



# CENTREPIECE

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## SCC Wrongly Accused of “Judicial Activism” in Recent Insite Case

Canada (Attorney General) v PHS Community Services Society, 2001 SCC 44 (“Insite”)

by

Linda McKay-Panos, B.Ed., J.D., LL.M.

### OPINION

Reprinted from University of Calgary, Faculty of Law [ablawg.ca](http://ablawg.ca)

The recent SCC judgment in the *Insite* case has been said to “threaten peace between judges and legislators” (see Kirk Makin, “Landmark Insite decision threatens peace between judges and legislators” October 10, 2011 *Globe and Mail* Online: <http://www.theglobeandmail.com/news/national/british-columbia/bc-politics/land-mark-insite-decision-threatens-peace-between-judges-and-legislators/article2196941/page1/>) (Makin). I am not sure that I agree with this sentiment.

Judicial activism usually has a negative connotation, but it is useful to discuss what it means (to me) before launching into the discussion of *Insite*. *Black’s Law Dictionary* (Bryan A. Garner, editor, *Black’s Law Dictionary 9th ed.* (West Group, 2009)) defines judicial activism as a “philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions.” It is often contrasted with “judicial restraint”, which has a more positive connotation: judges exercising judicial restraint will use interpretation methods that lead to upholding the constitutionality of laws.

Judicial activism does *not* occur when judges are doing what they have been empowered to do: interpret the law based on the arguments and evidence before them. Indeed, some argue that the timidity sometimes exercised by judges is reaction to criticisms that they are too activist (see: Patricia Hughes, “Judicial Independence: Contemporary Pressures and Appropriate Responses” (2001) 80(1) *Canadian Bar Review* 181). Clearly, the advent of the *Canadian Charter of Rights and Freedoms* (Cana-

*dian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11) “*Charter*” in 1982 brought the interpretation task of judges into the spotlight, because the *Charter* applies to the laws and actions of government. However, long before the advent of the *Charter*, judges also had to interpret laws, including the *British North America Act* (now the *Constitution Act, 1867*) with respect to division of powers issues (e.g., to assess which level(s) of government had the jurisdiction to pass legislation on particular matters). The difference is that the *Charter* deals with the relationship between the individual and the government, rather than relations between two levels of government.

What occurred in the *Insite* case to lead some commentators to argue that judicial activism was involved? This case had both a division of powers issue and a *Charter* issue. The facts are set out in paras 1-19. Vancouver’s Downtown Eastside (VDTES) had an injection drug use crisis in the early 1990s. HIV/AIDS and hepatitis C epidemics followed, and VDTES declared a public health emergency in September 1997. Since the population of the VDTES was marginalized, with complex mental, physical and emotional health needs, public health authorities recognized that creative solutions must be put in place. Years of research, planning, and intergovernmental cooperation resulted in the development of a proposal involving care

for drug users that would help them at all stages of treatment of their disease, not simply when they quit using drugs permanently. The proposed scheme included supervised drug consumption facilities, which were controversial in North America, but had been used successfully in Europe and Australia.

The Controlled Drug and Substances Act (“CDSA”) section 56, permits exemptions, for medical or scientific purposes, from the prohibitions of possession and trafficking of controlled substances, at the discretion of the Minister of Health. *Insite* received a conditional exemption in September 2003, and soon opened. It was North America’s first government sanctioned safe-injection facility, and it operated continuously since. Evidence accepted by the court indicated that *Insite* is a strictly regulated health facility, with its personnel being guided by strict policies and procedures. *Insite* does not provide drugs to the clients, who are required to check in, sign a waiver, and who are closely monitored during and after injection. Clients are provided with health care information, counselling, and referrals to service providers,

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# Staff and Volunteers

We have been busy these past few months. Articling student **Fatima Samhat** joined us in September. Congratulations to former articling student **Becky Andres** in being called to the bar in August (and on becoming parent in June!). University of Calgary, Faculty of Law summer students **Jelena Markovic** and **Emma McAuliffe** worked with us over the summer. **Pamela Dos Ramos** and **Brenda Johnston** continue to work on the Anti-Racism Education Project. We are fortunate have been working with excellent volunteers over the last few months—including **Colleen Bowman, Johanna Dias, Michelle Flores, Rabia Shuaib, Rolandis Vaiculis, Tasha Bobrovitz, Maral Kiani Tari, Monica Cheng, Sarah Pander** and others.

## Upcoming Event

### International Human Rights Day Commemoration

November 29, 2011

University of Calgary

2370 Murray Fraser Hall

11:45 am to 1:45 pm

### Corruption and Human Rights:

What are the major international instruments aimed at corruption, and how well is Canada doing in living up to its international obligations?

The need for reform of the *Corruption of Foreign Public Officials Act*

*Speakers: Janet Keeping, Chumir Foundation*

*RCMP Anti-Corruption Unit, representative*

*Milos Barutciski, Transparency-International Canada*

Greetings from the Alberta Human Rights Commission

Civil Liberties Award

light lunch served

for more information call (403) 220-2505

### Centrepiece

c/o

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Alberta Civil Liberties Research Centre

## Excerpt on transgendered/transsexual rights from our upcoming publication, *LGBT Rights: Climbing the judicial steps to equality*

by Melissa Luhtanen, J.D.

Canadian laws regarding lesbian, gay, bisexual and trans-identified (LGBT) individuals and couples have drastically changed in the past twenty years. After same-sex marriage rights became a reality in early 2000, many people thought that human rights and equality for LGBT people and same-sex couples had been achieved. However, this perception does not play out in a detailed examination of the law, policies and accessing legal resolutions. In addition, same-sex marriage did not change the fact that the laws protecting trans-identified ("trans") people still lag far behind those for LGB individuals.

### **Trans Human Rights**

Some key issues in the field of trans human rights center around what stage trans persons are at in their actual physical transition. Legislation and policy (see for instance, policies pertaining to identification and changing one's gender on driver's licenses, birth certificates, etc.) seems to recognize rights for trans people who have had some form of operation or hormone treatment, but ceases to acknowledge a trans person who has not had some form of gender reassignment surgery. Many trans people have not had this surgery. This stems from a variety of reasons: they are too early in the process and still doing the real-life test, (under the Benjamin Standard a trans person is required to go through a real-life test before they can undergo certain surgeries. This involves living in the gender they identify with at work, with family and/or with friends, for a period of 3 to 12 months), operations are expensive and there are few

facilities that conduct them, (no facilities for genital surgery exist within Alberta, so patients must fly out of province for these), the operation for female-to-male trans men is still considered by some provinces to be experimental, or (for some trans people), they are happy living in their identified gender without having an operation to alter physical body parts.

A key issue for trans people is whether they are permitted to use bathrooms and change-rooms as per their identified gender. Only a couple of lower court decisions have addressed this problem. For instance, in *Ferris (Ferris v Office and Technical Employees Union, Local 15, [1999] BCHRTD No 55)* an MTF (male-to-female trans person who was born male but identifies as female) transsexual woman was employed for 20 years by the same company. A coworker complained that she should be using the men's washroom. The union did not investigate the situation properly and did not fight against the company's treatment of Ms. Ferris. Expert evidence in front of the Tribunal noted that trans people are particularly vulnerable to discrimination. This kind of disrespectful treatment takes an emotional toll on trans people. Refusing the use of the women's washroom had a detrimental effect on Ms. Ferris and challenged her identity as being truly a woman. The Union was found to have discriminated against Ms. Ferris.

Another case that addressed the issue of using gendered washrooms happened in a nightclub, *Sheridan v Sanctuary Investments Ltd, [1999] BCHRTD No 43, 33 CHRR D/467 (BC Trib)*, when a male to female (MTF)

trans woman was refused use of the women's washroom. The British Columbia Human Rights Tribunal found that this was discriminatory treatment. A doctor speaking about trans rights said that using the appropriate washroom was "significant" in the identity of a transsexual person.

Both of these cases are tribunal decisions that have not received as much press and do not carry the same amount of legal weight as higher court decisions. Many workplaces, bars, health clubs and schools have not yet thought about the human rights issues of trans people who need to use on-site washrooms and change-rooms. Adults can often navigate their way through these issues by using single non-gendered washrooms or, if they easily pass in their identified gender, using a washroom without being noticed. However, the difficulty of having to find a single washroom space or hoping one will not be recognized can add an additional stress to a trans persons' everyday lives, and especially during the time they are in the real-life test and do not have identification to support their gender identity.



Becky Andres at her Call to the Alberta Bar on August 18, 2011. Congratulations!

- *Insite*, continued from page 1 including an on-site on-demand detoxification centre. The evidence also indicated that Insite has saved lives and improved health without increasing the incidence of drug use and crime in the surrounding areas. The Vancouver police, the city and provincial governments support Insite's program.

Before the initial exemption had expired, Insite formally applied in 2008 for an exemption. The Minister had granted temporary extensions in 2006 and 2007, but indicated he had decided to deny the formal application (*Insite*, para 121). Insite supporters (PHS Community Services Society, Dean Edward Wilson, Shelly Tomic, the Attorney General of British Columbia and others) commenced legal action in an effort to keep it open. The Vancouver Area Network of Drug Users (VANDU) cross-appealed, asking for the exemption from application of s. 4.1 of the CDSA to all addicted persons, not merely those who sought treatment at supervised injection sites.

The Trial Judge found that the application of sections 4(1) and 5(1) of the CDSA violated the claimants' rights under *Charter* s. 7 (right to life, liberty and security of the person). He granted a constitutional exemption to Insite, permitting it to continue to operate free from federal drug laws. The British Columbia Court of Appeal (BCCA) dismissed the federal government's appeal, holding that the doctrine of interjurisdictional immunity applied to Insite (*Insite*, paras 26-35). The Supreme Court of Canada (SCC) (per Justice McLachlin C.J., concurred with by Justices Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell) upheld the constitutionality of the federal legislation, but also ordered that, based on a violation of *Charter* s. 7, the Minister of Health granted an exemption forthwith to Insite under s. 56 of the CDSA.

On the issue of the constitutionality of the criminal prohibitions on possession and trafficking, the SCC held that the applicable provisions of the CDSA were, in pith and substance, valid exercises of the federal criminal law power (jurisdiction) (*Insite*, para 52). They had an incidental effect on the regulation of provincial health institutions, but this did not render them invalid constitutionally (*Insite*, para 51). The CDSA did not contain an express or implied limitation from application to provincial programs designed to advance the public interest (*Insite*, para 56).

The province had successfully argued at the BCCA that it was jurisdictionally immune from federal interference. The doctrine of interjurisdictional immunity is usually applied to limit the application of a provincial law that is general to

a federal law. It was rather unique (but not unheard of) to argue that it should be used to limit the application of a federal law to a provincial undertaking. The SCC held that decisions about what treatment could be offered in a provincial health facility did not constitute a protected core of the provincial power of legislating about health care, and thus render it immune from federal interference (*Insite*, para 66). The SCC noted that the doctrine of interjurisdictional immunity is narrow, and based on the premise of watertight cores with respect to areas of jurisdiction—this flows against the tide of the more flexible constitutional concepts of double aspect and cooperative federalism. It was also common ground that absent a constitutional immunity, the federal law would trump any provincial legislation or policies that conflicted with it (*Insite*, para 72).

The SCC's conclusion on the issue of division of powers is a model of judicial restraint. The judges (all nine of them) interpreted the federal legislation in a way that upheld its constitutionality. However, the claimant's lack of success on this issue did not end their claim that the law deprived them of their individual rights under *Charter* s. 7. The SCC noted that a validly enacted federal law (under s. 91 of the *Constitution Act*, 1867) can in purpose and effect deprive an individual of his or her rights guaranteed by the *Charter* (*Insite*, para 82).

*Charter* s. 7 provides:

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.

The SCC upheld the constitutionality of s. 4(1) of the CDSA. Section 4(1) directly engages the liberty interests of health professionals who provide services at Insite (they face imprisonment under ss. 4(3) and 4(6) of the CDSA), and the right to life, liberty and security of the person of the clients of Insite. However, because the Minister has the power to grant exemptions from s. 4(1) for medical, scientific or public interest reasons, the engagement of these *Charter* s. 7 rights is done in accordance with the principles of fundamental justice. The SCC noted that the exemption "acts as a safety valve that prevents the CDSA from applying where it would be arbitrary, overbroad or grossly disproportionate in effects" (*Insite*, para 113).

In addition, the SCC held that the prohibition against trafficking under s. 5(1) of CDSA would not constitute a limitation on the claimants' s. 7 rights because trafficking charges would not apply to the Insite staff (*Insite*, paras 95-96).

The SCC next discussed the constitutionality of the Minister's exercise of discretion in his application of the law. The conclusions reached on this issue have resulted in expression of concerns about judicial activism. The SCC said that the Minister's discretion to grant an exemption was not absolute, and had to be exercised in conformity with the *Charter* (*Insite*, para 117). The federal government argued that it had not yet made a decision about whether to grant the extension to Insite's exemption, but the SCC found that the Minister had effectively refused it (*Insite*, paras 119-125). When analyzing the grounds for the Minister's refusal, the SCC noted that it was not acceptable for the Minister to "simply deny an application for a section 56 exemption on the basis of policy simpliciter" (simply on the basis of policy, without any condition) (*Insite*, para 128). The Minister had to make a decision in accordance with the principles of fundamental justice because individuals' *Charter* s. 7 rights were at stake. Laws that are arbitrary are recognized as being contrary to the principles of fundamental justice, although there is some dispute in case-law as to the correct meaning of arbitrary. The SCC found that the Minister's refusal to grant the exemption was arbitrary, no matter which meaning of the term was used (*Insite*, para 132). The refusal to grant the exemption undermined the CDSA's objectives of public health and safety (*Insite*, para 131). The SCC also found that the effects of the Minister's refusal and the corresponding denial of services to Insite clients to be "grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics" (*Insite*, para 133). The court noted that its findings that the actions were arbitrary and their effects grossly disproportionate to the benefits, resulted in the application of the law being contrary to the principles of fundamental justice under *Charter* s. 7 (*Insite*, para 136).

The SCC also said that if the *Charter* s. 1 analysis were required, the *Charter* violation could not be saved by s. 1.

The SCC held that since the concern involves a governmental decision, *Charter* s. 24(1) permits the court to fashion the correct remedy. In this case the Minister was ordered to "grant an exemption to Insite under s. 56 of the CDSA forthwith" (*Insite*, para 150). The court also noted that, given the seriousness of the infringement and the grave consequences that might result from a lapse in Insite's exemption, a declaration that the Minister erred in refusing the exemption would be inadequate (*Insite*, para 148).

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- *Insite*, continued from page 4

# What are the implications of multiculturalism?

By Brian Seaman, B.A., LL.B.

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No Statues of Liberty stand in Vancouver or Halifax to welcome boatloads of refugees fleeing war, famine or persecution, or immigrants lured by dreams of a better life. However these two cities on opposite coasts of this vast land have also seen their share of immigrants and refugees throughout history. From Canada's pre-Confederation days as a fledgling, sparsely populated colony that was the target of American invasion in 1812 through its post-Confederation trials of depressions and wars, Canada has evolved to its present place in the world as a multicultural, rights-based society rooted in the rule of law.

When the political leaders of what was then British North America met throughout the 1850s and early 1860s to discuss what form an independent Canada with close ties to Britain would take, the prospects for a new North American nation could not have been shakier. The Fenian Brotherhood – a group of radical Irish-Americans that wanted to foment civil disorder in British North America – was raiding Canadian border settlements. American squatters were crossing the 49<sup>th</sup> Parallel into what is now western Canada and staking claims to unoccupied land. Expansionist-minded U.S. nationalists thundered about how it was America's *manifest destiny* that the thinly populated territories to their north would one day be American soil. The Canadian Fathers of Confedera-

tion looked south to the bloody civil war their neighbours had just fought and feared imminent invasion by the victorious Union Army. The partnership and power-sharing arrangements that the French-speaking and English-speaking inhabitants of early Canada were finally able to cobble together in 1867 did not result from any sense of destiny. There was no Canadian equivalent to Prussia's Otto von Bismarck calling for, rather than a greater Germany for all Germans, a greater Canada from sea to sea for all Canadians. No, this early Canada was a decidedly more mundane affair created out of necessity by unlikely political bed-fellows reluctantly brought to national union out of fear.

The pragmatic compromises that political leaders of the newly minted Canada had to make, coupled with the uniquely bilingual and bicultural nature of the country, were some of the early features that would distinguish Canada from its more quarrelsome, extremist southern neighbour. Successive national governments pursued nation-building policies that included constructing a railway across thinly populated western territories to link British Columbia with the rest of Canada in the east. For the first five decades of Canada's existence, policies encouraged waves of immigrants from Eastern Europe to settle in western Canada, thus ensuring that demographics tipped there in Canada's favour as largely poor eastern European

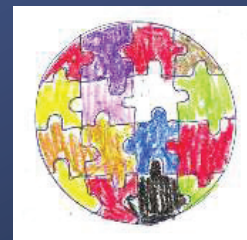
settlers gratefully welcomed the cheap land and the citizenship their new country offered. The tens of thousands of hungry, landless Irish peasants who fled Ireland earlier during the Great Potato Famine also left a lasting and positive mark on the country's social and political landscape.

From 1971, when Canada became the first nation in the world to adopt an official policy of multiculturalism to encourage immigration from non-European source countries, Canada has evolved to the point where it accepts, per capita, the largest number of immigrants in the world. Although the process of cultural adaptation has not been without challenges, on balance Canadian society is richer and stronger because of its cultural, ethnic and religious diversity. Among other things, there does seem to be an emergent common civic culture of a "live and let live" attitude and a respect for differences in the public square. Otherwise put, there's a common civic culture for that amorphous mass of us who, in spite of superficial differences (so often ascribed too much importance by the more strident among us) by dint of where we live, the party we vote for or the religion we practice or don't, will ensure that the Canada we know and love, fractious though it may sometimes seem to outsiders who were not raised in a democratic culture, will continue to thrive in the 21<sup>st</sup> century.

***See conference information on the next page.....***

# Multiculturalism or Interculturalism?

## What are the Implications for Albertans and Canadians?



**November 10-11, 2011**

**University of Calgary**

**Room 2370, Murray Fraser Hall, Faculty of Law**

Riots in Europe. Hijabs banned in Quebec. "Redneck" Calgary elects a Muslim as mayor.

We live in interesting times. Join us as Canadian and European experts meet to discuss what multiculturalism and interculturalism mean, and how we can live together. Questions for discussion include:

- Does multiculturalism mean "anything goes"?
- How important is language for personal identity?
- What are "Canadian values" anyway?

**Seating is limited, so register early!**

**Early Bird Registration Deadline: October 21, 2011**

**To register: [www.regonline.ca/ACLRCEURAC](http://www.regonline.ca/ACLRCEURAC)**

**For more information contact Brian Seaman**

**[bseaman@ucalgary.ca](mailto:bseaman@ucalgary.ca), ph: 403-220-2505**

A partnership between the Alberta Civil Liberties Research Centre and The European Academy (EURAC), Bolzano-Bozen, Italy



# Cry for me Argentina! The Commercial Sexual Exploitation of Children in South America

By Brian Seaman and Anna Deborah Tomasi

Visitors to South America's spectacular Iguazu Falls say you start to hear the roar kilometres away. The falls – actually a series of 275 individual cascades and waterfalls that drop up to 82 metres into a gorge below – are located along the rim of a crescent-shaped cliff that stretches for nearly three kilometres. The borders of three countries, Argentina, Brazil and Paraguay, meet here. The Iguazu Falls lie at the tip of a strip of Argentinean territory that, on a map, resembles a crooked finger jutting away from Argentina's main landmass, with Brazil to the east and Paraguay to the northwest. Long considered to be one of the world's natural wonders, when United States First Lady Eleanor Roosevelt visited them some time prior to the Second World War, she is reputed to have quipped "poor Niagara." The allusion was to a pair of massive waterfalls more familiar to North Americans: the two Niagara Falls straddling the international border between the Canadian province of Ontario and the American state of New York.

The Iguazu Falls and surrounding area is one of the most renowned natural tourism sites in South America, attracting hundreds of thousands of visitors every year. However the area is also the site of a different kind of traffic. Because of lax border controls, the porous borders in this tri-state region make for a smuggler's dream. There's a steady flow of people and goods; among the blend of cheap electronic goods, jewelry and clothing is an illicit trade in drugs, stolen vehicles and car parts, weapons and even people. Both *INTERPOL* and the *Federal Bureau of Investigation* have identified the Paraguayan city of Ciudad del Este – which lies across the Parana River from Brazil and is joined by the Friendship Bridge – as having a major problem with illicit trade. Some estimates place this underground economy as worth up to five times Paraguay's national economy. Various international intelligence and national security agencies have sug-

gested that some of the proceeds from this illicit trade have been supporting criminal gangs located outside the region, including groups that advocate and practice political terrorism ([http://www.army.mil/professionalWriting/volumes/volume3/january\\_2005/1\\_05\\_4.html](http://www.army.mil/professionalWriting/volumes/volume3/january_2005/1_05_4.html); <http://www.msnbc.msn.com/id/17874369/>). This article focuses on the trafficking of underage minors and children for sexual purposes.

As of the date this article was written, every member of the United Nations, except for the United States and Somalia, had ratified the *United Nations' Convention on the Rights of the Child*. Yet, horrible abuse of children continues, and one of the most heinous examples of this is child sex prostitution and the international trafficking of children for the purposes of sex. According to the United Nations' *International Organization for Migration* (IOM), human trafficking in the tri-state region around the Iguazu Falls chiefly involves women, teens and children. Studies for the IOM have shown that young women are usually trafficked for sexual purposes across the borders for short stays of anywhere from a few hours to a day or two (<http://www.oimconosur.org/>). Research projects have also estimated that roughly 6,000 unaccompanied children and teens cross the Friendship Bridge between Brazil and Paraguay each year. These young people are at risk of being kidnapped and forced into, or otherwise falling into, the sex trade; many of them are illiterate and come from extremely poor families in rural areas. Many of these children and minors have had to flee abuse and violence within their homes and have been obliged to move to the cities of the tri-state region to look for work. The incidence of sexual exploitation is staggeringly high. According to a Brazilian children's advocacy group called *Sentinel* (a Portuguese word that means "sentry" or "guard"), which has an office in the Brazilian border city of Foz do Iguacu, of the 489 children

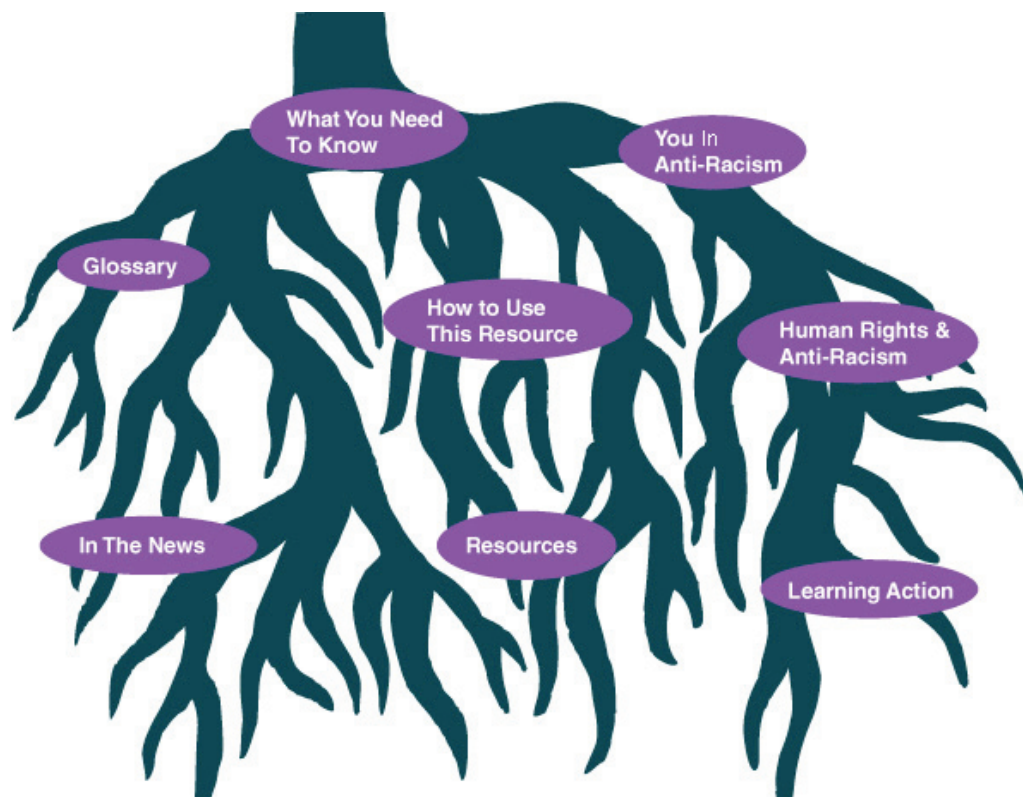
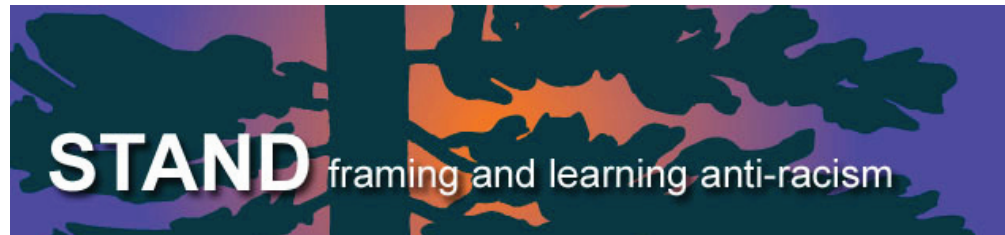
they assisted between the years 2002-07, 410 of them (representing 90% of the girls between the ages of seven to 18) were victims of sexual exploitation. Furthermore, according to Argentinean immigration officers, out of the dozens of girls and young women they assisted between the years of 2004-07 in the border city of Puerto Iguazu, almost all of them were Paraguayan girls or young women who were destined to be shipped to brothels or night clubs in Argentinean cities further south, including Buenos Aires and Cordoba (<http://www.iom.int/jahia/Jahia/media/press-briefing-notes/pbnAM/cache/offonce?entryId=25412>).

Argentina, as a party to both the *Convention on the Rights of the Child* and a protocol called the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, is obligated under international law to implement programs and policies that would inhibit the trafficking of children and under-aged youth. However Argentina continues to be the source of a lot of the trafficking in the region, largely because of a lack of resources to address the problem and because many law enforcement and border control officials continue themselves to be complicit in the trade. A reading of media reports about the commercial sexual exploitation of children and the various reports from United Nations' agencies and non-governmental organizations about the issue reveals that the problem is not lack of awareness. Rather, it is the lack of investigatory and prosecutorial resources and initiatives devoted to rescuing children and minors who are caught up in the trade.

This paucity of resources to address the problem is not just an issue for emerging regional economic powers like Brazil and Argentina, both of which still struggle with widespread poverty. There is also the failure of wealthier countries within the G20 (such as Canada) to themselves allocate

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## New ACLRC Website Resource Available: www.cared.ca —please visit

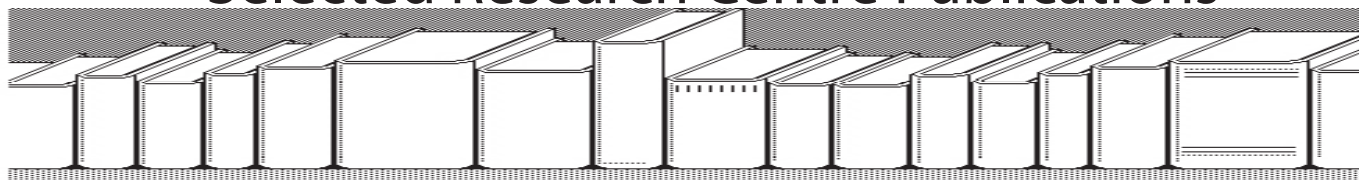


The criticism is that this case “forged a new means to strike down laws if there is scientific or statistical evidence showing that a regulation worsened the danger that an individual or group faces” (Makin). The court was accused of crafting a new test: measuring the harm a provision creates against the harm prevented. Kirk Makin indicates that this will elevate scientific evidence over laws that are arbitrary or disproportionate. I am not sure that this is a negative outcome. It seems that judges are in the business of weighing the purpose and effect of government laws and actions when they determine whether they are constitutional. In this case, they determined, based on the evidence and arguments before them, that the effect of not providing an exemption would be an unjustifiable violation of some individuals’ *Charter*, s.

7 rights. It doesn’t matter whether the individual judges think that the Insite project is a good or bad policy, which could then influence their decision (and thus leave them open to an accusation of judicial activism); rather, the decision was based on evidence of the harm that would result from the withholding of the exemption. They are simply performing the interpretation task that they have been granted by Parliament with the implementation of the *Charter*. I hope that they will not allow the accusation of judicial activism to prevent them from doing their jobs in future cases.

Note: For a related discussion of this case see Jennifer Koshan’s blog on *R v Pawlowski* [<http://ablawg.ca/2011/10/04/leave-to-appeal-granted-in-street-preacher-case/>]

# Selected Research Centre Publications



**Seniors and the Law: A Resource Guide 3rd Edition** In a question-answer format, provides an overview of issues facing seniors, including abuse, mental health, personal directives, powers of attorney and consumer protection. Includes a glossary and list of senior-serving agencies in Alberta. 150+ pages. Available as a PDF on website. 2000. Updated 2010. ISBN #1-896225- 28-4 (\$25 + s/h)

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# Nominations Wanted for ACLRC's Civil Liberties Award Deadline November 11th!

Do you know an Albertan who has demonstrated outstanding leadership in promoting civil liberties and human rights through legal research, education or advocacy?

Please provide us with a letter, email or fax in which you provide details about why your chosen person should receive our Civil Liberties Award. The letter must be received by November 11, 2011. The award will be given at a special ceremony on November 29th.

*Past award recipients include: Anna Pellatt (in memoriam), Gary Dickson QC, Vilma Dawson, Dr. Hussein Amery, Barbara Graff, Dr. Ed Webking, Janet Keeping, Paula Simon, and Judy Shapiro.*

- Argentina, continued from page 7

adequate resources to investigate so-called "sex tourists" and then bring them to justice within their domestic legal systems. Countries rich or poor are failing in their own fashion to live up to their obligations under international law. More than 20 years after the international community brought its focus to the universal rights of children when the *UN Convention on the Rights of the Child* came into force, many of the world's children continue to live lives that are anything but safe and in accordance with the values and requirements set out in that *Convention*. In addressing the situation in Argentina, we are in no way suggesting that Argentina's situation is an isolated, aberrant case: child trafficking for sexual purposes or for cheap labour is an international problem. Argentina is, however, a well-documented, significant destination for "sex tourists," the overwhelming majority of who are adult males from North America and Europe (<http://www.globalmarch.org/resourcecentre/world/argentina.pdf>). A Canadian sociologist named Richard Poulin who has studied the international sex trade says that the trade has grown larger and more complex over the last two decades. According to Poulin, human traffickers, all of whom are connected to networks of organized criminal gangs in some way, are responsible

for transporting around anywhere from one to four million women and children every year, with the majority of these people destined for the sex trade. "They are being treated as merchandise for the sex industry. They are new and raw resources," Poulin says, in a degrading trade that he has called the "feminization of migration" (<http://www.cbc.ca/news/world/story/2009/06/18/f-rfa-watson.html>).

Outside of the minority of countries which have well-entrenched systems of rule of law the world is still very much a Hobbesian place. The protection accorded to children on paper is not the reality. And the ugly reality is that the customers for the most vulnerable among us come from those very countries that have rule of law; Canada among them. The trafficking of children for sexual purposes reveals an international economic system of supply and demand at its basest and most amoral: those with a need that would land them a prison sentence and social shunning in their home countries if caught fly to places where children and young people are sold by their own families into a shadowy world that everyone knows exists yet continues in spite of the best-intentioned of laws and international conventions.

Anna Deborah Tomas is an LL.M. student at the *Centre for Applied Human Rights*, University of York (U.K.).

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