CASE SUMMARY

Canadian Court of Appeal upholds supervised injection site's right to operate

PHS Community Services Society v. Canada (Attorney General), 2010 BCCA 15 (B.C. Court of Appeal)

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On 15 January 2010, the British Columbia Court of Appeal, the province's highest appellate court, held that Insite, North America's first supervised injection facilty, was a provincial undertaking that did not undermine the federal goals of protecting health or eliminating the market that drives drug-related offences. As such, the Court held that the drug possession and trafficking provisions of the *Controlled Drugs and Substances Act* (CDSA) did not apply to Insite.[1]

Insite was opened in September 2003 by the Vancouver Coastal Health Authority in partnership with PHS Community Services Society. The facility, in which people are able to inject illicit drugs under the supervision of health workers, opened as a response to epidemic levels of infectious diseases and drug overdoses among people who inject drugs in Vancouver's Downtown Eastside.

Recognising the limitations of abstinence-based approaches in dealing with a street-entrenched open drug scene, Insite was designed as part of a larger strategy to minimise the negative consequences of drug use for communities and individuals by facilitating contact with high-risk injecting drug users, providing means to reduce their risk of injecting drug use-related health complications and death and assisting them to access other health and social services.[2] Insite operated under the purview of federal exemptions from prosecution for possession and trafficking

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1 *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 (B.C. Court of Appeal).

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

of a controlled substance contrary to Sections 4(1) and 5(1) of the *CDSA,* based on necessity for a scientific purpose.

The exemption was originally granted by the federal Liberal Party Minister of Health in 2003, and was subsequently extended to June 2008. When no further extensions appeared to be forthcoming under a new Conservative government, two separate actions were commenced before B.C.'s superior trial court (the province's Supreme Court), one by PHS Community Services Society and two of its clients, and the other by the Vancouver Area Network of Drug Users (VANDU), a drug user activist organisation.

In its action, PHS claimed that Insite was a health care undertaking, authority for the operation of which lay with the province. As a consequence, federal constitutional power to legislate with respect to criminal law could not 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* were unconstitutional and should be struck down because they deprive persons addicted to one or more controlled substances of access to health care at Insite. This, the Court found, 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.[3]

Consequently, the B.C. Supreme Court declared those sections of the *CDSA* inconsistent with the *Charter of Rights and Freedoms* and of no force and effect, and granted Insite an ongoing constitutional exemption permitting its continued operation without fear of criminal prosecution of its service users or its staff. The Court granted the federal government a one-year suspension of the effect of the declaration of constitutional invalidity to allow it time to rewrite its laws to allow for the medical use of illegal drugs, if they are part of a health care program.

The Attorney General of 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.

In its decision, the B.C. Court of Appeal held that the effect of the application of the doctrine

3 ibid.

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.

As held by Justice Huddart, writing for the majority,

> Insite is a provincial undertaking. It is a health care facility created under and regulated by provincial legislation within the province's exclusive power....It would be difficult to envisage anything more at the core of a hospital's purpose, than the determination of the nature of the services it provides to the community it serves. Indeed, it would be difficult to envisage anything more at the core of the province's general jurisdiction over health care than decisions about the nature of the services it will provide."[4] [emphasis in original]

In Justice Huddart's view, a supervised drug injection service 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. Rather, '[t]o the extent that the criminal law treats possession for personal use as an offence because of its role in creating an illegal "supply and demand" market, that role has already run its course when an addict enters Insite or a comparable facility.'[5]

Justice Huddart said that the restricted application of inter-jurisdictional immunity to protect a provincial undertaking where two *intra vires* exercises of authority collide precluded a pre-emptive, automatic and non-contextual determination in favour of federal power. Accordingly, the B.C. Court of Appeal 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. Given its findings in this regard, Justice Huddart decided that consideration of PHS's alternative claim under Section 7 of the *Charter* was unnecessary.

Nevertheless, Justice Rowles held, in *obiter*, that she agreed with the lower court ruling that Sections 4(1) and 5(1) of the *CDSA* engaged the rights to life, liberty and security of the person with respect to users of Insite and that those provisions violated Section 7 of the *Charter* in a manner that was not in accordance with the principles of fundamental justice. In her view, '[t]he effect of the application of the *CDSA* provisions to Insite would deny persons with a very serious and chronic illness access to necessary health care and would come without

4 *PHS Community Services Society v. Canada* (n 2) para. 157.
5 ibid, para. 169.

any ameliorating benefit to those persons or to society at large.'[6] Moreover, in her decision, Justice Huddart said that she had had the opportunity to review the reasons of Justice Rowles, and that she was in 'general agreement with them'.[7] As such, a majority of the B.C. Court of Appeal agreed with the *Charter* arguments advanced by PHS in support of Insite.

In February 2010, federal Justice Minister Rob Nicholson announced Canada's intention to appeal the ruling to the Supreme Court of Canada, the country's final court of appeal.[8]

6 ibid, para. 76.
7 ibid, para. 199.
8 Canadian Broadcasting Corporation, 'Ottawa to appeal injection site ruling', *CBC News*, 9 Feb 2010.