

Insight into Insite: Social Science Research v. Gut-Feeling Ideology

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On the last day of September, 2011, the Supreme Court of Canada released a unanimous judgment that condemned the Harper government's refusal to allow the drug-injection site in Vancouver known as "Insite" to continue its operations. A Minister's discretionary decisions, the Supreme Court ruled, must comply with the Charter of Rights and Freedoms. "Insite has been proven to save lives with no discernable negative impact on the public safety and health objectives of Canada. The effect of denying the services of Insite to the population it serves and the correlative increase in the risk of death and disease to injection drug users is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics."¹ Such ministerial denial is a violation of s. 7 of the Charter, which protects the right to "life, liberty and security of the person."

This decision is remarkable for a number of reasons: it was written by a Chief Justice generally regarded as conservative; it included two judges appointed by the Harper government; and it was blunt in its critique of the government's penchant to ignore the clear results of social science evidence. I must also mention that the Insite decision is specific to the downtown east side of Vancouver, and not necessarily applicable to other injection drug neighbourhoods, such as those in Toronto, Ottawa, Montreal or Halifax. What will be necessary for the precedent to apply to other situations (as well as to Insite in future iterations) is relevant social science evidence that is convincing to the court.

This paper argues that extreme ideological positions may compromise the rule of law from a perspective of s. 7 of the Charter of Rights and Freedoms. Arguments that have strong legal and social science evidentiary support may well find favour with Canadian courts for two reasons. First, judges tend to be passionate about safeguarding the principle rule of law, and for the moment, s. 7 has become the battleground for protection of the rule of law. The rule of law is a fundamental principle of democracy — a lesson learned by judges if not in law school, in practice both as lawyers and judges. Second, s. 7 is clearly still in its early stages of development from a jurisprudential perspective, and judges tend not to want to underestimate the potential of this section of the Charter. For some, the calculation may be that it is best to err on the side of an expansive interpretation, keeping in mind that if a government perceives that the courts have gone too far, the s. 33 override can be invoked.

The paper will begin with a brief review of the Insite decision (I expect my fellow panelists may analyze the decision in more detail than I do). Next, I will relate this decision to two previous decisions of the Supreme Court that followed a similar line of reasoning with regard to the application of S. 7 -- the two Khadr decisions -- and also to the recent Bedford decision of the Ontario Court of Appeal, which relies heavily on the SCC Insite decision. Finally, I will comment on the tension between the Supreme Court's objective analysis of the rule of law, and the very

¹ Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44, headnotes.

partisan approach of the Canadian cabinet regarding the rule of law in attempting to move its agenda forward.

The Insite Decision

North America's first safe injection site, known as "Insite," opened in Vancouver's downtown east side in 2003. The downtown east side is one of Canada's poorest and most squalid neighbourhoods. Insite was an intergovernmental response to the deteriorating situation in the downtown east side in the 1990s, which is home to about 4,600 intravenous drug users.² The purpose of Insite was not only to provide intravenous drug users with clean needles, but to encourage them to use the treatment facility that was eventually located in the same building. In order for the facility to operate legally, the federal Minister of Health would need to exempt Insite from the Controlled Drugs and Substances Act (CDSA). Section 56 of the Act provides the Minister of Health with discretion to issue exemptions from the CDSA for "medical and scientific purposes." Prior to Insite's opening in 2003, the federal Minister of Health issued a three-year exemption for Insite; two subsequent exemptions covered Insite until 2008. Evaluations of Insite had shown that it has been successful in reducing the proportion of deaths from overdoses, and has reduced infections from dirty needles. As well, there had been an increase in the proportion of intravenous drug users entering treatment programs. In spite of the demonstrated success of Insite, the Conservative party was ideologically opposed to the idea of a safe injection site, and in 2008 Health Minister Tony Clement refused to continue Insite's exemption from the CDSA when an earlier exemption expired.³ As a result, two users of Insite, and two nonprofit organizations initiated a court action aimed at keeping Insite open. The case reached the Supreme Court of Canada in 2011. The Supreme Court of Canada released a unanimous judgment that condemned the Minister's refusal to continue the exemption, and ordered the new Minister to issue another exemption. A cabinet Minister's discretionary decisions, the Supreme Court ruled, must comply with the Charter of Rights and Freedoms. "Insite has been proven to save lives with no discernable negative impact on the public safety and health objectives of Canada. The effect of denying the services of Insite to the population it serves and the correlative increase in the risk of death and disease to injection drug users is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics."⁴ Such ministerial denial is a violation of s. 7 of the Charter, which protects the right to "life, liberty and security of the person."

² Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44, para. 4. In 1993, annual deaths from overdoses reached 200. Nearly 90% are infected with Hepatitis C, and nearly 20% are HIV positive (para. 9).

³ Previous exemptions were granted in September 2003, September 2006, and October 2007. Canada (Attorney General) v. PHS Community Services Society, para. 121. There is no minimum or maximum time limit to the exemptions. See Irwin Cotler and Charlie Feldman, "The Decisive Moment of "(n"Decision: Insite and Ministerial Discretion," 6 (2012) Journal of Parliamentary and Political Law, 225, at 230.

⁴ Ibid., headnotes.

It is noteworthy that one of the arguments presented in court on behalf of the Minister was that “granting a s. 56 exemption to Insite would undermine the rule of law and that denying an exemption is therefore justified.”⁵ An exemption from the CDSA “would effectively turn the rule of law on its head by dictating that where a particular individual breaks the law with such frequency and persistence that he or she becomes unable to comply with it, it is unconstitutional to apply the law to that person.”⁶

This so-called rule of law argument was flatly rejected by the Court. On the contrary, the Court cited evidence that Insite had contributed to reducing crime in the downtown east side. As well, the court emphasized that those addicted to hard drugs are incapable of overcoming their addiction without appropriate intervention. The Court did not mince words in challenging the Health Minister’s refusal to grant the exemption: “the Minister’s refusal to grant Insite a s. 56 exemption was arbitrary and grossly disproportionate in its effects, and hence not in accordance with the principles of fundamental justice.”⁷

Perhaps because the government took no meaningful action in response to the Supreme Court’s recommendation in 2010 that Omar Khadr be repatriated to Canada after it declared a gross violation of Khadr’s Charter rights (see below), the Court did not trust the government to reconsider the decision not to grant the exemption to Insite in the light of the Court’s findings about the applicability of S. 7 of the Charter to ministerial discretionary decisions. The Court’s remedy was to order the Minister of Health to grant the s. 56 exemption to Insite.⁸ After referring to the 2010 Khadr decision, Kent Roach wrote that “the Court’s recognition that a declaration [alone] might have resulted in delay, threats to Charter rights and subsequent litigation represents important learning by the Court about the limits of relying on declarations as a constitutional remedy.”⁹

It should also be noted that it appears the Minister Clement adopted a devious strategy in attempting to avoid litigation about the renewal of the exemption. He claimed that rather than refusing to continue the exemption, he was merely taking a long time to make up his mind about the issue.¹⁰ This may be why the applicants at trial argued the case primarily on division of powers grounds: whether or not the Minister granted a further exemption, Insite was completely under provincial health jurisdiction so that the CDSA did not apply. When the case reached the Supreme Court, the government was still claiming that no decision had been made. However, the Supreme Court did not believe this claim because of Clement’s testimony to the House of Commons Standing Committee on Health on May 29, 2008. In his testimony, Minister Clement declared that “should another exemption application come forward, I have a duty to once again look at all the evidence and once again turn my mind to it in a way that gives due

⁵ Ibid. para. 138.

⁶ Ibid., para. 139.

⁷ Ibid., para. 127.

⁸ Ibid., para. 150.

⁹ Kent Roach, “The Supreme Court’s Remedial Decision in the Insite Decision,” 6 (2012) *Journal of Parliamentary and Political Law*, 238, at 239.

¹⁰ *Canada (Attorney General) v. PHS Community Services Society*, op. cit., para. 119 ff.

process. So I'm not resigning from that obligation that I have as health minister.¹¹ This reference to "another" application convinced the Supreme Court that Clement had decided against the exemption, and was anticipating another application.¹²

As well, it is disingenuous that Clement claimed that he would need to consider all the evidence again according to due process if another application for exemption came forward. Clearly, he did not consider with an open mind the overwhelming evidence presented with the 2008 application that the Insite facility was saving lives, reducing the rate of infections from Hepatitis C and HIV, and increasing the success rates of successful rehabilitation.¹³

Heather MacIvor points out that prior to the Insite decision, Conservative Public Safety Ministers had made a series of discretionary decisions under the International Transfer of Offenders Act (ITOA) to refuse applications of Canadian citizens who were serving sentences abroad to serve the remainder of their sentences in Canada. The Federal Court "quashed a string of ministerial decisions under the [ITOA and] ... repeatedly chided the Public Safety Minister for overruling departmental advice, failing to provide adequate reasons (as required by s. 11 of the ITOA), and exceeding the discretion afforded in section 10 of the ITOA."¹⁴ The government's response was to amend the ITOA, as part of the omnibus crime bill, to replace sections referring to "discretion" with "in the Minister's opinion" and similar phrases.¹⁵ "In this light, the importance of the Court's strategy in Insite becomes crystal clear. Instead of nullifying the enabling statute ... the Court declared the *substance* of the Minister's decision to be unconstitutional. No amount of tinkering with the CDSA [or the ITOA] will undo the ruling or the remedy."¹⁶

The SCC's *Insite* ruling is not just a bold assertion of judicial power. It is, in my view, an overdue defence of the rule of law.... The Insite ruling requires Cabinet Ministers to exercise their discretion in ways which bear objective scrutiny. In so doing it elevates the rule of law from the preamble of the Charter to the heart of rights jurisprudence.... And this is a very encouraging development.¹⁷

The Khadr Decisions

In 2002, Canadian Omar Khadr was a 15-year-old soldier fighting for Al-Qaeda in Afghanistan. He was captured by U.S. forces, and accused of killing a U.S. soldier. While in detention in

¹¹ Ibid., para. 123.

¹² See analysis of this issue in Irwin Cotler and Charlie Feldman, "The Decisive Moment of "(n)Decision: Insite and Ministerial Discretion," op. cit., at 227.

¹³ The Appellants' Record consisted of 20 volumes. Most of Volumes 2 to 20 consisted of scientific research studies showing the success of the Insite project. Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44, Appellants' Record. (An electronic copy of the complete record can be purchased from the Supreme Court of Canada Records Office for \$10.)

¹⁴ Heather MacIvor, "The Charter Section 7 Aspect of Insite," 6 (2012) Journal of Parliamentary and Political Law, 246, at 249.

¹⁵ Ibid.

¹⁶ Ibid., 249-250.

¹⁷ Ibid., 250

Guantanamo Bay, he was tortured by U.S. authorities on a number of occasions in attempts to obtain intelligence information. In 2003 and 2004, Khadr was interviewed twice by Canadian officials who knew that the results of the interviews would be used as evidence against Khadr in a military tribunal hearing in Guantanamo Bay. Khadr was not given access to legal counsel at the first interview. The second interview occurred after Khadr had been deprived of sleep for three weeks.¹⁸

In 2005, Khadr applied to the Federal Court for an order for Canadian officials to disclose to him of all of the evidence collected by the Canadian officials during their interviews with him. The case ended up in the Supreme Court of Canada, and the Supreme Court released its decision on May 23, 2008. Given that the United States Supreme Court on two occasions had declared that the regime to which Omar Khadr was subjected was illegal under U.S. domestic and international law, the Canadian Supreme Court declared that Khadr's Charter S. 7 right to "life, liberty and security of the person" had been violated in a manner that was not in accord with the principles of fundamental justice. The Canadian government was ordered to release to Khadr the transcripts of the interviews conducted by Canadian government officials in 2003 and 2004,¹⁹ and the government complied with the order.

Also in 2008, the House of Commons Subcommittee on International Human Rights²⁰ was considering the Khadr situation, and issued its report in June. The majority recommended that the government comply with Canada's obligations under the UN *Convention on the Rights of the Child*, and request repatriation of Khadr so that he could be dealt with under Canadian law. Khadr was then the only foreign national still held in detention at Guantanamo Bay. However, the Conservative minority on the Committee rejected this recommendation, emphasizing the possible risk associated with repatriating Khadr, and concluded that the usual standards of criminal law were impractical in a war situation and in particular when combating terrorism.²¹ The Conservative minority seemed to be arguing that in order to fight terrorism, the rule of law must be ignored. The contrast between the Supreme Court decision and the Conservative minority report illustrates the stark division between a legal analysis of the rule of law, and a right-wing partisan analysis. As would be expected, given the Conservative Party's minority report, the Conservative minority government did not request Khadr's repatriation from Guantanamo Bay.

After Barack Obama won the U.S. Presidential election in November of 2008, Khadr's lawyers advised Khadr to apply for a court order in Canada's Federal Court to compel the Canadian government to have him repatriated to Canada. The Obama Administration – which was opposed to the anti-rule of law Guantanamo Bay regime – wanted Khadr repatriated to be

¹⁸ Canada (Justice) v. Khadr, 2 S.C.R. 125, 2008 SCC 28, para. 7.

¹⁹ Canada (Justice) v. Khadr, 2 S.C.R. 125, 2008 SCC 28. This unanimous decision included Harper's first appointment to the Supreme Court, Mr. Justice Marshall Rothstein.

²⁰ The subcommittee is part of the Standing Committee on Foreign Affairs and International Development.

²¹ Report of the Standing Committee on Foreign Affairs and International Development, Kevin Sorenson, M.P. Chair, Subcommittee on International Human Rights, Scott Reid, M.P. Chair, JUNE 2008, 39th PARLIAMENT, 2nd Session.

dealt with under Canadian law. As well, given the Supreme Court's unanimous ruling in the 2008 Khadr decision that the Canadian Charter of Rights and Freedoms applied extraterritorially when there is a clear violation of Canada's international human rights obligations, it seemed a good possibility that Canadian courts would order Khadr to be repatriated.

The Federal Court of Appeal was convinced by the seven volumes of evidence submitted,²² and agreed with Khadr's argument. However, a unanimous Supreme Court of Canada agreed only in part. Given the 2008 Khadr decision, the Supreme Court confirmed that Khadr's Charter rights had been violated, and that they applied extraterritorially:

Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.²³

The remedy ordered by the Court, however, turned out to be ineffective.²⁴ The Court simply declared that Khadr's Charter rights had been violated, and left it to the Canadian government to find an appropriate remedy.²⁵

Shortly after the Supreme Court decision was released, Prime Minister Harper announced that the Canadian government would not request Khadr's repatriation, but would ask the U.S. government to treat Khadr fairly. As well, the Canadian government requested that the Guantanamo Bay military tribunal not use the evidence collected by Canadian officials against Khadr. This request was refused by the military tribunal. According to Audrey Macklin, it was "predictable" that the U.S. government would reject this request. "After all, attempting to tamper with the trial process of another state ... constitutes a significantly greater intrusion into the sovereignty of another state than a request from one executive branch to another to repatriate the accused before a trial commences."²⁶

Realizing that he could not get a fair trial before the illegal U.S. military tribunal in Guantanamo,²⁷ Khadr pleaded guilty to the charges against him in October of 2010 in return for

²² This evidence can be accessed at the University of Toronto Faculty of Law Omar Khadr Archives website, http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&contentId=1617

²³ Canada (Prime Minister) v. Khadr, 2010 SCC 3, at para. 25. This unanimous decision included two justices appointed by Steven Harper: Justice Rothstein and Justice Cromwell.

²⁴ Gerald Chan, "Remedial Minimalism under Section 24(1) of the Charter..." op. cit., 360 ff., and Audrey Macklin, "Comment on Canada (Prime Minister) v. Khadr (2010)," (2010) Supreme Court Law Review 51 (2d), 295, at 329.

²⁵ Gerald Chan, "Remedial Minimalism" at 366, op. cit., and Audrey Macklin, "Comment on Canada v. Khadr," op. cit., at 237-331. The reason given by the Court in not ordering the federal government to request the repatriation of Khadr was that foreign relations is a prerogative power of the federal cabinet, and the Court does not have the evidence or expertise to decide an appropriate remedy.

²⁶ As Macklin has pointed out, this reasoning is difficult to understand, given that the Obama administration clearly wanted Khadr to be repatriated to Canada. Audrey Macklin, "Comment on Canada v. Khadr", op. cit., at pp. 326-27.

²⁷ Although President Obama opposed the Guantanamo regime, he was left in an untenable position by the Bush administration, which had approved the use of torture to attempt to gain evidence. Evidence

a commitment on the part of U.S. officials to return Khadr to Canada to serve the remainder of his eight year sentence after an additional one year detention at Guantanamo. In the summer of 2011, Khadr's lawyers submitted an application to the Canadian government to have Khadr transferred to Canada, but this was not acknowledged by Public Safety Minister Vic Toews until April of 2012. Clearly, the government is delaying the inevitable for as long as feasible.²⁸ On May 21-22, 2012, the United Nations Committee against Torture in Geneva reviewed allegations that Canada failed to comply with its obligations under the Convention against Torture. On June 1, the Committee "condemns what it calls Canadian "complicity" in torture and human rights violations of Muslim men caught up in the post-9/11 security net.... It recommended that Canada "promptly approve Omar Khadr's transfer application and to ensure that he receives appropriate redress for human rights violations that the Canadian Supreme Court has ruled he experienced."²⁹

The Bedford Decision

In 2010, three current or former prostitutes (Bedford, Lebovitch and Scott) brought an application to the Ontario Superior Court for a declaration that three sections of the Canadian Criminal Code that deal with prostitution are unconstitutional. They challenged the following sections:

1. Section 210, which prohibits the operation of common bawdy-houses. This prevents prostitutes from offering their services out of fixed indoor locations such as brothels, or even their own homes;
2. Section 212(1)(j), which prohibits living on the avails of prostitution. This prevents anyone, including but not limited to pimps, from profiting from another's prostitution; and
3. Section 213(1)(c), which prohibits communicating for the purpose of prostitution in public. This prevents prostitutes from offering their services in public, and particularly on the streets.³⁰

The practical effect of these provisions is that there is only one way to sell sex in Canada without risking criminal sanction. This is what is referred to as "out-call" work, where a prostitute meets a customer at an indoor location such as a hotel room or the customer's home.³¹

based on torture is not admissible in U.S. courts or international courts of law. Given that there was precious little evidence in the possession of U.S. officials not contaminated with torture, Obama was left with little choice other than to put up with the continuance of Guantanamo in a somewhat less pernicious form. For background, see Tim Golden, "A Junior Aide Had a Big Role in Terror Policy", New York Times, December 23, 2005, accessed on May 6, 2012 at <http://www.nytimes.com/2005/12/23/politics/23yoo.html>, and Ashby Jones, "What to Do About John C. Yoo?," Wall Street Journal Law Blog, March 9, 2009, accessed on May 6, 2012 at <http://blogs.wsj.com/law/2009/03/09/what-to-do-about-john-c-yoo/>.

²⁸ "Omar Khadr Transfer Request in Ottawa's Hands," CBC News, April 18, 2012, accessed on May 17, 2012 at <http://www.cbc.ca/news/politics/story/2012/04/18/pol-omar-khadr-transfer-request.html>.

²⁹ Terry Milewski, "Canada accused of 'complicity' in torture in UN report," CBC News, retrieved on June 1, 2012 at <http://www.cbc.ca/news/politics/story/2012/06/01/pol-un-report-torture-canada-milewski.html>

³⁰ Canada (Attorney General) v. Bedford, 2012 ONCA 186, para. 3.

³¹ Ibid., para. 16.

The application was supported by “over 25,000 pages of evidence in 88 volumes.”³² The applicants won at trial in September of 2010, and had a partial victory at appeal in March of 2012. The Court of Appeal panel of five was unanimous that Section 210 and Section 212(1)(j) were unconstitutional, but a three to two majority ruled that Section 213(1)(c) had to be upheld in order to follow precedents established by the Supreme Court.³³ By the time of the Court of Appeal decision in Bedford, the Insite case had been decided, and it was relied on heavily by the panel:

We see a parallel between the circumstances of drug addicts who, because of a criminal prohibition, cannot access a venue where they can safely self-inject and therefore must resort to dangerous venues, and prostitutes who, because of criminal prohibitions, cannot work at venues using methods that maximize their personal safety, but must instead resort to venues and methods where the physical risks associated with prostitution are much greater. In both situations, the criminal prohibitions, as interpreted by the courts, operate on those claiming the s. 7 breach in a way that interferes with their ability to take steps to protect themselves while engaged in a dangerous activity. In one sense, the prostitute’s claim is even stronger in that prostitution, unlike the illicit possession and use of narcotics, is not an unlawful activity.³⁴

The panel noted that one difference between the Insite decision and the Bedford case was that in Insite, the Supreme Court applied S. 7 of the Charter to the Minister’s discretionary decision, while in Bedford, the Appeal Court panel was applying S. 7 to the criminal code itself. However, the panel relied on the analysis of the meaning of “overbroad” and “grossly disproportionate” in Insite and other precedents to find that the bawdy-house provision in the Criminal Code is overbroad “because it captures conduct that is unlikely to lead to the problems Parliament seeks to curtail,” and that it is grossly disproportionate to the legislative objective “because the record is clear that the safest way to sell sex is for a prostitute to work indoors, in a location under her control.”³⁵ The legislative purpose of the impugned provisions was determined to be “combating neighbourhood disruption or disorder and safeguarding public health and safety.”³⁶

³² Ibid., para. 23. “Much of the evidence was in the form of affidavits, and cross-examination on some of those affidavits, tendered by people affected by prostitution. The witnesses included current and former prostitutes, police officers, a Crown attorney, a representative of an organization that seeks to improve the safety and work conditions of prostitutes and to assist them in leaving the occupation, a politician concerned about the victimization of street prostitutes, and a journalist who has written extensively on the sex trade. The parties also tendered extensive expert evidence on the social, political and economic dimensions of prostitution in Canada, as well as many government studies – federal, provincial and municipal – that have been produced in the last 25 years. Finally, the parties tendered evidence regarding the social and legal context of prostitution in several foreign jurisdictions, including the Netherlands, Germany, Sweden, Australia, New Zealand and the United States.” (Ibid., para. 23 and 24)

³³ The panel consisted of Doherty, Rosenberg, Feldman, MacPherson and Cronk. MacPherson and Cronk would also have found Section 213(1)(c) unconstitutional by distinguishing the Supreme Court precedents.

³⁴ Bedford, op. cit., para. 116.

³⁵ Ibid., para. 172.

³⁶ Ibid., para. 192.

The panel issued a declaration that the bawdy-house provisions of the Criminal Code are invalid, but suspended the declaration for twelve months.³⁷

With regard to the living on the avails provision, the panel found it both overbroad and grossly disproportionate to the legislative purpose of preventing “the exploitation of prostitutes by pimps,”³⁸ and therefore a violation of s. 7. The remedy was to “read words of limitation into the text of s. 212(1)(j) so that the prohibition is against living on the avails of prostitution *in circumstances of exploitation*. This aligns the language of the provision with the vital legislative goal that animates it, and cures the constitutional defect.”³⁹

Because the panel found that the bawdy house provisions and the living on the avails provision to be overly broad and grossly disproportionate, they determined that these provisions could not be upheld under s. 1 of the Charter.

The Supreme Court will likely hear the appeal to Bedford in 2013. This appeal will likely be more challenging to the Supreme Court than either Khadr (1), Khadr (2) or Insite. According to Walter Tarnopolsky, judges unconsciously try not to get too far ahead of public opinion, lest they lose their public reputation for fairness and impartiality.⁴⁰ The Khadr decisions impacted just one person, and the Insite decision applied to just one area in Vancouver, and so the isolated impact of these decisions was likely to have minimal impact on public opinion. The Supreme Court of Canada decision in Bedford, however, will apply to all of Canada and will address a controversial topic about which public opinion is divided. However a poll conducted by Angus Reid in 2011 showed that if the Bedford case makes it to the Supreme Court of Canada, 72 per cent of Canadian men, and 49 per cent of Canadian women, would prefer a Supreme Court decision that “decriminalizes certain activities and allows adults to engage in consensual prostitution.”⁴¹

Analysis

In the Insite decision, the Supreme Court rejected the prospect of tampering with the division of powers or the substantive legislation, and instead focused on the use of ministerial discretion. This approach allowed the court to make a courageous decision that extended Section 7 into the area of ministerial discretion, but applied only to one particular location in the that case. However, this precedent may apply more broadly in the future, as indicated by the extensive use of the Insite precedent in Bedford. Such an incremental approach to a new or developing Charter doctrine is wise because there will be less chance of extreme or knee-jerk

³⁷ Ibid., para. 173. The declaration of invalidity was suspended to give “Parliament an opportunity to draft a Charter-compliant provision, should it elect to do so.”

³⁸ Ibid., para. 220.

³⁹ Ibid., para. 222.

⁴⁰ Walter S. Tarnopolsky, “The Evolution of Judicial Attitudes,” in Sheilah Martin and Kathleen Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987).

⁴¹ The survey showed that if the Bedford case gets to the Supreme Court of Canada, 20% of Canadian men, and 32% of Canadian women would prefer a “ruling that prohibits prostitution entirely, and makes it illegal to exchange sex for money.” Press release from Angus Reid Public Opinion, June 30, 2011, accessed on June 3, 2012 at

http://postmediavancouver.sun.files.wordpress.com/2011/07/2011.06.30_prost_can.pdf

media, public opinion, and governmental reaction to court decisions about very complex matters, which could erode the legitimacy of the Court.

In Bedford, the Section 7 arguments are so compelling, and supported by such voluminous evidence, that it will be difficult from a legal perspective for the Court to overturn the parts of the Ontario Court of Appeal decision that are unanimous. However, if the judges are concerned, consciously or unconsciously, that a decision upholding the Ontario Court of Appeal ruling in Bedford might provoke either a public or governmental backlash, the Court may find a way to narrow the ruling of the Ontario decision so as to continue to advance cautiously Section 7 jurisprudence. In his analysis of the Insite decision, Kent Roach outlined a scenario in which the Harper government, buoyed by the opinions of its core supporters, may use a S. 33 override to set aside the Supreme Court's approach to Section 7 for five-year periods.⁴² The s. 33 override is so unpopular that the s. 33 is not likely to be used by the government in relation to confined issues such as those raised in Insite and Khadr. However, prostitution is another matter because of its broader impact on society, and the greater attention the decision is likely therefore to attract.

As I indicated in the introduction, Canadian judges are unwavering advocates for the rule of law. This commitment was certainly evidenced by the tenor of the interviews that my colleagues and I conducted with 101 Canadian appellate court judges (including eight Supreme Court of Canada judges) in the early 1990s.⁴³ The rule of law is a foundational principle for any democracy. As John Locke put it in 1690, laws must be sanctioned by elected legislatures, and are "not to be varied in particular cases, but [there should be] one rule for the rich and poor, for the favourite at court, and the country man at plough."⁴⁴ The Supreme Court of Canada cited "constitutionalism and the rule of law" as foundational principles "animating the whole of the constitution,"⁴⁵ and of course, the rule of law is cited in the preamble to the Charter of Rights. In the Quebec Secession Reference, the Supreme Court summarized the rule of law as follows:

In the Manitoba Language Rights Reference, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the Manitoba Language Rights Reference itself. A third aspect of the rule of law is, as recently confirmed in the Provincial Judges Reference, *supra*, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between

⁴² Kent Roach, "The Supreme Court's Remedial Decision in the Insite Decision," *op. cit.*, 246.

⁴³ Ian Greene, Carl Baar, Peter McCormick, George Szablowski and Martin Thomas, *Final Appeal: Decision-making in Canadian Courts of Appeal* (Toronto: Lorimer, 1997).

⁴⁴ John Locke, *Second Treatise of Government* (London: Project Gutenberg, from 1763 edition, <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm>), Sect. 142.

⁴⁵ Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paragraph 32. The other foundational principles set out by the Court are federalism, democracy, and respect for minorities.

the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.⁴⁶

At a glance, the rule of law seems like a common sense idea that should not be difficult to observe. However, it is only during the past several hundred years that the rule of law has gained currency, first in the United Kingdom and its colonies and former colonies and in parts of continental Europe, and more recently in other parts of the world.⁴⁷ The rule of law is not always easy for governments to follow because of the human tendency to be more concerned with ourselves than others, or because of political passions which consciously or unconsciously put political ideals ahead of the rule of law. Thus, there will nearly always be a tension between some of the goals of governments – especially an extreme right-wing or left-wing governments – and judicial determination to protect and promote the rule of law. However, judges are not likely to criticize harshly the discretionary decisions or actions of a government minister, as they did in *Khadr (1)* and *Khadr (2)* and *Insite*, or long-standing social policy legislation, as they did in *Bedford*, unless their decisions are buoyed by overwhelming and practically incontrovertible evidence, as was the case in all four of these decisions. Alan Young argues that Canadian Courts are becoming increasingly open to recognizing the following “constraint on the exercise of arbitrary political power – the state should be able to provide a reasoned justification if its authority to enact law is called into question. Presumably, state action should be considered arbitrary if the state could not provide a reasoned justification for the action being taken.”⁴⁸

Conclusion

In the *Quebec Secession Reference*, the Supreme Court declared that “there are four fundamental and organizing principles of the Constitution...: federalism; democracy; constitutionalism and the rule of law; and respect for minorities.”⁴⁹ The Court affirmed that democracy is about more than free and fair elections. It is natural, then, that from time to time governments seeking to advance their political ideologies will clash with courts seeking to protect constitutionalism and the rule of law. When the courts succeed in defending the rule of law against ideological positions that run contrary to the rule of law, the winner is democracy. However, courts can persist with the task of defending the rule of law against incursions against it if there is an adequate understanding of the nature of the rule of law amongst Canadian citizens. I have written elsewhere that I am not confident that an adequate enough understanding currently exists.⁵⁰ We all have work to do!

⁴⁶ *Ibid.*, para. 71.

⁴⁷ A.C. Grayling, *Towards the Light: The Story of the Struggles for Liberty and Rights That Made the Modern West* (London: Bloomsbury, 2007).

⁴⁸ Alan Young, “Deprivations of Liberty: The Impact of the Charter on Substantive Criminal Law,” Osgoode Hall Law School Professional Development Centre, Constitutional Cases Conference 2011, presented on May 5, 2012, p. 3.

⁴⁹ *Op. cit.*, para. 32.

⁵⁰ Ian Greene, “Threats to the Rule of Law and Their Impact on Public Sector Ethics,” paper presented to the Canadian Association of Programs in Public Administration Conference, Ottawa, May 28, 2012.

While in Alberta...

First, I must admit that I grew up in Alberta, and so know something about politics in Alberta. As well, I admit that this growing-up experience may have impacted my perceptions. Here in Alberta, I applaud the efforts of the Sheldon Chumir Foundation for Ethics and Leadership in promoting greater public awareness about governance, rule of law, and democratic institutions.⁵¹ While in Alberta, I hope that all here will take advantage of the opportunity to learn more about this progressive and innovative foundation, and its initiatives to promote a better understanding of the rule of law.

Alberta has gained, from my perspective, an unfounded reputation for opposing human rights reforms. Although from time to time Alberta has indeed been guilty as charged (eg. the Klein governments' initial opposition to the Vriend decision), Alberta has also been at the vanguard of human rights progress. Alberta was the second province to enact an effective provincial Bill of Rights in 1971, following the lead of the Saskatchewan's Tommy Douglas government in 1947. Today, Alberta has one of the most active and successful human rights commissions.⁵² Visit it while you are here!

As well, you may wish to visit the John Humphrey Centre for Peace and Human Rights, located in the Faculty of Law at the University of Alberta.⁵³ John Humphrey is the Canadian who was the principal drafter of the UN Universal Declaration of Human Rights, an instrument that has impacted numerous Human Rights statutes around the world, including the Canadian Charter of Rights and Freedoms. (Humphrey and Trudeau consulted about the wording of the Canadian Charter.)

You can see the hand-written notes of John Humphrey, in the process of drafting the Universal Declaration, on display at the John Humphrey Centre.

⁵¹ See http://www.chumirethicsfoundation.ca/main/page.php?page_id=1

⁵² See <http://www.albertahumanrights.ab.ca/>

⁵³ See <http://www.jhcentre.org/>