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SCC Wrongly Accused of "Judicial Activism" in Recent Insite Case

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Decision Considered:

Canada (A.G.) v PHS Community Services Society **("Insite")**

The recent SCC judgment in the Insite case has been said to "threaten peace between judges and legislators" (see Kirk Makin, "Landmark Insite decision threatens peace between judges and legislators" October 10, 2011 Globe and Mail Online (Makin). I am not sure that I agree with this sentiment.

Judicial activism usually has a negative connotation, but it is useful to discuss what it means (to me) before launching into the discussion of *Insite*. *Black's Law Dictionary* (Bryan A. Garner, editor, *Black's Law Dictionary* 9th ed. (West Group, 2009)) defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." It is often contrasted with "judicial restraint," which has a more positive connotation: judges exercising judicial restraint will use interpretation methods that lead to upholding the constitutionality of laws.

Judicial activism does not occur when judges are doing what they have been empowered to do: interpret the law based on the arguments and evidence before them. Indeed, some argue that the timidity sometimes exercised by judges is reaction to criticisms that they are too activist (see: Patricia Hughes, "Judicial Independence: Contemporary Pressures and Appropriate Responses" (2001) 80(1) Canadian Bar Review 181). Clearly, the advent of the *Canadian Charter of Rights and Freedoms* (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) "*Charter*" in 1982 brought the interpretation task of judges into the spotlight, because the *Charter* applies to the laws and actions of government. However, long before the advent of the *Charter*, judges also had to interpret laws, including the *British North America Act* (now the *Constitution Act,* 1867) with respect to division of powers issues (e.g., to assess which level(s) of government had the jurisdiction to pass legislation on particular matters). The difference is that the *Charter* deals with the relationship between the individual and the government, rather than relations between two levels of government.

What occurred in the *Insite* case to lead some commentators to argue that judicial activism was involved? This case had both a division of powers issue and a *Charter* issue. The facts are set out in paras 1-19. Vancouver's downtown eastside (VDTES) had an injection drug use crisis in the early 1990s. HIV/AIDS and hepatitis C epidemics followed, and VDTES declared a public health emergency in September 1997. Since the population of the VDTES was marginalized, with complex mental, physical and emotional health needs, public health authorities recognized that creative solutions must be put in place. Years of research, planning, and intergovernmental

cooperation resulted in the development of a proposal involving care for drug users that would help them at all stages of treatment of their disease, not simply when they quit using drugs permanently. The proposed scheme included supervised drug consumption facilities, which were controversial in North America, but had been used successfully in Europe and Australia.

The *Controlled Drug and Substances Act* ("*CDSA*") section 56, permits exemptions, for medical or scientific purposes, from the prohibitions of possession and trafficking of controlled substances, at the discretion of the Minister of Health. Insite received a conditional exemption in September 2003, and soon opened. It was North America's first government sanctioned safe-injection facility, and it operated continuously since. Evidence accepted by the court indicated that Insite is a strictly regulated health facility, with its personnel being guided by strict policies and procedures. Insite does not provide drugs to the clients, who are required to check in, sign a waiver, and who are closely monitored during and after injection. Clients are provided with health care information, counselling, and referrals to service providers, including an on-site on-demand detoxification centre. The evidence also indicated that Insite has saved lives and improved health without increasing the incidence of drug use and crime in the surrounding areas. The Vancouver police, the city and provincial governments support Insite's program.

Before the initial exemption had expired, Insite formally applied in 2008 for an exemption. The Minister had granted temporary extensions in 2006 and 2007, but indicated that he had decided to deny the formal application (*Insite*, para 121). Insite supporters (PHS Community Services Society, Dean Edward Wilson, Shelly Tomic, the Attorney General of British Columbia and others) commenced legal action in an effort to keep it open. The Vancouver Area Network of Drug Users (VANDU) cross-appealed, asking for the exemption from application of section 4.1 of the *CDSA* to *all* addicted persons, not merely those who sought treatment at supervised injection sites.

The Trial Judge found that the application of subsections 4(1) and 5(1) of the *CDSA* violated the claimants' rights under *Charter* section 7 (right to life, liberty and security of the person). He granted a constitutional exemption to Insite, permitting it to continue to operate free from federal drug laws. The British Columbia Court of Appeal (BCCA) dismissed the federal government's appeal, holding that the doctrine of interjurisdictional immunity applied to Insite (*Insite*, paras 26-35). The Supreme Court of Canada (SCC) (per Justice McLachlan C.J., concurred with by Justices Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell) upheld the constitutionality of the federal legislation, but also ordered that, based on a violation of *Charter* section 7, the Minister of Health grant an exemption forthwith to Insite under section 56 of the *CDSA*.

On the issue of the constitutionality of the criminal prohibitions on possession and trafficking, the SCC held that the applicable provisions of the CDSA were, in pith and substance, valid exercises of the federal criminal law power (*Insite*, para 52). They had an incidental effect on the regulation of provincial health institutions, but this did not render them invalid constitutionally (*Insite*, para 51). The *CDSA* did not contain an express or implied limitation from application to provincial programmes designed to advance the public interest (*Insite*, para 56).

The province had successfully argued at the BCCA that it was jurisdictionally immune from federal interference. The doctrine of interjurisdictional immunity is usually applied to limit the application of a provincial law that is general to a federal law. It was rather unique (but not unheard of) to argue that it should be used to limit the application of a federal law to a provincial

undertaking. The SCC held that decisions about what treatment could be offered in a provincial health facility did not constitute a protected core of the provincial power of legislating about health care, and thus render it immune from federal interference (*Insite*, para 66). The SCC noted that the doctrine of interjurisdictional immunity is narrow, and based on the premise of watertight cores with respect to areas of jurisdiction—this flows against the tide of the more flexible constitutional concepts of double aspect and cooperative federalism. It was also common ground that absent a constitutional immunity, the federal law would trump any provincial legislation or policies that conflicted with it (*Insite*, para 72).

The SCC's conclusion on the issue of division of powers is a model of judicial restraint. The judges (all nine of them) interpreted the federal legislation in a way that upheld its constitutionality. However, the claimant's lack of success on this issue did not end their claim that the law deprived them of their individual rights under *Charter* section 7. The SCC noted that a validly enacted federal law (under s 91 of the *Constitution Act,* 1867) can in purpose and effect deprive an individual of his or her rights guaranteed by the *Charter (Insite,* para 82).

Charter section 7 provides:

> Everyone has the 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.

The SCC upheld the constitutionality of subsection 4(1) of the *CDSA*. Subsection 4(1) directly engages the liberty interests of health professionals who provide services at Insite (they face imprisonment under ss. 4(3) and 4(6) of the *CDSA*), and the right to life, liberty and security of the person of the clients of Insite. However, because the Minister has the power to grant exemptions from subsection 4(1) for medical, scientific or public interest reasons, the engagement of these *Charter* section 7 rights is done in accordance with the principles of fundamental justice. The SCC noted that the exemption "acts as a safety valve that prevents the *CDSA* from applying where it would be arbitrary, overbroad or grossly disproportionate in effects" (*Insite*, para 113).

In addition, the SCC held that the prohibition against trafficking under subsection 5(1) of *CDSA* would not constitute a limitation on the claimants' section 7 rights because trafficking charges would not apply to the Insite staff (*Insite*, paras 95-96).

The SCC next discussed the constitutionality of the Minister's exercise of discretion in his application of the law. The conclusions reached on this issue have resulted in expression of concerns about judicial activism. The SCC said that the Minister's discretion to grant an exemption was not absolute, and had to be exercised in conformity with the *Charter* (*Insite,* para 117). The federal government argued that it had not yet made a decision about whether to grant the extension to Insite's exemption, but the SCC found that the Minister had effectively refused it (*Insite*, paras 119-125). When analyzing the grounds for the Minister's refusal, the SCC noted that it was not acceptable for the Minister to "simply deny an application for a section 56 exemption on the basis of policy *simpliciter*" (simply on the basis of policy, without any condition) (*Insite*, para 128). The Minister had to make a decision in accordance with the principles of fundamental justice because individuals' *Charter* section 7 rights were at stake. Laws that are arbitrary are recognized as being contrary to the principles of fundamental justice, although there is some dispute in caselaw as to the correct meaning of arbitrary. The SCC found that the Minister's refusal to grant the exemption was arbitrary, no matter which meaning of the term was used (*Insite,* para 132). The refusal to grant the exemption undermined the *CDSA*'s

objectives of public health and safety (*Insite*, para 131). The SCC also found that the effects of the Minister's refusal and the corresponding denial of services to Insite clients to be "grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics" (*Insite*, para 133). The Court noted that its findings that the actions were arbitrary and their effects grossly disproportionate to the benefits, resulted in the application of the law being contrary to the principles of fundamental justice under *Charter* section 7 (*Insite*, para 136).

The SCC also said that if the *Charter* section 1 analysis were required, the *Charter* violation could not be saved by section 1.

The SCC held that since the concern involves a governmental decision, *Charter* subsection 24(1) permits the court to fashion the correct remedy. In this case the Minister was ordered to "grant an exemption to Insite under section 56 of the *CDSA* forthwith" (*Insite*, para 150). The court also noted that, given the seriousness of the infringement and the grave consequences that might result from a lapse in Insite's exemption, a declaration that the Minister erred in refusing the exemption would be inadequate (*Insite*, para 148).

The criticism is that this case "forged a new means to strike down laws if there is scientific or statistical evidence showing that a regulation worsened the danger that an individual or group faces" (Makin). The Court was accused of crafting a new test: measuring the harm a provision creates against the harm prevented. Kirk Makin indicates that this will elevate scientific evidence over laws that are arbitrary or disproportionate. I am not sure that this is a negative outcome. It seems that judges are in the business of weighing the purpose and effect of government laws and actions when they determine whether they are constitutional. In this case, they determined, based on the evidence and arguments before them, that the effect of not providing an exemption would be an unjustifiable violation of some individuals' *Charter*, section 7 rights. It doesn't matter whether the individual judges think that the Insite project is a good or bad policy, which could then influence their decision (and thus leave them open to an accusation of judicial activism); rather, the decision was based on evidence of the harm that would result from the withholding of the exemption. They are simply performing the interpretation task that they have been granted by Parliament with the implementation of the *Charter*. I hope that they will not allow the accusation of judicial activism to prevent them from doing their jobs in future cases.

Note: For another discussion of this case see Jennifer Koshan's ABlawg on *R v Pawlowski*.

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