I do not think the subject of narcotics is so global and indivisible that the legislative domain cannot be divided, illegal trade in narcotics coming within the jurisdiction of the Parliament of Canada and the treatment of addicts under provincial jurisdiction.

[96] In *Malmo-Levine*, the Court upheld the prohibition on the possession of marihuana as proper subject-matter for the federal criminal power because its purpose was to promote public health and safety, both for the user and those affected by the user's conduct. A "reasoned apprehension of harm" entitled Parliament to act under its criminal power (at para. 78). The Court thereby put to rest the controversy raised by the majority reasons in *Hauser*, and left unresolved in *Schneider*, that the use of narcotics was a new legislative subject-matter not otherwise allocated or a local matter that had risen to the level of a national emergency justifying Parliament's use of its residuary power. However, at para. 72, the majority left open for another day the possibility that the *Narcotic Control Act* might be justifiable under the "national concern" branch of that power on the rationale articulated by the majority in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 at 431-32.

[97] As we shall see, in *Malmo-Levine*, the Court did not close the door to a successful s. 7 challenge to the narcotic control legislation. It refused to extend constitutional protection to a lifestyle choice to use marihuana for recreational purposes. This case is not about a lifestyle choice. This case is about the extent to which Parliament may use its criminal law power to intrude on the general jurisdiction of the provinces in health matters, described in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 490-91 [*Morgentaler*]:

> The provinces have general legislative jurisdiction over hospitals by virtue of s. 92(7) of the *Constitution Act, 1867*, and over the medical profession and the practice of medicine by virtue of ss. 92(13) and (16). Section 92(16) also gives them general jurisdiction over health matters within the province: *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 137.
>
> [...]
>
> In addition, there is no dispute that the heads of s. 92 invoked by the appellant confer on the provinces jurisdiction over health care in the province generally, including matters of cost and efficiency, the nature of the health care delivery system, and privatization of the provision of medical services.

[98] The predominance of provincial legislation over health care had earlier been noted by Beetz J. in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 [*Bell Canada (1988)*] at 761, and has since been affirmed in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 [*Chaoulli*] at paras. 16-24, and *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326 [*Mazzei*] at paras. 31-36. The use of the criminal power to legislate within the health care field is before the Supreme Court again in *Renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d'appel, L.R.Q. ch. R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procreation assistée,* L.C. 2004, ch.2 (Dans l'affaire du), 2008 QCCA 1167 (on reserve at the Supreme Court of Canada) [*Quebec Assisted Reproduction Reference*].

The Impugned Legislation

[99] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19:

2. (1) In this Act,

...

"controlled substance" means a substance included in Schedule I, II, III, IV or V;

...

"possession" means possession within the meaning of subsection 4(3) of the *Criminal Code*;

"practitioner" means a person who is registered and entitled under the laws of a province to practise in that province the profession of medicine, dentistry or veterinary medicine, and includes any other person or class of persons prescribed as a practitioner;

...

"traffic" means, ...

(a) to sell, administer, give, transfer, transport, send or deliver the substance,

...

(c) to offer to do anything mentioned ...

...

otherwise than under the authority of the regulations.

...

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.

...

(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.

...

5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

(3) Every person who contravenes subsection (1) or (2)

(a) subject to subsection (4), where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;

(b) where the subject-matter of the offence is a substance included in Schedule III,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months;

...

55. (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including the regulation of the medical, scientific and industrial applications and distribution of controlled substances and precursors and the enforcement of this Act and, without restricting the generality of the foregoing, may make regulations

...

(z) exempting, on such terms and conditions as may be specified in the regulations, any person or class of persons or any controlled substance or precursor or any class thereof from the application of this Act or regulations;

...

56. The Minister may, 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 all or any of the provisions of this Act or the regulations

> if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

[100] *Criminal Code*, R.S.C. 1985, c. C-46 (as amended):

> 4 (3) For the purposes of this Act,
>
> (a) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.
>
> [Emphasis added.]

[101] The purpose of these provisions, like similar provisions in the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (as amended), is to protect the vulnerable by controlling access to and consumption of toxic substances. By controlling the possession and trade in scheduled substances, the *CDSA* indirectly controls the consumption of about 150 potentially dangerous drugs (including heroin and cocaine in Schedule I and methamphetamine in Schedule III), whether by injection, inhalation or ingestion, both for therapeutic and recreational purposes. The *Narcotic Control Regulations*, C.R.C., c. 1041, permit some therapeutic uses of all of the controlled drugs in prescribed circumstances and on prescribed conditions. Neither they nor ministerial exemptions under s. 56 of the *Act* permit supervision of the consumption of illegally-obtained drugs for health care reasons determined by provincial health care authorities to be in the public interest.

The affected provincial activity

[102] In this case, the activity said to constitute criminal possession of (and, arguably trafficking in) a scheduled drug is the supervision of an addict's self-injection of narcotics he or she obtained illegally for that purpose. That supervision

activity, as with the other services provided at Insite, is permitted by provincial legislation and subject to comprehensive provincial regulation and control. While the appellants argue that Insite could operate without the supervision of drug injection, the trial judge's finding that supervised injection is "a vital part of a provincial health care undertaking" is supported by undisputed evidence.

[103] It is not disputed that the supervision of drug injections is health care or that Insite is a health care facility that comes within the meaning of "hospital" in s. 92(7) of the *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, and thus within exclusive provincial competence. Nor is it disputed that provinces are competent to legislate with regard to the treatment of narcotic addiction and the prevention of infectious diseases among addicts: *Schneider.*

[104] The Legislature has exercised that authority in multiple statutes. Primary among them is the *Public Health Act*, S.B.C. 2008, c. 28. When it came into force on 31 March 2009, it replaced the *Health Act*, R.S.B.C. 1996, c. 179, in force when the trial judge's reasons were released. Under the *Public Health Act*, provincial health authorities (including the Provincial Health Officer) have broad powers to ameliorate health hazards including the spread of infectious diseases.

[105] Regional health authorities are established and operate under the authority of the *Health Authorities Act*, R.S.B.C. 1996, c. 180. Statutes relevant to their operation include the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, ss. 3 and 4. It provides that adults are entitled "to select a particular form of available health care on any grounds" and to give their consent to that care. The *Medicare Protection Act*, R.S.B.C. 1996, c. 286, provides insured medical benefits. The *Personal Service Establishments Regulation*, B.C. Reg. 202/83, enacted pursuant to the *Health Act* and continued under the *Public Health Act* (Reg. 51/09), requires adequate sanitary equipment and clean water in an "establishment in which a person provides a service to or on the body of another person" (s. 1), and ensures that such facilities are operated in accordance with the *Health Act* and in such a

way, *inter alia*, as to avoid the spread of infectious disease or otherwise endanger the public health.

[106] Activities of health care providers are regulated by a number of different bodies governed by the *Health Professions Act*, R.S.B.C. 1996, c. 183 (licensed practical nurses, nurse practitioners, occupational therapists, pharmacists, physical therapists, physicians, psychologists, registered nurses, and registered psychiatric nurses) and the *Social Workers Act*, S.B.C. 2008, c. 31.

[107] The Health Authority initiated Insite for reasons the trial judge explained in considerable detail, as a key part of meeting its responsibility for adult drug treatment services, after it was given that responsibility by the provincial Minister of Health in 2002. Its power to determine what health services are to be provided in its region and how they are to be delivered derives from s. 5 of the *Health Authorities Act*. However, Insite's health care delivery is regulated by all these statutes.

[108] PHS operates Insite in partnership with the Health Authority and in cooperation with the Vancouver Police Department under an extensive and detailed operating protocol approved by Health Canada. Located in the Downtown Eastside of Vancouver, Insite is open 18 hours a day, seven days a week. It is staffed by a combination of PHS, Health Authority and community workers. Vancouver police officers patrol the adjacent area and refer addicts to it. The exemption from Health Canada requires that any controlled substances left on the premises must be carefully maintained and turned over to the police. Internal protocols govern the use of the facility by first-time users, pregnant users and people less than 19 years of age.

[109] Insite is not just an injection site. Its staff provide clients with health care information and referrals to the Health Authority and other service providers, including addiction treatment centres or clinics. Since September 2007, "Onsite", a 24 hour per day, seven day per week drug detoxification centre, has been located in the premises above Insite. It provides immediate admission upon request.

[110] Once inside, staff members provide users with clean injection equipment, the only equipment clients can use at the site. They do not provide drugs to clients nor inject them. The 12 injection bays are open to view so that staff may monitor users for signs of distress or overdose, for which nurses and paramedic staff provide treatment, as they do for other health problems. Clients are not permitted to inject each other and staff do not inject clients. Consumption of drugs by other means is prohibited.

[111] The responsible provincial authorities have clearly determined Insite to be in the public interest, as exemplified by the letter from which I quoted at para. 81 of these reasons.

The problem

[112] Without a ministerial exemption or a regulatory exemption from the application of ss. 4 and 5 of the *CDSA*, health care providers at a provincial health care facility delivering a provincially-approved supervision service under an approved protocol face potential prosecution for possession or trafficking in heroin, cocaine or methamphetamines, as do their patients. Moreover, this risk of criminal prosecution will cause Insite to close its doors. The position taken by the federal Attorney in this case suggests the staff of other health care facilities providing this same supervision service, including the Dr. Peter AIDS Foundation, are open to prosecution.

[113] During oral argument, counsel for the appellants stated that prosecution of a member of Insite's staff for possession is unlikely and that the Minister's exemption for trafficking "offered no more than a written re-assurance that the common law would be respected."

The trial judgment

[114] VANDU sought a declaration that the conduct of the staff in the ordinary course of business at Insite does not amount to or involve the commission of any

offences at law, with the result that an exemption under s. 56 of the *CDSA* is not required or necessary. The trial judge rejected that submission writing:

> [95] The law pertaining to the possession and trafficking of controlled substances has been developed in the decided cases and is well established. If the provisions of s. 4(1) and s. 5(1) apply to the staff at Insite, the answer to the question of whether, in the course of what they do, they either possess or traffic in a controlled substance at any particular point in time must be answered by reference to the facts as they are determined in relation to any specific action or conduct and the law as it has evolved. That being the case, declaratory relief cannot be considered.
>
> ...
>
> [98] In present circumstances, where the legal principles that apply to possession and trafficking are settled, where the question of whether one possesses or is trafficking in controlled substances is fact-dependent, and where the ordinary course of business is not fixed with precision and may change in the future, the declaration is sought in respect of future events and would serve no useful purpose. Although the staff at Insite have a real interest in knowing whether what they do in any particular circumstances constitutes a criminal offence, judicial discretion cannot be used to answer the question one way or the other by way of a declaration "in the air" which would have no utility.
>
> [Emphasis added.]

[115] The dismissal of that claim is not appealed. On this appeal, the provincial Attorney raises essentially the same interpretation issue, relying on an authority not cited to the trial judge: *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 [*Jabour*]. In that case, the conflict was between the enforcement of policies the Law Society had developed under the authority of the *Legal Professions Act* and provisions of the federal *Combines Investigation Act* [*CIA*]. At 354, Estey J. framed the question to be answered this way: "whether the Law Society's actions could constitute an offence under Part V of the *CIA*, specifically s. 32(1)." The comparable question on this appeal is whether the actions of caregivers at Insite or similar facilities could constitute an offence under the impugned legislation, properly interpreted.

[116] The essence of the trial judge's decision on the division of powers issue is this:

> [117] The difficulty in this case results from the fact that the *CDSA* prohibition against possession indirectly controls injection, which is not proscribed by the criminal law, and in doing so, has an incidental effect upon a vital part of a provincial health care undertaking. As a result, the federal power to legislate in relation to criminal law, and the power of a provincial delegate to provide health care services meet head-to-head in conflict. This is a classic case of "double aspect". That being the case, the doctrine of interjurisdictional immunity cannot be applied.
>
> [118] The Supreme Court of Canada has said that the doctrine should be used sparingly, and not used where the subject matter presents a double aspect: *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23 at para. 4. While the Court has also said that the doctrine is reciprocal in that it can prevent legislation by the provincial government in relation to the essential and vital elements of a federal power, and vice versa, it has been most often, if not always, applied to ensure that provincial legislation does not encroach upon the core of a federal power or undertaking. As the Court stated in *Canadian Western Bank* at para. 78, "in practice, the absence of prior case law favouring the application [of interjurisdictional immunity] to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy."
>
> [119] When confronted with a double aspect, the court must strive to give legitimacy to both legislative initiatives: *Canadian Western Bank* at para. 37. In this case, however, the operation of the provincial undertaking, which is concerned with health care, interferes with or directly confronts the operation of the criminal law by permitting the possession of controlled substances at Insite contrary to the *CDSA*, which prohibits possession in all circumstances. While Parliament has some capacity to affect the supply and delivery of health care, the Province has no capacity to override the criminal law by creating an environment in which individuals can conduct themselves free of its constraints.
>
> [120] Because there is operational conflict between the Province's initiatives in health care and the criminal law which is directed in part to health, the conflict must be resolved by application of the doctrine of paramountcy. Absent *Charter* considerations, the criminal law must prevail.
>
> [Emphasis added.]

[117] When the trial judge turned to the s. 7 *Charter* challenge, he first rejected the federal Attorney's submission that the decision in *Malmo-Levine* was dispositive of the s. 7 challenge. In his view, that decision was limited in its scope:

> [137] In my opinion, the *Malmo-Levine* decision, concerned with the use of marijuana for purely recreational purposes, does not resolve the issues raised by the PHS and VANDU actions, concerned as they are with the health care of addicts resorting to a continuum of services.

[118] He found that all three branches of s. 7 were engaged by s. 4(1) of the *CDSA*. The right to life was engaged because "a law that prevents access to health care services that can prevent death clearly engages the right to life" (para. 140). The guarantee of liberty was engaged because of the threat of prosecution (para. 143). The right to security of the person was engaged because the law "denies the addict access to a healthcare facility where the risk of morbidity associated with infectious disease is diminished, if not eliminated" (at paras. 144-46). Ultimately, he concluded the potential deprivations of life, liberty and security of the person were not in accordance with the principles of fundamental justice because the law was arbitrary:

> [152] In my opinion, s. 4(1) of the *CDSA*, which applies to possession for every purpose without discrimination or differentiation in its effect, is arbitrary. In particular it prohibits the management of addiction and its associated risks at Insite. It treats all consumption of controlled substances, whether addictive or not, and whether by an addict or not, in the same manner. Instead of being rationally connected to a reasonable apprehension of harm, the blanket prohibition contributes to the very harm it seeks to prevent. It is inconsistent with the state's interest in fostering individual and community health, and preventing death and disease. That is enough to compel the conclusion that s. 4(1), as it applies to Insite, is arbitrary and not in accord with the principles of fundamental justice. If not arbitrary, then by the same analysis, s. 4(1) is grossly disproportionate or overbroad in its application.

[119] Finally, at para. 153, he concluded that the trafficking law, s. 5(1) of the *CDSA*, must also violate s. 7 by parity of reasoning.

Discussion

[120] In the provincial Attorney's view, once the appropriate provincial authorities determined that the supervision of self-injections of illegally-possessed drugs in a provincially-authorized and -supported health care facility is dictated by the public interest in health care, then neither Parliament nor the federal executive can decide that activity is contrary to the public interest so as to justify the use of the criminal power. In support of that proposition, he recalls Chief Justice Kerwin's statement in *Re The Farm Products Marketing Act*, [1957] S.C.R. 198 at 205-6, as cited in *Jabour* at 351:

> ... it cannot be said that any scheme otherwise within the authority of the Legislature is against the public interest when the Legislature is seized of the power and, indeed, the obligation to take care of that interest in the Province.

So the provincial Attorney asks this question:

> Does the federal criminal law, in the form of ss. 4 and 5 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "*CDSA*"), properly interpreted, purport to restrict supervised injections of controlled narcotics at a provincially-established and maintained facility such as Insite?

[121] Although the trial judge noted the respondents had made the point that ss. 4(1) and 5(1) of the *CDSA* should be "read down" so they do not apply to staff and users at Insite, he did not address that issue directly. As I read his decision, he concluded that reading down was not available because, as PHS conceded, those provisions were lawfully enacted by Parliament as in pith and substance criminal law. The provincial Attorney says this was a mistake. In his view, had the trial judge correctly interpreted the *CDSA* as part of a "firm application of the pith and substance analysis", he would have found that it did not apply to the supervision of injections at Insite.

[122] The proposition that the impugned provisions were within the federal power to enact as criminal law has never been disputed. The disputes are about their interpretation and thus their application to Insite and the application of the constitutional doctrines of interjurisdictional immunity and paramountcy. At their root is a disagreement as to whether the impugned provincial activity is at the core of provincial responsibility. The provincial Attorney would have this Court leave the constitutional questions for another day by "reading down" the application of the impugned legislation "to exclude its application to the activities of bodies exercising their provincially-authorized or regulated functions in the public interest within the core of the Province's constitutional jurisdiction," as, he maintains, the Supreme Court of Canada did the anti-combines legislation at issue in *Jabour*. In effect, the Attorney wants this Court to find that a valid federal law is rendered inoperative in relation to provincially-authorized activity to the extent of operational conflict

between them, the equivalent of the protection the doctrine of paramountcy gives to the federal government when validly enacted laws come into operational conflict.

[123] This submission is facially attractive in the circumstances of this case: the result of reading down would accord with what many will consider common sense, even the golden rule, in a federal state. Let each level of government fulfill its responsibilities in accord with its view of the best interests of those affected by its decisions, particularly when it is an executive decision rather than legislation that collides, and where the goals of the conflicting policies are the same, the disagreement is between two ministers of health about what is in the best interest of people who are ill and in desperate need of health care, and the effect on the criminal law (if any) is minimal. This interpretation would also accord with the principle of subsidiarity, as to which, see, e.g., *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 at para. 3.

[124] The interpretation of legislation, however, demands a more nuanced approach. In this case, it also requires an understanding of the relevant jurisprudence, not only of *Jabour*, but also of *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 [*Canadian Western Bank*], and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 [*Garland*]. I find myself persuaded by these authorities that the disagreement must be resolved on the division of powers analysis most recently applied in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19 [*Chatterjee*], and not by an interpretation that "reads down" the impugned provisions to protect areas of exclusive provincial legislative competence. As I understand the jurisprudence, protection for the exclusivity of provincial domains is available, if at all, only under the doctrine of interjurisdictional immunity, by way of a declaration of inapplicability.

The interpretation issue

[125] The provincial Attorney's proposition is founded on this passage from *Canadian Western Bank*, at paras. 31-32:

> [31] When problems resulting from incidental effects arise, it may often be possible to resolve them by a firm application of the pith and substance analysis. The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power. The usual interpretation techniques of constitutional interpretation, such as reading down, may then play a useful role in determining on a case-by-case basis what falls exclusively to a given level of government. In this manner, the courts incrementally define the scope of the relevant heads of power. The flexible nature of the pith and substance analysis makes it perfectly suited to the modern views of federalism in our constitutional jurisprudence.
>
> [32] That being said, it must also be acknowledged that, in certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. For this purpose, the courts have developed two doctrines. The first, the doctrine of interjurisdictional immunity... The second, the doctrine of federal paramountcy, recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse. Under our system, the federal law prevails.
>
> [Emphasis added.]

[126] Unsurprisingly, given the concession by the respondents that the pith and substance of the impugned provisions was criminal law, the trial judge did not undertake the analysis of the purpose of Parliament in enacting the *CDSA* and its legal effect as the first step in considering their constitutional challenge.

[127] If this analysis were done, "without regard to the head(s) of legislative competence" (*Chatterjee* at para. 16), the conclusion at the first step of the analysis would have been that the *CDSA* is an exhaustive scheme to control the trade in and production, import, and use of narcotics potentially dangerous to a person's health. This purpose was to be accomplished by an absolute prohibition on the possession of scheduled drugs with exceptions and exemptions available in the public interest, particularly for medical and scientific purposes.

[128] A major purpose of Parliament in enacting this scheme was the protection of the health of the public from the harm inherent in the use of narcotics and to security from the conduct of those who become addicted to them (*Malmo-Levine* at para. 65). The legal effect of the scheme was not just to control recreational or therapeutic use of scheduled drugs by individuals who might suffer harm from that use, but also to

control the prescription and use of scheduled drugs by provincially-authorized health care professionals, including their use in hospitals.

[129] The practical effect of the legislation on the therapeutic use of drugs depends on the regulations made under s. 55 and the ministerial orders made under s. 56. A medical practitioner who wants to prescribe a scheduled drug for a patient, a licensed pharmacist who is asked to fill that prescription and a registered nurse who is ordered to administer that drug in a hospital are all required to adhere to the regulation that controls the use of that drug under threat of criminal sanction. And, so, it is feared, is a health care provider in a health care facility who wants to watch an addict inject heroin he has obtained illegally to ensure a clean needle and safe injection site and, if necessary, to deal with a potentially fatal accidental overdose. Because neither a regulation nor a ministerial order permits that in providing health care service, the health care provider may have deemed possession of that heroin and be subject to criminal penalty for possession or trafficking in that drug; the patient may be charged with possession of the illegally obtained drug.

[130] The underlying purpose of the legislation and its legal effect both centre on the protection of health. As the trial judge's reasons affirm and the record supports, the harm to non-users of these drugs flows primarily from their unavailability legally to those who become addicted to them, most often, but not always, as a result of use for recreational or self-medication purposes. In essence, then, the *CDSA* is a measure intended to protect public health by controlling dangerous drugs and substances by criminal sanction.

[131] The next step in the required analysis is to determine if the impugned provisions of federal legislation come within a federal head of power. They do: *Malmo-Levine* at para. 78. In that case, because there was no suggestion of any overlap with a matter properly falling within the exclusive provincial powers under s. 92 of the *Constitution Act, 1867*, the Court was able to turn directly to a consideration of compliance with s. 7 of the *Charter.*

[132] However, in this case, there is just such an overlap. Thus, as Binnie J. noted in *Chatterjee* (at para. 24), the conclusion that the impugned legislation is within the competence of Parliament is "just a starting point." In *Chatterjee*, the issue was whether forfeiture provisions of a provincial law, found to be in pith and substance related to property (an exclusive provincial power under s. 92 of the *Constitution Act, 1867*), were *ultra vires* because they improperly intruded on the exclusive federal criminal law power in s. 91. He also noted that a "good deal of overlap in measures taken to suppress crime is inevitable" (at para. 24). This was especially so because, as Duff C.J.C. had noted in *Reference re Adoption Act (Ontario)*, [1938] S.C.R. 398 at 403, although the criminal law was entrusted to Parliament as "subject matter of legislation," the administration of justice, policing, suppression of crime and disorder had "from the beginning of Confederation been recognized as the responsibility of the provinces ...".

[133] The analogy is helpful. A good deal of overlap in measures taken to protect health is inevitable. While, as the subject matter of legislation, the protection of health justifies Parliament's use of the criminal power and Parliament has controlled the use of dangerous drugs for over 100 years, health care has been recognized as the responsibility of the provinces under three heads of exclusive provincial power since Confederation:

> 92. (7) The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary [charitable] institutions in and for the Province, other than marine hospitals.
>
> (13) Property and civil rights of the Province.
>
> (16) Generally all matters of a merely local or private nature in the Province.

[134] The provincially-authorized health care being delivered at Insite comes within all three heads. It is not disputed that: (i) the province has established a health care facility that is a hospital under s. 7; (ii) adults are entitled to select any form of health care being offered by a health care facility under s. 4 of the *Health Care (Consent) and Care Facility (Admission) Act*; and (iii) the delivery of health care has never

been claimed as a national responsibility by the federal government. It is delivered entirely by provincially-regulated health care professionals and facilities.

[135] In the case of an overlap, the next step is to identify the "'dominant feature' of an impugned measure" (*Chatterjee* at para. 29). At this step, Binnie J. stated the question as: "At what point does a provincial measure designed to 'suppress' crime become itself 'criminal law'?" Rephrased for the purposes of analysis of federal legislation, the question might be stated as: "At what point does a law designed to 'protect public health and security' become a colourable attempt to interfere with provincial health care measures, properly undertaken within the province's exclusive competence?" While it is argued the federal Minister of Health passed that point when he failed to accept the provincial Minister of Health's view of the public interest, the answer to the question is to be found, not in an exercise of executive discretion or in the failure to exercise that discretion, but in the "dominant feature" of an impugned measure.

[136] As we have seen, the trial judge found (at para. 12) the "dominant feature" in the concession by PHS that the impugned provisions were "concerned with suppressing the availability of drugs that have harmful effects on human health, and that the provisions have been lawfully enacted by Parliament as, in pith and substance, they represent a use of its criminal law power." As the provincial Attorney properly notes, the second step is missing. The "dominant" feature can be discerned only with reference to the competing feature.

[137] The Supreme Court noted in *Malmo-Levine* (at para. 72) that Parliament's competence to enact a purely regulatory scheme to control the use of drugs might well be questioned were the criminal sanctions not in place. I question whether an absolute prohibition on the use of all scheduled drugs would fall within Parliament's competence under the criminal law head in s. 91 were it not for the provisions in ss. 55 and 56 of the *CDSA* for exceptions and exemptions that permit therapeutic uses of almost all the scheduled narcotics.

[138] Whether this second step in the pith and substance analysis is considered by the idea of reading down, or, as I consider the jurisprudence now directs, by asking the question Binnie J. posed in *Chatterjee*, guidance toward a resolution of the conflict can be found in *Jabour* and *Garland*.

[139] I am not persuaded these authorities provide a "reading down" path to render inapplicable the impugned provisions of the *CDSA*, effectively making them inoperable in relation to the activities being carried out at Insite and similar facilities. Rather, the reasoning in those cases supports the conclusion the trial judge reached. The *Act* can be read only as reflecting a clear intention to control the production, import, and use of all potentially dangerous drugs and other substances at all times and all places throughout Canada, including in provincially-operated hospitals and by provincially-regulated health care practitioners, including doctors and pharmacists, subject only to those exceptions the federal executive council provides by regulation or the federal Minister of Health provides by exercise of the discretion Parliament granted that office-holder by s. 56. The impugned provisions resemble more closely the illegal interest provisions at issue in *Garland* than they do the anti-combines provisions at issue in *Jabour*. The necessary leeway for those actions pursuant to a valid provincial regulatory scheme cannot be found in the impugned legislation.

[140] Importantly, on the facts of this case, Parliament entrusted to the federal Minister of Health absolute discretion to decide what exemptions to make to the criminal prohibition against possession of scheduled drugs in the public interest. It left no room for a provincial government's view of the public interest. As I shall explain, the strongest argument in favour of the provincial Attorney's submission is that this failure to permit a role for provincial health authorities in determining the nature and extent of exemptions, perhaps by delegation of the power to make exemptions considered appropriate for the public health needs for which the provincial government bears responsibility, violates the division of powers. But, as I conclude, that argument cannot turn the provision of health care services into the dominant feature of the *CDSA* as a whole or the impugned provisions, in particular.

[141] In *Jabour*, the provincial *Legal Professions Act* was alleged to collide with the federal *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 32(1), because the former authorized what the latter forbade. Both this Court and the Supreme Court of Canada interpreted the two statutes and held the impugned provision did not apply to the Law Society of British Columbia, its governing body or its members.
Mr. Justice Estey, writing for a unanimous court, succinctly reduced the issue to the question (at 354) "whether [the Benchers'] actions could constitute an offence under [the impugned section of the *Combines Investigation Act*]". His negative response was not a "reading down," so much as it was a "reading in context". First he commented, at 356, that "[w]here a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes." He found the language of s. 32(1) "properly construed and applied" did not "relate to the action taken by the Law Society acting in accordance with their legislative authority... under a valid provincial statute." At 355, he re-stated the words of s. 32(1) as they applied to the question he posed this way:

> [B]y the taking of any of these actions and proceedings have the Benchers "conspire[d], combine[d], agree[d] ... (c) to prevent, or lessen, unduly, competition in the ... supply of a product, ... or ... (d) to otherwise restrain or injure competition unduly"?

He answered that question saying:

> I do not believe so. The Benchers were directed by the [provincial] statute to establish a Discipline Committee with power to inquire into the conduct or competence of members. This duty is found in the context of a wide range of powers granted to the Law Society to govern the profession in the interest of the public and the members of the Society. The words adopted by Parliament in s. 32 and restated above are not ordinarily found in language directed to the actions of persons...

[142] In *Garland*, the Court agreed this "regulated industries defence" could apply in cases involving conflict between federal competition law (valid under the federal criminal power) and a provincial regulatory scheme (valid under the provincial power over property and civil rights). It also agreed with the interpretive principle stated by Estey J. in *Jabour*. But it denied the defence to a company whose contract with its

customers conflicted with the illegal interest provisions in the *Criminal Code*, and read down s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, to exclude protection from civil liability damage arising out of *Criminal Code* convictions, where the interest provisions of the contracts at issue had been authorized under provincial legislation. At para. 77, Iacobucci J. explained:

> ... in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

This is the leeway missing from the *CDSA*.

[143] Then, at para. 78, he quoted this passage from the reasons of Sopinka J. for the court in *R. v. Jorgensen*, [1995] 4 S.C.R. 55, at para. 118:

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

[144] There followed this final nail for the coffin of the interpretation the provincial Attorney seeks (at para. 79):

> The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

[145] The answer to the Attorney's question is that the *CDSA*, properly interpreted, is intended to apply to provincially-regulated health care professionals at provincially-regulated health care facilities. Whether any person would ever be

convicted of either possession or trafficking for supervising the injection of a scheduled drug may be questioned, but the possibility cannot be negated by an interpretation of the provisions that would permit either health care providers or facilities to rely on provincial direction as an absolute defence. The *Act* purports to prohibit that which is not excepted or exempted; supervision of the use of heroin, cocaine or methamphetamine is neither.

[146] This reasoning leads me to conclude that the dominant feature of the *CDSA* is criminal law. The effect of the *Act* as a whole and the impugned provisions in particular on the province's authority over the provision of health care is an incidental intrusion into the provincial authority over health care, indeed to the core of that provincial responsibility. While the practical effect of the legislation in this case is to prevent the operation of a provincial health facility, the scale of those effects on the provincial competence over health does not rise to the level of "colourable" health care legislation. Nor, indeed, did any party suggest the *Act* was *ultra vires* Parliament. The result might well be different, were it not for the federal executive's use of its regulatory power to enact the *Narcotic Control Regulations* and the legislative provision for a ministerial exemption.

[147] To the extent the federal executive council has used its regulatory power to permit the therapeutic and scientific use of controlled drugs and the federal Minister of Health has responded favourably to provincially-authorized applications for exemptions to the prohibition, both levels of government have been able to function without operational conflict. The sad reality for the provincial government in this case is that the disagreement between the federal and provincial executives has resulted in a collision. To the extent the provincially-authorized supervision activity constitutes possession or trafficking under the *CDSA,* the federal legislation in its exclusive field of competence forbids what the province has authorized in its exclusive field of competence. Thus, as the trial judge found, the test for federal paramountcy set down in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 191 has been met:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

[148] The trial judge did not err in so finding (para. 120).

[149] Nor did he err in categorizing this case as one of "double aspect," as it was explained in *Canadian Western Bank* at para. 30:

> Also, some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence: *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 130; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 (*"Bell Canada (1988)"*), at p. 765. The double aspect doctrine, as it is known, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected. A classic example is that of dangerous driving: Parliament may make laws in relation to the "public order" aspect, and provincial legislatures in relation to its "Property and Civil Rights in the Province" aspect (*O'Grady v. Sparling*, [1960] S.C.R. 804). The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various "aspects" of the "matter" in question.
>
> [Emphasis added.]

[150] While I am not persuaded by the trial judge's analysis, I agree the subject-matter of drug use has both a "public order" and a "health care" aspect: the legislative domain is "divided, illegal trade in narcotics coming within the jurisdiction of the Parliament of Canada and the treatment of addicts under provincial jurisdiction" (*Schneider* at 132, and see 137-38).

[151] The trial judge's error was in moving directly from this conclusion to the doctrine of paramountcy. As I read *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, [*Lafarge*] and *Canadian Western Bank* at para. 78, the path is not so direct. The doctrine of interjurisdictional immunity

must still be considered. (See Robin Elliot, "Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: the Supreme Court Muddles the Doctrinal Waters – Again" (2008), 43 S.C.L.R. (2d) 433.)

Interjurisdictional immunity

[152] It may be possible to conclude that this doctrine has been subsumed into the division of powers analysis required by *Canadian Western Bank* and *Lafarge,* as Binnie J. suggested in *Chatterjee:*

> [2] The argument that the *CRA* is *ultra vires* is based in this case on an exaggerated view of the immunity of federal jurisdiction in relation to matters that may, in another aspect, be the subject of provincial legislation. Resort to a federalist concept of proliferating jurisdictional enclaves (or "interjurisdictional immunities") was discouraged by this Court's decisions in [*Canadian Western Bank* and *Lafarge*], and should not now be given a new lease on life. As stated in *Canadian Western Bank*, "a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government" (para. 37) (emphasis in original).

[153] However, the respondents, the intervenors and the provincial Attorney are unified in their view the doctrine is needed to protect the exclusive provincial domains, including the delivery of health care services, from intrusions by valid federal legislation, just as federal undertakings have been protected historically from intrusions by valid provincial legislation and that this case illustrates that need. Others have suggested the doctrine is reciprocal: see Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Scarborough, Ontario: Thomson Carswell, 2007) at 404; Robin Elliot, *Comment* (1988), 67 Can. Bar Rev. 523 at 542. Unlike the trial judge, they do not see the doctrine as having been put to death in "double aspect" cases by *Canadian Western Bank*. They submit Justices Binnie and LeBel affirmed the doctrine in their analysis in the companion case of *Lafarge* where the Vancouver waterfront development at issue presented a double aspect. In making this submission, they refer to Elliot at 480-81. Professor Elliot's point is that "it will almost always, if not always, be true in cases in which the doctrine of interjurisdictional immunity is invoked that they will 'present a double aspect'" because the federal legislation in relation to which the doctrine is invoked is valid, while the provincial

aspect of the subject is provided by the provincial head of power that forms the basis of the claim.

[154] The respondents and intervenors see utility in the doctrine because, in the words of PHS, it would "honour the province's jurisdiction over health care and public health, and make that jurisdiction effective for the purpose for which it was conferred: to provide responsive health care to the population and to deal with public health emergencies." As the trial judge found, this is the justification for the establishment of Insite: Insite provides a health care program that responds to the urgent compound public health care crises that have arisen from the long-term injection drug use in the Downtown Eastside.

[155] There is much merit in this submission. Judicial concern that legislative enclaves have been encouraged by the doctrine of interjurisdictional immunity, to the disadvantage of provincial activities touching on federal undertakings, has ignored the effect that this desire to encourage cooperative federalism has on provincial policies when a collision gives rise to federal paramountcy, regardless of the extent of the impact of the provincial activity on the federal power. I do not read the discussion of colourability as a proxy for interjurisdictional immunity.

[156] As I read the majority reasons in *Lafarge*, and for that matter, the reasons in *Multiple Access*, the door is not closed on the use of the doctrine of interjurisdictional immunity to give breathing room to provincial activity in its exclusive domain. At paras. 41-42 in *Lafarge*, Binnie and LeBel JJ. wrote:

> *B. The Scope of Interjurisdictional Immunity*
>
> [41] As discussed in *Canadian Western Bank*, there are circumstances in which the powers of one level of government must be protected against intrusions, even incidental ones, by the other level (para. 32). This is called interjurisdictional immunity and is an exception to the ordinary rule under which legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional (para. 26). Thus a provincial *Planning Act* relating to pith and substance of "Municipal Institutions in the Province" (*Constitution Act, 1867*, s. 92(8)) and "Property and Civil Rights in the Province" (s. 92(13)) as well as "Matters of a merely local or private Nature" (s. 92(16)) would quite permissibly have

> "incidental effects" on matters within its scope that would otherwise fall within federal jurisdiction over navigation and shipping, provided such "incidental effects" are not precluded from doing so by (i) the doctrine of interjurisdictional immunity or (ii) the operation of federal paramountcy.
>
> [42] In this case, we are dealing with a federal undertaking, the VPA, constituted pursuant to two heads of federal legislative power, the authority in relation to public property (*Constitution Act, 1867*, s. 91(1A)) and the federal authority in relation to navigation and shipping (s. 91(10)). In [*Bell Canada (1988)*], the Court restricted interjurisdictional immunity to "essential and vital elements" of such undertakings (pp. 839 and 859-60). In our view, as explained in *Canadian Western Bank*, Beetz J. chose his words carefully, and intended to use "vital" in its ordinary grammatical sense of "[e]ssential to the existence of something; absolutely indispensable or necessary; extremely important, crucial" (Shorter Oxford English Dictionary on Historical Principles (5th ed. 2002), at p. 3548). The word "essential" has a similar meaning, e.g. "[a]bsolutely indispensable or necessary" (p. 860). The words "vital" and "essential" were not randomly chosen. The expression "vital part" was used in an earlier shipping case *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the *"Stevedoring"* case), at p. 592. What is "vital" or "essential" is, by definition, not co-extensive with every element of an undertaking incorporated federally or subject to federal regulation. In the case of federal undertakings, that would include the VPA. Beetz J. referred to a "general rule" that there is no interjurisdictional immunity, provided "the application of [the] provincial laws does not bear upon those [federal] subjects *in what makes them specifically of federal jurisdiction*" (*Bell Canada (1988)*, at p. 762).
>
> [Italics emphasis in original; underline emphasis added.]

[157] In this case, Insite is a provincial undertaking. It is a health care facility created under and regulated by provincial legislation within the province's exclusive power. The only purpose of a health care facility is to provide health care services. The supervised drug injection service it provides is, as the trial judge found, "vital" to its provision of health care services to the community it serves (at para. 117). It would be difficult to envisage anything more at the core of a hospital's purpose, than the determination of the nature of the services it provides to the community it serves. Indeed, it would be difficult to envisage anything more at the core of the province's general jurisdiction over health care than decisions about the nature of the services it will provide: see *Mazzei*, para. 31. As to the scope of that jurisdiction see *Morgentaler*, *Chaoulli*, and *Quebec Assisted Reproduction Reference.*

[158] While affirming the use of illicit drugs at Insite under its protocol is not permitted without ministerial approval under s. 56 of the *CDSA*, the appellants submit that nothing in the impugned legislation prohibits most of the services Insite offers, because the exchange of new needles for old, medical attention for open wounds or infections, training for safer injection practices, counseling for drug abuse, and detoxification "do not run afoul of federal drug laws". Moreover, in the appellants' view, the strict restriction of particularly dangerous drugs (like heroin, cocaine and methamphetamine) "does not impair or intrude upon any specific provincial legislative enactment" because "there is no provincial legislation which either explicitly or by necessary implication mandates the use of addictive drugs as a form of 'treatment' for drug addiction." In its view, the only effect on Insite (or, by necessary implication, any other health facility), is the preclusion on pain of criminal penalty of one in a range of services provided the public under a contractual arrangement with a health authority. Thus, the appellants conclude, the inability to provide one service, the supervision of the use of "black market drugs," does not strike at the core of provincial legislative jurisdiction over health care.

[159] The appellants' analogy in support of this proposition is not helpful. They ask whether the decision of a physician and patient to try a drug not approved for use on humans to treat a very serious medical condition without s. 56 approval would infringe the impugned legislation. If the physician provided or injected the drug, it could. But if the patient obtained the drug for a domestic animal, legally or illegally, determined he would inject it and asked the doctor to provide a clean needle, teach him how to inject the drug, and stand by to watch for possible ill effects and to treat those, that consequence seems unlikely. Surely, the physician would be providing precisely the health care his patient was seeking, a patient to whom he had undoubtedly explained the risk of the undertaking.

[160] Equally unhelpful is the submission that "the use of heroin as a form of 'medical treatment' for heroin addiction" would necessarily "allow the provinces to bypass the current federal regulatory scheme governing the supply of drugs throughout Canada." No one has suggested any provincial government has or

should have the authority to import, or produce heroin to treat addiction. What is at issue is the provincially-authorized supervision of the injection of illegally-obtained heroin to prevent health problems associated with its self-injection. Like palliative care, it is a form of harm reduction with benefits for both the patient and the community. Moreover, s. 53(4) of the *Regulation* permits the prescription and administration of heroin for patients of hospitals, whether in-patient or out-patient. The unanswered question is where and how the practitioner can obtain heroin in order to administer it to a patient in a hospital.

[161] The trial judge's finding that supervised injections are vital to Insite's health delivery program is well grounded in the evidence. Liability to arrest and prosecution for possession while on its premises will undermine the low threshold nature of Insite, a key part of its design so that services might be delivered to high-risk injection drug users at the core of the health care crisis in the area it serves. The lure of safe injection gets those addicts into Insite so health care may be delivered, including detoxification treatment at Onsite. The only possible conclusion to be drawn from the evidence is that supervised injection is an essential element of Insite's health care delivery program.

[162] If the federal executive, in exercising or failing to exercise authority granted to it by Parliament, can effectively prohibit a form of health care vital to the delivery of a provincial health care program, that means Parliament has an effective veto over provincial health care services, to the extent its use of the criminal power can be justified by the potential for harm to public health or safety. That is just the sort of intrusion into a provincial domain that constituted an impermissible intrusion into the federal domain in *Bell Canada (1988)* (at 797-98).

[163] The appellants also submit that resorting to the doctrine of interjurisdictional immunity would be bad policy, inasmuch as it would frustrate the basic approach of the *CDSA* and effectively oust "firmly entrenched federal jurisdiction over controlled substances," creating a "significant gap in what is meant to be a law of general application." As such, it would "represent a significant departure from the

jurisprudence regarding the scope of the criminal law power." Finally, it argues, the result would "seriously impair Canada's ability to meet its international treaty obligations." These two points were not fleshed out in submissions. The second is particularly difficult to understand, given the establishment of 45 sites where a supervised injection service is provided in other countries and that some of them provided the model for Insite. Both arguments seem to be founded on a view that Insite's provision of services somehow approves of or promotes drug use. Nothing in the evidence supports that intention or effect.

[164] The cases where the wide scope of the criminal power is discussed (e.g., *R. v. Hydro Québec*, [1997] 3 S.C.R. 213; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Boggs*, [1981] 1 S.C.R. 49) consider the validity of federal legislation, the question currently before the Supreme Court in the *Quebec Assisted Reproduction Reference*. The application of the doctrine of interjurisdictional immunity to protect provincial exclusivity need not curtail the scope of the criminal power. Applied narrowly and with caution in this case the doctrine, as explained in *Canadian Western Bank* and *Lafarge*, would render inapplicable only the two aspects of the *CDSA* that impair the provincial government's ability to prescribe and deliver health care as it sees necessary to address a health care crisis. Implicit in the federal Attorney's submission regarding the unlikelihood of prosecution of anyone for the activity at Insite is acknowledgment that such a narrow and cautious application of the doctrine would have minimal, if any, effect on the criminal power. At most, it would permit a provincially-authorized activity without fear of a change in federal policy on the application of prosecutorial discretion. This application cannot be said to constitute an attack on the federal criminal power.

[165] Nor am I persuaded from my reading of *Canadian Western Bank*, *Lafarge* and *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, that the application of the doctrine of interjurisdictional immunity to permit Insite (and like provincially-approved health care service providers) to deliver a supervised injection service (or other services not approved by the federal executive as exceptions or exemptions to the prohibitions in the *CDSA*) authorized as in the public interest by

the appropriate provincial authority, would leave or tend to leave any "legislative gap" of the sort suggested in those decisions or otherwise. The effect of the doctrine's application in this case is to limit the federal enforcement power sufficiently to protect the exercise of an exclusive provincial power. It does not create a gap by preventing the exercise of the federal criminal power to control trafficking in narcotics. It requires respect for the exercise of an exclusive provincial power.

[166] No one suggests the criminal power gives Parliament authority over delivery of health care services. (The scope of the federal power to provide medical services in order to achieve goals of criminal law was discussed in *Mazzei*. At paras. 31, 34 and 35, the Court specifically noted that hospitals' treatment plans and practices are excluded from federal legislative authority.)

[167] Insite exists. The health care service immunized from the application of ss. 4 and 5 of the *CDSA* is very specific. The immunity would apply only to exempt a health care service considered essential by a provincial agency with the authority to make that decision under provincial legislation from the application of ss. 4(1) and 5(1) of the *CDSA*. The provision of health care services is what makes a hospital a hospital, what makes health care a provincially-regulated activity. It is the indisputable intrusion of the federal government into the provision of medical services *at the level of doctor and patient* that is happening at Insite. Could Parliament legislate to effectively prohibit a doctor from using a scalpel?

[168] This is precisely the restrained use of the interjurisdictional immunity doctrine the jurisprudence supports: to prevent intrusive incidental effects by one legislature on the domain of the other. In this case, its application would prevent two provisions of the *CDSA* from sterilizing essential elements of a provincial undertaking, and would do so without undermining the federal criminal law power to any significant degree.

[169] To the extent that the criminal law treats possession for personal use as an offence because of its role in creating an illegal "supply and demand" market, that role has already run its course when an addict enters Insite or a comparable facility.

Because addiction manifests as compulsion, possession for use by an addicted person is, in practical terms, immediately followed by actual use. It is possession for the purpose of use, not for the purpose of trafficking. Insite interacts with the patient at the limited point in time where possession of an illegal drug has been achieved, and the addiction compels its use. Insite's services address the activity and consequences of use in a health care setting. A supervised drug injection service does not undermine the federal goals of protecting health or eliminating the market that drives the more serious drug-related offences of import, production and trafficking. It presupposes, but does not encourage, the possession of drugs. In fact, the service, as the trial judge found, assists in eliminating the market for illegal drugs, by encouraging addicts to seek services consistent with the long-term goal of the criminal prohibition against possession for personal use.

[170] The restricted application of interjurisdictional immunity to protect a provincial undertaking where two *intra vires* exercises of authority collide precludes a pre-emptive, automatic and non-contextual determination in favour of federal power. This is the mischief the Supreme Court was addressing when it considered the application of the doctrine to federal undertakings in *Canadian Western Bank.*

[171] Its application in the circumstances of this case should increase the potential for concurrency and promote co-operation between the federal and provincial executives, because it gives breathing room to provincial authorities charged with the responsibility for dealing with the consequences of a failure of the criminal law in circumstances where the justification for both the federal and provincial legislation is the same: the protection of public health from the harm inherent in the use of controlled substances. It respects the medical as well as the criminal approach to the intractable problem dangerous substances have presented for over 100 years. Immediate resort to paramountcy is not only an error of law, it is questionable policy.

[172] In recent years, the Supreme Court of Canada has affirmed repeatedly that Canadian federalism must remain responsive to the actual needs of the public: e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 57; *Reference*

re Same-Sex Marriage, 2004 SCC 79, [2004] 3 S.C.R. 698 at para. 23. As I noted earlier, it has also acknowledged the principle of subsidiarity, that law-making is often best achieved by the level of government closest to the citizens affected and thus most responsive to local distinctiveness and to population diversity. I also note that this principle must be applied with caution in view of the comment in *Bell Canada (1988)* at 815, derived from the concluding words of s. 92, that an activity is deemed not to be local if it falls within a head of power enumerated in s. 91. In this case, however, the provincial activity falls not only under s. 92(16), but also under s. 92(7) and (13), to which the deeming provision does not apply.

[173] The health crisis sparked by illegal drug use in the central core of Vancouver demonstrates starkly the need for a practical response to the reality that people are obtaining drugs, using them, and becoming addicted despite a massive national effort to control their use (whether therapeutic or recreational) and avoid their abuse.

[174] The crisis that brings the issue to this Court is a local one. Only provincial authorities have the power to respond to this crisis. Their practical response to one of "the worst, if not the worst, health outcomes for injection drug use of any city in the developed world in the last 25 years" is to permit supervised self-injection of illegally-obtained drugs in a carefully-controlled health care facility. Co-operative federalism in this case is furthered by the application of interjurisdictional immunity so that the impugned provisions of the *CDSA* do not apply to Insite or to the premises of other similarly-controlled service providers.

[175] Finally, the application of the doctrine in this case does not amount to a form of provincial paramountcy. A firm application of the pith and substance analysis remains the starting-point of a division of powers analysis. The doctrine's application, as I understand it, is available only to enable the operation of an essential part of a provincial undertaking that would not negate the federal law or undermine its goals. It is most likely to be available where the federal and provincial legislative goals are the same, and particularly where the conflict is the result of executive decisions made under authorizing legislation. It is a surgical immunity – it

attaches only to a small part of the power, precisely defined and narrowly circumscribed.

[176] If interjurisdictional immunity is not available to a provincial undertaking on the facts of this case, then it may well be said the doctrine is not reciprocal and can never be applied to protect exclusive provincial powers. Interjurisdictional immunity available only to the federal government is potentially even broader than paramountcy, because it ousts the ability of a province to legislate in a given area. Paramountcy does not automatically bar a province from legislating, but directs federal supremacy in the case of conflict. Interjurisdictional immunity is total and final, and permanently precludes legislation. If it is the exclusive preserve of the federal government, then Ottawa has gained a powerful new avenue for wresting legislative power from the provinces.

[177] In view of this conclusion, I prefer not to address the challenges on either the appeal or cross appeal to the impugned provisions of the *CDSA* under s. 7 of the *Charter*. There remain the procedural issues raised at the opening of the appeal and, in accordance with this Court's practice, reserved for resolution after hearing full submissions on the appeal and cross appeal.

Standing

[178] Because this issue was not raised before the trial judge, this Court may decide the issues raised on the appeal even if we were to determine the respondents lacked standing (*Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 at 400). I would exercise this Court's discretion to decide the substantive issues. This Court and the court below have had the benefit of full argument and the questions raised are pressing ones of great public importance.

[179] However, recourse to that doctrine is not required in this case. The respondents have established a serious issue as to the validity of the impugned legislation; as operators and users of Insite, they have a genuine interest in its

validity; and, given the s. 56 exemption and the Vancouver Police Department's stated support of Insite, waiting for a criminal prosecution was not a feasible alternative. Waiting for a ministerial decision under s. 56 that did not appear to be forthcoming, was equally impractical. The first action was filed days before the original exemption was set to expire and the closure of Insite was imminent; the second action, just months before the expiration date of the extended exemption. There was no other reasonable and effective manner in which to bring the matter before the courts. The test for public interest standing set out in *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, is made out.

Summary trial process

[180] The appellants submit the trial judge erred in determining a summary trial was appropriate for deciding the issues raised by the plaintiffs where there was a "head-on" conflict in the evidence going directly to the foundation of the action: *Jutt v. Doehring* (1993), 82 B.C.L.R. (2d) 223 (C.A.). The respondents disagree, submitting there were no issues of credibility, and that the trial judge was entitled to draw the inferences he did from the evidence before him and accept the expert opinion of Dr. Marsh over that of Dr. Evans.

[181] This Court may interfere with a discretionary decision only if it was not exercised judicially or was exercised on a wrong principle: see *McLean v. Southam Inc.*, 2002 BCCA 229 (Saunders J.A. in Chambers), and *Watson v. Imperial Financial Services Ltd.* (1992), 65 B.C.L.R. (2d) 281 (C.A.) (Wallace J.A. in Chambers). The trial judge applied the appropriate principles, including those approved and applied in *Jutt.* They derive from the reasons of McEachern C.J.B.C. in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 215-16 (C.A.):

> Lastly, I do not agree, as suggested in *Royal Bank v. Stonehocker*, that a chambers judge is obliged to remit a case to the trial list just because there are conflicting affidavits. In this connection I prefer the view expressed by Taggart J.A. in *Placer*, quoted at p. 15 [pp. 212-13] of these reasons. Subject to what I am about to say, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to

> the other. It may be, however, notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given.

[182] Conflicting evidence is not a bar to deciding issues through the summary trial process. The court may grant judgment provided, on the whole of the evidence, it can find the facts necessary to decide the issues (Rule 18A(11)(a)(i)) and provided it is not unjust to do so (Rule 18A(11)(a)(ii)), as McEachern C.J.B.C. wrote at 214 in *Inspiration Management*:

> In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[183] In this proceeding, after an eight-day hearing, the trial judge concluded, at para. 12, "it is appropriate to proceed by means of the summary trial process", and I see no reason to interfere with his decision. This is not a case like *Jutt of a* "head-on" conflict in the evidence that goes directly to the foundation of the action. Although there is some conflict between the opinions of Dr. Evans, on the one hand, and the opinions of Dr. Marsh and Dr. Mate, on the other, much of their evidence coincided, and the trial judge found it unnecessary to resolve the conflict where it existed. Relying on the whole of the evidence, or as he stated, "the affidavit evidence and the course of argument", the trial judge found he was able to decide "the relevant issues of fact and law that [were] essential to the disposition of the actions" (para. 12). It was not unjust for him to do so, particularly considering the time and cost that had already been incurred. He approached this issue with an abundance of caution, declining to make a decision until after he had the benefit of the parties' full submissions. I would dismiss this ground of appeal.

Fresh evidence and new evidence

Fresh Evidence

[184] The Dr. Peter AIDS Foundation applies to adduce an affidavit by Maxine Davis containing information about its purpose and practices particularly as they concern the primary care centre it operates as the Dr. Peter Centre. Appendices include the Foundation's constitution and bylaws, an annual report, information from its pamphlets and website. In this way, it seeks to explain the Foundation's unique perspective on this appeal, not to provide adjudicative facts that go to the merits of the appeal, but as contextual backdrop to its position that supervised injection is a necessary and integral part of the primary health care the nurses at Dr. Peter Centre provide for their clients who are injection drug users afflicted with HIV or AIDS.

[185] In granting the Foundation leave to intervene on a "limited basis" to address the division of powers issue, Saunders J.A. relied on Ms. Davis' affidavit to identify the issue on which the Foundation could bring a distinct perspective to the appeal: "the division of powers issue in relation to health professionals and their governing bodies" (2008 BCCA 441 at para. 24). In accordance with the practice of this Court, she left to the division hearing the appeal the Foundation's motion to adduce fresh evidence and make oral submissions. Subsequently, the appellants applied to strike certain portions of the Foundation's factum and to deny each leave to adduce evidence on the appeal. Mr. Justice Chiasson denied the applications, noting that the motions to adduce evidence were returnable before the Court and that the "fate of the [impugned] paragraphs would appear to depend on the application for leave" (2009 BCCA 151).

[186] The Foundation brings its motion under Rule 31. That rule applies only to parties. While it applies to the provincial Attorney, a party by statutory decree, the Foundation, like other intervenors, is governed by Rule 36. Under that Rule, intervenors are always entitled to adduce evidence on their leave application, but they require the court's permission to adduce evidence on the appeal itself.

[187] In *Blackwater et al. v. United Church of Canada et al.*, 2002 BCCA 621 (Donald J.A. in Chambers), the Nuu-chah-nulth Tribal Council sought leave to adduce fresh evidence for a reason comparable to that given by the Foundation in this case. Mr. Justice Donald dismissed the application, explaining, at paras. 10-12:

> [10] Canada and the United Church's objection to the evidence forming part of the appeal is that they should not be forced to deal with more than what appears on the record.
>
> [11] I must uphold that objection. While the evidence gives powerful support for the application to intervene, it should not come into the appeal itself, for that would run contrary to the often cited words of Mr. Justice Seaton in *Canada (Attorney General) v. Aluminum Co. of Canada*, 10 B.C.L.R. (2d) 371, 15 C.P.C. (2d) 289 at 305:
>
> Intervenors should not be permitted to take the litigation away from those directly affected by it. Parties to litigation should be allowed to define the issues and seek resolution of matters they determine appropriate to place in issue. They should not be compelled to deal with issues raised by others.
>
> [12] The Tribal Council should be permitted to outline in its factum some basic facts describing its place in the residential school picture. However, it should not be permitted to relate the stories of former students not directly involved in the case, and to allege facts about the general impact of residential schools not in the record. The Tribal council's role should be confined to arguing the issues raised by the parties and assisting the court in understanding the full implications of the matter.

[188] In this case, no one has suggested that the Foundation seeks to raise a new issue, or any other potential interference with the case. The evidence is not controversial and is put forward only to explain and provide context for the Foundation's perspective and submissions on "how the issue of provincial jurisdiction over health professionals arises." Its submissions were restricted to that issue, and more specifically to its concern that the application of the *CDSA* to supervised injections services "intrudes on provincial jurisdiction to regulate the conduct of nurses as health professionals." The evidence establishes how and why the decision in this case will have significant effect on registered nurses seeking to comply with the professional and ethical standards to which they are held by their governing body. That concern is at the root of the division of powers issue and the evidence will be helpful to a full understanding of that issue. With certain important exceptions, the affidavit does not put forward evidence of adjudicative facts that go

to the merits of the appeals or alter the record from that before the trial judge; the evidence makes a useful contribution in general terms.

[189] I would admit paragraphs 1-29 and 35-44 of the Davis Affidavit as helpful context for considering the division of powers and *Charter* issues in this appeal. They supply necessary context to explain the Foundation's different perspective and its submissions on the nature of and rationale for supervised injection services.

[190] I would not, however, admit paragraphs 30-34 or 45-46 nor the exhibits to which those paragraphs refer. I would also strike all references to the exhibits made in the admissible paragraphs. This evidence unnecessarily widens the scope of the *lis*, and takes the case away from the parties by focusing on the Foundation's unique situation. The usefulness of the Foundation's submissions is restricted to contextual evidence of general application. The parties should not be required to deal with the Foundation's own legal difficulties with supervised injection services. The background materials on its constitution and operations are superfluous.

New Evidence

[191] The provincial Attorney applies to admit an affidavit of Nancy Reimer that contains the correspondence between the Vancouver Coastal Health Authority, the provincial Ministry of Health and Health Canada concerning the Health Authority's request for an extension of Insite's s. 56 exemption, and various media reports and articles during and following the trial that purport to demonstrate the opposition of the federal government, and in particular, that of the Minister of Health, to Insite.

[192] In my view, the correspondence should be admitted. It provides an important continuation to the trial judge's narrative regarding the ongoing attempts by the provincial government to keep Insite operative and the federal response to those efforts. The evidence does not in itself go to the adjudicative facts and its admittance does not prejudice Canada in the cross appeal. I would, however, decline to admit the media reports: they do not provide information relevant to the legal issues on

appeal and are otherwise, at best, second-hand accounts of or editorial comments about the federal government's actions.

Conclusion

[193] It follows from these reasons that I find no error in the conduct of the trial, and would grant the respondents standing, allow the fresh evidence motion in part and declare ss. 4(1) and 5(1) of the *CDSA* inapplicable to Insite by reason of the application of the doctrine of interjurisdictional immunity. Consequently, I need not comment further on the constitutional issues raised in the appeal and cross appeal and would dismiss the appeal as moot.

Costs

[194] Following release of his reasons, the trial judge awarded special costs to PHS, Mr. Wilson, and Ms. Tomic on a full indemnity basis, subject only to R. 57(3) reasonableness considerations. Thereafter, Saunders J.A. granted intervenor status in the appeal to the BCCLA, the Vancouver Coastal Health Authority, and the Dr. Peter AIDS Foundation (2008 BCCA 441). Then, on 3 December 2008, the Attorney General of Canada filed an amended notice of appeal, also appealing the order for special costs. Finally, the trial judge awarded costs to VANDU, after which the appellants amended their notice of appeal in that action.

[195] The trial judge explained the action "fits squarely within the scope of public interest legislation" (2008 BCSC 1453 at paras. 24, and 7-13): The plaintiffs undertook the litigation with a view to preserving the operations of a publicly-funded facility, without financial assistance from either the City or the Province (para. 24). The trial judge rejected the appellants' submission that it is not public interest litigation because PHS, Mr. Wilson, and Ms. Tomic have a personal interest in the outcome of the litigation, ruling that their personal interests are not such as to remove them from the ambit of public interest litigants: PHS is a non-profit society that operates the facility under contract with a provincial health authority; it does so for the benefit of the community as a whole and not for its own benefit or financial

gain. The individual plaintiffs have the same interest in the ongoing operation of the facility as any citizen has in respect of any other health care facility, namely their personal health and welfare. This action benefits all who suffer from the illness of addiction (para. 25).

[196] The trial judge also rejected the appellants' submission that PHS was not impecunious and could afford the conduct of the litigation as reason for not making a special costs award, not only rejecting the significance they alleged for the evidence they put forward as to PHS revenue, but also explaining that, unlike on an application for interim costs in any event of the cause, financial worth or ability to pay is not a factor that should predominate the consideration of an award of special costs following the successful completion of litigation (paras. 26-27).

[197] Finally, the trial judge rejected the federal Attorney's submission that no award of special costs should be made because the plaintiffs had been represented on a *pro bono* basis and therefore had not incurred any fees: costs had been incurred by someone; Canada should not derive a windfall because a third party has underwritten the litigation. He also noted the contradiction in the federal parties' submissions: one must be impecunious for an award of special costs to be considered, if impecunious and represented on a *pro bono* basis, an award of special costs should be denied or reduced (para. 28).

[198] The trial judge considered all of the appropriate factors in deciding to award special costs to a successful public interest litigant. There is no basis for this Court to interfere with the exercise of his discretion: *Victoria (City) v. Adams*, 2009 BCCA 563. I would not interfere with his orders for costs of the trial and would order the appellants to pay the respondents' costs of the appeal and cross appeal.

[199] Since preparing my reasons, I have had the opportunity to review the reasons of my colleague Justice Rowles, and I find that I am in general agreement with them.

The Honourable Madam Justice Huddart

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[200] I have had the opportunity to review the draft reasons of Madam Justice Huddart in which she concludes that the respondents' cross appeals should be allowed based on the trial judge's error in failing to apply the doctrine of interjurisdictional immunity in favour of B.C.'s supervised injection site ("Insite") in Vancouver's downtown eastside ("DTES"). In the result, it was unnecessary for her to address the second issue raised in the appeals, namely whether the effect of ss. 4(1) (possession of a controlled substance) and 5(1) (trafficking in a controlled substance) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*] on Insite's staff and clients infringes s. 7 of the *Charter* thereby rendering the federal provision of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[201] In the court below the respondents had included s. 5(1) of the *CDSA* (trafficking in a controlled substance) in their constitutional challenge, however, before this Court counsel for the Attorney General of Canada and the federal Minister of Health (collectively referred to as "Canada") acknowledged that the actions of the users and staff of Insite could not amount to trafficking in a controlled substance and therefore a s. 56 exemption under the *CDSA* to protect them from that potential was unnecessary. Accordingly, I will refer only to s. 4(1) in these reasons but it should be understood they also apply to s. 5(1) in the event that is necessary.

[202] As I understand my learned colleague's reasons, she would apply the doctrine of interjurisdictional immunity to render s. 4(1) of the *CDSA* inapplicable to the staff and clients of Insite. With respect, I find that I am unable to agree with that conclusion. In my view, the companion decisions of *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 [*CWB*], and *(British Columbia) Attorney General v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86 [*Lafarge*], confirmed in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, 1 S.C.R. 624, do not permit an application of the doctrine of interjurisdictional immunity to resolve

what the trial judge found, and with which I agree, is an operational conflict between s. 4(1) of the *CDSA* and Insite's activities. The jurisprudence, as I understand it, mandates a restricted approach to the application of the immunity doctrine and dictates that where possible, the doctrine of paramountcy should be applied as a matter of first recourse to resolve any conflict or incompatibility between a federal provision and a provincial activity.

[203] In the result, I find no error in the trial judge's dismissal of the respondents' claims for a declaration that s. 4(1) is inapplicable to Insite and would dismiss the respondents' cross appeals on this issue.

[204] This determination restores the need to address the s. 7 *Charter* issue. I therefore propose to first outline my reasons for upholding the trial judge's determination on the division of powers issue and thereafter address Canada's appeal on the trial judge's finding that the effect of s. 4(1) of the *CDSA* on Insite infringes s. 7 of the *Charter* and cannot be saved by s. 1, thereby rendering the federal provision of no force or effect pursuant to s. 52 of the *Constitution Act, 1982.*

A. The division of powers analysis

[205] A division of powers analysis begins with an application of the pith and substance (purpose and effect) doctrine to determine the constitutional validity of the impugned legislation (or provisions of legislation). This involves a characterization of the dominant purpose and legal effect of the legislation followed by a classification of the legislation as falling within the ss. 91 or 92 heads of power: *Reference re Firearms Act (Can.),* [2000] 1 S.C.R. 783, 2000 SCC 31 [*Firearms Reference*]. If the impugned legislation fits within the enacting body's heads of power it will be declared *intra vires* or constitutionally valid. If it falls outside the enacting body's heads of power it will be declared *ultra vires* or constitutionally invalid thereby rendering it of no force or effect.

[206] Sections 91 and 92 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5., divide "matters" (the textual language ss. 91

and 92) of legislative power exclusively to the federal Parliament and the provincial legislatures respectively. There are instances where a matter may fall within both heads of power. That is to say one aspect of the matter may fall within s. 91 and another aspect of the same matter may fall within s. 92 of the *Constitution Act, 1867*. In such cases, both levels of government may "legislate in one jurisdictional field for two different purposes": *Firearms Reference* at para. 52. This is commonly referred to as the "double aspect doctrine" and reflects the principle of concurrency that constitutionally valid legislation from each level of government can co-exist in the same field so long as the purpose and effect of each law is limited to the matter that fits within the enacting body's constitutional mandate. Noted examples of the double aspect doctrine include dangerous driving, health and drugs or drug abuse.

[207] The matter of drugs was addressed in *R. v. Schneider*, [1982] 2 S.C.R. 112. The issue in *Schneider* involved the constitutional validity of the *Heroin Treatment Act*. The provincial legislation authorized voluntary and compulsory medical treatment for heroin addicts in a hospital for the purpose of terminating or reducing a patient's dependency on heroin. At page 132, the Court observed that the dual legislative domain of narcotics was not "so global and indivisible that the legitimate domain cannot be divided, illegal trade in narcotics coming within the jurisdiction of the Parliament of Canada and the treatment of addicts under provincial jurisdiction". It held that the pith and substance of the legislation was the medical treatment of heroin addiction and that the matter fell within the s. 92(16) head of power under its general jurisdiction with respect to health (*Schneider* at 137-138). It followed that the legislation was declared as constitutionally valid public health legislation that did not exclude or encroach on Parliament's power to legislate with respect to the national public health under the *Narcotics Control Act*.

[208] At the pith and substance stage of the analysis, overreaching provisions may be "read down" in order to limit the scope of the legislation to within the enacting body's heads of power. "Reading down", in this context, is a technique of statutory interpretation that is used to narrow the meaning of the general words of an enactment, which may appear to extend beyond the enacting body's mandate, in

order to contain the effect of the legislation to within the limits of its constitutional mandate. Professor Peter Hogg describes this technique in his text *Constitutional Law of Canada*, 5th edition (Scarborough, Ontario: Thompson Carswell, 2007) at 15-26:

> The "reading down" doctrine requires that, whenever possible, a statute is to be interpreted as being within the power of the enacting legislative body. What this means in practice is that general language in a statute which is literally apt to extend beyond the power of the enacting Parliament or Legislature will be construed more narrowly so as to keep it within the permissible scope of power. Reading down is simply a canon of construction (or interpretation). It is only available where the language of the statute will bear the (valid) limited meaning as well as the (invalid) extended meaning; it then stipulates that the limited meaning be selected. [Emphasis added.]

[209] This process of "reading down" to determine the dominant purpose of legislation was described in *CWB* as follows:

> [31] When problems resulting from incidental effects arise, it may often be possible to resolve them by a firm application of the pith and substance analysis. The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power. The usual interpretation techniques of constitutional interpretation, such as reading down, may then play a useful role in determining on a case-by case basis what falls exclusively to a given level of government. In this manner, the courts incrementally define the scope of the relevant heads of power. The flexible nature of the pith and substance analysis makes it perfectly suited to the modern views of federalism in our constitutional jurisprudence.

[210] The "reading down" of the general words of an enactment to contain an ambiguity in the scope of the legislation is distinct from the "reading down" that occurs when the doctrine of interjurisdictional immunity is applied. The former is part of the pith and substance analysis for characterizing the dominant purpose of legislation and its constitutional validity. The latter is used to make legislation inapplicable to matters outside the enacting body's jurisdiction.

[211] Legislation enacted by one jurisdiction may have incidental effects on the other jurisdiction. Incidental effects of legislation may vary. At one end of the spectrum legislation that in form appears to fall within the enacting body's mandate but in effect is directed to a matter outside its jurisdiction will be found to be

"colourable" and therefore constitutionally invalid. In other words, the central character or dominant purpose of the legislation will be found to fall outside a matter within the enacting body's mandate. At the other end of the spectrum is constitutionally valid legislation that has incidental effects which are collateral and secondary to the other jurisdiction's mandate (*CWB* at para. 28 citing *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 28). Between the two ends of the spectrum, are incidental effects of legislation that impair or conflict with the other jurisdiction's legislative mandate. In these circumstances, the doctrines of interjurisdictional immunity and paramountcy, respectively, are used to contain the effects of the legislation by rendering it inapplicable to the other jurisdiction (interjurisdictional immunity) or inoperable (paramountcy) where the provincial legislation or activity is found to conflict or is incompatible with the federal legislative mandate (*CWB* at para. 32).

[212] The context in which the doctrine of interjurisdictional immunity evolved was the protection of federal corporations and undertakings, and things and persons under federal jurisdiction from the effects of valid provincial legislation that impaired the "basic, minimum and unassailable" core (i.e., vital and essential) competence of the affected federal head of power. Over time, the scope of the doctrine was extended to federal activities that fell within the s. 91 heads of power. The purpose of the doctrine was to preserve the "exclusivity" of the ss. 91 and 92 heads of power. When the doctrine is employed it renders the impugned legislation inapplicable to the other jurisdiction. *CWB* described this doctrine by reference to the seminal decision of *Bell Canada v. Quebec*, [1988] 1 S.C.R. 749 [*Bell Canada (1988)*]:

> [33] Interjurisdictional immunity is a doctrine of limited application, but its existence is supported both textually and by the principles of federalism. The leading modern formulation of the doctrine of interjurisdictional immunity is found in the judgment of this Court in *Bell Canada (1988)* where Beetz J. wrote that "classes of subject" in ss. 91 and 92 must be assured a "basic, minimum and unassailable content" immune from the application of legislation enacted by the other level of government.

[213] In comparison, the doctrine of paramountcy affects the operability of valid provincial legislation to the federal legislative mandate. It is triggered when the

provincial legislation conflicts or is found to be incompatible with the intent of the federal legislation. An operational conflict is said to occur "where the application of the provincial law will displace the legislative purpose of Parliament", where "one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; [and] 'compliance with one is defiance of the other'": *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 at para. 69 [*Mangat*]. In that event, the doctrine gives priority or paramountcy to the federal legislation thereby rendering the provincial legislation inoperable to the extent of the conflict or incompatibility.

[214] The Supreme Court of Canada extensively reviewed each of the constitutional doctrines in *CWB* and *Lafarge.* Justices Binnie and Lebel co-authored the majority decisions in both cases. In the view of the majority the doctrine of paramountcy was better suited to contemporary Canadian federalism, particularly in cases involving double aspect matters (*CWB* at para. 69).

[215] In *CWB*, the Court held that the insurance schemes developed by federal chartered banks operating under the federal *Bank Act*, S.C. 1991, c. 46, within the province of Alberta, were not immune from the province's insurance regulations under the *Insurance Act*, R.S.A. 2000, c. I-3, as there was no impairment by the provincial legislation of the "core" competence of the federal jurisdiction over banking under s. 91(15) of the *Constitution Act*, 1867. Stated otherwise, the incidental effects of the provincial legislation on the federal legislation did not encroach to the level of impairment on Parliament's core competence over banking.

[216] In *Lafarge*, the Court held that the Vancouver Port Authority ("VPA"), a federal undertaking operating under the statutory authority of the *Canada Marine Act*, S.C. 1998, c. 10, was not immune from the City of Vancouver's zoning and development bylaws in regard to VPA's proposal to construct a concrete batch plant on VPA's waterfront lands in Vancouver. The Court found that because the municipal regulations did not impair the core federal jurisdiction over navigation and shipping under s. 91(10) of the *Constitution Act, 1867*, the VPA should not be granted immunity from the effects of the City's municipal regulations. However, the Court

went on to find an operational conflict between the municipal by-laws and the provisions of the *Canada Marine Act*, which required that priority be given to the federal legislation by operation of the doctrine of paramountcy and thereby rendered the municipal bylaws inoperable to the VPA.

[217] *CWB* and *Lafarge* made a number of significant changes to the earlier *Bell Canada (1988)* formulation and application of the doctrine of interjurisdictional immunity. The doctrine has now been effectively returned to its earlier more constrained application. While in theory the immunity doctrine is reciprocal, the majority in *CWB* expressed the view that its natural application (both past and present) and the practical effect of its use should be limited to the protection of federal works and undertakings, and things and persons operating under the federal legislative heads of power:

> [67] In our view, the above review of the case law [on federal transportation, federal communication undertakings, maritime law, Aboriginal rights and land claims, the management of federal institutions and the regulation of federal corporations and undertakings] cited by the appellants, the respondent and interveners shows that not only *should* the doctrine of interjurisdictional immunity be applied with restraint, but with rare exceptions it *has* been so applied. Although the doctrine is in principle applicable to all federal and provincial heads of legislative authority, the case law demonstrates that its natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings. In most cases, a pith and substance analysis and the application of the doctrine of paramountcy have resolved difficulties in a satisfactory manner.

[218] The Court went on to describe "impairment" of a core competence of jurisdiction as something more than "affects" (as stipulated in *Bell Canada (1988)*) but less than "sterilizing" or "paralyzing" (from the pre-*Bell* jurisprudence as cited in *CWB* at para. 48). It also changed the order in which the two constitutional doctrines should be considered in a division of powers analysis. Previously, the doctrine of interjurisdictional immunity was considered first in order to determine the applicability of the impugned legislation. Only if the doctrine was found not to be applicable did it become necessary to consider the doctrine of paramountcy. In *CWB* the Court stated that in the absence of prior case authority in which the immunity doctrine has

been applied, the doctrine of paramountcy should be considered as the doctrine of first recourse:

> [47] For all these reasons, although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute.
>
> ...
>
> [78] In the result, while in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy.

[219] Some academics have been critical of the logic of this change. Professor Robin Elliot observed that in *Lafarge* the Court declined to follow its proposed new order by first considering and rejecting an application of the doctrine of interjurisdictional immunity and only thereafter applying the doctrine of paramountcy: Robin Elliot, "Interjurisdictional Immunity after *Canadian Western Bank and Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters—Again" (2008) 43 S.C.L.R. (2d) 433 at 480 [Elliot, "Interjurisdictional Immunity"]. However, *CWB*'s historical review of the difficulties, inconsistencies and "confusion" associated with past formulations and applications of the doctrine of interjurisdictional immunity arguably provides some insight into the Court's motivation for the proposed change. Mired in the earlier decisions are abstract discussions on: (i) whether the doctrine extends beyond the essential parts of a federal work or undertaking (banks, railways, police, television broadcasting), things (Aboriginal lands) or persons (Aboriginal persons), (ii) whether the doctrine in practice provides reciprocal protection to provincial undertakings and activities, (iii) what degree of "impairment" is required to find impermissible encroachment upon the core competence of the other legislative jurisdiction, and (iv) whether the effect of the doctrine creates undesirable "legal vacuums", "legislative gaps" or exclusive "enclaves" of jurisdiction in the absence of legislation from the other jurisdiction.

[220] Specifically, in *Lafarge* the Court instructed against the use of the immunity doctrine in cases of double aspect:

> [4] ... In particular, in our view, the doctrine should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect. Both federal and provincial authorities have a compelling interest. Were there to be no valid federal land use planning controls applicable to the site, federalism does not require (nor, in the circumstances, should it tolerate) a regulatory vacuum, which would be the consequence of interjurisdictional immunity.

[221] Professor Elliot suggests that this passage should be limited to the context in which it was made, namely to those instances where there exists a legislative gap on a double aspect matter: Elliot, "Interjurisdictional Immunity" at 480. However in *Mangat*, which pre-dated *Lafarge*, the Court also adopted a constrained approach to the application of the doctrine of interjurisdictional immunity in circumstances that involved a double aspect matter in which both jurisdictions had enacted constitutionally valid legislation.

[222] The circumstances of *Mangat* involved the regulation of individuals representing persons before judicial or quasi-judicial bodies. Agents appearing on behalf of individuals seeking naturalization before the Immigration Refugee Board, pursuant to the provisions of the *Immigration Act*, R.S.C. 1985, c. I-2, sought immunity from the requirements of B.C.'s *Legal Profession Act,* S.B.C. 1987, c. 25, which prohibited persons other than members in good standing with its Law Society from engaging in the practice of law. In finding the provisions of the provincial legislation inoperable to the federal statutory scheme for immigration tribunals, the Court rejected an application of the doctrine of interjurisdictional immunity and chose instead to apply "the more supple paramountcy doctrine":

> [54] I believe Mackenzie J.A. disposed of this question in a satisfactory manner. Paramountcy is the more appropriate doctrine in this case. The existence of a double aspect to the subject matter of ss. 30 and 69(1) favours the application of the paramountcy doctrine rather than the doctrine of interjurisdictional immunity. While the role for provincially regulated lawyers is non-exclusive, it is nonetheless inconsistent with interjurisdictional immunity, which would exclude provincial legislation, even if Parliament did not legislate in the area. The application of the interjurisdictional immunity in such a context might lead to a bifurcation of the regulation and control of the legal

> profession in Canada. The application of the paramountcy doctrine safeguards the control by Parliament over the administrative tribunals it creates. At the same time, it preserves the principle of a unified control of the legal profession by the various law societies throughout Canada.

[223] In its attempts to address the variety of issues associated with the interjurisdictional immunity doctrine, the Court has referred to the doctrine as "not a particularly compelling doctrine" (*Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2 at para. 26), not "the dominant tide of constitutional doctrines" (*OPSEU* at para. 27), "frustrat[ing] the application of the pith and substance analysis and of the double aspect doctrine" (*CWB* at para. 38), "asymmetrical" in its results (*CWB* at paras. 35 and 45), and applied "without too much doctrinal discussion"(*CWB* at para. 35). Interjurisdictional immunity is also said to avoid the principle of concurrency (*CWB* at para. 34). The current status of the doctrine was summarized in *CWB*:

> [77] ... As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensible or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat.* [Emphasis added.]

[224] More recently in *Chatterjee*, the Court reiterated the majority's views from *CWB* and *Lafarge* that a constrained approach should be adopted to the application of the doctrine of interjurisdictional immunity in contrast with the preferred (and presumably more robust) application of the doctrine of paramountcy as better reflecting the principle of concurrency in Canadian federalism:

> [2] The argument that the *CRA* [provincial forfeiture legislation] is *ultra vires* is based in this case on an exaggerated view of the immunity of federal jurisdiction in relation to matters that may, in another aspect, be the subject of provincial legislation. Resort to a federalist concept of proliferating jurisdictional enclaves (or "interjurisdictional immunities") was discouraged by this Court's decisions in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, and *British Columbia (Attorney General) v. Lafarge*

> *Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, and should not now be given a new lease on life. As stated in *Canadian Western Bank*, "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (para. 37 (emphasis in original)).

[225] In summary, in my view the recent jurisprudence endorses a limited application of the doctrine of interjurisdictional immunity to circumstances in which previous case law has already relied on its use. Those circumstances have typically involved federal works and undertakings, and things and persons under federal jurisdiction. The doctrine should not be applied as a doctrine of first recourse and should not be applied to double aspect matters.

[226] I turn now to an application of this division of powers outline to the circumstances of these appeals.

[227] Insite is operated by PHS Community Services Society ("PHS") under contract with the Vancouver Coastal Health Authority ("VCHA"). VCHA operates under statutory authority delegated to it by the *Health Authorities Act*, R.S.B.C. 1996, c. 180 ("*HAA*"). The *HAA* empowers the Minister of Health to designate regional health boards for the purpose of "develop[ing] and implement[ing] a regional health plan that includes ... programs for the delivery of health services provided in the region" and "to develop policies, set priorities ... and allocate resources for the delivery of health care services, in the region, under the regional health plan". Insite was developed and implemented by VCHA "to compliment [VCHA's] other health services in the DTES" including "withdrawal management, detoxification and rehabilitation programs" for the treatment of "people struggling with a debilitating and deadly disease in the worst of social circumstances." The provincial legislation is broadly worded; it does not specifically authorize or mandate Insite's supervised injection site.

[228] The *CDSA* provides detailed schedules that govern the possession, use and distribution of controlled substances throughout Canada. It also creates a regulatory scheme for the "medical, scientific and industrial applications of controlled substances". In particular, there are regulations "respecting the circumstances in

which, the conditions subject to which and the persons or classes of persons" in which a controlled substance may be imported, exported, produced, packaged, sent, transported, delivered, sold, provided, administered, possessed, obtained or otherwise dealt with in Canada.

[229] Under the regulatory scheme provided for in the *Narcotic Control Regulations* (the *"NCR"*), licit drug suppliers (licensed dealers, pharmacists), health professionals (medical practitioners) and institutions (hospitals) are authorized through licences issued under the *NCR* to be in possession of otherwise illegal controlled substances for express purposes. These purposes include the sale, prescription and administration of narcotics to patients under a medical practitioner's care in circumstances where the narcotic is required for the condition for which the patient is receiving treatment. Possession of heroin for such a purpose has the additional requirement that it may only be administered in a hospital on either an in-patient or out-patient basis.

[230] PHS, two clients of Insite (Mr. Wilson and Ms. Tomic), and the Vancouver Area Network of Drug Users ("VANDU"), a non-profit society that advocates on behalf of drug users (the "respondents"), initiated the constitutional challenge to ss. 4(1) and 5(1) of the *CDSA* in anticipation of a decision by the federal Minister of Health not to extend the exemption pursuant to s. 56 of the *CDSA*. The exemption was for a pilot project to research the effectiveness of a supervised injection site in the DTES. It had been granted to Insite since 2003 when the facility first opened. The interveners VCHA, Dr. Peter Aids Foundation, the British Columbia Civil Liberties Association, and the Attorney General of British Columbia ("AGBC"), who appeared as a party to the action pursuant to s. 8 of the *Constitutional Questions Act*, R.S.B.C. 1996, c. 66, supported the respondents' and interveners' position on the division of powers issue, albeit for different reasons.

[231] In regard to the preliminary issues, I agree with my colleague's view that the trial judge was correct in deciding that the issues before him could be determined by summary trial, that the respondents met the test for public interest standing to bring

their constitutional challenge before the ministerial exemption expired, and with the order granting the Dr. Peter Aids Foundation's application to introduce fresh evidence to the limited extent permitted, and the AGBC's application to introduce new evidence to the limited extent permitted.

[232] The federal government's power to enact s. 4(1) of the *CDSA* was not in issue before the trial judge. PHS conceded the validity of the enactment based on the decision in *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571. In *Malmo-Levine,* the Court held the federal narcotics legislation was constitutionally valid, albeit in the context of the *CDSA*'s predecessor the *Narcotics Control Act*, R.S.C. 1985, c. N-1. The Court identified the purpose of the federal legislation as protection of the health and public safety of vulnerable groups and its legal effect as the prohibition and penal consequences of the illegal possession and trafficking of those substances (at paras. 65, and 76-78). As such, both the purpose and effect of the legislation were found to fit within the criminal law power under s. 91(27) of the *Constitution Act, 1867* (at paras 74 and 78).

[233] In the course of addressing the validity of the federal narcotics legislation, the Court in *Malmo-Levine* observed that "[i]t is not the courts' function to reassess the wisdom of validly enacted legislation" (at para. 211) but to limit its focus to the more narrowly circumscribed constitutional challenges to the legislation (at para. 212). I agree that in this case the court's task is to determine the constitutional issues raised by the parties, not to engage in commentary about the merits of government policy. The forum for that debate lies elsewhere. The trial judge also recognized the narrow scope of the issues for his determination when he concluded that it was unnecessary for him to resolve the conflict in the expert's evidence on the effectiveness of Insite in order to resolve the constitutional issues:

> I do not doubt that there is room for divergent opinions in the debate about the efficacy of safe injection sites generally and Insite in particular. I do harbour doubt on the question of whether any investigation, however thorough, can provide answers that will scientifically resolve or reconcile the differences" (at para. 83).

[234] The principle focus of the respondents' challenge was on the applicability of s. 4(1) (and s. 5(1) in the court below) of the *CDSA* to Insite. On that issue, the trial judge first considered the doctrine of interjurisdictional immunity. He reviewed the respondents' and interveners' submissions that the effect of the impugned provisions amounted to an impairment of a vital and essential aspect of Insite (the supervised injection site), that Insite operated as a hospital and a validly constituted provincial undertaking within the core competence of the provincial legislative jurisdiction over the delivery of health services, and concluded:

> [117] The difficulty in this case results from the fact that the *CDSA* prohibition against possession indirectly controls injection, which is not proscribed by the criminal law, and in doing so, has an incidental effect upon a vital part of a provincial health care undertaking. As a result, the federal power to legislate in relation to criminal law, and the power of a principal delegate to provide health care services meet head-to-head in conflict. This is a classic case of "double aspect". That being the case, the doctrine of interjurisdictional immunity cannot be applied.

[235] The trial judge next reviewed the Court's direction in *Lafarge* that the doctrine of interjurisdictional immunity should be avoided where the matter engaged by the impugned legislation is one of double aspect. He noted that drugs are a matter of double aspect and as a result declined to apply the immunity doctrine. He then turned to a consideration of the doctrine of paramountcy:

> [119] When confronted with a double aspect, the court must strive to give legitimacy to both legislative initiatives: *Canadian Western Bank* at para. 37. In this case, however, the operation of the provincial undertaking, which is concerned with health care, interferes with or directly confronts the operation of the criminal law by permitting the possession of controlled substances at Insite contrary to the *CDSA*, which prohibits possession in all circumstances. While Parliament has some capacity to affect the supply and delivery of health care, the Province has no capacity to override the criminal law by creating an environment in which individuals can conduct themselves free of its constraints.
>
> [120] Because there is operational conflict between the Province's initiatives in health care and the criminal law which is directed in part to health, the conflict must be resolved by application of the doctrine of paramountcy. Absent *Charter* considerations, the criminal law must prevail.

[236] I make two observations with respect to this analysis.

[237] *Bell Canada (1988)* established the now defunct "affects a vital part" test of the doctrine of interjurisdictional immunity. Ten years later, *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927, qualified this test by distinguishing between a provincial law that "directly" affected a federal undertaking and one that only "indirectly" did so. In the latter instance, it held that the federal undertaking could not obtain immunity from the provincial legislation unless the indirect effect of the provincial legislation "impaired" a vital part of the federal undertaking. *CWB* ended the need to distinguish between direct and indirect effects for the purpose of establishing impairment of a "vital and essential part" of an undertaking. In its place, it returned to the pre-*Bell Canada (1988)* "impairment of a vital part" test, albeit not to the extent of its earlier scope that required the impairment to sterilize or paralyze the core competence of the other jurisdiction. Impairment is now said to occur when the effect of encroaching legislation amounts to an "adverse consequence".

[238] Second, following *CWB* and *Lafarge* it was not necessary for the trial judge to address the respondents' claims of interjurisdictional immunity. Having determined that an operational conflict or incompatibility existed between the impugned provisions of the *CDSA* and Insite's activities, the doctrine of paramountcy required that priority be given to the federal provisions.

[239] The AGBC contends that the pith and substance of s. 4(1) does not encroach on the provincial health jurisdiction. He argues that "properly interpreted" the federal provision should be "read down" in order to accommodate the "public interest" as determined by each level of government within its exclusive jurisdiction. For the province, the public interest is determined in the context of the delivery of health services to the chronically addicted in the DTES. At the federal level, the public interest is in the prohibition on the use and distribution of narcotics in order to protect public health and safety. The reading down of s. 4(1), it is submitted, would permit each level of government to determine the public interest within its jurisdiction in order to fulfill each jurisdiction's mandate and would thereby eliminate the need to resort to the doctrines of interjurisdictional immunity and paramountcy. In support of that submission, the AGBC relies on *Attorney General of Canada v. Law Society of*

B.C., [1982] 2 S.C.R. 307 [*Jarbour*] and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 [*Garland*], two "regulated industries cases". In the alternative, the AGBC supports the respondents' submission that the doctrine of interjurisdictional immunity should be invoked to render s. 4(1) of the *CDSA* inapplicable to Insite.

[240] I agree with my colleague that the AGBC's first submission cannot succeed. As I read *Jarbour* and *Garland*, those decisions turned on the statutory interpretation of the specific wording in each of the impugned federal provisions to determine if the purpose and effect (pith and substance) of those provisions impermissibly encroached on the provincially-authorized (constitutionally valid) and regulated activities. However, as has been determined, the pith and substance of federal narcotics legislation falls clearly within the federal criminal law mandate.

[241] The central issue before the trial judge was whether the doctrine of interjurisdictional immunity or the doctrine of paramountcy should be applied to the circumstances of Insite.

[242] Insite delivers health services that are predicated on the illegal possession of heroin in its facility. That premise conflicts with the federal criminal law power to control the importation, distribution, sale and use of heroin in Canada. The short answer to this incompatibility between the federal provision and the provincial activity is the application of the doctrine of paramountcy, which requires that the federal provision be given priority.

[243] The rationale behind the doctrine, in the circumstances of this case, may be found in the nature of the interests under the respective legislative mandates. The provincial legislature is constitutionally responsible for the delivery of health services. That mandate includes the treatment of narcotics addiction and the prevention of infectious diseases among addicts. Insite, operating as a hospital, provides health services to heroin addicts. Parliament is constitutionally responsible for regulating the access to, use and distribution of narcotics within Canada. Its mandate also extends to international obligations for suppressing the supply of illegal heroin that is derived, in large part, from organized criminal activity.

[244] The doctrine of interjurisdictional immunity cannot be applied to shield Insite from the applicability of s. 4(1) of the *CDSA*. To do so would significantly impair the federal criminal law mandate over controlled substances and create a gap in its general application across Canada. The effect of its application would require both jurisdictions to be wilfully blind to what Canada describes as "the chain of illegal distribution" or how the heroin injected by users of Insite is obtained from its place of original production, transported into Canada, distributed within Canada, sold to the consumers of illicit drugs, and from which the monetary proceeds are laundered domestically and internationally. This gap could grow larger if other provinces took advantage of the immunity proposed in this case: supervised injection sites could be opened in every city across Canada. The creation of "enclaves" where illicit drugs may be brought for intravenous drug use, without the potential for prosecution, could eviscerate the efficacy of a criminal law validly enacted by Parliament that seeks to address the broader context and consequences of illicit drug use across the entire supply chain.

[245] The province is not left without recourse in pursuing its policy initiative of harm reduction. It has the jurisdiction to explore and implement harm reduction strategies that do not involve the use of illicit drugs in a supervised injection site facility. It has the constitutional mandate to provide for the delivery of health services under a harm reduction model that it considers to be in the public interest, provided that it does so in compliance with the provisions of the *CDSA* and its regulations. It is only where the manner of treatment by the province conflicts with the federal prohibitions that the doctrine of paramountcy will render the provincial activity inoperable.

B. Does the application of s. 4(1) of the *CDSA* to Insite offend s. 7 of the *Charter*?

[246] Section 7 of the *Charter* has provided some of the most challenging issues in our *Charter* jurisprudence. These issues often arise in the context of social policy legislation upon which reasonable people may have principled differences. All legislation, however, is subject to constitutional limits imposed by the *Charter*. The

courts' task is not to participate in the policy debate over the merits of legislative actions but to undertake "the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it": *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35, [2005] 1 S.C.R. 791 at para. 107.

[247] The context in which s. 7 *Charter* issues arise, and the need for a proper evidentiary basis to inform the challenge, are essential features to the legal analysis. The importance of evidence in deciding a s. 7 issue was noted by Chief Justice McLachlin and Mr. Justice Major for three members of the majority in *Chaoulli*: "[t]he task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, not just of common sense or theory, but of the evidence" (at para. 150).

[248] The scope of s. 7 also remains unsettled. In *Chaoulli*, Madam Justice Deschamps (the fourth member of the majority in the result), observed, "[t]his Court has not yet achieved a consensus regarding the scope of this [s.7] protection" (at para. 33). For the three dissenting members, Justices Binnie and LeBel expressed a need for a cautious and incremental approach in addressing the scope of s. 7:

> [193] Section 7 gives rise to some of the most difficult issues in *Canadian Charter* litigation. Because s. 7 protects the most basic interests of human beings – life, liberty and security – claimants call on the courts to adjudicate many difficult moral and ethical issues. It is therefore prudent, in our view, to proceed cautiously and incrementally in applying s. 7, particularly in distilling those principles that are so vital to our society's conception of "principles of fundamental justice" as to be constitutionally entrenched.

[249] In this case, Canada submits the trial judge erred in law in finding that s. 4(1) of the *CDSA* infringes s. 7 of the *Charter* when it is applied to the activities of staff and clients of Insite. Insite is a health care facility (a hospital) that operates in the DTES. The DTES is home to over 4,600 of the estimated 12,000 intravenous drug users in the Vancouver area. About 5% of those in the DTES use the services at Insite. Approximately 60% of the drugs injected at Insite are heroin and hydromorphone; 40% are cocaine and methamphetamine. Over one million injections have occurred at the facility. The purpose of Insite is to provide a safe injection site for intravenous drug users through the provision of health services and supervision of their injection of illegal drugs. The primary objectives of the program

are to prevent deaths by overdose and the transmission of communicable diseases such as HIV/AIDS and Hepatitis C.

[250] Based on the evidence adduced by PHS, VANDU and Canada, the trial judge made the following findings of fact:

> [87] Whatever the shortcomings in the science surrounding the assessment of the outcomes at Insite, and however the disputes may be resolved among those who engage in the assessment of the efficacy of safe injection sites generally, or Insite in particular, all of the evidence adduced by PHS, VANDU and Canada supports some incontrovertible conclusions:
>
> 1. Addiction is an illness. One aspect of the illness is the continuing need or craving to consume the substance to which the addiction relates;
> 2. Controlled substances such as heroin and cocaine that are introduced into the bloodstream by injection do not cause Hepatitis C or HIV/AIDS. Rather, the use of unsanitary equipment, techniques, and procedures for injection permits the transmission of those infections, illnesses or diseases from one individual to another; and
> 3. The risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals.

[251] The trial judge's three "incontrovertible conclusions" are binding on this Court, absent palpable and overriding error, which is not alleged.

1. Section 7 *Charter* rights

[252] The respondents submit that the application of s. 4(1) of the *CDSA* to Insite deprives users of their right to life, liberty and security of the person, and that the deprivation does not accord with the principles of fundamental justice. They submit that s. 7 interests are engaged because the law operates in a manner that prevents intravenous drug users from accessing potentially life-saving medical treatment. In this manner, they claim, the law is arbitrary, disproportionate or overbroad because it is inconsistent with the purpose of the legislation, which is to protect the health of the public from the dangers of prohibited substances.

[253] Section 7 guarantees that "[e]veryone 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." The Court in *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 S.C.R. 307, summarized the two-stage test for establishing an infringement of a s. 7 *Charter* right. A claimant must prove, on a balance of probabilities, that:

(i) the impugned legislation or state action deprives the claimant of life, liberty, or security of the person; and

(ii) that the deprivation fails to accord with the principles of fundamental justice.

[254] The onus remains on the claimant throughout the s. 7 analysis to establish the deprivation and the breach of the principles of fundamental justice. Only then does it shift to the Crown, pursuant to s. 1 of the *Charter*, to establish that the impugned law or action is demonstrably justified in a free and democratic society.

2. The s. 7 interests

[255] The list of protected interests in s. 7 is disjunctive: a claimant need only establish that he or she has been deprived of one of the protected interests for the section to be engaged. Section 7 interests are not positively guaranteed. Rather, everyone is guaranteed to be free from state deprivations of life, liberty or security of the person (*Gosselin v. Quebec,* 2002 SCC 84, [2002] 4 S.C.R. 429.) To prove an infringement, a claimant must also show a causal connection between the state interest or purpose of the legislative action and the deprivation (*Blencoe* at para. 60).

[256] The requirement that the state action be linked to the deprivation was raised by Canada in its submission that it was the claimants' addiction rather than the impugned law that was the cause of any deprivation of their s. 7 rights.

[257] The Crown made similar arguments in *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519 and *R. v. Morgentaler,* [1988] 1 S.C.R. 30.

In each of these cases the Crown argued that its legislative actions were not the cause of the deprivation of the respective appellants' s. 7 rights. In *Rodriguez,* the Crown submitted that it was Ms. Rodriguez's physical disability that caused the deprivation; in *Morgentaler*, it contended that it was the woman's pregnancy that caused her deprivation. In both instances, the Court rejected these submissions. In *Rodriguez,* it concluded that Ms. Rodriguez's distress was exacerbated by the fact that she could not manage her own death; in *Morgentaler* it concluded that the probability of health risks associated with pregnancy was increased by the delays caused by the mandatory procedures in the *Criminal Code.*

[258] In *Blencoe,* the claimant attempted to use the reasoning in these two decisions to argue that, although his psychological stress was caused in large part by the media attention he received from the sexual harassment complaint before the Human Rights Commission, the state-caused delays in the tribunal's proceedings exacerbated his psychological stress and therefore infringed his s. 7 right to "security of the person". The Court did not find it necessary to make a decision on this "contributing cause" argument but did not rule out its future use. Mr. Justice Bastarache, for the Court, stated that neither *Rodriquez* nor *Morgentaler* "obviates the need to establish a significant connection between the harm and the impugned state action to invoke the *Charter*" (*Blencoe* at para. 70). They do provide, however, that the government cannot rely on a claimant's pre-existing cause or condition, alone, to claim a lack of causal connection between the state action and the claimant's deprivation. In my view, the causal connection argument advanced by Canada must fail for the reasons noted in *Rodriguez* and *Morgentaler.*

[259] While the trial judge could have limited his discussion to one of the s. 7 interests engaged by the impugned law, I agree with his decision to consider whether all three s. 7 interests were engaged.

[260] The Court in *Chaoulli* had to consider whether a legislative prohibition on the purchase of private health insurance offended s. 7 of the *Charter.* The purpose of the prohibition was to preserve the universal public health care plan; the effect of the

law was to make the universal plan the sole option for the provision of health care. Six members of the Court found that the prohibition on private medical treatment engaged both the life and security interests of the claimant. The same six justices were evenly divided on whether the claimant's deprivation was in accordance with the principles of fundamental justice. Neither side distinguished between the s. 7 interests of life or security of the person when they considered whether the deprivation was in accordance with the principles of fundamental justice. Chief Justice McLachlin and Major J., however, spoke of an increasing scale of seriousness in the infringement of the s. 7 interests: "[t]he more serious the impingement on the person's liberty and security, the more clear must be the connection" and "[w]here the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals" (at para. 131).

[261] Similarly in *R. v. Parker* (2000), 49 O.R. (3d) 481, 146 C.C.C. (3d) 193 (C.A.) [*Parker*], the court found that s. 4(1) of the *CDSA* infringed Mr. Parker's s. 7 right to liberty and security of the person because he suffered from severe epilepsy and required marihuana to control his seizures. Mr. Justice Rosenberg, writing for the court, considered the right to security of the person even though he was satisfied that the claimant's liberty interest had been engaged:

> [83] ... The dominant aspect of the context in this case is the claim by Parker and other patients that they require access to marihuana for medical reasons. They do not, like the appellant in the *Clay* case, assert a desire for marihuana for recreational use. Parker does not claim a right to use marihuana on the basis of some abstract notion of personal autonomy. The validity of the marihuana prohibition must be assessed in that particular context. The context here is not simply that the marihuana prohibition exposes Parker, like all other users and growers, to criminal prosecution and possible loss of liberty. Rather, Parker alleges that the prohibition interferes with his health and therefore his security interest as well as his liberty interest.

[262] The s. 7 "right to life" interest is triggered in this case. In *Chaoulli*, provincial legislation that caused undue delays for patients awaiting surgery, which could result in death was held to engage the "right to life" interest.

[263] In this case, the trial judge found as a fact that Insite's health services and harm reduction policy prevents death by overdose. Canada argues that any deprivation of life to Insite users is not attributable to state action but to their choice and the manner in which to use the drugs. However, this submission ignores the Supreme Court of Canada's rejection of a similar causal connection argument raised in *Morgentaler* and *Rodriguez.* Canada's submission also ignores the finding of fact by the trial judge that the claimants' addiction is an illness. Their illness does not mean that the claimants are incapable of choice, but rather that their ability to choose is seriously diminished by their addiction. The evidence from Canada's expert witness regarding the nature of addiction was clear and undisputed. While Dr. Frank Evans preferred abstinence-based treatment to harm reduction, he did not dispute that addiction can be explained by the neuro-chemical effects of addictive substances on the structure and function of the brain, and the underlying predisposition to the illness from genetic, psychological and social determinates.

[264] Canada also focuses on safe-use practices arguing that drug addicts can choose to inject drugs safely whether Insite exists or not. However, this argument overlooks the trial judge's finding of fact that an addict's risk of death by injection is reduced when it is undertaken in the presence of Insite's health professionals who are able to ensure that he or she, in the event of an overdose, receives immediate medical treatment. This finding is supported by the evidence that Insite staff have intervened in over 360 overdose events and not one of those events has resulted in death. The injection of drugs without medical supervision poses a risk of death to the users. In this manner, it may be said, the blanket prohibition against the possession of illicit drugs at Insite contributes to the risk of death by the claimants. This is the causal connection between the deprivation of life and s. 4(1) of the *CDSA.*

[265] Some might argue that a distinction may be made between the appellants in *Rodriguez* and *Chaoulli,* and the claimants in this case, in that the former had no input into the root cause of their illness while the claimants in this case initially chose to use a prohibited and addictive drug. However, not everyone chooses to become addicted to drugs. Some infants are born addicted to drugs by reason of the

addiction of their birth mother and are plagued with that addiction throughout their lives. Those who work in the sex trade are often forced to use illegal drugs and become addicts. Some individuals turn to illegal drugs after becoming addicted to legal prescription drugs. These examples disclose the weakness of the argument that because an addict's illness is the product of his or her initial choice to consume the illicit drugs, his or her s. 7 "right to life" interest is not engaged.

[266] The claimants' s. 7 liberty interests are also engaged. Section 4(1) of the *CDSA* criminalizes the possession of an illegal substance. An accused charged with possession of a prohibited substance faces potential imprisonment or other forms of restraint. In *Malmo-Levine,* the Court acknowledged the effect of this consequence by stating that "the availability of imprisonment for the offence of simple possession is sufficient to trigger s. 7 scrutiny: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486" (at para. 84), and concluded that "the risk of being sent to jail engages the appellants' liberty interest" (at para. 89). In my view, *Malmo-Levine* is determinative of this issue.

[267] The right to "security of the person" is probably the broadest of the s. 7 interests. In *Morgentaler*, Dickson C.J.C., for himself and Lamer J., defined an infringement of the right to security of the person as "state interference with bodily integrity and serious state-imposed psychological stress" (at 56). Mr. Justice Beetz, for himself and Mr. Justice Estey, described it as a "right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction" (at 91). Madam Justice Wilson identified it as a right that "protects both the physical and psychological integrity of the individual" (at 161). Madam Justice Wilson's description of the interest received the support of the majority in *New Brunswick (Minister of Health and Community Services) v. G.(J.),* [1999] 3 S.C.R. 46 at para. 58, who added that it included the freedom from state-imposed psychological stress" (at para. 59). In *Rodriguez,* Sopinka J., writing for the majority, described the right as encompassing "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress" (at 587-588).

[268] Canada argues that the trial judge drew a false dichotomy by finding that the choice confronting users was between Insite and injecting in an unsafe environment. However, this submission again overlooks the trial judge's finding of fact that the supervision offered at Insite has prevented deaths from overdose. While it might be true that intravenous drug users can choose to use clean needles, or to access drug treatment, it is not the case that users can choose to be supervised while injecting drugs without a supervised injection site. Based on the evidence, s. 4(1) of the *CDSA* can be said to deny intravenous drug users access to a facility that could prevent them from dying of an overdose or contracting disease. Because of their addiction, intravenous drug users do not choose these risks which impose on them significant adverse physical and psychological consequences. This amounts to a deprivation of their security of the person.

[269] In my view, the trial judge correctly found that all three s. 7 interests were engaged in the circumstances of this case.

3. The principles of fundamental justice

[270] Any state deprivation of life, liberty, or security of the person must be in accordance with the principles of fundamental justice. It is common ground that legislative actions may not be arbitrary, disproportionate or overbroad. These principles of fundamental justice are well established. The trial judge found that s. 4(1) of the *CDSA* failed to accord with all three of these principles of fundamental justice. His analysis on this point was brief and did not refer to any evidence in support of his findings. I propose to deal with each of these principles of fundamental justice separately.

(i) Arbitrariness

[271] A law is arbitrary when there is no real or rational connection between the purpose of the law and the means it employs to fulfill its purpose. The aim of the inquiry into arbitrariness is to determine if the impugned legislative action bears no relation to or is inconsistent with the identified state interest.

[272] In *Chaoulli*, McLachlin C.J.C. and Major J., for the three members of the majority, summarized the test as follows:

> [130] A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.
>
> [131] In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

[273] In determining whether a rational (clear) connection existed between the impugned law and the state interest, McLachlin C.J.C. and Major J. extended the definition of arbitrariness from "inconsistent" to "unnecessary". They did so by relying on the earlier judgment of Beetz and Estey JJ. in *Morgentaler*, in which the two members of the majority described the procedures and restrictions of the abortion law as "unnecessary" and "manifestly unfair" (at 110). In *Chaoulli*, Binnie and LeBel JJ. agreed that arbitrariness is a principle of fundamental justice and in general agreed with McLachlin C.J.C. and Major J.'s summary of the test, but disagreed on whether a law is arbitrary if it is "unnecessary" to achieve the government's objective in the law. In their view, the addition of "unnecessary" to the test would inappropriately expand the scope for intervention under s. 7:

> [234] The accepted definition in *Rodriguez* states that a law is arbitrary only where "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation". To substitute the term "unnecessary" for "inconsistent" is to substantively alter the meaning of the term "arbitrary". "Inconsistent" means that the law logically contradicts its objectives, whereas "unnecessary" simply means that the objective could be met by other means. It is quite apparent that the latter is a much broader term that involves a policy choice. If a court were to declare unconstitutional every law impacting "security of the person" that the court considers unnecessary, there would be much greater scope for intervention under s. 7 than has previously been considered by this Court to be acceptable. (In *Rodriguez* itself, for example, could the criminalization of assisted suicide simply have been dismissed as "unnecessary"? As with health care, many jurisdictions have treated

> euthanasia differently than does our *Criminal Code*.) The courts might find themselves constantly second-guessing the validity of governments' public policy objectives based on subjective views of the necessity of particular means used to advance legitimate government action as opposed to other means which critics might prefer.

[274] The result of these differing views is that the five-judge majority reasons in *Rodriguez* are the prevailing voice on the test for arbitrariness. Sopinka J., for the majority (at 595-596), described the test in this way:

> One cannot conclude that a particular limit is arbitrary because (in the words of my colleague, McLachlin J. at pp. 619-20) "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation" without considering the state interest and the societal concerns which it reflects.
>
> The issue here, then, can be characterized as being whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.

[275] Mr. Justice Binnie and LeBel J. in *Chaoulli* articulated a convenient three-step analysis based on the *Rodriguez* test for arbitrariness:

> (i) What is the "state interest" sought to be protected?
>
> (ii) What is the relationship between the "state interest" thus identified and the [impugned legislation]?
>
> (iii) [Has the rights claimant] established that the [impugned legislation] bears no relation to, or is inconsistent with, the state interest (at para. 235)?

[276] The trial judge in this case did not follow this three-step systematic approach but limited his analysis to whether s. 4(1) was rationally connected to a state interest in protecting individuals from a "reasonable apprehension of harm":

> [152] In my opinion, s. 4(1) of the *CDSA*, which applies to possession for every purpose without discrimination or differentiation in its effect, is arbitrary. In particular it prohibits the management of addiction and its associated risks at Insite. It treats all consumption of controlled substances, whether addictive or not, and whether by an addict or not, in the same manner. Instead of being rationally connected to a reasonable apprehension of harm, the blanket prohibition contributes to the very harm it seeks to prevent. It is inconsistent

> with the state's interest in fostering individual and community health, and preventing death and disease. That is enough to compel the conclusion that s. 4(1), as it applies to Insite, is arbitrary and not in accord with the principles of fundamental justice. If not arbitrary, then by the same analysis, s. 4(1) is grossly disproportionate or overbroad in its application.

[277] The trial judge identified the state interest sought to be protected by s. 4(1) as the "reasonable apprehension of harm". He did so based on Canada's submission that the hard drugs at issue in this case are dangerous to users and society at large, and are linked to organized crime (at para. 148). But collapsing the state interest into this single interest permitted him to find that the law had no rational connection to and was inconsistent with the state interest because it "contributes to the very harm it seeks to prevent." With respect, in my view the state interest sought to be protected by s. 4(1) cannot be reduced to this single focus.

[278] In *Malmo-Levine,* the Supreme Court of Canada considered the appellant's submission that the prohibition against possession of marihuana was arbitrary. The Court identified the state interest in the prohibition of marihuana under the *Narcotic Control Act* (*NCA)* as the "avoidance of harm" by the criminalizing of possession based on the reasonable apprehension of harm to users and potential users, and the harms associated with drug trafficking. This objective, it concluded, was a valid state interest for the purpose of the test for arbitrariness (at para. 136). The Court also concluded, however, that the prohibition of marihuana possession has always had more than one purpose and included the objective of the protection of health and public safety (at paras. 31-34). In reaching that determination, the Court relied upon and accepted Mr. Justice Braidwood's historical review of the purpose of the prohibition against simple possession of a narcotic in *R. v. Malmo-Levine,* 2000 BCCA 335, 145 C.C.C. (3d) 225), where he stated:

> [96] ... The purpose of retaining penal sanctions for simple possession, it seems, had more than one rationale. It was always meant to prevent the harm to society caused by drug addiction, such as the petty thefts that occur to raise funds to buy drugs. The post-1954 laws, however, also contain a larger plan to treat and "cure" drug addicts to eliminate the "market" for drug traffickers in Canada.

[279] The state interests in s. 4(1) of the *CDSA* are comparable to those identified under the *NCA* in *Malmo-Levine* where the history of drug legislation in Canada was reviewed up to the enactment of the *CDSA* (at paras. 31-34). Mr. Justice Braidwood's findings are therefore equally applicable in the circumstances of this case and arguably even more relevant because the prohibited drugs here are more addictive and pose a far greater risk to the state interest in the health and public safety.

[280] In *Malmo-Levine*, there was evidence disputing the health risks posed by marihuana. In this case there was no issue over the very serious health consequences of intravenous drug use. To the contrary, the evidence of the ongoing human tragedy in the DTES is a powerful reminder of the devastating impact these drugs have on health and public safety. Furthermore, the evidence regarding the nature of addiction and the difficult lives of Mr. Wilson and Ms. Tomic speaks directly to the addictive and dangerous nature of the drugs.

[281] At the second stage of the test for arbitrariness, the relationship between the state interest and the impugned law must be identified. In regard to s. 4(1) of the *CDSA*, the extent of the relationship is threefold. First, the prohibition against possession provides an impediment to some individuals who may entertain the notion that they can experiment with the drugs yet avoid the health risks associated with their use. Second, the prohibition attempts to strike at the demand for drugs, which, as with any commercial activity, affects supply. Third, the prohibition attempts to protect both the health of potential drug users and the safety of the public who are affected by drug-related crimes such as petty theft, robbery, and the more violent aspects of organized crime. Recent gang violence in Vancouver provides an example of this latter concern.

[282] It is open to argue, as the trial judge noted, that the link between organized crime and drug trafficking arises because of the criminalization of these drugs. It can also be argued that drug traffickers always will find or create a market for their product. However, these statements, to carry any weight, must be supported by

evidence. In the absence of evidence, they are more in the nature of the "common sense or theory", which was rejected in *Chaoulli* as a basis for finding a s. 7 breach. The reality is that no evidence was provided in this case to demonstrate that Parliament's policy choice to criminalize these drugs, in fact exacerbates the problem it is designed to address.

[283] The issue to be determined at the third stage of the analysis is whether s. 4(1) of the *CDSA* bears no relation to or is inconsistent with the state interest in preventing the harms associated with drug possession, being the health and public safety of its citizens. In my opinion, this is the core of the arbitrariness claim in this case.

[284] Contrary to the assertion of Canada, *Malmo-Levine* is not a complete answer to the issue of whether s. 4(1) is arbitrary. The claim in *Malmo-Levine* failed at the first stage of the analysis when the Court concluded that even a reasonable apprehension of harm could provide the basis for a legitimate state interest. The claim that the impugned legislation was arbitrary could not succeed because on the evidence there was an obvious rational connection between the harms caused by marihuana use and the prohibition against the possession of marihuana.

[285] In this case, there is a valid state interest and a plausible relationship between the state interest and the law. However, at the third stage the respondents successfully asserted before the trial judge that the law increases the risk of harm (or even death) to users of Insite and therefore is arbitrary. This claim was not available to the appellant in *Malmo-Levine*. The central issue here is whether the evidence of harm to the users of Insite is sufficient to demonstrate that the law is *inconsistent* with its purpose, keeping in mind that the burden is on the claimants to establish that s. 4(1) of the *CDSA* has no rational connection, or is inconsistent, with the state interest.

[286] On the question of the efficacy of Insite, the EAC report identified some of the problems with the research on this issue. The trial judge declined to resolve the differing experts' opinions, concluding that there is room for debate about this issue.

Later in his analysis, he found that "users do not use Insite to directly treat their addiction" (at para. 136). All that can be inferred from the trial judge's findings of fact is that s. 4(1), by prohibiting access to safe injection sites, increases the risk of death from overdose and the risk of receiving or transmitting communicable diseases for injection users. This consequence, it may be argued, is seemingly inconsistent with the state interest in the protection of health.

[287] However, if the broader state interest in the health and public safety of all Canadians (not just the intravenous drug users) becomes the focus of the analysis it cannot be said that the evidence supports the conclusion that s. 4(1) of the *CDSA* bears no relation to or is inconsistent with these broader interests, or even that the prohibition as it applies to addicts is not necessary to protect these interests.

[288] The trial judge's analysis on arbitrariness would seem to suggest that if any effect of an impugned law is inconsistent with the state interest, the law itself will be arbitrary. In my opinion, that cannot be the test. If one inconsistent effect of a law could invalidate that law, few laws would be safe from a claim of arbitrariness. To hold otherwise, would require legislatures to ensure that every conceivable effect attributable to a proposed law must advance the state interest or the law could be struck down. Legislators do not have crystal balls. A standard of arbitrariness that stringent would invite courts to second guess legislators' policy decisions on many intractable problems. That is beyond the scope of the court's task.

[289] The trial judge's analysis on this issue is also inconsistent with the reasoning of the six members of the Court in *Chaoulli*. In that case, some of the effects of the Quebec prohibition on private health insurance were inconsistent with the state interest of ensuring universal access to health care. All six judges agreed that the prohibition resulted in many Quebec residents experiencing delays in accessing the public health system. All six judges found that these delays increased the risk of death for some individuals. However, neither the three members in majority nor the three dissenting members concluded that the prohibition was arbitrary for these reasons. All six judges were prepared to accept such an outcome if, overall, the

impugned law advanced the state interest in a quality health care system. It is also noteworthy that the identification of these inconsistent outcomes did not shift the onus to the state to prove that, overall, the law advanced the state interest.

[290] To decide whether, overall, the state interest was advanced by the prohibition on private health insurance, the Court examined a significant amount of evidence on the issue. Extensive evidence was led by all of the parties on whether the prohibition did or did not protect a public health care system. In the result, the majority were not persuaded, based on the evidence, that the prohibition on private health insurance did in fact prevent injury to the public health care system. Their conclusion on this point was rooted in the evidence from other countries that demonstrated public and private systems could co-exist. They were satisfied that because the impugned law increased the risk of death for some individuals without advancing the broader interest of maintaining a quality public health care system, it arbitrarily deprived individuals of their s. 7 interests.

[291] Evidence even marginally comparable to the evidence presented in *Chaoulli* (and indeed in the other s. 7 jurisprudence canvassed in these reasons) simply was not tendered in this case. The fact that the application of s. 4(1) of the *CDSA* to Insite increases the risk of disease and/or death for intravenous drug users establishes the claimants' s.7 interests are engaged. However, there was no evidence presented to show that the blanket prohibition of possession of illegal drugs is not rationally connected to or is inconsistent with the overall state interest in health and public safety. It is not enough to assert, as did the respondent VANDU, that Canada is maintaining a "failed" drug policy or that the problem has not improved despite the long-time blanket prohibition. Such a submission amounts to just "theory" and is insufficient, in the absence of evidence, to establish a breach of a principle of fundamental justice. The burden was on the claimants to prove, on the evidence, that s. 4(1) of the *CDSA* was arbitrary. Given the lack of evidence on that issue, I am not persuaded the burden was met.

[292] The respondents rely on *Parker* in support of their position that s. 4(1) is arbitrary in its application to Insite. Mr. Parker claimed the prohibition against possession of marihuana was arbitrary because he needed marihuana to treat his epilepsy and the law prevented him from obtaining this treatment. The evidence in that case established marihuana was effective treatment for Mr. Parker's illness (at paras. 27-35) and that there was relatively minor harm associated with the use of the drug (at para. 192-196). It was also established that the number of persons that could claim to need marihuana as treatment for an illness was very small and would not likely affect the illicit market for marihuana (at para. 151). Furthermore, the evidence in *Malmo-Levine* showed that marihuana is not addictive, unlike the highly addictive drugs at issue in this case (at para 194).

[293] The trial judge in this case found that the drugs used by Insite's clientele are not used for recreational purposes; they are addictive and physically dangerous; and they do not directly treat the user's illness. The evidence before the trial judge also established that there are more than 12,000 intravenous drug users in Vancouver alone and more than one million injections have occurred at Insite. This evidence factually distinguishes *Parker* from the circumstances in this case.

[294] In summary, the respondents have not established on the evidence that s. 4(1) of the *CDSA* is inconsistent with the overall state interest in health and public safety. While the evidence establishes that an application of the law to Insite could deprive the claimants of their right to life, liberty and security of the person, that fact alone is insufficient to establish the law is arbitrary. While courts cannot abdicate their responsibility to review legislation for *Charter* compliance simply because it involves complex and challenging issues, these issues cannot and should not be decided in the absence of a proper evidentiary basis. In this case, the respondents offered no evidence that the overall effect of s. 4(1) was inconsistent (or even unnecessary) with its purpose to protect the health and public safety of Canadians.

(ii) Disproportionality

[295] The trial judge provided little analysis of the principles of disproportionality and overbreadth. He concluded that s. 4(1) of the *CDSA* did not accord with these principles of fundamental justice for the same reasons that he found it did not accord with the principle of arbitrariness. His comments are contained in para. 152 of his reasons, reproduced above in para. 276.

[296] The principle of disproportionality was discussed in *Malmo-Levine*. The test for disproportionality requires the court to determine whether the impugned law pursues a legitimate state interest, and if so, whether the law is grossly disproportionate to the state interest (at para. 143). The principle does not involve a consideration of the law's penalty, which is dealt with under s. 12 of the *Charter*, but of the broader consequences of the impugned law and whether its effects on the claimants' s. 7 rights are so extreme that they are *per se* disproportionate to the state interest, or whether Canadians would find the effects abhorrent or intolerable when considered in light of the state interest *(Malmo-Levine* at paras. 143, 159 and 169).

[297] As previously noted, the state interest in this case is the protection of health and public safety of all citizens from illegal drugs and their associated harm. This is a legitimate state interest. The effect of the law on the claimants' rights is the increased risk of disease or death from drug use. The question then is whether this risk is grossly disproportionate to the state interest. Again, the respondents provided no evidence to show that Parliament could prevent increased drug use, addiction, and associated crime by something other than a blanket prohibition. In the absence of such evidence, Parliament's rationale for the blanket prohibition, that more individuals would be harmed without the blanket prohibition on the use of illegal drugs, must be taken at face value. In these circumstances it cannot be said the law is grossly disproportionate, or that it causes more harm than it prevents.

(iii) Overbreadth

[298] The principle of overbreadth applies when a law is broader than is necessary to achieve its purpose. It occurs "as a result of a lack of sufficient precision by a legislature in the means used to accomplish an objective": *R. v. Heywood,* [1994] 3 S.C.R. 761 at 792. The question to be asked is whether "those means [are] necessary to achieve the State objective?" (at 792). As with the other principles at issue, this question is for the respondents to answer on the basis of evidence.

[299] In *Heywood,* the Court had to consider a provision of the *Criminal Code* that made it an offence for a person who previously had been found guilty of sexual assault (or various other offences) to be "found loitering in or near a school ground, playground, public park or bathing area." The Court found that the purpose of the law was protection of the safety of children. The conduct of "loitering" was not in and of itself criminal activity. Mr. Justice Cory, writing for the majority, concluded that while a law that deprived an individual of his or her s. 7 liberty interest for the purpose of protecting the safety of children would be in accordance with the principles of fundamental justice, the impugned law restricted the accused's liberty interest more than was necessary to accomplish its purpose. He found the law was overbroad because: 1) its geographic scope was too wide in that it applied to areas where children were not likely to be found; 2) its duration was too long in that it applied for life without review; and 3) the class of persons to whom it applied was too wide because some individuals "caught" by the provision did not represent an ongoing threat to the safety of children.

[300] Thereafter in *R. v. Demers,* 2004 SCC 46, [2004] 2 S.C.R. 489, the Court unanimously struck down a *Criminal Code* regime that applied to accused persons who were found unfit to stand trial, on the grounds that it offended s. 7 for being overbroad. The Court identified the twin goals of the law as the protection of the public and the treatment of the mentally ill accused fairly and appropriately. It concluded that the provisions did not deal fairly and appropriately with the permanently (rather than temporarily) unfit accused because they failed to provide

for an end to the criminal prosecution for those individuals who do not represent a significant threat to public safety as they remain in custody subject to indefinite restrictions on their liberty.

[301] In each of these cases, the application of the law was found to be overbroad because the means employed were determined to be unnecessary to achieve the purposes of the respective laws. The means in *Heywood* involved loitering. In *Demers* they involved an ongoing criminal prosecution for a permanently unfit accused who would never go to trial. In each case, the effectiveness of the means to achieve the purposes of the law was decided on evidence that less expansive means could achieve the same purpose of the impugned law. In both of these cases, the overbreadth and the solution to the overbreadth was a simple factual matter. The same cannot be said of the impugned provision in this case.

[302] The issue in this case is whether a blanket prohibition on the possession of hard drugs is necessary to achieve the state objectives of health and public safety. The question for this Court is whether Parliament could draft the law in such a way as to exempt illegal drug use at safe injection sites while still achieving the same objectives. The answer to this would involve a complex balancing of interests and policy choices—significantly more than what was at issue in *Heywood* and *Demers*. Professor Hogg notes that "the question whether the terms of the law are no broader than is needed to carry out the purpose raises a host of interpretative, policy and empirical questions" (Hogg, *Constitutional Law*). That courts must be cautious about injecting their views on the means by which a legislature chooses to achieve its objectives was expressly noted by Cory J. in *Heywood* at 793:

> In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator.

[303] The respondents, in this case, provided no evidence upon which a court could find that the means employed by Parliament to protect the health and public safety

of all Canadians from such dangerous, addictive and harmful drugs, was overly broad or could be achieved by some alternative and narrower legislative means. In these circumstances it would be mere speculation to conclude that this law could be less broad and still achieve its purpose.

[304] In summary, while the evidence before the trial judge established that the claimants' s. 7 rights to life, liberty and security of the person were engaged by s. 4(1) of the *CDSA,* there was no evidence to establish that the deprivation was arbitrary, disproportionate or overbroad. The burden was on the respondents to show that the law failed to comply with one or more of these three principles of fundamental justice. The lack of evidence to support the alleged failure of the legislation to comply with the principles of fundamental justice made the respondents' legal burden impossible to meet.

[305] Lastly, I must mention the submission by the British Columbia Civil Liberties Association that seeks to establish as a new principle of fundamental justice the reasonable accommodation of individuals with disabilities. In my view, this proposed principle would not satisfy the framework for the identification of principles of fundamental justice set out in *Malmo-Levine* and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* 2004 SCC 4, [2004] 1 S.C.R. 76. Furthermore, s. 15 of the *Charter* provides a remedy for any deprivation that may arise to a member of this class of individuals by reason of his or her "mental or physical disability". I would not accede to this submission.

C. Conclusion

[306] The doctrine of paramountcy is a constitutional doctrine of first recourse in double aspect matters. In my view, the trial judge correctly applied this doctrine in the face of an operational conflict between the supervised injection site program at Insite and s. 4(1) of the *CDSA.* The federal legislation is paramount and renders the provincial activity inoperable.

[307] The trial judge also was correct in finding that the claimants' s. 7 interests of the right to life, liberty and security of the person were engaged by the anticipated expiry of the s. 56 constitutional exemption for the staff and clientele of Insite. However, in my view, the trial judge erred in law in finding that s. 4(1) of the *CDSA* was arbitrary, disproportionate and overbroad and therefore did not accord with the principles of fundamental justice. There was simply no evidence to support that finding in the context of meeting the state's broader interests of health and public safety.

[308] The current harm reduction model employed at Insite cannot stand isolated from the sourcing, distribution and sale in Canada of the illicit drugs used in its facility, by wilfully ignoring the context in which those drugs arrive in the possession of its clientele. This conflicts with Canada's constitutional mandate for criminal law, which includes the control of dangerous and addictive drugs for the health and public safety of its citizens.

[309] In the result, I would allow the appeal of Canada from the order declaring ss. 4(1) and 5(1) of the *CDSA* constitutionally invalid as inconsistent with s. 7 of the *Charter* and dismiss the cross appeals of PHS, VANDU, Mr. Wilson and Ms. Tomic from the order dismissing their application for a declaration that ss. 4(1) and 5(1) of the *CDSA* are inapplicable to Insite based on the doctrine of interjurisdictional immunity.

D. Postscript

[310] Since preparing these reasons I have had the opportunity to review the reasons of Madam Justice Rowles. With respect, I find that I am unable to agree with her conclusions.

The Honourable Madam Justice D. Smith