

Division of Powers:

The PHS Case and Federalism Analysis and Argumentation

Prepared For: Legal Education Society of Alberta

Constitutional Law Symposium

Presented by:

Professor Dwight Newman
University of Saskatchewan,
College of Law
Saskatoon, Saskatchewan

For Presentation In:

Edmonton – Sept. 28, 2012

The *PHS* Case and Federalism Analysis and Argumentation

Introduction

The Supreme Court of Canada's decision of just under a year ago in *Canada (Attorney General) v. PHS Community Services Society* (also often called the *Insite Decision*)¹ saw the Court mandate that the federal Minister of Health could not decline to continue an exemption from narcotics provisions for the Insite Clinic providing an injection site in Downtown Eastside Vancouver. In this discussion of the case, I seek to accomplish both a scholarly objective and a practitioner-focused objective. Out of intellectual fulsomeness, I commence with the scholarly discussion and then move to a practitioner-focused objective in the latter pages of the article. Though I cannot recommend it in light of the inherent jurisprudential demands of constitutional law, the solely practically minded are welcome to flip to the last section of the article for several suggestions or tips for constitutional law argumentation and advocacy after the *PHS* decision. However, these points will hopefully resonate better as dessert after the scholarly meal for those who have not already flipped past the scholarly discussion.

On the scholarly side, I want to make the point that if the Court was boundset on reaching that result, it did so in precisely the wrong way by deciding based on s. 7 of the *Charter* rather than based on federalism arguments in the case. First, I will argue briefly that the s. 7 reasoning in the case is problematic and sets the Court onto a course of more intense judicial activism than has been widely recognized. Second, I will argue that the Court's decision not to engage fully in the federalism analysis involved in the case, particularly on issues of interjurisdictional immunity, leaves its federalism reasoning laden with logical tensions.

In making this argument, I stand largely at odds, albeit in a somewhat peculiar way, with most of the existing academic scholarship on the case. Those who have commented on the case in scholarly articles have largely done so with favourable comments about using a federalism argument to reach the same result but with their comments oriented to using this as a case in which to reshape federalism doctrine in the service of particular substantive values.² Even on the scholarly side of it,

¹ 2011 SCC 44, [2011] 3 S.C.R. 134

² See e.g. Hester Lessard, "Jurisdictional Justice, Democracy and the Story of Insite" (2010) 19 Const. Forum 93 (arguing for more contextual orientation within federalism analysis); Gillian Calder, "Insite: Right Answer, Wrong Question" (2010) 19 Const. Forum 113 (arguing for culturally sensitive federalism analysis). I also note Alana Klein's recent conference presentations in which part of her argument appears to be for a *Charter*-influenced division of powers analysis. One important exception to this generalization is Bruce Ryder, who does briefly affirm the importance of more formal federalism rules even in contexts like this case: "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 Sup. Ct. L. Re. (2d) 565 at 594 (noting a "yawning gap between the federal principle and the interjurisdictional immunity doctrine" and calling for doctrinal steps that would reduce tensions between the federal principle and the current shape of the latter doctrine).

my comment is not actually oriented to the substantive result in this case but to the consequences of this case for other cases and to the importance of consistent formal principles of federalism.

Turning to more practitioner-focused objectives, I will try to draw out something on what can be said based on *PHS* about future directions in analysis of validity, applicability, and operability and some specific suggestions that emerge for how to frame successful arguments in analogous sorts of cases.

The Highly Activist Nature of the Court's Use of the *Charter*

My first claim, then, is that the case's s. 7 reasoning is more problematic than widely assumed and that it marks a return of intense judicial activism. Although I will develop this point only briefly in the context of a discussion more focused on the federalism dimensions of the case, I would note upfront that the case's approach to s. 7 suggests a newly intensified scrutiny of government decisions based on the courts' own reading of appropriate balances between values like public health and public safety.³ The Supreme Court places itself as ultimate arbiter of reasoning of such points as that "[t]he effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics."⁴ This conclusion followed only seven lines of reasoning, and the Supreme Court of Canada finds it unnecessary to engage on this point, for instance, with a set of rich arguments that have been framed in the United States Supreme Court concerning the significance of uniform application of narcotics restrictions even in the context of significant rights claims on the other side of the ledger.⁵ Aside from whatever one might say on the causation issues and the engagement of s. 7 interests in the case, what the Court has done is to provide for intense scrutiny under some of the newer principles of fundamental justice based on whatever findings a trial court might reach combined with next to no analysis of the values framework at stake.

³ The section 7 discussion in the case is dramatic both for the approach to s. 7 itself and for the conclusions that, as described more recently in a lower court, "Constitutional challenge to the individual application of a provision of the *Charter* to a given exercise of discretion is possible where a *Charter* right is implicated by the decision involved: *R. v. Serdyuk*, [2012] A.J. No. 673, 2012 ABCA 205 at para. 19 (dissenting opinion of Watson J.A.). See also *UFCW, Local 401 v. Alberta (Attorney General)*, [2012] A.J. No. 427, 2012 ABCA 130, [2012] 6 W.W.R. 211 at para. 40 (deriving the principle that a particular discretionary decision can be scrutinized for conformity with *Charter* values). However, I will not even venture into this second dimension.

⁴ *Ibid.* at para. 133.

⁵ See especially *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (with, aside from the less accommodative approach of Scalia J. toward religion, even the opinion of O'Connor J. that would uphold an approach permitting significant religious exemptions from legislated requirements allowing for the importance of uniform application of drug laws so as to override that consideration, and containing a number of points in favour of the significance of that uniform application).