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LEGAL ISSUES WITH BILL C-2 / PROJETS DE LOI C-2 ET LA LOI

PIVOT LEGAL SOCIETY SUBMISSION TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS (LC)

PRÉSENTATION DE LA PIVOT LEGAL SOCIETY AU COMITÉ PERMANENT DES AFFAIRES JURIDIQUE ET CONSTITUTIONNELLES

Adrienne Smith
Health and Drug Policy Staff Lawyer
Avocat de la santé et de la politique des drogues

LEGAL ISSUES WITH BILL C-2

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PART I - OVERVIEW

Supervised injection services are specialised health care facilities where people who inject drugs can access harm reduction services, get connected to other health care services— including detox—and be supported by nurses who are trained to detect the symptoms of narcotic overdose and can treat it. There are over 70 such health care facilities around the globe, but only one in Canada. At Vancouver's Insite, there were 1418 overdoses between 2004 and 2010 without a single death[1]. Many of these overdoses could have been fatal had they occurred outside the facility. Insite was established in response to a public health emergency. A decade's worth of research during that time, as well as ample evidence from international facilities have confirmed that supervised injection services are both effective and necessary.

PART II - THE CDSA

The *Controlled Drugs and Substances Act* (CDSA)[2] is a Canadian criminal law that provides a framework for the control of import, export, production, distribution and use of substances that can alter mental processes and that may produce harm to health and to society when distributed or used without supervision. The default position of the CDSA is to criminalize a wide range of activities involved controlled substances, including their unauthorized possession[3].

Insite operates under an exemption available under the CDSA, the applicable section of which currently reads:

> Exemption by Minister
>
> **56.** The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

The Minister referred to in this section is the federal Minister of Health. The effect of a Minister's exemption is to suspend the operation of other sections of the CDSA, specified in the exemption, that would, if applicable, make illegal the activity of a person in relation to acontrolled substance (e.g., possession). Put simply, a section 56 exemption creates an amnesty against the functioning of the criminal law, creating a zone of legal drug use as long as it is occurring for a medical purpose[4].

The effect of the exemption for Insite is to insulate its clients (called "participants" at Insite) and staff from certain sections of the CDSA that would otherwise expose them to criminal sanction for possession, or possession for the purpose of trafficking, of illicit drugs while they are inside the facility. (In the case of staff, their liability could arise as a matter of "constructive" possession by

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[1] http://supervisedinjection.vch.ca/services/

[2] *Controlled Drugs and Substances Act* S.C. 1996, c. 19.

[3] Full text of the CDSA http://laws-lois.justice.gc.ca/eng/acts/c-38.8/

[4] The current rationale for exemptions is set out at this Health Canada site:
http://www.hc-sc.gc.ca/hc-ps/substancontrol/pol/pol-docs/r_travellers-voyageurs-eng.php

knowingly tolerating possession on the premises under their control.) The criminal prohibition of unauthorized possessions of controlled substances listed under the CDSA continues to function normally outside the facility.

PART III - *Canada v PHS*: What the SUPREME COURT SAID

Section 56 section of the CDSA was the subject of the 2011 Supreme Court of Canada decision: *Canada (Attorney General) v. PHS Community Services Society* (2011 SCC 44)[5] [*Insite*]. The *Insite* decision is still good law and is binding on the government.

The court case was chiefly about whether or not the federal Minister of Health had infringed the constitutional rights of Insite's participants in deciding to discontinue the exemption under section 56 of the CDSA applicable to people using otherwise illegal drugs while on the premises at Insite. As it came to its legal conclusion, the court made a number of findings of fact:

A. The provision of supervised injection services is healthcare and, therefore, a provincial responsibility;
B. People who inject drugs are exposed to great harm[6] as a result of their addiction, which is a health condition;
C. These harms, and the threat of criminal prosecution which arises because Insite participants are using illicit drugs, engages the right to life, liberty, and security of the person, guaranteed under section 7 of the *Canadian Charter of Rights and Freedoms*[7]
D. The suite of health services bundled with supervised injection available at Insite was an effective life-saving treatment;
E. The Minister's discretion in granting an exemption had to be exercised constitutionally, and so required that the Minister consider the section 7 rights of Insite participants;
F. The minister's discretion required a balancing between public health and public safety;
G. In the context of Insite, failing to grant an exemption violated the *Charter* rights of these participants, and more specifically, it deprived them of their life, liberty and security of the person in ways that did not accord with the principles of fundamental justice because the decision was:

    a. **"arbitrary"** because it undermined the objectives of public health and safety of the *Controlled Drugs and Substances Act*[8]*; AND*
    b. the harms to Insite participants' health and liberty from impeding access to Insite because of the risk of criminal prosecution were **"grossly**

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[5] *Canada (Attorney General) v. PHS Community Services Society* (2011 SCC 44) [*Insite*]. Full text http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7960/index.do

[6] *Insite* at para 10.

[7] *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.

[8] *Insite* at para 131.

disproportionate" to any benefit that Canada might derive from presenting a uniform stance on possession of narcotics.[9]

H. Unless there was a demonstrable threat to public safety, exemptions under section 56 should "generally be granted."

The fundamental point that exemptions ought to be granted is articulated in para 152 of the decision:

> [152] The dual purposes of the CDSA — public health and public safety —provide some guidance for the Minister. Where the Minister is considering an application for an exemption for a supervised injection facility, he or she will aim to strike the appropriate balance between achieving the public health and public safety goals. Where, as here, the evidence indicates that a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption.

The court also set out five factors meant to prevent any future decision from being arbitrary or creating a grossly disproportionate harm to people by impeding their access to necessary health services. All of them are qualified by the proviso "if any," and the factors are permissive. The factors are set out at para 153 of the decision:

> [153] The CDSA grants the Minister discretion in determining whether to grant exemptions. That discretion must be exercised in accordance with the Charter. This requires the Minister to consider whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice. The factors considered in making the decision on an exemption must include evidence, if any, on the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition.

These factors are to be assessed in conformity with the *Charter* rights of supervised injection patients. This is so because the *Charter* is a constitutional document, and is paramount above all other legislation and governs any action by government (including the exercise of a Minister's discretion such as that under CDSA s. 56). While the government is free to make policy decisions when it legislates, it must do so within the confines of the *Charter* and the impact of such policy decisions and legislation must not unjustifiably violate *Charter* rights.

PART IV - C-2: SIGNIFICANT DEPARTURES FROM THE *INSITE* DECISION

Bill C-2 modifies Section 56 and makes consequential amendments to other sections of the CDSA that allow supervised injection facilities like Insite to operate. The new section of the CDSA will make it more difficult for health authorities and community agencies to offer supervised consumption services for people who use drugs by setting out an excessive and unreasonable

[9] *Insite* at para 133.

process for applying for an exemption. The effect of the amendments makes approval for more injection sites unlikely.

Last week, the Minister of Health suggested that this legislation is a necessary response to the *Insite* judgment. Respectfully, the minister has misinterpreted that ruling and is relying on only a small part of it. Bill C-2 makes several significant departures from the letter and spirit of the *Insite* decision:

A. Bill C-2 answers the Court's requirement that exemptions generally be granted to protect the *Charter* rights of supervised injection site participants, with a presumption that exemptions will be withheld.

Following the Supreme Court's decision in *Insite*, the proper wording for provisions governing the issuing of CDSA exemptions for supervised consumption services to operate, without risk of criminal prosecution, should be that "the minister should generally … grant exemptions." However, the principles set out in Bill C-2 move the granting of exemptions from presumptive to exceptional. The proposed changes run afoul of the court decision, and the *Charter* rights of people who use drugs.

Section 5 of Bill C-2 inserts a new 56.1 (5) into the CDSA. This section outlines principles governing how the Minister's discretion will be exercised. This section does not codify the Supreme Court's direction that discretion shall be exercised in harmony with the *Charter* rights of patients. Rather, it states:

> (5) The Minister may only grant an exemption for a medical purpose under subsection (2) to allow certain activities to take place at a supervised consumption site in exceptional circumstances…

Other amendments in the bill restrict exemptions under any other sections of the CDSA, and prevent any exemption dealing with illicit substances. These prevent the Minister from granting an exemption even when the *Charter* rights of patients would be infringed by a denial.

B. Bill C-2 answers the requirement that the section 56 exemption decision balance public safety with public health, with a narrow focus on public safety.

The bill characterises supervised injection services as somehow harmful or dangerous, conflating this and other harm reduction services with the harms of illicit drug use and organized crime. It allows exemptions only after the Minister considers a number of factors related to the control of crime. The bill is silent about the health care purpose of supervised injection services or their ameliorative effect on the community and, more importantly, for the Canadians who would access health care services there.

To be clear, there is nothing disrespectful to communities about any kind of health care service. Insite

does not encourage drug use, it has not led to a reduction in treatment uptake, nor has it contributed to street disorder or drug related crime.[10]

The Supreme Court of Canada, and experts on the subject (most of whom were not called to testify before this committee), share a consensus that drug addiction is a recurrent and relapsing illness- and not bad conduct or a moral failing. However, the language in this bill and the uneven consultation it requires is likely to exacerbate discrimination suffered by some of the most vulnerable and most ill Canadians, whom it is arguably the Minister of Health's duty to protect.

Not only is it unfair to characterize this health care service as somehow dangerous or disrespectful, and a likely source of crime and street disorder, it is unnecessary. Other aspects of the criminal law and municipal bylaws already address alleged harms that Bill C-2 suggests erroneously are associated with supervised injection services.

To argue public safety to the exclusion of health care rejects the court's guidance about balancing, and exposes the most vulnerable Canadians to infection and death. It is inappropriate to prioritize non-existent harm over the lives of Canada's most vulnerable patients.

C. Bill C-2 expands the Court's five permissive factors into 26 impossible criteria

Rather than seeing the Supreme Court's five factors as guiding principles to assist the Minister, the bill introduces many barriers and puts the onus on applicants to provide an exhaustive amount of information before an application could be considered. The bill requires that before applications will be processed, evidence of 26 kinds must be submitted by an applicant, many of which have nothing to do with healthcare and many of which do not stipulate that the opinions in them be supported by any kind of evidence. The bill offers no guidance on how the various items on this extensive list will be weighed or considered. The Minister may request further information of an unknown character and quantity. Further barriers are contemplated by regulation. An unnecessary round of public consultation is permitted – and the scope of which is not defined (e.g., which public comment from where is considered potentially relevant). It requires each applicant to prove what has already been proven in multiple international settings, but is unprovable in any city without an existing injection facility. There is no clarity about what evidence would result in an exemption or when such a decision might be issued. Some of the information related to staff is unknowable at the time of application, and necessarily creates privacy concerns for staff members. Other restrictions are at odds with the operation of a facility like Insite that includes peer support people (i.e, people with personal experience of drug use).

In its *Insite* ruling, the Supreme Court simply said that *if* there is evidence about these five factors, then such evidence must be taken into consideration by the Minister. The Court did not rule that an application for an exemption could only be reviewed or an exemption granted if all five factors had been addressed and/or the evidence regarding each of them was uniformly positive (e.g. the lack of any community opposition). The decision in no way

[10] Urban Health Research Institute, BC Center for Excellence in HIV/AIDS, *Insight into Insite,* 2010, [UHRI]. Available at http://uhri.cfenet.ubc.ca/images/Documents/insight_into_insite.pdf.

required the 26 additional criteria set out in Bill C-2. The Court did not suggest the onus for justifying the effectiveness of supervised injection services should lie exclusively with the applicant, rather than being the result of cooperative federalism, as was the case with Insite.

The effect of these requirements is to frustrate the application process. Instead of facilitating the implementation of health services that have been recognized as critical by the Supreme Court of Canada, Bill C-2 makes it very difficult for health providers to apply for an exemption. It drains resources from applicants who are expert in the provision of frontline health care service by requiring them to justify an already well-proven health care service and by generating evidence about the non-existent effect the service has on public safety. It also imposes additional requirements on existing facilities.

A cynical person might read these provisions of the bill as granting a *de facto* veto to organizations or politicians with no expertise in the provision of health care or as a barefaced effort to generate evidence that will tip the balance, in the Minister's mind, between public health and public security such that an exemption can be withheld. Needless restrictions on the Minister's discretion to grant exemptions, particularly those that foreclose consideration of the *Charter* rights of patients, are unconstitutional.

PART V - WHAT THIS MEANS AND WHY IT MATTERS

Bill C-2 does not accord with the spirit or the letter of the Supreme Court of Canada's ruling. The legislative regime contemplated by the bill will impede access to constitutionally required supervised injection services. Bill C-2 would likely not withstand constitutional scrutiny, and to pass it would invite a re-litigation of the *Insite* decision, with a legislative framework which is much more problematic than the one in force at that time. The results of the coming into force of this amendment to the CDSA are problematic, both legally and in terms of human suffering.

A. Legal Problems

a. Section 7 issues

Bill C-2 replicates the problems the court condemned in *Canada v PHS*. In effect, what C-2 does is move the problematic aspects of the Minister's discretion from where it currently sits into the wording of the statute. Bill C-2 likely will not withstand *Charter* scrutiny and invites an almost inevitable constitutional challenge. This is so because, as the court decided in the *Insite* decision, a deprivation of injection drug users' access to safe injection services violates their section 7 *Charter* rights. The bill impedes access to healthcare in the name of public safety in a way that the Court has already found to be arbitrary and to result in grossly disproportionate harms to *Charter* rights. The bill practically guarantees denials of exemptions. This is exactly what the Supreme Court of Canada said was impermissible.

b. Section 15 issues

In addition, the section 15 *Charter* equality rights of supervised injection service participants are engaged because the bill treats health services for people who are disabled by drug dependence in a different way than it does health services for other types of people needing health services for other health conditions.

c. Minority rights

The bill offends several other constitutional principles. The bill also sets the government on a course of which the courts have long disapproved: that minority rights cannot be, and ought not to be, settled by public referendum;[11] and the public consultation required by the new regime may run afoul of this principle.

d. Cooperative federalism and subsidiarity

The bill is also a head-on attack on other constitutional values such as cooperative federalism (which honours a concordant use of overlapping federal and provincial powers) and the doctrine of subsidiarity (which states that decisions affecting communities, such as enabling access to health services are best made closer to where the services are provided). Provincial legislation, such as the *Ontario Public Health Standards 2008* adopted under the provincial *Health Protection and Promotion Act*, require that residents of every health unit have access to a variety of harm reduction services, including the provision of sterile needles and syringes. The same logic would apply to other harm reduction services such as supervised injection services, informed by evidence and supported by local need. These principles are not merely cute constitutional doctrines, but important parts of the legal backbone of the nation.

These legal issues should concern government and taxpayers because of the enormous cost of re-litigating a settled issue of law.

B. Human Suffering

This is more than an esoteric question of constitutional law. The harmful consequences of the *Respect for Communities Act* will be felt most deeply by the most vulnerable Canadians – who are members of our communities. The barriers this bill presents to access to supervised injection services allow a heartbreaking public health emergency to persist under a law-and-order agenda, and exposes patients and communities to infection, suffering, and death.

I live three blocks from Insite. On Thanksgiving weekend in Vancouver, the opiate drug fentanyl was being passed off as heroin by street dealers. Fentanyl is an order of magnitude more potent than heroin. As a result, dozens of my neighbours who use injection drugs suffered overdoses. On the Sunday of Thanksgiving weekend, 16 people overdosed at Insite. The next day, 10 more people overdosed. There were 5 the following day. None of the people who overdosed at Insite died. Five people did die, but they died because they were alone, not at a facility such as Insite.

Without this facility in my neighbourhood, at least 48 of my neighbours would have died over the last four years[12] and 300 of my neighbours would have died over the last 10 years. Insite saves lives. The service has overseen millions of injections while witnessing zero deaths.

In the summer of 2014, there was a similar set of overdoses across the country. The Agence de la santé et des services sociaux de Montréal investigated 83 cases of severe overdoses, 25

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[11] *Reference re Secession of Quebec,* [1998] 2 SCR 217 at paras 80-83. Esp. para 80: "We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter*'s provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, and *Mahe v. Alberta*, [1990] 1 S.C.R. 342.".

[12] UHRI.

of which were fatal[13]. In other neighbourhoods across the country, thousands of people have died, and countless others will die, without access to supervised injection services.

According to the BC coroner's service, there were 284 overdose deaths in 2012; 331 overdose deaths in 2013; and 336 in 2014[14]. These 951 deaths may have been avoided if drug users had access to medical help. Figures for the rest of Canada, when available, are comparable. Canada's drug overdose death rate is a preventable epidemic.

When people have access to supervised injection services, lives are saved. When they do not, people die. It is as simple as that.

This bill says quietly: the federal government does not value the lives of people who use drugs whose lives could be saved by this service. Just as Insite save lives, Bill C-2 will kill people while violating their constitutional rights. In my respectful submission, the predictable outcomes of the bill are unnecessary, reckless, and illegal.

PART VI – RECOMMENDATION

BILL C-2 *the Respect for Communities Act* is legally and morally problematic and cannot be saved by any amendments. Pivot Legal Society recommends that the committee reject the bill in its entirety.

WHO WE ARE

Pivot Legal Society is a leading Canadian human rights organization that uses the law to address the root causes of poverty and social exclusion in Canada. Pivot's work includes challenging laws and policies that force people to the margins of society and keep them there. Since 2002 Pivot has won major victories for sex workers' rights, police accountability, affordable housing, and health and drug policy.

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[13] Information available at http://www.dsp.santemontreal.qc.ca/media/dossiers_ de_presse/surdoses.html

[14] British Columbia Drug Overdose and Alert Partnership Report (BCCDC) http://www.bccdc.ca/NR/rdonlyres/360E0050-F939-4C0E-B627-854F0A7B346D/0/FinalDOAPReport2014.pdf

Pivot Legal Society
121 Heatley Ave Vancouver, B.C. V6A 3E9
Tel: 604.255.9700 | Fax: 604.255.1552
www.pivotlegal.org
adrienne@pivotlegal.org