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CASE SUMMARY

Supreme Court of Canada orders Minister of Health to exempt supervised injection site from criminal prohibition on drug possession

Attorney General v. PHS Community Services Society, 2011 SCC 44 (Supreme Court of Canada)

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In a unanimous decision, the Supreme Court of Canada ordered Canada's federal Minister of Health to grant Insite, North America's first supervised injection site, an extended exemption from the criminal prohibition on drug possession in the *Controlled Drugs and Substances Act* (*CDSA*), thus permitting the health facility to continue to operate. In its September 2011 decision, the Court held that while the *CDSA* provisions were applicable to Insite as valid exercises of the federal government's criminal law power, the Minister's refusal to extend Insite's *CDSA* exemption violated the Canadian constitution.[1]

In September 2003, the Vancouver Coastal Health Authority, in partnership with PHS Community Services Society, opened Insite in response to epidemic levels of infectious diseases and drug overdoses among people who inject drugs in the Downtown Eastside of Vancouver, British Columbia. Recognising the limitations of abstinence-based approaches in dealing with a street-entrenched open drug scene, Insite was part of a larger strategy to minimise the negative consequences of drug use for communities and individuals by facilitating contact between health workers and people who inject drugs, thereby providing means to reduce those individuals' risk of injecting drug use-related health complications and death, and assisting them to access other health and social services.[2]

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1 *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (Supreme Court of Canada).

2 *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661 (B.C. Supreme Court).

Section 56 of the *CDSA* permits the federal Minister of Health to issue exemptions from the application of all or any of the provisions of the *CDSA* if the exemption 'is necessary for a medical or scientific purpose or is otherwise in the public interest.'[3] Insite operated under the purview of an exemption from prosecution for possession and trafficking of a controlled substance contrary to Sections 4(1) and 5(1) of the *CDSA*. As a result, clients of Insite could inject drugs within the facility under medical supervision without fear of arrest and prosecution. The exemption was originally granted by the federal Minister of Health in 2003, and was subsequently extended to June 2008.

During its operation, extensive research indicated that Insite was an effective response to the catastrophic spread of infectious diseases such as HIV and hepatitis C virus, and the high rate of deaths from drug overdoses in Vancouver's Downtown Eastside.[4] When no further extensions appeared to be forthcoming, two separate actions were commenced before B.C.'s superior trial court, the B.C. Supreme Court, one by PHS and two of its clients, and the other by the Vancouver Area Network of Drug Users (VANDU).

In its action, PHS claimed that Insite is a health care undertaking, authority for the operation of which lies with the province. Therefore, the federal constitutional power to legislate with respect to criminal law cannot interfere with the provincial constitutional power with respect to health care because of the doctrine of inter-jurisdictional immunity.

The B.C. Supreme Court rejected this argument, but accepted PHS's alternative claim, which was that Sections 4(1) and 5(1) of the *CDSA* are unconstitutional and should be struck down because they deprived persons dependent on one or more controlled substances access to health care at Insite and, therefore, violated the right conferred by Section 7 of the *Canadian Charter of Rights and Freedoms* 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.[5]

Accordingly, the B.C. Supreme Court declared those sections of the *CDSA* inconsistent with the *Charter* and of no force and effect, and granted Insite an ongoing, constitutional exemption to permit its continued operation without fear of criminal prosecution of its users or staff. The Attorney General of Canada (Canada) appealed this order and PHS cross-appealed the dismissal of its application for a declaration that Sections 4(1) and 5(1) of the *CDSA* did not apply to Insite because of the doctrine of inter-jurisdictional immunity.

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3 *Controlled Drugs and Substances Act* (S.C. 1996, c. 19).
4 See, for example, the studies of Insite conducted by the British Columbia Centre for Excellence in HIV/AIDS, available via www.cfenet.ubc.ca.
5 *PHS Community Services Society v. Attorney General of Canada* (n 2).

The B.C. Court of Appeal, the province's highest appellate court, agreed with PHS and held that the effect of the application of the doctrine of inter-jurisdictional immunity was to limit the federal enforcement power sufficiently to protect the exercise of an exclusive provincial power — namely, the provision of a health care service.[6] In the Court's view, Insite was a health care facility that did not undermine the federal goals of protecting health or eliminating the market that drove the more serious drug-related offences of import, production and trafficking. As such, the Court dismissed Canada's appeal and allowed the cross-appeal of PHS, holding that Sections 4(1) and 5(1) of the *CDSA* were inapplicable to Insite, a decision the federal Justice Minister promptly appealed.[7]

The case was heard before the Supreme Court of Canada in May 2011. Among the many interveners before the Court was a coalition of the Canadian HIV/AIDS Legal Network, Harm Reduction International and Cactus Montréal. They argued that: (1) blanket prohibitions on drug possession and trafficking effectively outlawed Insite, and thereby deprived people who would otherwise use Insite of their *Charter* rights to life, liberty and security of the person because of the increased risks to life and health faced by those denied access to Insite; (2) the deprivations were arbitrary when applied in the context of Insite because the B.C. Supreme Court found that the *CDSA* had been ineffective in preventing trafficking, let alone use, of drugs in the neighbourhood surrounding Insite; and (3) the arbitrariness of the *CDSA* prohibitions was confirmed by reference to international law and practice, which affirm the effectiveness of harm reduction services such as those offered by Insite and recognize access to those services as an integral part of the right to health.

In its decision, the Court recognised that 'Insite has saved lives and improved health. And it did those things without increasing the incidence of drug use and crime in the surrounding area.'[8] Significantly, it rejected Canada's argument that any negative health risks drug users may suffer from Insite's closure was not caused by the *CDSA*, but rather were the consequence of their personal choice to use illegal drugs, and affirmed the B.C. Supreme Court's finding that drug dependency is an illness, in which the central feature is impaired control over the use of the substance in question.

The Court considered whether, as a result of the division of powers between Canada's federal government and its provinces, Insite was not bound by the *CDSA* prohibitions on possession and trafficking of controlled substances. It held that the *CDSA*'s criminal prohibitions were constitutionally valid exercises of the federal criminal law power and

6 *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 (B.C. Court of Appeal).
7 'Ottawa to appeal injection site ruling', *CBC News* , 9 February 2010.
8 *Canada (Attorney General) v. PHS Community Services Society* (n 1) para. 19.

applicable to Insite. The fact that those provisions had the incidental effect of regulating provincial health institutions did not mean that they were constitutionally invalid, and the mere fact that a province established that a particular activity served the public interest did not exempt that activity from the operation of federal criminal laws. Moreover, the doctrine of interjurisdictional immunity — which was already narrow — did not resolve the contest between the federal government and the provincial government because the delivery of health care services did not constitute a 'protected core' of the provincial power over health care in Canada's Constitution.

With respect to the validity of the legislation under Section 7 of the *Charter*, the Court recognised that without an exemption from the *CDSA*'s prohibition on drug possession, health professionals working at Insite would: (1) have their liberty interests engaged because their actions could be construed as the offence of possession, thus exposing them to the threat of being imprisoned for carrying out their duties; and (2) be unable to offer medical supervision and counselling to Insite's clients, thus depriving those clients of potentially lifesaving medical care and engaging their rights to life and security of the person. The Court also recognised that the prohibition on drug possession directly engaged the rights to liberty, life and security of the person of Insite's clients. The Court did not find the *CDSA*'s prohibition on trafficking constituted a constitutional deprivation, since Insite's staff and clients were not involved in trafficking, and clients in particular did not obtain their drugs at the facility and were not permitted to engage in activities that could be construed as trafficking while they are on the premises.

The Court proceeded to review the *CDSA* and found that general criminal prohibitions, subject to targeted ministerial exemptions, reflected the 'dual purpose' of the *CDSA* – the protection of both public safety and public health.[9] Despite finding the criminal prohibition on drug possession violated the claimants' Section 7 rights, the Court held that, because the *CDSA* conferred on the Minister the power to grant exemptions, it did so in accordance with the principles of fundamental justice. The Minister's discretionary power to grant an exemption acted as a 'safety valve' that prevented the *CDSA* from applying where it would be arbitrary, overbroad or grossly disproportionate in its effects.[10]

However, the discretion vested in the Minister of Health was not absolute and he had to exercise that power in conformity with the *Charter.* The Court held that the Minister's decision not to provide an exemption violated the claimants' constitutional rights because it would have prevented people who inject drugs from accessing the health services offered by

9 ibid. para. 41.
10 ibid, para. 113.

Insite, threatening their health and their lives. Since exempting Insite from the application of the prohibition on drug possession furthered the objectives of public health and safety, the government action qualified as arbitrary. Furthermore, the effect of denying the services of Insite to the population it served was grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics, since the facility had been proven to save lives with no discernable negative impact on Canada's public safety and health objectives.

Thus, the Minister's refusal to grant Insite an exemption was not in accordance with the principles of fundamental justice and unconstitutional. The Court ordered the Minister of Health to grant an exemption to Insite pursuant to Section 56 of the *CDSA* and held that, on future applications for such exemptions, the Minister must exercise that discretion within the constraints imposed by the law and the *Charter*. This meant striking the appropriate balance between achieving public health and public safety, and considering whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice.