1When Knowledge Translation Falls Short: Could Legal Proceedings be a New Frontier of Evidence-Based Drug Policy in Canada?

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The role of ‘evidence-based medicine’ in improving health services and health outcomes is widely recognized in the realm of health care policy.[1, 2] There is now growing recognition, particularly in the area of illicit drug policy and HIV prevention, that gaps between research evidence and public policy are resulting in suboptimal program development and delivery, and as a result, a failure to protect the health of marginalized groups including people who use injection drugs.[3-5] This has prompted mounting interest in the use of knowledge translation methods to help close the gap between research evidence and policy, and program delivery, to more effectively respond to the harms associated with problematic drug use.[6] By making research findings more accessible to policy-makers and affected communities, knowledge translation tools are promising mechanisms to support the development of public policies based on the best available scientific evidence.

Indeed, health researchers are devoting more attention and efforts to identifying the most appropriate strategies for translating health research to policy-makers. One key finding that has emerged from these studies is that policy-makers and community members generally do not access academic journals and are more receptive to research in the form of plain language summaries and synthesis reports.[7-10] Although the scientific rigor and quality of research is an important factor in the uptake of research findings, establishing networks between policy-makers and scientific researchers is

also identified as a principal facilitator in the adoption of research in public policy.[11]

One area where knowledge translation approaches have been implemented in an effort to advance evidence-based drug policy has been with the scientific evaluation of Vancouver's pilot supervised injection facility called '*Insite*'. In order to operate, the injection facility was granted an exception from Canada's *Controlled Drug and Substance Act*, under the premise that it was a medical experiment and would undergo extensive evaluation. When the injection facility opened in 2003 a rigorous scientific evaluation was established to determine if there was evidence of positive health and community benefits as well as evidence of any adverse health and community impacts. In the first five years of the scientific evaluation over 30 studies were published in peer-reviewed journals demonstrating that the facility was associated with a range of positive health and social benefits and was not associated with adverse impacts.[12] Although this body of evidence would be sufficient to justify the expansion of just about any other public health program, because of the controversial nature of supervised injection facilities, *Insite* was held to a much higher standard and continued to be scrutinized by the Federal Government.[13]

In an effort to address this scepticism, a multipronged knowledge translation strategy was implemented. This was undertaken to ensure that the results of the scientific evaluation of the facility were brought to the attention of all relevant stakeholders, ranging from high-level policy-makers

and advisors to grassroots community groups. One component of this strategy involved extensive media engagement, which resulted in scientists participating in hundreds of media interviews over the course of the evaluation. Scientists further engaged with policy-makers and the public by delivering dozens of presentations to a wide range of audiences. Another aspect of the strategy involved synthesising the research into reader-friendly summaries, both brief and lengthy versions, and distributing these, particularly to policy-makers. For example, scientists created a plain language report summarizing the first five years of research findings and in the summer of 2009 mailed a copy of this report to every federal Member of Parliament. A webpage dedicated to posting evaluation studies and reader-friendly summaries further facilitated the dissemination of research results.

Despite evidence of the apparent success of these knowledge translation initiatives and public acceptance of the evaluation research results, indicated by public opinion polls[14] and endorsements by medical bodies,[15] elected officials[16] and police,[17, 18] the Federal Government remained fiercely opposed to the program. It became evident that the basis of their opposition was ideological, that scientific evidence was irrelevant in this policy environment, and that conventional knowledge translation strategies were likely to have little impact.[19]

To prevent the Federal Government from closing the facility, two community based non-profit organizations representing the interests of injection drug users, as well as two individual plaintiffs, launched a lawsuit

against the Attorney General of Canada and federal Minister of Health.[20] One of the primary arguments in the case was that people who use injection drugs have a constitutional right to access *Insite* because of its importance as a health care service that reduces the harms of injection drug use. Another argument was based on the doctrine of interjurisdictional immunity. Specifically, given that the Province has constitutional power with respect to health care, it was argued that because *Insite* is a health care service it falls under the jurisdiction of the Provincial Government and its operation should not be subject to Federal interference. [20] In the process of the court case, researchers were called upon to translate their research findings in the form of sworn affidavits.

After lengthy proceedings, in May 2008 the BC Supreme Court dismissed the plaintiffs' claims that interjurisdictional immunity applied, but ruled that the current *Controlled Drugs and Substances Act,* to the extent that it provides the Federal Government with the power to close the facility, is in violation of the *Canadian Charter of Rights and Freedoms*.[21] The courts ordered the Canadian Federal Government to amend the relevant sections of the legislation to allow for the continued operation of *Insite*. This decision represented an important step forward for evidence-based drug policy and the courts effectively became the one arena where scientific evidence and constitutional rights trumped ideology. Although the ruling was not directly concerned with implementing evidence-based drug policy, the decision hinged on scientific research to establish that the program offered health

benefits to injection drug users. This decision raises the question "can courts be a new frontier for the establishment of evidence-based drug policy?" - especially in those instances when policy-makers systematically ignore scientific evidence. Although it is undeniable that the BC Supreme Court decision has already had a significant impact on the course of *Insite's* history and prevented its eminent discontinuation, the power of the ruling and implications for the advancement of evidence-based drug policy remain uncertain.

Far from being absolute, *Charter* rights have limitations, some of which are embedded in the *Charter* itself. Specifically, section 1 allows Parliament and provincial legislatures to limit *Charter* rights if it can be "demonstrably justified in a free and democratic society". Furthermore, Parliament and provincial legislatures can use the notwithstanding clause provided by section 33 to override *Charter* protections for limited periods of time. Although legislative bodies have invoked sections 1 and 33 (*Ford v. Quebec*, [1988] 2 S.C.R. 712*; R. v. Daviault*, [1994] 3 S.C.R. 63), it is rare that these provisions are used to reverse judicial rulings. More commonly, Charter-based judicial decisions have been described as sparking a sort of 'dialogue' between the courts and legislative bodies whereby a court's ruling is responded to with new legislation that addresses the civil libertarian concerns of the court, but typically maintains the intent of the original law.[22] However, in other instances, most notably in *R. v. Morgentaler* ([1988] 1 S.C.R. 30), where the Supreme Court of Canada ruled

that the abortion provision in the Criminal Code of Canada was unconstitutional, judicial decisions have fundamentally changed public policy.

In the case of the *Insite* decision the response by the Federal Government has been very oppositional. Immediately after the announcement of the 2008 court decision the Federal Government of Canada appealed the ruling that sections of the *Controlled Drugs and Substances Act* violated *Charter* rights. Conversely, the plaintiffs in the original case cross appealed the dismissal of the interjurisdictional immunity claim. In January 2010, Justices from the BC Supreme Court of Appeals ruled by a 2-1 majority that the doctrine of interjurisdictional immunity did indeed apply in the case; the implications being that the *Controlled Drugs and Substances Act* could not interfere with the operations of *Insite* or hinder its ability to provide health care to people who inject drugs. Although the ruling in favour of the application of the doctrine of interjurisdictional immunity made a ruling on the *Charter* issue unnecessary, the Justices provided their assessment of the arguments pertaining to this aspect of the case. With the same 2-1 majority, the Justices concluded that the original ruling on the *Charter* issue was correct, and that aspects of the *Controlled Drugs and Substances Act* were unconstitutional.[23] Most recently, the Federal Government has announced that it will now appeal this decision to the Supreme Court of Canada.[16]

Given the multiple dimensions of the case, it is difficult to anticipate all the possible outcomes of a trial in the Supreme Court of Canada. It is also difficult to predict what course of action the Government of Canada will pursue in reaction to a ruling from the Supreme Court of Canada. For instance, if the interjurisdictional immunity ruling is struck down but the *Charter* ruling is upheld one possible response on the part of the Federal Government would be to amend the *Controlled Drugs and Substances Act* in a manner that would allow for the unconstrained legal establishment of other medically supervised injection facilities across Canada. Conversely, attempts could be made to limit or suspend *Charter* protections and preserve the current *Controlled Drugs and Substances Act* in its entirety, which could threaten the existence of *Insite* and continue to place legal restrictions on the establishment of any additional supervised injection facility.

Although legal proceeding are a potentially promising vehicle for advancing evidence-based drug policy, like knowledge translation efforts, there are no guarantees that they can effect substantial change. Nevertheless, given the health and social harms that are resulting from persistent gaps between evidence and practice in the areas of illicit drug policy and HIV prevention, efforts to support even incremental advancements must be pursued and supported.

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