

1-1-2015

Canadian Prison Needle-Exchange Programs: Can the Health Benefits Overcome the Current Legal Barriers?

Adrien Iafrate

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/djls>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License](https://creativecommons.org/licenses/by-nc-nd/3.0/).

Recommended Citation

Adrien Iafrate, "Canadian Prison Needle-Exchange Programs: Can the Health Benefits Overcome the Current Legal Barriers?" (2015) 24 Dal J Leg Stud 25

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Journal of Legal Studies by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

CANADIAN PRISON NEEDLE-EXCHANGE PROGRAMS: CAN THE HEALTH BENEFITS OVERCOME THE CURRENT LEGAL BARRIERS?

Adrien Iafrate*

ABSTRACT

The incidence of HIV and Hepatitis C is significantly higher in Canadian federal penitentiaries than among the general public, as are the transmission rates of these two diseases. These disproportionate rates of infection are largely attributed to the sharing of needles among inmates who are addicted to intravenous drugs. This has created a serious public health risk for all federal inmates as well as the general public, since many of these inmates will be released back into society. In response to this risk, the Correctional Service of Canada asked the Public Health Agency of Canada (PHAC) to study the effectiveness and risks of prison needle-exchange programs (PNEPs). In 2006, PHAC's report, "Prison needle exchange: Review of the evidence," concluded that "[n]eedle-sharing practices decrease in prisons where PNEPs are offered." Despite these findings, the federal government has refused to establish a prison needle-exchange program.

The harm caused by the federal government's continuing reluctance is compounded by an existing legislative prohibition on sterile needles in federal penitentiaries. In light of current political and legislative barriers, any hope of establishing such a program lies with the courts. This article assesses the ability to challenge the legislative prohibition on sterile needles through a claim under the *Canadian Charter of Rights and Freedoms*.

Citation: (2015) 24 Dal J Leg Stud 25.

* Adrien Iafrate is a recent graduate of the Schulich School of Law at Dalhousie University. He would like to thank Professor Elaine Gibson for her guidance and feedback throughout the development of this article.

I. OVERVIEW

In *RJR-MacDonald Inc v Canada (Attorney General)*, Justice La Forest observed that “health underlies many of our most cherished rights and values, and the protection of public health is one of the fundamental responsibilities of Parliament.”¹ The exercise of Parliament’s fundamental responsibility has stopped at the doorsteps of its federal penitentiaries. The prevalence of HIV and Hepatitis C (HCV) in federal penitentiaries “raises several concerns regarding the increased risk to uninfected inmates and to public health.”² The concerns are largely attributed to the dangerous health risks faced by inmates who use needles to facilitate their drug addictions.³ While needle sharing is not unique to prison populations, the prohibition on clean needles in an environment with high rates of infectious diseases compounds the health risks. The potential risks spread beyond prison walls when infected inmates complete the custodial portion of their sentence and begin reintegrating into society. The Correctional Service of Canada (CSC) has several harm reduction strategies to combat this public health concern,⁴ but has stopped short of providing sterile needles.

In April 2006, the Public Health Agency of Canada (PHAC) released a risk-benefit analysis of prison needle-exchange programs (PNEPs) for CSC and reported that “needle-exchange programs for injection drug users in prisons reduce the need for health care interventions.”⁵ A needle-exchange program “denotes the one-to-one exchange of a used syringe (which includes a needle) for a new syringe.”⁶ The report analyzed similar programs from other jurisdictions to assess the practical implications of a Canadian initiative. It found that PNEPs could effectively reduce the transmission of HIV and HCV. However, PNEPs cannot be legally implemented in Canada given the current prohibition on

¹ *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 69, [1995] SCJ No 68 (QL), La Forest J, dissenting [*RJR-MacDonald*].

² Correctional Service of Canada, “Infectious Diseases in Canadian Federal Penitentiaries, 2000–2001”, by Prithwish De in *FORUM on Corrections Research*, vol 14, no 2 (Ottawa: CSC, 2002) [CSC, “Infectious Diseases”].

³ *Ibid.*

⁴ Correctional Service of Canada, “Management of Infectious Diseases”, Commissioner’s Directive No 821 (Ottawa: CSC, 23 December 2009).

⁵ Wayne Kondro, “Conservative government scuttles needle exchange” (2007) 176:3 CMAJ 308.

⁶ Ontario Medical Association, “Improving Our Health: Why is Canada Lagging Behind in Establishing Needle Exchange Programs in Prisons?” (Position Paper, 4 October 2004).

prisoners' use of sterile needles in federal penitentiaries for non-medical purposes. Despite PHAC's findings, former federal Minister of Public Safety Stockwell Day rejected the creation of a PNEP pilot project.⁷ On October 18, 2013, seven years after the report's publication, Public Safety Minister Steven Blaney reaffirmed the federal government's opposition.⁸ The program was rejected on the basis of fiscal restraints,⁹ safety concerns, and the government's "zero tolerance policy for drugs in [federal] institutions."¹⁰ These statutory limitations, combined with the federal government's unwillingness to implement this program, have resulted in PNEP proponents turning to the courts for justice. On September 25, 2012, a former federal inmate and several advocacy groups filed an application claiming that the lack of needle-sharing programs in federal penitentiaries violates the *Canadian Charter of Rights and Freedoms*.¹¹

This article examines the public health risk caused by sharing needles in Canadian penitentiaries and assesses the legal parameters of addressing this risk, specifically through needle-exchange programs. It begins by outlining the severity of the current public health risk caused by needle sharing among federal inmates. It then explores both current and prospective responses to eliminating the resultant public health risk. In addition, it explains the political and legislative barriers to implementing a needle-exchange program in Canadian penitentiaries. Finally, the last part analyzes the legal parameters for implementing a needle-sharing program in Canadian penitentiaries through *Charter* litigation. Specifically, this part assesses whether the total prohibition on sterile needles—especially in cases where addiction has been diagnosed—infringes an inmate's life, liberty, or security of the person in a manner inconsistent with the principles of fundamental justice, contrary to section 7 of the *Charter*. The ideal claimant for such a case is an inmate who is addicted to intravenous drugs. The severe health risks associated

⁷ Kondro, *supra* note 5.

⁸ Diana Mehta, "AIDS prevention groups want prison needle programs to protect inmates, public", *CTV News* (18 October 2013), online: <www.ctvnews.ca/canada/aids-prevention-groups-want-prison-needle-programs-to-protect-inmates-public-1.1502466>.

⁹ Kondro, *supra* note 5.

¹⁰ Mehta, *supra* note 8.

¹¹ *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, s 15 [*Charter*]. See also Notice of Application, *infra* note 17.

with a prohibition on sterile needles will likely engage an inmate's life, liberty, and security of the person. Furthermore, the discord between the state's objective in prohibiting the illicit use of needles and the potentially devastating effects on inmate health may cause these infringements to violate principles of fundamental justice. If PNEPs can provide a less drastic means of achieving the state's objective to maintain a safe penal environment, an outright prohibition will be difficult to justify as minimally impairing under section 1 of the *Charter*.

II. METHODOLOGY AND LIMITATIONS

This article combines social science and legal research. An analysis of various government, scholarly, and non-governmental data was conducted to develop a balanced view of the public health risk currently present in federal penitentiaries. The research focused on sources published within the last ten years in order to ensure the analysis is accurate and relevant. After researching the public health risk, an analysis of possible remedies, including PNEPs, was undertaken, relying on Canadian and international sources. The political opposition to PNEPs was studied using online Canadian media reports. The remainder of the research involved an analysis of *Charter* jurisprudence to determine whether a *Charter* challenge could force the government to implement a PNEP.

This article has four major limitations. First, the analysis is limited to Canadian federal penitentiaries and may not be applicable to provincial correctional facilities. While similar problems may arise in provincial institutions, the public health data is derived from federal penitentiaries and the legal analysis focuses on federal legislation. Second, the focus on PNEPs does not preclude the capacity of alternative measures, such as safe injection sites,¹² to achieve the same objective. This paper focuses exclusively on PNEPs because they are prevalent in other countries and have been studied extensively by the Canadian government. While a safe injection site can arguably accomplish the same objective, there is limited research on its practical implementation in Canadian

¹² A safe injection site allows individuals to inject drugs under the supervision of nurses and other staff, whereas PNEPs simply allow inmates to exchange their used needles for sterile ones. Unlike a safe injection site, PNEPs do not require supervision from additional staff.

prisons.¹³ Third, this paper does not discuss any potential remedies to be obtained through judicial review. As will be discussed in Part VI, sterile needles are unauthorized unless a Commissioner's Directive or an institutional head explicitly permits them. There is no indication that these administrative actors have explicitly denied a request to authorize sterile needles, which would open them up to a potential application for judicial review. Finally, this article focuses exclusively on legal arguments from Canadian domestic law to the exclusion of arguments based on international law. The Canadian government may also be required to fulfill obligations toward prisoners established by international laws and guidelines.¹⁴

III. SOCIAL AND LEGAL CONTEXT

Prison needle-exchange programs remain both a legally and politically contentious issue. As recently as October 2013, PNEPs made national headlines and prompted negative responses from the federal government. The current federal government remains strongly opposed to these programs, yet its reasoning directly contradicts the findings of PHAC.¹⁵ Despite rejecting PHAC's findings, the government's stance may resonate with the public. André Picard of *The Globe and Mail* believes that the "common reaction to the suggestion of prison needle exchanges is sputtering outrage" because, on its face, it legitimizes drugs in prisons and provides dangerous criminals with weapons.¹⁶

While the debate surrounding PNEPs has been evolving over the last decade, it has not fully matured. The Ontario Superior Court of Justice

¹³ Additionally, safe injection sites may be harder to establish through *Charter* litigation because they engage the *Controlled Drugs and Substances Act*, SC 1996, c 19, and the professionals administering the drugs could be held liable for possession of narcotics.

¹⁴ The Ontario Medical Association argues that Canada's obligations under the Universal Declaration of Human Rights, the International Covenant on Social, Economic and Cultural Rights, and the International Covenant on Civil and Political Rights require the federal government to offer syringe exchange programs to federal inmates: Ontario Medical Association, *supra* note 6.

¹⁵ Public Health Agency of Canada, *Prison needle exchange: Review of the evidence*, Report for Correctional Service of Canada (Ottawa: April 2006) [PHAC, *Prison needle exchange*].

¹⁶ André Picard, "A call for pragmatism in clean-needle debate", *The Globe and Mail* (1 October 2012), online: <www.theglobeandmail.com/news/politics/a-call-for-pragmatism-in-clean-needle-debate/article4580629>.

application will not only force the debate into public headlines, it will also force the courts to reconsider the level of *Charter* protection afforded to federal inmates.¹⁷ This legal area is relatively limited and likely contentious. However, the movement toward PNEPs is gaining momentum and it may reach the Supreme Court of Canada in the next few years.

IV. PUBLIC HEALTH RISK

A. Health Risk

The high transmission rates of HIV and HCV in federal penitentiaries have been largely attributed to the sharing of unsterile needles for the purpose of injecting illegal narcotics.¹⁸ Although narcotics are illegal in prisons, it has been documented that “drugs remain widely available in prisons and a substantial proportion of prisoners consume them.”¹⁹ The high transmission rates are also caused by unprotected sexual activity and unsafe tattooing practices. These additional sources of HIV and HCV transmission increase the likelihood that new inmates will become infected and, consequently, elevate the risks of needle sharing. These trends threaten the health of inmates who share needles, as well as the larger penitentiary population and the public at large.

The prevalence of HIV and HCV is disproportionately greater in federal penitentiaries than among the general population. In April 2006, PHAC released a report for CSC outlining the risks and benefits of PNEPs and the underlying problems concerning needle sharing. At the time, the prevalence of HIV in Canadian federal penitentiaries was between 1% and 8%, which was estimated to be 5 to 40 times higher than among the general Canadian population.²⁰ The prevalence of HCV in penitentiaries was between 17% and 40%, or 20 to 50 times

¹⁷ According to Canadian HIV/AIDS Legal Network, the Notice of Application to the Ontario Superior Court of Justice was filed on 25 September 2012. A copy of the Notice of Application can be found at <www.aidslaw.ca/site/wp-content/uploads/2013/04/PNSP_Notice-of-Application_FINAL-25-Sep-2012.pdf> [Notice of Application].

¹⁸ CSC, “Infectious Diseases”, *supra* note 2.

¹⁹ Thomas Kerr et al, “Harm reduction in prisons: a ‘rights based analysis’” (2004) 14:4 Crit Pub Health 345 at 346.

²⁰ PHAC, *Prison needle exchange*, *supra* note 15 at 4.

higher than among the general population.²¹ Even at the lowest estimates, these numbers represent a drastic public health issue. CSC's most recent figures estimate the HIV and HCV prevalence among federal penitentiaries to be 1.72% and 30.2% respectively.²² These numbers are consistent with the evidence presented by PHAC and demonstrate the disproportionate HIV and HCV rates in Canadian federal penitentiaries.²³ A population with a drastically high rate of infectious diseases becomes a serious public health risk when it shares unsterilized needles.

The health risk to individual inmates transforms into a *public* health risk when a specific population, namely inmates actively addicted to intravenous drugs, faces serious health concerns. Despite CSC's efforts to keep federal penitentiaries free from illegal drugs, drug injection and needle sharing still occur. PHAC reported that 11% of federal inmates inject drugs during incarceration.²⁴ CSC's *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey* found that 16% of male and 15% of female federal inmates reported injecting drugs while incarcerated.²⁵ CSC's survey also noted that 7% of male and 5% of female inmates reported sharing needles while incarcerated.²⁶ This research revealed that "among men, however, needle-sharing behaviours did not significantly decline in prison compared to the community."²⁷ PHAC concluded that the "available evidence strongly suggests that a large proportion of injection drug users who inject in correctional settings share (borrow and/or lend) needles

²¹ *Ibid.*

²² Public Health Agency of Canada, "Fact Sheet: People in Prison" (30 August 2012), online: <www.phac-aspc.gc.ca/aids-sida/pr/sec4-eng.php> [PHAC, "Fact Sheet"]. The prevalence may be greater than reported because not all inmates undergo testing.

²³ Correctional Service Canada, *Testing and Treatment for Human Immunodeficiency Virus and Hepatitis C Virus Infections among Canadian Federal Inmates* by Dianne Zakaria et al (August 2010), online: <www.csc-scc.gc.ca/research/005008-0223-eng.shtml> [CSC, *Testing and Treatment*]. These figures reflect the entire federal penitentiary population. The rates of federally-incarcerated Aboriginal women are astonishingly high, as their reported rates of HIV and HCV infections are 11.7% and 49.1% respectively.

²⁴ PHAC, *Prison needle exchange*, *supra* note 15 at 19.

²⁵ Correctional Service of Canada, *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey* (Ottawa: CSC, March 2010), online: <www.csc-scc.gc.ca/005/008/092/005008-0211-01-eng.pdf> [CSC, *Emerging Findings*].

²⁶ *Ibid.*

²⁷ *Ibid.*

and other injecting equipment.”²⁸ An injection rate between 15% and 16% and a needle-sharing rate between 5% and 7% is significant when considering that there are over 14,000 incarcerated individuals in federal penitentiaries.²⁹ In other words, approximately 1,000 incarcerated individuals reported sharing unsterile needles.³⁰

The public health risk becomes apparent when the high prevalence of HIV and HCV is considered in light of the needle-sharing rates. These factors “increase the probability of spreading [bloodborne viruses] in the prison setting.”³¹ The public health risk is heightened as the prevalence of these diseases in Canadian prisons has “been reported to be significantly higher for people who inject drugs.”³² Federal inmates who share unsterile needles for intravenous drug use face a serious risk of HIV or HCV infection. This risk can become a near certainty among certain vulnerable populations, such as female Aboriginal inmates, 50% of whom are infected with HCV.³³ The sharing of unsterile needles in a population with high rates of HIV and HCV sets the stage for a serious public health crisis.

The health risks created by the high rates of these diseases, combined with needle sharing among inmates, extend well beyond the prison walls. The PHAC and CSC reports indicate that individuals who do not have HIV or HCV upon incarceration have a high risk of becoming infected with these diseases by sharing needles in a federal penitentiary. This then becomes a risk to the general public because “most inmates are in prison only for relatively short periods of time and are then released into their communities.”³⁴ An inmate who becomes infected with these diseases while incarcerated may transmit the disease to members of their community after he or she is released by sharing needles and engaging in unprotected sex. Neither PHAC nor CSC have published data concerning the

²⁸ PHAC, *Prison needle exchange*, *supra* note 15 at 19.

²⁹ *Annual Report of the Office of the Correctional Investigator, 2012–2013* (Ottawa: 2013), online: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20122013-eng.pdf>.

³⁰ *Ibid.* As of 4 April 2013, there were 13,676 male inmates and 513 female inmates in federal penitentiaries. The approximate value of 1,000 is based on these numbers and their respective needle-sharing statistics.

³¹ PHAC, *Prison needle exchange*, *supra* note 15 at 4.

³² Sandra Chu, “Clean switch: the case for prison needle and syringe programs” (2009) 14:2 *Can HIV/AIDS Pol’y & L Rev.*

³³ See CSC, *Testing and Treatment*, *supra* note 23.

³⁴ Kerr et al, *supra* note 19 at 354.

rates of intravenous drug use and needle sharing among individuals released from federal custody. However, a longitudinal study conducted in Vancouver assessed the impact of incarceration on HIV risk factors for individuals released from prison. The sample was based on active injection drug users. The researchers found that “individuals recently released from prison were significantly more likely to report sharing contaminated syringes as compared to individuals who did not report incarceration.”³⁵ Although the research focused on provincial correctional facilities and municipal jails in addition to federal penitentiaries, the findings paint a stark picture. Not only do federal inmates addicted to intravenous drugs face higher risks of becoming infected with HIV and HCV while incarcerated, they are also more likely to share needles once released. These findings underscore the breadth of the public health risk.

B. Health Impact

Although advancements in medical treatments have reduced the health effects of HIV and HCV, both diseases can lead to severe medical complications. The health effects of these diseases can be grave: HIV weakens the body’s immune system and leads to life-threatening infections,³⁶ while HCV causes serious complications such as “ascites (swelling in the abdomen), jaundice, or delayed blood clotting.”³⁷ Fortunately for individuals diagnosed with these diseases, new treatments have reduced their impact. For example, HIV, albeit incurable,³⁸ is now a treatable disease with combination antiretroviral therapy. This therapy can dramatically increase the life expectancy of individuals diagnosed with HIV, although their life expectancy remains lower than the general population’s.³⁹ Similarly, HCV treatments can potentially suppress the virus, but

³⁵ M-J S Milloy et al, “Elevated HIV risk behaviour among recently incarcerated injection drug users in a Canadian setting: a longitudinal analysis” (2009) 9:156 *BMC Public Health*.

³⁶ CATIE, “HIV and AIDS Basics” (2015), online: Canadian AIDS Treatment Information Exchange <www.catie.ca/en/basics/hiv-and-aids> [CATIE, “Basics”].

³⁷ CATIE, “Hepatitis C: An In-Depth Guide” (2015), online: Canadian AIDS Treatment Information Exchange <www.catie.ca/en/practical-guides/hepc-in-depth/living-hep-c/symptom-management>.

³⁸ CATIE, “Basics”, *supra* note 36.

³⁹ The average life expectancy among the general population is 80 years. See Muriel Draaisma, “Drugs increase life expectancy of HIV patients by 13 years: study”, *CBC News* (1 August 2008), online: CBC <www.cbc.ca/news/canada/drugs-increase-life-expectancy-of-hiv-patients-by-13-years-study-1.694961>.

their success depends on a variety of factors and may result in serious liver damage.⁴⁰ These medical advancements, however, can only help individuals who have readily identified their infections and are receiving treatment. Unfortunately, these diseases are often not detected until medical complications have already occurred. In federal penitentiaries, the lack of mandatory testing for either virus⁴¹ may result in an inmate's infection going undetected.

V. MEASURES TO COMBAT THE PUBLIC HEALTH RISK

A. Current Measures

In response to this public health risk, CSC has implemented various educational and harm reduction strategies to address the negative health consequences of injection drug use. CSC's current policy requires institutions to offer harm reduction educational programs and to provide bleach for inmates to obtain in a discreet manner.⁴² While these initiatives demonstrate a willingness to address the public health problem, they have limited effectiveness. PHAC found education to be a necessary tool, although, on its own, it is not sufficient as a harm reduction strategy. Furthermore, the World Health Organization concluded that "there is no good evidence supporting the effectiveness of bleach in the field in reducing HIV infection."⁴³ PHAC also disapproves of using bleach as an HCV prevention strategy in either the community or the prison context.⁴⁴

Meanwhile, CSC has implemented a methadone maintenance treatment program for opiate-addicted inmates.⁴⁵ The program's objective is to provide methadone orally as a substitute for opiate-based drugs, such as heroin. While this program has been associated with significant decreases in drug injection, it

⁴⁰ CATIE, "Hepatitis C: After Treatment" (2012), online: [hepCinfo <www.hepCinfo.ca/en/detail/treatment/after-treatment>](http://hepCinfo.ca/en/detail/treatment/after-treatment).

⁴¹ Public Health Agency of Canada, "Fact Sheet: People in Prison" (30 August 2012), online <www.phac-aspc.gc.ca/aids-sida/pr/sec4-eng.php>. The prevalence may be greater than reported because not all inmates undergo testing.

⁴² CSC, "Infectious Diseases", *supra* note 2.

⁴³ PHAC, *Prison needle exchange*, *supra* note 15 at 32.

⁴⁴ *Ibid.*

⁴⁵ Correctional Service of Canada, "Post Release Outcomes of Methadone Maintenance Treatment Program (MMTP) Participants: A Comparative Study" (1 July 2012), online: <www.csc-ccc.gc.ca/research/005008-err12-3-eng.shtml>.

can be inaccessible to inmates for several reasons. First, inmates may fail to meet the program's admission and ongoing eligibility criteria, despite their opiate addiction. Second, the time required to process an application for the program creates a period where addicted inmates will try to satisfy their addiction through intravenous drug use. Finally, CSC limits the number of inmates who can receive this treatment. These three factors lead to "numerous situations where prisoners with a heroin addiction will continue to inject heroin and potentially engage in high-risk behaviours, despite the existence of [Methadone Maintenance Treatment] programs within the prison."⁴⁶

The methadone maintenance treatment program's ability to address the public health concern is also limited because it targets only individuals addicted to opiate-based drugs. CSC's report reveals that many inmates inject cocaine.⁴⁷ However, methadone treatment does not target cocaine addictions; it only counteracts the use of opiate-based drugs like heroin. Therefore, inmates injecting cocaine will not benefit from the treatment and, consequently, will still rely on injecting drugs with needles. While the methadone program is an important element of the solution to this public health issue, its benefits cannot be fully realized if inmates continue to share unsterile needles.

B. Prison Needle-Exchange Programs

The purpose of PNEPs is to eliminate the sharing of unsterile needles by supplying sterile needles to inmates. Sterile needles can be effectively distributed by using either the automatic dispenser model or the hand-to-hand distribution model. The automatic dispenser model provides inmates with a "dummy syringe" which can draw clean needles from a dispensing machine.⁴⁸ Inmates must insert the syringe and needle in order to obtain a sterile needle. This model allows for easy access, a high degree of discretion, and an effective disposal system.⁴⁹ By

⁴⁶ Rick Lines et al, *Prison Needle Exchange: Lessons from a Comprehensive Review of International Evidence and Experience*, 2d ed (Toronto: Canadian HIV/AIDS Legal Network, 2006) at 83.

⁴⁷ CSC, *Emerging Findings*, *supra* note 25.

⁴⁸ Lines et al, *supra* note 46 at 53.

⁴⁹ *Ibid.*

contrast, the hand-to-hand distribution model can be administered by prison medical staff, peer outreach workers, or external non-governmental organizations. While this option lacks discretion, it provides an opportunity to identify otherwise unknown drug users and helps to facilitate counselling.⁵⁰ These programs both reduce an inmate's likelihood of sharing unsterile needles.

The public health risk caused by sharing unsterile needles in prisons is not unique to Canada. In fact, solutions employed by other countries provide useful insight. PNEPs have been implemented in various countries, including Armenia, Belarus, Germany, Iran, Kyrgyzstan, Luxembourg, Moldova, Portugal, Romania, Spain, and Switzerland.⁵¹ The European PNEPs have been successful as they are "associated with stable or decreased levels of drug use, declines in syringe sharing, as well as no new cases of HIV or hepatitis C infection."⁵² At the request of CSC, PHAC commissioned a study on the potential risks and benefits of PNEPs. While PHAC found no definitive data concerning PNEPs' impact on HIV and HCV transmission, it concluded that:

- PNEPs do not lead to increased injection drug use;
- Needle sharing practices decrease in prisons where PNEPs are offered;
- Referrals to drug-treatment programs increase in prisons where PNEPs are offered;
- Health care interventions related to injection site abscesses decrease in prisons where PNEPs are offered; and
- The number of overdose-related health care interventions and deaths decrease in prisons where PNEPs are offered.⁵³

These findings are based on several European programs and favour the creation of a similar program in Canada. Data from international programs consistently suggests that PNEPs are effective at reducing the public health risks associated with needle sharing.

⁵⁰ *Ibid* at 52.

⁵¹ Chu, *supra* note 32 at 1.

⁵² Kerr et al, *supra* note 19 at 352.

⁵³ PHAC, *Prison needle exchange*, *supra* note 15.

VI. CURRENT IMPEDIMENTS TO PRISON NEEDLE-EXCHANGE PROGRAMS

A. Political Resistance

Despite the benefits of PNEPs, they face strong political opposition in Canada based on three arguments: first, that the program will undermine the government's zero tolerance drug policy in federal penitentiaries;⁵⁴ second, that the government cannot justify spending public funds to implement this program;⁵⁵ and, third, that PNEPs are inherently dangerous as they provide federally incarcerated inmates, who are serving sentences for relatively serious criminal offences, with dangerous weapons.⁵⁶ While all three arguments are persuasive at first glance, a deeper analysis reveals their flaws.

The government's fear that PNEPs will undermine its zero tolerance drug policy ignores the realities of federal penitentiaries. In September 2012, then-Public Safety Minister Vic Toews stated, "Our government has a zero tolerance policy for drugs in our institutions."⁵⁷ While drug possession is illegal throughout Canada and carries additional penalties in federal penitentiaries, the government's zero tolerance policy does not change the fact that drugs remain widespread in Canadian prisons despite the best efforts of staff and policymakers.⁵⁸ CSC implicitly acknowledges this reality through its bleach distribution program, which is designed to promote safe injection practices. The distribution of sterile needles has no effect on the government's objective of preventing the smuggling of drugs into prisons. If the government could effectively rid their penitentiaries of illegal drugs, the distribution of sterile needles would be unnecessary.

The government has also rejected PNEPs because they would be a costly and improper allocation of public resources. In response to PHAC's recommendation, former Public Safety Minister Stockwell Day stated that a pilot

⁵⁴ Mehta, *supra* note 8.

⁵⁵ Kondro, *supra* note 5.

⁵⁶ Notice of Application, *supra* note 17.

⁵⁷ Anna Mehler-Paperny, "Inmates take Ottawa to court over access to clean needles", *The Globe and Mail* (25 September 2012), online: <www.theglobeandmail.com/news/politics/inmates-take-ottawa-to-court-over-access-to-clean-needles/article4566054>.

⁵⁸ Kerr et al, *supra* note 19 at 346.

PNEP would be fiscally unjustifiable.⁵⁹ While PNEPs require the government to finance sterile needles, a distribution system, and possibly additional staff, the total estimated costs are unclear. The Canadian HIV/AIDS Legal Network estimates that it costs \$4,700 for a single automated syringe-dispensing machine.⁶⁰ In calculating the costs of creating a PNEP, it is not clear whether the Minister's assessment includes the costs of HIV and HCV treatment. The Canadian AIDS Society estimates the lifetime healthcare costs for an individual infected with HIV to be \$250,000.⁶¹ The total cost, accounting for factors such as quality of life and labour productivity, is estimated to be \$1.3 million for each new diagnosis of HIV.⁶² Given the rates of infection and needle sharing, the long-term costs to the government can quickly escalate. Thus, \$4,700 for an automated syringe-dispensing machine pales in comparison to the millions of dollars spent on medical treatment. If a PNEP prevents even a single inmate from contracting HIV, then the government benefits financially.

Lastly, the distribution of sterile needles to federal inmates has been strongly opposed by the government because it would allegedly provide inmates with dangerous weapons. The government fears that the needles could be used to injure other inmates and correctional staff, and would be even more dangerous if they are no longer sterile. Public Safety Minister Steven Blaney told the Canadian Press that his government "will never consider putting weapons, such as needles, in the hands of potentially violent offenders."⁶³ While the Minister's concerns are by no means trivial, they must be assessed in light of the evidence. PHAC reported that the current body of research indicates PNEPs do not lead to:

- PNEP syringes/needles being used as weapons;
- increased altercations, whether between inmates or by inmates against prison staff; [or]

⁵⁹ Kondro, *supra* note 5.

⁶⁰ Lines et al, *supra* note 46 at 64.

⁶¹ Lauryn Kronick, "Canadian AIDS Society: Cost of HIV is \$1.3 million per person infected" (24 November 2011), online: Canadian AIDS Society <www.cdnmaids.ca/cost-of-hiv>.

⁶² *Ibid.*

⁶³ Mehta, *supra* note 8.

- increased cases of needle-stick injuries.⁶⁴

These findings suggest that the Minister's concerns are unfounded; yet, to be fair, the public health risk cannot be addressed at the expense of correctional staff and other inmates. Additional safety measures can and should be put in place to diminish, if not completely remove, the potential for violence. However, despite the evidence, the current government's position is clear: PNEPs will not be introduced in federal penitentiaries.

B. Statutory Roadblocks

While the government has no intention of creating a PNEP, the current prohibition on sterile needles in federal penitentiaries requires a sound legal basis. Outside of prisons, the needles used to inject narcotics are legally obtainable. In fact, community needle-exchange programs exist throughout Canada.⁶⁵ However, the possession of needles in federal penitentiaries is illegal under the definition of either "contraband" in the *Corrections and Conditional Release Act*⁶⁶ or "unauthorized items" in the *Corrections and Conditional Release Regulations*.⁶⁷ Under the *Act*, possession of contraband constitutes a summary conviction offence, whereas possession of unauthorized items is a disciplinary offence pursuant to the *Regulations*. The distinction between possessing "contraband" and possessing "unauthorized items" becomes significant when one assesses the constitutionality of their respective penalties.

i. Contraband

A needle is potentially illegal in federal penitentiaries if it falls within the definition of contraband in section 2(1) of the *Act*. If a needle meets the definition of contraband, then possessing it is both a disciplinary offence⁶⁸ and a summary

⁶⁴ PHAC, *Prison needle exchange*, *supra* note 15 at 33.

⁶⁵ Lines et al, *supra* note 46 at 64.

⁶⁶ *Corrections and Conditional Release Act*, SC 1992, c 20, s 2(1) [*Corrections Act*].

⁶⁷ *Corrections and Conditional Release Regulations*, SOR/92-620, s 2 [*Corrections Regulations*].

⁶⁸ *Corrections Act*, *supra* note 66, s 40(i).

conviction offence.⁶⁹ The two relevant definitions of contraband are contained in sections 2(1)(b) and 2(1)(e).⁷⁰ These provisions define contraband to include:

- (b) a weapon or a component thereof, ammunition for a weapon, and anything that is designed to kill, injure or disable a person or that is altered so as to be capable of killing, injuring or disabling a person, when possessed without prior authorization; [and]

[...]
- (e) any item not described [in this section] that could jeopardize the security of a penitentiary or the safety of persons, when that item is possessed without prior authorization.⁷¹

While section 2(1)(e) seems most applicable to needles, one could argue that they also fall under section 2(1)(b). This section encompasses “anything” that is designed to inflict injury *or* anything that is altered to be capable of inflicting injury. While a needle is not a traditional weapon nor is it designed to inflict injury, it can be altered to inflict injury. However, since a needle is not *designed* to kill, injure, or disable someone, it probably does not fall under this section.

If a needle does not fall under section 2(1)(b), then it will certainly fall under section 2(1)(e). Section 2(1)(e) defines contraband as any unauthorized item that could jeopardize the safety of a person. This definition creates a fairly low threshold, since a needle—or any sharp object—could certainly jeopardize the safety of other inmates and staff. The “prior authorization” requirement implies the existence of administrative discretion to authorize and prohibit items. Needles that receive “prior authorization” will no longer fall within the definition of contraband under section 2(1)(e).

ii. Unauthorized Items

A needle is also illegal in federal penitentiaries if it falls within the definition of “unauthorized item” under the *Corrections Regulations*. An “unauthorized item” is defined as “an item that is not authorized by a Commissioner’s Directives [sic]

⁶⁹ *Ibid*, s 45(a).

⁷⁰ The other three definitions of contraband are not relevant as they cover intoxicants, explosives, and currencies.

⁷¹ *Corrections Act*, *supra* note 66, s 2(1).

or by a written order of the institutional head and that an inmate possesses without prior authorization.”⁷² Therefore, any such authorization must be explicit. Inmates found in possession of unauthorized items will have those items seized and may face disciplinary action. The latest Commissioner’s Directive regarding personal possession does not permit needles for either male or female inmates.⁷³ There is no evidence that an institutional head has authorized needles and, given the Minister of Justice’s recent statements, it would appear that they are not authorized. If a needle receives authorization from the Commissioner or institutional head in the future, then it will no longer meet the definition of “unauthorized item” or “contraband” under section 2(1)(e) of the *Act*.⁷⁴

The statute and regulations provide ample options to prohibit needle use. If a needle meets the definition of contraband under section 2(1)(a), it will be prohibited by law. In addition, if a needle meets the definition of contraband under section 2(1)(e) of the *Corrections Act* or, alternatively, the definition of unauthorized item under section 2 of the *Corrections Regulations*, it will be prohibited by law subject to a contrary decision by the Minister or institutional head.

VII. CIRCUMVENTING PARLIAMENT: CAN THE *CHARTER* PROVIDE CHANGE?

A. State Action

The current legislative and political roadblocks make a *Charter* challenge the only viable avenue to establish PNEPs in federal penitentiaries. Any potential *Charter* claim should not attempt to establish a positive right to PNEPs because the courts are unlikely to place positive obligations on the government through *Charter* litigation.⁷⁵ Instead, the state’s prohibition on sterile needles for prisoners’ use in federal penitentiaries should be challenged. The ideal claimant for a *Charter*

⁷² *Corrections Regulations*, *supra* note 67, s 2.

⁷³ Correctional Service of Canada, “Personal Property of Offenders”, Commissioner’s Directive No 566 12 (Ottawa: CSC, 13 June 2012).

⁷⁴ The definition of contraband, under s 2(1)(e) of the *Corrections Act*, *supra* note 66, does not apply to items that have received authorization.

⁷⁵ *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].

challenge would be an inmate who is addicted to intravenous drugs because this would strengthen the causation analysis. In *Canada (Attorney General) v PHS Community Services Society*, the Supreme Court of Canada held that the government's decision to close an existing safe injection site⁷⁶ infringed section 7 of the *Charter*. The court relied on the trial judge's finding that "addiction is an illness, characterized by a loss of control over the need to consume the substance to which the addiction relates."⁷⁷ As a result, the court found that it was the government's decision—not an individual's drug use—that would cause potentially devastating health risks if the safe injection site were closed. The court rejected "Canada's assertion that choice rather than state conduct is the cause of the health hazards [the safe injection site] seeks to address."⁷⁸

The state's prohibition on sterile needles in federal penitentiaries has a sufficient causative link with the harm suffered by the claimant in order to engage the *Charter*. In *Canada (Attorney General) v Bedford*, the Supreme Court held that the appropriate standard to determine causation for a section 7 *Charter* challenge is a "sufficient causal connection."⁷⁹ This standard "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities."⁸⁰ The standard is a flexible one and must be adapted in light of the circumstances of the case.⁸¹ In this case, the characterization of needles as "contraband" or "unauthorized items" has the practical effect of prohibiting sterile needles. This limits safe ways for inmates to satisfy their drug addiction and, in turn, fosters needle sharing. The added risk of harm caused by the prohibition constitutes sufficient causation to trigger *Charter* protection. Therefore, the state action in this case can be shown to engage the section 7 *Charter* rights of inmates addicted to intravenous drugs.

⁷⁶ The Minister refused to renew the safe injection site's exemption under the *Controlled Drugs and Substances Act*. The decision would have effectively made the site illegal and forced its closure.

⁷⁷ *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 99, [2011] 3 SCR 134 [*PHS Community Services*].

⁷⁸ *Ibid.*

⁷⁹ *Canada (AG) v Bedford*, 2013 SCC 72 at para 75, [2013] 3 SCR 1101 [*Bedford*].

⁸⁰ *Ibid* at para 76.

⁸¹ *Ibid* at paras 75, 78.

B. Section 7 Engagement

According to section 7 of the *Charter*, “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁸² The state’s prohibition on sterile needles engages an addicted inmate’s life, liberty, and security rights by encouraging needle sharing. The right to life may be engaged through the potentially lethal consequences of sharing a dirty needle. The right to liberty is engaged by the penal sanctions attached to possessing a clean needle. Finally, the right to security of the person, specifically bodily and psychological integrity, is engaged by the likelihood that inmates will contract one or more of these infectious diseases.⁸³ Any deprivation of these rights must accord with the principles of fundamental justice, or else section 7 will have been violated. In other words, prohibiting sterile needles in prisons infringes the *Charter* if the state’s decision to do so is arbitrary, overboard, or grossly disproportionate.

i. Right to Life

An inmate’s right to life is engaged if the prohibition on sterile needles can result in death.⁸⁴ In *Chaoulli v Quebec (Attorney General)*, McLachlin C.J. and Major J. said that “[w]here lack of timely health care can result in death, section 7 protection of life itself is engaged.”⁸⁵ In *Chaoulli*, Quebec’s prohibition on private health insurance forced residents to endure excessive wait times for medical procedures, causing life-threatening risks. Similarly, the prohibition on sterile needles restricts safe options for injection and, in turn, can encourage inmates to share needles that are potentially infected with HIV and HCV. However, since HIV and HCV are both treatable viruses, it is unclear whether they engage the section 7 right to life. In *PHS Community Services*, preventing drug users from using the safe injection site’s “lifesaving and health-protecting services”⁸⁶ engaged this

⁸² *Charter*, *supra* note 11, s 7.

⁸³ *PHS Community Services*, *supra* note 77 at para 93.

⁸⁴ *Chaoulli*, *supra* note 75 at para 72.

⁸⁵ *Ibid* at para 123.

⁸⁶ *PHS Community Services*, *supra* note 77 at para 92.

right. However, unlike clean needles, the safe injection site additionally reduced the risk of overdoses. Nevertheless, if the health risks stemming from HIV and HCV do not engage the right to life, they may still engage the right to liberty and to security of the person.

ii. Right to Liberty

The punitive sanctions attached to possessing a sterile needle engage two dimensions of an inmate's right to liberty. Firstly, if sterile needles are classified as contraband, the possession of a sterile needle is a summary conviction offence under section 45 of the *Corrections Act*, and carries a maximum term of six months' imprisonment.⁸⁷ The potential for additional prison time engages a core individual liberty interest.⁸⁸ Secondly, if sterile needles are an "unauthorized item," then the possession of a sterile needle constitutes a disciplinary offence under section 40(j) of the *Corrections Act*, which may carry penalties such as fines, loss of privileges, and segregation. The effect on the manner in which a sentence is served also affects an inmate's liberty interest.⁸⁹ While this liberty interest is clearly engaged, physical restraint in the penal context often engages liberty rights in a manner that complies with the principles of fundamental justice.⁹⁰

iii. Right to Security of the Person

The state's decision to prevent inmates from accessing sterile needles affects their bodily and physical integrity⁹¹ as well as their psychological integrity.⁹² An inmate's bodily and physical integrity is engaged by the increased harm caused by prohibiting clean needles. This prohibition denies inmates the opportunity to safely inject intravenous drugs and, consequently, increases the risk that they will

⁸⁷ Under s 34(2) of the *Interpretation Act*, RSC 1985, c I-21, a federal enactment that creates a summary conviction offence is subject to all the provisions of the *Criminal Code*, RSC 1985, c C-46. Section 787(1) of the *Criminal Code* says "everyone who is convicted of an offence punishable on summary conviction is liable to a fine of not more than five thousand dollars or to a term of imprisonment not exceeding six months or to both."

⁸⁸ *R v Clay*, 2003 SCC 75 at para 3, [2003] 3 SCR 735.

⁸⁹ *Cunningham v Canada*, [1993] 2 SCR 143 at para 14, [1993] SCJ No 47 (QL).

⁹⁰ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 47, [2002] 3 SCR 519, Gonthier J dissenting [Sauvé].

⁹¹ *PHS Community Services*, *supra* note 77 at para 93.

⁹² *Chaoulli*, *supra* note 75 at para 116.

share needles to satisfy their addiction. The high infection and transmission rates in federal penitentiaries, especially among intravenous drug users, increase the likelihood that inmates will contract HIV or HCV through needle sharing. The state's needle prohibition mirrors the ban on private health insurance in *Chaoulli* and the refusal to permit a safe injection site in *PHS Community Services*, as all three instances involve a state decision resulting in severe health risks to the public.

The prohibition on sterile needles may also affect an inmate's psychological integrity. This argument will succeed only if an inmate can establish that the prohibition on sterile needles, and the subsequent risk of infection, leads to "serious state-imposed psychological stress."⁹³ The serious psychological effects "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety" in order to engage section 7 of the *Charter*.⁹⁴ In *Chaoulli*, the psychological harm suffered by individuals experiencing delays for medical treatment was held to engage section 7.⁹⁵ Surely the risk of contracting a disease requiring lifelong treatment must at least match the suffering in *Chaoulli*.

The addictive nature of the injected drugs may worsen the effect on an inmate's psychological integrity. In *R v Malmo-Levine*, the Supreme Court rejected the argument that the criminalization of marijuana infringed the claimant's psychological integrity. The court based its decision in part on evidence concerning the addictiveness of marijuana. The court reasoned: "The appellants...contend that use of marihuana is non-addictive. Prohibition would not therefore lead to a level of stress that is constitutionally cognizable."⁹⁶ Unlike marijuana, an inmate's addiction to intravenous drugs might rise to this level of stress. Assuming that inmates have already managed to acquire illegal and addictive drugs, the prohibition on sterile needles prevents safe injection practices and places them in the position of either resisting their addiction or unsafely

⁹³ *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385, Dickson CJ.

⁹⁴ *Chaoulli*, *supra* note 75 at para 116, citing *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 60, [1999] SCJ No 47.

⁹⁵ *Chaoulli*, *supra* note 75 at para 117.

⁹⁶ *R v Malmo-Levine*, 2003 SCC 74 at para 88, [2003] 3 SCR 571 [*Malmo-Levine*].

injecting the drugs, both of which may negatively impact their psychological integrity.

iv. Conclusions on the Threshold Question

The jurisprudence suggests that the prohibition on sterile needles will, at the very least, engage an inmate's section 7 rights. This threshold analysis places little weight on the fact that the potential claimant is serving a criminal sentence and is actively in possession of narcotics while incarcerated.⁹⁷ However, the engagement of life, liberty, or security of the person does not constitute an infringement of section 7 if the state action was carried out "in accordance with the principles of fundamental justice."⁹⁸ The courts have generally given deference to the state by allowing it to incarcerate individuals who commit criminal offences.⁹⁹ In *Sauvé v Canada (Chief Electoral Officer)*, McLachlin C.J. highlighted this trend when she stated that "certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure."¹⁰⁰

The public health risk caused by the prohibition on sterile needles and recent *Charter* jurisprudence may make it harder to justify the prohibition as being in accordance with the principles of fundamental justice. Firstly, the engagement of the right to life carries significantly more weight in the infringement analysis. McLachlin's C.J.'s statement quoted above stops short of saying that penal reasons may justifiably limit the right to *life*. Secondly, and more importantly, *PHS Community Services* provides a novel approach to assessing the principles of fundamental justice. Although the facts are substantially different, the decision effectively authorizes a creative solution to the epidemic of infectious diseases caused by needle sharing. In light of the public health risk, the following pages assess whether the state's prohibition on sterile needles accords with the

⁹⁷ *Bedford*, *supra* note 79 at para 90.

⁹⁸ *Charter*, *supra* note 11, s 7.

⁹⁹ Debra Parkes, "A Prisoner's Charter? Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms" (2007) 40 UBC L Rev 629.

¹⁰⁰ *Sauvé*, *supra* note 90 at para 47.

principles of fundamental justice, particularly the rules against arbitrariness, overbreadth, and gross disproportionality.

C. Principles of Fundamental Justice

i. Arbitrariness

An arbitrary limit on an individual's right to life, liberty, or security of the person violates the principles of fundamental justice. In *Bedford*, the Supreme Court said that a law is arbitrary when it imposes limits on an individual's section 7 interests "in a way that bears *no connection* to its objective."¹⁰¹ In order to determine whether a state limitation is arbitrary, the law's objective must first be identified. The next step is to identify "the relationship between the state interest and the impugned law"¹⁰² or, in this case, the impugned "contraband" and "unauthorized item" provisions.¹⁰³ The purpose of this step is to determine whether the prohibition on sterile needles is rationally connected to the state's objective. The connection between the state's objective and the law's effect is the key consideration.

The state interest in prohibiting sterile needles in federal penitentiaries can be deduced from the Minister of Public Safety's media comments and the larger aims of the *Corrections Act*. The purpose of the *Corrections Act* is partly defined in section 3:

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
 - (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
 - (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.¹⁰⁴

¹⁰¹ *Bedford*, *supra* note 79 at para 111.

¹⁰² *PHS Community Services*, *supra* note 77 at paras 129–130.

¹⁰³ *Corrections Act*, *supra* note 66, s 2(1); *Corrections Regulations*, *supra* note 67, s 2.

¹⁰⁴ *Corrections Act*, *supra* note 66, s 3.

The *Corrections Act* is primarily focused on maintaining public safety and ensuring the humane treatment of inmates. It also emphasizes effective rehabilitation as a means of successfully reintegrating inmates into the community. Furthermore, section 70 of the *Corrections Act* imposes a positive duty on federal penitentiaries to ensure the “the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person’s sense of personal dignity.”¹⁰⁵ Together, sections 3 and 70 establish the purpose of the *Corrections Act*: the maintenance of public and offender safety.

In light of the *Corrections Act* and the Minister’s recent comments, one may reasonably infer that the state’s objective in prohibiting sterile needles in federal penitentiaries is to maintain a safe penal environment by eliminating illegal drugs and potentially lethal weapons. Since the state can rely upon either drug or weapon prevention to underpin its penal safety objective, the merits of each will be addressed separately. The state’s objective in prohibiting drugs was addressed in the context of marijuana possession in *Malmo-Levine*:

The criminalization of possession is a statement of society’s collective disapproval of the use of a psychoactive drug such as marihuana... and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm.¹⁰⁶

Though the prohibition of drugs is therefore a valid objective, it cannot extend to sterile needles. The prohibition on sterile needles is not connected to the federal penitentiaries’ desire to maintain a zero-drug policy. The availability of needles will neither positively nor negatively influence the smuggling of drugs into federal institutions. The state’s objective of maintaining a zero-drug policy in federal penitentiaries fails the arbitrariness test. The prohibition on sterile needles bears no connection to the objective of maintaining a safe penal environment by enforcing a zero-drug policy.¹⁰⁷

¹⁰⁵ *Ibid*, s 70.

¹⁰⁶ *PHS Community Services*, *supra* note 77 at para 130, citing *Malmo-Levine*, *supra* note 96 at para 136.

¹⁰⁷ *Bedford*, *supra* note 79 at para 111.

Alternatively, the state's objective in prohibiting sterile needles in federal penitentiaries may be to maintain a safe penal environment by eliminating potentially deadly weapons. Although PHAC and other reports suggest that needles have not been used as weapons in European PNEPs, the government's concern appears reasonable from a common-sense perspective. The potential for needles to be used as deadly weapons places the safety of other inmates and correctional staff in jeopardy. This concern is connected to the objective of penal safety. While the prohibition on sterile needles affects the safety of needle-sharing inmates, it does not detract from the state objective. The state must undertake the difficult task of balancing inmates' rights with the potential for harm to staff and other inmates. As a result, courts will afford deference to the state's preferred means of achieving its objective. So, despite the specious means chosen to advance the government's drug prevention objective and in light of these safety concerns, the effect of the prohibition on an inmate's life, liberty, and security of the person is probably not arbitrary in the constitutional sense.

ii. Overbreadth

If there is no rational connection between the purpose underlying the prohibition on sterile needles and *some* of its effects, the law is overbroad.¹⁰⁸ An overbroad law "is so broad in scope that it includes some conduct that bears no relation to its purpose."¹⁰⁹ Unlike the arbitrariness analysis, overbreadth applies when the purpose is rationally connected in some cases, but overreaches in its effects in other cases. This principle is more comprehensive than arbitrariness since it only requires the effect on a specific individual to bear no relation to the law's purpose. To be sure, this analysis is not concerned with "competing social interests or ancillary benefits to the general population."¹¹⁰ These concerns are relevant at the section 1 justification stage.

The prohibition on sterile needles in federal penitentiaries arguably goes too far and thus violates an inmate's section 7 rights "in a manner unconnected to

¹⁰⁸ *Ibid* at para 112.

¹⁰⁹ *Ibid* at para 113.

¹¹⁰ *Carter v Canada (AG)*, 2015 SCC 5 at para 85, 66 BCLR (5th) 215 [*Carter*].

the law's objective."¹¹¹ The law facilitates an environment where inmates who are addicted to intravenous drugs must share syringes in order to satisfy their drug addictions. The means chosen to achieve the state's objective of maintaining a safe penal environment increases these inmates' risk of contracting both HIV and HCV. The devastating effect on these inmates bears no relation to the law's objective of maintaining a safe penal environment. The prohibition on sterile needles is therefore overbroad.

iii. Gross Disproportionality

The deprivation of an individual's life, liberty, or security of the person will be grossly disproportionate when the state action or legislation is "so extreme as to be disproportionate to any legitimate government interest."¹¹² A gross disproportionality claim places a high burden on the claimant because it "only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure."¹¹³ In *Malmo-Levine*, the Supreme Court examined the relationship of proportionality between the state action and the state interest:

The aspect of proportionality of interest to the appellants is the alleged lack of proportionality between the contribution of the marijuana prohibition to public health and safety...and the adverse effects on persons subject to the prohibition... The relevant effects include those that relate to the life, liberty or security of an individual, and that are the product of the state action complained of.¹¹⁴

The onus is on the plaintiff to establish this claim, and the standard is one of *gross* disproportionality.

The disproportionality between the prohibition on sterile needles and the effects on inmates addicted to intravenous drugs is quite significant. While this principle of fundamental justice places a high burden on the claimant, it also provides an opportunity to adduce medical and social science research on the

¹¹¹ *Bedford*, *supra* note 79 at para 142.

¹¹² *PHS Community Services*, *supra* note 77 at para 37, citing *Malmo-Levine*, *supra* note 96 at para 143.

¹¹³ *Bedford*, *supra* note 79 at para 120.

¹¹⁴ *Malmo-Levine*, *supra* note 96 at para 144.

severe public health risks caused by needle sharing. This argument also requires a comparison to the state's objective of protecting staff and other inmates by prohibiting potentially deadly weapons, and invites the claimant to put forward evidence showing the negative effects of this prohibition. While the burden is high, the gross disproportionality analysis may establish a section 7 infringement because of the serious health risk that the prohibition imposes on individuals addicted to intravenous drugs.

D. Section 1

Section 1 of the *Charter* empowers the government to reasonably limit *Charter* rights if such limits “can be demonstrably justified in a free and democratic society.”¹¹⁵ Once a section 7 breach is established, the burden shifts to the government under section 1 to prove that the law's negative impact on inmates addicted to intravenous drugs “is proportionate to the pressing and substantial goal of the law in furthering the public interest.”¹¹⁶ Unlike the individual assessment under section 7, the section 1 analysis focuses on the overarching public goal.¹¹⁷ The infringement is justified if the prohibition is prescribed by law, the law has a pressing and substantial objective, and the means chosen are proportional to that objective.¹¹⁸ The law is proportional if: (1) the prohibition is rationally connected to government's objective; (2) it minimally impairs an inmate's section 7 *Charter* rights; and (3) there is proportionality between the deleterious and salutary effects of the law.¹¹⁹ The government can easily establish that the limit is prescribed by law and that the law has a pressing and substantial objective. The main inquiry is whether the prohibition on sterile needles is proportional.

The government can probably establish a rational connection by showing “a causal connection between the infringement and the benefit sought on the basis

¹¹⁵ *Charter*, *supra* note 11, s 1.

¹¹⁶ *Bedford*, *supra* note 79 at para 125.

¹¹⁷ *Ibid.*

¹¹⁸ *Carter*, *supra* note 110 at para 94, citing *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

¹¹⁹ *Ibid.*

of reason or logic.”¹²⁰ In *Alberta v Hutterian Brethren of Wilson Colony*, the Supreme Court declared the “government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.”¹²¹ In *Carter v Canada (Attorney General)*, the Supreme Court confirmed, “where an activity poses certain risks, prohibition of the activity in question is a rational method of curtailing the risks.”¹²² In this case, the government’s prohibition on sterile needles curtails the risk of needles being used to threaten the safety of correctional staff and other inmates.

However, the government may not be able to demonstrate that the prohibition minimally impairs an inmate’s section 7 rights. Its failure to do so would render the prohibition unconstitutional. At this stage, the government must demonstrate “the absence of less drastic means of achieving the objective ‘in a real and substantial manner.’”¹²³ The government would likely argue that there are no feasible alternatives for ensuring staff and inmate safety that are equally as effective as a total prohibition. In response, a potential claimant must demonstrate how alternative methods can better achieve the state’s objective. Specifically, a claimant should introduce extensive evidence concerning the effectiveness of PNEPs, relying on PHAC’s study and examples from other jurisdictions. This evidence must demonstrate how PNEPs address inmate and public safety in a way that does not infringe an inmate’s rights to life, liberty, and security of the person. Although the burden remains on the government, a successful *Charter* claim is contingent on a claimant demonstrating that “there are less harmful means of achieving the legislative goal.”¹²⁴ This would prevent the government from justifying the section 7 infringement as a reasonable limit under section 1.

Finally, if the government succeeds at the minimal impairment stage, the infringement will likely be justified under the last branch of the proportionality analysis. A finding that the prohibition is minimally impairing of an inmate’s section 7 rights would effectively mean that PNEPs are not as safe of an

¹²⁰ *RJR-MacDonald*, *supra* note 1 at para 153.

¹²¹ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48, [2009] 2 SCR 567 [*Hutterian*].

¹²² *Carter*, *supra* note 110 at para 100.

¹²³ *Ibid.*

¹²⁴ *Hutterian*, *supra* note 121 at para 53.

alternative to the current prohibition on needles. Moreover, it means that the prohibition is reasonably necessary to protect against needles being used as weapons against staff and other inmates. In this context, it is unlikely that the public health risk caused by the prohibition is so great as to outweigh the benefits of protecting staff and other inmates from this threat.

VIII. CONCLUSION

The prohibition on sterile needles in federal penitentiaries continues to pose a serious health risk for inmates addicted to intravenous drugs. The public health risk to this population has the ability to endanger the health of other prisoners and the general public. The abundant research by PHAC, CSC, and various others supports the idea that this poses a public health risk. This research not only describes the ineffectiveness of the government's current responses, but advocates for the creation of PNEPs. Given the undeniably high rates of HIV and HCV in federal penitentiaries, the time has come to explore this option.

The creation of a prison needle-exchange pilot project would be a sensible solution to the public health problem. In August 2005, CSC created a safe-tattooing pilot project in six federal institutions to address the risks caused by unsafe tattooing practices.¹²⁵ Although the pilot project was eventually terminated two years later,¹²⁶ it demonstrated the government's receptiveness to applying a unique solution to a major health problem. Unfortunately, the current government is not receptive to exploring innovative solutions to the current health risk caused by prison needle sharing. The current prohibition on needles also suggests that neither the Commissioner of CSC nor any institutional heads are inclined to exercise their statutory authority to address this problem. Any hope for change therefore lies in a court challenge.

A successful challenge to the prohibition on sterile needles must include evidence at the trial stage underscoring the public health risks. In *PHS Community*

¹²⁵ Correctional Service Canada, "Correctional Service Canada's Safer Tattooing Practices Pilot Initiative" (January 2009), online: <www.csc-sec.gc.ca/text/pa/ev-tattooing-394-2-39/index-eng.shtml>.

¹²⁶ Stockwell Day, News Release, "Why Ottawa rubbed out jail tattoo program" (2007), online: UCCO <www.ucco-sacc.csn.qc.ca/ScriptorWeb/scripto.asp?resultat=972710P>.

Services, the Supreme Court gave substantial deference to the trial judge concerning the benefits of a safe-injection site and the harms that would arise from its closure. The severity of the public health risks caused by closing a safe-injection site in Vancouver's Downtown Eastside fundamentally influenced the Supreme Court's analysis of arbitrariness and gross disproportionality. The overwhelming evidence concerning the risks caused by prohibiting this public health initiative ultimately outweighed any legitimate state objective. If the prohibition on sterile needles in federal penitentiaries constitutes a *Charter* infringement, then the resolution must follow the approach taken in *PHS Community Services*. A successful claimant must emphasize the serious health risk facing federal inmates and remind the government of its duty to ensure the living conditions of inmates are "safe, healthful and free of practices that undermine a person's sense of personal dignity."¹²⁷ Given the current state of the law, it should be relatively easy to show how the prohibition engages an inmate's right to life, liberty, or security of the person. The real analysis lies at the principles of fundamental justice and section 1 justification stages. Ultimately, proof that the legislation is overbroad and does not minimally impair an inmate's section 7 *Charter* rights is the key to a successful claim.

¹²⁷ *Corrections Act*, *supra* note 66, s 70.