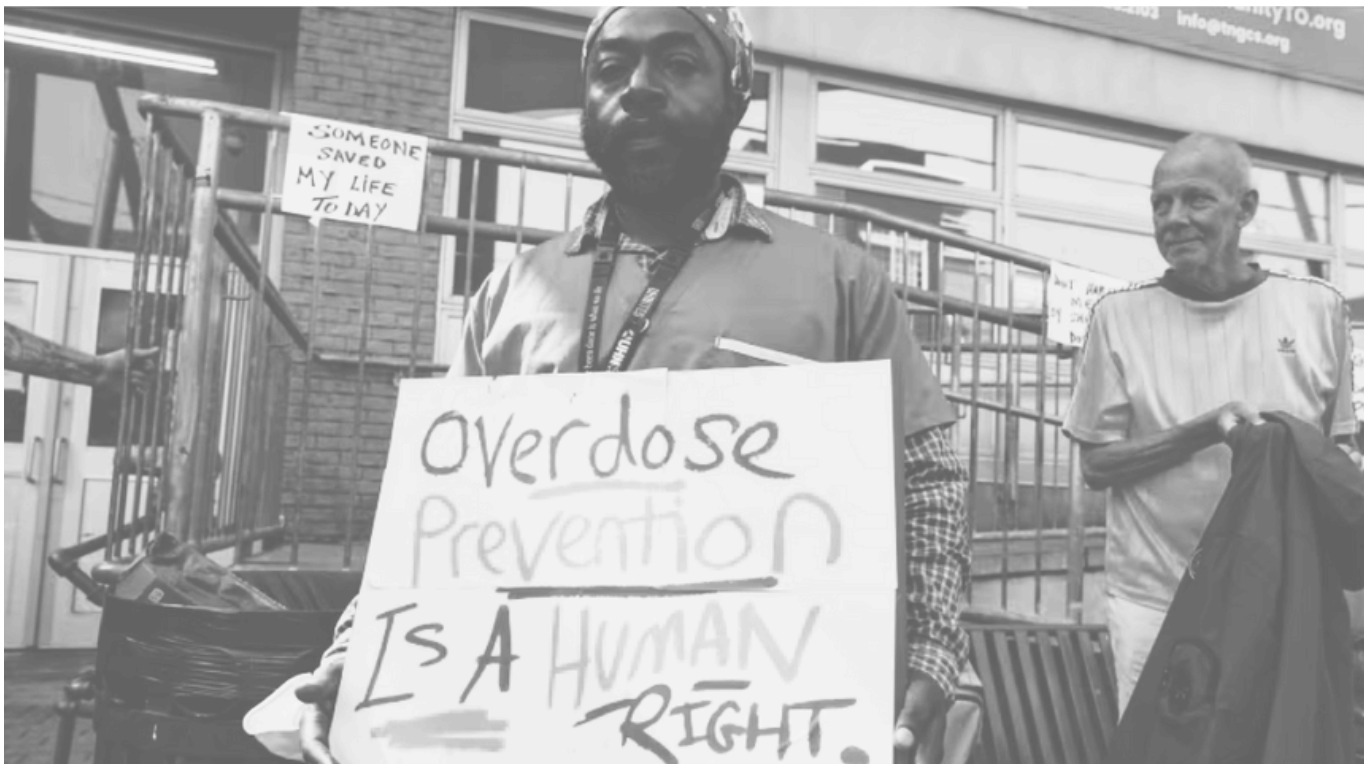


Charter challenge to the *Community Care and Recovery Act, 2024*

*The Neighbourhood Group Community Services,
Katharine Resendes and Jean-Pierre Aubry Forgues*

v.

His Majesty the King in Right of Ontario



HIV Legal Network (March 2025)

This document provides basic information and does not provide legal advice.

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Background

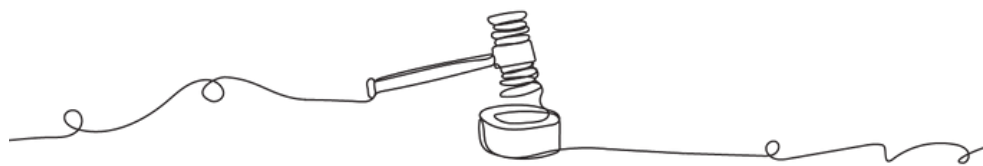
In August 2024, the Ontario government announced that it would impose new restrictions on supervised consumption services (SCS).[1] Among other things, Ontario declared that it would ban SCS within 200 metres of schools and childcare centres and prohibit municipalities from establishing or supporting SCS.

These restrictions became law on December 4, 2024, through the passage of the *Community Care and Recovery Act, 2024*, SO 2024 (CCRA).[2] Specifically with respect to SCS:

1. Section 2 of the CCRA prohibits the establishment or operation of a “supervised consumption site at a location that is less than 200 metres” from a school or childcare centre. Section 2 comes into force on April 1, 2025; and
2. Sections 3(2)(1) and (3) of the Act restrict, respectively, “a municipality or local board” from applying for or renewing a federal exemption to operate a SCS without the risk of criminal prosecution, or from supporting such an application by another person.

If unchallenged, the CCRA will result in the closure of at least 10 SCS across Ontario because they are within 200 metres of schools and childcare centres.

In response, The Neighbourhood Group Community Services (TNG), a social agency that operates a SCS in downtown Toronto, and two individuals who currently access or have accessed SCS in Toronto and Kitchener challenged the law in court. They ask the Ontario Superior Court of Justice to rule that the CCRA violates the *Canadian Charter of Rights and Freedoms* (Charter), or, in the alternative, that it is otherwise unconstitutional because it intrudes on Canada’s exclusive power to authorize SCS.[3]



[1] News Release, “Ontario Protecting Communities and Supporting Addiction Recovery with New Treatment Hubs Province banning consumption sites near schools and daycares while investing \$378 million more in 19 new treatment hubs,” August 20, 2024. Online: <https://news.ontario.ca/en/release/1004955/ontario-protecting-communities-and-supporting-addiction-recovery-with-new-treatment-hubs>.

[2] For more information on the restrictions in the CCRA, see *An Overview of the Community Care and Recovery Act, 2024*, HIV Legal Network, March 2025. Online: www.hivlegalnetwork.ca/site/an-overview-of-the-community-care-and-recovery-act-2024/?lang=en

[3] To operate, SCS must receive an exemption from the federal government. Otherwise, staff and clients could be charged for drug possession or trafficking. For a glossary of the terms used in this info sheet, please refer to Appendix A.

Who are the parties involved in this case?

The Applicants are the organization and two individuals who launched this court case:

- **The Neighbourhood Group Community Services (TNG)** – a social agency that operates the Kensington Market Overdose Prevention Site (KMOPS) providing supervised consumption services in downtown Toronto. In addition to supervised consumption, TNG offers drug checking and peer assistance at KMOPS. KMOPS is privately funded and does not receive provincial funding. TNG also operates a daycare that is located within 200 metres of KMOPS and therefore caught by section 2 of the CCRA. TNG has been notified by Ontario that it must close KMOPS by April 1, 2025.
- **Two individual applicants** – Katharine Resendes, who has used the SCS at the KMOPS and other services that TNG provides, and Jean-Pierre Aubry who accesses the SCS in Kitchener, one of the sites that will also be forced to close because of the CCRA.

The Applicants are represented by three law firms:

- Spencer Bass, Carlo Di Carlo, and Olivia Eng from Stockwoods LLP
- Rahool Agarwal from Lax O’Sullivan Lisus Gottlieb LLP
- Avnish Nanda from Nanda & Company

The Respondent is the Ontario government (i.e. “His Majesty the King in Right of Ontario”). Ontario is the “Respondent” because the province enacted the CCRA and must “respond” to the legal arguments that the Applicants are making about the law.



What are the Applicants arguing?

The Applicants are arguing the CCRA violates the following Charter rights:

- Section 7 of the Charter guarantees the **right to life, liberty, and security of the person**, which cannot be denied unless those violations are consistent with fundamental justice. **By closing SCS, the Applicants argue the CCRA unlawfully violates the rights to the life, liberty, and security of those who depend on SCS by:**
 - increasing their risk of death by overdose;
 - forcing people to resort to “unhealthy and unsafe consumption where there is a significant risk of morbidity or death”;
 - forcing people to consume outside SCS and exposing them to a higher risk of criminalization; and
 - exposing them to a higher risk of infectious disease and other harms to their health.

- Section 15 of the Charter **guarantees the right to everyone to be free from discrimination**. According to the Applicants, the law imposes disproportionate burdens on those experiencing substance use disorder (which is recognized as a “disability” in law – a prohibited ground for discrimination), by depriving them of the services they need and reinforcing stigma. These disadvantages are even more pronounced for those who are women, homeless, Indigenous or are otherwise racialized, or have other mental health and physical disabilities.

The Applicants also argue that *even if the court finds that the law does not violate the Charter*, it still violates the Constitution. Under the Constitution, only the federal government can make criminal law. With the CCRA, Ontario is attempting to usurp Canada’s criminal law power. At the very least, the CCRA frustrates the purpose of the exemption regime that the federal government established to determine whether SCS ought to be authorized. In sum, the provincial government does not have the authority to limit SCS implementation when the power to authorize SCS sits with the federal government.

To access the Applicants’ factum, please click here:

www.hivlegalnetwork.ca/site/factum-of-the-applicants-in-the-neighbourhood-group-community-services-katharine-resendes-and-jean-pierre-aubry-forgues-v-ontario/?lang=en.

Who are the witnesses in the case?

There are both fact and expert witnesses for the Applicants and for Ontario who provided evidence in relation to the case.

Applicants’ witnesses:

- The Applicants Bill Sinclair, CEO of TNG, Katharine Resendes, and Jean-Pierre Aubry.
- Parents of children who attended the daycare within 200 metres of KMOPS.
- Social service agencies that work with people who use drugs: (1) a Thunder Bay agency describing the effects of closing the only SCS in Thunder Bay and (2) a Toronto SCS operator that is not affected by the 200-metre rule, describing the ramifications of other SCS closures on their own site.
- Residents of neighbourhoods in proximity to SCS in Toronto, Kitchener, Ottawa, and Hamilton detailing their experiences with local SCS.

- Dr. Ahmed Bayoumi, a clinician scientist, professor in the Faculty of Medicine at the University of Toronto, and member of the South Riverdale Community Health Centre Consumption and Treatment Service Review describing (1) the history of SCS in Ontario and in Canada; (2) health effects of SCS on individuals who use these services; (3) socio-demographic characteristics of individuals who are most likely to use SCS; (4) concerns that community members have about SCS; (5) how SCS address those concerns; and (6) likely ramifications for SCS users and the community if the CCRA goes into effect.
- Dr. Dan Werb, St. Michael's Hospital/University of Toronto Chair of Mental Health and Substance Use Disorder, executive director of the Centre on Drug Policy Evaluation, and associate professor with dual affiliation at the University of Toronto and University of California San Diego describing (1) whether SCS affect crime rates in communities where they are located; (2) whether SCS affect homicide rates where they are located; (3) whether SCS affect overdose-based mortality where they are located; (4) who accesses SCS and socio-demographic characteristics of those who are most likely to use these facilities; (5) and likely ramifications for users of SCS and the communities where they are located if the CCRA goes into effect.
- Dr. Elaine Hyshka, associate professor at the University of Alberta's School of Public Health and Canada Research Chair in Health Systems Innovation, providing an account of the nature of SCS, their effectiveness, and Alberta's experience with SCS. This was in response to evidence from a witness for Ontario describing the experience in Alberta with SCS.
- Dr. Jennifer Wyman, a family physician practicing in Ontario and working in addiction medicine, and an assistant professor in the Faculty of Medicine, University of Toronto describing key principles in the treatment of addiction and the role SCS play in the treatment of addiction.

To access the Applicants' evidence, please click here:

www.hivlegalnetwork.ca/site/applicants-record-in-the-neighbourhood-group-community-services-katharine-resendes-and-jean-pierre-aubry-forgues-v-ontario/?lang=en.

Ontario's witnesses:

- Residents of neighbourhoods in proximity to SCS in Toronto, Ottawa, Hamilton, Vancouver, and Montreal, and a bylaw officer in Kingston, detailing their negative experiences with local SCS.
- William McGarry, a cyber analyst retained to create maps illustrating a 200-metre radius circle around each school and childcare facility in cities in Ontario where SCS are located.

- Krishanthakumar Ganeshan, a private investigator retained to ask residents and business owners about their experience with SCS and “make observations of activities around some of the SCS operating in Ontario.” Twenty-one employees of his firm took “video evidence and photographs” around SCS in Toronto, Guelph, Hamilton, Kingston, Kitchener, London, and Ottawa.
- Dr. Dirk Huyer, Chief Coroner for Ontario, who provided data on opioid and stimulant toxicity deaths that had been investigated by his Office / Ontario Forensic Pathology Service from 2017 onwards, relating to Toronto, Hamilton, Guelph, Kitchener-Waterloo, London, Windsor, Kingston, Ottawa, Sudbury, North Bay, and Thunder Bay.
- Dr. Julian Somers, a clinical psychologist and professor at Simon Fraser University discussing (1) principles in addiction treatment; (2) the use of illicit drugs in Canada and its evolution; (3) the role of SCS in addiction treatment, which he described as “minimal or non-existent”; (4) the effectiveness of SCS in addiction treatment; (5) whether the presence of SCS causes public disorder or has deleterious impacts; and (6) whether the CCRA will have an adverse impact or corresponding benefits in conjunction with additional initiatives for addiction and recovery services. Dr. Somers also responded to the expert reports of Dr. Bayoumi and Dr. Werb.
- Dr. Sharon Koivu, an addiction medicine physician in Ontario and assistant professor at Western University, discussing the principles of addiction treatment and the impacts of SCS and their effectiveness in improving health outcomes. Dr. Koivu also responded to the expert reports of Dr. Bayoumi and Dr. Werb.
- Dr. Nathaniel Day, an addiction medicine specialist and medical director of addiction medicine for Recovery Alberta who oversees addiction medicine programming including oversight of harm reduction services offered in Alberta, describing the treatment of opioid use disorder and the efficacy of SCS, and contextualizing the information provided by Dr. Bayoumi and Dr. Werb.
- Dr. Robert Platt, a professor in the Departments of Pediatrics and of Epidemiology, Biostatistics, and Occupational Health at McGill University and principal investigator of the Canadian Network for Observational Drug Effect Studies, retained to review the reports of Dr. Bayoumi and Dr. Werb to evaluate their conclusions considering the data presented and other literature.
- Dr. Jerry Ratcliffe, professor of criminal justice at Temple University, Philadelphia, and a scientific advisor to the International Association of Chiefs of Police, describing how locating SCS “near facilities that have concentrated numbers of children exposes children to a population that has a greater-than normal propensity towards crime, both property and violent” and opining that “...creating and sustaining an exclusion area around facilities with concentrated numbers of children can limit their exposure to the negative effects of the illicit drug environment and reduce the harm to which children are exposed.”

- Dr. Nancy Guerra, a developmental psychologist and professor and dean emeritus in the Department of Psychological Sciences, University of California at Irvine, discussing (1) adverse childhood experiences; (2) impacts on children and adolescents who attend schools and daycares within 200 metres of a SCS of witnessing “public illicit drug use, intoxication, illicit drug trafficking, physical assaults, threats of violence, brandishing of knives and guns, acts of property damage, public urination and defecation, discarded illicit drug paraphernalia, and other similar forms of disorder”; (3) impacts of witnessing incidents described in incident reports prepared by SCS in Ontario; and (4) the Applicants’ evidence.

To access Ontario’s evidence, please click here: www.hivlegalnetwork.ca/site/ontarios-record-in-the-neighbourhood-group-community-services-katharine-resendes-and-jean-pierre-aubry-forgues-v-ontario/?lang=en.

Who are the intervenors in the case?

Intervenors who describe the negative impacts of the CCRA

- Aboriginal Legal Services
- Black Legal Action Centre (BLAC)
- Board of Health for the City of Toronto Health Unit
- Harm Reduction Policy Coalition (comprising the Canadian Drug Policy Coalition, Toronto Harm Reduction Alliance, Toronto Overdose Prevention Society, and Waterloo Drug Action Network)
- Harm Reduction Service Providers Coalition (comprising six health centres operating SCS that will remain open despite the CCRA, one SCS that the CCRA will close, and the Registered Nurses Association of Ontario)
- HIV Legal Network and the HIV & AIDS Legal Clinic Ontario (HALCO)
- Barbara Hall and John Sewell, former mayors of Toronto

Intervenors who describe the harms of SCS

- Leslieville Neighbours for Community Safety and Niagara Neighbours for Community Safety

To access the intervenors’ factums, please click here: www.hivlegalnetwork.ca/site/combined-factums-of-the-intervenors-in-the-neighbourhood-group-community-services-katharine-resendes-and-jean-pierre-aubry-forgues-v-ontario/?lang=en.

When and where is the hearing happening?

The case will be heard before a judge of the Ontario Superior Court of Justice in Toronto, during a two-day hearing on March 24-25, 2025.

What are the potential outcomes?

The Applicants are asking the Court to rule that sections 2, 3(2)(1), and 3(2)(3) of the CCRA violate sections 7 and 15 of the Charter in an unjustifiable manner, and that those sections are invalid and of no force or effect.

The Applicants are also asking the Court to declare that the CCRA is “ultra vires” or beyond the powers of the province.

A “win”:

If the Court recognizes that sections 2, 3(2)(1), and 3(2)(3) of the CCRA violate the Charter:

1. the 200-metre prohibition would no longer apply and SCS set for closure, including KMOPS, would no longer be barred from operating based on that criterion;
2. the restriction prohibiting municipalities and local boards from seeking or renewing a federal exemption to operate an SCS would no longer apply, and municipalities should be able to establish their own site; and
3. the restriction prohibiting municipalities and local boards from supporting other organizations’ applications to open an SCS would no longer apply.

If the Court also declares the whole CCRA is beyond the powers of the province, then none of the law applies, including other parts of the law that restrict municipalities from seeking an exemption to decriminalize simple drug possession locally or applying for safe supply funding.[1] In this scenario, Ontario cannot also re-introduce the legislation with the “notwithstanding clause” (section 33 of the Charter), which allows the province to temporarily override certain Charter rights (sections 2 and 7-15) for five years, shielding laws from judicial review on those grounds.

However, even with a “win” it is unclear whether other SCS set for closure (all of which were provincially funded) would in fact be able continue to operate if funding is cut. Moreover, most of the SCS that are set for closure applied for provincial funding to become HART Hubs and HART Hubs are not allowed to provide supervised consumption services.

The issue of provincial funding for SCS is not before the Court and the legal challenge does not expressly ask the Court to force the provincial government to continue funding SCS. That said, if the Court rules that the closure of SCS violates the Charter and/or is unconstitutional, sites could urge the province to honour their original funding agreements for SCS – at least for those that have funding agreements beyond April 1, 2025.

Moreover, a “win” would set an important legal precedent and reinforce legal protections for SCS in Canada. In 2011, the Supreme Court of Canada forced the federal government to issue an exemption so Insite, an SCS in Vancouver, could continue operating.[5] A “win” in this case would add new safeguards against provincial obstructions to SCS implementation.

Given the urgency of the case with SCS set to close on April 1, 2025 (when the 200-metre rule comes into effect), the Applicants asked the Court for an interim and interlocutory order or “injunction” to suspend the application and effect of sections 2 (200-metre rule) and 3(2)1 and 3(2)(3) (municipal exemptions and municipal support) of the CCRA until the case is decided. This means that those sections will not apply until the Court releases its final decision on the merits of the case.

A “loss”:

If the Court decides the CCRA does not violate the Charter and is not beyond the power of the province, then the CCRA will remain in force and the 200-metre rule will come into effect on April 1, 2025, forcing the closure of at least 10 SCS in Ontario.

Note that Superior Court is the first level of court in Ontario, and the Applicants and the province could appeal any decision of this court to the Ontario Court of Appeal and even to the Supreme Court of Canada. This may take years.

For more information visit www.hivlegalnetwork.ca

[5] *Canada (Attorney General) v. PHS Community Services Society* 2011 SCC 44. Online: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/7960/index.do>.

APPENDIX A

A short glossary of words you may hear during the hearing:

Affidavit: A sworn, written statement used as evidence, where the person making it (the “affiant”) promises that the facts stated are true. Both the Applicants and Ontario submitted affidavits from various witnesses.

Applicant: In this case, the Applicants are TGN and the two individuals who use SCS. They are called the Applicants because they started the court case to challenge the CCRA.

Application: A legal procedure used to request a court order that resolves a legal dispute outside of the trial process and is based on written documents (e.g. affidavits and transcripts of previously conducted examinations). In an application, witnesses do not appear in person during the hearing, which involves submissions from lawyers.

Application Record: The compiled collection of documents, including the notice of application, affidavits, and supporting exhibits, used to support the Applicants’ claim. Ontario also submitted a “Responding Application Record” to respond to the Applicants’ claims.

Charter: *The Canadian Charter of Rights and Freedoms* sets out rights and freedoms that its drafters believed are necessary in a “free and democratic society”. These include the sections being argued in this case. The Charter is one part of the Canadian Constitution, which also includes the basic rules about how our country operates including the powers of the federal, provincial, and territorial governments in Canada. The Constitution (and the Charter) is the “supreme law” of Canada; all other laws, including the CCRA, must be consistent with the rules set out in it. If they are not, they may not be valid. However, the rights and freedoms in the Charter are not absolute. They can be limited to protect other rights or important national values. Section 1 of the Charter says that Charter rights can be limited by law as long as those limits can be shown to be reasonable in a “free and democratic society.”

Cross-examination: When lawyers for the Applicants and Respondents ask questions of the witnesses for the opposing party to test the accuracy, honesty, and credibility of their testimony and bring out facts that may help their case.

Exemption: The Controlled Drugs and Substances Act (CDSA) is the federal law that prohibits the possession of certain drugs for personal use as well as handling, distributing, splitting, or sharing those drugs (which may amount to “trafficking”). To operate supervised consumption and drug-checking services without risk of criminal prosecution, staff and clients of sites therefore need an exemption from the CDSA issued by the federal government pursuant to either sections 56(1) or 56.1 of the CDSA.

Factum: A legal statement of facts provided by each of the parties. They are the documents that present the legal arguments that each party wants to make about the case.

Injunction: A court order that requires a party to either do or refrain from a specific act, providing a temporary or permanent remedy to protect rights and prevent irreparable harm, especially during litigation. An interim interlocutory injunction is issued during ongoing legal proceedings to preserve the *status quo* until a final judgment is reached.

Intervenor: A person or organization who, though not directly a party in the case, has a legitimate interest in the outcome and seeks permission to participate in the proceedings, offering arguments that the court may find useful. In this case, eight individuals/organizations received permission from the Court to make written and oral arguments in this case.

Respondent: In this particular case, the Respondent is the Ontario government or "His Majesty the King in Right of Ontario." Ontario is the "Respondent" because the province enacted the CCRA and must "respond" to the legal arguments that the Applicants are making about the CCRA.

Witness: A witness is someone who has provided evidence in the case. There are two kinds of witnesses: fact witnesses and expert witnesses. A fact witness testifies about what they personally observed, while an "expert witness" (in this case, primarily those with academic credentials) provides specialized knowledge to help the Court understand complex issues and opinions beyond the scope of common knowledge.