

IN THE SUPREME COURT OF BRITISH COLUMBIA

CROWN APPEAL AGAINST ACQUITTAL

BETWEEN:

REGINA

AND:

MAURICE LEWIS

AND:

THE ELIZABETH BAGSHAW SOCIETY
EVERYWOMAN'S HEALTH CENTRE SOCIETY (1988)
THE B.C. COALITION FOR ABORTION CLINICS
THE B.C. WOMEN'S C.A.R.E. PROGRAM
THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

APPELLANT

RESPONDENT

INTERVENOR

FACTUM OF THE INTERVENOR

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I N D E X

PART I	<u>PAGE</u>
STATEMENT OF FACTS	3
PART II	
POINTS IN ISSUE	5
PART III	6
ARGUMENT	
A. Intervenor's Position with Respect to the Issues	
B. The Section 1 Test - General Principles	
C. Characterization of Legislative Objective	
D. Proportionality	
E. Conclusion	
PART IV	32
NATURE OF ORDER SOUGHT	
PART V	33
LIST OF AUTHORITIES	

PART I

STATEMENT OF FACTS

1
2
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4
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1. The Intervenor adopts the Statement of Facts contained in the Crown's Statement of Argument 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 which provides abortion and other reproductive services with counselling to women in a safe and confidential atmosphere ("Bagshaw");

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

c) the B.C. Coalition for Abortion Clinics, a non-profit organization with a broad and diverse membership of groups and individuals who support the Coalition's objective of securing safe, fully funded and high-quality abortion services ("BCCAC");

d) the B.C. Women's C.A.R.E. Program, a program of the B.C. Women's Hospital and Health Centre Society, which provides abortion services, counselling, birth control information and referrals to other community resources for women ("the "C.A.R.E. Program"); and

e) the Women's Legal Education and Action Fund, a national, federally incorporated not-for-profit advocacy organization which engages in equality rights litigation, research and public education to secure women's equality rights as

1 guaranteed by the *Charter* ("LEAF").

2

3 3. The Intervenor was granted leave to make written and oral submissions
4 relating to the s. 1 analysis in this Appeal on April 25, 1996, by order of the
5 Honourable Mr. Justice Romilly of the Supreme Court of British Columbia.

PART II
POINTS IN ISSUE

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4. There are two issues raised in this Appeal:

a) whether the Trial Judge erred in holding that ss. 2(1)(a) and 2(1)(b) of the *Access to Abortion Services Act* (the "*Act*") infringe the Respondent's freedom of conscience and religion as guaranteed by s. 2(a) of the *Charter*; and

b) whether the Trial Judge erred in holding ss. 2(1)(a) and 2(1)(b) of the *Act* are not reasonable limits prescribed by law, demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*.

PART III
ARGUMENT

A. Intervenor's Position with Respect to the Issues

5. The Intervenor takes no position on the first issue.

6. 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 by the *Act* of the Respondent's *Charter* rights is constitutionally justified under s. 1 of the *Charter*.

B. The Section 1 Test - General Principles

7. In seeking to justify legislation where a violation of freedom of expression has been established, whether alone or in conjunction with other substantive rights violations, the Court must determine:

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

b) whether the means chosen by the Legislature are proportional to the objective sought to be achieved.

R. v. Oakes, [1986] 1 S.C.R. 103 at 138-139.

8. The onus is on the party seeking to uphold legislation to establish the elements of a s. 1 justification. The standard is the civil standard of proof, namely,

1 proof on a balance of probabilities.

2 *Oakes, supra* at pp. 136-137.

3
4 *RJR-MacDonald Inc. v. Attorney General of Canada*
5 (1995), 187 N.R. 1 at p.17.

6
7 9. The Supreme Court of Canada has repeatedly emphasized that s. 1 is not a
8 rigid or technical provision, and that a s. 1 analysis should not be conducted in an
9 abstract fashion. Rather, a s. 1 analysis must be approached in a manner which is
10 attentive to the specific factual context in which both the infringement of *Charter*
11 rights and competing social values are asserted. The Supreme Court of Canada
12 recently endorsed this approach to s. 1 in *RJR-MacDonald, supra*:

13
14 In *Oakes*, this court established a set of principles or guidelines,
15 intended to serve as a framework for making this determination.
16 However, these guidelines should not be interpreted as a substitute
17 for s. 1 itself. It is implicit in the wording of s. 1 that the courts
18 must, in every application of the provision, strike a delicate balance
19 between individual rights and community needs. Such a balance
20 cannot be achieved in the abstract, with reference solely to a
21 formalistic "test" uniformly applicable in all circumstances. *The s.1*
22 *inquiry is an unavoidably normative inquiry, requiring the courts to*
23 *take into account both the nature of the infringed rights and the*
24 *specific values and principles upon which the state seeks to justify the*
25 *infringement.*

26
27 *RJR-MacDonald, supra* at p. 119, *per* LaForest J., dissenting and pp. 10-11, 14,
28 *per* McLachlin J., (emphasis added).

29
30 *R. v. Keegstra*, [1990]
31 3 S.C.R. 697 at p. 735 *per* Dickson C.J.

32
33 *Edmonton Journal v. Attorney General for Alberta* (1989),
34 64 D.L.R. (4th) 577 at pp. 583-84 *per* Wilson J. (S.C.C.).

35
36 *Rocket v. Royal College of Dental Surgeons of Ontario*
37 (1990), 71 D.L.R. (4th) 68 at p. 78, *per* McLachlin J. (S.C.C.).
38 *Committee for Commonwealth of Canada v. Canada*,
39 [1991] 1 S.C.R. 139 at p.139 *per* L'Heureux-Dube J. and pp. 245-248

per McLachlin J.

Ross v. New Brunswick School District No. 15
(1996 April 3, unreported decision of S.C.C.) at p. 45.

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6 10. In a case such as this, where the Crown has conceded that the *Act* infringes
7 certain of the Respondent's *Charter* rights, the court necessarily commences its s. 1
8 analysis without the benefit of a full appreciation of the nature and extent of the
9 substantive rights violation. This is comparable to the situation with which the
10 Supreme Court of Canada was confronted in *Schachter v. Canada*. In that case,
11 Lamer C.J. registered the Court's dissatisfaction when faced with a remedial issue
12 arising without the context which would have been supplied by an analysis of the
13 substantive rights violation and the s. 1 enquiry. In such cases, it is submitted that
14 it is particularly important that a court carefully consider the context in which the
15 rights infringements are asserted. Otherwise, there may be a tendency to consider
16 the rights violation in the abstract and, as a result, to overestimate the significance
17 of the infringement.

18
19 *Schachter v. Canada* (1992), 92 D.L.R. (4th) 1 at p. 10 (S.C.C.).

20
21 11. In the present Appeal, the Intervenor submits that in considering the context
22 informing the infringement of the Respondent's freedom of expression it is crucial
23 to recognize that the *Act* only restricts individuals from expressing anti-abortion
24 views in certain narrowly defined geographic locations; at all other locations, such
25 views may lawfully be expressed. The *Act* is in no way a total prohibition on the
26 expression of the message itself. As long as their actions fall short of harassment,
27 the Respondent and others are free to express their views about abortion through
28 radio, television, print media, public demonstrations, and protests, among many
29 alternative channels of communication, at any time and at any place in the
30 Province, save only at the specific locations set out in the *Act*. As McLachlin J.
31 has said, "Nor are all infringements of freedom of expression equally serious."

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Access to Abortion Services Act, S.B.C. 1995, c. 35 ("Act"), ss. 2-7.
Rocket, *supra* at p. 78.
Everywoman's Access Zone Plan (Exhibit 1).
Oakes, *supra*, at pp. 139-140.

12. Further, in applying s. 1, the court must focus, as indicated by La Forest J. in *RJR-MacDonald*, *supra*, on the language of s. 1 itself, and in particular, on the values underlying a "free and democratic society". This phrase embraces respect for the fundamental values embraced by all of the rights in the *Charter*, including equality, privacy, and respect for dignity.

Although freedom of expression is undoubtedly a fundamental value, there are other fundamental values that are also deserving of protection and consideration by the courts. When these values come into conflict, as they often do, it is necessary for the courts to make choices based not upon an abstract, Platonic analysis, but upon a concrete weighing of the relative significance of each of the relevant values in our community in the specific context.

RJR-MacDonald, *supra* at p. 133, *per* LaForest J., dissenting.
Keegstra, *supra* at p. 736.
Davidson v. Slaight Communications Inc.
(1989), 59 D.L.R. (4th) 416 at p. 427 (S.C.C.).

13. This case requires judicial balancing of the Respondent's fundamental freedoms as guaranteed by the *Charter* and the underlying constitutional values of equality, dignity and privacy in the context of legislation which seeks to ensure safe access to lawful reproductive health services.

Act, Preamble.

C. Characterization of Legislative Objective

14. Determination of whether or not a legislative objective is "pressing and

1 substantial” requires the court to address two issues. First, the nature and
 2 significance of the “mischief” or harm at which the legislation is directed must be
 3 evaluated. Second, the extent to which the legislation advances other values in the
 4 *Charter* must be considered. These values are “significant indicia of the strength of
 5 the objective.”

6
 7 *Keegstra, supra*, at pp. 744, 755.

8
 9 1. Nature of the Harm at which the Act is Directed

10
 11 15. The court is to consider the “mischief” of the law on the basis of the
 12 evidence before it. There must be some factual basis for the legislature’s concern.
 13 However, the court will defer to the government’s reasonable assessment of the
 14 harm the legislation seeks to remedy.

15
 16 *Irwin Toy Ltd. v. A.G. Quebec*, [1989]
 17 58 D.L.R. (4th) 577 at pp. 622-623 (S.C.C.).
 18

19 16. In this case, the legislature has set out its objectives explicitly in the
 20 Preamble to the *Act*. The primary objective of the *Act* is to ensure access to health
 21 care, including abortion services. Secondary legislative objectives include respect
 22 for the dignity and privacy of both users and providers of health care services.
 23 These secondary objectives are necessary components of any effective entitlement to
 24 access to lawful health services, including abortion services. In his introduction of
 25 the *Act* to the legislature, the Minister of Health described the government’s
 26 purpose in these terms:

27 This act is intended to defuse the tension by putting some distance
 28 between the protestors and the people seeking and providing abortion
 29 services.

30

31
 32 Access to health services is one of the foundations of the Canadian

1 medicare system, and it is my responsibility as a minister to maintain
 2 access to services. In the case of access to abortion services, we must
 3 ensure that access to choice is a practical reality, not just a legal
 4 right.

5
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7
 8 The legislation achieves a balanced solution to a difficult and chronic
 9 problem. We have balanced the need to protect access to this medical
 10 service with the ability of people to express their views. Access
 11 zones will separate those opposed to abortion from doctors, patients
 12 and other providers, and we believe that a great deal of tension that
 13 surrounds this service will be defused by creating this necessary
 14 balance.
 15

16 *Hansard*, 4th sess., 35th Parliament, Province of British Columbia,
 17 June 22, 1995, Vol. 21, No. 11, pp. 15977-15978.

18
 19 *Act*, Preamble.

20
 21 *Realizing Choices: The Report of the British Columbia Task Force on*
 22 *Access to Abortion Services*, (Victoria, 1994) ("*Realizing Choices*"), pp. 2, 31-32
 23 (Exhibit 23).
 24

25 *International Planned Parenthood Federation Western Hemisphere Region,*
 26 *Medical and Service Delivery Guidelines, Bill of Rights,*
 27 6th Appendix to *Realizing Choices*, at p. 118.
 28
 29

30 17. The means chosen by the legislature to achieve these objectives are to create
 31 access zones around the homes and offices of abortion service providers and to
 32 provide for the creation of additional zones, by regulation around abortion service
 33 facilities. Thus, legislative provision is made to tailor access zones to particular
 34 locations and circumstances of abortion service facilities.

35 *Access to Abortion Services Act*, ss. 5-7, 13, 15.

36
 37 *Abortion Services Access Regulation*, B.C. Reg. 337/95,
 38 O.C. 1027/95 effective Sept. 18, 1995
 39

40 *Everywoman's Access Zone Plan*
 41

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

13
 14 *Everywoman's Health Centre Society (1988) v. Bridges*,
 15 (21 Jan. 1989), Vancouver Registry C886265 (B.C.S.C.);
 16 aff'd (1990), 78 D.L.R. (4th) 529 (C.A.).

17
 18 *Elizabeth Bagshaw Society v. Bretton et al*
 19 (20 Nov. 1991); (30 Jan. 1992); (29 June 1995) Vancouver Registry
 20 C916855 (B.C.S.C.).

21
 22 *Canadian Urban Equities Ltd. et al v. Direct Action for Life et al*
 23 (1990), 68 D.L.R. (4th) 109; 70 D.L.R. (4th) 691 (Alta. QB).

24
 25 *Assadet v. Cambridge Right to Life et al*
 26 (1989), 69 O.R. (2d) 598 (Sup. Ct.).

27 *Ontario (Attorney General) v. Dieleman* (1994), 117 D.L.R.
 28 (4th) 449 (Ont. Ct. Gen. Div.).
 29

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

1 to abortion services.

2

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Realizing Choices, at pp. 17-18.

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T., Vol IV, p. 193.

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Hansard, supra, Vol. 21, No. 11, p. 15978.

8

9 22. The evidence before the trial court established that anti-abortion activities in
 10 front of abortion service facilities are part of a longstanding and well organized
 11 campaign to stop abortions from occurring, not only in the Province, but across North
 12 America. These activities are directed at both providers and users of abortion
 13 services. In relation to providers, anti-abortion activities impair access by
 14 discouraging doctors and other health care providers from continuing to provide
 15 abortion services. In the case of users, anti-abortion activities impair women's privacy
 16 and health by compromising the confidentiality of this medical service and increasing
 17 the stress associated with obtaining a lawful abortion.

18

19

Appellant's Statement of Fact, paras. 24-34.

20

21 Catherine Cozzarelli and Brenda Major, "The Effects of Anti-Abortion Demonstrators
 22 and Pro-Choice Escorts on Women's Psychological Responses to Abortion", (1994)
 23 13(4) *J. Soc. & Clinical Psych.*, 404-427 (Exhibit 21).

24

25

Hansard, supra, Vol. 21, No. 11, pp. 15977-78.

26

27 23. The impact of these activities, and the resulting harms suffered by women
 28 seeking access to abortion services may be different and more severe for some groups
 29 of women. For example, the consequences of impeded access to abortion may be
 30 heightened for women with disabilities. Health changes during pregnancy may be
 31 particularly serious for them, so that the decision to terminate a pregnancy becomes
 32 more complex and stressful, and the barriers posed by anti-abortion activities within
 33 an access zone especially onerous. Consideration of the situation of women with

1 disabilities illustrates the importance of remaining attentive to the vast range of
2 situations in which women seeking access to medical services, including abortion
3 services, may find themselves.

4

5 Adrienne Asch, "Reproductive Technology and Disability" in *Reproductive Laws for*
6 *the 1990s: A Briefing Handbook*, Nadine Taub and Sherrill Cohen, eds.,
7 (New Jersey: Humana Press, 1988) at pp. 95-96.

8

9 Laurie Nsiah-Jefferson, "Reproductive Laws, Women of Colour, and Low-Income
10 Women," in *Reproductive Laws for the 1990s, supra* at pp. 45-46.

11

12 24. Further, women seeking abortions because of a pregnancy which occurs as a
13 result of a sexual assault, young women, women living in poverty, women who reside
14 in smaller communities, and First Nations, immigrant, and refugee women are all
15 particularly vulnerable to the threat posed to their privacy by anti-abortion activities
16 within the access zones established by the *Act*. The psychological and physical
17 barriers to access posed by such anti-abortion activities may be especially severe for
18 these persons. In acting to safeguard access for all abortion service users and
19 providers, the legislature may legitimately keep the particular needs of different
20 groups in mind.

21

22

Realizing Choices, supra, at pp. 9-15.

23

24

Dieleman, supra, at pp. 491-94.

25

26 2. Constitutional Values Promoted by the *Act*

27

28 25. The constitutional values reflected in ss. 15, 7 and 28 of the *Charter* are
29 significantly furthered by the *Act*. These values are a significant factor to be taken
30 into account in determining whether that legislation is constitutionally justifiable.

31

32

33

I think that in determining whether a particular limitation is a
reasonable limit prescribed by law which can be "demonstrably justified
in a free and democratic society" it is important to remember that the

1 courts are conducting this enquiry in light of a commitment to uphold
2 the rights and freedoms set out in the other sections of the *Charter*.

3
4 *Re Singh and Minister of Employment & Immigration*
5 (1985), 17 D.L.R. (4th) 422 at p. 468 per Wilson J.

6
7 26. Additionally, when conducting the s. 1 analysis, Courts must ensure that the
8 *Charter* is not used, “to roll back legislation which has as its object the improvement
9 of the conditions of less advantaged persons.”

10
11 *Edwards Books and Art Limited v. R.*, [1986] 2 S.C.R. 713 at p. 779.
12

13
14 a) The Constitutional Value of Sex Equality: Section 15
15

16 27. Abortion is a lawful medical procedure which is necessarily exclusively
17 available to women. By taking steps to ensure safe and effective access to such
18 services, the *Act* promotes the equality values inherent in s. 15 in the particular
19 context of reproductive health care. Legislation which seeks to ensure that women
20 are not disadvantaged in their access to lawful medical services by virtue of their
21 reproductive capacity promotes the constitutional value of sex equality.

22
23 *Dieleman, supra*, at p. 727.
24

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

29 *Brooks v. Canada Safeway* (1989), 59 D.L.R. (4th) 321 at p. 338 (S.C.C.).
30

31 29. Safe, unimpeded and dignified access to lawful abortion services is a necessary

1 component of sex equality in the context of reproduction. Any legislatively imposed
2 barrier to access to lawful abortion services would impose an unequal burden on
3 women. This burden would be particularly severe for some women by virtue of their
4 age, disabilities, or other social characteristics. By the same token, positive
5 legislative action, such as the *Act*, which facilitates access to lawful abortion services,
6 is properly regarded as promoting sex equality and should be accorded a weight
7 commensurate with this fundamental constitutional value.

8

9 30. The Supreme Court of Canada said that the s. 15 guarantee " is the broadest
10 of all guarantees. It applies to and supports all other rights guaranteed by the
11 *Charter*." Further, Dickson C.J., writing for a majority of the Court in *Keegstra*
12 found that the principles underlying s. 15 "are integral to the s. 1 analysis."

13

14 *Andrews v. Law Society of British Columbia*, [1989] S.C.R. 143 at p. 185.

15

16

Keegstra, supra at p. 756.

17

18

19 b) The Constitutional Values of Liberty and Security of the Person: Section 7

20

21

22 31. Section 7 of the *Charter* identifies fundamental constitutional values in respect
23 of "liberty" and "security of the person." It is submitted that by facilitating access to
24 lawful abortion services, the *Act* significantly advances each of these values.

25

26 32. The phrase "security of the person" has been interpreted as embodying our
27 society's longstanding respect for the individual's physical integrity, which includes a
28 psychological dimension. A majority of the Supreme Court of Canada has held that
29 legislation which imposed severe barriers upon access to abortion services breached
30 the "security of the person" component of s. 7 of the *Charter*. By implication, the
31 constitutional value underlying "security of the person" is enhanced by legislation
32 which reduces barriers to access to lawful abortion services.

1 *Morgentaler, Smolling and Scott v. The Queen*
 2 (1988), 44 D.L.R. (4th) 385 at p. 401, *per* Dickson, C.J. and Lamer, J.;
 3 p. 440, *per* Beetz and Estey, JJ.; and p. 492, *per* Wilson, J.

4
 5 33. The *Act* enhances security of the person by reducing the considerable stress
 6 imposed by anti-abortion activities upon women who require abortion services. As
 7 Adams J. has remarked in *Dieleman, supra*, "there is something fundamentally
 8 disturbing about "capturing" women at the threshold of a medical facility and doing
 9 so immediately before they undergo a serious surgical procedure." The stress arises
 10 both from the confrontation itself and from a woman's entirely understandable
 11 uncertainty, in light of the history of such protest, of how far any individual or group
 12 of anti-abortion protestors might go in their attempts to stop her from having an
 13 abortion.

14
 15 *T.*, Vol. X, p. 529, ll. 43-47, p. 530, ll. 1-8; Vol. XIV, pp. 753-755.

16 *Dieleman, supra*, at p. 728.

17 Cozzarelli and Major, *supra*.

18
 19 34. By reducing the stress anti-abortion activities impose upon abortion service
 20 providers, which is itself a significant disincentive to physicians and other health care
 21 workers in providing abortion services, the *Act* further promotes women's security of
 22 the person. To the extent that a woman's priorities and aspirations with respect to the
 23 use of her body mean that she has decided to terminate a pregnancy, the reduced
 24 availability of abortion services due to a lack of service providers will compromise
 25 both the psychological and physical components of her security of the person. The
 26 increased likelihood of delay in gaining access to scarce abortion services creates
 27 increased risks to the health of women who require those services. This concern was
 28 described by the Attorney General as a "compelling" rationale for the *Act*:

29
 30 An even greater threat exists that hasn't been fully realized yet, and
 31 that is the threat that very soon, if current trends persist, there may be

1 not enough doctors left who are willing to face the harassment and the
2 intimidation and actually perform the service. Therefore, by the fact of
3 there not being enough medical doctors available and willing to do it,
4 women will be denied a legal service.

5
6 ...If urologists were not providing urology any longer because there
7 was some kind of intimidation going on, we would move very quickly
8 to deal with that, and we have to, in the same way, with this.

9
10 *Hansard, supra*, Vol. 21, No. 12, p. 16016.

11
12 *Appellant's Statement of Facts*, paras. 33-34.

13
14 *Dieleman, supra*, at pp. 728-29.

15
16 *Morgentaler, supra*, at pp. 402-407, *per* Dickson C.J.;
17 pp. 436-440, *per* Beetz J.; pp. 490-92, *per* Wilson J.

18
19 35. The constitutional value reflected in the "liberty" component of s. 7 has been
20 described, in the context of barriers to access to abortion services, in the following
21 terms: "Liberty in a free and democratic society does not require the state to approve
22 the personal decisions made by its citizens; it does, however, require the state to
23 respect them." Further, "liberty" guarantees a degree of personal autonomy over
24 important decisions intimately affecting one's private life. A decision to terminate a
25 pregnancy has been considered to fall within this class of decisions.

26
27 *Morgentaler, supra*, at pp. 487, 490 *per* Wilson, J.

28 *Dieleman, supra*, at p. 726.

29
30 36. The *Act* takes positive steps to manifest respect for the fundamentally personal
31 decision to terminate a pregnancy and advances the constitutional value of liberty by
32 ensuring that women who require abortion services as a result of that decision are not
33 "held captive" by virtue of their medical needs to the unsolicited and undesired
34 disapproval of anti-abortion protesters.

35

1 *Appellant's Statement of Facts*, para. 30.

2 *T.*, Vol. X, p. 547, ll. 27-40.

3
4 c) Conducting Charter Analysis in Light of Gender Equality: Section 28

5
6 37. Section 28 of the *Charter* provides that notwithstanding anything in the
7 *Charter*, the rights and freedoms therein are guaranteed to men and women equally. It
8 provides a constitutional directive to courts to be attentive to sex equality concerns
9 when conducting a s. 1 analysis.

10
11 *R. v. Red Hot Video Ltd* (1985), 45 C.R. (3d) 36 at 59 (B.C.C.A.),
12 leave to appeal refused (1985), 46 C.R. (3d) xxv (S.C.C.).
13

14 38. In the context of access to reproductive health services, the Intervenor submits
15 that s. 28 directs courts to apply the *Charter* so as to ensure that men and women
16 enjoy equivalent levels of respect for their privacy and dignity interests, and
17 corresponding ease of access to all lawful medical services. In order to accomplish
18 this, the court must consider the legislation from the perspective of the women whose
19 interests and concerns are intimately connected to the fundamental *Charter* values that
20 the *Act* advances.

21
22 3. Conclusion with respect to legislative objective

23
24 39. The Supreme Court of Canada has recognized that Canada's international
25 human rights obligations are both relevant and persuasive sources for the
26 interpretation of *Charter* rights, and that such obligations should inform "the
27 interpretation of what can constitute pressing and substantial s.1 objectives which may
28 justify restrictions upon those rights."

29
30 *Slaight Communications, supra*, at pp. 427-28.

1 *Keegstra, supra*, at p. 755.

2

3 40. In this Appeal, the *International Covenant on Civil and Political Rights* is
4 particularly instructive. In *Dieleman*, after reviewing the *Covenant*, Adams J. stated:

5

6 ...in this important international document, the freedoms of religion,
7 expression, assembly and association are subordinated to concerns for
8 health.

9

10 *Dieleman, supra*, at 662.

11

12 *International Covenant on Civil and Political Rights* (21 U.N.G.A. Res. Supp. 16,
13 U.N. Doc. A/6316 at p. 52 (1966); in force for Canada, August 19, 1976,
14 Canada Treaties Series 1976, No. 47), arts. 18, 19, 21, 22.

15

16

17 41. The Intervenor submits that in light of the serious and well-recognized harms
18 sought to be addressed by the *Act*, together with the extent to which the legislation
19 furthers fundamental values underlying ss. 7, 15 and 28 of the *Charter*, the objective
20 of the *Act* is clearly pressing and substantial. In fact, it is appropriately characterized
21 as an objective of "utmost importance."

22

23

Keegstra, supra, at p. 728.

24

25 **D. Proportionality**

26

27 42. The proportionality analysis comprises three enquiries, all of which must be
28 satisfied by a government seeking to justify its legislation under s. 1. The
29 government must establish that:

30

31 a) the measures adopted are rationally connected to the objective in
32 question;

33 b) the means impair "as little as possible" the right of freedom in
34 question; and

1 c) there is a proportionality between the effects of the measures which are
2 responsible for limiting the *Charter* right or freedom, and the objective
3 which has been identified as of "sufficient importance".

4 *Oakes, supra*, p. at 139.

5
6 43. When approaching the proportionality branch of the s. 1 analysis, it must be
7 recognized that freedom of expression has never been regarded as absolute. In
8 particular, the right to express one's views does not guarantee the right to an
9 audience. Thus, the Intervenor submits that care must be taken, when considering
10 whether the infringement of the Respondent's freedom of expression is proportional to
11 the *Act's* pressing and substantial objective, not to overstate the scope of the
12 infringement of the Respondent's right to speak.

13 *Dieleman, supra*, at p. 723.

14 *Committee for Commonwealth of Canada, supra*, at p. 205 *per* L'Heureux-Dube J.

15 *Fraser v. Public Service Staff Relations Board*, [1985]
16 2 S.C.R. 455 at pp. 463, 467-68.

17
18 1. Rational Connection

19
20 44. The Intervenor submits that the legislative restriction on anti-abortion activity
21 within the specified access zones around abortion facilities, is rationally connected to
22 the legislative objective of ensuring safe, equal and dignified access to lawful abortion
23 services for users and providers of those services.

24
25 2. Minimal Impairment

26
27 (a) Level of Scrutiny

28
29 45. In approaching this stage of analysis, the court must determine at the outset the
30 appropriate level of scrutiny to apply. Situations which have justified a reduced level

1 of scrutiny include:

2

3 (a) those in which the expression in issue is not closely linked to the values
4 underlying freedom of expression; and

5

6 (b) those in which the Legislature is not acting as a singular antagonist of
7 an individual, but rather is acting to protect a vulnerable group:

8

9 ...as courts review the results of the legislature's deliberations,
10 particularly with respect to the protection of vulnerable groups, they
11 must be mindful of the legislature's representative function.

12

13

Irwin Toy, supra at p. 625.

14

Keegstra, supra, at pp. 762-65.

15

16 46. It is submitted that an inquiry into the value of the expression in issue is
17 generally only appropriate where the legislature has imposed a general ban on the
18 expression as did the legislation in issue in *Keegstra* and *Butler*. In a situation where
19 the legislative restriction is geographical rather than universal, as is the case in this
20 Appeal, the more relevant question is whether the opportunity to exercise one's
21 freedom of expression at the particular restricted location is any more closely tied to
22 the values underlying s.2(b) than expression at other locations.

23

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

1 48. The issue in this Appeal is not the value of the Respondent's expression
2 generally, but whether a restriction on this expression at this location interferes with
3 core freedom of expression values. The purpose of the communication of this
4 message at this place is less about the search for truth, the free exchange of ideas or
5 self-fulfilment, than it is about assisting the Respondent in his admitted objective of
6 identifying women who are seeking abortions and attempting to stop them from doing
7 so.

8 *T.*, Vol. I, p. 42, ll. 37-47; p. 43, ll. 15-42.

9
10 49. When the political and social climate within which abortion services are
11 currently offered is considered together with the larger context of women's
12 vulnerability and inequality in relation to reproductive health, it is clear that women
13 seeking access to abortion services constitute a vulnerable group for the purposes of
14 the s. 1 enquiry.

15 *Appellant's Statement of Facts*, paras. 24-32.

16
17 50. A certain degree of vulnerability on the part of the individual needing a
18 medical service is associated with any pressing need for medical services. More
19 specifically, women seeking access to abortion services and counselling are a
20 vulnerable group in that they are a captive audience to anti-abortion protestors who
21 use abortion facilities as strategic sites in their larger campaign to prevent this medical
22 service from being provided. Mr. Justice Adams referred to women's vulnerability in
23 this context in his decision in *Dieleman*:

24
25 "Vulnerability" best describes the situation of the women targeted. The
26 decision to abort is a profoundly personal one and its complexities
27 pervade the entirety of that individual's life. To be trapped, by the
28 circumstances prevailing at the free-standing clinics, in a face-to-face
29 encounter with a hostile stranger justifies government concern over the
30 unnecessary humiliation and embarrassment inflicted on these women.

31
32 *Dieleman*, *supra*, at p. 728.

1 51. It is submitted that in light of the tenuous link between the expression and the
2 values underlying freedom of expression at the threshold of an abortion service
3 facility, and the vulnerability of the group protected by the *Act*, a lowered level of
4 scrutiny is warranted. The court should determine whether the *Act* burdens the
5 Respondent's freedom of expression no more than is reasonably necessary to further
6 the government's pressing objective of guaranteeing safe and dignified access to
7 lawful medical services. As McLachlin J. has said, "the tailoring process seldom
8 admits of perfection."

9
10
11
12

Ross, supra, at p. 58, quoting McLachlin J. in *RJR-MacDonald*,
supra, at p. 29.

13 b) Assessing the Degree of Impairment

14

15 52. Two aspects of the legislative restriction in issue in this Appeal must be
16 addressed in relation to the minimal impairment requirement. First, the geographic
17 reach of the access zones must be justified. Second, the range of prohibited activity
18 must also be found to infringe the *Charter* as little as reasonably possible.

19

20 53. With respect to the geographic scope of the access zones in which the
21 Respondent's anti-abortion activities are legislatively restricted, Dickson C.J. writing
22 for the majority of the Supreme Court of Canada in *Irwin Toy*, formulated the
23 relevant question:

24

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

34

1 *Irwin Toy, supra*, at p. 990.

2 *Committee for Commonwealth of Canada, supra*, at pp. 247-48.

3

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

12

13

Act, s. 5.

14

Everywoman's Access Zone Plan, supra.

15

16 55. It is submitted that the geographic scope of the access zones established by the
17 legislation, and of the particular access zone in issue, impairs the Respondent's rights
18 as little as reasonably possible. The geographical restriction is insignificant in
19 relation to the entire geographical area where such expression may occur. Given the
20 vulnerability of those seeking access to abortion service facilities and the
21 constitutional values promoted through the creation of a safe, dignified, and
22 reasonably private means of access to these facilities, a small geographical restriction
23 is constitutionally justified.

24

25

A limitation which is relatively insignificant will be easier to justify
26 under s.1 because, in all of the circumstances, the limitation in issue
27 will more readily be found to be reasonable when competing values are
28 considered.

29

30

R. v. Squires (1992), 18 C.R. (4th) 22
31 at p. 58; leave to appeal refused [1993] 3 S.C.R. ix.

32

33

Butler, at 487 (D.L.R.).

1 56. The type of activity caught by the *Act* is set out in s. 2(1) and the
2 corresponding definitions. These prohibited activities include:

3

4 (a) advising or persuading a person to refrain from making use of abortion
5 services by any means, including graphic, verbal or another means;

6

7 (b) informing or attempting to inform a person concerning issues related to
8 abortion services;

9

10 (c) any graphic, verbal or written material that exhibits disapproval or
11 attempted disapproval of the use of abortion services;

12

13 (d) constant watching of a service provider, doctor who provides abortion
14 services or a patient using abortion services which has as its purpose
15 the intent to dissuade the person from using the service;

16

17 (e) physically interfering with a person using the abortion service, doctor,
18 or service provider;

19

20 (f) intimidating a person who uses abortion services.

21

Act, ss. 1-2.

22

23 57. The range of activities restricted within access zones is necessarily
24 comprehensive since the pressing objective of the legislation is to ensure a level of
25 access to a lawful medical service consonant with respect for the privacy and dignity
26 of those who require abortions. For the reasons developed in more detail below, only
27 such a comprehensive restriction can provide women seeking abortion services with a
28 reasonable assurance that they can do so without risk of unacceptable affronts to their
29 privacy and dignity.

30

1 58. Privacy is one of the fundamental values underlying s. 7 and, indeed, the
 2 entirety of the *Charter*. Privacy interests have been held to be sufficiently compelling
 3 to warrant overriding a *Charter* right.

4
 5 *Edmonton Journal, supra*, at p. 593, *per* Wilson J.
 6 *Dieleman, supra*, at p. 720.

7
 8 59. Privacy underpins the confidential relationship between doctor and patient.
 9 And, in the context of access to reproductive health services, privacy is also a value
 10 specifically encompassed in ss. 15 and 28 of the *Charter*. In light of the climate of
 11 fear that persists regarding this medical service, any manner of sidewalk interference
 12 or protest, no matter how peaceful in intent, that occurs without the consent of an
 13 individual seeking access to an abortion facility necessarily represents a serious
 14 compromise of her privacy. In *Dieleman*, Adams, J. concluded that the prohibition of
 15 picketing, sidewalk counselling and engaging in any other manner of protest was
 16 justified in the face of the *Charter* violations established in that case.

17
 18 *Dieleman, supra*, at pp. 736, 745-7, 749-752.

19
 20 60. The privacy, dignity and equality values underlying ss. 7, 15 and 28 of the
 21 *Charter* are compromised when individuals are questioned repeatedly, approached by
 22 individuals or groups, given unwanted religious material, and photographed, among
 23 other anti-abortion activities which have occurred at the threshold of abortion service
 24 facilities. Such activities would be prohibited within access zones were the legislation
 25 now in force. Where the harm arises from a variety of activities, the legislature may
 26 legitimately restrict the entire range of activities that causes the harm.

27
 28 *T.*, Vol. IV, p. 175, ll. 6-32; Vol. VI, p. 353, ll. 27-30 (photos and videos); Vol. X,
 29 p. 547, ll. 27-40 (religious material); Vol. VI, p. 290, ll. 4-36; p. 353, ll. 31-45;
 30 Exhibit 26 (group demonstrations); Vol V, p. 235 ll. 2-5 (inability to avoid
 31 protestors).

1 *Butler, supra*, at pp. 486-487.

2

3 61. It is submitted that the legislative restrictions in ss. 2(1)(a) and (b) of the *Act*
4 are warranted in light of the legislature's overriding concern to ensure that persons
5 using abortion services do not become a "captive audience" for unwanted or
6 unsolicited expression. The legislature's concern to prevent a captive audience in the
7 context of access to abortion services furthers the values underlying ss. 7, 15 and 28
8 of the *Charter* and is related to the principle that the form of expression must be
9 compatible with the place or forum of the expressive activity.

10

11 *Dieleman, supra*, at pp. 723-24.

12

13 62. By creating access zones around abortion facilities, the *Act* ensures that all
14 persons seeking access to abortion facilities can exercise some control over what
15 information or advice they receive in relation to abortion. For example, women are
16 offered full counselling as part of the service provided at abortion facilities. Nothing
17 in the *Act* restricts the Respondent's ability to promulgate his views generally and in a
18 wide variety of ways. The *Act* simply ensures that contact with anti-abortion
19 expressive activity at the threshold of an abortion facility is not a means of inflicting
20 harm on women.

21

22 *T.*, Vol. X, pp. 537-539.

23

24 63. In *Committee for Commonwealth of Canada, supra*, McLachlin J. asked,
25 "what does the claimant lose by being denied the opportunity to spread his or her
26 message in the form and at the time and place asserted?" It is submitted that the
27 Respondent's right to freedom of expression is not unreasonably limited by the
28 expressive opportunity denied by the *Act*. His expressive activity is not compatible
29 with the place where the expression occurs. The *Act* provides that the expression can
30 only be limited within up to 50 metres of an abortion facility. This is a reasonably

1 minimal impairment of the Respondent's *Charter* rights.

2

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

4

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

11

12

13

14

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

15 65. Second, the restriction of a broad range of activities within a narrow
16 geographical area, is not only appropriate in light of the circumstances of abortion
17 service users, it is also the only practical approach to the problem of ensuring access.
18 A broad prohibition on anti-abortion activity within a geographically limited area
19 makes this law readily understandable to all concerned and facilitates evenhanded
20 enforcement. Restricting a more limited range of activities within the access zone
21 would require constant police surveillance of activity within the zone activities to be
22 effective. Such surveillance would be more invasive of the privacy of both abortion
23 service users and anti-abortion protestors. It is submitted that the legislative
24 mechanism in the *Act* is superior to this alternative, even from the perspective of the
25 protestors. Because it leaves them free to engage in anti-abortion activities anywhere
26 other than within an access zone, it relieves them from the constant state surveillance
27 which would otherwise be necessary.

28

29 3. Proportionality of Effects

30

31 66. In *Canadian Broadcasting Corp. v. Dagenais*, the Supreme Court of Canada

1 has recently elaborated upon the "proportionality of effects" part of the *Oakes*
2 analysis. That case required judicial interpretation of the common law governing
3 publication bans in light of the constitutional values of freedom of expression and
4 fairness of trials. The Court drew an explicit analogy between the weighing of the
5 deleterious and salutary effects of publication bans and the third part of the
6 proportionality analysis in *Oakes*. *Dagenais* thus suggests that courts should consider
7 two aspects of the proportionality of the effects of impugned legislation:

8

9 a) the proportionality of deleterious effects to the legislative objective; and

10

11 b) the proportionality of deleterious to salutary effects.

12

13 *Dagenais v. Canadian Broadcasting Corp.* (1995), 120 D.L.R.
14 (4th) 12 at p. 46.

15

16 67. It is submitted that the deleterious effects of legislation which merely curtails
17 the Respondent's anti-abortion activities within at most a 50 metre access zone around
18 an abortion service facility is clearly outweighed by the legislative objective animating
19 the *Act*.

20

21 68. It is submitted that in both its objective and its actual effect, the *Act* is a
22 measured response to a pressing social issue which has not been and indeed cannot be
23 adequately addressed by the more piecemeal alternative of injunctive relief. It clearly
24 promotes underlying constitutional values and protects a vulnerable group. There is
25 evidence that, despite the brief period during which it was in force, the *Act* did
26 noticeably improve the access, sense of security and privacy of abortion service users
27 and providers.

28

29

Appellant's Statement of Fact, para. 35.

30

T., Vol. VI, p. 358, ll. 3-28.

1 **E. Conclusion**

2

3 69. In conclusion, the Intervenor submits that the *Act* has been carefully tailored to
4 address an issue of profound importance. In a society which mandates respect for
5 women's reproductive choices, the *Act* represents a vital legislative recognition that
6 such choices cannot be real and meaningful without ensuring reasonably secure access
7 to related medical and health services. For these reasons, the Intervenor respectfully
8 submits that this Appeal should be allowed.

PART IV

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NATURE OF THE ORDER SOUGHT

70. That sections 2(1)(a) and (b) of the *Access to Abortion Services Act* be found to be constitutionally valid;

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Vancouver in the Province of British Columbia this 2nd day of May, 1996.

Nitya Iyer
Counsel for the Intervenor

Lindsay M. Lyster
Counsel for the Intervenor

PART V

LIST OF AUTHORITIES

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A. LEGISLATION

- Access to Abortion Services Act*, S.B.C. 1995, c. 35. 5, 8, 11, 32
- Abortion Services Access Regulation*, B.C. Reg. 337/95,
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- Hansard*, 4th sess., 35th Parliament, Province of British Columbia,
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B. CASES

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- Assadet v. Cambridge Right to Life et al* (1989),
69 O.R. (2d) 598 (Sup. Ct.). 12
- Brooks v. Canada Safeway* (1989), 59 D.L.R. (4th) 321 (S.C.C.) 16
- 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. Q.B.). 12
- Committee for Commonwealth of Canada v. Canada*, [1991]
1 S.C.R. 139. 7, 21, 25, 28, 29
- Dagenais v. Canadian Broadcasting Corp.* (1995), 120 D.L.R. (4th) 12. 29, 30
- Davidson v. Slight Communications Inc.* (1989), 59 D.L.R.
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1	<i>Elizabeth Bagshaw Society v. Bretton et al</i>	
2	(20 Nov 1991); (30 Jan 1992); (29 June 1995) Vancouver Registry	
3	C916855. (B.C.S.C.).	12
4		
5	<i>Everywoman's Health Centre Society (1988) v. Bridges,</i>	
6	(21 Jan. 1989), Vancouver Registry C886265 (B.C.S.C.);	
7	aff'd (1990), 78 D.L.R. (4th) 529 (C.A.).	12
8		
9	<i>Fraser v. Public Service Staff Relations Board,</i>	
10	[1985] 2 S.C.R. 455.	22
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12	<i>Irwin Toy Ltd. v. A.G. Quebec,</i> (1989) 58 D.L.R.	
13	(4th) 577 (S.C.C.).	10, 13, 22, 25
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15	<i>Morgentaler, Smolling and Scott v. The Queen</i> (1988),	
16	44 D.L.R. (4th) 385.	17, 18, 19
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19	(4th) 449 (Ont. Ct. Gen. Div.).	12, 15-21, 24, 27, 28
20		
21	<i>RJR-MacDonald Inc. v. Attorney General of Canada</i> (1995),	
22	187 N.R. 1 (S.C.C.).	7, 9, 13, 24
23		
24	<i>R. v. Keegstra,</i> [1990] 3 S.C.R. 697.	7, 9, 10, 17, 20-23,
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26	<i>R. v. Oakes,</i> [1986] 1 S.C.R. 103.	6, 7, 9, 21, 30
27		
28	<i>R. v. Red Hot Video Ltd</i> (1985), 45 C.R. (3d) 36 (B.C.C.A.),	
29	(leave to appeal refused (1985), 46 C.R. (3d) xxv (S.C.C.)).	19
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33		
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38	unreported decision of S.C.C.).	7
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43	(1985), 17 D.L.R. (4th) 422 (S.C.C.).	15
44		

1 C. TEXTS

2 Asch, "Reproductive Technology and Disability" in *Reproductive Laws for the*
 3 *1990s: A Briefing Handbook*, Nadine Taub and Sherrill Cohen, eds.,
 4 (New Jersey: Humana Press, 1988) at pp. 95-96. 14

5
 6 Laurie Nsiah-Jefferson, "Reproductive Laws, Women of Colour,
 7 and Low-Income Women," in *Reproductive Laws for the 1990s*, at pp. 45-46. 14

10
11 D. EXHIBITS

12
 13
 14 Exhibit 1: *Everywoman's Access Zone Plan*. 8, 11, 25

15
 16 Exhibit 21: Catherine Cozzarelli and Brenda Major,
 17 "The Effects of Anti-Abortion Demonstrators and Pro-Choice
 18 Escorts on Women's Psychological Responses to Abortion"
 19 (1994), 13(4) *J. Soc. & Clinical Psych.*, pps. 404 - 427 14

20
 21 Exhibit 23: *Realizing Choices: The Report of the British*
 22 *Columbia Task Force on Access to Abortion Services*,
 23 (Victoria, 1994) at pps. 2, 9-15, 17-18, 31-32, 118. 11

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 25 Exhibit 45: Everywoman's Health Centre, *Report to Commission*
 26 *of Inquiry: Policing in British Columbia*, July 7, 1993. 12

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 29