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## Safe Sites for Illegal Drug Consumption: In Need of Insight

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### Legislation / Case Commented on:

*Bill C-65, [An Act to amend the Controlled Drugs and Substances Act](#), First Session, Forty-first Parliament, 60-61-62 Elizabeth II, 2011-2012-2013 (“Respect for Communities Act”); *Canada (AG) v PHS Community Services Society*, [2011 SCC 44](#).*

Last week I attended the [Law on the Edge](#) conference in Vancouver, which Jonnette Watson Hamilton recently blogged on [here](#). One of the highlights for me was a field trip led by UBC Professor Margot Young to visit Insite, Vancouver’s safe injection site for intravenous drug users. Insite was the subject of constitutional litigation that went to the Supreme Court of Canada (see *Canada (AG) v PHS Community Services Society* and previous ABlawg posts on the case [here](#) and [here](#)). In brief, the Supreme Court ordered the federal Minister of Health to extend Insite’s exemption under the *Controlled Drugs and Substances Act*, SC 1996, c 19 (CDSA), on the basis that the refusal to do so violated Insite users’ section 7 *Charter* rights to life, liberty and security of the person in a manner that was arbitrary and grossly disproportionate in light of the government’s aims. In June 2013, the federal government introduced amendments to the CDSA in the so-called “*Respect for Communities Act*” that would make it more difficult for other communities to open safe injection sites. What does the Insite experience suggest in terms of the impact these amendments might have on other efforts to establish safe injection sites in Canada?

Insite opened in 2003 as a joint effort of the municipal, provincial and federal governments following an epidemic level of injection drug related overdoses in Vancouver’s Downtown Eastside (DTES) in the mid-1990s. It is co-managed by Vancouver Coastal Health, which provides Insite’s clinical staff, as well as the Portland Hotel Society. Insite is located right in the heart of the DTES at 139 Hastings. It is open from 10 a.m. to 4 a.m. daily, and has about 1300 uses each day. Participants go through an intake process where they are asked to provide a code name and their date of birth. They also have access at the intake desk to needles, spoons, clean water, tourniquets, and condoms. There is a waiting area for participants until one of the 12 safe injection booths opens up. Participants bring their own drugs to Insite, and must inject their own drugs – other users and Insite staff are prohibited from assisting. Insite staff does provide the clean gear, and can monitor the participants for overdoses, infections, etc. (although they cannot administer antibiotics and must arrange for participants to be treated elsewhere). Police do not attend Insite unless they are called, which helps create a safe space. Participants have access to a detoxification facility upstairs from Insite, which makes about 400 referrals a year to the facility. Insite also operates a peer group program where participants can work on site.

We were advised by our tour guide that there are many things that would make Insite better, including the ability to treat infections and provide for other health related needs, better access to NARCAN, a drug which treats overdoses, the ability to provide safe inhalation facilities in addition to safe injection facilities, and 24 hour a day operation. Insite’s assumption is that its

participants have made the decision to use drugs, and if they are not able to do so in a safe site with connections to health services, they will do so elsewhere, with risks to health and safety. Insite was originally opened on a three year pilot project basis, and one of the conditions for its operation was ongoing research into and evaluation of its impact. This made for a rich evidentiary record in the *PHS Community Services Society* case. Based on this evidence, the Supreme Court characterized Insite participants as addicts with complex histories of abuse, drug use, and mental illness, and noted the demographics of Insite users and their disadvantage in terms of age, homelessness, Aboriginality, and criminal histories. The Court also noted the multiple harms that injection drug users are vulnerable to, which are typically caused not by the drugs themselves but by injection methods (at paras 7-11). Significantly, the Court accepted the evidence that “Insite has saved lives and improved health ... without increasing the incidence of drug use and crime in the surrounding area” (at para 19).

This evidence grounded the Court’s finding that the federal Minister of Health’s refusal to extend Insite’s exemption from the CDSA violated the section 7 *Charter* rights of Insite participants, and that the refusal was contrary to the principles of fundamental justice. The decision was arbitrary because the evidence demonstrated that criminal prohibitions had not reduced drug use in the DTES, yet Insite participants’ risk of harm was reduced when they injected there, and Insite had not resulted in increased crime rates, increased injections in public, or relapses amongst clients. In addition, Insite had many favourable impacts, such that the CDSA exemption would have furthered rather than undermined the government’s objectives of public health and safety (at para 131). The evidence also led the Court to conclude that the Minister’s refusal to grant a further exemption was grossly disproportionate – the loss of the proven benefits of Insite would be extreme compared to any benefit Canada might gain from “presenting a uniform stance on the possession of narcotics” (at para 133).

Insite remains the only safe injection site in Canada at present. Bill C-65, which received first reading in the House of Commons before it broke for summer recess, will make it much more difficult for other cities to open safe sites for drug consumption. The preamble of Bill C-65 sets the tone by stating that “an exemption from the application of the CDSA and its regulations for certain activities in relation to controlled substances that are obtained from illicit sources should only be granted in *exceptional circumstances* and after the applicant has addressed *rigorous criteria*” (emphasis added). More concretely, the Bill would add a new section to the CDSA, section 56.1, which would govern “supervised consumption sites.” Under the proposed section 56.1(3), the Minister “may consider an application for an exemption for a medical purpose ... that would allow certain activities to take place at a supervised consumption site only after the following have been submitted...”

I set out the rest of the subsection in its entirety in Appendix 1, as it gives a sense of the breadth of the proposed criteria. Essentially, it requires the proponents of supervised consumption sites to provide evidence of the medical benefits and the potential impacts on public safety of the proposed activities at the site (including information on crime and public nuisance, public consumption of illicit substances, and the presence of inappropriately discarded drug-related litter in the vicinity, supported by law enforcement research or statistics, if any); evidence of the number of persons who consume illicit substances and with related infectious diseases near the site and in the municipality more broadly; evidence of overdose-related deaths and official reports such those of coroners; support of governments at the municipal and provincial level (the latter including both health and public safety ministers and lead health professionals); the support of the local police force; reports on consultations with professional licensing authorities for physicians and nurses and with local community groups; a financing plan as to the feasibility and

sustainability of the site; a description of drug treatment services and information available at the site; information / trends on loitering, trafficking and minor offence rates as well as public health emergencies in the vicinity of the site; details of measures to minimize diversion of controlled substances / precursors and the risks to the health, safety and security of persons at the site (including measures and record-keeping related to disposal, controlled access and prevention of loss and theft); information about the proposed staff, including whether they have a criminal or youth record in Canada or elsewhere for drug related offences; and lastly, “any other information that the Minister considers relevant to the consideration of the application” (s 56.1(3)).

Bill C-65 also covers exemptions in relation to existing supervised consumption sites, which will require the submission of all of the information referred to above, along with “evidence, if any, of any variation in crime rates in the vicinity of the site” during the period of the first exemption and “evidence, if any, of any impacts of the activities at the site on individual or public health during that period” (s 56.1(4)).

In relation to both existing and new supervised consumption sites, the Minister will only be permitted to grant exemptions for medical purposes “in exceptional circumstances and after having considered the following principles:

- (a) illicit substances may have serious health effects;
- (b) adulterated controlled substances may pose health risks;
- (c) the risks of overdose are inherent to the use of certain illicit substances;
- (d) strict controls are required, given the inherent health risks associated with controlled substances that may alter mental processes;
- (e) organized crime profits from the use of illicit substances; and
- (f) criminal activity often results from the use of illicit substances.” (s 56.1(5))

In short, Bill c-65 will require proponents of supervised consumption sites to provide evidence of the sorts of potential harm reduction impacts that Insite was only able to prove after it was in operation. Of particular concern are the provisions requiring criminal record checks for key staff members, as this may preclude those with direct and useful experience of illegal drug use to work at supervised consumption sites. Also concerning are the “principles” set out in the proposed section 56.1(5), which give a sense of the government’s underlying ideological position on safe consumption sites. The Bill would also allow inspectors to enter supervised consumption sites “to confirm any information in relation to an application submitted to the Minister for an exemption for a medical purpose” and “to verify compliance or to prevent non-compliance” with the *CDSA* (s 31(1.1) and (1.2)). Given the importance that Insite participants place on the notion of safe space, the presence of inspectors may create a barrier to the use of supervised consumption sites.

In a [joint statement](#) issued by the Canadian HIV/AIDS Legal Network, the Canadian Drug Policy Coalition and Pivot Legal Society, Bill C-65 is critiqued as “flouting the Supreme Court of Canada.” These groups are especially concerned that the Bill will allow “ill-informed” opinions of community and police opponents to sway the Health Minister’s decisions on exemptions

under the *CDSA*. It should be noted that some opponents of safe consumption sites did intervene in the *PHS* case, including REAL Women of Canada, so this fear is grounded in reality.

It is important to recall that in the *PHS* case, the Supreme Court found that the *CDSA* itself was constitutionally sound, as it provided discretion to the Health Minister to allow exemptions in appropriate circumstances – in other words, there was a “safety valve” (at para 113). It was the Minister’s refusal to exercise his discretion in favour of granting Insite an exemption that ran afoul of section 7 of the *Charter*. If Bill C-65 becomes law, the question will be whether the Minister’s discretion has been constrained too greatly by the amendments to the *CDSA*, such that the Act itself would violate the *Charter*. In light of the *PHS* decision, the government would do well to refer the constitutionality of Bill C-65 to the Supreme Court to avoid costly litigation at the behest of the proponents of safe consumption sites.

What is the import of all of this for Alberta? There are no safe consumption sites in this province, and to my knowledge, no pending applications for exemptions under the *CDSA* for such sites. In Calgary, we have the [Safeworks Harm Reduction Program](#), which is operated by Alberta Health Services. According to the website, this program provides a number of services, including “safer inhalation and injection resources”, as well as “safer sex supplies”, blood testing, wound care, vaccinations, client advocacy, physical and psychological health assessments, intervention and referrals, and hospital visits. Services are provided by outreach workers, public health nurses, and social workers, and are said to be free and confidential, with no appointments required. Locations where the services are provided are downtown at the [Calgary Drop-In Centre](#) (9 a.m. to 12 p.m. Monday to Friday) and the [Centre of Hope](#) (1 p.m. to 4 p.m. Monday to Friday), as well as by the [Safeworks Mobile Van](#), which operates seven days a week from 8 p.m. to 12.30 a.m. (except Fridays, 5 p.m. to 12.30 a.m.). Assuming that “safer inhalation and injection resources” includes provision of clean needles, water, and other supplies, there is still a large gap in time when these needed services are not available. Insite’s experience indicates that harm reduction services should be available around the clock to try to prevent the adverse health consequences of injection and inhalation drug use as much as possible.

Needle exchanges also exist in other areas of Alberta. For example, in Medicine Hat, AIDS Calgary runs a needle exchange program through the [Medicine Hat Cares Centre](#). In June 2013, The [Medicine Hat News](#) reported that “Medicine Hat provides more needles to drug users per capita than anywhere else in Alberta”, with 15,000 to 18,000 needles distributed each month. In Edmonton, [Street Works](#) operates a needle exchange program at various locations and via a mobile van. Although its website indicates that clean needles are provided on a 1 for 1 exchange basis, a recent interview on [CBC](#) indicated that this is no longer the case given that a strict 1 for 1 exchange policy can lead to needle sharing. About 50,000 needles leave Edmonton each year given the lack of needle exchange programs in northern Alberta.

Although it is good to see that harm reduction services are available in Alberta, these sorts of programs are insufficient when compared to safe consumption sites such as Insite. It is to be hoped that when Alberta sees its first application for a safe consumption site, the restrictive provisions in Bill C-65 have not become part of the legal landscape.

#### Appendix 1 – The proposed section 56.1(3) of the *CDSA*

56.1(3) The Minister may consider an application for an exemption for a medical purpose under subsection (2) that would allow certain activities to take place at a supervised consumption site only after the following have been submitted:

- (a) scientific evidence demonstrating that there is a medical benefit to individual or public health associated with access to activities undertaken at supervised consumption sites;
- (b) a letter from the provincial minister who is responsible for health in the province in which the site would be located that
- (i) outlines his or her opinion on the proposed activities at the site,
  - (ii) describes how those activities are integrated within the provincial health care system, and
  - (iii) provides information about access to drug treatment services, if any, that are available in the province for persons who would use the site;
- (c) a letter from the local government of the municipality in which the site would be located that outlines its opinion on the proposed activities at the site, including any concerns with respect to public health or safety;
- (d) a description by the applicant of the measures that have been taken or will be taken to address any relevant concerns outlined in the letter referred to in paragraph (c);
- (e) a letter from the head of the police force that is responsible for providing policing services to the municipality in which the site would be located that outlines his or her opinion on the proposed activities at the site, including any concerns with respect to public safety and security;
- (f) a description by the applicant of the proposed measures, if any, to address any relevant concerns outlined in the letter referred to in paragraph (e);
- (g) a letter from the lead health professional, in relation to public health, of the government of the province in which the site would be located that outlines their opinion on the proposed activities at the site;
- (h) a letter from the provincial minister responsible for public safety in the province in which the site would be located that outlines his or her opinion on the proposed activities at the site;
- (i) a description of the potential impacts of the proposed activities at the site on public safety, including the following:
- (i) information, if any, on crime and public nuisance in the vicinity of the site and information on crime and public nuisance in the municipalities in which supervised consumption sites are located,
  - (ii) information, if any, on the public consumption of illicit substances in the vicinity of the site and information on the public consumption of illicit substances in the municipalities in which supervised consumption sites are located, and
  - (iii) information, if any, on the presence of inappropriately discarded drug-related litter in the vicinity of the site and information on the presence of inappropriately discarded drug-related litter in the municipalities in which supervised consumption sites are located;

- (j) law enforcement research or statistics, if any, in relation to the information required under subparagraphs (i)(i) to (iii);
- (k) relevant information, including trends, if any, on the number of persons who consume illicit substances in the vicinity of the site and in the municipality in which the site would be located;
- (l) relevant information, including trends, if any, on the number of persons with infectious diseases that may be in relation to the consumption of illicit substances in the vicinity of the site and in the municipality in which the site would be located;
- (m) relevant information, including trends, if any, on the number of deaths, if any, due to overdose — in relation to activities that would take place at the site — that have occurred in the vicinity of the site and in the municipality in which the site would be located;
- (n) official reports, if any, relevant to the establishment of a supervised consumption site, including any coroner's reports;
- (o) a report of the consultations held with the professional licensing authorities for physicians and for nurses for the province in which the site would be located that contains each authority's opinion on the proposed activities at the site;
- (p) a report of the consultations held with a broad range of community groups from the municipality in which the site would be located that includes
- (i) a summary of the opinions of those groups on the proposed activities at the site,
  - (ii) copies of all written submissions received, and
  - (iii) a description of the steps that will be taken to address any relevant concerns that were raised during the consultations;
- (q) a financing plan that demonstrates the feasibility and sustainability of operating the site;
- (r) a description of the drug treatment services available at the site, if any, for persons who would use the site and the information that would be made available to those persons in relation to drug treatment services available elsewhere;
- (s) relevant information, including trends, on loitering in a public place that may be related to certain activities involving illicit substances, on trafficking of controlled substances and on minor offence rates in the vicinity of the site, if any;
- (t) information on any public health emergency in the vicinity of the site or in the municipality in which the site would be located that may be in relation to activities involving illicit substances as declared by a competent authority with respect to public health, if any;
- (u) a description of the measures that will be taken to minimize the diversion of controlled substances or precursors and the risks to the health and the safety and security of persons at the site, or in the vicinity of the site, including staff members, which measures must include the establishment of procedures

- (i) to dispose of controlled substances, precursors, and any thing that facilitates their consumption, including how to transfer them to a police officer,
  - (ii) to control access to the site, and
  - (iii) to prevent the loss or theft of controlled substances and precursors;
- (v) a description of record keeping procedures for the disposal, loss, theft and transfer of controlled substances and precursors — and any thing that facilitates their consumption — left at the site;
- (w) the name, title and resumé, including relevant education and training, of the proposed responsible person in charge, of each of their proposed alternate responsible persons, and of each of the other proposed key staff members;
- (x) a document issued by a Canadian police force in relation to each person referred to in paragraph (w), stating whether, in the 10 years before the day on which the application is made, in respect of a designated drug offence or a designated criminal offence, the person was
- (i) convicted as an adult,
  - (ii) convicted as a young person in ordinary court, as those terms were defined in subsection 2(1) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, immediately before that Act was repealed, or
  - (iii) a young person who received an adult sentence, as those terms are defined in subsection 2(1) of the *Youth Criminal Justice Act*;
- (y) if any of the persons referred to in paragraph (w) has ordinarily resided in a country other than Canada in the 10 years before the day on which the application is made, a document issued by a police force of that country stating whether in that period that person
- (i) was convicted as an adult for an offence committed in that country that, if committed in Canada, would have constituted a designated drug offence or a designated criminal offence, or
  - (ii) received a sentence — for an offence they committed in that country when they were at least 14 years old but less than 18 years old that, if committed in Canada, would have constituted a designated drug offence or a designated criminal offence — that was longer than the maximum youth sentence that could have been imposed under the *Youth Criminal Justice Act* for such an offence;
- (z) any other information that the Minister considers relevant to the consideration of the application; and
- (z.1) any prescribed information that is submitted in the prescribed manner.

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