File No. 33556

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF CANADA and
MINISTER OF HEALTH FOR CANADA

Appellants
(Appellants / Cross-Respondents)

AND:

PHS COMMUNITY SERVICES SOCIETY, DEAN EDWARD WILSON,
SHELLY TOMIC and VANCOUVER AREA NETWORK OF DRUG USERS (VANDU)

Respondents
(Respondents / Cross-Appellants)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Intervener

AND:

ATTORNEY GENERAL OF QUÉBEC

Intervener

FACTUM OF THE INTERVENERS CANADIAN NURSES ASSOCIATION, REGISTERED NURSES' ASSOCIATION OF ONTARIO and ASSOCIATION OF REGISTERED NURSES OF BRITISH COLUMBIA

(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

OGILVY RENAULT LLP
Royal Bank Plaza, South Tower
200 Bay Street, Suite 3800
Toronto, Ontario M5J 2Z4

Rahool P. Agarwal
Michael Kotrly
John M. Picone
Tel: (416) 216-3943
Fax: (416) 216-3930
E-mail: ragarwal@ogilvyrenault.com

Counsel for the Interveners

OGILVY RENAULT LLP
45 O'Connor St., Suite 1600
Ottawa, Ontario K1P 1A4

Sally A. Gomery
Tel: (613) 780-8604
Fax: (613) 230-5459
E-mail: sgomery@ogilvyrenault.com

Agent for the Interveners

ORIGINAL TO: THE REGISTRAR, SUPREME COURT OF CANADA

COPIES TO:

DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice
Bank of Canada Building, East Tower
1161 - 234 Wellington Street
Ottawa, ON K1A 0H8

Robert J. Frater
Tel: (613) 957-4763
Fax: (613) 954-1920
E-mail: robert.frater@justice.gc.ca

PUBLIC PROSECUTION SERVICE OF CANADA
Robson Court
900 - 840 Howe Street
Vancouver, BC V6Z 2S9

W. Paul Riley
Tel: (604) 666-0704
Fax: (604) 666-1599
E-mail: Paul.Riley@ppsc-sppc.gc.ca

Counsel for the Appellants,
Attorney General of Canada and Minister of Health for Canada

DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Bank of Canada Building, East Tower
234 Wellington Street, Room 1161
Ottawa, ON KIA 0H8

Myles J. Kirvan per Robert J. Frater
Tel: (613) 957-4763
Fax: (613) 954-1920
E-mail: robert.frater@justice.gc.ca

Solicitor for the Appellants,
Attorney General of Canada and Minister of Health for Canada

ARVAY, FINLAY
1350 - 355 Burrard Street
Vancouver, BC V6C 2G8

Joseph J. Arvay, Q.C.
Tel: (604) 689-4421
Fax: (604) 687-1941
E-mail: jarvay@arvayfinlay.com

ETHOS LAW GROUP LLP
1124 - 470 Granville Street
Vancouver, BC V6C 1V5

Monique Pongracic-Speier
Tel: (604) 569-3022
Fax (toll free): 1-866-591-0597
E-mail: Monique@ethoslaw.ca

Counsel for the Respondents,
PHS Community Services Society, Wilson and Tomic

MCMILLAN LLP
300, 50 O'Connor Street
Ottawa, ON K1P 6L2

Jeffrey Beedell
Tel: (613) 232-7171
Fax: (613) 231-3191
E-mail: jeff.beedell@mcmillan.ca

Agent for the Respondents,
PHS Community Services Society, Wilson and Tomic

CONROY & COMPANY
2459 Pauline Street
Abbotsford, BC V2S 3S1

John W. Conroy, Q.C.
Tel: (604) 852-5110
Fax: (604) 859-3361
E-mail: jconroy@johnconroy.com

Counsel for the Respondent,
Vancouver Area Network of Drug Users (VANDU)

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: henry.brown@gowlings.com

Agent for the Respondent,
Vancouver Area Network of Drug Users (VANDU)

MINISTRY OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas Street
Victoria, BC V8W 9J7

Craig E. Jones
Tel: (250) 387-3129
Fax: (250) 356-9154
E-mail: Craig.Jones@gov.bc.ca

Counsel for the Respondent,
Attorney General of British Columbia

BURKE ROBERTSON LLP
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert E. Houston, Q.C.
Tel: 613-566-2058
Fax: 613-235-4330
E-mail: rhouston@burkerobertson.com

Agent for the Respondent,
Attorney General of British Columbia

PROCUREUR GÉNÉRAL DU QUÉBEC
1200 Route de l'Église, 2e étage
Ste-Foy, QC G1V 4M1

Hugo Jean
Tel: (418) 643-1477
Fax: (418) 644-7030
E-mail: hjean@justice.gouv.qc.ca

Counsel for the Intervener,
Attorney General of Quebec

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry
Tel: (819) 771-7393
Fax: (819) 771-5397
E-mail: p.landry@noelassocies.com

Agent for the Intervener,
Attorney General of Quebec

FASKEN MARTINEAU DUMOULIN LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3

Andrew I. Nathanson
Tel: (604) 631-4908
Fax: (604) 631-3232

Counsel for the Intervener,
Dr. Peter AIDS Foundation

FASKEN MARTINEAU DUMOULIN LLP
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 6L5

Scott M. Prescott
Tel: (613) 236-3882
Fax: (613) 230-6423
E-mail: sprescott@fasken.com

Agent for the Intervener,
Dr. Peter AIDS Foundation

BULL, HOUSSER & TUPPER LLP
3000 - 1055 West Georgia Street
Vancouver, BC V6E 3R3

Ryan D.W. Dalziel
Tel: (604) 641-4881
Fax: (604) 646-2671
E-mail: rdd@bht.com

Counsel for the Intervener,
British Columbia Civil Liberties Association

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Brian A. Crane, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: brian.crane@gowlings.com

Agent for the Intervener,
British Columbia Civil Liberties Association

DAVIS LLP
2800 Park Place
666 Burrard Street
Vancouver, BC V6C 2Z7

Sheila Tucker
Tel: (604) 643-2980
Fax: (604) 605-3781
E-mail: stucker@davis.ca

Counsel for the Intervener,
Vancouver Coastal Health Authority

MCMILLAN LLP
300, 50 O'Connor Street
Ottawa, ON K1P 6L2

Marie-France Major
Tel: (613) 232-7171
Fax: (613) 231-3191
E-mail: marie-france.major@mcmillan.ca

Agent for the Intervener,
Vancouver Coastal Health Authority

FASKEN MARTINEAU DUMOULIN LLP
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, ON M5H 2T6

Paul F. Monahan
Tel: (416) 366-8381
Fax (416) 364-7813
E-mail: pmonahan@fasken.com

Counsel for the Intervener,
Canadian Civil Liberties Association

FASKEN MARTINEAU DUMOULIN LLP
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 6L5

Julia Kennedy
Tel: (613) 236-3882
Fax: (613) 230-6423
E-mail: jkennedy@fasken.com

Agent for the Intervener,
Canadian Civil Liberties Association

MCCARTY TETRAULT LLP
Suite 1300, 777 Dunsmuir Street
Vancouver, BC V7Y 1K2

Michael A. Feder
Tel: (604) 643-5983
Fax: (604) 622-5614
E-mail: mfeder@mccarthy.ca

Counsel for the Intervener,
Canadian HIV/AIDS Legal Network,
International Harm Reduction Association
and CACTUS Montreal

MCCARTHY TETRAULT LLP
200 – 440 Laurier Avenue West
Ottawa, ON K1R 7X6

Brenda C. Swick
Tel: (613) 238-2000
Fax (613) 563-9386

Agent for the Intervener,
Canadian HIV/AIDS Legal Network,
International Harm Reduction Association
and CACTUS Montreal

STOCKWOODS LLP
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Owen M. Rees
Tel: (416) 593-7200
Fax: (416) 593-9345
E-mail: owner@stockwoods.ca

Counsel for the Intervener,
Canadian Public Health Association

NELLIGAN O'BRIEN PAYNE LLP
1500 – 50 O'Connor Street
Ottawa, ON K1P 6L2

Dougald E. Brown
Tel: (613) 231-8210
Fax: (613) 788-3661
E-mail: dougald.brown@nelligan.ca

Agent for the Intervener,
Canadian Public Health Association

BORDEN LADNER GERVAIS LLP
100 – 1100 Queen Street
Ottawa, ON K1lP 1J9

Guy J. Pratte
Tel: (613) 237-5160
Fax (613) 230-8842
E-mail: gpratte@blgcanada.com

Counsel for the Intervener,
Canadian Medical Association

VICTORY SQUARE LAW OFFICE
100 West Pender Street, Suite 500
Vancouver, BC V6B 1R8

Marjorie Brown
Tel: (604) 684-8421
Fax: (604) 684-8427
E-mail: mbrown@vslo.ca

Counsel for the Intervener,
British Columbia Nurses' Union

SACK GOLDBLATT MITCHELL LLP
500 – 30 Metcalfe Street
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 235-5327
Fax (613) 235-3041
E-mail: cbauman@sgmlaw.com

Agent for the Intervener,
British Columbia Nurses' Union

MACLAREN CORLETT
50 O'Connor Street, Suite 1625
Ottawa, ON K1P 6L2

Michael A. Chambers
Tel: (613) 233-1146
Fax (613) 233-7190
E-mail: mchambers@macorlaw.com

Counsel for the Intervener,
Real Women Canada

TABLE OF CONTENTS

PAGE

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Nurses are of vital importance to Insite and this appeal. They provide a range of professional health care services at Insite, including supervising Insite's users while they inject drugs. Supervision ameliorates the risks of morbidity and mortality associated with injection drug use, which is the health care benefit that grounds the Respondents' claims under the *Canadian Charter of Rights and Freedoms*.[1]

2. However, nurses working at Insite face the threat of criminal prosecution for possession and trafficking under the *Controlled Drugs and Substances Act*.[2] That threat is real and significant – it was contemplated in the original Ministerial Exemption for Insite and cannot be mitigated by prosecutorial discretion or the possibility of a fact-based defence. Sections 4(1) and 5(1) of the *CDSA* effectively prohibit nurses from working at Insite and carrying out their supervisory role.

3. The Canadian Nurses Association, the Registered Nurses' Association of Ontario, and the Association of Registered Nurses of British Columbia (together, the "Nurses Associations") argue that the *Charter* requires the protection of nurses at Insite: (i) Insite's nurses must be permitted to supervise users without fear of prosecution, otherwise the *Charter* right not to be denied access to supervised injection will be rendered meaningless; and (ii) nurses' own rights to liberty under section 7 of the *Charter* are infringed by the *CDSA*.

4. The Nurses Associations also reject the Appellants' characterization of this appeal as a mere policy dispute. The evidence is uncontroverted: denying users access to supervised injection increases the risk of death and infectious disease. Consistent with cases such as *Chaoulli*,[3] *Morgentaler*[4] and *Parker*,[5] this increased health risk results in an infringement of users' *Charter* rights. This appeal is not about policy – the evidence transcends the parties' "policy preferences" and necessitates a remedy under the *Charter*.

---

[1] *Canadian Charter of Rights and Freedoms*, Part I to the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("*Charter*").
[2] S.C. 1996, c. 19 ("*CDSA*").
[3] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 ("*Chaoulli*"), Appellants' Book of Authorities ("CANBoA"), Vol. I, Tab 11.
[4] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 ("*Morgentaler*"), Respondents' Book of Authorities ("PHSBoA"), Tab 15.
[5] (2000), 146 C.C.C. (3d) 193 (Ont. C.A.) ("*Parker*"), CANBoA, Vol. III, Tab 42.

B. Statement of Relevant Facts

5. The Nurses Associations accept the facts as set out in the facta of the Respondents. The Nurses Associations also rely upon the following factual findings of the Trial Judge:

Addiction Drug Use

(a) Addiction is an illness which involves the continuing need or craving to consume the substance to which the addiction relates.[6]

(b) The epidemic of drug addiction facing the Downtown Eastside is a result of genetic, psychological, sociological and familial problems, the inability of governments to provide meaningful solutions and the failure of the criminal law to prevent the trafficking of controlled substances.[7]

(c) Injection drug users face significant health risks resulting from the use of unsanitary equipment, techniques and procedures for injection which facilitate the transmission of infectious disease between individuals, and overdoses, which can result in death.[8]

Harm Reduction and Supervised Injection

(d) In this context, harm reduction is a pragmatic and evidence-based health care strategy which:

(i) recognizes that abstinence may not always be a realistic goal, particularly in the short-term; and

(ii) attempts to ameliorate the effects of drug addiction on individuals and communities through incremental and achievable steps.[9]

---

[6] Appellants' Record ("*Record*"), Vol. I, Reasons for Judgment of the Trial Judge, p. 24, para. 87.
[7] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 24-25, para. 89.
[8] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 19, 24, 34, paras. 50-51, 87, 140; *Record*, Vol. II, Affidavit of Donald McPherson ("McPherson Affidavit"), p. 55, para. 6; *Record*, Vol. III, Affidavit of Dr. Gabor Maté, p. 4, para. 10; Affidavit of Dr. David Marsh, Vol. IX, pp. 77-78, 87, paras. 6-7, 30.
[9] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 16, para. 36; *Record*, Vol. II, McPherson Affidavit, Exhibit "B", p. 134.

(e) Supervised injection is one such step. It reduces the risk of health complications and death associated with injection drug use.[10]

(f) Supervised injection is part of a broader continuum of care for drug users which begins with harm reduction and can lead to recovery.[11]

The Benefits of Insite

(g) Supervision of injection drug use at Insite has virtually eliminated the risk of death by overdose and greatly reduced the risk of infectious disease.[12]

(h) Insite also provides users with access to counselling and consultation that can lead to abstinence and rehabilitation.[13]

(i) The services provided by Insite constitute health care.[14]

The Role of Nurses at Insite

(j) The services provided by nurses at Insite include:

(i) supervising users while they inject drugs;[15]

(ii) providing overdose treatment, including monitoring vital signs, administering oxygen and contacting physicians and ambulance services, when necessary;[16]

(iii) providing wound care and treatment for injection-related conditions;[17] and

(iv) providing health care education, counselling and referrals to other health services, such as drug withdrawal and addictions treatment.[18]

---

[10] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 17-18, para. 44; *Record*, Vol. V, Affidavit of Heather Hay ("Hay Affidavit"), pp. 136-137, para. 35.
[11] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 17-18, paras. 43-44; *Record*, Vol. V, Hay Affidavit, pp. 134-137, paras. 32-35.
[12] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 22, 24, 34-35, paras. 78, 87, 136, 144; *Record*, Vol. V, Hay Affidavit, p. 143, para. 53.
[13] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 34, para. 136.
[14] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 34, para. 136.
[15] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 22, para. 73; *Record*, Vol. V, Hay Affidavit, pp. 140-141, para. 47.
[16] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 22, para. 73; *Record*, Vol. V, Hay Affidavit, p. 141, para. 48.
[17] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 22, para. 75; *Record*, Vol. V, Hay Affidavit, pp. 141-142, para. 50.
[18] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 22, para. 76; *Record*, Vol. V, Hay Affidavit, p. 142, para. 51.

(k) The nurses at Insite were specifically exempt from the application of sections 4(1) and 5(1) of the *CDSA* under the Ministerial Exemption. In fact, the section 5(1) exemption was *only* for staff, not users.[19]

PART II - STATEMENT OF POSITION

6. The Nurses Associations support the Respondents' position that sections 4(1) and 5(1) of the *CDSA* infringe the rights guaranteed under section 7 of the *Charter* and that these infringements cannot be saved by section 1.

7. The Nurses Associations will address two specific issues: (i) the need to protect Insite's nurses from potential prosecution under the *CDSA*; and (ii) the Appellants' assertion that this appeal is a dispute about "policy preferences".

PART III - STATEMENT OF ARGUMENT

A. The Nurses at Insite Require Protection from the *CDSA*

8. For Insite to succeed, the nurses working at Insite must be protected from prosecution under the *CDSA*. The Nurses Associations' submissions are threefold: (i) nurses working at Insite face a very real threat of criminal prosecution; (ii) to give full meaning to users' *Charter* rights, nurses must be permitted to work at Insite without fear of a criminal penalty; and (iii) sections 4(1) and 5(1) of the *CDSA* infringe nurses' <u>own</u> rights to liberty under section 7 of the *Charter*.

(i) Nurses Face a Threat of Prosecution

9. By carrying out their duties at Insite, nurses are subject to potential criminal prosecution for possession and trafficking under the *CDSA*.

10. The *CDSA* defines the offences of possession and trafficking broadly. "Possession" under section 4(1) of the *CDSA* is defined by reference to section 4(3) of the *Criminal Code*,[20] which provides in relevant part:

---

[19] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 77-78, para. 81; *Record*, Vol. IX, Hay Affidavit, Exhibit "J", p. 48.

> **4(3)** For the purposes of this Act,
>
> ...
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody or possession of each and all of them.

11. By supervising drug users while they inject drugs, Insite's nurses could be deemed to have possession of a controlled substance by virtue of having "knowledge and consent".

12. "Trafficking" under section 5(1) of the *CDSA* could also capture nurses for the duties they perform at Insite. As held by the Trial Judge:

> It is possible that staff at Insite who handle used equipment contaminated by controlled substances, or staff who take possession of any controlled substances for delivery to police, could be alleged to be engaged in "trafficking", which is broadly defined by the CDSA to the (*sic*) administration or transfer of a controlled substance.[21]

13. The breadth of the impugned provisions exposes Insite's nurses to a very real threat of criminal prosecution. The Court of Appeal expressly recognized that both sections 4(1) and 5(1) of the *CDSA* place nurses in jeopardy:

> Because neither a regulation nor a ministerial order permits that in providing health care service, the health care provider may have deemed possession of that heroin and be subject to criminal penalty for possession or trafficking in that drug; the patient may be charged with possession of the illegally obtained drug.[22]

14. Notwithstanding the findings of the Courts below, the Appellants completely ignore the possibility that nurses at Insite could be charged with possession under section 4(1).

---

[20] R.S.C. 1985, c. C-46.
[21] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 36, para. 153.
[22] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, pp. 93-94, para. 129 (emphasis added).

15. Although the Appellants address the issue of trafficking, they assert that there is no possibility of prosecution because, at common law, handling drugs for the sole purpose of turning them over to the police (the public duty defence) is not considered an offence.[23]

16. The Appellants' argument is without merit. The cases they cite, while confirming the availability of a public duty defence, clearly state that the applicability of such a defence cannot be determined in the abstract – each case will turn on its own facts.[24] It was precisely for this reason that the Trial Judge dismissed VANDU's request for a declaration that the conduct of Insite's staff in the ordinary course of business did not amount to the commission of any offences under the *CDSA*.[25]

17. Moreover, the existence of a possible defence does not negate the threat of prosecution and imprisonment. The police retain the discretion to charge individuals with possession or trafficking, and the Crown retains the discretion to pursue any such charges. By providing the Ministerial Exemption, the federal government itself recognized: (i) that the prosecution of Insite's staff under the *CDSA* was a valid concern; and (ii) that it was appropriate and necessary to provide express protections for Insite's staff to ensure the successful operation of the clinic.

18. Nurses cannot reasonably be expected to work at supervised injection facilities without certainty that the performance of their professional duties will not lead to a criminal charge. For Insite to succeed, nurses must be able to deliver health care free from the threat of prosecution and imprisonment. The potential goodwill of the police and the Crown and an assurance in the air from the Appellants are not enough.

(ii) Users' *Charter* Rights Depend upon Nurses

19. The Respondents argue that the *CDSA*'s blanket prohibitions foreclose supervised injection, which results in a denial of access to certain health benefits. This amounts to an infringement of users' rights to life and security of the person guaranteed by section 7 of the *Charter*.

---

[23] Appellants' Factum, pp. 34-35, paras. 95-96.
[24] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 26, para. 95; see cases cited at Appellants' Factum, p. 35, para. 95, fn. 141.
[25] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 26, paras. 95, 98.

20. Nurses play an integral role in providing the health benefits which underlie the Respondents' *Charter* claims. The Trial Judge found that:

(a) supervised injection has eliminated the risk of death by overdose and greatly diminished the risk of infectious disease;[26] and

(b) nurses are responsible for supervision of injection drug use at Insite, which is instrumental to the provision of these health benefits.[27]

Thus, the *Charter* rights at issue are dependent upon nurses and the work that they do at Insite.

21. If the Court accepts the Respondents' position, users' *Charter* rights cannot be fully realized unless nurses at Insite are protected from prosecution under the *CDSA*. Nurses must be free to perform their supervisory duties without fear of criminal sanction. To borrow from the Trial Judge, failure to protect Insite's staff from prosecution would "negative the utility of any determination" that users' *Charter* rights have been violated.[28]

22. The Nurses Associations accordingly request that, in the event that the impugned provisions are found to infringe section 7 of the *Charter*, the Court make express reference to the need for Insite's staff to be protected from prosecution under the *CDSA*.

(iii) The Impugned Provisions Violate Nurses' *Charter* Rights

23. The impugned provisions also violate nurses' own rights to liberty under section 7 of the *Charter* in a manner that does not accord with the principles of fundamental justice.

The Impugned Provisions Deprive Nurses of their Liberty

24. The *CDSA*'s possession and trafficking provisions threaten nurses working at Insite with the possibility of prosecution and imprisonment. This is sufficient to constitute a deprivation of liberty under s. 7 of the *Charter*.[29]

---

[26] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 22, 24, 34-35, paras. 78, 87, 136, 144; *Record*, Vol. V, Hay Affidavit, p. 143, para. 53.
[27] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 22, para. 73; *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 86, para. 102.
[28] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 36, para. 153.
[29] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571 at para. 84, CANBoA, Vol. III, Tab 38.

25. The Appellants, however, argue that nurses' liberty interests are not engaged because they can assert the public duty defence in response to a charge of trafficking.[30]

26. The Appellants' position should be rejected for two reasons. First, it does not consider the deprivation of liberty to Insite's staff caused by section 4(1). Second, and in any event, the availability of a potential defence does not negate the application of the *Charter*. As recognized by the Court of Appeal, neither the hope of a favourable exercise of prosecutorial discretion nor the prospect of succeeding on an untested defence on the facts should displace the threat to liberty posed by a possible conviction under the *CDSA*.[31]

The Deprivation Does not Accord with the Principles of Fundamental Justice

27. The possession and trafficking provisions of the *CDSA* deprive nurses of their liberty in a manner that does not accord with the principles of fundamental justice.[32] The impugned provisions are arbitrary, grossly disproportionate and overbroad:

(a) they prohibit the management of addiction and its associated risks by treating all use of controlled substances the same;[33]

(b) blanket prohibitions are not necessary to achieve the state's objectives of public health and safety. Indeed, by preventing supervised injection, the impugned provisions undermine these very objectives by increasing the risk of morbidity and mortality associated with drug addiction;[34] and

(c) the impugned provisions prevent nurses at Insite from satisfying their professional obligation to provide health care that is consistent with current scientific evidence. Current evidence overwhelmingly supports nurses' participation in the delivery of health care at supervised injection sites.[35]

---

[30] Appellants' Factum, pp. 34-35, para. 95.
[31] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 68, para. 43.
[32] The Nurses Associations also agree with the submissions of the Respondents PHS Community Services Society, Dean Wilson and Shelly Tomic regarding the principles of fundamental justice: see PHS Factum, pp. 26-37, paras. 98-152.
[33] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 36, para. 152.
[34] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 76, paras. 74-76; *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 36, para. 152.
[35] The Registered Nurses Association of B.C. (now replaced by the College of Registered Nurses of B.C.) took the position that "providing clients with evidence-based information to safely give themselves intravenous injections is within the scope of Registered Nursing Practice": see *Record*, Vol. XX,

B. This Appeal Is about Evidence, not Policy Preferences

28. The Appellants state that the Respondents are attempting "through their evidence to make an empirical case that their preferred policy should be adopted".[36] But, by casting this appeal as a policy dispute, the Appellants ignore and trivialize the evidentiary basis for the Respondents' position and the decisions of the Courts below.

29. The evidence is clear: supervised injection at Insite has virtually eliminated the risk of death by overdose and greatly reduced the risk of infectious disease.[37] These evidentiary findings are what led the Trial Judge and the Court of Appeal to conclude that sections 4(1) and 5(1) of the *CDSA* violate section 7 of the *Charter*. The Respondents' *Charter* claim and the decisions of the Courts below are not based on policy, but are grounded in evidence.

30. In fact, it is the Appellants' argument that appears to rely upon a policy position: that supervised injection is not a legitimate health care strategy to address drug addiction.

31. The Appellants' policy-driven approach is evident from their efforts to distinguish this case from *Parker*.[38] They argue that the difference between the cases "could not be more striking: in *Parker*, the substance at issue was to be part of the treatment; in this case, the substances the individuals want to use are at the root of their health problems."[39]

32. This is a false distinction. The Appellants may find supervised injection unpalatable because it involves the use of controlled substances and does not "cure" drug addiction, but their position ignores several key factual findings of the Trial Judge:

(a) drug addiction is an illness, from which full recovery is not always possible;[40]

(b) abstinence is not a realistic option for many drug addicts;[41]

Affidavit of Maxine Davis, pp. 141-142, paras. 21-23. The *Code of Ethics* of the Canadian Nurses Association also requires that nurses provide care on the basis of current evidence.

[36] Appellants' Factum, p. 32, para. 86.

[37] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 22, 24, 34-35, paras. 78, 87, 136, 144; *Record*, Vol. V, Hay Affidavit, p. 143, para. 53.

[38] *Parker*, *supra*, CANBoA, Vol. III, Tab 42.

[39] Appellants' Factum, p. 33, para. 91.

[40] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 24, para. 87.

[41] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 16, para. 36; *Record*, Vol. II, McPherson Affidavit, Exhibit "B", p. 134.

(c) while users do not use Insite directly to treat their addiction, they receive services that are proven to ameliorate the health risks associated with injection drug use, including the risk of infectious disease and death by overdose;[42] and

(d) the services provided at Insite constitute health care.[43]

33. The *CDSA* operates to deny users access to a health care service that can improve their health and save their lives. Like *Parker*, this is enough to ground a violation of section 7. The Appellants' apparent distaste for supervised injection – because it reduces harm as opposed to cures addiction – is simply not enough negate the application of the *Charter*.

PART IV - COSTS SUBMISSIONS

34. The Nurses Associations do not seek costs and request that no order as to costs be made against them.

PART V - ORDER REQUESTED

35. The Nurses Associations request that an order be granted declaring the impugned provisions to infringe the rights guaranteed by section 7 of the *Charter*, and that such infringement is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1.

36. The Nurses Associations request that they be permitted to present oral argument at the hearing of the appeal for 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of April, 2011.

OGILVY RENAULT LLP
Counsel for the Interveners

---

[42] *Record*, Vol. I, Reasons for Judgment of the Trial Judge, pp. 22, 24, 34-35, paras. 78, 87, 136, 144.
[43] *Record*, Vol. I, Reasons for Judgment of the Court of Appeal, p. 86, para. 103; *Record*, Vol. I, Reasons for Judgment of the Trial Judge, p. 34, para. 136.

PART VI - TABLE OF AUTHORITIES

Caselaw		**Paragraph(s)**
1.	*Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791	4
2.	*R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571	24
3.	*R. v. Morgentaler*, [1988] 1 S.C.R. 30	4
4.	*R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.)	4, 31-33

PART VII - STATUTORY PROVISIONS

CANADIAN CHARTER OF RIGHTS AND FREEDOMS	**CHARTE CANADIENNE DES DROITS ET LIBERTÉS**
Rights and freedoms in Canada **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Life, liberty and security of person **7.** 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.	Droits et libertés au Canada **1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique. Vie, liberté et sécurité **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
***Criminal Code* [R.S.,c.C-34, s.1.]** 4(3) For the purposes of this Act, (a) a person has anything in possession when he has it in his personal possession or knowingly (i) has it in the actual possession or custody of another person, or (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.	***Code criminel* [S.R., ch. C-34, art. 1.]** 4(3) Pour l'application de la présente loi : (a) une personne est en possession d'une chose lorsqu'elle l'a en sa possession personnelle ou que, sciemment : (i) ou bien elle l'a en la possession ou garde réelle d'une autre personne, (ii) ou bien elle l'a en un lieu qui lui appartient ou non ou qu'elle occupe ou non, pour son propre usage ou avantage ou celui d'une autre personne; (b) lorsqu'une de deux ou plusieurs personnes, au su et avec le consentement de l'autre ou des autres, a une chose en sa garde ou possession, cette chose est censée en la garde et possession de toutes ces personnes et de chacune d'elles.
***Controlled Drugs and Substances Act* (S.C. 1996, c. 19)** 2.(1) In this Act, "traffic" means, in respect of a substance included in any of Schedules I to IV, (*a*) to sell, administer, give, transfer, transport, send or deliver the substance, (*b*) to sell an authorization to obtain the substance, or (*c*) to offer to do anything mentioned in paragraph (*a*) or (*b*), otherwise than under the authority of the regulations. Possession of substance 4.(1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III. Trafficking in substance 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.	***Loi réglementant certaines drogues et autres substances* (L.C. 1996, ch. 19)** 2.(1) Les définitions qui suivent s'appliquent à la présente loi. « trafic » Relativement à une substance inscrite à l'une ou l'autre des annexes I à IV, toute opération de vente — y compris la vente d'une autorisation visant son obtention — , d'administration, de don, de cession, de transport, d'expédition ou de livraison portant sur une telle substance — ou toute offre d'effectuer l'une de ces opérations — qui sort du cadre réglementaire. Possession de substances 4.(1) Sauf dans les cas autorisés aux termes des règlements, la possession de toute substance inscrite aux annexes I, II ou III est interdite. Trafic de substances 5.(1) Il est interdit de faire le trafic de toute substance inscrite aux annexes I, II, III ou IV ou de toute substance présentée ou tenue pour telle par le trafiquant.