Federal Court  Cour fédérale

**Date: 20190227**

**Docket: T-1764-17**
**T-1765-17**
**T-1766-17**

**Citation: 2019 FC 236**

**Ottawa, Ontario, February 27, 2019**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**CHINATOWN AREA BUSINESS ASSOCIATION**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**
**and**
**ACCESS TO MEDICALLY SUPERVISED INJECTION SERVICES EDMONTON**

**Respondents**

**CANADIAN DRUG POLICY COALITION**

**Intervenor**

# JUDGMENT AND REASONS

## I. Introduction

[1] The Applicant, Chinatown and Area Business Association (hereafter CABA), seeks judicial review of exemptions to the *Controlled Drugs and Substances Act*, SC 1996, c 19

[*CDSA*] issued by Health Canada which allow for the operation of three supervised consumption sites (SCSs) within close proximity in their community, in addition to a separate in-patient facility at a local hospital.

[2] The present application in file T-1764-17 is the consolidation of three applications for judicial review, one for each exemption decision: T-1764-17 for the SCS at Boyle Street Community Services (Boyle Street); T-1765-17 for the site at the premises of the George Spady Society (George Spady); and T-1766-17 for the Boyle McCauley Health Centre (Boyle McCauley). The records filed with respect to each application are essentially the same, save for particulars that are specific to each site. The applications were heard together and a copy of these reasons and judgment will be placed on each file.

[3] CABA submits that they are not opposed to injection drug users getting help, or to the hospital site, but contend that as representatives of a community directly affected by the decisions, they were not properly consulted on the exemption decisions. They further contend that opening three sites within six city blocks of each other, in addition to the nearby in-patient hospital site, will impose an unfair burden on the community. At the hearing, they suggested that if the applications for judicial review were granted, the order with respect to Boyle McCauley should be stayed for six months in order for supervised consumption services to continue at that location while the Minister reconsidered these matters.

[4] The Respondents – the Attorney General of Canada and the organization that applied for the exemptions, Access to Medically Supervised Injection Services Edmonton (AMSISE) –

defend the decisions. AMSISE argues that Health Canada did not violate CABA's procedural fairness rights and rendered reasonable decisions. The Attorney General makes similar arguments and contends, in addition, that CABA does not have standing to bring this application. The Canadian Drug Policy Coalition (CDPC) was granted leave to intervene to argue that third party community groups are not entitled to procedural fairness in the exemption process.

[5] From the record before the Court, it is understandable why the individuals and businesses that belong to the Applicant association believe that their concerns were not taken into account by Health Canada in the decisions to grant the exemptions and, further, that the outcome of the application process was preordained. Nonetheless, for the reasons that follow, I find that the minimal requirements of procedural fairness owed to CABA were met and the decisions were reasonable. The applications for judicial review will, therefore, be dismissed.

## II. **Background**

### *A. The Parties*

#### (1) CABA

[6] CABA is a provincial corporation created under the *Municipal Government Act*, RSA 2000, c M-26 and City of Edmonton Bylaw 12370 entitled *Chinatown and Area Business Revitalization Zone Bylaw*, adopted in 2005. The boundaries of the revitalization zone, varied from time to time, are set out in Appendix "C" to the Bylaw. The corporation represents approximately 200 retail stores, restaurants, professionals and others carrying on business in and around Edmonton's Chinatown.

[7] CABA's purposes, as set out in the Bylaw, are to improve, beautify and maintain property; to develop, improve and maintain public parking; and to promote the area as a business and shopping district. According to the evidence of its Executive Director, CABA also seeks to ensure that the Chinatown area is a safe and suitable environment for its members to live and work. To this end, CABA advocates on behalf of its members with government and other public officials, including the police.

[8] During the exemption application process, CABA participated in an unincorporated coalition of resident groups and business owners in downtown Edmonton which communicated with Health Canada through legal counsel (not CABA's present counsel) as the "Urban Core Coalition" (the UCC). CABA also communicated its members' concerns directly to AMSISE and to the Minister of Health. The UCC took no part in these applications. I accept that when the UCC communicated with Health Canada and AMSISE, it did so on behalf of the Applicant and its other members. I draw no inferences from the absence of the UCC's other members from these applications.

(2) AMSISE

[9] AMSISE is an unincorporated alliance formed in 2012 to "document the need, develop a tailored response, consult, and garner support" for SCSs in Edmonton. The alliance includes some 25 individuals and groups, such as community agencies, people who have used injection drugs, academic researchers and local and provincial agencies. It includes officials of the City of Edmonton, employees of the University of Alberta and physicians and policy advisors within Alberta Health Services, a provincial agency.

(3) Attorney General of Canada

[10] The Attorney General of Canada is named in these proceedings as the representative respondent to defend Health Canada's decisions and process.

(4) The Intervenor – CDPC

[11] CDPC describes itself as a civil society coalition of over 70 organizations and 3000 individuals from across Canada that has been active since 2010. Its membership includes people who use illicit street drugs, their families, medical professionals, drug policy experts, research institutes, legal organizations and service providers.

[12] CDPC was granted leave to file a brief memorandum of argument by the case management judge and, subject to the discretion of the hearing judge, the right to make brief oral submissions. In deciding that CDPC should be permitted to intervene, the case management judge held that the organization's prior involvement in hearings relating to the legislation gave them a unique insight not shared by the Respondents. I allowed counsel for the CDPC to make oral submissions at the hearing and found their input helpful, particularly with regard to the legislative history of the *CDSA* exemptions.

*B. The Statutory Exemption Framework*

[13] The *CDSA* is the federal legislation that implements Canada's international obligations and domestic policy to regulate certain drugs, their precursors and other substances. Among

other provisions, it contains criminal offences that prohibit the possession and trafficking of controlled substances. *CDSA* section 56.1 allows the Minister to exempt persons or controlled substances from the provisions of the *CDSA* to permit activities at an SCS, subject to any terms and conditions that the Minister considers necessary if, in the opinion of the Minister, the exemption is necessary for a medical purpose.

[14] The exemption provision has been part of the statute for many years. As it read from 1996 to 2015, in *CDSA* section 56, it simply required that the Minister be of the opinion that an exemption was necessary for a medical or scientific purpose or was otherwise in the public interest.

[15] The exercise of that discretion, in the context of 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*] was addressed by the Supreme Court of Canada in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS*]. *PHS* arose from a decision by the Minister of Health to refuse to renew an exemption for a safe injection facility in Vancouver's Downtown Eastside district.

[16] In *PHS*, the issue was whether Insite, Vancouver's safe injection facility, was exempt from the *CDSA*, either because Insite is a health facility within the exclusive jurisdiction of the Province, or because the application of the *CDSA*'s criminal law provisions would violate the *Charter*. Insite had operated under a *CDSA* section 56 exemption since 2003, but an extension was not granted by the Minister when it came up for renewal in 2008.

[17] Building on the decisions of the court of first instance and the British Columbia Court of Appeal, the Supreme Court concluded that the *CDSA* is applicable to Insite, and that the *CDSA* scheme conforms to the *Charter*. The Minister's actions in failing to extend Insite's exemption violated *Charter* section 7 and could not be justified under section 1. Accordingly, the Court ordered the Minister to grant Insite an extended exemption.

[18] In coming to this conclusion, the Supreme Court described the life of street injectors as follows, at paragraph 10:

> 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.

[19] The Supreme Court noted that while conceived as an experiment, the evidence demonstrated that Insight had proven to be successful: it saved lives and improved health. And it did so without increasing the incidence of drug use and crime in the surrounding area. The decision not to grant an extension of the exemption engaged the section 7 interests of Insight's

staff and clients and, based on the evidence, was arbitrary. In determining that the Minister's decision not to extend Insite's *CDSA* exemption violated the *Charter*, the Court, at paragraph 131, accepted several factual findings by the trial judge relevant to this judicial review:

> (1) traditional criminal law prohibitions have done little to reduce drug use in the [Downtown East Side];
>
> (2) the risk to injection drug users of death and disease is reduced when they inject under the supervision of a health professional; and
>
> (3) the presence of Insite did not contribute to increased crime rates, increased incidents of public injection, or relapse rates in injection drug users. On the contrary, Insite was perceived favourably or neutrally by the public; a local business association reported a reduction in crime during the period Insite was operating; the facility encouraged clients to seek counselling, detoxification and treatment. Most importantly, the staff of Insite had intervened in 336 overdoses since 2006, and no overdose deaths had occurred at the facility.

[20] The conclusion that the Minister had not exercised his discretion in accordance with the *Charter* was not to be taken as a licence for injection drug users to possess drugs wherever and whenever they wish, the Supreme Court cautioned. Nor was it an invitation for anyone to open a facility for drug use under the banner of a "safe injection facility." The result, in that case, rested on the trial judge's conclusions that Insite is effective in reducing the risk of death and disease and has had no negative impact on the federal government's legitimate criminal law objectives: *PHS*, above, at para 140.

[21] The Supreme Court noted at paragraph 152 that the *CDSA*'s dual purposes – 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.

[22] In determining whether to grant exemptions, the Supreme Court held, the Minister's discretion must be exercised in accordance with the *Charter*. The Minister should consider whether denying an exemption would cause deprivations of life and security that are not in accordance with the principles of fundamental justice. Evidence on a number of factors was to be taken into account, the Court stated, at paragraph 153:

> 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.

[23] Parliament responded to *PHS* by adding *CDSA* section 56.1 in 2015: *Respect for Communities Act*, SC 2015, c 22, s 5. The new provision imposed 26 conditions requiring information to be submitted with any application for an exemption. Among the conditions was a requirement to submit a report on consultations with a broad range of community groups from the municipality in which the proposed site would be located.

[24] The 2015 amendments stipulated that an exemption relating to a supervised consumption site could only be granted in exceptional circumstances: only after 26 prescribed conditions had been met and after the Minister had considered a number of specified principles regarding the

risks associated with illicit substance use. Taken together, the 26 conditions and the restrictions on the exercise of the Minister's discretion constituted a formidable barrier to obtaining an exemption. The legislation also authorized the Minister to issue a public notice of the application to allow the public to provide comments in addition to those gleaned from the consultations which the applicants were required to conduct prior to submitting the application.

[25] Parliament considered the matter again in 2017. Section 56.1 was significantly amended by *An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts*, SC 2017, c 7, section 42, introduced as Bill C-37. The changes, which were quickly adopted and came into force on May 18, 2017, removed the limitations on the Minister's discretion that had been imposed by the 2015 Act and substantially reduced the information required to be submitted to grant an exemption. Information regarding the intended public health benefits of the site was still required. Additional information, "if any", relating to the impact on crime rates, local conditions indicating a need for the site, the administrative structure in place and resources available to support the site and expressions of community support or opposition could also be submitted.

[26] The Minister's discretion to give notice of any application for an exemption was retained. If issued, the notice is to indicate the time – not less than 45 days or more than 90 days – during which members of the public can provide comments.

[27] As stated by the Minister of Health in the House of Commons on May 15, 2017, the intent of these amendments was to streamline the application process for supervised consumption

sites so that "communities that want and need these sites do not experience unreasonable delays in their efforts to save lives." She noted that in the previous year, more than 900 people had died from illicit drug overdoses in British Columbia and close to 500 more had died in Alberta. The conditions required by the 2015 legislation had caused delays in establishing sites. The new process, the Minister said, would "align with the five factors set out in the Supreme Court of Canada decision in 2011."

[28] The five factors set out by the Supreme Court in paragraph 153 of *PHS,* cited above, are now captured almost verbatim in *CDSA* section 56.1. The word "information" was substituted for "evidence" and "administrative" replaced "regulatory" in the third factor. The phrase "if any" was retained, indicating that such information need only be submitted if it is available. In cases of new sites, such as these, information on the impact on crime rates, for example, may not be available before the sites open.

*C. AMSISE's application*

[29] AMSISE submitted one single application for *CDSA* section 56.1 exemptions for each of the three agencies on May 1, 2017, while Bill C-37 was nearing adoption in Parliament.

[30] A separate application was submitted for an in-patient SCS at the Royal Alexandra Hospital, which is also located in Edmonton's downtown core but is over two kilometres from the three sites in the AMSISE application. CABA does not oppose the Royal Alexandra Hospital site and that application was not subject to this judicial review. But that site's existence is relevant to CABA's argument that three other sites were not required.

[31] AMSISE's application included:

- Written submissions;
- An outline of proposed policies, procedures, and protocols;
- Schematic drawings of the proposed facilities;
- Community engagement study by ibis communications;
- Edmonton Drug Use and Health Survey;
- Alberta Health Opioids Substance Misuse Report;
- A description of wrap-around supports available from the agencies and from Streetworks (a needle exchange program provided by Alberta Health Services);
- A proposed budget;
- College of Physicians & Surgeons of Alberta Council resolution of endorsement;
- College of Licensed Practical Nurses of Alberta letter of support;
- Alberta College of Social Workers motion of support;
- Alberta Associate Minister of Health letter of support;
- Alberta Chief Medical Officer of Health letter of support;
- Alberta Minister of Justice and Solicitor General letter of support;
- Edmonton Mayor letter of support on behalf of City Council; and
- Edmonton Chief of Police letter of support on behalf of Edmonton Police Services.

[32] The April 2017 report of the Community Engagement Study by ibis communications, "What we heard," was the result of a process meant to provide information to community members on why SCSs were being added to the agencies and to give them the opportunity to ask questions and raise concerns. It involved six 4-hour open house sessions in the agencies, a community questionnaire, attendance at community league and business association meetings and a door-to-door campaign. Of approximately 850 residences visited in the door-to-door campaign, they spoke to people at an estimated 40%, or 340 people. The report indicates that further information sessions with community leagues and business associations, including CABA, were planned.

[33] The report notes that the majority of residents and business owners reacted positively to the idea of decreasing the amount of people injecting in public and decreasing needle debris in

the neighbourhood. The report also notes positive community reactions to embedding SCSs in existing centres where drug users already attend and can get additional assistance and services.

[34] Conversely, the report notes some residents were concerned about concentrating yet more services in their neighbourhood, which they felt already had a disproportionate amount of services for marginalized persons. Residents also voiced concerns over public safety and a potential increase in gang or drug dealing activity around the facilities.

[35] AMSISE's proposal was also based in part on the University of Alberta's School of Public Health's Edmonton Drug Use and Health Survey. The survey was conducted in partnership with AMSISE and consisted of a "convenience sample of participants" recruited from in and around three inner-city agencies, including Boyle Street and Boyle McCauley.

[36] To be eligible for the survey, participants had to report using illicit drugs at least once a month over the previous six months, report spending at least two days per week in Edmonton's inner city, be at least 15 years of age and be capable of providing informed consent. The survey specifically oversampled people who inject illicit drugs. Participants were provided a $20 honorarium in exchange for their participation. The survey findings were based on data from 320 participants, 311 of whom were recruited from Boyle Street and Boyle McCauley.

[37] The survey findings note links between regular illicit drug use and inadequate housing, risk behaviours (such as sharing syringes, injecting in public, binge drug use and injecting

alone), violence and health problems (mental, physical and sexual). The survey findings also note a link between illicit drug use and unmet health needs.

[38] Over 90% of participants who had injected drugs over the past six months would use a SCS if one opened, the survey reports. More than 75% of these participants indicated they would walk no further than one kilometre to access a SCS. The majority of these participants were still willing to use a SCS if most of the proposed rules, such as registration, post-injection monitoring, no sharing of drugs and video surveillance, were enforced.

[39] The authors of the survey note several limitations. The results are a "snapshot" study only and cannot help draw causal influences or track patterns or trends; the survey likely overestimates drug users' willingness to use services as sampling was not random; and it is based entirely on self-reported data. Nevertheless, the survey recommends expanding operating hours for needle exchange programs, implementing SCSs and increasing access to support services.

[40] The application also included Alberta Health's 2016 Q4 Opioids and Substance Misuse report. The report notes that in 2016, 80% of apparent fentanyl overdose deaths occurred outside the central urban core. In the same period, however, the highest concentration of Emergency Medical Services (EMS) responses to opioid related events in Edmonton were downtown, including Central McDougall, McCauley and Boyle Street, the areas in which the proposed sites would be located.

[41] Letters of support from local politicians, representatives of police services, provincial politicians and health personnel were also submitted. In addition, Health Canada received direct submissions supporting AMISES's proposal from community members and Edmonton's police chief. One form letter of support was received 166 times, apparently as a result of AMSISE's campaign asking the public to email support to Health Canada.

[42] Direct submissions opposing AMSISE's proposal were received from business operators, community members (some of whom indicated they resided in the downtown core), the UCC and CABA.

[43] AMSISE's proposal was described in the application as tailored to the Edmonton context. In contrast to that in Vancouver, it involved embedding SCSs within the three existing community agencies. It was submitted that sites at the three agencies would complement the proposed in-patient services at the Royal Alexandra Hospital. The hospital would encourage outpatients to attend one of the three community agencies. Instead of a stand-alone facility like Vancouver's Insite, the three small-scale sites would offer their services in agencies that already provide health, social and harm-reduction services to the targeted population. In 2016, the three agencies were responsible for 98% of the syringes given out in central Edmonton. Building on these existing relationships, AMSISE's proposal sought to leverage existing services in each agency and make them available to SCS clients. Spreading the services across the three agencies, including overnight staffing at George Spady, would allow for 24/7 access to a SCS. Streetworks, Edmonton's needle exchange program, would coordinate services between the agencies.

*D. The Review Process*

[44] Health Canada confirmed receipt of AMSISE's application for the three exemptions on June 2, 2017 and proceeded to assess it on the basis of the *CDSA* as it read following Bill C-37's Royal Assent and coming into force.

[45] AMSISE and Health Canada communicated regularly over the phone and over email during the application's assessment. On July 5, 2017, for example, Health Canada contacted AMSISE to inquire whether AMSISE was aware of a local community group in Edmonton that did not support the proposed SCSs. In reply, AMSISE submitted a five-page "Community Concerns and Responses" document on July 26, 2017.

[46] As noted above, CABA was a member of the Urban Core Coalition and took part in the UCC's meetings and communications with Health Canada. The UCC contacted Health Canada on May 20, 2017 and pointed out that, according to the Alberta Health survey, most opioid-related deaths in Edmonton occur outside the downtown core.

[47] The UCC asked Health Canada to withhold approving the exemption until a complete analysis was conducted of the need for and effects of clustering three sites in the distressed downtown core and of the effects of diverting resources from other areas.

[48] The coalition raised a number of specific objections to the AMSISE proposal. The Edmonton Drug Use and Health survey, the UCC argued, was predisposed to its own conclusion,

and the results conflicted with public health data indicating the greatest need is outside the city core. The provincial government had placed undue pressure on the City of Edmonton to endorse AMSISE's proposal despite the absence of a public health emergency. The public consultations were inadequate and the survey samples too small to obtain an accurate picture of public attitudes. The material used to inform participants was only available in English despite the large proportion of residents of the affected area being of Chinese origin. Indigenous people were not involved in the proposal despite their over representation in the drug using community. AMSISE had failed to present convincing evidence of the need for three separate sites. The proposal would contribute to the "spatial concentration of poverty" and would force needy people into the already distressed downtown core, the UCC argued.

[49] Following a series of further communications from the UCC, Health Canada responded on September 15, 2017. Health Canada advised that they were in the process of reviewing the information submitted by AMSISE, including a summary of the community's views on the proposed SCSs, copies of all written submissions and a description of the steps AMSISE would take to address any concerns raised in consultations. Health Canada invited the UCC to provide specific comments or concerns by September 29, 2017. They later extended this deadline to October 9, 2017.

[50] AMSISE and Health Canada contacted the UCC on September 22, 2017 to provide links and attachments to documents AMSISE had submitted to Health Canada. The UCC acknowledged these communications the same day and raised further objections to the process, contending that Health Canada had prejudged the application and was now trying to justify its

conclusion. A further exchange took place on September 25, 2017, in which the UCC reiterated its concerns of prejudgment and bias in the decision-making process.

[51] On September 29, 2017, the UCC wrote again to Health Canada, noting a provincial politician announced that a decision would be made in AMSISE's application on October 6, 2017. The UCC complained that this would mean a decision would be made mere hours after their submissions (then due by 5 pm on October 4), indicating Health Canada had no intention of properly considering the UCC's evidence.

[52] On October 1, 2017, the UCC informed Health Canada that they had been provided with an incomplete version of AMSISE's "Community Concerns and Responses" document and requested that Health Canada provide the public a 45 to 90-day commentary period, as contemplated by *CDSA* subsection 56.1(4), in light of the novel issues raised by AMSISE's application.

(a) *The UCC's objections to the proposal*

[53] On October 9, 2017, the UCC submitted a 66-page letter, along with 38 pages of attachments, setting out its specific concerns with the AMSISE proposal and the review process.

[54] Among other objections, the UCC contended that AMSISE's application was barred for misrepresentation contrary to *CDSA* section 46.1, as enacted through Bill C-37. The alleged misrepresentations related to conflicts between statements in the application and information obtained by the UCC through Freedom of Information requests to the City of Edmonton.

[55] The UCC claimed that the public information received indicates that AMSISE had decided on the three-site model, and had even chosen the three specific sites, as early as November 23, 2012. The Edmonton Drug Use survey used to justify this approach was crafted to support this conclusion, the UCC claimed. Thus, AMSISE's statements about the survey were false or misleading. As were statements, the UCC claimed, about the hours and resources available at one of the sites, George Spady. The statement that none of the agencies could offer 24/7 coverage is patently untrue, the UCC argued.

[56] The UCC further claimed that AMSISE's use of data relating citywide consumption with drug injection data in the downtown core was misleading. Only three of the last 75 fentanyl-related deaths occurred in the downtown core, it argued; this leaves the remaining 72 deaths, or 96%, unaddressed by AMSISE's proposal. The proposal did not address other concerns, such as the incidence of Hepatitis C cases. As a result, the UCC argued that the claim that the sites were required downtown to respond to overdose deaths is patently untrue.

[57] Claims by AMSISE that the operators of the chosen sites are responsive to concerns about public disorder at their locations are contradicted by City by-law enforcement records. Reliance on Vancouver data about decreased crime in the vicinity of Insite was not justified as it was dependent on a greater police presence at one site. The three-location model, designed to allow users to travel between the sites, may entrench crime in these pathways, the UCC submitted.

[58] In the result, the UCC argued, AMSISE could not fulfill its promise to operate SCSs to benefit public health, safety, and security. If, despite their opposition, Health Canada decided to approve the exemptions, the UCC argued that the exemptions must include strict conditions, including independent third-party monthly reporting on conditions around the SCSs.

(b) *Health Canada's reaction to the UCC's submissions*

[59] A Health Canada "Alberta SCS Application Summary" document confirms Health Canada received and reviewed the UCC's submissions. In response, Health Canada proposed an additional exemption condition requiring AMSISE to provide Health Canada with additional data within 90 days of opening.

[60] On October 12, 2017, Health Canada prepared three Memoranda summarizing the applications for Boyle Street, George Spady, and Boyle McCauley. The Memoranda state that AMSISE's application provides substantial information in relation to the relevant criteria and seeks an approval or a rejection of each exemption application. Attached to the Memoranda are Health Canada's assessments of AMSISE's application against the relevant criteria.

(c) *CABA meeting with Minister*

[61] On October 17, 2017, CABA and other groups were invited to meet with the Minister on October 19, 2017 to "share [their] concerns about the process for approval of safe consumption sites." CABA's Executive Director understood from the invitation that she would have an opportunity to discuss CABA's concerns about the proposed SCS locations.

[62] On October 18, 2017, just before the scheduled meeting, CABA and other community groups learned that Health Canada had already approved the exemptions on October 17. As a result, some of the people invited to attend the meeting chose not to for that reason. CABA's Executive Director attended to express her concerns. She was informed that the decisions were made and would not change.

*E. The Decisions*

[63] As noted, on October 17, 2017, Health Canada approved AMSISE's exemption application. Hand-written notes in the record indicate that Health Canada considered: security information including surveillance cameras; EMS and overdose data; AMSISE's proposed evaluation plan and liaison committee; community support and concerns; and the evidence of a medical need for SCSs.

[64] Health Canada communicated its decisions to AMSISE the same day. Amongst the exemption conditions was a requirement that, for each site:

> [AMSISE] must provide a report of the impacts of the supervised consumption services on the neighbourhood where the Site is located. These impacts could include, but are not limited to, general demographics of the clients served, public complaints, overdoses in the vicinity, drug-related crime, improperly discarded syringes, public disorder, ongoing community engagement and mitigation efforts, etc. The report should be sent to [Health Canada] 90 days after the Site begins offering services to the public and will be made publically available.

## III. **Issues**

[65] Having considered the parties' submissions, the issues the Court must address are the following:

A. Does CABA have standing?

B. Was CABA entitled to procedural fairness? If so, at what level?

C. Did the exemption process violate CABA's procedural fairness rights?

D. Were the decisions reasonable?

[66] Not all of the parties submitted arguments relating to each issue. The Attorney General raised the issue of CABA's standing, but not AMSISE. AMSISE also took no position on the standard of review. And as noted above, CDPC's intervention was limited to the interpretation of *CDSA* section 56.1.

## IV. **Legal Framework**

[67] The relevant *Federal Courts Act* and *CDSA* provisions are attached in Annex "A".

### *A. The test for standing*

#### (1) Directly affected

[68] Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 provides that an application for judicial review may be made by the Attorney General of Canada or "by anyone directly affected by the matter in respect of which relief is sought."

[69] In order to be directly affected by a decision made by a federal board, commission or other tribunal – in this instance, Health Canada's decision to approve the exemptions – the decision must affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some way: *Rothmans of Pall Mall Canada Ltd v Minister of National Revenue*, [1976] 2 FC 500 at 506, 67 DLR (3d) 505 (CA); *Bernard v Close*, 2017 FCA 52 at para 2.

[70] Where a party's interests are purely commercial and they were not a party before the decision maker, they will not be directly affected: *CanWest MediaWorks Inc v Canada (Health)*, 2007 FC 752 at para 17, 68 Admin LR (4th) 81 [*CanWest*], aff'd on other grounds 2008 FCA 207; *Aventis Pharma Inc v Canada (Minister of Health)*, 2005 FC 1396 at para 19.

[71] Additionally, where a party has a right to procedural fairness, they must also have the right to bring the matter to Court to establish a violation of that right: *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 at para 28, [2010] 2 FCR 488 [*Irving*]. The Federal Court has discussed the interplay between standing and procedural fairness at length: *P&S Holdings Ltd v Canada*, 2015 FC 1331 at paras 30–39, 23 Admin LR (6th) 32 [*P&S*].

(2) Public interest standing

[72] Section 18.1 has been interpreted as being broad enough to also allow standing for parties who meet the public interest test: *Williams v Canada (Minister of Fisheries and Oceans)*, 2003 FCT 30 at para 8, aff'd 2003 FCA 484; *Canada (Royal Canadian Mounted Police) v Canada (Attorney General)*, 2005 FCA 213 at para 56, [2006] 1 FCR 53.

[73] To grant public interest standing, the Court must consider three factors: (1) whether there is a serious justiciable issue; (2) whether the party has a real stake or genuine interest in that issue; and (3) whether the proposed suit is a reasonable and effective way to bring the issue before the courts: *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at 253, 88 DLR (4th) 193; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37, [2012] 2 SCR 524 [*Downtown Eastside*].

*B. Standard of review*

[74] There is no dispute between the parties on the standards of review to be applied to the decisions at issue in this proceeding. Deference applies to exercises of discretion in the administrative law context, and such decisions are subject to the reasonableness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*].

[75] A decision is reasonable if it is justified, transparent, intelligible, and falls within a range of possible, acceptable outcomes defensible in fact and in law: *Dunsmuir*, above at para 47. The decision maker's reasons need not be perfect, nor do they need to include all arguments or details the reviewing judge would have preferred; so long as the reasons allow the reviewing court to understand why the decision maker made the decision, and to determine whether the decision is within the range of acceptable outcomes, the reasons meet the *Dunsmuir* criteria: *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 16–18, [2011] 3 SCR 708.

[76] The Federal Court of Appeal has recently clarified that issues of procedural fairness do not involve applying a standard of review; rather, the reviewing court is to determine whether the decision maker followed a fair and just process, in light of the substantive rights and consequences involved: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

### *C. Procedural fairness*

[77] Generally, a duty of procedural fairness applies to administrative decisions that affect an individual's rights, privileges or interests: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653, 24 DLR (4th) 44. This duty can, however, be ousted by clear statutory language or necessary implication: *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 39, [2011] 2 SCR 504; *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 21–22, [2001] 2 SCR 781 [*Ocean Port*].

[78] Where a party is entitled to procedural fairness, the extent of procedural fairness is to be determined case-by-case, according to the following five non-exhaustive factors: (1) the nature of the decision made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute; (3) the decision's importance to the individual challenging the decision; (4) the individual challenging the decision's legitimate expectations; and (5) the procedural choices made by the decision maker, especially when the decision maker can choose its own procedures or has an expertise in determining the appropriate procedures in the circumstances: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23–28, 174 DLR (4th) 193 [*Baker*].

*D. Legitimate expectation*

[79] An administrative decision maker may be held to its word if it makes clear, unambiguous and unqualified representations within the scope of its authority about an administrative process it will follow, provided these representations are procedural in nature and do not conflict with the decision maker's statutory duty: *Mavi*, above at para 68. It will be a breach of fairness if the decision maker subsequently fails in a substantial way to live up to the representations: *Mavi*, above at para 68.

## V. **Analysis**

*A. Does CABA have standing?*

[80] CABA submits that it is "directly affected" by the decision to grant the extensions for these reasons: (1) it is comprised of concerned residents and businesses from the area; (2) its mandate includes ensuring the area is safe; (3) AMSISE's three site model contemplates persons transporting controlled substances between the sites, through the neighbourhood; (4) health data shows fentanyl deaths occur outside the downtown core, meaning the sites will attract more drug users to the neighbourhood; and (5) AMSISE's proposal concedes that when the sites are at capacity, public consumption in the area is likely.

[81] CABA further submits that as a member of the UCC, which was invited to make submissions on the applications, it has a right to procedural fairness in the exemption process. They note that in *Irving*, above, at paragraph 28, the Federal Court of Appeal held that if a party

has a right to procedural fairness, they must also have the right to bring the matter to the Court in order to attempt to establish that the process violated their fairness rights.

[82] In the alternative, CABA submits that they meet the test for public interest standing set out by the Supreme Court of Canada in *Downtown Eastside*, above, at paragraph 37. Namely that they have raised serious justiciable issues; that CABA has a genuine interest for the same reasons it argued that it was directly affected; and that this is a reasonable and effective way to bring the issue before the Court because no one else has challenged the exemptions and neither party to the process will.

[83] The Attorney General of Canada submits CABA is not directly affected by the exemption decisions. CABA is a business advocacy organization created solely for commercial purposes, which can therefore only represent its members for commercial purposes. Moreover, it has alleged only speculative impacts on its membership. This is insufficient for standing, as discussed by the Federal Court in *CanWest*, above, at paragraphs 16 and 17.

[84] CABA and the UCC had no participatory rights in the exemption process, the Attorney General argues, supported by the Intervenor, because *CDSA* section 56.1 does not provide third parties any rights absent the issuance of a notice by Health Canada for public comments. As stated by the Court of Appeal in *P&S*, above, at paragraph 39, common law rules of procedural fairness can be ousted by clear statutory language. Allowing the UCC, and CABA, as part of that coalition, to provide comments during Health Canada's review of the application did not grant

them participatory rights. The requirement to gather information about community support rested solely with the applicant, AMSISE.

[85] CABA should not be granted public interest standing, the Attorney General argues, because its interests are purely commercial and its concerns are speculative and relate mostly to pre-existing planning issues better addressed by local authorities. They do not squarely address the question of whether an exemption should be granted for medical reasons, which is the purpose of *CDSA* section 56.1.

[86] I do not agree that CABA's interests are purely commercial. While it may have been initially created as a project to revitalize a business and shopping district, its Executive Director's evidence was that CABA seeks to ensure that the Chinatown area is a safe and suitable environment for its members to live and work. To that end, it works closely with local government agencies. Its concerns about the potential impact of the exemption decisions are to a degree speculative but based on evidence relating to existing problems in the area and, in particular, at the three sites. It is not unreasonable for CABA to contend that establishing a track for injection drug users between the sites could exacerbate those problems and detract from their efforts to improve the environment.

[87] I am persuaded that even if I were to conclude that CABA is not directly affected by the decisions, it deserves to be granted public interest standing as it has raised at least one issue that is "far from frivolous" (*Downtown Eastside*, above, at para 42) in seeking to determine the community's role in post-Bill C-37 exemption decisions. CABA is comprised of concerned

residents and businesses from the area and its mandate includes ensuring the area is safe. Neither AMSISE nor Health Canada have an interest in challenging the decisions, and this judicial review is a reasonable and effective means to bring the issue before the Court.

*B. Was CABA entitled to procedural fairness? If so, at what level?*

[88] As noted above, CABA submits it was owed a duty of fairness in the exemption process. An administrative process should comport with natural justice in the absence of clear and express statutory language ousting the duty of fairness: *Ocean Port*, above at para 21 and *Mavi*, above at para 39. CABA contends that the *CDSA*, as amended by Bill C-37, does not oust procedural fairness, but rather, in subsection 56.1(4) and paragraph 56.1(2)(e), contemplates extensive public participation. In this instance, CABA argues, Health Canada implicitly recognized its right to procedural fairness by inviting the UCC to make submissions on the applications.

[89] Based on the factors set out by the Supreme Court in *Baker*, CABA contends that it was owed a moderate to high level of procedural fairness. The fact that the decision was made in the face of community objections made it more like an inter-party dispute than an administrative policy decision. The decision is important because it affects the legality of controlled substances in the neighbourhood in which CABA's members live and work. And the lack of an appeal procedure militates in favour of a higher level of procedural fairness.

[90] Concerning expectations, CABA emphasizes that it was invited, as a part of the UCC, to make written submissions, creating a legitimate expectation that it would be heard. Then it was

invited, again as part of the UCC, to meet with the Minister, leading it to believe that it could put its concerns forward at that meeting before a decision was made.

[91] AMSISE does not directly address whether CABA was entitled to procedural fairness or at what level. However, whatever level of fairness was required, AMSISE says that it did not entitle CABA to the specific procedural elements they claim were owed to them and did not compare with the *Charter* protected rights *PHS* recognized were at play in the *CDSA* exemption context. AMSISE qualifies CABA's interest as that of neighbours who would prefer SCSs to be located in a different part of town.

[92] As noted above, the Attorney General argued that CABA was not entitled to participatory standing or procedural fairness in the exemption process. It was not an adjudicative process. If any duty of fairness did apply, it was minimal, limited to the ability to provide comments and have them considered. The Minister's offer for a meeting was limited to hearing concerns about the exemption process; it was not the type of statement that has been recognized by the courts as creating a legitimate expectation that an opportunity would be provided to make oral submissions before a decision was made.

[93] The Intervenor, CDPC, contends that providing third parties a duty of procedural fairness is inconsistent with *CDSA* section 56.1 and Parliament's intent in Bill C-37. The *CDSA* limits community representations to two avenues: (1) community support or opposition submitted by the applicant, and (2) solicited comments from the public where, in Health Canada's discretion, additional information is required for a decision – which should be the exception, not the rule.

The changes to the legislation effected by Bill C-37 made public health benefits the only mandatory criterion for exemption decisions. All other requirements, including public consultations, were subordinated. That this was the intent of the legislation is clear, CDPC submits, from statements made in both chambers of Parliament as the Bill was being considered.

[94] CDPC agrees with the Attorney General that absent Health Canada invoking *CDSA* subsection 56.1(4), third parties have no participatory rights. A judicially imposed procedural fairness obligation to third parties would risk impeding drug users' *Charter* section 7 rights, as found by the Supreme Court in *PHS*, above.

[95] The approach to statutory interpretation in Canada is settled. "[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re Rizzo & Rizzo Shoes*, [1998 1 SCR 27] at para 21, 36 OR (3d) 418, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

[96] Any former exclusionary rule about legislative history evidence has long been relaxed: *R v Morgentaler*, [1993] 3 SCR 463 at 484, 107 DLR (4th) 537. Such evidence can help discern why Parliament amended a statute, but the Court must be mindful of its limited use. Namely, "[i]t is clear that no single participant in the legislative process can purport to speak for the legislature as a whole": *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42 at para 12, [2007] 3 SCR 2017, citing Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Toronto: Butterworths, 2002) at 489.

[97] The Federal Court of Appeal has relied on *Hansard* debates to determine legislative intent: see *Canada (Citizenship and Immigration) v Young*, 2016 FCA 183 at paras 10–11, [2017] 1 FCR 299; *Alexander College Corp v Canada*, 2016 FCA 269 at paras 40–41, [2017] 2 FCR 269.

[98] I think that it is clear from the legislative history evidence submitted by CDPC that the mandatory requirements imposed by the 2015 legislation were, in CDPC's words, "stultifying applications" for exemptions. Because of this and from a concern that drug users' *Charter* rights were at risk of being violated, mandatory consultation, as required by subsection 56.1(3) of the 2015 *CDSA*, was eliminated in Bill C-37 in favour of a requirement that the applicant for an exemption provide statements of community support or opposition. Absent the issuance of notice for public comments under *CDSA* section 56.1(4), the legislation provided CABA no right to further consideration of its position before the decisions to grant the exemptions were made.

[99] In this particular application process especially where the UCC was invited to make submissions, CABA, as part of the UCC, was entitled to some degree of fairness. However, it was not a party to a contested application requiring a high degree of fairness. In the circumstances, the level of fairness owed to CABA was minimal. I will leave for another day the question of whether any procedural fairness would be owed where there had been no invitation to make submissions.

[100] The process, as stipulated by *CDSA* section 56.1, is both discretionary and non-adjudicative. The principal and mandatory focus of the legislation is on the question of whether

an exemption would provide public health benefits. Any consideration of negative impacts on the local community is secondary and discretionary. The only legitimate expectation that CABA could have, based on Health Canada's invitation to the UCC to provide submissions in writing, was that its concerns would be received and reviewed.

### *C. Did the exemption process violate CABA's procedural fairness rights?*

[101] CABA submits that Health Canada violated its procedural fairness obligations by: failing to provide reasons; failing to provide full disclosure; breaching CABA's legitimate expectations; and failing to exercise its discretion to invite public submissions.

[102] The minimal procedural fairness obligations owed to CABA were not breached by the failure to provide disclosure or reasons for the decision.

[103] Regarding disclosure, CABA's reliance on the Supreme Court of Canada's decision in *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809 is misplaced. The legislation at issue in that case required full disclosure, and the individual's liberty was at stake. Here, the legislation spelled out what AMSISE had to provide Health Canada, what Health Canada had to consider and outlined the fundamental requirement that the exemptions had to be supported by information on public health benefits. There was no requirement for Health Canada to provide CABA with all of the materials before it; the failure to do so did not breach procedural fairness. This was not an adjudicative process. CABA was not a party in a contest with AMSISE.

[104] With respect to reasons, it is clear from Bill C-37's legislative history that the requirement to explain a negative exemption decision was added to the *CDSA* to further the intent to protect injection drug users' *Charter* rights. Parliament did not wish to grant the Minister the authority to deny an application for an exemption without providing an explanation. However, the converse is not true. The legislation does not reflect an intent to require reasons where exemptions are granted. Where legislation requires reasons in some scenarios, it implicitly does not require them in others: *Mercier v Canada (Human Rights Commission)*, [1994] 3 FC 3 at para 23 (CA); *Gardner v Canada (Attorney General)*, 2005 FCA 284 at para 26, 339 NR 91. CABA was not a party to the application process established by the legislation. It had no right to reasons under the statute and none at common law.

[105] It is regrettable that CABA and other members of the UCC were led to believe that they would have a chance to make their case directly to the Minister before the decisions were made. The meeting appears to have been set up merely to give concerned citizens an opportunity to vent their frustrations about the process. However, the invitation to attend a meeting with the Minister did not constitute "clear, unambiguous and unqualified" representations which would be enforceable in the private law of contract, as required for the doctrine of legitimate expectation: *Mavi*, above, at paras 68–69.

[106] At most, the Minister's invitation stated participants could "share…concerns about the process for approval of safe consumption sites." This was not a clear and unambiguous representation of a right to a hearing before the decisions were made, unlike the facts of *Mercier-Néron v Canada (Minister of National Health and Welfare)*, 98 FTR 36, on which CABA relies.

In *Mercier-Néron*, the language of the form in question, which referenced the right to a hearing, was clear and unambiguous.

[107] The UCC made repeated requests to Health Canada that the notice contemplated by the statute for requesting public submissions be issued, none of which were answered. While I can understand how the members of the coalition may have been frustrated by the lack of a response, it is not clear to me how this constitutes a breach of the minimal procedural fairness owed to CABA. Contrary to CABA's submissions, the statute does not require that a positive answer, or indeed any answer, be provided to such a request. It is merely enabling. The Minister may issue a public notice. There is no obligation to do so no matter how many requests are made.

[108] CABA is correct that the Health Canada document entitled "Supervised Consumption Site, Guidance for Application Form" specifies that all applicants are required to provide a report of the consultations held with stakeholders in the community, including in the site's immediate vicinity. However, it was open to Health Canada to conclude that the material submitted by AMSISE met that requirement. The guidance document does not grant stakeholders a right to be heard by Health Canada prior to an exemption decision being made.

*D. Were the decisions reasonable?*

[109] CABA submits that the exemption decisions are not reasonable for two principal reasons: there was insufficient evidence to justify three exemptions (in addition to the Hospital in-patient exemption); and Health Canada ignored its arguments.

[110] AMSISE had the burden to establish to Health Canada's satisfaction that each individual exemption was "necessary for a medical purpose." CABA argues that it is unclear what evidence could meet this test in each case, and, further, that the evidence in the record cannot justify three exemptions. The situation in Edmonton was not as dire as that in Vancouver. And the Vancouver opioid overdose crisis was found to justify only one site. For that reason alone, CABA argues, it was unreasonable for Health Canada to approve three sites in Edmonton.

[111] There is no dispute that the problem of injection drug use in Edmonton is not analogous to the situation in Vancouver. The problem, as the Respondents acknowledge, is more concentrated in Vancouver and has led to many more opioid overdose deaths in the downtown eastside district of that city, as described in *PHS*, than in the core of Edmonton. However, the Supreme Court in *PHS* did not set a minimum standard of opioid overdoses in one community for exemption applications to be granted. As the Supreme Court stated, its decision does not serve as a license to obtain *CDSA* exemptions. Each application has to be examined on its own merits. The fact that *PHS* concerned only one SCS does not prevent other cities from adopting other models, such as AMSISE's Edmonton-specific approach.

[112] Nor can I cannot support CABA's contention that the evidence required for three exemptions at three sites would somehow be different than that required for a single site. The *CDSA* requires "information…regarding the intended public health benefits" of each site. In this case, Health Canada determined it was satisfied that the information AMSISE provided justified an exemption for each of the sites. In light of the information on the record that most drug injectors in the area would be willing to walk no more than one kilometre, I see nothing

unreasonable in expanding the coverage radius by relying on multiple sites. While I acknowledged that in-patient services at Royal Alexandra Hospital were relevant to whether or not three sites were required, I note that on top of being limited to in-patient services, the services at Royal Alexandra Hospital are also well beyond this one kilometre radius.

[113] For these same reasons, I also cannot support CABA's contention that it was imperative for Health Canada to review each of the three proposed sites individually. AMSISE's proposal relied on multiple locations to deliver safe consumption services. It was reasonable for Health Canada to consider the locations as a collective proposal, as approving one site and not the others would lead to a different outcome than what AMSISE proposed.

[114] Further, it is clear from the record that Health Canada did not provide a response to the concerns presented by the UCC and CABA and did not answer the requests for a notice to be issued for public comment pursuant to *CDSA* section 56.1(4). This does not, however, establish that the Department ignored the UCC and CABA's submissions. There is a difference, as AMSISE contends, between Health Canada being unconvinced by certain arguments and ignoring them.

[115] CABA relies on Mr. Justice Evans' comments in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35 (FC). In *Cepeda-Gutierrez*, Justice Evans, at paragraph 17, observed that it may be easier to infer that an agency has overlooked contradictory evidence when it refers in some detail to evidence supporting its finding but not to evidence that does not. The case does not stand for the proposition that every submission must be answered.

As no reasons for the exemption decision were required, the absence of reasons cannot be used to infer that Health Canada ignored the arguments. The fact that additional conditions were imposed on the application following the receipt of the UCC submissions indicates that they were taken into consideration, as do the hand-written notes referenced above.

[116] I agree with the Respondents that the record before Health Canada provided evidence of a health need and little evidence of a public safety risk that was not a result of pre-existing conditions in the area. The applicant for the exemptions, AMSISE, had amassed an impressive collection of supporting information and support from health and public safety professionals.

[117] The conditions attached to the exemption call for increased monitoring of events at the three sites and reporting to Health Canada. Concerns about the impact of the three sites can be addressed when the exemptions come up for renewal. At that time, if the conditions are applied as they appear to have been intended, AMSISE will be required to submit data on the sites' impact on local crime rates. I do not read the words "if any" in the enactment or in paragraph 153 of *PHS,* to mean that AMSISE can sit idly by and wait for such information to be brought to their attention. They are now bound by the conditions attached to the exemption and will have to take active measures to collect such information.

[118] It is not for the Court at this time to reweigh the evidence considered by Health Canada to determine whether the decision the department reached was reasonable. As discussed above, the test of reasonableness is whether the decision is justified, transparent, intelligible and falls within a range of possible, acceptable outcomes defensible in fact and in law. This is not a standard of

perfection. In reaching a determination on whether the decisions meet the standard of reasonableness, I can consider the extensive material submitted to Health Canada in support of the application for exemptions on the ground of medical necessity. It is not for the Court to assess whether there could have been better or different information. Based on the record before me, I see no reason for the Court to intervene in Health Canada's decisions.

[119] The arguments in CABA's written representations that AMSISE's application was barred for misrepresentation contrary to *CDSA* section 46.1 were not pressed at the hearing. As noted above, the alleged misrepresentations related to conflicts between statements in the application and information obtained by the UCC through Freedom of Information requests to the City of Edmonton. This is not a trial with the opportunity to examine witnesses but a judicial review. The Court is not in a position to make findings of fact with regard to these allegations. While CABA may disagree with the Minister's interpretation of the information received from AMSISE, this does not make the content of that information false or deceptive. For example, CABA contended that AMSISE was untruthful or misleading about multiple sites being required to offer 24/7 services in light of George Spady being a 24 hour facility. The record reveals that George Spady is the smallest facility. I see nothing unreasonable in Health Canada's evaluation that it could not provide the level of service required in the area on a 24/7 basis.

[120] In closing, I think it useful to note again that the Supreme Court was careful in *PHS* to stress that its conclusion in that case was not to be taken as a licence for injection drug users to possess drugs wherever and whenever they wish. Nor was it an invitation for anyone to open a facility for drug use under the banner of a "safe injection facility." They must first meet the

requirements for the granting of an exemption, including any additional conditions that are specified.

[121] As the Court was advised during the hearing that the parties had agreed that no costs would be sought regardless of the outcome, none will be granted.

**JUDGMENT IN T-1764-17, T-1765-17 and T-1766-17**

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

1. The applications for judicial review in Court files T-1764-17, T-1765-17 and T-1766-17 are dismissed;

2. No costs are awarded, and

3. A copy of this judgment and reasons shall be placed on each of the three files.

"Richard G. Mosley"
Judge

# ANNEX A

## *Federal Courts Act / Loi sur les Cours fédérales*

| | |
|---|---|
| **Application for judicial review** | **Demande de contrôle judiciaire** |
| **18.1 (1)** An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. | **18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. |
| **Time limitation** | **Délai de présentation** |
| **(2)** An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days. | **(2)** Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder. |
| **Powers of Federal Court** | **Pouvoirs de la Cour fédérale** |
| **(3)** On an application for judicial review, the Federal Court may | **(3)** Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut : |
| **(a)** order a federal board, commission or other tribunal to do any act or thing it has unlawfully | **a)** ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou |

failed or refused to do or has unreasonably delayed in doing; or

**(b)** declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

**b)** déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

**Grounds of review**

**(4)** The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

**Motifs**

**(4)** Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

**(a)** acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

**a)** a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

**(b)** failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

**b)** n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

**(c)** erred in law in making a decision or an order, whether or not the error appears on the face of the record;

**c)** a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

**(d)** based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard

**d)** a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou

for the material before it;

**(e)** acted, or failed to act, by reason of fraud or perjured evidence; or

**(f)** acted in any other way that was contrary to law.

sans tenir compte des éléments dont il dispose;

**e)** a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

**f)** a agi de toute autre façon contraire à la loi.

**Defect in form or technical irregularity**

**(5)** If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

**(a)** refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

**(b)** in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

**Vice de forme**

**(5)** La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

***Controlled Drugs and Substances Act / Loi réglementant certaines drogues et autres substances***

**Offence of making false or deceptive statements**

**46.1** No person shall knowingly make, or participate in, assent to or acquiesce in the making of, a false or misleading statement in any book, record, return or other document however recorded, required to be maintained, made or furnished under this Act or the regulations.

**Déclarations fausses ou trompeuses**

**46.1** Nul ne peut sciemment, dans un livre, registre, rapport ou autre document — quel que soit son support matériel — à établir aux termes de la présente loi ou de ses règlements, faire ou consentir à ce que soit faite une déclaration fausse ou trompeuse, participer à une telle déclaration ou y acquiescer.

**Exemption for medical purpose — supervised consumption site**

**56.1 (1)** For the purpose of allowing certain activities to take place at a supervised consumption site, the Minister may, on any terms and conditions that the Minister considers necessary, exempt the following 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 purpose:

**(a)** any person or class of persons in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act; or

**Exemption pour raisons médicales : site de consommation supervisée**

**56.1 (1)** Afin de permettre l’exercice de certaines activités dans un site de consommation supervisée, s’il estime que des raisons médicales 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 :

**a)** toute personne ou catégorie de personnes relativement à une substance désignée ou à un précurseur obtenus d’une manière non autorisée sous le régime de la présente loi;

**(b)** any controlled substance or precursor or any class of either of them that is obtained in a manner not authorized under this Act.

**b)** toute substance désignée ou tout précurseur obtenus d'une telle manière, ou toute catégorie de ceux-ci.

**Application**

**(2)** An application for an exemption under subsection (1) shall include information, submitted in the form and manner determined by the Minister, regarding the intended public health benefits of the site and information, if any, related to

**Demande**

**(2)** La demande d'exemption est accompagnée des renseignements, présentés selon les modalités fixées par le ministre, concernant les effets bénéfiques attendus du site sur la santé publique, et, le cas échéant, de renseignements concernant :

**(a)** the impact of the site on crime rates;

**a)** l'incidence d'un tel site sur le taux de criminalité;

**(b)** the local conditions indicating a need for the site;

**b)** les conditions locales indiquant qu'un tel site répond à un besoin;

**(c)** the administrative structure in place to support the site;

**c)** la structure administrative en place permettant d'encadrer le site;

**(d)** the resources available to support the maintenance of the site; and

**d)** les ressources disponibles pour voir à l'entretien du site;

**(e)** expressions of community support or opposition.

**e)** les expressions d'appui ou d'opposition de la communauté.

**Subsequent application**

**(3)** An application for an exemption under subsection (1) that would allow certain activities to continue to take place at a supervised consumption site shall include any update to the information

**Demandes subséquentes**

**(3)** Lorsque l'exemption aurait pour effet de permettre la continuation de l'exercice de certaines activités dans un site de consommation supervisée, la demande d'exemption est accompagnée de toute mise à

provided to the Minister since the previous exemption was granted, including any information related to the public health impacts of the activities at the site.

jour des renseignements fournis au ministre depuis la dernière exemption accordée, notamment des renseignements concernant toute répercussion des activités exercées dans le site sur la santé publique.

**Notice**

**(4)** The Minister may give notice, in the form and manner determined by the Minister, of any application for an exemption under subsection (1). The notice shall indicate the period of time — not less than 45 days or more than 90 days — in which members of the public may provide the Minister with comments.

**Avis**

**(4)** Le ministre peut donner avis, selon les modalités de son choix, de toute demande d'exemption. L'avis indique le délai — d'au moins quarante-cinq jours mais d'au plus quatre-vingt-dix jours — dont le public dispose pour présenter des observations au ministre.

**Public decision**

**(5)** After making a decision under subsection (1), the Minister shall, in writing, make the decision public and, if the decision is a refusal, include the reasons for it.

**Décision rendue publique**

**(5)** Après avoir pris une décision à l'égard de toute demande d'exemption, le ministre, par écrit, rend publique la décision et, s'il s'agit d'une décision de ne pas accorder l'exemption, il joint à sa décision les motifs de celle-ci.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1764-17 |
| **STYLE OF CAUSE:** | CHINATOWN & AREA BUSINESS ASSOCIATION V ATTORNEY GENERAL OF CANADA and ACCESS TO MEDICALLY SUPERVISED INJECTION SERVICES EDMONTON and CANADIAN DRUG POLICY COALITION |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 10, 2018 |
| **JUDGMENT AND REASONS:** | MOSLEY, J. |
| **DATED:** | FEBRUARY 27, 2019 |

**APPEARANCES:**

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