

# Constitutional rights to supervised drug injection facilities in Canada

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## ABSTRACT

On September 30, 2011, the Supreme Court of Canada ordered the government of Canada to continue to exempt Vancouver's supervised narcotic injection facility from Canada's criminal drug laws. The controversial clinic, known as Insite, had operated for eight years in one of the country's most socially troubled and economically challenged neighbourhoods struggling with addictions to illegal drugs. Insite was the first of its kind in North America, although supervised drug injection facilities continue in Europe and Australia. In this article we describe what the court accepted as the factual outcomes of this clinic and the constitutional basis for this judicial rejection of government health and criminal policy. We also consider the implications of this decision for similar facilities across Canada.

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## THERAPEUTIC BACKGROUND

The Insite clinic opened in 2003 in Vancouver's Downtown Eastside, a neighbourhood fraught with disproportionately high levels of illegal injection drug use, poverty, homelessness, and high rates of HIV and hepatitis C infection.<sup>1</sup> Insite sought to prevent death by accidental overdose, to reduce blood-borne illness and other infections, and to provide access to counseling, detoxification, and other health services that otherwise might not be accessible by the area's high need population.<sup>2</sup>

Several studies purport to highlight Insite's salutary impact. For example, the facility was accessed by individuals at highest risk of disease and overdose.<sup>3</sup> It treated injection-related infections,<sup>4</sup> and contributed to the 35 percent reduction in death by overdose in the area surrounding the clinic, whereas overdose deaths declined by only 9 percent in Vancouver farther afield from the clinic.<sup>5</sup> Most of these 'use and benefit' studies were conducted by The University of British Columbia (UBC) researchers relying upon Insite's own records. Voluntary blood sample and questionnaire data on these subjects, the Scientific Evaluation of Supervised Injecting (SEOSI) cohort, was compared with data from other Vancouver area cohorts, specifically, the Community Health and Safety Evaluation (CHASE) cohort and the Vancouver Injection Drug Users Study (VIDUS) cohort.<sup>6</sup> The comparative data were compiled to establish Insite's value in support of a renewal by the Federal Minister of Health<sup>7</sup> of its legal exemption under section 56 of the Controlled Drugs and Substances Act (CDSA):

The Minister [of Health] 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.<sup>8</sup>

As a matter of first observation, it is unlikely that the 1996 provision of this ministerial exemption anticipated the Insite-type supervised injection facility (SIF) and the Canadian Charter of Rights application to force the Minister's hand. The medical and scientific purposes envisioned as exemptions at that time would have been along the lines of medicinal marijuana. However, the phrase "or otherwise in the public interest" clearly left the door open for broader and longer-term considerations, as well as Charter support of them.

Insite is strictly self-regulated. Clients are encouraged to register in the same name at each visit, although it does not need to be their real name.<sup>9</sup> Names are retained in the database to track usage and collect data. Clients receive an injection kit containing the sterile tools needed to inject and are taken to one of twelve injection booths. Under the supervision and assistance of the clinic's nurses who monitor for signs of overdose, clients inject themselves with illicitly-acquired drugs such as cocaine and heroin. Nurses do not assist with the injections. After injections, clients are led to a "chill-out" room to relax and receive counseling.

Nurses also examine and treat wounds, administer immunizations, test clients for HIV and other sexually transmitted diseases, and offer referrals to other health services. Upstairs in the clinic is Onsite, a detoxification facility for clients who wish to pursue that option.<sup>10</sup> The harm-reduction strategy seeks to "decrease the adverse health, social, and economic consequences of drug use without

<sup>1</sup>*Can. v. PHS Community Servs. Soc'y*, 2011 SCC 44. The facts of this case are taken from the Supreme Court of Canada decision generally.

<sup>2</sup>Vancouver Coastal Health, *Supervised Injection Site, Services*, <http://supervisedinjection.vch.ca/services/> (last accessed Mar. 10, 2013).

<sup>3</sup>Evan Wood et al., *Do Supervised Injecting Facilities Attract Higher-Risk Injection Drug Users?* 29 *Am. J. Preventive Med.* 126 (2005).

<sup>4</sup>Will Small et al., *Accessing Care for Injection-Related Infections Through a Medically Supervised Injecting Facility: A Qualitative Study*, 98 *Drug & Alcohol Dependence* 159 (2008).

<sup>5</sup>Brandon D. L. Marshall et al., *Reduction in Overdose Mortality After the Opening of North America's First Medically Supervised Safer Injecting Facility: A Retrospective Population Based Study*, 377 *The Lancet* 1429 (2009).

<sup>6</sup>Evan Wood et al., *Methodology for Evaluating Insite: Canada's First Medically Supervised Safer Injection Facility for Injection Drug Users*, 1 *Harm Reduction J.* 9 (2004).

<sup>7</sup>Thomas Kerr et al., *Drug-Related Overdoses Within a Medically Supervised Safer Injection Facility*, 17 *Int'l J. Drug Policy* 436 (2006).

<sup>8</sup>Controlled Drugs and Substances Act, SC 1996, c 19.

<sup>9</sup>Mark W. Tyndall et al., *Attendance, Drug Use Patterns, and Referrals Made from North America's First Supervised Injection Facility*, 83 *Drug & Alcohol Dependence* 193 (2006).

<sup>10</sup>B. Lightfoot et al., *Gaining Insite: Harm Reduction in Nursing Practice*, 105 *The Canadian Nurse* 16 (2009).

requiring abstinence from drug use.”<sup>11</sup> According to Insite statistics, the clinic was visited around 900 times per day in 2010 and staff treated 221 overdoses with no fatalities reported. Some 458 clients were admitted to Onsite with 43 percent of those clients completing their detox.<sup>12</sup> Insite is supported by the Vancouver police, the city and provincial governments.

In spite of the positive findings and community support, Insite has many detractors, including those who question the objective strength of the academic studies – the very foundation on which the court’s decision rests.<sup>13</sup> Anti-drug organizations and individuals dispute both the ideology and efficacy of harm reduction practices.<sup>14</sup> Six physicians from Australia, Canada and the U.S. reviewed the 2009 study in *The Lancet* that reported the 35 percent decrease in overdose deaths. Data from 2001, a year which saw an unusual spike in overdose deaths, had been included. They postulated the decline in deaths was at least partially attributable to increased police presence in the neighbourhood.<sup>15</sup> This critical analysis of *The Lancet* study also threw doubt on the statistics. Far from any decline, it measured an increase in overdose deaths between 2002 and 2007 (Insite began in 2003), a trend supported by data from the British Columbia Coroner’s Office over the same period of time. Almost half of *The Lancet* drug fatalities were found not to be related to drug injections, which would tend to inflate Insite’s impact.

The UBC team that conducted the studies in question replied to these allegations in the January 2012 issue of *The Lancet*. It explained that the increase in overdose deaths found in the conflicting article was due to the fact that it took into account *all* overdose deaths, not just accidental ones. Therefore, that number included deaths due to other causes such as suicide. The UBC team also clarified that the decrease it found was in the immediate area surrounding the clinic, while *The Lancet* article included an area of several hundred city blocks. The UBC team also claimed that the heavy police presence mentioned in *The Lancet* article had actually ended a few weeks after the opening of Insite and “would have probably resulted in a conservative bias by differentially reducing overdose mortality in the area of interest before the facility’s opening.”<sup>16</sup>

## HARM REDUCTION – A GROWING TREND WORLDWIDE

In June 2012, the Global Commission on Drug Policy (GCDP), a group made up mainly of former politicians and scientists which aims to “bring to the international level an informed, science-based discussion about humane and effective ways to reduce the harm caused by drugs to people and societies,”<sup>17</sup> released its annual report. Entitled “The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic,” the report denounces the efforts made by many countries to curb drug use by attempting to limit drug supply and incriminating non-violent drug users. For example, the threat of police intervention actually encourages unsafe injection procedures (including needle sharing), as addicts may hasten to inject in order to avoid detection.<sup>18</sup> Incarceration of drug users has also contributed to a disproportionately high rate of HIV infection within many prison systems, due to inmates using unsafe sex and injecting practices. Imprisonment may also interfere with or inhibit addicts from seeking antiretroviral treatment, which when properly taken, has shown success in limiting the spread of HIV infection.<sup>19</sup> Police “crackdowns,” which lead to drug seizures and arrests, also tend to increase street-level violence but have been found to do little to reduce drug supply.<sup>20</sup> The GCDP instead supports health-based approaches, including syringe exchange programs, methadone

<sup>11</sup>Vancouver Coastal Health, *supra* n. 2.

<sup>12</sup>*Id.* at [http://supervisedinjection.vch.ca/research/supporting\\_research/user\\_statistics](http://supervisedinjection.vch.ca/research/supporting_research/user_statistics) (last accessed Mar. 10, 2013).

<sup>13</sup>For example, Susan Martinuk, *Some Insight Into Insite – The Data Don’t Hold Up*, Calgary Herald A24 (Oct. 14, 2011).

<sup>14</sup>For examples, the Drug Prevention Network of Canada, <http://dpnoc.ca/>, and REAL Women of Canada, *Illegal drug use in Canada*, [http://realwomenca.com/images/download/DrugFinal12\\_07.pdf](http://realwomenca.com/images/download/DrugFinal12_07.pdf) (last accessed Oct. 23, 2011).

<sup>15</sup>Greg Pike et al., *Analysis of the 2011 Lancet Study on Deaths From Overdose in the Vicinity of Vancouver’s Insite Supervised Injection Facility*, [http://www.drugfree.org.au/fileadmin/Media/Global/Lancet\\_2011\\_Insite\\_Analysis.pdf](http://www.drugfree.org.au/fileadmin/Media/Global/Lancet_2011_Insite_Analysis.pdf) (last accessed Mar. 10, 2013).

<sup>16</sup>Brandon D. L. Marshall et al., *Overdose Deaths and Vancouver’s Supervised Injection Facility – Authors’ Reply*, 379 *The Lancet* 118 (2012).

<sup>17</sup>The Global Commission on Drug Policy, <http://www.globalcommissionondrugs.org/about/> (last accessed Mar. 11, 2013).

<sup>18</sup>The Global Commission on Drug Policy, *The War on Drugs and HIV/AIDS: How the Criminalization of Drug Use Fuels the Global Pandemic* (available at [http://globalcommissionondrugs.org/wp-content/themes/gcdp\\_v1/pdf/GCDP\\_HIV-AIDS\\_2012\\_REFERENCE.pdf](http://globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/GCDP_HIV-AIDS_2012_REFERENCE.pdf)).

<sup>19</sup>*Id.* at 6-7.

<sup>20</sup>*Id.* at 14.

treatment, heroin prescription, and supervised injecting facilities (the Insite clinic is also mentioned). These measures have been studied around the world and have shown many of the same positive results found in the studies of Insite.<sup>21</sup>

SIFs first appeared in the Netherlands in the 1970s, with Switzerland following suit in 1986, and Germany in 1994. Many European countries now have several SIFs operating within them.<sup>22</sup> In addition to facilities in the Netherlands and Switzerland, SIFs are also found in Norway, Spain, Luxembourg, Denmark and Australia.<sup>23</sup> Canada's current conservative federal government, however, has been accused of attempting to limit harm-reduction programs, in favour of the criminalization approach. The government opposed Insite on moral hazard grounds: that is, narcotic drug injection is a matter of criminal choice and penalty. The initial September 2003 CDSA conditional exemption was extended by the Minister of Health in 2006 and 2007 to temporarily keep the clinic open. The Minister of Health commissioned an expert advisory committee to analyze and evaluate Insite's results based on the research studies that had been completed.<sup>24</sup> This report noted only about 5 percent of all drug injections occurred at Insite. It claimed Insite was effective in saving approximately 1.08 lives per year at a public, taxpayer-funded cost of C\$3 million. The 2008 exemption application was denied. This prompted Insite supporters to launch legal action to allow it to remain open. The group of academics that conducted the majority of the studies on Insite believe that the government's approach to drug use is "motivated by ideological principles of punishment and retribution towards drug users."<sup>25</sup> Since the Canadian Supreme Court's decision in September 2011, however, the government has cooperated and has allowed Insite to continue operation.<sup>26</sup>

### COMPARISON: HOW OTHER COUNTRIES HAVE HANDLED LEGALIZED MEDICALLY SUPERVISED INJECTION

Every country with a SIF has its own form of legal authorization for such facilities. For example, in the Netherlands (as in Canada), possession, trafficking and production of drugs are all illegal but the actual consumption of them is not. There is a policy that possession of small amounts of drugs is a low priority for law enforcement.<sup>27</sup> These technical distinctions and relaxed approach to enforcement leave individuals particularly free to use SIFs. In Australia, changes to the Drug Misuse and Trafficking Act 1985 permitted trials of the SIF. Nearly ten years later, new legislation, the Drug Misuse and Trafficking Amendment [Medically Supervised Injecting Centre] Bill 2010, was passed, which converted this centre into a permanent operation.<sup>28</sup> The United States has not opened an SIF and it would be a complicated process for it to do so. While there is no legislation to prevent states or cities from opening SIFs, they could be shut down by federal authorities for violating federal drug prohibition laws. To be successful in the long term, amendment of the federal laws or government support would be required.<sup>29</sup> In Germany, an amendment to the Narcotics Act in 2000 legalized SIFs, but state governments have exclusive authority to license them.<sup>30</sup> Canada's legalization of Insite is unique in that it did not involve an amendment of any criminal drug laws, but the reform came about as an exemption to those laws that was imposed by the highest court on the tandem grounds of constitutional rights and ministerial discretion.<sup>31</sup>

<sup>21</sup>*Id.* at 10.

<sup>22</sup>Kate Dolan et al., *Drug Consumption Facilities in Europe and the Establishment of Supervised Injecting Centres in Australia*, 19 *Drug & Alcohol Rev.* 337 (2000).

<sup>23</sup>Sydney Medically Supervised Injecting Centre, *Background and Evaluation*, <http://www.sydneymsic.com/background-and-evaluation> (last accessed Mar. 10, 2013).

<sup>24</sup>Health Canada, *Vancouver's INSITE Service and Other Supervised Injection Sites: What Has Been Learned From Research?* [http://www.hc-sc.gc.ca/ahc-asc/pubs/\\_sites-lieux/insite/index-eng.php#ref\\_8](http://www.hc-sc.gc.ca/ahc-asc/pubs/_sites-lieux/insite/index-eng.php#ref_8) (last accessed Mar. 10, 2013).

<sup>25</sup>Elaine Hyshka et al., *Canada Moving Backwards on Illegal Drugs*, 103 *Can. J. Pub. Health* 122 (2012).

<sup>26</sup>*Id.*

<sup>27</sup>Public Health Agency of Canada, *Harm Reduction and Injection Drug Use: An International Comparative Study of Contextual Factors Influencing the Development and Implementation of Relevant Policies and Programs - Harm Reduction in the Netherlands*, <http://www.phac-aspc.gc.ca/hepc/pubs/hridu-rmudi/netherlands-eng.php> (last accessed Aug. 16, 2012).

<sup>28</sup>Sydney Medically Supervised Injection Centre, *supra*, n. 23.

<sup>29</sup>Leo Beletsky et al., *The Law (and Politics) of Safe Injection Facilities in the United States*, 98 *Am. J. Pub. Health* 231 (2008).

<sup>30</sup>Dagmar Hedrich, *European Report on Drug Consumption Rooms, (Feb. 2004)* (available at <http://www.centromedici.napreventiva.org/comunicazioni/news/ven22,03045.pdf>).

<sup>31</sup>For an analysis of the ministerial discretion issue, see Irwin Cotler & Charlie Feldman, *The Decisive Moment of (In) Decision: Insite and Ministerial Discretion*, 6 *J. Parliamentary & Pol. L.* 225 (Mar. 2012).

## LEGAL REASONING AND DISPOSITION

Insite based its claim on two distinct constitutional grounds. Success in either of them would secure the clinic's perpetuation. It first argued that the federal government could not intrude into such a drug treatment aspect of provincial healthcare and, alternatively, that section 7 of the Charter of Rights,<sup>32</sup> which confers the "right to life, liberty and security of the person," should override the Minister's discretion and force the hand of the federal government to grant this indefinite exemption.

The British Columbia Supreme Court had ruled at trial that CDSA sections 4(1) and 5(1), which prohibit possession and trafficking, respectively, interfere with drug addicts' obtaining help for addictive illnesses, and that, accordingly, these prohibitions violate section 7 of the Charter.<sup>33</sup> To close Insite based on the CDSA anti-possession and anti-trafficking laws would be to "arbitrarily" deny addicts the care demonstrated to improve and save their lives. Therefore, the trial judge exempted Insite from the CDSA. The British Columbia Court of Appeal found the constitutional authority to regulate Insite fell under provincial, not federal, jurisdiction.<sup>34</sup> It also agreed with Insite on the second ground, exempting Insite from the CDSA because this criminal law was "overbroad."<sup>35</sup>

On further and final appeal, the Supreme Court of Canada concluded Insite was properly within federal jurisdiction: "the protection (offered by the CDSA) of public health and safety from the effects of addictive drugs is a valid criminal law purpose."<sup>36</sup> This presented a dilemma of overlapping jurisdiction.<sup>37</sup> Which governs – federal criminal power or provincial healthcare power? The doctrine of inter-jurisdictional immunity then asks whether, in this case, provincial control over healthcare was such an exclusive core of power to oust the federal reach into it. The court, observing the modern trend to strike a balance for cooperative federalism, decided the delivery of healthcare services was not a protected core of provincial power immune from federal interference. There is no clear, narrow provincial "core" in healthcare, because healthcare "extends to thousands of activities and to a host of different venues." The federal criminal law governs Insite and trumps any provincial legislation or policies that conflict with it, unless the Charter claim succeeds.<sup>38</sup>

The Supreme Court said the CDSA drug laws themselves did not infringe the Charter, precisely because section 56 authorized exceptions to its application in medically necessary circumstances. However, without ongoing exemption and access to life-saving care, the court said the right to life and security of the person (Charter, section 7) for Insite clients and staff was violated by 4(1) of the CDSA.<sup>39</sup> The illegal drugs were brought from outside by the clients but "the staff responsible for the Centre may be 'in possession' of drugs brought in by clients. They have knowledge of the presence of drugs, and consent to their presence in the facility over which they have control." This would place centre staff in legal jeopardy of criminal conviction. Given the positive outcomes set out in the Insite studies and reports, the judges characterized the Minister's refusal as "arbitrary" and "grossly disproportionate in its effects." The prohibition on trafficking in section 5(1) of the CDSA did not breach the Charter because Insite clients are not involved in trafficking. The court ordered a nebulously indefinite exemption from the CDSA: the federal Minister of Health may lawfully withdraw the exemption when, in the court's words, "changed circumstances at Insite so require."<sup>40</sup>

## IMPLICATIONS

Critics view this decision as another landmark in ideological judicial activism. One commentator likened the judgment to "a sociology paper."<sup>41</sup> Another says it "threaten(s) peace between judges and

<sup>32</sup>The Constitution Act, 1982 BCSC, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>33</sup>Per Pitfield J., 2008 661 (CanLII), 2008 BCSC 661, 85 B.C.L.R. (4th) 89, 293 D.L.R. (4th) 392, 173 C.R.R. (2d) 82, [2009] 3 W.W.R. 450, [2008] B.C.J. No. 951 (QL), 2008 CarswellBC 1043, and 2008 BCSC 1453 (CanLII), 2008 BCSC 1453, 91 B.C.L.R. (4th) 389, 302 D.L.R. (4th) 740, [2009] 3 W.W.R. 494, [2008] B.C.J. No. 2057 (QL), 2008 CarswellBC 2300.

<sup>34</sup>Per Rowles, Huddart and D. Smith J.J.A., 2010 BCCA 15 (CanLII), 2010 BCCA 15, 100 B.C.L.R. (4th) 269, 314 D.L.R. (4th) 209, 250 C.C.C. (3d) 443, 207 C.R.R. (2d) 232, [2010] 2 W.W.R. 575, 281 B.C.A.C. 161, 475 W.A.C. 161, [2010] B.C.J. No. 57 (QL), 2010 CarswellBC 50.

<sup>35</sup>See generally Heather MacIvor, *The Charter Section 7 Aspect of Insite*, 6 J. Parliamentary & Pol. L. 246 (Mar. 2012).

<sup>36</sup>*R. v. Marmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras. 77–78.

<sup>37</sup>The division of legislative powers in Canada, a federal state, is governed by the *Constitution Act, 1867*, 30 & 31 Vict, c 3.

<sup>38</sup>Ron Skolrood, *The Doctrine of Interjurisdictional Immunity*, 6 J. Parliamentary & Pol. L. 250 (Mar. 012).

<sup>39</sup>See Dustin Kenall, *Safety First: The Section 7 Harm-Avoidance Principle*, 30 Nat'l J. Const. L. 189 (June 2012).

<sup>40</sup>See Kent Roach, *The Supreme Court's Remedial Decision in the Insite Decision*, 6 J. Parliamentary & Pol. L. 238 (Mar. 2012).

<sup>41</sup>Brian Lilley, *Is the Top Court a Little Too Supreme?* Sun Media (Oct. 14, 2011).

legislators.”<sup>42</sup> The court had adopted a narrow approach to a complex health and criminal law policy. Why should the court elevate healthcare over crime? These judges are not healthcare policy experts. Even to characterize the Minister’s denial of an exemption as the act that endangers addicts’ lives ignores the real danger that is rooted in the addiction. Moreover, this decision facilitates the crime of trafficking illegal drugs. It raised serious issues of law and policy in respect of public interest decision-making.<sup>43</sup>

A longstanding abstinence policy that criminalizes possession is hardly “arbitrary.” Many Canadians question what precisely is “safe” about continuing to indulge high-risk addictions at Insite. Another critic pointed out the court’s “dangerous false dichotomy in finding that the government could only allow Insite to remain open—or refuse healthcare to addicts.”<sup>44</sup> It remains remarkable for the unelected judicial elite to so clearly second-guess ministerial discretion and substitute its own politically unaccountable judgment grounded only in legal principle. Anticipating and seeking to pre-empt these concerns, the court added:

There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the Charter . . . The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with Charter.

Ultimately, that may be a distinction without a difference if Canadians view the Supreme Court of Canada as merely favouring Insite’s status quo harm reduction approach to a hardline criminal abstinence approach pursued by the federal government. Abstinence and detox are even more effective forms of life-saving care, albeit more challenging, than is supervised injection. Will the next judicial pronouncement on Charter rights be to compel government to supply the illegal drugs? The abstinence and prohibition model across all fronts of social, health, safety and criminal policy now seems legally weakened as a result of this Insite precedent. Immediately after this decision was released, the Quebec government announced its plan to set up similar clinics, and other provinces are to do the same. Others claim that this decision sanctions houses of prostitution and other activities currently under the model of criminal abstinence. Again, the Supreme Court attempted to limit the scope of this ruling:

[This] is not a licence for injection drug users to possess drugs wherever and whenever they wish. Nor is it an invitation for anyone who so chooses to open a facility for drug use under the banner of a “safe injection facility.” The result in this case rests on the trial judge’s conclusions that Insite is effective in reducing the risk of death and disease and has had no negative impact on the legitimate criminal law objectives of the federal government.

While this ruling suggests that similar exemptions at other facilities remain up to the “discretion” of the minister of health, the reality is that the Supreme Court of Canada has effectively and seriously trimmed that discretion. This might be a threshold permissive legal ruling that cannot be easily contained.

### **MOVING FORWARD: INSITE ONE YEAR LATER**

Canada has yet to open another SIF since the Supreme Court’s decision in September 2011. Facilities have been proposed for Montreal, Toronto and Ottawa. Montreal’s public health authority recommended three facilities and one mobile clinic. Proponents of the SIFs are experiencing resistance from municipal governments, on behalf of concerned citizens. Citizens would prefer that the SIFs operate within hospitals or existing healthcare centres, though such facilities tend to be avoided by drug addicts. Residents are fearful of SIFs existing in their neighbourhoods.<sup>45</sup> For Toronto and Ottawa, a

<sup>42</sup>Kirk Makin, *Landmark Insite Decision Threatens Peace Between Judges and Legislators*, The Globe and Mail (Oct. 10, 2011) (available at <http://www.theglobeandmail.com/news/politics/landmark-insite-decision-threatens-peace-between-judges-and-legislators/article5,7654/>).

<sup>43</sup>See Arghavan Gerami, *Public Interest Considerations in the Exercise of Public Decision-Making*, 6 J. Parliamentary & Pol. L. 254 (Mar. 2012).

<sup>44</sup>Cardus Centre for Cultural Renewal, Kevin Boonstra *LexView 74.0 - Can Injecting Illegal Drugs Ever Be Safe?* <http://www.cardus.ca/lexview/article/2969/> (Oct. 26, 2011).

<sup>45</sup>Rene Bruemmer, *Fear Major Obstacle to Injection Site, Experts Contend*, Postmedia News (Apr. 19, 2012), <http://search.proquest.com.ezproxy.lib.ucalgary.ca/docview/10,08685,612> (last accessed Aug. 20, 2012).

study was commissioned (the Toronto and Ottawa Supervised Consumption Assessment Study, or TOSCA) to determine whether there was sufficient need and support for SIFs. Many Ontarians were found to support SIFs as a way of improving neighbourhoods and minimizing health issues in addicts; however – like residents in Montreal – residents in Toronto and Ottawa were concerned with the location of the proposed SIFs. This could present a great challenge, especially in Toronto, where drug use was found to be spread throughout the city, compared to cities like Vancouver where it is more prevalent in specific neighbourhoods.<sup>46</sup> Given this opposition, TOSCA indicated that much more planning, discussion, and perhaps even a pilot facility should be carried out before going forward with an SIF.

Canada's SIF situation is distinctive in many ways. While SIFs are now permitted to operate after the *Insite* decision, the federal government remains generally opposed to them. This sends a mixed signal to citizens, many of whom could be affected by an SIF in their neighbourhood. Studies may indicate that SIFs have some salutary impact on those who use their services and they have become increasingly popular, especially in Europe. European governments appear to be more tolerant of drug use and supportive of harm reduction strategies. This fosters a culture where SIFs may operate and thrive more easily.

Given how the Supreme Court of Canada saved *Insite* indefinitely, with some controversy using the Charter to override executive judgment clearly contemplated by the legislation, the legal status of the SIF in Canada remains fragile. For example, a drug scandal or a death on clinic premises might suffice to motivate the federal Minister of Health to lawfully withdraw the exemption, defending such withdrawal by invoking the court's own words, that "changed circumstances at *Insite* so require."

Experience has shown that strong, unequivocal judgments of the Supreme Court of Canada have brought about unintended consequences in their application. We will watch now how far the case of *Insite*, and all that it stands for, will extend across the Canadian social landscape.

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<sup>46</sup>Ahmed M. Bayoumi et al., *Report of the Toronto and Ottawa Supervised Consumption Assessment Study, 2012*, (available at [http://www.toscastudy.ca/toscastudy.ca/TOSCA\\_Report\\_files/TOSCA%20report-web.pdf](http://www.toscastudy.ca/toscastudy.ca/TOSCA_Report_files/TOSCA%20report-web.pdf)).