THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C–2, *Respect for Communities Act*

CANADIAN BAR ASSOCIATION
NATIONAL CRIMINAL JUSTICE SECTION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

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Bill C-2, *Respect for Communities Act*

I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section) and its Committee on Imprisonment and Release are pleased to comment on Bill C-2, *Respect for Communities Act*. The CBA Section represents a balance of Crown and defence counsel from all regions of Canada. The Committee on Imprisonment and Release is comprised of specialists in prison law, with an extensive history of important contributions to Canadian sentencing law.[1]

According to the Summary, Bill C-2 would amend the *Controlled Drugs and Substances Act* (*CDSA*):

> to create a separate exemption regime for activities involving the use of a controlled substance or precursor obtained in an unauthorized manner, specify the purposes for which an exemption may be granted for those activities, and detail information that must be submitted with an application to the Health Minister for an exemption in relation to a "supervised consumption site."[2]

We use the term "safe injection site" in this submission. The primary changes to the *CDSA* in Bill C-2 are to sections 55 and 56, governing Ministerial discretion to regulate or exempt from the application of the *Act* or its Regulations.

Previous controversy and litigation on this issue has primarily focused on the Vancouver Supervised Injection Site (Insite). Insite was created in 2003, when municipal and provincial governments responsible for public health devised a strategy to stem a persistent crisis around intravenous drug use in Vancouver. The idea was for addicts to bring their drugs from the

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1 For example, CBA Committee on Imprisonment and Release, Parole and Early Release (Ottawa: CBA, 1988); National Criminal Justice Section, Submission on Bill C-90 (Ottawa: CBA, 1993); National Criminal Justice Section, Bill C-41, *Criminal Code* amendments (sentencing) (Ottawa: CBA, 1994); National Criminal Justice Section, Bill C-9, *Criminal Code* amendments (conditional sentence of imprisonment) (Ottawa: CBA, 2006).

2 Bill C-2, *An Act to amend the Controlled Drugs and Substances Act* (*Respect for Communities Act*).

street to the facility to more safely inject under supervision by medical personnel. The site has since been used by over 10,000 people who would otherwise inject drugs in public spaces.

Some successes of Insite include reducing needle sharing and the spread of HIV/AIDS, educating addicts on safer injection practices and promoting treatment for drug dependence. It has saved lives by reducing drug overdoses and improved personal safety, especially for women who inject drugs.[3] Just this month, the Vancouver Sun reported that Insite had handled 31 overdoses from bad heroin over two days.[4] Studies documenting the positive outcomes of Insite have been independently peer-reviewed and published in top scientific periodicals, including the New England Journal of Medicine, The Lancet and the British Medical Journal.[5] The findings are echoed by evaluations of similar services in Australia and Europe.

Ideally, Bill C-2 could clarify the status of safe injection sites in Canada, and enable the successes of Insite to be replicated in other parts of the country by providing greater structure to and criteria for the discretion to be exercised by the Minister under the *CDSA*. This is a laudable goal. Our concern is that Bill C-2 would actually subject applicants to such a rigorous application process and so many new conditions as to make it virtually impossible to establish new safe injection sites, or to continue operating existing sites.

II. CONSTITUTIONAL CONSIDERATION OF SECTION 56

Section 56 of the *CDSA* has been subject to judicial consideration on several occasions, notably in relation to access to marihuana for medical purposes and for Insite.

In *R v. Parker,*[6] the Ontario Court of Appeal considered the section in the context of an individual charged with possession and the production of marihuana for medical purposes (before there was a viable constitutional exemption under the *Act*). The Court held that there

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3 Urban Health Research Institute, *Insight into Insite* (Vancouver: BC Centre for Excellence in HIV/AIDS, 2010). For more information about the research into Insite visit: http://uhri.cfenet.ubc.ca/content/view/57/92/

4 "Toxic Heroin blamed for Overdoses" (Vancouver: *Vancouver Sun*, October 15 2014).

5 T. Kerr, E. Wood, E., J. Montaner, *Vancouver's Pilot Medically Supervised Safer Injection Facility – Insite* (Vancouver: BC Centre for Excellence in HIV/AIDS, 2009). See: www.cfenet.ubc.ca/publications/findings-evaluation-vancouvers-pilot-medically-supervised-safer-injection-facility-insi

6 (2000), 49 O.R. (3d) 481 (ON CA) (leave to appeal to SCC dismissed).

must be a constitutionally viable medical exemption, with medical oversight, to prohibitions against the possession and cultivation of marihuana. The government's failure to provide reasonable access for medical purposes violated Mr. Parker's rights under section 7 of the *Charter* , as he had not only been charged with a criminal offense, but was forced to choose between his "liberty" and his "health". This was described as a violation of his security of the person, and not in accordance with the principles of fundamental justice. In summary, the Court said that:

i. The principles of fundamental justice are breached where the deprivation of the right in question does little or nothing to enhance the state's interest.

ii. A blanket prohibition will be considered arbitrary or unfair and thus in breach of the principles of fundamental justice if it is unrelated to the state's interest in enacting the prohibition, and if it lacks a foundation in the legal tradition and societal beliefs that are said to be represented by the prohibition.

iii. The absence of a clear legal standard may contribute to a violation of fundamental justice.

iv. If a statutory defence contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to persons who would prima facie qualify for the defence, it will be found to violate the principles of fundamental justice.

v. An administrative structure made up of unnecessary rules, which result in an additional risk to the health of the person, is manifestly unfair and does not conform to the principles of fundamental justice.[7]

About section 56, the Court said:

> In my view, notwithstanding the theoretical availability of the s.56 process, the marijuana prohibition does not accord with the principles of fundamental justice…
>
> Parker has established that the prohibition on possession of marijuana in the *Controlled Drugs and Substances Act* has deprived Parker of his right to security of the person and right to liberty in a manner that does not accord with the principles of fundamental justice... Since there is no legal source of supply of marijuana, Parker's only practical way of obtaining marijuana for his medical needs is to cultivate it. In this way, he avoids having to interact with the illicit market and can provide some quality control.[8]

After *Parker*, section 56 was used to grant exemptions for applicant patients, particularly after the issuance of an "Interim Guidance" document about those exemptions. That then led to the

7 *Ibid.* at 61.

8 *Ibid*. at 104.

2001 *Medical Marihuana Access Regulations (MMAR)*. Aspects of the *MMAR* scheme were subsequently challenged as too restrictive, leading to several subsequent amendments to comply with court ordered declarations about unconstitutionality.

The status of Insite resulted in a series of lower court decisions**,** culminating in the decision of the Supreme Court of Canada in *Canada (Attorney General) v. PHS Community Services Society* (*PHS)*.[9] That case involves a specific effort to keep Insite open when faced with the Minister's refusal to renew the exemption under section 56 of the *CDSA*.

At trial, the judge found that sections 4(1) and 5(1) of the *CDSA* (prohibitions on possession and trafficking) did not accord with principles of fundamental justice because they arbitrarily prohibited management of addiction. The arbitrariness was not cured by the exemption provided in section 56. The Court of Appeal dismissed the government's appeal of the lower court decision, but held that the doctrine of interjurisdictional immunity applied, so the majority did not address section 56. On further appeal, the Supreme Court of Canada concluded that the *CDSA* did not violate section 7 of the *Charter* because it granted the Minister power to grant exemptions on the basis of health. But, the Court found that the Minister's exercise of discretion in that case had violated section 7:[10]

> [148] The infringement at stake is serious; it threatens the health, indeed the lives, of the claimants and others like them. The grave consequences that might result from a lapse in the current constitutional exemption for Insite cannot be ignored. These claimants would be cast back into the application process they have tried and failed at, and made to await the Minister's decision based on a reconsideration of the same facts. Litigation might break out anew. A bare declaration is not an acceptable remedy in this case.
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> [149] Nor is the granting of a permanent constitutional exemption appropriate where the remedy is for a state action, not a law. In any event, such exemptions are to be avoided: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96. Moreover, the Minister should not be precluded from withdrawing an exemption to Insite should changed circumstances at Insite so require. The flexibility contemplated by s. 56 of the *CDSA* would be lost.
>
> [150] In the special circumstances of this case, an order in the nature of mandamus is warranted. I would therefore order the Minister to grant an exemption to Insite under s. 56 of the *CDSA* forthwith. (This of course would not affect the Minister's power to withdraw the exemption should the operation of Insite change such that the

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9 *Vancouver Area Network of Drug Users (VANDU) v. Atty. Gen. of Canada and Minister of Health for Canada*, which was then joined with, *PHS Community Services Society, Dean Edward Wilson, Shelley Tomich v. Atty. Gen. of Canada and Minister of Health Canada,* 2011 SCC 44 (*PHS*).

10 *Ibid.* at para. 27.

> exemption would no longer be appropriate.) On the trial judge's findings of fact, the only constitutional response to the application for a s. 56 exemption was to grant it. The Minister is bound to exercise his discretion under s. 56 in accordance with the *Charter*. On the facts as found here, there can be only one response: to grant the exemption. There is therefore nothing to be gained (and much to be risked) in sending the matter back to the Minister for reconsideration.
>
> [151] This does not fetter the Minister's discretion with respect to future applications for exemptions, whether for other premises, or for Insite. As always, the Minister must exercise that discretion within the constraints imposed by the law and the *Charter*.
>
> [152] The dual purposes of the *CDSA* — public health and public safety — provide some guidance for the Minister. Where the Minister is considering an application for an exemption for a supervised injection facility, he or she will aim to strike the appropriate balance between achieving the public health and public safety goals. Where, as here, the evidence indicates that a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption.
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> [153] The *CDSA* grants the Minister discretion in determining whether to grant exemptions. That discretion must be exercised in accordance with the *Charter.* This requires the Minister to consider whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice. The factors considered in making the decision on an exemption must include evidence, if any, on the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition.

III. SOME MEDICAL PERSPECTIVES

After the federal Minister of Health announced that she was closing the Insite program, Professor Martin Schechter at the University of British Columbia Faculty of Medicine, School of Population and Public Health commented that her decision would mean that people with severe and lengthy illnesses who had not been successfully treated with conventional methods in the past would likely relapse to street heroin.[11] Terry Lake, British Columbia Minister of Health, responded to the federal Health Minister's announcement saying:

> we're reluctant to close the door on innovation and creativity when it comes to tackling these very challenging problems. We have to think out of the box sometimes. I know that the thought of using heroin as a treatment is scary for people, but I think we have to take the emotions out of it and let science inform the discussion.[12]

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11 Maryam Shah, "BC Health Minister Derides Feds for Pulling Plug on Heroin Trial" (Vancouver: *Vancouver Sun*, October 2013).

12 *Ibid.*

Dr. Julio Montaner, Director of the BC Center for Excellence in HIV/AIDS, has noted that Bill C-2 would prevent new safe injection centers from being opened in BC and other parts of Canada, depriving people addicted to drugs who are not in Vancouver of the benefits of Insite.[13]

The Canadian HIV/AIDS Legal Network, together with the Canadian Drug Policy Coalition and Pivot Legal Society have also criticized Bill C-2, saying it will impede life-saving health services and cause more death and disease. This is because it will undermine health professionals' ability to reach those at greatest risk and damage both "public health and the public purse" by blocking access to safe injection sites. Those sites have been shown to save lives and prevent the spread of infections.[14]

IV. COMMENTS

The Preamble to Bill C-2 acknowledges the Supreme Court of Canada's observations in *PHS* about the dual purpose of exemptions from the application of the *CDSA*, to balance public safety and public health:

> Whereas Parliament recognizes that the objectives of the *Controlled Drugs and Substances Act* ("the *Act*") are the protection of public health and the protection of public safety;
>
> Whereas the *Act* and its regulations have a dual role of prohibiting certain activities associated with harmful substances and allowing access to those substances for legitimate medical, scientific and industrial purposes.

However, other parts of the Preamble reflect a continued emphasis on prohibiting illicit drugs. This approach ignores overwhelming historical and current evidence that prohibition drives the drug supply underground and increases violence and deaths associated with drug activity and overdoses. Not only dangerous, this approach has proven expensive and ineffective, even after decades and endless public funds to allow it to succeed. The CBA and many others have argued for a harm reduction approach to instead be used in dealing with illegal drugs and addiction.[15]

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13 Such benefits have now been well documented – see, for example, *Insight into Insite:* http://uhri.cfenet.ubc.ca/images/Documents/insight_into_insite.pdf

14 *Ibid*. See also,"Drug consumption rooms: evidence and practice" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184810

15 www.cba.org/CBA/resolutions/pdf/13-01-A-ct.pdf

The *CDSA* currently provides broad ministerial discretion to grant exemptions. Section 56 now states:

> The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this *Act* or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

The Governor in Council can also make regulations under the *Act* according to section 55, and section 55(1)(z) says that:

> Exempting, on such terms and conditions as may be specified in the regulations, any person or class of persons or any controlled substance or precursor or any class thereof from the application of this *Act* or the regulations.

The amendments proposed in Bill C-2 would create a separate exemption regime for safe injection sites dealing with illicitly obtained substances and significantly limit the Minister's discretion to make regulations and grant exemptions for safe injection sites.

New section 56(2) would clarify that the discretion to grant exemptions in section 56(1) does *not* apply for substances obtained in an unauthorized manner. Instead, an application to exempt those activities (including safe injection sites) must be made under a separate exemption regime in proposed section 56.1. Similarly, Bill C-2 would remove the Governor in Council's authority to make regulations exempting substances or persons for substances obtained in a manner not authorized under the *Act*.

The possibility of an exemption for a medical purpose, as for a safe injection site like Insite, is addressed in proposed new section 56.1(2). It would allow the Minister to grant an exemption involving a controlled substance obtained illicitly (like those commonly used in safe injection sites) from any or all applications of the *Act* and regulations, if the Minister is first of the opinion that an exemption is necessary for a "medical, law enforcement or prescribed purpose." Following that initial assessment, a long series of other hurdles follow.

The cumulative impact of all those hurdles would make it virtually impossible for the Minister to grant an exemption. The following summary illustrates our concern about the Bill's proposed regime:

1. **The Minister must first determine an exemption is *necessary* for a medical, law enforcement or prescribed purpose (section 56.1(2)).**

2. **If for a medical purpose involving illicit drugs, the *applicant must fulfill 26 individual requirements* (section 56.1(3), (a) to (z)).**

   For example, applicants would be required to submit: scientific evidence demonstrating a medical benefit; opinion letters from provincial ministers, local governments, health professionals, and the police; data and statistics on crime and drug use in the proposed area; descriptions of proposed measures to address any concerns that may have been raised in relation to the proposed safe injection site; reports of consultations with different stakeholders; and, detailed information about key staff members.

   Some requirements may not be excessive, for example, (c) obtaining a letter from the local municipal government. Others though are much more demanding, for example, under (i):

   > A description of the potential impacts of the proposed activities at the site on public safety, including the following:
   >
   > (i) Information, if any, on crime and public nuisance in the vicinity of the site and information on crime and public nuisance in the municipalities in which supervised consumption sites are located,
   >
   > (ii) Information, if any, on the public consumption of illicit substances in the vicinity of the site and information on the public consumption of illicit substance in the municipalities in which supervised consumption sites are located, and
   >
   > (iii) Information, if any, on the presence of inappropriately discarded drug-related litter in the vicinity of the site and information in the vicinity of the site and information on the presence of inappropriately discarded drug-related litter in the municipalities in which supervised consumption sites are located.

   The final requirement directs the Minister to consider "any other information that the Minister considers relevant to the consideration of the application". To be clear, it is not that any one of the requirements in Bill C-2 is likely to be insurmountable, but the sheer volume that would erect an unreasonable barrier for applicants.

3. **For existing sites wishing to continue to have an exemption, the hurdles are even higher (section 56.1(4)).** Not only must those sites meet all 26 requirements for new applications, but the Minister must also consider:

   (a) any evidence of any variation in crime rates in the vicinity of the site during the period of its operation; and

   (b) any evidence of any impacts of the activities at the site on individual or public health during that period.

4. **After an applicant has satisfied the Minister that an exemption is necessary for a medical purpose, and fulfilled the 26 requirements to the Minister's satisfaction, the Minister must then determine an exemption *responds to "exceptional circumstances"* (section 56.1(5)).**

5. **If exceptional circumstances are found to exist, the Minister must consider the following principles:**
    - *illicit substances may have serious health effects;*
    - *adulterated controlled substances may pose health risks:*
    - *the risks of overdose are inherent to the use of certain illicit substances;*
    - *strict controls are required, given the inherent health risks associated with controlled substance that may alter mental processes;*
    - *organized crime profits from the use of illicit substances; and*
    - *criminal activity often results from the use of illicit substances.*
6. **Finally, the Minister may give *notice of any such application to the public*, and allow 90 days for comment (section 56.1(6)).**

In our view, the overall result would be to make it practically impossible for new safe injection sites to be established, and for existing sites to continue. This goes against the Supreme Court of Canada's direction in *PHS*. It also seems contrary to the public interest given the well documented success of safe injection sites to date. Certainly, applications to establish or maintain such sites should be carefully considered and monitored according to consistent transparent criteria, but Bill C-2 would go far beyond that sort of responsible approach.

V. CONCLUSION

> For injection drug users, the nature of addiction makes for a desperate and dangerous existence. Aside from the dangers of the drugs themselves, addicts are vulnerable to a host of other life-threatening practices. Although many users are educated about safe practices, the need for an immediate fix or the fear of police discovering and confiscating drugs can override even ingrained safety habits. Addicts share needles, inject hurriedly in alleyways and dissolve heroin in dirty puddle water before injecting it into their veins. In these back alleyways, users who overdose are often alone and far from medical help. Shared needles transmit HIV and hepatitis C. Unsanitary conditions result in infections. Missing a vein in the rush to inject can mean the development of abscesses. Not taking adequate time to prepare can result in mistakes in measuring proper amounts of the substance being injected. It is not uncommon for injection drug users to develop dangerous infections or endocarditis. These dangers are exacerbated by the fact that injection drug users are a historically marginalized population that has been difficult to bring within the reach of health care providers.[16]

16 *Supra*, note 9 at para [10].

In this passage, the Supreme Court of Canada recognizes the realities of addicts' lives, and the risks they take to avoid the police and get to their drugs. In *PHS,*[17] too, all parties agreed that addiction is an illness. One aspect of that illness is a continuing need or craving for the substance involved. The unsanitary equipment, techniques and procedures, rather than the injection process itself, fosters the infections, illnesses or diseases that are common to addicts. The risk of morbidity and mortality associated with such addiction and injection is reduced or ameliorated by injection in the presence of a qualified health professional.[18]

Bill C-2 would severely hamper governments' ongoing efforts to combat these difficult problems in communities across Canada. As Pitfield, J. said at the trial level in *PHS,*[19] these people are not involved in drugs for recreation, but suffer from the illness of addiction. When continually shunned, addicted people are subject to and at greater risk of transmitting infectious diseases, which spreads to broader public health and social problems. Bill C-2 neglects an established body of knowledge and experience that addicted persons are hard to reach, and have an understandable fear of the law and its enforcement. Rather than encouraging drug use, safe injection sites bring addicts in the door to enable them to inject under supervision, get advice, and be exposed to treatment options, including the option to enter "detox" programs.

Bill C-2 would also intrude on provincial/territorial jurisdiction over health, and ignore concerns at the municipal level. New legislation to address safe injection sites must recognize the public health aspect of the *Act* and welcome health care practices that save lives and provide health care and addiction treatment services. Instead, the Bill is likely to attract constitutional scrutiny, and add to health costs as new cases of HIV, Hepatitis C and overdoses continue. It would create barriers to addressing public health hazards and make it increasingly difficult to combat disease and death amongst people addicted to drugs, many of whom suffer from mental health issues and troubled pasts.

In our view, there is no public policy justification for adding to the suffering of a vulnerable population, people who could be and have been helped by having access to safe injection sites.

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17 *Ibid.*

18 *Ibid.* at para. 27.

19 2008 BCSC 661.

Bill C-2 should be redrafted to ensure that it allows for the creation and continuation of those sites, with appropriate monitoring and oversight.