

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Attorney General) v.
Harm Reduction Nurses Association*,
2024 BCCA 87

Date: 20240301
Docket: CA49613

Between:

**His Majesty the King in Right of the Province of British Columbia
and the Attorney General of British Columbia**

Appellants
(Defendants)

And

**Harm Reduction Nurses Association / Association des Infirmiers
et Infirmières en Réduction des Méfaits**

Respondents
(Plaintiffs)

Before: The Honourable Justice Skolrood
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
December 29, 2023 (*Harm Reduction Nurses Association v. British Columbia
(Attorney General)*, 2023 BCSC 2290, Vancouver Docket S237607).

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia
February 23, 2024

Place and Date of Judgment:

Vancouver, British Columbia
March 1, 2024

Summary:

The Province applies for leave to appeal an order of the Supreme Court of British Columbia restraining it from bringing into force the Restricting Public Consumption of Illegal Substances Act, S.B.C. 2023, c. 40 until March 31, 2024. The Province also seeks an associated stay of the injunction order if granted leave to appeal.

Held: Applications dismissed. While the questions raised by the proposed appeal may be of significance to the practice, the appeal will be moot by the time it comes on for hearing. The proposed appeal would draw on the parties' resources and judicial resources without contributing to resolving the merits of the underlying action. Moreover, given the respondent's stated intention to apply for an extension of the injunction order, the injunction order will continue to be litigated in the court below, risking parallel proceedings concerning the same issues if the proposed appeal were allowed to proceed. In the circumstances, it is not in the interests of justice to grant leave to appeal.

SKOLROOD J.A.:

Introduction

[1] The applicants, His Majesty the King in Right of the Province of British Columbia and the Attorney General of British Columbia (the "Province"), seek leave to appeal an order of Chief Justice Hinkson of the Supreme Court of British Columbia dated December 29, 2023, granting an interim injunction restraining the Province from bringing into force the *Restricting Public Consumption of Illegal Substances Act*, S.B.C. 2023, c. 40 (the "Act") until March 31, 2024 (the "Injunction Order"). The Chief Justice's reasons are indexed at 2023 BCSC 2290. The Province also seeks a stay of the Injunction Order pending final disposition of the appeal.

[2] For the reasons that follow, I would dismiss the application for leave to appeal. This makes it unnecessary to address the stay application.

Background

[3] The background facts are reviewed in some detail in the Chief Justice's reasons and I will not repeat that background here. I will, however, highlight some of the facts most relevant to these applications.

[4] I start with the uncontroverted fact that the Province has experienced, and continues to experience, a public health emergency relating to the distribution and consumption of toxic drugs.

[5] As part of its strategy for addressing this emergency, the Province sought and obtained an exemption from the Government of Canada from the application of s. 4(1) of the federal *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [CDSA] (the “Exemption Order”). Ordinarily, the CDSA makes it an offence to possess a variety of substances listed in its Schedules. The Exemption Order effectively decriminalized the personal possession of small amounts of otherwise illegal drugs. The exemption was granted for a three-year period from January 31, 2023 to January 31, 2026.

[6] The Exemption Order excluded from its application a number of designated places, including: school premises; child care facilities; playgrounds; spray and wading pools; and skate parks.

[7] On November 8, 2023, the Province enacted the *Act*, which creates certain restrictions as to where illegal substances may be consumed in public and provides law enforcement with the powers necessary to relocate persons consuming drugs to unrestricted public areas. In effect, the *Act* works to divert drug use away from certain “restricted areas”—areas frequented by seniors, families, and people with disabilities—such as parks, beaches, and sports fields, as well as entrances to business, work places, and transit stops.

[8] The underlying constitutional challenge brought by the respondent, Harm Reduction Nurses Association [HRNA], alleges that the *Act* infringes the ss. 7 and 12 *Charter* rights of both persons who use drugs and HRNA members, and the s. 15 rights of Indigenous people. The respondent also alleges that the *Act* is *ultra vires* the Province.

[9] The Chief Justice heard the respondent’s application for an interim injunction in December 2023. The respondent sought to enjoin the bringing into effect of the

Act. The Chief Justice granted the Injunction Order, staying the effect of the *Act* until March 31, 2024.

[10] At the time of the hearing before the Chief Justice, the *Act* had not yet been brought into force, nor had the Province enacted any regulations, which the *Act* authorizes.

[11] The Province now seeks leave to appeal the Injunction Order and an associated stay.

The Act

[12] Section 1 of the *Act* defines “illegal substance” as having the same meaning as in the Exemption Order.

[13] Section 3(1) of the *Act* provides that a person must not consume an illegal substance in the following listed areas or places:

3(1) A person must not consume an illegal substance in any of the following areas or places or remain in any of the following areas or places after consuming an illegal substance in the area or place:

- (a) the area within 15 m of any of the following places:
 - (i) any part of a play structure in a playground;
 - (ii) a spray pool or wading pool;
 - (iii) a skate park;
- (b) any of the following places if the public has a right of access to the place:
 - (i) a sports field;
 - (ii) a beach;
 - (iii) a park within the meaning of the *Park Act*;
 - (iv) a regional park within the meaning of the *Local Government Act*;
 - (v) an outdoor area established by a local government for purposes of community recreation;
 - (vi) a permanent public park over which the Park Board has jurisdiction under section 488 of the Vancouver Charter;
 - (vii) a park held in trust by a local government;

- (c) the area within 6 m of the outside of the entrance to any of the following places:
 - (i) a place to which the public has access as of right or by invitation, express or implied, whether or not a fee is charged for entry;
 - (ii) a workplace;
 - (iii) a prescribed place;
- (d) the area within 6 m of the outside of the entrance to a place occupied as a residence, if the public has a right of access to the area;
- (e) the area within 6 m of a public transit bus stop;
- (f) a prescribed place;
- (g) the area within a prescribed distance from a prescribed place.

[14] Section 3(2) of the *Act* provides that the restrictions set out in ss. (1)(a) [playgrounds, wading pools, and skate parks], (b) [parks and beaches], and (e) [near bus stops] do not apply to “an area to which the public does not have a right of access”.

[15] Section 9 of the *Act* grants the Lieutenant-Governor-in-Council [LGC] broad regulatory powers that allow it to make regulations referred to in s. 41 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, including creating exemptions from the application of s. 3. More specifically, s. 9(2) of the *Act* permits the LGC to make regulations:

- a) prescribing places for the purposes of s. 3(1)(c) (iii), (t) or (g), which may be different for each paragraph in that section;
- b) prescribing a distance for the purposes of section 3(1)(g), which may be different for different places or classes of places;
- c) exempting the following, or a class of the following, from all or part of section 3:
 - (i) a person;
 - (ii) an illegal substance;
 - (iii) a form of consumption of an illegal substance;
 - (iv) a thing;
 - (v) a place;
 - (vi) an area within a specified distance of a thing or place.

[3] A regulation under s. (2)(c) of the *Act* may provide:

- (a) limits or conditions on the exemption, and
- (b) circumstances in which the exemption applies.

[16] Section 4 of the *Act* provides that a police officer, having reasonable grounds to believe that a person is consuming or has recently consumed an illegal substance in a restricted place or area, may direct that person to: "cease consuming an illegal substance in the area or place or leave the area or place".

[17] A person who refuses a police direction commits an offence under the *Offence Act*, R.S.B.C. 1996 c. 338, punishable by a maximum fine of \$2,000 and/or a term of imprisonment up to six months. Section 8 of the *Act* makes it an offence for a person to fail to comply with an officer's directions given under s. 4. If an officer has reasonable grounds to believe that a person is committing an offence under s. 8, that officer has discretion to take the following actions:

- a) arrest the person without a warrant (s. 5);
- b) seize and remove any illegal substances and packages containing illegal substances (s. 6(a));
- c) destroy any seized illegal substances (s. 6(b)); or,
- d) submit for analysis or examination any seized substance or sample of a seized substance (s. 7).

[18] Section 12 of the *Act* provides that the "*Act* comes into force by regulation of the Lieutenant Governor in Council". The LGC has not enacted a regulation bringing the *Act* into force, nor any other regulations.

The Chief Justice's Reasons

[19] The Chief Justice identified the test for granting an interim injunction emanating from the leading decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 (S.C.C.) at 348, which has three elements:

- a) Is there a serious question to be tried;
- b) Will the applicant suffer irreparable harm if the injunction is not granted;
and
- c) Does the balance of convenience favour granting a stay?

[20] Before turning to the application of that test, the Chief Justice first considered the respondent's standing to bring the action. He concluded that the respondent has both a direct and a public interest in the matters in issue that supported granting it standing. The Province does not seek to appeal this aspect of the Chief Justice's decision.

[21] On the first element of the *RJR* test, the Chief Justice was satisfied that the respondent had raised serious questions to be tried in respect of s. 7 of the *Charter of Rights and Freedoms*. The s. 7 argument, in part, is that the *Act* will drive drug users away from public spaces, resulting in more lone drug use, which carries a heightened risk of harm to the drug users.

[22] In coming to this conclusion, the Chief Justice rejected the Province's argument that the injunction application was premature because the regulations contemplated by the *Act* had not been enacted. He said (at para. 56):

...Just because the LGC may have the authority to tailor the application of the *Act* does not guarantee the form that any such tailoring may take, nor does it guarantee that any such tailoring will occur at all.

[23] On the question of irreparable harm, the respondent argued that there was a high degree of probability, verging on certainty, that the coming into force of the *Act* will cause irreparable, irreversible, and life-threatening harm to drug users and psychological harm to nurses who support them. The types of harm identified included increased interactions with law enforcement, involuntary displacement, drug seizures, fines and detention, arrest, and potential imprisonment. The Chief Justice concluded (at para. 89):

...I find that there is a high degree of probability that at least some of the harm set out by the plaintiff will in fact occur. Centrally, but not exclusively, the *Act* will promote more lone drug use, which carries incumbent risks to PWUD and also the plaintiff's members.

[24] On the balance of convenience, the Chief Justice acknowledged that there is a strong presumption that the *Act* is in the public interest. He further acknowledged the safety risks associated with drug use in places frequented by members of the public, particularly seniors, people with disabilities, and families with young children. However, he rejected the contention that the impact of the order sought would effectively permit drug users to use drugs "nearly wherever they want".

[25] Ultimately, the Chief Justice found that the prevailing exceptional circumstances—specifically the years-long and ever-worsening public health emergency that is causing approximately seven unnecessary deaths every day—warranted granting the injunction.

[26] Accordingly, the Chief Justice granted the Injunction Order, restraining the *Act* coming into force until March 31, 2024—the date requested by the respondent.

Leave to Appeal

Legal Framework

[27] The Injunction Order is a limited appeal order: Rule 11 of the *Court of Appeal Act*, S.B.C. 2021, c. 6. Accordingly, the Province requires leave to appeal pursuant to s. 13 of the *Court of Appeal Act*. See *VM Agritech Limited v. Smith*, 2024 BCCA 39 (Chambers) at para. 20.

[28] The onus is on the applicant to establish the conditions for leave to appeal on a balance of probabilities: *Independent Contractors and Businesses Association v. British Columbia*, 2018 BCCA 429 (Chambers) at para. 33.

[29] The criteria for granting leave to appeal are well established:

- a) Whether the point on appeal is of significance to the practice;

- b) Whether the point raised is of significance to the action itself;
- c) Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- d) Whether the appeal will unduly hinder the progress of the action.

(*Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10).

[30] The criteria for leave are “all considered under the rubric of the interests of justice”: *VM Agritech* at para. 23, citing *Vancouver (City) v. Zhang*, 2007 BCCA 280 (Chambers) at para. 10.

Analysis

Merits of the Proposed Appeal

[31] I will first address the merits of the proposed appeal. Both parties directed much of their attention towards this prong of the leave test. The Province submits that the Chief Justice erred:

- a) In failing to afford sufficient deference to the legislative and executive branches of government, including by issuing the injunction in the absence of regulations contemplated under the *Act*;
- b) In failing to adequately consider the prematurity of the application, again given the absence of the contemplated regulations;
- c) In failing to exercise his discretion judicially by granting the broadest possible remedy with no attempt to tailor the order to, for example, permit the Province to proceed to develop regulations under the *Act*;
- d) In finding irreparable harm based upon unproven and speculative harms, including those identified in a 2022 report submitted to the BC Coroner by a Death Review Panel Report. In particular, the Chief Justice allegedly failed to address the fact that the *Act* does not impose a blanket

prohibition on public drug use, but simply limits the public areas in which drug use is permitted while leaving many non-restricted public areas available; and

e) In making findings of fact based on inadmissible opinion evidence.

[32] For its part, the respondent submits that there is no merit to the proposed appeal. It argues that the Chief Justice did not err in finding that the application was not premature, nor did he err in finding irreparable harm on the evidence before him. The respondent notes that the Province adduced no evidence going to its allegation of harm flowing from an injunction in contrast to the respondent's evidence demonstrating the harms associated with displacement and isolation of drug users.

[33] I would not decline to grant leave to appeal based upon a preliminary assessment of the merits of the proposed appeal. The merits threshold is relatively low: *Wang v. Sullivan*, 2023 BCCA 409 (Chambers) at para. 20. The question is “[w]hether the applicant has identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court”: *Johnston v. Matheson* (also known as *A.L.J. v. S.J.M.*), 1994 CanLII 2614 (B.C. C.A.), 46 B.C.A.C. 158, at para. 10 (Chambers).

[34] As I have discussed, the Province raises a number of alleged errors on the part of the Chief Justice. While a discretionary decision to grant an injunction is entitled to a high degree of deference on appeal, it cannot be said that the appeal is wholly without merit. This is particularly so given that, as the parties acknowledge and as the Chief Justice alluded to, an order enjoining the coming into force of legislation is an extraordinary remedy.

Significance to the Practice

[35] I am also prepared to accept that, viewed in the abstract, the Injunction Order is of significance to the practice. On the one hand, the Chief Justice applied well-established legal principles in coming to his decision. However, the extraordinary

nature of an order enjoining the Province from bringing duly enacted legislation into force is worthy of this Court's attention.

[36] However, for the reasons I will develop more fully, it is my view that this proposed appeal, as currently framed and at this particular juncture in the proceeding, is not a proper case for this Court to provide guidance on this issue or to otherwise intervene. Specifically, the proposed appeal does not satisfy the other two criteria for granting leave—the significance to the underlying action and the impact on the progress of the action. An important factor in the analysis of those criteria is the fact, acknowledged by the Province, that the appeal will be moot by the time it comes on for hearing. Accordingly, in my respectful view, it is not in the interests of justice to grant leave to appeal.

Significance to the Action/Will the Appeal Unduly Hinder the Action?

[37] In my view, the proposed appeal has minimal significance to the action below which, at its heart, is a constitutional challenge to the *Act* based upon a number of alleged *Charter* breaches. Those issues do not arise on the proposed appeal, except to the extent that they are relevant to the first prong of the injunction test, i.e., whether there is a serious issue to be tried. It is very unlikely that a division of this Court would drill deeply into the merits of the appeal or dispose of the appeal under the first prong. Further, on an appeal from an interim injunction order, this Court would not opine on issues or make findings of fact that will impact the ultimate determination of the merits. Similarly, the Chief Justice did not make any findings of fact that will prejudice the Province's position on the merits.

[38] In *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29, Justice Newbury denied leave to appeal an interim order enjoining enforcement of certain provisions of the *Medicare Protection Act*, while a constitutional challenge to the legislation was ongoing. She stated (at para. 59):

...At bottom, the issues are at best theoretical distractions from the constitutional issues that are the subject of the underlying case.

[39] Justice Newbury's comment applies with equal force to the circumstances of this proposed appeal. The appeal would require the expenditure of resources for the sake of deciding a question that will not contribute to resolving the merits of the underlying action.

[40] In terms of the impact on the progress of the action, the Province submits that because it is not seeking an expedited hearing of the appeal, granting leave will not adversely impact the action, including the ability of the respondent to pursue its stated intention of seeking to extend the Injunction Order.

[41] Respectfully, I do not agree with the Province's contention. If leave to appeal is granted, the parties would have an obligation to pursue the appeal in accordance with the requirements of the *Court of Appeal Rules*. This would require the respondents, as well as the Province, to effectively engage in three different processes: (i) the appeal; (ii) the anticipated application to extend or renew the Injunction Order; and (iii) the hearing on the merits. In my view, it is unreasonable to require the parties to expend time and resources on an appeal that, as I have touched upon, will have no practical significance for the action below.

[42] Given that an application to renew or extend the Injunction Order is anticipated, whether before the Chief Justice or another judge of the Supreme Court, that judge will be faced with the situation in which there is an outstanding appeal of the original Injunction Order. That would put the judge in the difficult, if not untenable situation, of hearing arguments on the very points that form the basis for the appeal.

[43] A further factor that militates against granting leave to appeal is the incomplete state of the pleadings and evidentiary record. As of the date of the hearing before the Chief Justice, and indeed at the time this application was heard, the Province had not yet filed a response to civil claim. Thus, the parties have not yet joined issue on the central elements of the claim.

[44] Moreover, as I have noted, the Province filed no evidence in response to the application. However, it has indicated that if and when an application to renew or

extend is brought, it is likely to file evidence and that at least five days will be required for the hearing. Thus, the application, which is likely to be heard before any appeal, will proceed on a significantly different factual foundation than the proposed appeal of the Injunction Order.

[45] To grant leave to appeal in a matter where the record is incomplete and where events in the court below are likely to overtake the appeal, is not a reasonable or effective use of this Court's, or the parties', resources.

[46] This brings me back to the issue of mootness. This Court has the discretion to hear moot appeals, and in exercising that discretion, it is guided by the test set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353:

...First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

[47] In exercising its discretion, the Court may consider a number of factors, including whether an adversarial context continues to exist, whether judicial economy would be advanced and whether the Court will stray into the legislative sphere rather than acting as an adjudicative body: *Kassian v. British Columbia*, 2023 BCCA 383 at para. 37.

[48] Under the second of these factors—judicial economy—the Court in *Borowski* (at p. 360) noted that the mootness doctrine may not be strictly applied in circumstances in which doing so might result in an important issue evading review by the Court.

[49] Here, while there is an ongoing adversarial context, for the reasons that I have touched upon, judicial economy weighs against granting leave to appeal. Further, this is not a case in which denying leave will result in important issues evading review. The respondent has again indicated that it will apply to extend the Injunction Order. Accordingly, the issue of the Injunction Order will continue to be

litigated in the Supreme Court on the basis of a more fully developed record. That proceeding may well provide a more appropriate opportunity for appellate review.

Interests of Justice

[50] The final and indeed ultimate question on a leave application is whether the interests of justice favour granting leave. As will be apparent from my discussion of the other criteria, it is my view that it is not in the interests of justice to grant the Province leave to appeal.

[51] I would make one final comment. As I have discussed, the Province argued before the Chief Justice, and on this application, that the Injunction Order interferes with the ability of the LGC to develop regulations under the *Act* to complete the statutory scheme. Respectfully, I disagree. Nothing in the Injunction Order prevents the LGC from developing draft regulations for implementation upon a determination of the underlying constitutional challenge, or on the expiry of the Injunction Order.

Disposition

[52] In all of the circumstances, and for the reasons given, I would dismiss the application for leave to appeal. Given this conclusion, it is unnecessary to address the Province's stay application.

"The Honourable Justice Skolrood"