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Analyses of the Insite Judgment

Editor's Note: *On September 30, 2011, the Supreme Court of Canada issued its judgment in the matter of Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44. This judgment is so important and so rich in content that it merits more thorough than usual examination. Toward this goal, the present issue of the JPPL includes commentary by the following eminent scholars:*

— **Ministerial discretion and principles of fundamental justice**
Hon. Irwin Cotler, M.P., P.C., Ottawa and Charlie Feldman, Montreal

— **Remedies**
Professor Kent Roach, Faculty of Law, University of Toronto

— **Charter s. 7**
Heather MacIvor, University of Windsor

— **Inter-jurisdictional immunity**
Ron Skolrood, Lawson Lundell, Vancouver

— **Public interest**
Arghavan Gerami, Gerami Law PC, Ottawa

The Decisive Moment of (In)Decision: Insite and Ministerial Discretion

Irwin Cotler, M.P., P.C., O.C.
Charlie Feldman[*]

It has been written that "No one today denies the central, indeed, the necessary role played by discretion in the day-to-day functioning of the administrative state".[1] While the necessity of ministerial discretion goes unquestioned, the review of its

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1 Geneviève Cartier, "Keeping a Check on Discretion" in Colleen Flood and Lorne Sossin (eds.), Administrative Law in Context (Toronto: Emond Montgomery, 2008) Chapter 10 at 286.

has made it clear that interjurisdictional immunity is a holdover from a bygone era in the Courts' approach to division of powers issues and will, absent some exceptional circumstances, be confined to those situations already defined by historical precedent. Even there, it would surprise few constitutional observers if the Court in the future challenged even those limited applications should the opportunity arise.

Public Interest Considerations in the Exercise of Public Decision-Making

Arghavan Gerami[*]

Determining what is or is not in the "public interest" is a very challenging and responsible undertaking. Depending on the specific question, the concerns at play and the context in which the question arises, it often involves taking account of competing policy considerations, informed by the potential impact on individual rights as well as broader societal interests. In the case at Bar, the federal Minister of Health had this very challenge before him when he was called upon to exercise his discretion under section 56 of the *Controlled Drugs and Substances Act* ("Act" or "CDSA"),[115] and to allow an exemption from the application of section 4 and 5 of this Act which prohibit the possession and trafficking of certain prohibited substances.

This part of the analysis of *Insite* argues that the Supreme Court's reasons in this case offer important insight on the exercise of discretion by government decision-makers where there are significant "public interest" considerations at play, particularly where there is an immediate and direct impact on individual rights. In particular, the Court's approach and analysis lends support to the position that the Minister's exercise of discretion under s. 56 ought to be informed by and responsive to: (1) The purpose of the Act, including any balancing required by competing objectives set out in the scheme of the Act; (2) The relevant facts and evidence before the Minister; and, (3) The constraints imposed by the *Charter*. The paper will also set out the (4) specific "public interest" position put forth by the British Columbia Attorney General in this case in the context of a division of powers argument, and explains why the Supreme Court was ultimately not receptive of that position.

1. PURPOSE AND SCHEME OF THE ACT

The legislative framework of the CDSA is key to understanding the legitimate parameters of the Minister's discretion in this case. Section 4 and section 5 of the CDSA prohibit possession and trafficking of the substances listed in the Schedules

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115 S.C. 1996, c. 19.

of the Act (I, II & III for possession and I–IV for trafficking). However, section 56 of the CDSA allows the Minister the discretion to issue exemptions "on such terms and conditions as the Minister deems necessary . . . if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is *otherwise in the public interest*". As well, section 55 of CDSA empowers the Governor in Council to make regulations for carrying out the purposes and provisions of the Act.

These provisions reveal that Parliament intended sections 4, 5 and sections 55-56 to be considered and applied as a scheme and in line with the "dual purpose" of the CDSA — that is, the protection of public health and public safety.[116] Section 55-56 of the CDSA speak to Parliament's recognition of the need to "balance the two competing interests of public health and public safety".[117] These exemptions act as "a safety valve" to prevent the application of the CDSA where it would be "arbitrary, overbroad or grossly disproportionate in its effects".[118]

While this point was not explicitly argued in this case, the Court's Reasons convey that the Minister's exercise of discretion should have taken account of the balancing required by this legislative framework. The Chief Justice stated, "The decisions of the Minister under s. 56 must target the purpose of the Act" and the "legitimate state objectives of the CDSA" which "were identified by this Court in *Malmo-Levine* as the protection of health and safety".[119] However, the Minister's decision in this case was exclusively focused on the blanket prohibition on the possession and trafficking of illegal drugs.[120] The Court found that the federal government through the Minister of Health "made a policy choice to deny exemption under s. 56 of the CDSA"[121] and that the decision to refuse Insite's application was premised on its disapproval of the supervised exemption, which the Minister considered "a failure of public policy".[122]

2. CONSIDERATION OF RELEVANT FACTS AND EVIDENCE ON THE PROBLEM AND THE SOLUTION

In addition to being responsive to the purpose and scheme of the Act, the Minister's exercise of discretion should take into account the relevant facts and evidence both on the nature and dimensions of the problem and on the proposed solution. This is particularly crucial where the public interest is engaged due to the impact of the Minister's decision on the health and safety of individuals and the community. I believe this point came through clearly in the Supreme Court's detailed attention to the relevant dimensions of the problem as reflected by the specific facts and the evidence before it. In particular, the Court discussed (a) The

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116 *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at para. 41 [hereinafter "Insite"].

117 *Ibid.*, at para. 20.

118 *Ibid.*, at para. 133.

119 *Ibid.*, at para. 129.

120 *Ibid.*, at para. 20.

121 *Ibid.*, at para. 125.

122 *Ibid.*, at para. 122.