

Constitutional  
*forum*  
constitutionnel

 CENTRE *for* CONSTITUTIONAL STUDIES  
*Centre d'études constitutionnelles*



# Constitutional Forum constitutionnel

## *Managing Editor:*

- Patricia Paradis

## *Student Editor:*

- Anna Kurachineva

## *Production:*

- Leanna Parker

For information about subscriptions and back issues, contact:

Theresa Percheson  
tpercheson@law.ualberta.ca  
(780) 492-5681

or online at: [www.law.ualberta.ca/centres/ccs](http://www.law.ualberta.ca/centres/ccs)

*Constitutional Forum constitutionnel* is published by the Centre for Constitutional Studies/Centre d'études constitutionnelles with the generous support of the Alberta Law Foundation.

Alberta **LAW**  
FOUNDATION

**Indexed in:** Index to Canadian Legal Periodical Literature; Index to Canadian Legal Literature; Current Law Index; CPI.Q.; Legal-Trac; and is available through HeinOnline and Academic Search Complete.

ISBN: 978-0-9811751-5-7  
PUBLICATION MAIL AGREEMENT #4006449667

## *Centre for Constitutional Studies*

### *Board of Directors:*

- Eric Adams
- Peter Carver, Chair
- David Cooper
- L. Christine Enns
- Judith Garber
- Lois Harder
- Donald Ipperciel
- Janet Keeping
- Ritu Khullar
- Oryssia Lennie
- Bronwyn Shoush

### *Staff:*

- Patricia Paradis, Executive Director
- Theresa Percheson, Administrator

Centre for Constitutional Studies  
448D Law Centre  
University of Alberta  
Edmonton, AB T6G 2H5  
Canada  
(780) 492-5681 (phone)  
(780) 492-9959 (fax)  
[ccs@law.ualberta.ca](mailto:ccs@law.ualberta.ca)  
[www.law.ualberta.ca/centres/ccs](http://www.law.ualberta.ca/centres/ccs)

 CENTRE for CONSTITUTIONAL STUDIES  
*Centre d'études constitutionnelles*

## Submissions

*Constitutional Forum constitutionnel* publishes works, in English or French, of interest to a broad readership. We welcome essays, original research, case comments, and revised versions of oral presentations pertaining to constitutions and constitutionalism. Manuscripts addressing current issues and cases are particularly encouraged.

Submissions should be 3000–6000 words in length and can be accepted as Word or WordPerfect files. The final decision about publication rests with the Editor.

### Article Submission

Submissions and inquiries about publication should be directed to the Editor:

Patricia Paradis  
Centre for Constitutional Studies  
448E Law Centre  
University of Alberta  
Edmonton, AB T6G 2H5  
Canada

pparadis@law.ualberta.ca  
(780) 492-8281

### Format

The text of all manuscripts should be double-spaced, with margins of at least 1 inch on all sides.

### Citations

*Forum* citation style is based on the *Canadian Uniform Guide to Legal Citation (McGill Guide)*, 7th ed., but generally avoids abbreviations. When referencing court rulings, wherever available include parallel citations to free online sources (CanLII, FindLaw, BAILII, etc.) in addition to citations to printed reporters. Wherever possible, please cite paragraphs rather than page numbers.

The official style sheet for *Constitutional Forum constitutionnel* is available at:

<http://www.law.ualberta.ca/centres/ccs/Journals/Submissions.php>

### Spelling

Follow the *Canadian Oxford Dictionary* for English spelling; for French spelling, follow *Multidictionnaire de la langue française*, 4e éd.

### Usage and Style

For submissions in English, follow *The Chicago Manual of Style*, 16th ed.; for submissions in French, follow *Multidictionnaire de la langue française*, 4e éd.

Please note that manuscripts that do not conform to the fundamentals of *Forum* style may be returned to the authors for revision.

## A Note on Sources

Increasingly, legal materials are available online through free services offered by Legal Information Institutes (LIIs)/Instituts d'information juridique (IJs) as well as by courts themselves. One can search for and obtain court rulings (and related briefs, transcripts of oral arguments, etc.), legislation, constitutions, and other official documents or secondary sources. The more recent the materials, the more likely that they can be retrieved through a LII site.

In *Constitutional Forum constitutionnel*, endnote references to court rulings indicate whether the case is available from a free online source by the presence of a LII reference in the case citation (or a reference to a similar database). Unless otherwise indicated in the endnote, the reference is to material in English or French.

Databases include:

- CanLII (Canada) <<http://www.canlii.org>> (English)
- IJCan (Canada) <<http://www.ijcan.org>> (français)
- LexUM (Canada) <<http://www.lexum.umontreal.ca>>
- LII (United States) <<http://www.law.cornell.edu>>
- SCOTUS (United States Supreme Court) <<http://www.supremecourtus.gov>>
- FindLaw (United States) <<http://www.findlaw.com/casecode/>>
- BAILII (British, Irish, and European Union) <<http://www.bailii.org>>
- CommonLII (Commonwealth) <<http://www.commonlii.org>>
- SAFLII (Southern Africa) <<http://www.saflii.org>>
- Droit francophone (La francophonie) <<http://portail.droit.francophonie.org>>
- HKLII (Hong Kong) <<http://www.hklii.org>>
- AustLII (Australasia) <<http://www.austlii.edu.au>>
- PacLII (Pacific Islands) <<http://www.paclii.org>>
- NZLII (New Zealand) <<http://www.nzlii.org>>
- WorldLII covers some additional countries and links to all LII services <<http://www.worldlii.org>>

Dozens of individual countries' legal databases can also be accessed through WorldLII <<http://www.worldlii.org/catalog/2172.html>>.



# *table of contents*

85	<b>Introduction</b> <i>Rebecca Johnson</i>
	<b>Part 1—Insights on Insite</b>
87	<b>Insite: Site and Sight</b> <i>Margot Young</i>
93	<b>Jurisdictional Justice, Democracy and the Story of Insite</b> <i>Hester Lessard</i>
113	<b>Insite: Right Answer, Wrong Question</b> <i>Gillian Calder</i>
119	<b>Applying the Burden of Proof and Creating Connections to Communities</b> <i>Patricia Cochran</i>
125	<b>Section 7, <i>Insite</i> and the Competence of Courts</b> <i>Jeremy Webber</i>





*table of contents*  
*continued*

**Part 2—Some Pedagogical Insights**

- 131**      **Lost in Translation: Social Realities,  
*Insite*, and the Law in Legal Education**

*Tim Richards*

- 135**      **Some Pedagogical Reflections**

*Freya Kodar*

- 139**      **Pedagogies of Mapping**

*Rebecca Johnson*



# Introduction

Rebecca Johnson\*

In Vancouver's downtown eastside, just down from the Carnegie Community Centre on East Hastings Street, stands Insite. Funded by Vancouver Coastal Health, Insite is a supervised safe injection site for illegal drug users—currently the only such site in North America. It is also at the centre of a heated political and legal struggle over the boundary between health and crime. In *PHS Community Services Society v Canada (AG)*,<sup>1</sup> the courts have been articulating that struggle in the language of federalism, division of powers and interjurisdictional immunity. Insite, in the courtroom and in the media, raises a host of questions not only about the boundaries of provincial and federal powers, but also about drugs, harm, crime, health, poverty, community, the economy, urban planning, equality, epidemiology, social programming, race, gender, coalition building and municipal politics. Quite the menu of legal, social, and political possibility.

In this Issue of *Constitutional Forum*, we have drawn together a series of papers that were generated in the context of a pedagogical encounter at the University of Victoria, one that had students and faculty engaged in a collective exploration of the *Insite* case.<sup>2</sup> In the fall of 2009, at the end of the first two weeks of school, first year students in the introductory Legal Process course were given the trial judgment in *PHS Community Services Society v Canada (AG)* as a case briefing assignment: identify the facts, the issue, and the ratio of the case. The students returned to the case in January 2010 for the second module of Legal Process, one designed to provide space for a richer exploration of the case in its broader social context. Over the course of two days, with the benefit of the insights they had gained during their first semester of classes, the students returned to *PHS*

*Community Services*. They read more broadly about the case, watched a number of documentaries on Insite, and listened to a panel of politicians, activists, lawyers and health experts grappling with the challenges of drug use in Vancouver's Downtown Eastside (DTES). The B.C. Court of Appeal's judgment in the case was released the day after the Legal Process module was finished. With both students and faculty freshly immersed in the issues of the case, there was energy for yet a third return to the case the following week in the form of a panel in which 6 faculty members took a few moments to share "5 Minutes of Insight on Insite."<sup>3</sup>

For this issue of the *Constitutional Forum*, we offer 8 reflections generated by those involved in some way with this collective encounter with thinking, teaching and learning through the *Insite* case. In Part 1, "Insights on Insite," we offer a series of comments on substantive and jurisprudential questions raised by *PHS Community Services*. We begin with Margot Young's reflection on the intersection of site and sight, in which she asks about the visibility of the challenges of those living in the DTES.<sup>4</sup> Hester Lessard follows with a longer piece generated by her earlier panel presentation, providing an in-depth exploration of the trial and appeal judgements, and asking about the place of legal geography in our notions of jurisdictional justice. She is followed by Gillian Calder, who links the approach taken by the judges in this case to doctrinal trends about the division of powers visible in other cases involving equality seeking groups. Patricia Cochran next asks us to consider questions about evidence and the burden of proof raised in the *Insite* case. Finally, Jeremy Webber poses questions about the relationship between our substantive judgments about complicated social issues and the ways in

which our institutions of judgment are set up to structure our approaches to political and legal decision-making.

In Part 2, “Some Pedagogical Insights,” we share three comments on the use of the *Insite* case to teach Legal Process. We begin with a paper from Tim Richards, who created and coordinated the teaching unit for the first year curriculum. Here, he reflects on the challenges of integrating social context into the teaching of law. After that, Freya Kodar provides reflections on the range of pedagogies used in the teaching of *Insite*. Lastly, Rebecca Johnson reflects on one particular pedagogical approach—the mapping exercise—that was used to engage students in thinking more broadly about the rich context within which the legal issues surrounding *Insite* are embedded.

For those with a taste for longer discussions of pedagogy, many of the materials used to teach the *Insite* case can be found at <http://insite.law.uvic.ca>. So too can be found the script of a short play, *WAITING FOR GODOT GABOR INSITE-INSIGHT: a play in three parts (with apologies to Samuel Beckett)*. In this play, Sarah Arngna'naaq, Liam Cooper, and Zuzana Modrovic ( a group of students from that Legal Process class) meditate on the ways in which the experience of the *Insite* case has provided space for creative legal resonances. While the play script does not, perhaps, provide resolution, it opens space for thinking about the ways we wait for Justice (with all the inevitable controversies about what that means) to arrive.

It is clear that the issues raised by the *Insite* case are still far from settled in either the courts of law, or public opinion. The Supreme Court of Canada has granted leave to appeal and is scheduled to hear arguments in May 2011. As the wheels of justice prepare to engage in a third round of deliberations on *Insite*, the issues will again be debated, law will be re-articulated, and facts re-inscribed. We hope that this Issue will raise interesting questions, and contribute to a robust discussion of the place of law and the constitutional shape of experience on the streets of the cities and town in which we live.

## Notes

- \* Professor, Faculty of Law, University of Victoria.
- 1 *PHS Community Services Society v Canada (Attorney General)*, 2010 BCCA 15, 314 DLR (4<sup>th</sup>) 209, rev'g 2008 BCSC 661, 293 DLR (4<sup>th</sup>) 392, leave to appeal to SCC granted, 33556 (June 24, 2010) [*Insite*].
- 2 The course involves splitting the entering class of 100 into 5 small groups of 20, each of which is co-supervised by a group of 3 first year professors over the two week duration of the course. The result is that almost the entire first year faculty is involved in teaching the course. A set of materials from the course is available on line at <http://insite.law.uvic.ca>.
- 3 **At the original panel, students listened to Andrew Petter** discuss the different norms, assumptions and conceptions of community embedded in the three decisions. Nola Ries explored the role of judges in the context of cases involving questions of health policy, and Benjamin Berger focused on the bluntness of both constitutional law and criminal law for addressing complicated social questions, and about the way law (particularly when engaging with the brutality of criminal punishment) may cause more harm than good. The students also heard from Gillian Calder, Hester Lessard and Jeremy Webber, whose contributions are included in this issue.
- 4 While UBC can rightfully claim her as part of its faculty, Margot Young has regularly participated in the Legal Process course as a guest lecturer, and was thus drawn into the discussions here.



# Part 1—Insights on Insite

## *Insite: Site and Sight*

Margot Young\*

### Introduction

The *Insite* case is a great study for students of constitutional law.<sup>1</sup> The twinning of a claim of interjurisdictional immunity—in a somewhat novel application to provincial jurisdiction—to the assertion by some of Canada’s most marginalized citizens of the fundamental freedoms of life, liberty, and security of the person delivers a compact and compelling recitation of basic features of Canada’s constitutional landscape.

But a different landscape beckons from beyond this jurisprudential wrangling.<sup>2</sup> It is the landscape of the Vancouver’s Downtown Eastside (DTES)—a geography of spatial outcomes that reflects balances of economic and social power and displacement. This place has a specific demography and is shaped by particular sets of social conflict and cohesion.<sup>3</sup> The landscape is inner city and urban, a material outlook that is among the poorest in North America, and a symbolic vista that signals the multiple blights of race, gender, culture, and class oppressions of 21<sup>st</sup> century capitalism. In this latter sense, the term “landscape” “refers to an ensemble of material and social practices and their symbolic representation.”<sup>4</sup> In the former sense, the term captures the physical layout and use of space in this urban core. Thus, “landscape” signifies both “a physical environment and . . . a particular way of seeing a space.”<sup>5</sup> It is both “site and sight.” Both aspects are useful in thinking about the social geography that underlies

the legal argument and about how rights to citizenship so often instantiate in property and space. As Sharon Zukin remarks, “landscape is the most important product of both power and imagination.”<sup>6</sup>

The purpose of my comment is to link the case’s jurisprudential allure back to the local politics and activism out of which the legal argument sprang. What aperçus I have to offer about *Insite* focus primarily on reflections that centre thinking about geography and its margins, space, politics, and law.

### Site

The *Insite* case concerns North America’s first supervised injection site (SIS). *Insite* was opened on September 12, 2003, by Vancouver Coastal Health, in partnership with the Portland Hotel Society.<sup>7</sup> *Insite* responds to injection drug-related issues in Vancouver’s Downtown Eastside.<sup>8</sup> The injection clinic provides a range of services to injection drug users, including clean needles and a safe and supervised space to inject drugs. It also has association with *Onsite*, a detox unit located in the floor above *Insite*. While there are today over 75 SISs operating around the world, Vancouver is the only municipality on the continent with a sanctioned SIS.<sup>9</sup>

As a physical place on East Hastings Street in the DTES, *Insite* is significant. Cultural capital exists in real spaces: “a building is never just

a building.”<sup>10</sup> The legal challenge in the *Insite* case rests on an important allocation of urban property, an allocation that has a role in shaping the social relations of the city. *Insite* locates and makes concrete (literally) a shifted balance of cultural and political capital in the DTES. It is a space for injection drug users, geared singularly and specially to their health and social needs. The municipal, provincial and federal governments have all contributed funds to the opening and maintenance of *Insite*. Its spatial presence is a product of a redistribution (however slight) of resources to the injection drug addict population of the DTES.<sup>11</sup> Thus the space of *Insite* may be relevant to local peoples’ “sense of . . . belonging.”<sup>12</sup> The use of property in this manner, in the DTES, reflects collective possibilities of entitlement to space meaningful to a very vulnerable group that is itself central to the character and composition of the DTES.<sup>13</sup> Thus *Insite* is about urban property and its “acceptable” uses for different groups of residents. The case and the site mean that, to quote Nicholas Blomley slightly out of context, at least some of the “politics of urban property . . . have been forced to the surface.”<sup>14</sup>

The presence of *Insite* stands in complicated contrast to another spatial shift—gentrification—in the DTES. Both gentrification and the supervised injection site can be understood as the spatialization of consumption<sup>15</sup>—the former in terms of 21<sup>st</sup> century capitalism and the latter, perhaps more literally, in terms of injection drugs. Both spatial shifts generate controversy.

The space that *Insite* occupies has a story. It is a story that illustrates just how focal the physical location of *Insite* is in the struggle for safe injection rights. The current location comes out of an unplanned encounter between two Portland Hotel Society (PHS) supporters and a sandwich shop proprietor out sweeping the sidewalk of his shop. For 22 years, this shop owner and his wife had run the sandwich shop, living above it on the second floor and renting out the remainder of the building to hard-to-house tenants. An agreement was reached that the PHS would lease the space for a supervised injection site; the sandwich shop closed and renovations began to create *Insite*. The PHS spent

\$30,000 on these renovations until the space—nicknamed “the hair salon” because of the resemblance of its injection booths to salon stations—was ready, awaiting legal approval. Thus, the establishment of the space came before legal status and its presence, empty but ready, was impetus to the politicians working out their agreements.<sup>16</sup> It sat for some considerable time as a material reminder of, and “nudge” for, the political goal of opening an official supervised injection site.<sup>17</sup> While a practical and pragmatic step in the march to a supervised injection site, it was also a “politicized claim to space,”<sup>18</sup> arguably instrumental to obtaining the legal status sought for *Insite*.

The physical establishment of *Insite* also confounds the division of public and private space in the DTES. One issue *Insite* addresses is the absence of private space that is available for the drug users serviced by *Insite* to shoot up in. These people are poor and, if not homeless, then most likely insecurely and inadequately housed. Thus access to private space and the private resources of such space (such as clean water) for injection is certainly limited. Injection sites for those without rights to private property are necessarily public sites—alleys, parks, and so on. In this manner, the private needs of addicts in the DTES must play out in public space. This is not unique to injection drug users; it is a feature of how the private overlays the public for the homeless. But *Insite* caters to the private necessities of drug injection, albeit in another public space, and so creates inside each injection booth a moment of private space. Some drug users take advantage of the moment, stretching out in this space, a pause from their more exposed existence in other public spaces.<sup>19</sup> In this manner, also, then, the physical space of *Insite* is important. It removes from a more public presence and gaze the intimate and personal acts of drug injection.

## Sight

The point about private space, however, should not be overstated nor singularly understood. Injection is supervised inside *Insite* and takes place in a relatively large, open, well-lit and populated space. The visibility of the act of injection

tion in Insite is what makes it a supervised and thus a safer injection site. So “sight” and being public are as important to the objectives of Insite as is the physical “site” of Insite. This lends a strong public or at least non-private caste to the injection.

The notion of “sight” is important more largely. Insite, as an institution, changes the political and social visibility of injection drug users in the DTES, at least as a group with legitimate collective needs and claims on the polity. And this presence, marked by the building, its signage, and the cluster of drug users outside its doors, is a more focused, public, political presence. Insite lends injection drug users in the DTES an enhanced claim not merely to physical space but also to political space. It potentially enlists the private property of the site in aid of a larger political goal of putting injection drug addicts “in the sight of” policy-makers and governments.

In a piece on the Ontario anti-squeegee law, Janet Mosher writes about the importance of visibility to ensure that the disposed or marginalized occupy political space in dominant political agendas and in the social consciousness of citizens.<sup>20</sup> Ironically, giving the injection drug users of the DTES a more private place to inject grants this group an enhanced political visibility in the sense Mosher indicates, although she writes of public dispersed visibility. The discomfort this visibility generates creates possibilities for political change and action. The sight of Insite—its concentration of the drug-addicted and the marginalized—is politically important.

Insite also represents a change in the conceptualization of injection drug addiction and of responses to it. It represents the re-articulation of injection drug addiction as a health issue and of supervision of injection as a healthcare service. Thus, Insite also symbolizes a public reframing of issues around injection-drug addiction and use in the DTES. In this way, its space “structures metaphorically” through the visibility it lends the issues of injection-drug addiction in the DTES and how it reminds us by its presence of the healthcare needs of this population.<sup>21</sup> The site and sight of Insite locate a shift in the politi-

cal landscape of the DTES and its population of injection drug users.

## The Just City

Cities in this century have “new dynamics of inequality,”<sup>22</sup> a “valorization of certain spaces and people, and the simultaneous but interlocking devalorization of those deemed marginal, such as immigrants and the urban poor.”<sup>23</sup> In this sense, cities are places of contested citizenship.<sup>24</sup> The notion of a just city envisions “a harmonious and just urban form, in contrast to neo-liberal efforts to reshape civic life by narrowly proscribing active citizenship.”<sup>25</sup> The concept captures the struggle against “an increasingly exclusionary urban environment.”<sup>26</sup> Thus, creating and maintaining public space and private space reflect neo-liberal urban politics. We see, for example, how public space is subject to intensified policing as the homeless and the poor are evicted from or squeezed into narrower patterns of occupation of these spaces.<sup>27</sup>

Perhaps, we can understand the political and now legal struggle about Insite as an assertion of what David Harvey in an influential *New Left Review* article has discussed as “the right to the city.” Harvey describes this right as “the right to change ourselves by changing the city.”<sup>28</sup> Formulation of such a collective right rests on the understanding that it is through the city—the process and outcomes of urbanization—that we “re-make . . . ourselves.”<sup>29</sup> The political or social movement out of which the *Insite* case emerges attempts to “reshape the city in a different image,”<sup>30</sup> to rethink urban citizenship such that a more inclusive urban environment is offered to injection drug users. It is to claim, by the marginalized, a right to exist and exert agency in city spaces.<sup>31</sup> Policies and practices at large in the city shape urban opportunities and help citizenship be achieved more broadly.<sup>32</sup>

So the struggle to open Insite in the DTES is, perhaps, understandable as a “spatialization of rights” and a claim to more active citizenship by injection drug users.<sup>33</sup> Henri Lefebvre talks of the social production of space: that is, that social practices and regulations shape space. In this case, the use of the storefront



for Insite changes the social significance of the space and folds a particular set of social relations and meanings into the larger community. Insite's presence shifts the DTES as a community, altering associations and understandings of that community. Allocation of space to Insite communicates a set of moral and political meanings.<sup>34</sup> Insite instantiates localized agency working to shape the material and symbolic landscapes of the city.<sup>35</sup> Thus, the establishment of Insite shows that the city is a key site for the struggles of the dispossessed.

In sum, *Insite*, the legal case, enters the judicial fray trailing a rich and evocative tale of local activism and politics. The struggle for Canada's first legally sanctioned safe injection site<sup>36</sup> has been hard-fought, and the opening of Insite is both a symbolic and a practical victory. The case thus presents a legal moment in a much longer and more complex social and political struggle over the rights and life chances of groups significantly marginalized and disadvantaged in Canadian society generally, and in the urban life of the city at issue in particular. It also illustrates that a strong feature of the DTES is "a long history of activism and opposition" and assertion of community and right in the face of condemnation as marginal and anomic.<sup>37</sup> The DTES is a "contested landscape"<sup>38</sup>; Insite is a piece of this.

These issues of urban politics and space translate into legal argument about rights and jurisdiction. Legal arguments, particularly those employing "rights talk," are salient currency in aid of the politicized claim to space and a richer social citizenship. But the matrix of site and sight shapes these arguments. Judicial analysis in the case, at both levels of court, raises interesting opportunity for scholarly observations about the connection (or disconnection) between social activism and legal activism and the city. This narrative about injection drug addicts and supervised safe injection sites, and its judicial articulation and endorsement opens up space, perhaps, for enhanced citizenship rights for injection drug users.

## Notes

- \* Associate Professor, Faculty of Law, University of British Columbia.
- 1 *PHS Community Services v Canada (Attorney General)*, 2008 BCSC 661, 293 DLR (4<sup>th</sup>) 392, rev'd 2010BCCA 15, 314 DLR (4<sup>th</sup>) 209, leave to appeal to SCC granted, 33556 (June 24, 2010) [*Insite*].
- 2 Sharon Zukin, *Landscapes of Power: From Detroit to Disney World* (Berkeley: University of California Press, 1991). Zukin notes the ubiquity of the term "landscape," which I illustrate by my use of the notion to capture both the range of constitutional law and the social and geographic features of Vancouver's inner city.
- 3 See Zukin for a more general discussion of place as a geographical location, place as a form of local society, and place as a cultural artifact of social conflict and cohesion. *Ibid* at 12.
- 4 *Ibid* at 16.
- 5 Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004) at 37.
- 6 Zukin, *supra* note 2 at 268.
- 7 The program was supported by the Vancouver Police Department, the City of Vancouver, the Province of British Columbia, injection drug users, community groups, academic institutions, and others.
- 8 Insite provides a number of services. Specifically, it is staffed by a combination of clinical and non-clinical staff, including peers, program assistants, registered nurses, addictions counselors and co-ordinators. It is open 18 hours a day, seven days a week: 10 a.m. to 4 a.m. Its injection room has 12 booths with a daily capacity of roughly 850 injections. Drugs are not provided, injections are supervised, and emergency response to overdoses is available. The staff offers immunization and wound care, and injection-related first aid. Referrals to addiction treatment and other health services are available, accompanied by harm reduction institution and access to sterile injection equipment. Insite provides a post-injection space for observation and peer interaction. See Vancouver Coastal Health Authority, *Saving Lives: Vancouver's Supervised Injection Site* (Brochure) at 2, online: Legislative Library Services, Legislative Assembly of British Columbia <[http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/458493/insite\\_brochure.pdf](http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/458493/insite_brochure.pdf)>.
- 9 Government of British Columbia, Ministry of Healthy Living and Sport, Fact Sheet, *North America's First Supervised Injection Site*

- (Factsheet) (February 1, 2010), online: Housing Matters BC [http://www.housingmattersbc.ca/docs/dtes\\_insite.pdf](http://www.housingmattersbc.ca/docs/dtes_insite.pdf).
- The Netherlands, for example, opened several sites in the 1970s. See Larry Campbell, Neil Boyd & Lori Culbert, *A Thousand Dreams: Vancouver's Downtown Eastside and the Fight for Its Future* (Vancouver: Greystone Books, 2009) at 177. In Switzerland, a Zurich site in 2003 also had a restaurant that employed addicts, a laundromat, public computers, and a medical team to attend to clients. As well, it had an inhalation room for addicts who smoked drugs (*ibid* at 178).
- 10 Blomley, *supra* note 5 at 46.
  - 11 See generally Zukin, *supra* note 2 at 267.
  - 12 *Ibid* at 268.
  - 13 Blomley, *supra* note 5 at 153.
  - 14 *Ibid* at xviii.
  - 15 Zukin, *supra* note 2 at 269.
  - 16 This story comes out of Campbell, Boyd & Culbert, *supra* note 9 at 173.
  - 17 While this official site-in-waiting sat empty, activists had opened an illegal injection site at another location in the DTES. The illegal site was monitored by the police but not shut down. It closed when the official site opened in September 2003. *Ibid* at 180.
  - 18 Blomley, *supra* note 5 at 59.
  - 19 Personal conversation with Insite staff by author, Summer 2010.
  - 20 Janet Mosher, "The Shrinking of the Public and Private Spaces of the Poor" in Joe Hermer & Janet Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood, 2002) 41 at 41.
  - 21 Zukin, *supra* note 2 at 268.
  - 22 Saskia Sassen, "The Global City: Strategic Site/New Frontier" in Engin F Isin, ed, *Democracy, Citizenship and the Global City* (New York: Routledge, 2000) 48 at 52.
  - 23 Blomley, *supra* note 5 at 31.
  - 24 See e.g. Penny Gurstein and Silvia Vilches, "The Just City for Whom? Re-conceiving Active Citizenship for Lone Mothers in Canada" (2010) 17:4 *Gender, Place and Culture* 421 at 423.
  - 25 *Ibid* at 422.
  - 26 *Ibid* at 423.
  - 27 Blomley, *supra* note 5 at 31. Also, see generally Hermer and Mosher, *supra* note 20.
  - 28 David Harvey, "The Right to the City" (2008) 53 *New Left Review* 23 at 23, online: <<http://www.newleftreview.org/?view=2740>>.
  - 29 *Ibid*.
  - 30 *Ibid* at 33.
  - 31 Blomley, *supra* note 5 at 423.
  - 32 *Ibid* at 432.
  - 33 *Ibid*. See generally Ute Lehter and Andrea Winkler, "Public or Private? The Pope Squat and Housing Struggles in Toronto" (2006) *Social Justice*, online: <[http://findarticles.com/p/articles/mi\\_hb3427/is\\_3\\_33/ai\\_n29330385/pg\\_2/?tag=content;coll1](http://findarticles.com/p/articles/mi_hb3427/is_3_33/ai_n29330385/pg_2/?tag=content;coll1)>.
  - 34 Blomley, *supra* note 5 at 76.
  - 35 *Ibid* at 59.
  - 36 Indeed, Insite is North America's only legally sanctioned supervised safe injection site. Importantly, however, Insite is not Vancouver's only supervised safe injection site. The Dr. Peter AIDS Foundation, an HIV/AIDS health-care facility in Vancouver, has for some time allowed its registered nurses to provide supervised injection services without formal legal sanction, in this case a Ministerial exemption under the federal *Controlled Drug and Substances Act, RSC 1996, c 19*. The Dr. Peter AIDS Foundation is a non-profit registered charity, funded through various government health and housing agencies, with the purpose of assisting and caring for persons who are poor or needy and who suffer from HIV/AIDS. In defence of the absence of such an exemption, the Foundation argues that supervised injection services are part of the primary healthcare it provides to its clients. See generally Dr. Peter AIDS Foundation, online: <<http://www.drpeter.org/>>.
  - 37 Nick Blomley, "Enclosure, Common Right and the Property of the Poor" (2008) 17 *Social & Legal Studies* 311 at 312. Blomley refers to activism around issues of land, redevelopment and gentrification, but his characterization is equally true in reference to poverty and drug use issues.
  - 38 Blomley, *Unsettling the City*, *supra* note 5 at 53.



# *Jurisdictional Justice, Democracy and the Story of Insite*

**Hester Lessard\***

Insite, North America's first legally sanctioned safe injection site, opened its doors in 2003. It did so after several years of political struggle by a network of community groups in Vancouver's Downtown Eastside (DTES), the neighbourhood it serves. The grassroots movement secured support at municipal, provincial, and federal levels of government. The latter expressed its approval by granting an exemption that protected Insite staff and patients from prosecution for possession of illegal substances under the federal *Controlled Drugs and Substances Act* (CDSA).<sup>1</sup> The remarkable political consensus in favour of Insite came apart in 2008 when the federal government, after the election of the Harper Conservatives, declined to extend the exemption. As a consequence, Vancouver Area Network of Drug Users (VANDU) and the Portland Hotel Community Services Society (PHS), the non-profit that operates Insite, along with two Insite clients, brought an action against the federal government in the B.C. Supreme Court. The provincial government intervened.<sup>2</sup> The key arguments were that either the CDSA is inapplicable (and therefore the exemption is unnecessary) because primary jurisdiction over health resides with the province, or that the application of the provisions prohibiting possession in the federal statute violates the section 7 *Charter* rights<sup>3</sup> of clients seeking treatment at Insite.

In *PHS Community Services Society v Canada (Attorney General)*, PHS Community Services Society was successful at trial<sup>4</sup> and at appeal.<sup>5</sup> The case will be heard by the Supreme Court of Canada on May 12, 2011.<sup>6</sup> Both Pitfield J at the trial level and Rowles JA at the Court of Appeal

relied on the *Charter* to find in Insite's favour. They determined that the application to Insite clients of CDSA provisions prohibiting possession of illegal drugs would violate the section 7 *Charter* rights in a manner that cannot be justified in a free and democratic society. Rowles JA also agreed with her colleague Huddart JA's analysis, which found in Insite's favour on the basis of the division of powers. As Huddart JA declined to explore the *Charter* arguments, her reasons represent the majority position at the Court of Appeal. Huddart JA held that the subject matter of Insite lies at the core of the exclusive jurisdiction of the provincial government over hospitals and health and is thus immune, under the doctrine of interjurisdictional immunity, from impairment by the operation of the CDSA.

There was one dissent—by Smith JA—at the Court of Appeal. She rejected the interjurisdictional immunity argument (as indeed did Pitfield J at the trial level) by referring to recent decisions of the Supreme Court of Canada that have urged a restricted application of the doctrine. She also rejected the *Charter* argument. Here, she found that although section 7 interests in life, liberty and security of the person are threatened by the application of federal narcotics prohibitions to clients seeking treatment at Insite, those prohibitions are nevertheless consistent with the principles of fundamental justice.

The considerable judicial support for Insite—three out of the four judges that have presided so far—is significant. Despite the disagreement over which constitutional path to take, the

support speaks to the compelling nature of the justice claim underlying the doctrinal arguments. However, choice of constitutional path—the *Charter* or the division of powers—is also significant as, at least theoretically, it should explain why we, as constitutional citizens, should care deeply about the dispute over Insite. The *Charter* and its underlying constitutional values would seem to speak directly to the dignity harms and survival interests of the individuals who depend on Insite for treatment. Furthermore, when compared to *Charter* jurisprudence, much division of powers jurisprudence is arid and technical. There is, perhaps, no better example of this than the doctrine that provides the foundation for the Court of Appeal’s majority decision, namely, the interjurisdictional immunity doctrine. Nonetheless, I think there is an issue of jurisdictional justice that eludes the language of rights emanating from the *Charter* and that fits more comfortably within the division of powers framework.

Jurisdictional issues in federalism disputes deal with the question of where political authority to address a particular issue resides. In this case, the jurisdictional dispute revolves around issues of addiction and its treatment in Vancouver’s Downtown Eastside (DTES), and by implication, elsewhere in the province. I want to suggest that the political mobilization at the grassroots level that led to the establishment of Insite should be a contextual factor in deciding the jurisdictional question and hence in deciding whether the interjurisdictional immunity doctrine protects the province’s exclusive jurisdiction over health care. My conceptual point is straightforward. Jurisdictional disputes between the provinces and the federal government are commonly understood to be shaped by the principle of federalism—the commitment to reconcile unity with diversity—as well as by principles of democracy. The jurisprudence understands diversity and democracy in very formal terms, namely in terms of levels of government within a federal system, and the configuration of the population into provincial and national majorities, each with its set of representative institutions. I argue that this formal calculus of diversity and democracy should be textured by a more substantive account of polit-

ical engagement at the community level where two crucial elements are present. The first element is the voicelessness or political marginality of the community in question in relation to conventional institutional channels of democratic change. The second element is the fundamental nature of the interest at stake for that community. Both elements are present in the story of the struggle of the user community to establish Insite.

My argument that federalism jurisprudence should incorporate a fuller, more substantive consideration of democratic principles parallels one that is now commonly made in relation to rights jurisprudence and to the amending process, namely, that social movements are and should be key actors in shaping the substantive content of constitutional norms and principles.<sup>7</sup> I would, however, go further and argue that where the core principles animating the constitutional text are rooted in concerns about democracy, there are strong reasons for judges to take explicit account of such political engagement.

I will start by laying out key aspects of the story of the harm reduction movement that formed in the DTES in response to a health crisis caused by addiction. Drawing on a rich secondary literature, including ethnographic, geographic and drug policy studies, I will focus only on the early efforts of the community and its initial political mobilization (roughly from 1988 to 2000) in the face of very little support from the political establishment and seeming public indifference to the rising death toll from addiction-related causes. The subsequent steps in gaining political support for Insite also involve democratic processes both in and outside of government. However, this later chapter in the story is not as germane to my main conceptual point. The principles of federalism, diversity, and democracy at stake in the governmental and intergovernmental deliberations have at least formal representation in the judicial analysis of Insite’s constitutional positioning in relation to the division of powers. In contrast, the conventional judicial calculus provides little, if any, space for examining the mobilization of a profoundly marginalized community around

issues of survival in the face of overwhelming silence in the larger political sphere. In the second part of this essay, I provide a brief overview of the discussion of the interjurisdictional immunity doctrine in recent Supreme Court of Canada cases, focusing on aspects that relate to the doctrine's use in Huddart JA's reasons. In the third section, I discuss how the jurisprudential narrative about jurisdiction might engage more fully with the community narrative about self-government.

## **Part I: The story of Insite: The community narrative about self-government**

The DTES comprises an area that is roughly three kilometres along the east-west axis and two kilometres along the north-south axis. It lies along the Burrard inlet just east of the downtown commercial centre of contemporary Vancouver and is one of the most densely populated and diverse neighbourhoods in the city. Traces of its original Coast Salish inhabitants, who had fishing camps, villages, and trails in the area, have long ago been overlain by the rapid urbanization that took place in the late nineteenth century. Nevertheless, “cultural memories of dispossession”<sup>8</sup> live on, sustained by the significant concentration of indigenous peoples drawn from local and distant communities who currently reside there. Colonialism is both past and present in the DTES, prompting some to demand recognition of the neighbourhood and similar urban spaces in Canada as neo-colonial spaces that remain “unsettled.”<sup>9</sup> Nicholas Blomley, in particular, observes that the Coast Salish have been dispossessed but not displaced, that “the settler-city not only was, but still is, native land.”<sup>10</sup> The argument is particularly powerful in the DTES, in which estimates suggest that between 10% and 40% of the roughly 16,500 inhabitants are indigenous peoples.<sup>11</sup> The indigenous presence shapes the character of the community, not simply through formal visible markers such as the totem, “Standing with Courage, Strength and Pride,” carved and raised in Oppenheimer Park in 1998, but in more subliminal ways. Adrienne Burk, who has chronicled social mobilization in the neigh-

bourhood, notes “the keen cultural awareness of the high visibility of First Nations people in the Downtown Eastside; in virtually every meeting I have attended in the neighbourhood (and, in any government meetings), there have been verbal, behavioural, or cultural references to First Nations traditions.”<sup>12</sup> This palpable and numerically strong presence, however, has not translated into political voice. Activists express frustration at the fact that while indigenous people in the DTES are often recognized as an important client group for services, they are seldom viewed as political agents.<sup>13</sup>

The DTES is a truly heterogeneous and demographically distinctive neighbourhood. Roughly 45% of the population is comprised of first-generation immigrants to Canada.<sup>14</sup> In some parts of the neighbourhood, men far outnumber women, giving the neighbourhood an overall 62/38 male to female population split.<sup>15</sup> It has twice the seniors (22%) and half the children and youth (2% and 8%) than the rest of the city.<sup>16</sup> It also has roughly three times the number of persons living alone than the rest of the city. The DTES is notorious as the poorest postal code in Canada. Census figures (which do not include homeless persons or persons whose income is not reported) put the median income at \$12,084, and the unemployment rate (22%) is almost three times the rate in the rest of the city.<sup>17</sup> Close to 40% of DTES residents rely on transfer payments for support and 67% of households are in the low-income category—compared with 27% in the city as a whole.<sup>18</sup>

The nature of the neighbourhood is such that violence, both public and private, is a part of daily life and, as elsewhere, such violence deeply marks the lives of women, especially racialized and indigenous women. Since 1983, approximately 69 women associated with the neighbourhood—many of them indigenous, sex trade workers, and injection drug users—have disappeared. Leslie Robertson and Dara Culhane, echoing observations about the political voicelessness of indigenous residents more generally, note that women in the DTES are simultaneously visible and invisible.<sup>19</sup> For years, efforts by friends and family of the missing women to gain the attention of the police and

public were ignored. Slowly, other forces joined in pressuring authorities, and eventually investigations were undertaken. Local, national and international media attention exploded as evidence began to point in the direction of a serial murderer. The process culminated in the arrest of Robert Pickton in 2002 and his conviction in 2007 on six counts of second-degree murder. However, despite the sensational nature of the coverage of the Pickton trial, the feeling of invisibility remains palpable. As one resident, a Cree woman and injection drug user, put it: “See, the buses come and go down here, and you see people looking. But they don’t see nothing. All they see is the dope. People can hide in plain sight. They can be this far from you. . . . [T]he thing is these people, they’re invisible to society.”<sup>20</sup>

A number of converging factors compound the social and political invisibility of DTES residents. The commonplace “conflation of persons and place occurring in stigmatized space”<sup>21</sup> is, in the case of the DTES, exacerbated by the criminalization of its residents as addicts, drug dealers and sex trade workers, and by their subsequent medicalization as public officials began to seek responses other than law enforcement to the steeply climbing rates of overdose deaths and HIV infection. Moreover, detractors frequently characterize the DTES population as transient, despite the fact that it is a remarkably stable community.<sup>22</sup> In a property discourse dominated by what Blomley calls private property’s “ownership model,” the homeless person or long-term hotel dweller loses any place-based entitlement to belong. Her claim to be and remain in the neighbourhood is rendered incoherent.<sup>23</sup> Gentrification in the DTES increasingly threatens to displace many such residents, eclipsing their “community land claim.”<sup>24</sup> The claim is based on their collective investment in the physical space through use, habitation, action, and struggle—an investment that has produced a landscape with powerful material and representational dimensions.<sup>25</sup> For example, Oppenheimer Park, the site of the “Standing with Courage” totem and of VANDU’s first meeting, is often referred to by DTES residents “by terms generally used for a dwelling (our ‘back yard, our living room’).”<sup>26</sup>

Accounts of the escalation of addiction problems in the DTES during the 1980s are surreal. In the 1970s, the city opened a facility to house “the sixty seven people police had identified as the most problematic in the neighbourhood.”<sup>27</sup> By the end of the 1980s, this relatively manageable situation had transformed; the DTES “was home to one of the fastest growing open-air drug markets in Canada, an infrastructure of illegitimate businesses to support this market, and the epicentre of an epidemic of property crime.”<sup>28</sup> More significantly, “people were dying in great numbers.”<sup>29</sup> The neighbourhood, in particular the user community, began to respond on an *ad hoc* and then more concerted basis, and a harm reduction movement started to mobilize. The movement integrated health concerns—reduction of overdose deaths and the transmission of infectious diseases—with social concerns such as access to toilets, physical safety, and police harassment. At the time, the entrenched understanding of addiction to illegal narcotics was the criminal model. Canada endorsed a harm reduction approach in 1987 that, on paper at least, acknowledged the ineffectiveness of the criminal model, emphasizing instead the health dimension of addiction. However, enforcement activities continued to escalate and the bulk of funds earmarked for harm reduction went to police drug education programs that adhered to a traditional message.<sup>30</sup> Meanwhile, health care policy remained by and large committed to an abstinence-based treatment model that often relied on punitive measures to achieve compliance. In contrast, a harm reduction approach requires a fairly profound shift in thinking. It challenges not only the view that addiction is deviant behaviour best addressed through the criminal law, but also the view that addiction is exclusively a disease. Harm reduction approaches, when implemented as part of a governmental drug policy regime, typically are combined with enforcement measures aimed at trafficking and abstinence strategies. However, the approach is premised on the recognition that social factors such as homelessness, poverty, gender inequality, colonialism and racism must be factored into the understanding of addiction. Thus, a more comprehensive and flexible set of supports and resources are required for “treatment,” the aim of which is primarily to

reduce disease and death and achieve stability rather than to reduce addiction.<sup>31</sup>

The DTES activist and user community began to pursue a number of harm reduction, self-help strategies at the end of the 1980s. In 1988, social activist John Turvey was so concerned about the rise in infectious diseases related to injection drug use, that he “started single-handedly giving out three thousand clean syringes a month.”<sup>32</sup> Eventually, his organization received a government grant and opened the first official needle exchange in Canada in 1989.<sup>33</sup> In 1991, a weekly support group called Drug and Alcohol Support Group for Women (DAMS) was set up by volunteer health professionals and social workers who were unable to obtain funding because they pursued a harm reduction rather than abstinence approach.<sup>34</sup> The women in the group were primarily mothers, and indigenous. Importantly, the harm reduction approach permitted “recognition of the social factors that shape women’s lives and acknowledgement that women’s drug use differs from men’s,”<sup>35</sup> as well as being differentiated in relation to class, ethnicity, race, sexuality and culture. Thus, for example, “reunification of the family was a central component of the program because most of the women who participated in DAMS had at least one child apprehended by the state.”<sup>36</sup>

Meanwhile, however, the rate of overdose deaths in B.C. continued to climb, going from 39 in 1988, to 331 in 1995, and to 417 in 1998, the worst year on record.<sup>37</sup> Also, the spread, via unsafe injection practices, of infectious diseases—HIV/AIDS, Hepatitis A, B, and C, and other skin and blood-borne infections—as well as the development of a constellation of associated conditions—septicaemia, endocarditis, aggravated mental illness, foetal exposure to narcotics—began to reach epidemic proportions.<sup>38</sup> The situation was highly visible at the community level of health care provision and was not unnoticed at governmental levels. However, no comprehensive response was undertaken, leaving the neighbourhood to continue to pursue its own strategies.<sup>39</sup> A lobby group of drug users called IV Feed was formed, and in the Fall of 1995 it set up Back Alley, an illegal injection site that operated for a year, with informal sup-

port from the B.C. Centre for Disease Control (free syringes, and occasional visits by a nurse) and with no serious interference from police. It closed because of lack of funds.<sup>40</sup> Another group, called the Political Response Group, staged eighty demonstrations demanding better services for addicts. The most prominent was the “thousand crosses demonstration” in 1997. Traffic on a main artery running through the neighbourhood was blocked, leaflets were handed out detailing the epidemic of overdose deaths, and while indigenous elders drummed and sang, a thousand crosses were planted in Oppenheimer Park, presenting a powerful image in public space of the toll taken by drug-related deaths.<sup>41</sup>

The organization of the two institutional applicants in the Insite litigation—VANDU and PHS—occurred in 1998 and 1993 respectively. Starting in 1997, a number of advocacy and support groups in the neighbourhood—IV Feed, Political Response Group, MindBody Love, the Compassion Club, the Hype, and HCV+IDU—began discussing the development of a drug user organization as a means of coping with the epidemic of addiction-related deaths and health issues.<sup>42</sup> The result was VANDU. It commenced with a meeting in Oppenheimer Park in September 1997 organized by Ann Livingston, a non-user and harm reduction activist who had been instrumental in setting up Back Alley, and Bud Osborn, a DTES resident and former heroin addict, social activist, poet, and member of the Vancouver-Richmond Health Board. Osborn and Livingston plastered the neighbourhood with flyers inviting people to take a “community approach” to a list of five issues, none of them specifically about addiction, but all of them imbricated in the experience of addiction in the DTES. The five issues were: “police conduct, ‘is this your home?’, neighbour relations, violence and safety, washroom facilities.”<sup>43</sup> This inaugural meeting was followed by several more at a church and then by weekly user meetings, out of which VANDU arose. Osborn convinced the Health Board to declare a public health emergency in 1997 and to provide VANDU with the small grant that launched its formation in January 1998.<sup>44</sup> VANDU founders identified political marginalization and “the distance that us-



ers are from society” as a key obstacle.<sup>45</sup> As the membership grew in size (from 20 to 100 in the first few months, and eventually to more than 2,000),<sup>46</sup> the original founders involved participants in facilitating subsequent meetings, planning agendas and publicity, and developing action plans arising out of group discussions. With its membership consisting of “economically impoverished, ill and courageous drug addicts,” VANDU took as its first objective “to change the demonizing rhetoric they endured using community meetings, demonstrations, education and fearlessness in the face of repression.”<sup>47</sup> In short, VANDU set out to demand a part for injection drug users in the broader political conversation about addiction and the neighbourhood, a conversation in which, to that point, their members had only featured as the face of “the problem.”

In its effort to demand that injection drug users occupy political space as agents rather than objects, VANDU reached outward to challenge discourse in the broader public sphere that condemned the neighbourhood as deviant and beyond repair. For example, demonstrations were organized to contest Constable Mark Tonner of the Vancouver Police Department’s portrayal of DTES injection drug users as “vampires” and “werewolves” in a weekly column he wrote for a city newspaper.<sup>48</sup> And when home and business owners associations pursued an agenda against harm reduction, asking instead for more law enforcement, harm reduction activists responded with more demonstrations and circulated a poster that asked “Why don’t you just kill us?”<sup>49</sup> Yet, not all of VANDU’s interventions involved direct action of this sort. The notes from the user meetings record discussions about sharing public spaces with children and elderly, police harassment and racial profiling of Latino/a residents as drug dealers, police violence against indigenous residents, the harm reduction approaches pursued in Europe, as well as about larger systemic issues—the role of poverty, the effects of criminalization, and the absence of any political voice or credibility for injection drug users in the face of “war on drugs” rhetoric. As one participant asked: “Why should people be homeless, sick, beat up, etc., because they use drugs?”<sup>50</sup> Or as a protest sign stated: “Drug

Users are People Too! They deserve compassion and a place in the Community!”<sup>51</sup>

A recurrent theme in the VANDU minutes is the need for a harm reduction rather than a crime control approach, and, as a central feature of harm reduction, a safe injection site that is legal, user-controlled, and adequately funded to provide health and social support services.<sup>52</sup> VANDU’s programmatic achievements over the years have included creating peer support and mentorship relationships; obtaining CPR training for addicts; inviting guest speakers; creating support groups for people on methadone, women with HIV, and those with Hepatitis C; patrolling back alleys to reach high risk drug users; creating used syringe recovery and syringe exchange programs; lobbying for, and then supervising, night-time public toilets, creating drop-in centres; visiting hospitalized drug users; and engaging in educational activities including participating in local, national and international conferences.<sup>53</sup>

VANDU takes the anti-slavery, civil rights, and women’s movements as its models. Its commitment to challenge “traditional client/provider relationships and empower people who use drugs to design and implement harm reduction interventions,” is reflected in its governing structure. Anyone can join VANDU, but only addicts or former addicts have a vote at meetings or can be elected to its governing board. Supporting members have a voice but no vote at meetings and cannot exceed 10% of the entire membership.<sup>54</sup> The demographic make-up of the membership is roughly estimated to be 1/3 women and 1/3 indigenous peoples, with members ranging in age from 10 to 70 but clustered around the ages 30 to 50.<sup>55</sup>

PHS, the other institutional plaintiff in the Insite litigation, was formed by the Downtown Eastside Residents Association. It is named after the Portland Hotel, a residence it administers “for adults with mental illnesses, addictions and other problems” with funds from the Vancouver Coastal Health Authority and the B.C. Housing and Mortgage Corporation.<sup>56</sup> It is both an advocacy group and a service provider for its residents and the neighbourhood.<sup>57</sup> As such, its staff saw first-hand the impact of rising

addiction rates in the 1990s. PHS sponsored a conference in 1998 in Oppenheimer Park that drew together politicians, government bureaucrats, harm reduction experts from the U.K. and Europe, and neighbourhood drug users.<sup>58</sup> Although government acceptance of a harm reduction approach was still several years away, PHS often was able to bridge the divide between the neighbourhood and governmental bodies while still remaining “of the neighbourhood.”

As the harm reduction movement gained force in the DTES, it also started to acquire powerful allies, among them Larry Campbell, B.C.’s Chief Coroner at the time, who was dealing first-hand with the increasing amount of deaths; Ken Higgins, a former Vancouver deputy police chief; Dr. John Millar, the provincial health officer; and the Health Officer’s Council of B.C.<sup>59</sup> Phillip Owen, Vancouver’s mayor during the crucial years of 1993 to 2002, was initially unequivocally against harm reduction strategies. However, he eventually became a strong and articulate promoter of a “four-pillars” approach, which included harm reduction as one of its pillars. Libby Davies, the New Democratic Party MP for Vancouver East also became an outspoken supporter of harm reduction. In short, despite being ill, often homeless, and impoverished, harm reduction activists and injection drug users in the DTES managed to push back against their profound political invisibility. They crafted their own institutions and supports, and engaged in direct action and protests. In a remarkable and sustained demonstration of political agency, they challenged their construction as victims or deviant outsiders. Eventually, they succeeded in actively engaging powerful actors in the public sphere, “talking back” to negative press, and forming coalitions and alliances that crossed class, neighbourhood and international lines.

It is at this point in the story, in late 1998 and 1999, that action at the community level expanded and the project began to move through municipal, provincial and federal channels. After the release of a Health Board Report calling for four safe injection sites, Davies and Osborn met with federal health officials to discuss a strategy to obtain an exemption under the

*CDSA* and to secure governmental support for *Insite*. While serious resistance still remained at the federal, provincial and municipal government levels, a much broader-based public discussion in Vancouver and the province began to unfold over the next five years, with active participation by neighbourhood activists and drug user groups such as *VANDU*. This eventually led to the consensus at the three levels of government that secured the *CDSA* exemption and the funding to open *Insite*. The tale of these official negotiations and discussions has its own watershed moments as well as the drama of political careers lost and made.<sup>60</sup> In comparison with the tale of the unofficial community actions that got the process off the ground, it is much more visible in the judicial analysis of “who has jurisdiction.” It appears mostly in Pitfield J’s trial judgment in the form of the many reports and analyses by governmental health authorities as the city and province began to study seriously, and then endorse, an experimental harm reduction strategy with *Insite* as its centrepiece. The provincial jurisdictional stake is, of course, explicitly represented in any constitutional dispute structured by the binary of federal and provincial governments. The next section of this essay turns to that division of powers framework and outlines the technical doctrinal aspects of the interjurisdictional immunity doctrine in relation to the *Insite* litigation.

As a postscript to the story sketched out above, I should add that the DTES harm reduction movement by no means dropped out of the picture once the more recognized channels of democratic change were activated. It continued to intervene before city council and to engage with decision-makers at all three levels of government. It also continued to pursue self-help strategies. In 2002, PHS, fearing that the momentum behind *Insite* at the governmental level would dissolve in impending municipal elections, decided to move ahead and open an unapproved safe injection site. It raised funds, and acquired and renovated a building that had been a sandwich shop. The new facility, now supposedly a hair salon, was outfitted with six injection booths. When it looked like Campbell, a harm reduction supporter, would in fact win the mayoral election, PHS shelved the effort in

the hopes that an approved site would soon follow with better staffing and programming.<sup>61</sup>

Campbell did win and promised to open a facility by January 2003. But he soon found himself bogged down in governmental negotiations as well as coping with backlash from his endorsement of a massive crackdown by the Vancouver police on the open drug market in the DTES. Frustrated by the delays, Ann Livingston organized yet another illegal safe injection site, staffed by a volunteer nurse, that opened in April 2003, the day of the crackdown.<sup>62</sup> It operated until Insite opened its doors in September at the location PHS had prepared earlier. At this point, it had official approval, was expanded to twelve booths, and had funds dedicated to staff and supportive programming.

## Part II: Interjurisdictional immunity doctrine before, during and after the B.C. *Insite* cases

The interjurisdictional immunity doctrine, the basis of the Court of Appeal's majority decision in favour of *Insite*, is associated with the less favoured of two competing conceptions of interjurisdictional conflicts. The first conception uses the metaphor of watertight compartments to describe jurisdictional categories. It invokes for support the many references in the text of sections 91 and 92 in the *Constitution Act, 1867*<sup>63</sup> to the exclusive nature of federal and provincial jurisdiction. In order to realize this commitment to exclusivity, the enumerations of "Matters" in the constitutional text are thought to mark out areas of jurisdiction that must be kept clearly differentiated from each other. Judges should strive to avoid any messy overlap or "leakage" from one "compartment" to another. While some overlap is inevitable, the interjurisdictional immunity doctrine delineates areas of exclusivity at the core of the legislative subject matters, whether or not the level of government with jurisdiction has actually used its power to enact a law. Valid laws enacted by the other level of government, but which spill over into this exclusive core can be rendered inapplicable under the doctrine, thereby maintaining the watertightness of the compartment.

An enthusiastic application of the interjurisdictional immunity doctrine would favour a generous delineation of the exclusive core and a softening of the standard used to measure whether a spillover is serious enough to warrant rendering a valid law inapplicable. Theoretically, the doctrine applies to protect both federal and provincial jurisdiction; however, in practice, it has heavily, if not exclusively, favoured the federal government. The interjurisdictional immunity doctrine, as well as the watertight compartments approach more generally, currently has a negative reputation, especially with judges at the Supreme Court of Canada. The negativity is rooted in the perception that the approach is rigid, inflexible, not "modern," and at odds with co-operative federalism. There is also a recurrent concern that the approach creates legislative "gaps" in the form of exclusive areas of jurisdiction in which the government that has jurisdiction has little incentive, or finds it difficult, to regulate.<sup>64</sup>

The competing approach, often described as "modern," treats messy overlaps between jurisdictional categories as not only inevitable but, to some extent, desirable. On this approach, courts will only intervene to clarify a jurisdictional dispute if there is a conflict between two valid laws serious enough to trigger the paramountcy doctrine. This doctrine always operates in favour of federal jurisdiction. An enthusiastic application of the modern approach would demand a very stringent test of conflict in order to trigger the doctrine, thereby tolerating a wider range of overlapping laws. Conversely, a watertight compartments approach to paramountcy would install a very low threshold test of conflict which, at provincial expense, would reduce the amount of overlap between federal and provincial regimes. The paramountcy doctrine, in the modern version, is perceived as being everything that the competing approach is not: elastic, flexible, modern, and facilitative of co-operative federalism. As such, it is viewed as more suited to the complexity of government in a contemporary federal state. Indeed, the Supreme Court of Canada has recently affirmed that it is both the preferred and dominant approach.<sup>65</sup>

PHS and VANDU turned to the courts for relief in 2008. In the preceding year, while Insite still had a short-term extension of its CDSA exemption, the Supreme Court of Canada decided a pair of cases, *Canadian Western Bank v Alberta*<sup>66</sup> and *British Columbia (Attorney General) v Lafarge Canada Inc*<sup>67</sup>, that seemed to cement in place a “backseat” role for the inter-jurisdictional immunity doctrine in favour of a “front seat” role for the federal paramountcy doctrine.<sup>68</sup> *CWB* concerned a claim of inter-jurisdictional immunity by a federally regulated bank in relation to a provincial insurance regime; *Lafarge* concerned a claim of immunity by the Vancouver Port Authority in relation to municipal zoning requirements. The Supreme Court of Canada rejected both claims. In *CWB*, Binnie and Lebel JJ wrote lengthy reasons, supported by four others, that redesigned the inter-jurisdictional doctrine.<sup>69</sup> In *Lafarge*, Binnie and Lebel JJ again wrote reasons for the majority affirming the approach they had set out in *CWB*.<sup>70</sup>

After noting in *CWB* that the interjurisdictional immunity doctrine is inconsistent with the dominant trend in the jurisprudence, Binnie and Lebel JJ state that they wish to “make it clear that the Court does not favour an intensive reliance on the doctrine.”<sup>71</sup> They also direct that the indicia for its operation should be altered to make it harder to apply, specifying that it must be shown that the impinging legislation impairs rather than simply affects the vital and essential core of the other government’s jurisdiction. The impairment standard is described as not quite as stringent as the “sterilize” test from early case law, but as more demanding than the “affects” test that has been the standard for several decades.<sup>72</sup> Binnie and Lebel JJ also advise that it is preferable that courts resolve jurisdictional conflicts in new areas, if possible, with the doctrine of federal paramountcy.<sup>73</sup>

Despite these severe constraints on the doctrine’s use and scope, the *CWB* analysis affirms that the doctrine is here to stay. Importantly for the Insite litigation, the judges note that application of the doctrine has been quite lopsided, in general protecting federally regulated entities from provincial regulation and not vice versa. The judges state that theoretically it should work

both ways. Indeed, they observe that courts in the past have deployed the doctrine in the province’s favour but have done so by simply limiting the federal legislation’s ambit “without too much doctrinal discussion.”<sup>74</sup> The implication is that, henceforth, courts should be more explicit about using the doctrine to protect core areas of provincial exclusive jurisdiction.

By and large, *CWB* contains the elaboration of the new approach. The companion case *Lafarge*, however, opens with the controversial assertion that the interjurisdictional immunity doctrine “should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect.”<sup>75</sup> This statement is at the centre of the disagreement in the Insite litigation between the trial judge and the majority at the Court of Appeal. Pitfield J, the trial judge, took Binnie and Lebel JJ at their word. He found that the CDSA impairs a vital part of the provincial health care undertaking, Insite. However, because Insite operates in the double aspect field of health, Pitfield J felt compelled, following *Lafarge*, to resolve the conflict between the two levels of government in favour of the federal level under the paramountcy doctrine.<sup>76</sup>

Huddart JA at the Court of Appeal disagreed. She took heart from an article by Professor Robin Elliot in which he argues that Binnie and Lebel JJ could not have meant what they seem to have said in *Lafarge*. Professor Elliot points out that a new rule barring the use of the doctrine in double aspect fields would constitute a major transformation of the law, effectively eliminate the doctrine, and contradict much of what the two judges say in the companion case of *CWB* as well as what they proceed to do in *Lafarge*—namely, analyse whether the Vancouver Port Authority can claim immunity in the double aspect field of waterfront development.<sup>77</sup>

Huddart JA in *PHS Community Services Society* would seem, then, to challenge judicial trends, first by making interjurisdictional immunity the centrepiece of her decision, second, by finding that the doctrine applies to protect a provincial entity from federal intrusions, and third, by refusing to accept at face value the statement in *Lafarge* that the doctrine has no

role in double aspect fields. Her reasons, however, otherwise respect the parameters and spirit of the dominant approach by interpreting the requirements of the doctrine quite strictly. She accepts that the *CDSA* is valid criminal law but also makes clear that Insite's provision of medical treatment to its community is at the core of its purpose as a hospital and therefore at the core of provincial jurisdiction over hospitals. She maps that core very narrowly and precisely, fending off arguments that to give Insite the benefit of immunity would allow provinces to ignore federal narcotics legislation altogether or create legislative gaps with respect to the control of illegal drugs. At one point, she indicates that the application of the *CDSA* would "sterilize" essential and vital parts of Insite's operation as a hospital, suggesting that she is using a very high standard to determine whether the federal intrusion is sufficiently serious.<sup>78</sup> For Huddart JA, co-operative federalism is facilitated rather than impeded by the interjurisdictional immunity doctrine because it allows breathing room for both the medical and criminal aspects of "the approach to the intractable problem [of] dangerous substances."<sup>79</sup> She finishes by asserting that if immunity is not available to Insite in this situation, "then it may well be said [despite *CWB*'s remarks] the doctrine is not reciprocal and can never be applied to protect exclusive provincial powers."<sup>80</sup>

Huddart JA's scepticism about the *Lafarge* statement has since found powerful support from the Supreme Court of Canada. Several months after the B.C. Court of Appeal decision, the Supreme Court of Canada returned to the subject of the interjurisdictional immunity doctrine in another pair of cases. Both emanate from Québec and concern federal jurisdiction, under its aeronautics power, over the construction of aerodromes, namely landing facilities for non-commercial aircraft. In *Québec (Attorney General) v Canadian Owners and Pilots Association*,<sup>81</sup> the plaintiffs constructed an aerodrome on land zoned agricultural under Québec's scheme for the preservation of such land. The plaintiffs failed to obtain the required prior authorization for a non-agricultural use and, as a consequence, were ordered to return the land to its original state. McLachlin CJ wrote for a

majority and found in favour of the aerodrome owners. She found that the aerodrome was a federally regulated undertaking, that the matter of its location lay at the core of federal jurisdiction, and that, as such, it was interjurisdictionally immune from the application of Québec's regime. In the course of her reasons, McLachlin CJ rejected Québec's argument, relying on *Lafarge*, that interjurisdictional immunity cannot apply in double aspect fields. McLachlin CJ asserted that such an interpretation of *Lafarge* is inconsistent with the approach set out in *CWB*,<sup>82</sup> and that Québec's argument is a "challenge to the very existence of the doctrine of interjurisdictional immunity," a position that is inconsistent with the constitutional text and its many references to the exclusivity of legislative jurisdiction as well as precedent.<sup>83</sup>

In *COPA*, Binnie and Lebel JJ take different paths.<sup>84</sup> However, the divergence does not undermine the basic elements of their reasons in *CWB*. The crux of McLachlin CJ's majority reasons, with which Binnie J agreed, is her finding that the impact of Québec's agricultural land reserve scheme on federal jurisdiction meets the *CWB* standard of impairment. She reaches this conclusion even though the federal scheme leaves the location and development of aerodromes to the private market. For McLachlin CJ, the option of relying on private ordering in this way lies at the core of Parliament's aeronautics power and is impaired by Québec's decision to legislatively protect its agricultural lands from the operation of the market.<sup>85</sup>

Lebel J, in a very short dissent, agrees that the location of an aerodrome by Parliament is an essential and core aspect of its jurisdiction, but argues that the location of an aerodrome by a private company is not. The implication is that, for Lebel J, the question of impairment is irrelevant as there has been no intrusion at all into an exclusive area of federal jurisdiction.<sup>86</sup> Thus, the disagreement between Binnie and Lebel JJ would appear to be over how narrowly to map the exclusive core that can potentially be protected by the immunity doctrine's impairment test. Lebel J's restrained approach to this task would seem to be more in keeping with the caution advised by *CWB* as well as with the

concern it expressed about an asymmetry that favours federal power.

In the companion case, *Québec (Attorney General) v Lacombe*,<sup>87</sup> McLachlin CJ again wrote reasons in favour of the aerodrome owners for a majority that included Binnie J but not Lebel J, and, again, the divergence between the two judges does not point to a major fault line.<sup>88</sup> However, Deschamps J's comments in her dissent in *Lacombe* may have a direct bearing on the Insite litigation. Deschamps J at one point criticizes McLachlin CJ for suggesting in *COPA* that the interjurisdictional immunity doctrine only protects core areas of federal jurisdiction, a stance she argues is inconsistent with *CWB* and with the principle of subsidiarity. While McLachlin CJ's reasons in both *COPA* and *Lacombe* discuss the doctrine only in relation to federal jurisdiction, she does not actually state that it can only protect federal exclusivity.<sup>89</sup>

In short, this most recent foray by the Supreme Court of Canada into the interjurisdictional immunity doctrine affirms that *CWB* is the governing framework. It also affirms that the doctrine still has a role to play despite its less favoured position. In particular, McLachlin CJ's majority reasons in *COPA* support Huddart JA's view in *PHS Community Services Society (BCCA)* that the interjurisdictional immunity doctrine can be an important tool for resolving conflicts that arise in the context of double aspect subject matters such as health. Finally, Deschamps J's comments in *Lacombe* raise a question about whether interjurisdictional immunity protects provincial as well as federal jurisdiction.

### Part III: Complicating democracy in federalism jurisprudence

The above summary touches on the key aspects of the interjurisdictional immunity analysis that are at play in the Insite litigation. There are additional doctrinal questions raised by the case and by the recent jurisprudence. For example, are there any solid precedents supporting the application of the doctrine to entities lying within provincially regulated areas of jurisdiction? Or, is an application in favour of provincial power,

if that is still a possibility after the aerodrome cases, a new area and thus one that must, if possible, be settled under the federal paramountcy doctrine? Does the impairment test measure interference with the operation of the entities in question— aerodromes, port authorities, banks, safe injection sites— or with the integrity of the relevant government's exclusive jurisdiction? And, hovering in the background of these questions about the post-*CWB* approach is the larger question of the stability of the view, endorsed by *CWB*, that a modern approach that relies on the paramountcy doctrine to resolve interjurisdictional conflicts is the dominant and better approach and that the interjurisdictional immunity's less favoured watertight compartments approach should be confined to a minor role. McLachlin CJ's readiness in *COPA*, just three years after *CWB*, to give the immunity doctrine quite a generous scope, albeit in favour of the federal government, may rehabilitate the doctrine somewhat, although one would hope not in its typically asymmetrical form.

Some scholars reject the idea that one approach is better than the other or that functional considerations such as flexibility and efficiency should figure so prominently in adjudication of federal conflicts. Bruce Ryder and Robin Elliot, for example, argue that while both approaches present dangers, both are essential to a workable federalism jurisprudence.<sup>90</sup> Ryder in particular argues for a more values-based analysis of federalism conflicts. He is critical of a historical pattern of deploying the interjurisdictional immunity doctrine to pursue goals that lie outside the purview of adjudication, such as the pursuit of a deregulatory agenda with respect to markets.<sup>91</sup> Nonetheless, he argues that the doctrine, and the watertight compartments view more generally, is crucial to the realization of key constitutional values that underlie and animate the constitutional text setting out the division of powers— values that are properly within the purview of judges. He discusses in particular the principles of provincial autonomy, recognition of indigenous polities, and democracy.<sup>92</sup>

*PHS Community Services Society (BCCA)* would seem to engage at least two of these values— provincial autonomy and democracy. Pro-

vincial autonomy is clearly at the forefront of Huddart JA's analysis. She is adamant that both the local nature of the crisis, and the constitutional commitment to exclusive areas of provincial jurisdiction—evident in both the text of the Constitution and the jurisprudence—directs a finding of provincial immunity from the application of the *CDSA* to *Insite*. Democracy does not feature in the same central way; however, it is implicit, given the jurisprudential understanding that federalism and democracy are inextricably intertwined. The Supreme Court of Canada has assured us that the principle of federalism configures “different and equally legitimate majorities in different provinces and territories and at the federal level.”<sup>93</sup> And a key reason for rejecting interjurisdictional immunity is the “legislative gap” argument, namely that it mars the otherwise seamless and exhaustive distribution of legislative powers to democratically elected governments by creating, at a functional level, little pockets of exclusive jurisdictional space where one government's laws are inapplicable and the other government finds it difficult or uninviting to legislate.<sup>94</sup>

Huddart JA's reasons adhere diligently to these conceptions of the interrelation between federalism and democracy. She denies that any gaps would be created by according interjurisdictional immunity to the Province's health care undertaking *Insite*. For her, the “gap” we should be worried about is the one that would be created if the Province, the only government with authority to respond to the local health crisis in the DTES, was prevented from doing so by the paramountcy of federal narcotics legislation.<sup>95</sup>

At a more fundamental level, however, the key communities for Huddart JA are necessarily those marked out by formal representative processes and institutions, as well as by the formal apparatus of government: ministries, health authorities, and *Insite* itself—a “hospital” that is explicitly assigned to provincial jurisdiction by section 92(7) of the *Constitution Act, 1867*. Only her references to the “local” and to the principle of subsidiarity gesture in the direction of a more substantive understanding of democracy and autonomy.<sup>96</sup> Indeed, the “people” in her decision do not show up as active political agents

other than very indirectly. Rather, the “people,” in the story she tells, are most vividly present as patients desperately in need of the health services provided by the provincial governmental apparatus.

The “people” of course also show up as individuals in the *Charter* analyses. Rowles JA notes the PHS Society's self-description as representing “those who are homeless or at risk of homelessness due to multiple barriers to stable housing associated with a combination of unemployment, addiction, chronic illness and mental health problems.”<sup>97</sup> As well, she notes the evidence of a demographic survey of 1,000 users that shows high proportions of persons with infectious disease (87% have Hepatitis C; 17% have HIV); of aboriginal persons (18%); of sex trade workers (38%); and of the homeless (20%).<sup>98</sup> These figures assist in demonstrating the vulnerability of the individuals who are claiming an unconstitutional interference with their life, liberty, and security of the person. Similarly, Pitfield J at trial and Smith JA, in her dissent at the Court of Appeal, focus in their analyses of the section 7 interests in life and security of the person, on the medical vulnerabilities of *Insite* clients in terms of risks to life and health from overdose and infectious diseases.

For these three judges, then, the compelling justice issue has to do not with the autonomy of the relevant political community or with democracy, but with the fundamental entitlement of individuals, including those suffering from the illness of addiction, to live a life with dignity. Hence, the *Charter* rights framework works best for them. Social groups that are defined by disadvantage—homelessness, addiction, illness—are implicitly referenced, but only to give a more textured account of the key political actor in liberal rights discourse, namely, the individual. In short, a discourse of rights that presents individual claimants as “injured” in multi-dimensional and intersecting ways is strategically compelled by the *Charter* lens.<sup>99</sup>

Both the rights and division of powers narratives tell important stories about singular and significant dimensions of our political community. However, they are distinctly different narratives and only the jurisdictional frame,

I would suggest, can get at the concerns about democracy. Indeed, some would argue that the rights frame in some respects “fences” us into the sites of our subordination, thereby reproducing that subordination<sup>100</sup> and deflecting from “the dream of democracy—that humans might govern themselves by governing together.”<sup>101</sup> I understand, however, why, intuitively, the narrative about rights seems to get closer to our sense of the compelling issue of justice in the story of *Insite*. The jurisprudential story of intergovernmental relations, with its high level of abstraction and technicality, appears detached and removed, perhaps pathologically so, from the pain and urgency of the situation. Our judges, law teachers and legal scholars assure us that the vocabulary of immunities and vital parts, and the bewildering distinctions between sterilization, impairment, and effects, are really about the integrity of our democratic processes, the accountability of governments to the configuration of the “people” into various majorities, and the autonomy and self-government of the multiple polities that constitute our federal system. But it takes several analytical leaps to draw those connections, and in the end, frankly, we are still left with a very formal, procedural conception of the democratic political community—namely as a collection of voters configured into various territorial, provincial and national majorities.

I want to argue that there is another narrative about democracy and political community that although it has very little, if any, purchase in our constitutional texts and jurisprudence, might productively instill in them a deeper democratic logic. This narrative takes the “difference” that federalism protects out of its formal governmental container and locates it closer to the ground in an activist, “critical oppositional politics.”<sup>102</sup> The model is Iris Marion Young’s conception of democratic politics. Young urges us to embrace a theory of democracy that has a place for both reasoned deliberation within the institutional channels of representative government and established civil society institutions and a more “rowdy, disorderly and decentred politics.”<sup>103</sup> The latter, importantly, persists in challenging the constraints imposed by public and private institutions on the terms of social

change and on our imagined possibilities. Such institutions, although crucial to a functioning democracy, are inherently shaped by their historical evolution under and current positioning in relation to conditions of structural inequality.<sup>104</sup>

Young’s point is echoed in Wendy Brown’s discussion of the conundrum of formulating a post-individualist conception of democratic freedom, and in James Tully’s insistence that such freedom entails both rule of law and a practice of self-rule. Brown observes that freedom, when institutionalized, tends to reinstall the particular practices of domination that it has vanquished.<sup>105</sup> Hence, she advises, freedom would seem to “depend on a formulation of the political that is richer, more complicated, and also perhaps more fragile than that circumscribed by institutions, procedures and political representation.”<sup>106</sup> James Tully, similarly, urges us to embrace an expansive conception of democracy that both affirms and goes beyond eighteenth-century conceptions of formal representative institutions to include “any activity in which people assemble and negotiate the way and by whom power is exercised over them.”<sup>107</sup> Like Young, Tully argues that field of democratic politics must extend to include the full range of approaches to dialogue, deliberation, and “decision making interaction.”<sup>108</sup>

The story of *Insite* illustrates Young’s concern that the abiding conditions of structural inequality under which our representative institutions have evolved place significant limits on our political possibilities. Key institutional actors in 1993 assumed that the starting point for a response to the addiction crisis was a combination of the enforcement measures and abstinence-based treatments that had evolved over a number of years under the rubric of the “war on drugs.” The options within this frame ranged from more effective enforcement—more police officers on foot patrol, for example—to better ways to achieve abstinence—more facilities and resources for detox, for example. It took several years of direct action in the form of demonstrations such as the “thousand crosses” demonstration, the creation of illegal safe injection sites, the setting up of unfunded drop-in



centres, the convening of meetings in the park, and the institution of needle exchanges and back-alley patrols, to begin to shift perceptions in both enforcement and health care circles toward a wider set of possibilities. And after all that, the shift in the end, although significant, was relatively modest, consisting of a commitment to explore harm reduction strategies on an experimental basis for research purposes alongside enforcement and abstinence-based treatment.<sup>109</sup>

Young also urges that we create space for a critical oppositional politics because of its disruption of hegemonic discourses that, under conditions of structural inequality, render the conditions of that inequality as natural or inevitable features of life. Such discursive constraints on social and political change operate in a more subtle way, placing limits on the possible at a normative and conceptual level.<sup>110</sup> In the story of Insite, a discursive or ideological obstacle to change has been and continues to be the notion of choice, and the conflation of freedom with individual choice.<sup>111</sup> Despite a wealth of evidence supporting the characterization of addiction as a disease with multiple social, psychological, and genetic causes, the conviction that addiction is fundamentally a reprehensible personal choice for which, ultimately, individual addicts must accept responsibility remains difficult to dislodge. It is at the core of the federal government's argument in *PHS Community Services Society* that any addiction-related threat, in the form of death by overdose or infectious disease, posed to the *Charter*-protected interests in life, "results from an individual's choice to inject a harmful and dangerous narcotic rather than state action."<sup>112</sup>

There is little rhetorical space in our division of powers analysis to give texture to the democratic claims of the DTES user community and its grassroots harm reduction movement. The DTES user community simply is not cognizable as a political community in the legal, constitutional discourse of self-government. There are only two places in our jurisprudence that hint at what a more substantive and textured understanding of the principle of democracy might entail. The first is in the very brief references

in the case law to subsidiarity. The second is in the more extensive jurisprudence concerning division of powers conflicts in which the community standing behind the federal side of the conflict is an indigenous community.

The principle of subsidiarity surfaces in Canadian jurisprudence simply as a gesture, as in *PHS Community Services Society (BCCA)* itself.<sup>113</sup> The most oft-cited instance of this is in *114957 Canada Ltee (Spraytech, Société d'arrosage) v Hudson (Town)* in which L'Heureux-Dube J, writing for the majority, begins the decision by asserting that "matters of governance" in the current era are "often examined through the lens of the principle of subsidiarity."<sup>114</sup> She then defines subsidiarity as "the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity."<sup>115</sup> *Spraytech* involved a challenge to a municipal bylaw that imposed conditions on pesticide use that were more onerous than those in place at either the provincial or federal levels. L'Heureux-Dube J's majority reasons found in favour of the municipality and, in doing so, accorded the municipal level of government a broad power to act in the interest of the general welfare.<sup>116</sup>

Although there is a reaching out to difference "on the ground" in the form of the lived experience of communities in L'Heureux-Dube J's articulation of subsidiarity and her willingness to extend the principle to municipalities, it is still a principle framed in terms of formal "levels" of government.<sup>117</sup> Thus, it does not contemplate the sorts of processes and oppositional politics that unfolded around the establishment of Insite. Moreover, recent comments in a decision by the Supreme Court of Canada seem aimed at minimizing any role subsidiarity might have. In *Reference Re Assisted Human Reproduction Act*, a plurality of four judges in reasons set out by McLachlin CJ firmly rejects the notion that the principle of subsidiarity requires that "the criminal law must be circumscribed in order to preserve space for provincial regulation" of health care.<sup>118</sup>

The second example pertains to indigenous communities who have turned to the language of division of powers in pursuing their right to decide issues that bear directly on their survival as communities. The cases take the form of a claim that the federal government, by virtue of its constitutional jurisdiction over “Indians and Lands Reserved for Indians”<sup>119</sup> is immune from the operation of provincial laws, or, alternatively, that provincial laws are rendered inapplicable under the federal paramountcy doctrine. A claim of interjurisdictional immunity best achieves the underlying objective as it creates a jurisdictional space that, if uninhabited by federal laws, can be occupied in a *de facto* manner by indigenous legal orders.

Perhaps the most famous in this line of cases is *Natural Parents v Superintendent of Child Welfare et al.*,<sup>120</sup> in which the Tsartlip community unsuccessfully sought to resist the adoption under provincial law of a Tsartlip child by a non-indigenous couple. The argument was that interjurisdictional immunity applied because Indian child and family relationships lie at the exclusive core of federal jurisdiction, or alternatively, that the federal legislation with respect to Indians is paramount and rendered the provincial law inapplicable. At stake was not simply the adoption of the particular child in accordance with Tsartlip customary law, but the intergovernmental arrangement between federal and provincial governments that set in motion the infamous “sixties scoop,” namely the apprehension of disproportionate numbers of indigenous children under provincial child welfare legislation and their placement in and, in many cases, adoption by, non-indigenous families.

Ryder argues that courts should apply an “autonomist” approach to such cases, one that employs the “doctrinal techniques” of the watertight compartments approach, including the interjurisdictional immunity doctrine and an extremely broad “covering the field” interpretation of the paramountcy doctrine, to safeguard an area of sovereignty for indigenous communities.<sup>121</sup> As Ryder points out, this would require a radical change in current case law which presumes that section 91(24) confers plenary juris-

diction on the federal level of government over indigenous peoples rather than a responsibility to respect and support indigenous autonomy.<sup>122</sup> Indeed, Ryder notes that the case law provides little hope that such a shift is likely. However, the factual records in these cases—detailing claims with respect to customary adoption norms, hunting practices, spiritual practices, and child welfare—invite us to take seriously the indigenous claim to autonomy and to challenge the idea that a “legislative gap” necessarily means an absence of self-government. In short, in these cases, as in *PHS Community Services Society*, one can glimpse through the interstices of the jurisprudence the possibility of an alternative constitutional approach that nevertheless builds on fundamental constitutional principles.

## Conclusion

The purpose of this essay is to argue that we need to expand the range of factors that courts look at in settling interjurisdictional disputes with respect to the constitutional division of powers. Courts, in the large run of cases, are necessarily and properly constrained to examine such disputes in terms of formal levels and institutions of representative government. However, the deeper principles that animate our constitutional texts invite a more textured analysis, in particular with respect to the principle of democracy. The story of Insite presents us with a situation in which injection drug users’ survival and health were at stake and in which users as a group faced deeply embedded systemic and discursive barriers to participation within the conventional channels of democratic deliberation and change. In the face of this, the community pursued institution-building projects, peer support strategies, media interventions to “talk back” to demonizing discourses and to dislodge political indifference, and the creation of alternative fora (the weekly user meetings, direct action and protests) for deliberative democratic engagement. My argument is that a judicial determination of where jurisdictional authority resides in a democratic polity—a decision that is at base one about the structure of self-government—should take account of

these elements of functional self-government or “democracy on the ground.” The need to do so is particularly compelling where a social group, for reasons of structural inequality, has very little purchase in representative politics and where, as in the case of Insite, the interest at stake is of a significant and fundamental nature.

As I have developed this argument, admittedly in a preliminary way, I have been very conscious of feminist concerns regarding the interjurisdictional immunity argument in support of Insite. The concern is that the same template applied in the context of some provincial decisions about abortion clinics would produce decidedly less progressive results, essentially erasing instead of acknowledging political space for the critical oppositional politics engaged in by the women’s movement. In the abortion context, the characterization of provincial regulatory opposition to abortion clinics as essentially intruding upon federal jurisdiction under its criminal law power has, strategically, been crucial to ensuring women’s access to abortion.<sup>123</sup> However, my argument is not that interjurisdictional disputes should be more sensitive to and textured by local politics simply because they are local. Rather, my point is that the analysis of such disputes should be more sensitive to and textured by critical oppositional politics and by the democratic engagement of politically marginalized groups that takes place outside established channels of power.<sup>124</sup> Such a politics can as easily point in the direction of federal as well as provincial jurisdiction. What is crucial is that the premise of political marginality requires some attention to actual relations of power and to political voice. As well, such oppositional politics must be weighed in relation to the constraints implicit in the norms of publicity and openness that underpin political communication in a democracy, namely that any claims must “not [be] uttered in a way that others could not accept as consistent with their own worth and dignity.”<sup>125</sup>

The mobilization of the harm reduction movement by the user community in the DTES is a striking example of grassroots oppositional politics by a group that is structurally and discursively marginalized. Furthermore, the tex-

turing of the jurisprudence of jurisdiction with acknowledgement of such political engagement might provide the ground on which we could begin to recognize urban communities such as the DTES as “unsettled” neo-colonial spaces that demand a more sophisticated calculus of democratic self-government than the simplistic and formal federal-provincial binary provides.<sup>126</sup> In short, I agree with Ryder and Elliot that we need more, not fewer, conceptions of how federalism and complex jurisdictional arrangements work. My suggestion that courts should require argument and evidence that explicitly complicate, in this manner, the democratic principles at stake in jurisdictional disputes would be a modest step in that direction.

Judges, understandably, are loath to relinquish the solid ground of textual truths and objective principles. I am by no means arguing that these traditional guides to interpretation should be jettisoned. Judges, after all, are appropriately concerned not simply with the legitimacy of representative institutions, but with their own legitimacy within a broader democratic framework. Text and abstract principle often seem to provide the clearest foundation for judicial legitimacy. However, this is to assume that legitimacy exists in a vacuum, that it has a kind of self-referential coherence that can ignore the context of the deeply engrained and persistent legacy of colonialism as well as pervasive “class inequality, residential segregation, and gender division of labour.”<sup>127</sup> In short, attention to critical oppositional politics and its recognition as a fundamental and necessary component of democratic engagement is invited rather than foreclosed by our constitutional texts and principles.

## Notes

- \* Professor, Faculty of Law, University of Victoria.
- 1 SC 1996, c 19 s 56 [CDSA].
- 2 The BC Civil Liberties Association, the Vancouver Coastal Health Authority, and the Dr. Peter AIDS Foundation also intervened with the Province.
- 3 *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, s 7 [the *Charter*]: “7. 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.”
- 4 2008 BCSC 661, 293 DLR (4<sup>th</sup>) 392 [*PHS Community Services Society* (BCSC)].
- 5 2010 BCCA 15, 314 DLR (4<sup>th</sup>) 209 [*PHS Community Services Society* (BCCA)].
- 6 Supreme Court of Canada, *Scheduled Hearings*, online: Supreme Court of Canada <<http://www.scc-csc.gc.ca/case-dossier/cms-sgd/hear-aud-eng.aspx?ya=2011&ses=03&sr=Search>>.
- 7 See the work of Reva Siegel, for example, “*Roe’s Roots: The Women’s Rights Claims that Engendered Roe*” (2010) 90 BUL Rev 1875, and “Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the Defacto *ERA*” (2006) 94 Cal L Rev 1323; William Eskridge, “Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century” (2002) 100 Mich L Rev 2062; Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971–1995* (Toronto: University of Toronto Press, 1999); and Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund* (Vancouver: University of British Columbia Press, 2004).
- 8 Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004) at 34.
- 9 *Ibid* at 108.
- 10 *Ibid* at 131.
- 11 **The 10% figure, which does not include homeless persons or the large numbers who visit on a daily basis, is found in City of Vancouver, 2005/06 Downtown Eastside Community Monitoring Report, 10<sup>th</sup> ed, online: City of Vancouver <<http://vancouver.ca/commsvcs/planning/dtes/pdf/2006MR.pdf>> [*Monitoring Report*]. This is the most conservative figure. Others estimate the indigenous population at 37 to 40%. See J Cain, *Report of the Task Force into Illicit Narcotic Deaths in British Columbia* (Victoria: Ministry of the Attorney General, 1994), cited in Larry Campbell, Neil Boyd and Lori Culbert, *A Thousand Dreams: Vancouver’s Downtown Eastside and the Fight for Its Future* (Vancouver: Greystone Books, 2009) at 55. Adrienne L Burk notes that the DTES is “widely acknowledged in Canada as having one of the largest off-reserve concentrations of Aboriginal peoples of various First Nations” in *Speaking for a Long Time: Public Space and Social Memory in Vancouver* (Vancouver: University of British Columbia Press, 2010) at xi. Blomley, *supra* note 8 at 113 observes that in 2001 half of all indigenous people in Canada were urban.**
- 12 Burk, *supra* note 11 at 157.
- 13 Campbell, Boyd and Culbert, *supra* note 11 at 56. The authors recount Lou Demerais, an activist on Native health issues in the DTES, “telling Aboriginal people they needed to start voting in elections so that politicians would listen. ‘But they had so many more other issues to struggle with—sickness, housing, eating. . . .’”
- 14 *Monitoring Report, supra* note 11 at 10.
- 15 *Ibid* at 8.
- 16 *Ibid*.
- 17 *Ibid* at 12.
- 18 *Ibid* at 13.
- 19 Leslie Robertson and Dara Culhane, *In Plain Sight: Reflections on Life in Downtown Eastside Vancouver* (Vancouver: Talonbooks, 2005) at 13–14.
- 20 “Laurie” in Robertson and Culhane, *ibid* 36 at 60. In an effort to counteract the invisibility of the missing women as individuals, painter Betty Kovacic created an exhibition of mixed media portraits of the first fifty women to disappear. Kovacic hoped that the exhibition would “accomplish, in part, what the missing women could not achieve in life.” She wrote of her project: “I trust that each viewer will look into the face of each woman long enough to really ‘see’ her, acknowledge her individuality, and embrace our common humanity.” Betty Kovacic, *A Roomful of Missing Women* (Prince George: Two Rivers Gallery, 2007) at 1.
- 21 Leslie Robertson, “Taming Space: Drug use, HIV, and homemaking in Downtown Eastside Vancouver” (2007) 14:5 Gender, Place & Culture 527 at 528.
- 22 Adrienne Burk notes that “the Downtown Eastside has until recently been the second most stable neighbourhood in Vancouver, after the elite enclave of Shaughnessy.” Burk, *supra* note 11 at x.
- 23 Blomley, *supra* note 8 at xiv.
- 24 *Ibid* at 51.
- 25 *Ibid* at 53–65.
- 26 Burk, *supra* note 11 at 157.
- 27 Campbell, Boyd and Culbert, *supra* note 11 at 43.
- 28 Donald MacPherson, Zarina Mulla, Lindsey Richardson, “The Evolution of Drug Policy in Vancouver, Canada: Strategies for Preventing Harm from Psychoactive Substance Use” (2006) 17 International Journal of Drug Policy 127 at

- 127.
- 29 *Ibid.*
- 30 Dan Small, Anita Palepu, and Mark W Tyndall, “The Establishment of North America’s First State Sanctioned Supervised Injection Facility: A Case Study in Culture Change” (2006) 17 *International Journal of Drug Policy* 73 at 73–75.
- 31 MacPherson, Mulla and Richardson, *supra* note 28 at 129; Susan C Boyd, “The Journey to Compassionate Care: One Woman’s Experience with Early Harm-Reduction Programs in BC” in Susan C Boyd and Lenora Marcellus, eds, *With Child: Substance Use During Pregnancy: A Woman-Centred Approach* (Halifax: Fernwood 2007), 10 at 14–15.
- 32 Campbell, Boyd and Culbert, *supra* note 11 at 45.
- 33 Turvey worked with, Downtown Eastside Youth Activities Society (DEYAS). *Ibid* at 45–46.
- 34 Boyd, *supra* note 31 at 10.
- 35 *Ibid* at 14.
- 36 *Ibid* at 10.
- 37 Campbell, Boyd and Culbert, *supra* note 11 at 51, 127.
- 38 *PHS Community Services Society (BCSC)*, *supra* note 4 at paras 22–23.
- 39 Vince Cain, the Chief Coroner of B.C., released a report in 1994 that pronounced the war on drugs a failure and called for harm reduction strategies, including safe injection supervision, and highlighting, in particular, the impacts of addiction on indigenous residents in the DTES. It was several years before government officials heeded Cain’s recommendations. See MacPherson, Mulla and Richardson, *supra* note 28 at 127–28 and Campbell, Boyd and Culbert, *supra* note 11 at 51, 55.
- 40 *Ibid* at 62–63.
- 41 Susan Boyd, Donald MacPherson, and Bud Osborn, *Raise Shit! Social Action Saving Lives* (Halifax: Fernwood, 2009) at 19; and Campbell, Boyd and Culbert, *supra* note 11 at 108–10.
- 42 Thomas Kerr *et al*, *Responding to an Emergency: Education, Advocacy and Community Care by a Peer-Driven Organization of Drug Users: A Case Study of Vancouver Area Network of Drug Users* (Ottawa: Health Canada, 2001) at 6.
- 43 Boyd, MacPherson and Osborn, *supra* note 41 at 44.
- 44 *Ibid* at 43; and Campbell, Boyd and Culbert, *supra* note 11 at 111.
- 45 Kerr *et al*, *supra* note 42 at 9.
- 46 *Ibid* at 11; and Vancouver Area Network of Drug Users, online: <<http://www.vandu.org>>.
- 47 Boyd, MacPherson and Osborn, *supra* note 41 at 43.
- 48 *Ibid* at 84–85.
- 49 *Ibid* at 102.
- 50 *Ibid* at 51.
- 51 *Ibid* at 59.
- 52 *Ibid* at 45–62.
- 53 Kerr *et al*, *supra* note 42 at 9–10, 12–14, 24–26.
- 54 *Ibid* at 17.
- 55 These figures were provided in 2001 by VANDU staff who based them on attendance at meetings. See *ibid* at 13. The figures roughly parallel the demographic make-up of the neighbourhood discussed at *supra* note 11.
- 56 Shared Learnings on Homelessness, *Portland Hotel Society*, online: <[http://www.sharedlearnings.org/index.cfm?fuseaction=Prof.dspProfileFull&profiles\\_id=18131194-83ff-4f31-aea0-37e8756b3d0e](http://www.sharedlearnings.org/index.cfm?fuseaction=Prof.dspProfileFull&profiles_id=18131194-83ff-4f31-aea0-37e8756b3d0e)>.
- 57 Campbell, Boyd and Culbert, *supra* note 11 at 91.
- 58 *Ibid* at 127.
- 59 Boyd, MacPherson and Osborn, *supra* note 41 at 95–96, quoting Jim McNulty, “Death toll mounts while government searches for votes” *The Province* (July 22, 1998).
- 60 Mayor Philip Owen lost the support of his party because of his commitment to a framework that included consideration of harm reduction strategies. Larry Campbell became the next mayor, winning on the basis of his commitment to continue with Owen’s plan. Campbell, Boyd and Culbert, *supra* note 11 at 166–70.
- 61 *Ibid* at 173–74.
- 62 *Ibid* at 181–82.
- 63 *Constitution Act, 1867* (UK), 30&31 *Vict*, c 3, reprinted in RSC 1985, App II, No 5.
- 64 *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at paras 42, 44, Binnie and Lebel JJ [CWB].
- 65 *Ibid* at paras 36, 37 and 69.
- 66 *Ibid*.
- 67 2007 SCC 23, [2007] 2 SCR 86 [Lafarge].
- 68 CWB, *supra* note 63 at para 47.
- 69 The four other judges were McLachlin CJ and Fish, Abella and Charron JJ A seventh judge, Bastarache J, concurred in separate reasons and on generally the same grounds, but without re-vamping interjurisdictional immunity doctrine.
- 70 In this case, Binnie and Lebel JJ wrote reasons for a majority composed of Deschamps, Fish, Abella and Charron JJ Bastarache J wrote concurring reasons.
- 71 CWB, *supra* note 63 at para 47.
- 72 *Ibid* at para 48.
- 73 *Ibid* at para 78.
- 74 *Ibid* at para 35.
- 75 *Lafarge*, *supra* note 67 at para 4, cited by Pitfield

- J in *PHS Community Services Society (BCSC)*, *supra* note 4 at para 118.
- 76 *PHS Community Services Society (BCSC)*, *supra* note 4 at paras 117–18.
- 77 *PHS Community Services Society (BCCA)*, *supra* note 5 at paras 151–53, referring to Robin Elliot’s discussion of *Lafarge* in “Interjurisdictional Immunity after Canadian Western Bank and Lafarge Canada Inc.: The Supreme Court Muddies the Doctrinal Waters—Again” (2008) 43 SCLR (2<sup>nd</sup>) 433 at 480–81.
- 78 *PHS Community Services Society (BCCA)*, *supra* note 5 at para 168.
- 79 *Ibid* at para 171.
- 80 *Ibid* at para 176.
- 81 2010 SCC 39, [2010] 2 SCR 536 [*COPA*].
- 82 *Ibid* at para 55.
- 83 *Ibid* at para 58.
- 84 The majority was composed of McLachlin CJ and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ Lebel and Deschamps JJ each wrote dissenting reasons.
- 85 *COPA*, *supra* note 81 at paras 50–53.
- 86 *Ibid* at para 77. Deschamps J’s dissent turns on her finding that the impact of the provincial scheme on the federal aeronautics power does not meet the *CWB* impairment standard. *Ibid* at para 90.
- 87 2010 SCC 38, [2010] 2 SCR 453 [*Lacombe*].
- 88 McLachlin CJ finds that the municipal zoning regulation that would prohibit the construction of an aerodrome is an *ultra vires* invasion of the federal power over aeronautics that cannot be sustained under the ancillary powers doctrine. *Ibid* at paras 30, 58. Thus, there is no need to address immunity or paramountcy arguments. Lebel J in separate and very short reasons also finds in favour of the aerodrome owners but on the grounds of paramountcy doctrine. *Ibid* at para 70. Deschamps J in dissent, finds, like Lebel J, that the bylaw is valid and non-impairing but would also find that paramountcy doctrine is not triggered. *Ibid* at paras 148, 181.
- 89 Deschamps J, *ibid* at para 109 cites para 43 of McLachlin CJ’s reasons in *COPA* when describing McLachlin CJ’s position in this regard.
- 90 Bruce Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1990–91) 36 McGill LJ 308 at 313, 380–81; and Robin Elliot, *supra* note 77 at 482–90.
- 91 Ryder, *supra* note 90 at 321, 327–39.
- 92 *Ibid* at 322.
- 93 *Reference Re Secession of Québec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 66.
- 94 Ryder, *supra* note 90 at 313.
- 95 *PHS Community Services Society (BCCA)*, *supra* note 5 at para 174.
- 96 *Ibid* at paras 174,123.
- 97 *Ibid* at para 11.
- 98 *Ibid* at para 38.
- 99 I am invoking here Wendy Brown’s worry that by pursuing justice claims through the legal language of rights, we engage in a process that “fixes the identities of the injured and the injuring as social positions, and codifies as well the meanings of their actions against all possibilities of indeterminacy, ambiguity, and struggle for resignification or repositioning.” *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) at 27. See, however, Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montréal: McGill-Queen’s University Press, 2010) at 119–35 for a thoughtful analysis of how principles of democracy can and should inform equality rights.
- 100 Wendy Brown, “Suffering the Paradoxes of Rights” in Wendy Brown and Janet Halley, eds, *Left Legalism/Left Critique* (Durham, NC: Duke University Press, 2002), 420 at 422, 431.
- 101 Brown, *States of Injury*, *supra* note 99 at 5.
- 102 Iris Marion Young, “Activist Challenges to Deliberative Democracy” (2001) 29:5 Political Theory 670 at 671. See also *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) at 48–49.
- 103 Young, “Activist Challenges,” *supra* note 102 at 688.
- 104 *Ibid* at 683–84.
- 105 Brown, *States of Injury*, *supra* note 99 at 8.
- 106 *Ibid* at 9.
- 107 James Tully, *Public Philosophy in a New Key: Democracy and Civic Freedom*, vol 1 (Cambridge: Cambridge University Press, 2008) at 157.
- 108 *Ibid* at 308.
- 109 The endorsement in 2001 by the City of Vancouver of a four-pronged strategy aimed at prevention, treatment, enforcement and harm reduction included traditional as well as non-traditional responses to addiction and injection drug use. Subsequently, the Vancouver Coastal Health authority undertook a supervised injection site initiative, culminating in the approval of a *CDSA* exemption from the federal government. *PHS Community Services Society (BCSC)*, *supra* note 4 at paras 33–46. The exemption was granted based on “the necessity for scientific purpose.” *PHS Community Services Society (BCCA)*, *supra* note 5 at para 10.

- 110 Young, "Activist Challenges," *supra* note 102 at 685–87. Again, Young's point is echoed in Tully's argument, in the context of norms of mutual recognition, that such norms must always be open to contest and dialogue because any agreement will always be flawed: "There are always asymmetries in power, knowledge, influence and argumentative skills that block the most oppressed from getting to negotiations in the first place and then structuring the negotiations if they do." Tully, *supra* note 107 at 306.
- 111 Brown, *States of Injury*, *supra* note 99 at 13. Brown here is critiquing thinkers on the left who, in the wake of the atrocities of "actually existing socialisms" have abandoned a critique of capitalism in favour of the idea that "freedom, finally, is a matter of consumption, choice, and expression: an individual good rather than a social and political practice." *Ibid.*
- 112 PHS Community Services Society (BCSC), *supra* note 4 at para 141.
- 113 PHS Community Services Society (BCCA), *supra* note 5 at para 123.
- 114 2001 SCC 40, [2001] 2 SCR 241 [*Spraytech*] at para 3. Gonthier, Bastarache and Arbour JJ agreed with L'Heureux-Dubé J's reasons. Lebel J wrote concurring reasons with which Iacobucci and Major JJ agreed.
- 115 *Ibid.*
- 116 *Ibid* at para 29.
- 117 It should be noted that the principle has historically been invoked to demand deference to sub-political associations and social groups such as churches and guilds. Robert Howse, "Subsidiarity in All but Name: Evolving Concepts of Federalism in Canadian Constitutional Law" in *Contemporary Law, 1994: Canadian Reports to the 1994 International Congress of Comparative Law, Athens, 1994* (Cowansville, Que: Yvon Blais, 1995) 701 at 701. Howse warns that it was deployed in this manner at the end of the 19<sup>th</sup> century by the Catholic Church in order to defend Church power against democratic and socialist forces. In other words, lower levels of association may not in fact be more democratic and "closer to the people." *Ibid* at 702.
- 118 2010 SCC 61, 327 DLR (4<sup>th</sup>) 257 at para 69. McLachlin CJ's reasons are supported by Binnie, Fish and Charron JJ.
- 119 S 91(24) of the *Constitution Act, 1867* (UK), 30&31 Vict, c 3, reprinted in RSC 1985, App II, No 5.
- 120 [1976] 2 SCR 751. 60 DLR (3d) 148.
- 121 Ryder, *supra* note 90 at 363.
- 122 *Ibid* at 363, 379.
- 123 See e.g. *R v Morgentaler*, [1993] 3 SCR 463, 107 DLR (4th) 537
- 124 See *supra* note 117 regarding the anti-democratic history of the principle of subsidiarity.
- 125 Young, *Inclusion and Democracy*, *supra* note 102 at 68.
- 126 See, in addition to Ryder's argument, Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31 Queen's LJ 521; and John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 198–201.
- 127 Young, "Activist Challenges," *supra* note 102 at 684.





# *Insite: Right Answer, Wrong Question*

Gillian Calder\*

## I. The Wrong Question

I have entitled my five-minute comment: “*Insite: Right Answer, Wrong Question*.”<sup>1</sup> The focus of my comments is on the division-of-powers approach used in the reasoning of Justice Huddart of the British Columbia Court of Appeal. Although asked to determine whether the legislative regime at issue was enacted validly, that is, whether it *was* either federal or provincial—the question that she wanted to answer, and did answer, was whether the matter *should* be federal or provincial. My reading of the majority reasons is that Justice Huddart (with Justice Rowles concurring) used the doctrine of interjurisdictional immunity (“IJI”) to reach the conclusion that she deemed to be the just outcome—that “the supervision of self-injections of illegally-possessed drugs in a provincially authorized and supported health care facility is dictated by the public interest in health care”<sup>2</sup> and thus falls exclusively within provincial jurisdiction.

The use of IJI to reach this conclusion raises several concerns for me that are worth exploring further. First, the answer given by the court was grounded in one of the most inflexible aspects of constitutional law and continues the formal divide between division of powers and the *Charter*. Why is it that when courts are asked to analyze whether an issue is properly enacted by either the federal government or one of the provincial governments, the interpretative analysis used is rarely informed by *Charter* or section 35 jurisprudence?<sup>3</sup> Second, the use of IJI seems to offer renewed life to a “watertight compartments” approach to federalism. Of the differing metaphors that have emerged in case law to describe the division of powers in the

*Constitution Act, 1867*<sup>4</sup> over the past century and a half of jurisprudence, the “ship of state” approach remains the most rigid and, notwithstanding an emphasis on human ingenuity,<sup>5</sup> an inaccessible choice. Third, the approach leaves health hived off within provincial jurisdiction in a manner that raises some troubling questions with respect to other contentious health issues such as abortion.<sup>6</sup> In this comment, I will speak to the first issue and hope that the other questions will be addressed in the insights of my colleagues, in the conversation around this volume, and in future judicial decisions.

## II. The context

Over the past ten years I have explored systemic questions about the relationship between women, work and social reproduction in Canada through a feminist lens, primarily by examining the legal mechanisms through which the federal government delivers a benefit for maternity and parental leave.<sup>7</sup> This work coalesced, to some extent, with a judgment of the Supreme Court of Canada in October 2005 when, in a case similar to *Insite*, the Court offered a fairly straightforward answer to the division of powers question.<sup>8</sup> The end result there too was ultimately “correct,” but in the process the Court sidestepped answering the more pressing social questions.<sup>9</sup> This pushed me to question further why we limit assessment of constitutionality in a jurisdictional sense to a textual assessment of which level of government—the federal or the provincial—can legislate on a particular subject matter. Why don’t we use a different approach to constitutionalism, one in which “arid legal formalism [is] rejected in favour of an interpret-

ive stance under which the scope of the power is considered in light of the principles underlying the whole of our constitutional structure”?<sup>10</sup> The most important questions that underlie *Insite* are the ones that centre on the needs of people who use that care facility’s resources. What do we lose when we turn to division of powers to answer the most dynamic questions we can ask as a society?

### III. Three stories

In *Insite*, the British Columbia Court of Appeal addresses the division of powers question in an aridly formal way. The majority finds that its supervised drug injections services are “vital” and that determining the kinds of services a hospital provides is at the core of its purpose.<sup>11</sup> Because the federal legislation at issue would impair *Insite*’s work, it should not apply.

Instead of focussing on the text of sections 91 and 92, what if the Court had answered the question by interpreting the provisions at issue as the Supreme Court of Canada directed in the *Québec Secession Reference* with attention to the foundational unwritten principles that ground and inform the workings of Canadian constitutional law?<sup>12</sup> What would explicit attention to federalism, democracy, constitutionalism and the rule of law, and respect for minorities enable the Court to highlight?<sup>13</sup> Or, following the work of Patricia Hughes, what analysis would come from centring on substantive equality, giving the most nuanced understanding of equality the same foundational constitutional status as freedom of speech or judicial independence?<sup>14</sup> Or, wisely taking the advice articulated by Hester Lessard in this volume, what other ways of seeing might emerge from an analysis of division of powers questions “textured by critical oppositional politics and by the democratic engagement of politically marginalized groups that takes place outside established channels of power”?<sup>15</sup>

My assertion here is not that the result from the British Columbia Court of Appeal would ultimately have been different. I think they came to the just result. But by answering the question with reference only to the strict textual reading

of the Constitution, this case ends rather than prompts a more dynamic understanding of the role of law (or, the fuller role of law) in deciding these kinds of disputes. To make this argument more apparent, I will compare the result in *Insite* with three other division of powers cases in which the Court chose a formal approach to federalism to answer the question posed, leaving other questions of equality and colonialism unexplored.

#### a. Pauline Paul—*Paul v Paul*<sup>16</sup>

The first story is the story of Pauline Paul, a member of the Tsartlip First Nation who in 1984 commenced divorce proceedings against her husband of nineteen years. Mrs. Paul sought an interim order pursuant to British Columbia’s *Family Relations Act* that would allow her to live in their matrimonial home on her own with her children until division of property was determined. Her situation was heightened by the fact that she was escaping a violent relationship. Mr. Paul contested the application, relying on the argument that jurisdiction over matters pertaining to Indians and lands reserved for Indians were exclusively matters of federal jurisdiction. On a strict division of powers analysis, the Supreme Court of Canada (SCC) sided with Mr. Paul, finding the provincial legislation inapplicable to a family residence located on land in an Indian Reserve. As Mary Ellen Turpel has written, the Court gave no analysis of the gap this leaves in the present scheme, and does not even mention the violence that is present in Mrs. Paul’s relationship. In the process of applying a strict federalism analysis, the SCC effectively erased the social and political context of the dispute. The tools it used to answer the question left Turpel and others concluding, “why this is a division of colonial powers and not a matter of aboriginal custom regarding family breakdown and land consequences is lost on the courts.”<sup>17</sup>

#### b. Réjean Demers—*R v Demers*<sup>18</sup>

The second case is the story of Réjean Demers, a young man living with Down Syndrome, charged with sexual assault, but found permanently unfit to stand trial on account of his mental disability. However, under the *Criminal Code of Canada* he was subject to indefinite appear-

ances before a Review Board, and did not have access to an absolute discharge—unlike other accused who go through a trial and are found not criminally responsible by reason of mental disorder. M. Demers challenged the statutory regime on several bases, including that the provisions establishing a regime for dealing with accused persons living with mental disabilities were beyond the federal government’s criminal law power. On this issue, the Supreme Court of Canada, with LeBel J in dissent on this point, held that in pith and substance these provisions fell within both the preventative and criminal procedures branch of the criminal law, all well-accepted criminal law purposes. As such, they were within the jurisdiction of the federal government. Using this division of powers analysis, the needs of persons with mental disabilities in conflict with the law who are unable to establish their legal culpability through the trial process, is outside the Court’s purview.

### c. Maternity and Parental Leave—*EI Reference*<sup>19</sup>

Finally, in this 2005 reference case, the government of Québec asked the Supreme Court of Canada whether maternity and parental leave, while related to employment, was not in fact a matter attached to (un)employment insurance (a federal matter), or whether it was more properly a social program (a provincial matter).<sup>20</sup> In saving the regime as valid federal law, the Court left unexplored whether the benefit, delivered as it is through unemployment insurance, is failing marginalized Canadians who arguably need the benefit the most. As Nitya Iyer has argued, a benefit that is disproportionately available to certain women based on their labour force participation exacerbates the oppression of poor women, Indigenous women, women of colour, women with disabilities, single parents and lesbian parents—by making it easier for mothers with certain labour patterns to qualify for benefits.<sup>21</sup> The judgment seems to close the door on the more complicated question of whether the maternity and parental leave benefit program is properly rooted in principles outside of unemployment insurance. To most of us working in the area,<sup>22</sup> it seemed that the Court was being asked the wrong question. Given the nature

of the division of powers analysis, as with Mrs. Paul and M. Demers, the substantive equality questions that inform this debate were left unaddressed.

## IV. Crafting the right question

I have argued that division of powers analysis is often rigid, and as a result, existing gaps in legislative frameworks, such as the absence of a culturally sensitive means by which Aboriginal women can seek division of matrimonial property on reserve in Canada, or questions with respect to whether the *Criminal Code*<sup>23</sup> or the federal *Employment Insurance Act*<sup>24</sup> is meeting the equality needs of marginalized Canadians, are not considered, or are left unexplored. It is a crucial question for constitutional law that remains unanswered: whether assessment of constitutionality in a jurisdictional sense should be limited to a textual assessment of which level of government—the federal or the provincial—can legislate a particular subject matter, or whether an interpretive stance that considers the scope of the power at issue in “light of the principles underlying the whole of our constitutional structure” should be adopted.<sup>25</sup> The outcome in the case of *Insite*, where attention was paid to the unwritten constitutional principles of federalism, democracy, constitutionalism and the rule of law, protection of minorities, and substantive quality, would arguably have been the same. However, the result of coming to this conclusion by cementing walls around an area of provincial jurisdiction means both that this decision is being appealed with a different outcome possible, and that conclusions of this nature can be reached in the future without exploring the very systemic questions that make this facility necessary for people living with addictions in the first place. The right question may be more important than the right answer. Ultimately, the right to access services at *Insite* is an issue that invokes the necessities of life for the most marginalized Canadians. Surely the use of constitutional law to answer this critical and systemic question should not lead to a formal, arid, and dehumanized response.

Law is performative—a dynamic and constantly shifting medium that profoundly shapes

our understandings of citizenship, gender, social condition and community. The use of IJI to help reach the result that Insite should continue to exist and offer on one level the necessities of life and on the other the hope of systemic change, is laudable. However, the risk of shutting down solutions rather than enabling them in this context is too great. The British Columbia Court of Appeal came to the conclusion that the relevant provisions of the federal *Controlled Drugs and Substances Act* should not apply to the work done at Insite.<sup>26</sup> Crafting the right question so that the human issues of what it means to live with addiction and poverty in one of the most privileged societies in the world do not get lost in a determination of exclusive jurisdiction is essential.

## Notes

\* Associate Professor, Faculty of Law, University of Victoria.

1 This case comment will refer solely to *PHS Community Services Society v Canada (Attorney General)*, 2010 BCCA 15, 314 DLR (4<sup>th</sup>) 209, rev'g 2008 BCSC 661, 293 DLR (4<sup>th</sup>) 392, leave to appeal to SCC granted, 33556 (June 24, 2010) [*Insite*].

Thank you to Jen Raso for excellent research assistance and to the audience at Kent University on June 30, 2006, who first responded to this series of stories in relation to each other. Thank you also to Rebecca Johnson, Andrew Petter, Nola Ries, Jeremy Webber, Benjamin Berger, Hester Lessard and the assembled audience for this panel on the judgment for this conversation. Thank you specifically to Tim Richards whose work to provide students with the most dynamic way to engage with the questions underlying the legal challenges faced by the Insite facility was inspiring.

2 This was the argument made by the provincial Attorney General, and cited by Justice Huddart, *ibid* at para 120.

3 This refers to the large body of case law and scholarly analysis surrounding the *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 [the *Charter*] and s 35 of the *Constitution Act, 1982 (ibid)*.

4 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 91–92.

5 Donna Greschner, “The Supreme Court, Federalism, and the Metaphors of Moderation” (2000) 79 *Can Bar Rev* 47 at 53.

6 See the discussion by Hester Lessard in “Jurisdictional Justice, Democracy and the Story of Insite,” in this volume.

7 See e.g. “The Personal *is* Economic: Unearthing the Rhetoric of Choice in the Canadian Maternity and Parental Leave Benefit Debates” in Rosemary Hunter and Sharon Cowan, eds, *Choice and Consent: Feminist Engagements with Law and Subjectivity* (New York: Routledge-Cavendish, 2007) at 125; “A Pregnant Pause: Federalism, Equality and the Maternity and Parental Leave Debate in Canada” (2006) 14:1 *Fem Legal Stud* 99; “Recent Changes to the Maternity and Parental Leave Benefits Regime as a Case Study: The Impact of Globalization on Social Programs in Canada” (2003) 15:2 *CJWL* 342; and *Gender, Social Reproduction and the Canadian Welfare State: Assessing the Recent Changes to the Maternity and Parental Leave Benefits Regime* (LLM thesis, York University, 2002) [unpublished].

8 *Reference re Employment Insurance Act (Can)*, ss 22 and 23, 2005 SCC 56, [2005] 2 SCR 669 [*EI Reference*].

9 Calder, “A Pregnant Pause,” *supra* note 7 at 116–17.

10 *R v Demers*, 2004 SCC 46, [2004] 2 SCR 489 at para 78, LeBel J, dissenting on this point.

11 *Insite*, *supra* note 1 at para 157.

12 See *Reference re Secession of Québec*, [1998] 2 SCR 217, 161 DLR (4<sup>th</sup>) 385.

13 Here I am indebted to the work of John Borrows, and in particular, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37:3 *Osgoode Hall LJ* 537 at 589–96.

14 Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle” (1999) 22 *Dal LJ* at 5.

15 Hester Lessard, *supra* note 6 at 108.

16 [1986] 1 SCR 306, 26 DLR (4<sup>th</sup>) 196.

17 Mary Ellen Turpel, “Home/Land” (1991) 10 *Can J Fam L* 17 at 24.

18 *Supra* note 10.

19 *Supra* note 8.

20 For a discussion of the motivations underlying the challenge brought by the government of Québec, see: Calder, “The Personal *is* Economic” *supra* note 7, and Calder, “A Pregnant Pause,” *supra* note 7.

21 See Nitya Iyer, “Some Mothers Are Better than Others: A Re-examination of Maternity Benefits”

in Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 168 at 176, as cited in Calder, “The Personal is Economic,” *supra* note 7 at 134–35.

- 22 My work on maternity and parental leave has been greatly informed by many Canadian legal feminist scholars engaging with similar questions. See e.g. the work of Bev Baines, Gwen Brodsky, Susan Boyd, Barbara Cameron, Michèle Caron, Andrée Côté, Rachel Cox, Shelagh Day, Judy Fudge, Nitya Iyer, Ann Porter, Chantal Richard, Ruth Rose, and Lorna Turnbull.
- 23 RSC 1985, c C-46.
- 24 SC 1996, c 23.
- 25 *R v Demers*, *supra* note 10 at para 78. Pointing to these principles also at paras 79, 83–84, LeBel J alludes to *Reference re Secession of Québec*, *supra* note 12.
- 26 *Insite*, *supra* note 1 at para 193.



# Applying the Burden of Proof and Creating Connections to Communities

Patricia Cochran\*

One of the questions that lies at the heart of the *Insite* case<sup>1</sup> is this: *what kind of connections should exist between the law and the people it governs?* In this short comment, I explore one of the ways this question informs the treatment of evidence and proof by focusing on the section 7 aspect of the case and the question of arbitrariness. With the goal of inviting discussion, I suggest that in cases involving the constitutional rights of marginalized individuals and communities, the concept of the “burden of proof” can provide a way to help understand what is at stake, and what criteria we might use to relate the burden of proof to values of equality and justice.

The idea of a “connection” between law and its communities can be understood in a very broad sense, reflecting the way questions of jurisdiction and human rights speak to the boundaries of communities and their relationship to legal rules. Peoples’ overlapping membership in local, social, medical, regional, national and other groups are all at play in the *Insite* case, and the various judgments all attempt to grapple with the significance of these communities for the legal questions at issue. The questions of “connections” in this sense are addressed by constitutional law, which helps determine what kind of connections are required, for example, in order for a law to be non-arbitrary.

The notion of “connection” can also be understood in an evidentiary sense. In this

sense, questions of connection are about determining what will count as adequate grounds for legal and factual claims. Once we understand what kind of connections are required by the substantive law, it is necessary to ask: *how do we know when these connections exist?* Can the “connection” be established by logic? By scientific expertise? By the recounting of personal experience? What is the significance of community consensus? Of legislative intent?

The significance of this type of connection—an evidentiary connection—appears in relation to multiple legal questions in *Insite*. For example, to support her use of the doctrine of interjurisdictional immunity to protect the legal existence of the safe injection site, Huddart JA cites the requirement that constitutional law must “remain responsive to the *actual* needs of the public.”<sup>2</sup> In moderating the debate between competing expert opinions at the trial level, Pitfield J finds that “[t]he correlation between Dr. Marsh’s opinion and *reality* is reflected in the circumstances of the [individual] plaintiffs.”<sup>3</sup> I think that these type of statements are in part a reflection of the various judges’ attempts to engage with problems of evidence and proof, with the question of *how we know* when “law” connects to “reality” in some appropriate way.<sup>4</sup>

The question of connections and disconnections is made quite explicit in the section 7 aspect of the *Insite* case. Part of this analy-

sis requires the court to determine whether the impugned drug possession and trafficking laws are “overbroad” or “arbitrary” as they relate to the activities of the users and staff of the safe injection site. This requires direct consideration of the alleged connections between the objectives of the law and its consequences in the social reality in which it operates. Thus, in examining the constitutional question of what kind of connection is required to make the law legitimate, judges also engage with the evidentiary question of what will count as proof of such connection.

Central to these questions is the notion of the *burden of proof*. In *Insite*, there is no doubt, as a matter of law, that the claimants carry the burden of proof. PHS, Dean Wilson and Shelley Tomic must provide *evidence* to persuade the court, on a balance of probabilities, that their characterization of the impugned legislation is the right one. The judgments of the B.C. Supreme Court and the Court of Appeal in *Insite* on the question of arbitrariness are framed quite directly in terms of the burden of proof: for Rowles JA there was “ample” evidence to ground the trial judge’s finding of arbitrariness, whereas for Smith JA this issue was characterized by a “lack of evidence.”<sup>5</sup> For Smith JA, the claimants simply did not meet their burden of proof. However, the notion of the burden of proof is most useful when taken beyond the quantitative: it is not *simply* a matter of “more” or “less” evidence.

I suggest that the full meaning of a burden of proof becomes quite complex in the context of constitutional litigation, particularly when it involves the rights of individuals and communities who are marginalized in Canadian political and legal discourse. Beyond the simple determination that constitutional claimants carry the burden of proof, many related questions linger about the factual background judges should use to contextualize the evidence before them, about the proper roles for expert opinion and personal testimony, and about access to resources for generating useful evidence and presenting it to the court. All of these affect the distribution of burdens and benefits in the judge’s determination of the

facts. I think it is useful to read the judgments on arbitrariness in *Insite* through this lens because it helps to explain what is important and interesting about the case, and also because it provokes some questions for further thinking about the meaning of the burden of proof.

The judges’ differing perspectives on the adequacy of the evidence on arbitrariness relates in part to the way each judge contextualizes that evidence. I believe that the determination of the appropriate context for understanding and evaluating evidence is a complex and significant one. In this comment, I start to think through three aspects of this determination: 1) the question of whether the community or reference should be a local or national one; 2) the question of how the evidence of the individual claimants should be understood; and 3) the role of community consensus.

When answering questions about the connection between the law and its communities, judges must decide *which communities* are the relevant ones for understanding the facts of the case. In their decisions, Pitfield J and Rowles JA both orient their analysis to the local and provincial communities which are most affected by *Insite* and the competing laws surrounding them. At the trial level, Pitfield J finds that the impugned legislation is indeed arbitrary in the way it operates in the context of *Insite* and the Downtown Eastside of Vancouver (DTES). He says that “[i]nstead of being rationally connected to a reasonable apprehension of harm, the blanket prohibition contributes to the very harm it seeks to prevent. It is inconsistent with the state’s interest in fostering individual and community health, and preventing death and disease.”<sup>6</sup> The objectives of the law are measured against its consequences for local communities.

At the Court of Appeal, Rowles JA finds that the trial judge’s conclusion on this matter is “amply supported by the evidence.”<sup>7</sup> Rowles JA also finds that the concept of harm reduction is a constituent part of Parliament’s objective in enacting the *CDSA*,<sup>8</sup> further supporting her view that the application of the legislation arbitrarily undermines its own ob-



jectives in the context of *Insite*.<sup>9</sup> Rowles JA also goes further, saying that the legislation, when applied in this context, has *no salutary effect*. Thus, the rights of the claimants are affected “without any ameliorating benefit to those persons or to society at large.”<sup>10</sup>

Locating the dispute squarely in the provincial and local community affects Rowles JA’s constitutional analysis, but it also has consequences for her approach to the evidence and the burden of proof. Placed in *this* context, the evidence establishing that *Insite* does reduce harm from drug use, including the risk of fatal overdose, firmly supports the claim about arbitrariness: a law which aims to promote health and safety but instead promotes disease and risk of death is arbitrary indeed. In this way, the claimants have discharged their burden of proof by providing personal experience and expert opinion which shows that *Insite* prevents harm.

In her dissenting judgment, Smith JA finds that the claimants in the case have not offered sufficient evidence to *demonstrate* that the impugned parts of the *CDSA* are arbitrary. In particular, she holds that it is insufficient for establishing arbitrariness to show that *one* consequence of the legislation is inconsistent with its purpose.<sup>11</sup> Thus, even if it is true that the prohibition of access to safe injection sites causes harm or increases the risk of death for injection drug users, this alone is not enough to make the entire law inconsistent with the state’s objective in protecting health.<sup>12</sup>

In contrast to Pitfield J and Rowles JA, Smith JA identifies the local or provincial focus of the evidence as a source of weakness and partiality. Smith JA does not directly take issue with the conclusion that the operation of the *CDSA* may increase harm, including the risk of death, to injection drug users in the DTES. However, “if the broader state interest in the health and public safety of all Canadians (not just the intravenous drug users) becomes the focus of the analysis, it cannot be said that the evidence supports the conclusion that section 4(1) of the *CDSA* bears no relation to or is inconsistent with these broader interests, or

even that the prohibition as it applies to addicts is not necessary to protect these interests.”<sup>13</sup> So, for Smith JA, the burden of proof borne by the claimants is not discharged, because they have not provided evidence about the effects of the law on communities beyond the DTES, or the alternatives that might have been available to Parliament to fulfill its objectives.

If we think about the burden of proof as doing substantive work in relation to justice, the question of sufficient evidence might be reframed as follows: In the context of litigation about the rights of marginalized people, what are the obligations of a judge when deciding on a community of reference? The choice about framing the evidence at the local or national level resonates with competing notions of federalism, and these values are part of what animates the outcome. When the litigation involves the lives and rights of marginalized and vulnerable communities, as it does in *Insite*, values of equality also come into play. How does the introduction of equality values assist in determining how we should understand the burden of proof in this context?

One way to respond to equality values in the context of the burden of proof would be to say that the court carries an obligation to attempt to place the evidence of a marginalized claimant in a context which gives it meaning, to imagine a world in which that person’s claims make sense. I think we can see the various judges grappling with this possibility in relation to their treatment of the evidence of the individual claimants in the case.

Pitfield J sets out the evidence of the two personal claimants, Dean Edward Wilson and Shelly Tomic. Their affidavit evidence, as reported in the decision, describes some aspects of their personal histories, their health, and their experiences with drugs and addiction. Ms. Tomic’s affidavit, for example, states that she was born addicted to speed due to her mother’s addiction during pregnancy, and that her first experience with illegal drugs occurred when she was seven years old.<sup>14</sup> Mr. Wilson’s affidavit describes his long-term addiction to both cocaine and heroine, and his

participation in more than 25 treatment programs over the past 37 years.<sup>15</sup>

Pitfield J notes that Canada did not challenge the evidence of either individual.<sup>16</sup> However, the consequence of their evidence in the decisions is not entirely transparent, and does not explicitly enter into the analysis on arbitrariness. At the trial level, Pitfield J states that the evidence of Mr. Wilson and Ms. Tomic provides a lens for interpreting the evidence of the expert witnesses. Specifically, in favouring to some extent the evidence of the plaintiff's expert, Pitfield J finds that "[t]he correlation between Dr. Marsh's opinion and reality is reflected in the circumstances of the [individual] plaintiffs."<sup>17</sup>

At the B.C. Court of Appeal, Rowles JA writes that the evidence of the personal complainants is part of what "reveals the impact of the application of sub-section 4(1) of the *CDSA* on addicted persons in the DTES and how that is related to addicted persons engaging in unsafe practices, which result in overdoses and the spread of infectious diseases and other harms."<sup>18</sup> Rowles JA thus relies on the evidence of the personal complainants to support her conclusion that the trial judge was correct in finding that the legislation did engage section 7 interests in life, liberty and security of the person.

In her dissenting judgment that there was insufficient evidence to find that the laws in question offended section 7, Smith JA invokes the evidence of the individual complainants to support Canada's claims about the significance of the state objective in this case. She writes that "the evidence regarding . . . the difficult lives of Mr. Wilson and Ms. Tomic speaks directly to the addictive and dangerous nature of the drugs."<sup>19</sup>

These passages suggest to me that while the evidence of the individual claimants is taken quite seriously by all of the judges, Pitfield J and Rowles JA allow this evidence to play a larger role in grounding the way they see the evidence as a whole. In those judgments, it seems that the world in which the claimants' evidence makes sense is used to

test the other evidence, including determining which expert evidence is the more persuasive and relevant. This approach makes the failings of the impugned legislation central, rather than marginal. Rather than re-imagining a world in which the claimants' lives are marginal to Canadian public life, interpreting the burden of proof through an equality lens has the potential to place their reality at the heart of the analysis.

The questions of how the evidence should be placed in context also engages the issues of controversy, consensus and democracy that arise throughout this case. Although the litigation indicates strong differences of opinion between the provincial and federal governments, Rowles JA writes that she doubts the accuracy of Canada's "assertion that the operation of Insite is controversial in a policy sense. In this province, there is no longer any serious debate about the need for Insite as a health care facility."<sup>20</sup> Both Rowles JA and Pitfield J discuss the political processes that lead up to the establishment of Insite, and the development over time of a form of community consensus on this issue. In contrast, the judgment of Smith JA prioritizes the actions of Parliament, which are of course also linked to democratic processes of a different kind.

These questions about the role of community consensus might speak to the burden of proof by generating reasons for preferring one context over another. In the context of rights claims by marginalized communities and the existence of a broad political process, perhaps our understanding of the burden of proof should allow us to privilege a factual framework which has been used to support that consensus. Rather than saying, as Smith JA does, that absent evidence from the claimants about options other than a blanket prohibition, Parliament's claims about the law must be "taken at face value,"<sup>21</sup> we might require more powerful actors such as the federal government to demonstrate why its view of the situation should prevail over a worldview which provides cohesion to the process of community discourse which has led to consensus.

Understanding the burden of proof as a substantive matter of equality and justice opens far more questions than it answers and I suggest that the answers to these questions will never be obvious and may not even be attainable. However, I do think that asking these questions is a useful exercise. In the *Insite* case, thinking about how the evidence is contextualized in the local or national community, or within or without the experiences of individual claimants and in support or against processes of community consensus, directs our attention to the relationship between the burden of proof and the possibility for justice. The value of the “connection” between law and its communities depends on how we build it.

## Notes

- \* Ph.D. Candidate, Faculty of Law, University of British Columbia.
- 1 *PHS Community Services Society v Canada (Attorney General)*, 2008 BCSC 661, 293 DLR (4<sup>th</sup>) 392 [BCSC], rev'd 2010 BCCA 15, 314 DLR (4<sup>th</sup>) 209 [BCCA], leave to appeal to SCC granted, 33556 (June 24, 2010). The decisions are jointly referred to here as the “*Insite*” case.
- 2 BCCA, *ibid* at para 172 [emphasis added].
- 3 BCSC, *supra* note 1 at para 59 [emphasis added].
- 4 **The nature of this connection might be understood** in various ways: objective, constitutive, related to power, etc.
- 5 BCCA, *supra* note 1 at para 75, Rowles JA, majority and para 291, Smith JA, dissenting.
- 6 BCCA, *supra* note 1 at para 152.
- 7 BCCA, *supra* note 1 at para 75.
- 8 RSC 1996, c 19 [the CDSA].
- 9 BCCA, *supra* note 1 at paras 71–72.
- 10 *Ibid* at para 76.
- 11 *Ibid* at para 288.
- 12 *Ibid* at para 291.
- 13 *Ibid* at para 287.
- 14 BCSC, *supra* note 1 at para 65.
- 15 *Ibid* at paras 61–62.
- 16 *Ibid* at para 60.
- 17 *Ibid* at para 59 [emphasis added].
- 18 BCCA, *supra* note 1 at para 35.
- 19 *Ibid* at para 280.
- 20 *Ibid* at para 62.
- 21 *Ibid* at para 297.



# Section 7, Insite and the Competence of Courts

Jeremy Webber\*

In the *Insite* case,<sup>1</sup> the plaintiffs came to court with a very specific end in mind: to preserve the Insite safe-injecting facility. They did so for reasons of substantive justice: they wanted to protect drug users from the dangers of injection in the back alleys of the Downtown Eastside and to mitigate the harms common to that drug use—virulent infections and the risk of death from overdose.

As in many constitutional cases, the courts' decisions deal with these issues only partially and often indirectly. They are largely focused not on the substantive justice of the plaintiffs' claim, but rather on jurisdiction—most obviously the jurisdiction of the federal Parliament in relation to the B.C. legislature and less obviously on the jurisdiction of the courts vis-à-vis the other branches of the state (the executive and legislature).

That kind of disjuncture between plaintiffs' objectives and court's decision is common. It can cause intense frustration to plaintiffs for it seems to miss the very point of the litigation. But issues of jurisdiction do deserve our attention. They are not just distractions or matters of political power. They too speak to real issues of justice, even if those issues are far removed from the compelling needs of the Downtown Eastside.

Jurisdictional questions are founded on the need to make societal decisions when society is not unanimous; indeed, even when members of society intensely disagree. Because of that disagreement those of us who participate in the legal system cannot simply impose what we take to be right. Why should we be entitled

to make our personal opinions law? We need to be concerned not just with the substance of the matter (though we do need to be concerned with that), but also with the process by which decisions about that substance are made. Who should make the decision? Through what procedure? With what kind of public and evidentiary input? These questions are fundamentally institutional, often jurisdictional. And they form the very fabric of self-government in a democracy. If we care about our ability to govern ourselves, we have to care about issues of jurisdiction.

Those questions are the focus of this comment. I will not discuss the most obvious question of jurisdiction: the contest between federal authority over the criminal law and provincial authority over health. Instead, I will focus on a second and less obvious set of jurisdictional concerns—those that address the relationship between the courts and the executive and legislature, especially in the application of section 7 of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup>

The application of section 7 of the *Charter* is never purely about the vindication of “life, liberty and security of the person” so that deprivations are kept consistent with “fundamental justice.” That language is so general, its potential reach so vast and therefore so subject to reasonable dispute, that judges need to ask themselves a second set of questions, at least implicitly. They need to ask what potential definitions of life, liberty, security of the person, and fundamental justice lie within their competence, so that they are justified in second-guessing the other branches' decisions on these matters.

Their answers cannot be purely personal. We do not appoint judges as philosopher kings to elevate their individual views into law because of their great wisdom or exceptional insight. Rather, they are appointed to make certain kinds of decisions because of the specific institutional characteristics of courts. Because their legitimacy as decision makers depends on the nature of courts, judges have to tailor their decision making to situations where their institutional strengths are present—where the characteristics of courts allow judges to make especially dependable decisions, or decisions that focus on concerns that might otherwise be overlooked. Judges have to ask themselves, “What kinds of decisions are appropriate for me and my colleagues to decide? What sense of fundamental justice, what forms of life, liberty and security of the person, do the nature of my office and the procedure by which matters are argued before me prepare me to decide? And what judgments of justice, what aspects of life, liberty and security of the person, lie outside my competence, so that those decisions are best left to a democratic and participatory process?”

Now, in the early years of the *Charter* (the years of the Dickson court), the Supreme Court of Canada did a good job of making these judgments. One had the impression that the judges asked themselves where their distinctive expertise lay and tried, to the extent possible, to tailor their decision making to that competence. That did not mean that the Court was timid. Its reputation from that time remains one of great activity and accomplishment. In decisions like *Hunter v Southam*, *Oakes*, *Edwards Books*, *Morgentaler*, *Andrews*, and *Irwin Toy* they mapped, with balance and care, the essential content of *Charter* rights.<sup>3</sup> That accomplishment was founded on the Court’s sure-footed assessment of what judges could reasonably determine.

The Court has stumbled since that time, with particular low points being the majority decisions in *RJR-MacDonald* (in which the Court struck down a ban on cigarette advertising) and *Chaoulli* (in which the Court invalidated restrictions on the purchase of private health insurance).<sup>4</sup> In each of those cases, the majority of the Court lost sight of its particu-

lar role and strayed into areas of complex policy making for which it had neither the expertise nor the evidentiary tools. It therefore imposed its will in ways that seemed arbitrary, out of keeping with the strengths of the judicial role and unsophisticated in its understanding of the policy process. The Court may be returning to a greater awareness of its capacities. The contributions of judges with extensive knowledge of government and administrative tribunals—Binnie, LeBel and Abella JJ in particular—have injected a much better sense of what is involved in complex processes of democratic decision making and, as a result, a better understanding of the added value that a court can bring. I do not mean that these judges form a bloc apart from the other members of the Court. The division of opinion and range of contributions on the Court are much more complex than that. My point is simply that these judges’ institutional sense has been an important addition to the collegial decision making of the Court.<sup>5</sup>

Like many cases, *Insite* too raises questions of institutional competence and role: What kinds of issues are the courts well suited to decide? What should they leave to a more participatory and egalitarian process? And in that regard, the most relevant precedent for *Insite*—the majority of the Court’s decision in *Chaoulli*—is unhelpful.

Now, the precedential force of *Chaoulli* should not be exaggerated. It was heard by only seven of the nine members of the Supreme Court of Canada. Only three members of the Court would have struck the impugned provision down on the basis of the Canadian *Charter* and this against the vigorous opposition of three other members of the Court. The actual decision rested on the Québec *Charter of Human Rights and Freedoms*, not the Canadian *Charter*, and, as I have argued elsewhere, substantially different considerations—considerations directly related to the issues of institutional competence discussed here—apply to statutory as opposed to constitutionally entrenched bills of rights.<sup>6</sup>

The interpretation of section 7 of the Canadian *Charter* is not, then, bound by *Chaoulli*. And there is good reason to decline to follow the reasoning of the three judges in that case

who would have invalidated the provision on the basis of the Canadian *Charter*. Their reasoning was founded, in the end, on a policy judgment: on the supposed ability of the government to attain its objectives without having to rely on the provision that had been attacked—one that excluded the purchase of private health insurance for medical services that are available within the public system. The judges apparently reached that conclusion on the basis that other countries' health insurance schemes had been framed without relying on a "single payer" model, although the judges did so without assessing how well those systems worked, whether the alternative created two tiers of health care, or whether the existence of two tiers meant that most people were worse off. It might be argued that the Court had good reason to shy away from such complex judgments of comparative health policy but, if so, the three judges would have been well advised not to base their decision on just such a comparative judgment.<sup>7</sup> One gets the clear sense that, for those three judges in *Chaoulli*, a complex policy judgment was trumped by the simple desire to allow individuals to deploy their own resources in seeking medical care, regardless of whether fostering private delivery would impair the public system so that the bulk of the Canadian population would be worse off. The three judges' decision has been justly criticized for overstepping the bounds of judicial competence by intruding deeply into realms of policy in which courts are not expert.<sup>8</sup>

Does the same conclusion follow in *Insite*, which again involves the application of section 7 to health services? Interestingly, I think the considerations are significantly different.

First, the issues are much simpler. As framed at trial and at appeal, the debate in *Insite* is not about the relative merits of different forms of intervention in preventing addiction or discouraging drug use, and it does not involve complex issues of program design and funding, such as those presented by a scheme of universal health insurance. In *Insite*, the essential finding on which the trial judge based his decision was consistent with the evidence submitted by all parties: "The risk of morbidity and

mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals."<sup>9</sup> The federal government justified its refusal to extend *Insite* not on grounds of health policy, but as follows (as summarized by the trial judge):

[T]he compelling state objective of prohibiting the use of hard drugs which are dangerous to users and to society at large, the linkage of the drug trade to organized crime, and the opposition of the international community to narcotics as evidenced by treaties, mean that s. 4(1) is rationally connected to a reasonable apprehension of harm, not arbitrary, and therefore not offensive to the principles of fundamental justice.<sup>10</sup>

The essential question regarding section 7 was therefore much more straightforward than that posed in *Chaoulli*: Should the condemnation of drug use trump the known consequences to the lives and health of those using *Insite*? Moreover, this condemnation appeared to be based not on the capacity to stamp out the drug trade—no one presumed that this would occur—but simply on the desire to send an unequivocal message that illicit drug use was wrong.

Second, this conflict of considerations is precisely of the kind that judges are well placed to decide. The best justification for the independence of the judiciary is that the application of law should be insulated from the determination of general policy objectives, so that judges attend carefully to the particular facts of the case and do not distort their judgment in the interest of attaining a general policy goal. This ensures that issues pertaining to individuals are judged, to the extent possible, on the basis of a conscientious application of the law to the particular situation. A similar conception of the courts' institutional strengths—judges' capacity to attend to the detail of the law's application, without their view being distorted by close involvement in the policy process—also justifies their role in vindicating individual rights.<sup>11</sup> They focus on the impact of governmental decisions on specific individuals, an individual impact that may be given short shrift in the executive's or legislature's rush to achieve a general policy objective.

There is, then, an implicit division of labour inherent in the independence of the judiciary: legislatures are rightly focused on attaining general aims; courts focus on the individual case that might otherwise be overlooked. And that division is at the heart of *Insite*. The federal government is focused, above all, on affirming a general proposition: the unequivocal condemnation of drug use. And the courts are asked whether, in the rush to attain that objective, insufficient attention has been paid to the position of drug users, as individuals, in the Downtown Eastside.

Third, those drug users are among the most marginalized members of Canadian society: broken down, heavily addicted, often indigenous, and certainly not people who have ready access to the political process. Indeed, where their representatives have had real presence within democratic processes—in the City of Vancouver—there has developed, over time, very strong support across political lines for harm reduction measures, including the establishment of *Insite*. Thus, if one of the principal reasons for deference to executive and legislative decision making is the scope for strongly participatory engagement in the latter, *Insite* deals with a constituency that has routinely been excluded. Now, the courts should not judge the participatory nature of legislative processes too finely. There is a real danger that, if courts set the standard of participation too high, they might replace processes that allow at least some opportunity for citizens' direct participation with their own highly unparticipatory processes, all in the name of an unattainable perfection. But if there ever was a clear case of an excluded constituency, *Insite* is it.

Fourth, the Court's resolution of this dispute would not fall into the trap of treating rights as a simple matter of limiting government. Judges are often tempted to think that freedom is best achieved through the limitation of state power, so that individuals are left to do whatever they want. Private options, pursued by individuals using their own property, are taken to be the essence of liberty; government action, which constrains what individuals can do with their own property, is suspect. Arguably, that

presumption shaped the majority's decision in *Chaoulli*, for the majority treated private health care as the default position, to which individuals should have access even if the growth of private health care ultimately makes most Canadians worse off. This, of course, is an impoverished conception of rights. It neglects the fact that individuals' options are often constrained by a lack of property, that domination occurs within the private as well as the public sphere, and that government action often results in the extension of rights, not their constriction. Even in the heartland of human rights (non-discrimination, freedom of expression, freedom of religion), the vast majority of rights claims are vindicated under human rights acts adopted by the legislatures. And of course, a right to health care or a right to education only exists because governments provide those services.

In the *Insite* case, the courts are addressing a carefully elaborated regime, developed through democratic action, with input from all constituencies, including the Vancouver Police and health authorities. The regime is carefully blended and seeks to co-ordinate four aims: prevention of drug use; treatment of addicts; enforcement of drug laws; and harm reduction. The result of a successful challenge would not be a free-for-all, but a careful strategy, designed through a highly participatory process, focused on both protecting the life and health of addicts and discouraging drug use.

Now, the Court should be careful not to set this regime in constitutional cement. The regime was developed as a medical trial. The effectiveness of *Insite* may, over time, be shown to be limited. Studies may reveal that harm reduction strategies have unforeseen effects that augment, not reduce, the incidence of drug use (although the evidence produced in *Insite* suggests the opposite). Moreover, the *Insite* decisions were the result of a summary trial on affidavit evidence. The federal government may decide that it can justify a prohibition on more complex policy grounds and provide evidence of those grounds, together with the policy process that led to its decision. If so, then the Court may once again confront the limits of its competence and have to defer to the more inclusive, participatory and



investigatory processes of the executive and legislature. The Supreme Court should therefore confine its decision to the material before it and acknowledge that a different result might obtain if and when different information is presented to the Court. But, as framed, the issues in *Insite* fall within the Court's competence.

It is sometimes assumed that the relative role of courts and legislatures should depend upon how controversial a particular question is. On that view, courts should generally refrain from deciding matters of political controversy. But that is not my argument. Without a doubt, courts are called upon to make difficult and contentious decisions (as the Supreme Court has repeatedly recognized).<sup>12</sup> Rather, judicial deference to the decisions of the executive and legislatures should depend upon the nature of the issue and the relationship between that issue and the institutional strengths and weaknesses of the three branches of government. For the reasons given here, the issues in the *Insite* litigation fall within the traditional strength of courts.

## Notes

- \* Canada Research Chair in Law & Society, Faculty of Law, University of Victoria; Director, Consortium on Democratic Constitutionalism (Dem-con); 2009 Trudeau Fellow. My thanks to Gillian Calder and Andrew Petter for their comments on previous versions of this paper. All errors, of course, remain my own.
- 1 *PHS Community Services Society v Attorney General of Canada*, 2008 BCSC 661; *PHS Community Services Society v Canada (Attorney General)*, 2010 BCCA 15.
  - 2 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 7: "Everyone has the rights 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."
  - 3 *Hunter v Southam Inc*, [1984] 2 SCR 145; *R v Oakes*, [1986] 1 SCR 103; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713; *R v Morgentaler*, [1988] 1 SCR 30; *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927.
  - 4 *RJR-MacDonald Inc v Canada (Attorney Gen-*

- eral)*, [1995] 3 SCR at 199; *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR at 791.
- 5 See, for example, Binnie and LeBel JJ's dissent in *Chaoulli*, *ibid*; the decision of Deschamps and Abella JJ in *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256; and the Court's decisions in *AC v Manitoba (Director of Child and Family Services)*, [2009] 2 SCR 181 and *Withler v Canada (Attorney General)*, 2011 SCC 12.
  - 6 Jeremy Webber, "A Modest (but Robust) Defence of Statutory Bills of Rights" in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone eds, *Human Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Aldershot: Ashgate, 2006) at 263.
  - 7 Especially when intensive studies of these issues by both a Royal Commission and a Senate Committee had concluded in favour of maintaining a single-payer model of health insurance: Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada: Final Report* (Ottawa: The Commission, 2002); Senate, Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians—The Federal Role: Final Report* (October 2002) (Chair: Michael JL Kirby).
  - 8 For examples pro and con, see Colleen Flood, Kent Roach, and Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).
  - 9 *PHS Community Services Society (BCSC)*, *supra* note 1 at para 87. See also Brandon DL Marshall *et al*, "Reduction in Overdose Mortality after the Opening of North America's First Medically Supervised Safer Injecting Facility: a Retrospective Population-based Study," online: (2011) *The Lancet* DOI:10.1016/S0140-6736(10)62353-7 <www.thelancet.com>.
  - 10 *Ibid* at para 148.
  - 11 Webber, *supra* note 6, at 275-81.
  - 12 See, for example, *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 24-31.



# Part 2—Some Pedagogical Insights

## *Lost in Translation: Social Realities, Insite, and the Law in Legal Education<sup>1</sup>*

**Tim Richards\***

What comprises a legal education? What is its breadth and depth? What approaches, processes and content fulfill our responsibilities as legal educators?

The first of three elements of the University of Victoria Faculty of Law's Mandate states:

The Law Faculty's mandate is to:

- (i) provide legal education, scholarship and public service with a critical, interdisciplinary, policy-oriented focus that contributes to the attainment of justice and sees law as a dynamic process that cannot be fully understood apart from its context.<sup>2</sup>

This is a lofty sentiment tucked away in our foundational documents, but how do we translate it into pedagogy?

The *Insite* case appears destined to be taught in first year constitutional law classes. The British Columbia Court of Appeal has issued a provocative judgment, the Supreme Court of Canada is scheduled to hear the case in May 2011, and any decision is likely to contribute to foundational principles of law.

It will become one case in a crowded course syllabus, and be given perhaps one class time of instruction. My concern is what will be lost in legal education in the process. This article develops this concern and, in relation to this case, explores an effort to teach law in the spirit of the Law Faculty mandate quoted above in order to fulfill its vision and objectives of legal education.

This educational effort occurred in the spring of 2010, in a first year class called Legal Process. For two days we focused on the realities of intravenous drug users in the Downtown East Side of Vancouver (DTES) and the *Insite* case that was our legal system's response to this complex human and social reality.

The students had already encountered the courts' response to these realities through an assignment the previous September in which they had analyzed the section 7<sup>3</sup> portion of the trial judge's decision.<sup>4</sup> However, despite the trial judge's extensive presentation of the realities of the DTES, this exercise examined

the realities of intravenous drug users in the DTES through only the perspective of what the judge found was factually relevant to the legal issues. As the organizer of the two-day sessions held in January, my purpose was to invert this. We began by exploring the complex human and social realities of the DTES, including the roles of social and political organizations and institutions. The process was to then understand the nature and functioning of law in this context. This included an openness to how the law fit well and facilitated the concerns and needs of various people and groups, but also to explore where the law was absent, ill adapted or operated contrary to the needs and wellbeing of those in the DTES.

The students first viewed the documentary *Fix: The Story of An Addicted City*, which presents what transpired in the DTES community prior to the creation of Insite. It explores the realities of the DTES and intravenous drug use through the perspectives and experiences of those whose lives would be affected by the closure of Insite.

The film screening was followed by a panel of the following individuals who spoke to the issues related to Insite from their diverse experiences and perspectives:

1. VANDU:<sup>5</sup> Board members Ann Livingston and Jackie Robinson;
2. Philip Owen: The mayor of Vancouver who was instrumental in the creation of Insite;
3. Heather Hay: Director of Addiction, HIV/AIDS and Aboriginal Health Services for the Coastal Health Authority;
4. Sheila Tucker: Counsel on Appeal for the Coastal Health Authority;
5. Paul Riley: Counsel for the Attorney General of Canada; and
6. Doug Lang: A police officer in the DTES who participated in the documentary *Fix*.

Prior to the panel discussion, the students were

asked to consider the following as each person presented: their goals and objectives and those of the group they represented; whether and how the law was relevant to achieving their objectives; and whether the law operates positively or negatively in relation to their needs and objectives and in relation to the creation of Insite.

The following morning the Legal Process small groups met to follow up these themes. The instructors led discussions that explored how law functions in the DTES, its effects, and how well it is able to respond to the pressing and complex realities and concerns that were highlighted in both the film and in the panel discussion. That afternoon, the students, in groups of four to six students, completed a creative mapping exercise that explored and represented emerging themes and then shared these with their classmates.

The classrooms then emptied, and as instructors we were left to reflect on and evaluate what had transpired and what had been achieved.

The students provided written feedback on the sessions and this was remarkably positive and helpful. We summarized this into charts and spreadsheets to assist us in a follow up meeting to evaluate the sessions. The students' feedback indicated the panel was a highlight of the two days. A recurring theme that emerged was the value of understanding the context for the court proceedings, and the relevance of the material presented in the documentary *Fix*. The flavour of this feedback conveyed an enthusiasm that in my view reveals some deficits in current legal education. Clearly, student enthusiasm alone is an unreliable guide for legal education, as it may not align with legal learning. However, here I think it did. It related not simply to an interest in the concerns of the DTES, but to how the law figures in this landscape. For many students, this nexus is an important motivator in their decision to study law. Too soon in legal education we settle into a one-dimensional approach that is anchored in presenting principles of substantive law, and in which students are disconnected from their experiences prior to law school. This may overstate the point, but I do not think it does so greatly.

A reason for this is that the social context with which students relate is often largely absent from court decisions. Using these decisions as the focal point of instruction, our explanation of social context tends to be constrained by how judges have selected the legal issues and presented the “relevant” facts. This is apparent in reading the British Columbia Court of Appeal decision in the *Insite* case.<sup>6</sup> The critical actor behind the creation of *Insite* has vanished. It was through the extraordinary efforts of an unconventional mayor that *Insite* came to be. Yet this crucial aspect of social and legal context, that of municipal government, disappears entirely from the legal narrative and analysis.

This is also apparent from the complete detachment of the Court of Appeal’s decision from the social context of intravenous drug users in the DTES and *Insite*. While the trial judgment<sup>7</sup> is rich in social context, Justice Hubbart characterizes this in paragraph 91 as “a lengthy discussion of the background facts that have little direct relevance to the legal issues before this Court . . .”<sup>8</sup> This is peculiar because Justice Hubbart bases her constitutional division of powers analysis in part on the principle of subsidiarity, “that law-making is often best achieved by the level of government closest to the citizens affected and thus most responsive to local distinctiveness and to population diversity.”<sup>9</sup> Yet the argument is left abstract and with considerably diminished force by omission of the context that documents this. A consequence of this omission may be that the Supreme Court of Canada, at a greater distance from these relevant realities, will be less able to perceive and understand how the local social context gives force to the majority’s reasoning.

Thinking ahead, when these judgments with their selective presentation of legal issues and relevant facts are taught in a law school classroom there is a real risk, if not a certainty, that an understanding of how the law functions in the DTES will be fatally diminished. This will have been rendered invisible, and a significant dimension of legal education will be inadvertently omitted. Some students will inevitably be left with a sense of dis-ease that their interest in the legal dimensions of this social and political

reality has been sidelined or ignored altogether.

This returns to my earlier point of legal education connecting into the enthusiasm that the *Insite* sessions tapped in to and what underlies this. Teaching the law as we do through court decisions is an essential element of understanding and learning law, but much about law is missing as a result. Equally essential is understanding the messy and complex intersections of law with human and social realities. While we can contain and compartmentalize the former, the latter do not reduce themselves to conceptually simple frameworks or formulations. Looking ahead to legal practice, contextualizing the law in this way is helpful in teaching students to prepare for legal work, for issues do not arrive in neat packages, the needs of clients are complex and diverse, and the range of circumstances and information that may become relevant is broad.

In addition, connecting into student enthusiasm for the social context in which law operates fits well with the Mandate of our school. It refers to learning law in a way that “contributes to the attainment of justice.” Learning the law by sifting through what the courts have decided are legally relevant facts and legal issues, such as section 7 rights or the division of powers, will not fulfill this work of legal education contributing to the attainment of justice. The learning of substantive law is integral to legal education. However, when the human context is diminished by the legal method and this method dominates our teaching, it inevitably alienates those students for whom legal work should pursue justice. It will require more perseverance than it should, and more than some students possess, to maintain this link.

Even if the priority for legal education remains a study of substantive principles, this two-day session on the context within which the law operates was a success. The British Columbia Court of Appeal issued its judgment the day following the sessions, and in the community event organized by my colleagues shortly afterward to discuss this decision the room was crowded. Faculty and students participated in an engaging canvassing of how the Court of Appeal defined the issues and articu-

lated the law. The group participated in exploring the assumptions inherent in the decision and its ramifications.

I do not mean to suggest that all cases can or should be taught with the rich contextual approach advocated here. This would skew legal education in one specific direction at the expense of other important perspectives and content. However, the weight of legal pedagogy currently skews legal education in the direction of a one-dimensional presentation of the principles of substantive law. What is lost as a result is an understanding of and engagement with the essential human and social realities of law.

One of the benefits of incorporating this approach in to legal education and its content is to provide many students with much-needed relevance and to engage their legal education with their personal backgrounds, experiences, values and beliefs. Without overstating it, in the year since the Insite sessions I think that I have seen the positive effects of the session carry forward in the lives and legal studies of some individual students and I have also seen it ripple out through other aspects of our school's life and work.

## Notes

- \* Senior Instructor, Faculty of Law, University of Victoria.
- 1 This article addresses the requirements of legal education through referencing a two day program for first year students in the Faculty of Law at the University of Victoria. The program was part of a course called Legal Process and it studied the role of law in the social realities of the Down Town East Side of Vancouver (DTES) as it affects those who use intravenous drugs. The program was offered on January 13<sup>th</sup> and 14<sup>th</sup>, 2010. While the program attempted to explore these realities in some depth, this was limited by the time allocated. While this article advocates incorporating the approach to legal education that was followed, such programs explore many dimensional realities that will affect students in diverse ways. Careful thought, planning and preparation are important. One student approached me afterwards to say that the DTES

is their home and it was difficult to sit through small group discussions where the dominant focus was realities of intravenous drug use and not the other aspects of the community which is their home. Another student stated in their written evaluation that they and their family have difficult personal history with the issues covered, and this highlights the risks inherent in sessions such as this. This kind of response was anticipated, and in the afternoon prior to the all day sessions the students met in small groups and were told the nature and purpose of the sessions, the topics that would be covered, and the materials that would be used. However, this clearly was not sufficient to prepare this student for the sessions.

I would like to express my appreciation to my Legal Process colleagues for their willingness to instruct a program that they did not create. They gave me a free hand to craft the program as I thought best, and while they were consulted as it developed, the planning was made easier by the latitude that was provided. I also greatly appreciate their willingness to be creative and innovative in their approach to legal education, particularly in light of the comments above concerning the difficulties inherent in the program. In particular, my thanks to Professor Rebecca Johnson for developing the mapping exercise assignment for the afternoon of the second day that formed the culmination of the sessions.

- 2 **Strategic Plan, Faculty of Law, University of Victoria**, February 2003.
- 3 *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, s 7. Section 7 states:
7. 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.
- 4 *PHS Community Services Society v Canada (AG)*, 2008 BCSC 661, [2008] BCJ no 951.
- 5 Vancouver Area Network of Drug Users.
- 6 *PHS Community Services Society v Canada (AG)*, 2010 BCCA 15, [2010] BCJ no 57.
- 7 *Supra* note 7.
- 8 *Supra* note 6.
- 9 *Ibid* at 172.



# Some Pedagogical Reflections

Freya Kodar\*

It is always more challenging, and a little nerve-racking, to deliver an instructional unit someone else has pulled together, even when there has been significant discussion amongst, and input from, the instructional team. This was particularly so for the Insite unit because we were using some “unconventional” texts and teaching methodologies. The material under discussion was both intellectually and personally challenging for many, and it was our first time delivering it. I offer some reflections as a member of the teaching team on the ways in which these particular challenges together produced a rich and exciting unit to teach, and if the student feedback is any indication, provided a significant learning experience.

## The “unconventional” texts and teaching methodologies

The unit began in the fall with an assignment on the trial judgment in *PHS Community Services Society v Canada (Attorney General)*.<sup>1</sup> In the Spring session, we used several methodologies to encourage discussion and analysis of the case and to deepen students’ understanding of law in its social context. These were:

1. Viewing and discussing the film, *Fix: The Story of An Addicted City*;<sup>2</sup>
2. Watching and analyzing a panel discussion with a variety of speakers who had a role in the creation or continuance of the Insite facility;<sup>3</sup>
3. Re-reading and analyzing the trial decision, including the interjurisdictional immunity analysis that had not been

included when the students studied the case in the previous September;

4. Viewing and analyzing *Staying Alive*,<sup>4</sup> a Fifth Estate feature that focuses on Insite’s operations and the people who access its services;
5. A mapping exercise.

## *Fix: The Story of an Addicted City and Staying Alive*

The filmic texts provided a considerable amount of the unit’s content and context. Filmed over a two-year period, *Fix: The Story of an Addicted City* chronicles the social reality of drug addiction and overdose deaths in Vancouver’s Downtown Eastside (DTES) and the political efforts to create a safe injection site. Those involved in the political process, including activists Dean Wilson and Ann Livingston from the Vancouver Area Network of Drug Users (VANDU); Philip Owen, the city’s mayor at the time; and other participants in the political process who hold varying opinions about the merits of a harm reduction approach and a safe injection site, present their perspectives and experiences directly to the viewer. *Staying Alive* focuses on Insite itself—its operations and staff, and the people who use its services. In viewing *Fix*, students were asked to consider four questions:

1. Who speaks, and what do they tell us? (about self, others, drugs, the DTES, law);



2. What sources of authority are used? (science, religion, economics, experience, law);
3. What does the film foreground as significant? (what is relevant? what is unspoken?); and
4. What is ultimately the film's argument (who/what is judged, what are they guilty of)?<sup>5</sup>

Although mediated by the directors' editorial choices, both filmic texts allowed students to hear people in their own voices, and to view the political process as it unfolded. The films also showed some harsh realities of drug use and poverty in the DTES, realities that were narrowed and sanitized by the time they formed part of the court decision "text." Tim Richards writes of the ways in which the Insite unit provided important social context for students, particularly in terms of understanding "the perspectives and experiences of those whose lives would be affected by the closure of Insite."<sup>6</sup> The filmic texts played a critical role as they provided a visual and aural window into these lives that spoke to students on the affective domain without spilling over into voyeurism, and provided important context for understanding the court decision. Such a view could not have been replicated with transcripts, affidavits, judgments and other written texts.

In previous years, we have had students work with complex social and political problems through a multi-party negotiation role-playing exercise. In my experience, it was difficult to prepare students adequately to role play parties and perspectives, and it often seemed that the success or failure of the negotiation overshadowed efforts to understand the social and political context of the problem. Moreover, at times it was difficult for students to participate in a hypothetical problem that was very familiar to them personally, or to experience the perceptions of classmates about the issue or particular roles. The filmic texts and the format of the Insite unit did not entirely eliminate these difficulties, but they did alleviate them to some extent since the people in *Fix* and *Staying Alive*, along with members of the panel discussion,

were "playing themselves." Clearly, students were differently situated in terms of their personal experience, understandings and opinions about drug use, poverty, harm reduction and a safe injection site, but they were able to use the filmic texts and the panel to both expand their understandings, and as vehicles through which to articulate their own positions.

In addition to providing context, the filmic texts also provided a locus for students to think about perspective, evidence and argument. Film is an unexpected text for most law students and one that we had rarely used in the Legal Process course. Thus it was important to provide students (and faculty) with some guidance on "reading" filmic texts. Rebecca Johnson's introductory session before the viewing of *Fix* encouraged students to analyze (1) the perspectives of those portrayed in the films, (2) the arguments and the evidence they relied on in support of their positions, and (3) places of agreement and disagreement—a useful analytical approach for reading cases and resolving real legal problems.

## Mapping

Working with the filmic texts and the panel discussion in this way set the stage for the mapping exercise that brought everything together—the social and political context and the role of law (in the broadest sense) in creating and resolving the problem. Students had to work together and draw on the perspectives and arguments in the materials and discussions to create their group's map. One important benefit of this approach was that they did not necessarily have to position themselves in relation to the merits of safe injection sites or the litigation to produce a comprehensive map.

I have to admit that, at the time, mapping was out of my teaching comfort zone, so I approached facilitating the mapping session with some trepidation. Despite their initial uncertainty about how to proceed, the students produced interesting and thoughtful maps.<sup>7</sup> There was much to explore in discussion of each map and the connections amongst them. I am now a mapping "convert," and have used the meth-

odology in other classes to facilitate student discussion and analysis of complex material or problems.

### “Timing”

Finally, a few words on timing and luck. Students initially encountered the problem in an edited trial judgment they had to brief and comment on to complete the fall legal process component of the curriculum. At this point, they had two weeks of introduction, and their own assumptions to ground their understanding of the case. In January, they were given the full trial judgment, which now included the interjurisdictional immunity analysis that had been edited for the fall assignment, and they were asked to review their original assignment. This return to the case and the assignment gave them the opportunity to see how much they had learned since September (despite what their December examination results might have suggested).

We had hoped that the Court of Appeal decision would be released before the spring component started. However, the fact that it came down the day after it ended—after students had listened to people who were named plaintiffs in the case, and to lawyers who had argued it, and to people they had seen in the film—was exciting. It did make it “real” in a very particular way. Students’ engagement with the case, the issues and the controversies through the Insite unit, and their fall term course work, meant they were able to read and understand the judgment. The timing also created an enthusiastic and well-informed audience for the subsequent faculty panel on the Court of Appeal decision. Had it been later in the term student engagement might have waned as examinations and other assignments loomed. Moreover, the timing of the decision’s release meant that faculty were thinking about the case through a “first year legal process” lens as well through our disciplinary areas of interest which also contributed to a robust panel discussion.

While it is hard to imagine teaching the unit in this fashion again, given all the pieces that had to fall into place, the unit’s structure and methodologies serve as a template for fu-

ture cases, and for thinking about ways to teach complex social and political problems in our discrete subject area classes. And who knows . . . maybe the Supreme Court of Canada will release its appeal decision next January.

### Notes

- \* Assistant Professor, Faculty of Law, University of Victoria.
- 1 2008 BCSC 661.
- 2 *Dir. Nettie Wild, 2005, Canada Wild Productions*, Vancouver.
- 3 The panel included Ann Livingston and Jackie Robinson of the Vancouver Area Network of Drug Users (VANDU); Philip Owen, former mayor of Vancouver; Heather Hay, Director of Addiction, HIV/AIDS and Aboriginal Health Services, Coastal Health Authority; Sheila Tucker, Counsel for the Coastal Health Authority in the Appeal; Paul Riley, Counsel for the Attorney General of Canada; and Doug Lang, Police Officer, Downtown Eastside. See Richards *infra* for more details about the panel.
- 4 *Dir. Tamar Weinstein, 2009*. First aired on March 13, 2009 as an episode of CBC-TV’s *the fifth estate*.
- 5 Rebecca Johnson, “*Nettie Wild’s “Fix: The Story of an Addicted City”* (2002) Notes for Viewing ‘Law’ in Film.” The full viewing instructions distributed to students are available online at <http://insite.law.uvic.ca>.
- 6 *Infra* at <http://insite.law.uvic.ca>.
- 7 See Rebecca Johnson’s discussion of the maps produced in her class, which are also reproduced *infra*.



# Pedagogies of Mapping

Rebecca Johnson\*

Generations of students have engaged in the (more or less artistic) practice of doodling in the margins of their notes, and yet it is rare for law students to be given crayons and be directed to colour. In this note, I describe and reflect on the experience of using the visually based pedagogy of “mapping” as a tool for exploring the *Insite* case. This exercise took place at the end of the Legal Process module, after students had spent nearly two days of concentrated attention on the case and the issues raised by it. The class was divided into four groups, each of which was asked to imagine themselves as a newly formed government working group charged with the task of imagining more visionary ways of dealing with the problems of the “hard to house, hard to reach and hard to treat.” The first task was to work as a group to map out the terrain on which new solutions might be developed: to depict visually the hopes, fears, concerns, difficulties, convergences and possible strategic alliances created by drug use in the Downtown East Side (DTES).<sup>1</sup>

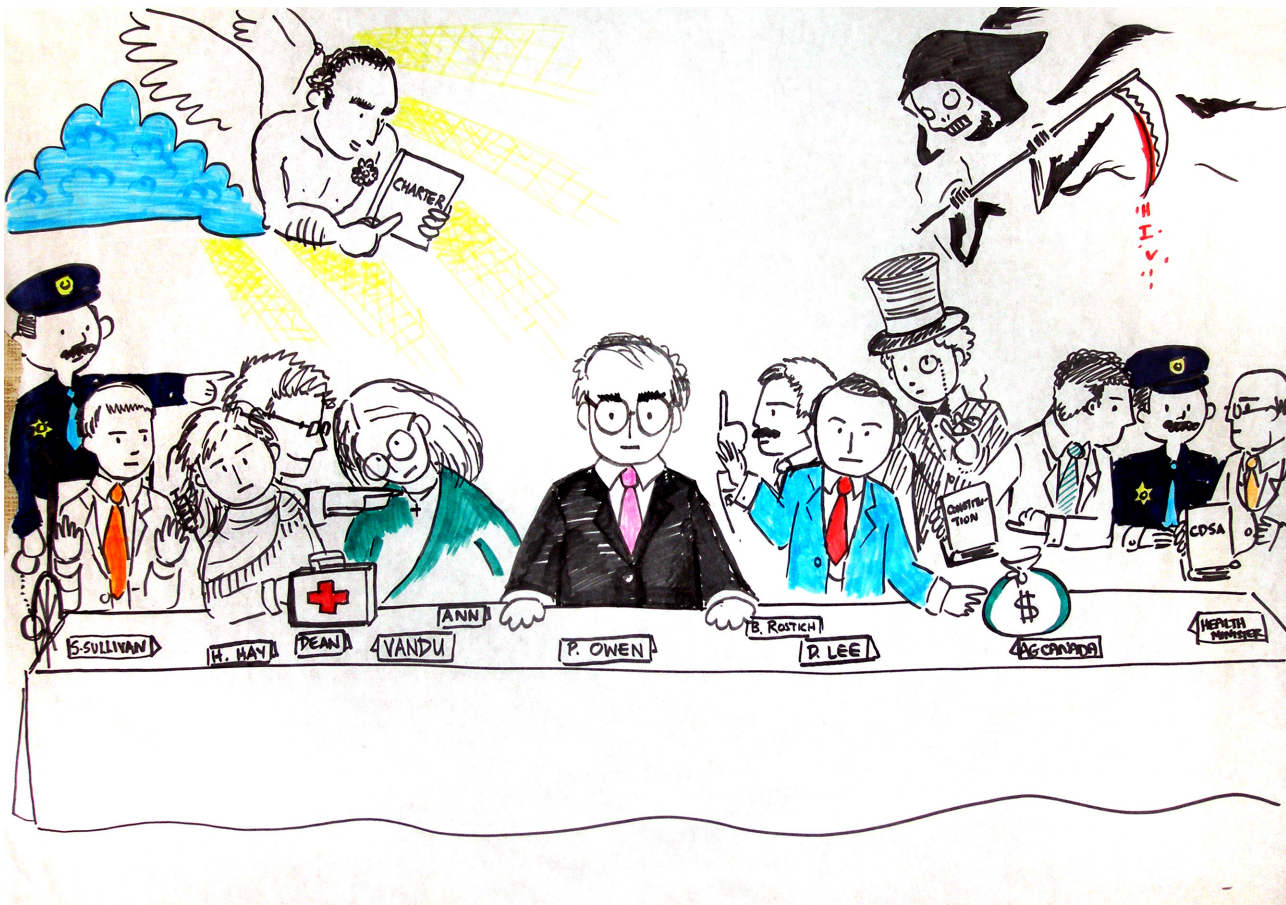
While some of the students expressed worry about their lack of drawing skills, the group took up the challenge with good humour. They were given coloured pens, large sheets of paper, and roughly 45 minutes to talk and draw. The groups then returned with their maps, each of which is reproduced below.<sup>2</sup> We hung them up in the classroom, and heard from each group about what they had tried to capture in their map, as well as the difficulties and challenges they faced in deciding what they would capture. Here, they talked about some of the pragmatic limits to their maps (such as whether or not groups had members with adequate skills in drawing), as well as about some of the more conceptual challenges involved in finding ways to represent complex social and legal concepts

visually. This included questions about the role of “time” or “place” in determining what a map might look like, as well as the implications of focusing visual attention on different dimensions of the problem. The exercise also generated a lively discussion about the dynamics of group decision-making processes, and the relationship of those processes to their efforts to produce some kind of “common” mapping.

One of the most interesting dimensions of the exercise arose from looking at the four maps in conversation with each other. Indeed, each of the maps seemed to capture different metaphors for the *Insite* case, metaphors that undoubtedly circulate in a number of complicated social/legal contexts. In brief, one could say that participants visualized the case in four different ways: one focusing on people, another on place, a third on fabric, and a fourth on flows of power. These different visual metaphors are visible as we examine each map in turn. First, consider the map that focused on “the people” (see page 140).

This map was generated by the group that inherited one of the “artists” in the class. The group drew on this expertise in art to produce a mapping that involved a playful echo between Da Vinci’s painting “The Last Supper”<sup>3</sup> and the various people the students had encountered over the week (in the panel of experts who came to speak, and the people featured in Nettie Wild’s film, *Fix*). Vancouver Mayor Phillip Owen sits at the centre of the table, framed by various advocates for and against *Insite*. On the left are activist Ann Livingston and addict Dean Wilson (both featured in the movie, *Fix*). A hypodermic needle is visible in Dean’s hand. On the right sit a number of advocates from the business community (again, featured

## MAP 1: People. . . “The Last Supper”



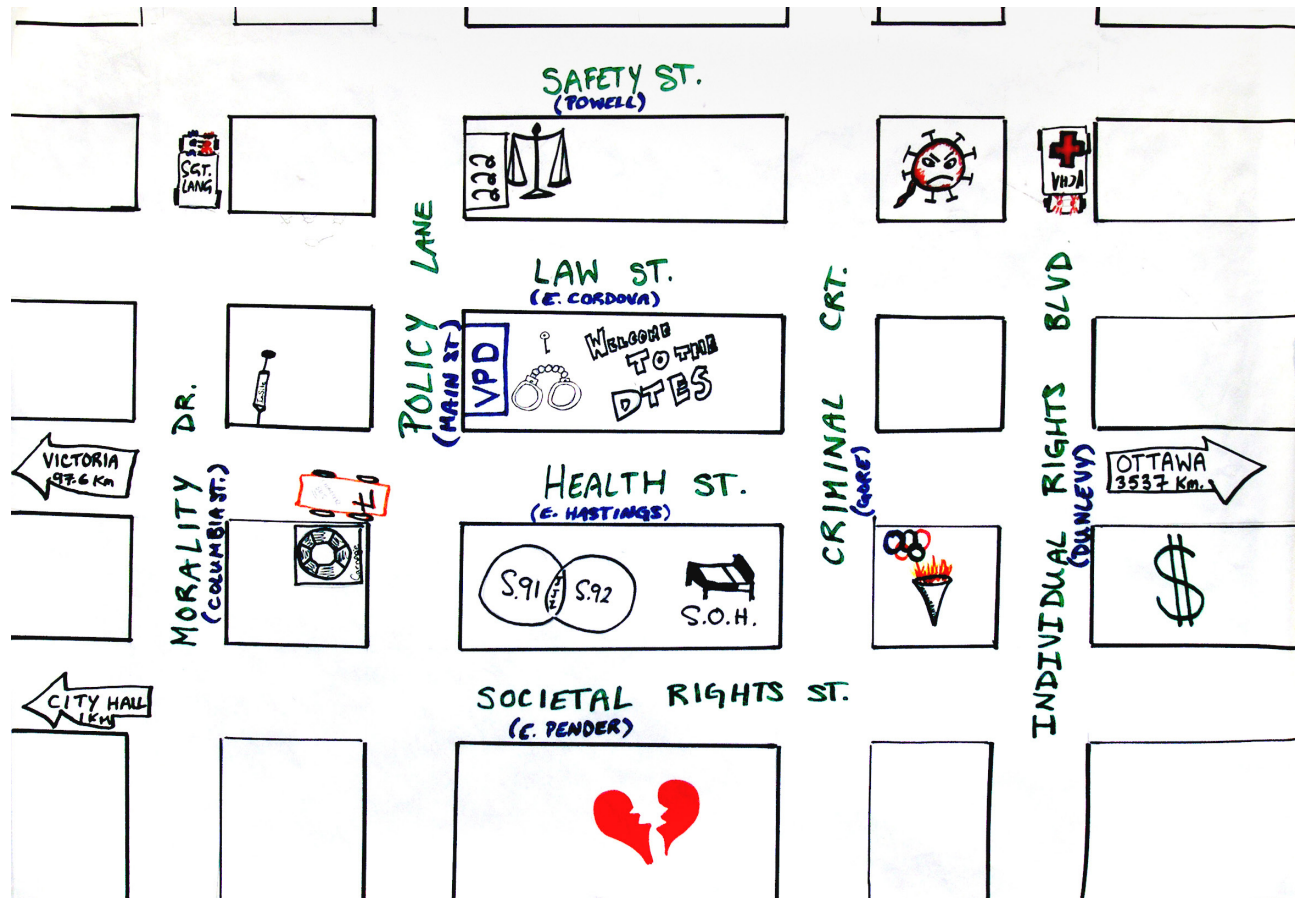
in the film *Fix*). Note that the Health Authority and Minister of Health are on opposite sides of the table. Note also, however, that the Police are found on both sides of the table, spatialized as representing communities on both the left and the right of any issue. The “monopoly man” on the left (nicknamed “Mr. Kerrisdale” by the group), evokes the ongoing discussions that had occurred in class about the differences between residents of the DTES and of the more upscale Vancouver neighbourhoods. In the top corners, an angelic Pierre Trudeau holds out the *Charter*, while Death wields a scythe, from which drip the letters, “H.I.V.”

This map places all the players at a table together, locating them spatially in specific relationships to each other (i.e., people on the left, people on the right, people in the middle, police officers on both sides, etc.). This map also captures something of the processes involved in

group decision-making. Their placement at a table captures the way in which different forms of decision-making require people to interact with each other and discuss problems in concrete locations. Situating the mayor at the centre also tended to foreground the questions of politics and democracy circling around the case.

Group Two took a different approach. This group took up the challenge of mapping in a literal way, attending to the importance of place. Here, using the hypodermic needle as a marker, the group placed Insite in its accurate geographical location in the DTES. Across the street, the circle references the Carnegie Community Centre as a reminder that the downtown is not just a place, but a community. Both the Courts (represented by the scales of justice) and Police Department (represented by handcuffs) are also visible in the area as institutions involved in the life of the downtown. The overlapping bubbles of

MAP 2: Places . . . “Downtown”

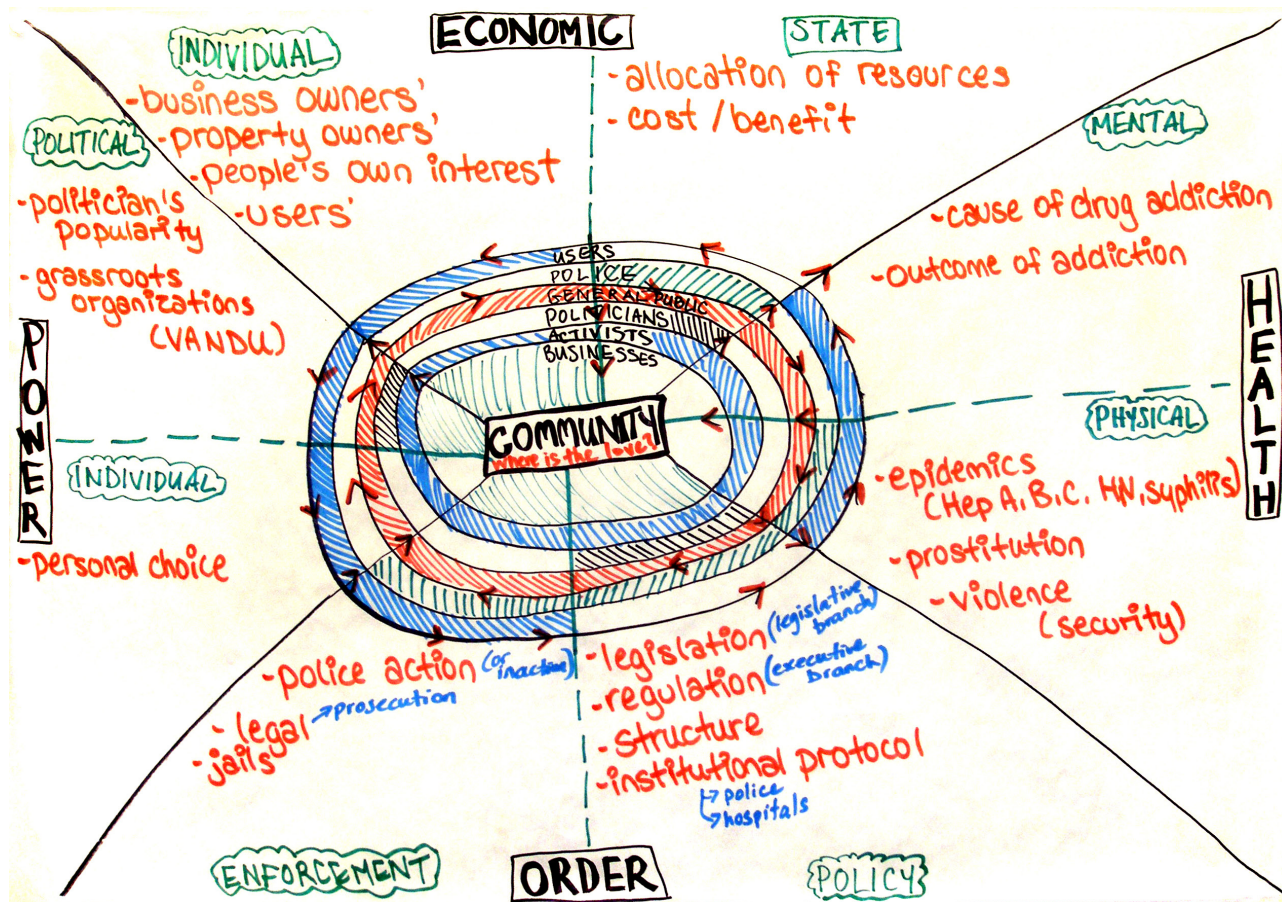


section 91 and section 92 jurisdiction make visible the ways Constitutional debates play themselves out in particular places. The streets on this map carry both their real names (Pender, Hastings, Cordova), along with names marking out the issues Insite raises for the downtown community (Safety, Health, Morality, etc). On the streets themselves, Sgt Lang (featured in the movie *Fix*) patrols the beat in his police car, while both an ambulance, and the Section 7 *Charter* bus roll up and down the streets. This mapping captures additional debates about place that were circling around the case: the bed and initials S.O.H. reference the difficulties of the “single-occupant-housing” situation featured in the documentary *Staying Alive*. The Olympic torch and logo are reminders of attempts to clean up the area for the Winter Games. At the bottom of the map, there is an evocation of “the street of broken dreams.” On the edges of the map, there

is a further statement about the politics of the local, with signage markers indicating how far one must go from the DTES to get to politicians at the municipal, provincial and federal levels. The map leaves it to the viewer to decide if the differences here relate to being “west and east” or “left and right” in a political sense.

Group 3 produced a map that could be best described using the metaphor of fabric or of a web. Whether constructed by spider or loom, the metaphor points in the direction of something woven from threads. It suggests a fabric with warp and woof threads that pull on each other and are in tension with each other. Like the edges of a loom, Health, Power, Order, and Economy seem to provide points of stability, but one can see that those seeming points of stability have more flexibility in them than one might expect. Not all economic arguments, for example, pull in the same direction. Economic argu-

MAP 3: Fabric: Weaving a Web



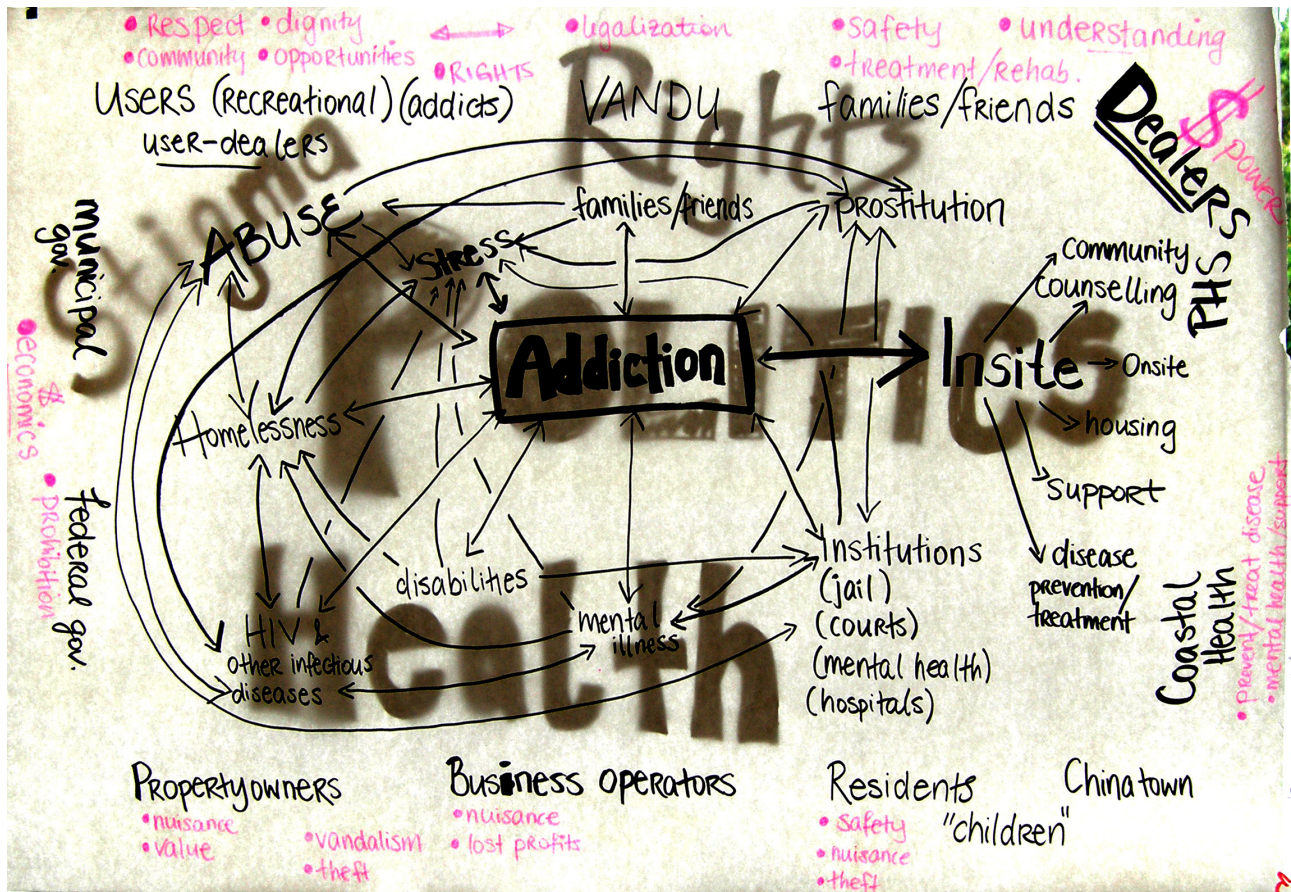
ments were constructed both for and against Insite. Health arguments were made both for and against Insite. Arguments about Order were similarly constructed in ways that left space for reasonable disagreement about what policy or approach would best support social order.

Woven into the lines that traverse the case are a series of concentric circles with the word “community” at the centre. But the circles making up that community include distinct circles for business, activists, politicians, users, police, and the general public. Directions of pull are indicated in these smaller circles, in ways that also make visible the differences, for example, between individual and state interests that various communities might feel (or not feel) in at different locations on the fabric. This map makes visible the ways that no group of people touched by the *Insite* case was monolithic in its interests or understandings of the case. And indeed, this

mapping reminds us that the communities affected by the case were not always discrete and separate. In a mapping such as this, one captures a sense of the ways in which issues were woven together, and the ways in which a tug on a single thread could reverberate throughout the fabric.

The fourth group produced a map with two layers of paper. On the top layer, they attempted to map out some of the processes and flows they had seen over the week. While one might say this is in some ways the messiest map, it is also one that provides the clearest sense of relations between, for example, health, economy, poverty, government, economy and family. Communities and groupings of people are situated around the edges of the map, with arrows running through the centre, raising questions about causation, correlation, and connection. This map also points to questions of time and

## Map 4: Flows . . . Overlapping Layers



movement, in contrast to the relative fixity seen in the other maps. The second layer of the map contains a series of concepts (or interests): Health, Politics, Rights, and Stigma. These are concepts that exerted powerful pressures on the debates and decision-making processes in the forming of Insite. They were not initially visible when the map was hung up on the board. It was only when we hung the map up on the window that the words showed through as ghostly underimages. The map was a reminder of the ways different assumptions and presumptions about these concepts are continually bleeding through into the conversations from below in ways that are not always visible, but that nonetheless inflect the present, and our understandings of the flows and movements of power and possibility.

## Final comments

The maps produced by the groups were independently interesting. But the most useful part of the exercise was the debrief session at the end of our class, and the chance it gave us to consider how each of the four different maps provides another lens for understanding the case and its challenges. The exercise did not lead to the conclusion that any particular mapping was the right way to capture the case (nor even that mapping is always a productive tool!). But in this particular context, we saw that each map provided another interesting vehicle for thinking through the ways in which one might understand the various aspects of the case. In this context, the different maps enabled us to focus on people, on places, on institutions, on weaving, and on process and flow. Having the four lenses gave us a broader range of tools for un-



derstanding and for sharing our observations. It made visible particular challenges and tools; how different ways of mapping demand the erasure or neglect of some dimensions of experience; and about the perennial difficulties lawyers, judges and litigants face in translating our understandings of law and justice from the medium of experience to that of images or words, and back again.

## Notes

- \* Professor, Faculty of Law, University of Victoria.
- 1 The instructions given to the students for the mapping exercise can be found on the web at <http://insite.law.uvic.ca>.
- 2 Here, creative rights in the maps are undoubtedly held by the fabulous students in that section of legal process, students who cast themselves into the task (or, who were cast by us into the task) with wholehearted (and a measure of justifiably faint-hearted) abandon. The authors in this context were: Asif Abdulla, Stephanie Ashley-Pryce, Jean-Kyle Bienvenu, Trina Brubaker, Geoff Coombs, Rebecca Crookshanks, Michael Gismondi, Natasha Gooch, Rory Johnston, Lianne Kramchynski, Agnes Lee, Ainsley MacCallum, Jeff Miller, Miles Motture, Laura Nichols, Brian Smith, Devon Peck, Dana Phillips, Greg Piper, Julia Tchezganova, Heather Watt, Michael Weber. The colour versions of the photos can be seen at <http://insite.law.uvic.ca>. Photos of the maps were taken (and cleaned up!) by Thomas Winterhoff, Communications Officer, University of Victoria Faculty of Law.
- 3 <http://milan.arounder.com/en/churches/santa-maria-delle-grazie-church/the-last-supper-leonardo-da-vinci.html>.