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A COMMENT ON THE INSITE DECISION – *CANADA (ATTORNEY GENERAL) V. PHS COMMUNITY SERVICES SOCIETY*, 2011 SCC 44

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One of the most interesting cases to come out of the Supreme Court of Canada this past term is of course the Insite decision. Insite is the infamous safe injection site located in the Downtown Eastside of Vancouver. Since 2003 it has enjoyed an exemption from the criminal laws in the *Controlled Drugs and Substances Act*, exempting its employees from prosecution for the possession of narcotics. In 2008, the current federal government refused to renew the exemption, thus setting forth a legal battle that ultimately made its way to the Supreme Court of Canada. The result in this case is not particularly surprising. According to the factual record, accepted by each of the courts who considered the case, Insite, simply put, saves lives. What is most interesting, from my perspective, is the basis upon which the Supreme Court of Canada decided this case, and the remedy it ultimately granted.

Unlike the judges in the courts below, the Chief Justice was unable to conclude that the *Controlled Drug and Substances Act* itself, either on its own or in its application to Insite, violated section 7 of the *Charter*, and therefore refused to strike the law. Instead, she held that the *actions* of the federal Minister of Health – who at the time was Tony Clement – in refusing to exercise his discretion to extend Insite's exemption, violated s. 7 and could not be justified by s. 1. Rather than sending the matter back to the Minister for reconsideration, as is common practice in the administrative law context and particularly with respect to discretionary decisions, she ordered, by way of *mandamus*, that the Minister grant Insite's extended exemption.

Despite being decided on this narrower ground, the Chief Justice's use of strong language cannot be interpreted as anything other than a rebuke of the Minister's decision, particularly in light of the overwhelming evidence indicating that the program's benefits had been proven and that Insite saves lives. She called the decision "arbitrary and grossly disproportionate in its effects, and hence not in accordance with the principles of fundamental justice." Rather than undermining the goals of public health and safety, which animate the *Controlled Drug and Substances Act*, the exemption furthers those goals. Failing to extend the exemption actually put Insite's clients' health and lives at risk, which is a serious infringement of the s. 7 right. As to remedy, she held that a simple declaration would be inadequate. The only constitutional response to the request for the exemption is to grant it, and there was "nothing to be gained (and much to be risked) in sending the matter back" for reconsideration.

From a practical perspective, the Insite decision should prompt administrative law lawyers, when faced with a situation where their client's constitutional rights are engaged, to consider challenging the constitutionality of the administrative act itself, and not simply the statute authorizing that administrative act. This case is also a good reminder of how important it is to provide a solid evidentiary basis for constitutional claims. The plaintiffs in this case should be commended for doing just that.

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