S.C.C. Court File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

B E T W E E N:

MARY WAGNER

APPLICANT

A N D:

HER MAJESTY THE QUEEN

RESPONDENT

APPLICATION FOR LEAVE TO APPEAL
(MARY WAGNER, APPLICANT)
(Pursuant to s.40 of the *Supreme Court Act,* R.S.C. 1985, c.S-26)

CREASE HARMAN LLP
800-1070 Douglas Street,
Victoria, B.C. V8W 2C4

Dr. Charles I.M. Lugosi
Tel: 1-250-388-5421
Fax: 1-250-388-4294
Email: dr.charles.lugosi@crease.com

Counsel for the Applicant

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Cory Giordano
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocay.ca
cgiordano@supremeadvocacy.ca

Ottawa Agent for Counsel for the Applicant

ATTORNEY GENERAL (ON), MIN. OF COUNSEL
Crown Law Office Criminal, 10th Flr.
720 Bay St.
Toronto, Ontario M7A 2S9

Tel: 416-326-4600
Fax: 416-326-4656
Email: susan.reid@ontario.ca

Counsel for the Respondent

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S.C.C. Court File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

B E T W E E N:

MARY WAGNER

APPLICANT

A N D:

HER MAJESTY THE QUEEN

RESPONDENT

NOTICE OF LEAVE TO APPEAL
(MARY WAGNER, APPLICANT)
(Pursuant to section 40 of the *Supreme Court Act,* R.S.C. 1985, c. S-26 and Rule 25 of the *Rules of the Supreme Court of Canada,* SOR/2002-156)

TAKE NOTICE that Mary Wagner applies for leave to the Supreme Court of Canada, under section 40 of the *Supreme Court Act,* R.S.C. 1985, c. S-26 and Rule 25 of the *Rules of the Supreme Court of Canada,* SOR/2002-156 from the judgment of the Court of Appeal of Ontario (Docket Number: M51709) made on September 14, 2020 and for an order granting the Applicants leave to appeal from the Court of Appeal Decision, and any further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE this application for leave is made on the following grounds:

Issue No. 1: Who should fit within the legal definition of "human being"?

Do the words "any one" or "everyone" and "every individual" include a foetus; are the words "any one" or "everyone" appropriately restricted by s. 223(1) of the Criminal Code; is s. 223(1) of the Criminal Code constitutionally compliant

Issue No. 2: Denial of the right to furnish evidence in support of a defence under the *Criminal Code* based on its implications for abortion in Canada

Did the Trial Judge violate the s. 7 and s. 11(d) Charter rights of the Applicant, and s. 650(3) of the Criminal Code by denying her right to an evidentiary hearing; was the Applicant wrongly deprived of her defence, including under s. 37(1) and s. 8(3) of the Criminal Code

DATED at Victoria, BC this 11th day of November, 2020.

SIGNED BY:

CREASE HARMAN LLP
800-1070 Douglas Street,
Victoria, B.C. V8W 2C4

Dr. Charles I.M. Lugosi
Tel: 1-250-388-5421
Fax: 1-250-388-4294
Email: dr.charles.lugosi@crease.com

Counsel for the Applicant

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Cory Giordano
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocay.ca
cgiordano@supremeadvocacy.ca

Ottawa Agent for Counsel for the Applicant

ORIGINAL TO: **THE REGISTRAR**

COPY TO:

ATTORNEY GENERAL (ON), MIN. OF COUNSEL
Crown Law Office Criminal, 10th Flr.
720 Bay St.
Toronto, Ontario M7A 2S9

Tel: 416-326-4600
Fax: 416-326-4656
Email: susan.reid@ontario.ca

Counsel for the Respondent

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

2015 ONCJ 66
Ontario Court of Justice

R. v. Wagner

2015 CarswellOnt 1862, 2015 ONCJ 66, [2015] O.J. No. 706, 119 W.C.B. (2d) 605

Her Majesty the Queen and Mary Wagner

Fergus ODonnell J.

Judgment: February 12, 2015
Docket: None given.

Counsel: Ms Tracy Vogel, for Crown
Mr. Charles Lugosi, for Defendant, Mary Wagner

Subject: Constitutional; Criminal; Evidence; Property
Related Abridgment Classifications
Criminal law
XVI Wilful and forbidden acts in respect of certain property
XVI.3 Mischief
XVI.3.a Elements
Criminal law
XXI Defences
XXI.12 Mistake or ignorance of fact
XXI.12.a Availability of defence
Criminal law
XXI Defences
XXI.14 Necessity
Criminal law
XXI Defences
XXI.17 Self defence or defence of another
XXI.17.d Miscellaneous
Criminal law
XXII Sentencing procedure and principles
XXII.8 Types of sentence
XXII.8.h Probation
XXII.8.h.vii Sentencing for breach
Criminal law
XXXI Trial
XXXI.1 General principles
XXXI.1.f Powers of court
XXXI.1.f.ix Miscellaneous
Headnote
Criminal law --- Offences — Mischief — Elements — Miscellaneous
Accused was anti-abortion activist — Accused was bound by two probation orders, both requiring her to keep peace and be of good behaviour and one barring her from attendance at or communication with any person at abortion facility in province — Accused gained entry to abortion clinic, seeking to intercede with various clinic patients and refusing to leave premises — Accused was charged with breach of probation and with mischief interfering with private property — Accused convicted

— Accused's conduct clearly disrupted operation of clinic and treatment of clinic's patients in more than trivial manner — Accused's commission of mischief interfering with private property constituted breach of obligation to keep peace and be of good behaviour.

Criminal law --- Defences — Self defence — Miscellaneous

Accused was anti-abortion activist, bound by two probation orders — Accused gained entry to abortion clinic, seeking to intercede with various clinic patients and refusing to leave premises — Accused was charged with breach of probation orders and with mischief interfering with private property — Accused convicted — If applicable, accused could rely either on self-defence provision in force at time of offence or at time of trial — Accused could not shelter herself under s. 37 of Criminal Code as it read of time of offence, because her conduct did not fit within use of force required by any sensible reading of section and unborn foetus, even if it could count as "anyone", was not "under her protection" — Accused reasonably believed that foetuses of clinic patients were in imminent danger of being subjected to deadly force and her intercession was intended to protect foetuses from that imminent peril, as required by new self-defence/defence of others provision in s. 34 of Code — Accused could not succeed in showing that her acts were reasonable in circumstances, given provisions as to other means of responding to potential use of force and whether force was known to be lawful — Accused's actions sought to impose her will and world-view on emotionally vulnerable patients who were seeking treatment that accused knew to be lawful under law of Canada — Availability of other options, such as seeking judicial declaration as to lawfulness of abortion, undermined her ability to rely on s. 34 of Code.

Criminal law --- Defences — Necessity — No reasonable alternative

Accused was anti-abortion activist — Accused was bound by two probation orders, both requiring her to keep peace and be of good behaviour and one barring her from attendance at or communication with any person at abortion facility in province — Accused gained entry to abortion clinic, seeking to intercede with various clinic patients and refusing to leave premises — Accused was charged with breach of probation orders and with mischief interfering with private property — Accused convicted — Defence of necessity was not available to accused — Accused had other options to challenge lawfulness of abortion, including bringing seeking declaration in court — Accused's personal penury was irrelevant to such route, given size of anti-abortion movement and success of much less significant crowdfunding causes — Accused did not agree with law and chose to disobey it because she felt bound to do by some higher calling — This formulation of law of necessity had been clearly rejected.

Criminal law --- Trial procedure — Preliminary matters — Powers of court — Miscellaneous

Accused was anti-abortion activist — Accused was bound by two probation orders, both requiring her to keep peace and be of good behaviour and one barring her from attendance at or communication with any person at abortion facility in province — Accused gained entry to abortion clinic, seeking to intercede with various clinic patients and refusing to leave premises — Accused was charged with breach of probation orders and with mischief interfering with private property — Accused convicted — Accused sought to introduce evidence to support argument as to status of foetus and its right to protection under Canadian Charter of Rights and Freedoms — Long evidentiary inquiry, even assuming all facts were found in favour of accused, had no conceivable chance of affecting outcome of case — Accused's proposed scientific evidence on foetal development did not involve any material differences from state of scientific understanding at time of relevant Supreme Court of Canada precedents — Given deep and broad field of jurisprudence from Supreme Court of Canada and various provincial courts of appeal on issues inextricable intertwined with legal status of foetus under s. 7 of Charter, there was no rational way that accused could succeed in argument — Trial judge had power to decline to hold evidentiary hearing in circumstances.

Criminal law --- Sentencing — Types of sentence — Probation — Breach of order

Accused was anti-abortion activist — Accused was bound by two probation orders, both requiring her to keep peace and be of good behaviour and one barring her from attendance at or communication with any person at abortion facility in province — Accused gained entry to abortion clinic, seeking to intercede with various clinic patients and refusing to leave premises — Accused was charged with breach of probation orders and with mischief interfering with private property — Accused convicted — It was clear that accused attended clinic and communicated with people there, in clear and wilful disobedience of probation orders — Accused sought to raise issues relating to protection of foetuses from imminent harm as defences — Regardless of issues as to status of foetus in Canadian law, arguments were not applicable as defences to breach of probation charges — Time and place to make arguments that terms of orders limiting her ability to attend abortion clinic were invalid and unenforceable was to trial judge who imposed them and on appeal from them — Accused's route of "breach first, challenge later" was contrary to rule against collateral attack — Even if there was merit to argument about foetus being protected by s. 7 of Charter or

that accused could fit within provision on defence of others, argument would not safeguard her from conviction on breach of probation counts.

Criminal law --- Defences — Mistake or ignorance of fact — Miscellaneous

Accused was anti-abortion activist — Accused was bound by two probation orders, both requiring her to keep peace and be of good behaviour and one barring her from attendance at or communication with any person at abortion facility in province — Accused gained entry to abortion clinic, seeking to intercede with various clinic patients and refusing to leave premises — Accused was charged with breach of probation orders and with mischief interfering with private property — Accused convicted — When not permitted evidentiary hearing on whether foetuses were protected as "anyone" under s. 7 of Canadian Charter of Rights and Freedoms, accused sought to have evidence submitted to assess possible mistake of fact argument — Mistake of fact argument was not available, and was merely attempt to sneak viva voce evidence — Notion that accused was operating under mistake of fact was entirely disingenuous — Question of legal status of foetus was clearly question of law — Accused, with single-minded focus on rights of unborn, was clearly familiar with definition and just fervently disagreed with it — Accused knew what clinic's activities were, went in there precisely because of her opposition to those activities and there was no error at all in her understanding of underlying facts.

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Roe v. Wade (1973), 93 S.Ct. 705, 410 U.S. 113, 35 L.Ed.2d 147 (U.S. Sup. Ct.) — followed

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Tremblay c. Daigle (1989), [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634, 102 N.R. 81, (sub nom. *Daigle v. Tremblay*) 11 C.H.R.R. D/165, (sub nom. *Daigle v. Tremblay*) 27 Q.A.C. 81, 1989 CarswellQue 124, 1989 CarswellQue 124F (S.C.C.) — considered

Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.) (1997), 1997 CarswellMan 475, 1997 CarswellMan 476, 31 R.F.L. (4th) 165, (sub nom. *Child & Family Services of Winnipeg Northwest v. D.F.G.*) 219 N.R. 241, 152 D.L.R. (4th) 193, 121 Man. R. (2d) 241, 158 W.A.C. 241, [1998] 1 W.W.R. 1, [1997] 3 S.C.R. 925, 39 C.C.L.T. (2d) 155 (Eng.), 39 C.C.L.T. (2d) 203 (Fr.), 3 B.H.R.C. 611, 39 C.C.L.T. (2d) 155 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 2 — considered

s. 2(a) — considered

s. 4 — considered

s. 7 — considered

s. 8 — considered

s. 11(b) — considered

s. 15 — considered

s. 24 — considered

s. 24(2) — considered

s. 32 — considered

Charte des droits et libertés de la personne, L.R.Q., c. C-12

en général — referred to

art. 1 — considered

art. 2 — considered

Citizen's Arrest and Self-defence Act, S.C. 2012, c. 9

Generally — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

Controlled Drugs and Substances Act, S.C. 1996, c. 19

s. 12(b) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

s. 52 — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 2 — considered

s. 8(3) — considered

s. 25(1) — considered

s. 25(3) — considered

s. 25(4) — considered

s. 25(5) — considered

s. 26 — considered

s. 27 — considered

s. 27.1 [en. 2004, c. 12, s. 2] — considered

s. 30 — considered

s. 32 — considered

s. 34 — considered

s. 34(1) — considered

s. 34(1)(c) — considered

s. 34(2) — considered

s. 34(2)(b) — considered

s. 34(2)(h) — considered

s. 35 — considered

s. 37 — considered

s. 43 — considered

s. 46(2)(a) — considered

s. 52 — considered

s. 52(4) — considered

s. 59 — considered

s. 68 — considered

s. 76 — considered

s. 78.1 [en. 1993, c. 7, s. 4] — considered

s. 144 — considered

s. 159(3)(b)(ii) — considered

s. 176(1) — considered

s. 176(2) — considered

s. 176(3) — considered

s. 223 — considered

s. 223(1) — considered

s. 251 — considered

s. 265(1) — considered

s. 279 — considered

s. 490 — considered

Interpretation Act, R.S.O. 1990, c. I.11

s. 13 — considered

Treaties considered:

Convention on the Rights of the Child, 1989, C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25

Generally — referred to

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222; E.T.S. no. 5

Generally — referred to

Words and phrases considered:

force

[A] reading of the Criminal Code overall suggests that the word "force" as used repeatedly therein was intended by the legislator to refer to an act of violence or constraint or something similar. Virtually all of the uses of the word "force" in the Criminal Code otherwise make little or no sense.

TRIAL of accused on charges of mischief interfering with private property and breach of probation orders, with respect to attendance within abortion clinic and communication with its patients.

***Fergus ODonnell J.*:**

Overview

1 Mary Wagner stood charged with breach of probation and with mischief interfering with private property, all arising out of her attendance at a Toronto abortion clinic, the allegation[1] being that she had sneaked into the locked clinic and sought to intercede with various clinic patients by offering them roses and pamphlets in an effort to have them reconsider their interest in having an abortion. This all allegedly happened while Ms. Wagner was bound by two probation orders, each of which required her to keep the peace and be of good behaviour and one of which more specifically prohibited her from being on the premises of any abortion provider in Ontario and from communicating with any person at an abortion facility in Ontario. Ms. Wagner believes that abortion involves the termination of human life and is the equivalent of murder. Indeed, I expect Ms. Wagner would leave the words "the equivalent of" out of that last sentence.[2]

2 As it turned out, unlike most trials, this trial was hardly, if at all, about whether the Crown could prove beyond a reasonable doubt that Ms. Wagner had done the acts alleged, but rather about whether or not Ms. Wagner was justified in doing what she admitted doing when she testified. As I noted above, it is the view of Ms. Wagner and her many supporters that a foetus has the same status and same right to protection as any of the rest of us and that since the patients of the abortion clinic were presumably there to terminate the lives of their foetuses, she was entitled to intervene as she did in order to save those lives. Indeed, Ms. Wagner would say she was duty-bound rather than "entitled" to act as she did.

3 In the course of what turned out to be a long and protracted trial we ended up meandering through a variety of issues and historical way-points including what exactly Ms. Wagner did at the clinic (which, as I have noted, was pretty much a side-show compared to the other issues), whether Ms. Wagner should have access to the clinic records concerning the patients, the *Criminal Code* definition of "human being", the legal status of the unborn in Canada, the Ten Commandments, the history of abortion proscription through the ages, tort law, the Civil Code of Quebec, the distinction between the rule *of* law and rule *by* law, the law of "self defence of others" (two versions, given a change in the *Criminal Code* after Ms. Wagner's visit to the clinic but before her trial), Ms. Wagner's standing to bring a constitutional challenge, a trial court's power to decline to hear *viva voce* evidence on a *Charter* issue, a forest of Supreme Court of Canada decisions, Franz Kafka's classic novel, *The Trial*, a biology lesson that might cause a judge to reconsider the wisdom of having bailed from science classes after grade 10, *Dred Scott*, one of the most notorious decisions in the history of the United States Supreme Court,[3] and the Nuremberg Trials. I may not deal with every one of those issues in these reasons,[4] but the list gives some flavour of the trial and the argument. While the proceedings were marked at times by some palpable exasperation between the parties, any such exasperation was greatly exceeded by enduring civility manifested in dealing with a time-consuming and emotion-laden set of issues.

4 Ms. Wagner was in custody for the entirety of the proceedings. While at the outset her detention *may* have been brought about by factors external to her, ultimately, given the drastically watered-down bail she was offered and which she persistently rejected, her long detention was very much the product of her obstinacy or her devotion. Which characterization is more apt,

fortunately, is not one of the issues I have to determine. The depth and sincerity of her beliefs, her selfless commitment to those beliefs and the quiet dignity she manifested throughout the proceedings cannot, in any event, be gainsaid.

5 Insofar as Ms. Wagner was in custody (for almost two years), I delivered my judgment the day that the argument was concluded. I found Ms. Wagner guilty of all of the charges and imposed sentence that day. These are my reasons.

The Evidence of the Alleged Offences

6 I have said that the question of precisely what Ms. Wagner did at the clinic was largely a sideshow in these proceedings. The bigger questions included whether her conduct was justified by the law of self-defence or necessity, which in turn engaged the contentious issue of whether or not a foetus is a human being. It is Ms. Wagner's contention, and she is not alone in this, that a foetus is a human being and that it acquires that status at the moment of conception. In keeping with the fact that many things were not in dispute, there was no issue that Ms. Wagner attended at the clinic on the day in question, at a time when she was bound by two probation orders prohibiting any such attendance. Although we danced around the head of a pin on this issue to a certain extent, it was agreed that, if a foetus is a human being, then whatever actions were taken by the clinic to abort the foetuses whose mothers attended the clinic, that conduct would be assaultive in nature (to say the least) *vis a vis* the foetuses, assaultive conduct being necessary to trigger the law of self-defence (assuming that Ms. Wagner had standing to raise the issue of self-defence of others, which, along with the status of the foetus in law was a bone of contention between the parties). It was an admitted fact that the patients who were at the clinic did terminate their pregnancies at the clinic.

7 On 15 August, 2012 Ms. Wagner was bound by two probation orders, one imposed by Justice Bassel on 13 September, 2011 and the other imposed by Justice Clements on 21 March, 2012. Those orders each required her to keep the peace and be of good behaviour and Justice Clements's order prohibited Ms. Wagner from being on the premises of any abortion provider in Ontario and, separately, from communicating with any person in such premises. On 15 August, 2012 Ms. Wagner gained entry to the Women's Care Clinic, an abortion clinic in Toronto and allegedly communicated with patients in the waiting room and corridor and disrupted the work of the clinic thereby. I heard details of what happened in the clinic from:

a. The medical director of the clinic, Dr. Sarai Markovic;

b. Two of the receptionists, June and April;

c. One of the nurses, Khatija;

d. One of the arresting officers, Constable Richard Mau;

e. Ms. Wagner.

8 Jane, the receptionist, testified that she worked behind the Plexiglas that separates the reception area from the smaller, outer waiting room. Early on 15 August, 2012 a co-worker told her to go out to the waiting room, where she found Ms. Wagner crouched beside a client and her companion, holding a rose and softly asking the client to change her mind about her appointment. There were other clients in the waiting room, along with their support people. The client appeared very uncomfortable and was crying and her companion put his arm around her. Jane told Ms. Wagner repeatedly to leave, but she did not. Ms. Wagner asked Jane if she worked there and then told her she should get another job.

9 Jane kept asking Ms. Wagner to leave and opened the corridor door, but she did not leave. The nurse-manager, Khatija, then came out, told Ms. Wagner the clinic was private property and asked Ms. Wagner to leave, but she refused. Eventually, Jane and Khatija pulled Ms. Wagner out of the clinic, Jane using her hands on Ms. Wagner's arm. Ms. Wagner leaned back to resist their efforts. Jane did not recall Khatija threatening physical harm to Ms. Wagner.

10 Khatija, the nurse, testified that she was taking a telephone call when she saw Ms. Wagner in the outer waiting room, with roses and pamphlets, making contact with patients. She told Jane to go out and deal with it while she was on the phone call. She could see Jane approach Ms. Wagner and hear parts of the conversation. Ms. Wagner kept trying to give out pamphlets and flowers and even tried to get into the second waiting room, where about six patients and their partners or companions were

waiting behind a glass partition. She tried to talk through the Plexiglas and held up a pamphlet against the glass. She was talking about Jesus and about killing babies. Ms. Wagner's voice was medium to loud, but calm, "like someone giving a sermon". After she finished the phone call, Khatija herself went to the outer waiting room and told Ms. Wagner that this was private property, she was not allowed there, she was not allowed to drop off her "paraphernalia" there and that she had to leave. Khatija said that, as an emergency nurse, her voice would have been quite stern in addressing Ms. Wagner. Ms. Wagner was "pretty resistant and obstinate. She doesn't want to move." Khatija took the pamphlets from the outer waiting room and threw them in the corridor. When Ms. Wagner still refused to move, Khatija told the other receptionist, April, to call 911. Around the same time they were trying to direct patients from the outer waiting room to the inner waiting room and to direct incoming patients to another door. At one point, Khatija took over the 911 call. When Ms. Wagner failed to leave after several requests, they started backing her towards the door. Khatija told Jane to open the door and grabbed Ms. Wagner's shoulder. They got her into the corridor.

11 In the corridor, Ms. Wagner set up her pamphlets and Jesus icons by the clinic door, but then saw that the staff were letting patients into the clinic by its second door, which was closer to the elevator, so she moved over there. Khatija stayed out there with Ms. Wagner, with April, the other receptionist coming and going from the corridor with patients.

12 In her testimony April said she saw Ms. Wagner after she had gained entry to the outer waiting room and told Ms. Wagner through the Plexiglas multiple times that she should leave. Ms. Wagner did not respond. She kneeled in front of two clients, putting her hand on theirs and asking them to reconsider, while offering them pamphlets and roses. The clients were obviously upset, cried and looked sad. April called the police and notified Khatija that Ms. Wagner was there. She saw Khatija go to the outer waiting room and repeatedly ask Ms. Wagner to leave. Ms. Wagner said she had a right to voice her opinion and tried to get in the larger waiting room after all the patients had been transferred in there. April described how, for as long as Ms. Wagner was there, most of the activities of the clinic were at a standstill.

13 Once Ms. Wagner had been removed to the corridor, April went out there to assist clients arriving to the clinic. Ms. Wagner told April that she was murdering children and should get another job. While Ms. Wagner was pacing and praying in the corridor, a woman came out from another office and asked Ms. Wagner to protest outside (the building) because her presence was disrupting their patient traffic. Eventually, April went downstairs to escort the police up. When she returned with the police, Ms. Wagner was telling a patient leaving the clinic to ask for forgiveness; that patient was, "very upset. She was crying to the point where she was hyperventilating".

14 Dr. Markovic testified that the clinic is private property. It is accessible by a door to the corridor of the building. That door is kept locked and access is controlled through a buzzer and video camera. The reason it is locked is, "because we don't want anti-abortion people to come in." Behind the corridor door is a small outer waiting room that is separated by Plexiglas from a receptionist who controls the corridor door. A larger waiting room is also adjacent to the outer waiting room. Access to the larger waiting room is controlled by a lock. The two-waiting room set-up was designed because "this lady" (it is unclear if that was Ms. Wagner or someone else, but nothing hangs on it), had come to the clinic before when there was only a single waiting room. The dual waiting room system reduces the number of patients that a protester could interfere with if he or she gained access to the clinic. Behind the larger waiting room are offices for counselling and behind those offices is the operating room.

15 Dr. Markovic testified that she was in the operating room performing a medical procedure on a patient around 9 a.m. on 15 August, 2012, along with two staff members and a patient, when one of her nurses, Khatija, came and told her of Ms. Wagner's entry into the clinic. She told Khatija to call 911, move the patients into the larger waiting room and ask Ms. Wagner to leave.

16 Dr. Markovic testified that it is important that patients be calm. Apparently if a patient is confronted with allegations of being a "baby killer", they get upset, which requires additional counselling and a lot more medication to calm them down. Patients are conscious during the procedure. If they are not calm, it increases the risk of the doctor making a mistake, such as perforating the uterus or an artery, which could cause complications or even death. The patient Dr. Markovic was operating on when Khatija brought the news of Ms. Wagner's presence appeared upset to Dr. Markovic — she started to cry. Dr. Markovic testified that she continued with the procedure but had to take more time and give the patient more medication and time to relax. This occasioned a delay of five or six minutes. The nurse, Khatija, confirmed Dr. Markovic's testimony about the impact of Ms. Wagner's visit on patients during abortions that day and the added time and medication required.

17 About ten or fifteen minutes later Dr. Markovic was performing a "procedure" on another patient when Khatija came back to report that Ms. Wagner had left the clinic itself, but was out in the corridor praying loudly. After she finished with the second patient, Dr. Markovic went out into the corridor to check on her secretary, April, who she had been told was out with Ms. Wagner. If Dr. Markovic had not felt the need to go out into the corridor, she would have dealt with other patients. She was delayed in that by about ten minutes.

18 When Dr. Markovic went out into the corridor she saw red roses splayed about the main entrance to the clinic. Ms. Wagner was standing between the entrance and the elevator, telling three or four patients approaching the clinic not to enter, not to commit a murder, to take time to reconsider. One of the patients got "very, very upset" and told Ms. Wagner to leave her alone and that her decision was her own business. Ms. Wagner was saying these things in a conversational tone of voice. Ms. Wagner did not use physical force. Dr. Markovic told Ms. Wagner to leave, but she did not leave. Dr. Markovic took the patients into the clinic and left her secretary, April, in the corridor with Ms. Wagner. She told April to stay with Ms. Wagner in the corridor until the police arrived because otherwise Ms. Wagner would just have sneaked back into the clinic.

19 Dr. Markovic testified that her secretary, April, was out in the hallway the whole time she was there; had Ms. Wagner not come to the clinic April would have been at her work-station doing administrative work and processing patients. She said that five or six of the ten to fifteen patients she saw that morning after Ms. Wagner's behaviour were crying and it took at least an extra five or ten minutes to perform their procedures because of their upset. Some of them were fourteen years old. Whereas normally one patient a year would call the clinic for post-treatment counselling, six or seven of that morning's patients called back for that follow-up.

20 Dr. Markovic denied that she was the "older woman" Ms. Wagner claimed had come out into the corridor who called Ms. Wagner a "psycho" or that she had told Ms. Wagner to "go fuck yourself", language that Dr. Markovic said was "not my dictionary. I don't use those words." She did not slam the door; she pointed out that the door was self-closing. Dr. Markovic said that other than the cleaning lady, she is the oldest woman at the clinic. The words attributed by Ms. Wagner to the "older woman" did not strike Dr. Markovic as the kind of language her cleaning lady would use.

21 Dr. Markovic testified that she does not teach her clients embryology; they have access to all sorts of information before they come to her and when they come to her they have generally made up their minds. When they come to the clinic they spend twenty or thirty minutes with a counsellor. If they are not sure of their decision they are told about other options, such as continuing the pregnancy, giving the child up for adoption and going home and thinking about their options further. The clinic provides referrals to gynaecologists and adoption services and further counselling services for those who are not one hundred percent sure that they want to proceed with the abortion. Khatija spoke of this issue as follows:

> Patients come in with a fair amount of knowledge before they enter to our clinic. They just want the procedure done. They have tonnes of counselling and opportunities to go on pro-life websites and to address these issues.

22 Constable Richard Mau attended at the clinic in response to the 911 call. He found Ms. Wagner in the corridor and told her that it was private property and she had to leave, to which she said that she chose to stay because of her convictions. During Constable Mau's time there, Ms. Wagner tried to approach one patient coming out of the office and give her a rose. Faced with Ms. Wagner's repeated refusals to leave under her own steam, Constable Mau and his partner each took an arm and escorted her out. Upon confirming her probation conditions, she was arrested outside the building.

23 Ms. Wagner testified that she is Roman Catholic and a member of the pro-life community. She has been engaged in pro-life activity for decades and has been arrested many times because of it, spending perhaps a total of two-and-a-half years in jail as a result of her activism. She has violated "bubble zones" around abortion clinics, "Because children's lives were in danger. The lives of human beings were in danger, and I needed to go and to speak for them." Her obligation to intervene for the unborn arises from her faith and from a universal concern for others. She testified that, "it's a certainty that each human being is precious and human life begins at conception; that life in the womb is — is a human being just like you are a human being." Her criminal record reflects no moral wrongdoing, she said.

24 Ms. Wagner testified that in her view, people considering abortions need greater education, including information about the continuum of human life from fertilization to full adulthood. People considering an abortion have a right to full information about what is involved for the mother and the baby, from a health, emotional, physical and spiritual perspective and others have a duty to provide that information. While such information should be provided much earlier, providing information at the clinics is important because it is the, "last chance for the human being in their womb to be protected."

25 Ms. Wagner testified that on 15 August, 2012 her intention was to protect unborn human beings who were going to be aborted. She sees the unborn as being under her protection and, in an abortion clinic, nobody else is likely to protect them. She hoped that some of the patients would accept the support she was offering because that has sometimes happened in the past. She offered the rose to the patient as a gesture of peace and comfort and told her she had options. Each of the pamphlets she had with her had a purpose, one in connection with providing a place for mothers to stay and carry her child to term, another to show the development of the foetus and the finality of the decision to abort, another about the health and psychological risks of abortion, and so on. From her interaction with women who have had abortions, Ms. Wagner understood that abortion clinics typically provide minimal information to patients.

26 Ms. Wagner testified that she did not consider herself to be trespassing at the clinic, but rather to be acting out of necessity to protect human life that was in danger. While she was "technically" violating court orders by attending the clinic, "human life takes precedence over court orders.... Care for human life should be given highest priority." Ms. Wagner says that if obeying natural law requires her to pay a penalty for breaking man's law, she is prepared to pay that penalty. She will likely return to abortion clinics after this trial is over and pay whatever penalty ensues for that also.

27 With respect to what happened on 15 August, 2012, Ms. Wagner said she followed a young couple into the clinic and then approached another couple sitting in the outer waiting room, offered the young woman a rose and said there was support available for her. Within seconds, the receptionist Jane came out and told her to leave. Ms. Wagner kept engaging with the young woman, who eventually said, "I don't want this", whereupon Ms. Wagner said she left her and approached another couple. She said that Khatija entered the room before she could get to the second couple and she also told her to leave. Khatija, she said, put her hands on Ms. Wagner to get her out and Ms. Wagner told her that was an assault, to which Khatija's response was "charge me". Around this time Ms. Wagner said she told someone behind the Plexiglas that she should get another job.

28 Within a couple of minutes, the outer waiting room had been cleared and Ms. Wagner said she realized there was an inner waiting room, so she raised her voice loud enough for the people in that room to hear her and held a pamphlet up to the glass barrier between the rooms, imploring them not to go ahead with the abortions. She tried to enter the inner waiting room, but it was locked. At this point Khatija renewed her efforts to remove her physically; with Jane's help, they managed to get her out into the corridor.

29 Ms. Wagner testified that for a while she was left alone in the corridor, so she prayed silently. After a while, April came out and went down by the elevator. She told April to find other work. Then Dr. Markovic came out and started screaming at her, calling her a "psycho" and telling her to "go fuck yourself", before returning into the office. After that, a woman came out from another office and said people in her suite were getting upset and asked Ms. Wagner to leave.

30 Eventually Ms. Wagner noticed that patients were coming off the elevator and entering the clinic through the back door so she tried to engage with them, about five women in total, along with their supporters, but Khatija spoke over her. At one point, she said, Khatija threatened her, although Ms. Wagner could not recall the exact words. After Ms. Wagner said that Khatija was free to vent her anger, she said Khatija no longer raised her voice to her. [5]

31 Ms. Wagner accepted that her presence at the clinic did cause disruption and interfered with the business of the clinic. That was her intention. While she felt free to disobey a court order to protect the unborn, Ms. Wagner testified that she would not resort to violence for that purpose, because her faith requires her to lay down her life for others rather than to take up arms.

Conclusions on the Evidence of What Happened At The Clinic

32 The testimony I heard did not really strike me as requiring any particular findings of credibility. Ms. Wagner came across as a sincere witness and I believe that I can place much credit in her testimony about what happened at the clinic. The same, however, can be said for the Crown witnesses. Indeed, I do not believe that this case really is about what happened at the clinic as opposed to what legal conclusions follow from what happened. The only glaring factual inconsistency is the question of whether or not Dr. Markovic came out of the clinic and called Ms. Wagner a "psycho" and swore at her, which she denies. That question, of course, is entirely irrelevant to anything and I do not believe that resolving that question would even help me with any issue about the general credibility of Ms. Wagner or Dr. Markovic so I shall say no more of it.

33 On the evidence before me, it is clear beyond any doubt that Ms. Wagner attended at the clinic and communicated with people there, in clear and wilful disobedience of the two probation orders. Her conduct clearly disrupted the operation of the clinics and the treatment of the clinic's patients in more than a trivial manner, thus making out the offence of mischief interfering with private property and her commission of that offence constitutes breaches of her obligation to keep the peace and be of good behaviour in each probation order. Before any pronouncement can be made on whether or not the charges have been proved beyond a reasonable doubt, however, I must consider whether or not the various arguments in Ms. Wagner's defence hold sway, including questions such as whether or not the Crown has disproved defence of others and necessity as argued by Ms. Wagner.

The Law of Self-Defence/Defence of Others

34 These events occurred in 2012. Between then and the time of the trial, Parliament changed the self-defence/defence of others provisions of the *Criminal Code*. [6] Ms. Wagner initially appeared to rely solely on the pre-amendment provisions, but I expressed my view that both versions should be considered and argued, after which Ms. Wagner argued that she should have the benefit of whichever provision better served her, only to adopt the position late in argument that she was not relying on the new s. 34. [7] Different arguments might arise depending on which provision(s) Ms. Wagner is entitled to rely on. Quite apart from the position adopted by Ms. Wagner, it is my duty to consider any potential defence that may be available and I have done so.

35 The version of the law of self-defence/defence of others that was in effect at the time of the alleged offences was the object of significant confusion and criticism as being unduly complex. One prominent professor, now a judge of this court, accorded the old provisions the label of, "the most confusing tangle of sections known to law," [8] and other judges and commentators were equally uncharitable in their observations (In fairness, Professor Paciocco may not have considered s. 490's eligibility for that title, although the quagmire that is s. 490 likely has less practical impact on people's lives than the law of self-defence). There were various provisions in effect at the time (not necessarily particularly compatible with each other), but the one argued as being applicable to Ms. Wagner's case was section 37, which stated as follows:

> **37.** (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.
>
> (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

36 This provision is dramatically different from the successor provision, which is set out further on in these reasons. A number of questions arise under section 37 of the *Code* in effect in 2012, such as:

a. What is the meaning of "force" in the section and does it encompass Ms. Wagner's intervention?

b. Were the foetuses of the clinic clients "anyone"? This issue is addressed elsewhere in these reasons.

c. If the foetuses were included within the word, "anyone", were they under Ms. Wagner's protection?

37 It was argued on Ms. Wagner's behalf that the word "force" is not limited to physical intervention, but could include her efforts at verbal persuasion. On the facts of this case, it is clear that Ms. Wagner was not physically assaultive at any time

and even her resistance to being removed from the clinic was clearly passive resistance, using only the weight of her body to make removal difficult.

38 From a purely linguistic perspective, the word "force" is capable of many meanings. To the grade ten student, "force" and the formulae relating to it are either the entrée to great career potential or reasons for eternal enmity towards Sir Isaac Newton. A boxer might succumb to the force of his opponent's blows. A contracting party's liability might be excluded in case of *force majeure.* Martin Luther King, Jr. might be said to have dominated the political landscape of the United States by the force of his convictions, his personality and his oratory. Undoubtedly, many judges have heard "forceful" submissions from counsel, as did I in this case. I think it can fairly be argued that Ms. Wagner's efforts at persuasion in the clinic fit within some linguistic definitions of "force". That, however, is not the end of the inquiry.

39 The word "force" is not defined in the *Criminal Code.* It is, however, used in numerous sections of the *Code* and its use in those sections within the same statute is a legitimate source of enlightenment as to its meaning in the self-defence/defence of others provisions of that same statute. Among the places where the word "force" is used in the *Code* are:

a. Section 25(1), which empowers persons enforcing the law to "use as much force as is necessary for that purpose."

b. Section 25(3) limits the power to use "force that is intended or likely to cause death or serious bodily harm" except in specific circumstances defined in s. 25(3) and ss. 25(4) and 25(5).

c. Section 26 criminalizes the excessive use of force by persons authorized to use force.

d. Section 27 authorizes the use of force to prevent the commission of an offence for which a person could be arrested without warrant and that would be likely to cause immediate and serious personal injury or property damage.

e. Section 27.1 provides similar authorization if there is danger of immediate and serious danger to an aircraft in flight or any of its occupants.

f. Section 30 authorizes the use of "no more force than is reasonably necessary" to prevent a breach of the peace.

g. Section 32 authorizes the use of force to suppress a riot.

h. The present s. 34 of the *Code* makes repeated use of the word "force".

i. The former section 34 of the *Code*, which was in force at the time of Ms. Wagner's attendance at the clinic said: "Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm..."

j. Section 43 allows teachers, parents and others to use force by way of correction of a child or pupil if the degree of force is reasonable under the circumstances.

k. Section 46(2) (a) defines treason as including the use of "force or violence" to overthrow the government of Canada or a province.

l. Section 59, the sedition provision, criminalizes advocating the use of force as a means of governmental change.

m. The unlawful assembly provision of the *Code*, in s. 68 makes it an offence for any person who "opposes, hinders or assaults, wilfully and with force" a person seeking to proclaim an assembly to be unlawful.

n. Section 76 of the *Code* describes hijacking in terms of, "unlawfully, by force or threat thereof" exercising or seizing control of an aircraft for defined purposes. Section 78.1 provides likewise for seizure of a ship or fixed platform.

o. Section 144 makes it an offence "by force or violence" to cause a prison break.

p. The *Criminal Code* vitiates consent in sexual matters, e.g. if, "the consent is extorted by force, threats or fear of bodily harm..." (e.g. s. 159(3) (b)(ii).). Likewise, a complainant's failure to resist a kidnapping or forcible confinement is irrelevant unless the defendant can show that the failure to resist was not brought about by "force or exhibition of force" (s. 279).

q. Section 176(1) of the *Criminal Code* makes it an offence "by threats or force" to obstruct the clergy from performing divine service, an indictable offence. Sections 176(2) and (3), by distinction, make it a summary conviction offence wilfully to disturb such a meeting.

r. Section 265(1) of the *Criminal Code* includes as one of the definitions of "assault", the non-consensual, intentional application of "force" to another person. The section goes on to vitiate any "consent" obtained by the application of force or fear of the application of force.

40 Section 12(b) of the *Controlled Drugs and Substances Act* empowers an officer executing a search warrant to, "use as much force as is necessary in the circumstances".

41 I also note that the sabotage provision in s. 52 of the *Criminal Code* provides an explicit exemption from criminal liability for the type of behaviour alleged against Ms. Wagner in the present case, as follows:

(4) No person does a prohibited act within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

42 In *Centre for Addiction and Mental Health v. R.*, [9] the Supreme Court of Canada has most recently re-affirmed the current governing approach to statutory interpretation as follows:

[14] This issue raises a question of statutory interpretation which must be resolved according to the modern principle of statutory interpretation: "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). We underline that the starting point is the text of the provisions in their grammatical and ordinary sense.

43 I think that even if one were to start with the view that the word "force" in the English language "can" encompass the type of persuasion that Ms. Wagner sought to engage in at the clinic, a reading of the *Criminal Code* overall suggests that the word "force" as used repeatedly therein was intended by the legislator to refer to an act of violence or constraint or something similar. Virtually all of the uses of the word "force" in the *Criminal Code* otherwise make little or no sense. For example, section 25(1), which protects police officers from liability for the use of "force" would scarcely be necessary to protect them from liability for verbally persuading an offender to put down his gun. Section 27, safeguarding a person from the use of force to prevent the commission of an offence would seem redundant if "force" included simply talking a person out of committing an offence, since talking to someone is hardly likely to engage criminal liability in those circumstances. Likewise, in s. 32, it is hard to image that Parliament seriously thought it was necessary to safeguard a person from criminal liability for verbally persuading people not to riot. In the old s. 34, the idea that "force" includes "persuasion" is entirely irreconcilable with the balance of the section. The same is true of the language of the old section 35. In a different context, there are references to the obtaining of consent (re assaults, certain sexual offences) by "force", whereby Parliament holds that consent obtained by force is irrelevant. It would be peculiar if "persuasion" were to expose an individual to criminal liability in such circumstances.

44 I suppose it might be argued that the occasional use of the words "force or violence" in the *Criminal Code* means that "force" does not necessarily include violence. I think, rather, that such language simply reflects the lawyer's and draftsperson's frequent failing in often preferring two words where one would do, purely out of an abundance of caution. I do not think that causing a prison break by "[persuasion] or violence" was the object of s. 144 of the *Criminal Code.*

45 I also note the dramatic difference between the old provision and the new provisions, which may, to some extent, be informative with respect to the meaning of the old provisions. The new provision, set out hereafter, moves entirely away from the narrower concept of justifying a person's use of "force" to the much broader concept of justifying a person's "act".

46 Accordingly, I do not accept the argument that Ms. Wagner can shelter herself under s. 37 because her conduct at the clinic does not, by its terms, fit within the use of force as required by any sensible reading of the section. To give "force" the meaning she asks would do violence to the clear and inescapable intention of Parliament in its choice of that word.

47 I also cannot accept Ms. Wagner's contention that (assuming for present purposes that the foetus counts as "anyone"), the unborn foetus was "under her protection." For that argument to be valid, the words "under her protection" would have to be read as being entirely redundant. The argument as framed by Ms. Wagner really suggests that anyone is under everyone's protection. If that had been Parliament's intention, the words "under his protection" would not have appeared in the provision. It seems clear to me that the words "under his protection" were intended by Parliament to limit the shelter of the old s. 37 to defendants who bore some special relationship (by fact or invitation) to the person being protected or who were under some legal obligation to extend protection to that person. While it may be argued that a law providing broader protection to the "good Samaritan" would have been better public policy, that is not the law that Parliament adopted in section 37. The new section 34 appears to remedy that shortcoming.

48 It was argued on Ms. Wagner's behalf, that there are cases interpreting "under his protection" very broadly. For example, Ms. Wagner refers to the trial decision of the Ontario Court (General Division) in *R. v. Webers*, [10] as authority for that proposition. I am prepared to agree that "under his protection" is not a closed or defined class of cases, but it has to mean something. Thus, in *Webers*, the fact that the person Mr. Webers intervened to protect from a blatantly unlawful and outrageous assault by eight hospital staff and police officers on a twenty-year employee of his who looked upon him as a father and whom he had escorted to the hospital when she was experiencing a breakdown, could very reasonably qualify as a person "under his protection" within the meaning of s. 37 of the *Code*. The language of O'Connor, J. to the effect that, "it means anyone who requires protection which the accused may be able to provide," [11] is clearly *obiter* and, with all due respect, hard to reconcile with the language of the section. Likewise, I do not have difficulty accepting that if a person recruits a stranger to assist him and the stranger agrees to offer that assistance, the relationship of a person under the stranger's protection has likely thereby been created. This is the scenario in *R. v. Barkhouse*, [12] where a person was called in aid to resist an unlawful vehicle seizure, although I note that the judge in that case did not go so far as to actually find that Mr. Barkhouse was protected by the then s. 37 language of defending a person "under his protection".

49 Ms. Wagner also argued that she was entitled to rely on the common-law of defence of others, which is argued to be broader than the language of s. 37. It is certainly true that some of the cases referred to note that common law defences are preserved in Canada under s. 8(3) of the *Criminal Code*, but it seems to me that none of the cases cited does so with any particular critical assessment, merely a recitation of that "fact" followed by reference to English authorities defining the potential extent of the common law, including reference to the comment by Edmund-Davies, L.J. in *R. v. Duffy*, [13] that, "there is a general liberty even as between strangers to prevent a felony."

50 I fear that this repeated reliance on the common law of defence of others fails to recognize the qualifying language of s. 8(3) of the *Criminal Code*, namely, "except in so far as they are altered by or are inconsistent with this Act..." The restrictive language of s. 37, as it was, seems palpably inconsistent with a regime where it would apply even as between strangers, unless perhaps the defendant had been expressly recruited by the stranger to come to his or her aid. Obviously, no such call in aid could have occurred here insofar as the "persons" in need of assistance were foetuses. [14]

51 I cannot accept that the common-law defence was available to Ms. Wagner to, in effect, circumvent the restrictive language of the former s. 37 as enacted by Parliament. In any event, unless the foetus was a "person" and the mother's use of force on that "person" was unlawful, the common law would not authorize Ms. Wagner's intervention. As we shall see below, since s. 251 of the *Criminal Code* was struck down, there is no law prohibiting abortion in Canada.

52 The new self-defence/defence of others provisions in the *Criminal Code* are greatly streamlined from the earlier version and provide a meaningful framework for assessing when conduct that might otherwise be criminal will be exempted from criminal liability because of "self-defence". For our purposes, the governing provision is the new s. 34 of the *Criminal Code*, which states:

> **34.** (1) A person is not guilty of an offence if
>
> (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
>
> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> (c) the act committed is reasonable in the circumstances.
>
> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> (a) the nature of the force or threat;
>
> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> (c) the person's role in the incident;
>
> (d) whether any party to the incident used or threatened to use a weapon;
>
> (e) the size, age, gender and physical capabilities of the parties to the incident;
>
> (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
>
> (f.1) any history of interaction or communication between the parties to the incident;
>
> (g) the nature and proportionality of the person's response to the use or threat of force; and
>
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

53 As I noted above, when the new self-defence provisions came into effect there was controversy about whether or not, as substantive law, they would have retrospective application. As mentioned earlier, I found the reasoning of MacDonnell, J. in *R. v. Pandurevic*, *supra*, and of Paciocco, J. in *R. v. Parker*, *supra*, compelling and, as such, was satisfied that the new s. 34 of the *Criminal Code* was also available to Ms. Wagner, a view that I communicated to the parties. I observed that neither Crown nor defence focused long on the issue, in the Crown's case presumably because it felt that however much more favourable the new s. 34 might be to Ms. Wagner's position, the Crown's contention that a foetus is neither "any one" nor "another person" was unanswerable.

54 I think that, with the exception of the issue of the status of the foetus, the new s. 34 remedies the language of the old s. 37 that, in my opinion, precluded Ms. Wagner from having resort to its protection. The new s. 34 applies to any alleged offence where the defendant's act was in response to the perceived use of force or threatened use of force against the defendant or "another person". This would potentially cover both the mischief and breach of probation charges. "Another person" is entirely unqualified, this making it seem clear that it was Parliament's intent to safeguard the good Samaritan if he or she stayed within the boundaries defined by the new s. 34.

55 Under the new s. 34 it would seem that Ms. Wagner would tick a couple of the boxes. There is no disputing that Ms. Wagner reasonably believed that the foetuses of the clinic patients were in imminent danger of being subjected to (deadly) force. There is no disputing that her intercession was intended to protect the foetuses from that imminent peril. The remaining questions are (1) whether or not the foetus is "another person"; and, (2) whether or not her acts were reasonable in the circumstances. In respect of the second inquiry, it would seem to me that Ms. Wagner would probably have little difficulty demonstrating the imminence of the threat or the likely use of a "weapon" in the feared use of force against the foetuses, but I expect she would have significant difficulties with the following parts of the new s. 34(2):

(b) "whether there were other means available to respond to the potential use of force";

(h) "whether the act committed was in response to a use or threat of force that the person knew was lawful".

56 I do not see how Ms. Wagner could succeed, even under the new s. 34(1)(c), in light of, at a minimum, ss. 34(2)(b) and (h). These events occurred in mid-2012. By that time, the pro-life movement was a long-established and significant community with the resolute backing of powerful religious and other forces; it was no shrinking violet and no marginalized group. By that time, the Internet was fully entrenched in modern society and its capacity via "crowdfunding" for people and groups to amass very substantial resources for a common goal was already well established. These are neither novel nor obscure realities. It was the view of Ms. Wagner and those with whom she worked that the killing of every foetus was a murder. However personally well-motivated they may have been, her actions sought to impose her will and her world-view on emotionally vulnerable patients and their companions in a medical facility who were seeking lawful treatment, which Ms. Wagner knew to be lawful under the law of Canada. Her intervention also affected the treatment and potentially the safety of those patients. The availability of other options, such as going to court to seek a declaration in relation to the lawfulness of abortion undermines Ms. Wagner's ability to rely on the new s. 34 of the *Criminal Code*.

57 I do not know whether Ms. Wagner went to the clinic that day hoping to be charged criminally, hoping to have a prominent pulpit from which to argue her cause and hoping, as in indigent criminal defendant, to have her challenge to the abortion law funded by the state as she ultimately sought to do in this trial. Whether events were planned that way or that was just the way it played out is irrelevant for present purposes. What is relevant is that there was at least one other path open to Ms. Wagner for her to raise a legal challenge to abortion by way of application in Superior Court. Given the size of the pro-life movement and the success of much less significant crowdfunding causes, any such challenge could easily have raised a significant war chest to fund the litigation without selecting individual patients and their partners as pawns in Ms. Wagner's campaign. [15] I appreciate fully Ms. Wagner's position that her acts were performed to save human life, but there are two perspectives to almost every argument.

58 I should also note, that to the extent that it might be argued that an application for a declaration that personhood attaches upon conception and that abortion is therefore murder would not save lives *that day*, that argument strikes me as somewhat of a sophism: why, then, was Ms. Wagner not at the clinic the day before, or the week before that? If Ms. Wagner's argument about when personhood attaches is correct, why try to save one or two lives when one could more readily save tens of thousands by an application? [16]

Necessity

59 It was also argued on Ms. Wagner's behalf that the defence or excuse of "necessity" was available to her. I do not agree.

60 As I have noted above, common-law justifications and excuses are largely preserved in Canadian criminal law by s. 8(3) of the *Criminal Code*. Ironically, the history of the availability of necessity in Canadian law wends its way through the travails of one of Ms. Wagner's nemeses: see *R. v. Morgentaler (No. 5)*, [17] but it found its clearest definition nine years later when a ship laden with drug smugglers and tonnes of marihuana bound from Colombia to Alaska found it necessary to set ashore on Vancouver Island as a result of weather and mechanical difficulties, whereupon they were beset by the Royal Canadian Mounted Police. In *Perka v. R.*, [18] Dickson, C.J.C., who, nine years earlier, had expressed at best lukewarm openness to the possible

existence of a defence of necessity in *Morgentaler (No. 5) (1975)*, *supra*, clearly recognized that a "defence" of necessity existed and expanded greatly upon when "necessity" would excuse a person from criminal liability for his acts.

61 In *Perka*, *supra*, Dickson, C.J.C. traced the defence of necessity back to Aristotle. He observed that the defence actually encompassed two separate concepts and that the failure to distinguish between them was the source of substantial confusion. As expressed by the Appellate Division of the Nova Scotia Supreme Court in *R. v. Salvador* (1981), 59 C.C.C. (2d) 521 (N.S. C.A.), [19] a case along the same lines as *Perka*, *supra*, "necessity" covers cases, (a) where an emergency *excuses* non-compliance with the law; or (b) where the actor's pursuit of some greater good *justifies* the otherwise unlawful conduct. As the Law Reform Commission of Canada noted, as cited by Dickson, C.J.C., the former of these is a utilitarian philosophy, the latter a humanitarian philosophy.

62 Dickson, C.J.C. addresses the two concepts as follows in *Perka*, *supra*: [20]

> It will be seen that the two different approaches to the "defence" of necessity from Blackstone forward correspond, the one to a justification, the other to an excuse. As the examples cited above illustrate, the criminal law recognizes and our *Criminal Code* codifies a number of specific categories of justification and of excuse. The remainder, those instances that conform to the general principle but do not fall within any specific category such as self-defence on the one hand or insanity on the other, purportedly fall within the "residual defence" of necessity.
>
> As a "justification" this residual defence can be related to Blackstone's concept of a "choice of evils". It would exculpate actors whose conduct could reasonably have been viewed as "necessary" in order to prevent a greater evil than that resulting from the violation of the law. As articulated, especially in some of the American cases, it involves a utilitarian balancing of the benefits of obeying the law as opposed to disobeying it, and when the balance is clearly in favour of disobeying, exculpates an actor who contravenes a criminal statute. This is the "greater good" formulation of the necessity defence: in some circumstances, it is alleged, the values of society, indeed of the criminal law itself, are better promoted by disobeying a given statute than by observing it.
>
> With regard to this conceptualization of a residual defence of necessity, I retain the skepticism I expressed in *Morgentaler*, *supra*, at p. 678. It is still my opinion that, "[n]o system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value". The *Criminal Code* has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions. Neither is a role which fits well with the judicial function. Such a doctrine could well become the last resort of scoundrels and in the words of Edmund Davies L.J. in *Southwark London Borough Council v. Williams*, [1971] **Ch. 734, it could "very easily become simply a mask for anarchy".**
>
> Conceptualized as an "excuse", however, the residual defence of necessity is, in my view, much less open to criticism. It rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is, when one does a wrongful act under pressure which, in the words of Aristotle in the *Nicomachean Ethics*, *supra*, at p. 49, "overstrains human nature and which no one could withstand".
>
> (emphasis added)

63 At p. 259 of *Perka*, *supra*, Dickson, C.J.C. lists ten considerations that should be kept in mind when assessing the availability of a necessity "defence". I have reviewed those ten criteria and one of them strikes me as particularly cogent in the present case, namely:

> (8) the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law;

It seems to me that Ms. Wagner's necessity ship must founder on this rock. There was a "reasonable legal alternative" open to her, "an alternative course of action that does not involve a breach of the law". Quite apart from her freedom to engage in various forms of advocacy and in any public demonstrations that complied with the law and with her particular probation terms, it was always open to Ms. Wagner and those of similar world view to go to a civil court and to argue before that court everything that has been argued before me. I have dealt elsewhere in these reasons with why Ms. Wagner's personal penury is irrelevant to her ability to pursue her cause in a civil application or action. It might be argued that a civil action would not respond to the urgency of saving any foetuses that would have died that day, but that is, in the context of the abortion debate, a specious argument. That day was no different than any of the days before or since.[21] The simple reality here is that Ms. Wagner does not agree with the law and chose to disobey it because she felt bound to do so by some higher calling. This is a formulation of the law of necessity that the Supreme Court of Canada rejected outright in *Perka*, *supra.*

A Viva Voce Evidentiary Hearing on The Charter Issue?

64 It was Ms. Wagner's wish to call evidence in support of her argument about the status of the foetus and its right to protection under the *Charter*. I asked the parties to address the issue of whether or not an evidentiary hearing was warranted. For the purposes of addressing that issue, I invited Ms. Wagner to file a written outline of what she expected her expert witnesses would say. For the limited purpose of determining whether or not to enter into an evidentiary hearing on the science of human conception, foetal development, etc., that material would be taken as uncontroverted.

65 There is a long history of courts imposing time limits on counsel. Very tight limits on argument are a given in the Supreme Court of Canada. Limits on oral argument have long been routine in the Court of Appeal for Ontario, sometimes serving as a challenge to the loquacious counsel, sometimes holding out to the nervous young barrister the promise that his or her ordeal at the hands of the panel will at least end by a time certain. In this court, operating on the theory that few if any judges require to be educated by counsel on what *R. v. Askov*[22] or *R. v. Morin*[23] say about the right to trial within a reasonable time, applications to stay charges for delay under s. 11(b) are routinely tightly time-limited, with the admonition to counsel to focus on the particularities of their client and his or her case.

66 Time limits in appellate courts have a longer pedigree than in trial courts, but the authority for imposing time limits and the corollary that trial judges have the authority to exercise reasonable control over how cases are presented and how court time will be allocated is unassailable. That authority reflects the fact that court time is a finite resource with many litigants seeking to avail themselves of it and that the halcyon days when a single "provincial court" could hear two or three trials in a day are at best a "fond" reminiscence for older counsel and entirely implausible to younger counsel who did not live through that reality and who take for granted that a routine impaired driving trial will take longer than a day. The present case is an example of the post-*Charter* reality of trial scheduling. Before the *Charter*, this trial might have taken two or three days, perhaps less.[24] I have lost count of how many appearances there have been and that is without having entered into an evidentiary clash of scientists, which would have added several more days.

67 Two 1992 decisions of the Court of Appeal for Ontario clearly anchor a trial court's power to decline to enter into an evidentiary hearing in appropriate cases. In *R. v. Kutynec*,[25] Finlayson, J.A. wrote for the court in the context of an application to exclude evidence at trial:

> In some cases, when the defence indicates, prior to the calling of evidence, that it intends to advance a Charter application to exclude evidence, the trial judge may call upon the defence to summarize the evidence that it anticipates it would elicit on the application. This kind of procedure is well known to the criminal process: see *R. v. Sproule* (1975), 26 C.C.C. (2d) 92, 30 C.R.N.S. 56 (Ont. C.A.), at pp. 97-98 C.C.C., pp. 62-64 C.R.N.S., and *R. v. Dietrich*, 1970 CanLII 377 (ON CA),

> [1970] 3 O.R. 725, 1 C.C.C. (2d) 49 (C.A.), leave to appeal refused, [1970] S.C.R. xi, [1970] 3 O.R. 744 n, at pp. 738-39 O.R., p. 62 C.C.C. If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry. In other words, if the facts as alleged by the defence in its summary provide no basis for a finding of a Charter infringement, or a finding that the evidence in question was obtained in a manner which infringed the Charter, or a finding that the test for exclusion set out in s. 24(2) was met, then the trial judge should dismiss the motion without hearing evidence.
>
> There is nothing unique in this position. Where an accused bears the burden of proving the admissibility of evidence, it is incumbent on counsel to put forward a factual and legal basis on which the evidence could be admitted. Counsel is not entitled to proceed immediately to a voir dire on the issue. The same principle should be applied where the onus is on an accused to establish that certain evidence is inadmissible.

Kutynec dealt with an application to exclude evidence under s. 24(2) of the *Charter*, but there is no principled reason why a trial judge's power ought not to be exercised in appropriate cases dealing with other *Charter* arguments. The breadth of the principle can be seen in a case that followed *Kutynec*, *supra*, by a few months.

68 *R. v. Durette*[26] was the Court of Appeal's treatment of one of the great biker drug conspiracies of the 1980s. The prosecution was so large that the Crown split it into two trials, a twelve-defendant trial in the then Supreme Court of Ontario followed by a twenty-seven-defendant trial in the then District Court. The issue of delay arose in the District Court trial and defence counsel sought to call evidence on the Crown's decision to split the trial, which the defence argued was the cause for the delay. To that end, the defence proposed to examine the officer-in-charge and two members of the Department of Justice about the reasons for splitting the prosecution. The trial judge refused that request, which refusal became one of the grounds of appeal. Finlayson, J.A., speaking for the majority,[27] stated (at paragraph 31):

> In my opinion, because the burden of establishing a violation of the Charter falls on the accused, when an accused makes a Charter motion he or she can be asked to stipulate a sufficient foundation for the claim or its constituent issues. If such a foundation cannot be articulated, I think the trial judge may determine that it is not necessary to hear evidence on the issue and he is entitled to dismiss the motion: see *R. v. Hamill* (1984), 1984 CanLII 39 (BC CA), 14 C.C.C. (3d) 338, 13 D.L.R. (4th) 275 (B.C. C.A.) [affd 1987 CanLII 86 (SCC), [1987] 1 S.C.R. 301, 33 C.C.C. (3d) 110], at pp. 366-67 C.C.C., pp. 302-03 D.L.R.

69 Finlayson, J.A. placed this power in the context of the need to ensure that trials are not any more unwieldy and time-consuming than they need to be (at paragraph 44):

> The Supreme Court of Canada and appellate courts across Canada have been attempting in recent years to restrict the issues that go to a jury to those which have, on the evidence, an air of reality to them. Just as we have tried to restrict the trial of an accused on the merits to factual issues that are directly raised in the particular case, so should we strive to restrict pre-trial Charter motions to matters of substance where defence counsel can establish some basis for a violation of a right. Unless we, as courts, can find some method of rescuing our criminal trial process from the almost Dickensian procedural morass that it is now bogged down in, the public will lose patience with our traditional adversarial system of justice. As Jonathan Swift might have said, we are presently sacrificing justice on the shrine of process.

70 Age has not wearied the proposition advanced in *Kutynec* and *Durette*, *supra*, nor have the years condemned it. Although it dealt with problems of a different order of magnitude from anything I encountered in this case, the language of the Court of Appeal in *R. v. Felderhof*[28] reinforces the validity of *Kutynec* and *Durette*, *supra*. Speaking for the court, Rosenberg, J.A. stated:

> [40] Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please. Until relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not years. Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable. It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate

> time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. I do not see this power as a limited one resting solely on the court's power to intervene to prevent an abuse of its process. Rather, the power is founded on the court's inherent jurisdiction to control its own process.
>
> . . .
>
> [43]..... In my view, the trial judge must have the power to control the procedure in his or her court to ensure that the trial is run effectively. Sometimes, the exercise of this power may mean that the trial judge will require counsel to proceed in a different manner than counsel desired.

71 Affirmation of the principle can also be found even higher in the judicial pecking order. In *R. v. Lising*, [29] the Supreme Court of Canada endorsed Finlayson, J.A.'s concern about "the almost Dickensian procedural morass" when it stated:

> 35 The concern over the constructive use of judicial resources is as equally, if not more, applicable today as it was 15 years ago when *Garofoli* was decided. For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

72 It goes without saying that an evidentiary hearing should never be denied where to do so might cause an injustice. However, where it reasonably appears to a trial judge that a long evidentiary inquiry (here set for five days of court time and nothing in this case including these reasons was done in the time allotted), even assuming all facts are found in favour of the applicant, cannot possibly result in the relief the applicant seeks, it lies within the trial judge's power to decline to enter into that evidentiary hearing. (Arguably, this is not just a matter of a judge's power, but in a system with more demands on its time than time itself, it is arguably a judge's obligation to the other participants in the system). The question, of course is whether or not any given case falls within the rule. In this case, for the reasons I state when I address the proposed evidence and the state of the law in Canada, it seemed inescapable to me that the evidentiary hearing sought had no conceivable chance of affecting the outcome of the case.

73 I should make it very clear that I entirely reject the argument made on Ms. Wagner's behalf that a judge's power to decline to hold an evidentiary hearing is restricted to arguments about the violation of a *Charter* right as opposed to four other scenarios, namely:

> a. A constitutional challenge to legislation under s. 52 of the *Charter;*
>
> b. Interpretation of statutory language such as "anyone";
>
> c. The question of reasonableness in a "mistake of fact" defence;
>
> d. The defences of necessity and the defence of others.

I see nothing in the language of the cases to limit a trial judge's power in the manner proposed and any such limitation strikes me as lacking any reference point in principle or in rationality. The idea that a trial judge has no choice but to engage in a long and pointless evidentiary hearing because the underlying issue is, e.g., the constitutionality of an enactment, whereas he could refuse such a hearing if the allegation were a violation of a right, is, to be charitable, peculiar. It is a distinction without a difference.

74 Neither does the principle of full answer and defence come to Ms. Wagner's support. Every litigant enjoys that right. Not even a defendant in a criminal trial, however, enjoys the absolute right to arrogate to herself finite public resources. Ms. Wagner's arguments are not particularly novel. The foundation of each of them (i.e. the legal and constitutional status of a foetus) has been around for decades. The process adopted allows her to express what the expert evidence would have been in written form and, for the purpose of deciding whether to hold a *viva voce* hearing of the expert evidence, to have that evidence accepted as true, as far as it goes. [30] If this is a denial of the right to full answer and defence, it is a most peculiar manifestation. Furthermore, if Ms. Wagner's argument is correct, then every criminal defendant has the right to re-litigate any issue *ad infinitum* regardless of

how many courts have rejected the proposition in the past and even if nothing has changed in the underlying facts or the state of the law. No principle of public policy supports such a philosophy. [31]

"Thus Far Shalt Thou Go And No Further"?

75 I should make it clear that while I believe I am entitled to ask the defence to make an "offer of proof" before allowing Ms. Wagner to advance her constitutional argument, I reject the Crown's position that I really had no business even considering the issue because the Supreme Court of Canada had spoken. I find support for this approach in the decision of the Supreme Court in *Bedford v. Canada (Attorney General)*, [32] which dealt with the constitutionality of various *Criminal Code* provisions purporting to regulate prostitution. It is inescapable that the present case touches on issues that have enjoyed much (albeit not recent) consideration by the Supreme Court of Canada itself, a court that operates on a level and with an authority and with precedential perquisites substantially above my own. Indeed, as I have mentioned it was the general purport of the Crown's original argument that the field has been so completely tilled by the Supreme Court of Canada that neither I nor Ms. Wagner really ought to tread upon it. While I do not consider that the law of *stare decisis* acts as quite as much of a latter-day privative clause as the Crown urged upon me, [33] the desirability or propriety of entering into a full-fledged evidentiary hearing that might lead nowhere is all the more concerning if it turns out that the defendant is in effect asking me to overturn the Supreme Court of Canada in circumstances where there has been no material intervening change in the law or the relevant science or other facts. The guiding principles are set out thus by the Supreme Court of Canada in *Bedford*, *supra:*

> [42] In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. **Similarly, the matter may be revisited if** new legal issues are raised as a consequence of significant developments in the law, or if **there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.**
>
> [43] The intervener, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis (I.F., at para. 25).
>
> [44] I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.
>
> (emphasis added)

76 More recently, the Supreme Court of Canada in *Carter v. Canada (Attorney General)* [34] reaffirmed the entitlement, indeed the duty, of a trial judge in appropriate cases to revisit decisions of appellate courts stating that:

> *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate"...

As we shall see below, the proposed evidence filed on Ms. Wagner's part falls far, far short of, "fundamentally [shifting] the parameters of the debate," and there was no demonstration of any new legal issue. Indeed, it was put rather bluntly in Ms. Wagner's materials that only a change in the composition of the Supreme Court of Canada is likely to change anything for her cause.

The Legal Background To, And Viability of, Ms. Wagner's Constitutional Argument

77 The *Criminal Code* defines homicide as causing the death of a "human being", a term that is not defined in s. 2 of the *Criminal Code*, although, s. 223 of the *Code* says:

> **223.** (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not
>
> (a) it has breathed;
>
> (b) it has an independent circulation; or
>
> (c) the navel string is severed.

It is Ms. Wagner's contention that denying a foetus the status of "human being" violates the *Charter of Rights* and that s. 223 of the *Criminal Code* is thus inconsistent with the *Charter*. She also says that the "defence of others" provisions of the *Criminal Code* must be interpreted in a fashion that recognizes the foetus as being encompassed within its protective scope. It is her contention that the foetus is entitled to the same constitutional protections, including the right to life, that are enjoyed by everyone else after birth and that her actions in defence of that right to life were thus justified. It is Ms. Wagner's contention that conception is the start-point of the life of a human being and that any termination of the foetus's existence would be murder. If she is correct, abortion, in all or most circumstances, would be murder.[35]

78 The *Charter of Rights* guarantees certain rights. Among these rights in s. 7, for example, is, "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." This is a right guaranteed to "everyone". The obvious question is whether or not a foetus falls within the meaning of "everyone" in the *Charter.* The *Charter* uses different terms to define who enjoys various rights. For example, some rights are limited to "every citizen of Canada", many rights are guaranteed to "everyone" including certain rights that arise on arrest or detention, while, for reasons that are not clear the protections given when a person is charged with an offence are given to "any person charged with an offence" rather than to "everyone charged with an offence."

79 The issue of abortion rights and foetal rights is one of the most divisive issues in society. The controversy was particularly prominent in the last quarter of the last century. Indeed, in Canada it would surely rank among the most prominent social or political issues of that time. Coincidentally, one of the other great political issues in Canada at the time gave rise to the *Charter of Rights*, which has become the latest tool in the hands of the pro-choice and pro-life camps. Advocates on both sides of the issue have had resort to the court to seek to advance their positions. It was in light of that long history of jurisprudence that I asked the Crown and defence to address the issue of whether or not I should enter into a full-blown evidentiary hearing on the *Charter* issues. I shall review several of those decisions below.[36]

80 In 1987 the case of *Borowski v. Canada (Attorney General)*[37] reached the Saskatchewan Court of Appeal. Mr. Borowski challenged the then s. 251 of the *Criminal Code*, which criminalized abortion with a maximum sentence of life imprisonment (two years if the defendant was the pregnant woman), but permitted abortions if a hospital's "therapeutic abortion committee" certified that continuing the pregnancy "would be likely to endanger (the woman's) life or health". Mr. Borowski was pleased with the general criminalization of abortion, but argued that the exception for the sake of the mother's life or health was a violation of the foetus's right to life and security of the person, which cannot be violated other than in keeping with "the principles of fundamental justice". Mr. Borowski also argued that s. 251 could not be justified under s. 1 of the *Charter.* The trial judge, Cameron, J., had ruled against Mr. Borowski, observing:

> **Although rapid advances in medical sciences may make it socially desirable that some legal status be extended to foetuses, irrespective of ultimate viability, it is the prerogative of Parliament, and not the Courts, to enact whatever legislation may be considered appropriate to extend to the unborn any or all legal fights possessed by living persons.** Because there is no existing basis in law which justified a conclusion that foetuses are legal persons, and therefore within the scope of the term 'everyone' utilized in the *Charter,* the claim of the plaintiff must be dismissed.[38]

(emphasis added).

Cameron, J. also held that a linguistic analysis of the *Charter* could not result in extending rights to foetuses since the word "everyone" was repeatedly used in various other provisions of the *Charter* that could clearly never apply to a foetus. In this conclusion, Cameron, J. had the concurrence of the Saskatchewan Court of Appeal. [39]

81 In reviewing Justice Cameron's rejection of the contention that a foetus falls within the meaning of "everyone" in s. 7 of the *Charter*, the Saskatchewan Court of Appeal considered and endorsed Cameron, J.'s detailed survey of the availability of abortion in Anglo-Canadian law and went on to consider the availability of abortion in other legal systems, as well as other areas of Anglo-Canadian law where foetal rights have been considered. The Court of Appeal observed:

> It is clear from this historical consideration that for lengthy periods of our legal history in England and in Canada abortions have been permitted at certain stages of pregnancy and for certain reasons. It is equally clear that it cannot be said that there has been a uniform evolution to permit fewer and fewer abortions as, for example, to parallel the development of scientific knowledge or the evolution of moral values. [40]

It is noteworthy that at common law abortion was only an offence after quickening, roughly fourteen weeks after conception, and even then it was only a misdemeanour. The Saskatchewan Court of Appeal went on to conclude:

> [21] A consideration of the historic treatment of the foetus shows that at various stages our society has permitted abortion at various stages of foetal development and for various reasons. Such treatment is not consistent with recognition of its status historically as a person, or as an entity to be included within "Everyone".
>
> [22] That is, respect for human life and its fundamental sanctity have been part of the common law tradition for centuries; it did not spring newborn from the inclusion of the words "right to life" in the Charter. **But within this tradition for long periods of time, destruction of the foetus has been permitted, albeit limited by the state of foetal development and/or the effect on the mother, and permitted despite full knowledge of the scientific principles of foetal capacity for life urged upon us by the appellant.**
>
> [23] **Such treatment of the foetus would not have been consistent with full status as a person. In no other instance known to the law would the law have permitted an individual to be destroyed because of age, state of development, or innocent conflict with the well being of another.**
>
> [24] I must thus conclude that the historic treatment of the foetus at Anglo-Canadian law has not been as a person or part of "everyone" and that if such status were now to be accorded it would be novel. This is of course not conclusive, but as noted in *R. v. Big M Drug Mart Ltd.*, supra, is an important factor to be considered by us in making our determination. [41]
>
> (emphasis added)

82 When the *Borowski* court went on to consider the treatment of the foetus in other areas of Anglo-Canadian law, it noted that a foetus may acquire certain rights, including the right to sue in tort for damage incurred while it was "*en ventre sa mere*" and the right to inherit, but that neither of those rights crystallized until the foetus was born alive.

83 Looking further afield than Canada, the Saskatchewan Court of Appeal considered first the landmark decision of the United States Supreme Court in *Roe v. Wade*, [42] which described significant similarities between the American history and the Anglo-Canadian treatment of abortion, concluding:

> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make

this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

84 The *Borowski* court considered the British decision of *Paton v. British Pregnancy Advisory Service Trustees*,[43] as reflective of the law of the United Kingdom and by connection of the European Community. In that case, Mr. Paton was denied an injunction to stop his wife from getting an abortion. The application was denied, with the following observation:

> The first question is whether this plaintiff has a right at all. **The foetus cannot, in English law, in my view, have any right of its own at least until it is born and has a separate existence from the mother.** That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant)...
>
> (emphasis added).

85 When Mr. Paton pursued his claim further under the *European Convention of Human Rights*, that court made it clear that, at least in the early stages of pregnancy the foetus has no "absolute right to life".[44] Only one of the European Union's high contracting parties (what was then West Germany), the court noted, ascribed foetal rights under a provision to the effect that "everyone has the right to life". The history of that interpretation in the West German context, it has been suggested, may have much to do with concerns arising out of that country's relatively recent descent into the abyss of Nazism.[45]

86 Having considered the language of the *Charter*, the *Canadian Bill of Rights*, a broad survey of international approaches to foetal rights and the legislative history, the Saskatchewan Court of Appeal concluded that, "it was not the purpose of either s. 7 or s. 15 of the *Charter* to protect the rights of a foetus to life".

87 The Saskatchewan Court of Appeal delivered its judgment in *Borowski*, *supra*, in April, 1987. At that time, the Supreme Court of Canada had had the case of *R. v. Morgentaler*,[46] on reserve for some months, ultimately releasing its judgment in January, 1988. Dr. Morgentaler and his colleagues had set up a clinic to perform abortions without the approval of a therapeutic abortion committee as required by the then s. 251 of the *Criminal Code*. After their challenge to the constitutionality of s. 251 was rejected at trial, Dr. Morgentaler et al. were acquitted by a jury. The Court of Appeal for Ontario rejected their constitutional challenge and set aside the jury's acquittals, ordering a re-trial. On further appeal, the Supreme Court of Canada, in a 5:2 decision, held that s. 251 of the *Criminal Code* violated s. 7 of the *Charter* and was of no force or effect. As a result, the criminal prohibition on abortion in Canada was struck down. Although the Supreme Court of Canada's decision appears to make it very clear that Parliament likely has the right to impose restrictions on abortion and that it is not the courts' job to "solve the abortion issue", none of the many Parliaments since then appears to have had the inclination, willingness or fortitude to enter into the maelstrom.

88 In *Morgentaler (1988)*,[47] the Supreme Court of Canada made the following determinations:

> a. The *Charter* does impose an obligation on the courts to review the substance of legislation once an impairment of a s. 7 right has been made out.
>
> b. There is a long-recognized right not to have one's bodily integrity infringed upon by others; under the *Charter* this has been raised to a constitutional norm.
>
> c. There may very well be valid reasons for interfering with a person's bodily integrity and Parliament is free to do so as long as any interference conforms to the principles of fundamental justice.
>
> d. The evidence establishes, "beyond any doubt that s. 251 of the *Criminal Code* is prima facie a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not want to continue with a pregnancy".

e. The mechanisms set out in s. 251 of the *Criminal Code* whereby abortions can lawfully be obtained do not conform to the principles of fundamental justice in light of serious problems with real-world access to timely abortions and the lack of meaningful criteria to govern the decision-making process of therapeutic abortion committees.

f. With respect to the question of whether s. 1 of the *Charter* can "salvage" s. 251, it was accepted that it was a valid governmental objective for Parliament to legislate to protect both the health and safety of pregnant women and the interests of the foetus, but the means to achieve those objectives do not satisfy the proportionality test set out in *R. v. Oakes*. [48]

g. It was not necessary for the purposes of the appeal to "evaluate or assess "foetal rights" as an independent constitutional value". [49]

89 In March, 1989 the Supreme Court of Canada dealt with the appeal from the Saskatchewan Court of Appeal's decision in *Borowski*, *supra*. [50] Mr. Borowski was granted leave to appeal four months before the Supreme Court of Canada gave judgment on *Morgentaler (1988)*, *supra*, and the first of his grounds of appeal was the question of whether, "a child *en ventre sa mere* [has] the right to life as guaranteed by section 7 of the *Charter*..." Since Mr. Borowski's appeal was based on a challenge to the constitutional validity of certain parts of s. 251 of the *Criminal Code* (the parts allowing abortions if approved by a therapeutic abortion committee) and since the Supreme Court of Canada in *Morgentaler (1988)*, *supra*, had ruled all of s. 251 to be unconstitutional, the Supreme Court of Canada found that his appeal to that court was moot. The court specifically expressed "no opinion as to foetal rights", but did note that if it were to consider future abortion legislation, "any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7." [51]

90 That same year the Supreme Court of Canada had to deal with abortion in a different context. In *Tremblay c. Daigle*, [1989] 2 S.C.R. 530 (S.C.C.), a father sought (and originally obtained) an injunction to prohibit his former partner from having an abortion. Here again, the Supreme Court of Canada did not address the issue of foetal rights under the *Charter of Rights* because the case did not involve any state action, which is a precondition to *Charter* rights being triggered under s. 32 of the *Charter*. However, the Supreme Court did look at the issue under the Quebec Civil Code and the Quebec Charter of Human Rights and Freedoms, as well as making reference to the common law. It bears noting that section 1 of the "Quebec Charter" grants every "human being" the "right to life, and to personal security, inviolability and freedom". Section 2 provides that "every human being whose life is in peril has a right to assistance" and "Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason."

91 In the course of determining the status of a foetus under the Quebec Charter and the Civil Code, the Supreme Court of Canada made the following observation that is of equal application to the present case:

> The respondent's argument is that a foetus is an "*être humain*", in English "human being", and therefore has a right to life and a right to assistance when its life is in peril. In examining this argument it should be emphasized at the outset that the argument must be viewed in the context of the legislation in question. The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties — a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature. [52]

92 The Supreme Court also rejected the contention that a plain linguistic analysis necessarily led to the conclusion that a foetus was a "human being":

> This argument is not persuasive. A linguistic analysis cannot settle the difficult and controversial question of whether a foetus was intended by the National Assembly of Quebec to be a person under s. 1. What is required are substantive legal reasons which support a conclusion that the term "human being" has such and such a meaning. If the answer were as simple as the respondent contends, the question would not be before the Court nor would it be the subject of such intense debate in our society generally. The meaning of the term "human being" is a highly controversial issue, to say the least, and it cannot be settled by linguistic fiat. A purely linguistic argument suffers from the same flaw as a purely scientific argument: it attempts to settle a legal debate by non-legal means; in this case by resorting to the purported "dictionary" meaning of the term "human being". [53]

93 In concluding its assessment of the status of a foetus under the Quebec Charter, the Supreme Court of Canada concluded that the drafters of that Charter had not intended to create foetal rights. In expressing that conclusion, the court raises questions that would seem to have equal force in relation to the Canadian *Charter of Rights and Freedoms:*

> In our view the Quebec *Charter*, considered as a whole, does not display any clear intention on the part of its framers to consider the status of a foetus. This is most evident in the fact that the *Charter* lacks any definition of "human being" or "person". For her part, the appellant argues that this lack of an intention to deal with a foetus' status is, in itself, a strong reason for not finding foetal rights under the *Charter*. There is force in this argument. One can ask why the Quebec legislature, if it had intended to accord a foetus the right to life, would have left the protection of this right in such an uncertain state. As this case demonstrates, even if the respondent's arguments are accepted it will only be at the discretionary request of third parties, such as Mr. Tremblay, that a foetus' alleged right to life will be protected under the Quebec *Charter*. If the legislature had wished to grant foetuses the right to life, then it seems unlikely that it would have left the protection of this right to such happenstance. [54]

94 After a detailed review of various provisions of Quebec's *Civil Code*, the Supreme Court of Canada concluded that, not only did they fail to support the father's claim that a foetus has juridical personality in Quebec law, in fact they lead to the opposite conclusion. The court then proceeded to consider the treatment of the foetus in Anglo-Canadian law as being potentially instructive even in a civil case emanating from Quebec. That review of the law of abortion in Anglo-Canadian law as well as the status of a foetus in areas such as tort and inheritance largely covers the same ground trod by the Saskatchewan Court of Appeal in *Borowski (1987)*, *supra*, and reached the same conclusion. This was a 9:0 decision of the Supreme Court of Canada.

95 In *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, [55] the Supreme Court of Canada had to deal with a case in which a superior court judge had ordered a pregnant woman into the custody of the Director of Child and Family Services until she gave birth because she was addicted to sniffing glue (which can damage a foetus's central nervous system) and two of her previous three children had been born with permanent disabilities. The Manitoba Court of Appeal had overturned the order, but the Director appealed further to the Supreme Court of Canada. Speaking for seven members of a nine-judge panel, McLachlin, J. (as she then was) dismissed the appeal, holding that detaining a pregnant woman to protect her foetus would involve changes to the law that are better suited to the legislative rather than the judicial branch.

96 In the course of her reasons, McLachlin, J. made certain comments that are pertinent to my inquiry. It might well be argued that, in light of the result and the mootness of the issue before the Supreme Court of Canada, some of those observations could be characterized as *obiter dicta*. I do not propose to further lengthen these reasons by engaging in a detailed examination of what is or is not *obiter* or what effect any such comments might have depending on the speaker and the context other than to observe that when seven members of the Supreme Court speak in a fashion that is consistent with other pronouncements on related matters, disregarding those utterances would seem injudicious and inconsistent with the orderly development of the law.

97 In commencing her analysis of whether the law of tort supported the detention and treatment order, McLachlin, J. opened with the following observations:

> 11 Before dealing with the cases treating the issue in tort law, I turn to the general proposition that the law of Canada does not recognize the unborn child as a legal or juridical person. Once a child is born, alive and viable, the law may recognize

that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person. This is a general proposition, applicable to all aspects of the law, including the law of torts.

12 By way of preamble, two points may be made. First, we are concerned with the common law, not statute. If Parliament or the legislatures wish to legislate legal rights for unborn children or other protective measures, that is open to them, subject to any limitations imposed by the Constitution of Canada. Further, the fact that particular statutes may touch on the interests of the unborn need not concern us. Second, the issue is not one of biological status, nor indeed spiritual status, but of legal status. [56]

98 After reviewing its own decision in *Tremblay c. Daigle*, *supra*, the Supreme Court of Canada held that the foetus on whose behalf the agency had purported to act was "not a legal person and possessed no legal rights", which meant that no court order could validly be made in its favour. The court ultimately decided that judicial modification of the common law of tort to allow for such an order was too fraught with complexity and that any such change ought to be made by the legislature. In the course of that discussion, the court addressed the argument that it should rescind the "born alive" rule and made the following observation:

25 Two arguments are made in favour of this Court abolishing the rule that no legal rights accrue before live birth. The first is that there is no defensible difference between a born child and an unborn child. This is essentially a biological argument. As noted above, the inquiry before this Court is not a biological one, but a legal one: *Tremblay v. Daigle*, *supra*. The common law has always distinguished between an unborn child and a child after birth. The proposition that biologically there may be little difference between the two is not relevant to this inquiry. For legal purposes there are great differences between the unborn and the born child, differences which raise a host of complexities.

When the Supreme Court then went on to decide whether or not the court's *parens patriae* jurisdiction, which allows the court to step into the shoes of the parent in order to protect a child's interests, to unborn children, it noted that the existing law of *parens patriae* applies only to born children. This is true in Canada, in Britain and in the European Community. Indeed, the trial judge in *Winnipeg* was the only Canadian case to have extended such oversight to unborn children. [57]

99 The inclusion of a foetus in "everyone" in s. 7 of the *Charter* was also the object of judicial scrutiny in *R. v. Demers*, [58] a decision of the Court of Appeal for British Columbia. Mr. Demers, like Ms. Wagner, held "sincere and strong views against abortion". He admitted that his protest outside an abortion clinic violated a British Columbia statute, but argued that his protest outside the clinic was both a form of protected expression and an attempt to protect the lives of foetuses, which are, he argued, safeguarded by s. 7 of the *Charter*. Citing *Borowski (1987)*, *Tremblay c. Daigle*, *supra*, the British Columbia Court of Appeal stated that, "the current law of this country supports the position of the Crown...that a foetus is not included in the word "everyone" in s. 7 of the *Charter*," and concluded that, "these cases leave no room for this court to entertain the constitutional argument advanced on behalf of Mr. Demers. The courts have made it clear that any preference of foetal rights over the rights of pregnant women as addressed in *Morgentaler*, *supra*, is a matter best left to the careful consideration of legislators." [59]

100 On reviewing the authorities referred to above, it seems inescapable to me that the Crown comes to this constitutional contest armed with a quiver full of highly relevant and extremely authoritative decisions addressing the issue of foetal rights generally through the closing decades of the last century and the early years of this century. Whether or not those decisions address the issue of foetal rights under s. 7 of the *Charter* directly, those authorities nonetheless do not bode well for Ms. Wagner's position. What, then, of the evidence she would have me hear *viva voce*?

Does The "New" Scientific Evidence Proffered Have The Potential to Alter The Equation?

101 In response to my request, consonant with authorities such as *R. v. Durette*, *supra*, Ms. Wagner proffered the written expert opinions and scholarly works of Dr. Maureen L. Condic and Dr. John M. Thorp, Jr. Each was accompanied by a *curriculum vitae* reflective of noteworthy achievement and scholarship. While the Crown, in her submissions, made some feints to question the objectivity of the proposed experts, at this stage of the proceedings fairness requires that I take their evidence at face value. What I asked of counsel was that these "will states" address the question of how the science has changed materially since the

Supreme Court of Canada abortion cases were decided. If the science is not materially different than what was understood at the time, the current state of the science, e.g. of foetal development, cannot fruitfully be the subject of relevant evidence in a lengthy *viva voce* hearing.

102 Having read the Condic and Thorp materials, I fail to see how they are at all sufficient to their purpose. Each of them at best pays lip service to the most vital question, i.e. addressing how the science has *changed* since the 1980s. For example, Dr. Condic states:

> Both the scientific data and the social context in which that data is interpreted have changed dramatically over the last 25 years. Uncontested modern scientific evidence clearly demonstrates that the life of a human being begins at sperm-egg fusion, a well-studied biological event that takes less than a second to complete. Based on clear scientific criteria, from the moment of sperm-egg fusion onward, the human embryo is unambiguously a human organism, i.e. a human being. [60]

103 Dr. Thorp states:

> Since 1989 science has advanced to the point where one can conclude without doubt that the embryo or fetus from the moment of conception onward can be described as a human being. If provided adequate nutrition and exchange of oxygen and carbon dioxide, that new individual will develop in an orderly fashion and emerge from his, her, or their mother as a recognizable human infant. These conditions are the same prerequisites for survival needed by all plants and animals. Advances in genomics, embryonic stem cell research and pregnancy imaging have all contributed to the avalanche of biologic evidence that undergirds this claim. [61]

104 These, unfortunately, strike me very much as more conclusory statements than they are evidence. A meaningful answer to the question of how scientific knowledge has changed in the past quarter-century to justify re-visiting a decision of the Supreme Court of Canada requires a statement of what was known then, what is known now, what the differences are and how those differences are material to the precise issue in question. That strikes me as absent from the material provided, other than, as I have noted, in a strikingly conclusory and unsatisfactory form. There is no question that some of the material provided goes into great detail about the fusion of the sperm and egg gametes into a zygote and why, in Dr. Condic's view, that results in the creation of human life within a second of that fusion rather than what she views as the discredited view of some scientists that human life begins at a later point perhaps twenty four hours later (both of which events take place before the woman would have any idea she was pregnant), and it may even be true that scientific knowledge and technology in 1989 were not advanced enough to draw that legally trivial distinction (although I do not see Dr. Condic making even that assertion clearly).

105 However, what is material for these purposes is not what Drs. Condic and Thorp say, but rather how what they say is materially different from the scientific understanding of twenty-five years ago. That is what I asked counsel to address in the material to be filed. It goes without saying that science and technology generally have advanced in tens of thousands of ways, since the 1970s and 1980s, but that was not the question. I did not need anyone's assistance to figure that out. One fundamental requirement for *all* evidence in a trial is that it be material; that fundamental requirement was no less operative in terms of my request of Ms. Wagner's counsel, namely that the proposed evidence demonstrate how the relevant science has changed *materially* in the intervening decades. While the science and technology available to specialists in the field of human foetal development have undoubtedly advanced by leaps and bounds in a quarter-century, it does not appear to me that the science underlying the fundamental assertion by Ms. Wagner that human life begins at conception has been shown in the material tendered to have altered in any material fashion.

106 I have been careful to challenge myself as to whether my various educational and intellectual limitations with respect to the various "-ologies" may lie at the root of my conclusion, but am satisfied that it is not so. The concepts in play here are not such that one has to be in line for a Nobel Prize in embryology to make sense of the material presented. The unfortunate fact for Ms. Wagner in relation to the material presented to me is that the 1980s were not some kind of medico-legal dark ages out of which we have now been elevated into a post-2000 renaissance of discovery. When I look at what Drs. Condic and Thorp say, it strikes me as remarkably similar to the science reflected in materials from the 1980s and even earlier.

107 In *"Foetal Rights and The Regulation of Abortion"*, [62] Martha Shaffer examines two 1980s Supreme Court of Canada decisions (*Borowski (1989)*, and *Tremblay c. Daigle*, *supra)*, through an examination of the facta filed by the parties and interveners. For example, Shaffer, summarizes some of the arguments in *Borowski (1989)* as follows: [63]

> Anti-abortionists believe science establishes two irrefutable facts about the foetus. First and foremost, science provides conclusive proof that human life begins at conception and that most of what is unique about an individual is fixed at that point.' In his factum filed at the Supreme Court of Canada, Borowski described the significance of conception in the following terms:
>
> > Dr. Lejeune testified that upon fertilization, there are determined the nature and the unique genetic qualities of each of us as an individual human being. At that moment of fertilization, all things are fixed: the color of the eyes, the hair, the skin, the form of the nose and ears, the strength of the person and all characteristics. [64]
>
> Second, science demonstrates that from conception onwards, the foetus is, in physiological and genetic terms, a separate entity from the pregnant woman within whom it exists. Because of this distinctiveness, the foetus cannot be said to be a part of the pregnant woman, but must instead be recognized as an independent human being meriting its own legal protection. Borowski submitted:
>
> > That mother and *child en ventre sa mere*, each is a separate and distinct human being, appears obvious to us today, assisted as we are by modem science and the remarkable expansion of our knowledge of the unborn. Mother and child, each has a different genetic makeup. Often they have different blood types, different sex and differently coloured skin and eyes. They are separate, distinct and unique human beings.
>
> . . .
>
> Second, the accounts of foetal development allow opponents of abortion to emphasize that life is a continuum from conception to death, a notion which figures prominently in anti-abortion arguments. Viewing life as a continuum beginning at conception allows opponents of abortion to emphasize the importance of prenatal development, and to claim it as the most significant development period of human life. Borowski, for example, submitted:
>
> > "The first seven weeks [after conception] are the most crucial in the life of a child because it is then that all of the major systems of the body come into place.
>
> Borowski reinforced the significance of this period of development by describing its magnitude in scientific terms:
>
> > "Dr. Liley described the rapid development of the child from the first cell that comes into being upon fertilization. In a human lifetime, there are 45 generations of cell divisions. These produce the 30,000,000,000 cells that go to make up every adult. Eight of these divisions will have occurred upon implantation of the fertilized ovum in the wall of the uterus. *30 divisions, or 2/3 of the 45 generations of cell divisions that encompass the total development of an individual's life will have taken place within 8 weeks after fertilization. 41 of the 45 divisions will have been completed before birth. More than 90 percent of the development of the human adult is completed by birth.* Dr. Liley summarized the significance of this growth as follows:
> >
> > > *In development terms we spend ninety per cent of our life in utero* and indeed the die is very far cast as to the type of person we are going to be — physically, our intellectual capacities, and all manner of body functions ...
>
> The significance of prenatal development leads anti-abortionists to conclude that life in this phase of human existence is worthy of protection.

108 When I read, and re-read and re-read again the materials provided by Dr. Condic and Dr. Thorp, I fail entirely to see how the state of human, medical or scientific knowledge relevant to the present issue has been shown to have changed in any

material respect from the proposition advanced by Mr. Borowski a quarter century ago. As I said earlier, I do not question that there have been quantum leaps in science and medicine in countless respects in the generation that has passed since those cases, but the arguments and the foundational medical facts look remarkably similar.

109 If there has been a material change in medical knowledge in the intervening years, the nature and extent of any such material change is certainly not made out in the material presented. Indeed, I believe it could fairly be said that one could go back another generation, to the time of the pivotal United States Supreme Court ruling in *Roe v. Wade* , *supra*, and the same could be said with equal validity:

> While it is beyond the scope and objective of this article to engage in a scientific debate, two years before the Roe v. Wade decision, a group of 220 distinguished physicians, scientists, and professors submitted an amicus curiae brief to the Supreme Court expressing that science had established that "human life is a continuum..." and that "the unborn child from the moment of conception on is a person...." Motion and Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees at 29-30, *Roe v. Wade*, 410 U.S. 113(Nos. 70-18, 70-40), 1971 WL 128057. For more information on the scientific and medical community's view that life begins at conception, see The Human Life Bill: Hearing on S. 158 and H.R. 900 Before the Subcomm. on Separation of Powers of the S. Judiciary Comm., 97th Cong. 7, 14 (1981) (Statement of Micheline Mathews-Roth, Principal Research Associate, Harvard Medical School), where Professor Micheline Mathews-Roth, of Harvard University's Medical School, stated that "In biology and in medicine, it is an accepted fact that the life of any individual organism reproducing by sexual reproduction begins at conception...." Similarly, Jerome Lejuene, M.D., Ph.D., and former professor of genetics at the University of Paris, Sorbonne has stated that "each of us has a unique beginning, the moment of conception...when the information carried by the sperm and by the ovum have encountered each other, then a new human being is defined because its own personal and human construction is entirely spelled out. The information which is inside the first cell obviously tells this cell all the tricks of the trade to build himself as the individual this cell is already...to build that particular individual which we will call later Margret or Paul or Peter, it's already there, but it's so small we cannot see it.... It's what life is, the formula is there...if you allow the formula to be expanded by itself, just giving shelter and nurture, then you have the development of the full person." Jerome Lejeune, The Concentration Can: When Does Human Life Begin? An Eminent Geneticist Testifies (San Francisco: Ignatius Press 1992), p. 145. [65]

110 Not only does it appear to me that the proposed evidence filed on Ms. Wagner's behalf fails to demonstrate a *material* change in scientific knowledge that is capable of changing the legal status of the foetus, it appears to me in light of the foregoing that no such credible medical or scientific evidence likely exists. One might agree or disagree with what conclusions are to be drawn from the science, but any such agreement or disagreement will not hinge on discoveries about foetal development of the past thirty or forty years.

111 It has been said before, but it bears repeating, that, while scientific evidence may be one consideration in legal interpretation, it is only one factor and is far from determinative. If climate experts ran the world, their scientific facts would be manifested in laws requiring more trains and fewer cars. If medical officers of health ran the world, the urban speed limit would be 30 km/h in order to almost eliminate fatalities in motor vehicle-pedestrian collisions. On the other hand, if economists ran the world, they might compute that the economic value of lives lost paled by comparison with the greater "efficiencies" of higher speed limits. Experts in animal husbandry would laugh you off the farm if you said that a sheep was "cattle", yet that is precisely what Parliament says in the *Criminal Code.* That is because legal characterization, legal status and legal limitations are inherently normative processes. To repeat what the Supreme Court of Canada said in *Tremblay c. Daigle*, *supra:*

> Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties — a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature. [66]

The Rule of Law, The Supremacy of God And International Law

112 A medley of arguments was advanced on Ms. Wagner's behalf to demonstrate the rightness of her actions and the wrongness of a system of law that permits abortion, described in her factum as including, "at least four ways to justify why excluding the unborn child from the definition of human being mandates judicial intervention." These included:

a. "historical protection of the unborn child";

b. "incompatibility with the Rule of Law";

c. "incompatibility with the Supremacy of God";

d. "international law"

I have discussed the issue of "historical protection of the unborn child" above. The record makes it clear that any such protection has at best been spotty, inconsistent and far from absolute. To a large extent, the international treatment of the foetus has been dealt with in similar fashion, so I shall deal with any other relevant "international law" issues briefly in a few footnotes in these reasons. I consider the other issues below.

113 This country is a constitutional democracy with a written constitution. The *Constitution Act, 1982*, [67] which contains the *Charter of Rights*, is self-defined as "the supreme law of Canada". The definition of the "constitution of Canada" in s. 52 of the *Constitution Act, 1982* is somewhat open-ended, allowing for the existence of constitutional principles that are not reflected in the Act itself. The preamble to the *Charter of Rights* itself proclaims that Canada is founded on "the supremacy of God and the rule of law". As is true of all statutory interpretation, but all the more so in constitutional interpretation, the devil lies in giving meaning to those details. As a constitution must be interpreted as a "living tree", [68] those meanings may change over time.

The Rule of Law

114 The "rule of law" not only finds itself in the preamble to the *Charter of Rights*, its spirit is manifested throughout the document, from the restrictions on the state's powers in relation to citizens, complete with enforcement mechanisms such as the exclusion of evidence or the invalidation of statutes to concepts such as the "principles of fundamental justice" and the requirement that any restrictions to *Charter* rights be, "demonstrably justified in a free and democratic society".

115 The idea that there are certain fundamental unwritten principles that govern all members of society including legislators and which judges are expected to enforce is not particularly new. Chief Justice McLachlin described this idea as follows:

> To these questions I would answer as follows. First, unwritten constitutional principles refer to unwritten norms that are essential to a nation's history, identity, values and legal system. Second, constitutions are best understood as providing the normative framework for governance. Seen in this functional sense, there is thus no reason to believe that they cannot embrace both written and unwritten norms. Third — and this is important because of the tone that this debate often exhibits — the idea of unwritten constitutional principles is not new and should not be seen as a rejection of the constitutional heritage our two countries share.
>
> The contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law. Like those conceptions of justice, the identification of these principles seems to presuppose the existence of some kind of natural order. Unlike them, however, it does not fasten on theology as the source of the unwritten principles that transcend the exercise of state power. It is derived from the history, values and culture of the nation, viewed in its constitutional context. [69]

The Chief Justice goes on to note that these rules bind the legislative, executive and judicial branches. The debate is not so much about whether such norms exist, but what those norms are in relation to any given case where a litigant calls on such norms to his aid.

116 The Chief Justice goes on to develop the scope of these binding principles as follows:

> **This "rich intellectual tradition" of natural law seeks to give the law minimum moral content. It rests on the proposition that there is a distinction between rules and the law. Rules and rule systems can be good, but they can also be evil. Something more than the very existence of rules, it is argued, is required for them to demand respect: in short, to transform rules into law. The distinction between rule by law, which is the state of affairs in certain developing countries, and rule of law, which developed democracies espouse, succinctly captures the distinction between a mere rules system and a proper legal system that is founded on certain minimum values.** The debate about unwritten constitutional principles can thus be seen as a debate about the nature of the law itself and what about it demands our allegiance.
>
> Modern democratic theory, as espoused by most developed western democracies, combines two inherently contradictory doctrines. The first is what is often identified as the Diceyan doctrine that it is for Parliament and Parliament alone to establish the law, and, by implication, the fundamental norms upon which it rests. The second is the belief, widely accepted in developed modem democracies since World War II, that legal systems must adhere to certain basic norms. At a minimum they must allow citizens to vote for those who rule them, and they must not kill any (or many, depending on the state) of their citizens. This much we insist on since the Holocaust. Beyond this minimum, there is a variance, although still a solid core of agreement. States, most hold, should not torture their citizens. States should not discriminate on the basis of gender, race or religion. Finally, at the developing fringes of the new natural law, which goes by the name human rights, are other assertions. Not only should states not directly kill their citizens, they should avoid killing them indirectly by famine, medical neglect, and degradation of the environment. [70]
>
> (emphasis added)

117 Thus, as important as these principles may be, and as essential as it may be that in difficult cases the judge must stand against the winds and rains to uphold them, it is equally important that these principles not be used to create an anarchic judicial oligarchy that blithely undermines the principle of democratic government, the democratic principle being clearly recognized in, for example, sections 1 and 4 of the *Charter of Rights:*

> I return to the question: how can unwritten constitution principles be identified? The answer is that they can be identified from a nation's past custom and usage; from the written text, if any, of the nation's fundamental principles; and from the nation's international commitments. Unwritten principles are not the arbitrary or subjective view of this judge or that. Rather, they are ascertained by a rigorous process of legal reasoning. Where, having regard to convention, written provisions and internationally affirmed values, it is clear that a nation and its people adhere to a particular fundamental principle or norm, then it is the court's duty to recognize it. [71]

Support with respect to the issue of democracy as a competing constitutional value can be found in the language of the Supreme Court of Canada in *British Columbia v. Imperial Tobacco Canada Ltd.* [72] The same case cites the warning by Strayer, J.A. that, "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be." [73]

118 It seems to me self-evident that the idea of unwritten constitutional principles effectively plays a lesser role in countries with mature, enshrined constitutions than it does in those without a written constitution that explicitly binds the institutions of the state. Those unwritten principles tend to be largely replicated in the text of the constitution, with s. 7 of Canada's *Charter of Rights* striking me as a prime example. Our written constitution reflects many, many influences, including the drafters' awareness of natural law, civil liberties and the democratic tradition, as well as the depths to which supposedly advanced, civilized and democratic societies might sink, as freshly manifested in the horrors of Nazi Germany and the struggles of the American civil rights movement. Thus, when Lord Cooke suggested, in considering regulations that purported to abrogate the citizen's right to silence, that it would be beyond the legislative competence of the New Zealand Parliament to authorize torture, [74] those words

resonate no less strongly in Canada. It might be observed, however, that with an enshrined *Charter of Rights*, the principle Lord Cooke sought to advance so doggedly and so eloquently in a series of cases in a country without a written constitution equally finds expression in that *Charter*, so there will be less need to look farther afield to the modern principles of natural law. Likewise, a latter-day Premier Duplessis might find his malicious and maladroit meddling run aground on the provisions of the *Charter* (if not, indeed, in the more prosaic requirements of administrative law), long before anyone required resort to the unwritten principles of the "rule of law".

119 Although Ms. Wagner may find cold comfort in this conclusion, I agree with her that the "rule of law" is, quite apart from the terms of any written constitution, part of the constitutional DNA of this country and that its precepts must be abided by and must be applied by judges no matter how strong may be the prevailing winds or how challenging the social or political environment in which an issue arises. "Rule by law", in which palpably immoral behaviour affecting basic rights of others may be entirely lawful, is indeed, as Ms. Wagner argues, the hallmark of totalitarian and despotic states rather than of our own legal and constitutional history.

120 Where I disagree with Ms. Wagner is that I do not think it can fairly be said that the "rule of law" dictates the conclusion she so fervently advances. In the context of the present debate, I cannot see anything that the idea of the rule of law adds to the discussion. The core question is whether or not the foetus has the absolute status as a human being and enforceable rights that go along with it that Ms. Wagner asserts it has. The answer to that question lies in the process I have gone through under the *Charter*, which effectively mimics the language of Chief Justice McLachlin's speech, *supra*, that:

> [w]here, having regard to convention, written provisions and internationally affirmed values, it is clear that a nation and its people adhere to a particular fundamental principle or norm, then it is the court's duty to recognize it."

121 The simple reality is that none of those pre-conditions has been satisfied by Ms. Wagner. The principle she advocates, effectively that all abortion is murder, a crime against humanity and a form of genocide, is undoubtedly sincerely and deeply held, but that contention lacks affirmation in our history or in universal or international values.[75] Acceding to her requested interpretation does not require the judicial courage she says it requires; it requires instead a dreadful and odious judicial unilateralism that would itself be anathema to the rule of law on which Ms. Wagner calls in aid.

The Supremacy of God

122 Ms. Wagner also points to the *Charter's* preamble, which recognizes the "supremacy of God", and from there she points to the Fifth Commandment in the Old Testament, which forbids murder, which she says encompasses the unborn. The significance and effect of those three words has received precious little attention from the Supreme Court of Canada, or indeed from any courts at all. A single judge of the Court of Appeal for British Columbia has gone so far as to characterize the "supremacy of God" preamble as a "dead letter".[76]

123 Whether or not those words in the preamble will prove through the centuries to be little more than window-dressing, remains to be seen,[77] although as I have noted, thus far the seed appears to have fallen on stone rather than on fertile and nourishing soil.[78] The preamble received perhaps its most robust (and more than mildly Eurocentric), interpretation in the Alberta Court of Appeal dissenting reasons in *R. v. Big M Drug Mart Ltd.*,[79] a case from the *Charter's* infancy dealing with Sunday-closing legislation. In that case the two dissenting judges opined:

> [113] I do not believe that the political sponsors of the *Charter* intended to confer upon the courts the task of stripping away all vestiges of those [European and Western] values and traditions, and the courts should be most loathe to assume that role. With the *Lord's Day Act* eliminated, will not all reference in the statutes to Christmas. Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar. Such interpretation would make of the *Charter* an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless and Godless nation contrary to the recognition of the Supremacy of God declared in the preamble.

That rare, robust and dissenting application of the "supremacy of God", however found no echo in the reasons of the majority, nor in the reasons of the Supreme Court of Canada, which gave the "supremacy of God" mere passing mention, preferring instead to focus on the diversity of religious freedom protected by s. 2(a) of the *Charter*. [80] Indeed, I believe that a fair reading of the reasons of Dickson, C.J.C. clearly recognizes that "freedom of religion" also encompasses "freedom from religion".

124 *O'Sullivan v. R.* [81] was a case in which a taxpayer sought to withhold fifty dollars from his income tax because some of the money would be used to fund abortions. Muldoon, J. provides one colourful perspective on the "supremacy of God" preamble, as follows:

> 16 .... The principles based upon the supremacy of God (and its companion basis, the rule of law) are not stated in the preamble but may, in part be found, or logically inferred from the Charter's text and the historical roots of Canada which also evinced those principles.
>
> 17 What does the recognition of the supremacy of God mean in constitutional and legal terms? After all, the supremacy of God is recognized by people of many similar and different religions; but their professed worship of God does not prevent them from killing, maiming and torturing each other, including, in many instances, their own co-religionists. Did the inclusion in Canada's constitution of recognition of the supremacy of God mean to make a theocracy of Canada? Hardly. Had the expression been inserted about a century or more, ago, it might have been taken to mean that Canada was a Christian State, or kingdom. Since the first settlement of western Europeans, at first almost exclusively the French, in this land nearly 400 years ago, the religions of North American Europeans were those of western Europe, principally England (later Britain) and France. The Roman Catholic faith to which the taxpayer here adheres, was implanted from the beginning in the early 1600's in New France, which was a virtual theocracy. The arrival of the British brought Protestantism, but the overwhelmingly Christian aspect of the population remained. So ingrained was the popular assumption of the eternally Christian complexion of the population, that whereas minority Roman Catholic and Protestant separate schools were constitutionally recognized, the majority were always content to find their educational formation imparted in public schools. It was thought then, and never foreseen otherwise, that the Canadian public would always remain nearly 100% Christian. So, the taxpayer's religious beliefs and principles are well known in history and generally familiar to the population of Canada. Nevertheless, the late amendment to the Charter in 1981 cannot be construed to have converted Canada into a Roman Catholic theocracy, a Mennonite theocracy, an Anglican theocracy or a Jehovah's Witnesses' theocracy any more than Canada was thereby converted into an Islamic theocracy (whether Sunnite or Shiite), a Hindu theocracy, a Sikh theocracy, or a Buddhist theocracy.
>
> 18 What then is meant by this preamble? Obviously it is meant to accord security to all believers in God, no matter what their particular faith and no matter in what beastly manner they behave to others. In assuring that security to believers, this recognition of the supremacy of God means that, unless or until the Constitution be amended — the best of the alternatives imaginable — Canada cannot become an officially atheistic State, as was the Union of Soviet Socialist Republics or as the Peoples' Republic of China is understood to be. Some may see little difference between an atheistic State and a secular State, but it is apparent that when the former begins, as several have done, to enforce its basic principles, it must thereby suppress theistic religions and the believers who practise such religions. The fact that the political "philosophy" with its "party line" is a non-theistic religion never deters those who lust for political power and control. A secular state just leaves religion alone, with one exception, founded on pure reason.
>
> 19 The preamble to the Charter provides an important element in defining Canada, but recognition of the supremacy of God, emplaced in the supreme law of Canada, goes no further than this: it prevents the Canadian state from becoming officially atheistic. It does not make Canada a theocracy because of the enormous variety of beliefs of how God (apparently the very same deity for Jews, Christians and Muslims) wants people to behave generally and to worship in particular. The preamble's recognition of the supremacy of God, then, does not prevent Canada from being a secular state.
>
> 20 Indeed, section 1 of the Charter directly defines Canada in purely secular terms by guaranteeing

> 1... the rights and freedoms set out in it subject only to such reasonable [but not, or not necessarily, religious] limits prescribed by law [not religion] as can be demonstrably justified [again, reason, not necessarily religion] in a free and democratic society. [Underlining added.]

Thus, defining Canada as a "free and democratic" society is to avoid defining it in religious terms such as "très chrétien" or "Islamic", or the like.

125 It is certainly a much easier task to insert such words into a preamble than it is to apply and interpret them. Obvious questions arise, such as "whose God?" Ms. Wagner refers to a Judeo-Christian commandment, which is itself silent on the issue of when human life begins, but even accepting her interpretation of it, Canada is immeasurably more complex than that. Different organized religions adopt different views with respect to the status of the foetus at different times in its growth.[82] Within a given organized religion, whose interpretation governs? What of those who believe in God, but who do not ascribe to any organized religion? What of those who do not believe in God, given that, as much as the preamble refers to God's supremacy, s. 2 of the *Charter*, labeled "Fundamental Freedoms," lists freedom of conscience, religion, thought, belief, opinion and expression as protected values?

Conclusion With Respect To The Legal Status of the Foetus as a Person

126 It is not for me to presume to speak for the Supreme Court of Canada. It is, however, my role as a trial judge to assess whether or not to permit a full evidentiary hearing on the constitutional issues advanced by Ms. Wagner. When I consider and consider and consider again the deep and broad field of jurisprudence from the Supreme Court of Canada and various provincial courts of appeal on issues that strike me as inextricably intertwined with the merits of Ms. Wagner's argument about the legal status of the foetus under s. 7 of the *Charter*, I cannot rationally conceive of any way in which she can succeed. It may fairly be argued on her behalf that the Supreme Court of Canada has not definitively ruled on the precise question of whether a foetus is a "human being" or is captured within the word "everyone" or has an independent right to life under s. 7 of the *Charter*, but the authorities cited above demonstrate that any such contention is so hemmed in by authority from the Supreme Court of Canada and various provincial courts of appeal and various courts around the world that, without a dramatic turnabout on the part of the Supreme Court of Canada, she could not possibly prevail. I cannot read the Supreme Court of Canada decision in *Morgentaler (1988)*, *supra*, as conceivably allowing room for the Supreme Court to find in favour of the absolutist foetal right to life/status as a human being advanced on Ms. Wagner's behalf. I cannot imagine that, if the Supreme Court of Canada even remotely allowed for the possibility that status as a human being inured at the moment of conception, meaning that the act of abortion would be murder, that they would have ignored that possibility in deciding *Morgentaler (1988)* and *Borowski (1989)*, *supra*. *Morgentaler (1988)* specifically recognized a constitutional right on the part of women to terminate pregnancies, a right that cannot co-exist with the absolute status of a foetus as a "human being" or "everyone" from the moment of conception as urged by Ms. Wagner. All of that would have been inescapably obvious to the Supreme Court of Canada in the late 1990s and it is fatal to the position advanced by Ms. Wagner before me. As I have said before, the scientific evidence presented to me was not capable of changing the outcome.

Standing

127 There was much *Sturm und Drang* in this case over the issue of whether or not Ms. Wagner had standing to challenge s. 223 of the *Criminal Code*, which defines when legal personhood begins. It was her contention in her Amended Notice of Constitutional Question that s. 223 of the *Code* was of no force or effect by virtue of s. 52 of the *Charter*.[83] It was argued by the Crown that Ms. Wagner had neither private standing (i.e. that she was not directly affected) nor public interest standing (i.e. that she is not directly affected but has a genuine or special interest in the validity of the impugned law). Given that the issue of standing has very much been overtaken by other determinative conclusions in this case, I do not propose to dwell long on that issue, nor to drill down deep into the not entirely consistent jurisprudence on that topic.

128 The law of standing has important public policy concerns at its heart. If there were no limitations on standing, the courts would become a battleground for every manner of litigious or mischievous busybody, thereby misdirecting scarce resources

required for actual disputes,[84] criminal and otherwise, and increasing the danger of important issues being decided without a proper factual foundation. It is especially important that courts not decide constitutional issues without such a background.

129 The law of public interest standing was recently and comprehensively reviewed by the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*.[85] The following excerpts of the judgment of Cromwell, J. bear noting:

> [1] This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, 1986 CanLII 6 (SCC), [1986] 2 S.C.R. 607, at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.
>
> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).
>
> [42] To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713. Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690).

130 In a case in which many significant issues were argued vigorously, the challenge to Ms. Wagner's standing to advance her constitutional complaint also gives rise to the recurring legal conundrum of the chicken and the egg. Where the Crown argues that Ms. Wagner has no plausible legal argument to advance and, in any event, she has no right to advance the argument, what is the correct order of proceeding? It seems to me that the issue of standing and the issue of reasonable prospect of success or "serious issue" as it has alternately been described in the cases, (or reasonable cause of action in the civil context) overlap to some extent, namely that both require consideration of the viability of the applicant's claim. The decision of the Court of Appeal for Ontario in *Energy Probe v. Canada (Attorney General)*[86] supports this conclusion. The gatekeeper function of the "serious issue" test in public interest standing is inescapably clear from the language of *Downtown Eastside Sex Workers*, *supra*. However, courts also enjoy a gatekeeper function in other respects that provide additional means of avoiding clogging up the courts with mischievous litigants or specious and repetitive arguments, including the ability to refuse a *viva voce* hearing referred to elsewhere in these reasons and the "air of reality" test that is commonly applied before issues are put to a jury.

131 It should be clear that, in light of the history of the courts' treatment of "foetal rights" and related issues, I find it exceeding difficult to conclude that Ms. Wagner's constitutional contentions are "far from frivolous" or that they raise "a serious justiciable issue", which conclusion would disentitle her from public interest standing. I suspect that limitations might validly be placed on "abortion on demand", i.e. I suspect that Parliament has the competence whereby it could, if it had the stomach for the debate,

enact constitutionally valid limitations on abortion, such as fixing a date beyond which abortions could not be performed,[87] but Ms. Wagner's absolutist contention, namely that abortion is murder, thereby giving her (or anyone else) the right to intervene when, where and as they see fit, strikes me as entirely unsustainable for the reasons I set out elsewhere in this judgment.[88]

132 Given her decades-long history, I do think that Ms. Wagner has "a real stake or genuine interest" in the outcome of the constitutional issue and would likely satisfy that criterion with respect to public-interest standing. With respect to the final criterion, there is some resonance to the argument that there is nobody else to speak for the unborn, but the availability of other litigation options discussed elsewhere means that, in my view, she would fail to satisfy that requirement for public interest standing.

133 With respect to personal standing, it was suggested to me that it is one thing for a criminal defendant to challenge the law under which she was charged, but another thing entirely for her to challenge an "unrelated" provision (such as the definition of when a particular legal status begins) and that she generally lacks standing to assert a violation of someone else's rights.

134 It is true that Ms. Wagner was not challenging the law criminalizing mischief or the law criminalizing breach of court orders; rather, she was contending that she had a "defence of others" defence to those charges and that the statutory limitation on the meaning of "others" that is implicitly applicable through s. 223 of the *Criminal Code* narrowed her defence in a way that was unconstitutional: she says that unborn foetuses have an inalienable, undeniable and absolute claim to the status of human beings and to personhood and that, as they are incapable of defending themselves, she is entitled to fill the void.

135 I can see nothing in the cases referred to me to support a contention that, as a criminal defendant in the circumstances of this case, she lacks the standing to raise the alleged constitutional flaw in her defence. In the absence of compelling and directly binding authority,[89] I would find any such purported limitation to be both peculiar and disturbing. It strikes me as one thing to conclude that an itinerant, occasional occupant of another's apartment lacks standing to challenge a search of that apartment even where it uncovers evidence that will be tendered against the itinerant,[90] and an entirely different thing to deny a criminal defendant an opportunity to challenge the constitutionality of a *Criminal Code* provision (s. 223) that narrows the applicability of another *Criminal Code* provision (the old s. 37 or the new s. 34) that, depending on the constitutional interpretation, might or might not afford the defendant a defence against criminal liability (leaving aside, of course, the fact, as discussed elsewhere in these reasons, that her constitutional argument has zero lift).

136 The cases on standing in relation to s. 8, s. 24, etc. of the *Charter*, which deal with alleged constitutional violations arising from particular state actions, strike me as less helpful in this analysis than cases where s. 52 is relied on to argue that a legislative provision is itself unconstitutional. It strikes me as hard to accept that a corporation, which has no soul and which by definition has only one fervent belief, i.e. the enrichment of its shareholders, can rely on the constitutional freedom of religion to strike down a statute (i.e. relying on the religious rights of others or the rights of others to be free of religion-based constraints) as in *R. v. Big M Drug Mart Ltd.*, *supra*, but Ms. Wagner cannot rely on the purported right to life of a third party to argue the invalidity of s. 223 of the *Code*. This, of course, stands separate and apart from the actual merits of the constitutional argument advanced. Accordingly, although it is of no practical benefit to Ms. Wagner in the circumstances, I would be inclined to agree with her that, leaving aside for present purposes the patent weakness of her constitutional argument, in the circumstances of this case she has personal standing to challenge s. 223 of the *Criminal Code*.[91]

The Collateral Attack Rule: A Further Barrier to Ms. Wagner's Defence on the Breach Probation Counts

137 Ms. Wagner faced two types of charges. One was the charge of mischief interfering with private property. The others were charges that her conduct at the abortion clinic violated various probation orders that had been made against her. Quite apart from any issues that may arise from the status of a foetus in Canadian law or the applicability of one or both of the versions of "self-defence of others", I do not see how Ms. Wagner can raise any of those arguments in relation to the breach of probation charges.

138 Ms. Wagner relied heavily on the importance of the rule of law in her defence. It is one of the pillars of the rule of law that court orders must be respected. Thus, in the early wiretap case of *R. v. Wilson*,[92] the Supreme Court of Canada held (at p. 599):

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

139 Coming closer to the facts of the present case, the judgment of the Court of Appeal for Ontario in *R. v. Domm*,[93] dealt with a defendant who had chosen to violate a publication ban. In the course of disposing of the appeal, Doherty, J.A., speaking for the court, observed:

> The rule against collateral attack on court orders has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order. For example, in *R. v. Reed* (1994), 1994 CanLII 1634 (BC CA), 91 C.C.C. (3d) 481 at p. 499, 24 C.R.R. (2d) 163 (B.C.C.A.), the court held that the accused could not defend against a charge of breaching a term of his probation by arguing that the term was invalid.

140 I know as a matter of law that Ms. Wagner had the right to appeal the terms of the probation orders imposed upon her in earlier cases.[94] If limitations in those orders on her ability to attend at or near abortion clinics were, in her view, invalid and unenforceable because those limitations impinged upon the s. 7 *Charter* rights of the unborn, or on her own supposed right to vindicate those foetuses' "right to life", the time and place to make those arguments was, first, before the trial judge, and thereafter to the summary conviction appeal court or the Court of Appeal.

141 Ms. Wagner's contention that the probation orders were constitutionally invalid does not change the outcome. In *Canada (Human Rights Commission) v. Taylor*,[95] Taylor was convicted of contempt for violating a cease-and-desist order of the Canadian Human Rights Commission in relation to hate speech. The majority of the Supreme Court of Canada upheld the validity of the governing statute. McLachlin, J, (as she then was), speaking for the minority would have found the provision allowing the commission to make the cease-and-desist order to be unconstitutional, but nonetheless held that the contempt convictions should stand. She held that there was no authority to suggest that a person was entitled to disobey a court order made under a law that was unconstitutional:

> In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the Charter violation until set aside. **This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens'** safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.[96]
>
> (emphasis added)

142 In committing the breaches of the probation orders and then coming to trial and arguing that the orders were constitutionally infirm, Ms. Wagner chose the "breach first, challenge later" path. All of the arguments she made before me could have been made much more efficiently before the judges who made those probation orders and before the appropriate appellate court if those arguments did not find favour at trial. In light of the rule against collateral attack, the path she chose was not open to her. Thus, even if there were merit to her argument about the status of a foetus as being part of "everyone" protected by s. 7 of the *Charter* and assuming that she could fit herself within either the older or newer definitions of "self defence of others", that argument would not safeguard her from conviction on the breach of probation counts.

143 During argument it was suggested to me that the law would surely not punish a passer-by for running into a burning house and saving its occupants from death if he did so in violation of a court order prohibiting him from being in that house. I agree. If there were a police officer sufficiently lacking in judgment to lay a breach charge in those circumstances and a Crown Attorney sufficiently lacking in judgment to take the matter to trial, I am sure that the law of necessity, as detailed herein, would vindicate the passer-by's breach of the order. But it is facile to suggest Ms. Wagner was in the same position as that person. Unlike the passer-by, she attended at the clinic, a place she knew she was not allowed to be, with the full intention of breaching the court order. No social harm arises from the selfless passer-by running into the burning building. By contrast, Ms. Wagner's

attendance at the clinic showed a wilful disregard of a law she was fully aware of, which she disagreed with and which she chose to flout, disregarding the interests of the clinic's patients, their companions and the clinic's operators, which the highest court in the land has long deemed worthy of protection.

144 It was argued in Ms. Wagner's defence that if the passer-by were in Nazi Germany and the place he entered was a concentration camp and the reason he entered was to save the lives of inmates, who were not considered human by the laws of that time and place and who were lawfully incarcerated under those laws, and he was under a court order not to attend there, then the passer-by would act with the same advance intention as Ms. Wagner. This is true, but irrelevant for a different reason. While the reaction of the community of nations to what was happening in Nazi Germany in the 1930s may not have been our finest hour, there was no room for debate, when all of the facts were known of what had happened under that regime, that the atrocities committed and the dehumanization of various populations by reason of race or religion or sexual orientation, was a crime against humanity. It did not require "victor's justice" to reach that conclusion. A court operating under the rule of law, would excuse the person who attended to save the prisoners by virtue of the doctrine of necessity. There is, however, no established recognition of the equivalent status of the foetus in our laws and traditions or in the laws and traditions of the community of nations, as set out elsewhere in these reasons.

Mistake of Fact

145 After I notified counsel that I would not hear the *viva voce* evidence, it was argued on Ms. Wagner's behalf that I still had to allow the *viva voce* evidence on her trial because the question of the meaning of "anyone" still required to be decided on the merits of the trial for the purpose of assessing a possible mistake of fact argument on Ms. Wagner's behalf and for various other reasons. Failing to allow the expert evidence for those purposes would violate Ms. Wagner's right to full answer and defence.

146 Although it was dressed up in different clothing, (seemingly as an after the fact argument, although that in itself is not fatal, merely regrettable) this argument changes nothing. It was a palpable effort to sneak the *viva voce* evidence in through the window after the doors had been closed. The very notion that Ms. Wagner was operating under a mistake of fact strikes me as entirely disingenuous. The question of the legal status of the foetus is clearly a question of law. If there is anyone in the country who is familiar with that definition, Ms. Wagner, with her single-minded focus on the rights of the unborn, is that person; she just fervently disagrees with it. As for what was going on in the clinic, Ms. Wagner knew what its activities were, she went there precisely because of her opposition to those activities and there was no error at all in her understanding of the underlying facts.

Conclusion

147 In *Morgentaler (No. 5) (1975), supra*, the Supreme Court of Canada found that the then s. 251 of the *Criminal Code* did not pass constitutional muster because it lacked the necessary balance. The Supreme Court did not go so far as to say that there was no room for legitimate state control of abortion; indeed it seemed to imply that such room did in fact exist. That decision, and the many that followed it, were part of the respectful constitutional dialogue that ought to exist among executives, legislatures and courts in any constitutional democracy. The reality, however, is that for the past quarter century Parliament and the legislatures have remained uncharacteristically mute. The reality underlying that legislative silence may be that while "judicial activism" is at some times in history a convenient bogeyman for certain parts of the legislative and executive branches, at other times judicial enforcement of constitutional values affords those branches of government a convenient means to duck and cover. A cynic might wonder if it is sometimes handy to have judges' skirts to hide behind when a political issue is sufficiently divisive within society or is otherwise politically inconvenient.

148 As the Supreme Court of Canada observed in *Morgentaler (No. 5) (1975), supra*, it is not the courts' job to "solve" the abortion problem, any more than it is the courts' job to solve various other complex social issues. It is the courts' job under the constitution adopted thirty-three years ago to rule on any fatal constitutional flaws in legislation and, generally, to require Parliament to come up with a constitutionally compliant scheme instead.[97] The authorities and underlying history suggest that Parliament and the legislatures likely do have a constitutionally legitimate field of play within which they can regulate abortion. By way of purely hypothetical example only, Parliament might choose severely to limit the right to abortion after a particular point in the foetus's development and the constitutional balancing of societal and private interests involved might well lead to

the conclusion that Parliament got the balance right. That is an issue for another case. The choice to do nothing in relation to the abortion issue is, however, a choice that is open to legislators and that is largely a political choice, unless doing nothing itself offends constitutional values. That, too, is an issue for another case.

149 Coming back to this case, however, there is no realistic basis upon which the effectively absolutist view espoused by Ms. Wagner can prevail. That position entirely lacks balance and entirely lacks historic or legal foundation. And while it might be the view of some in the abortion debate that "extremism in the defence of virtue is no vice", the obviously conflicting interests inherent in the abortion issue mean that balance is the *sine qua non* of a constitutionally sound regime. While it may have had the purest of motivations, Ms. Wagner's invasion of the abortion clinic lacked balance and failed to respect the legitimate interests of those inside.

150 Ms. Wagner chose to place herself above the law and sought to impose her views and her will on the patients and operators of the abortion clinic. She has chosen to have a trial, which is every defendant's right. For Ms. Wagner, however, the defendant at the trial was Canada's law (or lack thereof) on abortion and the law's failure to accord the full status, rights and protections of a human being to the unborn. That contention, rather than the "who, what, where and when" of most trials was the focus of her attention and it informed each of the legal issues raised in her defence. On the evidence before me, I was satisfied of Ms. Wagner's guilt on each of the charges beyond a reasonable doubt, including the following conclusions:

a. That I was entitled to require her to make an "offer of proof" to support a claim that the nature of scientific knowledge now is sufficiently materially different now than twenty-five years ago that those differences could change the legal status of the foetus;

b. That the materials presented as the offer of proof were not at all adequate to the task;

c. That the argument about the legal status of the foetus could not succeed;

d. That s. 223 of the *Criminal Code* does not offend against the *Charter of Rights;*

e. That neither the old s. 37 nor the new s. 34 of the *Criminal Code* could, for the reasons elaborated herein, insulate Ms. Wagner's conduct from criminal liability;

f. That the law of necessity was not available to insulate Ms. Wagner's conduct from criminal liability;

g. That the Crown had proved Ms. Wagner's guilt on each of the charges beyond a reasonable doubt (indeed her factual guilty hardly seemed in dispute), including disproving the defence of others and necessity arguments.

151 For these reasons, Ms. Wagner's constitutional arguments were dismissed and I found her guilty of all of the charges.

152 I am indebted to counsel for their hard work, advocacy and civility throughout.

Accused convicted.

Footnotes

1 I use the word "allegation", although, as will be seen, there appears to be little difference, and certainly no difference that struck me as relevant to any matter in issue, between the conduct of Ms. Wagner and others as alleged by the Crown and the events Ms. Wagner testified to in her evidence.

2 Language can be a powerful weapon and combatants can "discern" meaning and nuance where none was intended. To the extent that I might use terms such as "pro-life", "anti-abortion", "pro-abortion", "pro-choice", "anti-choice" or any other formulation in these or any other reasons in this case, the amount of meaning that should be read into the choice of words is precisely nil.

3 *Dred Scott v. Sandford*, 60 U.S. 393 (U.S. Sup. Ct. 1856)

4 For example, as fascinating as the issue is, I do not propose to deal with the war crimes trials at Nuremberg, which were referred to in the submissions made in Ms. Wagner's defence (for example, the defence relied on an article by Prof. Jeffrey Tuomala, *"Nuremberg and the Crime of Abortion"*, 42 University of Toledo Law Review, 284). I stress that there is no harm in persons in authority, including judges, being reminded from time to time of the potential moral and legal perdition that lurks behind any failure to recognize the difference between rule of law and rule by law or generally in failing to recognize the obligation to act promptly and in a principled way that is perhaps best embodied in Pastor Niemoeller's timeless self-critique from that era. At the same time it strikes me as ludicrous to compare, or even to juxtapose, a mother's truly voluntary decision to have an abortion with a policy of forcing abortions on occupied or enslaved peoples based on a Nazi ideology to reduce the population of "unworthy" races in order to ensure the dominance of the "Aryan" Volk, or to legal structures that discriminated between "races" when determining whether or not abortion would be allowed or tolerated. Likewise, it seems to me disingenuous to rely on any conclusion (assuming there was in fact such a conclusion) by the Nuremberg tribunals that the community of nations has universally and consistently treated abortion as the killing of a human being when the historic evidence to the contrary supports no such absolutist conclusion.

5 In addition to her *viva voce* testimony, Ms. Wagner adopted for trial purposes an affidavit that she had filed earlier in the proceedings.

6 The *Citizen's Arrest and Self-defence Act*, S.C. 2012 c. 9, came into force on 11 March, 2013.

7 The old s. 37 reproduced in these reasons was in effect at the time of Ms. Wagner's attendance at the clinic. The new provisions, in particular the new s. 34, came into effect between her visit and the trial. A fair amount of ink has been spilled over the question of whether a person in Ms. Wagner's situation is governed by the law in place at the time of the allegations, the law in place at the time of the trial or by whichever of those versions is more advantageous to her. The first conclusion was reached by the Supreme Court of British Columbia in *R. v. Evans*, [2013] B.C.J. No. 500 (B.C. S.C.). The second conclusion was reached by Justice MacDonnell of the Superior Court of Justice in a ruling on a trial barely a month after the new provisions came into effect: *R. v. Pandurevic*, 2013 ONSC 2978 (Ont. S.C.J.) (CanLII). The third conclusion was reached by Justice Paciocco of the Ontario Court of Justice in *R. v. Parker*, 2013 ONCJ 195 (Ont. C.J.), also very soon after the new provisions came into force (the "either/or" option does not appear to have been argued in *Pandurevic*.) I agree with Justice MacDonnell that the new provisions will almost always (perhaps always) be most advantageous to the defendant. I agree with Justice Paciocco that whichever version is more advantageous to the defendant should be open to him or her. In the present case, the old s. 37 presents several obstacles to Ms. Wagner, which are discussed in these reasons, along with the new s. 34.

8 David Paciocco, *Getting Away With Murder*, Irwin Law (1999), at page 274.

9 2014 SCC 60 (S.C.C.)

10 *R. v. Webers* [1994 CarswellOnt 1833 (Ont. Gen. Div.)], 1994 CanLII 7552

11 At paragraph 49.

12 *R. v. Barkhouse*, [1983] N.S.J. No. 448 (N.S. Prov. Ct.)

13 *R. v. Duffy* (1965), 50 Cr. App. R. 68 (Eng. C.A.).

14 Indeed, in oral argument, Mr. Lugosi conceded that there is a line of argument to the effect that s. 8(3)'s qualifying language ousts the common law version of defence of others.

15 These are not matters requiring evidence. One would have to be Rip van Winkle to be unaware of the power of the Internet to raise vast amounts of money, even for obscure causes, in a very short time. The same was true in 2012 and 2013 and 2014.

16 Keeping in mind that a finding in favour of Ms. Wagner in this court would not bind any other court anywhere, whereas a finding in her favour in Superior Court would have province-wide effect and also keeping in mind that pursuing the remedy in this court on summary conviction charges adds a level of litigation and a significant layer of delay that could have been avoided by seeking a declaration in Superior Court.

17 *R. v. Morgentaler (No. 5)* [1975 CarswellQue 3 (S.C.C.)], 1975 CanLII 8

18 *Perka v. R.*, [1984] 2 S.C.R. 232 (S.C.C.), 1984 CanLII 23

19 *R. v. Salvador* (1981), 59 C.C.C. (2d) 521 (N.S. C.A.) (at p. 542)

20 At pp. 247-249.

21 There is a danger, especially in an issue as emotion-laden as abortion, that a comment such as this may seem callous, which is not its intent. It is not for me to question Ms. Wagner's choices as an individual. However, the choices she made are relevant to assessing issues such as necessity, urgency or emergency. A successful application would presumably save thousands of the unborn, whereas the ruling of a provincial judge, after Ms. Wagner spent two years in custody, would bind nobody, although it might well lead to the anarchy warned of by Edmund-Davies, L.J. as cited by Dickson, C.J.C. in *Perka*, *supra.* Indeed, if one were to follow an urgency argument along its logical path, if Ms. Wagner felt driven by the emergency of saving as many lives as possible presumably she would have signed whatever bail order the Crown sought after being charged with these offences and gone out and re-attended the clinic the following day, which would at least have given her the chance to save two groups of foetuses.

22 *R. v. Askov*, [1990] 2 S.C.R. 1199 (S.C.C.)

23 *R. v. Morin*, [1992] 1 S.C.R. 771 (S.C.C.)

24 For unrelated reasons, some of the court days in this trial started rather late.

25 *R. v. Kutynec* [1992 CarswellOnt 79 (Ont. C.A.)], 1992 CanLII 7751.

26 *R. v. Durette*, [1992] O.J. No. 1044 (Ont. C.A.)

27 Doherty, J.A. wrote separate reasons in which he agreed that the evidence to be tendered was irrelevant, but dissented with respect to the outcome of the appeal on a separate ground of appeal, relating to the editing of wiretap material. On further appeal to the Supreme Court of Canada solely on the wiretap issue, a new trial was ordered based on Doherty, J.A.'s reasoning: *R. v. Durette*, [1994] 1 S.C.R. 469 (S.C.C.).

28 *R. v. Felderhof*, [2003] O.J. No. 4819 (Ont. C.A.).

29 *R. v. Lising*, [2005] S.C.J. No. 67 (S.C.C.), at paragraph 35.

30 Indeed, in "Schedule F: Final Submissions Made on Behalf of Mary Wagner, June 12, 2014" filed at the trial, Ms. Wagner notes that the documentary evidence of Drs. Condic and Thorp "has the same weight as *viva voce* evidence given at trial".

31 I fail entirely to see how the authorities argued on Ms. Wagner's behalf (see "Schedule E To Legal Submissions on Behalf of Mary Wagner" filed at trial), including *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.) assist her. The issue in *Seaboyer* related to legislation that had the potential to deny a defendant the right to adduce relevant factual evidence that related to the issue of guilt or innocence. Any such denial clearly undermines the right to full answer and defence. *Seaboyer*, however, did not deal with the issue of a court's power to control its process or the court's power to refuse to hear evidence that, after a *voir dire* it had found could not possibly affect the outcome of the case. It is only in such cases that the power described in *Durette*, *(supra)* and its successors is engaged. I reject the defence contention that *Seaboyer* dictates that I must hear the *viva voce* expert evidence even when it has no potential to affect the outcome.

32 *Bedford v. Canada (Attorney General)*, [2013] 3 S.C.R. 1101 (S.C.C.).

33 In fairness, the Crown's argument was based on the majority decision of the Court of Appeal in *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296 (Ont. C.A.), e.g. at paras. 82-83, a holding which was much more favourable to the Crown on this issue than the decision of the Supreme Court of Canada, which followed.

34 *Carter v. Canada (Attorney General)*, 2015 SCC 5 (S.C.C.) (CanLII), at paragraphs 42-48.

35 Ms. Wagner also argued separately that quite apart from the constitutional challenge, I should find that the definition of when a child becomes a human being in s. 223 of the *Criminal Code* is not of general application throughout the Code. This argument is unburdened by merit. Section 223 says specifically, "A child becomes a human being *within the meaning of this Act*...." The wording of s. 223 is not prefaced by any language such as "for the purposes of sections X, Y and Z" in order to limit its purpose. The plain language and meaning of s. 223 is that a child becomes a human being upon defined events happening, which necessarily means that for the purpose of the *Criminal Code*, a "child" is not a human being until that point. The vast body of jurisprudence (generally, but not exclusively in the constitutional context), with respect to the legal status of the foetus is far from irrelevant in interpreting the meaning of *Code* provisions. It would stretch the English language and common sense grotesquely to find that "human being" in s. 223 "any one" in s. 37 of the *Criminal Code* should mean different things.

36 The courts had already been a battleground in the abortion rights debate before the advent of the *Charter* in 1982 (and the implementation of its equality rights provisions three years later), for example in cases dealing with prosecutions of abortion providers, the *Canadian Bill of Rights*, the defence of necessity, jury nullification, etc. I do not propose to catalogue every case, both pre-and post-*Charter* in these reasons. See, e.g.: *R. v. Morgentaler (No. 5)* (1975), [1976] 1 S.C.R. 616 (S.C.C.), 1975 CanLII 8, *Dehler v. Ottawa Civic Hospital* [1979 CarswellOnt 484 (Ont. H.C.)], 1980 CanLII 1878.

37 *Borowski v. Canada (Attorney General)* [1987 CarswellSask 342 (Sask. C.A.)], 1987 CanLII 4890 (hereafter Borowski (1987))

38 *Borowski (1987)*, *supra*, paragraph 7 (Sask.C.A., quoting Cameron, J.)

39 *Borowski (1987)*, *supra*, paragraphs 59-60

40 *Borowski (1987)*, *supra*, paragraph 20.

41 *Borowski* (1987), *supra*, paragraphs 21-24 (Sask. C.A.)

42 *Roe v. Wade*, 410 U.S. 113 (U.S. Sup. Ct. 1973)

43 *Paton v. British Pregnancy Advisory Service Trustees*, [1978] 2 All E.R. 987 (Eng. Q.B.)

44 *Paton v. United Kingdom* (1980), 3 E.H.R.R. 408 (European Ct. Human Rights).

45 *Borowski (1987)*, *supra*, paragraph 49.

46 *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.)

47 I shall refer to this decision as *"Morgentaler (1988)"* to distinguish it from the Supreme Court of Canada's decision in relation to Dr. Morgentaler in 1975.

48 *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.).

49 *Morgentaler (1988)*, *supra*, paragraph 55.

50 *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.) (hereafter, *"Borowski, 1989")*.

51 *Borowski (1989)*, *supra*, at paragraphs 45-46 (S.C.C.).

52 *Tremblay v. Daigle*, *supra*, at paragraph 38.

53 *Tremblay v. Daigle*, *supra*, at paragraph 40. See also, paragraphs 41-42 in which the Supreme Court of Canada appears to touch on concerns similar to those raised by Cameron, J. at the trial level in *Borowski*, *supra*, in relation to the varying terminology (in the Quebec *Charter*) of "person" and "human being".

54 *Tremblay v. Daigle*, *supra*, at paragraph 44.

55 *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 (S.C.C.).

56 *Winnipeg*, *supra*, at paragraphs 11-12.

57 See *Winnipeg*, *supra*, at paragraphs 49-57.

58 *R. v. Demers*, [2003] B.C.J. No. 75 (B.C. C.A.).

59 *Demers*, *supra*, at paragraphs 17, 23. The British Columbia Court of Appeal (at paragraphs 21-22) also refers to paragraph 11 of the Supreme Court of Canada's decision in *Winnipeg*, *supra*, in which the court stated the "general proposition that the law of Canada does not recognize the unborn child as a legal or juridical person...This is a general proposition, applicable to all aspects of the law..." The British Columbia Court of Appeal develops that line of thought by stating (at paragraph 22 of *Demers*, *supra)*, that, "the phrase "all aspects of the law" in para. 11 must include Charter law."

60 Statement of Maureen L. Condic, Ph.D, paragraph 5.

61 Letter of Dr. John M. Thorp, Jr., dated 26 February, 2014.

62 *"Foetal Rights and the Regulation of Abortion"*, (1994) 39 McGill L.J. 58.

63 At pages 75-76.

64 Compare this language to Dr. Thorp's comments twenty-five years later: "This particular combination of genes comes together at the moment when the nuclei of sperm and egg fuse (the moment of conception) and that new single cell possess (sic) all the information it needs to form a new individual." (at p. 2 of Dr. Thorp's letter).

65 Excerpted from footnote 2 in Charles Lugosi, *"Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence"*, The Georgetown Journal of Law & Public Policy 4.2 (2006): 361-452.

66 *Tremblay v. Daigle*, *supra*, at paragraph 38.

67 Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.)

68 See, e.g. *Edwards v. Canada (Attorney General)* (1929), [1930] A.C. 124 (Jud. Com. of Privy Coun.); *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at paragraph 53.

69 *"Unwritten Constitutional Principles: What is Going On?"*, Remarks by Chief Justice Beverley McLachlin Supreme Court of Canada, given at the 2005 Lord Cooke Lecture Wellington, New Zealand, pp. 4-5.

70 *"Unwritten Constitutional Principles"*, *supra*, at pp. 5-6.

71 *"Unwritten Constitutional Principles"*, *supra*, at p. 20.

72 *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 (S.C.C.), at paragraph 66.

73 *Singh v. Canada (Attorney General)* [2000 CarswellNat 26 (Fed. C.A.)], 2000 CanLII 17100, at paragraph 33

74 *Taylor v. New Zealand Poultry Board*, [1994] 1 N.Z.L.R. 394at 398.

75 Consider, for example, the *United Nations Convention on the Rights of the Child*, described as "the most widely ratified human rights treaty in the world", having been ratified by 193 countries, excluding only Somalia and the United States of America. That convention, which grants rights to any human being under the age of eighteen years, does not set a lower age limit, "leaving the States Parties to determine where life begins". See: Luisa Blanchfield, *"The United Nations Convention on the Rights of the Child"*, Congressional Research Service, 1 April, 2013.

76 *R. v. Sharpe*, 1999 BCCA 416 (B.C. C.A.), paras. 74-80(Rowles, J.A., concurring).

77 For a thorough review of the treatment of the "supremacy of God" clause and an assessment of how it ought to be interpreted, see: Jonathon Penney & Robert Danay, *"The Embarrassing Preamble? Understanding the "Supremacy of God" and The Charter"*, University of British Columbia Law Review, Vol. 39, No. 2, p. 287, 2006.

78 There is also the issue about precisely how much impact the language of preambles should have on interpretation. Section 13 of the *Interpretation Act*, states: "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object." It has been suggested in the United Kingdom that preambles will generally carry little weight as an interpretive aid, but that does not appear to conform to the vein of authority in Canada, which accords the words of a preamble as much weight as they can bear (depending on their specificity, the issue and the language of the rest of the statute, for example), in keeping with the modern purposive approach to statutory interpretation: see R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 381-387.

79 *R. v. Big M Drug Mart Ltd.*, 1983 ABCA 268 (Alta. C.A.) (per Belzil, J.A.)

80 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.)

81 *O'Sullivan v. R.* (1991), [1992] 1 F.C. 522 (Fed. T.D.)

82 For example, one of the articles presented to me on Ms. Wagner's behalf was, "When Does Human Life Begin? The Scientific Evidence and Terminology Revisited", Journal of Law and Public Policy, 2014, by Dr. Maureen Condic, one of the experts advanced by Ms. Wagner. At p. 3 of the version presented to me, Dr. Condic refers to: "...the lack of consensus in our society regarding the moral and ethical status of human prenatal life. Different religions, philosophies and cultures have come to very different conclusions on the question of when human life begins and when that life has value..."

83 The original constitutional challenge had argued that s. 223 called for a remedy under s. 24 of the *Charter*, but was amended, presumably to accord with the distinction drawn between the roles of ss. 24 and 52 by the Supreme Court of Canada in *R. v. Ferguson*, [2008] 1 S.C.R. 96 (S.C.C.).

84 See, e.g. *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.), at paras. 34-35.

85 *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, [2012] 2 S.C.R. 524 (S.C.C.)

86 *Energy Probe v. Canada (Attorney General)* [1989 CarswellOnt 390 (Ont. C.A.)], 1989 CanLII 258. See also: *Finlay v. Canada (Minister of Finance)* (1986), 33 D.L.R. (4th) 321 (S.C.C.), 343-344

87 Such as viability of the foetus, which (subject to protecting the mother's life or health), was found by the United States Supreme Court in *Roe v. Wade*, *supra*, to be the point at which the state's interest in protecting the foetus could outweigh the mother's right to self-determination. It may be that another point in foetal development could validly be chosen by Parliament, as long as the point selected achieved a constitutionally valid balance.

88 Ms. Wagner comes across as a gentle, if persistent soul, but the claims advanced by her would not be limited to her. If Ms. Wagner is right that the foetus is a human being and she (or by logical extension anyone) is entitled to intervene to prevent harm to the foetus, one obvious question is what degree of force such an intervener could resort to when the harm to be avoided is "murder".

89 I do not consider that the various authorities referred to me by the Crown in the present case encompass the nature of the challenge advanced by Ms. Wagner. Even if there were such clear and direct authority presented to me, I might continue to find the proposition peculiar and disturbing, but I would be obliged to overcome such reservations in light of the rule of law.

90 See, e.g. *R. v. Edwards*, [1996] 1 S.C.R. 128 (S.C.C.), involving the seizure of controlled substances in Edwards's girlfriend's apartment.

91 It was argued on Ms. Wagner's behalf that the time and energy spent on the issue of standing as a result of the Crown's objection should result in an order of costs against the Crown on the basis of "costs thrown away". I do not agree. Without citing chapter and

verse in reasons that are already too long, awards of costs are an extreme rarity in criminal cases and the underpinnings to such an order would have to be much, much stronger than my mere disagreement with the Crown on the issue of private standing. It is a given in litigation that parties will advance some successful arguments and some unsuccessful arguments, but the sum total of inappropriate, wrongful, abusive or malicious Crown conduct in this case is zero. If I were to start awarding costs merely on the basis of untenable arguments advanced (which I have neither the right nor the inclination to do in the absence of serious wrongdoing), it is not the Crown that would have to be concerned.

92 *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.)

93 *R. v. Domm*, [1996] O.J. No. 4300 (Ont. C.A.) (Application for leave to appeal to the Supreme Court of Canada dismissed May 8, 1997 (L'Heureux-Dubé, Sopinka and Iacobucci JJ.). S.C.C. File No. 25803 [(1997), 102 O.A.C. 320 (S.C.C.)]. S.C.C. Bulletin, 1997, p. 872).

94 The rule against collateral attack can be relaxed where the needs of justice require it, such as where the defendant had no viable means of challenging the order he or she violated. That is not the case here.

95 *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.)

96 See *Taylor*, *supra*, at pp. 972-975 for McLachlin, J.'s treatment of this issue.

97 In appropriate cases, the courts may "solve" a particular problem directly, for example by excising constitutionally offensive provisions entirely (see, e.g.: *R. c. St-Onge Lamoureux*, [2012] 3 S.C.R. 187 (S.C.C.)), but where the policy choices are complicated, as in abortion or the "right to die", the preference is for society to choose its preferred options through the democratic process, subject only to future assessment of whether that new structure is itself constitutionally sound.

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CITATION: R. v. Mary Wagner, 2016 ONSC 8078
COURT FILE NO.: CR-14-40000083-00AP
DATE: 20161222

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	Megan Petrie, for Her Majesty The Queen
	)	
– and –	)	
	)	
MARY WAGNER	)	Charles Lugosi, for the Appellant
	)	
Appellant	)	
	)	
	)	**HEARD:** November 28, 29, 30, December
	)	1, 2016

REASONS FOR DECISION

DUNNET J.

Overview

[1] The appellant is an anti-abortion activist who was bound by probation orders requiring her to keep the peace and be of good behaviour and barring her from attending any abortion clinic or communicating with any person at an abortion clinic in Ontario. She appeals her convictions for mischief (interference with private property) and breach of probation.

[2] Counsel for the appellant contends that this case is a test case of great public importance and national significance engineered to overturn s. 223 of the *Criminal Code of Canada*, which excludes foetuses from the definition of "human being," on the basis that Parliament does not have the jurisdiction to define who is and who is not a human being.

[3] Section 223 reads:

> (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not
>
> (a) it has breathed;
>
> (b) it has an independent circulation; or

(c) the navel string is severed.

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

Background

[4] The facts are not substantially disputed.

[5] The appellant believes that a foetus is a human being and that abortion is murder. On August 15, 2012, the appellant gained entry to an abortion clinic in Toronto. Employees of the clinic found her in the waiting room talking to patients in an effort to dissuade them from having abortions. She offered them roses and pamphlets, including one that contained graphic images of aborted foetuses. The patients were visibly upset. When the appellant ignored repeated requests to leave the clinic, the police were called.

[6] Employees physically removed the appellant from the clinic into the hallway of the building where she set up her pamphlets and attempted to dissuade patients from entering the clinic and from committing "murder."

[7] When the police arrived, the appellant refused to leave and had to be escorted out of the building. The police arrested her after confirming the conditions of her probation orders.

[8] The appellant's attendance at the clinic had the effect of disrupting operations. Distressed patients required further time to complete their procedures. Some of the patients were as young as 14. It was agreed, for the purpose of the trial, that each woman who attended the clinic to have an abortion and who had contact with the appellant proceeded with her abortion.

[9] The appellant's account of what occurred that day was largely consistent with the accounts of the Crown witnesses. She testified that she intended to disrupt operations at the clinic and to speak to women who were there to have an abortion. She believed that her actions were peaceful and non-violent.

[10] She testified that human life takes precedence over court orders to keep away from private property. She said that in order to protect unborn human beings, she had no option other than to break the law.

[11] She testified that regardless of the outcome of this matter, she would likely repeat her actions and that she was prepared to pay the price again.

Decision of the Trial Judge and Summary of this Appeal

[12] The appellant did not deny having committed the offences, but sought to defend her actions on the basis that she was acting in defence of others under s. 37 of the *Criminal Code*, a provision that was repealed in 2013. She further argued that she was acting under necessity and/or operating under a mistake of fact.

[13] During the trial, the appellant sought to have the trial judge hear evidence from two American experts to the effect that a human being exists from conception onward. She also requested production of the identities of the patients who had been at the clinic on the day in question.

[14] Following a protracted trial, the trial judge delivered detailed reasons in which he concluded:

1. The Supreme Court of Canada has consistently maintained that the status of a foetus is a legal question and that Parliament is better positioned to answer the philosophical question of whether a foetus is a human being.[1] While it is perhaps arguable that the Supreme Court has not answered the precise question of whether a foetus is a "human being," or is captured within the word "every one," or has an independent right to life under s. 7, the appellant's arguments are so hemmed in by authorities from the Supreme Court and provincial courts of appeal that they have no possibility of success.[2]

2. There is no new legal issue that would justify revisiting the question of foetal status, *per Bedford v. Canada (Attorney General)* and *Carter v. Canada (Attorney General)*.[3] Even assuming that scientific evidence could alter the legal status of a foetus, the science has not changed in the past 25 years.[4] There has been no significant change in the circumstances or evidence, the alternative grounds for revisiting a settled issue in *Bedford*.[5]

3. The rule of law, supremacy of God, and international law do not oust Parliament's jurisdiction to define "human being."[6]

4. Even assuming that a foetus is a human being under s. 37 of the *Criminal Code*, the defences of necessity and mistake of fact, these defences would not be available to the appellant.[7]

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[1] *R. v. Wagner*, 2015 ONCJ 66, at paras. 77-100.
[2] *Ibid*, at para. 126.
[3] *Ibid*, at paras. 75-76; *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 42-44; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 44.
[4] *Wagner*, at para. 108.
[5] *Ibid*, at para. 76; *Bedford*, at paras. 42-44.
[6] *Wagner*, at paras. 112-125.
[7] *Ibid*, s. 37 defence of others at paras. 34-58; necessity at paras. 59-63; mistake of fact/colour of right at paras. 145, 146.

5. The appellant's arguments on the breach of probation orders are barred by the rule against collateral attacks on court orders.[8]

[15] The appellant faults the trial judge's reasons on the following bases:

1. He erred in reaching each of the conclusions summarized above.

2. He had no jurisdiction to decline to enter into an evidentiary hearing on the issue of whether a foetus is "in fact" a "human being."

3. By declining to enter into an evidentiary hearing, he denied the appellant a fair trial.

4. There was a reasonable apprehension of bias.

5. The probationary sentence imposed by the trial judge and the probation orders by which she was bound on August 15, 2012, are all unconstitutional.

[16] This appeal largely turns on whether the trial judge had the jurisdiction to decline to enter into an evidentiary hearing and whether his decision to do so on the basis that the appellant's arguments had no possibility of success was correct. The answer to these questions is largely dispositive of the fair trial and bias issues.

[17] My reasons proceed as follows. I first examine whether the trial judge erred in his conclusion with respect to the viability of the appellant's constitutional argument. I then consider whether the trial judge erred in declining to enter into an evidentiary hearing on the basis that the appellant's constitutional argument had no possibility of success, and his conclusion that the proffered expert evidence had no capability of shifting the debate. Next, I examine whether that decision deprived the appellant of a fair trial, and whether there was a reasonable apprehension of bias. I then consider whether the defences raised by the appellant – the s. 37 defence of others, the common law defence of others, the defence of necessity and the defence of mistake of fact – would have been available to the appellant even if one assumed that a foetus was a human being. Finally, I consider the constitutionality of the probation orders.

The Constitutional Question

[18] Although the availability of the s. 37 defence is dealt with later in these reasons, I will briefly explain the appellant's constitutional argument in order to provide context for the trial judge's decision to decline to enter into an evidentiary hearing. The appellant concedes that the

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[8] *Ibid*, at paras. 137-144.

Supreme Court of Canada has already determined that a foetus is not a "person." The appellant asserts that she relied on s. 37 rather than the new s. 34, which replaced s. 37, because s. 37 uses the words "any one" whereas s. 34 uses the word "person." At the time of these offences, s. 37 read,

> Everyone is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

[19] It is the appellant's position that the words "any one" encompass human beings, and a foetus would fall under this category but for s. 223 of the *Criminal Code*, which states that a child becomes a human being when it has completely proceeded from the body of its mother in a living state. If s. 223 is unconstitutional, then, in the appellant's submission, a foetus falls within the meaning of "any one" and the appellant was protected by s. 37 when she attended the abortion clinic.

[20] The appellant's position is that the trial judge erred in law in finding s. 223 to be constitutional because abortion is culpable homicide at common law, and, if a foetus is a human being, then s. 223 is contrary to ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*, contrary to international human rights law and inconsistent with the rule of law. In the appellant's submission, an evidentiary hearing regarding whether a foetus is a human being was therefore required to answer the constitutional question.[9]

The Trial Judge's Reasons

[21] In his reasons, the trial judge noted that the *Charter* guarantees certain rights. Some rights are limited to "every citizen of Canada" and many rights are guaranteed to "everyone," including the s. 7 right to "life, liberty and security of the person." He went to say that the obvious question is whether or not a foetus falls within the meaning of "everyone" in the *Charter*.[10]

[22] The trial judge then reviewed the history of abortion-rights and foetal-rights jurisprudence in Canada.[11] In *Borowski v. Canada*, the Saskatchewan Court of Appeal concluded that the extension of legal rights to foetuses was the prerogative of Parliament, not the courts.[12] Furthermore, "everyone" could not apply to foetuses because the term was used in

[9] This evidentiary hearing was also required, the appellant's submission, to address whether the defence of necessity was available to the appellant.
[10] *Wagner*, at para. 78.
[11] *Ibid*, at paras. 77-100.
[12] (1987), 59 C.R. (3d) 223, at para. 7.

other provisions in the *Charter* that could never apply to a foetus.[13] This conclusion was consistent with historical treatment of abortions in Canadian, United Kingdom and United States jurisprudence.[14] Thus, the Saskatchewan Court of Appeal in *Borowski* concluded that ss. 7 and 15 did not extend to foetuses.

[23] Although the decision was appealed to the Supreme Court, the appeal was declared moot since it challenged the same provision found to be unconstitutional in *R. v. Morgentaler*.[15]

[24] The trial judge then considered the Supreme Court's decision in *Tremblay c. Daigle*.[16] Because the case did not involve state action, the Supreme Court did not address foetal rights under the *Charter*. However, the Court did consider the status of a foetus under s. 1 of the Quebec *Charter of Human Rights and Freedoms*, which grants the right to life to every "human being" and s. 2 of that instrument, which provides that "every human being whose life is in peril has the right to assistance."[17]

[25] The trial judge noted that the Supreme Court in *Tremblay* observed that the issue in the case was the legal question of whether the Quebec legislature had accorded the foetus personhood, and that metaphysical or scientific arguments were not determinative; that the question could not be determined on a plain linguistic analysis; and that if the drafters of the Quebec *Charter* had intended to create foetal rights, they would likely have done so explicitly.[18]

[26] The trial judge also considered *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, in which the Supreme Court considered whether a superior court judge had authority to order a pregnant woman who was sniffing glue into custody.[19] The trial judge considered certain comments made by McLachlin J., as she then was, who observed that the common law does not recognize a foetus as a person, that it is open to Parliament to legislate rights for foetuses, and that the issue of a foetus's status in tort law is "not one of biological status, nor indeed spiritual status, but of legal status."[20]

[27] Finally, the trial judge cited *R. v. Demers*, in which the British Columbia Court of Appeal concluded that a foetus is not included in the word "everyone" in s. 7 of the *Charter*.[21]

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[13] *Ibid*, at para. 63.
[14] *Ibid*, at paras. 44-56.
[15] [1988] 1 S.C.R. 30.
[16] [1989] 2 S.C.R. 530; *Wagner*, at para. 90.
[17] CQLR c. C-12.
[18] *Wagner*, at paras. 90-94.
[19] [1997] 3 S.C.R. 925.
[20] *Wagner*, at paras. 11, 12.
[21] 2003 BCCA 28, 102 C.R.R. (2d) 367.

[28] Based on these authorities, the trial judge concluded that any contention by the appellant that the *Charter* protects foetal rights "is so hemmed in by authority from the Supreme Court of Canada and various provincial courts of appeal and various courts around the world that, without a dramatic turnabout on the part of the Supreme Court of Canada, she could not possibly prevail."[22]

[29] The trial judge agreed with the appellant that the rule of law was an important unwritten constitutional principle, but noted that it was equally important for judges not to use this principle to undermine the principle of democratic government. He also observed that s. 7 replicates many unwritten constitutional principles. Ultimately, although the trial judge acknowledged that the rule of law is part of Canada's "constitutional DNA," he disagreed with the appellant that the conclusion that abortion is murder was supported by the rule of law.[23]

[30] The reasons of the trial judge state:

> [120] Where I disagree with Ms. Wagner is that I do not think it can fairly be said that the "rule of law" dictates the conclusion she so fervently advances. In the context of the present debate, I cannot see anything that the idea of the rule of law adds to the discussion. The core question is whether or not the foetus has the absolute status as a human being and enforceable rights that go along with it that Ms. Wagner asserts it has. The answer to that question lies in the process I have gone through under the *Charter*, which effectively mimics the language of Chief Justice McLachlin's speech, *supra*, that:
>
> [w]here, having regard to convention, written provisions and internationally affirmed values, it is clear that a nation and its people adhere to a particular fundamental principle or norm, then it is the court's duty to recognize it.
>
> [121] The simple reality is that none of those pre-conditions has been satisfied by Ms. Wagner. The principle she advocates, effectively that all abortion is murder, a crime against humanity and a form of genocide, is undoubtedly sincerely and deeply held, but that contention lacks affirmation in our history or in universal or international values. Acceding to her requested interpretation does not require the judicial courage she says it requires; it requires instead a dreadful and odious judicial unilateralism that would

[22] *Wagner*, at para. 126.
[23] *Ibid*, at paras. 117-119.

> itself be anathema to the rule of law on which Ms. Wagner calls in aid.[24]

[31] The trial judge specifically referred to the *United Nations Convention on the Rights of the Child* and stated that it has been described as "the most widely ratified human rights treaty in the world."[25] He correctly pointed out that the convention grants rights to any human being under the age of 18 years and does not set a lower limit, "leaving the States Parties to determine where life begins."[26]

[32] The trial judge also rejected the appellant's argument that the Fifth Commandment's prohibition on murder should be taken into account by reference to the supremacy of God in the preamble to the *Charter*. In rejecting this assertion, the trial judge reviewed the jurisprudence addressing the *Charter*'s preamble and indicated that the effect of the preamble on *Charter* jurisprudence was limited. The trial judge noted, moreover, the interpretive difficulties associated with the words "supremacy of God":

> Obvious questions arise, such as "whose God?" Ms. Wagner refers to a Judeo-Christian commandment, which is itself silent on the issue of when human life begins, but even accepting her interpretation of it, Canada is immeasurably more complex than that. Different organized religions adopt different views with respect to the status of the foetus at different times in its growth. Within a given organized religion, whose interpretation governs? What of those who believe in God, but who do not ascribe to any organized religion? What of those who do not believe in God, given that, as much as the preamble refers to God's supremacy, s. 2 of the *Charter*, labeled "Fundamental Freedoms," lists freedom of conscience, religion, thought, belief, opinion and expression as protected values?[27]

[33] The trial judge ultimately concluded that the appellant's constitutional argument with respect to the legal status of a foetus was incapable of success. He acknowledged that it may fairly be argued that the Supreme Court had not ruled on the precise question of whether a foetus is a "human being," captured within the meaning of "everyone" in s. 7 of the *Charter*. In the

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[24] *Wagner*, at paras. 120, 121; "*Unwritten Constitutional Principles: What is Going On?*", Remarks by Chief Justice Beverley McLachlin Supreme Court of Canada, given at the 2005 Lord Cooke Lecture Wellington, New Zealand, pp. 4-5.
[25] *Wagner*, at fn 75.
[26] Luisa Blanchfield, "*The United Nations Convention on the Rights of the Child*," Congressional Research Service, 1 April 2013.
[27] *Wagner*, at paras. 122-125.

trial judge's view, however, the appellate authorities precluded any possibility of success on this point. In particular, the trial judge considered that if the Supreme Court were of the view that a foetus is a human being, then it cannot possibly have recognized the right of women to terminate pregnancies in *Morgentaler*.[28]

Positions of the Parties

[34] The appellant argues that both the Crown and the trial judge misapprehended the central issue in this case and derailed the appellant's defence by focussing on personhood instead of the issue of who is a human being. She argues that the former describes a legal construct and the latter, a natural state in accord with science and biological reality, and that only the latter was raised by the appellant and is relevant to this case.

[35] Citing *R. v. Howe*,[29] the appellant submits that the overriding objectives of the criminal law are to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility. The appellant claims that Parliament has failed in its duty to enact laws to protect innocent human lives and aids and abets abortion by not repealing s. 223 of the *Criminal Code*.

[36] The appellant also argues that abortion is a crime against humanity and an affront to the dignity and equal worth of every human being. Abortion offends s. 15 because it is prejudicial against foetuses, an insular minority. Furthermore, the *Charter's* preamble, which affirms the supremacy of God, requires the court to consider both positive and natural law. She disputes Parliament's authority to decide who is and who is not a human being.

[37] The respondent submits that the appellant raises the same arguments that she raised before the trial judge. It is submitted that the common law does not recognize the foetus as a legal person, as concluded by McLachlin J. in *Winnipeg* when she held that neither the common law nor the civil law of Quebec recognizes the unborn child as a legal person possessing rights.[30] The respondent asserts that although at one point abortion may have been illegal after "quickening" (after a woman can feel movement in her womb), even this is disputed, as concluded by the United States Supreme Court in *Roe v. Wade*.[31]

Analysis

[38] The trial judge did not err in his analysis of the constitutional question. The case law from the Supreme Court and provincial appellate courts reviewed by the trial judge leaves no

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[28] *Ibid*, at para. 126.
[29] [1987] A.C. 417, at pp. 430, 432.
[30] *Winnipeg*, at para. 15.
[31] (1973) 410 U.S. 113.

room for a determination that an unborn child has the right to life under s. 7 or equality rights under s. 15 of the *Charter*.

[39] I reject the appellant's argument that the status of a foetus was a new legal issue in this case. Courts of law determine matters of law. The pre-*Charter* case of *Dehler v. Ottawa Civic Hospital*[32] dealt with a similar argument and supports the trial judge's decision:

> The question of when human life begins is one which has perplexed the sages down the corridors of time. In my respectful view, even if the theological, philosophical, medical and jurisprudential issues involved in it could be answered in a courtroom, the answer would be beside the point insofar as this lawsuit is concerned. Accepting as fact the conclusion the plaintiff seeks to establish by testimony at trial, that is, that a foetus is a human being from conception, the legal result obtained remains the same. The foetus is not recognized in law as a person in the full legal sense. The plaintiff has cited no case that holds a foetus is within the concept of a legal person entitled to the rights asserted in this action. The cases here and elsewhere demonstrate that the law has selected birth as the point at which the foetus becomes a person with full and independent rights.

[40] The respondent claims that the only point of the finding sought by the appellant (that a foetus is a human being) is to vest the foetus with legal rights in order to set up a competition of rights and to challenge the legality of abortion. During submissions at trial, appellant's counsel stated:

> …if you ever get to the point where there's a finding of fact that a foetus is a human being, then there's the subsequent legal connection as to whether a human being is also a person and then there's the subsequent competing of rights under the Constitution and then which right is paramount – the right to life versus the right to personal liberty and/or security of the person? And it seems to me that in such a context, the right to life would trump. In other words, somebody's right to kill stops at the moment there's somebody's right to life.

[41] I agree with the respondent's position.

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[32] (1979), 25 O.R. (2d) 748 (S.C.), at para. 30 , aff'd on appeal for the same reasons as the trial judge, (1980), 29 O.R. (2d) 677.

[42] The appellant argues that if Parliament is not bound by scientific evidence defining "human being," there is ultimately no constitutional limit to what Parliament will do when it comes to matters of life and death and that the door is opened to the government excluding, in addition to foetuses, the elderly, the sick and the disabled.

[43] In this regard, Major J.'s comments in *British Columbia v. Imperial Tobacco Canada Ltd.*[33] are noteworthy:

> [62] This debate underlies Strayer J.A.'s apt observation in *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.) at para. 33, that "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be".
>
> [66] … the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court – most notably democracy and constitutionalism – very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box (citations omitted).
>
> [67] The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text.

[44] The appellant's arguments fail to recognize that we live in a constitutional democracy and that we are protected against arbitrary legislation by the democratic process and our courts' ability to review legislation for constitutionality.

The Evidentiary Hearing

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[33] 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 62, 66, 67.

The Trial Judge's Reasons

[45] As it was the appellant's wish to call expert evidence in support of her argument about the status of the foetus and its right to protection under the *Charter* notwithstanding the jurisdiction discussed above, the trial judge asked the parties to address the issue of whether or not an evidentiary hearing was warranted.

[46] The trial judge relied on *R. v. Kutynec*,[34] *R. v. Durette*,[35] and *R. v. Felderhof*[36] for the authority to decline to enter into an evidentiary hearing in an appropriate case. He quoted the following passages from *Felderhof*:

> [40] Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please. Until relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not years. Early in the trial or in the course of the trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable. It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. I do not see this power as a limited one resting solely on the court's power to intervene to prevent an abuse of its process. Rather, the power is founded on the court's inherent jurisdiction to control its own process.
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> …
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> [43] …. In my view, the trial judge must have the power to control the procedure in his or her court to ensure that the trial is run effectively. Sometimes, the exercise of this power may mean that the trial judge will require counsel to proceed in a different manner than counsel desired.

[47] The trial judge also referred to *R. v. Pires; R. v. Lising* where the Supreme Court stated that one mechanism for controlling the course of proceedings is the power of the trial judge to decline to embark upon an evidentiary hearing at the request of one of the parties when that party

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[34] (1992), 7 O.R. (3d) 277 (C.A.); *Wagner*, at para. 67.
[35] (1992), 9 O.R. (3d) 557 (C.A.); *Ibid*, at para. 68.
[36] (2003), 68 O.R. (3d) 481 (C.A.). *Ibid*, at para. 70.

is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.[37]

[48] He also noted that an evidentiary hearing should never be denied where to do so might cause injustice.[38]

[49] The trial judge noted that the issue of abortion rights and foetal rights is a divisive one in our society and that both pro-choice and pro-life advocates have sought resort to the courts and the *Charter* to advance their positions, resulting in a long history of jurisprudence on the status of the foetus and foetal rights.[39]

He recognized that a trial judge may have a duty to revisit the decisions of appellate courts under *Carter* and *Bedford* in two circumstances:

1. where a new legal issue is raised, or
2. where there is a change in the circumstances or the evidence that "fundamentally shifts the parameters of the debate"[40]

[50] However, he considered that it would be neither desirable nor appropriate to enter into "a full-fledged evidentiary hearing that might lead nowhere," especially if the appellant was asking that he overturn the Supreme Court "in circumstances where there has been no material intervening change in the law or the relevant science or other facts."[41]

[51] The trial judge concluded that the key cases in the "long history of jurisprudence" on the issue of foetal rights, discussed above, were "highly relevant and extremely authoritative decisions addressing the issue of foetal rights generally through the closing decades of the last century and the early years of this century" and that these decisions supported the Crown's position that a foetus does not have rights under s. 7 of the *Charter*. The issue, then, was whether the evidence to be given at the proposed evidentiary hearing could disclose a significant change in circumstances or fundamentally shift the parameters of the debate.

[52] In light of the foregoing, the trial judge sought submissions from the appellant and respondent on whether or not to enter into an evidentiary hearing. He invited the appellant to file a written outline of what she expected her expert witnesses would say. He asked that these "will states" address the question of how the science had changed materially since the Supreme Court abortion cases were decided.

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[37] 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 35; *Ibid*, at para. 71.
[38] *Ibid*, at para. 72.
[39] *Ibid*, at para. 79.
[40] *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 42.
[41] *Wagner*, at paras. 75, 76.

[53] The trial judge reasoned that, "[i]f the science is not materially different than what was understood at that time, the current state of the science, e.g. of foetal development, cannot fruitfully be the subject of relevant evidence in a lengthy *viva voce* hearing."[42] He noted that for the purpose of deciding whether to hold a *viva voce* hearing, the proposed evidence would be accepted as true.[43]

[54] He held that it lies within a trial judge's power to decline to enter into an evidentiary hearing where it reasonably appears to the judge that even assuming all facts are found in favour of the party proposing the inquiry, the inquiry could not possibly result in the relief the party seeks.[44]

[55] He rejected the appellant's argument that a judge's power to decline to hold an evidentiary hearing is restricted to scenarios where the issue is the violation of a *Charter* right (through state action) rather than where the issue is statutory interpretation or the constitutionality of legislation.[45] He also rejected the appellant's argument that declining to enter upon the proposed evidentiary hearing would, under any circumstances, infringe the appellant's right to make full answer and defence.

[56] The trial judge stated:

> Neither does the principle of full answer and defence come to Ms. Wagner's support. Every litigant enjoys that right. Not even a defendant in a criminal trial, however, enjoys the absolute right to arrogate to herself finite public resources. Ms. Wagner's arguments are not particularly novel. The foundation of each of them (i.e. the legal and constitutional status of a foetus) has been around for decades. The process adopted allows her to express what the expert evidence would have been in written form and, for the purpose of deciding whether to hold a *viva voce* hearing of the expert evidence, to have that evidence accepted as true, as far as it goes. If this is a denial of the right to full answer and defence, it is a most peculiar manifestation. Furthermore, if Ms. Wagner's argument is correct, then every criminal defendant has the right to re-litigate any issue *ad infinitum* regardless of how many courts have rejected the proposition in the past and even if nothing has changed in the underlying facts or the state of the law. No

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[42] *Ibid*, at paras. 64, 79, 101.
[43] *Ibid*, at para. 74.
[44] *Ibid*, at para. 72.
[45] *Ibid*, at para. 73.

> principle of public policy supports such a philosophy.[46] (citations omitted)

[57] In response to his request, the appellant provided the written opinions and scholarly works of her proposed experts, Dr. Maureen L. Condic of the University of Utah School of Medicine and Dr. John M. Thorp, Jr. of the University of North Carolina School of Medicine.

[58] The trial judge concluded that these materials "at best [paid] lip service" to the question of how scientific knowledge had sufficiently changed since the 1980s to justify re-visiting the Supreme Court's decisions. [47]

[59] Although he accepted that the science and technology available to a specialist in the field had changed dramatically, the trial judge found that the proffered material did not show that the science had altered in in any material fashion to establish the appellant's fundamental assertion that human life begins at conception.

[60] He pointed out that while Dr. Condic's materials might have described her view that human life begins within a second of the fusion of the egg and sperm, rather than perhaps 24 hours later, this distinction was legally trivial.[48]

[61] When he examined what the experts said in their materials, the trial judge found it "remarkably similar to the science reflected in materials from the 1980s and even earlier" – including the science described in the factums of the parties advocating for positions similar to the appellant's in *Borowski* and *Tremblay*.[49]

[62] Importantly, the trial judge noted that a fundamental requirement for all evidence in a trial is that it be material; that requirement was operative in this context as the proposed evidence needed to demonstrate how the "relevant science had changed materially" in the decades since the binding Supreme Court decisions were decided.[50]

[63] He emphasized that scientific evidence is only one consideration in legal interpretation and that it is far from determinative because the interpretation of legal status is inherently a normative process.[51]

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[46] *Ibid*, at para. 74.
[47] *Ibid*, at para. 102.
[48] *Ibid*, at para. 104.
[49] *Ibid*, at paras. 106-109.
[50] *Ibid*, at para. 105.
[51] *Ibid*, at paras. 110, 111.

[64] Ultimately, he concluded that the proposed evidence "falls far, far short of, 'fundamentally [shifting] the parameters of the debate,'" and there was no demonstration of any new legal issue.[52] The trial judge therefore declined to enter into the proposed evidentiary hearing.

Positions of the Parties

[65] The appellant now argues that in denying her the opportunity to call *viva voce* evidence from her two experts, the trial judge denied her a fair trial. She states that the proposed experts would have testified that the life of a human being begins at conception, and that abortion is a fatal assault upon an unborn child that is a human being – "the core issue" in the case. She characterizes the proposed evidence as "uncontested" scientific truth.

[66] The appellant submits that the trial judge unilaterally expanded the law in *Kutynec*. She submits that a trial judge only has the discretion to deny an evidentiary hearing on a *Charter* motion and does not have such discretion on an application to have legislation declared unconstitutional.

[67] The appellant maintains that she was entitled to develop a full evidentiary record because an application to have legislation declared unconstitutional must be based on an evidentiary foundation. Moreover, an evidentiary record was required for the appellant's non-constitutional defences. She asserts that the proposed evidence was material, relevant to the factual underpinning for the constitutional challenge and essential to the task of truth-finding.

[68] Her position is that the trial judge was not permitted to deny an evidentiary hearing simply because he did not believe that the appellant's argument had merit. Citing *Hunt v. Carey Canada Inc.*,[53] the appellant draws a parallel between the decision to deny an evidentiary hearing and the decision to strike out civil litigation pleadings that have no prospect of success, given the current state of the law. She submits that there was a chance of success here.

[69] The respondent's position is that the Supreme Court and provincial appellate jurisprudence clearly establishes that the trial judge's trial management power includes the discretion to decline to hold an evidentiary hearing that will not assist in determining the issues before the court.

Analysis: Did the trial judge err in declining to embark on a full evidentiary hearing on the issue of whether a foetus is a "human being"?

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[52] *Ibid*, at para. 76.
[53] [1990] 2 S.C.R. 959.

[70] I reject the appellant's argument that a trial judge has no jurisdiction to decline to enter into an evidentiary hearing on a *Charter* application to have legislation declared unconstitutional. A trial judge has the power to exclude proposed evidence that is irrelevant, immaterial, or otherwise inadmissible. There is no principled basis for restricting a trial judge's case-management authority in the context of a *Charter* application to have legislation declared unconstitutional.

[71] I would also note that Wilson J.'s comments in *Hunt*, regarding a motion to strike based on a proposed expansion of the law, is inapplicable in the present context. What concerned Wilson J. in that case was that tort law would lag behind societal developments if pleadings could be struck on the basis that they disclosed a tort not previously recognized by law.

[72] In this case, however, the appellant is not advancing an expansion of the common law, but rather is challenging the constitutionality of a legislative provision. *Bedford* and *Carter* provide a comprehensive framework for ensuring that constitutional law will adapt to societal changes.

[73] First, a judge will be permitted to rule that a legislative provision is unconstitutional if the judge is doing so on the basis of a legal issue that has not already been determined. Second, where there is no new legal issue, a court may revisit an issue only if there is a significant change in the circumstances or evidence. These two requirements ensure that constitutional law will adapt to societal changes and permit the hearing of new legal arguments.

[74] As summarized above, here, the legal issue raised by the appellant has been raised many times before. The courts have addressed the legal status of the foetus and have found that under the common law and the *Charter*, the foetus does not have the legal status that the appellant would have the court bestow upon it. There was no new legal issue requiring an evidentiary record.

[75] The trial judge's conclusion that the science has not changed in the past 25 years means that there has been no significant change in the circumstances or evidence which would warrant the court's assumption of jurisdiction over the status of a foetus.

[76] The trial judge was therefore justified in denying the evidentiary hearing on the basis that the appellant's arguments had no possibility of success. His reasons are entirely consistent with the continued development of constitutional law.

[77] Furthermore, the Supreme Court's decision in *R. v. Seaboyer; R. v. Gayme*,[54] cited by the appellant, does not support a right to call any evidence, regardless of relevance or materiality. The issue in *Seaboyer; Gayme* related to legislation that had the potential to exclude evidence of

[54] [1991] 2 S.C.R. 577.

"critical relevance" to the defence. In the present case, by contrast, the trial judge specifically found that the proposed evidence was not material.

[78] The appellant does not suggest any viable basis on which to challenge the trial judge's finding that the proposed evidence was not material. She does not challenge the trial judge's interpretation of the Supreme Court case law on the legal status of the foetus, including under the *Charter*, which the trial judge found to be binding on him.

[79] Significantly, she does not suggest that the trial judge misapprehended the proposed expert evidence. The appellant does not say, for example, that the proposed evidence did disclose a material change in scientific understanding that the trial judge failed to grasp. Although the appellant complains that the trial judge failed to communicate that the proposed evidence was required to show a material change in the science (as discussed further below), on this appeal she does not suggest that had she been made aware of this requirement, she could have provided evidence that would have complied with it.

[80] Indeed, the appellant's description of her proposed evidence on this appeal supports the trial judge's conclusion that, given the existing appellate case law on the issue, this evidence could not have assisted her. The appellant does not suggest that the experts would have been prepared to testify about the kind of material change in the science that could make a difference in this case. This lends further support to the trial judge's suggestion that "it appears … in light of the foregoing that no such credible medical or scientific evidence likely exists."[55]

[81] The appellant submits that it was an error for the trial judge to decline to embark on the evidentiary hearing because the expected testimony that "abortion is a fatal assault upon an unborn child that is a living human being" went to the "core question" of the case. This submission misunderstands the role of expert evidence at trial – and specifically, ignores the principle that the expert should not usurp the role of the fact finder. It also misunderstands the role of scientific evidence in the context of determining the legal status of the foetus.

[82] The appellant contends that the proposed finding of fact was necessary to either accept or deny her defences and that after failing to make the factual finding sought, the trial judge also failed to decide the constitutional challenge on its merits. For reasons set out later in these reasons, her contention is without merit.

[83] The trial judge did deny all of the appellant's defences and did decide the constitutional challenge raised by the appellant, but simply reached the opposite conclusion from that advocated by the appellant. The trial judge did this after finding that the proposed evidence was not material and, therefore, not necessary to resolving the issues in the case.

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[55] *Wagner*, at para. 110.

[84] The trial judge accepted for the sake of argument that that the proposed evidence would state that a foetus is a human being from the moment of conception and appropriately determined that the requested finding did not change the outcome in the case.

[85] In my view, the evidence provided no support for the finding sought – that the foetus has rights under s. 7 of the *Charter* or falls within the meaning of "any one" in s. 37 of the *Criminal Code*. Moreover, the evidence could not assist with material issues before the court.

Remaining Trial Fairness and Reasonable Apprehension of Bias Issues

[86] As I indicated earlier in my reasons, my conclusions on the constitutional question and the evidentiary hearing issue are largely dispositive of the fair trial and bias issues in this case. Specifically, my conclusion that the trial judge properly answered the constitutional question is dispositive of the appellant's argument that the trial judge derailed the appellant's defence by considering the question of legal personhood. I will now address the remaining fair trial and bias issues.

[87] The appellant complains that the trial judge informed counsel in an email that the appellant should provide an outline of what her experts would say "including whether or not the underlying science has changed in the past 25 years," but that the trial judge gave no reason as to why he was requesting this information.

[88] In my opinion, the trial judge in no way misled or confined counsel. He relied on cases that were referenced by counsel in oral submissions or cited in other cases that were discussed, and the appellant's counsel had ample opportunity to provide submissions on the issues. If counsel did not understand the purpose for which submissions were sought, it was incumbent on counsel to follow-up with the trial judge for clarification.

[89] The appellant argues that the trial judge's emails to counsel, asking for submissions on whether the science had changed in the past 25 years, did not disclose his intention to revisit the issue of personhood. The appellant, therefore, did not adduce evidence directed to the issue of revisiting previously decided issues *per Bedford*, which the trial judge considered in his judgment, and to which the appellant had no opportunity to respond.

[90] I do not agree that this deprived the appellant of a fair trial. The appellant's counsel argued strenuously at trial that there was a new legal issue in this case requiring an evidentiary hearing. Indeed, it was the entire basis for her "test case." Moreover, the trial judge specifically asked how the science had changed since the Supreme Court abortion cases were decided. This question effectively restated the second arm of *Bedford*, providing the appellant with sufficient opportunity to make submissions. Indeed, the appellant's experts prepared reports which specifically addressed how the science had changed in the past 25 years. For example, Dr. Condic's report states:

> Both the scientific data and the social context in which that data is interpreted have changed dramatically over the last 25

> years. Uncontested modern scientific evidence clearly demonstrates that the life of a human being begins at sperm-egg fusion, a well-studied biological event that takes less than a second to complete. Based on clear scientific criteria, from the moment of sperm-egg fusion onward, the human embryo is unambiguously a human organism, i.e. a human being.

[91] The trial judge found these reports merely paid lip service to the question of how the science has changed since the 1980s. Again, the appellant has not identified any error in the trial judge's interpretation of the expert evidence.

[92] In his email, the trial judge asked counsel to confine their submissions on the need for an evidentiary hearing to the issues raised in *Durette*. However, in his reasons, he also relied on *Kutynec* and *Felderhof,* cases he had not raised with counsel beforehand. Again, I do not find the trial judge's reliance on these cases deprived the appellant of a fair trial. The trial judge asked counsel to prepare submissions on *Durette* and its "progeny." *Durette* refers to *Kutynec* expressly, and Crown counsel referred to *Felderhof* in both her written and oral submissions, following which appellant's counsel had ample opportunity to reply.

[93] It is also submitted that the issues raised in the emails should have been raised in the presence of the appellant, per s. 650(1) of the *Criminal Code*.

[94] The communications by email were not part of the trial for the purposes of s. 650(1) of the *Criminal Code*, as they did not concern the appellant's vital interests. The trial spanned more than one year and there were discussions by email involving administrative details. The communication from the trial judge alerting counsel to a legal issue did not involve a final determination and was full recounted and addressed in open court in the appellant's presence when submissions were made on the issue.

[95] Indeed, it was the trial judge who raised s. 650 in response to an email from appellant's counsel on May 21, 2014, when he wrote: "These submissions and the Crown's response can be heard on 30 May so that Ms. Wagner's s. 650 rights are not compromised."

[96] The appellant points to three statements made by the trial judge in his reasons as giving rise to a reasonable apprehension of bias. The first statement purportedly made by the trial judge is: "Nothing in this case…could possibly result in the relief the appellant seeks."

[97] The appellant misquotes the trial judge. His reasons state:

> It goes without saying that an evidentiary hearing should never be denied where to do so might cause an injustice. However, where it reasonably appears to a trial judge that a long evidentiary inquiry (here set for five days of court time and nothing in this case including these reasons was done in the time allotted), even assuming all facts are found in favour of the applicant, cannot

> possibly result in the relief the applicant seeks, it lies within the trial judge's power to decline to enter into that evidentiary hearing.[56]

[98] The second statement on which the appellant relies is: "[T]here is no realistic basis upon which the effectively absolutist view espoused by Ms. Wagner can prevail." The sentences that follow this comment place it in context:

> That position entirely lacks balance and entirely lacks historic or legal foundation. And while it might be the view of some in the abortion debate that "extremism in the defence of virtue is no vice," the obviously conflicting interests inherent in the abortion issue mean that balance is the *sine qua non* of a constitutionally sound regime. While it may have had the purest of motivations, Ms. Wagner's invasion of the abortion clinic lacked balance and failed to respect the legitimate interests of those inside.

[99] The third passage that the appellant claims to give rise to a reasonable apprehension of bias is that the trial judge could not "rationally conceive any way" the appellant could succeed before the Supreme Court and "could not imagine" the Court even remotely allowing for the possibility that an unborn child was a human being when it decided the cases of *Morgentaler* and *Borowski*.

[100] The appellant takes these words out of context. The trial judge stated:

> It is not for me to presume to speak for the Supreme Court of Canada. It is, however, my role as a trial judge to assess whether or not to permit a full evidentiary hearing on the constitutional issues advanced by Ms. Wagner. When I consider and consider and consider again the deep and broad field of jurisprudence from the Supreme Court of Canada and various provincial courts of appeal on issues that strike me as inextricably intertwined with the merits of Ms. Wagner's argument about the legal status of the foetus under s. 7 of the *Charter*, I cannot rationally conceive of any way in which she can succeed. It may fairly be argued on her behalf that the Supreme Court of Canada has not definitively ruled on the precise question of whether a foetus is a "human being" or is captured within the word "everyone" or has an independent right to life under s. 7 of the *Charter*, but the authorities cited above

[56] *Wagner*, at para. 72.

> demonstrate that any such contention is so hemmed in by authority from the Supreme Court of Canada and various provincial courts of appeal and various courts around the world that, without a dramatic turnabout on the part of the Supreme Court of Canada, she could not possibly prevail. I cannot read the Supreme Court of Canada decision in *Morgentaler (1988)*, *supra*, as conceivably allowing room for the Supreme Court to find in favour of the absolutist foetal right to life/status as a human being advanced on Ms. Wagner's behalf. I cannot imagine that, if the Supreme Court of Canada even remotely allowed for the possibility that status as a human being inured at the moment of conception, meaning that the act of abortion would be murder, that they would have ignored that possibility in deciding *Morgentaler (1988)* and *Borowski (1989)*, *supra*.[57]

[101] None of the trial judge's written remarks excerpted by the appellant support the suggestion that the trial judge was biased.

[102] A review of the record demonstrates that the appellant received a wide berth for her arguments, a fair hearing and the utmost courtesy during the trial. Indeed, appellant's counsel, near the end of the proceedings, acknowledged the trial judge's fairness to the parties when he said, "I know that you've done your utmost to consider all the different arguments." It is the respondent's assertion that the trial judge showed great leniency with the appellant with respect to compliance with the *Criminal Rules of the Ontario Court of Justice*,[58] the filing of materials and the scheduling of proceedings. Based on my review of the record, I would agree.

[103] There is a strong presumption that judges are impartial, and the onus for demonstrating bias is a heavy one. The appellant has failed to demonstrate a reasonable apprehension of bias.

The Defences

[104] I will now address the availability of the defences raised by the appellant at trial and on appeal. This issue is also relevant to the trial judge's decision to decline to enter into an evidentiary hearing. If, even assuming a foetus is a human being, the defences were not available to the appellant, then the evidentiary hearing had no possibility of changing the outcome of the case. For the following reasons, I conclude that the trial judge did not err in finding that the s. 37 defence of others, the defence of necessity, and the defence of mistake of fact were not available to the appellant.

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[57] *Ibid*, at para. 126.
[58] S1/2012-30.

Did the trial judge indirectly decide the case under s. 34 of the *Criminal Code* as opposed to the former s. 37?

[105] On March 11, 2013, ss. 34 to 37 of the *Criminal Code* were repealed and replaced with s. 34, which reads in part:

> (1) A person is not guilty of an offence if
>
> (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
>
> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> (c) the act committed is reasonable in the circumstances.

[106] When the appellant was arraigned on April 16, 2013, the law was not yet settled with respect to the application of the new s. 34 to events pre-dating its introduction. The appellant was found guilty on June 12, 2014 with reasons for judgment released on February 12, 2015.

[107] On June 8, 2015, the Ontario Court of Appeal released its reasons on the issue of the retrospective application of the *Citizen's Arrest and Self-defence Act*, S.C. 2012, c. 9 in *R. v. Bengy*[59] finding that the new provisions applied prospectively only, and not retrospectively. On the same day, the Ontario Court of Appeal released its reasons in *R. v. Rogers*,[60] in which it adopted its reasons in *Bengy* on the issue of the application of s. 34. Leave to appeal to the Supreme Court was refused in *Rogers* on March 17, 2016.[61]

[108] The appellant contends that the trial judge erred by indirectly deciding the case under the current s. 34 of the *Criminal Code* rather than under the old s. 37, the provision in effect at the time she committed the offences. It is submitted that when the trial judge stated that the appellant was asking him to overturn the Supreme Court when the science had not changed in the past 25 years, he shifted the issue from the biological status of a foetus to the irrelevant issue of personhood.

[109] I have already determined that the trial judge correctly determined that the status of a foetus is not a new legal issue. It is also clear from the trial judge's reasons that he considered the availability of both the s. 34 and s. 37 defences.

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[59] 2015 ONCA 397, 335 O.A.C. 268, at paras. 70-71.
[60] 2015 ONCA 399, 338 O.A.C. 105, at para. 95.
[61] 2016 S.C.C.A. No. 448.

[110] The trial judge stated:

> Ms. Wagner initially appeared to rely solely on the pre-amendment [self-defence] provisions, but I expressed my view that both versions should be considered and argued, after which Ms. Wagner argued that she should have the benefit of whichever provision better served her, only to adopt the position late in argument that she was not relying on the new s. 34. Different arguments might arise depending on which provision(s) Ms. Wagner is entitled to rely on. Quite apart from the position adopted by Ms. Wagner, it is my duty to consider any potential defence that may be available and I have done so. (citations omitted)[62]

[111] The trial judge observed:

> [N]either Crown nor defence focused long on the issue, in the Crown's case presumably because it felt that however much more favourable the new s.34 might be to Ms. Wagner's position, the Crown's contention that a foetus is neither "any one," nor "another person" was unanswerable.[63]

[112] Consistent with the then-state of the law and his duty to consider available defences, regardless of whether counsel had raised them,[64] the trial judge considered the appellant's arguments in the context of both sections and found that neither section assisted the appellant. He did not decide the case indirectly under s. 34.

Section 37 (1)

[113] At the time of these offences, s. 37(1) read:

> Everyone is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

[114] For the defence under s. 37 to apply here, there must be evidence on each of the following elements:

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[62] *Wagner,* at para. 34.
[63] *Ibid*, at para. 53.
[64] *R. c. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 51.

1) The appellant must have reasonably believed that she or any one under her protection was being or was about to be assaulted;
2) The appellant used force to defend herself or any one under her protection from what she reasonably believed was an unlawful assault; and
3) The force used by the appellant was no more than necessary to prevent the assault or to stop it from continuing or being repeated.

[115] The trial judge concluded that, even assuming for the sake of argument that a foetus could count as "any one" for the purposes of s. 37 and an abortion would be an assault, that provision was not available to the appellant for two reasons: the appellant's actions did not constitute "force," as that word is used in s. 37, and the foetuses the appellant was purporting to be acting in defence of were not "under her protection," as required by s. 37.

[116] The appellant now challenges each of these findings made by the trial judge and asserts that a foetus would count as "any one." The respondent argues that the trial judge correctly interpreted the words "force" and "under his protection" and submits that a foetus would not qualify as "any one" under s. 37. Moreover, abortion is a lawful medical procedure, not an assault.

Does "any one" in s. 37 include an unborn child?

[117] For the following two reasons, I conclude that "any one," as it is used in s. 37, means the same thing as "person."

[118] First, the *Criminal Code* treats the terms "any one" and "person" as synonymous and uses them interchangeably. Moreover, the French version of s. 37 uses the words "toute personne" rather than "any one:"

> 37(1) Toute personne est fondée à employer la force pour se défendre d'une attaque, ou pour en défendre toute personne placée sous sa protection, si elle n'a recours qu'à la force nécessaire pour prévenir l'attaque ou sa répétition.

[119] De Villiers J. reached precisely this conclusion in *R. v. Manning*,[65] where he held that "any one" and "person" were synonymous and did not apply to unborn children.

[120] Second, the shared meaning rule of statutory interpretation supports the respondent's argument. The rule holds that for bilingual legislation, both the French and English versions of

[65] (1994), 31 C.R. (4th) 54 (B.C. Prov. Ct.), at paras. 14-18.

the statute must have the same meaning.[66] As Lebel J. explained in *Schreiber v. Canada (Attorney General)*:

> A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred. (citations omitted)[67]

[121] Where one meaning is clear and the other ambiguous, it is the clear meaning which must be preferred. Here, "any one" is the ambiguous version, since, at least in the appellant's argument, it may encompass a foetus. In the appellant's own submission, "personne" is not ambiguous. It applies only to legal persons. The French version of s. 37 therefore eliminates any ambiguity regarding the word "any one" in the English version of s. 37: it applies only to legal persons.

[122] The appellant argues, however, that the principle of strict construction of penal statutes requires ambiguity to be resolved in favour of the accused.[68] By this logic, the ambiguous English version of the statute should be adopted because it is favourable to the appellant.

[123] This argument overlooks the principle that courts may only resort to principles of statutory interpretation like the principle of strict construction of penal statues when there is ambiguity.[69] As I have indicated, the French version of s. 37 eliminates any ambiguity in s. 37.

Did the trial judge err in concluding that the words "under his protection" preclude the appellant's reliance on s. 37?

[124] The appellant argues that the trial judge erred in limiting "everyone," as the word is used in s. 37, to those individuals who bore some special relationship by fact or invitation to the person being protected or who were under some legal obligation to extend protection to that person. It is submitted that the words "under his protection" grant immunity from criminal liability to the Good Samaritan, such as the appellant, who uses force to rescue victims from crimes.

[125] The appellant relies on *R. v. Webers* for the proposition that the words mean "any one who requires protection which the accused may be able to provide."[70]

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[66] Ruth Sullivan, *Sullivan on the Construction of Statutes* 6th ed., (Markham: LexisNexis Canada, 2014), at para. 5.19.
[67] 2002 SCC 62, [2002] 3 S.C.R. 269, at para. 56.
[68] *R. v. Cohen* (1984), 15 C.C.C. (3d) 231 (Q.C.C.A.), at para. 21.
[69] *R. v. Daoust*, 2002 SCC 6; [2002] 1 S.C.R. 217, at para. 31.

[126] In the alternative, the appellant argues that she did in fact have a special relationship to foetuses because of her years of devotion to the cause of protecting the unborn and her belief that she had a legal duty to save their lives. The appellant finds support for her argument in the trial judge's reasons on standing where he found that "there is some resonance to the argument that there is nobody else to speak for the unborn."[71]

[127] The respondent submits that the trial judge did not err in rejecting the appellant's interpretation. Words within a statute are presumed to make sense and have meaning and if everyone may rescue any one, then the words "under his protection" would be pointless.

[128] The trial judge acknowledged that other decisions had interpreted the words "under his protection" broadly, but rejected the appellant's suggestion that the words were so broad as to allow everyone to rescue any one. Such an interpretation, the trial judge reasoned, would render the words redundant. He stated that while it may be argued that a law providing broader protection to the Good Samaritan would have been better public policy, it is not the law that Parliament adopted in s. 37.[72]

[129] The trial judge was prepared to agree that "under his protection" did not describe a closed or defined class of cases, but found that it has to mean something. He went on to state:

> Thus, in *Webers*, the fact that the person Mr. Webers intervened to protect from a blatantly unlawful and outrageous assault by eight hospital staff and police officers on a twenty-year employee of his who looked upon him as a father and whom he had escorted to the hospital when she was experiencing a breakdown, could very reasonably qualify as a person "under his protection" within the meaning of s. 37 of the *Code*. The language of O'Connor J. to the effect that, "it means anyone who requires protection which the accused may be able to provide," is clearly *obiter* and, with all due respect, hard to reconcile with the language of the section. Likewise, I do not have difficulty accepting that if a person recruits a stranger to assist him and the stranger agrees to offer that assistance, the relationship of a person under the stranger's protection has likely thereby been created.[73]

[130] I find no error in the trial judge's analysis. The words "under his protection" are capable of broad interpretation, but not so broad as to render the words redundant. In *R. v. Foley*, Durno

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[70] (1994), 95 C.C.C. (3d) 334 (Ont. Gen. Div.), at para. 49.
[71] *Wagner*, at para. 132.
[72] *Ibid*, at para. 47.
[73] *Ibid*, at para. 48.

J. held that the scope of "under his protection" has not been defined by binding authority and appears to have developed on a case by case basis.[74] While the courts in *R. v. Tracey*, and *Foley* applied *Webers* favourably, the facts of these cases are instructive.

[131] In each case, the accused had a pre-existing relationship with the person being protected. In *Webers*, the person being protected looked upon the accused as a father. In *Tracey*, the accused was protecting his girlfriend from her former boyfriend. In *Foley*, a bouncer at a bar was found to be under the protection of the accused, who was another bouncer at the bar.[75]

[132] While a pre-existing relationship with the person being protected may not be necessary to invoke s. 37, I agree with the trial judge that, on the facts of this case, the foetuses were not under the appellant's protection. The appellant would argue that she could intervene to protect a foetus from murder because she has a calling and has devoted her life to this cause. In my view, this does not give her the entitlement or legal duty under s. 37 to protect the foetus. The appellant had no relationship whatsoever with either the women at the abortion clinic or the foetuses she believed she was protecting. Accordingly, the trial judge did not err when he found that the foetuses were not under the appellant's protection within the meaning of s. 37.

Does "force" require an act of violence or constraint?

[133] The appellant submits that the trial judge erred in interpreting the word "force" as it is used in s. 37 to require an act of violence or constraint. It is submitted that the words uttered by the appellant could be construed as fighting words and verbal assault when accompanied by a graphic image of an aborted child and that s. 37 is available to the appellant on that basis.

[134] The appellant relies on the evidence of the clinic's medical director, who testified that the appellant said to her patients, "Don't kill your babies. Don't do this. Don't do that. That's for me verbal assault." She also described the appellant as "verbally very violent."

[135] The appellant contends that because the trial judge denied her motion to release the identities of and contact information for the patients at the clinic, there is no evidence about the subjective effect of her words and actions on those patients.

[136] The respondent argues that the appellant's actions did not constitute "force" within the plain meaning of s. 37. At no time did she employ physical force or coercion against patients. As described by the appellant herself, her actions were anything but violent or forceful. She testified, "If somebody has indicated that, 'I don't want to talk to you,' if they have said that, or – then I – I don't continue dialoging with them."

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[74] [2000] O.J. No. 5204 at paras. 56-62.
[75] *Ibid*.

[137] The trial judge set out 18 provisions of the *Criminal Code* and concluded that a reading of the *Criminal Code* overall indicates that the word "force" was intended to refer to an act of violence or constraint or something similar. He added that to give "force" the meaning the appellant seeks would do violence to the clear and inescapable intention of Parliament in its choice of that word.[76]

[138] Having applied the approach to statutory interpretation mandated by the Supreme Court and having considered the use of the word "force" in other parts of the *Criminal Code*, the trial judge found that while the appellant's persuasive efforts in the clinic might fit within some linguistic definitions of "force," they did not meet a criminal one. In my opinion, he did not err in law.

Is an abortion an assault?

[139] The appellant submits that abortion is an act of violence and a fatal injury to unborn children whom she had a duty to protect. Therefore, s. 37 was available to her to prevent an assault from occurring. The respondent argues that the appellant may have believed that abortion is culpable homicide, but she cannot have reasonably believed that she was protecting any one from an unlawful assault.

[140] I would also note that s. 265(1) of the *Criminal Code* defines "assault" using the word "person," not "any one." The appellant concedes that "person" does not include a foetus. In fact, this concession is central to her argument that there is a novel legal issue to be decided. It makes little sense, then, for her to argue that she reasonably believed she was saving foetuses from assault when, by her own admission a foetus is not a person and, therefore, cannot be assaulted.

[141] In any event, the trial judge assumed, for the sake of argument, that if a foetus is a human being, then whatever actions were taken by the clinic to abort the foetuses whose mothers attended the clinic, would be assaultive in nature *vis-à-vis* the foetuses, assaultive conduct being necessary to trigger the law of self-defence.[77]

[142] Given my finding that the trial judge did not err in his interpretation of "force" and "under his protection," the issue of whether an abortion is an assault would not affect the availability of s. 37.

Can the appellant rely on the common law defence of others?

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[76] *Wagner*, at paras. 43, 46.
[77] *Ibid*, at para. 6.

[143] The appellant submits that her acts were justified under the common law defence of others. She relies on *Handcock v. Baker*[78] and *R. v. Duffy*, where the English Court of Appeal held:

> Quite apart from any special relations between the person attacked and his rescuer, there is a general liberty even as between strangers to prevent a felony.[79]

[144] The respondent argues that the cases cited by the appellant concern a right to prevent the commission of a felony, not a right to protect another person.

[145] The trial judge rejected the appellant's submission that she was entitled to rely on a broad common law defence of others. He acknowledged that some cases refer to the preservation of common law defences, but noted that s. 8(3) of the *Criminal Code* preserves only those defences, which are not inconsistent with the *Criminal Code*.[80]

[146] In my view, the trial judge was correct. The restrictive language of s. 37, which permits the defence of others only in the event of an assault on someone under the accused's protection, is inconsistent with a broad based common law defence of others.

The Defence of Necessity

[147] The trial judge found that the defence of necessity was not available to the appellant. He reviewed the majority reasons Dickson J., as he then was, in *Perka*[81] and noted that the defence is available in circumstances where an emergency excuses non-compliance with the law and "where the actor's pursuit of some greater good justifies the otherwise unlawful conduct." He emphasized that the latter was not available to persons who violate the law because they believe the law conflicts with a higher social value.[82]

[148] Of particular significance to the trial judge was the existence of reasonable legal alternatives available to the appellant. She could, for example, engage in advocacy that complied with the terms of her probation or she could pursue a remedy in civil court. "The simple reality," the trial judge concluded, "is that Ms. Wagner does not agree with the law and

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[78] [1800] 129 Eng. R. 1270.
[79] [1966] 1 All E.R. 62 at p. 63.
[80] *Wagner*, at paras. 49, 50.
[81] *Perka v. R.*, [1984] 2 S.C.R. 232.
[82] *Wagner,* at paras. 61, 62.

chose to disobey it because she felt bound to do so by some higher calling. This is a formulation of the law of necessity that the Supreme Court of Canada rejected outright in *Perka*."[83]

[149] The appellant submits that the trial judge erred in relying solely on the existence of a reasonable legal alternative and failed to consider four other conclusions reached by Dickson J. in *Perka*:

> (6) negligence or involvement in criminal or immoral activity does not disentitle the actor to the exercise of necessity;
>
> (7) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle;
>
> (9) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril;
>
> (10) where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.[84]

[150] In any event, the appellant urges this court not to follow Dickson J.'s judgment in *Perka*. Instead, this court should follow Wilson J.'s concurring reasons in *Perka*, which the appellant argues are consistent with the history and judgments of the common law. The appellant submits that these authorities draw a distinction between acts motivated by unselfishness to save the human lives of others and acts motivated by selfishness to preserve one's own life.

[151] Addressing the argument that the trial judge erred in his application of *Perka*, the appellant contends that a foetus in a waiting room is in imminent danger and there is no legal alternative available for the foetus or the rescuer. She submits that contrary to the suggestion of the trial judge, protesting would not save the foetus. The harm inflicted is proportionate to the harm to be avoided, the death of a human being. She also submits that the trial judge erred in failing to consider the defence of necessity from the perspective of the victim.

[152] I do not agree. The trial judge stated that he had reviewed the ten considerations listed in *Perka* that should be kept in mind when assessing the availability of the necessity defence. It was the consideration of a reasonable legal alternative that struck him as particularly cogent in this case.[85]

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[83] *Ibid*, at para. 63.
[84] *Perka*, at para. 62.
[85] *Wagner*, at para. 63.

[153] In *Perka*, Dickson J. emphasized that the requirement that there be no reasonable legal alternative will almost certainly be the most important one and goes to the heart of the defence of necessity.[86]

[154] Moreover, the trial judge did not err in concluding that there was no urgency and that there was a reasonable legal alternative. August 15, 2012 was just like any other day. Ms. Wagner did not find herself by happenstance at the abortion clinic. Her attendance at the clinic was pre-planned. She had clear foreseeability of the circumstances by which she now seeks to excuse her actions. She could have challenged her probation order or protested against abortion in some other way. Instead, she deliberately contravened her probation order because she disagreed with it. The defence of necessity is not available in these circumstances. This conclusion is consistent with a number of cases in which the defence of necessity was rejected in circumstances very similar to this case. [87]

[155] Finally, there is no merit to appellant's argument that the trial judge erred in failing to consider the defence of necessity from the perspective of the victim. Nothing in *Perka* or *R. v. Latimer*[88] supports such a requirement.

[156] The appellant urges this court to follow Wilson J.'s concurring reasons in *Perka* instead of Dickson J.'s. I reject this submission for two reasons.

[157] First, the defence of necessity would not be available to the appellant even under Wilson J.'s reasons in *Perka*. Wilson J. would have expanded the defence of necessity to circumstances where an accused violates a law while fulfilling a duty reflected in the legal system. Importantly, she would not have expanded the defence for ethical duties. [89]

[158] The appellant contends that there is a legal duty to save human life. I find no support for that proposition in the cases cited by the appellant. The historical tort cases on which the appellant relies stand for the proposition that a rescuer who is injured in the course of a rescue may sue a defendant whose negligent conduct caused the need for a rescue.[90] The courts' comments in these cases on the natural instinct of humans to rescue others speak to the element of foreseeability in a negligence claim. In no way do they stand for the proposition that there is a legal duty to save human lives.

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[86] *Perka*, at paras. 68, 71.

[87] *Everywoman's Health Centre (1988) v. Bridges* (1990), 62 C.C.C. (3d) 455 (B.C.C.A.); *R. v. L.(N.)*, [1990] O.J. No. 1767 (Prov. Ct.); *R. v. Toth* (1991), 63 C.C.C. (3d) 273 (B.C.C.A.); *R. v. Watson* (1996), 106 C.C.C. (3d) 445 (B.C.C.A.); *Elizabeth Bagshaw Society v. Breton*, [1997] B.C.J. No. 2414 (B.C.S.C.).

[88] 2001 SCC 1, [2001] 1 S.C.R. 3.

[89] *Perka*, at para. 102.

[90] *Southwark L.B.C. v Williams*, [1971] 2 W.L.R. 467, at p. 472; *Wagner v. International Railway* (1921), 133 N.E. 437 (U.S. N.Y).

[159] Second, assuming that I had the power to overturn binding jurisprudence from the Supreme Court, I would not do so in these circumstances. The appellant's criticism of Dickson J.'s reasons in *Perka* focuses on a single comment that a defence of necessity based on justification could become a mask for anarchy. The appellant argues that this concern was only present in common law cases dealing with selfish acts of self-help (such as cannibalism),[91] and not in unselfish acts to rescue others (such as pulling down a house on fire to prevent the fire's spreading).[92] Even if there is merit to this distinction, the substance of the passage suggests that Dickson J.'s concern was that a defence of justification would "invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions."[93] The concern appears well-founded on the facts of this case. The trial judge was correct to rely on Dickson J.'s reason in *Perka*.

[160] The appellant's arguments do not persuade this court that the trial judge erred in concluding that the defence of necessity was not available to her.

Mistake of Fact

[161] The appellant believes that a foetus is a human being, a state of facts which, if true, would justify or excuse her breach of probation and mischief charges. She argues that if a foetus is not a human being, then it must be an animal by default. Animals are protected from wanton and needless killing under s. 445(1)(a) of the *Criminal Code*.

[162] For the common law mistake of fact defence to apply, the appellant must honestly believe in circumstances which, if they were true, would render her conduct innocent.[94] The defence does not operate to excuse criminal conduct based on a disagreement with the current state of the law. As stated in s. 19 of the *Criminal Code*, "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence."

[163] The trial judge interpreted the appellant's attempts to argue a mistake of fact defence as "a palpable effort to sneak the *viva voce* evidence in through the window after the doors had been closed." He stated that the very notion that the appellant was operating under a mistake of fact struck him as entirely disingenuous. She knew that the legal status of a foetus is a question of law. She just fervently disagreed with it. And she knew exactly what was going on at the clinic.[95]

[164] I see no error in the trial judge's analysis.

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[91] *R. v. Dudley and Stephens*, (1884) 14 Q.B.D. 273.
[92] *Mouse's Case* (1609), 12 Co. Rep. 63.
[93] *Perka*, at para. 32.
[94] *R. v. Pappajohn*, [1980] 2 S.C.R. 120.
[95] *Wagner*, at para. 146.

[165] As for the animal cruelty argument, it seems to me that the appellant once again falls into the error of mistaking a legal category for a "natural" or "factual" category. Whether a foetus falls under the category of "animals," as the term is used in the *Criminal Code*, is a question of law. A finding that a foetus does not fall under the legal category of a person does not necessitate the conclusion that a foetus must fall under the legal category of animals.

[166] As the trial judge noted, "Experts in animal husbandry would laugh you off the farm if you said that a sheep was "cattle", yet that is precisely what Parliament says in the *Criminal Code*. That is because legal characterization, legal status and legal limitations are inherently normative processes."[96] I have little difficulty in finding the animal cruelty provisions of the *Criminal Code* do not apply in this case.

The Probation Orders

[167] The appellant argues that her probation orders are unconstitutional because they violate her freedoms of conscience, speech, expression and liberty to save human life and offend ss. 2 and 7 of the *Charter*.

[168] The trial judge found that the appellant's arguments regarding the constitutionality of her probation orders were barred by the rule against collateral attacks on court orders. He held that the appropriate forum for such arguments is before the trial judge and, thereafter, before an appellate court if her arguments did not find favour at trial.[97]

[169] The trial judge referred to *Canada (Human Rights Commission) v. Taylor*, where McLachlin J., as she then was, speaking for the minority, said:

> If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.[98]

[170] In response to submissions made by counsel for the appellant, the trial judge acknowledged that a breach of probation might be justified under the defence of necessity if, for example, it involved saving someone from death in a burning building or rescuing inmates from a concentration camp in Nazi Germany. But the trial judge did not view the appellant's attendance at the clinic in a similar light.

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[96] *Ibid*, at para. 111.
[97] *Wagner*, at para. 140.
[98] *Ibid*, at para. 141; [1990] 3 S.C.R. 892, at para. 184.

[171] He found that the appellant showed a "wilful disregard of a law she was fully aware of, which she disagreed with and which she chose to flout, disregarding the interests of the clinic's patients, their companions and the clinic's operators, which the highest court in the land has long deemed worthy of protection."[99]

[172] The trial judge did not err in his analysis of the rule against collateral attacks on court orders.

[173] Section 732.1(3)(h) of the *Criminal Code* specifically authorizes a sentencing judge to impose reasonable conditions on an offender to protect society and to facilitate reintegration into the community.

[174] In my view, the condition prohibiting the appellant from being within 100 meters of any abortion clinic was reasonable, given her actions at the clinic, her wilful and flagrant breaches of past orders and her admission that she will not be deterred from breaking the law.

[175] Accordingly, there is no merit to this ground of appeal.

Disposition

[176] For these reasons, the appeal is dismissed.

Dunnet J.

Released: December 22, 2016

[99] *Ibid*, at para. 143.

CITATION: R. v. Mary Wagner, 2016 ONSC 8078
COURT FILE NO.: CR-14-40000083-00AP
DATE: 20161222

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

Respondent

– and –

MARY WAGNER

Appellant

REASONS FOR DECISION

Dunnet J.

Released: December 22, 2016

COURT OF APPEAL FOR ONTARIO

DATE: 20200914
DOCKET: M51709

Tulloch, Paciocco and Harvison Young JJ.A.

BETWEEN

Her Majesty the Queen

Respondent/Responding Party

and

Mary Wagner

Applicant/Moving Party

Charles I.M. Lugosi, for the moving party

Susan L. Reid, for the responding party

Heard: in writing

ENDORSEMENT

[1] Leave to appeal is denied.

“M. Tulloch J.A.”
“David M. Paciocco J.A.”
“A. Harvison Young J.A.”

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The 1988 *Morgentaler* decision left undecided whether or not a *foetus* was a "human being" and included within the meaning of s. 7 of the *Charter*.[1] "Human being" as currently defined by s. 223(1) of the *Criminal Code* excludes any human being who has not yet been born alive: "A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother…"[2]

2. The definition of "human being" has significant legal and practical ramifications for Canadians. For example, in 2012, the now repealed s. 37(1) of the *Criminal Code* provided: "Everyone is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it."

3. The Applicant, Mary Wagner, believed s. 37(1) provided legal justification for acts to save the lives of unborn children. Fundamentally, her Trial was about whether the words "any one" in s. 37(1) include all natural human beings (i.e. those born and unborn) or *only* those human beings that were within the definition of "human being" set out in s. 223(1).

4. This test case raises fundamental questions of public importance, including:

- whether, at law, the words "any one", "every individual" or "everyone" are appropriately restricted by s. 223(1) of the *Criminal Code*;
- whether s. 223(1) of the *Criminal Code* is itself constitutionally compliant; and
- whether an accused person should be denied the right to furnish evidence in support of a defence under the *Criminal Code* based on the implications of that defence for abortion in Canada.

5. By granting Leave, this Honourable Court can examine the scope of Parliament's authority to determine who should fit within the legal definition of "human being" and determine

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[1] *R. v. Morgentaler*, 1988 CarswellOnt 45 SCC at para. 189.
[2] Section 223, *Criminal Code*, R.S.C., 1985 c. C-46.

whether the words "any one" (in the *Criminal Code* and legislation across Canada) or "everyone" and "every individual" (in the *Charter* context) includes a *foetus*.

B. Statement of Facts

Factual Summary

6. The Applicant, Mary Wagner, is a pro-life activist who was bound by probation orders requiring her to keep the peace and be of good behaviour and barring her from attending any abortion clinic or communicating with any person at an abortion clinic in Ontario.

7. On the morning of August 15, 2012, the Applicant was arrested for the crimes of breach of probation and mischief after she

- entered the secure reception area of a private abortion clinic in Toronto; and
- used the force of words and the gift of roses to persuade pregnant mothers from proceeding with scheduled abortions.

8. At Trial, the Applicant conceded her behaviour interfered with the business operations of the abortion clinic.[3] That was the point.

9. The Applicant relies on s. 37(1) of the *Criminal Code*; she testified that her intention was to save the lives of unborn human beings (included within the meaning of "any one"), who she believed were under her protection, by using the force of words and moral persuasion to prevent the imminent lethal assault inherent in an abortion. Twelve pregnant women went to the abortion clinic that morning, and when they left, they were no longer pregnant, after having an abortion.[4]

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[3] Proceedings at Trial, December 12, 2013, Concession at p. 65, lines 4-32; p. 66, lines 1-11 [Tab 4A].

[4] Proceedings at Trial, December 12, 2013, p. 28, lines 1-14; p. 29, lines 14-22; p. 30, lines 1-10; p. 31, lines 1-8; p. 33, lines 22-32; p. 34, lines 1-17; p. 37, lines 1-32; p. 38, lines 1-33; p. 52, lines 4-32; p. 53, lines 1-24; p. 70, lines 3-9; p. 72, lines 13-31; p. 73, lines 1-29; p. 78, lines 8-

10. The abortion provider, Dr. Markovic, testified the words she heard the Applicant say to her patients constituted force equivalent to physical violence: "Don't kill your babies, don't do this, don't do that. That's for me verbal assault."[5]

Proceedings at Trial: Ontario Court of Justice

11. The Crown refused to make an admission that the unborn children at the clinic were "human beings", but conceded under questioning by the Trial Judge, that if the Court found that an unborn child was a human being, and that its life was terminated by abortion, then abortion was an assault, within the meaning of s. 37(1).

12. To extend the scope of s. 37(1) to the Applicant's protection of unborn human beings, she challenged the constitutionality of s. 223 of the *Criminal Code*. To succeed under s. 52(1) of the *Constitution Act, 1982*, the Applicant's evidentiary burden required her to establish:

- that unborn children are in fact, truth, science and medicine, human beings,
- that s. 223 violates s. 7 and 15 *Charter* rights, and
- that the definition of "human being" in s. 223(1) cannot be saved by s. 1 of the *Charter*.

13. The Applicant engaged two prominent international experts, Dr. Condic in embryology and Dr. Thorp in medicine. Both prepared written opinions of their evidence, which unequivocally concluded that unborn children were biologically individual human beings from the time of their conception. Their evidence was marked as exhibits for identification only.[6] No expert evidence was filed by the Crown to contradict the opinions of these experts. In response to

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31; p. 79, lines 1-30; p. 80, lines 1-11 [Tab 4B]; Proceedings at Trial, March 3, 2015, p. 5, lines 18-24; p. 7, lines 2-14; and p. 11, lines 6-20 [Tab 4C].

[5] Proceedings at Trial, December 6, 2013, p. 149, lines 3-34 [Tab 4D].

[6] Letter of Dr. John Thorp Jr. dated February 26, 2014 [Tab 4E]; Statement of Maureen Condic, Ph. D. dated February 14, 2015 [Tab 4F]; *R. v. Wagner*, 2015 ONCJ 1862, at para. 101.

the submissions of the Applicant, the Crown denied that a foetus was a human being or a person.[7]

14. The Trial Judge

- refused to permit the Applicant's experts to give evidence;
- refused to admit uncontested written expert evidence that unborn children (*foetuses*) were human beings; and
- refused to make a finding of fact that an abortion kills a human being.

15. Although the Applicant was granted personal standing by the Trial Judge to raise her constitutional challenge to s. 223, she was forced to do so without the benefit of an evidentiary foundation. The Trial Judge ruled that hearing evidence would be a waste of the Court's time, reasoning "…although it is of no practical benefit to Ms. Wagner in the circumstances, I would be inclined to agree with her that, *leaving aside for present purposes the patent weakness of her constitutional argument*, in the circumstances of this case she has personal standing to challenge s. 223 of the *Criminal Code*".[8]

16. The Trial Judge ruled that the Court had the power to deny the evidentiary hearing needed to make a constitutional challenge to the validity of legislation.[9] It was unprecedented for the Trial Judge to expand the authority to deny evidence needed to establish the factual foundation to assist in resolving the Applicant's constitutional law challenge in the face of

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[7] Proceedings at Trial, February 4, 2014, p. 60, lines 1-33; p. 61, lines 1-8; p. 62, lines 1-8; p. 64, lines 13-16 [Tab 4G]; May 13, 2014, p. 9, lines 13-33; p. 10, lines 1-33; p. 11, lines 1-33; p. 12, lines 1-16; p. 22, lines 1-24; p. 76, lines 11-33; p. 77, lines 1-5, 19-33; p. 78, lines 1-8; p. 82, lines 11-26; p. 83, lines 24-32; p. 84, lines 1-32; p. 85, lines 1-24 [Tab 4H].
[8] *R. v. Wagner*, 2015 ONCJ 66, at para. 136.
[9] *R. v. Wagner*, 2015 ONCJ 66, at para. 67, 70; *R. v. Durette*, 1992 CarswellOnt 955 (ONCA); *R. v. Kutynec*, 1992 CarswellOnt 79 (ONCA) para. 11, 15; *R. v. Pires; R. v. Lising* [2005] S.J.C. No. 67, at para. 34-35.

binding authority from this Honourable Court requiring the development of a proper evidentiary record to challenge the constitutionality of legislation.[10]

17. The Trial Judge rejected the Applicant's secondary defences of necessity and mistake of fact. The Applicant was convicted on both charges.

Summary Conviction Appeal Proceedings: Ontario Superior Court of Justice

18. Dunnett, J. upheld the rulings and decision of the Trial Judge, holding the current case law "leaves no room for a determination that an unborn child has the right to life under s. 7 or equality rights under s. 15 of the *Charter*."[11]

19. Like the Trial Judge, Dunnett J. adopted an outcome-determinative framing of the case that pegged this case with other clearly distinguishable cases about personhood and the legal status of the *foetus*, to evade making a finding a fact that an unborn child was a "human being" within the meaning of s. 223.

20. Dunnett, J. never decided whether or not an unborn child was a human being.[12] Instead, Dunnet J. ruled against the Applicant's s. 7 and 15(1) *Charter* arguments, noting the excluded evidence could not assist with deciding the material issues before the court.[13]

Ontario Court of Appeal

21. On September 14, 2020, Justices Tulloch, Paciocco and Havison Young, JJ.A. dismissed the Applicant's application to be heard by the Ontario Court of Appeal.

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[10] *R. v. Videoflicks,* [1986] 2 SCR 713, para. 114-115, 228-229; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, para. 8-9, 19-21*R. v. Seaboyer*; *R. v. Gayne* 1991 CarswellOnt 109 (SCC) at para. 34, 37, 39, 48-49, 56, 59.
[11] *R. v. Mary Wagner*, 2016 CarswellOnt 21758, O.S.C.J. at para. 38.
[12] *R. v. Mary Wagner*, 2016 CarswellOnt 21758, O.S.C.J. at para. 74.
[13] *R. v. Mary Wagner*, 2016 ONSC 8078, 2016 CarswellOnt 21758 (OSCJ) at para. 38, 85.

PART II – STATEMENT OF ISSUES

22. This application for Leave raises the following issues of public importance:

Issue No. 1: Who should fit within the legal definition of "human being"?

Do the words "any one" or "everyone" and "every individual" include a foetus; are the words "any one" or "everyone" appropriately restricted by s. 223(1) of the Criminal Code; is s. 223(1) of the Criminal Code constitutionally compliant

Issue No. 2: Denial of the right to furnish evidence in support of a defence under the *Criminal Code* based on its implications for abortion in Canada

Did the Trial Judge violate the s. 7 and s. 11(d) Charter rights of the Applicant, and s. 650(3) of the Criminal Code by denying her right to an evidentiary hearing; was the Applicant wrongly deprived of her defence, including under s. 37(1) and s. 8(3) of the Criminal Code

PART III – STATEMENT OF ARGUMENT

Issue No. 1: Who should fit within the legal definition of "human being"?

Are born alive human beings also human beings before birth?

23. This Honourable Court is invited accept the uncontested evidence of the Applicant's experts that a new and unique human being comes into existence at the moment of its conception. The Crown led no scientific or medical evidence to the contrary.

Is s. 223(1) of the Criminal Code constitutionally compliant?

24. Section 15(1) of the *Charter* bestows equality rights to "every individual". In the French version, the phrase, "*ne fait acception de personne*" translates into English as "every individual." There is no discrepancy or ambiguity. "Individual" is universally defined in dictionary definitions as "a single human being" as distinguished from a group.[14]

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[14] https://www.linguee.com/french-english/translation/ne+fait+acception+de+personne.html; https://www.dictionary.com/browse/individual; https://www.merriam-webster.com/dictionary/individual; https://www.lexico.com/definition/individual.

25. Every individual means a natural "human being." Assuming the truth of the opinion of the Applicant's uncontradicted experts, the meaning of "human being" includes *every* unborn child. To the extent that s. 233(1) excludes *every* individual, can it be considered constitutionally compliant under s. 15(1) of the *Charter*?

26. If s. 15(1) of the *Charter* includes the unborn in the class of "every individual", then the s. 223(1) definition of "human being" creates an arbitrary distinction between individuals.

27. The right to equality is an inherent human right that is not conferred by mere positive law, nor capable of being abridged or abrogated by positive law. As such, should s. 233(1) be permitted to restrict an interpretation of s. 15(1) which includes the unborn?

28. A law passed by Parliament that excludes one class of human beings from the definition of human being is a positive law inferior to constitutional law. It is a fundamental precept that a legislative enactment cannot override entrenched constitutional provisions of s. 15(1) that guards the human rights of all individual human beings to equality, irrespective of age, size, stage of development, condition of dependency, or location of existence.

29. Judicial deference to Parliamentary choice, whether by action or inaction, does not immunize Parliament's decisions from *Charter* scrutiny. In a constitutional democracy, it is the role of the courts to interpret the constitution, which is the instrument that limits the authority of Parliament.[15]

Is s. 7 of the Charter violated by s. 223(1) of the Criminal Code?

30. The Applicant argues that s. 7 of the *Charter* grants "everyone" the right to life, and "everyone" includes the unborn.

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[15] *Vriend v. Alberta*, 1998 CarswellAlta 210 SCC at para. 51-57; 65-66.

31. In *Morgentaler*, the legal definition of "everyone" in s. 7 was not decided or considered by this Honourable Court.[16] Since *Morgentaler*, this Honourable Court has not been given an opportunity to decide whether the Court of appeal in *Borowski* erred by not applying the common language rule when it decided that "everyone" in s. 7 does not apply to the unborn.[17]

32. The Court of Appeal in *Demers* similarly refused to answer the question as to whether "everyone" in s. 7 includes the unborn, reasoning that it was left with "no room" to decide this issue after this Honourable Court ruled in *Tremblay v. Daigle* and *Winnipeg Child* that an unborn child was not a person and therefore did not have either legal or juridical rights.[18] Left unanswered is whether human beings who are denied juridical rights are still entitled to constitutional rights under s. 7 of the *Charter*.

33. In *Tremblay v. Daigle*, the father of an unborn human being challenged the decision of the mother to abort their child. At stake was whether a *foetus* was a "human being" under a Québec statute, the *Charter of Human Rights and Freedoms*, which grants in s. 1 "every human being the right to life" and the possession of "juridical personality".

34. This Honourable Court held that the failure of Québec provincial legislature to define "human being" or "person" meant it did not intend to include the unborn in the Québec *Charter*. Left open was whether an unborn human being is included within the meaning of "everyone" in s. 7.[19]

35. The case of *Winnipeg Child* involved the legality of a judicial order to detain a pregnant mother to prevent harm to her unborn child. The case did not involve interpreting either s. 7 or s.

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[16] *R. v. Morgentaler*, 1988 CarswellOnt 45 SCC at para. 222, 230-232, *per* McIntyre, J; para. 189, Beetz J.
[17] *Borowski v. Canada (Attorney General)*, 1987 CarswellSask 342 Sask C.A. at para. 65; *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342 (S.C.C.) paras. 14, 26.
[18] *R. v. Demers,* 2003 BCCA 28 at para. 23; *Tremblay c. Daigle*, 1989 CarswellQue 124 SCC; *Winnipeg Child & Family Services (Northwest Area)*, 1997 CarswellMan 475.
[19] Québec *Charter of Human Rights and Freedoms*, R.S.Q. c.-12; *Tremblay v. Daigle*, 1989 CarswellQue 124 SCC at pp. 5, 13, 20.

15(1) of the *Charter*. Chief Justice McLachlin held the order was unlawful, because only after a child is born alive and becomes a legal or juridical person is that child a juridical person protected by the common law.[20]

36. In *Dobson*, a non-*Charter* case, this Honourable Court created an exception to the common law rule that a born alive child could sue a tortfeasor for its pre-birth injuries, as matter of public policy to shield mothers who negligently or deliberately injured their unborn child.[21]

Unresolved issue of public importance

37. It is still an open question of whether "everyone" in s. 7 applies to unborn human beings, as this precise narrow *Charter* question has never been squarely presented and decided by this Honourable Court.

38. The Trial Judge avoided this issue, ruling that the Applicant was so "hemmed in" by authoritative case law that "she could not possibly prevail."[22] The appellate judge decided that the appellate case law "leaves no room for a determination that an unborn child has the right to life under s. 7 or equality rights under s. 15 of the *Charter*."[23]

39. It is submitted that both courts missed the point raised by the Applicant. This case raises a unique, unprecedented constitutional challenge to s. 223(1) of the *Criminal Code* that has nothing to do with juridical personhood under the common law or a statute. Neither of the Courts below considered the dissenting judgment of Sopinka and Major JJ. in *Winnipeg Child*, who decided that the "born alive" rule was scientifically out of date and should be abandoned.[24]

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[20] *Winnipeg Child & Family Services (Northwest Area) v. G (D.F.),* 1997 CarswellMan 475 SCC at para. 11-15.
[21] *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 CarswellNB 248 SCC at para. 22-24, 84, 114.
[22] *R. v. Wagner,* 2015 CarswellOnt 1982 O.C.J. at para. 126.
[23] *R. v. Mary Wagner*, 2016 CarswellOnt 21758, O.S.C.J. at para. 38.
[24] *Winnipeg Child & Family Services (Northwest Area) v. G (D.F.),* 1997 CarswellMan 475 SCC at para. 113, 116, 118-120.

40. Courts have a duty to rise above political debate and tackle challenging questions, including whether Parliament's definition of "human being" infringes the constitutional right to life of unborn human beings. Deference to Parliament is no excuse. Section 52(1) of the *Constitution Act, 1982*: "…affirms the constitutional power and obligation of courts to declare laws of no force to the extent of their inconsistency with the Constitution…There is nothing in our constitutional arrangement to exclude 'political questions' from judicial review where the Constitution itself is alleged to be violated."[25]

Can s. 223(1) be Saved Under s. 1 of the Charter?

41. Does the means chosen by Parliament to legalize abortion infringes upon the right to life and the equality of unborn human beings? It is submitted that s. 223(1) violates ss. 7 and 15(1) of the *Charter*, and must be declared to be of no force and effect, pursuant to s. 52(1) of the *Constitution Act, 1982*.

42. The effect of s. 223(1) is overbroad, disproportionate, and results in arbitrary distinctions between the born and unborn. A criminal law that is shown to be irrational or arbitrary infringes s. 7. The right to life protected by s. 7 is foundational and cannot be overridden by competing *Charter*, political or social interests.[26]

<u>Issue No. 2</u>: Denial of the right to furnish evidence in support of a defence under the *Criminal Code* based on its implications for abortion in Canada

Was the Appellant's right to a Fair and Impartial Trial Violated by the denial of an Evidentiary Hearing?

43. The denial of an evidentiary hearing was unlawful, violating the Applicant's fight to make full answer and defence:

> "The precept that the innocent must not be convicted is basic to our concept of justice" [34] "Thus our courts have traditionally been reluctant to exclude even tenuous defence

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[25] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 193, 89, 183.
[26] *R. v. Malmo-Levine*, 2003 SCC 74 at para. 203, 135, 142, 271.

> evidence."[37] … It has long been recognized that an essential facet of a fair hearing is the "opportunity to adequately state [one's] case"… This applies with particular force to the accused, who may not have the resources of the state at his or her disposal. … The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. … If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him. … In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. [39]" "Canadian courts… have been extremely cautious in restricting the power of the accused to call evidence". [48] "…the circumstances where truly relevant and reliable evidence is excluded are few, particularly where the evidence goes to the defence" [49] "…to deny a defendant the building blocks of his defence is often to deny him the defence itself". [56] … The examples show that the evidence may well be of great importance to getting at the truth and determining whether the accused is guilty or innocent under the law -- the ultimate aim of the trial process. [59]"[27]

44. A proper evidentiary record is required for a constitutional challenge and for non-constitutional defences too. Accordingly, the absence of a factual base is a fatal flaw to challenge legislation, and judicial obstruction denying an evidentiary record results in an unfair trial.[28]

45. The goal of a trial is to ascertain the truth: "The goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth." Scientific evidence serves to establish innocence, as well as guilt.[29]

46. Denying the evidentiary hearing violated the appellant's s. 7 and 11 (d) *Charter* rights and s. 650(3) of the *Criminal Code.* The Trial Judge deliberately refused to admit the uncontested medical and scientific truth that

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[27] *R. v. Seaboyer*; *R. v. Gayne* 1991 CarswellOnt 109 (SCC) at para. 34, 37, 39, 48-49, 56, 59.
[28] *R. v. Videoflicks,* [1986] 2 SCR 713, para. 114-115, 228-229; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, para. 8-9, 19-21.
[29] *Boucher v. The Queen*, [1955] S.C.R. 16 (S.C.C.), para 26; *R. v. Levogiannis*, [1993] 4 S.C.R. 475 (S.C.C.), para. 14 *per* L'Heureux-Dubé J.; *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 (S.C.C.) para. 13-14 *per* Cory, J.

- the life of a human being begins at conception; and
- abortion is a fatal assault upon a living human being,

even though he knew that was the "core question" in the case.[30]

47. By reframing the case as an attempt to overturn prior personhood rulings by this Court, the courts below deviated from the *Amended Notice of Constitutional Question* filed on February 4, 2014 that said nothing about personhood and focused on the constitutional validity of s. 223:

> "Mary Wagner seeks a constitutional remedy under s. 52 of the *Constitution Act, 1982* to declare Section 223 of the *Criminal Code* to be of no force and effect. The practical effect is that the defendant will then be able to make full answer and defence under s. 37 of the *Criminal Code*. Unborn human beings will then be within the scope of "anyone" protected by s. 37 … from the very being of their existence, the moment of conception."[31]

48. Despite this, the Trial Judge incorrectly stated: "… the defendant is in effect asking me to overturn the Supreme Court of Canada in circumstances where there has been no material intervening change in the law or the relevant science or other facts."[32]

49. The Trial Judge expressed a personal opinion that even if all the facts were found in the Applicant's favour, "nothing in this case …. could possibly result in the relief the applicant seeks" and that "[T]here is no realistic basis upon which the effectively absolutist view espoused by Ms. Wagner can prevail."

50. Further, the Trial Judge stated he could not "rationally conceive any way" the Applicant could succeed before the Supreme Court of Canada, and "could not imagine" the Supreme Court of Canada even remotely allowing for the possibility that an unborn child was a human being. The Trial Judge's personal opinion that the Applicant's constitutional challenge was futile

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[30] *R. v. Wagner*, 2015 ONCJ 66, at para. 120.
[31] Amended Notice of Constitutional Question [Tab 4I].
[32] *R. v. Wagner*, 2015 ONCJ 66, at para. 75.

resulted in adverse unfair rulings, an unfair trial, and an inability to make full answer and defence.[33]

Was the Appellant Wrongfully Deprived of Her Defence Under s. 37(1) of the Criminal Code?

51. In *People v. Kurr*, a pregnant mother with quadruplets was permitted to rely upon the self-defence of others, the equivalent of s. 37, to protect her unborn children and to justify killing her abusive boyfriend who was punching her in the stomach.[34] She was acquitted.

52. Here, both judges below failed to consider the possibility that an unborn human being who is not a legal person could fall within the protection of a statute intended to protect a human being from a possibly fatal assault.

53. Did Dunnett J. err in law by failing to use the proper approach to determine the meaning of "any one" or "*toute personne*" in s. 37 of the *Criminal Code*? With respect, Dunnett J. did not apply the settled common language rule, and the principles of bilingual interpretation. Further, she failed to read the words "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[35]

54. This Honourable Court has held: "The rule that statutes are to be construed according to the meaning of the words in common language is quite firmly established and it is applicable to statutes dealing with technical or scientific matters…"[36] The proper way to construe the words of a statute written in two languages is:

> "… to read its words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of

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[33] *R. v. Wagner*, 2015 ONCJ 66, at para. 72, 149, 126; *Yukon Francophone School Board v. Yukon Territory (A.G.)* 2015 SCC 25 (SCC) para. 20-37.
[34] *People v. Kurr*, 654 N.W.2d 651 (Mich. Ct. App. 2002) at pp. 654-655.
[35] Dreidger, *Construction of Statutes* (Second ed. 1983) 87, applied in *R v. Sharpe*, 2001 SCC 2 at para 33.
[36] *Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise),*1975 CarswellNat 386, para. 8.

> Parliament. … Both language versions of federal statutes are equally authoritative. Where the meaning of the words in the two official versions differs, the task is to find a meaning common to both versions that is consistent with the context of the legislation and the intent of Parliament."[37]

55. In this case, the appeal court failed to properly engage in the proper analysis of bilingual statutory interpretation set out by this Court in *R. c. Bois*:

> " … where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would a priori be preferred; … where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning: … The *Criminal Code* is a bilingual statute of which both the English and French versions are equally authoritative. … statutory interpretation of bilingual enactments begins with a search for the shared meaning between the two versions. … Unless otherwise provided, differences between two official versions of the same enactment are reconciled by educing the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained. There is, therefore, a specific procedure to be followed when interpreting bilingual statutes. The first step is to determine whether there is discordance. If the two versions are irreconcilable, we must rely on other principles: …
> A purposive and contextual approach is favoured:
> … We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are "reasonably capable of more than one meaning… If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions … The common meaning is the version that is plain and not ambiguous:
> … If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version: … There is a third possibility: one version may have a broader meaning than another, in which case the shared meaning is the more narrow of the two…The second step is to determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent: … First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the *Code*…. Finally, we must also bear in mind that some principles of interpretation may only be applied in cases where there is an ambiguity in an enactment. … Other principles of interpretation — such as the strict

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[37] *Schreiber v. Canada (Attorney General)* 2002 SCC 62, at para. 54.

> construction of penal statutes and the *Charter* values presumption — only receive application where there is ambiguity as to the meaning of a provision."[38]

56. There are no irreconcilable differences between the French and English versions of the words "any one" and "*toute personne*." When the words "*toute personne*" are translated from French to English, they match "anyone," the word in the English version of s. 37.

57. Is it an error of law to translate "*toute personne*" to mean a "legal person" or a "juridical person"? Only the words, "*toute personne morale*" or "*personne morale*" translate into a legal or juridical person. A correct translation results in the conclusion that there is no ambiguity or difference between the English and French versions in s. 37.

58. Both versions mean "any one," which includes all human beings, including unborn human beings. If the French version of s. 37 used the words, "*toute personne morale*" or "*personne morale*," then the appeal court would be correct to interpret those words as a legal or juridical person, a status that only extends to natural persons who are born alive and endowed with juridical and legal rights. But s. 37 does not.[39]

Was the Appellant Wrongly Deprived of the Defences of Necessity and Mistake of Fact?

59. The Applicant argues that the common law defence of necessity found in s. 8(3) of the *Criminal Code* also excuses her morally involuntary behaviour and conduct from criminal liability, in accordance with s. 7 of the *Charter*:

> "Although moral involuntariness does not negate the *actus reus* or *mens rea* of an offence, it is a principle which, similarly to physical involuntariness, deserves protection

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[38] *R. c. Bois* 2004 SCC 6, 2004 CarswellQue 139, para. 26-31.
[39] https://www.linguee.com/french-english/translation/toute+personne.html; https://context.reverso.net/translation/french-english/toute+personne; https://www.linguee.com/french-english/translation/toute+personne+morale.html; https://context.reverso.net/translation/french-english/toute+personne+morale; https://www.linguee.com/french-english/translation/personne+morale.html; https://context.reverso.net/translation/french-english/personne+morale; *R. v. Mary Wagner*, 2016 CarswellOnt 21758 at para. 117-123.

> under s. 7 of the *Charter*. It is a principle of fundamental justice that only voluntary conduct — behaviour that is the product of a free will and controlled body, unhindered by external constraints — should attract the penalty and stigma of criminal liability. Depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice."[40]

60. To qualify for this defence of mistake of fact the Applicant must have had "an honest belief in a state of facts which, if existed, would be a legal justification or excuse."[41] There is no doubt she honestly believed unborn babies were human beings, and that the unborn children at the clinic on August 15, 2012 faced imminent death. Given the absence of a finding that unborn children were human beings, the Applicant's acts were based upon a mistake of fact that entitles her to an acquittal.

61. In *Latimer,* this Honourable Court rejected the necessity defence claimed by a parent who murdered his disabled child: "In considering the defence of necessity, we must remain aware of the need to respect the life, dignity and equality of all individuals affected by the act in question."[42]

62. If the right to life of a human being disentitles a murderer from relying upon the defence of necessity, is the reverse true? Can a rescuer *illegally* save the life of a human being, born or unborn, from an assault, and be legally and morally justified by the defence of necessity?[43]

63. The defences of necessity and s. 37(1) are opposite sides of the same coin. Was the Applicant lawfully allowed to intervene to prevent an imminent fatal assault and lawfully placed unborn human beings under her protection? Since the Crown did not meet its burden to prove beyond a reasonable doubt that the Applicant was disentitled to these defences, and that there is

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[40] *R. v. Ruzic*, 2001 SCC 24 at para. 47.
[41] *R. v. Johnson* 1904 CarswellOnt 118 at para. 6-7; (1904) 8 C.C.C. 123 at 129 per Boyd J.; *R. v. Fetzer* (1900), 19 N.Z.L.R. 438, p. 443.
[42] *R. v. Latimer,* 2001 SCC 1 at para. 42.
[43] *R. v. Ruzic*, 2001 SCC 24 at para. 87-90.

no evidence that unborn children are anything other than human beings, was she entitled to an acquittal?

PART IV – SUBMISSION ON COSTS

64. The Applicant respectfully requests costs of this application to be granted in the cause.

PART V – ORDERS SOUGHT

65. The Applicant requests that Leave be granted, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of November, 2020

Charles I. M. Lugosi
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

Cases

Other

Statutory Provisions

A. I - I don't know if - immediately it doesn't appear to be the case, but perhaps - perhaps down the road hopefully.

Q. You heard evidence in this trial...

A. H'mm, h'mm.

Q. ...that you made people distraught, crying, emotionally upset?

A. H'mm, h'mm.

Q. Do you have a response to that?

A. H'mm, h'mm. Well, I didn't see - I didn't see people getting really upset. I didn't - I don't recall seeing anyone crying, but it wouldn't surprise me if some people would be crying because maybe the reality of what they were going to do started to dawn on them.

Q. You heard that people had to be given extra medication?

A. H'mm, h'mm.

Q. Procedures were delayed?

A. Yes.

Q. Staff weren't doing their normal duties?

A. Yes.

Q. Do you accept that's what happened?

A. Well, I accept that staff couldn't continue with the regular day while I was there because they were doing other things because of my presence, and so I accept that there was some disruption.

Q. Did you interfere with the business of the abortion clinic?

A. I - I believe that I did.

Q. Did you intend to do so?

A. Yes.

Q. Why?

A. Because the object of the business is to abort human beings.

Q. Did you intend to make the patients upset?

A. No.

Q. Why not?

A. My goal isn't to make them upset. My goal is to speak the truth.

Q. In your mind, did you have any choice as to your actions that day?

A. Yes. I could have chosen to - chosen not to think of the babies who were about to be killed.

Q. Or?

A. Pardon?

Q. Or your other choice was?

A. Or I could have done many other things.

Q. Was it necessary for you to go into that abortion clinic that day?

A. It was necessary. There was - there was no - to my knowledge there was no one else protecting them.

Q. Why not just leave it up to their mothers to make their own choice, and if their mothers chose not to protect the unborn human beings within them just leave it alone? Why not?

A. H'mm, h'mm. Well, I think you could look at that in any situation where vulnerable people are under the care of others. You could say well about a child in a family home

the bubble zone. I was also arrested for - with charges of mischief, for impeding access to a Vancouver abortion site, and for presence on the prop - well, not inside, for - yeah.

Q. And why did you do that?

A. Why did I do that?

Q. Go inside a bubble zone?

A. Because children's lives were in danger. The lives of human beings were in danger, and I needed to go and to speak for them.

Q. When you say 'human beings' and you say 'children,' can you be more specific?

A. Okay. Un - unborn human beings who were in danger of being aborted.

Q. All right. Were you punished by the Courts for trans - being inside the bubble?

A. If I - yes, I was arrested. So I was punished and I spent time in jail as well.

Q. And you relocated to Ontario, I understand, and-

A. H'mm, h'mm.

Q. -and was a working guest at Madonna House in Combermere?

A. Yes.

Q. And were you arr - arrested in Toronto?

A. Yes, in 2010, January - no, March of 2010.

Q. Tell us what happened?

A. Regarding specifically the arrest?

Q. Well --

A. Or --

Q. In general, first of all?

A. Okay. I - I attended the - I believe it was - some abortion site, I don't remember the name, on Bloor Street, and I went into the - I attempted to enter the premises. It was - it was locked and I waited in the stairwell, and I guess it became known they have cameras there, and it became known that there was somebody there. I attempted to talk with somebody going into the suite and police were called out, and police came and - and told me to leave, and I refused to leave.

Q. Why were you - why were you there in the first place?

A. I was there to protect human beings who were in danger of abortion.

Q. But these human beings are strangers to you, are they not?

A. Well, yes, they might be strangers but I'm still called to protect my neighbour who's in danger.

Q. And what calls you to protect your neighbour? Where does that come from?

A. Well, on one level it's - it's universal. There's sense of concern for the other, but definitely enhanced by my faith. Definitely.

Q. Your - your Catholic faith to be...

A. Yes.

Q. ...specific? Is this a matter - do you have a choice in terms of your faith, in terms of your behaviour?

A. Do I have a choice?

Q. Not - or is - is there something that compels you to do this?

A. Well, it's a certainty that each human being is precious and human life begins at conception; that life in the womb is - is a human being just like you are a human being.

Q. How many times were you arrested in the Toronto area before this case arose?

A. I think five or six. I'm not sure exactly.

Q. And were you punished on each occasion?

A. I was arrested and I spent probably a total of over two years, two and a half years maybe in - in total.

Q. In jail?

A. Yes.

Q. And did that teach you a lesson?

A. I don't know what lesson it's supposed to have taught me.

Q. Well, maybe not to break the law?

A. Okay. Are you asking if it taught me a lesson to break the law - not to break the law?

Q. Yeah.

A. No, not in this sense.

Q. What do you mean?

A. I don't - sorry?

Q. What do you mean, not in this sense?

A. Well, if the goal of my arrest is to teach me that I shouldn't do it, to deter, I'm - I'm not deterred by that.

Q. Why not?

A. Because I'm convinced that human beings in the womb are worth protecting.

Q. Is - is there something that happened early in your life or at some point in your life that made you become - made protecting human life the focus of your life?

A. Well, I would say it would be a series of - of events and probably deepening in my - deepening in my faith. My mother gave a very strong example to us of respect for life in the womb. She had very difficult pregnancies, and I witnessed that. I'm the eldest daughter in a family of 12 children, including those who were adopted. And so I witness her laying down her life for her unborn children, my brothers and sisters. So that was definitely an impact early on, but there's been many other instances.

In my times of travel in Europe I visited Auschwitz, and not that I would have gone on my own because I'm naturally not very open to seeing such horrors, but I'd made friends who were Polish and they thought it was really important that I - that I go with them, so I did. And I saw - I saw horrors there, and - and I saw the guest book where people signed, "May this never happen again" over and over.

Q. Just take a moment.

A. Thank you.

of abortion, and that probably entered into their inability to see that just because somebody's in jail doesn't mean that they're a bad member of society.

Q. In terms of your pro-life activism, your repeated arrests, your repeated incarcerations, do you see yourself as a criminal?

A. If - I don't believe that I'm a criminal in - my understanding of what a criminal is, it implies a moral wrongdoing, and from what I'm charged with I - I don't believe that.

Q. What is your legacy, then, instead of - instead of being a criminal what do you see your legacy as?

A. I - I'm not sure how to answer that question.

Q. Take your time.

A. I - I hope that people would see beyond the current laws that favour abortion on demand and see be - see through to see that we're talking about human lives that are being killed.

Q. Do you want to see different laws in Canada pertaining to abortion?

A. Certainly.

Q. What do you want to see done?

A. Laws that reflect the humanity of children, of people from the beginning, from conception.

Q. Do you want to see abortion outlawed in Canada?

A. Yes.

Q. Why?

A. Because it's the killing of a human being.

Q. What about a woman's right of choice? What do you say to that?

A. Well, what is the choice? What is the choice? I - I ask that question.

Q. Well, you tell me.

A. Choice to do what?

Q. Choice either to terminate the pregnancy or to keep the pregnancy?

A. And - and what is the termination of pregnancy but killing a human being?

Q. Do you consider that murder?

A. I consider that killing. I hesitate to use the word 'murder,' but it is definitely killing a human being.

Q. Did you study embryology?

A. No, I haven't done any official embryology study, but I have - I have read - I read about fetal development.

Q. And what is - and what is the result of your learning about fetal development?

A. Amazement. Amazement at life in the womb, the rapid development. That a heart is beating at three weeks after conception, that brainwaves can be detected at about 42 days after conception, that fingernails are there in the 10th week. It's amazing.

Q. Well, you heard the evidence of Dr. Markovic, she says that as young as four weeks they're just

Q. Why do you have to be there at the point of final decision, at the point of final - of final termination? Why - why do you have to be there at that late stage?

A. Well, it's to - the last chance to - to receive some encouragement. It's last chance for the human being in their womb to be protected.

Q. Let me focus your attention on August 15th, 2012. What was your intention that day?

A. My intention was to protect the unborn human beings who were in danger of abortion.

Q. What do you mean by aborted specifically?

A. I mean fatally assaulted in the womb.

Q. By whom?

A. By the abortionist. By her assistants.

Q. What do you see as your relationship with these human beings you are trying to save from being killed?

A. Well, they're my brothers and sisters and they're under my protection.

Q. Once inside an abortion clinic is there anyone else who can protect these unborn --

A. There's likely no one else. Anyone who's there is facilitating in some way. Facilitating in the - the killing of the human beings.

Q. What do you believe that you are lawfully entitled to do to protect an unborn human being who is about to be aborted?

A. I can approach the mothers with love, and I can speak to them, offer them support for other options than

abortion, and I can educate them as to the development of their babies; the reality of what abortion does to the - the human being, what abortion may do to them.

Q. So - so what did you believe that you lawfully did when you approached the pregnant women inside the abortion clinic of Dr. Markovic's?

A. Well, I believe I attempted to do all of what I just stated.

Q. How specifically?

A. You want me to describe what I - what I...

Q. Yes.

A. ...did?

Q. Exactly.

A. Okay. Well, I entered and I crouched down to the level of a woman who was sitting - seated, and I offered her a rose, and I said, "This is for you."

Q. Why the rose?

A. It's a gesture of - showing that I come in peace and to comfort her, to offer her hope, for something beautiful to see.

Q. Yes?

A. Yeah.

Q. And then?

A. Yeah. And I - so I offered it to her, and - and I said, "I'm here to support you and your baby. There's help for you, you don't have to go through with this." It was very brief, my encounter with her. There was - I have learned her name is Ms. Yoon who - who came out and - so she

Q. The police were given information about an unwanted guest. Would that be you?

A. I suppose so.

Q. And when you entered the clinic did you consider that you were trespassing?

A. I didn't consider it trespassing.

Q. What did you consider it to be?

A. I considered it necessity. Necessity to - to enter this building where human life is in danger.

Q. Well, when you set foot inside the abortion clinic were you breaking a court order?

A. Technically, yes.

Q. Did you consider it - what made you break the court order? What was your motivation?

A. My - my motivation was that human lives were in danger, and that human life takes precedence over court orders to keep away from private property or from a place where one has been ordered to stay away from.

Q. Earlier in your evidence a moment ago you - you used the word 'necessity'?

A. H'mm, h'mm.

Q. What do you mean by that?

A. Meaning that there is no other option.

Q. But - but didn't you have an option not to go to the clinic?

A. Well, yes, I had an option not to go to the clinic, but as far as the security of - and the protection of

the unborn human beings there was no other option for them than for me to break that court order.

Q. Generally speaking, do you believe court orders ought to be obeyed in the normal sense?

A. Yes, if - if they - yes. In the normal sense, if something higher doesn't take precedence then they should be obeyed.

Q. And in this case there's something higher?

A. Yes.

Q. What is that higher law that --

A. The protection of unborn human beings.

Q. And what's the source of that law?

A. The source of that law, it's a law beyond what human beings attempt to establish for a just society. It's a foundation. A human life is sacred. It's something beyond ourselves.

Q. Does this higher law come from your religious beliefs?

A. Yes, I would say it does, but I would say it also is beyond my religious beliefs in - in the sense of natural law. Naturally we - we can understand that life is sacred, even without specific faith, revealed faith.

DR. LUGOSI: Okay.

THE COURT: Would this be an appropriate point to break, Mr. Lugosi?

DR. LUGOSI: I think so.

THE COURT: Okay.

DR. LUGOSI: That will be fine.

and respect for the children who are going to die here. Something to that effect.

Q. Did you believe children were actually going to die that day at the abortion clinic?

A. Yes.

Q. Upon what was that belief based?

A. Because it's an abortion clinic, and by children I mean unborn human beings.

Q. You heard later in court proceedings that every woman who went their for an abortion did have an abortion?

A. Yes.

Q. Do you have any comment about that?

A. I'm very sorry to hear that.

Q. Did your mission fail?

A. It - it failed as - in the sense that if that's true that none of the children were spared, then yes, it failed. But I believe there's more to it than that. I hope that there's more to it than that.

Q. What is the more to it?

A. That maybe my presence there might have touched the women in some way, that maybe the truth that was spoken might have - might have registered with them on some level, if not for the - the child, maybe in the future. And maybe for the staff who were there as well. So --

Q. Do you think your conduct would change their thoughts about abortion, the staff, Dr. Markovic?

A. I - I believe that I did.

Q. Did you intend to do so?

A. Yes.

Q. Why?

A. Because the object of the business is to abort human beings.

Q. Did you intend to make the patients upset?

A. No.

Q. Why not?

A. My goal isn't to make them upset. My goal is to speak the truth.

Q. In your mind, did you have any choice as to your actions that day?

A. Yes. I could have chosen to - chosen not to think of the babies who were about to be killed.

Q. Or?

A. Pardon?

Q. Or your other choice was?

A. Or I could have done many other things.

Q. Was it necessary for you to go into that abortion clinic that day?

A. It was necessary. There was - there was no - to my knowledge there was no one else protecting them.

Q. Why not just leave it up to their mothers to make their own choice, and if their mothers chose not to protect the unborn human beings within them just leave it alone? Why not?

A. H'mm, h'mm. Well, I think you could look at that in any situation where vulnerable people are under the care of others. You could say well about a child in a family home who's being abused? I mean, a generation - or a couple generations ago a child who was being abused in their family home, the general attitude of society was, well, that's their family, that's their business. So, I see a similar justification today.

Q. But you're comparing - are you comparing abortion to child abuse?

A. Yes.

Q. Why?

A. Because it - child abuse means injury to the child, and abortion is fatal injury to an unborn human being, an unborn child.

Q. Do you believe that you had a lawful right to communicate within the clinic...

A. Yes.

Q. ...to these women? Upon what basis?

A. Well, we could speak of rights, but I would prefer to speak of duty. Life is in imminent risk and where there's imminent risks and we're aware of that we have a duty. I have - and I - I saw that duty very clearly.

Q. And what precisely was your duty?

A. To be present there, to advocate for the - the children, to - to protect them as much as possible.

Q. Doesn't your freedom of speech stop when it comes to the privacy of others?

Q. You've earned the right to certainly say something. Do you have anything additional that you wish to say before Ms. Vogel has a chance to examine you?

A. No.

DR. LUGOSI: Okay. I just want to check my notes one last time, Your Honour.

THE COURT: Take your time.

DR. LUGOSI: Q. Ms - Ms. Wagner, there is one last area I forgot to deal with. Part of your defence, assuming we will be permitted to go there, is that you're relying upon self-defence of others in *The Criminal Code* to justify your actions?

A. Yes.

Q. Is that your position?

A. Yes.

Q. That s.37 of *The Criminal Code* as it then was enforced applies to your actions, conduct, beliefs?

A. Yes.

Q. Okay. And the other thing is you're aware even if the Court holds s.37 applies and 'others' includes not just born human beings, but unborn human beings, you're also aware parliament has passed a law defining a human being as only a human being that is born alive? You're aware of that?

A. Okay.

Q. And so, are you using this case as a - as a vehicle - a test case...

A. Yes.

Q. ...to challenge that section of *The Criminal Code* and to say that it's unconstitutional?

A. Yes.

Q. And that's why you're doing what you do, and saying what you say, and act the way you act, in order to challenge the law?

A. Well, I wouldn't say that's my primary motivation, but it comes as a result of what I'm doing. I'm attempting, yes, to see these changes occur.

Q. Do you disagree with the definition of *The Criminal Code* that says a human being is only a human being once they're born alive? Do you disagree with that?

A. I disagree.

Q. And why do you do that? Why do you disagree?

A. Because science tells us that human life begins at fertilization, that there's a unique human being that comes into existence at conception.

Q. Do you believe the Parliament of Canada has the legal right to say when a human being is a human being and when a human being is not a human being? Do you believe parliament has that right or - or not?

A. Parliament has a duty to uphold the truth, and so they need to look at the scientific evidence.

Q. And if parliament won't amend that law on their own are you taking it upon yourself to do it?

A. Yes.

Q. Do you believe the self-defence of others applies to unborn human beings?

A. Yes, I do.

Q. Does that include a fetus?

A. Yes.

Q. An embryo?

A. An embryo, yes.

Q. Even from the moment of conception?

A. Even from the moment of conception, from fertilization, yes.

DR. LUGOSI: Those are my questions. Thank you.

THE WITNESS: Thank you.

THE COURT: Thank you. Ms. Vogel?

MS. VOGEL: I have no questions. Thank you.

THE COURT: Okay. Thank you, Ms. Wagner.

THE WITNESS: Thank you. Thank you.

THE COURT: So, are we any further ahead on the scheduling issue?

MS. VOGEL: We are.

THE COURT: Okay.

MS. VOGEL: There's a smile on my face. I'm happy as I can be about the schedule. Let me just find it here. All right. So, I spoke to the assigned Crown, who is Ms. Stanford, and it - she is agreeable...

THE COURT: H'mm, h'mm.

affidavit, about a year after the alleged offences).

Privacy is extremely important to the clinic's clients, most of whom attend for abortion services. "Their decision to come to the Clinic is often the most emotional and challenging one of their lives." Most patients have told nobody in their family about their pregnancies. Some are rape victims; some are in their early teens.

The maintenance of confidentiality of both patients' identities and patients' actual health records is extremely important. The clinic's website is set up so that clients can e-mail the clinic without leaving any email trace on their own computers (i.e. using an online form).

Of the fifteen patients in the clinic waiting rooms, three were there for post-abortion check-ups. The other twelve were there for pre-abortion counselling and abortions and went ahead with those abortions as scheduled after Ms. Wagner was removed.

The records sought by Ms. Wagner had been compiled and provided to the clinic's counsel so that they would be readily available in the event that I ordered them produced.

The Application

disservice to the strongly-held views of either side, the bottom line was that twelve pregnant patients had gone to the clinic that morning and twelve non-pregnant patients had left the clinic after the "procedure" was carried out. If one were to assume for the sake of the O'Connor application that those foetuses were persons, which it seemed to me was entirely appropriate for the immediate purpose, then it did not seem to me that there would be much room to argue that the foetuses/persons had been terminated/killed and that it is generally rather hard to kill someone without assaulting them and thus engaging the language of section 37 of the Criminal Code.

In any event, after a bit of backwards and forwards referred to above, we managed to come to the point where the appropriate understandings were reached during argument, thus making the nature of the procedure irrelevant, or perhaps, to be more precise, all agreeing that the nature of the procedure had never really been relevant to anything all along. This removed medical records from the equation and "limited" Ms. Wagner's request to contact information vis a vis the clients, companions and employees. As for the issue of incident reports, security video and the like, it was clear from Dr. Markovic's affidavit that there were no incident reports and that the security video was irretrievably lost. Mr. Lugosi made it clear during argument that, although he had specifically applied for

witnesses to an event see it exactly the same way. However, while those other witnesses might recall things in a light more consistent with Ms. Wagner's version, that evidence is still not logically probative to anything that is realistically in issue at this trial. This trial will be about whether or not a foetus is a person and whether or not Ms. Wagner was entitled to intervene to save that foetus's life. If the foetus was a person under Ms. Wagner's protection (or more broadly under the new "self-defence" provisions of the Criminal Code), the issue of her justification in intervening will raise the issue of proportionality between the imminent danger to the foetus and the acts done by Ms. Wagner to protect it. If one accepts Ms. Wagner's premise that the lives she was there to save that day were twelve human beings, it is hard to imagine what she could have done in that clinic that would not be proportionate. In any event, the evidence of other eyewitnesses as to whether she approached one patient or five, whether she gave them roses or pamphlets, whether she left immediately when asked to do so or not, whether she lifted pamphlets to the view of patients, etc., etc. falls far short of reasonable probability that it will be probative of any issue at this particular trial.

Assuming that I am wrong on the first branch of the test, would I order disclosure on the second branch, the balancing phase? That phase requires

A. I was there for a short time, and I heard from my people.

Q. I just wondered when you use the word 'abuse' do you mean physical abuse or again just verbal?

A. Maybe - I was not there, I cannot tell you. Verbal abuse, I - I was there, I saw. But physical, I didn't see.

Q. Okay. So like --

A. So, April was with her for a long time. She know more about this than me.

Q. Okay. So, "Don't kill your baby," that would be like a verbal abuse?

A. Yes.

Q. But not physical abuse?

A. I think when you talk it's a verbal abuse.

Q. Yeah. All right. You said, "I personally entered the hallway and told her she had no right to assault individuals in such a way, and requested that she leave the premises immediately otherwise the police would be forced to remove her when they arrived." What do you mean to assault individual?

A. Verbal.

Q. You mean strictly verbal?

A. Verbal assault.

Q. When you say --

A. Because of - yeah, because I saw that she was approaching my patient and following them, and telling them,...

Q. So --

A. "...Don't kill your babies, don't do this, don't do that." That's for me verbal assault.

UNC
SCHOOL OF MEDICINE

THE UNIVERSITY
of NORTH CAROLINA
at CHAPEL HILL

DEPARTMENT OF OBSTETRICS & GYNECOLOGY
DIVISION OF WOMEN'S PRIMARY HEALTHCARE
3027 OLD CLINIC BLDG, CAMPUS BOX 7570
CHAPEL HILL, NC 27599-7570

T 919-843-7850
F 919-966-6001
www.med.unc.edu/obgyn

JOHN M. THORP, JR. MD
Division Director
Vice-Chair Research

February 26, 2014

Dr. Charles I. Lugosi, LL.B. LL.M. M.B.E. S.J.D. (Doctor of Juridical Science)
Barrister-at-Law, Attorney-at-Law
107 Wellington Street, Brantford, Ontario, Canada N3T 2M1

RE: Canada Report

Dear Dr. Lugosi,

Since 1989 science has advanced to the point where one can conclude without doubt that the embryo or fetus from the moment of conception onward can be described as a human being. If provided adequate nutrition and exchange of oxygen and carbon dioxide, that new individual will develop in an orderly fashion and emerge from his, her, or their mother as a recognizable human infant. These conditions are the same prerequisites for survival needed by all plants and animals. Advances in genomics, embryonic stem cell research, and pregnancy imaging have all contributed to the avalanche of biologic evidence that undergirds this claim.

The human genome project has sequenced all the DNA base pairs in the 46 chromosomes humans possess. Thousands of genes with myriad functions have been mapped and changes in various genes have been linked to various diseases. It is clear that this is the biologic code that makes humans human and establishes the unique features of their persona and identity. This particular combination of genes comes together at the moment when the nuclei of sperm and egg fuse (the moment of conception) and that new single cell possess all the information it needs to form a new individual.

Stem cell research supports the grandeur of the claim that the embryo is a nascent human. Cells from early embryonic life (first week of development) are described as "pluri-potent". If isolated they can be genetically instructed to develop into an array of human tissues such as cells from blood, heart, muscle, brain, or skin. These induced tissues are genetically and immunologically identical to the embryo they were isolated from. In fact these cells can be induced to form a second individual who will be an identical twin (clone) to the original embryo.

With the advent of endovaginal ultrasound transducers in the 1990s the capacity to image early pregnancies and display embryological events has been markedly enhanced. Four weeks from conception, 6 weeks from last period, a gestational sac can be seen and in the next seven days the embryo becomes apparent with movement and heart motion detectable. Days thereafter, a sonogram can detect embryonic head, umbilical cord, hearts, and arms and legs. This advance in imaging capability has allowed us to watch intrauterine development of the nascent human.

Thus, it is clear that termination of pregnancy by abortion (TOP) ends the existence of this nascent human being and that termination of pregnancy by abortion (TOP) destroys an unborn human being. If not surgically or medically terminated, the embryo will advance through the stages of life in utero development and become the newborns we are all

familiar with. Each and every termination of pregnancy by abortion (TOP), if "successful", results in the loss of a unique human individual possessing capacity equivalent to that of an infant to grow into a human adult.

I am available for question or comment.

Sincerely,

John M. Thorp, Jr., MD
Hugh McAllister Distinguished Professor of Obstetrics and Gynecology
Professor, Maternal & Child Health, School of Public Health
Division Director, Women's Primary Healthcare
Vice Chair of Research, UNC Department of Ob-Gyn

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Statement of Maureen L. Condic, Ph.D.

1. I am Associate Professor of Neurobiology and Anatomy at the University of Utah School of Medicine, with an adjunct appointment in the Department of Pediatrics, and have personal knowledge of the information set forth below. I received my undergraduate degree from the University of Chicago, and my doctorate in Neurobiology from the University of California at Berkeley. Since my appointment at the University of Utah in 1997, my primary research focus has been the development and regeneration of the nervous system. In 1999, I was awarded the Basil O'Connor Young Investigator Award for my studies of peripheral nervous system development. In 2002, I was named a McKnight Neuroscience of Brain Disorders Investigator in recognition of my research in the field of adult spinal cord regeneration. Current work in my laboratory focuses on human stem cell treatments for developmental defects in infants.

2. In addition to my scientific research, I participate in both graduate and medical teaching. I am director of Human Embryology for the University of Utah School of Medicine. I have published and presented seminars both nationally and internationally on issues concerning science policy and the ethics of biological research.

3. My current *Curriculum Vitae* is attached.

4. The two questions put to me by the court are answered below (items 5 and 6), followed by a detailed explanation (items 7-19).

5. **Question: Has the underlying science of when a human being is created changed in the past 25 years?** *Answer:* Yes. Both the scientific data and the social context in which that data is interpreted have changed dramatically over the last 25 years. Uncontested modern scientific evidence clearly demonstrates that the life of a human being begins at sperm-egg fusion, a well studied biological event that takes less than a second to complete. Based on clear scientific criteria, from the moment of sperm-egg fusion onward, the human embryo is unambiguously a human organism; i.e. a human being.

6. **Question: Does abortion kill a human being?** *Answer:* Yes. Based on the scientific facts that demonstrate the life of a human being begins at sperm-egg fusion, any intervention to disrupt the natural process of development after this point kills a human being.

7. *Explanation (items 7-19):* When a new human being comes into existence is a question that has been answered in many ways throughout history, based on the understanding of human development available at any given time. Yet the question of *precisely* when a new human organism comes into existence wasn't a matter of practical importance until the advent of *in vitro* fertilization (IVF) and human embryo research. The first baby produced by IVF was born in 1978 (36 years ago) and human embryonic stem cell lines were first isolated in 1998 (16 years ago). Consequently, scientists, physicians, philosophers, and bioethicists have not considered the question of when human life begins in great detail until recently, and appealing to different experts yields a plethora of opinions, often with very little factual evidence to support them. Yet the question of when life begins is primarily a matter of *science*, and personal opinions are irrelevant to the scientific facts.

8. How does science determine when human life begins? In considering this question, we must first address the more fundamental question of when a new cell, distinct from sperm and egg, comes into existence. The entire scientific field of biology is based on the ability of scientists to distinguish one cell type from another based on clearly established criteria. For example, when skin cells are converted into stem cells by manipulation of specific genes, scientists must have a way of evaluating whether this conversion has actually occurred, and this evaluation must be based on fact, not on mere opinion.

9. How do scientists determine when a new cell type has been produced, either in the laboratory or as a consequence of a natural biologic process? The scientific basis for distinguishing one cell type from another rests on two criteria: *differences in molecular composition and differences in behavior*. Differences in molecular composition can arise due to an alteration in gene expression, or a change in the subcellular localization of existing molecules, or a chemical modification of existing molecules. Alternatively, when a cell exhibits new behavior (for example, going from a quiescent to an actively dividing state), it can be identified as a distinct cell type. These two criteria are not "religious" or matters of subjective, personal opinion; they are objective, verifiable scientific criteria that distinguish one cell type from another.

10. Based on these criteria, the fusion of a human sperm and a human egg at fertilization clearly produces a new human cell type. The basic events of early development are both well characterized and entirely uncontested. Following the binding of sperm and egg to each other, the membranes of these two cells fuse, creating in this instant a single cell: the zygote or one-cell embryo. Cell fusion is a well-studied and very rapid event, occurring in less than a second. Because the zygote arises from the fusion of two different cells, it contains all the components of both sperm and egg, and therefore the zygote has a unique molecular composition that is distinct from either gamete. It has a unique genetic code that is different from both parents. Thus, based on the first scientific criteria (a change in cell composition), the cell formed in the instant of sperm-egg fusion (the zygote) is a new cell type.

11. Subsequent to sperm-egg fusion, the behavior of the zygote also changes dramatically to initiate a sequence of events that do not normally take place in either sperm or egg. Within minutes of membrane fusion, the zygote produces changes in its ionic composition that will, over the next 30 minutes, result in chemical modifications that block additional sperm binding to the cell surface. Thus, the zygote acts immediately and specifically to antagonize the function of the gametes from which it is derived; while the "goal" of both sperm and egg is to find each other and to fuse, the first act of the zygote is immediately to prevent any further binding of sperm to the cell surface. Clearly, the prior trajectories of sperm and egg have been abandoned, and a new developmental trajectory—that of the zygote—has taken their place. Thus, based on the second scientific criteria (changes in cell behavior), the zygote is also a new cell, distinct from either sperm or egg.

12. Based on this factual description of the events following sperm-egg fusion, we can confidently conclude that the zygote is a new cell that comes into existence at the "moment" of sperm-egg fusion, not as a matter of personal opinion, but as a matter of objective scientific fact.

13. We must turn now to the question of the what *kind* of cell is formed at sperm-egg fusion; i.e. is the zygote merely another human cell (like a liver cell or a skin cell or an egg cell) or is it a human being? Just as science distinguishes between different types of cells, it also makes clear distinctions between human cells and human *organisms*.

14. An organism is defined by Merriam Webster as "(1) a complex structure of interdependent and subordinate elements whose relations and properties are largely determined by their function in the whole and (2) an individual constituted to carry on the activities of life by means of organs separate in function but mutually dependent: a living being" (http://www.merriam-webster.com/dictionary/; Accessed 15 February, 2014). This definition stresses the interaction of parts in the context of a coordinated whole as the distinguishing feature of an organism. Again, this is not a religious definition; it is a scientific definition based on objective criteria that can be reliably observed.

15. Organisms are "living beings." Therefore, another name for a *human* organism is a "human being"; an entity that is a *complete* human, rather than a *part* of a human.

16. Unlike human cells, a human organism acts in an interdependent and integrated manner to "carry on the activities of life." These activities include 1) growth towards a mature human form, 2) repair of injury, 3) adaptation to novel environments and 4) coordinated function of all parts such that the life, health and development of the organism as a whole are preserved. In contrast, human cells typically only divide to produce more copies of themselves. Some types of human cells, for example stem cells, can generate a variety of mature cell types in a random jumble to produce a tumor, but such tumors never exhibit the integrated properties of organisms listed above.

17. Are human zygotes human beings (i.e. human organisms)? Our understanding of the molecular events occurring in the minutes and hours following sperm-egg fusion has expanded enormously in the last 25 years, allowing scientists to draw clear conclusions regarding the nature of the zygote. Based on modern scientific evidence, human embryos clearly demonstrate the integrated, organismal behavior that constitutes the scientific definition of a whole human being from the one-cell stage forward.[1] The zygote immediately and decisively enters into a complex pattern of development that is distinct from the behavior of sperm and egg and that sequentially produces all of the molecular interactions, cell types, tissues, structures and organs required for the organism as a whole to live and mature as a unique individual. In this process, it meets all of the criteria for a living human being listed above. The embryo develops continuously towards a characteristic mature human form (characteristic #1 above). It repairs injuries (characteristic #2). For example, if one cell is removed from an embryo at the 8-cell stage for prenatal genetic diagnosis, the embryo is able to repair this catastrophic injury, and continue to develop normally. Embryos are also able preserve normal development in a surprising range of artificial environments, including the laboratory dish in which "in vitro" embryos are created (characteristic #3). Finally, even at

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[1] For a detailed discussion of the organismal events occurring after sperm-egg fusion, see: Condic, M.L. (2008). When does human life begin? A scientific perspective. **Westchester Institute White Paper**. 1: 1-32; Condic, M.L. (2014). When does human life begin?: The scientific evidence and terminology revisited. **Journal of Law and Public Policy**. (*in press*).

the one-cell stage, embryos exhibit a wide range of complex molecular interactions that anticipate *future* requirements of the embryo as a whole (characteristic #4). These integrated activities of the zygote can only be interpreted as part of an ongoing, organismal pattern of development that is clearly different from the behavior shown by mere human cells.

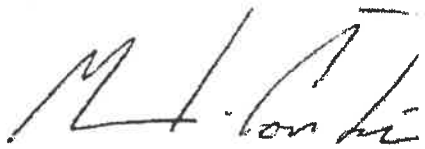
18. The ability of the zygote to generate all of the cells of the human body in a correctly organized spatial and temporal sequence is referred to as "totipotency." This behavior is entirely unlike the behavior of all human cells (including human stem cells) and is the defining characteristic of a human organism.[2]

19. Based on a scientific description of early human development, fusion of sperm and egg generates a new human cell, the zygote, with composition and behavior distinct from that of either gamete. Moreover, this cell has all the properties of a fully complete (albeit immature) human being; it is "an individual constituted to carry on the activities of life by means of organs separate in function but mutually dependent: a living being."

20. In conclusion, human life begins at sperm-egg fusion, a well-defined, observable 'moment of conception' that takes less than a second to accomplish. The zygote formed by sperm-egg fusion is an immature, but complete human individual; i.e. a human being. This conclusion is objective, based on the universally accepted scientific method for distinguishing different cell types from each other, and consistent with an enormous body of modern scientific evidence. It is entirely independent of any specific ethical, moral, political, or religious view of human life or of human embryos. A neutral examination of the factual evidence merely establishes the onset of a new human life at a scientifically well defined instant, a conclusion that unequivocally demonstrates that human embryos from the zygote stage forward are indeed living individuals of the human species; i.e. human beings.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: This 15th day of February, 2014



Maureen L. Condic, Ph.D.

[2] For a detailed discussion of totipotency and how embryos differ from human cells, see: Condic, M.L. (2014. Totipotency: what it is and what it isn't. **Stem cells and Development.** *(epub, ahead of print).*

MR. LUGOSI: Mary Wagner is not doing anything different than Henry Morgentaler did but I think it's really important here to recognize that this case is not about personhood, it never was and never will be. By introducing law relating to personhood status confuses the legal landscape. This whole case is about whether or not a fetus is a human being and whether or not self defence of other may apply to those human beings who have no rights. Unborn human beings are not persons in law. But that doesn't make them any less of a human being. Just as you can strip away personhood from a Jew or strip away personhood from a black. It doesn't take away their humanness. So these cases that deal with personhood all they really deal with is a legal term of art. A person is whoever the Courts define a person to be. But personhood is a legal term of art that is used to confer certain protections so when my friend says they're not persons under section 7, all that means is that they're not covered with the same protection of law, like an adult would be that's legally defined to be a person. But I have deliberately throughout this entire case been very careful not to tread into the area of personhood. And it would be a distraction to, to accept this invitation from the Crown to go down that route so what are we left with then because Mary is saying that she's trying to defend the lives of the youngest human beings in existence, that is the unborn human being so has the Supreme Court

dealt with this, no. Has it directly ruled on the bear status of an unborn human being, no. Has it dealt with this even in an indirect way in the criminal context, no. What the Demers case was about at its heart was a freedom of expression case and the advocate for Mr. Demers was a lawyer not trained in Canadian law. The advocate was a professor of interactional law from Liberty University called Jeff Tuamala, who is a former U.S. Marine and a scholar on international law who virtually knew nothing about Canadian law. And his argument as recorded by Judge Lowe who wrote the judgement, was that profession Tuamala basis his section 7 argument on divine law. Saying that their enaliable rights which are a gift of God, that's his argument. And that's at paragraphs 15 and 16. It's, in other words, the Court didn't full consider the proper legal arguments because of, I would say, ineffective assistance of counsel. That's not a basis for saying that this is a strong precedent when the case is not fully and properly argued by counsel trained in Canadian law. So and then going on to page 6 of the judgement, Justice Lowe says "at paragraph 19, that the Supreme Court of Canada decided the Borowski appeal was moot yet and therefore he says "the Supreme Court of Canada has not directly addressed the section 7 issue argued by Mr. Borowski or by Mr. Demers in the present case. But that's again dealing with the issue of personhood, in other words, who is a person under

section 7. We are dealing with whether or not there's a human - a fetus is a human being which is different than I would say a person which is a legal term of art, I'm talking about a biological entity known as a human being. And whether or not there is a right to try to save the lives of a human being. Just like is there - in 200 years ago, is there a right to try and save the life of a slave even though they're not a person but they're still a human being perhaps without rights. They're, they're completely separate distinct fears of, of legal reasoning at, at stake here and in paragraph 20, the Court is very careful to delineate the civil context. In other words, the *Charter* was not considered in Tremblay and Diego. The unwritten constitutional was not considered. This is completely a civil, a civil matter that was decided pertaining to Quebec law. Clearly all distinguishable and unhelpful. And if we go back to Tab 1, the Borowski case, my learned friend starts reading a quote about the historical treatment of the fetus that Anglo Canadian law, at page 15, and she stops short of the very next sentence which takes this is of course not conclusive. In other words, there are factors to be considered but this was not the final say and as we all know, Borowski didn't have his day in court, it was ironic that Borowski was filed before Morgentaler in terms of date order, but the Court chose to decide Morgentaler first and then declare the earlier case Borowski moot. So I just though as a

those because quite frankly this case is very narrow. Is, is whether or not she has standing to proceed and in my respectful submission, there's nothing that was said by my learned friend that ought to persuade you otherwise. This case is not about fetal rights. It's not about the definition of person under section 7. It's not about what, what fetal rights exist or don't exist. It's really important that there be full and fair argument on those points raised by my friend later in the proper forum at the proper time at the proper place with the proper fact and with the proper books of authority. And so it would be, I believe, a grave mistake to characterize this as a personhood case because it has nothing to do with that whatsoever. So finally, I invite you to reconsider my earlier remarks. I know this is a reply so I'm not going to repeat myself, but it seems to me that, that if Sandy were to be denied, we couldn't - we could never get to the merits of her defence. We can never get to the constitutional argument. All of which is novel but all of which has merit.

MS. VOGEL: I know there's no reply to reply but if I can just make one brief comment.

THE COURT: I know I can't do this but can I do it?

MS. VOGEL: Yes.

MR. LUGOSI: Well...

THE COURT: Yes.

MR. LUGOSI: As long as I get the last word, that's fine with me.

her materials. She also goes on to say at paragraph 38 that the anticipated scientific evidence doesn't matter. She says this is a legal inquiry. The scientific evidence is utterly irrelevant to the legal definition of a human being. I thought deeply about, about what she says because I have the highest regard for her as counsel and as a human being and so I thought deeply about what she has put forward and, and of course this court, according to the Court of Appeal, must be vigilant to guard against frivolous arguments that have no merit. And so are we engaged in a very serious important issue or not? And it's our submission that what is truly at the root of everything is how this court ultimately decides the place of the rule of law in our society. How do I get there? Here is how. The knowledge of when a new human life begins is critical as opposed to irrelevant or doesn't matter. Why? Because when a new human life begin is the point when human rights begin and arguably when section 7 *Charter* rights begin for a human being.

Now if this knowledge does not matter then we are in effect abandoning the rule of law because we then live in a legal regime that decides strictly by legal definition who is and who is not a human being. If, if legal definition determines who I am then no one is safe. No human being at any stage of existence or condition is safe from harm. Think of it this way, Your Honour, am I a

human being because that is my natural condition? Or am I human being because I fall within the definition of human being as decided by a legal lawmaking body. I submit the correct answer in a rule by law society is we do not tinker with the natural human condition. We are either a human being or we're not. Our very existence as a human being defines us. It is not for the government or parliament or any lawmaking body to decide who is and who is not a human being. Or whether a class of human being is no longer a human being.

Why I say we're not safe from harm? It's because the government may for political purpose then exclude, for example in the case of abortion, the very young who are unborn from the definition of human being. Once that is accomplished, abortion is legal because no human being is killed in the process. This opens the floodgates because one asks legitimately well who is next? The very old? The insane? The disabled? Or anyone who is simply unwanted. Because if my friend says this is strictly a legal inquiry and the only thing that really matters is the law and what the legal definition is, we are excluding everything else that makes the rule of law work in our society. Our society is founded upon the principles of the rule of law and as you know, my legal materials also address the supremacy of God. But we don't even need to go as far as considering the principles of the supremacy of

God because the rule of law, in and of itself, is dispositive of the issue.

And so once we go from the categories of physical condition, do we then expand the categories to race, sex, or religious? To have this court or any Canadian court say that a person is a - sorry, that, that, that a human being is a human being only by legal definition of a lawmaking body through, and I'm using a legal term now, positive law, it's the hallmark of a rule by law society not one governed by the rule of law. And one recalls the trials at, at Nuremberg. Put on trial judges, lawyers, law professors, who simply had as their defence that everything was done legally, by legal definition and that the people who are exterminated at Auschwitz and other placed like that, were not worthy of living and it was, it was legal to kill them. And so, and so convictions were founded because natural law was found to be superior to positive law and a scholar of the law will concede, I would hope, that the rule of law embodies natural law principles to say there's some higher authority then simply positive law exercised by any parliament.

Now we say the definition of a human being is not a legal construct that is permissible in a rule of law society. It's only in a rule by law to totalitarian society where evidence and truth of humanity is excluded and ignored. A pure legal

analysis empowers the government to determine by definition who is and who is not a human being. The rule of law, as I said earlier, is informed by natural law. This limits the power of government because people who are human - are human beings by nature, they are not human beings by government decree.

In Mary's case, full answer and defence allows the calling of evidence as part of a defendant's case. To answer the case for the prosecution. The government says foetuses are not human beings therefore the self-defence of others does not apply. The defendant claims foetuses are human being and Parliament violates the constitution by passing a law that permits killing human beings.

Now, in fairness, the definition of, of when a child becomes a human being was based upon historical science and it's a very old thinking that is behind the fact that we have this definition in the homicide section in the *Criminal Code* which says you are not legally a human being unless you are fully born and born alive. Now I have not had the benefit of submissions by an intervenor such as the constitutional branch of the Attorney General, they are not intervening, but had they intervened they would have provided a legislative history and I suspect that this definition was probably in play many, many years ago, perhaps even around the time that women were not legally persons.

Number one, our will say statements are stipulated on the record. This is - there is a foundation here. Both Dr. Thorp and Dr. Condic will say that a new human being comes into existence from the time of conception and/or fertilization. So our claim is this, if human life begins at conception and/or fertilization, then section 223 is constitutionally suspect. Why? Because Parliament excludes a class of human beings, the unborn. And they issue then that the court can decide if - can Parliament define who is and who is not a human being without reference to science which poses another question. In a rule of law society is the definition of human being a purely legal construct? Or must it be a reflection of the reality of nature? In other words, the physical reality. So I could ask you, Your Honour, am I a human being because that is my very nature? Or am I a human being because you say I'm a human being? And thank you for letting me be a human being. So you see, the *Charter* argument here is Mary's defence. The *Charter* argument depends on evidence. The evidence is to assist you to decide if the object of Mary's attempted rescue is a human being. I'm looking at the time.

THE COURT: If this is a logical spot to break, then that's fine. We can take a break. People can get some - a little bit more fresh air or fresher air.

... WHEREUPON ANOTHER MATTER IS ADDRESSED

concerns of scientific classification. In short, this court's task is a legal one. Decisions based upon broad, social, political, moral and economic choices are more appropriately left to the legislature. If that quote from the Supreme court doesn't answer the question as posed by Ms. Wagner, I'm not sure what would. It doesn't qualify itself. It doesn't say based on our limited scientific understanding of the developing foetus, it makes it very clear it is a normative task. Medical science. Biological fact cannot assist in the normative task that is required to determine a legal definition of a human being. And so whether or not Dr. Thorp would testify and Dr. Condic would testify and perhaps hundreds of others who share their same views and beliefs biologically and I would say linguistically it is not going to further discussion about Parliament's role and the democratic process.

The Court indicated in Tremblay that the legal analysis required in resolving the status of a foetus would begin with an examination of the relevant legislation and whether or not there was an indication of intent to define a foetus as a human being. The Supreme Court went on to state that linguistic argument was not persuasive. Again, Drs. Thorp and Dr. Condic I anticipate if Your Honour says an evidentiary foundation is required would come and would sit in the chair and would say that the collection of cells that

forms an embryo is a human being. That is a linguistic argument rooted in scientific fact but it doesn't assist in the Court's determination of whether or not or Parliament's determination of what constitutes a human being.

At paragraph 40 the Supreme Court stated the following and, again, this is reference to the linguistic argument. The linguistic argument is not persuasive. A linguistic analysis cannot settle the difficult and controversial question of whether a foetus was intended by the National Assembly of Quebec to be a person under section one. What is required are substantive legal reasons which support a conclusion that the term "human being" has such and such a meaning. If the answer were as simple as the respondent contends, the question would not be before the Court nor would it be the subject of such intense debate in our society generally. The meaning of the term "human being" is a highly controversial issue to say the least and it cannot be settled by linguistic fiat. A purely linguistic argument suffers from the same flaw as a purely scientific argument. It attempts to settle a legal debate by non-legal means, in this case by resorting to the purported "dictionary meaning" of the term human being.

The test of the *Charter* contains no indication of an intention to define a foetus as "human being" and this was not an oversight, it was design.

So even on counsel's argument go back to the actual statute itself, if Parliament had decided that they wanted a foetus to include anyone or everyone or any person there would be a definitional section which would include that a foetus is everyone or anyone or any person. And I included in the constitutional materials provided by the respondent Crown, Professor Shaffer's paper titled Foetal Rights and the Regulation of Abortion at pages 88 to 89 of her article and that's at Tab 4C. I won't read the whole section, I do refer Your Honour to pages 88 to 89 but in a brief - I should say the Crown now briefly responding to what is expanded on in much more detail by Professor Shaffer, addresses antiabortion advocates arguments. Linguistic arguments, scientific arguments, normative arguments and looks at an intense based approach to foetal personhood and says in particular, and this is the third paragraph at page 88, "Were the Court to adopt an intent based approach the conclusion that the foetus is not a person for the purposes of the *Charter* would be inevitable. The text of the *Charter* displays no evidence of an intention to broaden the ordinary legal definition of personhood to include a foetus. The *Charter* does not define the word "person" nor does it define the various words it uses to refer to holders of rights such as anyone, everyone, any person and every individual. If Parliament intended to depart from the common-law and civil

in the Fisher, in the third party record application and in the standing application. No foetal rights have ever been granted to a foetus in Canada. And as previously argued, the Supreme Court has had an opportunity to grant a foetus legal rights, whether it's civil law, whether in tort law, whether or not in common-law and they have declined to do so. Your Honour can make reference to paragraph 67 to 41 of the respondent's factum. I'll just review this area briefly. A foetus is not "anyone". There is in effect of seeking to criminalize abortion, Your Honour can look to paragraph 72 to 81 of the Crown's factum and might I add parenthetically in the context of counsel's often poetic, very emotional submissions, one thing that he ever failed to address is what would be the actual consequence to granting Ms. Wagner's application? There's been not one reference to it and I've referenced this before. I'll reference it again later in my materials or in my submissions but it has application not just to Ms. Wagner but basically to any anti-abortion advocate. It has the effect of seeking to criminalize abortion and it could have very significant consequences for women who are seeking to abort a foetus.

Just to continue on what the application would be of granting Ms. Wagner's application and I referenced this in the standing argument last time. On the issue of the proportionality argument, counsel has argued that it's a

proportionate response to what is imminent death. i.e. murder to the foetus. And I argued it the last time, I'll argue it again because we are dealing with the substantive issue here that any proportionate response by someone like Ms. Wagner or Mr. Wagner herself would then allow for assault, forcible confinement, kidnapping because all those things would be proportionate to possible murder. So someone like Ms. Wagner, I imagine not Ms. Wagner herself but someone like Ms. Wagner could say "I can legally do anything that's shy of murder". So I can take this woman and her foetus, I can take very good care of her for the remaining eight months of her pregnancy and that would be a proportionate response because I would be saving that young child from murder. That's a potential consequence because it would be a proportionate response to murder. Her defence goes against settled Canadian law. Your Honour can reference paragraphs 82 to 86 of the respondent factum. And, again, unlike Ms. Wagner's argument that is often based on rhetoric and emotion and clearly deeply held conviction. Her argument is not based on jurisprudence.

But what does the jurisprudence tell us about where we are in a Canadian society with respect to granting a foetus legal rights? In Sullivan, a foetus is not a human being. In Sullivan, a foetus is not a person. A foetus' father does not have legal rights in Tremblay. Only a foetus' mother has legal rights. In Winnipeg,

Child and Family Services. All Supreme Court Canada decisions. "Everyone in section 7 of the *Charter* does not include a foetus." Borowski and Demers and there was no legal duty of care by a mother towards her foetus in Dobson. Counsel today says that Madam Crown has included many appellative authorities, many of which are from the Supreme Court of Canada but they're not of assistance to Your Honour because they never considered the constitutionality of section 223. The Crown respectfully responds to that by saying it's really distinction without a difference because what they did consider is whether or not a foetus has legal rights and they have repeatedly said that a foetus does not have legal rights in different contexts. Civil, tort, common law and we know in Winnipeg Child and Family Services the Court also said applicable to all aspects of the law and I'll touch on that briefly.

Since Tremblay the developments in the law, for example, Dobson vs. Winnipeg Child and Family Services are all in support of a position that a foetus is not a legal person capable of protection under the *Charter* and as the Supreme Court of Canada stated in Winnipeg Child and Family Services at paragraph 11 and this is Tab Four of the Crown's standing materials, "Before dealing with cases treating the issue in tort law, I turn to the general proposition that the law of Canada does not recognize the unborn child

as a legal or juridical person. I emphasize that. The law of Canada. Once a child is born alive and viable, the law may recognize that its existence began before birth for certain limited purposes but the only right recognized is that of the born person. This is a general proposition applicable to all aspects of the law including the law of torts. Paragraph 12, by way of preamble, two points may be made: first we are concerned with the common-law not statute. If Parliament of the legislatures wished to legislate legal rights for unborn children or other protective measures that is open to them subject to any limitations imposed by the Constitution of Canada. Further the fact that particular statutes may touch on the interests of the unborn need not concern us. Second, the issue is not one of biological status nor indeed spiritual status but of legal status. And then the Court goes on to reference what Tremble - what the Court said in Tremblay vs. Daigle with respect to the task of properly classifying a foetus in law and science being different pursuits.

The applicant maintains that the Supreme Court has never considered foetal rights in the context of section 7 but the Supreme Court will not reach the *Charter* in its own rulings and to say that this is a *lacuna* is to ignore the jurisprudential reality. The Supreme Court has refused to grant legal rights to a foetus in both tort and common

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FORM 4F

Courts of Justice Act

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AMENDED NOTICE OF CONSTITUTIONAL QUESTION

R. v. Mary Wagner

NOTICE OF CONSTITUTIONAL QUESTION

The *defendant Mary Wagner* questions the constitutional validity of section 223 of the *Criminal Code* and seeks an interpretation of section 37(1) of the *Criminal Code* that the words "any one" in section 37, includes all living human beings, at any age, whether born or unborn. Standing in the way is section 223 of the *Criminal Code*, which excludes from the legal definition of "human being" all human beings that are alive but not yet born alive. Mary Wagner thus seeks a remedy under Section 52 of the *Canadian Charter of Rights and Freedoms* (herein the *Charter*) to declare section 223 unconstitutional, contrary to the unwritten Constitution of Canada, which is referenced by s. 26 of the *Charter* and in the preamble to the *Constitution Act, 1867*, and in the touchstone foundational principles of the Rule of Law and the Supremacy of God, found in the text of the preamble, to the *Constitution Act, 1982*.

The constitutional arguments are currently scheduled to be argued on May 13, 14, 15, and 16, 2014 at the Ontario Court of Justice, the Honourable Justice Fergus ODonnell presiding, at 1000 Finch Avenue West, North Toronto. A copy of the filed constitutional law factum is attached with this Amended Notice.

The following are the material facts giving rise to the constitutional question: On or about August 15, 2012 Mary Wagner entered the public reception area of a Toronto abortion clinic that was not subject to a court order (injunction) or buffer zone legislation, and attempted to engage in conversations with women who were there to obtain abortions, to give them a genuine choice of support for both the mother and the unborn child as a viable alternative to abortion. She used peaceful respectful conversation in an attempt to persuade pregnant women not to take the life of their unborn children. Clinic staff alerted the police who arrested Mary Wagner for this conduct. *(The testimony from the trial is transcribed).*

The following is a summary of the legal basis for the constitutional question. Mary Wagner relies upon Section 37 of the *Criminal Code* to legally justify her conduct. She used forceful, proportionate, non-violent means, the spoken word, literature, and flowers, in her attempt to get pregnant women to change their minds about terminating the lives of their unborn children. Mary Wagner claims that her conscience compels her to act in defence of the unborn human beings who were then alive within these women. Since unborn human beings cannot speak for themselves, Mary Wagner placed these unborn children under her protection to prevent them from the imminent assault upon their living human bodies by abortion clinic staff who wilfully intended and did in fact by violent means extinguish the lives of living unborn children.

In considering this defence, the Court must determine the meaning of the words "any one" contained in Section 37 of the *Criminal Code*. Are these words capable of applying to all living human beings, born or unborn? Or may the Parliament of Canada, notwithstanding the Constitution, define who is and who is not a human being, and use positive law to exclude from the human family some classes of human beings so that killing them is not murder or genocide. Or will the Court defer to the superiority of the Rule of Rule and the Supremacy of God, to invalidate positive law that offends against the inherent right to life of all human beings, in compliance with natural law and international law and the common law Constitution of Canada?

Mary Wagner seeks a constitutional remedy under Sections 52 of the *Constitution Act, 1982* to declare Section 223 of the *Criminal Code* to be of no force and effect. The practical effect is that the defendant will then be able to make full answer and defence under s. 37 of the *Criminal Code*. Unborn human beings will be within the scope of "any one" protected by s. 37. All living human beings, born and unborn, are then human beings in law from the very beginning of their existence, the moment of conception. Abortion would be criminalized, for the planned and deliberate killing of an unborn human being would be murder. A pregnant mother's right to liberty yield to an innocent human being's inherent right to life.

Even though Mary Wagner's charges are relatively minor, her defence rests upon complex issues of great national importance. In summary, Mary Wagner acted in lawful self-defence of living human beings, children in an unborn state, who were in need of protection from imminent violent assault and death. She is thus not guilty of any crime.

February 4, 2014

Charles I. Lugosi
Lugosi Law Firm
107 Wellington Street
Brantford, Ontario N3T 2M1

TO The Attorney General of Ontario *(as required by section 109 of the Courts of Justice Act)*
Constitutional Law Branch
4th floor
720 Bay Street
Toronto, Ontario M5G 2K1
Fax: (416) 326-4015

The Attorney General of Canada *(as required by section 109 of the Courts of Justice Act)*