

Safe Injection Sites: How the Supreme Court got it right with Insite

In 2011, the Supreme Court of Canada ordered the federal Minister of Health to continue exempting Insite, a safe injection facility, from the application of criminal drug laws.[\[1\]](#) The Court ruled that the Minister's decision to not exempt Insite, violated the *Canadian Charter of Rights and Freedoms*.[\[2\]](#) This ruling allowed Insite to remain operational.

Insite has been a massive success, saving lives without increasing drug use or crime in the community.[\[3\]](#) Today, cities across Canada are opening safe injection sites as a measure to deal with the opioid crisis that has resulted in over 2400 deaths in the past year alone.[\[4\]](#)

What is "Insite"?

Insite - located in the Downtown Eastside of Vancouver, British Columbia ("DTES") - is North America's first safe injection facility.[\[5\]](#) Criminal drug possession laws under the *Controlled Drugs and Substances Act* ("CDSA") do not apply in the facility because of a Health Canada exemption.[\[6\]](#) Clients at Insite are provided with clean injection equipment and are able to inject pre-obtained drugs under medical supervision without fear of arrest or prosecution.[\[7\]](#) The nurses at the facility also provide other health care services, such as wound care and immunizations.[\[8\]](#)

In 1997, a public health emergency was declared in the DTES in response to an epidemic in HIV infection rates and overdose deaths related to injection drug use.[\[9\]](#) Part of the problem was the unsafe practices that injection drug users developed out of fear of police discovery and confiscation.[\[10\]](#) The practice of injecting hurriedly in alleyways resulted in mistakes in measuring proper amounts of substances being injected and overdoses away from medical help.[\[11\]](#) Injection drugs users would "dissolve heroin in dirty puddle water before injecting it into their veins," which led to dangerous infections.[\[12\]](#) Addicts also shared needles, resulting in the transmission of HIV and hepatitis C.[\[13\]](#)

Many of the drug users in the DTES had suffered physical and sexual abuse as children, struggled with mental illness, and had been exposed to drug use at an early age.[\[14\]](#) Criminal prohibitions were ineffective at reducing their drug use.[\[15\]](#) Insite was founded in 2003 in response to this public health emergency.[\[16\]](#) Insite uses a harm reduction strategy. This means it focuses on minimizing the harm associated with drug use rather than preventing the drug use itself.[\[17\]](#)

PHS Community Services Society v Canada (Attorney General)

The federal Minister of Health can exempt facilities such as Insite from the application of all

or parts of the *Controlled Drug and Substances Act* – including the criminal drug possession and trafficking laws – if the Minister considers it to be in the public interest or necessary for a medical or scientific purpose.[18] In 2003, Health Canada granted Insite a three-year exemption as a pilot research project, and temporarily extended it twice after that.[19]

In 2008, Insite's exemption was set to expire and the federal Minister of Health decided not to extend it, which meant that Insite would no longer be able to offer its services.[20] In response, PHS Community Services Society together with Vancouver Area Network of Drug Users (VANDU) and two clients of Insite, initiated a constitutional challenge against the federal government in an effort to keep Insite open.[21]

The case eventually made its way to the Supreme Court of Canada. The Supreme Court had to determine if Insite was exempt from the federal criminal drug possession and trafficking laws either because of the [division of powers](#) or because the application of the laws would violate section 7 of the *Charter*: "the right to life, liberty, and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." [22]

Division of Powers

The division of powers issue was largely focused on the doctrine of [interjurisdictional immunity](#) – an interpretative tool courts use in division of powers cases.[23] Valid laws enacted by one level of government are interpreted to not interfere with the core of another level of government's power.[24] In this case, PHS Community Services Society's argument was that "decisions about what treatment may be offered in provincial health facilities lies at the core of the provincial jurisdiction in the area of health care, and are therefore protected from federal intrusions." [25]

The Supreme Court rejected this argument.[26] The Court preferred a more restrained application of the doctrine in favour of more flexible approaches to interpreting the division of powers.[27] In other words, it was inappropriate to apply the doctrine to an area as broad as health care. Ultimately, it was the *Charter* argument that succeeded.

The *Charter* violation

The Supreme Court unanimously concluded that the refusal of the federal Minister of Health to extend the exemption violated section 7 of the *Charter*. The Court found that the application of the drug possession laws to Insite would violate the rights of both its staff and clients.[28]

The application of the drug possession laws engaged the staff's right to liberty because imprisonment was a potential penalty for criminal possession of illegal drugs and the CDSA's definition of possession was broad enough to encompass the activities of Insite's staff.[29] Furthermore, without the exemption, the health professionals at Insite would not be able to offer their services to the clients.[30] This indirectly engaged the clients' right to life and security of the person by depriving them of potentially life-saving medical care.[31]

The Minister's decision not to exempt Insite also directly engaged the clients' right to life and security of the person.[\[32\]](#) The decision created a risk to the health and lives of Insite's clients by effectively denying them vital health services.[\[33\]](#) The Supreme Court agreed with the findings of the trial judge who found that "many of the health risks of injection drug use are caused by unsanitary practices and equipment, and not by the drugs themselves" and that the risk of disease and death associated with addiction and injection is decreased when injecting in the presence of health professionals.[\[34\]](#)

The Supreme Court concluded that the Minister's decision which effectively closed Insite was not in accordance with the principles of fundamental justice because it was both arbitrary and grossly disproportionate in its effects.[\[35\]](#) The Minister's decision was arbitrary because it was neither necessary nor related to the purposes of the Act - "the protection of public health and the maintenance of public safety."[\[36\]](#) Insite actually furthered those objectives rather than undermined them.[\[37\]](#) Not only did Insite alleviate the health risks for injection drug users, but it also "did not contribute to increased crime rates, increased incidents of public injection, or relapse rates in injection drug users."[\[38\]](#)

The Minister's decision was grossly disproportionate in its effects - meaning that the harm it caused severely outweighed its benefits. Insite had no observable negative impacts on Canada's public safety and health objectives.[\[39\]](#) The decision effectively denied life-saving services to injection drug users in exchange for a uniform stance on the possession of drugs.[\[40\]](#)

As the decision could not be justified, the Court ordered the Minister to grant the exemption to Insite, allowing it to remain operational.[\[41\]](#)

Insite undeniably saves lives

Had the Supreme Court's decision in *PHS* been different, Insite would have closed and the benefits of the facility would not have been realized. More than 40 peer-reviewed studies have shown that "Insite saves lives and health-care dollars, reduces disease transmission and promotes entry into addiction treatment."[\[42\]](#) Regular clients of Insite are 30% more likely to enter addiction treatment.[\[43\]](#) To date, Insite has had over 3.6 million visits, 48,000 clinical treatment visits, and 6400 death-free overdose interventions - all without any increases in drug use or crime in the community.[\[44\]](#)

The current opioid crisis: history repeats

Before the creation of Insite, the number of annual overdose deaths from the use of injection drugs such as heroin and cocaine in Vancouver increased from 16 in 1987 to 200 by 1993.[\[45\]](#) There is a striking similarity between the overdose deaths in the 1990s in the DTES and the current opioid crisis in Canada. Between 2009 and 2014 there were an estimated 655 deaths in Canada related to fentanyl.[\[46\]](#) In 2016 alone, there were over 2400 deaths resulting from fentanyl overdoses in Canada.

The important role of safe injection sites in the opioid crisis

Safe injection sites play an important role in addressing the opioid crisis. They are necessary for preventing overdoses and the spread of infectious diseases that may result from injection drug use. A dosage of fentanyl the size of two grains of salt is enough to kill a healthy adult.[\[47\]](#) Although it comes in a pill form, some users crush and inject the drug.[\[48\]](#)

Furthermore, many who overdose from fentanyl are not aware that they were using the drug.[\[49\]](#) Fentanyl testing kits were recently provided at Insite as part of a drug test study. The study revealed that about 80% of drugs were contaminated with fentanyl.[\[50\]](#) Those that detected fentanyl before consumption are 10 times more likely to reduce their dose, which makes them 25% less likely to overdose.[\[51\]](#)

In May 2017, the federal government passed Bill C-37 which simplifies the process of applying for an exemption under the *CDSA*.[\[52\]](#) This Bill reduces the barriers that were previously created by the Conservative government's *Respect for Communities Act* for opening new safe injection sites. by reducing the application criteria.[\[53\]](#)

The Bill is a clear example of dialogue between the Supreme Court and Parliament. The information that communities seeking to establish safe injection sites must provide in the application aligns with the five factors that the Supreme Court in *PHS* required the Minister of Health to consider when deciding on whether to grant an exemption:[\[54\]](#)

- The impact of the site on crime rates;
- The local conditions indicating a need for the site;
- The administrative structure in place to support the site;
- The resources available to support the maintenance of the site; and.
- Expressions of community support or opposition.

Cities across Canada are now opening safe injection sites as a measure to deal with the opioid crisis. For over a decade, Insite was the only safe injection site in Canada.[\[55\]](#) As of July 26, 2017, Health Canada has approved 15 safe injections sites.[\[56\]](#)

Conclusion

In *PHS*, the Supreme Court of Canada protected the constitutional rights of a vulnerable and often overlooked population. By allowing Insite to remain operational, the decision has saved lives. The Government of Canada's current position is clear – safe injection sites work.[\[57\]](#) Harm reduction measures such as those offered in safe injection sites are an important part of addressing the current opioid crisis, and cities across Canada are recognizing that.[\[58\]](#) Safe injection sites may not be the entire solution to the opioid crisis, but they are definitely a step in the right direction.

[\[1\]](#) *PHS Community Services Society v Canada (AG)*, 2011 SCC 44 at paras 2-3 .

[2] *Ibid* at para 3.

[3] Jennifer McIntosh, "Health Canada approves supervised injection site for Sandy Hill Community Centre", *Ottawa East News* (28 July 2017), online: <www.ottawacommunitynews.com/news-story/7476046-health-canada-approves-supervised-injection-site-for-sandy-hill-community-centre/> .

[4] Patrick Lejtenyl & Rob Gillies, "Canada expands safe injection sites as overdose deaths rise", *Associated Press* (6 July 2017), online: <www.ems1.com/opioids/articles/285186048-Canada-expands-safe-injection-sites-as-overdose-deaths-rise/>.

[5] Vancouver Coastal Health, "Supervised Injection Sites", online: <www.vch.ca/public-health/harm-reduction/supervised-injection-sites>.

[6] *Ibid*.

[7] *Ibid*.

[8] *Ibid*.

[9] BC Centre for Disease Control, "Public Health emergency in BC", online: <www.bccdc.ca/about/news-stories/stories/public-health-emergency-in-bc>.

[10] *PHS*, *supra* note 1 at paras 10-11.

[11] *Ibid* at para 10.

[12] *Ibid*.

[13] *Ibid*.

[14] *Ibid* at para 7.

[15] *Ibid* at para 131.

[16] PHS Community Services Society, "The History of Insite", online: <www.phs.ca/index.php/project/the-history-of-insite/>.

[17] Harm Reduction International, "What is harm reduction", online: <www.hri.global/what-is-harm-reduction>.

[18] *PHS*, *supra* note 1 at paras 16, 39-40.

[19] *Ibid* at paras 16, 121.

[20] *Ibid* at paras 121-22.

[21] *Ibid* at para 21.

[22] *Ibid* at para 3.

[23] The Constitutional Law Group, *Canadian Constitutional Law* (Toronto: Emond Montgomery Publications, 2010) at 249.

[24] *PHS, supra* note 1 at para 58.

[25] *Ibid* at para 57.

[26] *Ibid* at para 66.

[27] *Ibid* at paras 67-70.

[28] *Ibid* at para 126.

[29] *Ibid* at paras 89-90.

[30] *Ibid* at para 91.

[31] *Ibid*.

[32] *Ibid* at para 92.

[33] *Ibid* at paras 92-93.

[34] *Ibid* at para 93.

[35] *Ibid* at para 127.

[36] *Ibid* at para 129, 132.

[37] *Ibid* at para 131.

[38] *Ibid*.

[39] *Ibid* at para 133.

[40] *Ibid*.

[41] *Ibid* at paras 137, 150.

[42] Thomas Kerr, "Thomas Kerr: Insite has science on its side", *National Post* (30 May 2011), online: <nationalpost.com/opinion/thomas-kerr-vancouvers-insite-clinic-has-been-a-resounding-success/wcm/796492fe-b202-44c6-94dd-a3516c222156>.

[43] Ken MacQueen, "The science is in. And Insite works", *Maclean's* (20 July 2015), online: <macleans.ca/news/canada/the-scientists-are-in-insite-works/> .

[44] Vancouver Coastal Health, "Insite user statistics", online: <www.vch.ca/public-health/harm-reduction/supervised-injection-sites/supervised-injection-u

ser-statistics>.

[45] *PHS*, *supra* note 1 at para 11.

[46] Canadian Centre on Substance Abuse, “Deaths Involving Fentanyl in Canada, 2009-2014” CCENDU Bulletin (August 2015) at 1.

[47] Karen Howlett et al, “A Killer High: How Canada got addicted to fentanyl”, *The Globe and Mail* (1 June 2017), online: <www.theglobeandmail.com/news/investigations/a-killer-high-how-canada-got-addicted-to-fentanyl/article29570025/>.

[48] Nikki Wiart, “Why Canada has so few supervised injection sites”, *Maclean’s* (17 August 2016), online: <www.macleans.ca/society/health/why-there-are-so-few-supervised-injection-sites/>

[49] Richard G Frank & Harold A Pollack, “Addressing the Fentanyl Threat to Public Health”, *The New England Journal of Medicine* (22 February 2017), online: <www.nejm.org/doi/full/10.1056/NEJMp1615145?af=R&rss=currentIssue&#t=article>.

[50] Matt Meuse, “Insite fentanyl test reduces overdoses, study finds”, *CBC News* (15 May 2017), online: <www.cbc.ca/news/canada/british-columbia/insite-fentanyl-testing-1.4115500>.

[51] *Ibid.*

[52] Andrea Woo, “Streamlined injection-site conditions become law”, *The Globe and Mail* (18 May 2017), online: <www.theglobeandmail.com/news/british-columbia/streamlined-conditions-for-supervised-injection-sites-become-law/article35055553/>.

[53] *Ibid.*

[54] Health Canada, “Royal Assent of Bill C-37 - An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts” (18 May 2017), online: <www.canada.ca/en/health-canada/news/2017/05/royal_assent_of_billc-37anacttoamendthecontrolleddrugsandsubstan.html>. Bill C-37, *An Act to amend the Controlled Drugs and Substances Act and to make related amendments to other Acts*, 1st Sess, 42nd Parliament, 2017, cl 42 (assented to 18 May 2017).

[55] *MacQueen*, *supra* note 43.

[56] Jon Willing, “Feds approve Ottawa’s first supervised injection site”, *Ottawa Citizen* (26 July 2017), online: <ottawacitizen.com/news/local-news/feds-approve-ottawas-first-supervised-injection-site>.

[57] *McIntosh*, *supra* note 3.

[58] *Ibid.*