SCC File No.: 40990

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

B E T W E E N:

HIS MAJESTY THE KING

APPELLANT
(Respondent)

– and –

PAUL ERIC WILSON

RESPONDENT
(Appellant)

– and –

JOHN HOWARD SOCIETY OF SASKATCHEWAN, DIRECTOR OF PUBLIC PROSECUTIONS, PIVOT LEGAL SOCIETY, CANADIAN CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN DRUG POLICY COALITION, ASSOCIATION DES INTERVENANTS EN DÉPENDANCES DU QUÉBEC AND HARM REDUCTION NURSES ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

MCKAY FERG LLP
1800, 639 6th Ave SW
Calgary, Alberta T2P 0M9

Sarah Rankin
Tel: (403) 984-1919
Fax: (844) 895-3926
Email: sarah@mckayferg.com

Heather Ferg
Tel: (403) 984-1919
Fax: (844) 895-3926
Email: heather@mckayferg.com

Counsel for the Intervener,
Canadian Civil Liberties Association

JURISTES POWER LAW
50 O'Connor Street, Suite 1313
Ottawa, Ontario K1P 6L2

Maxine Vincelette
Tel/ Fax: (613) 702-5573
Email: mvincelette@juristespower.ca

Ottawa Agent for the Intervener,
Canadian Civil Liberties Association

ORIGINAL TO: **REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1

COPIES TO:

MINISTRY OF JUSTICE
300-1874 Scarth Street
Regina, Saskatchewan S4P 4B3

Erin Bartsch
Tel: (306) 787-5490
Fax: (306) 787-8878
Email: erin.bartsch@gov.sk.ca

Counsel for the Appellant,
His Majesty the King

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Appellant,
His Majesty the King

PFEFFERLE LAW OFFICE
311 – 21st Street E.
Saskatoon, Saskatchewan S7K 1C1

Thomas Hynes
Tel: (306) 370-5516
Fax: (866) 869-2959
Email: thomas@pfefferlelaw.com

Counsel for the Respondent,
Paul Eric Wilson

SUPREME LAW GROUP
1800 - 275 Slater Street
Ottawa, Ontario K1P 5H9

Moira Dillon
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Agent for Counsel for the Respondent,
Paul Eric Wilson

JOHN HOWARD SOCIETY OF SASKATCHEWAN
2323 Broad Street
Regina, Saskatchewan S4P 1Y9

Pierre E. Hawkins
Tel: (306) 519-2665
Fax: (306) 565-8014
Email: phawkins@sk.johnhoward.ca

Counsel for the Intervener, the John Howard Society of Saskatchewan

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Thomas Slade
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: tslade@supremeadvocacy.ca

Agent for Counsel for the Intervener, the John Howard Society of Saskatchewan

PUBLIC PROSECUTION SERVICE OF CANADA
515 - 234 Donald Street
Winnipeg, Manitoba R3C 1M8

Janna A. Hyman
Colleen Liggett
Tel: (204) 984-0493
Fax: (204) 984-1350
Email: janna.hyman@ppsc-sppc.gc.ca

Counsel for the Intervener, Director of Public Prosecutions

PUBLIC PROSECUTION SERVICE OF CANADA
160 Elgin Street, 12th Floor
Ottawa, Ontario K1A 0H8

Éric Marcoux
Tel: (867) 336-0762
Fax: (613) 941-7865
Email: Eric.Marcoux@ppsc-sppc.gc.ca

Agent for Counsel for the Intervener, Director of Public Prosecutions

PIVOT LEGAL SOCIETY
312 Main Street
Vancouver, British Columbia V6A 2T2

Caitlin O. Shane
Mark Iyengar
Tel: (604) 255-9700
Fax: (604) 255-1552
Email: caitlin@pivotlegal.org

Counsel for the Intervener, Pivot Legal Society

NORTON ROSE FULBRIGHT CANADA LLP
99 Bank Street, Suite 500
Ottawa, Ontario K1P 6B9

Jean-Simon Schoenholz
Tel: (613) 780-1537
Fax: (613) 230-5459
Email: Jean-simon.schoenholz@nortonrosefulbright.com

Agent for Counsel for the Intervener, Pivot Legal Society

HENEIN HUTCHISON ROBITAILLE LLP
235 King Street East
First Floor
Toronto, Ontario M5A 1J9

Matthew R. Gourlay
Brandon Chung
Tel: (416) 368-5000
Fax: (416) 368-6640
Email: mgourlay@hhllp.ca

Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

DANIEL BROWN LAW LLP
103 Church Street, Suite #400
Toronto, Ontario M5C 2G3

Maxime Bédard
Meagan Berlin
Tel: (416) 297-7200 Ext: 116
Email: bedard@danielbrownlaw.ca

Counsel for the Intervener, Canadian Drug Policy Coalition, Association des intervenants en dépendances du Québec and Harm Reduction Nurses Association

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PART I — OVERVIEW AND FACTS

1. Section 4.1(2) of the *Controlled Drugs and Substances Act* ("*CDSA*") offers immunity from criminal liability to individuals in possession of a controlled substance who remain at the scene of a medical emergency.[1] The CCLA intervenes because the interpretation of that immunity determines whether the provision preserves life and liberty, or whether it is hollowed out and incapable of realizing its purpose.

2. The CCLA offers two submissions, to inform an interpretive approach that ensures Parliament's purpose is realized and avoids an absurd interpretation. First, that the provision's scope must be informed by the relevant social context, using a large and liberal interpretive approach.[2] Second, the approach must also consider the actual impact of an arrest on a person's physical and psychological integrity, and on vulnerable persons in particular, to evaluate the claim that s. 4.1(2) permits the arrest of people immune from liability.

PART II — ISSUES

3. The CCLA's submissions address the issue of whether s. 495 of the *Criminal Code* authorizes an arrest for simple possession of a controlled substance when an individual is immune from being charged or convicted of that offence because they remained at the scene of a drug-induced medical emergency, and fall within the circumstances outlined under s. 4.1(2) of the *CDSA*.[3]

PART III — STATEMENT OF ARGUMENT

(i) Statutory Interpretation Presumes Parliament Understands Social Context

a. A Strictly Textual Approach to s. 4.1(2) Would Frustrate Parliament's Purpose

4. Section 4.1(2) was enacted in the context of an unprecedented and lethal health crisis.[4] It addressed an aspect of the crisis – situations where people had drug-induced medical emergencies and did not receive assistance because someone was concerned about notifying authorities. Giving

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[1] *Controlled Drugs and Substances Act*, SC 1996, c 19 [***CDSA***].
[2] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 [***Rizzo***] at para 27.
[3] Appellant's factum at paragraph 24; *Criminal Code of Canada*, RSC 1985, c, C-46.
[4] This is the subject of judicial notice, see for example *R v Messoudi*, 2022 ONSC 2252, at para 24 and *R v Brazier*, 2023 ONSC 3191, at para 175.

effect to the remedial purpose of s. 4.1(2) requires an interpretive approach that is informed by the social context of the provision's enactment and operation. An interpretation of the provision that permits arrests, despite s. 4.1(2), overlooks critical social context information and is unduly textual. The law envisions a broader set of considerations, equipping courts with all the tools necessary to ensure the goals of the provision are meaningfully advanced.

5. The provision's enactment occurred against the backdrop of *who* could offer assistance in these emergencies and help alleviate the crisis, and the demographic and experiential factors that mean those individuals are too scared or unable to do so. The social context surrounding the provision is the specific barrier those individuals face when deciding whether to call for help or stay until it arrives, and the reasons they experience this barrier.

6. Where the purpose of legislation is to respond to a serious societal problem, statutory interpretation must be particularly attuned to the relevant social context in ascertaining its purpose. The provision addresses the possibility or likelihood that the person who can assist, when someone has consumed illicit substances and is having a medical emergency, is a person who may themselves possess illicit substances, or who would otherwise be a potential target for investigation and detention by police.

7. This Court's interpretation of other remedial provisions that bear on the criminal law illustrates the importance of statutory interpretation being properly informed by social context. For example, when interpreting s. 718.2(e) of the *Criminal Code* which is intended to reduce the overincarceration of Indigenous persons, this Court has held, "the scope and content of Parliament's remedial purpose in enacting s. 718.2(e) may be derived from the social context surrounding the enactment of the provision."[5]

8. A provision that offers immunity to people who possess drugs at the scene of a substance-induced medical emergency is a provision looking to eliminate the reason someone might be reluctant to contact authorities, or to remain at that scene until help arrives. The remedial benefits of keeping a Good Samaritan at the scene may result from the fact they provide assistance during the wait for help, or from the information they are able to provide to first responders, narrowing their investigation into causes for the emergency.

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[5] *R v Gladue*, [1999] 1 SCR 688 [***Gladue***] at para 49.

9. Someone may hesitate to call 911, potentially identifying themselves in the process, because they are aware there's a threat they will be targeted for criminal investigation. They may leave the scene of the emergency because of the prospect of having the power and focus of the police directed at them. In response to this, Parliament has chosen to achieve its remedial purpose through s. 4.1(2) by removing the threat of criminal liability for certain offences. A strictly textual and narrow interpretive approach to the immunity granted by the provision is inconsistent with the approach to interpreting remedial provisions, and would defeat Parliament's intent. If the provision is interpreted so that it does not offer protection from arrest for the offences enumerated in it, the provision will not eliminate the threat that causes a person to leave the scene of the medical emergency.

10. The absence of the term "arrest" from the exemption under s. 4.1(2) of the *CDSA* is not the end of the interpretive exercise of determining whether arrests are permitted for prosecutions that the provision prohibits. There are many examples of offences that have remained in the *Criminal Code* though it was no longer possible for anyone to be prosecuted or convicted of those offences. This occurs when, for example, a provision is rendered inoperable because it offends a provision of the *Charter.* Following *Morgentaler,* the possibility of being prosecuted or convicted of a crime for obtaining an abortion was eliminated.[6] It has never been suggested this might mean it is nevertheless permissible to arrest someone for an abortion, or for felony murder, or anal intercourse between consenting teens, because there could never be a prosecution resulting from those arrests.[7] "All state powers...are bounded by the principle that they are to be exercised only for the purposes for which they are given."[8]

11. The intended scope of s. 4.1(2)'s protection similarly cannot be discerned through a decontextualized examination of the words "charge" or "conviction" within it. The modern approach to statutory interpretation does not instruct Courts to halt their analysis at the "plain and ordinary meaning" of a provision's words.[9] The approach demands that the "words of an Act are to be read in their entire context," and that the plain and ordinary meaning of the words in their

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[6] *R v Morgentaler,* [1988] 1 SCR 30.
[7] *R v Vaillancourt,* [1987] 2 SCR 636; *R v CM,* 1995 CanLII 8924 (ON CA), [1995] OJ No 1432 (QL); *R v TCF,* 2006 NSCA 42.
[8] *R v Wilson*, 2023 SKCA 106 [***Wilson***] at para 52.
[9] *Rizzo* at para 21.

entire context must also be harmonized with the broader structure of the *Act*, its purposes and Parliamentary intention.[10] These sources of interpretive information, including Parliament's presumed awareness of the social context, are essential components of statutory interpretation in every instance.

12. An interpretation drained of any consideration of the "reality of how the statutory scheme operates on the ground" would result in a situation where a person at a medical emergency would still face the potential that police powers and the loss of their liberty may readily be exercised against them.[11] A reasonable Good Samaritan would be right to fear the arrival of police as a threat to their liberty if police retain residual investigative, arrest and search powers for offences, despite the prosecutorial immunity grant in s. 4. 1(2) for those very offences. This interpretation also means that an officer, arriving at a medical emergency, may approach those at the scene as investigative targets rather than individuals in need of urgent assistance.

13. Shifting the focus of police who arrive at drug-related medical emergencies, from primarily investigative to primarily life-saving is consistent with the evolving understanding of substance use in Canada. In the context of bail, this Court has recognized that substance use issues are "recognized health concerns."[12] As this Court noted in *Zora*, the Public Prosecution Service of Canada has developed bail conditions that specifically respond to the risks posed when a person with an opioid use disorder is taken into custody – recognizing the heightened danger of death following time in custody.[13]

b. People Must Be Able to Predict the Consequences of Calling 911

14. The public crisis of drug overdose and poisoning deaths, and the purpose of this provision to reduce them, ought to be a central consideration. That requires reflecting on the factual contexts in which s 4.1(2) will succeed or fail to achieve its intended purpose. The Court of Appeal for Saskatchewan got to the heart of this component of the interpretive exercise. The interpretation of the provision must allow the person who is deciding whether to call 911 or to stay at the scene of the emergency to reliably predict whether they will be subject to arrest: "if drug users witnessing

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[10] *Ibid.*
[11] *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para 41.
[12] *R v Zora*, 2020 SCC 14 [***Zora***] at para 92.
[13] *Ibid* at para 97.

an overdose or other medical emergency do not know or trust that the Good Samaritan Act will protect them, their fear of consequences for simple possession will reduce the likelihood of them calling 911."[14]

(ii) The Reality of an Arrest For Vulnerable People Must Play a Role in Interpreting s. 4.1(2)

15. Determining the scope of s. 4.1(2)'s protection must be informed by how a vulnerable person, potentially one who uses illicit substances, would experience the risk of arrest by a police officer. The provision aims to change the behaviour of those who could provide assistance in a medical emergency. Evaluating whether the proposed interpretation thwarts s. 4.1(2)'s purpose requires considering the experience of those who would lose its protection from arrest if the provision is read too narrowly.

16. Arrest and search powers are invasive. Their stark material impact on a person - including a person who requires emergency medical care or their companion, either of whom may possess illegal substances - must be at the forefront of the analysis of s. 4.1(2). An arrest is a form of "intimidating and coercive pressure" and of state interference against individual liberty.[15] The presence and actions of police in the course of their duties "communicates an exercise of *power"* from the perspective of a member of the public.[16]

17. The reality of an arrest must not be overlooked or minimised. The arrest power authorizes an invasion of a person's liberty, mobility, and physical and psychological integrity – and may mark only the beginning of the destabilizing impact of criminal investigation on their lives. The invasive nature of an arrest is reflected in the fact that an unlawful arrest is an axiomatic violation of s. 9 of the *Charter.* It is also affirmed by the fact that the circumstances of an unlawful arrest can found liability in the torts of battery, unlawful search and false imprisonment. Section 25 of the *Criminal Code* protects an officer's use of force in the course of their duties, and reflects the reality that physical force will frequently play a role in that work, including effecting an arrest.

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[14] *Wilson*, at para 86.
[15] *R v Le*, 2019 SCC 34 [***Le***] at paras 25 and 38.
[16] *Ibid* at para 56.

18. Vulnerable persons are disproportionately represented in enforcement and arrest, and "[m]any of the people involved in our criminal justice system are poor, live with addiction or other mental health issues, and are otherwise disadvantaged or marginalized."[17] It is likely that an interpretation of s. 4.1(2) which preserves an arrest power will have its biggest impact on the disadvantaged or marginalized people in Canada who are disproportionately represented in the criminal justice system.[18] The specific experiences of marginalized groups inform the impact that s. 4.1(2) might have if interpreted to contain an arrest power for offences that cannot be prosecuted.

19. People with mental health conditions, Indigenous people and Black people in Canada are among those disproportionately likely to experience the force and control authorized by the arrest power. The law has long recognized that Canada's chronic mistreatment of Indigenous people is reflected in "the estrangement of the aboriginal peoples from the Canadian criminal justice system."[19] The "long history in Canada of overtly racist attitudes and social practices" is also connected to "present day institutional and systemic discrimination against Black people", which includes a "strong and aggressive police presence" in the communities of many Black Canadians.[20] This can contribute to a "relationship with the police" marked by fear of the police.[21]

20. Individuals in groups that are over-represented in the justice system may "already feel the presence and scrutiny of the state more keenly" than those who are not subject to police interactions on a regular basis.[22] The characteristics that may mean vulnerable or marginalized individuals are already prone to view police with fear or suspicion can make an arrest particularly destructive to the lives of those individuals. This, in turn, will deter them from accessing emergency medical care under s. 4.1(2) if they risk arrest by doing so.

21. This Court has recognized that, for individuals who are "poor, have unstable housing and/or transportation issues and suffer from addictions or other disabilities", contact or monitoring by the justice system can generate additional contact with the justice system.[23] A prior conviction for breaching bail conditions, for example, "may lead to the denial of bail or the increased likelihood

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[17] *R v Boudreault*, 2018 SCC 58 [***Boudreault***] at para 3.
[18] *Ibid.*
[19] *Gladue* at para 61.
[20] *R v Morris,* 2021 ONCA 680 at para 39.
[21] *Ibid* at para 99.
[22] *Le,* at para 60.
[23] *Boudreault,* at para 70.

of more stringent bail conditions for future unrelated offences." A person with "addictions, disabilities, or insecure housing may have criminal records with breach convictions in the double digits", making it much more likely that an arrest which turns into a criminal charge is going to lead to a prolonged deprivation of their liberty.[24]

22. That possibility, in turn, opens the door to a devastating list of detrimental effects on an already-marginalized person's life, health and functioning. This Court has recognized that pre-trial detention has wide-reaching costs, including "negative impacts on accused persons' employment and income, housing, health and access to medication, relationships, personal possessions, and ability to fulfill parental obligations."[25] The process of regaining custody of children, stabilizing medication, finding housing or employment and rebuilding one's life can last long after the criminal proceeding is done.

23. The fear of a potential arrest, then, is a justified one for the individual at the scene of a medical emergency. This Court has recognized that the desire to avoid criminal liability or police involvement can and does lead people to make choices even where those choices may cost them their safety.[26]

24. The suggestion that law enforcement objectives must be balanced with the intention of s. 4.1(2) should be rejected by this Court. This view boils down to the submission that a conviction is disallowed, but police should nevertheless be able to investigate these offences, because it is somehow in the public interest. The fact of s. 4.1(2) is evidence of why this is not the case. Considering the perspectives of the people likely to be at the scenes of these medical emergencies makes it apparent this interpretation nullifies s. 4.1(2)'s intended effect. When people fear arrest and investigation at the scenes of medical emergencies, particularly if those people have experiences with police that leave them afraid or suspicious, they do not involve police. Limiting s. 4.1(2)'s immunity does not lead to an increased number of successful criminal investigations, it leads to scenes where help arrives too late.

25. The provision is aimed at getting people to call for help and to stay until it arrives. If they are not confident the provision protects them, they will not perform these actions. The provision

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[24] *Zora,* at paras 56-57.
[25] *Ibid* at para 62.
[26] *Canada (Attorney General) v Bedford,* 2013 SCC 72 at paras 86-91.

responds to the profound consequences of an arrest on an individual, and the reality that they will not call 911 or will not remain at the scene of an emergency if arrest is possible or likely. The "words of an Act are to be read in their entire context" to arrive at an interpretation.[27] The provision exists to protect and reassure the population that is trying to avoid the trauma and disruption of an arrest and everything it might mean for their lives. People with no legal background do not have the luxury of time to parse nuances in criminal procedure when witnessing an emergency and navigating fears for their own liberty and bodily integrity. This is the critical context for the *Good Samaritan Overdose Prevention Act.*

PARTS IV and V — COSTS AND ORDER SOUGHT

26. The CCLA does not seek costs and asks that no costs be awarded against it. The CCLA takes no position on the disposition of this appeal as it pertains to the facts of the case before the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF AUGUST, 2024

For: **Heather Ferg and Sarah Rankin**
Counsel for the Intervener,
Canadian Civil Liberties Association

[27] *Rizzo* at para 21.

PART VI — TABLE OF AUTHORITIES

Case Law	Paragraph (s) cited
Canada (Attorney General) v Bedford, 2013 SCC 72	23
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