Court File No. 34229

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

BETWEEN:

IVANA LEVKOVIC

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

THE ATTORNEY GENERAL OF CANADA

Intervener

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APPELLANT'S FACTUM

PART I – OVERVIEW AND FACTS

(A) Overview

1. Section 243 of the *Criminal Code*, a provision left substantively unchanged since its enactment in 1892, prohibits the disposal of a child's dead body with intent to conceal the fact of its birth. S. 243 applies whether the child died "before, during or after birth". Justice Hill held that in its death-before-birth application, the concept of "child" within s. 243 was unconstitutionally vague. As a remedy, he severed the word "before" from the phrase "before, during or after birth", so that the provision only applied to a child that died "during or after birth". The Ontario Court of Appeal overturned Justice Hill's decision, and held that s. 243 was not vague.

2. There is no statutory definition of "child" applicable to s. 243 of the *Criminal Code*. The Appellant submits that the concept of a "child" that died before birth in s. 243 is vague. Unlike other sections of the *Criminal Code* which use the word "child", s. 243 in its application to a child that died before birth does not delimit the scope of the term "child" in any way. Does the term capture the

entire period from conception to full term birth? If not, what period does it cover? As Justice Hill posed the question in para. 126 of his reasons:

> With the absence of an operative statutory definition of "child" in the *Code*, the issue arises, however, as to the intention of law-makers in the use of this term to describe an unborn entity – at what point from conception to the emergence of a fetus in child-birth can it be said that there is the "body" of a "child" within the contemplation of s. 243?[1]

3. Justice Hill accepted the Crown's argument that s. 243 is not intended to apply to miscarriages or to abortions, but that it is intended to apply to still-births.[2] The Court of Appeal also seems to have accepted this conclusion. The Appellant does not take issue with this aspect of the interpretation of s. 243. However, the Appellant submits that neither the text of s. 243, the principles of statutory interpretation, nor the "chance of life" standard relied on by the Crown in the Superior Court provides a coherent meaning to the concept of a child that dies before birth. While it may be possible, with the current state of medical knowledge, to say that a fetus of 15 weeks does not have a "chance of life", what about the fetus of 20 weeks, 23 weeks, 25 weeks, etc.? And how is the woman who has just lost a pregnancy to tell the difference between a miscarriage, to which s. 243 does not apply, and a still-birth, to which it does apply? It is submitted that neither the text of s. 243, the surrounding sections of the *Criminal Code*, the legislative history, nor the history of judicial interpretation of s. 243, provide a definition of "child" that died before birth that is sufficiently clear to allow the citizen to know in advance the prohibited conduct, and to limit enforcement discretion.

4. The Appellant does not take issue with the purpose of the legislation as found by Justice Hill (and confirmed by the Court of Appeal).[3] Parliament may validly legislate for the purpose of preserving evidence in order to investigate potentially suspicious infant deaths. The Appellant accepts this as the current purpose of s. 243 (although not historically the only purpose). The Appellant also accepts that this purpose allows Parliament to enact legislation which has application to the concealment of a fetus at some stages of development prior to live birth. But Parliament must draft such a legislative provision in terms that are sufficiently clear to give the citizen notice of the conduct

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[1] Reasons for Judgment of Justice Hill, para. 126, *Appellant's Record*, vol. I, p. 62.
[2] Reasons for Judgment of Justice Hill, paras. 121-127, *Appellant's Record,* vol. I, pp. 60-62
[3] Reasons for Judgment of Justice Hill, para. 150-156, *Appellant's Record*, vol. I, pp. 69-71; Reasons for Judgment of the Court of Appeal, para. 108-110, *Appellant's Record*, vol. I, pp. 125-126.

that is prohibited, and to limit enforcement discretion. While s. 243 makes clear from its reference to a child that died "before ...birth" that the legislature intended concealment of some fetuses to be an offence, it provides no assistance in determining at what point a fetus becomes a "child" to which s. 243 applies. This inability to determine the conduct to which s. 243 applies in the context of a child that dies before birth renders the section unconstitutionally vague.

5. In short, Justice Hill was correct to conclude that in its application to a "child....before birth" s. 243 is unconstitutionally vague. As the jurisprudence requires, Justice Hill sought to determine whether the concept "child...before birth" within s. 243 provides "the basis for coherent judicial interpretation"[4] and identifies a "solid core of meaning."[5] Justice Hill correctly identified that the meaning of "child...before birth" could not be interpreted literally or by reference to ordinary definitions,[6] and thus sought to interpret the concept in a contextual manner. He considered a number of possible meanings that could be attributed to the "might have been born alive" test of physical maturity advanced in *Berriman*. He concluded that no coherent, principled meaning could be identified for the concept "child...before birth" that accorded with the statutory text, the common law *Berriman* interpretation, and the principles of statutory interpretation.[7]

6. By contrast, the Court of Appeal erred in concluding that s. 243 as interpreted in *Berriman* was not vague. In reaching that conclusion the Court of Appeal committed two errors. First, it failed to take the required contextual approach to its analysis of whether s. 243 is unconstitutionally vague. Second, in its ultimate identification of the *Berriman* standard as the proper interpretation of s. 243, the Court of Appeal articulated it as two <u>different</u> tests for capacity for life of a "child... before birth", thus leaving a vague and incoherent interpretation of the provision.

7. It may be the case that the definition of "child . . . before birth" raised in a new argument of the Crown, made for the first time in the Court of Appeal (and further refined in its response to the leave application to this Court) – that the definition of "child" in death-before-birth aspect of s. 243 is limited to a fetus of seven months or more gestation – would be sufficiently clear to satisfy the vagueness standard. However, there is simply no basis in the language of s. 243 for this specific gestational-age definition of "child" before birth. Nor is it consistent with the past interpretation of s.

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[4] *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 46.
[5] *Canadian Foundation for Children v. Canada*, [2004] 1 S.C.R. 76 at para. 40.
[6] Reasons for Judgment of Justice Hill, para. 205, *Appellant's Record,* vol. I, p. 92
[7] Reasons for Judgment of Justice Hill, para. 163-202, *Appellant's Record,* vol. I, pp. 80-92.

243. If such a specific gestational-age approach to the meaning of "child" is to be applied in the *Criminal Code*, it is for Parliament to make this choice and legislate, not for this Court to do so to cure the vagueness of s. 243.

(B) Facts

8. With the express consent of Crown counsel, the constitutional application that is the subject of this appeal was argued and decided at trial before any evidence was called. Crown counsel had conceded at the preliminary hearing "that there is no evidence at this point, and the Crown will not seek to pursue any suggestion, that the infant was born alive."[8] Following Justice Hill's decision finding the definition of "child" that died before birth unconstitutionally vague, Crown counsel chose to lead no evidence on the basis that the Crown could not prove that the "child" died during or after birth, and invited Justice Hill to enter an acquittal.[9] The following "facts" come from the Crown's submissions concerning evidence the Crown would have sought to adduce, had the matter proceeded to trial. Trial counsel for the Appellant did not concede that the Crown's case could, in fact, have been proven. Thus, the following facts are provided by way of context, but they have not been established by admissible evidence, and have not been tested by cross-examination or otherwise.

9. While cleaning a recently vacated apartment unit, a building superintendant discovered the human remains of what appeared to be a baby. A subsequent post-mortem examination determined that the remains were of a female delivered at or near full term. It could not be determined whether there had been a live birth. The Appellant subsequently made a statement to police. Had the matter proceeded to trial, the Crown would have sought to prove that the statement was voluntary, but that issue was not adjudicated. In the statement the Appellant said she was in the apartment alone when she fell and had the baby. She placed the baby in a bag and put it out on the balcony. There was no suggestion by the Crown that the Appellant said in her statement that the baby was born alive (and

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[8] Applicant's Factum in the Superior Court, quoting from Transcript of Proceedings in the Ontario Court of Justice, September 22, 2006, p. 6, *Appellant's Record*, vol. I, p. 144.

[9] Transcript of September 25, 2008 (p. 1, l. 30-p. 3, l. 30; p. 4, ll. 3-12), Transcript of October 22, 2007 (p. 18, l. 3-p. 19, l. 4), *Appellant's Record*, vol. III, pp. 158-160; vol. II, pp. 36-37.

such a conclusion would be contrary to the Crown's concession that it could not prove that the baby was born alive). The Appellant was subsequently charged under s. 243 of the *Criminal Code*.[10]

10. The reasoning in the decisions of Justice Hill and the Court of Appeal is discussed in the course of the legal argument below.

PART II – POINTS IN ISSUE

11. This case raises the issue of whether section 243 of the *Criminal Code* in its death-before-birth application is impermissibly vague, and thus contrary to section 7 of the *Charter and Rights and Freedoms*, and consequently of no force and effect. On January 10, 2012, the Chief Justice stated the following constitutional questions:

> 1. In its application to a "child" that dies before birth, does s. 243 of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

12. If the Court finds that s. 243 is unconstitutionally vague, then the Court will also be required to consider whether the word "before" should be severed from the phrase "whether the child died before, during or after birth" in order to remedy the s. 7 violation.

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[10] Reasons for Judgment of Justice Hill, paras. 4-7, *Appellant's Record*, vol. I, p. 6; Transcript of September 25, 2008 (p. 1, l. 29-p. 4, l. 13), *Appellant's Record*, vol. III, p. 158-161.

PART III – ARGUMENT

(A) The s. 7 Interests at Stake – Liberty and Security of the Person

13. It is well established that the principles of fundamental justice vary according to the context in which they are invoked and the interests at stake, and must be interpreted within the specific context in which the asserted s. 7 interest arises.[11] This rule applies to the principle of fundamental justice embodied in the vagueness doctrine. The context in which s. 243 arises and applies must therefore be considered in determining whether the provision is impermissibly vague.

(i) The section 7 interests at stake

14. The availability of imprisonment upon conviction under s. 243 is sufficient to engage the s. 7 liberty interest. This does not, however, exhaust the s. 7 liberty and security interests that are engaged for pregnant women and on which s. 243 trenches.

15. State action need not include physical restraint or direct physical interference in order to engage the s. 7 liberty and security interests of a person. The jurisprudence of this Honourable Court has recognized that s. 7 protects a core of intimate or private decisions that are fundamental to personal autonomy. In *Malmo-Levine*, the majority summarized this jurisprudence as follows:

> In *Morgentaler*, *supra*, Wilson J. suggested that liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance...without interference from the state" (p. 166). Liberty accordingly means more than freedom from physical restraint. It includes the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference... This is true only to the extent that such matters "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence".[12]

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[11] *R. v. Lyons*, [1987] 2 S.C.R. 309 at p. 361; *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 71 (*per* LaForest J. concurring); *Pearlman v. Manitoba Law* Society, [1991] 2 S.C.R. 869 at pp. 884-885.

[12] *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 85 (*per* Gonthier and Binnie JJ. for the majority) [internal citations omitted]. See also: *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 at para. 100 (*per* Abella J. for the majority) and para. 136 (*per* McLachlin C.J. concurring); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 49-54 (*per* Bastarache J. for the majority); *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844 at para. 15, 63-68 (*per* LaForest J. for the plurality); *R. v. Clay*, [2003] 3 S.C.R. 735 at para. 31 (*per* Gonthier and Binnie JJ. for the majority); *R.B.*, *supra* at para. 74, 80-85 (*per* LaForest J. for the plurality).

The s. 7 security interest protects against "serious psychological incursions resulting from state interference with an individual interest of fundamental importance"[13] and includes a "notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress."[14]

16. A woman's decisions concerning her own pregnancy – including choices whether to become pregnant and concerning medical treatment or conduct while pregnant[15] – unquestionably fall within "the core of what it means to be an autonomous human being blessed with dignity and independence in 'matters that can properly be characterized as fundamentally or inherently personal.'"[16] As Cory J. observed in *Dobson*,

> Pregnancy represents not only the hope of future generations but also the continuation of the species. It is difficult to imagine a human condition that is more important to society. From the dawn of history, the pregnant woman has represented fertility and hope. Biology decrees that it is only women who can bear children. Usually, a pregnant woman does all that is possible to protect the health and well-being of her fetus. On occasion, she may sacrifice her own health and well-being for the benefit of the fetus she carries. Yet it should not be forgotten that the pregnant woman – in addition to being the carrier of the fetus within her – is also an individual whose bodily integrity, privacy and autonomy rights must be protected.
>
> ...
>
> ... The relationship between a pregnant woman and her fetus is of fundamental importance to the future mother and her born alive child, to their immediate family and to our society. So far as the fetus is concerned, this relationship is one of complete dependence. As to the pregnant woman, in most circumstances, the relationship is marked by her complete dedication to the well-being of her fetus. This dedication is

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[13] *Blencoe*, *supra* at para. 82 (*per* Bastarache J. for the majority); see also *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 58-64 (*per* Lamer C.J. for the whole Court on this point).

[14] *Re Rodriguez and Attorney-General of British Columbia*, [1993] 3 S.C.R. 519 at pp. 587-588 (*per* Sopinka J. for the majority); see also at p. 560 (*per* Lamer C.J. dissenting but not on this point) and p. 618 (*per* McLachlin J. dissenting but not on this point).

[15] *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 S.C.R. 925; *Dobson (Litigation guardian of) v. Dobson*, [1999] 2 S.C.R. 753 at para. 24, 30-31 (*per* Cory J. for the majority) and para. 85-87 (*per* McLachlin J. concurring); *Bovingdon v. Hergott* (2008), 290 D.L.R. (4th) 126 at para. 59-60, 64, 68 (Ont. C.A.), leave to appeal refused (2008), 291 D.L.R. (4th) vii (S.C.C.); *Paxton v. Ramji* (2008), 299 D.L.R. (4th) 614 at para. 68, 73, 79 (Ont. C.A.), leave to appeal refused (2009), 303 D.L.R. (4th) vii (S.C.C.); *Morgentaler, Smoling and Scott v. The Queen*, [1988] 1 S.C.R. 30 at pp. 56-57 (*per* Dickson C.J.) and p. 171 (*per* Wilson J.); *Blencoe*, *supra* at para. 86 (*per* Bastarache J. for the majority).

[16] *Clay*, *supra* at para. 31, quoting *Godbout*, *supra* at para. 66.

> profound and deep. It affects a pregnant woman physically, psychologically and emotionally...[17]

The societal importance of pregnancy does not diminish the fundamental nature of the pregnant woman's individual rights to bodily integrity, privacy and autonomy, but rather assists in identifying this context as one engaging the "essential life choices" deserving of s. 7 protection.

17. It is submitted that a woman's decision as to whether and how to disclose publicly the natural end of a failed pregnancy falls within the narrow class of "decisions of fundamental personal importance" that constitute the "irreducible sphere of personal autonomy" protected by s. 7. The loss of a fetus by miscarriage or stillbirth is a deeply personal and private event, closely tied to a woman's physical and psychological sense of self. In contrast to a therapeutic abortion, which involves an act of choice on the part of the woman, a miscarriage or stillbirth occurs without planning and often with limited advance warning, for reasons that are largely unknown and completely unrelated to any choice exercised by the pregnant woman. Prior to the miscarriage or stillbirth, the fetus growing within a woman was unquestionably part of her; this fundamental connection does not end when the fetus leaves her body. A woman suffering such an unexpected loss may, for many different reasons, wish to limit its public disclosure. The miscarriage may evoke feelings of shame, guilt and humiliation that are exacerbated by public disclosure; the woman may wish to mourn in private, without the intrusions occasioned by external scrutiny by the state; or she may have chosen to keep the fact of her pregnancy private, and hence wish to limit disclosure of its end. Like other decisions relating to pregnancy, a woman's preferences and choices in this regard engage social, psychological, ethical and medical considerations, and will reflect and affect her vision of herself and her relationship to others.[18] The intensely private, personal nature of this decision is akin to other essential life choices that have been recognized as basic to individual autonomy and dignity.[19]

18. In all cases where a criminal prohibition may lead to a loss of liberty, s. 7 requires that persons be able to know what is allowed and what is prohibited. A women who has just suffered the natural

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[17] *Dobson, supra* at para. 24, 29.
[18] *Morgentaler, supra* at p. 171 (*per* Wilson J.)
[19] Such as the choice to terminate a pregnancy by abortion (*Morgentaler, supra* at p. 56 (*per* Dickson C.J. concurring) and p. 171 (*per* Wilson J. concurring)), the decision to terminate one's life (*Rodriguez, supra*), or the freedom to raise one's children (*G.(J.), supra*; *R.B., supra*; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 at para. 85-87 (*per* L'Heureux-Dubé J. for the majority) and para. 5-6 (*per* Arbour J., dissenting)).

end of a failed pregnancy, and who is otherwise acting within the constitutionally protected sphere of interests that are engaged during pregnancy, is further entitled pursuant to s. 7 to be able to know what the prohibition set out in s. 243 allows and what it prohibits. Since decisions relating to disclosure of the natural end of a failed pregnancy fall within the core of personal autonomy protected by s. 7, the state is constrained it its ability to interfere in a woman's choice with respect to such matters.[20]

(ii) Section 243 of the Criminal Code unavoidably engages s. 7 personal autonomy interests

19. On its face, the prohibition set out in s. 243 is engaged by a "birth" or "delivery"; without a "delivery", the offence cannot be engaged. Justice Hill accepted the Crown's submission that the terms "birth" and "delivery" mean natural child-birth of either a stillborn or live child, and exclude both non-induced abortion (miscarriage) and induced abortion.[21] However, Justice Hill noted that this definition of "delivery" did not ultimately assist in identifying the scope of s. 243, as the distinction between a miscarried fetus (which by definition is not "delivered" or "born") and a prematurely "delivered" stillborn fetus remains elusive.[22] The Appellant submits that the definition of "delivery" and "birth" that was advanced by the Crown and accepted by Justice Hill does not alleviate the vagueness of the meaning of "child", as Justice Hill recognized. Any definitional certainty achieved simply displaces the uncertainty onto the term "child". Put differently, the definition of "delivery" begs the question of the distinction between a stillbirth and a miscarriage for the purpose of s. 243, which is effectively the same difficulty that plagues the interpretation of the term "child...before birth". On this basis, and in order to permit argument to proceed in relation to one contested term only, the Appellant accepts the definitions of "delivery" and "birth" adopted by Justice Hill, and focuses, as he did, on the meaning of "child".

20. Section 243 is inextricably related to the recognized core of personal autonomy protected by s. 7, both through the prohibition it creates and the state involvement it necessarily envisions. Under s. 243, a pregnant woman who suffers the natural end of a failed pregnancy must assess the fetus and

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[20] It is submitted that the inherently gendered nature of this security of the person interest is also a relevant contextual factor. Although, on a given set of facts, either a man or a woman, or both, can be convicted of the offence contained in s. 243, the factual basis for the offence necessarily involves a woman, since only a woman can become pregnant: *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at p. 1241-1250.

[21] Reasons for Judgment of Justice Hill, paras. 123-125, *Appellant's Record*, vol. I, pp. 60-62.

[22] Reasons for Judgment of Justice Hill, para. 166; Transcript of Proceedings of March 10, 2008 (p. 20, l. 21-p. 25, l. 17), *Appellant's Record*, vol. I, pp. 80-81; vol. III, pp. 107-112.

determine whether she has simply miscarried or whether she has instead been delivered of a stillborn "child." If she has simply miscarried, then s. 243 does not apply and she is free to decide for herself, in accordance with her own priorities, views and needs, whether she wishes to disclose the miscarriage to others, including the authorities. The criminal law places no restriction upon her choice concerning how to dispose of the products of conception. Her freedom of choice regarding disclosure of the loss of the fetus is respected. The state does not, through interference in this private sphere, exacerbate her psychological stress.

21. If she has been delivered of a stillborn "child," however, the situation is altogether different. In those circumstances, s. 243 interferes with a woman's decision as to whether and how to disclose publicly the end of the pregnancy. Pursuant to s. 243, a woman must report the stillbirth to the authorities, and she thereby loses control over the disclosure of both the fact of her pregnancy and its end. She is prohibited, by virtue of the criminal law, from choosing to keep her loss private. The state interference envisioned by s. 243 inevitably intrudes upon the "inherently private choices" related to a woman's pregnancy.

22. The effect of s. 243 in its pre-birth application is that the state's general interest in investigating suspicious infant deaths takes precedence over the specific s. 7 interests of a woman who has been delivered of a stillborn "child" that died before birth. The provision imposes a deprivation of the woman's liberty and security interests based on a presumption that reporting is necessary in order to maintain the general effectiveness of law enforcement efforts (investigation of potentially suspicious infant deaths). In the case of a woman who has been delivered of a stillborn "child," the s. 7 deprivation is thus imposed for general reasons that are unrelated to the end of her particular pregnancy. That is, the state is not interested in a still-birth itself, which does not involve any criminal activity; rather the state is interested in investigating in order to discover cases which are not still-births, but involve some criminal end to the fetus.

(B) Vagueness of Legislation and s. 7 of the Charter – The Principles

23. The requirement of sufficient precision in legislative provisions that they not be vague derives from two concerns. The first concern is the need to provide citizens with fair notice of prohibited conduct. The rule of law requires that citizens are able to know and understand what conduct is prohibited so that they may govern their conduct and benefit from a full answer and defence should

they be tried. The second concern is the need to limit enforcement discretion. The rule of law requires that laws be sufficiently defined to limit enforcement discretion so that the law governs, rather than *ad hoc* decision-making of enforcement authorities.[23]

24. The test for whether a law is unconstitutionally vague has been formulated in a variety of ways, summarized by Chief Justice McLachlin in *Canadian Foundation for Children v. Canada* as follows: "A law is unconstitutionally vague if it 'does not provide an adequate basis for legal debate' and 'analysis'; 'does not sufficiently delineate any area of risk'; or is not intelligible. The law must offer a 'grasp to the judiciary'".[24]

25. In considering whether a particular legislative provision suffers from vagueness, a court is not limited to the bare text of the provision. As with any consideration of the meaning of a statute, the court must attempt to engage in the process of statutory interpretation. In the words of Justice Gonthier in *Canadian Pacific*, "a court must first develop the full interpretive context surrounding an impugned provision."[25]

26. The jurisprudence concerning the vagueness doctrine establishes that while the constitutional threshold for finding a law vague is always "relatively high,"[26] the adequacy of any given statutory text must be assessed in light of its particular context, as "the standard of legal precision required by s. 7 will vary depending on the nature and subject matter of the particular legislative provision."[27] The constitutional sufficiency of the intelligibility offered by a given enactment thus cannot be assessed without reference to such factors as the field in which it is intended to operate, the objectives it seeks to achieve, the nature and status of those to whom it is intended to apply, and the manner in which it is expected to operate.

27. This Court's application of the vagueness doctrine in particular cases confirms the contextual nature of this analysis. For example, the Court has referred to the following factors in support of its

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[23] *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606, at pp. 626-627, 632-636.; *Canadian Pacific, supra* at para. 46; *Canadian Foundation for Children, supra* at para. 16.
[24] *Nova Scotia Pharmaceutical Society, supra* at pp. 638-640; *Canadian Pacific Ltd., supra* at para. 46; *Canadian Foundation for Children, supra* at para. 15.
[25] *Canadian Pacific Ltd., supra* at para. 47; *Canadian Foundation for Children, supra* at para. 20.
[26] *Nova Scotia Pharmaceutical Society, supra* at p. 632; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para. 68.
[27] *Canadian Pacific Ltd., supra* at para. 49. See also *Young v. Young*, [1993] 4 S.C.R. 3 at p. 75.

conclusion that a particular provision satisfied the constitutional standard of intelligibility set by s. 7, notwithstanding its apparent facial uncertainty:

(a) the nature of the subject matter to which the provision is addressed, particularly its engagement with matters of regulatory or social policy;[28]

(b) whether discretion and/or flexibility are necessary in light of the legislative objectives served by the provision;[29]

(c) any specialized knowledge of the persons to whom the impugned term is addressed;[30] and

(d) whether the impugned term in the provision is commonly used in ordinary parlance and/or in the legal context.[31]

28. The requirement that legislation provide an "adequate basis for legal debate" must be interpreted to refer to an adequate basis for legal debate which is capable of coming to a coherent conclusion on the meaning of the provision at issue, using ordinary tools of statutory interpretation. It does not mean any legal debate whatsoever, because, as Peter Hogg has pointed out, "almost any provision, no matter how vague, could provide a basis for legal debate."[32]

29. In seeking to interpret a legislative provision, the courts may properly use ordinary tools of statutory interpretation including the text, the purpose of the legislation, related legislative provisions, legislative history, and prior judicial interpretation of the provision. But the courts should not move beyond their role in interpreting legislation and engage in judicial rewriting of legislation. The legislatures have a responsibility to be clear in their drafting of legislation. The Courts should not take on the role of "curing" vagueness by recasting the legislation beyond what the text, context and purpose can reasonably bear.[33]

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[28] *Nova Scotia Pharmaceutical*, *supra* at pp. 640-642; *Canadian Pacific*, *supra* at para. 57; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 at para. 110-112.

[29] *Nova Scotia Pharmaceutical*, *supra* at p. 641; *Canadian Pacific*, *supra* at para. 52-53, 59; *R. v. Morales*, [1992] 3 S.C.R. 711 at p. 754-755 (*per* Gonthier J. dissenting in part).

[30] *Morgentaler*, *supra* at p. 106-107 (*per* Beetz J.), analyzed in *Nova Scotia Pharmaceutical*, *supra* at p. 622.

[31] *Nova Scotia Pharmaceutical*, *supra* at pp. 646-647; *Reference re. ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at p. 1159 (*per* Lamer J. concurring). See also at *R. v. Lindsay* (2009), 245 C.C.C. (3d) 301 at para. 23 (Ont. C.A.); *Cochrane v. Ontario (Attorney General)* (2008), 301 D.L.R. (4th) 414 at para. 50 (Ont. C.A.), leave to appeal refused (2009), 304 D.L.R. (4th) vi (S.C.C.).

[32] Peter W. Hogg, *Constitutional Law of Canada*, Fifth Edition Supplemented (Carswell: 2007) at §47.18(b).

[33] This is not to suggest that "reading in" or "reading down" are not appropriate in some cases as constitutional remedies under s. 52 after a *Charter* violation is found. Rather, the Appellant's point is that in interpreting a legislative provision, the courts must be guided by the ordinary principles of statutory

(C) S. 243 of the *Criminal Code* in its application to a "child" that "died before.... birth" is unconstitutionally vague

(i) The legislative text and uses of similar language in related sections of the Criminal Code do not provide a coherent interpretation of the concept of "child....before birth" in s. 243

30. It is submitted that neither the ordinary usages of the word "child", nor the use of the word "child" in s. 243 and surrounding provisions of the *Criminal Code*, provide a coherent interpretation of the concept of a child that dies before birth in s. 243.

31. "Child" is not defined in the *Criminal Code*.[34] In its ordinary meaning, the term "child" may or may not include a fetus before it is born, and this will depend on context.[35] It is not necessary for the Court to resolve that debate in this case. It is clear from the reference to a "child....before birth" in s. 243 that Parliament intended the word "child" to have some application to a fetus before it is born. However, there is no way of telling from the text of the provision whether it applies to the entire period from conception to full term, or whether it only applies at some point along the gestational spectrum. The ordinary meaning of the word "child" provides no assistance in resolving this question. As noted above at paragraph 27(d), this Court has considered in previous cases involving vagueness whether the words at issue can be given meaning based on their ordinary usage or usage in the legal context. While "child" is a term of common use, it is submitted that neither the ordinary usage of the word "child", nor its usage in the legal context, assists in giving meaning to the concept of a child that died before birth in s. 243.

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interpretation, and should not go beyond what a statute can reasonably bear in order to avoid a finding of unconstitutionality: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at paras. 62-66; *R. v. Rodgers*, [2006] 1 S.C.R. 554 at para. 18-19; *Canadian Foundation for Children, supra* at para. 43 (*per* Chief Justice McLachlin for the majority), at para. 190 (*per* Arbour J. dissenting), at paras. 214-216 (*per* Deschamps J. dissenting) (In the result in *Canadian Foundation*, the Chief Justice found that s. 43 was capable of coherent interpretation using ordinary principles of statutory interpretation. But she did not disagree with the principle stated by the dissenting Justices that courts should not engage in judicial amendment under guise of interpretation); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at pp. 168-169; *R. v. Heywood*, [1994] 3 S.C.R. 761 at p. 803.

[34] S. 214 of the *Criminal Code*, previously contained the following definition of "child" applicable to the Part of the *Code* on Offences Against the Person and Reputation: "'child' includes an adopted child and an illegitimate child.". That definition of "child" was repealed in 2002, S.C. 2002, c. 13, s. 9. In any event, that definition does not assist in the interpretation of s. 243.

[35] Reasons for Judgment of Justice Hill, para. 163, *Appellant's Record*, vol. I, p. 76. See also *Collins English Dictionary*, 10th ed., HarperCollins 2009, definition of "child": "a boy or girl between birth and puberty. . ., a baby or infant. . . , an unborn baby".

32. The meaning of "child....before birth" in s. 243 is not limited by the text of the provision. This undelineated use of "child....before birth" in the text of s. 243 can be contrasted to other sections that use the word "child" in the same Part of the *Criminal Code,* which contain express temporal or other limitations in the text of the section so as to more specifically define the ambit of the sections.[36]

33. Section 242, which uses the term "child" in the context of the offence of neglecting to obtain assistance in childbirth expressly defines the limits of its application to the time period immediately before and after delivery by the words: "being pregnant and about to be delivered" and the words "or dies immediately before, during or in a short time after birth" [emphasis added].

34. Section 238, which uses the word "child" in the creation of the offence of killing an unborn child in the act of birth, expressly limits its application to the time period during the birth process by the words "everyone who causes the death, in the act of birth, of any child that has not become a human being...." [emphasis added].

35. Section 223(1), which defines when a "child" becomes a "human being" for the purposes of the *Criminal Code* (in particular for the homicide provisions), expressly defines the limits of its application to the period after birth (as defined in the section), by the words: "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....." [emphasis added].[37] Although section 223(2) permits a conviction for homicide where a person causes injury to a "child" before or during its birth, it is limited by the requirement that for the provision to apply the child must die "after becoming a human being" (as defined in s. 223(1)).

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[36] In other parts of the *Criminal Code*, and in related legislation such as the *Youth Criminal Justice Act*, much more specific language is used to define "child" or similar terms in any particular legislative use. See for example: *Youth Criminal Justice Act*, S.C. 2002, c. 1, as am., s. 2 definition of "child": "means a person who is or, in the absence of evidence to the contrary, appears to be less than twelve years old"; *Criminal* Code ss. 280-283 re: child abduction, "an unmarried person under the age of sixteen years", "a person under the age of fourteen years"; s. 150.1 re: inability of young person to consent to sexual contact "under the age of 16 years", "12 years of age or more but under the age of 14 years", "14 years of age or more but under the age of 16 years"; ss. 151-153 Re: sexual offences against young people "under the age of 16 years", "16 years of age or more but under the age of 18 years"; s. 163.1 re: child pornography "is or is depicted as being under the age of eighteen years.

[37] See interpretation of s. 223(1) in *R. v. Sullivan* (1988), 43 C.C.C. (3d) 65 (B.C.C.A.), affirmed on this issue, [1991] 1 S.C.R. 489.

36. The offence of infanticide (s. 233), which uses the phrase "newly born child", is circumscribed by the definition of "newly born child" in s. 2 of the *Criminal Code*, as "a person under the age of one year."

37. Sections 215(1)(a) and 218 of the *Criminal Code*, which use the word "child" in defining the offences of failure to provide the necessaries or life and child abandonment, also expressly circumscribe the meaning of the word "child". S. 215(1)(a) expressly sets an upper limit by using the words "a child under the age of sixteen years." It is further submitted that the concept of providing the "necessaries of life" necessarily entails that a child first be born alive. Similarly, s. 218 sets an upper limit by using the words "a child who is under the age of ten years". And the requirement that a person "unlawfully abandons or exposes" the child clearly limits the use of "child" in this context to a child born alive.

38. The comparison of s. 243 to these other sections of the *Criminal Code* leads to two conclusions. First, unlike s. 243, the other provisions are not vague because the text of the provisions tailors the application of the sections by express temporal or other limitations. Second, absent such express limitations, or limitations which could be interpreted by ordinary principles of statutory interpretation, the word "child" in the *Criminal Code* is not limited to any particular time period between conception and birth.

39. As noted above at paragraph 27(a) and (b), in previous cases where this Court has considered whether a legislative provision is vague, the Court has considered whether flexibility or discretion are necessary in light of the subject matter or objectives served by the legislation. So, for example, the Court accepted that a measure of flexibility was necessary in defining the concept of pollution in *Canadian Pacific,* or "unduly" lessening competition in *Nova Scotia Pharmaceutical*, because of the nature of the problem the legislature was addressing. The Appellant submits that such a measure of flexibility is not required in the context of s. 243. The object of s. 243 as found by both Justice Hill and the Court of Appeal is to prevent concealment of bodies of infants in order to allow for investigation of potentially suspicious deaths. In order to be effective, this prohibition includes infants that die after birth, during birth, and some subset of infants that die before birth. This is a limited and defined problem. Parliament could turn its mind to which infants/fetuses before birth it wishes to cover by s. 243, and define that subset, either based on gestational age, or some other

defined criteria.[38] There is no need for the type of flexibility which was required to address the problems at issue in *Canadian Pacific* or *Nova Scotia Pharmaceutical*.

(ii) The legislative history does not provide a coherent interpretation

40. It is submitted that in interpreting s. 243 for the purpose of a vagueness analysis, legal concepts developed centuries ago must be scrutinized for compliance with contemporary constitutional principles and societal values.

41. The Appellant submits that Justice Hill correctly recognized that in relation to the concept of a "child" dying before birth, the conceptual underpinnings of the concealment offences were strongly related to those informing the abortion proscription: both relate to the attribution of a form of pre-birth personhood to the fetus, with limited if any recognition of the consequent effects upon the personal autonomy interests of women. Justice Hill was correct to observe that "[w]ith the disappearance of these contextual features forming part of the crime's early history, a question inevitably arises as to the ongoing relevance of the standard or its meaning in contemporary society.[39]

42. It is a well-established principle of statutory interpretation that the intention of Parliament is not frozen for all time at the moment of a statute's enactment, and a court interpreting a statute is not confined to the meanings and circumstances that governed at the time of the enactment. A dynamic approach to statutory interpretation is to be adopted when warranted, particularly when the legislation is enacted to regulate ongoing activity over an indefinite period of time and relates to subject-matter that is continuously developing or changing.[40] In other words, since the law is presumed to speak continually once enacted, "the will of the legislature must be interpreted in light of prevailing, rather than historical, circumstances"[41] and "in light of modern values and expectations".[42] Conclusions that may have appeared unassailable or incontrovertible in earlier times may properly be reevaluated in light of evolving social or material realities.[43] At the same time, the courts must respect their

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[38] The possibilities of such definition are addressed in the Reasons for Judgment of Justice Hill at para. 213, *Appellant's Record*, vol. I, p. 95.
[39] Reasons for Judgment of Justice Hill, para. 208, *Appellant's Record*, vol. I, p. 93.
[40] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 128; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis, 2008) at 151-152.
[41] *R. v. 974649 Ontario Inc.*,[2001] 3 S.C.R. 575 at para. 38; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 10.
[42] *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at pp. 814-815.
[43] *Symes v. Canada*, [1993] 4 S.C.R. 695 (1993), 110 D.L.R. (4th) 470 at pp. 793-794 (*per* L'Heureux-Dubé

institutional limitations vis-à-vis Parliament, and ought not to adopt interpretations that amount to judicial rewriting of the statute or require decisions with respect to policy issues that involve potentially far-reaching or unpredictable implications.[44]

43. The legislative history of the concealment offence is relevant to the assessment of whether the concept of a "child...before birth" within s. 243 affords sufficient guidance for legal debate. The subjects of legal debate change over time. Concepts that may, in earlier centuries, have provided guidance, or have been viewed as self-evident, can, in light of new norms and changed circumstances, no longer provide the precision that was once perceived. Chief Justice McLachlin made a similar point on behalf of the majority in *Canadian Foundation for Children*, observing that the issue with respect to vagueness is not whether a provision "has provided enough guidance in the past, but whether it expresses a standard that can be given a core meaning in tune with contemporary consensus".[45]

44. The text now included in s. 243 of the *Criminal Code* dates back, without substantive change,[46] to 1892. Prior to 1892, a concealment offence relying on the same concept of a "child....before birth" was included in the first Canadian federal consolidation of offences against the person, enacted in 1869.[47] This provision was based on statutes in force in the Canadian jurisdictions prior to Confederation, which in turn could be traced back to an English statute from 1828.[48] While

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J., dissenting), pp. 727-729 (*per* Iacobucci J. for the majority) (S.C.C.).

[44] *R. v. Salituro*, [1991] 3 S.C.R. 654 at 670, applied with respect to the interpretation of a statutory term in *Symes, supra* at pp. 728-729. With respect to the institutional limitations of the judiciary in relation to policy choices regarding fetal rights, see *Dobson, supra* at para. 18; *Winnipeg v. D.F.G., supra* at para. 4, 20, 45.

[45] *Canadian Foundation for Children, supra* at para. 39.

[46] The only change occurred in 1954, when the sentence structure of the provision was rearranged, without substantive change to its content. The text of the 1892 provision read as follows: "Every one is guilty of an indictable offence and liable to two years' imprisonment, who disposes of the dead body of any child in any manner, with intent to conceal the fact that its mother was delivered of it, whether the child died before, or during, or after birth." (*Criminal Code* (1892), 55-56 Victoria, c. 29, s. 240 (Dominion of Canada)).

[47] *An Act Respecting Offences Against the Person* (1869), 32 & 33 Vict., c. 20, s. 1, 61, 62 (Dominion of Canada). The offence was retained with minor revisions, which did not affect the substance, in the 1887 consolidation of the *Revised Statutes of Canada*: *An Act Respecting Offences Against the Person*, Revised Statutes of Canada 1887, c. 162 (enacted by 49 Vict. , 4). The 1887 provision read as follows: "Everyone who, by any secret disposition of the dead body of any child of which any woman is delivered, whether such child died before, at or after birth, endeavors to conceal the birth thereof, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years."

[48] 9 Geo. 4, c. 31, s. 14: "And be it enacted, that if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to be

concealment of birth had been subject to statutory prohibition in England and some Canadian jurisdictions prior to 1828, the concept of a "child....before birth" appeared for the first time in the 1828 English provision, as this provision made concealment a stand-alone offence,[49] and the Crown was for the first time relieved of the burden of proving that the child died after birth. Thus, the concept of a "child....before birth" in s. 243 can be traced directly back to 1828.

45. The Appellant submits that in respect of the concept of "child...before birth", a conceptual relationship between the concealment and other pre-natal offences, including abortion, exists as a matter of logic and historical experience. All of these offences were developed as statutory exceptions to the general common law rule that a child *en ventre sa mère* has no distinct legal personality, and any injuries suffered in the womb that led to a fetus's death before birth did not give rise to any criminal penalties or civil liabilities.[50] The abortion proscription and the concealment offence form part of the early efforts by the legislature to progressively fill perceived holes in the law with respect to the protection of pre-natal life.[51]

46. It is apparent that when the Canadian Parliament embarked upon its task of consolidating the criminal law, it did not simply adopt and codify the then-existing British law with respect to the protection of pre-natal life. Rather, Parliament sought to ensure comprehensive protection: in addition to continuing the offences of procuring an abortion and concealment of birth that existed under British law, and codifying the live-birth rule into a definition of "human being", the 1892 *Code* introduced two entirely new related offences – neglecting to obtain assistance in childbirth and killing a child in

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imprisoned, with our without hard labour, in the common gaol or house of corrections, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth..." With respect to Canadian statutes modelled on the English Act, see discussion in Constance B. Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada" (1984), 34 *U.T.L.J.* 447 at 454-455.

[49] The earlier legislation of 1624 and 1803 applied only to "bastard" children, and did not make concealment a separate offence, but rather proof of murder (according to the 1624 statute) or a substituted verdict on a charge of murder (according to the 1803 statute). The latter aspect is maintained in s. 662(4) of the *Criminal Code*, which makes concealment an included offence in murder and infanticide. See Reasons for Judgment of Justice Hill, para. 13, 24, *Appellant's Record*, vol. I, pp. 8, 12-13.

[50] *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 at pp. 567-570; *Winnipeg v. D.F.G.*, *supra* at para. 11-15; *R. v. Sullivan*, (1988), 43 C.C.C. (3d) 65 at 68-69 (B.C.C.A.), aff'd, [1991] 1 S.C.R. 489 at pp. 502-503; *Attorney General's Reference No 3 of 1994*, [1997] 3 All ER 936, [1998] A.C. 245 (H.L.) at pp. 7, 12 (QL); *Roe v. Wade* (1973) 410 US 113 at 132-135.

[51] For example, in 1803, *Lord Ellenborough's Act*, 43 Geo. III, c. 58 made abortion of a quick fetus a capital offence, while providing for lesser penalties for the offence of abortion before quickening; important amendments to the concealment offence were made in the same legislation.

its mother's womb – both designed to plug perceived gaps in the law.[52] The word "child" appeared in all of these provisions.[53] As a result, the 1892 *Code* reflected a comprehensive scheme for the protection of pre-natal life against any interference, and the criminal law operated on the basis of a conception of pre-natal personhood that recognized only a limited, if any, distinction between interference with the "child" at an earlier stage of the gestation period and interference at a near-term stage or during birth.[54]

47. The Appellant submits that in the context reflected in the 1892 *Code*, in which the personal autonomy and privacy interests of women *at any stage of pregnancy* were not recognized unless there was a threat to life, the fluid and elusive boundaries of the term "child...before birth" within s. 243 might well have been perceived as capable of providing guidance. The *Berriman* "chance of life" standard applied to the concealment offence simply represented a dividing line chosen by Parliament, which for some accused persons offered a defence. The contemporary context has, however, changed significantly. It is now recognized that a woman's rights to bodily integrity, privacy and autonomy are engaged in a unique and interconnected manner in respect of decisions concerning pregnancy. State measures to protect pre-natal life must appropriately recognize and reflect these interests. In this sphere of activity, Parliament may no longer simply place the dividing line between permissible and impermissible conduct wherever it pleases, and must ensure that legislation in this area is not vague.

(iii) Judicial interpretation does not provide a coherent meaning to "child. . . before birth"

48. The Appellant submits that judicial interpretation of s. 243 has not resulted in a coherent interpretation of its application to a child that dies before birth.

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[52] Henri Elzear Taschereau, *The Criminal Code of the Dominion of Canada* (Toronto: Carswell, 1898) at 228-229, 275; James Crankshaw, *The Criminal Code of Canada and the Canada Evidence Act, 1893* (Montreal: Whiteford & Theoret, 1894) at 166-167. In respect of the new neglecting to obtain assistance in childbirth offence, the Canadian Parliament appears to have acted to overcome uncertainty as to whether such conduct could found a manslaughter conviction: compare *R. v. Knights* (1860), 2 F. & F. 46, 175 E.R. 952 and *R. v. Handley* (1874), 13 Cox C.C. 79.

[53] See ss. 219 [now 223], 239 [now 242], 240 [now 243], 271 [now 238], 272-274 [now 287] of the 1892 *Code*: Crankshaw, *supra* at 141, 166-167, 190.

[54] Thus, in the 1892 *Code*, the offence of killing an unborn child "before or during birth" (s. 271) appeared immediately before the abortion provisions relating to "procuring miscarriage" (ss. 272-274), and both provided for identical penalties (imprisonment for life). The interconnected nature and design of the two offences was reinforced by the fact that the statutory defence set out in s. 271(2) – in relation to good faith efforts taken before or during birth considered necessary to save the mother's life – was also applicable to the abortion provisions. See Crankshaw, *supra* at 190-193.

49. The classic statement of the applicable test for the death-before-birth application of s. 243 comes from the charge to the jury in *R. v. Berriman*, in which Erle J. stated,

> This offence cannot be committed unless the child has arrived at that stage of maturity at the time of birth, that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstance, such as disease on the part of itself or its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity, and if she has miscarried at a time when the foetus was but a few months old, and therefore could have had no chance of life, you could not convict upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probability is that the child would not be born alive.[55]

50. Both before Justice Hill and in the Court of Appeal, the Crown relied on *Berriman* as the basis to interpret s. 243 in its death before birth application (although, as discussed further below, the Crown took a different approach to the interpretation of *Berriman* in the Court of Appeal than it did in the Superior Court).

51. A review of the analyses of both Justice Hill and the Court of Appeal of the *Berriman* approach to s. 243 leads to the conclusion that s. 243 in its application to a child that died before birth is unconstitutionally vague. The Court of Appeal faulted Justice Hill for, in their view, applying an "overly demanding standard of vagueness", and failing to "properly apply the decision in *Berriman* in reaching his conclusion."[56] The Appellant submits that Justice Hill did not make either of these purported errors. By contrast, the Appellant submits that the Court of Appeal erred by applying this Court's jurisprudence on the constitutional analysis of vagueness in an unbalanced manner, which failed to consider the contextual factors required by the jurisprudence. The Court of Appeal erred in its conclusion that s. 243 was not vague in its application to a "child....before birth", and indeed, the Court of Appeal's interpretation of the provision is not coherent.

52. Justice Hill disposed of the interpretation of the words "birth", "deliver" and "conceal" in s. 243 in a relatively swift manner, finding that they did not pose interpretative difficulties.[57] In the course of this analysis, he concluded that s. 243 did not apply to a non-induced abortion (a

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[55] (1854), 6 Cox C.C. 388, at 390.
[56] Reasons for Judgement of the Court of Appeal, para. 101, *Appellant's Record*, vol. I, p. 124.
[57] Reasons for Judgment of Justice Hill, paras. 121-127, *Appellant's Record*, vol. I, pp. 60-62.

miscarriage) or an induced abortion. The Court of Appeal did not take issue with this aspect of his reasons. As noted above, this left as the crux of the interpretative problem the meaning of the term "child" in s. 243 in the context of a child that dies before birth. As Justice Hill put it, "at what point from conception to the emergence of the fetus in child-birth can it be said there is the 'body' of a 'child' within the contemplation of s. 243?"

53. As the jurisprudence requires, Justice Hill then sought to determine whether the concept "child...before birth" within s. 243 provides "the basis for coherent judicial interpretation"[58] and identifies a "solid core of meaning."[59] Justice Hill correctly identified that the meaning of "child...before birth" could not be interpreted literally or by reference to ordinary definitions,[60] and thus sought to interpret the concept in a contextual manner. He considered a number of possible meanings that could be attributed to the "might have been born alive" test of physical maturity advanced in *Berriman*. He ultimately concluded that no coherent, principled meaning could be identified for the concept "child...before birth" that accorded with the statutory text, the common law *Berriman* interpretation and the principles of statutory interpretation.[61] Specifically:

(a) Justice Hill accepted the Crown's submissions that the concept "child...before birth" within s. 243 must be interpreted in light of the provision's legislative purposes. He accepted that the purpose of the legislation is to preserve evidence in order to allow the police to investigate potentially suspicious infant deaths, both in the context of context of the "pre-birth" criminal offences (s. 223(2), 238(1) and 242), and to investigate whether a child was stillborn or born alive and the cause of death (in relation to offences where a child was born alive).[62]

(b) Justice Hill accepted the Crown's submission that the test stated in *Berriman* constituted the correct judicial interpretation of the statutory concept "child...before birth". In particular, Justice Hill noted that s. 243, as interpreted by the common law test from *Berriman*, "compels the court to hypothetically determine whether the dead body is that of an entity which might have lived", and that determining the meaning of "the probability of life" was essential to interpreting the provision.[63]

(c) Justice Hill also remarked upon the important distinction between determining whether a stillborn fetus "might have been born alive" or had a chance of post-

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[58] *Canadian Pacific*, *supra* at para. 46.
[59] *Canadian Foundation*, *supra* at para. 40.
[60] Reasons for Judgment of Justice Hill, para. 205, *Appellant's Record,* vol. I, p. 92
[61] Reasons for Judgment of Justice Hill, para. 163-202, *Appellant's Record,* vol. I, pp. 80-92.
[62] Reasons for Judgment of Justice Hill, para. 138, 143, 149, *Appellant's Record*, vol. I, pp. 65-69.
[63] Reasons for Judgment of Justice Hill, para. 170-173, *Appellant's Record*, vol. I, p. 82.

natal life, and the issue of whether a particular child/fetus did in fact live and the related question of the cause of its death.[64]

(d) Justice Hill noted that on the evidence available to him, the court was provided with no guidance as to the principles informing the crucial distinction, relied upon by the Crown, between a miscarriage (not caught by s. 243) and the premature birth of a stillborn fetus (caught by s. 243).[65]

(e) Justice Hill also accepted the Crown's submission that a "near birth, late in the gestation period" meaning could be read in the language of ss. 238(1) ("in the act of birth") and 242 "about to be delivered".[66] However, he found that this conclusion did not resolve the problem of deciding if every birth of a dead fetus, including premature deliveries, is captured by the concept of a "child. . . before birth" in s. 243. He noted that the law of homicide protects a prematurely born infant delivered earlier in the gestation period that lives as a "human being" for even a short time (and evidently has shown that "it might have been born alive"),[67] and at the same time, according to the *Berriman* test, not every stillborn fetus that is delivered earlier in the gestation period will be subject to s. 243.

(f) Justice Hill considered five possible meanings that could be attributed to the *Berriman* "chance of life" concept in respect of a "child" that dies prior to birth. He rejected several possible interpretations (quickening, common law live-birth, s. 223 definition of "human being", and the provincial regulatory stillbirth standard) as inconsistent with the common law and/or the statutory text.[68] He also concluded that the remaining possible interpretation, tied to viability, did not satisfy the constitutional standard of precision.[69]

(g) Justice Hill observed that when an individual is left "uncertain of the relevant legal standard", a statutory proscription is unconstitutionally vague.[70] He noted that the *Berriman* "chance of life" standard arose "in an era of pre-birth personhood assigned to the fetus and at a time when abortion was legally proscribed". He concluded that a contemporary interpretation of the standard could not rely upon these "contextual features", and without them, a question arose as to the meaning to be ascribed to the "chance of life" standard.[71]

54. Justice Hill's careful analysis shows that the imprecision he identified in s. 243 was not solely a boundary issue relating to the practical uncertainties that could be anticipated in relation to

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[64] Reasons for Judgment of Justice Hill, para. 209, *Appellant's Record*, vol. I, p. 93.
[65] Reasons for Judgment of Justice Hill, para. 166, *Appellant's Record*, vol. I, pp. 80-81.
[66] Reasons for Judgment of Justice Hill, para. 168, *Appellant's Record,* vol. I, p. 81.
[67] *R. v. Prince* (1988), 44 C.C.C. (3d) 510 (Man. C.A.); *R. v. West* (1848), 2 Car. & K. 784, 175 E.R. 329; *Attorney General's Reference, supra*; *R. v. Iby*, [2005] NSWCCA 178.
[68] Reasons for Judgment of Justice Hill, para. 174-191, *Appellant's Record*, vol. I, pp. 83-84, 86-88.
[69] Reasons for Judgment of Justice Hill, para. 192-212, *Appellant's Record*, vol. I, pp. 88-95.
[70] Reasons for Judgment of Justice Hill, para. 198, *Appellant's Record*, vol. I, pp. 89-90.
[71] Reasons for Judgment of Justice Hill, para. 208, *Appellant's Record*, vol. I, p. 93.

borderline cases. His reasons make clear that he properly understood that a "core-periphery problem" is not in itself sufficient to invalidate a statute for vagueness.[72] Rather, Justice Hill found the term "child...before birth" void for vagueness because he was unable to identify a core meaning for the *Berriman* "chance of life" concept that provided sufficient guidance in light of the relevant circumstances – including contemporary recognition of the engagement of personal autonomy interests and the biological realities of pregnancy – while remaining consistent with the statutory text and the common law, as required by the cannons of statutory interpretation. In particular, Justice Hill's conclusion turned on his concern that the required assessment of the "capacity for life" yields inherently ambiguous results, as it invariably engages issues of medical probability and individual moral views relating to the start of life and medical intervention, that are insufficiently managed by the statutory provision in light of the constitutional interests at stake.[73]

55. Justice Hill's analysis of s. 243 was properly contextual, and focussed on the biological realities of pregnancy in a manner that acknowledged the important constitutional interests that are engaged. Pregnancy is a developmental process, and miscarriage and stillbirth are unpredictable non-voluntary events, such that a pregnant woman has no choice but to fall into "the area of risk" set by s. 243 as her pregnancy progresses. Expert medical advice will not always be readily available when the "area of risk" materializes. Recognizing the relevance of this context to the standard of intelligibility set by the vagueness doctrine, Justice Hill noted that the Crown had not established that there existed "any obstetrical distinction between a spontaneous abortion [miscarriage] at 6 months and the premature birth of a still born fetus at 6 months",[74] and that this elusive distinction was critical to the application of s. 243. Justice Hill also observed that multiple, possibly inconsistent meanings were embedded within the *Berriman* "chance of life" test.[75] Importantly, he concluded that given these circumstances, a "viability" standard that depended upon the informed medical judgment of experts in order to be applied in any particular case was inadequate in this context.[76]

56. It is submitted that the Court of Appeal erred in two respects in reaching the conclusion that s. 243 was not vague in its application to a "child ...before birth". First, it failed to take the required

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[72] *Canadian Pacific, supra* at para. 73.
[73] Reasons for Judgment of Justice Hill, paras. 192-212, *Appellant's Record*, vol. I, pp. 88-95.
[74] Reasons for Judgment of Justice Hill, para. 166, *Appellant's Record,* vol. I, pp. 80-81.
[75] Reasons for Judgment of Justice Hill, para. 187, *Appellant's Record,* vol. I, pp. 86-87.
[76] Reasons for Judgment of Justice Hill, para. 163-202, *Appellant's Record,* vol. I, pp. 80-92.

contextual approach to its analysis of whether s. 243 is unconstitutionally vague. Second, in its ultimate endorsement of the *Berriman* standard as the proper interpretation of s. 243, the Court of Appeal interpreted the standard as two different tests for capacity for life of a "child... before birth", thus leaving a vague and incoherent interpretation of the provision.

57. With respect to the first error, it is submitted that the Court of Appeal took an unbalanced approach to the constitutional analysis of vagueness, focussing on its observations that "vaguenesss has been rarely applied by the courts to strike down federal or provincial legislation", that the "governing principles have been narrowly defined", and that "the constitutional standard of precision that the vagueness doctrine demands cannot be very exacting", and failing to apply the aspects of the jurisprudence that clearly require a court to take a contextual approach to the analysis of vagueness (discussed at paragraphs 26-27 above).[77]

58. In its review of Justice Hill's decision, the Court of Appeal accepted that s. 7 engages more that the liberty interest of potential imprisonment.[78] However, unlike Justice Hill, in the "The Principles Applied" section of its judgment,[79] the Court of Appeal did not consider as a contextual factor the fact that s. 243 trenches on the constitutionally protected security of the person interests that are engaged for pregnant women. Indeed, an earlier passage in the Court of Appeal's judgment appears to disparage this aspect of Justice Hill's analysis for having unnecessarily "ranged over a great many issues, medical legal and philosophical".[80]

59. It is submitted that the unique and direct manner in which s. 243 engages s. 7 interests materially affects the vagueness analysis. In short, when the prohibition and envisioned state interference trench directly on the sensitive core of personal autonomy protected by the s. 7 liberty and security interests, the "sufficient guidance for legal debate" test for vagueness must apply in an appropriately contextual manner. As noted above at paragraphs 26-27, although the jurisprudence concerning the vagueness doctrine establishes that the constitutional threshold for finding a law vague is always "relatively high,"[81] the adequacy of any given statutory text must be assessed in light of its

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[77] Reasons of the Court of Appeal, paras. 86-97, in particular paras. 93, 96, *Appellant's Record*, vol. I, pp. 120-123.
[78] Reasons for Judgment of the Court of Appeal, para. 83-85; *Appellant's Record,* vol. I, pp. 41-42.
[79] Reasons for Judgment of the Court of Appeal, para. 101-123; *Appellant's Record,* vol. I, pp. 48-60.
[80] Reasons for Judgment of the Court of Appeal, para. 71; *Appellant's Record,* vol. I, p 115.
[81] *Nova Scotia Pharmaceutical Society, supra* at p. 632; *Winko v. British Columbia, supra* at para. 68.

particular context, as "the standard of legal precision required by s. 7 will vary depending on the nature and subject matter of the particular legislative provision."[82] The constitutional sufficiency of the intelligibility offered by a given enactment cannot be assessed without reference to such factors as the field in which it is intended to operate, the objectives it seeks to achieve, the nature and status of those to whom it is intended to apply, and the manner in which it is expected to operate.

60. It is submitted that where a legislative provision trenches on a constitutionally protected sphere of activity (here, women's personal autonomy and privacy interest in relation to pregnancy), that context is relevant to the vagueness analysis, for reasons similar to the factors noted above at paragraph 27. In such circumstances, the citizen may properly expect greater clarity *in advance* as to the boundary between permissible, constitutionally-protected conduct and a criminal offence. The U.S. Supreme Court has expressly recognized this point in *Grayned*, stating that "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked".[83] This passage from *Grayned*, and its emphasis on the importance of advance notice when proscriptions touch upon fundamental rights, were discussed with approval by L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada.*[84] In this context, L'Heureux-Dubé J. observed that "[v]ague laws intruding on fundamental freedoms create paths of uncertainty onto which citizens fear to tread, fearing legal sanction. Vagueness serves only to cause confusion and most people will shy from exercising their freedoms rather than facing potential punishment."[85]

61. It is submitted that recognition of the relevance of this type of contextual factor in the vagueness analysis appropriately incorporates the general *Charter* principles that the requirements of fundamental justice vary depending on the context and the interests at stake[86] and that the principles of fundamental justice reflect a balance between individual and societal interests.[87]

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[82] *Canadian Pacific Ltd., supra* at para. 49. See also *Young v. Young, supra* at p. 75.
[83] *Grayned v. City of Rockford*, 408 U.S. 104 (1972) at 109 [internal quotations omitted]
[84] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at pp. 212-214.
[85] *Committee for the Commonwealth, supra* at p. 214.
[86] *Lyons, supra* at p. 361. See also *Attorney General of Canada v. Bedford*, 2012 ONCA 186 at paras. 95-96, in which the Court of Appeal concluded, in the context of its analysis of the constitutionality of the *Criminal Code* prostitution provisions, that an understanding of the specific nature of the rights interfered with, and the nature of the interference, were necessary for the proper assessment of the principles of fundamental justice.

62. In the case of an ordinary criminal prohibition that engages s. 7 interests only because of the availability of imprisonment, a greater measure of flexibility is appropriate when assessing whether the terms of the offence-creating provision are sufficiently intelligible. In addition, it may be appropriate in such cases to refer to the protections for the accused resulting from the Crown's burden of proof; after all, when s. 7 is engaged only through the availability of imprisonment, it is arguably relevant that a particular accused benefits from protections that reduce the availability of a conviction and hence the possibility of imprisonment.[88] However, a requirement of greater precision – and of boundaries that can be perceived with greater clarity in advance of a charge or trial – will be constitutionally appropriate when the proscription touches directly upon a protected sphere of activity (in this case, a woman's personal autonomy and privacy interests in relation to pregnancy). In such cases, it is appropriate to be less tolerant of uncertainty, because the constitutionally protected status of the activity itself materially affects the usual rule that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."[89]

63. With respect to the second error, the Court of Appeal accepted the *Berriman* "chance of life" test as a correct judicial interpretation of s. 243.[90] In providing its interpretation of the *Berriman* test, the Court of Appeal stated that the "chance of life" standard marks the outer boundary of when a foetus becomes a child. The Court further stated that this "outer boundary" is equivalent to "viability". In the same paragraph, the Court then provided two separate explications of the *Berriman* "viability" standard: (1) when "but for some accidental circumstances, such as disease, [the foetus] might have been born alive", and (2) when the foetus "reaches a stage in its development from which it might grow into a human being, given proper care."[91] But, as Justice Hill noted,[92] these are two different outer boundaries: there will be cases where a very early-term foetus could have been born

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As a result, in that case, a consideration of the security of the person interests at issue was required, even though the liberty interest at stake from the risk of imprisonment was sufficient to engage s. 7.

[87] *Malmo-Levine*, *supra* at para. 98.

[88] This observation is supported by the judgment in *Malmo-Levine*, in which the majority held that the actual use of imprisonment, and not the availability of imprisonment, was the operative concept when assessing whether an offence complied with the constitutional standard of overbreadth: see *Malmo-Levine*, *supra* at para. 150-168.

[89] *Boyce Motor Lines v. U.S.*, 324 U.S. 337 (1952) at 340.

[90] Reasons for Judgment of the Court of Appeal, para. 81; *Appellant's Record,* vol. I, pp. 118-119.

[91] Reasons for Judgment of the Court of Appeal, para. 114; *Appellant's Record,* vol. I, p. 127.

[92] Reasons for Judgment of Justice Hill, para. 187, *Appellant's Record,* vol. I, pp. 86-87 .

alive (i.e., survived for at least a few seconds), but could not have survived even with proper care; and there will be cases where a later-term foetus could never have been born alive. This inconsistent double explication of the *Berriman* test was not noted, explained or resolved by the Court of Appeal.

64. The unresolved duality in the Court of Appeal's explication of the *Berriman* test was then carried forward into its restatement of the "viability" standard in its interpretation of s. 243. According to the Court of Appeal, the provision is to apply "when it (the foetus) has reached a stage in its development when, but for some external event or other circumstance, it would likely have been born alive" [93]. This interpretation melds together the two separate explications of the *Berriman* test that the Court of Appeal had just provided, again without explaining how the two separate meanings were to be resolved. Having left this central problem unresolved, the Court of Appeal went on to explain that the application of the "viability" standard by the trier of fact would be informed by expert medical evidence "about the course of the pregnancy, fetal age and viability, and the cause of death".[94] The Court of Appeal thus acknowledged that the application of the "viability" standard under *Berriman* and s. 243 in a particular case would be dependent on a medical opinion. Unlike Justice Hill, however, the Court of Appeal did not consider or address the constitutional ramifications of dependence on expert medical evidence in the particular context of a prohibition that arises in relation to the natural end of a failed pregnancy.

65. The "viability" standard articulated by the Court of Appeal, with its ambiguous duality, is not capable of being applied in a particular case without expert medical advice. In light of this acknowledged requirement for case-specific medical evidence,[95] the Court of Appeal's interpretation of s. 243 effectively reduces to a presumption that the reasonable law-abiding and prudent pregnant woman who has fallen into "the area of risk" *must* report to the authorities *any* miscarriage or stillbirth that *might be suspected* to have reached the *Berriman* test. There is no recognition in the Court of Appeal's analysis that a criminal prohibition that reduces in practice to a requirement of presumptive reporting will by definition undermine the pregnant woman's protected sphere of privacy. Put bluntly, in the vast preponderance of cases, the pregnant woman who has just suffered

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[93] Reasons for Judgment of the Court of Appeal, para. 115; *Appellant's Record,* vol. I, p. 127.
[94] Reasons for Judgment of the Court of Appeal, para. 116; *Appellant's Record,* vol. I, p. 128.
[95] See the Court of Appeal's acknowledgment of the requirement for case-specific medical evidence, Reasons for Judgment of the Court of Appeal, para. 116; *Appellant's Record,* vol. I, p. 128.

the unexpected natural failure of a pregnancy will not have a doctor at her side to opine on the viability of the dead foetus of which she has just been delivered. The Court of Appeal did not consider whether, in light of this reality and the constitutionally-protected sphere at issue, the interpretation it had articulated was sufficiently intelligible to satisfy constitutional requirements. It is respectfully submitted that the Court of Appeal's interpretation thus impermissibly fails to accord appropriate recognition to the pregnant woman's constitutionally-protected personal autonomy and privacy interests and the related s. 7 right to know at the time of her actions whether they could lead to imprisonment.

66. A comparison with the context at issue in *Canadian Foundation for Children* is helpful to illustrate this point. In that case, Chief Justice McLachlin, writing for the majority, made the point that the use of force for correction provision of the *Criminal Code* provided sufficient guidance not to be found vague, because:

> It sets real boundaries and delineates a risk zone for criminal sanction. The prudent parent or teacher will refrain from conduct that approaches those boundaries, while law enforcement officers and judges will proceed with them in mind. [emphasis added][96]

While it is constitutionally permissible to tell a parent or teacher considering discipline a child to "refrain from conduct that approaches those boundaries", the same analysis is constitutionally problematic when applied to a woman who has just suffered the unplanned end to a pregnancy and must consider whether she has an obligation to report it to authorities. The teacher or parent has no constitutional interest at stake at the time they are considering disciplining the child. By contrast, the woman in this situation has a constitutional right to autonomy and privacy in relation to her failed pregnancy, and made no choice to approach the boundaries of criminal sanction as her pregnancy progressed.

(D) Section 243 does not Support the Restrictive Interpretation Advanced by the Respondent for the First Time in the Court of Appeal

67. In its efforts to show that s. 243 provides sufficient precision, the Respondent asserted, for the first time in the Court of Appeal, that two limitations are implicit in the concept "child...before birth": first, that s. 243 includes a legal presumption that, absent evidence of live birth, precludes prosecution

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[96] *Canadian Foundation for Children, supra* at para. 42.

when the fetus cannot be shown to be at least seven months old; and second, that the *Berriman* "chance of life" standard refers to the capacity of the dead fetus to meet the definition of "human being" in s. 223(1). The Appellant submits that a proper application of the principles of statutory interpretation reveals that the first interpretive limitation advanced by the Respondent is not supported by the statutory text, and the second does not provide the degree of precision the Respondent seeks to attribute to it.

(i) S. 243 cannot support a 7 months gestation cut-off to "child... before birth"

68. The Respondent asserted in the Court of Appeal that s. 243 includes a "legal presumption that, absent evidence of live birth, the Crown's failure to prove that the dead fetus was at least seven months old would lead to a determination that it could never have been born alive".[97] Although it is not entirely clear, in its response to the leave application in this Court, the Crown appears to have gone further than a seven month presumption, and now asserts a seven months gestational-age cut-off, before which s. 243 does not apply.[98] The Respondent thus seeks to convert s. 243's alleged late-term focus into a solid guarantee: according to the Respondent, the concept "child...before birth" cannot be vague, because no concealment prosecution can occur in respect of a fetus that cannot be shown to be at least seven months old (gestational-age).

69. The Appellant submits that no such "legal presumption" or cut-off operates within s. 243. The relevant passage from *Berriman* – which appears to be the Respondent's sole authority for this purported "presumption" – does not support the Respondent's interpretation. Rather, *Berriman* expressly states that no bright-line rule applies, and the seven month point is a guideline only, its strength strongly qualified by the use of the words "may", "perhaps" and "the great probab[ility]":

> No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probab[ility] is that the child would not be born alive.[99]

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[97] This quotation is from the factum filed by the Crown, then Appellant, in the Court of Appeal, para. 30.
[98] See Crown's Response to Application for Leave to Appeal, para. 22, 23, 27, 28.
[99] *Berriman*, *supra* at 390.

70. There is simply no basis to import a seven months gestation presumption or cut-off into the concept of a "child...before birth" within s. 243. *Berriman* does not establish such a legal presumption, but rather at most presents a presumption of fact, permitting an inference to be drawn if appropriate but not mandating it.[100] The text of s. 243 certainly does not suggest that, in adopting a statutory provision based upon the English statute to which *Berriman* referred, Parliament intended to elevate the *Berriman* seven month guideline into a firm requirement.[101] Indeed, such a legal presumption would appear contrary to the investigative purpose of s. 243: reported cases from the *Berriman* period and more recently demonstrate that pre-natal and post-natal offences can occur when a child is born prior to the seven month point.[102]

71. In short, if Parliament had intended to articulate a bright-line presumption of the kind suggested by the Respondent, it would have done so. In this context, it should be noted that in 1929, the English Parliament did legislate a bright-line 28-week presumption,[103] but long after the Canadian Parliament had clearly established its own separate path in relation to the substantive content of the criminal law in respect of pre-natal life.[104] The fact that this specific legislative statement was necessary to establish a presumption under English law, and that this was done at a time long after the separate establishment of Canadian criminal law, indicates that no presumption of the kind suggested by the Respondent operates within s. 243.

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[100] See discussion in Alan Bryant, Sidney Lederman and Michelle Fuerst, *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 3rd ed. (Toronto: LexisNexis Canada Inc., 2009) at 135-141, 144-145 with respect to the distinction between a legal presumption and a presumption of fact.

[101] *Berriman* arose under *Lord Lansdowne's Act* (1828) 9 Geo. 4, c. 31, s. 14. See para. 27 and note 55 above.

[102] See, for example, *West*, *supra*. See also *Rance v. Mid-Downs Health Authority and Another*, [1991] 1 All ER 801 (Q.B.), in which it was held that the handicapped child at issue in that case would, at 26 weeks in the gestation period, have been a "child capable of being born alive" (within the meaning of the 1929 *Act*). See also *R. v. Colmer* (1864), 9 Cox C.C. 506 (although the accused there was ultimately acquitted).

[103] In section 1(2) of the *Infant Life (Preservation) Act, 1929*, 19 & 20 Geo. 5, c. 34, the English Parliament provided that "[f]or the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be *prima facie* proof that she was at that time pregnant of a child capable of being born alive". It should be noted that the presumption created by the *Infant Life (Preservation) Act, 1929* does not, however, operate in the manner proposed by the Respondent, in that proof that the fetus has reached 28 weeks is *prima facie* proof that it was capable of being born alive, but a fetus younger than 28 weeks may also be shown to be capable of being born alive (see, for example, *Rance*, *supra*).

[104] In Canada, an offence substantively similar to that created by the *Infant Life (Preservation) Act, 1929* had already been in existence since 1892, in what is now s. 238. See *Sullivan* (B.C.C.A.), *supra* at 72.

72. In the absence of an express seven months gestational-age limit or presumption in the text of s. 243, it is not appropriate for the courts to judicially legislate such a limit. To do so would go beyond the scope of appropriate statutory interpretation and into the realm of rewriting the legislation.[105]

(ii) The s. 223(1) definition of "human being" does not cure the vagueness of s. 243

73. The Respondent argued in the Court of Appeal that that the *Berriman* "chance of life" standard must, under Canadian law, refer to the capacity of the fetus to be born alive as described in the s. 223(1) definition of a "human being". Based on this restricted interpretation, the Respondent further asserted that the *Berriman* standard is not based on speculation about long-term survivability or available medical technology, but rather simply requires determination of whether the fetus was sufficiently physically mature such that, but for the misadventure it encountered, it could have been "born alive" as described in s. 223(1).[106] According to the Respondent, this interpretation confirms the late-term focus of s. 243, and provides sufficient precision.

74. Justice Hill considered and rejected an interpretation equating the *Berriman* "chance of life" standard with the stillborn fetus's capacity to satisfy the s. 223(1) definition of "human being". He noted that Parliament had deliberately chosen to speak of "a human being" in other proximate sections of the *Code* relating to pre-natal offences, but in s. 243 had referred to a "child...before birth", when it could have used the language "whether or not the child died before becoming a human being".[107] The Appellant submits that this analysis is sound.

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[105] See cases cited above at footnote 33. Section 243 is distinguishable in this way from the interpretation of s. 43 of the *Criminal Code* in *Canadian Foundation*. In that case, Chief Justice McLachlin, writing for the majority, as a matter of statutory interpretation construed s. 43 to be limited in its application to children between the ages of two and eighteen. That interpretation was based on the use of the words "reasonable under the circumstances" which modified the amount of "corrective" force required. As the Chief Justice noted, the use of a reasonableness test directs the court interpreting s. 43 to consider contemporary social consensus in assessing what is "reasonable": *Canadian Foundation for Children, supra* at paras. 36-37, 40 (and also 25). The "reasonableness" standard was the source of the ability to interpret s. 43 as including age limits. S. 243 contains no similar language.

[106] This argument can be found in the factum filed by the Crown (then Appellant) in the Ontario Court of Appeal, para. 25 and 28, footnote 16.

[107] Reasons for judgment of Justice Hill, para. 189, *Appellant's Record*, vol. I, p. 87. It should also be noted that before Justice Hill, Crown counsel indicated that the Crown was seeking to advance an interpretation for "child" within s. 243 that exceeded the s. 223(1) definition of a human being: see *Transcript of Submissions*, March 10, 2008 (p. 21, lines 14-21), *Appellant's Record*, vol. III, p. 108.

75. In any event, the Respondent's reference to the s. 223(1) definition does not resolve the problem identified by Justice Hill. The s. 223(1) definition of "human being" is a codification of the common law, which relied upon evidence of live birth to found legal personhood. From the perspective of the common law and s. 223(1), live birth is a fact to be assessed in a given case, regardless of gestational age. One prematurely born infant may be born alive when most others of the same gestational age would not be; from the perspective of s. 223(1), the question is not whether the infant is likely to (or did) survive for a particular length of time, but rather whether it lived separate from its mother for at least an instant. In a concrete case, the s. 223(1) definition may therefore be satisfied by an infant that is born early in the gestation period, perhaps at four or five months.[108] The availability of medical interventions before, during and immediately after birth, and the (inevitably moral and irreducibly personal) choices regarding whether to use them, may also affect the result in a given case. The s. 223(1) definition thus does not, as the Respondent contends, necessarily import a "late term focus". The s. 223(1) definition is related to gestational age only in the sense that the likelihood of live birth increases with gestational age; such probabilities are, however, irrelevant to the assessment of whether live birth in fact occurred in a particular case.

76. For the purposes of criminal prosecutions, the indeterminacy of the s. 223(1) definition is manageable, when one is focused solely on the question of whether the evidence shows that a particular infant was in fact born alive, not whether it could have been born alive. The Appellant submits, however, that when the s. 223(1) definition is grafted onto the *Berriman* "chance of life" standard the indeterminacy becomes unmanageable. The test proposed by the Respondent requires a determination of whether the stillborn fetus "could" have been born alive in the sense of satisfying the definition of "human being" in s. 223(1). Recognizing that live birth has in practice been observed at fairly early stages of the gestation period, it is apparent that the test proposed by the Appellant can only be applied in practice by reference to probabilistic assumptions derived from medical experience combined with personal moral views (i.e., at X weeks of development, the average fetus has a Y likelihood of being born alive, assuming the availability of Z medical interventions, and this *ought* to be considered a "chance of life"). The Respondent's proposed test has not sidestepped the problems of speculation and unavoidable reliance on medical judgment.

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[108] *Prince*, *supra* (prematurely born infant living for 19 hours); *West*, *supra* (prematurely born infant living for five hours); *R. v. Senior* (1832), 1 Mood. 347, 168 E.R. 1298; *Rance*, *supra*. See also commentary in Crankshaw, *supra* at 192, that as of 1893, "children have been born alive as early as four to five months".

(E) Neither the *Mens Rea* nor the Exercise of Prosecutorial Discretion can Cure the Vagueness of s. 243

77. In the courts below, the Respondent sought to excuse the vagueness of the concept of a "child....before birth" by relying on various evidentiary and procedural hurdles the Crown faces in securing a concealment conviction in a particular case, the practice of reliance upon case-specific medical evidence, and the frequency of acquittals in historical concealment cases. The Appellant submits that the substantive vagueness problem with s. 243 cannot be overcome by demonstrating that the Crown faces hurdles in securing a conviction, that charges are rarely laid, or that in practice the Crown has in the past chosen to pursue charges only when the fetus was near full-term (an argument relying on the exercise of prosecutorial discretion).

78. To satisfy the constitutional standard of intelligibility, a legislative provision must be capable of providing a principled basis for enforcement decisions and for the identification of the conduct that risks criminal sanction;[109] the exercise of Crown discretion with respect to prosecutions, or empirical observations concerning the challenges experiences in securing convictions, cannot serve as substitutes.[110]

79. Arguments based on the exercise of prosecutorial discretion or the fact that few women are ultimately convicted of the concealment offence are particularly problematic in light of the impact s. 243 has on the personal autonomy and privacy interests of women in relation to pregnancy discussed above at paragraphs 14-22. In such cases, the constitutional standard cannot be met by arguing that however it is interpreted, the apparently vague term will apply only in respect of those accused persons who are ultimately convicted of the offence. This approach fails to accord any recognition to the interests of the many other women who must seek to regulate their conduct to avoid the risk of criminal prosecution, and who must, long before case-specific medical evidence may be available, make a choice whether to invite state intrusion into an otherwise protected and private sphere. From the perspective of these women, it is no answer to suggest, as the Respondent has in the courts below, that the contours of the concept of "child ...before birth" in s. 243 will be adequately demonstrated

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[109] *Canadian Foundation, supra* at para. 29.

[110] It is well-established that Crown discretion cannot cure a constitutional defect: see *Lavallee, Rackel & Heintz v. Canada (Attorney General*, [2002] 3 S.C.R. 209 at para. 45; *R. v. Nguyen*, [1990] 2 S.C.R. 906 at p. 924.

through case-specific medical evidence at trial. It is submitted that in a context where women must make decisions about what steps to take at the time of the end of an unsuccessful pregnancy, defining the boundaries of the legal standard based on expert evidence that a woman will not have available to her at the relevant time does not meet the s. 7 requirement of precision. As noted above at paragraph 27(c), this Court has recognized that where a somewhat vague provision will be interpreted by a medical practitioner exercising their medical judgment, some level of flexibility did not make a provision vague.[111] By the same reasoning, it is submitted that if the interpretation of "child....before birth" is dependent on case specific medical evidence, a relevant consideration in whether the provision is vague is the fact that the woman who experiences the natural end of an unsuccessful pregnancy will not have that case specific medical evidence available at the time she must make a decision about her conduct.

80. The constitutional vagueness standard in relation to s. 243 must acknowledge the interests of not only those who are ultimately charged, but also of all women who, given the inherent uncertainty of the provision, choose to regulate their conduct by accepting state intrusion to avoid any risk of criminal liability. The Appellant, as a person facing a charge under s. 243, may rely upon these broader effects in arguing that s. 243 fails to meet the applicable constitutional standard. The standing of an accused to challenge the constitutionality of the charging provision under s. 52 does not depend upon demonstration that the unconstitutional effects are felt in his or her case.[112] A remedy under s. 52 is available when a law is shown to produce unconstitutional effects, even if these effects are not experienced directly in the particular accused's case.[113]

81. Nor can reliance on a *mens rea* requirement in s. 243 save it from its vagueness. The *mens rea* requirement of s. 243 includes at least the following elements: "intent to conceal that the mother has been delivered of it" [the "dead body of a child" that "died before.... birth], and knowledge of what is being concealed [the "dead body of a child" that "died before....birth]. The element of knowledge that the body being disposed of is that of a "child" that "died before birth" does nothing to eliminate the vagueness in s. 243. The argument is circular. That aspect of the *mens rea* turns on the same

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[111] *Morgentaler, supra* at p. 106 (*per* Beetz J), analyzed in *Nova Scotia Pharmaceutical, supra* at p. 622.
[112] *Morgentaler, supra* at pp. 62-63 (*per* Dickson C.J.); *Canadian Pacific, supra* at para. 7 (*per* Lamer C.J., concurring), para. 76-77 (*per* Gonthier J. for the majority); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 313.
[113] *R. v. Ferguson*, [2008] 1 S.C.R. 96 at para. 59, 66.

vague language, i.e., knowledge that what is being disposed of is a "child....before birth", as does the *actus reus*. While American jurisprudence cited by the Respondent in the Court of Appeal recognizes that a knowledge requirement may in some situations ameliorate or cure an otherwise vague statute, this recognition is tempered by the principle that "a *scienter* requirement cannot eliminate vagueness . . . . if it is satisfied by an 'intent' to do something that is in itself ambiguous."[114]

82. The essential ambiguity of the term "child...before birth" and the circularity of the knowledge requirement related to this element means that the *mens rea* requirements of s. 243 provide no assistance for the prudent and law-abiding woman who, valuing her privacy, wishes to ascertain whether she faces a risk of criminal prosecution if she chooses to conceal the loss of her fetus, and must therefore assess whether she has miscarried or "delivered" a stillborn "child".

(F) The Existence of Provincial Regulatory Obligations Cannot Save a Vague Criminal Prohibition

83. The Respondent argued in the courts below that the existence of provincial regulatory reporting obligations for stillbirths serve to cure any vagueness in the concept of "child....before birth" within s. 243, and further that Justice Hill's finding of vagueness is inconsistent with his recognition of the existence of these provincial regulatory obligations.

84. The Appellant submits that Justice Hill dealt with this issue correctly. It is true that if all provincial laws are obeyed without exception, an ordinary person in Ontario and most other provinces ought never to have to determine if a stillborn fetus is a "child" within the meaning of s. 243, as provincial regulatory obligations will likely apply in any event, except in the provinces of Newfoundland and Labrador and Quebec, where such still birth reporting requirements appear not to exist.[115] In any event, the fact that a provincial *regulatory* reporting obligation applies is not determinative of whether the *criminal* prohibition satisfies the constitutional intelligibility standard.

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[114] *Nova Records v. Sendak*, 706 F.2d 782 (7th Cir. 1983) at 789-90; See also *Planned Parenthood of Central New Jersey v. Verniero*, 41 F. Supp.2d 478 (D.N.J. 1998) at 48-53; *Little Rock Family Planning Services v. Jegley*, 1998 U.S. Dist. LEXIS 22325 (D. Ark. 1998) at 55-59); *U.S.A. v. Loy*, 237 F.3d 251 (3rd Cir. 2001) at 265.

[115] Newfoundland and Quebec do not appear to have statutes defining stillbirth reporting requirements. For legislation of other provinces on stillbirth reporting, see: *Vital Statistics Act* [legislation has the same name in remaining provinces], R.S.A. 2000, c. V-4, s. 1(t); R.S.B.C. 1996, c. 479, s. 1; C.C.S.M., c. V60, s. 1; S.N.B. 1979, c. V-3, s. 1; R.S.N.W.T. 1988, c. V-3, s. 1; R.S.N.S. 1989, c. 494, s. 2; R.S.O. 1990, c. V.4, s. 1; R.S.P.E.I. 1988, c. V-4.1, s. 2; S.S. 1995, c. V-7.1, s. 2; R.S.Y. 2002, c. 225, s. 1.

From societal and individual perspectives, different considerations apply in respect of the commission of an offence under the *Vital Statistics Act* (*VSA*) as compared to an offence under the *Criminal Code*. In Ontario, for example, the failure to comply with the *VSA* reporting requirement can lead to a fine,[116] while s. 243 creates an indictable offences, with a penalty of up to two years imprisonment.

85. Although the constitutionality of the various provincial statutes is not at issue, it is notable that they avoid the vagueness problems that plague s. 243 by relying on drafting which employs specific gestational ages or weight.

(G) The Record before Justice Hill

86. In the Court of Appeal and its response to the leave application, the Respondent raised concerns about the evidentiary record. The Respondent further suggested (for the first time in the Court of Appeal), that Justice Hill ought to have adjourned the matter, presumably to permit the Crown to adduce medical evidence. The Court of Appeal did not accept these arguments.[117]

87. The Appellant submits that the Respondent's arguments in relation to the record are without merit. In the trial court, Crown counsel consented to proceeding with the constitutional challenge on a limited evidentiary basis.[118] This consent was noted by Justice Hill.[119] Crown counsel never expressed any reconsideration of this consent before Justice Hill. The Court of Appeal found no error in Justice Hill's discretionary decision to decide the motion at the start of trial.[120] The Crown chose to argue the motion without adducing case-specific medical evidence, and without providing Justice Hill with expert evidence to elucidate and substantiate the medical distinctions (such as between "miscarriage" and "stillbirth") upon which it sought to rely in its interpretation of s. 243. It is notable that Justice Hill summoned counsel to reappear before him on March 10, 2008, four and a half months after the main argument had concluded, to give counsel an opportunity to respond to specific concerns

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[116] *Vital Statistics Act*, R.S.O. 1990, c. V-4.1, s. 55(1).
[117] Reasons for Judgment of the Court of Appeal paras. 33-43, *Appellant's Record*, vol. I, pp. 105-108.
[118] Respondent's factum in the Superior Court, para. 5, *Appellant's Record*, vol. I, pp. 186-187; *Submissions of October 22, 2007*(p. 32, ll. 15-20), *Appellant's Record*, vol. II, p. 32..
[119] Reasons for Judgment of Justice Hill, para. 87, *Appellant's Record*, vol. I, pp. 42-43.
[120] Reasons for Judgment of the Court of Appeal, paras. 38-43, *Appellant's Record, vol. I, pp. 107-108; R. v. DeSousa*, [1992] 2 S.C.R. 944 at pp. 954-956; *R. v. Curtis* (1998), 123 C.C.C. (3d) 178 at para. 8 (Ont. C.A.).

he had developed in the course of considering his reasons. Crown counsel did not at that time ask for an adjournment to consider calling evidence in response.[121]

88. The Respondent's reliance in the Court of Appeal upon the approach adopted by Lord Birkenhead in *Gaskill v. Gaskill* – a civil case – is thus entirely misplaced. The case at bar is a criminal case, and the Attorney General is already a party to it. If any specific or further notice to the Attorney General were required, this was amply satisfied by the Notice of Constitutional Question that was served on both Ontario and Canada.[122]

89. The Appellant bore the burden before Justice Hill to establish that s. 243 is unconstitutionally vague (and continues to bear that burden), as the accused always bears the burden of establishing a prima facie *Charter* breach. The Appellant did not, however, have to adduce evidence to establish this breach: she could also rely upon logic, common experience, or decisions from previous cases.[123] The Appellant's argument before Justice Hill below proceeded largely on the basis of logic and common experience, contending that the term "child...before birth" could not be interpreted coherently, but rather required resort to elusive value-laden distinctions that produced absurd results or did not conform with common experience.

90. In response, Crown counsel argued that s. 243 and the concept "child...before birth" could be readily interpreted to provide the necessary determinacy: miscarriages and induced abortions are excluded, natural births including stillbirths are included, and the *Berriman* "chance of life" standard applies to stillbirths. Justice Hill largely adopted the interpretation of s. 243 advanced by the Crown, and then sought to determine if it provided sufficient guidance to satisfy the constitutional vagueness standard. Justice Hill referred to a wide range of material – including American, UK and Canadian case law – for the purpose of explaining his conclusion that the distinction relied upon by the Crown to establish the intelligibility of s. 243 was subject to significant uncertainty and dispute. In proceeding in this manner, Justice Hill did not – as the Respondent contended in the Court of Appeal

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[121] *Submissions of March 10, 2008* (p. 4, l. 27-p. 5, l. 15), *Appellant's Record*, vol. III, pp. 91-92.

[122] *Submissions of October 22, 2007* (p. 13, l. 16-p. 14, l. 10), *Appellant's Record*, vol. II, pp. 31-32; Reasons for Judgement of Justice Hill, para. 3, *Appellant's Record*, vol. I, p. 5. The Notice of Constitutional Question served by the Appellant in the Superior Court was not included in the record in the Crown's appeal to the Ontario Court of Appeal, and as a result has not been included in the record before this Court. But the record is clear that the required notice was given to both the federal and provincial Attorneys General.

[123] *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 37-42 (*per* McLachlin and Iacobucci JJ. for the majority) (S.C.C.); *DeSousa*, *supra* at pp. 954-955; *Manitoba (Attorney General v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at p. 133.

– adopt specific contested facts from other cases, or require the Crown to prove that s. 243 was unambiguous as judged by today's science. It was, after all, the Crown and not the Appellant who introduced and relied upon the concepts of the miscarriage/stillbirth distinction and the *Berriman* "chance of life" standard, and in these circumstances it was entirely appropriate for Justice Hill to look to the Crown to substantiate the accuracy and precision of these concepts. In so doing, he simply required the Crown to prove the facts on which it sought to rely.

(H) The Respondent has not Sought to Rely on a s. 1 Justification

91. The Respondent did not seek to rely on s. 1 of the *Charter* in the courts below. The Appellant submits that given the nature of the analysis which is required for a finding that a legislative provision infringes s. 7 of the *Charter* because it is unconstitutionally vague, such a constitutional infringement would never be justified under s. 1 of the *Charter*. A vague legislative provision is not a minimally intrusive or proportionate limitation on constitutional rights.[124]

(I) The Appropriate Remedy is to Sever the Word "before" from the Phrase "whether the child died before, during or after birth"

92. The Appellant submits that if this Honourable Court holds that s. 243 is unconstitutionally vague in its application to a "child" which died before birth, then the appropriate remedy is to sever the word "before" from the phrase "whether the child died before, during or after birth", restoring the remedy granted by Justice Hill at trial. This remedy removes the unconstitutionally vague portion of s. 243, while preserving its application to a child that died "during or after birth". This remedy is consistent with the requirement of s. 52 of the *Constitution Act, 1982* that legislation which infringes the *Charter* is of no force and effect "to the extent of the inconsistency".

93. Severance is an appropriate remedy where only a portion of a legislative provision is unconstitutional, and the rest of the provision can independently survive.[125]

94. As noted above, the Appellant does not take issue with the proposition that Parliament could constitutionally legislate an offence of concealment applicable to some circumstances involving a

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[124] *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at pp. 94-95 (*per* Sopinka J.); *R. v. Nova Scotia Pharmaceutical Society, supra* at pp. 626-627.
[125] P. W. Hogg, *Constitutional Law of Canada, supra* at §40.1(e).

fetus that dies before it is born, so long as it does so in a manner that is not vague, and so long as the provision does not otherwise infringe the liberty and security interests of women in a manner contrary to the principles of fundamental justice.[126] The severance remedy sought would permit Parliament to legislate, if it chooses to do so, to enact a provision which applies to concealment in the before birth context which is sufficiently defined to pass s. 7 scrutiny.

PART IV – SUBMISSIONS AS TO COSTS

95. The Appellant does not seek costs.

[126] The latter concern would be an issue, for example, if Parliament chose to make concealing of the "body" of a fetus of any gestational age an offence. While such a provision might not be vague, as its scope would be clear, it might well suffer from constitutional overbreadth, or infringe women's right to personal autonomy in a manner not in accordance with the principles of fundamental justice. However, the Court is not called upon to decide that issue in this case.

PART V – ORDER REQUESTED

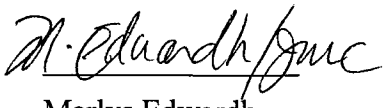
96. For all the reasons stated above, the Appellant respectfully requests the constitutional questions be answered as follows:

> 1. In its application to a "child" that dies before birth, does s. 243 of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: Yes
>
> 2. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: No

97. The Appellant requests that this Court sever the word "before" from the phrase "whether the child died before, during or after birth" in s. 243, restoring the remedy granted by Justice Hill at trial.

98. The Appellant further requests that the appeal be allowed and the acquittal entered at trial by Justice Hill be restored.

ALL OF WHICH is respectfully submitted, this 2nd day of April, 2012, by



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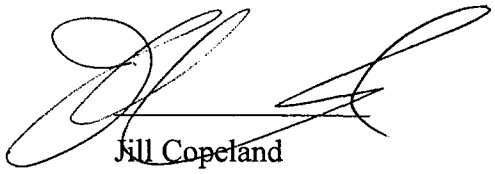
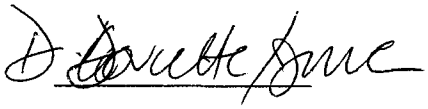


Jill Copeland



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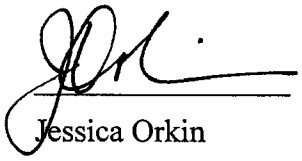

Jessica Orkin

PART VI – TABLE OF AUTHORITIES

SECONDARY SOURCES

PART VII – STATUTORY PROVISIONS

Criminal Code R.S.C. 1985 c. C-34, s. 2

"newly-born child" means a person under the age of one year;

« enfant nouveau-né » ou « nouveau-né » Personne âgée de moins d'un an.

Criminal Code R.S.C. 1985 c. C-34, s. 215(1)(a)

215. (1) Every one is under a legal duty
(a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;

215. (1) Toute personne est légalement tenue :
a) en qualité de père ou mère, de parent nourricier, de tuteur ou de chef de famille, de fournir les choses nécessaires à l'existence d'un enfant de moins de seize ans;

Criminal Code R.S.C. 1985 c. C-34, s. 218

218. Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured,
(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.
R.S., 1985, c. C-46, s. 218; 2005, c. 32, s. 12.

218. Quiconque illicitement abandonne ou expose un enfant de moins de dix ans, de manière que la vie de cet enfant soit effectivement mise en danger ou exposée à l'être, ou que sa santé soit effectivement compromise de façon permanente ou exposée à l'être est coupable :
a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;
b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.
L.R. (1985), ch. C-46, art. 218; 2005, ch. 32, art. 12.

Criminal Code R.S.C. 1985 c. C-34, s. 223(1)

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

223. (1) Un enfant devient un être humain au sens de la présente loi lorsqu'il est complètement
sorti, vivant, du sein de sa mère :
a) qu'il ait respiré ou non;
b) qu'il ait ou non une circulation indépendante;
c) que le cordon ombilical soit coupé ou non.
(2) Commet un homicide quiconque cause à

becoming a human being.
R.S., c. C-34, s. 206.

un enfant, avant ou pendant sa naissance, des blessures qui entraînent sa mort après qu'il est devenu un être humain.
S.R., ch. C-34, art. 206.

***Criminal Code R.S.C.* 1985 c. C-34, s. 233**

233. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.
R.S., c. C-34, s. 216.

233. Une personne du sexe féminin commet un infanticide lorsque, par un acte ou une omission volontaire, elle cause la mort de son enfant nouveau-né, si au moment de l'acte ou de l'omission elle n'est pas complètement remise d'avoir donné naissance à l'enfant et si, de ce fait ou par suite de la lactation consécutive à la naissance de l'enfant, son esprit est alors déséquilibré.
S.R., ch. C-34, art. 216.

***Criminal Code R.S.C.* 1985 c. C-34, s. 238**

238. (1) Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and liable to imprisonment for life.
(2) This section does not apply to a person who, by means that, in good faith, he considers necessary to preserve the life of the mother of a child, causes the death of that child.
R.S., c. C-34, s. 221.

238. (1) Est coupable d'un acte criminel et passible de l'emprisonnement à perpétuité toute personne qui, au cours de la mise au monde, cause la mort d'un enfant qui n'est pas devenu un être humain, de telle manière que, si l'enfant était un être humain, cette personne serait coupable de meurtre.
(2) Le présent article ne s'applique pas à une personne qui, par des moyens que, de bonne foi, elle estime nécessaires pour sauver la vie de la mère d'un enfant, cause la mort de l'enfant.
S.R., ch. C-34, art. 221.

***Criminal Code R.S.C.* 1985 c. C-34, s. 242**

242. A female person who, being pregnant and about to be delivered, with intent that the child shall not live or with intent to conceal the birth of the child, fails to make provision for reasonable assistance in respect of her delivery is, if the child is permanently injured as a result thereof or dies immediately before, during or in a short time after birth, as a result thereof, guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.
R.S., c. C-34, s. 226.

242. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans une personne du sexe féminin qui, étant enceinte et sur le point d'accoucher, avec l'intention d'empêcher l'enfant de vivre ou dans le dessein de cacher sa naissance, néglige de prendre des dispositions en vue d'une aide raisonnable pour son accouchement, si l'enfant subit, par là, une lésion permanente ou si, par là, il meurt immédiatement avant, pendant ou peu de temps après sa naissance.
S.R., ch. C-34, art. 226.

***Criminal Code* R.S.C. 1985 c. C-34, s. 243**

243. Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
R.S., c. C-34, s. 227.

243. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque, de quelque manière, fait disparaître le cadavre d'un enfant dans l'intention de cacher le fait que sa mère lui a donné naissance, que l'enfant soit mort avant, pendant ou après la naissance.
S.R., ch. C-34, art. 227.

***Interpretation Act,* S.C. 1985, c. I-21. S. 10**

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

R.S., c. I-23, s. 10.

10. La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

S.R., ch. I-23, art. 10.

Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

***Vital Statistics Act,* R.S.O. 1990, c. V-4, s. 1 and 55(1)**

1. "still-birth" means the complete expulsion or extraction from its mother of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more, and where after such expulsion or extraction there is no breathing, beating of the heart, pulsation of the umbilical cord or movement of voluntary muscle. ("mortinaissance")

55(1) Every person who neglects or fails to give any notice or to register or to furnish any

documentation or particulars respecting the birth, marriage, death, still-birth, adoption or change of name of any person, as required by this Act and the regulations, is guilty of an offence and on conviction is liable to a fine of not more than $50,000 for an individual or $250,000 for a corporation.

***Vital Statistics Act,* R.S.B.C. 1996, c. 479, s. 1**

"stillbirth" means the complete expulsion or extraction from its mother after at least 20 weeks' pregnancy, or after attaining a weight of at least 500 g, of a product of conception in which, after the expulsion or extraction, there is no breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle;

***Vital Statistics Act,* C.C.S.M., c. V60, s. 1**

"stillbirth" means the complete expulsion or extraction from its mother of a product of conception in which after the expulsion or extraction there is no breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle,

(a) where the expulsion or extraction occurs after a pregnancy of at least 20 weeks, or

(b) where the product weighs 500 grams or more. (« mortinaissance »)

***Vital Statistics Act,* S.N.B. 1979, c. V-3, s. 1**

"stillbirth" means the complete expulsion or extraction from the mother of a fetus of at least five hundred grams in weight or at least twenty weeks gestation in which, after the expulsion or extraction, there is no breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle;

***Vital Statistics Act,* R.S.N.W.T. 1988, c. V-3, s. 1**

"stillbirth" means the complete expulsion or extraction from its mother, either after at least 20 weeks pregnancy or after attaining a weight of 500 g, of a product of conception in which after the expulsion or extraction, there is no breathing, beating of the heart, pulsation of the umbilical cord or movement of voluntary muscle; (mortinaissance)

***Vital Statistics Act,* R.S.N.S. 1989, c. 494, s. 2**

"stillbirth" means the complete expulsion or extraction from its mother after at least twenty weeks pregnancy, or after attaining a weight of five hundred grams or more, of a fetus in which, after such expulsion or extraction, there is no breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle.

***Vital Statistics Act,* R.S.O. 1990, c. V.4, s. 1**

"still-birth" means the complete expulsion or extraction from its mother of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more, and where after such expulsion or extraction there is no breathing, beating of the heart, pulsation of the umbilical cord or movement of voluntary muscle. ("mortinaissance")

***Vital Statistics Act,* R.S.P.E.I. 1988, c. V-4.1, s. 2**

"stillbirth" means the complete expulsion or extraction from its mother after at least twenty weeks pregnancy, or after attaining a weight of at least 500 grams, of a product of conception in which, after the expulsion or extraction, there is no breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle.

***Vital Statistics Act,* S.S. 1995, c. V-7.1, s. 2**

"stillbirth" means the complete expulsion or extraction from the mother after at least 20 weeks pregnancy, or after attaining a weight of at least 500 grams, of a product of conception in which, after the expulsion or extraction, there is no breathing, beating of the heart, pulsation of the umbilical cord or unmistakable
movement of voluntary muscle; («mortinaissance»)

***Vital Statistics Act,* R.S.Y. 2002, c. 225, s. 1.**

"stillbirth" means the complete expulsion or extraction from its mother after at least 20 weeks pregnancy, or after reaching weight of a least 500 g, of a product of conception in which, after the expulsion or extraction, there is no breathing, beating of the heart, pulsation of the umbilical cord, or unmistakable movement of voluntary muscle. *«mortinaissance »*

« mortinaissance » L'expulsion ou l'extraction complètes du corps de la mère d'un produit de la conception après 20 semaines au moins de grossesse ou qui pèse 500 grammes au moins, chez lequel, après cette expulsion ou extraction, il n'y a aucune respiration, aucun battement du coeur, aucune pulsation du cordon ombilical ou contraction nettement perceptible d'un muscle volontaire. *"stillbirth"*