

COURT OF APPEAL

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

BETWEEN:

JAMES ROGER DEMERS

APPELLANT

AND:

REGINA

RESPONDENT

AND:

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

INTERVENOR

INTERVENOR'S FACTUM

JAMES R. DEMERS

RR #2, S-12 C-7

Nelson, B.C. V1L 5P5

Telephone: (250) 354-4749

The Appellant, pro se

ROGER CUTLER

LISA MROZINSKI

Ministry of Attorney General

Criminal Justice Branch

Box 9276 Stn Prov Govt

9th Floor, 1001 Douglas Street

Victoria, B.C. V8W 9J7

Telephone: (250) 387-4218

Counsel for the Respondent

NITYA IYER

ANDREA ZWACK

Heenan Blaikie LLP

2200 – 1055 West Hastings Street

Vancouver, B.C. V6E 2E9

Telephone: (604) 669-0011

Counsel for the Intervenor

INDEX

	<u>PAGE</u>
PART 1	
STATEMENT OF FACTS	1
PART 2	
ISSUES ON APPEAL	3
PART 3	
ARGUMENT	4
A. The Section 7 Claim	4
B. The Section 1 Analysis	5
1. Contextual Factors	
2. Legislative Objective	
3. Proportionality	
C. Conclusion	19
PART 4	
NATURE OF ORDER SOUGHT	20
LIST OF AUTHORITIES	21

PART 1: STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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PART 2: POINTS IN ISSUE

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5. The Intervenor’s position with respect to the points in issue is as follows:
- a) Whether the foetus has rights under s. 7 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).

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

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

The Intervenor takes no position in this issue.

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

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

1 **PART 3: ARGUMENT**

2 **A. The Section 7 Claim**

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

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

8
9 7. The Appellant does not claim that the *Act* infringes his own s. 7 rights. He claims that the
10 *Act* infringes the s. 7 rights of fetuses. However, the *Act* does not address the legality of
11 abortion. The impugned provisions of the *Act* simply restrict a range of activities expressing
12 disapproval of abortion, in defined ways, within precisely specified geographic zones. There is
13 therefore no nexus between the impugned provisions of the *Act* and any s. 7 rights of fetuses
14 asserted by the Appellant.

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

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

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

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

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

13 *Borowski, supra*, at pp. 358-363.

14
 15 11. As in *Borowski*, consideration of the second and third factors demonstrates that the
 16 discretion should not be exercised in the present appeal. The Supreme Court of Canada has stated
 17 that a ruling that the foetus has a right to life would be a radical change in the law with
 18 unpredictable consequences, and would introduce enormous uncertainty into the law regarding
 19 the constitutional status of abortion services in Canada. Judicial economy therefore militates
 20 against deciding this question. Further, a determination of the Appellant's claim that foetuses
 21 have s. 7 rights would effectively turn this appeal into a private reference on the legality of
 22 abortion, precisely the circumstance the Supreme Court considered in *Borowski* when it declined
 23 to hear the appeal.

24 *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*,
 25 [1997] 3 S.C.R. 925 at pp. 940-41, 943, and 945;
 26 *Borowski, supra*, at p. 364-365.

27
 28 **B. The Section 1 Analysis**

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

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

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

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

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

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

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

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

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

1 **1. Contextual Factors**

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

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

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

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

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

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

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

6 *R. v. Sharpe*, [2001] 1 S.C.R. 45, at p. 96;

7 *Keegstra, supra*, at p. 776;

8 *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 504;

9 *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927, at p. 990.

10
11 19. Fourth, the nature of the activity prohibited by the *Act* is not of high value. This is not
12 because the expression of anti-abortion views in general is of low value, as was found with
13 respect to hate speech in *Keegstra* or obscenity in *Butler*. Rather, it is because anti-abortion
14 views can easily be expressed at other locations, and their expression at the locations prohibited
15 by the *Act* is no more closely tied with the values underlying s. 2 (a) and 2(b) of the *Charter* than
16 expression of those views at other locations.

17 *Keegstra, supra*, at p. 762;

18 *Butler, supra*, at p. 500.

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

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

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

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

5
6 22. Fifth, the impugned provisions of the *Act* significantly further other *Charter* values,
7 namely, the rights of women under ss. 7, 15 and 28.

8 **(i) Section 7 Values**

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

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

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

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

29

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

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

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

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

24 **(ii) Section 15 Values**

25
 26 27. The *Act* significantly promotes the constitutional values underlying s. 15 of the *Charter*.
 27 Abortion is a lawful medical procedure which, by its nature, is only available to women. By
 28 taking steps to ensure safe and effective access to such services, the *Act* promotes the equality
 29 values inherent in s. 15 in the particular context of reproductive health care. Legislation which
 30 seeks to ensure that women are not disadvantaged in their access to lawful medical services
 31 related to their reproductive capacities promotes the constitutional value of sex equality.

32 *Dieleman, supra*, at p. 727.

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

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

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

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

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

20 **(iii) Section 28 Values**

21 30. The *Act* also promotes the constitutional values underlying s. 28 of the *Charter*. Section
22 28 of the *Charter* provides that notwithstanding anything in the *Charter*, the rights and freedoms
23 therein are guaranteed to men and women equally. It provides a constitutional directive to courts
24 to be attentive to sex equality concerns when conducting a s. 1 analysis. In the context of access
25 to reproductive health services, the Intervenor submits that s. 28 directs courts to apply the
26 *Charter* so as to ensure that men and women enjoy equivalent levels of respect for their privacy
27 and dignity, and corresponding ease of access to all lawful medical services.

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

1 **(iv) Privacy**

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

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

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

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

20 **2. Legislative Objective**

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

25 *Keegstra, supra*, at pp. 744, 755.

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

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

5 *Act*, Preamble;
 6 *Hansard*, 4th sess., 35th Parliament, Province of British Columbia, June 22, 1995, Vol. 21, No.
 7 11, pp. 15977-15978, as quoted in *Lewis, supra*, at 516, para. 52;
 8 *Realizing Choices, supra*, at pp. 2, 31-32;
 9 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at p. 690-91.

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

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

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

27 *Everywoman's Health Centre Society (1988) v. Bridges*, [1990] B.C.J. No. 2895 (B.C.C.A.);
 28 *Elizabeth Bagshaw Society v. Bretton et al.* (20 Nov. 1991); (30 Jan. 1992); (29 June 1995)
 29 Vancouver Registry C916855 (B.C.S.C.);
 30 *Canadian Urban Equities Ltd. et al. v. Direct Action for Life et al.* (1990), 68 D.L.R. (4th) 109;
 31 70 D.L.R. (4th) 691 (Alta. QB);
 32

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

6 *Keegstra, supra*, at p. 758.

7 **3. Proportionality**

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

14 *Dieleman, supra*, at p. 723;

15 *Committee for Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 205;

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

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

23 *RJR MacDonald, supra*, at p. 333;

24 *Sharpe, supra*, at p. 96;

25 *Lewis, supra*, at p. 527, para. 97.

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

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

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

11
12 44. At issue in this appeal is the restriction of anti-abortion activity within access zones
13 around abortion service facilities. Section 5 of the *Act* limits such access zones to a maximum 50
14 metre radius. It further provides that no access zone exists around any particular abortion service
15 facility unless it is established by regulation. It should be noted that the access zone established
16 around Everywoman's is limited to 30 metres at its widest point. An examination of the access
17 zone around Everywoman's demonstrates that it was carefully tailored to the particular location
18 and circumstances of that facility.

19 *Everywoman's Access Zone Plan, supra*.

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

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

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

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

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

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

11
12 48. The range of activities restricted within access zones is necessarily comprehensive since
13 the pressing objective of the legislation is to ensure a level of access to a lawful medical service
14 consonant with respect for the privacy and dignity of those who require abortions. Only such a
15 comprehensive restriction can provide women seeking abortion services with a reasonable
16 assurance that they can do so without risk of unacceptable affronts to their privacy and dignity.

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

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

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

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

7 *Respondent's Statement of Facts* para. 27
8 *Intervenor's Statement of Facts* para. 2.

9
10 51. In *Committee for Commonwealth of Canada, supra*, McLachlin J. asked, "what does the
11 claimant lose by being denied the opportunity to spread his or her message in the form and at the
12 time and place asserted?" It is submitted that the Appellant's *Charter* rights are not unreasonably
13 limited by the expressive opportunity denied by the *Act*. The *Act* provides that the expression
14 can only be limited within up to 50 metres of an abortion facility. The Appellant may lawfully
15 express his views within a reasonable distance of an abortion services facility; he is simply
16 prohibited from expressing these views on its threshold. This is a minimal impairment of the
17 Appellant's *Charter* rights.

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

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

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

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

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

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

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

18 *Respondent's Statement of Facts*, para. 30.

19 **C. Conclusion**

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

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PART 4: NATURE OF THE ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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

Nitya Iyer
Counsel for the Intervenor

Andrea L. Zwack
Counsel for the Intervenor

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PAGE NO's

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