SCC File No: 35982

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

JOSEPH RYAN LLOYD

APPELLANT
(Respondent)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

-and-

CANADIAN BAR ASSOCIATION, AFRICAN CANADIAN LEGAL CLINIC, PIVOT LEGAL SOCIETY AND UNION OF BRITISH COLUMBIA INDIAN CHIEFS, HIV & AIDS LEGAL CLINIC ONTARIO, CANADIAN HIV/AIDS LEGAL NETWORK, BRITISH COLUMBIA CENTRE FOR EXCELLENCE IN HIV/AIDS, PRISONERS WITH HIV/AIDS SUPPORT ACTION NETWORK, AND CANADIAN ASSOCIATION OF PEOPLE WHO USE DRUGS, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) and WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENERS

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Globally, prisons disproportionately incarcerate people from marginalized communities, who, in turn, are disproportionately affected by conditions such as drug dependence, human immunodeficiency virus ("HIV"), and hepatitis C virus ("HCV").[1] This results, in part, from laws on illegal drugs (including sentencing laws) that *de facto* criminalize and incarcerate many people with drug dependence.

2. Canada is no exception. The majority of prisoners are admitted to prison with current or previous problematic substance use, a significant proportion of them having committed an offence connected to that use. Prevalence of HIV and HCV is also much higher among prisoners than in the population as a whole.

3. Incarceration adversely affects the health of prisoners, particularly those who use drugs and are living with HIV and/or HCV, and the health of the communities to which most ultimately return. Treatment of drug dependence, HIV, and HCV is often inadequate or unavailable in prison. Moreover, conditions of incarceration create greater risk of HIV and HCV transmission in prison. Incarceration puts people who use drugs at increased risk of returning to their communities living with HIV and/or HCV and of fatal overdose following release.

4. Section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*[2] (the "MMS Provision") mandates that the persons to whom it applies serve a one year prison sentence, whatever their health condition. The MMS Provision thereby jeopardizes the health of people who use drugs, particularly those living with HIV and/or HCV, and public health more broadly. These adverse effects unjustifiably infringe the guarantee of security of the person (s. 7) and the protection against cruel and unusual punishment (s. 12) of the *Canadian Charter of Rights and Freedoms*[3] (the "*Charter*"). While causing considerable harm to health, particularly that of marginalized and disadvantaged people, the MMS Provision advances neither health nor public safety, but rather undermines them both.

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[1] World Health Organization, *Declaration: Prison Health as part of Public Health* (2003) [HALCO et al Book of Authorities ("HBA") Tab 33].
[2] SC 1996, c 19 (the "*CDSA*") [*CDSA*].
[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

B. Summary of Context

5. Incarceration is a very common experience for people who use drugs. About four out of five people who are admitted to federal prisons in Canada have a serious substance use problem.[4] Nearly two-thirds of men in federal prisons "reported that they were under the influence of substances during the commission of their offence."[5] Studies of prisoners in federal and provincial prisons in Canada indicate that between 10% and 15% of crimes committed in Canada are causally attributed to illicit drug use, and another 10% to 20% are causally attributed to both alcohol and illicit drug use. Of the drug-related crimes committed by Canadian prisoners (mainly drug trafficking), 24% were causally attributed to intoxication by alcohol or drugs or the need to engage in gainful crimes to sustain dependence.[6]

Incarceration Exacerbates Risks of Infectious Disease Among People Who Use Drugs

6. The prevalence of HIV and HCV in prison populations in Canada is much higher than in the general population. Canadian studies of various prison populations conducted over more than two decades have estimated HIV prevalence among prisoners as ranging from 2% to 8%, at least ten times higher than the estimated prevalence in the population as a whole (and likely even higher than this, as reported infection rates may underestimate HIV infection in prisons), while HCV prevalence among prisoners has been estimated as ranging from 19.2% to 39.8%, at least 20 times higher than the estimated prevalence in the population as a whole.[7] These infection rates are significantly higher for prisoners who inject drugs.[8]

7. A substantial proportion of people with current or prior history of problematic drug use at the time of incarceration use drugs while incarcerated.[9] There is a close relationship between

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[4] Office of the Correctional Investigator, "Annual Report: 2013-2014" (The Correctional Investigator Canada, 2014), at 22 [HBA Tab 27].
[5] *Ibid* at 2 [HBA Tab 27].
[6] K. Pernanen et al, "Proportions of Crimes Associated with Alcohol and Other Drugs in Canada" (Canadian Centre on Substance Abuse 2002), at 8-10 [HBA Tab 21].
[7] S. Chu & R. Elliott, "Clean Switch: The Case for Prison Needle and Syringe Programs in Canada" (Canadian HIV/AIDS Legal Network, 2009) at 1, notes 2, 4, 5 [HBA Tab 30]; Correctional Service Canada, "Infectious Diseases Prevention and Control in Canadian Federal Penitentiaries 2000-01" (Correctional Service of Canada, 2003), at 6, 14 [HBA Tab 17]; S. Skoretz et al, "Hepatitis C Virus Transmission in the Prions/Inmate Population" (2004) 50:16 *Canada Communicable Disease Report* 141 at 142 [HBA Tab 31].
[8] Chu, *ibid* at 1, note 4 [HBA Tab 30]; Correctional Service Canada, *ibid* at 12 [HBA Tab 17].
[9] L. Calzavara et al, "Prior opiate injection and incarceration history predict drug use among inmates," (2003) 98 *Addiction* 1257 at 1257-1258, 1260 [HBA Tab 23].

HIV and HCV infections among prisoners and injection drug use, resulting from (i) the prevalence of HIV and HCV infections among people who inject drugs in the wider community; (ii) the widespread incarceration of people who use drugs (to which the MMS Provision contributes); and (iii) higher risk of infection within prisons (given conditions of detention).[10]

8. Incarceration often disrupts access to health services such as opioid substitution therapy for opioid dependence treatment and always disrupts access to sterile injection equipment available in the community (but currently denied inside Canadian prisons).[11] Incarceration therefore increases the risk of blood-borne and other infections through injection, including through the use of shared, non-sterile equipment, which is endemic in Canadian prisons.[12] A study of an HIV outbreak infection among people who inject drugs in Vancouver's Downtown Eastside estimated that approximately 21% of all HIV infections among that population resulted from in-prison transmission, and that incarceration was associated with 2.74 times higher rates of HIV transmission.[13]

Inadequate Access to Necessary Health Care During Incarceration

9. Another factor explaining negative health outcomes in incarcerated people who use drugs is the disparity between care available to incarcerated versus non-incarcerated populations.

10. For people who use drugs who are also living with HIV, engagement in medical treatment and daily ingestion of antiretroviral therapy ("ART") is crucial.[14] Incarceration can disrupt access and adherence to ART, other HIV-related care, and HCV-related care.[15] The greater number of times a person living with HIV is incarcerated, the less likely that person will maintain adherence to ART.[16] Disruption of ART endangers the health of prisoners living with HIV

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[10] Chu, *supra* note 7 at 1 [HBA Tab 30].
[11] M. Milloy et al, "Incarceration experiences in a cohort of active injection drug users" (2008) 27 *Drug Alcohol Rev* 693 at 695-696 [HBA Tab 25].
[12] *Ibid*.
[13] H. Hagan, "The relevance of attributable risk measures to HIV prevention planning" (2003) 17 *AIDS* 911 at 912 [HBA Tab 18].
[14] M. Milloy et al, "Dose-response Effect of Incarceration Events on Nonadherence to HIV Antiretroviral Therapy Among Injection Drug Users" (2011) 203 *J Infect Dis* 1215 at 1215-1216, 1218-1219 [Milloy, "Dose-response"] [HBA Tab 24].
[15] Milloy, "Dose-response", *ibid* [HBA Tab 24]; P. Webster, "Federal inmates treated for hep C dropped 29%" (October 29, 2015), CMAJ, online: <www.cmaj.ca/site/earlyreleases/29oct15_federal-inmates-treated-for-hep-c-drop-29-percent-cmaj.109-5181.xhtml> [HBA Tab 29].
[16] Milloy, "Dose-response", *supra* note 14 [HBA Tab 24].

because it can result in loss of pharmacological suppression of the virus; resultant resumption of viral replication and disease progression (which also increases the risk of transmission to others); and greater risk of mutation of the virus into treatment-resistant forms. Incarceration may nearly double theses risks.[17]

11. A wealth of research ultimately demonstrates that arrest, transfer to secure custody, incarceration, and transition to release from correctional facilities present substantial barriers to maintaining consistent HIV and HCV care for people who use drugs.[18]

Impacts on Individual and Public Health following Release

12. The negative impacts of incarceration often continue after release.

13. Prisoners who do not receive adequate care during incarceration are more likely to reoffend.[19] People who have used drugs also face a high risk of relapse and fatal overdose in the period following release:

> Transition to the community may be a stressful period marked by emotional distress which can often trigger relapses. Drug overdose is an important and sometimes deadly consequence of relapse, and is especially problematic for the period immediately following release.[20]

14. The adverse health consequences of incarceration for people who use drugs pose broader public health risks, since the vast majority of people who spend time in prison return to their families and communities.[21]

PART II: COALITION'S POSITION ON ISSUES

15. The Coalition[22] intervenes with respect to each of the constitutional questions at issue in

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[17] Milloy, "Dose-response", *ibid* [HBA Tab 24]; M. Milloy et al, "Incarceration of people living with HIV/AIDS: Implications for Treatment-As-Prevention," (2014) 11:3 *Curr HIV/AIDS Rep* 308 at 2-4, 7-8 [HBA Tab 26].
[18] J. Baillargeon et al, "Accessing Antiretroviral Therapy Following Release From Prison" (2009) 301:8 *JAMA* 848 [HBA Tab 20]; Webster, *supra* note 15 [HBA Tab 29]; Affidavit of Amy Wah, affirmed October 14, 2015, para 60 [HALCO et al Motion Record for Leave to Intervene, Tab 2, p 25].
[19] K. Sorensen et al, "Report of the Standing Committee on Public Safety and National Security: Mental Health and Drug and Alcohol Addiction in the Federal Correctional System" (2010), at 1, 22, 69 [HBA Tab 22].
[20] I. Richer & M. Lemelin, "Drug-related Deaths among Recently Released Offenders: A Review of the Literature" (Correctional Service Canada, 2012) [HBA Tab 19].
[21] Canadian HIV/AIDS Legal Network, "Prison Needle and Syringe Programs: Policy Brief" (2012), at 1 [HBA Tab 16].

this appeal. The Coalition submits that the MMS Provision violates ss. 7 and 12 of the *Charter*, and that those violations cannot be justified under s. 1.

PART III: STATEMENT OF ARGUMENT

A. The MMS Provision Breaches Section 7 of the *Charter*

16. The MMS Provision breaches s. 7 of the *Charter* because its application creates a deprivation of the security of the person interest that is not in accordance with principles of fundamental justice.

(i) *Deprivation of Security of the Person*

17. Where a law creates a risk to the health and/or to the lives of the individuals at issue, a deprivation of the right to security of the person is made out. This Court held in *Canada v. PHS Community Services Society* that when a law criminally penalizing the unauthorized possession of controlled substances impedes access to health services and thereby contributes to adverse health consequences (including greater risk of disease and death), it engages the s. 7 security of the person interest.[23]

18. The s. 7 analysis (and the s. 12 analysis, below) must be informed by the principles and purposes enshrined in s. 15 of the *Charter*, which guarantees equal protection and equal benefit of the law without discrimination, including on the basis of disability.[24] Canadian legislatures and courts have long-recognized that drug dependence (including on a controlled substance) is a health issue and constitutes a disability for some purposes at law (e.g., protection against discrimination).[25] People living with drug dependence constitute a disadvantaged group against

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[22] The Coalition consists of the HIV & AIDS Legal Clinic Ontario, the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS, the Prisoners with HIV/AIDS Support Action Network and the Canadian Association of People Who Use Drugs.

[23] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 93, 126, [2011] SCJ No 44, McLachlin CJC [*PHS*] [HBA Tab 1].

[24] *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at paras 112, 115, [1999] SCJ No 47, Lamer CJC [*J.G.*] [HBA Tab 3].

[25] See, for example: *Canadian Human Rights Act*, RSC, 1985, c H-6, s 25, "disability"; *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593, [2010] OJ No 3812 [HBA Tab 4]; *Canada (Human Rights Commission) v Toronto-Dominion Bank*, [1998] 4 FCR 205, [1998] FCJ No 1036 (CA) [HBA Tab 2].

whom the state must not unjustifiably discriminate, yet they disproportionately bear the adverse health consequences of the MMS Provision.[26]

19. The MMS Provision creates risks to the health and lives of the individuals to whom it applies, thereby amounting to a deprivation of security of the person, because:

a. it precludes the sentencing judge from considering the health condition of an individual and the serious health risks that individual faces if imprisoned; and

b. the result is that an individual will necessarily be exposed to imprisonment, thereby increasing the likelihood of a serious health decline and negative health outcomes following release.

(ii) *Deprivation does not Accord with the Principles of Fundamental Justice*

20. The s. 7 violation does not accord with principles of fundamental justice because it is arbitrary, overbroad, and grossly disproportionate.

21. The deprivation is arbitrary because the MMS Provision is not connected to the dual purposes of the *CDSA* or the sentencing regime thereunder: "the protection of both public safety and public health."[27] The MMS Provision does not advance public safety or public health.

22. The empirical evidence is clear: mandatory minimum sentences do not deter crimes, including drug offences, as the Department of Justice Canada's own commissioned review concluded:

> [Mandatory minimum sentences ("MMS")] do not appear to influence drug consumption or drug-related crime in any measurable way. A variety of research methods concludes that treatment-based approaches are more cost effective than lengthy prison terms. MMS are blunt instruments that fail to distinguish between low and high-level, as well as hardcore versus transient drug dealers.[28]

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[26] *J.G.*, *supra* note 24 at paras 112, 115 [HBA Tab 3].
[27] *PHS*, *supra* note 23 at paras 41, 129 [HBA Tab 1]; *CDSA*, *supra* note 2, s 10(1).
[28] T. Gabor & N. Crutcher, "Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities and Justice System Expenditures" (Department of Justice Canada, 2002), at 18 [HBA Tab 32]; *R v Nur*, 2015 SCC 15 at para 114, [2015] SCJ No 15, McLachlin CJC [*Nur*] [Appellant's Book of Authorities ("ABA") Tab 6].

Longer prison sentences may in fact increase recidivism rates, particularly for people at low risk of re-offending.[29]

23. Mandatory minimum sentences for drug offences also undermine the health of individual prisoners and public health more broadly. Incarceration exposes prisoners, particularly those who are living with drug dependence, to increased risks of contracting blood-borne infections, including HIV and HCV. The overall prevalence of these infections therefore eventually increases outside prison as well, particularly among a population that is at greater risk of further activities posing a risk of onward transmission. Prison health is inseparable from public health; mandating incarceration for drug offences exacerbates the risk for both, including contributing to epidemics of HIV and HCV.

24. In his analysis of rational connection under s. 1 of the *Charter*, the trial judge focused on deterrence and denunciation.[30] While these are general sentencing objectives relevant to the sentencing analysis, the MMS Provision is part of the *CDSA*; the *CDSA*'s dual purposes must therefore be paramount in the arbitrariness analysis under s. 7 and in the similar rational connection analysis under s. 1.

25. Even if denunciation and deterrence are relevant objectives to consider, the MMS Provision remains arbitrary. The MMS Provision has no connection to deterrence, as previously described. With respect to denunciation, the reasonably foreseeable applications before this Court involve drug-dependent individuals, who are far less morally blameworthy. The need for denunciation is therefore significantly attenuated, if not eliminated. The MMS Provision also departs from the fundamental sentencing principle of proportionality (as set out in the s. 12 analysis, below) and undermines the principle of rehabilitation, contributing to its arbitrariness. An individual is entitled to a sentencing *process* directed at crafting a proportionate sentence.[31]

26. The MMS Provision is also overbroad in that it goes too far by mandating a minimum prison sentence in instances where penalizing conduct in this manner will not advance public

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[29] D. Bennett et al, "Throwing away the keys: The human and social cost of mandatory minimum sentences" (Pivot Legal Society, 2013) at 22 [ABA Tab 15]; P. Gendreau et al, "The Effects of Prison Sentences on Recidivism" (Public Works and Government Services Canada, 1999) at 1-2, 15-19 [HBA Tab 28].
[30] *R v Lloyd*, 2014 BCPC 11 at para 13, [2014] BCJ No 145, Galati J [HBA Tab 8].
[31] *R v Safarzadeh-Markhali*, 2014 ONCA 627 at paras 81-82, [2014] OJ No 4194, Strathy JA [HBA Tab 13].

health or public safety.[32]

27. Finally, the MMS Provision's effect is grossly disproportionate to its objective, for the reasons set out in the s. 12 analysis, below.

B. The MMS Provision Breaches Section 12 of the *Charter*

28. The MMS Provision breaches s. 12 of the *Charter* because its application precludes the sentencing judge from considering (i) the health consequences of a prison sentence on an individual who is drug-dependent and (ii) the reduced moral blameworthiness of a drug-dependent individual where an offence is connected to that dependence. The MMS Provision therefore leads to grossly disproportionate sentences in reasonably foreseeable applications.

(iii) *General Principles of Sentencing*

29. The fundamental principle of sentencing is proportionality. In order to achieve a proportionate sentence, the sentencing judge must undertake "a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime."[33]

30. The principle of parity and the correctional imperative of sentence individualization must also inform the sentencing process.[34] These dictate that a sentence must be tailored to the personal circumstances of the individual.[35] In applying the principle of parity, a sentencing judge ought to take into account the collateral consequences of a sentence, as these may affect the proportionality analysis.[36]

31. A sentencing judge may properly consider the exacerbation of an individual's medical condition likely to be caused by incarceration.[37] Sentencing courts regularly incorporate such

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[32] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 101, 112, [2013] SCJ No. 72, McLachlin CJC [ABA Tab 1].
[33] *Nur, supra* note 28 at paras 41, 43 [ABA Tab 6].
[34] *R v Pham*, 2013 SCC 15 at para 8, [2013] SCJ No 100, Wagner J [HBA Tab 11].
[35] *Ibid* at para 9 [HBA Tab 11].
[36] *Ibid* at paras 11-14, 19 [HBA Tab 11].
[37] *R v Knoblauch*, 2000 SCC 58 at paras 29 to 32, [2000] SCJ No 59, Arbour J [HBA Tab 7]; *R v Ye*, 2012 ONSC 1278 at para 92-95, [2012] OJ No 1231, Quigley J [*Ye*] [HBA Tab 14].

considerations into the sentencing analysis in order to abide by the sentencing principles of proportionality, parity, and rehabilitation.[38]

(iv) *Application of Sentencing Principles to Reasonably Foreseeable Applications*

32. Drug dependence is a factor in many drug-related offences. Some drug offences captured by the MMS Provision will therefore involve individuals who are drug-dependent (as is the case with the Appellant). Given the higher prevalence of HIV and HCV infection among people who use drugs (particularly among those who are drug-dependent), some of the drug-dependent persons captured by the MMS Provision will inevitably be living with HIV and/or HCV.

33. The s. 12 *Charter* analysis ought therefore to include consideration of a reasonably foreseeable application in which the MMS Provision applies to a drug-dependent person (who may also be living with HIV and/or HCV) who shares drugs with a friend or partner or who, as is not uncommon, engages in small-scale sale of a controlled substance to support his/her own dependence.[39]

34. For the reasonably foreseeable application described, the MMS Provision precludes the sentencing judge from considering an individual's drug dependence, the nature of the offence, and the likely health outcomes of incarceration, thereby breaching the principles of proportionality and parity. The easily foreseeable result is a grossly disproportionate sentence.

35. A drug-dependent person whose dependence is connected to a trafficking offence is less morally blameworthy than a person who is not drug dependent or whose offence is not connected to such dependence:

> The courts have always distinguished between a drug addict who is trafficking for the purpose of supplying his habit and the non-addict who is trafficking purely out of motives of greed.[40]

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[38] See, for example: *R v Kerr*, [2001] OJ No 5085 at paras 15-16, 153 OAC 159 (CA) [HBA Tab 6]; *Ye*, *ibid* at paras 92-95 [HBA Tab 14].

[39] That is, combining the additional characteristics of living with HIV and/or HCV with the reasonably foreseeable application considered by the trial judge; see *R v Lloyd*, 2014 BCPC 8 at paras 21, 48-55, [2014] BCJ No 274, Galati J [*Lloyd*] [HBA Tab 9]; see also Canadian HIV/AIDS Legal Network, "Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses" (2006), at 2-3 [HBA Tab 15].

[40] *R v Mete*, [1980] OJ No 1438 at paras 4-5, Martin JA (CA) [HBA Tab 10]; see also: *R v Smith*, [1987] SCJ No 36 at para 2, [1987] 1 SCR 1045 [ABA Tab 8]; and *R v Andrews*, [2005] OJ No 5708 at paras 36-45 (Sup Ct J) [HBA Tab 5].

The nature of the trafficking offence may also reduce the moral blameworthiness of an individual (e.g., sharing or small-scale dependence-related sale versus large-scale trafficking for profit).[41]

36. With respect to the principle of parity, drug-dependent persons (including those living with HIV and/or HCV) are likely to suffer significant health declines and negative health outcomes during and after imprisonment. As set out in Part I, above, incarceration exposes drug-dependent persons to increased risks of contracting HIV and/or HCV; of overdose; and of inadequate health care and resultant health decline.

C. The Section 7 and Section 12 Violations are not Saved by Section 1 of the *Charter*

37. The Coalition adopts the Appellant's s. 1 arguments, and further submits that, in its impact on health, the MMS Provision violates ss. 7 and 12 of the *Charter* in a manner that cannot be saved under s. 1. As described in the preceding sections, the MMS Provision is not rationally connected to the legislative objectives of the *CDSA*; it is not minimally impairing of those rights; and, finally, its deleterious effects (on both individual and public health) substantially outweigh the (non-existent) benefits claimed by the government.

PART IV: SUBMISSION CONCERNING COSTS

38. The Coalition does not seek costs and asks that no costs be awarded against its members.

PART V: ORDER SOUGHT

39. The Coalition requests permission to make oral submissions for 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON DECEMBER 22, 2015.

per: 

Khalid Janmohamed, Ryan Peck, Richard Elliott
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[41] *Lloyd*, *supra* note 39 at para 51 [HBA Tab 9].

PART VI: TABLE OF AUTHORITIES

CASE LAW

Case	Paragraph(s) Cited
1. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] SCJ No 44	17, 21
Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] SCJ No 72	26
2. *Canada (Human Rights Commission) v Toronto-Dominion Bank*, [1998] 4 FCR 205, [1998] FCJ No 1036 (CA)	18
3. *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, [1999] SCJ No 47	18
4. *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593, [2010] OJ No 3812	18
5. *R v Andrews*, [2005] OJ No 5708 (Sup Ct J)	35
6. *R v Kerr*, [2001] OJ No 5085, 153 OAC 159 (CA)	31
7. *R v Knoblauch*, 2000 SCC 58, [2000] SCJ No 59	31
8. *R v Lloyd*, 2014 BCPC 11, [2014] BCJ No 145	24
9. *R v Lloyd*, 2014 BCPC 8, [2014] BCJ No 274	33, 35
10. *R v Mete*, [1980] OJ No 1438 (CA)	35
R v Nur, 2015 SCC 15, [2015] SCJ No 15	22, 29
11. *R v Pham*, 2013 SCC 15, [2013] SCJ No 100	30
12. *R v Proulx*, 2000 SCC 5, [2000] SCJ No 6	/
13. *R v Safarzadeh-Markhali*, 2014 ONCA 627, [2014] OJ No 4194	25
R v Smith, [1987] SCJ No 36, [1987] 1 SCR 1045	35
14. *R v Ye*, 2012 ONSC 1278, [2012] OJ No 1231	31

SECONDARY AUTHORITIES

Authority	**Paragraph(s) Cited**
15. Canadian HIV/AIDS Legal Network, "Mandatory Minimum Sentences for Drug Offences: Why Everyone Loses" (2006)	33
16. Canadian HIV/AIDS Legal Network, "Prison Needle and Syringe Programs: Policy Brief" (2012)	14
17. Correctional Service Canada, "Infectious Diseases Prevention and Control in Canadian Federal Penitentiaries 2000-01" (Correctional Service of Canada, 2003)	6
D. Bennett et al, "Throwing away the keys: The human and social cost of mandatory minimum sentences" (Pivot Legal Society, 2013)	22
18. H. Hagan, "The relevance of attributable risk measures to HIV prevention planning" (2003) 17 *AIDS* 911	8
19. I. Richer & M. Lemelin, "Drug-related Deaths among Recently Released Offenders: A Review of the Literature" (Correctional Service Canada, 2012)	13
20. J. Baillargeon et al, "Accessing Antiretroviral Therapy Following Release From Prison" (2009) 301:8 *JAMA* 848	11
21. K. Pernanen et al, "Proportions of Crimes Associated with Alcohol and Other Drugs in Canada" (Canadian Centre on Substance Abuse 2002)	5
22. K. Sorensen et al, "Report of the Standing Committee on Public Safety and National Security: Mental Health and Drug and Alcohol Addiction in the Federal Correctional System" (2010)	13
23. L. Calzavara et al, "Prior opiate injection and incarceration history predict drug use among inmates," (2003) 98 *Addiction* 1257	7
24. M. Milloy et al, "Dose-response Effect of Incarceration Events on Nonadherence to HIV Antiretroviral Therapy Among Injection Drug Users" (2011) 203 *J Infect Dis* 1215	10

Authority	**Paragraph(s) Cited**
25. M. Milloy et al, "Incarceration experiences in a cohort of active injection drug users" (2008) 27 *Drug Alcohol Rev* 693	8
26. M. Milloy et al, "Incarceration of people living with HIV/AIDS: Implications for Treatment-As-Prevention," (2014) 11:3 *Curr HIV/AIDS Rep* 308	10
27. Office of the Correctional Investigator, "Annual Report: 2013-2014" (The Correctional Investigator Canada, 2014)	5
28. P. Gendreau et al, "The Effects of Prison Sentences on Recidivism" (Public Works and Government Services Canada, 1999)	22
29. P. Webster, "Federal inmates treated for hep C dropped 29%" (October 29, 2015), CMAJ	10, 11
30. S. Chu & R. Elliott, "Clean Switch: The Case for Prison Needle and Syringe Programs in Canada" (Canadian HIV/AIDS Legal Network, 2009)	6, 7
31. S. Skoretz et al, "Hepatitis C Virus Transmission in the Prions/Inmate Population" (2004) 50:16 *Canada Communicable Disease Report* 141	6
32. T. Gabor & N. Crutcher, "Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities and Justice System Expenditures" (Department of Justice Canada, 2002)	22
33. World Health Organization, *Declaration: Prison Health as part of Public Health* (2003)	1

PART VII: LEGISLATION

CANADIAN CHARTER OF RIGHTS AND FREEDOMS – PART I OF THE *CONSTITUTION ACT, 1982*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

CANADIAN HUMAN RIGHTS ACT, RSC, 1985, c H-6

Definitions

25. In this Act,

…

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug;

…

25. Les définitions qui suivent s'appliquent à la présente loi.

«déficience» Déficience physique ou mentale, qu'elle soit présente ou passée, y compris le défigurement ainsi que la dépendance, présente ou passée, envers l'alcool ou la drogue.

…

***CONTROLLED DRUGS AND SUBSTANCES ACT*, SC 1996, C 19**

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.

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

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

(*a*) subject to paragraph (*a.1*), if 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, and

(i) to a minimum punishment of imprisonment for a term of one year if

(A) the person committed the offence for the benefit of, at the direction of or in association with a criminal organization, as defined in subsection 467.1(1) of the *Criminal Code*,

(B) the person used or threatened to use violence in committing the offence,

(C) the person carried, used or threatened to use a weapon in committing the offence, or

(D) the person was convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence, within the previous 10 years, or

Purpose of sentencing

10. (1) Without restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.