

Case Law Update: Canada (Attorney General) v PHS Community Services

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2011 SCC 44 (Released September 30, 2011)

Constitutional Division of Powers Interjurisdictional Immunity *Canadian Charter of Rights and Freedoms* Life, Liberty and Security of the Person Principles of Fundamental Justice Ministerial Discretion

The Supreme Court of Canada unanimously ordered that the federal Minister of Health (the “**Minister**”) must exempt Insite, a safe drug injection facility in Vancouver’s Downtown Eastside, from provisions of the *Controlled Drugs and Substances Act* (“**CDSA**”).

Insite has provided various medical services, including supervised injections of controlled substances, to intravenous drug users since 2003. The Insite facility was able to operate legally between 2003 and 2008 under a discretionary exemption by the Minister pursuant to s. 56 of the *CDSA*, which allows for targeted ministerial exemptions necessitated by medical, scientific, or other public interest purposes. In 2008, the Minister indicated that he did not intend to grant a continued exemption. The Supreme Court considered the legislative scheme and the Minister’s decision in light of the *Canadian Charter of Rights and Freedoms* and the constitutional division of powers.

The Court rejected an argument that the application of the *CDSA* to Insite ran afoul of the constitutional division of powers. The Court concluded that the *CDSA* was a valid exercise of the federal criminal law power, and that the doctrine of interjurisdictional immunity did not render the *CDSA* inapplicable to Insite as an impermissible federal intrusion into the core of a provincial thing or undertaking. In so deciding, the Court noted that no other cases had recognized a protected core of provincial power over health; that the claimants had failed to delineate any meaningful core; and that recognizing a protected core of provincial power over health may give rise to legal vacuums with respect to such issues as human cloning or euthanasia.

The Court further held that the legislative scheme created by the *CDSA* complied with s. 7 of the *Charter*. Although the life, liberty, and security of the person interests of Insite staff and clients were engaged by the *CDSA* prohibitions against possession of narcotics, the s. 56 ministerial exemption served as a “safety valve” to prevent arbitrary, overbroad, or disproportionate application of the law.

The Court found that the Minister’s decision not to continue Insite’s exemption pursuant to s. 56 of the *CDSA* did breach s. 7 of the *Charter*. The life, liberty, and security of the person interests of Insite staff and clients were engaged by the application of the prohibition against possession of narcotics to the Insite facility because of both the possibility of imprisonment for contravention of the *CDSA* and the serious health and safety interests at stake for Insite clients. The Court further found that the Minister’s failure to grant an exemption to Insite was contrary to the principles of fundamental justice since it was both arbitrary and grossly disproportionate with reference to the *CDSA*’s dual purposes of protecting health and public safety. The Court relied on the trial judge’s factual findings that the life-saving benefits of Insite had been proven, and that there was no discernable negative impact to public health and safety objectives.

The Court emphasized that the decision was not “an invitation for anyone who so chooses to open a facility for drug use under the banner of a “safe injection facility” (at para 140), and that the holdings in this case were dependent on the specific factual findings that the Insite facility reduced death and disease while having no negative impact on legitimate criminal law objectives.

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