Federal Court Cour fédérale

**Date: 20260226**

**Docket: T-1365-24**

**Citation: 2026 FC 268**



**Ottawa, Ontario, February 26, 2026**

**PRESENT: Madam Justice Conroy**

**BETWEEN:**

**MATSQUI-ABBOTSFORD IMPACT SOCIETY, VANCOUVER, BC NETWORK OF DRUG USERS, WESTERN ABORIGINAL HARM REDUCTION SOCIETY, BRITISH COLUMBIA ASSOCIATION OF PEOPLE ON OPIATE MAINTENANCE, KNOWLEDGING ALL NATIONS AND DEVELOPING UNITY SOCIETY, PARENTS ADVOCATING COLLECTIVELY FOR KIN, COALITION OF PEERS DISMANTLING THE DRUG WAR SOCIETY, COALITION OF SUBSTANCE USERS OF THE NORTH SOCIETY, NANAIMO AREA NETWORK OF DRUG USERS SOCIETY, EAST KOOTENAY NETWORK & SOCIETY OF PEOPLE WHO USE DRUGS, SURREY UNION OF DRUG USERS, SOLID OUTREACH SOCIETY AND SNOW SOCIETY FOR NARCOTIC AND OPIOID WELLNESS**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF HEALTH OF BRITISH COLUMBIA**

**Respondents**

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# JUDGMENT AND REASONS

## I. Introduction

[1] This judicial review arises in the context of the toxic illegal drug crisis in British Columbia [BC].

[2] The parties agree that the illegal drug poisoning crisis is tragic and devastating. In 2016, the BC Provincial Health Officer declared a public health emergency due to rising deaths resulting from the toxic illegal drug supply. By 2024, more than 14,000 British Columbians had lost their lives due to toxic drugs.

[3] The Province of British Columbia [Provincial Government or Province] has implemented several public health measures in response. One of these measures was a pilot project to decriminalize the possession of small amounts of opioids, cocaine, methamphetamine and MDMA, in most locations in BC [Decriminalization Pilot].

[4] The legal mechanism used to authorize the Decriminalization Pilot was an exemption issued by the federal Minister of Mental Health and Addictions [Federal Minister] pursuant to s. 56(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*].

[5] BC is the first and only province to pursue the decriminalization of controlled substances in support of broader harm reduction objectives. The Respondents, the Attorney General of

Canada [Federal Respondent] and the Minister of Health of British Columbia [Provincial Minister or Provincial Respondent], underline that the Decriminalization Pilot was intended to be one of many tools within a larger comprehensive approach to address the crisis.



[6] After a trial period of 18 months, the Provincial Minister asked the Federal Minister for significant changes to the original s. 56(1) exemption. The requested changes would, in effect, recriminalize personal possession in most locations in BC. This request followed what the Provincial Minister described as significant public outcry and concerns expressed by municipalities, police and others about public drug use and related public safety issues.

[7] On May 7, 2024, in response to the provincial request, the Federal Minister amended the s. 56(1) exemption, significantly curtailing drug decriminalization in BC [Decision]. The present application for judicial review challenges this Decision.

[8] The Applicants in this proceeding are a coalition of non-profit organizations representing a diverse range of people who use drugs [PWUD] and people with lived and living experience of substance use and homelessness, including Indigenous and other racialized people, across BC.

[9] The Applicants ask the Court to set aside the Decision. They argue that the Decision is unreasonable, including for failing to proportionately balance the rights of PWUD protected by the *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], under sections 7, 8, 9, 12 and

15. They further argue that the manner in which the Federal Minister reached the Decision was unfair.

[10] For the reasons that follow, I conclude that the Decision is *Charter* compliant, and that the Applicants have not established that the Decision was unreasonable or the process leading to it unfair. The judicial review is dismissed.

## II. Summary of Substantive Issues

[11] This case comes to the Court by way of a judicial review, not a trial. A court's role on judicial review is to ensure that decisions made by public actors, such as the Federal Minister, are lawful and fair. The Court's role here is not to decide the merits of decriminalizing controlled substances. As aptly explained by Justice Zinn of this Court, "courts serve as guardians of legality, not arbiters of the wisdom of policy": *Universal Ostrich Farms Inc. v Canada (Food Inspection Agency)*, 2025 FC 878 [*Universal Ostrich FC*] at para 79, aff'd *Universal Ostrich Farms Inc. v Canada (Food Inspection Agency)*, 2025 FCA 147, leave to appeal to SCC refused, 2025 CanLII 113895 (SCC) [*Universal Ostrich FCA*].

[12] The Applicants submit that the Decision was unlawful and rendered in a manner that was not procedurally fair.

[13] A public decision will not be lawful if it runs afoul of the *Charter*. Decisions made by the Federal Minister under s. 56(1) of the *CDSA* must comply with the *Charter*.

[14] I conclude that the Decision is *Charter* compliant.

[15] The bulk of the parties' constitutional arguments focused on s. 7 of the *Charter* which protects the right to life, liberty and security of the person. However, s. 7 "does not promise that the state will never interfere with a person's life, liberty or security of the person — laws do this all the time": *Carter v. Canada (Attorney General),* 2015 SCC 5 [*Carter*] at para 71. Rather, it guarantees that the state will not deprive individuals of their s. 7 interests in a way that violates the principles of fundamental justice. "The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty, or security of the person must meet": *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*] at para 94.

[16] Accordingly, to demonstrate a violation of s. 7, the Applicants must show that the Decision interferes with, or deprives individuals of their life, liberty or security of the person. Once this is established, then it must be shown that the deprivation in question is not in accordance with the principles of fundamental justice.

[17] The record shows that restricting the locations where individuals are allowed to possess controlled substances may lead PWUD to consume in isolated or private settings. This practice heightens the risk of death from toxic drugs, as it hinders the timely detection and reversal of overdoses. The Decision therefore impacts the right to life guaranteed by s. 7. The Decision also impacts the liberty interests protected by s. 7 of the *Charter*. It recriminalizes personal possession in most public spaces in BC which introduces a risk of imprisonment which did not exist during the 18-month trial period from January 2023 to May 7, 2024.

[18] While the Decision results in the deprivation of interests protected by s. 7 of the *Charter*, I conclude that it does so in accordance with the principles of fundamental justice. Principles of fundamental justice demand that a law which interferes with s. 7 rights not be arbitrary, overbroad or grossly disproportionate to the law's objective.



[19] The Decision was not arbitrary. One of the objectives of the CDSA is public safety. The Decision sought to return tools to law enforcement to address public safety concerns arising from public drug use. Additionally, the following prevent the impacts on the s. 7 *Charter* interests from being grossly disproportionate or overbroad:

1. The Decision continues to allow personal possession of controlled substances in certain places, including where unhoused people are legally sheltering, and in provincially designated health clinics, including overdose prevention sites [OPS] and supervised consumption sites [SCS];

2. The Evidence-based Diversion Measures in Part I.1 of the *CDSA*;

3. Subsections 4.1(2) and (3) of the CDSA which provide some legal protection from possession charges for those experiencing or witnessing an overdose who seek medical or law enforcement assistance;

4. The Public Prosecution Service of Canada's Guideline urging prosecutorial restraint in most cases of simple possession; and

5. The training of law enforcement to limit arrests and limit the seizure of controlled substances in most cases involving personal possession.

Accordingly, the Decision complies with the principles of fundamental justice and thus does not violate s. 7 of the *Charter*.

[20] I further conclude that the Decision does not violate s. 15 (equality rights), and does not engage the other *Charter* rights raised by the Applicants: s. 8 (search and seizure), s. 9 (arbitrary detention) or s. 12 (cruel and unusual punishment).

[21] Alternatively - considering the constitutional issues under the *Charter* values framework first set out in *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*] - I conclude that the Decision proportionately balances the *Charter* rights of PWUD with the statutory objectives of the *CDSA*.

[22] The Applicants also challenge the Decision as unreasonable on non-constitutional grounds.

[23] Jurisprudence provides guidance on what is meant by “reasonable” in the context of a judicial review. When assessing a decision for reasonableness courts must respect Parliament’s choice to assign decision-making power to administrative actors. Here, Parliament has assigned the Federal Minister the power to decide whether to grant exemptions under s. 56(1) and on what terms. Respect for Parliament’s choice means that in reviewing a decision under s. 56(1) the court does not re-weigh the evidence or ask how they themselves would have resolved an issue: *Pepa v Canada (Citizenship and Immigration)*, 2025 SCC 21 at para 48; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*] at para 83.

[24] Crucially, however, a reasonableness review is not a “rubber-stamping” exercise meant to shelter the Federal Minister from accountability for her Decision: *Vavilov* at para 13. Rather, the Court’s role here is to conduct a robust review the Decision, in light of the administrative context and the material that was before the Minister. A reasonable decision is one that is internally coherent and is transparent, intelligible, and justified in relation to the facts and law that constrain the decision: *Vavilov* at paras 85, 95-96, 99-101, 105.

[25] Having considered the extensive material before the Federal Minister, who Parliament endowed with broad discretion for policy decisions under s. 56(1) of the *CDSA*, I find that it was open to her to come to the conclusions she did. While the Applicants have cogently articulated their reasons for disagreeing with the Decision, they have not established that the Decision was unreasonable on the basis of the legal principles that govern judicial reviews.

[26] Finally, I am unable to conclude that the Decision was reached in a manner that breached procedural fairness. While public policy experts may opine on the Decision to significantly curtail decriminalization in the absence of engaging the Applicants and others representing PWUD, the jurisprudence does not support the Court’s intervention on this basis. The scope of the duty of procedural fairness for the Decision - which is a legislative or policy decision - is limited to the procedural requirements set out in the *CDSA*. The *CDSA* does not mandate the Federal Minister consult before issuing an exemption under s. 56(1).

## III. Material Facts Leading to this Judicial Review

### A. *The Toxic Drug Crisis*

[27] It is common ground among the parties that BC is in the midst of a drug poisoning crisis and has been for many years.

[28] A provincial public health emergency was declared in 2016 due to rising deaths caused by the toxic illegal drug supply. In response to the public health emergency, the Provincial Government undertook a series of public health measures targeted at the drug crisis. Some of these measures are listed below:

a. Harm reduction services including take-home Naloxone, harm reduction supplies, drug checking services, OPS and SCS's;

b. Medication-assisted treatment services providing expanded access to medications for substance use disorders;

c. An increase in treatment and recovery services, both community-based and bed-based;

d. Injectable opioid agonist treatment [OAT];

e. Prescribed safer supply programs and policies aimed at increasing pharmaceutical alternatives to illicit drugs;

f. Mental health and substance use supports; and

g. Community outreach programs for people at risk of overdose.

[29] In addition to the above, and central to this proceeding, is a pilot project to decriminalize possession in BC. BC is the first and only province in Canada to pursue the decriminalization of illegal substances in response to what is described by the Provincial Respondent as “an unprecedented and devastating public health and public safety challenge” arising from toxic drugs.

[30] To this end, the Provincial Government established a “decriminalization team,” with a dedicated Core Planning Table [CPT], tasked with informing the development of a Decriminalization Pilot. The CPT is a working group, and not a decision-making body. It is comprised of key stakeholders and is intended to provide “cross-sectoral feedback… on policy development, implementation, and evaluation activities related to decriminalization.”

[31] Several of the Applicants in this proceeding are members of the CPT.

[32] Between July 2021 and January 2024, the CPT met on a monthly basis, and on a quarterly basis thereafter. Up until about early 2024, the Provincial Government worked closely with the CPT in developing and implementing the Decriminalization Pilot.

B. *Legislative and Policy Landscape*

[33] At the centre of this case is the *CDSA*. The *CDSA* has dual objectives – the protection of public health and the protection of public safety: *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [*PHS*] at paras 41 and 129.

[34] With certain exceptions, the *CDSA* makes the possession of illegal drugs a criminal offence. Subsection 4(1) of the *CDSA* criminalizes the possession of controlled substances listed in Schedules I through III to the Act.

[35] Section 56(1) of the *CDSA* allows the Federal Minister to grant exemptions from any provision in the legislation, including s. 4(1), the possession offence. Section 56(1) reads as follows:

| **Exemption by Minister** | **Exemption par le ministre** |
|---|---|
| **56 (1)** The Minister may, on any terms and conditions that the Minister considers necessary, exempt from the application of all or any of the provisions of this Act or the regulations any person or class of persons or any controlled substance or precursor or any class of either of them if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest. | **56 (1)** S'il estime que des raisons d'intérêt public, notamment des raisons médicales ou scientifiques, le justifient, le ministre peut, aux conditions qu'il estime nécessaires, soustraire à l'application de tout ou partie de la présente loi ou de ses règlements toute personne ou catégorie de personnes, ou toute substance désignée ou tout précurseur, ou toute catégorie de ceux-ci. |

[36] At issue in this application is the Federal Minister's exercise of her discretion under s. 56(1) to recriminalize personal possession in most locations in BC.

[37] Subsections 4.1(2) and (3) of the *CDSA* also provide some legal protection from possession charges for those experiencing or witnessing an overdose who seek medical or law enforcement assistance. These provisions were added to the *CDSA* in 2017 following Parliament's adoption of the *Good Samaritan Drug Overdose Act*, SC 2017, c 4 [*Good Samaritan Act*]. Subsections 4.1(2) and (3) provide:

| | |
|---|---|
| **Exemption — medical emergency** | **Exemption — urgence médicale** |
| **4.1(2)** No person who seeks emergency medical or law enforcement assistance because that person, or another person, is suffering from a medical emergency is to be charged or convicted of an offence under subsection 4(1) if the evidence in support of that offence was obtained or discovered as a result of that person having sought assistance or having remained at the scene. | **4.1 (2)** La personne qui demande, de toute urgence, l'intervention de professionnels de la santé ou d'agents d'application de la loi parce qu'elle-même ou une autre personne est victime d'une urgence médicale ne peut être accusée, ni être déclarée coupable, d'une infraction prévue au paragraphe 4(1) si la preuve à l'appui de cette infraction a été obtenue ou recueillie du fait de la demande de secours ou de sa présence sur les lieux. |
| **Exemption — persons at the scene** | **Exemption — personnes sur les lieux** |
| **(3)** The exemption under subsection (2) also applies to any person, including the person suffering from the medical emergency, who is at the scene on the arrival of the | **(3)** L'exemption prévue au paragraphe (2) s'applique aussi à toute personne qui se trouve sur les lieux à l'arrivée des professionnels de la santé ou des agents d'application de |

| | |
|---|---|
| emergency medical or law enforcement assistance. | la loi, y compris la personne victime de l'urgence médicale. |

[38] Part I.1 of the *CDSA*, titled "Evidence-based Diversion Measures" also reflects the public health objective of the legislation. This Part of the *CDSA* addresses the enforcement of the possession prohibition in cases of problematic substance use and came into force in 2022. The relevant provisions state:

| | |
|---|---|
| **Declaration of principles** | **Déclaration de principes** |
| **10.1** The following principles apply in this Part: | **10.1** Les principes ci-après s'appliquent à la présente partie : |
| **(a)** problematic substance use should be addressed primarily as a health and social issue; | **a)** la consommation problématique de substances doit être abordée principalement comme un enjeu social et de santé; |
| **(b)** interventions should be founded on evidence-based best practices and should aim to protect the health, dignity and human rights of individuals who use drugs and to reduce harm to those individuals, their families and their communities; | **b)** les interventions doivent reposer sur des pratiques exemplaires fondées sur des données probantes et viser à protéger la santé, la dignité et les droits de la personne des consommateurs de drogues ainsi qu'à réduire les méfaits pour ceux-ci, leurs familles et leurs collectivités; |
| **(c)** criminal sanctions imposed in respect of the possession of drugs for personal use can increase the stigma associated with drug use and are not | **c)** l'infliction de sanctions pénales pour la possession de drogues à des fins de consommation personnelle peut accroître la stigmatisation liée à la |

consistent with established public health evidence;

consommation de drogues et est incompatible avec les données probantes établies en matière de santé publique;

**(d)** interventions should address the root causes of problematic substance use, including by encouraging measures such as education, treatment, aftercare, rehabilitation and social reintegration; and

**d)** les interventions doivent cibler les causes profondes de la consommation problématique de substances, notamment en favorisant des mesures comme l'éducation, le traitement, le suivi, la réadaptation et la réintégration sociale;

**(e)** judicial resources are more appropriately used in relation to offences that pose a risk to public safety.

**e)** l'utilisation de ressources judiciaires est plus indiquée dans le cas des infractions qui présentent un risque pour la sécurité publique.

**Warnings and referrals**

**Avertissements et renvois**

**10.2 (1)** A peace officer shall, instead of laying an information against an individual alleged to have committed an offence under subsection 4(1), consider whether it would be preferable, having regard to the principles set out in section 10.1, to take no further action, to warn the individual or, with the consent of the individual, to refer the individual to a program or to an agency or other service provider in the community that may assist the individual.

**10.2 (1)** L'agent de la paix évalue s'il est préférable, compte tenu des principes énoncés à l'article 10.1, plutôt que de déposer une dénonciation contre l'individu à qui est imputée une infraction prévue au paragraphe 4(1), de ne prendre aucune mesure, de lui donner un avertissement ou de le renvoyer, s'il y consent, à un programme ou à un organisme ou à un autre fournisseur de services dans la collectivité susceptibles de l'aider.

| | |
|---|---|
| **Subsequent charges not invalidated** | **Validité des accusations** |
| **(2)** The failure of a peace officer to consider the options set out in subsection (1) does not invalidate any subsequent charges laid against the individual for the offence. | **(2)** L'omission par l'agent de la paix de se conformer au paragraphe (1) n'a pas pour effet d'invalider les accusations portées ultérieurement contre l'individu pour l'infraction en cause. |
| **Prosecution — limits** | **Poursuites — limites** |
| **10.3** A prosecution may be commenced or continued against an individual alleged to have committed an offence under subsection 4(1) only if, having regard to the principles set out in section 10.1, the prosecutor is of the opinion that the use of a warning or referral under section 10.2, or of alternative measures as defined in section 716 of the Criminal Code, is not appropriate, and a prosecution is appropriate in the circumstances. | **10.3** Une poursuite contre l'individu à qui est imputée une infraction prévue au paragraphe 4(1) ne peut être engagée ou continuée que dans les cas où, compte tenu des principes énoncés à l'article 10.1, le poursuivant est d'avis que le recours à l'avertissement ou au renvoi visés à l'article 10.2 ou encore aux mesures de rechange au sens de l'article 716 du Code criminel ne sont pas opportuns, mais que la poursuite l'est dans les circonstances. |



[39] In addition, the Public Prosecution Service of Canada issued a Guideline in August, 2020 urging prosecutorial restraint in cases of simple possession under s. 4(1) of the *CDSA* [PPSC Guideline].[1] The PPSC Guideline recognizes "the well-documented realities about the health impact of substance use while acknowledging that certain drug use may present particular public safety concerns, particularly when associated with other criminal conduct."

[1] 5.13 *Prosecution of Possession of Controlled Substances Contrary to s. 4(1) of the Controlled Drugs and Substances Act*.

[40] It sets out three “Applicable Principles” for prosecutors, the first of which is that “[r]esort to a criminal prosecution of the possession of a controlled substance contrary to s. 4(1) of the *CDSA* should generally be reserved for the most serious manifestations of the offence.” The second principle states that, “[i]n all instances, alternatives to prosecutions should be considered unless they are inadequate to address the concerns related to the conduct…” The third principle sets out “areas of concern will generally be considered to be the most serious manifestations of the harms justifying a criminal prosecution response.”



C. *The Original Exemption*

[41] In the autumn of 2021, the Provincial Government made a request to the Federal Minister to grant an exemption under s. 56(1) of the *CDSA*. The exemption requested would decriminalize personal possession of small quantities of certain controlled substances across the province.

[42] In its request, the Province outlined the actions taken in response to the illicit drug poisoning crisis, including, amongst others, the “rapid scale-up” of access to medication-assisted treatments and prescribed safer supply, expanded access to OPS and SCS’s and improvements in treatment and recovery. It said that these measures were “undermined by the continued criminalization of illicit substance use under …[the CDSA]. Criminalization of simple possession remains a significant impediment to [the Province’s] ability to implement a comprehensive public health response to the illicit drug poisoning crisis.” (Applicant’s Record [AR] at pdf 74, Exhibit C to the Affidavit of Brittany Maple, affirmed August 6, 2024 [Second Maple Affidavit]). The provincial request explained:

> Criminalization and associated stigmatization for substance use have a significant and negative impact on the social environment and wellbeing of people who use drugs by contributing to self-stigma, social isolation, lack of economic opportunity, reduced access to health and social services, and societal exclusion, all leading to increased vulnerability to substance use harms including illicit drug toxicity-related poisoning events and deaths. As part of a comprehensive strategy to save lives, this [decriminalization] framework and policy seeks to address criminalization as a social determinant of health, reducing harms caused by criminalization and removing structural barriers to support for people who use drugs and who are at high risk of drug poisoning death.

(AR at pdf 86, Exhibit C to the Second Maple Affidavit.)



[43] The request also referenced evidence that criminalization does little to deter illicit substance use (AR at pdf 78, Exhibit C of Second Maple Affidavit). The request cited a poll showing 66% public support for decriminalization, as well as support from several BC municipalities, the Canadian Association of Chiefs of Police, the First Nations Health Authority, the Health Officers Council of BC, Health Canada's Expert Task Force on Substance Use as well as organizations that represent PWUD.

[44] Between November 2021 and May 2022, the Province worked with Health Canada to address policy and implementation questions, and to refine the s. 56(1) exemption application.

[45] On May 31, 2022, the Federal Minister granted the exemption, effective for a period of three years, from January 31, 2023 to January 31, 2026 [Original Exemption].

[46] The Original Exemption provided that "adults within the province of British Columbia are…exempt from the application of s. 4(1) of the CDSA if they are in possession of an illegal

substance …or any combination of such illegal substances, up to a maximum cumulative quantity of 2.5 grams." The "illegal substances" covered by the exemption are opioids, cocaine, methamphetamine and MDMA.



[47] In effect, the Original Exemption decriminalized possession of small amounts of opioids, cocaine, methamphetamine and MDMA in BC, with limited exceptions. The exceptions where possession was still illegal were as follows:

1) on K-12 School premises;

2) on child care facility premises;

3) in airports;

4) on Canadian Coast Guard vessels or in Canadian Coast Guard helicopters;

5) to a Canadian Armed Forces member who is subject to the Code of Service Discipline;

6) in a motor vehicle that is driven or operated by a minor, whether or not the vehicle is in motion; and

7) in a watercraft that is operated by a minor, whether or not the watercraft is in motion.

[48] Included in the Original Exemption letter is a section entitled "Suspension or Revocation," where it is stated that "[t]his exemption may be suspended without prior notice if the [Federal] Minister determines that such suspension is necessary to protect public health or

public safety. The Minister may revoke the exemption if the [Federal] Minister is of the opinion that it is no longer necessary."

[49] Accompanying the Original Exemption was the Federal Minister's Letter of Requirements for the Province [LoR] (AR at pdf 1309-1319, Exhibit B to the Affidavit of Chris Van Veen [Van Veen Affidavit]). The LoR states that the Original Exemption is "one of the many tools that can be considered as a part of a multi-faceted approach to stem the tide of the [overdose] crisis." It lays out details further to the commitments made by the Provincial Government to support the successful implementation of the exemption. Specifically, the Province made certain commitments with respect to:

1) The expansion of "alternative measures," such as harm reduction services, health and social services, and addiction treatment services;

2) Meaningful and ongoing engagement with partners and stakeholder groups;

3) Communications and public education to raise awareness of the Original Exemption and what it means;

4) Indigenous engagement via the "Indigenous Consultation Approach and Plan" submitted to Health Canada;

5) Improving the readiness and capacity of health and social systems;

6) Improving law enforcement readiness to support law enforcement in applying the Original Exemption; and

7) Leading ongoing oversight, monitoring and evaluation of the Original Exemption, including monitoring progress towards objectives, intended outcomes, unintended

> consequences, risks, and risk mitigation strategies. This includes providing monthly updates to Health Canada during the "pre-implementation period," so that the federal and provincial governments "may collectively respond to any unintended consequences in a timely manner."

D. *First Amendment to the Original Exemption*

[50] Following the implementation of the Original Exemption, the Provincial Government monitored its effects closely, as required by the LoR.

[51] The Certified Tribunal Record [CTR] indicates that the Province received feedback from law enforcement agencies, local governments, and community members concerned with the Original Exemption's effect on the public consumption of drugs. By July 4, 2023, the British Columbia Association of Municipal Chiefs of Police and the British Columbia Association of Chiefs of Police wrote a letter to the Province's health ministers to express such concerns, noting that "a significant number of individuals, business leaders, community groups, city councils, and front line police officers from throughout British Columbia have voiced a substantial amount of concern surrounding the potential health effects of public consumption including the negative impact of increased public disorder and threats to public safety"(CTR at 305). The letter further notes that municipalities had reached the point of trying to take the situation into their own hands, resulting in a patchwork of municipal by-laws.

[52] The Provincial Minister asked the Federal Minister to amend the Original Exemption in an apparent effort to address these concerns. On September 18, 2023, the Federal Minister

granted the request to amend the Original Exemption [First Amendment] (AR at pdf 1321, Exhibit C to the Van Veen Affidavit).

[53] The First Amendment expanded the list of exceptions from the Original Exemption. Effectively, it re-criminalized the possession of all controlled substances in the following locations:

1) within 15 metres of any part of any play structure in a playground;

2) within 15 metres of a spray pool or wading pool; and

3) within 15 metres of a skate park.

[54] The CPT and Indigenous groups were consulted by the Provincial Government in advance of the First Amendment. The Province noted "[r]easonably broad support" for the First Amendment (CTR at 438-440).

E. *BC Public Consumption Act*

[55] At the same time that it sought the First Amendment, the Provincial Government developed Bill 34, the *Restricting Public Consumption of Illegal Substances Act* [*BC Public Consumption Act*]. The Provincial Respondent states that the *BC Public Consumption Act* attempted to regulate the public locations where illegal substances could and could not be consumed. It sought to provide law enforcement with additional tools to effectively respond to reports of inappropriate public consumption.

[56] On November 9, 2023, the Harm Reduction Nurses Association filed a constitutional challenge to the *BC Public Consumption Act* with the British Columbia Supreme Court [BCSC]. On December 29, 2023, then-Chief Justice Hinkson granted an interim injunction staying the effect of the Act: see *Harm Reduction Nurses Association v British Columbia (Attorney General)*, 2023 BCSC 2290 [*Harm Reduction Nurses*]. The injunction was extended on consent several times.

[57] Municipalities reacted quickly to the injunction, voicing their support for the *BC Public Consumption Act* and expressing their desire for an appeal. The Provincial Government's application for leave to appeal the injunction was dismissed on March 1, 2024: *British Columbia (Attorney General) v Harm Reduction Nurses Association*, 2024 BCCA 87.

[58] While the *BC Public Consumption Act* received Royal Assent on November 8, 2023, the Act never came into force and has since been repealed.

F. *Second Amendment (Decision under Review)*

(1) Provincial Request for Second Amendment

[59] In light of the constitutional challenge to the *BC Public Consumption Act*, the Province sought to achieve its aims through s. 56(1) of the *CDSA* by way of a second amendment to the exemption [Second Amendment].

[60] By letter dated April 26, 2024, the Province made its request to the Federal Minister for a further amendment to the s. 56(1) exemption [April 2024 Request]. The April 2024 Request stated that the Province had continued to "hear feedback from partners in the health sector, law enforcement, local government and more," and that it had "become clear that [they could not] wait for the [BC Public Consumption Act] litigation to resolve in order to ensure police have the tools they need to ensure public safety" (CTR at 79).

[61] The April 2024 Request asked for a further amendment to the s. 56(1) exemption "to expand the exceptions to include all public places, including a place to which the public has access … and on public transit." The Province also clarified in its request that it wished for the exemption to continue to apply to "private residences, healthcare clinics that provide outpatient addictions services…sanctioned overdose prevention sites, including those operated by housing providers, as well as drug checking sites and to people lawfully sheltering overnight."

[62] The April 2024 Request further noted that the Province was "working with police on guidance to ensure that people who merely possess drugs but are not threatening public safety, their own safety or causing a disturbance, will not be subject to arrest or charge."

[63] The April 2024 Request closed by stating that, while addiction is "a health issue and not a criminal justice one," at the same time, "communities have to be safe and welcoming for everyone."

(2) Federal – Provincial Information Exchange

[64] On May 1, 2024, Health Canada asked the Province for further information to support the assessment of the April 2024 Request. The requested information included:

1) the Province's rationale for the Second Amendment, including data on harms and risks associated with possession and public use, evidence of impacts and unintended consequences;

2) clarity on how this approach would be distinct from the response to personal possession in the rest of Canada after the passing of Bill C-5 [which amended the CDSA to include Part I.1] and the updated PPSC Guideline;

3) the Province's rationale for maintaining the exemption for private residences, given existing legal protections from law enforcement entering such residences and concerns about overdosing in private residences;

4) confirmation of the operational aspects of any Second Amendment, including definitions for the locations where the exemption would continue to apply; and

5) an explanation of why the scope of the Second Amendment would be different from the BC Public Consumption Act, and clarity on the Province's implementation plan in line with the key themes outlined in the LoR.

[65] The provincial and federal health departments exchanged several emails on May 1, 2024, and the Province provided Health Canada with a copy of the *Harm Reduction Nurses* court

decision, and some of documents filed with the BCSC and the British Columbia Court of Appeal [BCCA] in relation to the constitutional challenge to the *BC Public Consumption Act*.

[66] On May 1, 2024, Health Canada also prepared a memorandum for the Federal Minister concerning the April 2024 Request. The memorandum outlines the relevant background and recommends that once the additional information requested is received, Health Canada would prepare "a decision-making package to support the Federal Minister in making an informed decision" (CTR at 4).

[67] On May 3, 2024, the Province submitted its response to the federal government's information request [May 3 Response]. The thrust of the May 3 Response is that community stakeholders, including municipal governments, police, health system partners, and community members, have raised concerns about public drug use, and have requested additional tools to manage this challenge. The Province substantiated its reported feedback with several letters it received from various stakeholders.

[68] Included in the May 3 Response is a letter from the British Columbia Association of Chiefs of Police and the British Columbia Association of Municipal Chiefs addressed directly to the Federal Minister expressing BC law enforcement's concerns about the public consumption of illicit drugs following the implementation of the Original Exemption in January 2023. The letter asserted that "[i]t is evident that overdose deaths increased in public spaces in the wake of decriminalization." Finally, it urges the federal government to work with the Province and grant the amendment sought in the April 2024 Request (CTR at 308).

[69] Similarly, the May 3 Response includes a letter to BC Premier David Eby from the Union of BC Municipalities, expressing concerns with the "public use of hard drugs" since decriminalization took effect. The letter stated that to "maintain community-level acceptance of the larger projects of decriminalization and the destigmatization of drug addiction, … meaningful and prompt action must be taken to address the public safety concerns of many community members about preserving important public spaces while balancing the need to provide drug users with safe means of consumption and access to harm reduction and other needed health services." It stated that the April 2024 Request to restrict the scope of the s. 56(1) exemption would be "an important step in achieving that goal …" (CTR at 334).

[70] The May 3 Response also included a chart of proposed definitions and rationales for the locations where the Province sought to maintain the exemption from s. 4(1).

(3) Information before the Federal Minister

[71] Having received the requested information from the Province, Health Canada prepared and delivered its decision-making package for the Federal Minister on May 6, 2024 [May 6 Package]. The following were included in the May 6 Package:

1) a second Health Canada memorandum to the Federal Minister;

2) a copy of the April 2024 Request and the May 3 Response (Appendix A);

3) documents summarizing substance use trends and responses in BC from roughly 2016 - September 2023 (Appendices B1 and B2);

4) a summary of the risks and considerations for the proposed Second Amendment (Appendix C) [Risks and Considerations Document];

5) an overview of the alternatives to criminal penalties (Appendix D);

6) a backgrounder on the Province's response to public drug use concerns (Appendix E);

7) an overview of the guidance the Provincial Government intends to deliver to law enforcement with respect to the exercise of their discretion to arrest for possession of controlled substances, should the April 2024 Request be granted (Appendix F);

8) an overview of the data received from the Province as required by the LoR (Appendix H);

9) Other documents including: the report to the federal government on CPT member feedback from 2023 on the First Amendment; a March 2024 report by the BC Auditor General on the toxic drug crisis, Stakeholder responses, including letters and press releases, including a letter from the Harm Reduction Nurses Association to the Federal Minister expressing concerns about the potential termination of the Decriminalization Pilot (Appendix I);

10) a draft of the s. 56(1) exemption letter for a second amendment to the Original Exemption, if granted (Appendices J1 and J2);

11) a table analyzing the rationale, considerations and approach to maintaining certain areas where the exemption would continue to apply (Appendix K); and

12) a draft of the revised Letter of Requirements (Appendix L).

[72] Health Canada's memorandum to the Federal Minister acknowledges that the April 2024 Request, if granted, would create "functionally a new exemption where ss4(1) of the CDSA (possession) remains in force and the exceptions are now the locations where possession […] would not be subject to criminal charges" (CTR at 544). Under the Original Exemption, personal possession was generally allowed, with limited exceptions in certain locations. Under the proposed second amendment, personal possession would generally be prohibited, with limited exceptions in certain locations where possession would be allowed.



[73] The memorandum reviews, *inter alia*, the relevant public health considerations including the potential harms that could arise from the proposal:

> There are public health risks to the approach being proposed by BC that should be considered. By broadly excluding public places from the exemption, people experiencing housing insecurity would have few places to use drugs without fear of criminalization. Although access to supervised consumption spaces has expanded, further access is needed and many spaces do not yet allow for inhalation, which is increasingly becoming the more common mode of consumption … . Should this request be granted, people may be more likely to use substances alone…In this context, there is a risk that the [requested] amendment could drive more people to use alone in the places where overdoses are least likely to be promptly reversed, resulting in more harm and deaths.

(CTR at 547.)

[74] The Risks and Considerations Document also recognizes that a risk of granting the requested second amendment is "[n]ecessitating risky use behaviours among already vulnerable populations," but notes as a mitigating factor BC's "ongoing commitment to a public health approach," including plans to "expand OAT [opioid agonist therapy] and other treatments" (CTR at 399-400).

[75] In response to law enforcement's assertion that they lack the power to intervene in many cases of public drug use that pose a risk to public safety, Health Canada notes that it was initially advised (presumably during the discussions leading to the Original Exemption) that police could use tools outside of the *CDSA* framework such as public disorder, public intoxication, trespassing and littering laws if needed to address problematic public drug use. Health Canada states that "it is not clear why these provisions are proving insufficient" (CTR at 396-397).

[76] The same document explicitly discusses the need to balance public health and public safety, noting that the April 2024 Request "focuses primarily on public safety concerns, without discussion of the public health objectives of the original exemption" (CTR at 400). In response to this concern, the document contemplates that "[f]or further assurance the [Federal] Minister could grant the request with a revised Letter of Requirements, setting out measures to be taken by BC to continue to support the public health and public safety objectives of the exemption."

[77] The May 6 Package summarized the data on the effectiveness of decriminalization under the Original Exemption. It stated that "[a]s of November 2023, health outcomes and drug toxicity indicators remain stable since decriminalization," and "[t]he number of paramedic-attended opioid overdose events remains high," while "[a]verage fentanyl concentrations in street-level samples remains unchanged" (CTR at 140).

[78] Further data before the Federal Minister shows that the number of suspected unregulated drug deaths in 2023 was "the highest number ever recorded in a calendar year, 7% higher than the number of deaths in 2022" (CTR at 383).

[79] Included in the May 6 Package was a letter from the Harm Reduction Nurses Association, dated April 24, 2024, to the Federal Minister expressing concern about misinformation about the Decriminalization Pilot. The letter states that "[d]ecriminalization is not driving public drug use – lack of housing and safer use spaces and the volatility of the drug supply is." It advocates for "safer consumption spaces, housing, alternatives to the unregulated supply, and access on demand to voluntary regulated treatment services" and that "anything short of that will not decrease public drug consumption, it will only make it more dangerous for people who are at risk of dying" (CTR at 495).

[80] Also on May 6, 2024, some of the CPT members wrote a letter to the Federal Minister and other federal officials expressing their concern about the April 2024 Request. The signatories to this letter state that "criminalization of public consumption will only lead to more violence, misery, and death," and that they were "deeply concerned by the increasing use of political rhetoric that seeks to misinform the public, dehumanize drug users, and delegitimize programs that PWUD depend on to survive" (AR at pdf 1289, Exhibit A to the Affidavit of Garth Mullins). This letter also notes that the Provincial Government did not consult with the CPT about the April 2024 Request.

[81] The Federal Minister did not respond to the CPT letter, and it was not included in the CTR, so it is assumed she did not see the letter.

(4) Second Amendment Granted

[82] On May 7, 2024, the Federal Minister issued a second amendment to the Original Exemption ["Second Amendment" or "Decision"], along with a new Letter of Requirements [New LoR]. The Second Amendment states as follows:

> This exemption is granted in consideration of the following:
>
> - substance use harms are first and foremost a health and social issue and should be treated as such except in exceptional cases where public safety risks are present;
> - the Controlled Drugs and Substances Act (CDSA) has a dual purpose to protect public health and maintain public safety;
> - the province of British Columbia has requested that the exemption granted under subsection 56(1) of the CDSA be amended due to concerns about widespread use of controlled substances in public spaces; and
> - part of achieving a balance between public health and public safety is ensuring law enforcement has the tools needed to address issues of public safety while continuing to take a public health approach to addressing substance use harms.

[83] The New LoR recognizes "the public safety concerns that [the Province], stakeholders and members of the public in BC have raised," and goes on to state that this "new exemption gives law enforcement additional tools to address public safety concerns related to public drug use when they arise." It states that it is "essential for us to strengthen complementary initiatives to address the social determinants of health, as set out in the original Letter of Requirements in May 2022," as they "are critical to saving lives and supporting people in their journey to treatment and recovery" (CTR at 535).

[84] Like the original LoR, the New LoR recognizes that the exemption was not made in isolation, but as part of a comprehensive public health approach to address the toxic drug crisis and addressed other facets of the public health response to the crisis that need to be expanded. The New LoR also underlines the need to "immediately develop, on a priority basis, clear guidance and training for law enforcement that will support law enforcement to consider alternative measures in instances of personal possession." The New LoR maintains the requirement for continuing evaluation and monitoring by the Province and ongoing frequent reports to Health Canada.



## IV. Evidentiary Issues

[85] The Respondents each bring their own motion to strike certain of the Applicants' affidavits, in whole or in part.

[86] The Federal Respondent's motion seeks to strike the following:

1. The entirety of the affidavit affirmed by Kali-olt Lawrence Rufus-Sedgemore on August 16, 2024 [Rufus-Sedgemore Affidavit];
2. The entirety of the affidavit affirmed by Anmol Swaich on August 16, 2024 [Swaich Affidavit]; and
3. Paragraphs 2-3, 5, 8-9, and Exhibits A, B, D, G and H of the Second Maple Affidavit.

[87] By a separate motion, the Provincial Respondent seeks to strike the same evidence as the Federal Respondent. In addition, it seeks to strike the last sentences of paragraphs 8(e)-(f), 13(c) and 17(c) in the first Affidavit Brittany Maple affirmed August 6, 2024 [First Maple Affidavit].

[88] The evidence that the Respondents seek to strike is collectively referenced as the "Impugned Evidence."

[89] The Respondents submit that the Impugned Evidence is inadmissible because it does not form part of the record that was before the Federal Minister, nor does it fall within any of the exceptions to the rule against extrinsic evidence in judicial reviews identified in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*]. They further argue that the usual rule prohibiting new evidence on judicial review is not displaced where constitutional issues are raised.

[90] Additionally, the Respondents assert that the Impugned Evidence contains impermissible hearsay and that the Rufus-Sedgemore Affidavit and Swaich Affidavit contain impermissible arguments and opinion evidence.

[91] The Applicants acknowledge that much of the Impugned Evidence is substantively uncontroversial and was within the knowledge of the Federal Minister at the relevant time. The Applicants explain, at paragraph 19 of their written submissions on the evidentiary motion:

> Much of the Impugned Evidence goes directly to contextualizing a concern noted directly—and repeatedly—in the Certified Tribunal Record. Namely, the concern that "Canada is dealing with compounding social crises (e.g. poverty, housing, mental health)

> and novel harm reduction interventions tend to be targeted by the media and the public as scapegoats for such social issues (e.g., housing, mental health)."

[92] The Applicants assert that the Impugned Evidence meets all three exceptions recognized in *Access Copyright*.

[93] First, they submit that the evidence provides general background on the impact of the Decision on *Charter* rights and situates the Federal Minister's Decision in the context of her previous decisions to grant the Original Exemption and First Amendment: *Access Copyright* at para 20(c). They say that *Charter* issues should not be decided in a factual vacuum.

[94] Second, the Applicants argue that the Impugned Evidence serves to highlight procedural defects in the Decision, namely that the Federal Minister "rubber-stamped" the April 2024 Request, failed to consult CPT members and Indigenous peoples, and made her Decision based on stigma and stereotypes: *Access Copyright* at para 20(b).

[95] Third, the Applicants contend that the Impugned Evidence highlights the absence of evidence before the Federal Minister when she made the Decision: *Access Copyright* at para 20(c).

A. *Scope of Admissibility: Constitutional vs Non-constitutional issues*

[96] Evidence on judicial review is generally limited to the evidence that was before the decision-maker below. The *Access Copyright* case recognized three non-exhaustive exceptions to

this general rule. Evidence extrinsic to the record before the administrative decision-maker will be admissible in a judicial review where:

1) it is general background information;

2) it brings procedural defects to light, and

3) it serves to demonstrate a complete lack of evidence before the administrative decision-maker.



[97] The parties agree, as do I, that in considering the non-constitutional issues, the Impugned Evidence will be admissible if it falls under one of the three exceptions set out in *Access Copyright*.

[98] There is disagreement however about the evidentiary rules that apply to the constitutional issues.

[99] The Respondents argue that the usual evidentiary limits in judicial review apply to the constitutional issues, relying on *Air Canada Pilots Association v Air Canada*, 2023 FC 138 at para 38 [*Air Canada*], *Landau v Canada (Attorney General)*, 2022 FCA 12 at para 11 [*Landau*] and *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 [*Forest Ethics*] at paras 40-46.

[100] The Applicants take issue with the imposition of the usual evidentiary rules in judicial review where constitutional issues arise. They point out that they had no opportunity to put evidence before the Federal Minister in advance of the Decision, and jurisprudence has long

cautioned against deciding constitutional issues in a factual vacuum. They argue that the question of the engagement of *Charter* rights is assessed on a correctness standard and does not depend on the circumstances of the particular case, citing *Toth v Canada (Mental Health and Addictions)*, 2025 FCA 119 at para 18 [*Toth FCA*].

[101] I find the Applicants' arguments persuasive. While not cited by the Applicants, there are a number of cases from this Court that support the proposition that greater flexibility in the admission of evidence in a judicial review is called for where constitutional issues are raised: *Englobe Environment Inc v Canada*, 2023 FC 1676 at para 16; *Slepcsik v Canada (Citizenship and Immigration)*, 2025 FC 1840 at para 83; *State Farm Mutual Automobile Insurance Company v Privacy Commissioner of Canada*, 2010 FC 736 at para 54; *Native Council of Nova Scotia v Canada (Attorney General*), 2011 FC 72 at paras 20–24; *City of Medicine Hat v Canada (Attorney General)*, 2019 CanLII 31004 (FC) at para 30.

[102] In considering the *Charter* issues, a more flexible approach is called for, particularly where the applicants had no opportunity to contribute to the administrative decision-maker's record. Unlike in *Landau*, *Forest Ethics* and *Air Canada*, (the cases relied on by the Federal Respondent), which were judicial reviews of tribunal decisions, the Applicants here did not have an opportunity to participate in the process that led to the Second Amendment. They had no opportunity to put evidence relevant to the *Charter* issues on the record.

[103] In summary, the usual evidentiary rules, as articulated in *Access Copyright*, apply to the non-constitutional grounds raised in this judicial review, while a more flexible approach applies when considering the constitutional grounds.

[104] I will first address the admissibility of evidence under the non-constitutional issues under the *Access Copyright* framework and then turn to the admissibility of the Impugned Evidence for the purposes of the constitutional issues.



B. *Admissibility: Non-constitutional issues*

[105] For the purposes of determining the admissibility of the Impugned Evidence for the non-constitutional issues, the question is whether it meets any of the exceptions recognized in *Access Copyright*. The issues of hearsay, expert versus lay opinion evidence, and impermissible argument do not become relevant unless it is determined that the evidence is admissible.

[106] I agree with the Respondents that none of the Impugned Evidence is admissible for the purposes of the non-constitutional issues as none of it falls within the *Access Copyright* exceptions.

[107] I will ground my analysis of each affidavit in the use that the Applicants make of it in their written submissions. The purpose for which the evidence is relied upon will help elucidate whether it in fact meets the *Access Copyright* exceptions.

[108] I note at the outset that none of the Impugned Evidence falls under the second *Access Copyright* exception of highlighting procedural defects that cannot be found in the record. The Applicants' written submissions on procedural fairness never actually rely on any of the Impugned Evidence. Their procedural fairness arguments are grounded in the fact that the Federal Minister made the Decision on an expedited timeline and did not consult the members of the CPT or others who represent the interests of PWUD. The facts underlying these allegations are already present in the CTR and none of the Impugned Evidence is required to make out this argument – indeed, the Applicants never cite the Impugned Evidence when arguing these points.



[109] The evidence is also of no assistance to the Applicants' argument that the Decision was based on stigma and stereotypes. Evidence of a broad, societal perceptions of PWUD laden with stigma and stereotype does not lead to the conclusion that the Federal Minister herself carried such views.

(a) *The Rufus-Sedgemore Affidavit*

[110] Kali-olt Lawrence Rufus-Sedgemore is the executive director of one of the Applicant organizations, Coalition of Peers Dismantling the Drug War, based in Vancouver's Downtown East Side. Amongst other things, this organization runs an afterhours OPS. Rufus-Sedgemore is a member of Namgis First Nation with lived experience of drug use and homelessness as a teenager. Their affidavit speaks to their experience as an Indigenous PWUD and the stigma associated with their drug use. Much of the latter half of the affidavit clearly strays into opinion, citing case law and various studies and reports on the disproportionate risk Indigenous people face with respect to drug poisoning death, incarceration and houselessness, as well as Indigenous

overrepresentation in the child welfare system and systemic discrimination in the healthcare system.

[111] The Applicants rely on the Rufus-Sedgemore Affidavit to argue that Indigenous people are overrepresented among: (1) PWUD; (2) those who are unhoused; and (3) those who die from toxic drugs. It is also relied on to establish that criminalizing public possession increases the risk of death from unregulated drugs and therefore infringes the right to life.

[112] In considering the exceptions in *Access Copyright*, the Rufus-Sedgemore Affidavit cannot be said to "highlight the complete absence of evidence" in the record, because the foregoing propositions already arise from the CTR. Health Canada's May 6 Package explicitly recognizes that, by criminalizing possession in public spaces, the Second Amendment may increase the risk of death and overdose-related harms by necessitating more drug use in private or isolated spaces. The same package recognizes the risk of further stigmatizing PWUD and the higher risk of recriminalizing Indigenous and unhoused PWUD. Finally, the Original Exemption itself states that it is being granted in consideration of the fact "Indigenous and racialized communities have been and are disproportionately impacted by the overdose crisis." Further, there is no dispute amongst the parties that Indigenous and unhoused people are disproportionately impacted by the overdose crisis.

[113] Any additional detail the Rufus-Sedgemore Affidavit adds to the non-constitutional issues, in my view, risks "varying or supplementing" the evidence that was before the Federal Minister and invites the Court to form its own views on the factual merits contrary to the

demarcation of roles between a reviewing court and an administrative decision-maker: *Delios v Canada (Attorney General)*, 2015 FCA 117 at paras 49-52 [*Delios*].

[114] Moreover, the Rufus-Sedgemore Affidavit does not provide "general background," as it goes further than simply summarizing "the history and nature of the case that was before the administrative decision-maker" in a neutral and uncontroversial way; instead, I find that it "provide[s] evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Delios* at paras 45-46.

[115] For the purposes of the non-constitutional issues, the Rufus-Sedgemore Affidavit is inadmissible as it does not fall under the *Access Copyright* exceptions.

(b) *The Swaich Affadivit*

[116] Anmol Swaich is a community organizer for the Surrey Union of Drug Users, one of the Applicants. In her role she facilitates weekly meetings, including meetings conducted in Punjabi and Hindi, and gathers knowledge about the experiences of PWUD in Surrey, BC. The Swaich Affidavit speaks generally to the following:

- the nature and purpose of the Surrey Union of Drug Users organization;
- the disproportionate number of drug poisoning deaths among the South Asian population in Surrey;
- the lack of publicly accessible safe consumption sites in Surrey;
- Surrey's demographics including houseless numbers;

- the assertion that the combination of criminalization and lack of safe consumption sites forces PWUD to use drugs in isolated places, increasing the risk of death and other physical harms.



[117] The Applicants rely on the Swaich Affidavit to argue that there remains a profound unmet need for OPS and SCS's, and that marginalized PWUD are more likely to use drugs in isolated locations, increasing their risk of death by unreversed overdose.

[118] Again, the CTR shows that Health Canada made the Federal Minister aware of the increased risk of death the Second Amendment may cause to PWUD, and the Original Exemption recognizes the disproportionate impact of the drug overdose crisis on racialized PWUD. Furthermore, the May 6 Package also speaks to the availability of OPS/SCS, noting that although access to these sites has expanded, it is not yet universal in BC and many spaces do not allow for inhalation, an increasingly preferred form of drug consumption. As with the Rufus-Sedgemore Affidavit, it cannot be said that the Swaich Affidavit highlights a complete absence of evidence before the Federal Minister.

[119] For the same reasons as my conclusion regarding the Rufus-Sedgemore Affidavit, the Swaich Affidavit cannot be characterized as providing "general background." It supplements the evidence already on the record and invites the Court to make further findings of fact that go directly to the merits of the matter.

[120] Accordingly, the Swaich Affidavit does not fall under any of the *Access Copyright* exceptions and is inadmissible for the purposes of the non-constitutional issues.

(c) *The Second Maple Affidavit*

[121] I begin by noting that the Applicants primarily rely on Exhibit C in the Second Maple Affidavit, which is a public document dated October 2021, outlining the Province's request for the Original Exemption. This is a true example of "general background," and it is not challenged by the Respondents.

[122] The Respondents challenge the portions of the Second Maple Affidavit which attach articles and news releases about the number of lives lost in BC due to the toxic drug crisis, and a 2023 report on homeless counts in BC.

[123] The Applicants rely on this evidence in their summary of facts and the description of the drug poisoning crisis.

[124] I note that the CTR reflects that the Federal Minister had before her data on the substance use landscape and trends in BC, including the number of suspected deaths arising from unregulated drugs. Similarly, the May 6 Package contained several documents discussing the increase in houselessness across BC. Again, the matters to which the Impugned Evidence speak are already present in the CTR, and it cannot be said the record before the Federal Minister suffered from a "complete absence of evidence" on these issues**.**

[125] The impugned portions of the Second Maple Affidavit cannot be characterized as providing "general background." They improperly supplement the evidence already on the record.

[126] Accordingly, for the purposes of the non-constitutional issues, the impugned portions of the Second Maple Affidavit are inadmissible.

(d) *The First Maple Affidavit*

[127] The vast majority of the First Maple Affidavit is entirely unobjectionable as it provides general background on the Applicant organizations. The Applicants say the purpose of this affidavit was to support their standing to bring these proceedings, which, in the end, neither Respondent contested.

[128] Nevertheless, the Provincial Respondent is concerned with four statements in the First Maple Affidavit:

1) the statement that there is an increased risk of death when stimulants are contaminated with opioids like fentanyl (the last sentence of paragraph 8(e);

2) the statement that some PWUD's preferred mode of substance use, smoking, is prohibited in most OPS's at paragraph 8(f);

3) the statement in paragraph 13(c), that members of the Nanaimo Area Network of Drug Users Society (an Applicant) experience stigmatization, homelessness, and the criminalization of their health condition; and

4) that one of the Applicant organizations, the Snow Society for Narcotic and Opioid Wellness, was forced to close and relocate its OPS in Dawson Creek due to opposition from the municipality and public backlash at paragraph 17(c).



[129] I would agree that these statements, like the remainder of the Impugned Evidence, either support the findings already made by Health Canada, as reflected in the CTR, or seek to vary or supplement them in a manner found impermissible in *Delios*. I therefore find these statements inadmissible for the purposes of the non-constitutional issues.

(e) *Conclusion on Impugned Evidence – Non-constitutional Issues*

[130] None of the Impugned Evidence is admissible for the purposes of the non-constitutional issues. To summarize, none of the Impugned Evidence falls under an *Access Copyright* exception for new evidence. The Applicants' procedural fairness arguments do not rely in any way on the Impugned Evidence. The Applicants use the Impugned Evidence to argue in favour of findings already made by Health Canada, as reflected in the CTR, or otherwise to supplement or vary these findings in a manner which urges the Court to venture beyond its role on judicial review and infringe on the fact-finder's domain.

C. *Admissibility: Constitutional Issues*

[131] Evidence that speaks to the affiants' relevant first-hand experience and observations arising from their roles in the Applicant organizations is admissible in considering the

constitutional issues. Accordingly, the following portions of the Impugned Evidence fall into this category, and are **admissible**:

a. Rufus-Sedgemore Affidavit, paragraphs 1 - 42, 48, 49, 57, 59, 60, 74, and 82-86;

b. Swaich Affidavit, paragraphs 1 - 9, 14, 24, 26(a) and (b); and

c. First Maple Affidavit, paragraphs 8(f), 13(c) and 17(c).



[132] In admitting the above evidence, I acknowledge that the line between observations arising from first-hand experience and inadmissible opinion can be blurry at times, particularly for witnesses with lived experience of drug use, homelessness and Indigeneity, such as Rufus-Sedgemore.

[133] For the purpose of considering the constitutional issues, I also find a number of exhibits that benefit from the public records exception to the hearsay rule to be admissible.

[134] Public records may be admissible "because of their inherent reliability or trustworthiness and because of the inconvenience of requiring public officials to be present in court to prove them": *R. v P. (A.)*, 1996 CanLII 871 (ONCA). To be admissible under this exception, the records must meet four criteria:

> (a) the document must have been made by a public official, that is a person on whom a duty had been imposed by the public;
>
> (b) the public official must have made the document in the discharge of a public duty or function;
>
> (c) the document must have been made with the intention that it serve as a permanent record, and

(d) the document must be publicly available

(*R. v Caesar*, 2016 ONCA 599 at para 38.)

[135] To the extent that the commentary in the affidavits related to exhibits that benefit from the public records exemption is not argument or opinion, it is also admissible. Where it is not possible to untangle the opinion or argument from the commentary in the affidavit about the exhibit, the commentary is not admissible. Accordingly, the following portions of the Impugned Evidence are **admissible** pursuant to the public records exception to the hearsay rule:

a. Rufus-Sedgemore Affidavit, paragraphs 45 and 52, last two sentences of paragraphs 53 a., 58, 76, and 87 – 90 and Exhibits A, C, D, H, L, Q, R, S and T;

b. Swaich Affidavit, paragraphs 13, 15, 16, and 25 and Exhibits C, D, E, G, and K; and

c. Second Maple Affidavit, paragraphs 2, 3, 5, and 8 and Exhibits A, B, D, and G.

[136] However, the affidavits in question attach a number of academic articles and other reports that do not fall within the public document hearsay exception. All of the affiants were presented as lay witnesses, not experts. None of the Impugned Evidence conformed to Rule 52.2, governing expert evidence, nor did the affiants meet the requirements that experts be impartial, independent and unbiased: *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at para 32. Academic articles tendered for the truth of their content constitute inadmissible hearsay when adduced through a lay affiant: *Canada (Privacy Commissioner) v Facebook, Inc*, 2021 FC 599 at paras 33-36. Likewise, commentary on these reports is

inadmissible. Accordingly, the following paragraphs and exhibits are **inadmissible**, including for the purposes of determining the constitutional issues:

a. Rufus-Sedgemore Affidavit, paragraphs 46, 53 (except the last two sentences of para 53 a.), 55, 63-65, 70 and Exhibits B, E, F, G[2], I, J, K, N, O, P

b. Swaich Affidavit, paragraphs 17-23, and 30-31, and Exhibits F, H, I, J, M and N;

c. Second Maple Affidavit, paragraph 9 and Exhibit H.



[137] In addition, the Rufus-Sedgemore Affidavit attaches and discusses three articles that they co-authored (Exhibits F, O and P). As previously noted, Rufus-Sedgemore's Affidavit did not comply with Rule 52.2. nor are they impartial, independent and unbiased and therefore cannot be considered an expert. Academic articles must be entered through expert witnesses. Thus, Exhibits F, O and P are **inadmissible** as is their related commentary in paragraphs 53 c., 71, and 72.

[138] The following evidence strays beyond facts within the personal knowledge of the affiants and instead contains impermissible argument and opinion evidence and is therefore **inadmissible**:

a. Rufus-Sedgemore Affidavit paragraphs 43, 44, 46, 47, 50, 53 (except the last two sentences of para 53(a)), 57, 61-63, 67-70, 73, 75, 78, 79 and 81;

[2] The cover page of this report indicates it a Department of Justice document, but a note on title page states, "[t]he views expressed in this report are those of the authors and do not necessarily represent the views of the Department of Justice Canada or the Government of Canada." It is therefore not apparent that the author created the document "in the discharge of a public duty or function", one of the criteria for the public documents exception to hearsay.

b. Swaich Affidavit, paragraphs 26(c), 27 – 29, 32 and 33; and

c. First Maple Affidavit, the last sentence of paragraph 8(e).

[139] Finally, I find the following evidence **inadmissible** for the purposes of the constitutional issues**:**

- Paragraphs 51, 56, and 69 of the Rufus-Sedgemore Affidavit reference jurisprudence and contain opinion evidence;
- Paragraph 54 of the Rufus-Sedgemore Affidavit provides commentary on a report contained in the CTR. While such statements may be suitable in counsel's written submissions, it is not appropriate to include in an affidavit;
- Exhibit M to the Rufus-Sedgemore Affidavit is a report by the Federal Housing Advocate, titled "Upholding dignity and human rights: the Federal Housing Advocate's review of homeless encampments." Its relevance to the proceeding is not apparent and does not stand for the proposition set out in paragraph 67 of the affidavit, where the report is referenced; and
- Paragraphs 10 and 11 and the related Exhibits A and B to the Swaich Affidavit consist of an exchange of correspondence between the Surrey Union of Drug Users and the BC Minister of Public Safety regarding the *BC Public Consumption Act*. This evidence is not relevant to the present proceeding.

[140] Having determined the preliminary evidentiary issues, I now turn to the substantive grounds for judicial review.

## V. Substantive Issues

[141] The Applicants argue that the Second Amendment ought to be set aside on the basis of the following:

1. It disproportionately limits the *Charter* rights of PWUD, namely the rights protected by sections 7, 8, 9, 12 and 15;
2. Apart from the *Charter* issues, the Decision is unreasonable; and
3. The Federal Minister breached her duty of procedural fairness.

[142] As explained in the section below, the Respondents take issue with the Applicants' framing of the *Charter* issues. The Respondents argue that the Second Amendment was a legislative decision, not an administrative decision and therefore the *Charter* issues must be considered under the framework set out in *R v Oakes,* 1986 CanLII 46 (SCC) [*Oakes*], not the *Charter* values framework set out in *Doré*.

[143] Accordingly, under the first section below, I address the threshold question of the nature of the Decision (legislative or administrative) and then consider the *Charter* issues under the applicable framework. Finally, I address the non-constitutional grounds for review.

### A. *Charter Issues*

[144] There is no dispute that the Federal Minister's discretion under s. 56(1) of the *CDSA* is constrained by the *Charter*: *PHS* at para 153.

[145] The Applicants argue that the Second Amendment failed to proportionately balance the *Charter* rights of PWUD. They assert that the Decision engages ss. 7, 8, 9, 12 and 15 of the *Charter*. The Applicants submit that the Decision is an administrative one and therefore the *Charter* values framework set out in *Doré* applies to determine the *Charter* issues.

[146] The Respondents argue that the Decision is legislative in nature and therefore the Court must analyze the *Charter* issues pursuant to the *Oakes* framework. The Respondents agree that the Second Amendment may engage s. 7 of the *Charter* but deny any infringement. They also dispute that the Decision infringes ss. 8, 9, 12, and 15 of the *Charter*.

[147] The parties agree that the outcome on the *Charter* questions is unaffected by the framework applied. The Applicants argue that the Second Amendment does not pass constitutional muster under either the *Oakes* or *Doré* framework, while the Respondents argue that the Second Amendment is *Charter* compliant under either framework.

[148] For the reasons that follow, I find that the Decision is legislative in nature and thus ought to be considered under the *Oakes* framework. Further, while the Second Amendment deprives PWUD of interests protected by s. 7 of the *Charter*, I find that it does so in accordance with the principles of fundamental justice, and it therefore does not violate s. 7. I also conclude that the Decision does not violate s. 15 of the *Charter* and that ss. 8, 9, and 12 of the *Charter* are not engaged. Finally, I conclude that the Decision is also *Charter* compliant when considered under the *Doré* framework: the Decision proportionately balances the *Charter* rights of PWUD.

(1) The Second Amendment is a Legislative Decision

[149] In *Doré*, the Supreme Court of Canada [SCC] confirmed that the analytical framework for assessing a law's constitutionality is distinct from assessing an administrative decision said to violate the rights of a particular individual: *Doré* at paras 2-6 and 36.

[150] When a legislative instrument is being assessed for *Charter* compliance, the question is whether the law infringes any *Charter* right, and if so, whether it is saved by s. 1, pursuant to the test in *Oakes*.

[151] For adjudicative administrative decisions, the *Charter* values framework set out in *Doré* applies. Under this framework, the question is whether the decision disproportionately, and therefore unreasonably, limits a *Charter* right: *Doré* at paras 3-6.

[152] I agree with the Respondents that the Decision to grant the Second Amendment is a legislative decision.

[153] The *Charter* values framework was intended for "adjudicated administrative decisions" (*Doré* at para 3; Emphasis added) said to violate the rights of a particular individual, in relation to a particular set of facts: *Doré* at para 36.

[154] The SCC was clear that "[w]hen a particular 'law' is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application," and thus

the *Oakes* analysis applies: *Doré* at para 36. Indeed, the balancing approach in *Doré* was developed, in part, based on "the difficulty of applying the Oakes framework beyond the context of reviewing a law or rule of general application": *Doré* at para 39 [Emphasis added.]



[155] Thus, where a party is not challenging an administrative decision based on the interpretation or application of a law or general rule, and is instead challenging the constitutionality of the law or rule itself, the framework in *Doré* does not apply: *Canada (Union of Correctional Officers) v Canada (Attorney General)*, 2019 FCA 212 at para 21 [*Correctional Officers*]; *Power Workers' Union v Canada (Attorney General)*, 2023 FC 793 [*Power Workers FC*] at paras 34 and 43-49; *The Christian Medical and Dental Society of Canda v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at paras 57-62 [*Christian Medical*], aff'd in 2019 ONCA 393.[3]

[156] A decision need not take the form of a statute to be characterized as legislative in nature. As explained in *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at paragraph 64:

> In order to be legislative in nature, the policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority. A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply (D. C. Holland and J. P. McGowan, *Delegated Legislation in Canada* (1989), at p. 103). For the purposes of s. 1 of the *Charter*, **these rules need not take the form of statutory instruments**. **So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish**

[3] It is noted that the Ontario Court of Appeal side-stepped the *Oakes* versus *Doré* issue, finding that the outcome would be same under either framework (at para 30).

> **rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a *Charter* right**.
>
> [Emphasis added.]



[157] The Federal Minister made the Decision pursuant to her delegated rule-making authority under s. 56(1) of the *CDSA*, for the specific purpose of enacting a binding rule of general application to all "adults within the province of British Columbia." The Decision to grant the Second Amendment is therefore legislative in nature, and the *Oakes* framework applies.

[158] I recognize that this Court and the Federal Court of Appeal applied the *Doré* framework in *Toth v Canada (Mental Health and Addictions)*, 2023 FC 1283 [*Toth FC*] and *Toth FCA* which were judicial reviews of decisions under s. 56(1) of the *CDSA*. The judicial reviews in *Toth* (consolidated and heard together) arose from several individual applications made by healthcare practitioners to permit them to possess and consume psilocybin mushrooms for their own professional training for psilocybin-assisted psychotherapy: *Toth FC* at paras 4 and 14. The present case is clearly distinguishable: the Second Amendment applies to all adults in BC , rather than a handful of individual s. 56(1) applicants. The Second Amendment creates binding rules concerning rights and obligations of a general nature rather than a specific nature.

[159] The Applicants' submissions on this issue focus on the discretionary nature of the Decision. They point to *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427 [*Beaudoin*], where the BCCA grappled with this question in relation to COVID-19 public health orders prohibiting certain gatherings. After reviewing some of the case law from other provinces

that “was not easily reconciled,” the Court concluded that the public health orders were administrative in nature and thus subject to the *Doré* framework: *Beaudoin* at paras 251-257. The Court’s decision appeared to turn on the fact that the impugned orders were made through a delegation of *discretionary* decision-making authority under the relevant legislation: *Beaudoin* at para 255.



[160] Respectfully, I do not agree that it is the discretionary nature of the decision that is determinative for the purposes of choosing the appropriate analytical framework. I prefer the analysis of the Federal Court of Appeal in *Correctional Officers* at paragraph 21 and the Ontario Superior Court in *Christian Medical* at paragraphs 56-62. It is also worth mentioning that Chief Justice Crampton in *Spencer v Canada (Health),* 2021 FC 621, considered *Charter* challenges in a judicial review of COVID-19 related travel measures under the *Oakes* framework.

[161] The determinative factor in choosing the applicable framework is whether a rule or law of general application is being challenged. As noted, as the Decision is a rule of general application, I will apply the *Oakes* framework.

[162] Under the *Oakes* framework:

1. The Applicants have the onus to establish that the Decision violates any of ss. 7, 8, 9, 12 or 15(1) of the *Charter*;
2. If a violation is made out, then the burden is on the Federal Respondent to establish that such a violation is demonstrably justified in a free and democratic society, under s. 1 of the *Charter*.

[163] The standard of review is correctness: *Vavilov* at paras 53 and 56.

[164] The bulk of the parties' *Charter* arguments focus on s. 7. I do the same in these reasons.

(2) No Infringement of section 7 of the *Charter*

[165] Section 7 of the *Charter* guarantees "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."

[166] Importantly, s, 7 "does not promise that the state will never interfere with a person's life, liberty or security of the person — laws do this all the time": *Carter* at para 71. Rather s. 7 guarantees that the state will not interfere with the right to life, liberty or security of the person in a way that violates the principles of fundamental justice: *Bedford*, para 94.

[167] To establish a violation of s. 7, the Applicants have the onus to demonstrate:

(a) there has been, or could be, a deprivation of the right to life, liberty or security of the person (this is sometimes referred to as the "engagement" of the right); and

(b) if s. 7 is engaged, that the deprivation is not in accordance with the principles of fundamental justice.

[168] If the Applicants demonstrate both elements, the Federal Respondent then bears the burden of establishing that the deprivation is justified under s. 1: *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 12; *R. v D.B.*, 2008 SCC 25 at para 121.



[169] As I explain below, I find that the Decision interferes with the right to life and liberty protected by s. 7, however it does so in accordance with the principles of fundamental justice. Accordingly, there is no violation of s. 7.

[170] As no violation of s. 7 is made out, there is no need to consider the question of justification under s. 1 of the *Charter*.

(a) *Section 7 is engaged*

[171] The Applicants submit that by significantly narrowing the scope of the Original Exemption, the Decision to grant the Second Amendment engages the s. 7 *Charter* right to life, liberty and security of the person. Specifically, they argue that the Second Amendment infringes PWUD's right to life by increasing the risk of death due to drug poisoning by:

1) authorizing drug seizures, where doing so is known to elevate the risk of drug-related harms such as withdrawal symptoms and cause PWUD to resort to risky behaviours to obtain replacement drugs or rushed injections;

2) deterring access to life-saving health services by rendering travel to and from OPS and SCS with one's drug supply illegal;

3) increasing isolated or hidden drug use, which carries an elevated risk of death; and

4) increasing the risk of death in prison, where PWUD cannot control their drug supply, or after release from prison, when their drug tolerance is reduced and they become susceptible to overdose.



[172] With respect to the liberty and security of the person, the Applicants argue that these s. 7 *Charter* protections are infringed because the Decision creates a risk of arrest and incarceration and interferes with PWUD's ability to make decisions concerning their bodily integrity and medical care.

[173] Instructive to the s. 7 analysis is the SCC's decision in *PHS*, where the issue was also a Federal Minister's decision concerning an exemption under s. 56 of the *CDSA*.[4] In *PHS*, an exemption had originally been granted to allow for a safe-injection site in Vancouver. When the exemption expired, the minister refused to extend it. The SCC concluded that the refusal to extend the exemption was a violation of s. 7 of the *Charter*.

[174] The Respondents rely on *PHS* to argue that the SCC found s. 4(1) of the *CDSA* to be constitutional, and that accordingly, re-instating the operation of s. 4(1) in most of BC via the Second Amendment cannot be a *Charter* violation. They assert that the Applicants erroneously argue that earlier (and broader) exemptions are the constitutional baseline. Rather, the Respondents contend that the prohibition on all possession created by s. 4(1) is the constitutional baseline one must compare the Second Amendment against. They say therefore that as compared

[4] When *PHS* was decided the federal Minister of Health was delegated with certain duties under the *CDSA*. Since then, these duties have been transferred to the Minister of Mental Health and Addictions: SI/2022-031, (2022) C Gaz II, 2096. For ease, I refer both Ministers as "Federal Minister".

to the constitutional baseline where all possession is criminalized, the exemption under the Second Amendment is more permissive as it creates some carve-outs from the application of s. 4(1).



[175] There is some support in the jurisprudence for the proposition that the legislature is free to decide whether to act on a specific matter which enhances a *Charter* right, and that it cannot be the case that, once it has acted in such a matter, it deprives itself of the right to change its policies or repeal the protective scheme: *Barbra Schlifer Commemorative Clinic v Canada*, 2014 ONSC 5140 at para 44; see also *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA) at paras 94-95.

[176] However, the Respondents' argument cannot succeed as it overlooks the basis upon which the SCC in *PHS* found s. 4(1) of the *CDSA* to be compliant with s. 7 of the *Charter*. Specifically, the SCC found s. 4(1) to be constitutional "because the *CDSA* confers on the Minister the power to grant exemptions from s. 4(1)." As the Court concluded at paragraph 114 of *PHS*:

> I conclude that while s. 4(1) of the *CDSA* engages the s. 7 *Charter* rights of the individual claimants and others like them, it does not violate s. 7. This is because the *CDSA* confers on the [Federal] Minister the power to grant exemptions from s. 4(1) on the basis, *inter alia*, of health. Indeed, if one were to set out to draft a law that combats drug abuse while respecting *Charter* rights, one might well adopt just this type of scheme — a prohibition combined with the power to grant exemptions.

[177] The Court found that the Federal Minister's ability to grant exemptions under s. 56 acted as a "safety valve" and "prevent[ed] the *CDSA* from applying where such applications would be arbitrary, overbroad or grossly disproportionate in its effects": *PHS* at paras 109-113.

[178] The SCC explained, "[i]f there is a *Charter* problem, it lies not in the statute but in the Minister's exercise of the power the statute gives him to grant appropriate exemptions": *PHS* at para 114. Therefore, "[i]f the Minister's decision results in an application of the *CDSA* that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally": *PHS* at para 117.

[179] The SCC then went on to find that the Federal Minister's decision not to extend the exemption for the safe-injection site engaged the claimants' s. 7 rights in a manner not in accordance with the principles of fundamental justice, resulting in a violation of the *Charter*: *PHS* at paras 3 and 126-136.

[180] Accordingly, it is necessary to look at the Federal Minister's exercise of discretion under s. 56(1) at issue here – the Second Amendment – and assess whether it infringes s. 7 of the *Charter*.

[181] As explained below, I find that the Decision to grant the Second Amendment engages PWUD's s. 7 rights, including the right to life and liberty.

(i) Right to Life

[182] Where a law or state action imposes death or an increased risk of death on a person, either directly or indirectly, it will generally engage the right to life: *Carter* at para 62 [*Carter*].

[183] The Federal Respondent questions whether the Original Exemption and the First Amendment saved lives. They point to evidence that rates of drug-related deaths remained stable while those broader exemptions were in force and that 2023 marked a record year for drug-related deaths in BC.

[184] The SCC in *Bedford* canvassed the standard of causation required to establish that s. 7 rights are engaged. It endorsed the "sufficient causal connection" standard: the claimant bears the onus of establishing a sufficient causal connection between the state-caused effect and the prejudice suffered by the claimant: paras 75-78. The Applicants need not establish that the impugned state action is the only or the dominate cause of the prejudice suffered by the claimants: *Beford* at para 76. The standard can be satisfied by a reasonable inference, beyond mere speculation: *Bedford* at paras 76 and 78. The SCC described the standard as "flexible" and "sensitive to the context of the particular case": *Bedford* at para 75-76.

[185] Sensitivity to the context here entails recognizing the complexity of mitigating the impacts of the toxic drug crisis from a public policy perspective. No party disputes this complexity.

[186] Applying the standard set out in *Bedford*, the evidence in the CTR establishes there is a sufficient causal connection, beyond mere speculation, that the risk of a possession charge may lead some PWUD to consume alone, which increases the risk of death and health-related harms arising from toxic drugs.



[187] The May 6 Package includes recommendations in a June 2023 document from the BC Medical Health Officer and Provincial Health Officer stating that "… in the context of a drug poisoning emergency, **it can be said with certainty that the safest option for people using substances is to have others present at the time of use**" [Emphasis added] (CTR at 1777). In the Risks and Considerations Document, Health Canada notes for the Federal Minister, in no uncertain terms, that a public health risk of granting the Second Amendment is that "**people may be more likely to use substances alone**, either on private property or hidden from public view. **This would increase the risk of death and other overdose-related harms** (e.g. brain injuries from delayed emergency response)" [Emphasis added] (CTR at 400).

[188] Health Canada's memorandum to the Federal Minister, included in the May 6 Package, also states the following (CTR at 72):

> Should this request be granted, people may be more likely to use substances alone, either on private property or hidden from public view to avoid a possession offence. In BC in 2023, most unregulated drug deaths occurred in private residences (47.1%) and other residences such as hotels, rooming houses, and shelters (28.2%), with only a minority occurring outside (18.7%). **In this context, there is a risk that the amendment could drive more people to use alone in the places where overdoses are least likely to be promptly reversed, resulting in more harm and deaths.**
>
> [Emphasis added.]

[189] The data that was before the Federal Minister, as well as Health Canada's interpretation of that data, support a conclusion that the Second Amendment, by restricting the places where people can possess controlled substances, risks increasing drug use in isolated or private settings, where the rate of deaths from overdose is increased. This engages the right to life guaranteed by s. 7 of the *Charter*.

[190] The admissible evidence filed by the Applicant's further corroborates the evidence before the Federal Minister, about the increased risk of undetected overdoses that may be occasioned by narrowing the scope of decriminalization: see for example, Second Maple Affidavit, Exhibits A, B, and C.

(ii) Right to Liberty

[191] The right to liberty is also engaged by the Decision.

[192] There is "no doubt that the risk of being sent to jail engages the…liberty interest": *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 89 [*Malmo-Levine*]. Re-criminalizing personal possession in most public spaces in BC introduces the availability of imprisonment where it did not exist from January 2023 to May 7, 2024 (when the Original Exemption and First Amendment were in place).

[193] The Respondents acknowledge that "the physical liberty interests of PWUD and the public at large are engaged by the Second Amendment as it re-triggers the application of s. 4(1) of the CDSA to most public spaces in BC, increasing the potential for incarceration," but again

argue that this does not result in a deprivation of s. 7 interests since the Decision "simply returns most public spaces in BC to the status quo": Federal Respondent Memorandum of Fact and Law, at para 52.



[194] As previously explained, such an argument must fail. In *PHS*, the SCC found that the Federal Minister's decision to allow an exemption to expire without renewing it was a state action triggering s. 7 rights: para 126. The engagement of s. 7 is even more apparent here, where, as acknowledged by Health Canada, the Federal Minister's Second Amendment created a "functionally new" exemption. It follows that an argument premised on the "return to the *status quo*" is not a sufficient answer to state action that re-introduces risks to s. 7 rights.

[195] Having concluded that the Second Amendment interferes with the rights to life and liberty of PWUD, the remaining step in the s. 7 analysis is to determine whether this deprivation is in accordance with the principles of fundamental justice. If so, s. 7 is not breached. I turn now to consider whether the deprivation of the right to life and liberty arising from the Decision accords with the principles of fundamental justice.

(b) *The Deprivations Accord with Principles of Fundamental Justice*

[196] At the outset, I note some important differences between the s. 7 analysis on principles of fundamental justice, and the s. 1 analysis which may or may not follow.

[197] At the second stage of the s. 7 analysis, courts are not to "engage in a free-standing inquiry…into whether a particular legislative measure "strikes the right balance" between

individual and societal interests in general…Such a general undertaking…would entirely collapse the s. 1 inquiry into s. 7”: *Malmo-Levine* at para 96. Rather, “the issue under s. 7 is the delineation of the boundaries of the rights and principles in question, whereas under s. 1 the question is whether an infringement may be justified”; where “under s. 7 it is the claimant who bears the onus of proof…[i]t is only if an infringement of s.7 is established that the onus switches to the Crown”: *Malmo-Levine* at para 97. Finally, “the range of interests to be taken into account under s. 1 is much broader than those relevant to section 7”: *Malmo-Levine* at para 97, see also, *Bedford* at paras 124-128.

[198] The principles of fundamental justice at issue in the present case were discussed in detail by the SCC in *Bedford*; at paras 93–123. The Court explained that “[t]he principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person’s life, liberty, or security of the person must meet”: at para 94. The principles of fundamental justice are an attempt to capture the basic values underlying our constitutional order: *Bedford* at para 96.

[199] The basic values against arbitrariness, overbreadth, and gross disproportionality are relevant here. In other words, if the Second Amendment’s negative effects on s. 7 interests are arbitrary, overbroad or grossly disproportionate to the *CDSA*’s objects, the Decision will not accord with the principles of fundamental justice, and will violate s. 7 of the *Charter*. Arbitrariness, overbreadth and disproportionality all compare the deprivation of the right with the law’s object, taken at face value. Importantly, it is the law’s object, not its effectiveness that is relevant at this stage of the analysis: *Bedford* at para 123.

[200] The Applicants argue that the deprivation of the s. 7 rights of PWUD engaged by the Second Amendment are not in accordance with the principles of fundamental justice. The Applicants' written submissions raise arbitrariness and gross disproportionality as the relevant principles. These are the same principles of fundamental justice found to be violated in *PHS*. In their oral submissions, the Applicants also reference overbreadth.



(i) Arbitrariness

[201] "An arbitrary law is one that is not capable of fulfilling its objectives": *Carter* at para 83. In considering arbitrariness in *PHS*, the SCC held that "[d]ecisions of the Minster under s. 56 of the CDSA must target the purpose of the Act": *PHS* at para 129. The legitimate state objectives of the *CDSA* are the protection of public health and public safety: *PHS* at paras 41 and 129.

[202] To establish that the s. 7 deprivations caused by the Second Amendment are arbitrary, the Applicants must demonstrate that the deprivations bear no connection to the protection of health and public safety: *Bedford* at para 111.

[203] The Applicants have not met this burden.

[204] The Second Amendment sought to return tools to law enforcement to address public consumption when public safety and health concerns arise, including where people are exposed to fumes of drugs consumed in public places. The evidence from community leaders, including some healthcare workers, law enforcement and municipal governments, is that the broader exemptions from the possession prohibition increased public safety and health risks due to the

rise in public drug consumption. This is precisely the type of evidence the SCC in *PHS* considered to be relevant in determining whether a s. 56 exemption ought to be granted: *PHS* at para 153.



[205] Importantly, the evidence in *PHS* was very different than the evidence in the present case. In *PHS*, there was "little or no evidence" that the exemption for a safe-injection site would "negatively impact public safety": *PHS* at para 152. Indeed, in *PHS* the evidence was the exemption would enhance public safety and health: *PHS* at paras 131.

(ii) Gross Disproportionality

[206] Gross disproportionality asks if the impugned state action effects on s. 7 interests are so grossly disproportionate to its purposes that they cannot rationally be supported. As explained in *Bedford*, at paragraph 120:

> The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

[207] The Court in *PHS* found that the evidence before it proved the exemption for the safe-injection site was saving lives, with "no discernable negative impacts on the public safety and health objectives of Canada during its eight years of operation": *PHS* at para 133. Therefore, the SCC concluded that the negative effects of refusing to renew the exemption were grossly

disproportionate to the benefits the government sought by uniformly prohibiting the possession of narcotics.

[208] The evidence in the instant case is not the same as in *PHS*.

[209] The record before the Federal Minister was that following the Original Exemption's implementation, public drug consumption was causing public safety concerns not present in *PHS*. Ultimately, where the exemption in *PHS* was shown to "decrease the risk of death and disease …[with] little or no evidence that it will have a negative impact on public safety" (*PHS* at para 152), the same cannot be said here.

[210] The Respondents point to the "tailoring" in the Second Amendment which would continue to allow personal possession of controlled substances in, *inter alia*, places where unhoused people are legally sheltering and at provincially designated health care clinics (which includes OPS and SCS's). I agree that this attenuates the s. 7 deprivations.

[211] Other mechanisms also attenuate the impacts on the liberty interests of PWUD, and prevent the Second Amendment from being grossly disproportionate. These include: (1) Part I.1 of the *CDSA*; (2) the PPSC Guidelines; (3) the amendments to the *CDSA* made by the *Good Samaritan Act*; and (4) the training of law enforcement to limit arrests and seizing of substances in most cases involving personal possession.

[212] Accordingly, I do not find the impugned Decision to be grossly disproportionate.

(iii) Overbreadth

[213] The Applicants argue that the Second Amendment was not the least impairing option available to the Federal Minister and say it is therefore overbroad. I disagree.

[214] In examining overbreadth, the question is not whether the least restrictive option has been chosen, but whether the chosen path infringes life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature: *Carter* at para 85. A measure is overbroad if it generally supports the object of the law, but goes too far by denying the rights of individuals in a way that bears no relation to the object: *Carter* at para 85. I am not persuaded that is the case here.

[215] Part I.1 of the *CDSA*, the PPSC Guidelines, the *Good Samaritan Act*, and the training of law enforcement to limit arrests and seizures in most cases involving personal possession as well as the tailoring in the Second Amendment and its New LoR prevent the Decision from being overbroad.

(c) *Conclusion on section 7 of the Charter*

[216] To conclude, while the Decision engages the s. 7 *Charter* rights of PWUD, it is in accordance with the principles of fundamental justice and no infringement of s. 7 has been established. It is therefore unnecessary to consider whether the infringement is justified by s. 1 of the *Charter*: *Malmo-Levine* at para 183.

(3) No Infringement of section 15 of the *Charter*

[217] Section 15(1) of the *Charter* protects equality rights. It provides:

| | |
|---|---|
| **15 (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. | **15 (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques. |

[218] The two-step test to determine if s. 15(1) is violated is set out in *R v Sharma*, 2022 SCC 39 at paragraph 28 [*Sharma*]. The claimant must demonstrate that the impugned state action: (a) creates a distinction based on a ground enumerated in s. 15(1) or an analogous ground, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[219] The Applicants argue that the Decision infringes the s. 15 rights of: (a) Indigenous and racialized PWUD, and (b) people with drug dependencies (disability). Both arguments fail. I address each in turn below.

(a) *Indigenous and racialized PWUD*

[220] The Applicants submit that the Decision infringes s. 15 because it "reinforces, perpetuates, and exacerbates the systemic discrimination faced by Indigenous and racialized persons, including their historic overrepresentation in the criminal justice system; child 'welfare' system; unsheltered and unhoused populations; and their disproportionate representation among the fatalities of the toxic drug crisis": Applicants' Memorandum of Fact and Law at para 58.



[221] The Respondents do not dispute that Indigenous and other racialized persons are disproportionately affected by the toxic drug crisis. The statistics clearly bear out that Indigenous PWUD are disproportionately at risk of drug related deaths. The Original Exemption itself states that it was granted in consideration of the fact that "Indigenous and racialized communities have been and are disproportionately impacted by the drug overdose crisis and are overrepresented in the criminal justice system."

[222] While it is acknowledged that the toxic drug crisis has disproportionate effects on Indigenous and racialized PWUD, it does not follow that the Decision "*created or contributed to* the disproportionate impact" [Emphasis in original]: *Sharma* at para 45. Both the terms "created" and "contributed to" describe cause: *Sharma* at para 45. It is not enough that a law or action has an impact on a matter which historically implicates a protected group; the law or action must itself cause or contribute to a disproportionate impact on the group. This was the SCC's conclusion in *Sharma*, where it found that the claimant failed to satisfy her burden to show that the sentencing provisions at issue "create[d] or contribute[d] to increased imprisonment of

Indigenous offenders…**relative to non-Indigenous offenders**" [Emphasis added]: *Sharma* at para 36.

[223] Importantly, the SCC in *Sharma* went on to note that, while the situation of the claimant group, such as the history of colonial policies and overincarceration of Indigenous people, is important, it is not sufficient on its own to establish disproportionate impact under s. 15(1) of the *Charter*: *Sharma* at paras 71 and 73; see also *Wright v Yukon (Government of),* 2024 YKSC 41 at para 217 and *Wirring v Law Society of Alberta*, 2023 ABKB 580 at para 195.

[224] The Applicants have not shown that the Decision will disproportionately impact Indigenous and racialized PWUD as compared to their non-Indigenous and non-racialized counterparts. The evidence demonstrating that Indigenous and racialized persons form a greater proportion of PWUD, all of whom will potentially face greater risks, is the type of historical evidence *Sharma* deemed important but insufficient to establish the first step of the s. 15 test.

[225] As the first step of the *Sharma* test is not established with respect to this ground, there is no need to address the second step of the s. 15 test.

(b) *Drug Dependency – Disability*

[226] The Applicants further submit that drug dependence is a recognized disability and therefore a protected ground of discrimination (citing *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 58, per Gascon J., dissenting, but not on this point [*Stewart*]), and they argue that the

Second Amendment exposes PWUD's with drug dependencies to a disproportionate risk of death or serious harm relative to the general population.

[227] I recognize that the Second Amendment will disproportionately impact those with drug dependencies.

[228] The parties' arguments did not meaningfully canvass the issue of whether drug dependency is a disability under s. 15(1), and the issue need not be decided for the purposes of this case. Even if it is accepted that drug dependency is considered a disability under s. 15(1), the Applicants' argument fails on the second part of the s. 15 test.

[229] First, I agree with the Respondents that the Second Amendment must be assessed on its own to determine if it complies with s. 15(1), without regard to the Original Exemption: *Sharma* at para 61. I find that the Second Amendment does not impose a burden or deny those with drug dependencies a benefit. Indeed, it is an ameliorative measure that decriminalizes personal possession in certain locations.

[230] Furthermore, the Respondents submit, and I agree, that when the government takes steps to address inequality, it can do so incrementally: *Sharma* at para 4. Section. 15(1) does not impose on the government a positive obligation to enact the Original Exemption which may remedy some inequality faced by people with drug dependencies; thus restricting its scope cannot be a breach of s. 15(1): *Sharma* at paras 63 and 82.

[231] Ultimately, regardless of whether drug dependence is considered a “disability” under s. 15(1), I find the Second Amendment to be an ameliorative policy and thus there is no infringement of s. 15.

(c) *Conclusion on section 15 of the Charter*

[232] The Decision does not infringe s. 15 and therefore it follows there is no need to determine if it is justified under s. 1 of the *Charter*.

(4) No Infringement of sections 8, 9 or 12 of the *Charter*

[233] I agree with the Respondents that none of the Applicants’ ss. 8, 9 or 12 arguments can succeed because they are speculative; they do not actually arise from the facts of this case. Rather, the Applicants’ submissions suggest that, when enforcing s. 4(1) of the *CDSA*, the police *may* subject PWUD to unreasonable search and seizure, arbitrary detention, and cruel and unusual punishment.

[234] I pause to note that the increased risk of arrest and imprisonment has already been captured by the liberty interest in s. 7. However, what the Applicants argue with respect to ss. 8, 9 and 12 goes further; these arguments are grounded in speculation about *how* the police might go about enforcing s. 4(1) in public spaces, and what *might happen* in the course of such enforcement.

[235] The Applicants' arguments are not based on anything that the Second Amendment *actually does*, just what it may "open the door" to. This is not a sufficient basis to ground a *Charter* challenge.

(5) *Doré* Framework – the Second Amendment proportionately balances *Charter* protections

[236] If I am wrong in my conclusion on the applicable analytical framework, I would nevertheless find that the Decision proportionately balances *Charter* rights with the statutory objectives of the *CDSA*.

[237] Under *Doré*, when reviewing an administrative decision for compliance with the *Charter*, the court applies a two-step approach. The first step is to determine whether the decision under review engaged the *Charter* by limiting a *Charter* protection. If it did, the second step requires an examination of whether, in exercising its statutory discretion, the decision-maker properly balanced the relevant *Charter* protection with the statutory objectives: *Doré* at para 57; see also *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 39, *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 28.

[238] The standard of review that applies to the first step – whether the Charter right is engaged – is correctness: *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at paras 64 -71. The standard of review for the second step – the decision-maker's weighing of *Charter* values – is reasonableness: *Toth FCA* at paras 17 – 19.

[239] For the same reasons as set out above, I conclude that the Second Amendment engages s. 7 of the *Charter*.

[240] The Applicants assert that the Federal Minister failed to take into account the *Charter* protections at issue because there is no mention of the *Charter* in the Decision and "*no* consideration of them anywhere in the underlying record."

[241] They argue there is no quantitative evidence that public drug consumption had increased since the Original Exemption or was caused by it. The Applicants criticize the quality and nature of the evidence provided by the Province to the Federal Minister about the public safety risks associated with personal possession. They say that stakeholder feedback was grounded in stereotype, based on "perceived" not "actual" public safety concerns and conflated the issue of public drug use with other social problems such as houselessness, poverty, and mental illness. They further argue that in relying on subjective stakeholder reports about perceived public safety risks, the Federal Minister unreasonably allowed irrelevant stereotypes to guide her reasoning.

[242] In particular, the Applicants point to competing evidence on the record about whether law enforcement was justified in their assertion that it required additional tools to manage problematic public drug use.

[243] First, there is no requirement that the Federal Minister expressly decide if a *Charter* right is engaged and how it is balanced; "rather the core question is, in taking into account the nature

of the decision and the statutory and institutional context, whether the decision reflects a proportionate balancing of the Charter interests": *Toth FCA* at para 50.

[244] Second, I disagree with the Applicants' characterization of the contents of the record.

[245] The May 6 Package was thorough and, amongst other things, carefully canvassed the s. 7 *Charte*r interests of PWUD and the arguments raised by the Applicants in these proceedings, including: the absence of quantitative data on causation; that public safety concerns could also be attributed to other social problems such as rising houselessness and poverty; and that there was not a clear explanation from law enforcement about whey they could not rely on tools outside the *CDSA* to manage problematic public drug use.

[246] The briefing materials from Health Canada are replete with discussions on the risks of death and incarceration (the s. 7 interests engaged here) of PWUD, including Indigenous PWUD and people experiencing housing insecurity. Mitigation strategies for these risks are also proposed and elaborated on at length.

[247] In light of the record, it cannot be said that in making the Decision, the thrust of the *Charter* arguments now before the Court were missed or not taken into account. It is presumed that the Federal Minister considered and weighed this information in making the Decision. It is well established in the jurisprudence that decision-makers are presumed to have considered all the evidence before them: *Sekhon v Canada (Citizenship and Immigration)*, 2018 FC 700 at para 13.

[248] The Applicants further argue that, beyond the underlying record, the outcome of the Decision itself reflects that there was a failure to proportionately balance *Charter* rights against *CDSA* objectives. The Applicants canvass other options that they believe were available to the Federal Minister which, in their view, do a better job at the balancing exercise and are more minimally impairing.



[249] The Applicants' arguments venture into the territory of disagreement with the Federal Minister's use of her discretion, rather than argument about a particular reviewable error. The Applicants have not established that the Federal Minister's reasoning was guided by stereotypes, nor that the outcome itself fell outside the range of reasonable outcomes available based on the information before her.

[250] It must be remembered that the standard of review applicable to the second step of the *Doré* analysis – consideration of whether the *Charter* interests were proportionately balanced – is reasonableness: *Toth FCA* paras 17–19. The role of the Court in these circumstances is not to reassess and reweigh the evidence and make its own decision on the merits. Instead, the Court's role is to consider whether the Decision made by the Federal Minister, including its rationale and the outcome, was reasonable: *Vavilov* at para 83.

[251] The Decision included measures to balance the s. 7 *Charter* rights of PWUD. The New LoR includes several such measures:

- Increasing access to and availability of high-quality, evidence-based services, including in rural and remote communities, to support law enforcement in diverting

PWUD away from the criminal justice system and towards health and social services, when appropriate.

- An ongoing commitment by the Provincial Government to a public health approach to the crisis and a comprehensive response including new virtual opioid agonist therapy (OAT), and enhancing the availability of health and social services, including harm reduction services.

- Immediate development, "on a priority basis, clear guidance and training for law enforcement that will support law enforcement to consider alternative measures in instances of personal possession" (CTR at 536). This includes training "law enforcement to ensure people who are simply in possession of drugs, and where there is no associated public safety risk, are not subject to arrest or seizure of drugs. […] It should cover the new rules, how to apply discretion under a public health approach, the impacts of stigma and racism in relation to drug issues and support in how/where to divert people to available health and social services where appropriate. This training should also include information on policies and legislation that exist to guide police discretion, including the Good Samaritan Drug Overdose Act, the Public Prosecution Service of Canada's Guidance related to prosecuting possession offences, and the amendments to the CDSA that came into force in November 2022, requiring police to consider alternatives to laying charges in situations involving personal possession offences" (CTR at 538). It also calls for the development of a "detailed plan for supporting Indigenous relationships with police under the [Second Amendment]" (CTR at 537).

- "[S]upporting efforts led by the First Nations Health Authority to increase the number of individuals and communities with access to culturally safer, trauma-informed, and culturally appropriate healing and treatment services, as well as mental health and substance use care" (CTR at 537).



[252] As referenced above, the record includes statements from law enforcement leadership that decriminalization eliminated the tools necessary to protect public safety in some circumstances. It includes information about municipal and public opposition, citing issues such as discarded drug equipment, instances of related property crimes, and a real or perceived decrease in community safety, including due to unpredictable behaviour following drug use. There was also evidence that increasing public concern about decriminalization was undermining support for other harm reduction measures such as OPS's.

[253] The Applicants have not established that the Decision failed to proportionately balance *Charter* rights with the statutory objectives of the *CDSA*. It was open to the Minister to issue the Second Amendment, particularly in light of: the evidence on the record about public safety concerns, the detailed information on the potential impacts on PWUD's including on their *Charter* protected interests, and the requirements set out in the New LoR to mitigate these impacts.

B. *Non-Constitutional Issues*

[254] Having considered the *Charter* issues, I now turn to the non-constitutional grounds raised by the Applicants.

[255] Again, a threshold issue is the nature of the Decision. Determining whether the Decision's nature is legislative or administrative will inform the reasonableness analysis, and the existence and scope of any duty of procedural fairness.



[256] The Respondents argue the Second Amendment was a legislative decision, or as it is sometimes referred to, a policy decision (I use these descriptors interchangeably). The Applicants reject this characterization.

[257] I address the issues as follows:

1. Is the Second Amendment a policy decision?

2. Apart from the *Charter* issues, is the Second Amendment reasonable?

3. Did the Federal Minister breach procedural fairness in coming to the Decision?

(1) The Second Amendment is a Policy Decision

[258] The Decision to issue the Second Amendment is of a policy nature, not administrative. It was made by the Federal Minister in the exercise of her broad discretionary power under s. 56(1) to grant exemptions from any provision in the *CDSA* in the public interest. Moreover, it imposes a rule of general application on everyone in BC and was based on broad considerations of public policy.

[259] Legislative or policy decisions may come in forms other than statues passed by a legislature. They may find expression in a regulation (*Auer v Auer*, 2024 SCC 36 [*Auer*]), orders in council (*Canadian Doctors for Refugee Care v Canada (Attorney General)* 2014 FC 651 [*Canadian Doctors*]; *Health Sciences Association of British Columbia v British Columbia (Attorney General)*, 1986 CanLII 964 (BCSC)), ministerial guidelines (*TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, 2022 ABCA 381 [*TransAlta*], aff'd on appeal 2024 SCC 37), rules or policies set by a statutory delegate (*Green v Law Society of Manitoba*, 2017 SCC 20 [*Green*]; *Power Workers FC*, aff'd, 2024 FCA 182 [*Power Workers FCA*]), policies established by a professional regulatory body (*Christian Medical*), government policies (*Universal Ostrich FCA*), Treasury Board Standards, Correctional Commissioner Directives (*Correctional Officers*), the minister's allocation of quotas under the *Fisheries Act*, RSC 1985, c F-14 (*Animal Justice Canada and Soi Dog Canada v Attorney General of Canada*, 2025 FC 1703 [*Animal Justice*]; *Barry Seafoods NB Inc. v Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 725), as well as ministerial orders made pursuant to legislation or regulations (*Barry Group v Canada (Fisheries, Oceans and Coast Guard)*, 2017 FC 1144 [*Barry Group*]; *Kohl v Canada (Minister of Agriculture)*, (1995) 185 N.R. 149 (FCA), [1995] FCJ No. 1076 (FCA)).

[260] In the context of judicial review, the question of whether a decision is a legislative/policy decision or an administrative one hinges on whether it imposes a rule of general application without reference to a particular case: *Animal Justice* at paras 64-67 and 71; *Shelburne Elver Limited v Canada (Fisheries, Oceans and Coast Guard)*, 2023 FC 1166 at para 31, aff'd 2024 FCA 190; *Ecology Action Centre Society v Canada (Attorney General)*, 2004 FC 1087 at para

50. Additionally, legislative decisions tend to be based “on broad considerations of public policy”: Donald JM Brown & John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2013) (loose-leaf updated 2023, release 4), 7.38).



[261] The Nova Scotia Court of Appeal in *Potter v Halifax Regional School Board*, 2002 NSCA 88, [*Potter*] at paragraph 40, described the classification exercise as follows:

> The classification of an act as legislative or administrative is not always easily done. There is a great diversity of administrative decision-making with decision-makers ranging from those primarily adjudicative in function to those that deal with purely legislative and policy matters: see *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21 at ¶ 27. Where a particular decision-making power falls on this continuum is a consideration in determining the application and extent of any duty of fairness. In *Martineau (No. 2)* (*supra*), Dickson, J. indicated at p. 628 that a “purely ministerial decision, on broad grounds of public policy” would typically afford no procedural protection and spoke at p. 629 of “myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum.” In *Knight* (*supra)*, L’Heureux-Dubé, J. made a distinction at ¶ 26 between acts of a “legislative and general nature” which generally do not attract a duty of fairness and acts of a “more administrative and specific nature.” While it is not possible to define such decisions in generally applicable terms, I agree with Brown and Evans that those decisions closer to the “legislative and general” end of the spectrum usually have two characteristics: generality (the power is of “general application and when exercised will not be directed at a particular person”) and a broad policy orientation in that the decision creates norms rather than decides on their application to particular situations: see D. Brown & J. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) vol. 2 at ¶ 7:2330.

[262] The Second Amendment has the effect of reinstating, with some exceptions, a law of general application, s. 4(1) of the *CDSA*. The Second Amendment applies to all adults in BC in

most locations in the province. The fact that the Decision, in practical terms, impacts a subset of the population in BC (i.e., PWUD) more than others, does not by itself, take it outside of the realm of a policy decision: *Animal Justice* at para 76; *Barry Group* at para 28; *South Shore Trading Co. Ltd. v Canada (Fisheries, Oceans and Coast Guard)*, 2025 FC 174 at paras 44–48.



[263] Further, it is apparent from the record that the Federal Minister made the Decision based on broad considerations of public policy, including how to balance public safety concerns with an overriding consensus amongst governments and others that harms to PWUD's arising from the toxic drug supply are best addressed with public health measures, not criminal ones.

[264] Not all decisions made pursuant to s. 56(1) of the *CDSA* are policy decisions. An examination of the circumstances is required. Some decisions under s. 56(1) are specific to an individual case and are administrative in nature. Where, for example, the decision involves whether to grant an exemption to a particular safe consumption site (*PHS*), or determines whether a particular individual applicant or organization ought to be exempt from s. 4(1) in relation to a specific controlled substance for a specific purpose (*Toth FCA*), the decision will be administrative and more adjudicative in nature. Where, however, a decision under s. 56(1) results in the imposition of rule of general application, throughout a province, for example, and is based on broad considerations of public policy – as is the case with the Original Exemption , the First Amendment and the Second Amendment – the decision will be classified as a policy decision for the purposes of judicial review.

(2) The Second Amendment is Reasonable

(a) *Standard of Review*

[265] The Federal Court of Appeal recently had an opportunity to consider the standard of review applicable to a discretionary policy decision in *Universal Ostrich FCA* at paras 47 to 56. The FCA confirmed that in reviewing policy decisions, *Vavilov* has overtaken *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2, 1982 CanLII 24: *Universal Ostrich FCA* at para 49.

[266] The standard of review that applies to policy decisions is reasonableness. The question is whether the Decision "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov* at para 99.

[267] The particular administrative context will inform the reviewing court of the relevant constraints on the decision-maker. As explained in *Vavilov* at paragraph 90:

> [90] […] what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt.

[268] *Vavilov* recognized "that as a practical matter, some decisions are more likely to survive reasonableness review because they are relatively unconstrained": *Entertainment Software*

*Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 [*Entertainment Software*] at para 25.

[269] The wording of s. 56(1) of the *CDSA* and the nature of the Second Amendment being a policy decision with complex, multifaceted, public interest considerations both indicate that the Federal Minister's discretion here was relatively unconstrained.



[270] Decision-makers are relatively less constrained where provisions vest them with a broad scope of discretion: *Entertainment Software* at 32; *Auer* at paras 60-62. The wording of s. 56(1) of the *CDSA* provides significant flexibility to the Federal Minister:

| | |
|---|---|
| **56 (1)** The Minister may, on any terms and conditions that the Minister considers necessary, exempt from the application of all or any of the provisions of this Act or the regulations any person or class of persons or any controlled substance or precursor or any class of either of them if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.<br>[Emphasis added.] | **56 (1)** S'il estime que des raisons d'intérêt public, notamment des raisons médicales ou scientifiques, le justifient, le ministre peut, aux conditions qu'il estime nécessaires, soustraire à l'application de tout ou partie de la présente loi ou de ses règlements toute personne ou catégorie de personnes, ou toute substance désignée ou tout précurseur, ou toute catégorie de ceux-ci. |

[271] Section 56(1) "endows the Minister with broad discretion, underscored by the words 'opinion' and 'public interest'" to grant exemptions from any part of the *CDSA* or its regulations, on any terms and conditions it considers necessary: *Toth FCA* at para 82. "Public interest determinations based on wide considerations of policy and public interest, assessed on

polycentric, subjective or indistinct criteria … are very much unconstrained": *Entertainment Software* at para 28, see also *Vavilov* at para 110.

[272] Policy decisions are subject to fewer procedural and substantive constraints that would otherwise apply to the making of an administrative decision: *Universal Ostrich FCA* at paras 56 and 69; *Entertainment Software* at paras 24-36.

[273] The Second Amendment, as well as the Original Exemption and First Amendment, involved complex, multifaceted, public interest considerations by the Minister of "information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon changing and evolving circumstances": *Entertainment Software* at para 29.

[274] The evidence here demonstrates an understanding that the implementation of the Decriminalization Pilot would necessarily be iterative, based on shifting information and evolving circumstances. This is reflected in the requirement set out in both of the LoRs which require the Province's ongoing oversight, monitoring, evaluation and regular reporting to Health Canada. Monitoring progress towards objectives, unintended consequences, risks, and risk mitigation strategies was seen as necessary so both levels of government could "collectively respond to any unintended consequences in a timely manner" (AR at pdf 1317, Van Veen Affidavit, Exhibit B).

[275] As policy decisions, the Second Amendment, as well as the Original Exemption and First Amendment, are "very much unconstrained" and thus harder to set aside: *Universal Ostrich FC*

at para 72. “[M]atters of policy are quintessentially the preserve of the executive”: *Innovative Medicines Canada v Canada (Attorney General),* 2022 FCA 210 at para 39.

[276] The focus of judicial review in these circumstances should target compliance with legal and factual constraints: *Universal Ostrich FC* at para 79. With respect to legal constraints, establishing unreasonableness will require the applicant to show that the Second Amendment fails to respect the purpose of the statute, and any constraints which s. 56(1) places on the Federal Minister’s discretion: *Universal Ostrich FCA* at para 56. Fact-based determinations will be unreasonable if it is shown the Minister fundamentally misapprehended or failed to account for the evidence before her: *Vavilov* at para 126; *Universal Ostrich FCA* at para 55. Absent exceptional circumstances, a reviewing court cannot reweigh and reassess the evidence: *Vavilov* at para 125.

[277] As explained by Justice Zinn, “courts serve as guardians of legality, not arbiters of the wisdom of policy”: *Universal Ostrich FC* at para 79. The Court must leave the assessment of the policy merits to the decision-makers chosen by Parliament, which, in this case, is the Federal Minister.

(b) *Reasonableness Analysis*

[278] In addition to the *Charter* arguments addressed above, the Applicants submit the Decision was unreasonable for the following reasons:

1. The Federal Minister made the Decision in a rushed manner, without sufficient evidence, and rendered it in a fashion which made it "nearly impossible to assess [her] chain of reasoning."

2. The Federal Minister "relied on absurd premises and false dilemmas, creating an irrational chain of reasoning that undermines the entire Decision."

3. The Federal Minister "rubber stamped" the Province's request for the Second Amendment without an independent assessment.

4. The Second Amendment represented a significant policy shift and as such it was incumbent on the Federal Minister to explain the shift, and she failed to do so.

[279] Issues 1, 2 and 4 above rest on an assumption that the Minister was required to provide formal reasons for the Second Amendment, and that the reasonableness analysis here is driven by a "reasons first" approach: see for example, *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 58–63.

[280] However, it is well established that formal reasons are not always required: *Vavilov* at para 77 and 136-138; *Power Workers FCA* at paras 178-180. The *CDSA* does not require that the Federal Minister provide reasons for a decision under s. 56(1)[5] and, as discussed further in the next section, nor does the duty of procedural fairness give rise to a duty to provide reasons for a policy decision under s. 56(1).

[5] See in contrast, s. 56.1(5) of *CDSA* which mandates the Minister provide reasons if an application under s. 56.1 for a supervised consumption site is refused.

[281] In any event, the Federal Minister did provide some reasons for the Decision. The Second Amendment states:

> This exemption [Second Amendment] is granted in consideration of the following:
>
> • substance use harms are first and foremost a health and social issue and should be treated as such except in exceptional cases where public safety risks are present;
>
> • [the *CDSA*] has a dual purpose to protect public health and maintain public safety;
>
> • the province of British Columbia has requested that the exemption granted under subsection 56(1) of the *CDSA* be amended due to concerns about widespread use of controlled substances in public spaces; and
>
> • part of achieving a balance between public health and public safety is ensuring law enforcement has the tools needed to address issues of public safety while continuing to take a public health approach to addressing substance use harms.

[282] The New LoR, which forms part of the reasons, states that she recognizes "the public safety concerns that [the Province], stakeholders and members of the public in BC have raised" and goes on to state:

> As you know, the federal government shares BC's commitment to an approach that balances public health and public safety objectives. This new exemption gives law enforcement additional tools to address public safety concerns related to public drug use when they arise. But we both know that it is also essential for us to strengthen complementary initiatives to address the social determinants of health, as set out in the original Letter of Requirements in May 2022. As you know, these additional actions, which BC committed to in its original request and reiterated in this request, are critical to saving lives and supporting people in their journey to treatment and recovery.

[283] Like the original LoR, the New LoR requires continuing evaluation and monitoring by the Province and ongoing frequent reports to Health Canada.

[284] In these circumstances – where some reasons are provided for the policy decision – the assessment of reasonableness is measured against the reasons provided and the record before the Federal Minister: *Vavilov* at paras 136-138. The focus of the reasonableness inquiry is on whether the decision fell within the constraints of the Federal Minister's delegated authority: *Auer* at para 54; *Universal Ostrich FCA*, at para 53.

[285] With these considerations in mind, I address each issue raised by the Applicants in more detail below.

[286] First, the Applicants argue that "the [Federal] Minister accepted at face value [the Province's] suggestion that the [Second] [A]mendment application was 'urgent', and did not consider whether it in fact was." As a result, they say the Federal Minister made the Decision without sufficient evidence and rendered it in a fashion which made it "nearly impossible to assess [her] chain of reasoning": Applicants Memorandum of Fact and Law at para 84.

[287] The Applicants point to the short timeframe between the April 26, 2024 Request and the Federal Minister's Decision on May 7, 2024, and to information gaps in the evidence before the Federal Minister, such as for example, a lack of quantitative data demonstrating public drug use has increased or led to an increase in crime.

[288] With respect to the urgency which the April 2024 Request was dealt with, the Applicants acknowledge that this fact alone does not render the Decision unreasonable. As I understand their argument, they submit the sense of urgency surrounding the request contributed to the Decision being rendered without sufficient evidence.

[289] The pace with which the Decision was made must be examined in the broader context. I agree with the Federal Respondent's submission that it would be inaccurate to portray the April 2024 Request from the Province has having been "dropped in the lap" of the Federal Minister and her advisors in Health Canada. Rather, they were well acquainted with the issues and the policy context, having worked with the Province on the Decriminalization Pilot since 2021.

[290] The Federal Minister had before her an extensive record which included data on public health indicators with respect to the toxic drug crisis from roughly 2016-2023. As noted above, Health Canada's briefing materials for the Federal Minister were thorough and, amongst other things, carefully canvassed the points raised by the Applicants in these proceedings.

[291] Also in the record were letters and expressions of support from municipalities, law enforcement and others outlining their concerns about public drug consumption and associated public safety risks. This is the type of evidence the SCC in *PHS* said ought to be considered when rendering a decision on a s. 56(1) exemption: *PHS* at para 153.

[292] Based on the material before her, it was open to the Federal Minister to come to the conclusions she did, particularly in light of Parliament's choice to endow her with broad discretion under s. 56(1) to form an opinion about whether an exemption is in the public interest.



[293] I interpret the Applicant's arguments alleging an insufficiency of evidence as an invitation to reweigh and reassess the evidence before the Federal Minister. I decline that invitation as it exceeds the role of the Court on a judicial review. Disagreement about how the Federal Minister weighed the evidence before her does not give rise to a reviewable error: *Vavilov* at para 125.

[294] Second, the Applicants argue that "the [Federal] Minister relied on absurd premises and false dilemmas, creating an irrational chain of reasoning that undermines the entire Decision." To this end, they argue that the Federal Minister relied on a false dilemma by accepting "that she was faced with a binary choice between full criminalization of drug possession (or use) on one hand and allowing PWUD to 'use drugs 'nearly wherever they want'"" on the other: Applicants Memorandum of Fact and Law at para 85.

[295] The Federal Minister cannot have believed these to be her only two choices, as she chose neither. The Second Amendment recriminalizes possession in most public spaces but maintained certain exemptions from s. 4(1).

[296] The Applicants' submissions appear to be injecting this false dilemma into the Decision – nothing in the record shows that the Federal Minister considered herself to be caught between the

two options suggested. Rather, this framing appears to be borrowed from the BCSC's summary of the Province's position in the injunction decision in *Harm Reduction Nurses* (see para 96). While this may have been the Province's rationale for enacting the *BC Consumption Act* or defending it in the injunction hearing, it has no bearing on the federal Decision and cannot be used to impugn it.



[297] The third issue raised by the Applicants is that the Federal Minister abdicated or unlawfully delegated her discretion to the Province by "rubber stamping" its request without an independent assessment. Again, I disagree.

[298] Looking at the Province's May 3 Response to Health Canada's information request, the specifications of the April 2024 Request are different than the Second Amendment actually granted. For example, the carve-outs from the application of s. 4(1) requested by the Province are not the same as the Second Amendment ultimately provided. The May 6 Package goes much further than simply relaying the information provided by the Province to Health Canada. Both the record underlying the Decision and the form of the amendment actually granted reflect that the Federal Minister did not blindly approve the Province's request, as the Applicants suggest.

[299] The fourth issue raised by the Applicants is that the Second Amendment represented a significant policy shift, and as such it was incumbent on the Federal Minister to explain the shift, which they say she failed to do.

[300] In making this argument, the Applicants rely on the Federal Court of Appeal's decision in *Toth FCA*. As set out above, the *Toth FCA* case involved several applications from health practitioners seeking an exemption under s. 56(1) of the *CDSA* allowing them to possess, transport, and consume psilocybin mushrooms for a specific training program. All of the applications were refused for the same reasons and their judicial reviews were heard together. The Court of Appeal found that the refusals were unreasonable because they were inconsistent with exemptions granted by the federal minister in 2020, and the decision letters did not explain the policy shift. Justice Rennie stated at paragraph 89 that where "there is a shift in policy or a change in the assessment of the underlying evidence, science or facts, it is incumbent on the Minister to explain the change. This is the justificatory burden that *Vavilov* addresses, this is what transparency means in judicial review": *Toth FCA* at para 89.



[301] The Applicants argue that, as in *Toth FCA*, the Federal Minister was obliged to provide reasons for the policy shift that resulted in the Second Amendment. The Applicants also argue that, pursuant to the SCC's guidance in *PHS*, the Federal Minister cannot rely on policy *simpliciter* to justify her Decision: *PHS* at para 128. I am not persuaded.

[302] The Applicant's reliance on *PHS* in the context of the non-constitutional issues is misplaced. The statement referenced by the Applicants is limited to exercises of discretion under s. 56(1) that engage *Charter* rights. Paragraph 128 of *PHS* states:

> As noted above, the Minister, when exercising his discretion under s. 56, must respect the rights guaranteed by the *Charter*. This means that, where s. 7 rights are at stake, any limitations imposed by ministerial decision must be in accordance with the principles of fundamental justice. The Minister cannot simply deny an application for a s. 56 exemption on the basis of policy *simpliciter*;

> **insofar as it affects *Charter* rights**, his decision must accord with the principles of fundamental justice.
>
> [Emphasis added.]

[303] As noted above, the Respondents accept that the Federal Minister's discretion under s. 56(1) is subject to the rights protected in the *Charter*.

[304] In any event, the Federal Minister does not rely on policy *simpliciter* to justify her Decision. The Second Amendment explains that it was granted in response to public safety concerns raised about public drug use, and to provide law enforcement additional tools to address these concerns. The reasons also underscore the need to balance public health and public safety objectives, and that it is essential "to strengthen complementary initiatives to address the social determinants of health, as set out in the original Letter of Requirements" that are "critical to saving lives and supporting people in their journey to treatment and recovery" (CTR at 535, New LOR).

[305] I appreciate that the Applicants believe that the public safety concerns were based on "perceived" and not "real" threats to safety, and that they dispute that law enforcement required additional tools to manage public drug use. However, once again, my role is not to re-weigh the competing evidence that was before the Federal Minister on these matters and come to my own conclusion on the merits: that is the role of the Federal Minister. In the absence of a reviewable error, it is not the Court's role to disturb the Decision or assess the policy merits of the Decision.

[306] Unlike *Toth FCA*, the Second Amendment is a policy decision: the Federal Minister was not obliged to provide any formal reasons for the Second Amendment (*Vavilov* at paras 77 and 136-138; *Auer* at para 52; *Universal Ostrich FCA* at para 53). Nevertheless, I find that the reasons provided are sufficient to explain the change in policy direction.

(3) The Procedure was Fair

[307] The Applicants argue that the Decision was procedurally unfair. They assert that, given the circumstances, procedural fairness demanded some level of engagement with those who represent PWUD's before the Second Amendment was issued.

[308] The Applicants add that they do not rely on the doctrine of legitimate expectations, but that logically, given the following circumstances, they were entitled to some consultation before decriminalization was effectively reversed by the Second Amendment. They point to the ongoing close work between the Province and the CPT (which includes some of the Applicants) on the Decriminalization Pilot going back to 2021, the chain of decisions starting with the Original Exemption, and the importance that Health Canada placed on consultation up until the April 2024 Request for a Second Amendment. They also point to the seriousness of the issues at stake for PWUD.

[309] The Applicants reference the May 6, 2024 letter to the Federal Minister from the members of the CPT which would have informed her of the Province's failure to consult with the CPT and PWUD (arguably those most impacted by the Decision) about the April 2024 Request.

This letter expressed profound concern about the proposed recriminalization of personal possession in public spaces.

[310] The Provincial Respondent does not dispute the salient facts as described by the Applicants and acknowledges its ongoing "close collaboration" with the CPT starting in 2021 when the CPT was first empaneled. The Provincial Respondent candidly conceded that the Province did not consult the CPT, including CPT members who are Applicants in this matter, about its April 2024 Request to Health Canada.

[311] It is understandable that the Province's exclusion of CPT members and others representing PWUD at the very time the Province appeared to be reversing its position on the Decriminalization Pilot would strike the Applicants as abrupt and unfair, particularly after years of close collaboration.

[312] While public policy experts may opine on the wisdom of making such a decision without engaging those arguably most impacted, the jurisprudence does not support Court intervention on this basis.

[313] A free-standing duty of procedural fairness does not extend to policy decisions such as the Second Amendment: *Animal Justice* at para 78, citing *Canadian Assn. of Regulated Importers v Canada (Attorney General)*, [1994] 2 FC 247 (CA) at 258-259; *TransAlta* at para 88; *Potter* at para 40; *Green* at para 54; *Canadian Doctors* at paras 434 and 439-440; *Hospitality House Refugee Ministry Inc. v. Canada (Attorney General)*, 2013 FC 543 at paras 17-20.

[314] Policy decisions are subject only to statutorily mandated procedural requirements: *Animal Justice* at paras 77-78.

[315] The *CDSA* does not mandate any public consultation or other procedural fairness requirements for applications under s. 56(1). This can be contrasted with applications made for SCS's under s. 56.1 of the *CDSA* : see for example, *Chinatown & Area Business Association v Canada (Attorney General),* 2019 FC 236 [*Chinatown*] at paras 101-108. Even where the *CDSA* mandates certain procedural steps, such as for SCS applications, this Court has described the procedural fairness requirements as "minimal": *Chinatown* at para 99.

[316] For these reasons, I find that the Applicants have not established a breach of procedural fairness.

## VI. Conclusion

[317] The application for judicial review is dismissed. The Applicants have failed to identify a reviewable error in the Decision to significantly curtail the Decriminalization Pilot.

## VII. Costs

[318] The parties advised the Court during the hearing that no costs would be sought regardless of the outcome, and accordingly, none will be awarded.

**JUDGMENT IN T-1365-24**

**THIS COURT'S JUDGMENT is that**:

1. The Respondent's motions to strike parts of the Applicants' affidavit evidence [Impugned Evidence] is granted in part.

    a. The Impugned Evidence (as defined in the judgment and reasons) is not admissible for the purposes of the non-constitutional issues;

    b. For the purposes of the constitutional issues, the following evidence is inadmissible:

        i. Rufus-Sedgemore Affidavit, paragraphs 43, 44, 46, 47, 50, 51, 53 (except the last two sentences of para 53 a.), 54 – 57, 61-65, 67-73, 75-79, 81, and Exhibits B, E, F, G, I, J, K, M, N, O, and P;

        ii. Swaich Affidavit, paragraphs 10, 11, 17-23, 26(c), 27-33, and Exhibits A, B, F, H, I, J, M and N;

        iii. First Maple Affidavit, paragraph 8(e); and

        iv. Second Maple Affidavit, paragraph 9 and Exhibit H.

2. The application for judicial review is dismissed.

3. No costs are awarded.

"Meagan M. Conroy"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1365-24 |
| **STYLE OF CAUSE:** | MATSQUI-ABBOTSFORD IMPACT SOCIETY, VANCOUVER, BC NETWORK OF DRUG USERS, WESTERN ABORIGINAL HARM REDUCTION SOCIETY, BRITISH COLUMBIA ASSOCIATION OF PEOPLE ON OPIATE MAINTENANCE, KNOWLEDGING ALL NATIONS AND DEVELOPING UNITY SOCIETY, PARENTS ADVOCATING COLLECTIVELY FOR KIN, COALITION OF PEERS DISMANTLING THE DRUG WAR SOCIETY, COALITION OF SUBSTANCE USERS OF THE NORTH SOCIETY, NANAIMO AREA NETWORK OF DRUG USERS SOCIETY, EAST KOOTENAY NETWORK & SOCIETY OF PEOPLE WHO USE DRUGS, SURREY UNION OF DRUG USERS, SOLID OUTREACH SOCIETY AND SNOW SOCIETY FOR NARCOTIC AND OPIOID WELLNESS v THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF HEALTH OF BRITISH COLUMBIA |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | JULY 21, 2025 |
| **JUDGMENT AND REASONS:** | CONROY J. |
| **DATED:** | FEBRUARY 26, 2026 |

**APPEARANCES:**

| | |
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