S.C.C. Court File No. 39402

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

REPLY TO RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(MARY WAGNER, APPLICANT)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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Should the *Charter* be constricted by statute?

1. In Canada

- s. 15(1) of the *Charter* bestows equality rights to "every individual";
- s. 7 of the *Charter* grants "everyone" the right to life.

2. Fundamentally, this test case is about determining whether an ordinary provision of the *Criminal Code*,[1] in this case s. 223(1), can be used to constrict the meaning of words used in the *Charter*. More specifically, can an ordinary piece of legislation remove a constitutional guarantee to "every individual" or "everyone" by defining these words exclusively?

3. The clear language of s. 52(1) of the *The Constitution Act, 1982* dictates that all law, including s. 223(1) of the *Criminal Code*, must comply with the *Charter*.[2] The decisions below and the Crown have it the other way round: the otherwise broad and inclusive language of the *Charter* is instead being narrowly read in a way consistent with Parliament's selective definition of "human being".

4. This Honourable Court has diligently reviewed legislation that has been found not to conform to the *Charter*. To overlook s. 223(1) of the *Criminal Code* at the invitation of the Crown, effectively grants a constitutional exemption to an inferior positive law that is not constitutionally compliant. Refusing Leave in this case has the effect of re-writing the *Charter* without following the ordinary constitutional amendment formula,[3] in order to preserve the status quo of legalized abortion, which is dependent upon the legalized killing of someone who is not legally defined as a human being.

5. It is submitted that this Honourable Court should never permit the development of a body of jurisprudence that gives *Charter* guarantees to some human beings, but not to other human beings, who are denied *Charter* guarantees, simply because Parliament has divided biological natural human beings into two classes, one legally recognized, and the other not legally

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[1] *Criminal Code*, RSC 1985, c C-46.
[2] *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at para. 25.
[3] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss. 38-51.

recognized, because of age, condition and location of existence. Section 52(1) of the *Constitution Act, 1982* is the supreme law of Canada, and may not be constricted by a part of the *Criminal Code*, or other legislation that is subordinate to the entire Constitution of Canada.

Public Importance; Unanswered Questions

6. By granting Leave in this case, 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 the extent to which that definition (or any similar legislative pronouncement) may then be used to limit the scope of the words "everyone" and "every individual" as they appear in the *Charter*. The Saskatchewan Court of Appeal, in *Borowski v. Canada (Attorney-General)*,[4] did not consider the issue of whether a *foetus* was a human being. It found:

- 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 to be accorded, it would be novel;

- an interpretation of the *Charter* which gave independent rights to a *foetus* would be a major departure from tradition. This is not of course to suggest that such a radical step in recognition of rights could not have been taken;

- the *Charter* is neutral in relation to abortion; it remains for Parliament, reflecting the will of the Canadian people, to determine without reference to the *Charter* in what circumstances the termination of pregnancy will be lawful or unlawful;

- this legislative history as well points to the fact that it was not intended to make radical changes and that the *Charter* was indeed intended to be neutral with respect to the subject of abortion and the rights of a *foetus*; and

- the intended purpose of ss. 7 or s. 15 of the *Charter* was not to protect a *foetus'* right to life.

7. It is noteworthy that this Honourable Court has not considered these findings, including the observation that it was open to this Honourable Court to recognize the rights of the unborn as

[4] *Borowski v. Canada (Attorney-General)*, 1987 CanLII 6815, 56 Sask. R. 129 (SK CA) at para. 28, 56, 65, 69, 71.

human beings, if not as persons. In *Tremblay v. Daigle*,[5] this Honourable Court expressly refused to apply s. 7 of the *Charter* to the questions in that case, because that appeal arose in the context of a civil action between two private parties. Similarly, the *Morgentaler* decision deliberately left undecided whether or not a *foetus* was a "human being" or a "person" and included within the meaning of s. 7 of the *Charter*.[6] In *Demers*, the accused argued his right to freedom of expression was violated for engaged in a protest within a zone prohibited by statute in the vicinity of an abortion clinic. In the s. 1 balancing analysis submission made by his agent, an American law professor, who was not licensed or qualified to practice law in Canada, the appellant made a submission based upon divine law, foreign and international law that "everyone" in s. 7 includes every *foetus*. The court confined its consideration to the question as to whether the *foetus* was recognized as a constitutional "person" or given juridical status as a "person." The court did not consider the question of whether the foetus was a "human being" or an "individual" under s. 15(1) of the *Charter*. The Court dismissed the appeal, deferring the question of the balancing for foetal rights over the rights of pregnant women to the legislature.[7]

8. The question of whether the unborn child is a "human being" and included in the scope of the Constitution of Canada remains an open and unsettled question that has yet to be considered by this Honourable Court. While in the past complex and difficult questions that affect public policy were left to legislators, since 1982 this Honourable Court has the added crucial responsibility to ensure that legislation enacted by Parliament conforms to the Constitution of Canada, including s. 223(1) that that excludes an entire class of human beings from the definition of "human being" in the *Criminal Code*.

9. The Crown conflates two different concepts: "person" and "human being." The term "human being" encompasses the factually indisputable biological and scientific reality recognizing the natural state of all members of the human family. On the other hand the legal concept of a "person" refers to those human beings who are endowed with a bundle of legal rights, privileges and immunities upon the meeting of state determined legal criteria. Personhood jurisprudence is distinguishable and is not applicable to the question of who is a human being,

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[5] *Tremblay v. Daigle*, 1989 CanLII 33 (SCC), [1989] 2 SCR 530.
[6] *R. v. Morgentaler*,1988 CanLII 90 (SCC), [1988] 1 SCR 30.
[7] *R. v. Demers* 2003 BCCA 28, at para. 2, 5, 15-16.

which is not a normative question, representing a value judgment, but a factual one, capable of a judicial finding of fact based upon hard and uncontroverted evidence.

10. The Applicant contends that Parliament lacks authority to exclude any one individual human being or any class of human beings from the human family by the use of a positive law that does not conform to s. 52 of *The Constitution Act, 1982* and the language of the *Charter*. The question remains unanswered by this Honourable Court as to whether the unborn, who are unrecognized as human beings by s. 223(1) of the *Criminal Code*, are still entitled to constitutional protection under ss. 7 or 15(1) of the *Charter*; because all natural human beings of any age, condition or location of existence are within the scope of the words "everyone" and "every individual".

11. While this Honourable Court has found, in *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, that "[n]either the common law nor the civil law of Quebec recognizes the unborn child as a legal person possessing rights",[8] that is not the issue raised in this application. Leave is sought to ascertain whether in the context of a criminal proceeding between an accused and the state, a statute, the *Criminal Code,* may deny a legal defence that is blocked by positive law that denies or infringes the constitutional rights of a class of human beings.

12. This Honourable Court has established that the *Charter* may be relied upon to aid in the interpretation of legislation.[9] However, there is no known decision of this Honourable Court which says that the *Charter* must be interpreted in a narrow manner so as not to invalidate an overreaching provision of the *Criminal Code*, or any other piece of legislation. Indeed, the opposite is true. In *Big M Drug Mart*, this Honourable Court held that any accused may challenge the constitutionality of any law upon which a criminal charge is alleged.[10] Since s. 223(1) obstructs the Appellant's *Charter* and statutory rights to make full answer and defence, she is entitled as of right to challenge the constitutionality of s. 223(1). In *Morgentaler*, this

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[8] *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, 1997 CanLII 336 (SCC) at para. 15.
[9] *Symes v. Canada*, [1993] 4 S.C.R. 695 at page 752; *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559 at para. 62.
[10] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at para. 40.

Honourable Court permitted the accused physicians to base their defence upon a violation of the s. 7 *Charter* rights of a third party class, pregnant women. The Appellant is thus entitled to attack the constitutional validity of s. 223(1) on the alternative basis that this provision adversely affects the *Charter* rights of a third party class, the unborn human being.[11]

The *Supreme Court Act*

13. With all due respect to the Crown, the jurisdiction of this Honourable Court to grant Leave is defined by ss. 40 and 43(1)(a) of the *Supreme Court Act*.[12] Pursuant to these sections, this Honourable Court may grant Leave where "any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it".[13] To trivialize this appeal as a collateral attack upon a conviction for a breach of probation is a wrongful mischaracterization of this test case, which has nothing to do with a criminal charge for disobeying an underlying order for an interim injunction, as was the situation in *Gibbons*.[14] This appeal is of supreme national importance, raising questions that are eminently suited and long overdue for this Honourable Court to adjudicate.

14. The questions raised herein are clearly issues of law, and, to the extent that they involve an issue of mixed fact and law, neither ss. 40 or 43(1)(a) would disqualify the Applicant's submission, as the Crown insists.[15] Both sections refer to "any issue of law or any issue of mixed law and fact involved in that question".[16]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of December, 2020.

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[11] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at para. 26-27, 70.
[12] *Supreme Court Act*, RSC 1985, c S-26.
[13] *Supreme Court Act*, RSC 1985, c S-26, s. 43(1)(a).
[14] *R v. Gibbons*, 2015 ONCA 47, (Ont. CA) at para. 9.
[15] Respondent's Materials at para. 17.
[16] *Supreme Court Act*, RSC 1985, c S-26.

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Loi sur la Cour suprême (L.R.C. (1985), ch. S-26), a. 43(1)(a)