

CONTEXT, CHOICE, AND RIGHTS: *PHS COMMUNITY SERVICES SOCIETY v CANADA (ATTORNEY GENERAL)*

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FORTHCOMING UBC LAW REVIEW

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. . . we have won a major battle  
we the most afflicted of the poor  
have won a battle . . .<sup>1</sup>

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<sup>1</sup> Bud Osborn, “A New Day” in *Signs of the Times* (Vancouver: Paneficio Studios and Anvil Press, 2005) at 42. This poem was read by Osborn at the opening of Vancouver’s Insite.

## I. INTRODUCTION

Constitutional law cases that revolve around the rights or circumstances of those groups most marginalized in Canadian society are not frequent cause for celebration.<sup>2</sup> Typically, these cases push the boundaries of classical liberal understandings of the rights our *Canadian Charter of Rights and Freedoms*<sup>3</sup> protects, asking the courts to recognize social and economic dimensions to liberties that are traditionally and popularly more narrowly construed.<sup>4</sup> Such demands are more often than not sidestepped (or rejected outright) by courts, with the result that activist agendas focusing on leveraging *Charter* rights to achieve significant social change are less compelling than initially imagined.<sup>5</sup> It is simply not clear that the turn to courts as a strategy of social, political, and economic transformation is the best use of sparse resources.

However, a recent case out of British Columbia—*PHS Community Services Society v Canada (Attorney General)*<sup>6</sup>—complicates simple political assessment of the relationship between rights litigation and social struggle. This case brings together two separate actions,<sup>7</sup> each challenging the constitutional ability of the federal government to criminalize supervised safe injection of prohibited drugs in a provincially established safe injection site—Insite, located in Vancouver’s Down-

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<sup>2</sup> See especially *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*]; Martha Jackman & Bruce Porter, “Socio-Economic Rights under the Canadian Charter” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209.

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>4</sup> Sandra Fredman has written of social and economic rights as “the Cinderella” of human rights. See *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at 2.

<sup>5</sup> See generally Margot Young, “Why Rights Now: Law and Desperation” in Margot Young et al, eds, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 317; Sanda Rodgers & Sheila McIntyre, “Introduction” in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Canada: LexisNexis Canada, 2010) xxv; Martha Jackman, “Constitutional Castaways: Poverty and the McLachlin Court” in Rodgers & McIntyre, *ibid*, 297.

<sup>6</sup> 2010 BCCA 15, 314 DLR (4th) 209 [*PHS* (CA)].

<sup>7</sup> 2008 BCSC 661, 293 DLR (4th) 392, *aff’d* *PHS* (CA), *supra* note 6; 2008 BCSC 1453, 302 DLR (4th) 740, *aff’d* *PHS* (CA), *supra* note 6.

town Eastside (“DTES”). Challengers to federal criminalization were successful at both the British Columbia Supreme Court (“BCSC”) and Court of Appeal (“BCCA”). Leave to appeal has been granted at the Supreme Court of Canada.<sup>8</sup> The case engages a wide swath of constitutional issues: legal rights under the *Charter* and interesting (albeit at times obtuse) division of powers arguments about interjurisdictional immunity and federal paramountcy.

Assessment of constitutional challenges and their relevance to progressive political struggle remains fraught, despite the clear success, at least up to the Court of Appeal level, of the rights claimants in *PHS*. The acknowledgment, particularly at the trial level, of the complexity and reality of injection drug addiction and health care treatment for such addiction is important and noteworthy. Judicial analysis employed recognition of a complex and socially evolving set of conceptions about the activities—supervised injection and drug addiction—pertinent to *Insite*. This narrative clearly comes out of the local community’s struggle against hegemonic understandings of the marginalized individuals involved and their needs. This raises an interesting opportunity for scholarly observations about the connection (or disconnection) between social activism and legal action, and the effect of this case on progressive local politics about drug addiction and treatment for addicts.

This is not to over-emphasize or over credit the transformative aspect of the judgment texts at both levels of court in *PHS*. While the case is, so far, a victory for the rights claimants, I argue that the manner in which the way was cleared for that victory may compromise or constrain future constitutional arguments. The framing of the reality at issue, and its relevance to the unpacking of the *Charter*’s section 7 rights, retains too narrow a scope for these rights to be positioned as reliable triggers for progressive social transformation.

That said, the case is nonetheless important as a reminder of the attention due local urbanized political struggle. Vancouver, certainly, is a city characterized by what one writer has called the “new dynamics of inequality.”<sup>9</sup> Nicholas Blomley elaborates, writing of the urban “valori-

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<sup>8</sup> 2010 CanLII 34800. The case is scheduled to be heard by the SCC on 12 May 2011.

<sup>9</sup> Saskia Sassen, “The Global City: Strategic Site/New Frontier” in Engin Isin, ed, *Democracy, Citizenship and the Global City* (New York: Routledge, 2000) 48 at 52, quoted in Nicolas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004) at 31 [Blomley, *Unsettling the City*]. Vancouver, of course, is not unique in this. For a journalistic account of a similar phe-

zation of certain spaces and people, and the simultaneous but interlocking devalorization of those deemed marginal, such as immigrants and the urban poor.”<sup>10</sup> The setting of the case and the people whose lives and issues animate the struggle over Insite illustrate this well. Consequently, the broader issue of diversity—the topic of this issue of the *UBC Law Review*—has a more focused expression in the underlying politics that lead up to, account for, and are affected by the *PHS* case. As a political artifact, the case is a piece of a larger campaign to make Vancouver more responsive to and reflective of the needs of its citizenry—especially those at the margins, underrepresented in the control and focus of public and private social spaces of the city.

This essay has three sections that follow. First, it begins by providing some context to the case, telling a selective story about the area (the DTES) and the facility (Insite) that have spawned the lawsuit. Second, it looks at the two decisions so far rendered in the case, at the section 7 bases of the judgments at each level of court, and at the linkage of legal argument and contextual factors key to the outcomes that relate to section 7. While the case also entails division of powers arguments for interjurisdictional immunity and federal paramountcy, these aspects are not considered. Finally, the essay considers how decisions, so positive in outcome for the rights claimants in this case, could nonetheless cast a shadow on possible future cases representing the interests of low-income or disadvantaged plaintiffs. It concludes with a caution. The rejection of individual agency as relevant to resolution of the rights issue in this case demands broader principled extension to all rights analysis. A commitment to social justice and substantive equality demands no less.

## II. THE DTES AND INSITE: HISTORY AND CONTEXT

*PHS* 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 Vancouver in particular. The case, and the legal challenges that initiated it, took this struggle from the municipal and local political arena into the legal forum. The story of Insite has

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nomenon in Toronto, see Anna Mehler Paperny, “Toronto a city of extremes, losing the middle ground” *The Globe and Mail* (15 December 2010) A1.

<sup>10</sup> Blomley, *Unsettling the City*, *supra* note 9 at 31.

been described as “a complex and interconnected series of events brought about by the activities of advocates, peers, community agencies, politicians, journalists, [and] academics”.<sup>11</sup> The drama must now also assign key roles to lawyers and the judiciary.

Insite was opened on 12 September 2003 by the Vancouver Coastal Health Authority (“Health Authority”), in partnership with the Portland Hotel Society.<sup>12</sup> The site responds to injection drug-related issues in Vancouver’s DTES.<sup>13</sup> While there are today over 75 supervised injection sites operating around the world, Vancouver is the only municipality on the continent with a government sanctioned safe injection site (“SIS”).<sup>14</sup> The injection clinic provides a range of services to injection

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<sup>11</sup> Dan Small, Anita Palepu & 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.

<sup>12</sup> The Portland Hotel Society operates Insite under a contractual arrangement with the Vancouver Coastal Health Authority. 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. As an aside, it is interesting to note that 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 a ministerial exemption. 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. The Foundation argues that these supervised injection services are part of the primary health care it provides to its clients.

<sup>13</sup> Insite provides a number of services. Specifically, it is staffed by a combination of clinical and non-clinical staff, including peers, program assistants, RNs, alcohol and drug counsellors and coordinators. It is open 18 hours a day, seven days a week, from 10 AM to 4 AM. Its injection room has 12 booths with a daily capacity of roughly 850 injections. Drugs are not provided and injections are supervised with emergency response to overdoses available. The staff offers immunization, wound care, and injection-related first aid. Referrals to addiction treatment and other health services are available, accompanied by access to sterile injection equipment. Insite provides a post-injection space for observation and peer interaction. See Vancouver Coastal Health, “Saving Lives: Vancouver’s Supervised Injection Site” (brochure) at 2, online: 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)>.

<sup>14</sup> British Columbia, Ministry of Healthy Living and Sport, “North America’s First Supervised Injection Site” (1 February 2010), online: Housing Matters <[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. A site in Zurich in 2003 also had a restaurant employing addicts, a laundromat, public computers, and a medical team to at-

drug users, including clean needles and a safe and supervised place to inject drugs.<sup>15</sup>

Insite runs on a harm reduction model. The program is directed “towards decreasing the adverse health, social and economic consequences of drug use without requiring abstinence from drug use.”<sup>16</sup> The substances brought to Insite by drug users are prohibited, have been obtained illegally, and are in the possession of Insite clients before entering the facility. Roughly 60 per cent of the drugs injected are opioids, two-thirds of which are heroin and one-third of which is morphine or hydromorphone. The remainder, approximately 40 per cent of injected drugs, are stimulants, of which 90 per cent are cocaine and 10 per cent are methamphetamine.<sup>17</sup>

The DTES is one of the most impoverished urban neighbourhoods in Canada.<sup>18</sup> The area lies just east of the Vancouver’s downtown core<sup>19</sup> and is intriguingly described by geographer Nicholas Blomley as produced by “a complicated and fractured geologic layering of material and representational processes”.<sup>20</sup> The social history of the DTES is complex, with different groups of peoples and different eras of use shaping and reflected in the neighbourhood of today. First Nations peoples occupied and used the land now known as the DTES, historically setting up summer camps, villages, and fishing settlements since time immemorial on the territory.<sup>21</sup> Aboriginal peoples still represent a significant percentage of inhabitants. European colonization came in the

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tend clients. As well, it had a supervised inhalation room. 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 177–78.

<sup>15</sup> *Ibid.*

<sup>16</sup> Vancouver Coastal Health, *Insite—Supervised Injection Site* (7 November 2010), online: Vancouver Coastal Health <<http://supervisedinjection.vch.ca>>. For a fuller description of services and protocols at Insite, see *PHS Community Services Society v Canada (Attorney General)*, 2008 BCSC 661 at paras 71–77, 293 DLR (4th) 392 [*PHS (SC)*].

<sup>17</sup> See *PHS (SC)*, *ibid* at para 72.

<sup>18</sup> See generally Campbell, Boyd & Culbert, *supra* note 14.

<sup>19</sup> The BCSC judgment establishes the DTES as: “bounded by the waterfront along Burrard Inlet on the north, Clark Drive on the east, Pender and Terminal Streets on the south, and Richards Street on the west” (*PHS (SC)*, *supra* note 16 at para 15).

<sup>20</sup> Blomley, *Unsettling the City*, *supra* note 9 at 32.

<sup>21</sup> See *ibid.*

early 1800s, bringing fur traders and entrepreneurs into the city, transforming the area into a key economic piece of the frontier city of Vancouver. The years leading up to the two world wars saw the area populated by seasonal workers seeking inexpensive rental accommodation. After World War II, these housing units became permanent homes for older single male workers, retired from the resource industry. Demographics further shifted as the development of an emergent business district in the west side of Vancouver drew away more affluent residents and business.<sup>22</sup>

Currently, the DTES is home to a large low-income population.<sup>23</sup> Indeed, the DTES represents the increasing polarization of cities around the world as, in the words of David Harvey, “divided and conflict-prone”<sup>24</sup> areas. The median household income in the DTES is well below that of the municipal average: \$12 thousand in 1996 compared to \$48 thousand.<sup>25</sup> Over 4,600 intravenous drug users reside in the DTES, close to one-half of those in Vancouver as a whole.<sup>26</sup> About five per cent of the users in the DTES use Insite.<sup>27</sup> The area is known for its lack of adequate housing, many single-room occupancy hotels, and a large number of vulnerable people including urban Aboriginals and individuals with mental illnesses.<sup>28</sup> This inequality is “etched on the spatial forms”<sup>29</sup> of the area and surrounding districts: single-room occupancy hotels, bars, and run-down buildings line the streets. As the BCSC *PHS* judgment notes, in 2008, 87 per cent of drug users in the DTES had Hepatitis C, 17 per cent had HIV, 20 per cent were homeless, 80 per cent had been incarcerated, and 38 per cent were involved in prostitu-

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<sup>22</sup> See Susan Boyd, Donald MacPherson & Bud Osborne, *Raise Shit!: Social Action Saving Lives* (Halifax: Fernwood Publishing, 2009) at 11.

<sup>23</sup> See *ibid* at 34.

<sup>24</sup> David Harvey, “The Right To The City” (2008) 53 *New Left Review* 23 at 32. See also Jeff Sommers & Nick Blomley, “The Worst Block in Vancouver” in Stan Douglas, *Every Building on 100 West Hastings* (Vancouver: Arsenal Pulp Press, 2002) 18.

<sup>25</sup> See *PHS* (SC), *supra* note 16 at para 15.

<sup>26</sup> See *PHS* (CA), *supra* note 6 at para 249.

<sup>27</sup> See *ibid*.

<sup>28</sup> See *PHS* (SC), *supra* note 16 at para 15.

<sup>29</sup> Harvey, *supra* note **Error! Bookmark not defined.** at 32.

tion.<sup>30</sup> Poverty is palpable: people sleeping on the streets, open injection of heroin and smoking of crack, and many individuals simply hanging about.<sup>31</sup> The “visible street scene in the DTES is directly related to poverty, gentrification and lack of access to private space.”<sup>32</sup>

The DTES is also an area known for “a long history of activism and opposition” and the assertion of community and rights in the face of condemnation as marginal and anomic.<sup>33</sup> In this sense, it is a “contested landscape”.<sup>34</sup> Many of those outside the area share an understanding of the DTES as derelict and a place of suffering, dysfunction, and dislocation. But many inhabitants understand the DTES to be their chosen community, an area where they enjoy a high degree of acceptance and manageability. Thus the DTES is a neighbourhood with a strong counter-narrative of place and belonging.

The struggle for Insite emerges from this latter perspective, from strategies employed by residents and activists to establish a facility that responds to the high density of injection drug users with no safe place to inject the drugs to which they are addicted, and with limited, if any, access to clean and safe injection equipment. Insite is the product of concerted efforts to reshape the DTES to better reflect and serve its inhabitants and their uniquely concentrated needs and circumstances. Insite thus invokes a tale of “early community activism that culminated in a social justice movement that exposed the harms of prohibition and rallied to open the first official safe injection site.”<sup>35</sup>

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<sup>30</sup> See *ibid* at 16. See also Martha Lewis et al, *Downtown Eastside Demographic Study of SRO and Social Housing Tenants* (Vancouver: City of Vancouver, 2008) at 2, online: City of Vancouver <<http://vancouver.ca/commsvcs/housing/pdf/dtesdemographic08apr.pdf>>.

<sup>31</sup> See Robert Tarantino, “Creating Conflict: Legal Strategies for Housing the Homeless in Vancouver’s Downtown Eastside” (2010) 28 Windsor Rev Legal Soc Issues 109 at 112.

<sup>32</sup> Boyd, MacPherson & Osborne, *supra* note 22 at 12.

<sup>33</sup> Nicholas Blomley, “Enclosure, Common Right and the Property of the Poor” (2008) 17 Soc & Leg Stud 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.

<sup>34</sup> Blomley, *Unsettling the City*, *supra* note 9 at 53.

<sup>35</sup> Boyd, MacPherson & Osborne, *supra* note 22 at 17. See this book more generally for a detailed discussion of specific actions.

The story of the choice of the location of Insite, told in a recent book on the DTES,<sup>36</sup> illustrates the importance of local activism and effort. Two supervised injection site supporters, Dan Small and Mark Townsend,<sup>37</sup> out for a walk in the area met a man sweeping the sidewalk in front of a sandwich shop along Hastings Street. For 22 years, this man and his wife had run the sandwich shop, living above the store front in a second-floor apartment and renting out the remainder of the building to hard-to-house tenants. Conversations ensued and ultimately the Portland Hotel Society<sup>38</sup> obtained a lease to the building on the understanding that a supervised injection site would open there. The sandwich shop closed and the Society spent \$30 thousand renovating the 1,200 square foot ground floor.<sup>39</sup> The renovation project, code-named “the hair salon,” was ready for opening in 2002, even without government support, when Larry Campbell, a local figure and a supporter of the supervised injection site, announced his candidacy for mayor. Organizers decided to wait for election results, hoping for government support—at least at the municipal level. But even without this support they had numerous healthcare professionals, activists, social services workers, and addicts waiting and “ready to act on a moment’s notice” to staff the facility.<sup>40</sup>

Municipal government support came quickly, pointedly in the form of a commitment from Larry Campbell during his mayoral campaign to open a safe injection site by 1 January 2003.<sup>41</sup> Toward the end of his term, outgoing mayor Phillip Owen had also become a supporter of a SIS. When Larry Campbell was elected mayor of Vancouver on 16 No-

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<sup>36</sup> This tale is closely taken from Campbell, Boyd & Culbert, *supra* note 14 at 173–77.

<sup>37</sup> Mark Townsend and Dan Hall work with the Portland Hotel Society. The Portland Hotel Services Society is a non-profit and registered charity organized with the purpose to provide housing and support to individuals in Vancouver’s Downtown Eastside. The individuals on whom its services are focused are those with the general description of “hard to house, hard to reach or hard to treat” (*PHS (CA)*, *supra* note 6 at para 4).

<sup>38</sup> See, *ibid*.

<sup>39</sup> Apparently, the space was also renovated to include an inhalation room for addicts who smoked drugs, featuring a negative-air circulation system. However, the inhalation room has not been opened, although need for such a site is recognized. Campbell, Boyd & Culbert, *supra* note 14 at 178.

<sup>40</sup> Small, Palepu & Tyndall, *supra* note 11 at 78.

<sup>41</sup> See Campbell, Boyd & Culbert, *supra* note 14 at 174.

vember 2002, the election brought in a city council with a majority of members from the same political party.<sup>42</sup> But Campbell's electoral promise proved naïve, and by April 2003 not much progress had been made. Although, as we learn from affidavit evidence, the Vancouver Richmond Health Board voted at a June 2001 board meeting to support SISs as "a vital and necessary part of the continuum of the health care system."<sup>43</sup> And, in March 2003, the Health Authority approved a proposal for a safe injection site and authorized an application to Health Canada for an exemption from the prohibition of such a site.<sup>44</sup>

On 7 April 2003, a number of activists, most notably Ann Livingston,<sup>45</sup> opened an illegal injection site at 327 Carrall Street in the DTES. This was Livingston's third illegal facility and the purpose of the site "was to put pressure on the government to approve the official site."<sup>46</sup> The illegal site had two injection booths and provided clean needles and sterile water with a regular client base of about 50 users. The police knew of the site, monitoring it but not shutting it down.<sup>47</sup> The illegal site stayed open for about six months, closing when the official site opened in September 2003, in the former sandwich shop.<sup>48</sup>

Six hundred addicts came through Insite on the first day. The average now is between 700 and 1,000 daily.<sup>49</sup> In 2004, the Portland Hotel Society took over the whole building and expanded the facilities by including a twelve-bed detox unit called Onsite on the second floor and a recovery wing on the third floor for people waiting to get into long-term treatment.<sup>50</sup>

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<sup>42</sup> COPE took eight out of ten city council seats.

<sup>43</sup> *PHS (SC)*, *supra* note 16 at para 44.

<sup>44</sup> See *PHS (SC)*, *supra* note 16 at para 45.

<sup>45</sup> Ann Livingston is a long-term activist in the DTES and co-founder of the Vancouver Area Network of Drug Users ("VANDU").

<sup>46</sup> Ann Livingston, quoted in Campbell, Boyd & Culbert, *supra* note 14 at 180–81.

<sup>47</sup> See Campbell, Boyd & Culbert, *supra* note 14 at 181.

<sup>48</sup> See *ibid* at 182. See also Boyd, MacPherson & Osborne, *supra* note 22 at 180.

<sup>49</sup> See *ibid* at 183.

<sup>50</sup> See *ibid* at 184.

### III. THE CASE

The legal regime under which Insite operates was, up to this case, a product of both federal and provincial law. Insite is set up under exclusive provincial jurisdiction over health care and health care facilities.<sup>51</sup> A wide range of provincial statutes are relevant to the Health Authority's establishment of Insite.<sup>52</sup> The trial judge found on undisputed evidence that supervised injection is "a vital part of a provincial health care undertaking".<sup>53</sup> But supervised injection is also caught within a federal prohibitory regime. Sections 4 and 5 of the federal *Controlled Drugs and Substances Act*<sup>54</sup> criminalize possession of and trafficking in controlled substances. Appendices I to IV of the CDSA set out what substances are "controlled," and include such drugs as heroin and cocaine.<sup>55</sup> On their face, these sections apply to the activities of both users and staff at Insite. However, the statutory regime allows for exemptions from such wide criminalization. Section 56 of the CDSA provides for the federal minister of health to grant exemptions from application of any provision of the Act. According to this section, an exemption can be granted if "in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest."<sup>56</sup> But, under this federal statutory regime, absent a ministerially-granted exemption, users and staff of Insite are liable to prosecution.

Insite received an initial three-year ministerial exemption under section 56 of the CDSA from sections 4 and 5 for both drug users and staff within Insite's premises, commencing 12 September 2003.<sup>57</sup> The initial exemption reflected the 2002 conclusion of the report of the House of Commons Special Committee on the Non-Medical Use of Drugs that

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<sup>51</sup> See *PHS (CA)*, *supra* note 6 at para 103. Huddart JA points to subsection 92(7) in particular.

<sup>52</sup> See *ibid* at paras 104–06.

<sup>53</sup> *Ibid* at para 102.

<sup>54</sup> SC 1996, c 19 [CDSA].

<sup>55</sup> *Ibid*.

<sup>56</sup> The full section reads: "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 . . ." (*ibid*, s 56).

<sup>57</sup> The initial exemptions were based on necessity for a scientific purpose. For excerpts from the exemption letter, see *PHS (CA)*, *supra* note 6 at para 81.

the DTES presented a “public health disaster.”<sup>58</sup> The creation of a safe injection facility would, the committee argued, allow scientific assessment and evaluation of the harm reduction option.<sup>59</sup> This two section exemption was extended by the minister to 31 December 2007, and then to 30 June 2008. Thus, the federal and provincial governments orchestrated for some time a form of coexistence and cooperation between the federal and provincial regimes that enabled the operation of Insite. However, after the February 2006 election of the Conservative government under Stephen Harper, cooperation became attenuated and extension of the exemption unlikely. Apparent federal political unwillingness to further extend the exemption led a number of supporters of Insite to seek a judicial remedy to the growing threat of illegality under the federal statute.

This aspect of Insite’s story highlights, at least through contrast, a key feature of modern Canadian federalism. Gerald Baier, a Canadian political scientist, notes that executive negotiation, rather than litigation, has become the preferred method of resolving jurisprudential conflicts in modern Canadian federalism.<sup>60</sup> Much of what actually structures the nature of current federalism, he argues, is political, rather than judicial. The formal textual division of powers between federal and provincial governments and actual judicial doctrine under our constitutional texts are simply less informative about the state of the federal union than the actual practical outcome of extrajudicial intergovernmental negotiation.<sup>61</sup> But this model breaks down when there is disagreement over desirable policy directions between the federal and provincial governments. And this, of course, is a recent key feature of the

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<sup>58</sup> House of Commons, Special Committee on Non-Medical Use of Drugs, *Policy for the New Millennium: Working Together to Redefine Canada’s Drug Strategy* (December 2002) at 61 (Chair: Paddy Torsney), online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/Committee/372/SNUD/Reports/RP1032297/snudrp02/snudrp02-e.pdf>> [*Committee Report*], quoted in *PHS (CA)*, *supra* note 6 at para 73.

<sup>59</sup> *Committee Report*, *supra* note 58 at 88.

<sup>60</sup> See Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (Vancouver: UBC Press, 2006) at 9. See also, in reference to executive intergovernmental agreement as a feature of modern Canadian federalism, Barbara Cameron, “Accounting for Rights and Money in the Canadian Social Union” in Young et al, *supra* note 5, 162.

<sup>61</sup> See *ibid.*

story of Insite, with the consequent emergence of judicial decision making as the primary shaper of the relevant constitutional landscape with respect to the SIS.

This fracturing of federal/provincial cooperation did not go judicially unnoticed. At the BCCA, Huddart JA expressed regret that the cooperative executive federalism that had facilitated the opening of Insite had disintegrated. Huddart JA observed that the federal executive's concern to protect its jurisdiction to prohibit possession and use of scheduled drugs had "overtaken respect for difficult decisions made by British Columbia."<sup>62</sup> Her comments rue the failure of "respectful federal and provincial co-operation",<sup>63</sup> a failure that, in this case, made judicial intervention necessary.

To repeat, then, the politically generated uncertainty of Insite's legal status, the failure of intergovernmental accommodation, ultimately resulted in the initiation of two actions before the BCSC.<sup>64</sup> One was brought by the Portland Hotel Services Community Society and another by individuals representing the Vancouver Area Network of Drug Users ("VANDU").<sup>65</sup> Together, these plaintiffs asked for a number of declaratory remedies with the shared goal of allowing Insite to continue its activities immune from potential criminalization under the CDSA. More specifically, the Portland Hotel Society asked that the Court declare that Insite is a health care undertaking, authority for the operation of which lies with the province, and that federal constitutional power to legislate with respect to criminal law cannot interfere with the provincial constitutional power over this aspect of health care because of the doctrine of interjurisdictional immunity. The Portland Hotel So-

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<sup>62</sup> *PHS (CA)*, *supra* note 6 at para 92.

<sup>63</sup> *Ibid* at para 93.

<sup>64</sup> For more detailed chronology of the actions, see *ibid* at paras 82–83.

<sup>65</sup> The plaintiffs were two residents of the DTES and representative users of Insite. As the BCCA judgment of Rowles JA details, one is an injection drug user addicted to heroin for approximately 38 years, with Hepatitis C as a result of this injection drug use. The other had long been addicted to illicit drugs. This claimant also had Hepatitis C (see *ibid* at para 12). VANDU is a drug user organization well-recognized internationally and is a non-profit society with the primary purpose of advocating on the behalf of drug users in order to increase the ability of addicts to live healthy lives. The organization started in 1997 as a means to address the health crisis in the DTES among local injection drug users. See Thomas Kerr et al, "Harm reduction by a 'user-run' organization: A case study of the Vancouver Area Network of Drug Users (VANDU)" (2006) 17 *International Journal of Drug Policy* 61 at 62.

ciety also pleaded that subsections 4(1) and 5(1) of the CDSA are unconstitutional and should be struck down because they deprive persons addicted to one or more controlled substances of access to health care at Insite and therefore violate the rights conferred by section 7 of the *Charter*.

The individual VANDU plaintiffs sought a number of specific declarations. They argued that the activities undertaken by staff and volunteers at Insite do not violate sections 4 and 5 of the CDSA and that the CDSA and its regulations do not apply to the medical treatment at Insite of persons addicted to a controlled substance. They also argued that the offence of the possession of all addictive drugs as set out in the CDSA violates section 7 of the *Charter* and that section 56 of the CDSA which vests an unfettered discretion in the minister to grant an exemption from the provisions of the CDSA is unconstitutional.

The commonality across these issues resulted in the two actions being heard together, with trial for both beginning on 30 June 2008.<sup>66</sup> The range of issues as articulated in the two sets of pleadings, boiled down to a small number of key questions considered by the trial judge: the validity of subsections 4(1) and 5(1) of the CDSA; and the operability and application of the CDSA to the staff and users of Insite. The Attorney General of Canada opposed the granting of relief on any of these issues.<sup>67</sup> Pitfield J heard the case at the trial court level and accepted the section 7 argument but not the interjurisdictional immunity argument.<sup>68</sup> As a remedy, Pitfield J issued a suspended declaration of invalidity with the proviso that during the suspension Insite would be constitutionally immune from application of subsections 4(1) and 5(1) of the CDSA.

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<sup>66</sup> The British Columbia Attorney General appeared as a party under section 8 of the *Constitutional Questions Act*, RSBC 1996, c 68. The Vancouver Coastal Health Authority obtained intervenor status. Both of these parties argued in favour of the claimants on the division of powers issues.

<sup>67</sup> For more specific detailing of Canada's opposition, see *PHS (CA)*, *supra* note 6 at para 15.

<sup>68</sup> The trial judge refused to rule one way or the other on the issue of statutory application of possession or trafficking provisions to Insite staff. *PHS (SC)*, *supra* note 16 at paras 90–98. The issue of paramountcy was also not a feature of the judgment.

The result, then, after the trial, was the constitutional invalidity of the CDSA as it applied to Insite.<sup>69</sup>

Both sides appealed aspects of this decision. The Portland Hotel Society argued that the trial court had erred in failing to find interjurisdictional immunity for provincial jurisdiction involved in setting up Insite and that the trial court had erred in dismissing the argument for the unconstitutionality of section 56 of the CDSA. The federal government contested the trial court's finding that subsections 4(1) and 5(1) were unconstitutional. Three organizations applied for leave to intervene at the Court of Appeal hearing: the Vancouver Coastal Health Authority, the Dr Peter AIDS Foundation, and the British Columbia Civil Liberties Association ("BCCLA"). Application by the BCCLA was not opposed, but the Attorney General of Canada opposed the applications of the Vancouver Coastal Health Authority and the Dr Peter AIDS Foundation. Leave to intervene was granted to all.<sup>70</sup>

At the BCCA, two judges—Madame Justices Rowles and Huddart—found for the claimants in terms of both the section 7 and the interjurisdictional immunity argument, with the interjurisdictional immunity finding taking precedence. The result, pending appeal at the Supreme Court of Canada, was that subsections 4(1) and 5(1) of the CDSA do not apply to Insite but are in full force everywhere else.<sup>71</sup> Madame Justice Smith rejected the claimants' section 7 and interjurisdictional immunity arguments, finding instead that application of federal paramountcy was appropriate. The dissenting judgment thus would have rendered the provincial legal regime at issue in conflict with valid and applicable federal legislation, with the result that criminalization of supervised injection would have been left intact and provincial legislation establishing a SIS rendered inoperative.<sup>72</sup>

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<sup>69</sup> The trial judge declared subsections 4(1) and 5(1) of the CDSA constitutionally invalid but suspended the application of the order for twelve months. A constitutional exemption was granted to Insite for the duration of the suspension.

<sup>70</sup> See the Court of Appeal's preliminary decision on leave to intervene: *PHS Community Services Society v Attorney General of Canada*, 2008 BCCA 441 (available on CanLII).

<sup>71</sup> See *PHS (CA)*, *supra* note 6 (Court Order).

<sup>72</sup> See *PHS (CA)*, *supra* note 6 at para 306, Smith JA.

#### IV. SECTION 7

I turn now to the major doctrinal preoccupation of this paper—the Court’s treatment of section 7. I discuss this aspect of the case for two reasons. First, I am interested in it because of the judgment’s clear demonstration of the importance of context to section 7 analyses. And, second, I argue that this very contextual argument, while facilitating the finding of a section 7 infringement in this case, raises troubling questions about the future course of section 7.

Section 7, increasingly the site of contestations over social and economic entitlements, states that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.<sup>73</sup>

The section protects three distinct and separate interests—life, liberty, and security of the person—and application of these rights has been held to entail two stages of analysis: first, whether or not any of the three individual rights has been infringed; and, second, whether or not such infringement accords with the principles of fundamental justice.<sup>74</sup> The scope of section 7 is, as Smith JA at the BCCA in this case noted, “unsettled.”<sup>75</sup> In the Supreme Court of Canada decision *Chaoulli v Quebec (Attorney General)*,<sup>76</sup> Justices Binnie and LeBel argued that application of section 7 should be cautious and incremental.<sup>77</sup> In *Gosselin v Quebec (Attorney General)*, Chief Justice McLachlin similarly stated that “the meaning of s. 7 . . . should be allowed to develop incrementally.”<sup>78</sup> In that judgment, McLachlin CJ further argued that “[i]t would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases.”<sup>79</sup> The result has been that section 7 has been invoked in a broad range of claims and its ultimate

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<sup>73</sup> *Charter*, *supra* note 3.

<sup>74</sup> See e.g. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307.

<sup>75</sup> *PHS (CA)*, *supra* note 6 at para 248.

<sup>76</sup> 2005 SCC 35, [2005] 1 SCR 791.

<sup>77</sup> *Ibid* at para 193.

<sup>78</sup> *Gosselin*, *supra* note 2 at para 79.

<sup>79</sup> *Ibid* at para 82.

import has yet to be determined, making it compelling but uncertain terrain for those who wish to push forward ambitious rights claims. In particular, those seeking to expand opportunities for recognition of social and economic rights in the *Charter* are attentive to, and hopeful about, this judicially retained, albeit cautiously framed, open potential of section 7.<sup>80</sup>

In this case the plaintiffs' arguments about section 7 hinged on the claim that subsections 4(1) and 5(1) of the CDSA prevented access to essential health care services for drug addicts—health care services that reduced or eliminated the risk of overdose and infectious diseases—and made addicts risk incarceration to obtain such services. As such, they argued these sections of the CDSA infringe all three of the section 7 rights, breach principles of fundamental justice, and are not justifiable under section 1 of the *Charter*. Canada's response was that there is no constitutional right to the non-medical injection of hard drugs, and that "the unbridled injection of illegal [d]rugs, the activity at the SIS,"<sup>81</sup> is not medical treatment for drug addiction. Consequently, the federal government argued, the resulting prohibited access to safe injection sites such as Insite is not an infringement of section 7.<sup>82</sup>

This paper has, of course, already revealed that the claimants were successful. The BCSC held that both stages of section 7 were met, in relation to both sections of the CDSA, and that the resulting infringements of section 7 were not justifiable under section 1 of the *Charter*. This finding was upheld by two of the three judges on appeal—Madame Justices Rowles and Huddart.<sup>83</sup> But I want to consider the contextual overlay established by the trial judge and how it makes possible the success of the section 7 arguments of the rights claimants both at trial and on appeal. That context figured to this extent is laudatory. *Charter* issues need to be grounded in the richness of the claimants'

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<sup>80</sup> See e.g. Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality, and Citizenship" in Young et al, *supra* note 5, 77.

<sup>81</sup> *PHS (SC)*, *supra* note 16 (Memorandum of Argument of the Attorney General of Canada at para 125).

<sup>82</sup> See *ibid.*

<sup>83</sup> The third judge, Madame Justice Smith, found an infringement of the interests protected under section 7, but went on to hold that such infringement was in accord with the principles of fundamental justice.

circumstances.<sup>84</sup> Yet the actual factors recognized and the import assigned to them leads to the reservations this argument expounds about doctrinal development of section 7.

Considerable discussion at the trial level is taken up with the social and medical context surrounding the circumstances of Insite's creation and its geographic location and focus of service.<sup>85</sup> The Court considered "numerous government reports and action plans, individual affidavits regarding the development and operation of Insite, affidavits about the experiences of the individual parties, expert affidavits relating to the nature of addiction and expert evidence relating to the outcomes of Insite."<sup>86</sup> It is a discussion critical to the outcome of the case: the finding of a section 7 infringement rested on a number of key findings of fact, three of which the trial judge termed "incontrovertible,"<sup>87</sup> and all of which are central to the issues raised.<sup>88</sup> Five groups of contextual detail are elaborated by Pitfield J: the DTES and the origin of Insite, the nature of addiction, the evidence of the two VANDU plaintiffs (both injection drug users), the operation of Insite, and assessment of outcomes at Insite. The discussion of these factors—collectively termed the "Historical and Operating Context"—is lengthy. At the BCCA, Rowles JA termed the evidence supporting these factual conclusions "overwhelming."<sup>89</sup> Out of this thicket of political, social, and policy history emerged a number of crucial holdings.

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<sup>84</sup> For discussion critical of judicial failure to do this, see Dianne Pothier, "But It's for Your Own Good" in Young et al, *supra* note 5, 40; and Martha Jackman, "Reality checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases" in Young et al, *supra* note 5, 23.

<sup>85</sup> *PHS* (SC), *supra* note 16 at paras 13–46. Extensive affidavit evidence was put before the Courts. The Attorney General of Canada initially objected to a summary trial on affidavits, arguing instead for in-court testimony, based on the complexity of evidence, appearance of material conflict in affidavits, and importance of issues. The Court decided to consider the affidavit evidence first and then, should Canada renew its objections, at that point the Court would consider the application. After eight days of hearing, counsel for Canada withdrew objections to a summary trial, provided that the Court not make findings of fact on matters of science on which evidence was in conflict. See *PHS* (SC), *supra* note 16 at paras 11–12.

<sup>86</sup> Catherine Bois Parker, "Update on Section 7: How the Other Half is Fighting to Stay Warm" (2010) 23 Can J Admin L & Prac 165 at 173.

<sup>87</sup> *PHS* (SC), *supra* note 16 at para 87.

<sup>88</sup> *PHS* (CA), *supra* note 6 at para 13.

<sup>89</sup> *Ibid* at para 36.

First, addiction is an illness. The government lawyer, John Hunter QC, made a significant acknowledgment during oral argument at the BCSC, stating that government was in agreement that addiction was an illness.<sup>90</sup> This was a key concession, as it enabled the discourse of health and health care to predominate. Second, communicable diseases such as Hepatitis C or HIV/AIDS are not caused by the introduction into the bloodstream by injection of controlled substances such as heroin and cocaine. Rather, use of unsanitary equipment, techniques, and procedures for injection allows transmission of such infections, illnesses, diseases from one individual to another.<sup>91</sup> Third, risks of morbidity and mortality associated with addiction and injection is lessened by injection supervised by qualified health professionals.<sup>92</sup> Fourth, Insite is a health care facility.<sup>93</sup> “All of the services provided to addicts at Insite constitute health care.”<sup>94</sup> And fifth, the situation addicts face is the result of a range of:

personal, governmental and legal factors: a mixture of genetic, psychological, sociological and familial problems; the inability, despite serious and prolonged efforts, of municipal, provincial and federal governments, as well as numerous non-profit organizations, to provide meaningful and effective support and solutions; and the failure of the criminal law to prevent the trafficking of controlled substances in the DTES.

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Thus, the court finds that a mix of factors—many beyond the addicts’ control—contribute to the circumstances in which injection drug users at Insite find themselves. More generally, the findings establish a picture of injection drug addiction and use of supervised safe injection in which health issues are central and individual volition is downplayed.

More specifically, these contextual findings at the trial level, and their reiteration and acceptance in all three judgments of the Court of Appeal, are significant in two particular ways: first, in terms of the

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<sup>90</sup> See *ibid* at para 88.

<sup>91</sup> See *PHS (SC)*, *supra* note 16 at para 87.

<sup>92</sup> See *ibid*.

<sup>93</sup> See *PHS (CA)*, *supra* note 6 at para 134.

<sup>94</sup> *Ibid* at para 27.

<sup>95</sup> *PHS (SC)*, *supra* note 16 at para 89.

larger culture shift the case reflects and reinforces, and second, in relation to the legal argument accepted at each level of court.

The first aspect is usefully caught by a relatively recent paper in which several addiction researchers and community workers term the establishment of Insite “culturally momentous”.<sup>96</sup> The researchers understand the opening of Insite to be the outcome of a noteworthy cultural shift: the product of a struggle to change key values underpinning conventional understandings of people with drug addiction in the DTES. Insite became possible when the narrative of addicts as persons “deserving of caring and life” emerged successful in opposition to the conventional narrative of “law enforcement at all costs.”<sup>97</sup> These authors note that in 2001, only two years before Insite opened, “it was difficult to find people in authority who would publicly support [supervised injection facilities] and stand by the basic assertion that addiction is primarily a health and social issue, rather than principally a criminal justice issue.”<sup>98</sup> A year later, this had changed.

The authors rely on Bourdieu’s notion of “habitus”, of regular and observable collective practices that are internalized as second nature, to understand the different lay narratives in competition over Insite.<sup>99</sup> More specifically, they coin the term “addiction habitus” to capture an enduring set of lay narrative responses about addiction. Included in this “addiction habitus” are the following sorts of beliefs: that addiction results from personal choice and therefore addicts are to blame for their addiction and lifestyle, that addicts should be made uncomfortable to discourage addiction, and that harm reduction services such as supervised injection sites promote addiction.<sup>100</sup> The “addiction habitus” is a conventional and uninformed “gut reaction” to drugs and addicts characteristic of mainstream media and political responses.<sup>101</sup>

A 1988 column in a local neighbourhood newspaper, *The West End Times*, illustrates a traditional narrative of addiction and addicts. In an article criticizing the idea of a SIS, the journalist, Guy Bennett, writes:

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<sup>96</sup> Small, Palepu & Tyndall, *supra* note 11 at 73.

<sup>97</sup> *Ibid* at 74.

<sup>98</sup> *Ibid.*

<sup>99</sup> See *ibid*, citing Pierre Bourdieu, *The Logic of Practice* (Stanford: Stanford University Press, 1990).

<sup>100</sup> For the longer list, see Small, Palepu & Tyndall, *supra* note 11 at 74.

<sup>101</sup> *Ibid* at 75.

“[w]hen addicts inject heroin publicly . . . they are *screaming* for intervention. The only decent response is to arrest them, detox them[,] and sentence them to lengthy terms of hard labour.”<sup>102</sup> The culture change that Insite required had to target and alter this reflexive set of values.

The researchers also detail the forces of change that led to revision of the “addiction habitus”. Some of this has already been pointed to in this essay. Largely, the authors talk about the peer movement (groups such as VANDU), the family movement (members of addicts’ families), community agencies (such as the Portland Hotel Society), law enforcement, academics, journalists, health officers, and local individual activists such as Bud Osborn, a social justice poet.<sup>103</sup> These groups’ activism was so successful that when the safe injection facility permit application was made, there was “virtually no public opposition”.<sup>104</sup> Clearly, other pieces of change were also critical.<sup>105</sup> But the collective and activist retelling of the social and individual import of addiction, of drugs, and of SISs is an obvious piece of the political and social struggle that led up to the establishment of Insite.

We can add to this story of cultural shift. The struggle over meanings around addiction and supervised injection that took place in the *PHS* case at both the trial and appeal levels engages a similar story of competing narratives and this competition was no less important to the claimants’ success than the jurisprudential or doctrinal wrangling in the case. The Attorney General of Canada’s opposition to the claimants’ constitutional arguments has relied on the assertion of claims very similar to those Small and his co-authors attribute to the “addiction habitus”. In addition to repeated reference to “unbridled injection of illegal drugs,”<sup>106</sup> the federal government argued that “[u]nsafe injection or, for that matter, consumption by injection at all, is a choice made by the consumer.”<sup>107</sup> Addicts are “those who have chosen to use such danger-

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<sup>102</sup> Cited in Boyd, MacPherson & Osborne, *supra* note 22 at 109 [emphasis in original].

<sup>103</sup> See Small, Palepu & Tyndall, *supra* note 11 at 75–77.

<sup>104</sup> *Ibid* at 78.

<sup>105</sup> See generally *ibid*.

<sup>106</sup> See e.g. *PHS (SC)*, *supra* note 16 (Memorandum of Argument of the Attorney General of Canada at paras 9, 76).

<sup>107</sup> *PHS (CA)*, *supra* note 6 (Factum of the Appellants at para 63).

ous and harmful substances despite the legal prohibition.”<sup>108</sup> And those who use Insite are described variously by the Attorney General of Canada in its Supreme Court of Canada Appellant Factum as “hard-core addicts, the mildly addicted, frequent users or occasional users.”<sup>109</sup> The Attorney General of Canada in its BCCA Factum adds, in relation to the method of injection, “[n]or does a user have to inject drugs, but if he or she does, the person can do so with a new needle, a sterilized needle, or a needle used only by that person.”<sup>110</sup> Such language and framing convey a specific picture—a sliding scale of necessity with respect to supervised injection needs and an implied lower sense of urgency for many users at Insite. The clear message of the Crown’s argument, reinforced by this assertion of choice and lifestyle, is that injection drug users are authors of their own misfortune and of the harms complained of in this case. Indeed, the heading of the section making this argument in the Appellant Supreme Court of Canada Factum reads: “The Deprivation is not Result of the Possession Law, but Individual Choice.”<sup>111</sup> Thus the Attorney General of Canada has argued that there is no causal link between the legislation and deprivation of access to supervised safe injection: “[n]othing about the law prevents ‘safe’ injection”<sup>112</sup> or “access to health services such as visits to health care professionals, treatment programs or needle exchanges.”<sup>113</sup> The Attorney General of Canada concluded in its BCCA Factum “that addicts do indeed make choices.”<sup>114</sup> At heart, then, the federal Crown’s argument is that any restriction on the interests protected under section 7 in this case is independent of state action and not the stuff of constitutional obligation.<sup>115</sup>

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<sup>108</sup> *Ibid* (Factum of the Appellants at para 76).

<sup>109</sup> *PHS Community Services Society v Canada (Attorney General)*, file no 33556 (SCC) (Factum of the Appellants at para 90) [*PHS* (SCC)].

<sup>110</sup> *PHS* (CA), *supra* note 6 (Factum of the Appellants at para 66).

<sup>111</sup> *PHS* (SCC), *supra* note 109 (Factum of the Appellants at para 97) [emphasis omitted].

<sup>112</sup> *PHS* (CA), *supra* note 6 (Factum of the Appellants at para 63).

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid*.

<sup>115</sup> Thus, the federal government argues in its SCC Appellant Factum that:

The trial judge erred in failing to demand that the respondents show the causal link between their alleged deprivations and the legislation itself. Nothing about the law prevents “safe” injection or access to health services such as visits to health professionals or participation in needle exchanges. Unsafe injection or, for that matter, consumption by injection at all, is a

The difficulty with the BCCA decision is, the Attorney General of Canada argues in its Factum for the SCC appeal, that “the approach of the courts below . . . absolves drug users of responsibility for the choices they make.”<sup>116</sup>

It is true the trial judge’s factual findings tell an opposing story with respect to user choice and responsibility. These findings repeat the alternative set of meanings about addiction and its treatment that emerged from the community struggle to establish Insite—a tale that sidelines choice or addict fault and that understands the supervised injection services of Insite to be healthcare, addiction to be an illness, and use of Insite a necessity. Thus, the trial judge (and Rowles JA at the next level of court) rejected the government’s arguments as not useful.<sup>117</sup> Addiction and resort to Insite are not a “lifestyle,” not reflections of “personal preference,” and not acts of “civil disobedience.”<sup>118</sup> To the extent that choice is involved, it is between use of Insite and injecting in an unsafe environment. Indeed, the dissenting judge at the Court of Appeal is most clear in her rejection of the presence of meaningful choice in the situations the injection drug users face: “Their illness does not mean that the claimants are incapable of choice, but rather that their ability to choose is seriously diminished by their addiction.”<sup>119</sup> She adds, “it is not the case that users can choose to be supervised while injecting drugs without a supervised injection site.”<sup>120</sup>

One could also, using a different set of terms, discuss this shift in meaning given to addiction and supervised safe injection by the trial judge’s contextual findings as indicating movement between competing discourses. If we understand discourses to represent ways of “giving meaning to the world and of organizing social institutions and process-

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choice made by the consumer. . . . The trial judge’s conclusion also offends basic notions of personal autonomy, in that it is premised on a claim that addicts are incapable of making rational choices. Taken to its logical conclusion, it would mean that no addict would ever be cured.

*PHS (SCC)*, *supra* note 109 (Factum of the Appellants at para 100) [citation omitted].

<sup>116</sup> *Ibid* (Factum of the Appellants at para 97).

<sup>117</sup> See *PHS (CA)*, *supra* note 6 at para 43.

<sup>118</sup> *Ibid* at para 70.

<sup>119</sup> *Ibid* at para 263.

<sup>120</sup> *Ibid* at para 268.

es”,<sup>121</sup> we can then see how sets of interpretations of addiction and Insite were in contention. The triumph of the discourse around DTES addiction issues that understands these issues as reflective of a health care crisis and that sees use of Insite as other than a lifestyle choice shows the successful resistance by a once marginalized discourse. The institutional support now lent this ascendant discourse by the two British Columbia court decisions surely is not insignificant. Indeed, it marks that this set of meanings has come to occupy a considerably more mainstream position.

Acceptance of this particular and emergent contextual narrative about both addiction and resort to Insite’s services also means that, as Bois Parker notes, it was a simple step to see that fundamental interests protected under section 7 were at stake.<sup>122</sup> This is, then, the second aspect of how the contextual findings at the trial level are significant. The contextual underpinnings ensure that the interests protected under section 7 are given a deeper understanding that extends the notions of life, liberty, and security of the person into territory that is more responsive to the circumstances of the vulnerable individuals in each case. This is simply to say, for example, in relation to the right to liberty, that:

For many persons in other circumstances, the ability . . . to inject dangerous drugs in a certain setting would not trigger the liberty interest. But once the circumstances of the claimants are understood, it is clear that these are important choices which go to the dignity, autonomy and independence of those . . . under the heavy burden of addiction.<sup>123</sup>

Although Bois Parker uses the language of choice here, the import of this quote is that it is the lack of choice, of meaningful alternatives, that makes the use of Insite the kind of intimate, core expression of personal liberty that section 7 must encompass. It is not a trivial or inconsequential or optional decision to seek supervision of injection drug use at Insite. And, as Smith JA argues on the basis of the evidence accepted at trial and in reference to another of the interests section 7 protects: “the blanket prohibition against the possession of illicit drugs at Insite con-

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<sup>121</sup> Chris Weedon, *Feminist Practice & Poststructuralist Theory* (New York: Blackwell, 1997) at 34, quoted in Cosmo Howard, “Introducing Individualization” in Cosmo Howard, ed, *Contested Individualization: Debates About Contemporary Personhood* (New York: Palgrave Macmillan, 2007) 1 at 4 [Howard, *Contemporary*].

<sup>122</sup> See Bois Parker, *supra* note 86 at 175.

<sup>123</sup> *Ibid* at 176.

tributes to the risk of death by the claimants. This is the causal connection between the deprivation of life and [sub]section 4(1) of the CDSA”,<sup>124</sup> and such a holding involves implicit recognition of the contextual circumstances of the drug users at Insite.

More specifically, the activists’ narrative about addiction, Insite, and addicts enables the trial judge’s holding that all three interests protected under section 7 are implicated by subsections 4(1) and 5(1).<sup>125</sup> The right to life is engaged because the risk of mortality from overdose is managed within Insite.<sup>126</sup> The right to liberty is infringed because the federal statute presents Insite users with possible prosecution and imprisonment for possession of illegal substances.<sup>127</sup> By impeding the right to make a choice to minimize potential hazards of overdose and other serious illness through use of Insite, the CDSA further implicates the right to liberty. Security of the person is threatened because the CDSA has the effect of denying access to a health care facility where serious health risks associated with addiction are diminished. Thus, each of the interests in section 7 is engaged. And, each engagement employs assumptions about Insite and healthcare and addiction and illness that flow out of the activists’ set of meanings.

Pitfield J went on to rule that such infringements were arbitrary, or in the alternative either grossly disproportionate or overbroad, such that the infringements were not in accordance with the principles of fundamental justice.<sup>128</sup> This conclusion was upheld by two of the three judges at the Court of Appeal, at least to the extent that the infringements were not in accordance with the principles of fundamental justice because of overbreadth and being grossly disproportionate.<sup>129</sup>

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<sup>124</sup> *PHS (CA)*, *supra* note 6 at para 264.

<sup>125</sup> The trial judge conducts his analysis of the rights claim primarily in relation to subsection 4(1) of the *CDSA*. However, Pitfield J. then concludes that conclusions about the constitutionality of subsection 4(1) apply equally to the trafficking provision, subsection 5(1), by virtue of the interconnection of each section in the delivery of the supervised injection services at Insite. See *PHS (SC)*, *supra* note 16 at para 153.

<sup>126</sup> See *ibid* at para 140.

<sup>127</sup> See *ibid* at para 143.

<sup>128</sup> See *ibid* at paras 148–153.

<sup>129</sup> Rowles JA is the author of the section 7 judgment at the Court of Appeal. See *PHS (CA)*, *supra* note 6 at paras 74–76.

To repeat, critical to this result is the trial court's acceptance of rich and detailed contextual argument. Acceptance of addiction as an illness and of the use of injected prohibited drugs as a material part of the illness and thus other than a "lifestyle choice" enables the trial judge and Rowles JA at the Court of Appeal to distinguish the Supreme Court of Canada's decision in *R v Malmo-Levine; R v Caine*.<sup>130</sup> In *Malmo-Levine* the drug use at issue was understood by the Court to be purely recreational and access to health care for the illness of addiction was not involved.<sup>131</sup> By confirming a picture of addiction and Insite that conforms to the political and community culture shift that allowed Insite to open, the judgments cast in authoritative voice the larger activist politics of SISs. Thus, the legal activism that was the catalyst for this case potentially reinforces the political and social activism of community advocates that preceded the case. The messages about addiction, supervised injection, and addicts that underpin the context affirmed by the trial court are not trivial nor is their import inconsequential.<sup>132</sup>

General popular response to the case was mixed, but at the local level, at least, it was largely supportive.<sup>133</sup> A recent Angus Reid poll shows that a majority (68 per cent) of British Columbians support Insite and oppose the federal government's attempt to shut it down.<sup>134</sup> British Columbia was the only province in which there was such support—the

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<sup>130</sup> 2003 SCC 74, [2003] SCR 571 [*Malmo-Levine*]. Pitfield J writes at the trial court level:

In my opinion, the *Malmo-Levine* decision, concerned with the use of marijuana for purely recreational purposes, does not resolve the issues raised by the PHS and VANDU actions, concerned as they are with the health care of addicts resorting to a continuum of services.

*PHS* (SC), *supra* note 16 at para 137.

<sup>131</sup> See *PHS* (SC), *ibid* at paras 135–37; *PHS* (CA), *supra* note 6 at para 27.

<sup>132</sup> Also rejected by both levels of court is the federal government's argument that the issue is a purely political one: that it engages merely the choice between "competing policy options with respect to the problem of drug abuse" (*PHS* (SCC), *supra* note 109 (Factum of the Appellants at para 3)).

<sup>133</sup> Jenny Kwan, an NDP MLA, authored a private member's bill with the purpose of affirming that Insite was a health care facility, that the care and treatment delivered at Insite was incidental to the provincial health legislation and part of the Province's exclusive jurisdiction over health care. See Bill M-214, *Supervised Injection Facility Designation Act*, 4th Sess, 38th Parl, British Columbia, 2008 (first reading 21 May 2008).

<sup>134</sup> See Todd Coyne, "More than two-thirds of BC residents back Insite" *The Vancouver Sun* (29 July 2010) A8.

opinion in most other provinces was largely split. As well, 58 per cent of respondents in BC expressed opposition to the court action.<sup>135</sup> Indeed, the success of Vancouver’s Insite—both practically and legally—has encouraged calls for supervised injection sites elsewhere in Canada.<sup>136</sup>

## V. CHOICE AND RIGHTS

I turn now to the last part of my argument, the concern that there may be a less progressive side to this particular contextualized discussion of section 7 rights. Specifically, I caution against understanding “choice”—or its absence—as an essential configuring factor in rights claims under the *Charter*. By “choice,” I mean to capture the idea of individual volition, intention, or agency that underpins assignment of normative responsibility for outcomes to the individual.

To recap, in the *PHS* judgments, section 7 rights are more easily claimed due to the trial judge’s factual findings that choice is not meaningfully implicated in the claimants’ ongoing drug addiction and use of Insite’s facilities. This absence of choice enables a relatively uncomplicated tale of government interference with protected liberty, life, and security of the person. Thus, successful assertion of section 7 rights in this case relies on the factual findings that individual blameworthiness or wilful choice is not a significant factor in generating the harm about which the claimants complain. But, by using an understanding of addiction and Insite use that removes complainant choice from the calculus of reasonable responsibility for the outcome at issue, the courts leave open the possibility that the presence of choice—in another scenario—might result in just the kind of disenfranchisement for which the government pleads in this case. This would be an unfortunate direction for the jurisprudence to take and certainly challenging to crafting a social justice reach for *Charter* rights.

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<sup>135</sup> British Columbians scored above the national average in awareness of the kinds of services available at Insite. However, they were the most misinformed about the provision of drugs. Thirty percent believed that drugs were provided, although they are not. *Ibid.*

<sup>136</sup> See e.g. “Quebec moving towards opening safe-injection sites” *Canadian Press* (16 July 2008); Tara Brosnan, “Support for safe injection sites: Positive studies might not be enough to get Quebec on board” *The McGill Daily* (1 February 2010), online: [The McGill Daily <http://www.mcgilldaily.com>](http://www.mcgilldaily.com).

It would be troubling because attentiveness to choice—its absence or presence—implies a model of individual accountability and corresponding lack of state responsibility that ill fits progressive rights protections. It cannot be the case that there is state obligation only where the individual claimant cannot be understood to have made avoidable choices that resulted in the outcome at issue. Rights under the *Charter* must do more than simply abandon the unfortunate—however implicated in that misfortune—to their own miserable fates. If not, rights analysis will ignore the clear message of so much social theory that individual actions and choices are meaningfully constrained, shaped, and made possible by larger systemic norms, structures, and institutions. Simply put, individual choice is always compromised by historic and current material, and symbolic systems. Sandra Fredman thus refers to the “social meaning of choice”<sup>137</sup> and Diana Majury to the necessity of a “more sceptical, more problematized approach to choice.”<sup>138</sup> Consequently, individual circumstances reflect a complicated “intermingling among issues of agency, exposure, and vulnerability.”<sup>139</sup> Simple causal invocation of “choice” reduces this matrix to a false simplicity.

The configured and contingent character of choice means that the criterion of choice is poorly fingered as a feature relevant to foreclosing or determining a rights analysis. It is so for both pragmatic and principled reasons. Pragmatically, judges are not best suited to or situated for any disentangling and analysis of social and individual factors that shape and limit choice. This judicial inability tells most true in relation to those individuals most marginalized or disadvantaged in Canadian society, those individuals whose social, economic, and cultural features are likely far from the typical biographical facts of the average Canadian judge. The rights claims of these individuals thus risk being read in light of inaccurate depictions of choice and agency, as the vulnerabilities and constraints of marginality and extreme disadvantage may be the most difficult for the judges who sit in determination of these rights

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<sup>137</sup> Sandra Fredman, *supra* note 4 at 14.

<sup>138</sup> Diana Majury, “Women are Themselves to Blame: Choice as a Justification for Unequal Treatment” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2009) 209 at 215.

<sup>139</sup> Robert RM Verchick, “Katrina, Feminism, And Environmental Justice” (2008) 13 *Cardozo JL & Gender* 791 at 800.

claims to discern and appreciate.<sup>140</sup> Thus, it seems unwise to include an element in rights analysis that promises to be often misread and thus misused, particularly in relation to those most in need of their rights.

On a more principled basis, choice—even a reasonable finding of the availability of meaningful choice—should perhaps never let the state off the hook for obligations under section 7. Assuming that it were reasonably possible to ascertain when choice was meaningfully available to avoid or shape the situation of which the rights claimant complains, nonetheless, it is not clear that such choice or agency should matter. Instead, the focus should be on the state restriction at issue. In *PHS*, this restriction is, of course, the criminalization of addict’s access to the health care Insite offers. This harm to the interest protected by the *Charter* persists, regardless of whether or not the complainants have other reasonable possibilities for supervised safe injection.

By focusing too much on choice or agency, courts risk, in the words of political theorist Elizabeth Anderson, neglect of “the distinctively political aims of equalitarianism” relevant to both equality rights and liberty rights.<sup>141</sup> Anderson posits the notion of a “democratic equality” that, characteristic of a just society, grants to all citizens “effective access to the social conditions of their freedom at all times”,<sup>142</sup> and “neither presume[s] to tell people how to use their opportunities nor attempt[s] to judge how responsible people are for choices that lead to unfortunate outcomes.”<sup>143</sup> Despite how individuals arrived at being vulnerable to state imposition of constraints on fundamental freedoms, rights protections should apply. The state is correspondingly obligated on the basis of substantive theories of equality and citizenship alone, regardless of individual complainant culpability or blamelessness.

Certainly, such sidelining of choice is a significant challenge to traditional understandings of the public/private divide and to a more classical, or neo-, liberal sense of the role of the state in addressing inequalities and limitations of freedoms. But the idea of a non-political, certain, or determinate divide between public action and private action has little

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<sup>140</sup> See Margot Young, “Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15” (2010) 50 *Sup Ct L Rev* 183 at 197.

<sup>141</sup> Elizabeth S Anderson, “What is the Point of Equality” (1999) 109 *Ethics* 287 at 288.

<sup>142</sup> *Ibid* at 289.

<sup>143</sup> *Ibid*.

theoretical currency any more.<sup>144</sup> This theoretical critique of the distinction should be extended to doctrinal consideration of individual and state action notions under substantive rights analysis as well.<sup>145</sup> A minimal state assigned little role in or responsibility for addressing equality and liberty harms in Canadian society is fundamentally opposite to any robust vision of social justice achieved through rights entitlements.

The critique of the relevance of choice is also a challenge to the picture of the citizen that has emerged as dominant in current, mainstream neo-liberal policy and politics. Neo-liberalism instructs individuals “to become self-critical, to take personal responsibility for their lives, to adapt specific practices of self-regulation and improvement, and to embrace entrepreneurial and materialistic self-identities.”<sup>146</sup> The citizen of the neo-liberal state is wilful, self-actualizing—the creator of his or her own life chances and circumstance.<sup>147</sup> This is, Janine Brodie, a political scientist, tells us, the “new vocabulary of governance.”<sup>148</sup> To this citizen is owed not *social* justice, but rather justice more individually and thinly understood: economic reward and assignment of societal resources based importantly on individual accomplishment, strategic, and prudent choice.<sup>149</sup> Equally, bad choices and poor outcomes are also the individual’s responsibility, threatening disentitlement from collective or state consideration and compensation. The result is that “structurally disadvantaged groups are ‘collectively individualized’ in popular cultural representations, in citizenship discourses, and in public policy”<sup>150</sup> Social problems are seen as individual failings and the systemic construction of vulnerabilities or constraints is rendered irrelevant and thus unremarkable. The emphasis is on finding personal causes and responses

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<sup>144</sup> See e.g. Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997).

<sup>145</sup> Certainly, this should be the case at least after the strictures of section 32 of the *Charter* are considered.

<sup>146</sup> Howard, *supra* note 121 at 5.

<sup>147</sup> See Janine Brodie, “The Social in Social Citizenship” in Engin Fahri Isin, ed, *Recasting the Social in Citizenship* (Toronto: University of Toronto Press, 2008) 20 at 23.

<sup>148</sup> Janine Brodie, “The New Social ‘isms’: Individualization and Social Policy Reform in Canada” in Howard, *Contemporary*, *supra* note 121, 153 at 157.

<sup>149</sup> See *ibid.*

<sup>150</sup> Brodie, *supra* note 147 at 42.

to what are, in effect and under another analysis, collective social problems. This picture thus posits a “biographical solution” to an explanation for our problems or disadvantage.<sup>151</sup> But as already aired, such an understanding of citizenship, and of action and possibility, misdescribes how individuals, particularly those labouring under conditions of disadvantage and marginalization, experience and live their lives. Erasure of larger systemic conditions, constraints, and structures as important features of individual and collective circumstances simply ensures that points of access for effective and just redistributive collective intervention are made invisible or politically unlikely. And social justice will continue to elude our society, or, at least, will not be substantively advanced by *Charter* litigation.

## VI. CONCLUSION

There are other observations appropriate to the legal and social issues engaged by the Insite case. The physical establishment of Insite—that is, the facility as a “site”—represents a not insignificant spatial rearrangement in the DTES that changes the political and social landscape of Vancouver. And, by bringing into “sight” a more focused presence of an otherwise more dispersed (albeit nonetheless concentrated in the lanes and alleys of the DTES) marginalized population, Insite raises levels of consciousness around drug addiction and poverty—and our response to these things—in Vancouver’s urban core. These are important features attached to the opening of this safe injection site, aspects that are cemented, as well as enhanced, by the victory of the rights claimants at the two levels of court in *PHS* and the publicity surrounding such success.

Certainly, the judgments and, as I have tried to show, their understanding of drug addiction and use of Insite, model a more inclusive consideration in constitutional rights analysis of the different life courses and options of some of the more disadvantaged and disregarded citizens. The understanding of addiction as a disability in human rights and health literature is long standing. The extension of this to local politics and its expression in the output of courts as they focus on poverty and

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<sup>151</sup> Ulrich Beck & Elizabeth Beck-Gernsheim, *Individualization: Institutionalized individualism and its social and political consequences* (London: Sage, 2002) at xvi, cited in Brodie, *supra* note 147 at 41.

injection drug users is key. The case is thus, as already mentioned, an appropriate one to include in any discussion foregrounding our legal system's capacity to encompass diversity. Our courts must be attentive in applying and expanding rights protection under the *Charter* to the ways in which individual agency and action cannot be simply and straightforwardly signalled or sited. And they must understand how context subtly but powerfully shapes rights claims and state obligations under the *Charter*. But, perhaps ironically, the courts' method in this case, if read too narrowly, risks future judicial insensitivity to difference and disadvantage.

The concern about individual choice or agency disempowering claimants from rights protections has been raised already in relation to equality challenges under s. 15 of the *Charter*.<sup>152</sup> In that context, this kind of argument advanced by government, and on occasion accepted by courts,<sup>153</sup> has rendered s. 15 rights less hospitable territory for rights claimants. It has, quite simply, compromised the ability of s. 15 analysis to recognize the systemic and substantive inequalities that shape the circumstances of some of our most disadvantaged citizens.<sup>154</sup> It would be a shame if the promise of s. 7 as more fertile ground for social and economic rights is sapped by the reoccurrence in that context of the same unnuanced notions of agency and of state responsibility.<sup>155</sup>

Thus judicial judgment in this case is correct in dismissing the notion of individual choice as determinative of the rights claim here. Future cases must read this dismissal expansively. There needs to be judicial recognition of the unsuitability of choice generally as a reliable metric for determination of individual as opposed to state responsibility under a rights analysis. If choice is allowed to function as a bar to section 7 actions, attempts to broaden the scope of *Charter* analysis to encompass the most pressing needs of social justice in the language of

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<sup>152</sup> See Margot Young, "Blissed Out: Section 15 at Twenty" (2006) 33 Sup Ct L Rev (2d) 45-69 reprinted in *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, Sheila McIntyre & Sanda Rodgers, eds, (Markham, Ont.: LexisNexis Butterworths, 2006) 45.

<sup>153</sup> See, for example, *Gosselin supra* note 6; *Nova Scotia (Attorney General) v. Walsh* [2002] 4 S C R 325, 2002 SCC 83.

<sup>154</sup> Thanks to Sheila McIntyre for a reminder of this point.

<sup>155</sup> Sarah Buhler, "Cardboard Boxes and Invisible Fences" (2009) 27 Windsor YB Access Just 209 at 222.

*Charter* rights may be forced, once again, to reconsider the effective entry point for such concerns into *Charter* protections.