Court of Appeal File No. CA026297
Vancouver Registry

COURT OF APPEAL

ON APPEAL FROM: THE DECISION OF THE HONOURABLE
MR. JUSTICE HOOD OF THE SUPREME COURT OF BRITISH COLUMBIA,
VANCOUVER CRIMINAL REGISTRY NO. CC980044

BETWEEN:

JAMES ROGER DEMERS

APPELLANT

AND:

REGINA

RESPONDENT

AND:

THE ELIZABETH BAGSHAW SOCIETY
EVERYWOMAN'S HEALTH CENTRE SOCIETY (1988)
THE B.C. PRO-CHOICE ACTION NETWORK SOCIETY
THE B.C. WOMEN'S C.A.R.E. PROGRAM
THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENOR

INTERVENOR'S FACTUM

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I N D E X

PART 1: STATEMENT OF FACTS

1. The Intervenor adopts the Statement of Facts contained in the Respondent's Factum with the addition of the following facts.

2. The Intervenor is a coalition of five organizations. They are:

a) the Elizabeth Bagshaw Society, which operates the Elizabeth Bagshaw Women's Clinic, a non-profit medical facility that provides abortion and other reproductive services with counselling to women in a safe and confidential atmosphere;

b) Everywoman's Health Centre Society (1988), which operates the Everywoman's Health Centre ("Everywoman's"), a non-profit clinic accessible to all women that provides abortion and other reproductive services in a supportive and confidential setting;

c) the B.C. Pro-Choice Action Network Society, previously called the BC Coalition for Abortion Clinics, a non-profit educational and advocacy organization with a broad and diverse membership whose objective is ensuring safe, fully-funded and high-quality reproductive health services, including abortion services;

d) the C.A.R.E. Program, a program of the Children's and Women's Health Centre of British Columbia Branch that provides abortion services, counselling, birth control information and referrals to other community resources for women; and

e) the Women's Legal Education and Action Fund, a national, federally incorporated not-for-profit organization that engages in equality rights litigation, research and public education to secure women's equality rights as guaranteed by the *Canadian Charter of Rights and Freedoms.*

3. The Intervenor was granted leave to intervene and to make written and oral submissions before the British Columbia Supreme Court in *R. v. Maurice Lewis*.

4. The Intervenor was granted leave to intervene in this appeal on April 9, 2002, by order of the Honourable Chief Justice Finch. The Intervenor was granted leave to make written submissions and to apply to the Court to make oral submissions at the hearing of the appeal.

PART 2: POINTS IN ISSUE

5. The Intervenor's position with respect to the points in issue is as follows:

a) Whether the foetus has rights under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

The Intervenor respectfully submits that this Honourable Court should decline to address the substance of the Appellant's claim that the foetus has constitutional rights under s. 7 of the *Charter* because it is unnecessary to the disposition of this appeal. In particular, the Intervenor submits that the Appellant's s. 7 argument on this point is moot since the determination of whether a foetus has s. 7 rights has no bearing on the issues before the Court in this appeal.

b) Whether ss. 2(1)(a) and (b) of the *Access to Abortion Services Act*, R.S.B.C. 1996, c.1 (the "*Act*") infringe the rights of the Appellant under ss. 2 (a) or (b) of the *Charter.*

The Intervenor takes no position in this issue.

c) Whether any infringement of the Appellant's rights by the impugned provisions of the *Act* are justified under s. 1.

The Intervenor submits that when the nature and extent of the harm addressed by the *Act* are considered together with the manner in which the *Act* advances the constitutional values of equality, privacy and dignity of the person, values reflected in ss. 7, 15 and 28 of the *Charter,* any infringement of *Charter* rights by the impugned provisions of the *Act* is constitutionally justified under s. 1 of the *Charter*.

PART 3: ARGUMENT

A. The Section 7 Claim

6. The Intervenor respectfully submits that it is unnecessary for this Court to consider the constitutional status of the foetus in order to dispose of this appeal, because such status has no bearing on the constitutionality of the impugned provisions of the *Act*, and is therefore moot with respect to this appeal.

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, at p. 353.

7. The Appellant does not claim that the *Act* infringes his own s. 7 rights. He claims that the *Act* infringes the s. 7 rights of foetuses. However, the *Act* does not address the legality of abortion. The impugned provisions of the *Act* simply restrict a range of activities expressing disapproval of abortion, in defined ways, within precisely specified geographic zones. There is therefore no nexus between the impugned provisions of the *Act* and any s. 7 rights of foetuses asserted by the Appellant.

8. In attempting to raise the issue of whether foetuses have rights under s. 7 of the *Charter*, the Appellant is essentially mounting a collateral attack on the legality of abortion rather than directly challenging existing legislation that recognizes abortion as a lawful medical service. Such collateral attacks are especially inappropriate in *Charter* cases, where the legislative context provides the framework for assessment and balancing of completing fundamental values.

9. The Appellant led no evidence that establishes that the *Act* actually affects any hypothetical constitutional rights of foetuses. Although there is some evidence that a few individuals may have decided not to enter Everywoman's because of protest activities on its threshold, and the Appellant has asserted that the activities prohibited by the *Act* reduce the number of abortions, there is also evidence to the contrary. Further, even accepting such evidence does not establish the requisite connection. It is equally plausible that a woman who did not enter a clinic because of protest activity within the zone described in the *Act* would also have turned away if the activity had occurred outside that zone, that she would have decided not to have an abortion even if there had been no protest, or that she would have proceeded with the

abortion subsequently, or at another facility. As a result, even if a foetus has rights under s. 7 of the *Charter*, the impugned provisions have no impact on any such rights. Therefore, the Appellant's s. 7 claim is moot.

Respondent's Statement of Facts, para. 17, 19, and 21;
Appellants Statement of Facts, para. 12.
R. v. Lewis [1997] 1 W.W.R. 496, at p.525, para. 85.

10. A court may exercise its discretion to determine a moot issue in appropriate circumstances. In *Borowski*, the Supreme Court of Canada listed three factors relevant to this determination: whether the issue had been raised in the full adversarial context; whether scarce judicial resources should be allocated to resolve the moot issue; and whether such a determination would be appropriate in light of the role of the judiciary in our political framework.

Borowski, supra, at pp. 358-363.

11. As in *Borowski*, consideration of the second and third factors demonstrates that the discretion should not be exercised in the present appeal. The Supreme Court of Canada has stated that a ruling that the foetus has a right to life would be a radical change in the law with unpredictable consequences, and would introduce enormous uncertainty into the law regarding the constitutional status of abortion services in Canada. Judicial economy therefore militates against deciding this question. Further, a determination of the Appellant's claim that foetuses have s. 7 rights would effectively turn this appeal into a private reference on the legality of abortion, precisely the circumstance the Supreme Court considered in *Borowski* when it declined to hear the appeal.

Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.),
[1997] 3 S.C.R. 925 at pp. 940-41, 943, and 945;
Borowski, supra, at p. 364-365.

B. The Section 1 Analysis

12. The Intervenor submits that, if this Court finds that the impugned provisions of the *Act* infringe ss. 2 (a), 2 (b) or 7 of the *Charter*, any such infringement is demonstrably justified under

s. 1. Applying the s. 1 analysis established by the Supreme Court of Canada, the Intervenor submits that:

a) the objective of the legislation is pressing and substantial; and

b) the means chosen by the legislature are proportional to the objective sought to be achieved, such that the measures adopted are rationally connected to the legislative objective, they impair "as little as possible" the right of freedom in question, and there is a proportionality between the deleterious effects of the measures and the legislative objective, and also between the deleterious and salutary effects of the measures.

R. v. Oakes, [1986] 1 S.C.R. 103, at 138-139;
Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at 889.

13. The Supreme Court of Canada has emphasized that s. 1 is not a rigid or technical provision. Rather, each stage of the s. 1 analysis must be undertaken with close attention to context:

> In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

Thomson Newspapers Co. v. *Canada (Attorney General),* [1998] 1 S.C.R. 877, at p. 939.

14. In *Thomson Newspapers*, the Supreme Court of Canada identified four contextual factors relevant to the s. 1 analysis: the vulnerability of the group the legislation seeks to protect, the group's subjective fears and apprehension of harm, the extent to which the particular harm or the effectiveness of the remedy is capable of scientific measurement, and the nature of the activity infringed (the nature of the expression at issue). The Supreme Court has also often considered the extent to which the legislation enhances other *Charter* values as an additional contextual factor in the s. 1 analysis.

Thomson Newspapers, supra, at pp. 942-943;
R. v. Keegstra, [1990] 3 S.C.R. 697, at p. 756;
Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R 892, at p. 916-917;
M. v. *H.*, [1999] 2 S.C.R. 3, at p. 61.

1. Contextual Factors

15. The Intervenor submits that in the present appeal, all of the contextual factors identified by the Supreme Court of Canada support a finding that the impugned provisions of the *Act* are justified under s. 1.

16. First, the group the *Act* seeks to protect is a vulnerable group. A certain degree of vulnerability on the part of the individual needing a medical service is associated with any pressing need for medical services. When the political and social climate within which abortion services are currently offered is considered together with the larger context of women's vulnerability and inequality in relation to reproductive health, it is clear that women seeking access to abortion services constitute a vulnerable group for the purposes of the s. 1 enquiry. Mr. Justice Adams referred to women's vulnerability in this context in his decision in *Dieleman*:

> "Vulnerability" best describes the situation of the women targeted. The decision to abort is a profoundly personal one and its complexities pervade the entirety of that individual's life. To be trapped, by the circumstances prevailing at the free-standing clinics, in a face-to-face encounter with a hostile stranger justifies government concern over the unnecessary humiliation and embarrassment inflicted on these women.

Ontario (Attorney General) v. *Dieleman* (1995) 117 D.L.R. (4th) 449, at p. 728
Respondent's Statement of Facts, paras. 22-27.

17. Second, it is reasonable to expect that the women described in the passage from *Dieleman* quoted above will feel apprehensive and fearful about such encounters. Certain groups of women may experience greater fears and stresses. For example, women with disabilities, women seeking abortions because of a pregnancy that has occurred because of a sexual assault, young women, women who reside in smaller communities, women living in poverty, and First Nations, immigrant, and refugee women may, because of these characteristics, experience greater apprehensions about contact with protesters at the threshold of an abortion services facility.

Realizing Choices: The Report of British Columbia Task Force on Access to Contraception and Abortion Services, August 1994, Exhibit 23, A.B. Vol. V, p. 969, pp. 9-15;
Lewis, supra, at p. 530, para. 107.

18. Third, the kinds of harms the *Act* seeks to avert and the efficaciousness of the remedy it employs are not capable of precise scientific measurement. Courts have recognized in a variety of contexts that legislative measures which seek to limit expressive activity in order to prevent specific harms should not be held to a rigourous standard of scientific proof when applying the proportionality aspect of the s. 1 test.

R. v. Sharpe, [2001] 1 S.C.R. 45, at p. 96;
Keegstra, supra, at p. 776;
R. v. Butler, [1992] 1 S.C.R. 452, at p. 504;
Irwin Toy Ltd. v. Quebec (Attorney General) [1989] 1 S.C.R. 927, at p. 990.

19. Fourth, the nature of the activity prohibited by the *Act* is not of high value. This is not because the expression of anti-abortion views in general is of low value, as was found with respect to hate speech in *Keegstra* or obscenity in *Butler*. Rather, it is because anti-abortion views can easily be expressed at other locations, and their expression at the locations prohibited by the *Act* is no more closely tied with the values underlying s. 2 (a) and 2(b) of the *Charter* than expression of those views at other locations.

Keegstra, supra, at p. 762;
Butler, supra, at p. 500.

20. It is submitted that a confrontation with a woman seeking abortion services at the threshold of an abortion facility is not an appropriate forum to pursue a larger quest for truth in relation to the issues surrounding abortion. Neither does this location possess any specific virtue as a marketplace for ideas or as a democratic forum. While the Respondent's individual self-fulfilment may be enhanced by engaging in anti-abortion activity within the access zones, it is accomplished at the expense of the listener's self-fulfilment, as the location effectively strips her of the opportunity to exercise her right not to hear this particular message.

21. The issue in this appeal is not the value of the Appellant's expression generally, but whether a restriction on this expression <u>at this place</u> interferes with core freedom of expression values. The *Act* only restricts individuals from expressing anti-abortion views in certain narrowly defined geographic locations; at all other locations, such views may lawfully be expressed. The *Act* is in no way a total prohibition on the expression of the message itself. The legislative

prohibition is limited to the locations where the expression is most likely to cause significant harm to others.

Act, ss. 2-7;
Everywoman's Access Zone Plan, Exhibit 2, A.B. Vol. 1, p. 3.

22. Fifth, the impugned provisions of the *Act* significantly further other *Charter* values, namely, the rights of women under ss. 7, 15 and 28.

(i) Section 7 Values

23. By facilitating women's access to lawful abortion services, the *Act* advances the values of "liberty" and "security of the person" contained in s. 7 of the *Charter*. The Supreme Court of Canada has held that legislation that imposes severe barriers to access to abortion services breaches women's right to security of the person. By implication, legislation that facilitates such access enhances this constitutional value.

R. v. Morgentaler, [1988] 1 S.C.R. 30*,* at p. 56*, per* Dickson, C.J. and Lamer, J.;
p. 106, *per* Beetz and Estey, JJ.; and p. 173, *per* Wilson, J.

24. The *Act* enhances women's security of the person by reducing the considerable stress anti-abortion activities on the threshold of abortion facilities create for women who seek such medical services. As Adams J. remarked in *Dieleman*, *supra*, "there is something fundamentally disturbing about “capturing” women at the threshold of a medical facility and doing so immediately before they undergo a serious surgical procedure." The stress arises both from the confrontation itself and from a woman’s entirely understandable uncertainty, in light of the history of such protest, of how far any individual or group of anti-abortion protestors might go in their attempts to stop her from having an abortion.

Respondent’s Statement of Facts, para. 24
Dieleman, *supra*, at p. 728;
C. Cozzarelli and B. Major, "The Effects of Anti-Abortion Demonstrators and ProChoice Escorts on Women's Psychological Responses to Abortion" (1994), 13(4) *Journal of Social and Clinical Psychology,* 404-429, Exhibit 21, A.B. Vol. V, p. 937.

25. The *Act* also promotes women's security of the person by reducing the stress anti-abortion activities cause to abortion service providers. Anti-abortion activities have been a significant disincentive to physicians and other health care workers to provide this lawful medical service. To the extent that a woman's priorities and aspirations with respect to the use of her body mean that she has decided to terminate a pregnancy, the reduced availability of abortion services due to a lack of service providers will compromise both the psychological and physical components of her security of the person. The increased likelihood of delay in gaining access to scarce abortion services creates increased risks to the health of women who require those services.

Respondent's Statement of Facts, paras. 28-30;
Dieleman, supra, at pp. 728-29;
Morgentaler, supra, at pp. 56-63, *per* Dickson C.J.;
pp. 101-106, *per* Beetz J.; pp. 171-172, *per* Wilson J;
Lewis, supra, at. pp. 527-528, paras. 95-98.

26. The constitutional value reflected in the "liberty" component of s. 7 has been described as guaranteeing a degree of personal autonomy over important decisions intimately affecting one's private life. A decision to terminate a pregnancy has been considered to fall within this class of decisions. The *Act* takes positive steps to manifest respect for the fundamentally personal decision to terminate a pregnancy and advances the constitutional value of liberty by ensuring that women who require abortion services as a result of that decision are not "held captive" because of their medical needs by the unsolicited and undesired disapproval of anti-abortion protesters.

Morgentaler, *supra*, at pp. 166, 171, *per* Wilson, J.;
Dieleman, supra, at p. 726.

(ii) Section 15 Values

27. The *Act* significantly promotes the constitutional values underlying s. 15 of the *Charter.* Abortion is a lawful medical procedure which, by its nature, is only available to women. By taking steps to ensure safe and effective access to such services, the *Act* promotes the equality values inherent in s. 15 in the particular context of reproductive health care. Legislation which seeks to ensure that women are not disadvantaged in their access to lawful medical services related to their reproductive capacities promotes the constitutional value of sex equality.

Dieleman, supra, at p. 727.

28. Just as pregnancy discrimination has been held to be a form of sex discrimination, access to reproductive health services required by women is an issue of sex equality. Laws cannot alter the reproductive capacities of men and women, but they can, and do, prescribe the social and legal consequences which attach to them.

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219, at p. 1242.

29. Safe, unimpeded and dignified access to lawful abortion services is a necessary component of sex equality in the context of reproduction. Any legislatively imposed barrier to access to lawful abortion services would impose an unequal burden on women. This burden would be particularly severe for some women by virtue of their age, disabilities, or other social characteristics. By the same token, positive legislative action, such as the *Act*, which facilitates access to lawful abortion services, is properly regarded as promoting sex equality and should be accorded a weight commensurate with this fundamental constitutional value. As a unanimous Supreme Court of Canada held in *Law v. Canada*:

> The key purpose of section 15 is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

Law v. *Canada*, [1999] 1 S.C.R. 497 at p. 529.

(iii) Section 28 Values

30. The *Act* also promotes the constitutional values underlying s. 28 of the *Charter*. Section 28 of the *Charter* provides that notwithstanding anything in the *Charter*, the rights and freedoms therein are guaranteed to men and women equally. It provides a constitutional directive to courts to be attentive to sex equality concerns when conducting a s. 1 analysis. In the context of access to reproductive health services, the Intervenor submits that s. 28 directs courts to apply the *Charter* so as to ensure that men and women enjoy equivalent levels of respect for their privacy and dignity, and corresponding ease of access to all lawful medical services.

R. v. Red Hot Video Ltd (1985), 45 C.R. (3d) 36 at 59 (B.C.C.A.) leave to appeal refused (1985), 46 C.R. (3d) xxv (S.C.C.).

(iv) Privacy

31. In addition to the constitutional values described above, the *Act* promotes the constitutional value of privacy. Privacy has been held to be a value underlying s. 7 of the *Charter* and, in the context of access to reproductive health services, the Intervenor submits it is also a value underlying ss. 15 and 28. Privacy interests have been held to be sufficiently compelling to justify infringements of *Charter* rights.

Edmonton Journal v. Alberta (A.G.), [1989] 2 S.C.R. 1326, at pp. 1363-64, *per* Wilson J;
R. v. Mills,[1999] 3 S.C.R. 688, at pp. 721-23;
Sharpe, *supra*, at p. 72.

32. The Intervenor submits that the vulnerabilities and apprehensions of the group protected by the *Act*, the limited nature of the restriction it imposes on the Appellant's *Charter*-protected activities, the fact that this is an area in which harms and effects cannot be measured with scientific precision, and, perhaps most importantly, the very significant constitutional values promoted by the *Act*, are all contextual factors which impact on each stage of the section 1 analysis. Together, they strongly suggest that this is an area in which the Court should give considerable latitude to the legislature's determination of how to balance the constitutional rights of the Appellant and those of the group protected by the impugned provisions of the *Act*.

RJR MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199, at pp. 331-33;
Irwin Toy, supra, at p. 993.

2. Legislative Objective

33. Determining whether or not a legislative objective is "pressing and substantial" requires the court to consider the nature and significance of the harm at which the legislation is directed in light of the extent to which the legislation advances other values in the *Charter*. These values are “significant indicia of the strength of the objective.”

Keegstra, supra, at pp. 744, 755.

34. In this case, the legislature has set out its objectives explicitly in the Preamble to the *Act*, and the minister further explained these objectives to the legislature. The primary objective of the *Act* is to ensure access to health care, including abortion services. Secondary legislative

objectives include respect for the dignity and privacy of both users and providers of health care services. These secondary objectives are necessary components of any effective entitlement to access to lawful health services, including abortion services. Overall, the legislature sought to balance these objectives with the right of anti-abortion protesters to express their views.

Act, Preamble;
Hansard, 4th sess., 35th Parliament, Province of British Columbia, June 22, 1995, Vol. 21, No. 11, pp. 15977-15978, as quoted in *Lewis, supra,* at. 516, para. 52;
Realizing Choices, supra, at pp. 2, 31-32;
Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, at p. 690-91.

35. The legislature chose to achieve these objectives by creating access zones around the homes and offices of abortion service providers and providing for the creation by regulation of additional zones around abortion service facilities, tailoring access zones to the particular locations and circumstances of abortion service facilities.

Abortion Services Access Regulation, B.C. Reg. 337/95, O.C. 1027/95;
Everywoman's Access Zone Plan, supra.

36. The restrictions on anti-abortion activity contained in the *Act* comprise an integrated and comprehensive legislative response to a pressing social problem. Courts in British Columbia and elsewhere in Canada have already identified and attempted to remedy this problem, albeit only in the piecemeal and incremental manner necessitated by their role as adjudicators of the particular disputes brought before them. Numerous site-specific injunctions have been granted to restrict anti-abortion activity in order to safeguard access to this lawful medical service. The granting of such injunctions reflects a judicial determination that the close proximity of anti-abortion protestors to the threshold of abortion service facilities poses a sufficiently serious threat of harm to both users and providers of abortion services to warrant injunctive relief. Courts have also considered that such injunctions strike a valid and appropriate balance between competing interests in light of the guarantees contained in the *Charter*.

Everywoman's Health Centre Society (1988) v. Bridges, [1990] B.C.J. No. 2895 (B.C.C.A.);
Elizabeth Bagshaw Society v. Bretton et al. (20 Nov. 1991); (30 Jan. 1992); (29 June 1995) Vancouver Registry C916855 (B.C.S.C.);
Canadian Urban Equities Ltd. et al. v. Direct Action for Life et al. (1990), 68 D.L.R. (4th) 109; 70 D.L.R. (4th) 691 (Alta. QB);

Assad v. Cambridge Right to Life et al. (1989), 69 O.R. (2d) 598 (Sup. Ct.);
Dieleman, supra.

37. The Intervenor submits that a legislature should be able to act with confidence in addressing, through a carefully crafted and directed regulatory scheme, harms already identified by the courts pursuant to their common law jurisdiction as necessitating a legal remedy at common law. Legislative action is especially appropriate where, as here, there is evidence to show that injunctive relief has not adequately addressed the problem.

Lewis, supra, at pp. 533-39, paras. 118-119.

38. In enacting the *Act*, the legislature was responding to a well-documented, current, and pressing social problem. There is no question that abortion remains a highly volatile and socially divisive issue. In *Lewis*, Saunders J. noted that it was proper for the legislature to consider that there are extremists involved in the abortion debate who, because of the intensity of their belief, will resort to violence. The B.C Task Force on Access to Abortion and Contraceptive Services reported that at every one of its five regional meetings, abortion service users and providers recounted experiences of harassment due to anti-abortion activities. The extent of the harassment was so great as to jeopardize access to abortion services.

Realizing Choices, supra, at pp. 17-18;
Lewis, supra, at p. 527, para. 97.

39. The evidence in *Lewis* established that anti-abortion activities in front of abortion service facilities are part of a longstanding and well organized campaign to stop abortions from occurring, not only in the Province, but across North America. These activities are directed at both providers and users of abortion services. Anti-abortion activities impair access by discouraging doctors and other health care providers from continuing to provide abortion services. In the case of users, anti-abortion activities impair women's privacy and health by compromising the confidentiality of this medical service and increasing the stress associated with obtaining a lawful abortion.

Respondent's Statement of Fact, paras. 22-30;
Cozzarelli and Major, *supra*;
Lewis, supra, at p. 528, paras. 98-99.

40. The Intervenor submits that, in light of the serious and well-recognized harms sought to be addressed by the *Act* and the extent to which the legislation furthers fundamental values underlying ss. 7, 15 and 28 of the *Charter*, both of which form an important part of the context for the s. 1 analysis, the objective of the *Act* is clearly pressing and substantial. In fact, it is appropriately characterized as an objective of "utmost importance."

Keegstra, *supra*, at p. 758.

3. Proportionality

41. When approaching the proportionality branch of the s. 1 analysis, it must be recognized that freedom of expression has never been regarded as absolute. The right to express one's views does not guarantee the right to an audience. Thus, the Intervenor submits that, when considering whether the infringement of the Appellant's freedom of expression is proportional to the *Act's* pressing and substantial objective, care must be taken not to overstate the scope of the infringement of the Appellant's right to speak.

Dieleman, supra, at p. 723;
Committee for Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139, at p. 205;
Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at pp. 463, 467-68.

42. The Intervenor submits that the legislative restriction on anti-abortion activity within the specified access zones around abortion facilities is rationally connected to the legislative objective of ensuring safe, equal and dignified access to lawful abortion services for users and providers of those services. In light of the contextual factors and, in particular, the history of anti-abortion protest activities, the legislature had a “reasoned apprehension of harm” resulting from anti-abortion activities at clinics and at the homes of service providers.

RJR MacDonald, supra, at p. 333*;*
Sharpe, supra, at p. 96;
Lewis, *supra*, at p. 527, para. 97.

43. Turning to the minimal impairment requirement and the geographic scope of the access zones in which the Appellant's anti-abortion activities are legislatively restricted, Dickson C.J. writing for the majority of the Supreme Court of Canada in *Irwin Toy*, formulated the relevant question:

> Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.

Irwin Toy, supra, at p. 990;
Committee for Commonwealth of Canada, supra, at pp. 247-48.

44. At issue in this appeal is the restriction of anti-abortion activity within access zones around abortion service facilities. Section 5 of the *Act* limits such access zones to a maximum 50 metre radius. It further provides that no access zone exists around any particular abortion service facility unless it is established by regulation. It should be noted that the access zone established around Everywoman's is limited to 30 metres at its widest point. An examination of the access zone around Everywoman's demonstrates that it was carefully tailored to the particular location and circumstances of that facility.

Everywoman's Access Zone Plan, *supra*.

45. The Intervenor submits that the geographic scope of the access zones established by the legislation, and of the particular access zone in issue, impairs the Appellant's rights as little as reasonably possible. The geographical restriction is insignificant in relation to the entire geographical area where such expression may occur. Given the vulnerability of those seeking access to abortion service facilities and the constitutional values promoted through the creation of a safe, dignified, and reasonably private means of access to these facilities, as well as the other contextual factors, a small geographical restriction is constitutionally justified.

R. v. Squires (1993), 18 C.R. (4th) 22 at p. 58;
leave to appeal refused [1993] 3 S.C.R. ix.

46. The type of activity caught by the *Act* is set out in s. 2(1) and the corresponding definitions in s. 1. Within an access zone, the *Act* essentially prohibits any communication

concerning abortion services, physical interference with people seeking access to such services or with service providers, or forms of intimidation.

47. The privacy, dignity and equality values underlying ss. 7, 15 and 28 of the *Charter* are compromised when women seeking access to lawful abortion services must run the gauntlet of anti-abortion protesters at the threshold of abortion service facilities, be questioned repeatedly, approached by individuals or groups, given unwanted religious material, or be photographed. Where the harm arises from a variety of activities, the legislature may legitimately restrict the entire range of activities that causes the harm.

Respondent's Statement of Facts paras. 11-21;
Lewis, supra, at p. 536, paras. 130-131.

48. The range of activities restricted within access zones is necessarily comprehensive since the pressing objective of the legislation is to ensure a level of access to a lawful medical service consonant with respect for the privacy and dignity of those who require abortions. Only such a comprehensive restriction can provide women seeking abortion services with a reasonable assurance that they can do so without risk of unacceptable affronts to their privacy and dignity.

49. Privacy underpins the confidential relationship between doctor and patient, and indeed, can be indispensable to the patient's security of the person. In light of the climate of fear that persists regarding this medical service, <u>any</u> manner of sidewalk interference or protest that occurs without the consent of an individual seeking access to an abortion facility necessarily represents a serious compromise of her privacy, no matter how peaceful the intent of the protestor. In *Dieleman*, Adams J. concluded that the prohibition of picketing, sidewalk counselling and engaging in any other manner of protest was justified in the face of the *Charter* violations established in that case.

Mills, supra, at pp. 721-23;
Dieleman, supra, at pp. 736, 745-7, 749-752.

50. By creating access zones around abortion facilities, the *Act* ensures that all persons seeking access to abortion facilities can exercise some control over what information or advice they receive in relation to abortion, and in particular, exercise a meaningful choice not to receive

unwanted communications. For example, women are offered counselling as part of the service provided at abortion facilities. Women who wish also to receive counselling from anti-abortion groups are free to seek it out outside of the access zone. Nothing in the *Act* restricts the Appellant's ability to promulgate his views generally and in a wide variety of ways. The *Act* simply ensures that contact with anti-abortion expressive activity at the threshold of an abortion facility is not a means of inflicting harm on women.

Respondent's Statement of Facts para. 27
Intervenor's Statement of Facts para. 2.

51. In *Committee for Commonwealth of Canada, supra,* McLachlin J. asked, "what does the claimant lose by being denied the opportunity to spread his or her message in the form and at the time and place asserted?" It is submitted that the Appellant's *Charter* rights are not unreasonably limited by the expressive opportunity denied by the *Act*. The *Act* provides that the expression can only be limited within up to 50 metres of an abortion facility. The Appellant may lawfully express his views within a reasonable distance of an abortion services facility; he is simply prohibited from expressing these views on its threshold. This is a minimal impairment of the Appellant's *Charter* rights.

Committee for Commonwealth of Canada, supra, at p. 250.

52. Two final points are relevant to an assessment of the degree of impairment of the Appellant's rights. First, while the Appellant can express his views anywhere, a woman seeking an abortion has no other options: she must gain access to an abortion service facility to receive a safe and lawful abortion. The disparity in power between speaker and listener in this particular context has already been judicially recognized as a factor which may justify the restriction of *Charter* rights.

Dieleman, supra, at p. 728, quoting *Edmonton Journal*, *supra*, at p. 601.

53. Second, the restriction of a broad range of activities within a narrow geographical area is not only appropriate in light of the circumstances of abortion service users, it is also the only practical approach to the problem of ensuring access. A broad prohibition on anti-abortion activity within a geographically limited area makes this law readily understandable to all

concerned and facilitates even-handed enforcement. Restricting a more limited range of activities within the access zone would require constant police surveillance of activity within the zone activities to be effective. Such surveillance would be more invasive of the privacy of both abortion service users and anti-abortion protestors. It is submitted that the legislative mechanism in the *Act* is superior to this alternative, even from the perspective of the protestors. Because it leaves them free to engage in anti-abortion activities anywhere other than within an access zone, it relieves them from the constant state surveillance which would otherwise be necessary.

54. With respect to the proportionality of effects, it is submitted that the deleterious effects of the *Act*, which only curtails the Appellant's anti-abortion activities within at most a 50 metre access zone around an abortion service facility, is clearly outweighed by the legislative objective animating the *Act*.

55. It is submitted that in both its objective and its actual effect, the impugned provisions of the *Act* are a measured response to a pressing social issue which has not been, and cannot be, adequately addressed by the more piecemeal alternative of injunctive relief. It clearly promotes underlying constitutional values and protects a vulnerable group. There is evidence that the *Act* has noticeably improved the access, sense of security and privacy of abortion service users and providers. Thus, its salutary effects outweigh its deleterious effects.

Respondent's Statement of Facts, para. 30.

C. Conclusion

56. In conclusion, the Intervenor submits that the *Act* has been carefully tailored to address a pressing legislative objective. In a society which mandates respect for women's reproductive choices, and in which abortion is a lawful medical service, the *Act* represents a vital legislative recognition that women's decisions concerning their reproductive capacities cannot be real and meaningful without ensuring reasonably secure access to related medical and health services. For these reasons, the Intervenor submits that the impugned provisions of the *Act* are constitutionally valid, and that this appeal should be dismissed.

PART 4: NATURE OF THE ORDER SOUGHT

57. That sections 2(1)(a) and (b) of the *Access to Abortion Services Act* be found to be constitutionally valid, and that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver in the Province of British Columbia this 24th day of October, 2002.

Nitya Iyer
Counsel for the Intervenor

Andrea L. Zwack
Counsel for the Intervenor

LIST OF AUTHORITIES