Future of Safe Injection Site to be Determined by Supreme Court

On June 24, 2010, the Supreme Court of Canada decided to hear an appeal from a constitutional case that will decide the fate of Insite, Canada's first supervised injection site.

Insite is located in Vancouver's downtown east side. It provides a place for intravenous drug addicts to obtain clean injection equipment and inject their drugs under staff supervision. Medical care is provided in the event of an overdose. It is intended to reduce the risks associated with drug dependency, preventing death by overdose and reducing the transmission of diseases such as HIV and hepatitis C. Insite also provides access to other services, such as a detox centre.

In 2003, the federal government allowed Insite to open by exempting the staff and patients of Insite from criminal prosecution under federal drug laws. The purpose of the exemption was to allow for research on supervised injection sites. The exemption was extended several times to allow Insite to continue to operate. In 2008, however, after a change in government, the federal government refused to renew the exemption.

As a result, PHS Community Services (which operates Insite under a contract with the Vancouver Coastal Health Authority) and two users of Insite's services have brought constitutional challenges to the application of the federal *Controlled Drugs and Substances Act*[1] to Insite. They have been supported by the government of British Columbia, the British Columbia Civil Liberties Association, the Vancouver Coastal Health Authority, and the Dr. Peter AIDS Foundation.

A split decision of the British Columbia Court of Appeal in January 2010 resulted in a defeat for the federal government. The court declared the relevant sections of the federal drug law inapplicable to Insite, even though the exemption from the law had been withdrawn.

The appeal of the case presents two distinct issues for the Supreme Court to decide. The first concerns federalism and the division of powers, and whether the federal government is intruding on provincial powers over health care by not allowing Insite to continue to operate. This issue revolves around the scope of the doctrine of interjurisdictional immunity. The second issue is whether applying federal drug laws to Insite violates the section 7 *Charter* 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."[2]

Interjurisdictional Immunity

Under Canada's constitution, the provinces and the federal Parliament have different areas in which they may legislate. The scope of those areas is determined by the heads of power listed in the *Constitution Act, 1867*.[3] Normally a law is valid if it falls within a head of power allotted to the level of government that enacted it. However, a problem arises when a

provincial law and federal law conflict with each other; that is, when one law permits an action while the other law prohibits it. Normally, this sort of conflict is resolved by the doctrine of federal paramountcy, which renders the provincial law inoperative to the extent of the conflict.[4]

In this case, however, PHS Community Services and the British Columbia government argue that Insite's services fall so close to the core of the province's responsibility for health care that the federal drugs laws should be rendered inapplicable to Insite. This argument is based on the doctrine of interjurisdictional immunity.

The doctrine of interjurisdictional immunity has been a part of Canadian constitutional law for many years. It has been used to render provincial laws inapplicable to federally-regulated undertakings. For example, interprovincial telephone companies do not have to comply with provincial laws requiring the consent of municipalities for the erection of telephone poles.[5] Similarly, international bus lines do not have to comply with provincial regulations about routes and rates.[6] As well, provincial labour laws do not apply to postal workers.[7]

In recent cases the Supreme Court of Canada has appeared to back away from a strict application of the doctrine. In one recent case, for example, the Court ruled that banks, which are federally regulated, must comply with provincial licensing schemes governing the promotion of insurance products.[8] As well, the Court has never used the doctrine of interjuridictional immunity to protect a *provincial* undertaking from a*federal* law.[9]

In the British Columbia Court of Appeal, two of the three judges ruled that the doctrine of interjurisdictional immunity protects the core aspects of provincial powers. They therefore concluded that federal drugs laws were inapplicable to Insite because they would interfere with provincial powers over health care.[10] On the other hand, Justice Smith favoured restricting the doctrine of interjurisdictional immunity to situations where previous case law has already relied on it.[11] She reasoned that extending interjurisdictional immunity to provincial facilities like Insite would "create a gap" in the general application of federal criminal law on illegal drugs. The effectiveness of valid federal law would be threatened if provinces were free to set up locations where drug use cannot be prosecuted. She therefore concluded that the doctrine of paramountcy should decide the issue, and federal drug laws should continue to apply to Insite patients and staff.[12]

This case will therefore require the Supreme Court to consider the role that the doctrine of interjurisdictional immunity plays in Canadian constitutional law, and whether it protects provincial undertakings as well as federal ones.

The Right to Life, Liberty and Security of the Person

If federal drugs laws are found to be valid federal laws that apply to Insite, the Supreme Court will also have to consider whether applying those laws violates intravenous drug addicts' *Charter* right to life, liberty and security of the person. At the British Columbia Court of Appeal, one of the three judges concluded that it was unnecessary to consider this

question.[13] The other two judges did consider this issue, however, and disagreed on the result.

Both judges agreed on the basic requirements for establishing a breach of these rights. A person must establish two things. First, that government action has deprived him or her of one of the three rights: the right to life, the right to liberty, or the right to security of the person. Once this is established, that person must identify one or more principles of fundamental justice and show that the deprivation is contrary to those principles.

Both Court of Appeal judges agreed on the first step of the analysis. They concluded that all three of the rights were engaged in this case. The right to life is engaged because denying access to supervised injection sites denies access to potentially life-saving medical care in the event of an overdose.[14] (Justice Rowles also pointed out that this right was engaged since Insite provides clean injection supplies and therefore reduces the risk of contracting disease.[15]) Both judges also stated that the right to liberty is engaged, due to the threat of imprisonment upon conviction for possession an illicit substance.[16] (Justice Rowles added that the threat of prosecution interferes with the addicts' ability to make decisions of fundamental personal importance: the choice to minimize the potentially life-threatening hazards of overdose and disease.[17]) As well, they agreed that the right to security of the person is engaged by denying access to a service that can reduce the risks associated with injection drug use.[18] They both rejected arguments that these deprivations resulted from the addicts' choice to use drugs rather than from the law, since it was established at trial that addiction is an illness and injection drug use cannot be properly characterized as a choice.[19]

Where the two judges disagreed, however, was on whether these deprivations accord with the principles of fundamental justice. Three principles were identified. The first is the principle that laws not be arbitrary, which requires that there must be a rational connection between the purpose of a law and the means employed to achieve that purpose. The second is the principle of proportionality, which requires that the means used to pursue a law's purpose must not be grossly disproportionate to the government's interest. And third is the principle that laws must not be overbroad, which requires that a law not be broader than necessary to achieve its purpose.

Justice Rowles argeed with the trial judge that all three of these principles were breached in this case. She concluded that criminalizing the services provided by Insite does nothing to further the goals of suppressing the drug trade and protecting public health. Instead, she concluded that criminalizing these services endangers intravenous drug users.[20] Justice Smith, on the other hand, concluded that it was wrong to limit the inquiry to the effect of the law on Insite's patients. She stated that the court must instead consider whether the laws are arbitrary, overbroad, or disproportionate to achieving the goal of ensuring the health of *all* Canadians. She emphasized that answering this question interferes with Parliament's ability to decide matters of policy, so courts must be careful not to find a breach of a principle of fundamental justice without sufficient evidence supporting that breach. In this case, she concluded that there was no evidence establishing a breach of any

of these principles.[21]

The Supreme Court may therefore have to clarify the appropriate role of the courts, the evidence required to establish a breach of a principle of fundamental justice, and the appropriate scope of the inquiry when a law has disproportionate effects on a subset of the general population.

---

[1] S.C. 1996, c. 19. [2] *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7. [3] *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, ss. 91-95. [4] For the Supreme Court's most recent discussion of division of powers and the doctrine of federal paramountcy, see Adam Badari, "Chatterjee v. Ontario (Attorney General): Provincial Law on Proceeds of Crime (2009)" *Centre for Constitutional Studies* (12 May 2009). [5] *Toronto v. Bell Telephone Co.*, [1905] A.C. 52. [6] *A.-G. Ont. V. Winner* [1954] A.C. 541; *Registrar of Motor Vehicles v. Canadian American Transfer*[1972] S.C.R. 811. [7] *Reference Re Minimum Wage Act of Saskatchewan*, [1948] S.C.R. 248. [8] *Canada Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3. [9] Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., vol. 1, looseleaf (Scarborough, Ont.: Carswell, 2005) at 15-34. [10] *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 at paras. 1, 162-74. [11] *Ibid.* at para. 225. [12] *Ibid.* at para. 241-45. [13] *Ibid.* at para. 177. [14] *Ibid.* at paras. 38-39, 262-63. [15] *Ibid.* at paras. 38-39. [16] *Ibid.* at paras. 40, 266. [17] *Ibid.* at paras. 41-42. [18] *Ibid.* at paras. 44, 267. [19] *Ibid.* at paras. 39, 265. [20] *Ibid.* at paras. 70-76. [21] *Ibid.* at paras. 294, 297, 303-04.