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# MEMO

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**To:** You (counsel for the Appellant Crown)

**From:** Senior Crown Counsel

**Date:** September 30, 2011

**Re:** *Canada v PHS Community Services Society*

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We act for the Crown in this constitutional challenge involving Vancouver's safe injection facility, Insite. I filed the notice of appeal and will prepare the appeal book, but I need you to write the factum and argue the appeal for me.

Our factum is due on Friday, October 21, 2011 between 9:00 a.m. – 11:00 a.m. in Room 407. We must file three copies with the Court.

The appeal will be heard during the week of February 6-9, 2012. I am scheduled to be out of town that week. You will need to check the Court's docket to determine the exact date and time of the appeal.

I've summarized the facts of the case below as found by the trial judge and set out our grounds of appeal. Feel free to use any other facts mentioned in the lower courts' decisions, if you think they might be useful.

Good luck!

## Facts

Insite is North America's first government-sanctioned safe injection facility. It opened in September 2003 in response to the devastating effects of injection drug use on the residents of Vancouver's downtown eastside. In order to operate, Insite requires an exemption from laws prohibiting the possession and trafficking of controlled substances. This exemption is available under section 56 of the *Controlled Drugs and Substances Act*, SC 1996, c 19 ("CDSA"). Insite received a conditional exemption in 2003 and temporary extensions in 2006 and 2007. In 2008, the Minister of Health indicated an intention to deny Insite's latest application for an exemption. PHS (the non-profit organization that oversees Insite's operation) commenced a constitutional challenge in an effort to keep Insite operating.

The trial judge made several key findings of fact (referenced at para. 27 of the SCC decision):

... all of the evidence adduced by PHS, VANDU and Canada supports some incontrovertible conclusions:

1. Addiction is an illness. One aspect of the illness is the continuing need or craving to consume the substance to which the addiction relates.
2. Controlled substances such as heroin and cocaine that are introduced into the bloodstream by injection do not cause Hepatitis C or HIV/AIDS. Rather, the use of unsanitary equipment, techniques, and procedures for injection permits the transmission of those infections, illnesses or diseases from one individual to another; and
3. The risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals.

The trial judge also accepted the findings of the Expert Advisory Committee report to the federal Minister of Health, which are reproduced at para. 28 of the SCC decision:

- Observations in the period shortly before and after the opening of Insite indicated a reduction in the number of people injecting in public;
- There was no evidence of increases in drug-related loitering, drug dealing or petty crime in the area around Insite;
- The local Chinese Business Association reported reductions in crime in the Chinese business district outside the DTES;
- Police data showed no changes in rates of crime recorded in the DTES;
- There was no evidence that Insite increased the relapse rate among injection drug users; and
- The cost/benefit analysis was favourable.

The trial judge rejected the argument that Insite was shielded from the possession and trafficking provisions of the CDSA through the doctrine of interjurisdictional immunity. He concluded that the federal and provincial legislation were in conflict, with the result that the federal legislation must prevail by virtue of the doctrine of federal paramountcy. However, he ultimately found for the applicants on the basis that sections 4(1) and 5(1) of the CDSA violated the section 7 rights of the claimants and could not be saved by section 1. He granted Insite a constitutional exemption, permitting it to continue to operate, even without the Minister's section 56 exemption.

A majority of the British Columbia Court of Appeal upheld the section 7 violation but concluded (unlike the trial judge) that the doctrine of interjurisdictional immunity applied to protect Insite. One judge dissented on both the *Charter* and division of powers issues. She concluded there was no section 7 violation because the deprivation was in accordance with the principles of fundamental justice. She held that the doctrine of interjurisdictional immunity did not apply, but that paramountcy did. You should look closely at her reasons, as they represent our best chance for success at the Supreme Moot Court of Dalhousie.

The Supreme Court of Canada took a different approach than either of the courts below. The SCC unanimously concluded that the doctrine of interjurisdictional immunity did not apply. They found it unnecessary to consider the doctrine of paramountcy as all parties agreed that without constitutional immunity, Insite could not operate. The SCC honed in on the exemption process in s.56 of the CDSA, holding that the Minister's refusal to extend the exemption violated the claimants' section 7 rights and could not be saved under section 1. They ordered the Minister to grant Insite a section 56 exemption.

The Crown appealed to the Supreme Moot Court of Dalhousie on the *Charter* issue, but concedes that if a section 7 violation is found, it cannot be saved under section 1. PHS and the individual claimants cross-appealed on the applicability of interjurisdictional immunity. The appeals will be heard together, but for convenience, the Crown will be known as the appellant throughout, and PHS the respondent.

### **First Issue:**

1. Are sections 4(1) and 5(1) of the CDSA constitutionally inapplicable to Insite by virtue of the doctrine of interjurisdictional immunity?

### **Second Issue:**

2. Do sections 4(1) or 5(1) of the CDSA, or the Minister's refusal of a section 56 exemption violate section 7 of the *Charter*?

### **Sources**

You will want to look at the trial judge's decision at 2008 BCSC 661. The British Columbia Court of Appeal's decision can be found at 2010 BCCA 15. The Supreme Court of Canada decision can be found at 2011 SCC 44.

The Supreme Moot Court of Dalhousie prefers that counsel cite only the most relevant cases and authorities. You may cite up to five cases on each issue, any relevant legislation you feel should be brought to the Court's attention, and up to two secondary sources (such as journal articles). Lower court decisions in this matter do not count towards the five-case limit.