

# Safe Injection Site Goes To Court

The Portland Hotel Society (“Society”) and the Vancouver Area Network of Drug Users (“VANDU”) are preparing to challenge the possible closing of Vancouver’s supervised safe injection site, Insite. Following the 10-day summary trial, which is presently underway, Justice Ian Pitfield will decide whether a full trial is necessary. Two central questions are shaping the trial: first, does the federal government have jurisdiction over the program? Second, does closing down Insite entail a breach of s. 7 of the Charter of Rights and Freedoms (“Charter”)?[1]

The facility has been operating, since 2003, under an exemption provided in s. 56 of the Controlled Drugs and Substances Act. The exemption was initially for a 3-year term, but was renewed until June 30, 2008.[2] Section 56 provides that:

The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.[3]

The federal government has deemed Insite a pilot project for medical and scientific evaluation.[4] The program’s purpose has not been to prevent drug use. The objective is, rather, to determine whether the site promotes public order and reduces harm, in a broader context.[5] Another facility, the Dr. Peter Centre of Vancouver for individuals with H.I.V./A.I.D.S, has been operating without the permission of the federal government. It is not a scientific study, but the director of the Centre suggests that its legitimacy is derived from the standard of care expected of nurses by the province. The director feels that supervision of injections to prevent death and sickness, as well as to promote health, is mandated by B.C. legislation regulating health care professionals.[6] B.C. Health Minister George Abbott has given strong indications, although no confirmation, that the facility may operate even if the federal government does not renew the exemption.[7]

Both the Society and the VANDU will contend, at trial, on behalf of those addicted to illicit drugs, that the federal government does not have jurisdiction over the matter, because it is a health-care facility. [8]

A report for the Senate Special Committee on Illegal Drugs, written in 2001, states that the provinces have largely acquired authority over public health matters.[9] In 1982, the Supreme Court decided, in *Schneider v. The Queen* (“Schneider”),[10] that public health should be read into s. 92(16) of the Constitution Act, 1867, which gives provinces jurisdiction over local and private matters.[11] By extension, the court found that the British Columbia Heroin Treatment Act, a piece of provincial legislation, was *intra vires* provincial jurisdiction, on the grounds that it dealt with treatment of addicts, not control of narcotics.[12] Section 92(7), which gives the province authority over hospitals, and s. 92(13), which concerns property and civil rights, have also been used as important grounds

for establishing provincial authority over health legislation.[13] In a more recent decision, *RJR MacDonald Inc. v. Canada* (1995), the Supreme Court ruled that the regulation of tobacco companies, in relation to health, falls under the federal authority over criminal law.[14] The decision has expanded the scope of the criminal law power in relation to healthcare, making jurisdiction over drugs and their effect on health, less clear.[15] The groups advocating for drug addicts will present an argument in line with the *Schneider* ruling: prohibitive drug laws should not apply to users while they are undergoing treatments.[16]

John Hunter, a lawyer for the federal government, has argued before the B.C. Supreme Court that if the exemption becomes permanent, the effect would be to grant a constitutional right to use illicit drugs.[17] The renewal of Insite, he suggests, is a political, not legal issue.[18]

Much scientific evidence has been accumulated in an attempt to assess the outcomes of the facility on the public. The evidence is being used to help make decisions about the facility's fate. On the negative side, some evidence shows that less than 5% of illegal drug injections occurring in the neighbourhood are conducted at the facility.[19] It has been suggested that drug users in the Downtown Eastside avoid the area because of the inconvenience involved in scheduling and in following the requirements of the program. A panel of experts, commissioned by the federal government to review the evidence, stated that the results are mixed. In particular, they found that no change in crime rates could be detected.[20] On the other hand, the committee acknowledged that the site had improved public order, reduced H.I.V. risk behaviour, and encouraged people to get treatment. It also found that about one life a year is saved through overdose intervention and that the public speaks highly of the facility.[21]

The second argument being put forward by the Society is that closing down Insite will violate the users' right to "security of the person." Section 7 of the Charter states that:

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.[22]

In *R. v. Morgentaler* (1988), it was decided that security of the person refers to both the psychological and physical elements of an individual's well-being. Any "serious state-imposed psychological stress, at least in the criminal law context, constitute[s] a breach of security of the person." [23]

The team defending Insite will argue that Parliament's approach to prohibition is often detrimental to individuals, causing the opposite effect of what the law intends. In some cases, the lawyers argue, the law may contribute to deaths or encourage the avoidance of healthcare that leads to psychological stress rising above constitutionally acceptable levels.[24]

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- [1] CTV.ca, "Charter doesn't protect addicts' rights: lawyers" (7 May 2008):
- [2] Ibid.
- [3] Controlled Drugs and Substances Act, S.C. 1996, c. 19, online.
- [4] Petti Fong, "Addicts sue Ottawa, seeking legal status for injection site" (29 April 2008). Toronto Star. Page A17.
- [5] Brian Hutchinson, "'Social Revolution' nears its expiry date" (7 May 2008) National Post. Page A1.
- [6] David Carrigg, "Insite could run without feds' OK" (29 October 2007) The Province, online.
- [7] CTV.ca, "Safe injection facility in Vancouver in the limelight" (April 14, 2008), online.
- [8] Ibid.
- [9] David Goetz, "[Drug Prohibition and the Constitution](#)" (1 March 2001), online.
- [10][1982] 2 S.C.R. 112, online.
- [11] Supra note 9.
- [12] Supra note 10 at para. 48.
- [13] Supra note 9.
- [14] RJR-MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199, online.
- [15] Martha Jackman, "Constitutional jurisdiction over health in Canada" (2000) 8 Health Law Journal 95 at 101.
- [16] Ian Mulgrew, "Drug laws tested this week in B.C. Supreme Court" (28 April 2008) Vancouver Sun. Page B1.
- [17] Supra note 4.
- [18] Supra note 1.
- [19] Supra note 5.
- [20] Ibid.
- [21] Supra note 7.
- [22] [Canadian Charter of Rights and Freedoms](#), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 7, online.
- [23] R. v. Morgentaler, [1988] 1 S.C.R. 30 at para. 22, online.
- [24] Supra note 16.