Court File No.: C63218

NOTICE OF APPEAL OR APPLICATION FOR LEAVE TO APPEAL

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

- and -

MARY WAGNER

Appellant

APPELLANT'S FACTUM

PART I Statement of the Case

1. The appellant seeks leave to appeal in the interests of justice on the grounds that the courts below erred in deciding questions of law that are of public importance and have a significant impact on the general administration of justice.

R. v. R. (R.) 2008 ONCA 497 at para. 28-34.

2. This is a test case challenging the constitutional validity of s. 223 of the *Criminal Code* which defines who is and who is not a human being (the "born alive rule). Section 223 states that a "child" does not become a "human being" until it is born alive and is fully outside its mother's body.

Section 223, *Criminal Code*, R.S.C., 1985 c. C-46.

3. The appellant believes that from the time of conception a new human being is in existence, and that s. 223 is in violation of s. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* (herein *Charter*).

Sections 7, 15(1) *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, (U.K.) 1982 c. 11.

4. The appellant specifically contends Parliament lacks the legal authority to use legal definitions to exclude one class of biological human beings from legal protection. The appellant contends the *Constitution* limits the power of Parliament to use legal definitions as a tool to fatally harm an unwanted innocent unborn human being, who is selected to die on any one or more of the following discriminatory grounds: race, sex, ethnicity, ability, age, size, stage of development, condition of

dependency, location of existence, or alleged criminal behaviour of the father or the economic health, mental health or physical health of the mother.

5. This test case is about protecting the human rights of every innocent human being, born or unborn. Does the *Constitution* limit the authority of the government to define who and who is not a human being as a matter of law? The appellant contends s. 223 is unconstitutional.

6. Once a court makes a finding of fact that an unborn child is a human being, section 223 of the *Criminal Code* may not withstand a constitutional challenge under s. 7 or 15(1). The significance of this case is whether or not abortion will remain legal or not. If s. 223 withstands a constitutional challenge, abortion remains legal. Since a court may decide an unborn child is a human being as a consequence of s. 223 being declared to be of no force and effect under s. 52, the future legality of abortion becomes a question of supreme national importance.

Section 52, *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

7. This test case is not about revisiting the settled common law jurisprudence that an unborn child is not a "person" until it is born alive. It is about whether an unborn child is a human being, as matter of physical reality and existence, proven by biology, science and medicine, and whether or not Parliament may use a legal definition tool to achieve a political goal to legally terminate the lives of innocent unwanted unborn human beings. The Supreme Court in *Sullivan* did not decide the constitutionality of s. 233. It simply interpreted and applied s. 223 (then 206) when it decided that an unborn child was not a human being (by definition) until it was born alive and completely outside its mother's body, and not a juridical person until it satisfied the legal definition of "human being." This case is about answering other questions never presented to or decided by the Supreme Court of Canada: 1) Is an unborn child an individual human being, as a matter of biological, scientific or medical fact, from the time of conception? 2) If yes, does the legal definition of human being in s. 223 violate that factual human being's constitutional rights, including those under s. 7 or s. 15(1) of the *Charter*? 3) If yes, is s. 223 of no force and effect, pursuant to s. 52 of

the *Constitution Act, 1982*? 4) If an unborn human child is not found as a fact to be a human being, contrary to biology, science or medicine, then what is it?

R. v. Sullivan, [1991] 1 S.C.R. 59 (SCC), 1991 CarswellBC 916 at para. 19, 21.

8. These material issues arise in the context of a summary conviction proceeding resulting in the conviction and sentence of the appellant by Justice ODonnell of the Ontario Court of Justice for mischief and breach of probation, and the judgment of Justice Dunnet of the Ontario Superior Court of Justice, who dismissed her appeal from her conviction and sentence. Justice Dunnet decided:

1) There is no viability to the constitutional question, as the case law leaves no room for determination that an unborn child has the right to life under s. 7 or equality rights under s. 15(1) of the *Charter*;

2) The trial judge was entitled to decline the appellant an evidentiary hearing. Justice Dunnet found there is no principled basis to restrict a trial judge's case-management authority in the context of a *Charter* application to have legislation declared unconstitutional, the appellant did not raise a new legal issue requiring an evidentiary record, the evidence sought to be admitted provided no support for the finding sought, that the foetus has rights under s. 7 or falls within the meaning of "any one" in s. 37 of the *Criminal Code*;

3) The defence of others set out in s. 37 of the *Criminal Code*, the common law defence of necessity, nor the defence of mistake of fact, were not available to the appellant, even if one assumes the feotus was a human being.

R. v. Mary Wagner, 2016 ONSC 8078, 2016 CarswellOnt 21758 (OSCJ) at para. 38, 70, 74, 85, 117-123; 132 (s. 37); 137; 153-155; 158-159 (necessity); 162-164 (mistake of fact).

9. These errors of law resulted in a miscarriage of justice. As the appellant has served her sentence, she is not appealing her sentence, but only her convictions.

PART II Summary of the Facts

10. While bound by a probation order to keep the peace and to stay away from abortion clinics, the appellant, who has a long history of peaceful advocacy to protect the unborn child, slipped uninvited

past an opened door into the secure patient waiting room of a Toronto area abortion clinic to talk to pregnant women waiting there to have an abortion. She offered pamphlets and a white rose flower and attempted to converse with anyone willing to talk. Her goal was to educate, inform and to persuade these mothers not to terminate pregnancies.

Proceedings at Trial, December 12, 2013 Wagner, p. 34, lines 27-32; pp. 35-46; p. 47, lines 13-32; p. 54, lines 6-17; p. 64, lines 6-12.

11. Her attempts were unsuccessful. The appellant conceded her behaviour interfered with the operations of the abortion clinic. The police attended and physically removed the appellant, who was arrested and charged her with mischief and breach of probation.

Proceedings at Trial, December 12, 2013 Wagner, p. 64, lines 13-23; p. 65, lines 4-32; p. 66, lines 1-11.

12. The appellant claimed her actions were in defence of the lives of the unborn human beings in that abortion clinic and were legally excused, including under s. 37(1) which stated:

37 (1) Everyone is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

13. The appellant submitted an unborn human being is included within the meaning of "anyone." She contended her words, gifts and her mere presence was a psychological force intended to influence the moral conscience of the mothers to stop the imminent fatal assault of abortion. The abortion provider Dr. Markovic 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."

Proceedings at Trial, December 6, 2013, p. 165, lines 5-6: Ex. 14; December 12, 2013, p. 75, lines 7-17.

14. The court faced this question: Did the meaning of the word "anyone" in the now repealed s. 37 extend to include unborn human beings? In section 222, which defines homicide, the *Criminal Code* includes "child" within the scope of a "human being" and defines homicide as the killing of a human being. Section 2 of the *Criminal Code*, which sets out definitions, does not define either "child" or

"human being." However, s. 223(1) excludes an unborn child from the definition of human being until that child is born alive and s. 223(2) excludes abortion from the definition of homicide:

> 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, …
>
> (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.

The effect of s. 223 narrows the scope of legal protection under s. 37(1) to only those children that are born alive, and does not protect unborn children from abortion.

15. Since the Crown declined to admit that an unborn child was a human being, and the court refused to take judicial notice that an unborn child is a human being, the defence was forced to call expert evidence to establish the fact that an unborn child is a human being and is therefore included within the meaning of "anyone" in s. 37(1), once s. 223(1) is declared to be of no force and effect.

Proceedings at Trial, February 4, 2014, p. 50 lines 13-14.

16. The full challenge to the constitutional validity of s. 223 was prevented when the trial judge denied an evidentiary hearing that was necessary to establishing a record upon which an appeal court could find that an unborn child is an individual and unique human being. Without this essential finding of fact, Justice Dunnet ruled against the appellant's s. 7 and 15(1) *Charter* arguments, and added the excluded evidence could not assist with deciding the material issues before the court.

R. v. Mary Wagner, 2016 ONSC 8078, 2016 CarswellOnt 21758 (OSCJ) at para. 38, 85.

17. The appellant testified she believes that unborn children are natural biological human beings. She challenged the validity of s. 223 because it dehumanizes. The appellant is a recipient of the Queen's Diamond Jubilee Medal for her activism on behalf of unborn children. She has dedicated her adult life to saving the lives of those who cannot defend themselves.

Proceedings at Trial, December 12, 2013 Wagner, p. 29, lines 6-32; p. 67, lines 6-24; p. 69, lines 2-21; p. 30, lines 1-7.

18. Since the Supreme Court ruled in 1988 that s. 251 of the *Criminal Code* was unconstitutional, abortion was left totally unregulated and the killing of the unborn human being was lawful. Parliament's inaction to criminalize abortion or to repeal s. 223 compelled the appellant to take action out of sheer necessity. She responded out of necessity to fill the legislative void.

R. v. Morgentaler, 1988 CarswellOnt 45 SCC. At para. 189, Beetz, J., emphasized the question of whether a foetus was a human being and included within the meaning of "everyone" in s. 7 of the *Charter* was not decided; Proceedings at Trial, December 12, 2013 Wagner, p. 72, lines 5-32; p. 73, lines 1-21.

19. The appellant testified she tries to save human lives because of her obedience to God and to love thy neighbour. The Crown conceded in argument if the court found that an unborn child was a human being, and its life was terminated by abortion, then abortion was an assault, within the meaning of s. 37. The trial judge found that twelve pregnant women went to the abortion clinic on the morning of August 15, 2012 and twelve non-pregnant women left the abortion clinic after the "procedure" was carried out.

Proceedings at Trial, December 12, 2013 Wagner, p. 31, line 8-13; p. 34, lines 1-25; p. 47, lines 23-29; p. 48, line 7-18; p. 52, lines 11-12; p. 27, lines 5-29; October 8, 2013, p. 52, lines 28-32; p. 53, lines 1-24; p. 54, lines 7-32; Ruling at Trial, March 3, 2015, p. 7, lines 2-5.

20. The trial judge granted personal standing to raise the constitutional challenge, but denied presenting evidence to prove that an unborn child is a human being from the time of conception. The trial judge believed the constitutional arguments had no possibility of success on appeal, and ruled the evidence needed by the appellant to succeed in her constitutional arguments would waste the court's time. He dismissed all the appellant's arguments and convicted.

R. v. Wagner, 2015 ONCJ 66, at para. 136.

21. The appeal court below 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*."

R. v. Mary Wagner, 2016 CarswellOnt 21758, O.S.C.J. at para. 38.

22. The appeal court followed the reasoning of the trial judge almost by rote, utilizing an outcome determinative framing of the case that bundled this case with clearly distinguishable other cases that were about other issues -- personhood and the legal status of the foetus -- to justify why there was no need for an evidentiary hearing. The appeal court did not decide whether or not an unborn child was a human being, or acknowledge that this was the first case to: 1) challenge the constitutionality of s. 223; 2) to decide whether an unborn human being was an individual within the meaning of s. 15(1); 3) to decide whether or not an unborn human being is within the meaning of "everyone" in s. 7 of the *Charter*; and 4) to decide whether or not an unborn human being is within the meaning of "anyone" in s. 37 of the *Criminal Code*. The courts below declined to answer the fundamental question whether an unborn child is a human being, and by not answering this question, effectively preserved the *status quo*, with the result abortion remains legal.

R. v. Mary Wagner, 2016 CarswellOnt 21758, O.S.C.J. at para. 74.

PART III Issues and the Law

A Did the court below err in law by denying an evidentiary hearing?

B Did the court below err in law by finding that s. 223 of the *Criminal Code* is constitutional?

C Did the court below err in law by ruling that the appellant could not rely upon the defences of necessity, s. 37 of the *Criminal Code* and mistake of fact?

D Does the appellant meet the test for leave to the Court of Appeal?

A Denial of Evidentiary Hearing

23. The trial judge refused to hear the evidence of Dr. John M. Thorp, professor of obstetrics and gynecology, and director of Women's Primary Healthcare at the University of North Carolina. In his expert medical opinion, an embryo is from the moment of conception onward a human being. The trial judge also disallowed the expert scientific opinion of Dr. Maureen L. Condic, Associate Professor of Neurobiology and Anatomy at the University of Utah, School of Medicine. She deposed in a sworn

declaration uncontested modern scientific evidence clearly demonstrates that the life of a human being begins at sperm-egg fusion that takes less than a second to complete. When human life begins is a matter of science fact. Personal opinions should be irrelevant. Although the trial judge accepted this expert evidence "at face value," he excluded it.

A.B. Vol. 1, 205-207, 272-275; *R. v. Wagner*, 2015 ONCJ 1862, at para. 101 (OCJ).

24. The Crown did not present any evidence to the contrary, but refused to make an admission of fact that abortion fatally harms an unborn human being, and argued that the foetus was neither a human being nor a person. If true, then just what is an unborn child? Crown counsel did not say.

A.B. Vol. 2, 472; Proceedings at Trial, February 4, 2014, p. 50 lines 13-14.

25. On February 10, 2014, as he was considering the standing arguments previously made by counsel, the trial judge emailed counsel requesting written submissions on a related question, the power of the court to decline to enter into a *Charter* evidentiary hearing in certain circumstances, in accordance with the comments of Finlayson J.A. in *R. v. Durette*, since the Crown had contended that the appellant's constitutional arguments were ultimately untenable. The appellant's counsel advised the judge by reply email that the Crown's argument falsely misconceived the appellant's constitutional argument to be about personhood and advised:

"This case is about whether a human being who is not a legal person may be protected and defended by a third party, and whether Parliament has unlimited power to decide who is and who is not a human being."

A.B. Vol. 2, 513, 515; *R. v. Durette*, 1992 CarswellOnt 955 (ONCA).

26. In an email dated February 14, 2014 the trial judge ruled that oral argument was needed and requested will say evidence from the experts:

"I am inclined to agree that Ms. Wagner should have an opportunity for oral argument as proposed by Mr. Lugosi. That argument should also outline what she expects the experts to say, including whether or not the underlying science has changed in the past 25 years."

A.B. Vol. 2, 517.

27. On May 12, 2014, the day before the scheduled argument, the trial judge advised defence counsel that the appellant was faced with satisfying the legal test set out by Findlayson JA in *Durette*:

"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. I do not know if that standard will be met in this case or not, but that is the standard defined by the Court of Appeal and, unless, the law has changed in that regard, it is the standard to be applied in Ms. Wagner's case."

A.B. Vol. 2, 526.

28. On May 21, 2014 the trial judge advised counsel by email that the evidence from the defence experts would be not permitted at the trial for any purpose:

"For reasons to follow, I have decided that no purpose would be served by having an evidentiary hearing on Ms. Wagner's *Charter* application and that in the current state of the law it has no possibility of success…. "

A.B. Vol. 2, 527.

29. In *Durette,* Finlayson J.A. authorized dismissal of an attempt to discover evidence, inspired by mere speculation:

"…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 judge may determine that it is not necessary to hear evidence on the issue and he is entitled to dismiss the motion."

This rule was derived from a trial judge's authority to allow only a defence that meets the "air of reality" test to go before a jury.

R. v. Durette, para. 39, 46.

30. The discretion to deny an evidentiary hearing is only applicable to a *Charter* motion and does not extend to an application under s. 52 of the *Constitution Act, 1982*. The rule also does not extend to whether or not a court thinks the argument will ultimately succeed in the Supreme Court of Canada.

31. In *R. v. Pires*, Charron J. ruled that judges may eliminate unnecessary *voir dires* on pre-trial *Charter* motions:

"… so should we [judges] strive to restrict pre-trial *Charter* motions to matters of substance where counsel can establish some basis for a violation of a right."

R. v. Pires; R. v. Lising [2005] S.J.C. No. 67, at para. 34-35.

32. The trial judge failed to note that Charron J. also said that trial judges are to determine subjectively and objectively if there was the "reasonable likelihood that an evidentiary hearing can assist in determining the issues."

R. v. Pires; R. v. Lising [2005] S.J.C. No. 67, at para. 35.

33. In this case an evidentiary hearing, in the absence of an admission of fact or judicial notice, was mandatory to determine the key fact of whether an unborn child is a human being, a finding essential to all of the appellant's legal arguments.

34. In his reasons, the trial judge relied upon *R. v. Kutynec,* which dealt with a motion to exclude evidence under s. 24(2). The defence's motion for a *voir dire* was denied and upheld on appeal by Finlayson J.A., who cautioned that his decision was narrowly confined in the context of a s. 24(2) application to exclude evidence wrongfully obtained, and not to all *Charter* applications: "I should point out that I am dealing here only with applications to exclude evidence."

R. v. Kutynec, 1992 CarswellOnt 79 (ONCA) para. 11, 15.

35. The trial judge declined an evidentiary hearing outside the scope of his authority authorized in *Felderhof*, and unfairly and irreparably damaged the defence and the constitutional challenge to s. 223.

R. v. Felderhof, 2003 CarswellOnt 4943 (ONCA), para. 32, 33, 40, 43, 57; *R. v. DeSousa*, 1992 CarswellOnt 100 (SCC), para. 17-18.

36. The trial judge greatly expanded the law when he ruled that a court may deny an evidentiary hearing that is needed in a constitutional challenge to the validity of legislation, stating:

"there is no principled reason why a trial judge's power ought not to be exercised in appropriate cases dealing with other *Charter* arguments."

R. v. Wagner, 2015 ONCJ 66, at para. 67, 70.

37. Do appellate courts in Canada require trial courts to establish a full evidentiary record on which

to determine constitutional issues? Is it juridically appropriate for trial courts to decide not to admit evidence in case a higher court may not accept a novel argument?

38. The Supreme Court of Canada's decision in *R. v. Seaboyer*; *R. v. Gayne* required that the appellant's trial judge hold an evidentiary hearing:

"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 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]"

R. v. Seaboyer; *R. v. Gayne* 1991 CarswellOnt 109 (SCC) at para. 34, 37, 39, 48-49, 56, 59.

39. It was an error for the trial judge to disregard binding authority that required the development of a proper evidentiary record for the constitutional challenge and for the non-constitutional defences too. The Supreme Court of Canada requires an evidentiary record in order to make a proper consideration of *Charter* issues. Absence of a factual base is a fatal flaw to a challenge to legislation.

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.

40. The prosecution did not offer any medical or scientific will-say evidence to contradict the opinions of the appellant's experts. Instead of admitting truth, the Crown diverted the question of whether an unborn child was a human being and introduced the question of personhood in order to reframe the case as a challenge to prior settled law regarding personhood, which was a constitutional "red herring"

used by the trial judge to deny the evidentiary hearing. 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 can serve to establish innocence, as well as guilt.

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.

41. In this case, the trial judge refused to accept uncontested medical and scientific truth, by refusing to admit the testimony of two distinguished experts, who were prepared to testify that the life of a human being begins at conception, and that abortion is a fatal assault upon an unborn child that is a living human being, even though he recognized that was the "core question" in the case.

R. v. Wagner, 2015 ONCJ 66, at para. 120.

42. The trial judge erred by denying the evidentiary hearing, thereby violating the appellant's s. 7 and 11 (d) rights and s. 650(3) of the *Criminal Code.*

43. The *Amended Notice of Constitutional Question* filed on February 4, 2014 with the trial court 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."

A.B. Vol. 2, 465.

44. Yet the trial judge said:

"… 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."

R. v. Wagner, 2015 ONCJ 66, at para. 75.

45. The trial judge stated that even if all the facts were to found in the applicant's favour, "nothing in this case …. could possibly result in the relief the applicant seeks." He added, "[T]here is no realistic

basis upon which the effectively absolutist view espoused by Ms. Wagner can prevail." The trial judge could not "rationally conceive any way" the appellant could succeed before the Supreme Court of Canada. He "could not imagine" the Supreme Court of Canada even remotely allowing for the possibility that an unborn child was a human being when it decided the cases of *R. v. Morgentaler* and *Borowski v. Canada.* These opinions expressed by the trial judge may have tainted his rulings.

R. v. Wagner, 2015 ONCJ 66, at para. 72, 149, 126; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.); *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342 (S.C.C.); *Yukon Francophone School Board v. Yukon Territory (A.G.)* 2015 SCC 25 (SCC) para. 20-37.

46. In the Michigan case of *People v. Kurr*, a pregnant mother with quadruplets was permitted to rely upon the self-defence of others to protect her unborn children and to justify killing her abusive boyfriend who was punching her in the stomach. Yet in this case the courts below did not 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, for even a non-viable unborn human being can meet the definition of "other" and is worthy of protection as living entity even though that human being is not a person.

People v. Kurr, 654 N.W.2d 651 (Mich. Ct. App. 2002) at pp. 654-655.

B Is Section 223 Constitutional?

A Matter of Interpretation

47. With respect to the proper approach to determine the meaning of and "any one" or "*toute personne*" in s. 37 of the *Criminal Code*, "individual" in s. 15(1), and "everyone" in s. 7, the appellant asks this Honourable Court to apply the settled common language rule and the principles of bilingual interpretation.

48. Driedger advises the words in a federal statute are to be read "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." Lord Tenterden in *Winstanley* stated, "Now, when we look at the words

of an Act of Parliament, which are not applied to any particular science or art, we are to construe them as they are understood in common language." Pigeon, J. in *Pfizer Co.* 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 …"

Dreidger, *Construction of Statutes* (Second ed. 1983) 87, applied in *R v. Sharpe*, 2001 SCC 2 at para 33; *A.G. v. Winstanley*, [1831] II Dow & Clark, 302, at 310; *Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise),*1975 CarswellNat 386, para. 8.

49. The common language rule includes context. Sedgwick J. in *Kennedy* restated the rule:

"The general rule of statutory interpretation is that words and sentences must be construed in their ordinary meaning or common or popular sense, unless the context requires some special or particular meaning to be given to them."

Kennedy v. Canada (Customs & Revenue Agency) 2000 CarswellOnt 3182 ((OSCJ) at para. 8.

50. In *Kennedy*, "person" was left undefined in the *Income Tax Act*. Sedgwick J. resolved the matter by applying a purely linguistic approach to solve a legal problem, by using dictionary definitions:

"Who is a "person" within the meaning of the *Income Tax Act*? Applying the established rules of statutory interpretation the question may properly be restated: what is the ordinary meaning or common or popular sense of the word "person "? The *Canadian Oxford Dictionary* (1998), gives as the primary meaning of the word, "an individual human being". The *Nelson Canadian Dictionary of the English Language* (1997) gives as the primary meaning of the word, "a living human being". Dictionaries are a recognized aid to the courts in determining the ordinary meaning or common or popular sense of a word used in a statute in accordance with the general rules of statutory interpretation.

Kennedy v. Canada (Customs & Revenue Agency) 2000 CarswellOnt 3182 (OSCJ) at para. 15-17; followed by Wright J. in *R. v. Sargent*, 2004 CarswellOnt 5626 (OCJ) at para. 33.

51. When words in the *Charter* are interpreted, a court may look at the context of the instrument. In *PPG Industries*, the B.C.C.A. held that "person" in s. 11(f) of the *Charter* meant "an individual natural human being." In looking at the context of the *Constitution Act, 1982* Nemetz, CJBC concluded that "any person" had a more restricted meaning than "everyone," and that the plain meaning of s. 11(f) led to the conclusion that not everyone had the benefit to a trial by jury, but only those natural persons who were in jeopardy of imprisonment for five years or more.

PPG Industries Canada Ltd. v. Canada (Attorney General), 1983 CarswellBC 16, (BCCA) para. 3, 5.

52. In the Supreme Court of Canada case of *Schreiber,* LeBel J. stated that the proper way to construe the words of a statute 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 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."

Schreiber v. Canada (Attorney General) 2002 SCC 62, at para. 54.

53. In the Supreme Court of Canada case of *R. c. Bois*, Bastarache J. comprehensively summarized the principles of bilingual statutory interpretation:

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

R. c. Bois 2004 SCC 6, 2004 CarswellQue 139, para. 26-31.

54. With respect to the proper interpretation of s. 37, there are no irreconcilable differences between the French and English versions of the words "any one" and "*toute personne*." When the words "*toute*

personne" is translated from French to English, it matches "anyone," the word in the English version of s. 37. But it is an error in 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. 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.

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.

Section 15(1) *Charter*

55. Section 15(1) 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. Every individual means a natural "human being." Assuming the truth of the opinion of the appellant's experts, the meaning of "human being" must include all unique living complete individuals who are unborn human beings and begin their lives from the time of their conception.

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

56. 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. The origins of assertions of human rights are found in the ideas of natural law and natural rights, and are at the root of the basic principle of the

rule of law embedded in both English and Canadian law. 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.

Allman v. Northwest Territories (Commissioner) 1983 CarswellNWT 36 (leave to SCC refused) at para. 14-15; *R. v. Big M Drug Mart*, 1985 CarswellAlta 316, [1985] 1 S.C.R. 295 (SCC) at para. 39, 40, 47, 116.

57. The omission of the unborn human being from the enumerated rights in s. 15(1) is not determinative. This issue is resolved by determining if there is some matter within the authority of Parliament which is the proper subject of a *Charter* analysis. This is a simple threshold test. 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. There is no distinction between a positive act of Parliament or an omission when it comes to *Charter* scrutiny. Neutrality cannot be assumed. Laws that regulate private activity are subject to the *Charter*.

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

58. When assessing a claim under s. 15(1), the Canada's Supreme Court established a two-step approach set out by Abella J.: Does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground, and, if so, does it impose "burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating ... disadvantage", including "historical" disadvantage?

Centrale des syndicats du Québec c. Québec (Procureure générale) 2018 SCC 18, 2018 CarswellQue 3615, 2018 CarswellQue 3614, para. 22, 30.

59. Cote, J. concurred and summarized the s. 15(1) jurisprudence:

Section 15(1) guarantees for every person substantive equality as opposed to mere formal equality under the law… This guarantee is rooted in a recognition of the fact that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society…. The purpose of the *Charter* provision is thus to prevent conduct that perpetuates those discriminatory disadvantages … The main issue under s. 15(1) is whether the impugned law violates this *Charter* guarantee of substantive equality …. It is therefore necessary to apply the two-step analytical framework laid down by the Court and ask the following two questions: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a discriminatory disadvantage by, among other things, perpetuating prejudice or stereotyping? … In this analysis, the main consideration must be the impact of the law.

Centrale des syndicats du Québec c. Québec (Procureure générale) 2018 SCC 18, 2018 CarswellQue 3615, 2018 CarswellQue 3614, para. 113-118, 134-136.

60. The application of two-part step in the s. 15(1) analysis to this case proves a *prima facie* violation of s. 15(1): 1) the unborn child is denied equal protection or equal benefit of the law, when compared to a child who is born alive, by being excluded from the legal definition of human being in s. 223, 2) this denial of equality is discrimination, based upon the enumerated ground of age, or upon any one or more of the following analogous grounds: size, stage of development, condition of dependency, and location of existence, and 3) the impact is death. This unequal treatment is based upon the stereotypical myths that an unborn child is not a unique individual human being, but mere tissue or biological material that is a part of its mother's body, and is the personal property of the mother to be kept or destroyed as the mother pleases. This situation conflicts with *Vriend*, which held those who are "different" from us should have the same equality rights that we enjoy.

Vriend v. Alberta, 1998 CarswellAlta 210 SCC at para. 69.

61. Section 223 creates an arbitrary discriminatory boundary between individuals, making illegal the murder of only those individuals who are born alive. This violates the equality rights of all individuals, as this law fails to protect unborn children denied their equality rights guaranteed by the *Constitution*. Section 223 violates s. 15(1), cannot be saved by s. 1, and must be declared to be of no force and effect, pursuant to s. 52 of the *Constitution Act, 1982*.

Section 7 *Charter*

62. The appellant contends s. 7 grants "everyone" the right to life, and "everyone" includes all human beings, including those people who are not yet born. The text omits the word "person", which has a more restricted meaning than "everyone." While "person" means a born alive human being that enjoys juridical rights and privileges, the appellant contends "everyone" means all living human beings, born or unborn, from the time of conception until the time of death. "Everyone" includes all people and must be given a large and liberal construction to properly expound the constitution. In the French version, "*chacun*" means "everyone." There is no discrepancy between the meanings.

https://en.bab.la/dictionary/french-english/chacun;
https://dictionary.cambridge.org/dictionary/french-english/chacun;
https://www.collinsdictionary.com/dictionary/english/everyone

63. In *Morgentaler*, no one was denied an abortion. The case was decided on a hypothetical basis. No constitutional abortion right exists. The definition of "everyone" in s. 7 was not decided or considered.

R. v. Morgentaler, 1988 CarswellOnt 45 SCC at para. 222, 230-232, *per* McIntyre, J; para. 189, Beetz J.

64. When the Sask. C.A. in *Borowski* decided that "everyone" in s. 7 did not apply to unborn human beings, the court did not apply the common language rule. Instead that Court assumed that the *Charter* was intended to be neutral on the question of abortion, and left it up to Parliament to legislate on this subject matter. The Supreme Court of Canada declined to consider this issue, dismissing the appeal as moot, because the remedy sought in *Borowski* was founded upon s. 251 of the *Criminal Code*, which was no longer of any force or effect after the *Morgentaler* decision.

Borowsky 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.) para.14, 26.

65. The B.C.C.A. in *Demers* refused to answer the question of whether "everyone" in s. 7 included unborn human beings, and stated that the court was left with "no room" to decide this issue after the Supreme Court of Canada 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.

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.

66. In *Tremblay v. Daigle,* the parents of an unborn child litigated the unilateral decision of the mother to abort their child. The father argued that his unborn child 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." The Supreme Court of Canada declined to apply the settled law of the common language rule:

"The meaning of the term 'human being' is a highly controversial issue … 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 Court decided that the failure of Québec provincial legislature to define "human being" or "person" meant it did not clearly intend to consider the status of a foetus. Unanswered was the answer to the question of whether a foetus was included within the meaning of "everyone" in s. 7, since this case was a civil action between two private parties.

Québec *Charter of Human Rights and Freedoms*, R.S.Q. c.-12; *Tremblay v. Daigle*, 1989 CarswellQue 124 SCC at pp. 5, 13, 20.

67. The case of *Winnipeg Child* involved the legality of a judicial order to detain a pregnant mother to prevent harm from occurring to her unborn child because of drug abuse caused by her glue-sniffing addiction. The case did not involve interpreting either s. 7 or s. 15(1), but the common law. McLachlin CJC held tort law permits a child to bring an action for pre-birth injuries only after that child is born alive and becomes a legal or juridical person. In *Dobson*, even though the parties did not address the *Charter* in their arguments, the Supreme Court created an exception to this rule. It removed the juridical child's cause of action for pre-birth injuries caused by its own mother, creating immunity from legal liability. Freed from her duty of care to her own child, a mother may fatally harm her unborn child by abortion, in exercising her s. 7 rights.

Winnipeg Child & Family Services (Northwest Area) v. G (D.F.), 1997 CarswellMan 475 SCC at para. 11-15; *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 CarswellNB 248 SCC at para. 22-24, 84, 114

68. Even though it is still an open question of whether "everyone" in s. 7 applies to unborn human beings, both the trial court and the appellate court below declined to decide the s. 7 issue. The trial judge stated that the appellant was so "hemmed in" by authoritative case law that "she could not possibly prevail." 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*." Both courts erred by failing to distinguish this case as a unique unprecedented constitutional challenge to s. 223 that has nothing to do with juridical personhood under the common law or a statute, and ignored the dissenting judgments of Sopinka and Major JJ. In *Winnipeg Child*, who decided that the "born alive" rule was scientifically out of date and should be abandoned.

R. v. Wagner, 2015 CarswellOnt 1982 O.C.J. at para. 126; *R. v. Mary Wagner*, 2016 CarswellOnt 21758, O.S.C.J. at para. 38; *Winnipeg Child & Family Services (Northwest Area) v. G (D.F.),* 1997 CarswellMan 475 SCC at para. 113, 116, 118-120.

69. Both the trial court and the appellate court erred by substituting the concept of juridical personhood, a legal fiction that was never litigated or challenged in this case, for the novel unprecedented factual question of whether an unborn child is a "human being," and if so, whether s. 223 is in conformity with the *Constitution*. Put another way, once a child is born alive, the legal status of "personhood" is acquired. This is a legal fiction. This is distinguished from the question of truth left undecided by the courts below: Is an individual is a human being by virtue of existing from when that individual's life begins at the time of the sperm-egg fusion? There is no law preventing any court from deciding as a biological or scientific or medical fact when a human being's life begins to exist.

70. When the appellant was charged in 2012, s. 223(1) had never been updated to accord with modern scientific truth that a human being begins its existence at the time of the sperm-egg fusion, the moment of conception. Section 223(2) was earlier amended so that abortion was no longer defined as a

homicide, when the words, "after becoming a human being," were added in at the end of that paragraph.

71. The appellant challenged the constitutionality of s. 223 under s. 7. She was granted public interest standing because she has a long history of being a defender of the right to life of unborn human beings. She has spent years in jail as a result of her civil disobedience. While the appellant could have brought her constitutional challenge by way a declaration in superior court, the most reasonable, expedient and effective way for her to strike down s. 223, for it impeded her defence.

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 at para. 35, 186-188; *R. v. Big M Drug Mart Ltd.*, 1985 CarswellAlta 316 at para. 40.

Principles of Fundamental Justice

72. In this case, the onus is on the appellant to show that the law interferes with or deprives the right to life of one or more human beings, who are individuals within the meaning of "everyone" in s. 7. If yes, then the appellant must next meet the onus that the interference or deprivation is not in accordance with the principles of fundamental justice. If this is met, then the onus shifts to the Crown under s. 1 of the *Charter* to justify the interference or deprivation.

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 at para. 29, 109; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 55; Section 1 *Charter*.

73. Section 7 cases require the courts to adjudicate many difficult moral and ethical issues that go to the heart of the most basic interest of all human beings, the right to life. But the courts have a duty to rise above political debate and questions when the social policy of unregulated abortion infringes the constitutional right to life of unborn human beings, for judges are not permitted to shy away from their duty to apply the law. Section 52 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. Where a violation stems from a *Charter* breach, the court may also order whatever remedy is "appropriate and just" in the circumstances under s. 24. There is

nothing in our constitutional arrangement to exclude "political questions" from judicial review where the Constitution itself is alleged to be violated."

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 at para. 193, 89, 183.

74. The principles of fundamental justice must be given a "large, liberal and purposive interpretation" in s. 7. The *Reference re s. 94(2) B.C. Motor Vehicle Act* case states that the content of the principles lie "… in the inherent domain of the judiciary as guardian of the justice system," and "The principles are found in the basic tenets of the legal system." The appellant contends that there are at stake in this case a minimum of two violations of these principles: the protection of a child's right to life; and the killing of an innocent human being.

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 at para. 198; *Reference re s. 94(2) B.C. Motor Vehicle Act*, 1985 CarswellBC 398 at para. 37.

75. Section 223 violates a principle of fundamental justice, for it removes the protection of an unborn child's right to life. La Forest J. stated in *B. (R.)*:

"The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, that it meets the requirements of fair procedure."

B. (R.) v. Children's Aid Society of Metropolitan Toronto, 1995 CarswellOnt 105 SCC at 88; Applied: *A.B. v. C.D.*, 2020 BCCA 11 at para. 208

76. Lord Hailsham stated in *R. v. Howe*:

"[T]he overriding objects of the criminal law must be to protect innocent lives …" Withdrawing the protection of the criminal law from the innocent victim "casts the cloak of its protection on the coward and the poltroon in the name of a concession to human frailty." Parliament's choice to remove unborn human beings from the definition of human being rejects the primary fundamental principle of justice to protect the lives of all human beings: "… the common law has established a hierarchy, and has held that the interests of the victim must prevail."

Public policy yields to the special responsibility of the judiciary to protect the innocent. If the law does not permit the killing of an innocent human being to save one's own life, will any lesser reason to kill an innocent human being be legally excused or justified?

R. v. Howe, [1987] 1 All E.R. Rep. 771 (H.L.) p. 778, 780; See *R. v. Sandham*, 2009 CarswellOnt 6502, (OSCJ) para. 99 *per* Heeney, J.; *United States v. Burns*, 2001 SCC 7 at para. 71; *R. v Dudley and Stephens*, (1884) 14 Q.B.D. 273 at pp. 286-288.

Section 1

77. The finality of death means there can be no rectification for the injustice done to an innocent human being, incapable of consent or acquiescence to its own termination. In assessing s. 7 *Charter* compliance, courts are required to look to both the purpose and to the effect of the impugned legislation. Here the means chosen by Parliament to achieve its purpose infringes upon the right to life of other human beings. The effect is overbroad, disproportionate, and results in arbitrary selection for termination.

R. v. Malmo-Levine, 2003 SCC 74 at 203.

78. A criminal law that is shown to be irrational or arbitrary infringes s. 7. Granting legal immunity to deliberately and fatally harm an innocent human being is so extreme a response to an unwanted pregnancy that is *per se* disproportionate and overbroad to serve any legitimate government interest.

R. v. Malmo-Levine, 2003 SCC 74 at para. 135, 142.

79. Can the Crown meet its burden to save s. 223 under s. 1 of the *Charter*? The right to life protected by s. 7 is foundational and cannot be overridden by competing *Charter*, political or social interests.

R. v. Malmo-Levine, 2003 SCC 74 at 271.

International Law

80. Canada's international human rights obligations inform and guide the principles of fundamental justice. These obligations assist to interpret the content of these principles and to assist the court in s. 1 *Charter* balancing of competing interests.

United States v. Burns, 2001 SCC 7 at para. 79-80.

81. On December 13, 1991, Canada ratified the *United Nations Convention on the Rights of the Child*. Its preamble affirms the inherent dignity and the equal and inalienable rights of all members of the human family, prohibiting discrimination of any kind based upon status, and mandates the State Parties to the Convention to give legal protection to the birth of all children, even from the child's parents or other family members. Canada is bound by international law to protect every child's inherent right to life. Canada made no reservation or statement of understanding upon ratification with regard to any of the applicable Articles quoted below and is fully bound to obey those the appellant relies upon.

United Nations Convention on the Rights of the Child at:
Article 1 "… a child means every human being below the age of eighteen years…"
Article 2 (1) "State Parties shall respect and ensure the right set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's … or other status. (2) State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status of, activities, expressed opinions, or beliefs of the child's parents …"
Article 4 "State Parties shall undertake all appropriate legislation, administrative or other measures for the implementation of the rights recognized in the present Convention."
Article 6 (1) "State Parties recognize that every child has the inherent right to life." (2) "State Parties shall ensure to the maximum extent possible the survival and development of the child."
Article 37 (a) No child shall be subject to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor ….. shall be imposed …."

United Nations Convention on the Rights of the Child:
https://www.ohchr.org/en/professionalinterest/pages/crc.aspx
Canada's Reservations:
https://canadiancrc.com/UN_CRC/UN_Canada_Declarations_Reservations_Convention_Rights_Child.aspx

82. The international and domestic principles of fundamental justice are offended by s. 223. A nation founded upon the rule of law must never permit the tyranny of the majority to prevail over the right to life of a legally inferior minority that is discrete and insular. This law prejudices a discrete and insular minority, and demands a far more searching judicial inquiry than the analysis undertaken by the courts below.

See *U.S. v. Caroline Products*, 304 U.S. 144, at 152-153 (1938)(footnote 4).

83. Section 11(g) of the *Charter* permits a criminal conviction based upon the general principles of international law recognized by the community of nations or international law. La Forest J. held in *Finta* that domestic immunity for behaviour contrary to civilized law is untenable:

"To allow the state to authorize and immunize its agents from any responsibility simply by enacting a law authorizing behaviour that is contrary to the principles of international law and the general principles of law observed by all civilized nations is in my view untenable."

R. v. Finta, 1994 CarswellOnt 1154 SCC at para. 334, *per* La Forest, J. dissenting.

The Unwritten Constitution of Canada

84. There are in Canada fundamental unwritten constitutional principles. These principles go to the core of the meaning of just government and give robust authority to the courts to exercise their common law inherent jurisdiction and serve as a check upon abuse of power by the state. These unwritten constitutional norms are rooted in fundamental principles and conventions that are foundational to the common law. The language of s. 52 of the *Constitution Act, 1982* defines the Constitution to "include" the *Constitution Act, 1867* and the *Constitution Act, 1982*. This indicates that the textual sources of the Constitution are not exhaustive and that they may be supplanted and, if necessary, altered by principles and conventions found in the unwritten *Constitution*. The unwritten *Constitution* includes "organizing principles" which are derived from Canada's history and traditions. Organizing principles can take precedence over formal legal norms. The preamble to the *Constitution Act, 1867* states, in part, that Canada is to have a constitution similar in principle to that of the United Kingdom. This means that Canada's unwritten constitutional principles derive their authority from the common law. The preamble to the *Charter* adds the "organizing principles" of the supremacy of God and the rule of law. Section 26 of the *Charter* is a gateway as to how unwritten common law constitutional law principles remain alive and are incorporated by reference into the *Constitution*. These unwritten constitutional principles are capable of limiting the Parliament's authority under s. 32 of the *Charter*.

See: Rt. Hon. Beverley McLachlin, *Unwritten Constitutional Principles: What is Going On?* at https://www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx pp. 1-2, 4, 7-9; *Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice)*, 1997 CarswellNat 3038 SCC at para. 90, 94-95, 109; *Babcock v. Canada (Attorney General)*, 2002 SCC 52 at para. 54; Preamble, Sections 26, 32, 52 *Constitution Act, 1982*; Preamble, *Constitution Act, 1867*.

C The Defences of Necessity, Section 37 and Mistake of Fact

Necessity

85. The appellant further relies upon the common law defence of necessity found in s. 8(3) and s. 37 of the *Criminal Code*. She contends that her morally involuntary behaviour and conduct be excused or justified from criminal liability, in accordance with s. 7:

"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 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."

R. v. Ruzic, 2001 SCC 24 at para. 47.

86. The appellant's actions were justified. The Supreme Court of Canada determined in *Perka* that involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure. 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. Dickson J. (as he then was) believed that there was no exception to breaking the law: "[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." Yet in *Latimer,* the Supreme 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." If the right to life of a child disentitles a murderer from relying upon the defence of necessity, the reverse must be true: a rescuer can illegally save the life of an unborn child from an inevitable imminent legal murder, and be justified by the defence of necessity, to fill a legislative void.

Perka et al v. The Queen, 1984 CarswellBC 2518 SCC at para. 62, 32,*; R. v. Latimer,* 2001 SCC 1 at para. 42*; R. v. Ruzic*, 2001 SCC 24 at para. 87-90.

87. Lord Denning, M.R. recognized the paramountcy of the defence of necessity over the rights of others: "In case of great and imminent danger, in order to preserve life, the law will permit of an encroachment on private property." In *Mouse's Case*, an unanimous court held that in a case of necessity created by a great tempest that threatened human life, it was lawful for a passenger to throw overboard property belonging to the plaintiff. The court in *Mouse's Case,* relied upon another common law principle: illegal acts can be justified by the doctrine of *pro bono publico*, the public good or benefit. The common law excuses even strangers from rescuing from harm any human being, even if that human being in danger was not a legally recognized person. The duty of care in negligence law is rooted in the same moral law that compelled the appellant to rescue unborn children from the certain death she foresaw.

Southwark L. B. C. v. Williams [1971] 2 W.L.R. 467, at 472-473; *Mouse's Case*, (1609) 12 Co. Rep. 63; *R. v. Duffy*, [1966] 1 All E. R. Rep. 62, at 71-72, 64, (H.L.); *Handcock v. Baker,* 129 Eng. R. 1270 (1800); *Donoghue v. Stephenson*, [1932] A.C. 562 (H.L.) at p. 580.

Section 37

88. The appellant incorporates by references preceding paragraphs 49-56, and says that the appeal court below erred in law by holding that "any one" as it is used in s. 37 means the same thing as "person," which has been interpreted by case law to mean a juridical person. A correct legal interpretation of the principles of statutory and bilingual construction would have translated "*toute personne*" to mean "human being." Justice Dunnet erred in law, as only "*personne morale*" may be translated into the English language as a legal or juridical "person."

R. v. Mary Wagner, 2016 ONSC 8078, 2016 CarswellOnt 21758 (OSCJ) at para. 117-123.

Summary: Necessity and s. 37

89. There was an air of reality to the necessity defence, and under s. 37, for the appellant adduced sufficient evidence to legally justify her actions. The appellant says on a proper construction of s. 37 and the defence of necessity, she was lawfully allowed to intervene to prevent an imminent fatal assault and lawfully placed unborn children under her protection, even though they were strangers. She is

entitled to an acquittal since the Crown did not meet its burden to prove beyond a reasonable doubt that the appellant was disentitled to these defences, and that there is no evidence that unborn children are anything other than human beings.

Colour of Right (Mistake of Fact)

90. Alternatively the defence of colour of right, the mistake of fact, applies if unborn children are not human beings as a matter of fact. To qualify for this defence, the appellant must have had "an honest belief in a state of facts which, if existed, would be a legal justification or excuse." "There must be at least an honest belief in the existence of a state of facts which, if it actually existed, would at law justify or excuse the act done."

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.

D Why this Case Merits Leave to Appeal

91. This is a strong s. 7 and 15(1) *Charter* test case challenging the constitutionality of s. 223 of the *Criminal Code*. If this law is ruled unconstitutional, and of no force and effect, then abortion will revert to being homicide and again be a crime. This is a matter of great public importance in a legislative context that affects social stability, politics, public policy, health care, civil liberties, human rights, Canada's international obligations under treaties, international, federal, provincial, and territorial abortion funding, and the need for people to replace Canada's falling birth rate.

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342 (S.C.C.), para. 46.

92. The appeal court below expanded the power of trial courts to deny an evidentiary hearing to *Charter*-based challenges to legislation. This unprecedented expansion of judicial discretion and power is not supported in the previous jurisprudence, and will now deprive any accused person in Canada of a constitutional defence that a trial judge believes is unlikely to succeed. Will this Honourable Court re-evaluate this new power with respect to the general administration of justice in the context of a right to make full answer and defence?

93. Rejecting the defence of others under s. 37 of the *Criminal Code* in this case is of public importance, as being deprived of this defence resulted in an injustice to the appellant. The appellate court's translation of "*toute personne*," the requirement of a pre-existing relationship between a rescuer and a victim, and that finding that words do not constitute force in the context in criminal law, were all clear errors of law, that deprived the appellant of realistic prospect of an acquittal in this case.

94. In the absence of a finding of fact that a foetus is a human being, and given the appellant's sincere belief that unborn human beings commence their lives from the time of sperm-egg fusion, it would be a miscarriage of justice to derive the appellant from relying upon the defence of mistake of fact. It is unfair to deprive the appellant of this defence, since the other rulings of the appeal court leave the appellant with only this last viable defence.

PART IV Order Requested

95. The appellant seeks to have this Court grant:

1 Leave to Appeal;
2 A Declaration that an unborn child is a human being from the beginning of its life;
3 A Declaration that s. 223 of the *Criminal Code* is unconstitutional and of no force and effect, contrary to s. 52 *Constitution Act, 1982;*
4 Orders to vacate the appellant's convictions, and to acquit her of all charges; and,
5 Costs to the appellant on a full indemnity basis, for both the trial and for all appeals herein.
6 Such further orders as counsel may request or may be deemed necessary and appropriate by this Honourable Court.

All of which is respectfully submitted this 19th day of February, 2020

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Charles I. M. Lugosi, counsel for the appellant

Schedule A

Authorities to be Cited

Authorities (In Order of First Appearance)	**Paragraph Location**
R. v. R. (R.) 2008 ONCA 497 (ONCA)	1
R. v. Sullivan, [1991] 1 S.C.R. 59 (SCC), 1991 CarswellBC 916	7
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Kennedy v. Canada (Customs & Revenue Agency, [2000] O.J. No. 3313, CarswellOnt 3182 (OSCJ)	49

Schedule B

Relevant Legislative Provisions