The Safe Injection Site Precedent: Parliamentary Supremacy vs. Democratic Values?

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Case commented on: *Canada (A.G.) v PHS Community Services Society*, (2011) SCC 44 (*Insite*)

The recent SCC ruling in the *Insite* case caused quite a stir when the Supreme Court of Canada ordered the Minister of Health to exempt a supervised injection site and its clients from drug possession laws.

Some editorial writers and Internet bloggers immediately described the decision as "a new tool for activism" a threat to the "peace between judges and legislators" and as "a confrontation brewing between the Harper government and Canadian courts" on everything from prostitution laws to euthanasia (For example, see Kirk Makin, *Landmark Insite Decision Threatens Peace Between Judges and Legislators*, The Globe and Mail, October 17, 2011, http://m.theglobeandmail.com/news/national/britishcolumbia/bc-politi…s-peace-between-judges-and-legislators/article2196941/service=mobile ; Kevin l. Boonstra, Cardus, LexView 74.0 – *Can Injecting Illegal Drugs Ever Be Safe?*, October 26, 2011.).

In their overheated reactions, however, the commentators overlooked more than 20 years of a gradually evolving Charter jurisprudence, especially in cases involving the socially disadvantaged, where the Supreme Court has consistently preferred harm-based reasoning to moral or ideological reasoning. In most of these cases the importance of protecting citizens and society from harm was linked to the fundamental values of equality, freedom and democracy. While the *Insite* case may arguably be a high water mark with respect to the type of remedy imposed, at its core it does no more than reflect and refine this gradual evolution. The legal remedy imposed was an order of mandamus, which ordered the Minister to grant the exemption forthwith. In most cases where executive decisions are found to be flawed, the Courts sets out guiding principles that are intended to inform a decision, and remit the matter to the Minister to exercise their statutory power to decide, thereby engaging in a constitutional dialogue. Here, the dialogue ended with the order. The Court's decision about ministerial discretion in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3. Is arguably much more of a constraint on ministerial discretion because the guidance provided to the Minister was specifically limited by saying the discretion should almost never be used to deport an individual to face torture (at paras 77-78).

From the beginning, the Supreme Court made it clear that the *Charter* must not be used as "an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons" (*R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 779).

This principle applied more generally would suggest that any exercise of ministerial discretion consistent with the ameliorative objective of *Charter* rights and proven to reduce harm to the already disadvantaged, would attract special constitutional attention if it was arbitrarily taken away (*Insite,* note 1 paras 127, 128, 132). It is apparent from the *Insite* case that the Supreme Court will not look favorably on either individuals or governments rolling back protective measures for marginalized and excluded groups for moral or ideological reasons without more (No evidence was adduced by the crown to support the refusal see *Vriend* v. *Alberta,* [1998] 1 S.C.R. 493, at paras 133, 137).
The contextual background of the *Insite* case is a downtown eastside Vancouver neighborhood where some of the poorest and most vulnerable people in Canada live, including 4,600 intravenous drug users. In the early 1990s, injection drug use reached crisis levels there where open drug use was accompanied by epidemic levels of HIV/AIDS and hepatitis C, and a high rate of deaths from overdoses (*Vriend at* paras 133, 137).

Local authorities developed a plan to address the crisis that included a supervised drug consumption facility where clients could inject drugs under medical supervision without fear of arrest and prosecution as long as an exemption was obtained from the Minister of Health under the *Controlled Drugs and Substances Act*, legislation which prohibits the possession and trafficking in controlled substances (s 56 of the *Controlled Drugs and Substances Act* SC 1996, c 19, ("*CDSA*").provides for an exemption from prosecution for possession of illegal drugs for medical and scientific purposes at the discretion of the federal Minister of Health).

Exemptions were granted from 2003 to 2008, but then refused after the government changed from a Liberal to a Conservative one. The new Minister of Health refused to grant the exemption, describing the *Insite* facility as an "abomination" despite a large body of scientific evidence indicating that the facility contributed to a wide range of health and social benefits including saving lives and preventing disease (Monica Winlow, *A Safe Place to Shoot Up*, McGill Daily, Nov. 10, 2011).

The Minister's decision was constitutionally challenged under section 7 of the *Charter* alleging that the refusal to grant the exemption violated the life, liberty and security rights of both the *Insite* health care workers and their clients. The Supreme Court agreed. Balancing the need for public safety against the need for public health, the Court found that the benefits to the health of the drug addicts from *Insite* far outweighed any detriment to the community or to society generally.

The Court could not have been more clear that the Minister must exercise his power to grant exemptions in a manner that complies with the Charter. This meant a decision could not be made on pure policy alone. Because of the evidence that was before him, the Court effectively decided the Minister had no choice but to grant the exemption.
The *Insite* decision is similar to the landmark *R v Morganthaler*, [1988] 1 SCR 30 (*Morgenthaler)* decision decided in 1988. Both exhibit the same basic reasoning. In *Morganthaler*, the Supreme Court struck down the abortion legislation because it put women at risk of unnecessary physical and psychological harm, violating their section 7

security rights. Justice Wilson added in *obiter* that the abortion law was grounded in morality and that moral decisions, such as whether or not to have an abortion, are ones which in a free and democratic society should be made by the individual, not the state (*Morgenthaler* at paras 37,38).

In another case, *Vriend,* the Supreme Court unanimously held that the Alberta government's deliberate omission of sexual orientation from the human rights legislation on ideological grounds violated section 15 of the Charter. They concluded that the proper remedy was to read sexual orientation into the *Individual Rights Protection Act,* RSA 1980, c 1-2 (*IRPA*), because of the "dire and demeaning effect of denial of access to remedial procedures" on an already disadvantages group. The Alberta government failed to demonstrate that it had a reasonable basis for excluding sexual orientation from the *IRPA* and that the harm caused by the legislative omission was grossly disproportionate to any benefit gained.

In the Court's *R v Keegstra* [1990] 3 SCR 697 (*Keegstra)* and *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 (*Taylor)* decisions a harm-based analysis was used to *uphold* hate speech laws against a *Charter* challenge. The Court accepted the proposition that Parliament promotes equality and moves against inequality when it prohibits the willful public promotion of group hatred. The Court found that the harms to individuals and to society caused by hate speech run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is bolstering the notion of mutual respect necessary in a nation which venerates the equality of all persons.

In similarly upholding obscenity laws in *R* v *Butler*, [1992] 1 SCR 452 (*Butler*), the Supreme Court used an equality-harms based approach advising that while it would not be constitutionally permissible for Parliament to impose a certain standard of public and sexual morality, the *Charter* gave Parliament the right to legislate on the basis of harm caused to women by degrading and dehumanizing pornography. Again, this was rationalized as safeguarding the values of a free and democratic society, especially the value of equality.

The case of The *Whatcott v Saskatchewan (Human Rights Commission*), 2010 SKCA 26 (*Whatcott*), currently before the Supreme Court raises the same issues of harm only the targets of the hate speech in question are sexual minorities and those doing the speaking are justifying their hate speech on moral, religious grounds.

Given its previous decisions based on harm, it will be surprising and inconsistent with precedent if the Court strikes down the legislation in favor of those who claim the hate speech law violates their free speech and religious freedom. As in the *Insite* case it would seem that in the balance, the harmful effects of allowing hate speech to go unchecked would be grossly disproportionate to any benefit that Canada might derive from allowing religious groups to generate hatred against sexual minorities or other disadvantaged groups. While the Saskatchewan law may be overbroad in some respects, it will be very interesting to see whether the Court decides to "read down" the law to make it conform to Charter requirements, or strike it down altogether. Section 14(1) (b)

of the *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, more broadly worded than other human rights statutes dealing with hate speech but comparable sections have been interpreted and applied with careful analysis, such that they have been found to minimally impair freedom of expression. See for e.g., *Kane v. Alberta Report*, 2001 ABQB 570 (CanLII) paragraph 106.

In the recent polygamy reference decision (*Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (*Reference re: Section 293*)), evidence of harm guided the Court to upholding the polygamy laws even though they were attacked as an unjustified imposition of religious morals. The BC Supreme Court disagreed, finding that Parliament's original intent in prohibiting polygamy was to protect the Christian, moral ideal of monogamous marriage, but at its core, the legislative purpose was to protect women and children from physical, psychological and economic harm caused by polygamous relationships (*Reference re: Section 293 at para 783*). After an extensive canvassing of evidence of harm, the polygamy prohibition was found constitutionally valid as long as it was not used to prosecute children. The clear emphasis in justifying the limits on religious freedom was harm, not competing religious ideologies.

Some have argued that the *Insite* decision could result in prostitution laws being struck down and legalized brothels of the sort found in Nevada springing up because prostitution laws are morality-based and are now vulnerable to a successful *Charter* challenge (See for e.g., Allison Martell, Rueters, *Insite Ruling Could Affect Prostitution Case*). This is unlikely because just as in the polygamy reference, even if there is some moral purpose underlying the prostitution laws, the Court will fasten on the overwhelming evidence of harm as the most important purpose of the legislation. Studies indicate that all forms of prostitution are very harmful to men, women and children in the sex trade (*Prostitution Research and Education, Prostitution Research*). Canada's argument that the state has no obligation to protect prostitutes because they voluntarily enter a world known for violence, drugs and death will also fail, however, given the Court's rejection of that argument in *Insite*. If the goal of minimizing harm to prostitutes is the Court's objective, the remedy will include decriminalizing the prostitution laws which endanger prostitutes but enforcing those which do not.

In conclusion, the judicial preference for a harms-based approach to interpreting *Charter* rights over pure policy is not new. It has been around since the early days of *Charter* jurisprudence and has required the Court to employ the full gamut of remedies. Sometimes legislation has been upheld (see *Butler*, Keegstra, *Taylor*), and other times it has been struck down or re-interpreted (*Morganthaler, Butler).* Where a legislative omission is discriminatory and causes harm, the SCC has not hesitated to read-in or read-down provisions (*Vriend*). The *Insite* decision indicates that Ministers of the Crown do not have absolute discretion in exercising their statutory powers. They must exercise them consistent with *Charter* principles.

The gap between research and policy has always been a problem for lawmakers, especially when the gap is a result of ideological conviction taking priority over scientific evidence (Kora Debeck, Thomas Kerr, *The Use of Knowledge Translation and Legal*

Proceedings to Support Evidence-based Drug Policy in Canada: Opportunities and Ongoing Challenges, Open Medicine, Vol.4, No. 3 (2010)). The government failed to utilize scientific evidence to inform public policy in the *Insite* case, instead preferring to focus their attention on the immorality of drug use. On the other hand, the Supreme Court adopted a deeply contextual approach, analyzing public health and safety through examining all the surrounding circumstances as well as all of the scientific evidence. What the evidence showed the Court was that the harm reduction policy underlying the *Insite* faculty was working better than the punitive, morality-driven, "war on drugs" policy that the governing Conservative Party favored.

When policy makers implement less than optimal programs and services because they base their decisions on morality rather than on the best available evidence, negative impacts are felt the most strongly in already marginalized groups such as drug addicts, the poor, sexual minorities, prostitutes, and racial, ethnic and religious minorities. If good governance is understood as providing greater protection of fundamental rights and freedoms, the challenge for policy makers should be to identify strategies that can support the implementation of evidence-based policies to deal with all health issues including those with moral dimensions such as HIV/AIDS prevention, teen sexuality or prostitution. The *Insite* decision should be welcomed because it has moved the country one step further down that road.