Sleeping Rough and Shooting Up: Taking British Columbia's Urban Justice Issues to Court

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Canada sits in a different spot than thirty years ago when the *Canadian Charter of Rights and Freedoms*[1] was proclaimed amid grand hopes for a society marked by the key liberal values enshrined in that document. Today, Canadians are no longer a people with appropriate confidence in a "kinder, gentler" national soul. Poverty is more than ever a critical issue,[2] highlighting desperation and deprivation surrounded by privilege and excess.[3]

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 In 2010, three million people, about 9 percent of Canadians, were below the after-tax Low-Income Cut-Off – Canada's unofficial low income measurement. Included in this figure are 546,000 children. Statistics Canada, "Incomes of Canadians, 2010" at 1, online: The Daily www.statcan.gc.ca.

3 For example, food security is a real issue across Canada, and particularly for indigenous peoples. The United Nations Special Rapporteur on the right to food made the following statement in May 2012: "A growing number of people across Canada remain unable to meet their basic food needs. In 2007/2008, approximately 7.7 per cent of households in Canada reported experiencing moderate or severe food insecurity. Approximately 1.92 million people in Canada, aged 12 or older, lived in food insecure households in 2007/2008 and a staggering 1 in 10 families, 10.8 per cent, with at least one child under the age of six were food insecure during the same period." Olivier De Schutter, Special Rapporteur on the right to food, "Visit to Canada from 6 to 16 May 2012 – End-of-mission statement," online: Office of the High Commissioner for Human Rights www.ohchr.org.

Homelessness has emerged as a seemingly intractable urban blight.[4] Our nation ranks as one of the more unequal among western countries.[5] This inequality grows and the chasm between the "haves" and the "have nots" yawns, increasingly evident in indicators of social dysfunction, injustice, and anomie.[6] The triumph of neo-liberalism, and its attendant vision of the sturdy, calculating individual, ground many of these developments. Theorists chart the 'hollowing out' and, then, the 'filling in' of the state as part of neo-liberal policies.[7] The role of government is both reduced and expanded to serve the "rational, entrepreneurial, economic individual."[8] The idea of 'social' citizenship is eviscerated: social issues are viewed as essentially economic problems and the economic order reaches to include all human activities within its logic. The state is no longer offered by our political elite as a resource for social justice and a facilitator of substantive equality and freedoms. The citizen stands alone, free to succeed or fail on his or her own.

Yet, against this backdrop and, in fact, because of it, collective social and political resistance surges. This is despite funding cuts and political disparagement of civil society organization and voice. The *Charter* has been the focus of much of this activism, with particular attention paid to sections 15 and 7 of the *Charter*. As things have worsened, as governments have backtracked on social responsibilities and promises, the courts have been used in the attempt to soften or moderate this harsher Canada.

British Columbia is no stranger to such *Charter* cases. Indeed, some of the most notable *Charter* cases of the past thirty years have their origin in

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4 A 2007 report issued by the then United Nations Special Rapporteur on Adequate Housing, Miloon Kothari, stated that: "The Special Rapporteur remains concerned about the significant number of homeless in all parts of the country . . . It has been stated that the widespread and rapid growth of homelessness in Canada since the mid-1990s is unprecedented since World War II." (Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari*, UNGAOR, 10th sess, UN Doc A/HRC/10/7/Add.3 (2009) at paras 53–54.

5 Armine Yalnizyan, *The Rise Of Canada's Richest 1%* (Ottawa: Canadian Centre for Policy Alternatives, 2010) online: Canadian Centre for Policy Alternatives www.policyalternatives.ca; "Canadian Income Inequality: Is Canada becoming more unequal?" online: The Conference Board of Canada www.conferenceboard.ca.

6 See, for example, Richard G Wilkinson & Kate Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (London: Allen Lane, 2009).

7 Luke Desforges, Rhys Jones, & Mike Woods, "New Geographies of Citizenship" (2005) 9:5 Citizenship Studies 439 at 440.

8 Leslie Kern, *Sex and the Revitalized City: Gender, Condominium Development, and Urban Citizenship* (Vancouver: UBC Press, 2010) at 6 [Kern].

British Columbia.[9] This is no wonder: British Columbia is a province in which the major social justice challenges of Canada are clearly apparent — particularly in that province's two major cities. Both Vancouver and Victoria are marked by disparities of income and wealth, issues of inadequate and unaffordable housing, the impact of colonization on indigenous peoples, and the presence of ill-health, poverty, homelessness, and marginalization in a country of tremendous affluence. These cities have active communities of civil society groups strategizing about how to make use of the Constitution to achieve social justice.

This piece takes up two relatively recent cases shaping the current constitutional social justice landscape in British Columbia. One of these cases — *Victoria (City) v Adams*[10] — sits stopped at the level of the Court of Appeal.[11] The other — *PHS Community Services Society v Canada (Attorney General)* (*Insite*)[12] — concluded with a judgment from the Supreme Court of Canada. This chapter makes a familiar observation: the cases of *Adams* and *Insite* highlight and reinforce the importance of context to effective *Charter* analysis. However, my argument has a twist: it urges a larger and spatially-situated context for these cases. I emphasize the importance of both the urban context of many modern social justice struggles and the acknowledgment that rights have spatial dimension and influence.

Contextualization of the claimants' circumstances is a key prerequisite to recognition of social justice claims in *Charter* litigation. At its fullest, contextualization allows revelation of the systemic factors central to shaping the course of individual opportunity and experience. Contextualization is necessary to capture the dense interpellation of social facts and relations, and the significance of this connection for comprehending the harm at issue. *Adams* and *Insite* make this clear. But, the clarion call to contextualization, a constant refrain from progressive scholars and activists,

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9 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78; *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519; *Withler v Canada (AG)*, 2011 SCC 12.

10 *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams* (BCCA)], on appeal from *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams* (BCSC)].

11 The Court of Appeal decision was not appealed.

12 *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 [*Insite* (SCC)], on appeal from *PHS Community Services Society v Canada (AG)*, 2010 BCCA 15 [*Insite* (BCCA)], on appeal from *PHS Community Services Society v Attorney General of Canada*, 2008 BCSC 661 [*Insite* (BCSC)].

needs geographic enrichment.[13] By so elaborating, one can apprehend more fully the fundamental lessons of substantive equality and justice that must underpin every right in the Constitution.

A. The Cases

The parallels between *Adams* and *Insite* are many and provocative. Both cases present a legal moment in a more complex social and political struggle over the rights and life chances of groups significantly marginalized and disadvantaged in Canadian society, generally, and in the urban life of the cities at issue, in particular. In this sense, then, both *Adams* and *Insite* are importantly part of larger, and longer, political strategies. The cases neither begin nor end political struggle, but are apiece and interact with other tactics, of different duration.

Argument in *Adams* and *Insite* raised constitutional issues around section 7 of the *Charter*. This section of the *Charter* sets out constitutional guarantees for the rights of life, liberty, and security of the person.[14] Similar argumentative structure was accepted in relation to this section in each of the cases by the courts. And, ultimately, in both cases, the rights claimants were successful — a noticeable departure from the usual fate of low-income claimants under our *Charter*.[15]

Of course, there are also differences between the cases. The *Insite* case pits levels of Canadian government against each other, engaging constitutional judgments about federalism as well as about individual rights. The *Adams* case is structured more formally as a claim of individual rights, with no federalism issues involved. As well, *Insite* focuses on criminal law prohibitions, while the state action at issue in *Adams* is simply a municipal by-law injunction. But the similarities, I argue, are stronger than these factual disparities. Both cases situate a very marginalized and dispossessed group in the urban environment in key relation to fundamental rights under the *Charter*.

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13 See for example Dianne Pothier, "But It's for Your Own Good" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 40 at 40–56 [Pothier, "But It's for Your Own Good"] and Martha Jackman, "Reality Checks: Presuming Innocence and Proving Guilt in *Charter* Welfare Cases" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 23 at 23–39.

14 Section 7 reads: "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" (*Charter*, above note 2, s 7).

15 See for example *Gosselin v Québec (AG)*, 2002 SCC 84.

1)*Victoria (City) v Adams*

Canada faces a homelessness crisis. The only member of the G8 without an ongoing national housing strategy,[16] Canada has more than a million people facing housing insecurity, with an estimated 150,000 – 200,000 homeless.[17] This is despite the fact that Canada has signed onto the United Nation's *International Covenant on Social, Economic and Culture Rights* which recognizes the "right of everyone to an adequate standard of living . . . including adequate . . . housing".[18] In particular, British Columbia faces its own housing emergency, with provincial government neglect of the creation of new social housing stock.[19]

The *Adams* case involved a constitutional challenge under section 7 of the *Charter* to two City of Victoria bylaws: the *Parks Regulation Bylaw No. 07-05*[20] and the *Streets and Traffic Bylaw No. 92-84*.[21] These bylaws, at

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16 The federal House of Commons recently defeated on second reading Bill C-400, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 1st Sess, 41st Parl, 2012. This was the second private member bill of the same name on this subject before the House. The first, Bill C-304, elapsed upon dissolution of the House for the 2011 election (*An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 2nd Sess, 40th Parl, 2009). The Centre for Equality Rights in Accommodation has an application before the Ontario Superior Court claiming that federal and provincial failures "to implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing" violate ss 7 and 15 of the *Charter* (*Tanudjaja et al v Attorney General (Canada)*, Court File No CV-10-403688 (Ont SCJ) (Notice of Application, filed 26 May 2010), online: The Social Rights Advocacy Centre www.socialrights.ca.

17 Wellesley Institute, Precarious Housing in Canada (Toronto: Wellesley Institute, 2010) at 4, online: Wellesley Institute www.wellesleyinstitute.com. John Irwin, *Home Insecurity: The State of Social Housing Funding in B.C.* (Ottawa: Canadian Centre for Policy Alternatives, 2004) at 7, online: Canadian Centre for Policy Alternatives & Tenant's Rights Action Coalition www.policyalternatives.ca [Irwin]. See also, Toba Bryant, "The Current State of Housing in Canada as a Social Determinant of Health" (2003) 24:3 Policy Options 52; Ontario Human Rights Commission, *Right at Home: Report on the consultation on human rights and rental housing in Ontario* (Toronto: Ontario Human Rights Commission, 2008) at 7 [*Right at Home*].

18 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, art 11.

19 Irwin, above note 17 at 7.

20 City of Victoria, by-law No 07-059, *Parks Regulation Bylaw,* ss 13(1), (2), 14(1), (2) & 16(1) [*Parks Regulation Bylaw*]. City of Victoria, by-law No 92-84, *Streets and Traffic Bylaw*, ss 73(1) and 74(1) [*Streets and Traffic Bylaw*].

21 *Streets and Traffic Bylaw*, above note 20, ss 73(1) and 74(1).

the time of the trial, prohibited taking up temporary abode in a public space.[22] In practice, this meant a ban on erecting any form of overhead protection while sleeping outside on public property, even on a temporary basis, at all times.[23] Thus, putting up tents, tarps, or even sheltering under cardboard boxes for only a few hours on public property while sleeping was forbidden.

The municipal bylaws at issue in *Adams* were an example of "roll-out neoliberalism." This term is used to refer to "the purposeful construction and consolidation of neoliberalized state forms, modes of governance, and regulatory relations".[24] It captures the positive actions of neo-liberal governance that span the neoliberal state, as opposed to privatization or "roll-back neoliberalism".[25] Across the continent, cities have, as part of this new form of governance, proactively targeted the ways in which low-income or homeless people necessarily use public spaces. Protest response to these forms of municipal street legislation is also politically pointed and prevalent. Nick Blomley, a Canadian geographer, reminds us that the squatting at issue in *Adams* and in other situations is a form of "personal empowerment and democratization."[26]

The *Adams* case arose in October 2005 when the City of Victoria commenced an action to obtain a civil injunction to enforce these two bylaws in relation to a tent city consisting of seventy people and twenty tents in Victoria's Cridge Park. The defendants – nine of the homeless people living in the tent city – opposed the application, raising the *Charter* in defence. After significant procedural and interim wrangling (including the City's attempt to have the action discontinued),[27] the case came to trial in June 2008.

The result at the trial level was a finding that the bylaws at issue, "to the extent to which they prohibit the erection of overhead protection",[28] were contrary to section 7 and not justifiable under section 1 of the *Charter*. The

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22 In August 2007, the *Parks Regulation Bylaw* was amended by the city so that it "no longer
prohibited 'loitering' in public parks" (*Adams* (BCSC), above note 11 at para 24). Prior to the hearing, at the defendants' request, the city clarified that the "operational policy of the Victoria Police" for enforcement of the bylaws allowed for sleeping in public in some circumstances but did not allow the use of any tents, tarps, boxes or other structures (*ibid* at para 26).

23 *Ibid* at para 4.

24 Jamie Peck & Adam Tickell, "Neoliberalizing Space" (2002) 34:3 Antipode 380 at 384.

25 Ibid at 399.

26 Nicholas K Blomley, *Unsettling the City: Urban Land and the Politics of Property* (New York: Routledge, 2004) at 20 [Blomley].

27 For a description of this, see *Adams* (BCSC), above note 10 at paras 6–30.

28 *Ibid* at para 217.

Court issued a declaration of invalidity, stating that the bylaws "are of no force and effect insofar as they apply to prevent homeless people from erecting temporary shelter."[29] Critical to this result was the framing of the issue as one about temporary, not permanent, shelter.

The provincial Supreme Court judgment was upheld, on appeal by the City, at the British Columbia Court of Appeal (BCCA). The Appeal Court framed the issue at stake more narrowly:

> when homeless people are not prohibited from sleeping in public parks, and the number of homeless people exceeds the number of available shelter beds, does a bylaw that prohibits homeless people from erecting any form of temporary overhead shelter at night – including tents, tarps attached to trees, boxes or other structure – violate their constitutional rights to life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*?[30]

As this quote illustrates, the appeal judges linked the holding of unconstitutionality expressly to the factual finding that the number of homeless people exceeded the number of available shelter beds. Consequently, the Court of Appeal judgment elaborated, were there sufficient shelter places to accommodate the homeless population in Victoria, a blanket prohibition of overhead protection in public parks might be constitutional.[31] Similarly, constitutional acceptability might exist if there were "appropriate designated areas outside of parks to accommodate the homeless."[32]

The order that issued from the Court of Appeal reflected this more specific, narrower parsing:

> Sections 14(1)(d) and 16(1) of the *Parks Regulation Bylaw* No. 07-059 are inoperative insofar and only insofar as they apply to prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds in the City of Victoria.[33]

This Court of Appeal conclusion rests on finding that the bylaw failed to meet the principles of fundamental justice referenced in section 7 because of overbreadth. Thus, the judges did not find that the provisions of the bylaw

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29 *Ibid* at para 239.

30 *Adams* (BCCA), above note 10 at para 1.

31 *Ibid* at para 74.

32 *Ibid* at para 162. The Court of Appeal judgment also limits the legal finding to a smaller number of the provisions of only one of the two originally impugned bylaws, the *Parks Regulation Bylaw*. The Court found that the other provisions and bylaw need not have been mentioned in the declaration.

33 *Adams* (BCCA), above note 11 at para 166.

were generally void. Rather, the provisions were selectively void. Should shelter conditions change, the bylaw could survive constitutional scrutiny.[34] The result? Under certain conditions pertaining to availability (or lack) of alternative shelter, homeless residents of Victoria can erect temporary overnight shelter in public parks. In response, municipal bylaws have been amended to now allow overhead outdoor shelter between the stipulated hours of 7 p.m. and 7 a.m.[35] Anecdotal reports are that these time limits are strictly enforced by local police.[36]

This outcome is, of course, a victory — on the terms set by the rights claimants themselves. Broader rights to, say, actual housing, or even shelter beds, are not part of this success.

2) *PHS Community Services Society v Canada (Attorney General)*

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34 James Hendry, "Section 7 and Social Justice" (2009) 27 NJCL 93 at 100 [Hendry, "Section 7 and Social Justice"].

35 The exception is during daylight saving time and then the time limit is 8 p.m. and 7 a.m. The full text of the relevant section of the amendment to the Bylaw stipulates:

> **Overnight Shelter**
> 16A (1) Sub-section (2) applies despite the general prohibitions under section 14(1)(d) and section 16(1) of this Bylaw.
> (2) A homeless person must not place, secure, erect, use, or maintain in place, in a park, a structure, improvement or overhead shelter, including a tent, lean-to, or other form of overhead shelter constructed from a tarpaulin, plastic, cardboard or other rigid or non-rigid material:
> (a) subject to sub-section (b), except between the hours of:
> (i) 7:00 o'clock p.m. of one day and 7:00 o'clock a.m. of the next day when Daylight Saving time is not in effect; and
> (ii) 8:00 o'clock p.m. of one day and 7:00 o'clock a.m. of the next day when Daylight Saving time is in effect,
> (b) at any time, in a playground, sports field, footpath, a road within a park, Bastion Square, environmentally sensitive area, or any area within a park that has been designated for an event or activity under a valid and subsisting permit issued under the authority of this Bylaw.

City of Vancouver, by-law No 10-021, *Parks Regulation Bylaw, Amendment Bylaw (No 6)*, s 3.

36 In a subsequent case, *Johnston v Victoria*, a claim that s 7 was breached when a homeless person was prevented from erecting daytime shelter in a park was defeated at the Court of Appeal. The Court found no evidence of a shortage of adequate daytime shelter for homeless persons in Victoria. Thus, the condition for the finding of the breach in *Adams* was not met (*Johnston v Victoria (City),* 2011 BCCA 400, aff'g 2010 BCSC 1707 [*Johnson v Victoria*]).

The *Insite* case concerns North America's first legally sanctioned supervised injection site (SIS). [37] While there are today over 75 SISs operating around the world, Vancouver is the only municipality on the continent with a sanctioned SIS.[38] The Vancouver SIS was set up as a research pilot project, is located in Vancouver's Downtown Eastside (DTES), and operates under the name of Insite. Insite was opened on 12 September 2003 by Vancouver Coastal Health, in partnership with the Portland Hotel Society.[39] The facility responds to injection drug-related issues in Vancouver's Downtown Eastside[40] and provides a range of services to injection drug users, including clean needles

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[37] The Dr. Peter AIDS Foundation, an HIV/AIDS health care facility in Vancouver, has for some time allowed its registered nurses to provide supervised injection services without a Ministerial exemption. The Foundation argues that these supervised injection services are part of the primary health care its nurses provides to clients. The Dr. Peter AIDS Foundation is a non-profit registered charity, funded through various government health and housing agencies, with the purpose of assisting and caring for persons who are poor or needy and who suffer from HIV/ AIDS.

[38] Brandon D L Marshall et al, "Reduction in overdose mortality after the opening of North America's first medically supervised safer injecting facility: a retrospective population-based study" (2011) 377 The Lancet 1429, online: Insite http://www.communityinsite.ca/injfacility.pdf; Public Health Physicians of Canada, "Support for Supervised Injection Sites (SIS) Proposed Federal Bill C-65 Respect for Communities Act, 2013 Public Health Physicians of Canada Position Statement" (June 2013) online: Public Health Physicians of Canada http://nsscm.ca/Resources/Documents/ECAC%20Docs/PHPC%20SIS%20Position%20Statement_Final.pdf. The Netherlands, for example, opened several sites in the 1970s (Lawrence Campbell, Neil Boyd & Lori Culbert, *A Thousand Dreams: Vancouver's Downtown Eastside and the Fight for Its Future* (Vancouver: Greystone Books, 2009) at 177). A site in Zurich in 2003 also had a restaurant that employed addicts, a laundromat, public computers and a medical team to attend to clients. As well, it had an inhalation room for addicts who smoked drugs (*ibid* at 178).

[39] The programme was supported by the Vancouver Police Department, City of Vancouver, Province of British Columbia, injection drug users, community groups, academic institutions and others.

[40] Insite provides a number of services. Specifically, it is staffed by a combination of clinical and non-clinical staff, including peers, programme assistants, RNs, Alcohol and Drug Counselors and coordinators. It is open 18 hours a day, for seven days: 10 a.m. to 4 a.m. Its injection room has 12 booths with a daily capacity of roughly 850 injections. Drugs are not provided and injections are supervised with emergency response to overdoses available. The staff offers immunization and wound care, and injection-related first aid. Referrals to addiction treatment and other health services are available, accompanied by harm-reduction services and access to sterile injection equipment. Insite provides a post injection space for observation and peer interaction. Vancouver Coastal Health, Brochure, "Saving Lives: Vancouver's Supervised Injection Site" at 2.

and a safe and supervised pace to inject drugs.[41] It is also associated with Onsite, a detox unit located in the same building, on the floor above Insite. Insite runs on a model of harm reduction: "decreasing the adverse health, social and economic consequences of drug use without requiring abstinence from drug use."[42] The substances injected at Insite are prohibited, have been obtained illegally and are in the possession of the users before entry into the facility. About 60 percent of the drugs are opioids, two-thirds of which are heroin and one-third of which is morphine or hydromorphone. The remainder, roughly 40 percent of injected drugs, consists of stimulants such as cocaine and methamphetamine.[43]

The legal regime under which Insite operates is both federal and provincial in origin and at its most functional was a good example of federal/ provincial cooperative federalism.[44] The safe injection facility was opened as an initial exercise of provincial jurisdiction over health and hospitals.[45] Key institutional, local leadership is provided by Vancouver Coastal Health, the regional health authority funded and empowered under the BC Ministry of Health Services. Portland Hotel Community Services Society (PHS),[46] a local private, non-profit agency, administers the facility. The City of Vancouver supported the site both politically and financially. However, the facility also engages aspects of federal jurisdiction and law. More specifically, federal jurisdiction over illicit drugs exists under the federal government power to enact criminal laws.[47] Broadly speaking, possession and trafficking in a controlled substance is contrary to federal criminal law: sections 4 and 5 of the federal *Controlled Drugs and Substances Act* (*CDSA*) criminalize

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41 *Ibid* at 3.

42 Vancouver Coastal Health, "Insite — Supervised Injection Site", online: Supervised Injection http://supervisedinjection.vch.ca.

43 See *Insite* (BCSC), above note 12 at para 72.

44 The Supreme Court of Canada notes this (*Insite* (SCC), above note 12 at para 19). For a discussion of cooperative federalism generally, see Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (Vancouver: UBC Press, 2006) at 146–52.

45 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 92(7), (13) and (16), reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

46 The Portland Hotel Community Services Society is a non-profit and registered charity organized with the purpose to provide housing and support to individuals in Vancouver's Downtown Eastside. The individuals on whom its services are focused are those with the general description of "hard to house, hard to reach or hard to treat" (*Insite* (BCSC), above note 13 at para 4). For more information about this organization, see Raising the Roof, "Initiatives Profiles: Portland Hotel Society" online: Shared Learnings on Homelessness Project www.sharedlearnings.org.

47 *Constitution Act, 1867*, above note 45, s 91(27).

possession and trafficking in controlled substances. (Appendices I–IV of the *CDSA* set out what substances are "controlled", and include such drugs as heroin and cocaine, two drugs commonly in use at Insite.[48]) The federal statutory regime allows for some exceptions to such wide criminalization. Section 56 of the *CDSA* provides for the federal Minister of Health to grant exemptions from application of any provision of the *CDSA*. According to this section, an exemption can be granted if "in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest."[49] Importantly, absent such a Ministerial granted exemption, users and staff of Insite would be liable to prosecution under the *CDSA*. So, federal government involvement in sanctioning Insite, through the grant of an exemption, is legally necessary.

Insite received an initial three-year ministerial exemption under section 56 of the *CDSA* from the ambits of sections 4 and 5, commencing 12 September 2003.[50] The two-section exemption was extended to 31 December 2007, and then to 30 June 2008. At some point, after the election of the Conservative government under Stephen Harper, extension of the exemption became unlikely. This apparent political unwillingness to further extend the exemption led a number of supporters of Insite to seek judicial remedy to the threat of illegality under the federal statute.

More specifically, the uncertainty resulted in the initiation of two actions before the British Columbia Supreme Court. One was brought by the PHS and another by individuals representing the Vancouver Area Network of Drug Users (VANDU).[51] Together, these plaintiffs asked for a number of declaratory remedies with the shared goal of ensuring that Insite could continue its activities immune from potential criminalization under the *CDSA*.

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48 *Controlled Drugs and Substances Act*, SC 1996, c 19, ss 4 & 5, Apps I–IV [*CDSA*]. The relevant sections state:

> 4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.
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> . . .
>
> 5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

49 The full section reads: "The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest" (*ibid*, s 56).

50 *Ibid*.

51 The Vancouver Area Network of Drug Users is a non-profit society with the primary purpose of advocating on the behalf of drug users in order to increase the ability of addicts to live healthy lives. For more information, see Vancouver Area Network of Drug Users, "About VANDU", online: VANDU www.vandu.org.

Most importantly, the Court was asked to declare two things. First, it was argued that the criminalization of Insite activities was an unjustified violation of section 7 of the Charter and, second, it was argued that provincial jurisdiction over Insite as an instance of provincial health care provision was constitutionally immunized from being affected by the federal statute. The trial court accepted the section 7 argument, suspending the declaration of invalidity for one year but granting Insite, during that period, constitutional immunity from application of the *CDSA*. The trial court rejected the interjurisdictional immunity argument. At the BCCA, two judges found for the claimants in terms of both the section 7 and the interjurisdictional argument, with the interjurisdictional immunity finding taking precedence.[52] This argument references the rather obtuse doctrine of interjurisdictional immunity. One judge was in dissent on both points.

The Supreme Court of Canada (SCC) decision was issued in the form of a unanimous judgment written by the Chief Justice. Ultimately, the judgment reached a conclusion that let Insite continue legally, but the decision was narrow and Insite-specific. The Court considered both the interjurisdictional immunity and the section 7 claims — rejecting the first and significantly altering the focus of the second. The judgment is interesting for its development of doctrine in the area of interjurisdictional immunity, for the section 7 result specific to Insite, and for the relevance of that result for plans other Canadian cities might have for their own supervised injection sites. It is the section 7 considerations that concern and are the focus of this chapter.[53]

With respect to section 7, the SCC relied on the contextual findings of the trial judge, discussed in the next section, to hold that the rights to life, liberty, and security of the person were infringed by section 4(1) the *CDSA*, for both drug users and the staff supervising injections at Insite.[54] Having reached this conclusion, the Court then examined whether or not such infringement was, as section 7 requires, "in accordance with the principles of fundamental justice". The Court concluded that the statute, because of section 56 — the exemption clause discussed earlier, was not contrary to any principle of fundamental justice. Section 56 was described as "a safety valve" that "prevents the CDSA from applying where such application would be

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52 It was unclear on the basis of the BCCA judgment which finding took precedence: interjurisdictional immunity or the *Charter* infringement. A later order from the Court clarified the situation (Order of the Court, 15 January 2010).

53 Continuing the trend of recognition but also constraint of the doctrine of interjurisdictional immunity, the Supreme Court of Canada declined to apply it in this case, stating that the area of provincial jurisdiction involved was too "broad and extensive" to be appropriately protected by way of the doctrine (*Insite* (SCC), above note 12 at para 68).

54 Unlike the lower courts, the SCC did not consider s 5(1) — the trafficking provision of the *CDSA* — a constitutional problem (*ibid* at para 95).

arbitrary, overbroad or grossly disproportionate in its effects."[55] Thus, concerns about the offence provisions of the statute were met by the availability of the Minister's exemption. There was, therefore, the Court asserted, no *Charter* problem with the statute itself.[56]

However, the Court continued on to find a *Charter* issue with the Minister's decision to refuse an exemption to Insite. Disputing the (somewhat disingenuous, perhaps) assertion by the Attorney General of Canada that the Minister had yet to reject the application for renewal of the exemption, the Court found that an exemption for Insite been denied and that such a denial was unconstitutional. More specifically, the Court held that the Minister's refusal to grant the exemption was "arbitrary and grossly disproportionate in its effects, and hence not in accordance with the principles of fundamental justice."[57] Key to this result was the Court's insistence that the *Charter* applied to the Minister's decisions. Then, in an unusual move, the Court ordered the Minister to grant the exemption for Insite under section 56 of the *CDSA*.[58] There was, the Court maintained, "nothing to be gained (and much to be risked)" in sending the matter back to the Minister for reconsideration.[59] So the victory goes, by a thin thread, to the rights claimants in this case as well.

B. One Layer of Context

Contextualization of the issues at stake and of the circumstances of the groups affected by the government action was instrumental in each case. It is this paper's argument that comprehending the rich and dense circumstances out of which rights claims emerge is a necessary part of effective rights analysis. More precisely, the specific social and economic context of the claimants will shape the harm experienced, as well as structure understandings of state responsibility in relation to that harm.[60] But context must be recognized on a number of levels in order to grasp fully the import modern rights claims. In this section, I point out one dimension of context, as it was captured by the

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55 *Ibid* at para 113.

56 The federal statute is not only *Charter* proof but also valid, applicable, and paramount should conflict with provincial action continue.

57 *Insite* (SCC), above note 12 at para 127.

58 *Ibid* at para 156.

59 *Ibid* at para 150.

60 As I have argued elsewhere, contextually dense legal analysis must be careful not to assign undue importance to the issue of individual choice as fulcrum for assigning (or not) state responsibility for the harm claimed. See Margot Young, "Social Justice and the *Charter* : Comparison and Choice" (2013) 50:3 Osgoode Hall L J 669.

judgments in *Adams* and *Insite*. The section that follows further complicates this understanding of context by adding spacial and geographic dimensions.

The trial court in *Adams* examined wide ranging evidence elucidating the histories and circumstances of the claimants. Wide ranging evidence considered by the Court centred on the homeless population in Victoria, the availability of services for the homeless, the causes of homelessness, and the effects of sleeping outside without shelter. The Court considered evidence from homeless individuals themselves, from surveys and studies conducted by non-profit organization, from government reports, and from a medical practitioner and a wilderness expert.[61] Four sets of foundational factual findings emerged. First, the trial judge found that homelessness is the result of complex social, economic and personal factors. It is not simply a matter of personal choice:

> While there may be some people for whom urban camping is a lifestyle choice, it is clear that this is not the situation of the majority of the population of Victoria's homeless. Rather, these are people who do not have practicable alternatives.[62]

Second, evidence was accepted that "the number of homeless people exceeds the available supply of *shelter beds*."[63] Third, the trial judge accepted medial expertise that:

> (d) exposure to the elements without adequate shelter such as a tent tarpaulin or cardboard box is associated with a number of substantial risks to health including the risk of hypothermia, a potentially fatal condition.[64]

And, finally, fourth, it was accepted that:

> (e) adequate shelter for those sleeping outside in the West Coast climate requires both ground insulation and appropriate overhead protection in the form of a tent or tent-like shelter.[65]

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61 Catherine Boies Parker, "Update on Section 7: How the Other Half is Fighting to Stay Warm" (2010) 23:2 Can J Admin L & Prac 165 at 172 [Parker, "Update on Section 7"].

62 *Adams* (BCSC), above note 10 at para 66.

63 Specifically, the judge wrote that: "(a) there are at present more than 1,000 homeless people living in the City; (b) there are at present 141 permanent shelter beds in the City, expanded to 326 when the Extreme Weather Protocol is in effect; (c) the number of homeless people exceeds the available supply of shelter beds." *Ibid* at para 69.

64 *Adams* (BCSC), above note 10 at para 69.

65 *Ibid* at para 69.

Cumulatively, these findings allowed the Court to find that: "compliance with the Bylaws exposes homeless people to a risk of serious harm, including death from hypothermia".[66] These findings and their cumulative import were not disturbed by the Court of Appeal.

Insite, similarly, had key factual findings based on contextual evidence on which, equally, the case turned. Justice Pitfield was attentive to the social context surrounding issues particular to Insite: he began his judgment by noting that such factors are "central" to an understanding of the issues raised.[67] Here, the Court relied on "numerous government reports and action plans, individual affidavits regarding the development and operation of Insite, affidavits about the experiences of the individual parties, expert affidavits relating to the nature of addiction and expert evidence relating to the outcomes of Insite."[68] Considerable discussion was taken up by the social and medical context surrounding the circumstances of Insite's creation and its geographic location and focus of service.[69] The Court noted the thick political and policy history around issues of drug use in the DTES,[70] highlighting, first, a series of reports and policies on health issues of injection drug use in the

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66 *Ibid* at para 142.

67 *Insite* (BCSC), above note 12 at para 13.

68 Parker, "Update on Section 7", above note 61 at 173.

69 Extensive affidavit evidence was put before the courts. The Attorney General of Canada initially objected to a summary trial on affidavits, arguing instead for in-court testimony, based on the complexity of evidence, appearance of material conflict in affidavits, and importance of issues. The Court decided to consider the affidavit evidence first and then, should Canada renew its objections, at that point the Court would consider the application. After eight days of hearing, counsel for Canada withdrew objections to a summary trial, provided that the Court not make findings of fact on matters of science on which evidence was in conflict (*Insite* (BCSC) above note 12 at paras 9–12).

70 This section considers, for example, the level of HIV/AIDS in the area, noting that by 1997, 27 percent of injection drug users were infected, an epidemic level of infection and public health emergency (*ibid* at paras 24 and 26).

area,[71] second, *The Vancouver Agreement*,[72] and, third, the report, *A Framework for Action – A Four Pillars Approach to Drug Problems in Vancouver: Prevention, Treatment, Enforcement and Harm Reduction.*[73] The DTES was described as a place where "[e]xistence is bleak."[74] The discussion of these factors — collectively termed the "Historical and Operating Context" — was lengthy. Conclusions from this evidence established a clear link between injection drug use and multiple health issues, indeed public health emergencies, in the DTES of some variety. As one expert affidavit stated: "[the DTES] [was] the perfect storm for a continued public health crisis."[75]

Five findings emerged. First, the government lawyer, John Hunter QC, made a significant concession during oral argument allowing Justice Pitfield to conclude as a fact that: "Addiction is an illness."'[76] Second, the judge found that communicable diseases such as Hepatitis C or HIV/AIDS are caused not by the introduction into the bloodstream by injection of controlled substances such as heroin and cocaine. Rather, use of unsanitary equipment, techniques, and procedures for injection allows transmission of such infections, illnesses, diseases from one individual to another. Third, risks of morbidity and mortality associated with addiction and injection are lessened

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71 See British Columbia Task Force Into Illicit Narcotic Overdose Deaths in British Columbia, *Report of the Task Force Into Illicit Narcotic Overdose Deaths in British Columbia* (Victoria: Office of the Chief Coroner, 1994); Vancouver/Richmond Health Board, *Action Plan to Combat HIV/AIDS in the Downtown Eastside* (Vancouver: Vancouver/Richmond Health Board, 1997); Dr John S Miller, Provincial Health Officer, *HIV, Hepatitis, and Injection Drug Use in British Columbia — Pay Now or Pay Later?* (Victoria: BC Ministry of Health, 1998).

72 *The Vancouver Agreement* originated in March 2000 and involved the Province and Federal governments in an agreement over co-operation and funding for the City's critical needs. This Agreement had a focus on the DTES and proposed a string of strategic objectives for that area. *A Framework for Action* followed in April 2001 (Canada, British Columbia & City of Vancouver, *The Vancouver Agreement* (2000)).

73 This was released in April 2001and adopted by the City on 15 May 2001 (*Insite* (BCSC) above note 12 at paras 33 and 40).

74 *Ibid* at para 8. There is an importantly and equally valid story to be told about the DTES — that it is also a community of hope, creativity, optimism, and belonging. This strong sense of solidarity and acceptance is noted, for example, in Susan C Boyd, Donald MacPherson, & Bud Osborne, *Raise Shit!: Social Action Saving Lives* (Halifax: Fernwood Publishing, 2009) at 12. The DTES is a complicated and complex neighbourhood with significantly different tropes and narratives invoked in its description.

75 *Insite* (BCSC) above note 12 at para 28.

76 *Ibid* at para 87.

by injection supervised by qualified health professionals.[77] Fourth, Insite is a health care facility.[78] And, fifth, addiction is the result of a range of "personal, governmental and legal factors."[79] Injection drug addiction is not equatable to recreational drug use nor is addiction a question of individual choice. Thus, the trial judge accepted a complicated understanding of addiction, one in which addict choice or control is a minor factor only. Health issues were central; individual volition was downplayed. The parallels with the *Adams* decision are obvious.

Certainly, many of the facts found by these courts about homelessness and injection drug use are not controversial. As Catherine Boies Parker (one of the claimants' counsel in the *Adams* case) elaborates about the findings in *Adams*, "while there was dispute about whether certain shelters were fully utilized, there could be no question that the number of homeless greatly exceeded the number of shelter beds."[80] Nor was the expert evidence that significant detrimental health effects attached to sleeping outside without shelter of any great dispute. The *Insite* case similarly invoked broad consensus about a number of key facts: that Insite provided critical and harm reducing health services to injection drug users, and that the facility had not increased crime and disorder in its neighborhood.[81] More contested are the understandings of homelessness and addiction — that neither are simply reducible to lifestyle or recreational choices — that the courts accept. In the context of drug addiction, several addiction researchers see the shift to viewing addiction as a health, rather than moral or criminal, issue, as "culturally momentous".[82]

Thus, the analytical results in these cases — the trail of which is adumbrated above — depended upon judicial acceptance of subaltern stories about the activities involved. And such judicial acceptance relied upon the key relevance of context to constitutional claims.[83] Judicial analysis of each challenge employed recognition of a complex and socially evolving set of

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77 *Ibid*.

78 *Ibid* at para 136.

79 *Ibid* at para 89.

80 Parker, "Update on Section 7", above note 61 at 175.

81 I maintain this despite the fact that these understandings were all repeatedly challenged by the federal government. However, the governmental assertions had thin credibility and were remarkable for their dismissal and manipulation of scientific evidence.

82 Dan Small, Anita Palepu, & Mark W Tyndall, "The Establishment of North America's First State Sanctioned Supervised Injection Facility: A Case Study in Culture Change" (2006) 17:2 Int'l J Drug Pol'y 73 at 73.

83 Hendry, "Section 7 and Social Justice", above note 34 at 100.

conceptions about the activities — sleeping rough and shooting up — at issue in the cases. Judicial framing allowed non-mainstream experiences to emerge as authoritative. The judges at the trial level gave a less orthodox narrative about, in one instance, homelessness, and in the other, drug injection. Each alternative narrative comes out of the community's struggle against negative hegemonic understandings of the marginalized groups.

It is worth emphasizing that the contextual understandings accepted by the judges tell stories starkly in contrast to those asserted by governments in each case.[84] The governments defending against the rights claims argued that the activities at centre of each case were the result of claimants' free choice or will. Thus, in *Adams* at the Court of Appeal level, the municipal government argued that the circumstances of the homeless claimants resulted from "lifestyle choice".[85] Therefore, harm that follows from such homelessness was the responsibility of the claimants, not the government. [86] In *Insite*, at the Supreme Court of Canada level, McLachlin CJ distilled Canada's argument as asserting that "from a factual perspective, personal choice, not the law, is the cause of the death and disease Insite prevents."[87] Written argument by the federal government at the trial level of *Insite* referred repeatedly to "unbridled injection of illegal drugs".[88] At the stage of the Court of Appeal in the same case, Canada's factum argued : "[u]nsafe injection or, for that matter, consumption by injection at all, is a choice made by the consumer."[89] The Supreme Court of Canada factum submitted by this Attorney General also described the clients at Insite as "hard-core addicts, the mildly addicted, frequent users or occasional users."[90] A specific picture is conveyed — a sliding scale of necessity for supervised injection needs and an implied reduced sense of urgency for users at Insite.[91] The heading of the

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84 This reference is to the federal attorney general in the *Insite* case and the municipal government in *Adams*.

85 *Victoria (City) v Adams*, 2009 BCCA 563 (Factum of the Appellant).

86 Hendry, "Section 7 and Social Justice", above note 34 at 98.

87 *Insite* (SCC), above note 12 at para 99.

88 *PHS Community Services Society v Attorney General of Canada*, 2008 BCSC 661 (Memorandum of Argument of the Attorney General of Canada at paras 9 and 76).

89 *PHS Community Services Society v Canada (AG)*, 2010 BCCA 15 (Factum of the Appellants at para 63) [Factum of the Appellants].

90 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (Factum of the Appellants at para 90).

91 For elaboration of this point see Margot Young, "Insite: Site and Sight" (2010–2011) 19 Const Forum Const 87.

written argument at the SCC level charges: "The Deprivation is not the Result of the Possession Law, But, Individual Choice."[92] These governmental assertions of choice and lifestyle paint the injection drug users at Insite and the homeless needing overhead shelter as authors of their own misfortune and harm. Thus, the Attorney General of Canada critiques the BCCA and BCSC *Insite* decisions as "absolv[ing] drug users of responsibility for the choices they make."[93] However, these arguments were defeated by the factual record laid down at trial in each case.

There is no doubt that attentiveness to this first layer of context thickened judicial assessment of the harms the claimants suffered in *Adams* and *Insite*. Without such consideration and elaboration, it is unlikely that the claimants would have succeeded. That is, once these findings were accepted by the courts in each case, it was a simple step to see that fundamental interests protected under section 7 were at stake.[94] The contextual underpinnings of the trial judges' holdings ensured that the courts' understanding of each of the interests protected under section 7 was given a deeper understanding, one that extends the notions of life, liberty and security of the person into territory more responsive to the circumstances of the vulnerable individuals in each case. This is simply to say, that:

> For many persons in other circumstances, the ability to erect overnight shelter in a public park, or to inject dangerous drugs in a certain setting, would not trigger the liberty interest. But once the circumstances of the claimants are understood, it is clear that these are important choices which go to the dignity, autonomy and independence of those living without shelter or under the heavy burden of addiction.[95]

It is also the case that, absent this contextual shaping of the experiences and circumstances of the rights claimants and their treatment by the state, the second stage of the claimants' section 7 challenges would also have failed. Section 7 requires a showing that not only one of the rights the section protects been breached but also that such a breach is contrary to the principles of fundamental justice. Factual findings determine this possibility. Thus, breach by the government of the fundamental principles of justice about overbreadth, arbitrariness and gross disproportionality could not have been made out without the factual findings. So, these cases demonstrate the importance of contextual narrative to claims by marginalized and disadvantaged individuals. As Dianne Pothier has written about other constitutional rights: "the ultimate question is whether the court 'gets' the

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92 Factum of the Appellants, above note 89 at para 97 [emphasis omitted].

93 *Ibid*.

94 Parker, "Update on Section 7", above note 61 at 175.

95 *Ibid* at 176.

context of the claimant in order to be able to make a sensible judgment."[96] The stories and experiences of the marginalized do not easily make their way into law and legal judgment.[97] Context is the primary vector for carrying the reality of lives lived at the margin of society into the centre of the judicial arena.

C. Another Layer: Space and The City

I have promised to complicate the discussion of context: the *Adams* and *Insite* cases point to a different kind of context to the claiming of rights. These cases involve claims that target allocation of urban property and invoke consideration of how that allocation shapes the social relations of the city. So questions about both the relationship of rights to physical space, and the claiming of rights within urban space, present themselves clearly in *Adams* and *Insite*.

1)Spatialization of Rights

The *Adams* and the *Insite* cases illustrate a more general point about the rights, that many specific and traditionally formulated rights exist in and are recognized through spatial, geographic ordering.[98] Resolution of the issues faced by the rights claimants in these cases involves thinking "spatially about questions of citizenship, democracy, politics, and (in)justice."[99]

This is an interesting amplification of the idea of context relative to these cases. Geographic spaces are the sites for articulation and struggle over "identity politics, citizenship, and alternative political agendas."[100] Allocation of space communicates moral and political judgments[101] and thus sets the terms or conditions for the social interactions that occur in and around space. Spatial dynamics, like social dynamics, produce and reproduce injustices.[102]

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96 Pothier, "But It's for Your Own Good", above note 13 at 40–56.

97 *Ibid* at 42.

98 Eugene J McCann, "Space, Citizenship, and the Right to the City: A Brief Overview" (2002) 58:2 GeoJournal 77 at 78 [McCann, "Space, Citizenship"]. See generally, Benjamin Davy, "Centenary Paper: The Poor and the Land: Poverty, Property, Planning" (2009) 80:3 Town Planning Review 227.

99 Mustafa Dikeç, "Police, Politics, and the Right to the City" (2002) 58:2 GeoJournal 91 at 95 [Dikeç, "Police, Politics"].

100 McCann, "Space, Citizenship" above note 98 at 77.

101 Blomley, above note 26 at 76.

102 *Ibid* at 93.

Interesting parallels stand between how social theorists think about the construction of social differences and how one might understand the shaping of geographies. Melissa Gilbert, for instance, argues that just as race and gender, as categories of identity, must be understood through the lense of nonessentialist epistemology — "we can most usefully understand 'race' and 'gender' as processes whereby people become racialized and gendered"[103] — so too must "space and place" be seen as produced by political, social and economic processes.[104] Space is constituted through social structures and, in turn, itself constitutes social structures: "places [result] as processes of social relations rather than as bounded enclosures, and [have] multiple meanings and identities."[105] So reads a "social constructivist" approach to space.[106] Thus, to understand the inequality and the hierarchies of power manifest in Canadian society, it is important to think about the pattern of our built structures, the organization of public and private spaces, and the distribution of people among buildings and spaces.[107]

Rights claims thus can entail not only a claim for metaphorical political space but also, often, for physical space. Rights open up space — clearly a kind of metaphorical room for assertion and attentiveness to interests and clams, but many rights demand access to and create, if successful, real space. [108] Rights, in these cases at least, represent a "moment in the production of space — especially material, physical space."[109] Demanding rights can encode a "critique of human geography."[110] The human practices at issue change what the meaning of the space at issue is and how that space folds into community narratives, associations, and understandings.

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103 Melissa R Gilbert, "Identity, Space, and Politics; A Critique of the Poverty Debates" in John Paul Jones, Heidi J Nast & Susan M Roberts, eds, *Thresholds in Feminist Geography: Difference, Methodology, Representation* (Lanham, MD: Rowman & Littlefield Publishers Inc, 1997) 29 at 30 [Gilbert, "Identity, Space, and Politics"].

104 *Ibid*.

105 *Ibid*.

106 Dikeç, "Police, Politics", above note 99 at 95.

107 Gilbert, "Identity, Space, and Politics", above note 103 at 42.

108 Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* (New York: The Guilford Press, 2003) at 29 [Mitchell].

109 *Ibid* at 28.

110 *Ibid* at 19 and 29, quoting Guy Debord, *The Society of the Spectacle*, translated by Donald Nicholson-Smith (New York: Zone Books, 1994) at 126.

2) Urban Spaces

Moreover, the cases are about the larger political contexts of urban justice, of urban space and its uses. The political or social movements out of which each of these cases emerged involve attempts to "reshape the city in a different image",[111] to rethink the "ideals of urban identity, citizenship and belonging."[112] In this manner, then, both cases, albeit in more specific terms, represent claims to urban citizenship — to inclusion, justice, and respected identity as part of a civic population. Discourses of citizenship, in the words of two feminist theorists, "constitute horizons of possibilities."[113] The issues around citizenship of these two cases pinpoint the very immediate and local scale of the city and its politics, a scale where "state, civil society and individual particularity intersect."[114]

City spaces are the sites for articulation and struggle over "identity politics, citizenship, and alternative political agendas."[115] Thus, "citizenship rights and urban space are produced in relation to each other."[116]

Urban justice studies are of increasing importance. Since 2007, the majority of the world's population lives in urban centres.[117] Eighty-one per cent of Canadians live in urban areas.[118] Consequently, the city has emerged as a site for research across a range of scholarly disciplines. It is correspondingly argued that cities occupy a place of recent, resurgent importance. For example, the large or global city locates possibilities of new forms of power and politics at the subnational level, creating new transnationality and translocality. Cities are 'key geographical sites' for the

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111 David Harvey, "The Right to the City" (2008) 53 New Left Rev 23 at 33 [Harvey, "The Right to the City"].

112 *Ibid* at 32.

113 Pnina Werbner and Nira Yuval-Davis, "Introduction: Women and the New Discourse of Citizenship" in Nira Yuval-Davis & Pnina Werbner, eds, *Women, Citizenship and Difference* (London: Zed Books, 1999) 1 at 3.

114 *Ibid* at 8.

115 McCann, "Space, Citizenship" above note 98 at 77.

Ibid.

116 Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge: Cambridge University Press 2013) at 78 [Darian-Smith].

117 Margaret Shaw et al, "Introduction" in Carlyn Whitzman et al, eds, *Building Inclusive Cities: Women's Safety and the Right to the City* (Oxon: Routledge, 2013) 1 at 8 [Shaw et al, "Introduction"].

118 These are areas of 1,000 people and more with a density of 400 people per square kilometre. Statistics Canada, "Population, urban and rural, by province and territory" online: Statistics Canada www.statcan.gc.ca.

playing out of neo-liberal policies and programmes.[119] The new modes of neo-liberal governance bear directly and powerfully on the shape of large cities. As cities reach for global city status, physical arrangements of public and private space and notions of citizen and citizenship are enlisted in this goal.[120] The city is a physical manifestation of the social relations and norms that reflect and sustain this extension.

Moreover, a focus on cities emphasizes the immediate everyday environment in which citizenship is experienced. Urban citizenship reveals localized sets of social relations and practices core to our daily experiences. Here, for some feminist theorists, the focus is on the 'ordinary', a concept that encompasses both social and legal orders, and the standard, routine, or average experience.[121] Urban citizen literature thus looks to the prosaic, not extraordinary, instances and experiences of citizenship: the 'humdrum' of daily life containing the unfolding of "acts of citizenship."[122] The approach has been characterized as "bottom-up", signaling that it is this local context, the sites of people's everyday experiences and exchanges, that grounds the possibilities and actualities of law and of politics.[123]

By way of illustration of this point, Leslie Kern, in a study of condominium development in Toronto, sees urban development in the cities of Western democracies as an significant force in the neo-liberal reconstitution of urban citizenship. She argues, more specifically, that the marketing of condominiums to women, with its combination of urban space construction and consumerism, has reconfigured gendered urban citizenship in a restrictive and constrained manner. Women are enticed by the image of consumer agency into patterns of consumption that short-sheet and sideline effective political agency.[124]

Most relevant, perhaps, to this discussion is the additional claim that cities provide concentrated illustrations of inequality and of citizens' responses to injustices as everyday practices of power.[125] The destabilization of categories and identities of citizens catalyzed by recent changes plays out

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119 Kern, above note 8 at 7.

120 *Ibid*.

121 Lynn A Staeheli et al, "Dreaming the Ordinary: Daily Life and the Complex Geographies of Citizenship" (2012) 36:5 Progress in Human Geography 628 at 630 [Staeheli et al, "Dreaming the Ordinary"].

122 Engin F Isin & Bryan S Turner, "Investigating Citizenship: An Agenda for Citizenship Studies" (2007) 11:1 Citizenship Studies 5 at 16.

123 Darian-Smith, above note 116 at 167.

124 Kern, above note 8.

125 Saskia Sassen, "The City: Its Return as a Lens for Social Theory" (2010) 1:1 City, Culture and Society 3 [Sassen, "The City"].

most pointedly in cities. Cities are 'strategic terrain'[126] for the conflicts, contradictions, and openings of global capitalism, new transportation and telecommunication technologies, and the fracturing and multiplying of identity.

It is no surprise then that theorists see the development of new progressive citizenship practices in the spaces of cities. Cities locate institutional innovation and creative individual and group agency.[127] New political actors emerge,[128] with fresh public practices. Cities thus are important spaces of inclusion and exclusion, of centrality and marginalization.[129] They are "strategic arena[s] for the development of citizenship because they engage the tumult of citizenship through the concentration of difference and the availability of public space."[130] Thus, how cities contemplate, order, and recognize diversity in their built environments ground and make concrete, and pragmatic, more abstract discussions of the politics of difference.[131]

After all, "cities are part of a larger society…their spatial form is inter-related with the economic, social, cultural, and political structures of the society within which they exist."[132] These broader power relations manifest in urban space:[133] "[S]ystems and structures of inequality become entrenched and reproduced in the actually existing world."[134] .[135] Saska Sassen argues that the global city has a dynamic that reflects direct interaction with other levels of community — the national, regional and global. The urban experience cast a uniquely distinct formation of social relations and political

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126 *Ibid* at 19.

127 *Ibid*.

128 *Ibid*.

129 Kern, above note 8 at 7.

130 *Ibid* at 11.

131 Lynn A Staeheli, "Introduction: Cities and Citizenship" (2003) 24:2 Urban Geography 97 at 98.

132 Peter Marcuse & Ronald van Kempen, "Introduction" in Peter Marcuse & Ronald van Kempen, eds, *Globalizing Cities: A New Spatial Order?* (Oxford: Blackwell Publishers Ltd, 2000) 1 at 5 [Marcuse & van Kempen, "Introduction"].

133 Peter Marcuse & Ronald van Kempen, "Conclusion: A Changed Spatial Order" in Peter Marcuse & Ronald van Kempen, eds, *Globalizing Cities: A New Spatial Order?* (Oxford: Blackwell Publishers Ltd, 2000) 249 at 273 [Marcuse & Ronald van Kempen, "Conclusion"].

134 Don Mitchell, above note 108 at 30.

135 Susan S Fainstein, *The Just City* (Ithaca: Cornell University Press, 2010).

structures.[136] Cities provide terrain where new political, economic, cultural and subjective processes emerge, particularly in light of the transformation and diminishment of the national level.[137]

The material shaping of the city, through the built environment and its articulation of public and private spaces, is crucial to political processes and outcome. "Capitalist cities are not only sites for strategies of capital accumulation; they are also areas in which the conflict and contradictions associated with historically and geographically specific accumulation strategies are expressed and fought out."[138] City spaces are where the articulation and struggle over "identity politics, citizenship, and alternative political agendas"[139] are fought out.

The city emerges as an important cite of social analysis. It is, in the words of Peter Marcuse, "the point at which the rubber of the personal hits the ground of the societal, the intersection of everyday life with the socially created systemic world about us."[140] The routinized and intimate personal interactions of local sites forge the substratum of citizenship.[141]

The cases of *Insite* and *Adams* arise from a particular urban form, what some academics have described as "a spatial concentration within cities of a new urban poverty."[142] Polarization of income, wealth, quality of life in cities has increased.[143] The downtown cores in Vancouver and in Victoria are marked by a density of homelessness and social affliction. And, the geography of the two cities — Vancouver and Victoria — is affected by the outcome of each of these cases.[144]

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136 Sassen, "The City", above note 125.

137 Saskia Sassen, "The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics" (2002) 46 Berkeley J Sociology 4.

138 Neil Brenner, Peter Marcuse, & Margit Mayer, "Cities for People, Not For Profit: An Introduction" in Neil Brenner, Peter Marcuse, & Margit Mayer, eds, *Cities for People, Not For Profit: Critical Urban Theory and the Right to The City* (New York: Routledge, 2012) 1 at 1.

139 McCann, "Space, Citizenship" above note 98 at 77.

140 Peter Marcuse, "From Critical Urban Theory to the Right of the City" (2009) 13:2 City 185 at 185.

141 *Ibid*.

142 Marcuse & van Kempen, "Introduction", above note 132 at 3.

143 Shaw et al, "Introduction", above note 117 at 8.

144 By "geography", I mean "the physical pattern of development of a city" ([Marcuse & van Kempen, "Conclusion" above note 133 at 266).

3) The Right to the City

The section 7 rights requested by each set of claimants invoke the larger and evocative politics of what commentators refer to as the "right to the city", the entitlement to form and occupy the city in ways reflective of diverse needs and circumstances. David Harvey in an influential New Left Review article describes this as "the right to change ourselves by changing the city."[145] Formulation of such a collective right rests on the understanding that it is through the city — the process and outcomes of urbanization — that we "make…ourselves".[146] The concept imagines rights to access of essential services, to housing security, to livability, to mobility, and to participation.[147] The city, "its special forms, social practices, and power relationships, is integral to the construction of citizenship and of the public".[148]

French urbanist Henri Lefebvre's essay, "The Right to the City"[149], serves as inspiration for this idea of civic struggle. The city is an *oeuvre*, or a work, reflective of practices of inclusion and exclusion, and of legitimized and illegitimated actors. It is a "production" — of spaces and a public.[150] And the notion of the right to the city, in the words of Isin, is "the right to claim presence in the city, to wrest the use of the city from privileged new masters and democratize its spaces".[151] It is, simply, the right not to be marginalized in the city's governance structures and in relation to the development and use of the spaces of the city.[152] It is a claim to a "city of centrality" — where diverse groups are included in core processes and structures, recognized as central to the city's constitution.[153]

This idea of a right to the city runs the risk of meaning everything and thus nothing. The claim has not been sufficiently articulated by theorists but the notion of the right to the city offers "promise as a way of responding to

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145 Harvey, "The Right to the City", above note 111 at 23.

146 *Ibid*.

147 Shaw et al, "Introduction", above note 117 at 8.

148 Staeheli et al, "Dreaming the Ordinary", above note 121 at 73.

149 "The Right to the City" in Henri Lefebvre, *Writings on Cities*, translated by Eleonore Kofman & Elizabeth Lebas (Cambridge, MA: Blackwell, 1996) 147.

150 Staeheli et al, "Dreaming the Ordinary", above note 121 at 75.

151 Engin F Isin, "Introduction: Democracy, Citizenship and the City" in Engin F Isin, ed, *Democracy, Citizenship and the Global City* (Oxon: Routledge, 2000) 1 at 14.

152 McCann, "Space, Citizenship" above note 98 at 78.

153 *Ibid* at 78.

the problem of urban disenfranchisement."[154] It has potential as a conceptual device for thinking about the importance of the urban environment to the justice on our lives. Indeed, the concept of the "right to the city" has considerable circulation internationally. The World Charter on the Right to the City was enacted in 2004 and has been endorsed by a number of cities and countries.[155] In Canada, the City of Montreal's *Charter of Rights and Responsibilities* endorses the underlying notion.[156]

So, attention to space—to urban space—is an important amplification of the idea of context relative to these cases. And, *Adams* and *Insite* thus urge a particular "spatial turn" to understanding rights.[157] This insight links the *Adams* and *Insight* cases to the larger political struggles taking place in their cities and makes sense of why these cases involve access in particular ways to particular spaces within the urban environment. Both cases invoke the larger political context of urban justice, of urban space and its uses.

D. Conclusion: Social Justice and the City

My discussion of these two cases is essentially a discussion about social justice in the city. The notion of social justice reminds us that the struggle for justice must be configured by social context and necessary reference to social conceptions of citizenship, group membership, and institutional structures. A concern with social justice has particular political content. It is a call for the alleviation of social and political exclusion, and the reduction of inequalities as a matter of justice, not merely charity, and as a matter of state, not individual, responsibility.[158]

What I hope this chapter adds to the legal conversation is that, as geographer Don Mitchell argues, there is an inherently geographical character to the normative notion of social justice.[159] Social justice is not merely a political concept but also a practice that requires a space of representation and struggle. Most Canadians live in cities, and discussions of social justice necessarily, therefore, invoke a focus on the city — its politics and the "crucial importance of public space, action, and connection; and a sense of order that is progressive and democratic rather than repressive and

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154 Mark Purcell, "Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant" (2002) 58:2 GeoJournal 99 at 106.

155 Shaw et al, "Introduction", above note 117 at 5.

156 "Montréal Charter of Rights and Responsibilities" online: Ville de Montréal http://ville.montreal.qc.ca.

157 The quoted term is Darian-Smith's. Darien-Smith, above note 116 at 167.

158 Janine Brodie, "Reforming Social Justice in Neoliberal Times" (2007) 1:2 Studies in Social Justice 93 at 97.

159 Mitchell, above note 108.

oppressive"[160] Thus, as I have already discussed, we are reminded by these cases that the city is "a terrain of spatially informed politics."[161]

These cases mark two of the few occasions when the poor, homeless, and marginalized have been able to advance their specific interests in the area of social and economic rights under the *Charter*. The cases involve moral disturbances that render the spatial landscape uncertain, up for grabs.[162] The contested property and its uses instantiates localized agency working to shape the material and symbolic landscapes of the relevant cities.[163] Opposed to these efforts are the politics of neo-liberalism, argued by many to demand the redistribution of the resources of the city to a small political and economic elite.[164] This makes the city is a preeminent site for the struggles of the dispossessed. The dispersment of and access to public and private spaces are central. Both groups of claimants in these cases seek access to property for their needs. This is a result of, in different ways, being consigned to playing out private needs — sleeping or injecting — in public spaces. The homeless in *Adams* want private use of public space, and the users in *Insite* need a private space for their private needs but one that has a significant public profile and that is open to the public. In *Adams*, it is public property that is advanced upon; in *Insite*, it is private property that is enlisted.

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160 Kern, above note 8 at 12.

161 Dikeç, above note 99 at 96.

162 Blomley, above note 26 at 76.

163 *Ibid* at 59.

164 Harvey, "The Right to the City", above note 111 at 38.

The results of these two cases stand in complicated relationship to larger struggles for social justice.[165] The *Adams* decision grants some comfort to those left sleeping outside in our parks — the cover of a tarp or a cardboard box is better than nothing on a cold, rainy Victoria night. And, most definitely, keeping Insite open is tremendously crucial to the life opportunities of the injection drug users in Vancouver's Downtown Eastside. Opposite results in these cases would have profoundly deepened the harshness of the social and political landscape in Canada evoked in the opening paragraph of this chapter. Indeed, it is shameful that the claimants had to go to court to assert these rights against a government. But these are narrow victories. The right to housing, writ large, is left unattended still. And, the Supreme Court's judgment in *Insite* leaves everything except one specific governmental decision intact. Other safe injection sites face hurdles to legality that remain significantly unaltered.

But these cases mark an important moment in understanding social justice struggles under the *Charter*. With the downsizing, downloading, and downscaling typical of neoliberalism in full bloom across Canada, we can expect to see prominent rights issues emerging from the streets, lanes, parks, and structures of Canadian cities. It would be unfortunate if this dynamic local struggle, so richly evocative of the lived contexts of injustice and inequality in Canadian society, is stymied at the level of constitutional analysis by too narrow a focus on the abstract character of rights. We need to think about social and economic rights as often deeply located in local politics and as requiring a re-ordering and re-allocation, and thus a re-production, of spaces and civic geography. A socially just Canada calls for no less.

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165 Apart from the specific points that follow in the text, the following legal developments after each of the cases are important and poignant reminders of the often limited and unpredictable catalytic effects of rights litigation. The *Adams* decision did not convince the municipal government of Vancouver to amend bylaws closely resembling those found unconstitutional in Victoria. A local advocacy organization has subsequently launch a challenge specific to this nearly identical Vancouver legislation. (For discussion of this Vancouver court action, see online: PIVOT www.pivotlegal.orgl. The *Insite* case has engendered a legislative response by the federal Conservative government. Legislation was introduced into the House of Commons that would dramatically increase the difficult of obtaining a ministerial exemption from the operation of the *CDSA* for a supervised safe injection site. The legislation may indeed impede further extension of the exemption for the Insite facility ordered by the Supreme Court of Canada. (*Bill C-65*, *An Act to amend the Controlled Drugs and Substances Act*, 1st Session, 41st Parliament, 60-61-62 Elizabeth II, 2011-2012-2013.)