

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

B E T W E E N:

IVANA LEVKOVIC

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL OF CANADA

Intervener

RESPONDENT'S FACTUM

Jamie Klukach/Gillian Roberts

Crown Law Office - Criminal
720 Bay Street, 10th Floor
Toronto, Ontario
M5G 2K1
Tel: (416) 326-4600
Fax: (416) 326-4656
jamie.klukach@ontario.ca
Counsel for the Respondent

Delmar Doucette/Marlys Edwardh

Jill Copeland/Jessica Orkin
Doucette Boni Santoro
#1100-20 Dundas Street West
Toronto, Ontario
M5G 2G8
Tel: (416) 597-6907
Fax: (416) 342-1766
doucette@delmardoucette.com
Counsel for the Appellant

Robert Houston

Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
rhouston@burkerobertson.com
Ottawa Agent for the Respondent

Brian A. Crane, Q.C.

Gowling Lafleur Henderson LLP
#2600-160 Elgin St.
Ottawa, Ontario
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
brian.crane@gowlings.com
Ottawa Agent for the Appellant

Robert J. Frater and Richard Kramer

Attorney General of Canada

Room 1161

234 Wellington Street

Ottawa, Ontario

K1A 0H8

Tel: (613) 957-4763

Fax: (613) 954-1920

robert.frater@justice.gc.ca

Counsel for Intervener AG Canada

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	Page
Part I: Overview and Statement of Facts.....	1
A. Overview of the Respondent’s position.....	1
B. The Facts.	3
C. History of proceedings.....	3
Part II: Points in Issue.....	4
Part III: Brief of Argument.....	5
A. The role of vagueness and the meaning of its “contextual” analysis in relation to section 7 of the <i>Charter</i>	5
(1) Introduction.	5
(2) The distinct concepts of vagueness and overbreadth in Canadian constitutional law.....	5
(3) The requirement of intelligible laws as a principle of fundamental justice.....	7
(4) The test for vagueness.	8

(5)	The scope of “contextual” vagueness analysis.....	9
(6)	The American approach to vagueness and overbreadth.....	10
(7)	Why the current test for vagueness should not be modified along American lines.	11
B.	Section 243 is not unconstitutionally vague.	13
(1)	The trial judge’s errors.....	13
(2)	The Court of Appeal was correct that section 243 is not vague when the correct test is applied.	15
(i)	Legislative history of the section.	16
(ii)	Purpose of the prohibition.	16
(iii)	Legislative context.....	17
(a)	Criminal Code prohibition of child homicide and criminal negligence, including offences with a pre-natal aspect, and the related definition of when a child becomes a human being.....	17
(b)	Criminal Code prohibitions against interfering with or offering indignity to a dead body.....	19
(c)	Provincial regulation mandating notice of “birth” and “stillbirth”.	20
(iv)	Judicial interpretation.....	21
(v)	Elements of the offence, including <i>mens rea</i>	22
(3)	Conclusion.....	24
C.	The “contextual” analysis advanced by the Appellant invites a balancing of individual and state interests.....	24
(1)	Introduction.	24
(2)	The objective of section 243.	25
(3)	The impact of section 243 on individual interests.....	27
(4)	Balancing of interests: The effects of section 243 do not overshoot its purpose.	30
D.	Section 1 of the <i>Charter</i>	31
	Part IV: Submissions as to Costs.	33
	Part V: Order Requested.	33
	Part VI: Authorities Cited	34
	Part VII: Statutory Provisions.	38

Appendix A: Summary of decisions involving vagueness analysis of statutory provisions found to limit constitutional rights of engaged s. 7 interests

Appendix B: Summary of reported concealment cases

Appendix C: The Old Bailey cases dealing with child murder and concealment

Appendix D: Provincial legislation regulating births and stillbirths

PART I
OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's position

1. It is the Respondent's position that s.243 of the *Criminal Code* easily meets the "intelligibility" standard for determining whether legislation is unconstitutionally vague. The contextual analysis developed in the jurisprudence of this Court provides a framework for appraising whether a statutory proscription is sufficiently clear to provide citizens with fair notice about what conduct is prohibited and to place appropriate limits on law enforcement discretion. Section 243 survives this analysis without difficulty.

2. The issue in this case is narrowly cast as whether a single aspect of the *actus reus* of the impugned provision is capable of discernible meaning, sufficient to pass muster with the principle of fundamental justice embodied by the vagueness doctrine. The "concealment" offence has a venerable history at common law and has been codified in the Canadian *Criminal Code* since the time of its enactment in 1893. The meaning of a "child" who died "before birth", in s.243, is fully substantiated through reference to the section's purpose, legislative history and context, judicial interpretation, and consideration of the elements of s.243 as a whole. Its focus is on stillbirths, not miscarriages. It contemplates at or near full-term pregnancy. It identifies, as a guide, gestational age of at least 7 months. This meaning delineates a zone of risk with sufficient clarity to guide citizens and law enforcement personnel on the section's application. The vagueness doctrine established by this Court's repeated pronouncements requires nothing more. The ultimate determination of whether the offence under s.243 has been committed falls to the competent authority of a court of law.

3. The Appellant proposes a re-vamped test for vagueness that *does* require more by adding, to the contextual analysis, consideration of the effect of the impugned law on *Charter*-protected individual interests. If accepted, this means that laws, although intelligible on the current standard, will need to be even more precise to counter their limiting effects on protected rights. The rationale for this proposed test is that affected citizens are entitled to know, with greater certainty, whether conduct risks transgression of a law so they can avoid deleterious effects which may turn out to have been unnecessary.

4. This Court has never factored into contextual vagueness analysis, the law's limiting effect on or interference with individual rights or interests. Such consideration finds its proper place in

relation to the concept of overbreadth, either as a principle of fundamental justice under s.7 or within s.1 analysis. This Court has emphasized the distinct, conceptual meanings of overbreadth and vagueness and, hence, their discrete functional roles in *Charter* analysis. This Court has also adamantly rejected the notion that overbreadth can operate *in abstracto*. Rather, it is *always* related to some limitation under the *Charter* and it is *always* established by comparing the ambit of the provision touching upon a protected right with concepts such as the objectives of the state.¹ The approach urged by the Appellant introduces, into vagueness doctrine, the concept of overbreadth in the abstract as a basis for unconstitutionality. It mirrors an aspect of American vagueness doctrine which this Court has explicitly rejected, for good reasons.

5. It is doubtful whether s.243 interferes with s.7 liberty and security in the manner alleged by the Appellant; but this question need not be resolved because, assuming that it *does*, these interests are fairly and fully accounted for within the prism of overbreadth. Any such interference is minimal and necessary to the realization of important state objectives.

6. The purpose of s.243 is to facilitate the investigation of infant deaths in furtherance of the *Criminal Code*'s infant homicide provisions. The state's ability to investigate suspicious infant deaths is essential to the achievement of a goal directed at the protection of the most vulnerable of victims. At common law, concealment of a dead body has long been known to frustrate the urgent need to understand infant deaths. The secret disposal of infant bodies also had the effect of putting homicide and concealment prosecutions at the mercy of claims – too easily advanced – that the child in question was stillborn. Forcing the Crown to prove live birth in concealment prosecutions would revive the loophole that section 243 was enacted to foreclose.

7. Both of the courts below rejected the Appellant's overbreadth argument and it is not resurrected here. This is tacit acknowledgement that any limitation on the asserted interests is justified when balanced against the state's ability to achieve the important objectives served by s.243. The vagueness doctrine in Canadian constitutional law should not be manipulated to permit the outcome of that balancing exercise to be ignored.

¹*R v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at para.35

B. The Facts

8. The unresolved allegations are as follows: On April 5, 2006, a building superintendent in Mississauga was cleaning a recently vacated unit when he discovered an abandoned bag on the apartment's balcony. Thinking the bag was full of discarded rags, he was about to throw it down the garbage chute. Feeling something inside, he instead opened the bag and discovered the lifeless body of a baby. The police were called. A subsequent post mortem at Sick Children's Hospital led the pathologist to describe the body as that of a female "at or near full term". Due to the body's advanced state of decomposition, however, the cause of death could not be determined. It was also uncertain whether the child had died before, during or after birth. On April 9, 2006, following media reports of the unusual discovery, the Appellant attended a police station and admitted that the baby girl was hers. She claimed that she had delivered the baby in her apartment following an unexpected fall. She said that she placed the dead body in a bag and put it on the balcony.²

C. History of proceedings

9. After finding that the concept of "child...before birth" was unconstitutionally vague, the trial judge sought to remedy that constitutional violation by striking the word "before" from the section. Since the Crown had no reasonable prospect of obtaining a conviction due to its inability to prove that the timing of the child's death, it offered no evidence. The Appellant was acquitted on September 25, 2008.³

10. The Crown appealed to the Court of Appeal for Ontario. In a judgment released on December 7, 2010, the Court (consisting of Doherty, Armstrong and Watt JJ.A.) allowed the appeal, declared s.243 not to be void for vagueness and, therefore, constitutionally valid and ordered a new trial.⁴

11. Leave to appeal against the judgment of the Court of Appeal was granted by this Court on October 20, 2011.

²*Transcript, Appellant's Record*, Vol. III, pp. 158-161.

³*Reasons for Judgment of Justice Hill, Appellant's Record*, Vol. I, pp. 2-96 [also reported at [2008] O.J. No. 3746].

⁴*Judgment of Court of Appeal, Appellant's Record*, Vol. I, pp. 97-131 [also reported at [2010] O.J. No. 5252].

PART II
POINTS IN ISSUE

12. The following constitutional questions were stated by the Chief Justice on January 10, 2012:
1. In its application to a “child” that dies before birth, does s.243 of the *Criminal Code*, R.S.C., 1985, c. C-45, 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*?
13. The Respondent submits that the answer to the first question is no. The Court of Appeal correctly concluded that s.243 is not unconstitutionally vague in its application to a “child” that dies before birth.
14. Alternatively, should this Court answer the first question in the affirmative by holding that s.243 is vague for the reasons advanced by the Appellant, then the Respondent submits that the s.7 infringement is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

PART III
BRIEF OF ARGUMENT

A. The role of vagueness and the meaning of its “contextual” analysis in relation to section 7 of the *Charter*

(1) Introduction

15. The test for vagueness in *Charter* analysis, as developed and repeatedly applied in the jurisprudence of this Court, asks whether the means used by a legislature to accomplish an objective are defined with sufficient clarity.⁵ A law is unconstitutionally vague if the ambit of its application cannot be known. Sufficient clarity is achieved when citizens have fair notice of a law’s application so they can govern their conduct accordingly, without peril of arbitrary law enforcement. Beyond this, the test does not concern itself with the impact of legislation on individual interests as a measure of its constitutional adequacy.

16. The argument advanced by the Appellant seeks to fundamentally alter this test. In effect, the Appellant asks this Court to expand established vagueness principles to incorporate, into Canadian law, a specialized branch of the American vagueness doctrine, developed to provide added protection for first amendment rights. This approach has already been explicitly rejected by this Court - for solid reasons. Its adoption would be a radical shift in the Canadian approach. It would undermine the discrete purpose of the vagueness doctrine in *Charter* analysis by blurring the functional distinction between vagueness and overbreadth. It would introduce overbreadth in the abstract as a basis for unconstitutionality, without the necessity of balancing individual interests against the objectives of the state. And, it would confound the clarity that is afforded by a constant vagueness standard.

(2) The distinct concepts of vagueness and overbreadth in Canadian constitutional law

17. The concept of vagueness is relevant to two aspects of *Charter* analysis. First, it is a principle of fundamental justice against which s.7 deprivations of life, liberty and security of the person are measured. Second, vagueness operates at the threshold of s.1 analysis as relevant to whether a limitation imposed by legislation on a protected *Charter* freedom is “prescribed by law”. Consideration of vagueness at either stage involves careful contextual analysis, much along the lines of statutory interpretation; but the standard or principle of fundamental justice that must be met is constant. As this Court held in *Nova Scotia Pharmaceuticals*:

⁵ *R. v. Heywood*, [1994] 3 S.C.R. 761 at para. 48.

[I]n American constitutional law, “vagueness” has been given various contents. ... ***Under the Charter... the “doctrine of vagueness” is a single concept***, whether invoked as a principle of fundamental justice under s.7 of the Charter or as part of s.1 of the Charter *in limine*....⁶

18. This Court has also considered vagueness as an aspect of the related but distinct concept of overbreadth in the context of proportionality analysis. A law which passes the threshold of being “prescribed by law”, may nonetheless be too imprecise to confine the invasion of a Charter right to a reasonable limit.⁷ For example, in considering whether the “minimal impairment” branch of the *Oakes* test could be met in the context of laws violating the s.2(b) right to freedom of expression, McLachlin J. (as she then was) was concerned with the chilling effect of vague and subjective laws on legitimate activity:

[T]he vagueness and subjectivity inherent in s.319(2) of the *Criminal Code* give ground for concern that the chilling effect of the law may be substantial. The more vague the language of the prohibition, the greater the danger that right-minded citizens may curtail the range of their expression against the possibility that they may run afoul of the law.⁸

This dissent was considered by the majority in *Osborne v. Canada (Treasury Board)* where Sopinka J. clarified that vagueness is really subsumed by overbreadth in this context:

[51] Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no “limit prescribed by law” and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. ***Generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits. In this sense vagueness is an aspect of overbreadth.*** [emphasis added]⁹

⁶ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at paras.38-39.

⁷ *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 per Sopinka J. at paras.51-54.

⁸ *R. v. Keegstra* [1990] 3 S.C.R. 697 per McLachlin in dissent at para.322; see also Justice McLachlin’s similar dissent in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at paras.130, 147-148.

⁹ *Osborne v. Canada (Treasury Board)*, *supra*, per Sopinka J. at para.51

19. In *Nova Scotia Pharmaceutical Society*, this Court again clarified that this kind of vagueness is properly considered as an aspect of overbreadth or proportionality in the context of a balancing exercise and is distinct from “true vagueness”:

A notion tied to balancing such as overbreadth finds its proper place in sections of the Charter which involve a balancing process....

[O]verbreadth remains no more than an analytical tool. ***The alleged overbreadth is always related to some limitation under the Charter.*** It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the state, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. ***There is no such thing as overbreadth in the abstract....***

For the sake of clarity, ***I would prefer to reserve the term “vagueness” for the most serious degree of vagueness, where a law is so vague as not to constitute a “limit prescribed by law” under s.1 in limine. The other aspect of vagueness, being an instance of overbreadth, should be considered as such....***[emphasis added]¹⁰

20. In subsequent decisions, this Court has consistently confirmed this approach.¹¹

(3) The requirement of intelligible laws as a principle of fundamental justice

21. The prohibition against vague laws has its origins in the rule of law, which conceives of the law as a body of fixed rules, easily knowable in advance.¹² With the advent of the *Charter*, it has taken on a constitutional dimension as a “principle of fundamental justice” protected under s.7 of the *Charter*. As such, it meets these three criteria:

(1) It is a legal principle;

(2) There is sufficient consensus that the principle is fundamental to the way in which the legal system ought fairly to operate; and

¹⁰ *Nova Scotia Pharmaceutical Society*, *supra*, at para. 34-35, 37.

¹¹ See, e.g., *Ontario v. Canadian Pacific Limited*, [1995] 2 S.C.R. 1031 per Gonthier J. at para.82; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 per LaForest J. at paras.56-57; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 per McLachlin C.J.C. at paras.77-79.

¹² Carol Rogerson “The Judicial Search for Appropriate Remedies Under the Charter: the Examples of Overbreadth and Vagueness”, in R. J. Sharpe, editor, *Charter Litigation* (Toronto: Butterworths, 1987) at p.243.

(3) It can be identified with precision and applied to situations in a manner that yields predictable results.¹³

22. The principles of fundamental justice engaged by particular situations will vary with context.¹⁴ Once engaged, the application of a principle of fundamental justice also involves consideration of context. However, the actual *content* of a principle of fundamental justice will not, and by definition cannot, shift with different contexts.

(4) The test for vagueness

23. This Court has, on repeated occasions, expounded upon the content of the vagueness doctrine, emphasizing that the threshold for finding a law vague is “relatively high”.¹⁵ The purpose of the prohibition is to ensure that laws set intelligible standards. This is achieved when a law: (1) provides fair notice to citizens about what conduct is prohibited; and (2) sets appropriate limits on law enforcement discretion.¹⁶

24. A law sets an intelligible standard by providing a sufficient basis for legal debate; but it need not yield precise and immediate answers. As Gonthier J. explained for an unanimous Court in *Nova Scotia Pharmaceutical Society*:

... Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. ... ***Legal dispositions therefore delineate a risk zone and cannot hope to do more***, unless they are directed at individual instances....

It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. ***All it can do is enunciate some boundaries, which create an area of risk...***

A vague provision does not provide an ***adequate basis for legal debate***, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria.

¹³ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para.8. See also *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571 at para.113 and *R. v. D.B.*, [2008] 2 S.C.R. 3 at para.46.

¹⁴For example, in *R. v. Lyons*, [1987] 2 S.C.R. 309 at p.361, this Court concluded that the process of declaring an individual to be a “dangerous offender” did not engage the principle of fundamental justice requiring a jury.

¹⁵*Nova Scotia Pharmaceutical Society*, *supra*, at para.42.

¹⁶ *Canadian Foundation for Children*, *supra*, at para.16.

It does not *sufficiently delineate any area of risk* and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. *Such a provision is not intelligible ... and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.* [emphasis added]¹⁷

(5) The scope of “contextual” vagueness analysis

25. Vagueness must not be considered in the abstract. Rather, it must be assessed within a larger interpretive context, developed through analysis of considerations such as the purpose, history and subject matter of the section, societal values, related legislative provisions, and judicial interpretations. Only after exhausting its interpretive role will a court be in a position to determine whether an impugned provision affords sufficient guidance for legal debate.¹⁸

26. The “intelligibility” standard identified by this Court has a constant meaning, reserved for the most serious forms of vagueness. Objective fair notice of risk is all that is required. A statute must permit reasonable persons to recognize that certain conduct approaches an area of risk. This standard has no regard for whether the legislation interferes with constitutionally protected, individual interests. Accordingly, such considerations play no part in the interpretive context. Their inclusion would radically overhaul the current test, converting its constancy to an imprecise and fluctuating standard.

27. This Court’s adamant rejection of the approach urged by the Appellant is well-illustrated through its decisions dealing with vagueness-based challenges to the constitutional validity of legislation. An enhanced standard of precision has never been required where impugned legislation interferes with or trenches on protected interests or rights, such as freedom of expression. Rather, the constitutional implications of these effects have consistently been resolved within the prism of proportionality.¹⁹

¹⁷ *R. v. Nova Scotia Pharmaceutical Society*, *supra* at paras.60, 62, 63.

¹⁸ *Ontario v. Canadian Pacific Limited*, *supra*, at para.47; see also approach taken by majority in *R. v. Heywood*, *supra*, and *R. v. Zundel*, [1987] O.J. No. 52 at paras. 62-68.

¹⁹ See “Appendix A”, listing cases where an alleged, vague law also limits a substantive constitutional right, or engages vital liberty interests.

(6) The American approach to vagueness and overbreadth

28. As discussed earlier, this Court has explicitly rejected the American approach to vagueness, holding that “contrary to the position of U.S. constitutional law, vagueness should have a constant meaning in Canadian law.”²⁰ The Appellant’s position urges reconsideration of that position. Examination of the distinctively different American concept of vagueness demonstrates why it is ill-suited as a transplant to the unique Canadian constitutional landscape.

29. Vagueness (or procedural due process) and overbreadth (or substantive due process)²¹ are separate analyses under American constitutional law, with the exception of a unique area in which they merge in service of protecting the First Amendment.²²

30. As in Canada, the twin purposes of fair notice and limiting the discretion of law enforcement officials animate vagueness doctrine in the United States. A law will be void for vagueness if persons “of common intelligence must necessarily guess at its meaning and differ as to its application”.²³ Because of the difficulty in achieving a general legislative purpose with specific wording, the Supreme Court will “not ordinarily invalidate a statute because some marginal offences may remain in its scope.” More is generally required: “that the individual challenging the statute is indeed one of the entrapped innocent, and that it would have been practical for the legislature to draft more precisely.”²⁴

31. Overbreadth analysis ordinarily compares what conduct is prohibited by the statute with what conduct is protected by the constitution and the judiciary. If the protected activity is a substantial part of the law’s target and the unconstitutional application cannot be severed, the law risks being voided as overbroad. The usual approach of American constitutional adjudication of “gradually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case

²⁰*Nova Scotia Pharmaceutical*, *supra* at para.30

²¹ These descriptors come from Rex Collings, Jr. “Unconstitutional Uncertainty - An Appraisal” (1954-55), 40 Cornell L.Q. 195.

²²*Nova Scotia Pharmaceutical Society*, *supra* at para.31

²³ *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); Lawrence Tribe, *American Constitutional Law*, 2nd Edition (New York: The Foundation Press, Inc., 1988) at pp.1033-35; see also *Note*, “The Void-for-Vagueness Doctrine in the Supreme Court” (1960-61), 109 U. Pa. L.Rev. 67.

²⁴ Lawrence Tribe, *supra*, at p.1034

by case” is not sufficient to address the “chilling” effect of such a statute, and the whole thing must be struck down until rewritten, or authoritatively narrowed by an appropriate court. For similar reasons the overbreadth doctrine also permits an exception to the usual prohibition in American constitutional law of litigating the rights of third parties.²⁵

32. In the particular context of first amendment cases, vagueness and overbreadth merge in order to create a buffer of additional protection for freedom of speech and association. Here, due to fear of a statute’s potential chilling effect (the fear being that broad language may “throttle” protected conduct as people will tend to leave protected utterances unsaid), an enhanced vagueness test, requiring greater specificity, applies. This merged, enhanced test has two significant consequences.²⁶ First, it brings the possibility of a broader approach to standing. Ordinarily one clearly caught by a vague statute cannot challenge it, unless it is broad in all its aspects (and thus the claimant is arguably caught). However, this restriction does not apply to a vague statute which is overbroad by significantly infringing an area protected by the first amendment.²⁷ Second, it provides access to a declaration that the statute is void “on its face”. The normal remedy in American constitutional litigation is a declaration that a law is invalid only as applied in the particular case. Improper applications of a law are thus chipped away on a case-by-case basis.²⁸ However, as with overbreadth, a vague statute which is overbroad by significantly infringing first amendment speech or conduct, and which cannot be narrowly construed, may be declared void on its face.²⁹

(7) Why the current test for vagueness should not be modified along American lines

33. The Appellant’s proposed “enhanced” vagueness standard would confound the hitherto careful separation of vagueness with overbreadth and proportionality. Such a mix is neither necessary nor desirable in the Canadian constitutional context.

²⁵ Lawrence Tribe, *supra*, at pp.1022-24.

²⁶ See *Note*, “The Void-for-Vagueness Doctrine in the Supreme Court”, at pp.96, 104.

²⁷ Jesse Choper, Richard Follon Jr., Yale Kamisar and Steven Shirffrin, *Constitution Law*, Eleventh Edition (St.Paul: Thomson Reuters, 2011), at p.764.

²⁸ See, *e.g.*, Rogerson, *supra*, at pp. 253-54.

²⁹ Lawrence Tribe, *supra*, at pp.1034-35; Kathleen Sullivan and Gerald Gunther, *Constitutional Law*, Seventeenth Edition (Stanford: Foundation Press, 2010), at pp.1116-17; Choper et al, *supra*, at p.761.

34. First, it confusingly overlaps fundamentally different analyses focused on protecting different interests. True vagueness analysis is about discerning meaning. It employs a contextual approach similar to the modern approach to statutory interpretation. As noted above, it aims to ensure that (1) citizens are provided with fair notice of what is illegal; and (2) sufficient guidance is provided to limit the discretion of law enforcement agents. In contrast, vagueness as an aspect of overbreadth is about whether the means employed by government are proportionate to the legislative goal. It aims to ensure that legitimate activity, especially constitutionally protected activity, is not constrained more than is necessary to achieve a valid government objective. As noted above, there is no such thing as overbreadth in the abstract. It always involves balancing.

35. Second, mixing the two analyses permits reviewing courts to improperly trench on the role of Parliament. Indeed, introducing the concept of proportionality into the exercise of discerning intelligible meaning fundamentally alters the judicial role. Instead of determining whether a section has sufficient meaning, courts would also be considering how it *should* be drafted. This court has always kept these analyses separate, for good reason. Along similar lines, this Court has been cautious about using *Charter* values as an interpretive tool:

Where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result....

If this limit were not imposed on the use of the *Charter* as an interpretive tool, the application of the *Charter* principles as an over-arching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the provision. Moreover, it would deprive the *Charter* of its more powerful purpose—the determination of the constitutional validity of the legislation.³⁰

36. Finally, the Appellant's position is rooted in an American approach which simply does not translate to the Canadian context. The essential reasons behind the enhanced vagueness doctrine in American constitutional law are to facilitate a broader approach to standing and the ability to declare the law as a whole invalid. Canadian constitutional law already takes a very broad approach to standing. Also, in direct contrast to the American approach, the Canadian model of judicial review grounds the general view that it is more intrusive of Parliament's domain to reinterpret an

³⁰ *R. v. Jackpine and Rodgers*, [2006] 1 S.C.R. 554 per Charron J. at paras.18-21.

unconstitutional provision than it is to void it.³¹ Moreover, the modern structure and language of the *Charter*, including the limitation provision in s.1,³² the broadly worded remedial provision for individual breaches in s.24,³³ and the primacy provision in s.52,³⁴ expressly endow courts with tremendous discretion in assessing the extent of a constitutional violation and fashioning an appropriate remedy. This Court has taken a broad and purposive approach to interpreting the *Charter*, including these provisions; an approach which enables reviewing courts to *directly* assess alleged violations on their own terms and to fashion appropriate remedies.

B. Section 243 is not unconstitutionally vague

(1) The trial judge's errors

37. The Court of Appeal was correct in its conclusion that s.243 meets the standard of intelligibility set by this Court for determining whether legislation is unconstitutionally vague. The court unanimously held that the trial judge erred in his determination of unconstitutionality by applying an overly demanding standard of vagueness and by failing to properly apply the seminal case of *Berriman* in interpreting the section's meaning.³⁵

38. The correctness of most of the trial judge's thorough reasons is not in issue. As held by the Court of Appeal, the trial judge's conclusion turned on two, key errors.

³¹ Carol Rogerson argues that this different approach reflects our "ultra vires" model of judicial review, in which, under federalism, courts were well versed in reviewing laws for constitutional validity and striking them down if they failed to pass muster. In contrast, the dominant model of judicial review in American constitutional law has been described as a "conflict model", in which courts resolve conflicts arising between ordinary laws and the laws of the Constitution as they arise in concrete individual cases. See Rogerson, *supra*, at pp.253-55.

³² Section 1 reads as follows: "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."

³³ Section 24(1) reads as follows: "Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Section 24 (2) deals specifically with evidence obtained in a manner that infringed or denied a *Charter* right.

³⁴ Section 52 provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect."

³⁵ *Judgment of Court of Appeal, supra*, at para.101.

39. First, after correctly setting out the law relating to the principle of vagueness, the trial judge ultimately applied too strict a test as illustrated in these passages at the end of the judgment, where the test was actually applied:

[204] An ordinary person, and a peace officer executing her or his duties, must be able to perceive with a reasonable degree of clarity *the line* separating perfectly lawful conduct from the actus reus of a crime. The face of the relevant statutory provision, or judicial interpretation of it, *must provide such guidance*.

[212] I am unable to determine...a coherent, *unambiguous* meaning of “child” in the context of death before birth. [emphasis added]

The reasonable person, properly apprised of s.243’s wording and judicial interpretation of it, need not perceive, with *any* degree of clarity, the precise geometric “line”³⁶ separating “perfectly lawful” conduct from unlawful conduct. All the reasonable person need perceive is a surrounding area of risk. Nor is Parliament restricted to using “unambiguous” language when creating criminal offences. That is especially so when it regulates in an area lacking precise medical boundaries where case-specific expert testimony must, of necessity, be resorted to by the courts.

40. Second, the trial judge failed to appreciate the meaning of “child died before...birth” apparent from the entire context, including the consistently applied standard from *R. v. Berriman*. In particular, the trial judge was mistaken in framing the issue as:

[126]...[A]t what *point* from conception to the emergence of the fetus in childbirth can it be said there is the “body” of a “child” within the contemplation of s.243?

This is the wrong question in the context of s.243. Section 243 only applies when there has been a birth or a delivery and the dead body of a child has been intentionally concealed. It always looks *backward* from this point, with the purpose of protecting potential evidence of the various child homicide and criminal negligence provisions of the *Criminal Code*. These, in turn, relate only to children born alive who die as a result of criminal acts or omissions. There is no need to identify a point in the abstract when a fetus becomes a “child” (unlike the American abortion context the trial

³⁶ The Supreme Court of Canada has indicated that, when discussing vagueness and the outer boundaries of a statutory offence, analogies to grade school geometry are imprecise because they falsely imply that said boundaries are symmetrical, contiguous and clear. In fact, since the holding in each case lays down only a very short “line”, and since untried cases remain unactualized, with their “lines” undrawn and frequently unknown, a statutory offence’s ascertainable boundaries are often broken and asymmetrical and lack the kind of clear definition that the trial judge was searching for in the court below: *R. v. Nova Scotia Pharmaceutical Society*, *supra*, at paras. 310-11.

judge turned to). When the section is considered in this context, as it must be, there is only one zone of risk, and the correct question is the one asked in *Berriman*: did the fetus reach a period in its development that, but for some external event or circumstance (such as homicide, criminal negligence or accident), it might have been born alive?

41. The trial judge's error is underscored by his preoccupation with the hypothetical border between a stillbirth and a miscarriage. That hypothetical situation was remote from this case where the dead child was at or near full term and may have been born alive. Such a hypothetical is properly the stuff of overbreadth, not vagueness.³⁷ The trial judge's determination that s.243 was *not* overly-broad answered his concern about whether its application to persons at the outer boundary of risk defeated its constitutionality. As noted above, the established vagueness standard requires fair notice of an area of risk, not precision in the nature of "line-drawing" or "unambiguous meaning". Certainty is achieved only when the law is actualized by a competent authority.³⁸

(2) The Court of Appeal was correct that section 243 is not vague when the correct test is applied

42. As noted above, the test for vagueness must be applied with careful regard to the larger context, including the principles of statutory interpretation, the history of the section, its purpose, its subject matter, the context in which it operates (including both related provisions and the scheme of the act), the elements of the offence, and how it has been interpreted by courts.

43. Section 243 of the *Criminal Code*, entitled "Concealing Body of Child", has deep roots in the common law. It has been part of the *Criminal Code* since July 1, 1893, virtually unchanged. It currently reads as follows:

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.

³⁷ See, e.g., *Ontario v. Canadian Pacific Ltd*, *supra*, per Gonthier J. at paras.46, 47, 76-82.

³⁸ *Nova Scotia Pharmaceutical Society*, *supra*, per Gonthier J. at p.638.

(i) Legislative history of the section

44. The legislative history of s.243 of the *Criminal Code* was thoroughly canvassed by the trial judge. It has its origins in legislation aimed at protecting illegitimate children from being murdered, and the difficulty of proving that a dead child was born alive and thus proving murder. The offence of concealment began as a lesser included offence to murder, but eventually became its own stand alone offence.³⁹ The trial judge summed up the history of the offence of child concealment as follows:

Whatever motives may have impelled governments in past centuries to enact laws relating to illegitimate children, the poor, abortion, and child-killing, the history of ***the concealment crime has, in some measure, always demonstrated concern with the inability of the state to investigate suspicious infant death where the body of a child is disposed of in a manner intended to conceal its birth....***Stealthy and indiscriminate disposition tends to defeat timely forensic conclusions as to time and cause of death and intentionally seeks to obscure the link between child and its mother and her associates who may be criminally responsible respecting the child's death. This does not amount to an impermissible presumption of wrongdoing on the part of the dead child's mother, or an affront to personal autonomy, but rather recognition of the importance of an opportunity for a medical, and in turn legal, determination of the circumstances surrounding loss of life. The very history and existence of the homicidal crime of infanticide exemplifies the significance of this societal concern.⁴⁰

(ii) Purpose of the prohibition

45. The purpose of s.243 is to preserve evidence in order to facilitate the investigation of infant deaths. Compliance with s.243 has the effect of preserving a dead body as evidence of possible criminal wrongdoing.⁴¹

³⁹ *Reasons for Judgment of Justice Hill, supra*, paras. 8-56. See also the reported cases (summarized at "Appendix B"), and the case summaries from the Old Bailey, (summarized at "Appendix C") - in particular, the following reported cases: *State v. Joiner* (1826), 4 Hawke 350 - "The offence consists in concealing the death, so that it could not be known whether the child be born alive"; *Washington v. State* (1926), 171 Ark. 357 (Ark.S.C.) (1926) - "The gist of the offence is the concealment of the death of the bastard child, and not causing it; and the purpose of the statute is to make such concealment a crime, so it may come to light whether or not the infant was born alive"; *Perry v. Commonwealth*, 295 Ky. 317 (1943) - "The gist of the offence is the concealment of the birth of the child by the mother so that it cannot be determined whether the child was born dead or alive".

⁴⁰ *Reasons for Judgment of Justice Hill, supra*, para. 151.

⁴¹ See paras. 66-70, *infra*.

(iii) Legislative context

46. Section 243 operates in a number of distinct but related contexts which constrain and guide its meaning and set out a zone of risk: a series of *Criminal Code* provisions prohibit homicide and criminal negligence, including in relation to acts or omissions performed before or as a child is born; the *Criminal Code* prohibits interfering with the remains of a dead human body; and extensive provincial laws regulate burying the dead and impose reporting obligations in relation to deaths and still births.

(a) Criminal Code prohibition of child homicide and criminal negligence, including offences with a pre-natal aspect, and the related definition of when a child becomes a human being

47. It is well-established that an unborn child has no legal status at common law, and no recognized rights apart from its mother.⁴² The *Criminal Code* provisions aimed at protecting newly born children reflect this principle but explicitly prohibit conduct, or negligence (including omissions) occurring before or during birth as a result of which the child dies or is left in an injured state *after* birth.

48. The *Criminal Code* defines when a child becomes a “human being” in s.223 (reproduced below), and a “newly-born child” (s.2 defines this as a person under one year old, which is relevant for the s.233 offence of infanticide), but does not define “child”.⁴³ However, the word is repeatedly used in the context of the child protection provisions with a pre-natal interest and a meaning of “child before birth” can be derived by considering these provisions, together with the fact that s.243 aims to protect evidence relating to these offences. They read as follows:

When child becomes human being/ killing child

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

⁴² *Reasons for Judgment of Justice Hill, supra*, para. 31, citing *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*, [1997] 3 S.C.R. 925 at paras.11, 15-16, 27, 29, 37, 55-56; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 at 565-571; *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 at 771; see also *R. v. Sullivan*, [1991] 1 S.C.R. 489 per Lamer J. at paras.16-21.

⁴³ As the trial judge notes at para.163, dictionary definitions of “child” are broad: the Oxford Dictionary defines child as “Foetus, infant....A boy or girl...The offspring, male or female, of human parents”.

(c) the navel string is severed.

(2) A person commits homicide when he causes injury to a child before or during its birth *as a result of which* the child dies *after* becoming a human being. R.S., c. C-34, s. 206.

Killing unborn child in act of birth

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. R.S., c. C-34, s. 221.⁴⁴

Neglect to obtain assistance in child-birth

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 [emphasis added]

49. In each case, criminal liability hinges on the child being born alive, or being in the process of being born alive, and dying *as a result of* a criminal act or omission (in the case of s.242). This significantly limits the meaning of “child before birth”. Although s.223 reads more broadly than this on its face, it must be considered together with the sections to which it applies. The broad exclusions listed under it are best seen as a response to the common law, developed in an earlier era.⁴⁵ Section

⁴⁴ A related section was originally introduced in 1892 and amended in 1968 to include the phrase “in the act of birth” to make it clear that it was *not* intended to apply to any kind of abortion, but to fill the gap between abortion, which applied before birth, and murder, which applied after a child was “wholly born”. John Turner, then Minister of Justice, made considerable effort to emphasize this point, explaining that the section had “nothing to do with abortion”, Hansard, *House of Commons, Standing Committee on Justice and Legal Issues, Minutes of Proceedings and Evidence*, 27 March 1969, at p.786-92. See also Gary P. Rodrigues, *Crankshaw’s Criminal Code of Canada*, “Legislative Histories, Criminal Code, s.238” (Thomson Reuters Canada Ltd, 2010).

⁴⁵ The common law was clear that a child must be born before it could be the subject of a murder, but what constituted being born was far from clear, and provided fertile ground for reasonable doubt. For example, in *R. v. Poulton* (1832) 5 Car. & P. 329 the dead body of a child was found with a string bound around its neck. Medical experts believed the child had breathed but could not say it had been “wholly born alive” at the time, thus there could be no murder. In *R. v. Enoch and Pulley* (1833) 5 Car. & P. 539 the child was stabbed in the head with a fork, puncturing the skull, but it was not clear when this occurred. Parke J. held “the child might breathe before it was born; but it having breathed is not sufficiently life to make the killing of the child murder; there must have been an independent circulation in the child, or the child cannot

243 is similarly constrained: in so far as s.243 is protecting evidence in relation to these provisions, in addition to infanticide and murder, it is only concerned with children who could be born alive and die *due to* the infliction of harm or the deliberate failure to take proper care.

50. To put the matter another way, the state is interested in children born alive, or in the process of being born alive, who are killed, or criminally neglected in the course of birth so as to cause death or permanent injury. Because it is easy to say that a child was stillborn, and correspondingly difficult to determine whether that is true, after the fact and *especially* after a delay, s.243 includes in its reach stillborn children: the state wants to investigate them.⁴⁶ But this reach is limited by the clear late term focus of the offences s.243 is supporting; they relate to children born alive or in the process of being born alive who are then killed or permanently injured by criminal conduct or neglect.⁴⁷

(b) *Criminal Code prohibitions against interfering with or offering indignity to a dead body*

51. The common law has long imposed various duties in relation to burying the dead.⁴⁸ These have been codified in Canada in what is now s.182 of the *Criminal Code*, which makes it an offence to neglect to perform a duty imposed by law relating to the burial of dead person, or to improperly interfere with or offer any indignity to human remains. The trial judge noted that this duty must reference provincial legislation regulating the disposal of dead bodies. He went on to note that

be considered as alive for this purpose.” In *R. v. Crutchley* (1837) 7 Car. & P.814 the dead body of child was found with a black ribbon tied tightly round its neck. A surgeon concluded “that the brain was gorged with blood, the lips livid, face swollen, and the lungs entirely inflated; the umbilical cord being severed, but not secured in any way, but there did not appear to have been any effusion of blood from it.” Another surgeon believed that the ligature was tied before the circulation between the mother and child ceased. Parke B. held that in order to convict the jury must be satisfied “that the whole body of the child had come forth from the body of the mother when the ligature was applied”. The jury found the mother not guilty of murder, but guilty of concealment. For a fuller review of this issue, see *Russell on Crimes*, 5th ed., 1844, Vol.I, pp.484-87.

⁴⁶ *Reasons for Judgment of Justice Hill, supra*, at para.156.

⁴⁷ *Reasons for Judgment of Justice Hill, supra*, at para.143.

⁴⁸ Parents and householders were under a legal duty to provide a proper burial. It was a separate offence to prevent a lawful and decent burial without lawful excuse. It was also an offence at common law for anyone to interfere with the dead body of a person with the intention that the authorities be denied a viewing of it. See, e.g., *R. v. Stewart* (1840), 12 Ad E 773 at 777-79; *R. v. Vann* (1851), 2 Den 325 at 329-30; *R. v. Mills* (1992), 77 C.C.C. 318 (Man.C.A.) at 320; over’d but not on this point [1993] 4 S.C.R. 277; *R. v. Lynn* (1788), 2 T.R. 732 at 734; *R. v. Hunter*, [1974] 1 Q.B. 95 (Eng.C.A.); *R. v. Swindle* (1981), 3 Cr.App.R. 255 (C.A.); *R. v. Stephenson* (1884), 13 Q.B. 331 (C.A.) at 335-37; *R. v. Godward*, [1998] 1 Cr.App.R. 385 (S) (C.A.); *R. v. Holly* (1998), 105 B.C.A.C. 83 (C.A.) at paras. 2,4.

section 25 of the *Environmental Protection Act*, R.S.O. 1990, c.E.19, as amended, defines “waste” to include “other materials as designated in the regulations”. Section 2 of the *General-Waste Management* regulation, R.R.O. 1990, Reg.347, made pursuant to the Act, designates as a “waste”, “hazardous waste”, including “(i) pathological waste” including “any part of the human body, including tissues and bodily fluids”. Section 40 of the *Act* prohibits the deposit of waste in land or water and any building, except a certified waste disposal site. The *Cemeteries Act (Revised)*, R.S.O. 1990, c. C.4 regulates where human remains can be buried or cremated, and requires anyone knowing about an unregulated “burial site” to “immediately notify the police or coroner” (see definitions in ss.1, 47, 56(1), 69, 70(1), 71(1)). The trial judge summed up his review of this heavily regulated area, which demonstrates a clear area of risk, as follows:

Surely, in a civilized society, fundamental social and ethical values support forbiddance of disposition of the dead bodies of children in locations other than those provided for in the relevant provincial regulatory scheme. Indiscriminate discard of infants’ bodies risks public health hazards. The prospect of inadvertent discovery of human remains should not be countenanced.⁴⁹

(c) *Provincial regulation mandating notice of “birth” and “stillbirth”*

52. Another important aspect of the context that s.243 operates within is the existing provincial regulation over the reporting of births and still-births.⁵⁰ As with the regulation of dead bodies, this demonstrates an existing zone of risk that extends well beyond the outer limits of s.243. Provincial legislation in all provinces and territories requires that *notice* be given of a “birth” (complete expulsion or extraction of a fetus that showed signs of life) and a “stillbirth” (complete expulsion or extraction of the products of conception either after the 20th week of pregnancy or after it had attained the weight of 500 grams or more, and where there is no breathing, beating of the heart, pulsation of the umbilical cord or movement of voluntary muscles). In addition, in the case of stillbirth, a doctor or coroner must certify the cause. Similarly, deaths must be registered, and their cause certified.⁵¹

⁴⁹ *Reasons for Judgment of Justice Hill, supra*, at paras.64-67, 147.

⁵⁰ Provincial legislation may form part of the legal context in which federal legislation operates, and should be considered in the course of both statutory interpretation, and constitutional analysis of the federal legislation. See, e.g., *Reasons for Judgment of Justice Hill, supra*, at paras.116-17; Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at p.330-31; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 per Dickson C.J.C. at 474, 476, per Beetz J. at 495, 514; *Canadian Foundation for Children, Youth and the Law, supra* at para.38.

⁵¹ See “Appendix D” for a summary of this legislation

(iv) Judicial interpretation

53. A review of the reported concealment cases, and summaries from the Old Bailey cases relating to concealment, reveal that, for over 150 years, *R. v. Berriman* has set out the test for the meaning of child before birth in the context of child concealment cases:

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 of 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 had 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 her on 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 [sic] is that the child would not be born alive.⁵²

There has been one notable exception, *R. v. Colmer*,⁵³ which has not been followed (and the point of law would have been reserved for consideration on appeal, but the jury acquitted.)

54. A number of general observations can be made from a review of this body of law:⁵⁴

- The “dead body of a child” is invariably at or near term (with rare exceptions which resulted in acquittals, such as *R. v. Colmer*, and *R. v. Hewitt and Smith* (1866), 4 F.&F. 1099).
- Case-specific medical evidence has invariably been called.
- The legal issues have rarely included the gestational age of the child but instead have focused on accidental death, or lack of proven “disposal” or “concealment”. In none of these reported concealment cases has uncertainty about the concept of “child before birth” contributed to a conviction as opposed to an acquittal.

⁵² *R. v. Berriman* (1954), 6 Cox. C.C. 388 at p.390. See also Archbold, *Criminal Pleading and Practice* (London: Sweet and Maxwell, 2009) at p. 1952, describing the holding in *Berriman* as including a seven month “presumption”; *State v. Heti*, [1977], PNGLR 173 (Papua New Guinea) and *State v. Torvel*, [1982] PNGLR 242 (Papua New Guinea) which endorsed and follow *Berriman* and its seven month (28 week) presumption; *State v. Peter*, [2005] PGNC 135 (Papua New Guinea) which notes “Generally if a woman is 28 weeks pregnant or more, she will have delivered a ‘child’ for the purposes of the section...[citations omitted]...This is the meaning of ‘child’ that has been developed by the courts in the interpretation and application of this special provision.”

⁵³ *R. v. Colmer* (1864), 9 Cox C.C. 506 at p.507. The editors of Archbold’s have queried Colmer’s correctness for more than half a century and no court has ever approved of it or followed it: *Pleading Evidence and Practice* (33ed.) (London: Sweet and Maxwell Ltd., 1954) at pp. 982-3; Archbold, *Criminal Pleading and Practice*, *supra* at p. 1952.

⁵⁴ See Appendices “B” and “C” for summaries of these cases

- There is no indication that the scope and operation of the concealment offence was ever informed by the old crime of abortion or that concealment prosecutions were ever conducted to buttress that now, non-existent criminal offence.

55. *Berriman*'s "chance of life" test is focused on at or near full-term pregnancy and the advanced physical maturity of the fetus. The seven month benchmark explicitly clarifies that narrow focus. It is a standard that has been understood and applied for over 150 years. The Court of Appeal correctly concluded that the *Berriman* standard marks, with sufficient clarity, the outer boundary of when a fetus becomes a child for the purpose of the concealment offence:

Section 243, guided by the principles described in *Berriman* in the present context, lays down an area of risk that gives fair notice to persons of the boundaries of criminal liability and limits the discretion of police in enforcing legislation.⁵⁵

(v) *Elements of the offence, including mens rea*

56. The elements of the offence of child concealment, in particular the specific intent required, act to further limit its scope and constrain law enforcement discretion.

57. The *actus reus* is the disposal of the dead body of a child after birth or delivery. The trial judge concluded that the plain meaning of disposal applies.⁵⁶ As noted above, the term "child" is not explicitly defined. The trial judge concluded that, its plain meaning in the context of the balance of the provision, together with the use of the words in "neighbouring provisions", suggests *natural child birth*, and not a miscarriage/non-induced abortion, or an induced abortion, regardless of the stage.⁵⁷ This is also consistent with the important *Criminal Code* provisions with a pre-natal interest, described above, which suggest that the child must have been capable of being born alive and living but for disease, accident or a criminal act or omission. Both these significant contextual clues are

⁵⁵ *Judgment of Court of Appeal, supra*, at para.120; see also: paras.63, 69, 78-81, 114-116. The Appellant's argument (at paras.63-65 of her factum) that the Court of Appeal's interpretation of *Berriman* is ambiguous, is resonant of the semantics-driven approach of the trial judge which ignored the relative clarity of *Berriman*'s legal standard in favour of probing the niceties of medical viability. The impugned sentences (from para.114 of the Court of Appeal's judgment) merely employ different terminology to describe the policy that animates *Berriman*. There is no doubt, when the judgment is read as a whole, that the Court of Appeal identified a single, comprehensible legal standard.

⁵⁶ *Reasons for Judgment of Justice Hill, supra*, at para.120.

⁵⁷ *Reasons for Judgment of Justice Hill, supra*, at paras.121-25; *Judgment of Court of Appeal, supra*, at paras.52, 73.

aligned with the common law test for the meaning of child before birth, as set out in *Berriman*, and reproduced above.

58. The *mens rea* consists of the intentional disposal of the dead body of a child, which requires knowledge or recklessness or wilful blindness that the thing disposed of is a child, as defined above. It also includes the further *specific* intent to conceal the fact of a birth.⁵⁸ The trial judge concluded that the natural and ordinary meanings of “‘conceal’ included keeping secret, hiding, preventing disclosure or recognition”.⁵⁹ The common law would add that it is concealment from “the world at large”.⁶⁰ In sum, the basic intention would require knowledge that what was disposed was the dead body of a child. The Crown must then prove the additional specific intent to conceal the fact of birth from “the world at large”.

59. The Court of Appeal was critical of the trial judge’s approach which focused on a single aspect of the *actus reus* of the offence and overlooked the relevance of *mens rea*:

The portion of s.243 upon which the trial judge focused here cannot be uprooted from its context and subjected to microscopic scrutiny. This offence requires proof of *knowledge* of the character of the subject-matter disposed of, the dead body of a child, together with a *purpose*, or ulterior intention, of concealment of the birth. ... It is also worth reminder that a crime consists of an *actus reus* and a *mens rea*. Each may have several components. To determine whether the definition of a crime is impermissibly vague requires a consideration of the enactment as a whole, including its *mens rea*. It is the provision as a whole that must define an area of risk, provide fair notice and curtail law enforcement discretion, not each individual noun, adjective, adverb, verb or preposition. And that, in my view, s.243 does.⁶¹

The *mens rea* requirement for s.243 contributes to the creation of a sufficiently clear and intelligible standard for citizens and law enforcement personnel.

60. This Court has looked to the mental element accompanying proscribed conduct in interpreting the scope of provisions challenged as being vague. A strict *mens rea* requirement provides direction to law enforcers in the exercise of their discretion, thereby controlling its exercise.

⁵⁸ *Reasons for Judgment of Justice Hill, supra*, at para 127; *Judgment of Court of Appeal, supra*, at paras.73, 76.

⁵⁹ *Reasons for Judgment of Justice Hill, supra*, at para.127

⁶⁰ See, e.g., *R. v. Morris* (1848), 2 Cox C.C. at 490; *R. v. Jacob*, [1932] PNGLR at 460-61; *State v. Torovel*, [1982] PNGLR at 242.

⁶¹ *Judgment of Court of Appeal, supra*, para.122

Correlatively, it enhances the judiciary's ability to control the exercise of this discretion.⁶² For instance, in *Lucas*, the requirements of knowledge that the defamatory libel was false and intent to defame were found to contribute to "a sufficient indication as to how [prosecutorial] decisions must be reached."⁶³ In *Canadian Foundation for Children*, the requirement that "the person applying the force must have intended it to be for educative or corrective purposes" was found to contribute to the precision with which conduct falling within the sphere of s.43 is identified.⁶⁴

61. Similarly, the *mens rea* requirement of s.243 contributes to the precision with which the zone of risk is identified and provides parameters for the exercise of discretion by law enforcers. The disposal of a child's dead body will not come within the sphere of s.243 in circumstances which fall short of establishing the intention to do so for the purpose of concealing its birth.

(3) Conclusion

62. When the legislative history and purpose of s.243 is considered together with the fuller context in which it operates, how it has been interpreted by the courts, and its elements, the concept of "child before birth" provides an intelligible standard for the courts to apply, sufficient to outline a zone of risk, and constrain law enforcement discretion. Citizens are on notice that the natural termination of a pregnancy, resulting in the stillbirth of a late-term fetus cannot be purposively concealed without risk of criminal sanction.

C. The "contextual" analysis advanced by the Appellant invites a balancing of individual and state interests

(1) Introduction

63. As noted above, the Appellant seeks to fundamentally change well-established vagueness principles. She urges that the test of sufficient clarity for *all* of what a law proscribes be changed to a requirement of even greater clarity when the interests of *some* are effected more harshly by the law's application. This calls for a balancing exercise which weighs the effects of the law on individual interests against the state interests that the law serves, with a measure of deference paid to the means selected by the legislature to achieve its objective. A contextual analysis which takes

⁶² *Nova Scotia Pharma*, *supra*, at para.69

⁶³ *R. v. Lucas*, [1998] 1 S.C.R. 439 at para.30

⁶⁴ *Canadian Foundation for Children, Youth and the Law*, *supra*, at paras.22-24; See also: *U.S. v. Hassan*, 542 F.3d 968 (2nd Cir C.A.) (2008) at 978-80.

account of individual interests in the manner advanced by the Appellant is lopsided without equal regard to the law's objectives. It is a two-sided equation; something which the Appellant's argument largely ignores.

64. An appropriate balancing exercise compels the conclusion that s.243 does not limit the right to liberty and security of the person in a manner that is inconsistent with the principles of fundamental justice. Section 243 serves important objectives which would be defeated by the removal of its "death before birth" application. Any interference with the personal sphere of autonomy of pregnant women is minimal and proportionate to the legitimate government interests at stake.

65. The fluctuating vagueness standard posited by the Appellant is already functionally served by the concept of overbreadth. Both courts below concluded that s.243 is not broader than is necessary to accomplish Parliament's goal of preserving potentially significant evidence of infant homicides. Writing for the Court of Appeal, Watt J. stated:

Although the submission was not pressed in argument before us, I agree with the conclusion reached by the trial judge. The inclusion of the impugned words does not overshoot the purpose of the prohibition by including within it conduct beyond what is necessary to achieve the purpose for which the section was enacted.⁶⁵

The Appellant does not dispute this conclusion by reviving, before this Court, the argument that s.243 is overly-broad or grossly disproportionate in its effect on individual rights. The correctness of the lower courts' conclusion stands, regardless of whether the analysis is framed in terms of overbreadth or a modified vagueness test which takes account of the legislation's impact on individual interests and therefore properly invites a balancing exercise.

(2) The objective of section 243

66. As noted above, the purpose of s.243 is to facilitate state investigation of infant deaths. As stated by the Court of Appeal, "by enacting a criminal prohibition against the concealment of the dead body of a child, s.243 preserves crucial evidence."⁶⁶

⁶⁵ *Reasons for Judgment of Justice Hill, supra*, paras.150-156; *Judgment of Court of Appeal, supra*, para.123.

⁶⁶ *Judgment of Court of Appeal, supra*, para.108.

67. This is an important and pressing objective. The preservation of human life is a fundamental value of our society.⁶⁷ This value is reflected in the severity of criminal sanctions for causing another's death. Detecting and deterring the murder of its citizens is amongst the state's most important functions. The overwhelming urgency of this task in the child homicide context was recently discussed in the "*Goudge*" Report on pediatric forensic pathology:

For the community itself, the death of a child in criminally suspicious circumstances is deeply disturbing. Children are the community's most precious and most defenceless asset. The sense of outrage and the urgent need to understand what happened are overwhelming.⁶⁸

68. Children are amongst the most vulnerable members of Canadian society. The protection of children from harm and promotion of their well-being are primary concerns for Canadians.⁶⁹ Newborn infants are especially vulnerable to those who would intentionally harm them, particularly when the birth occurs in circumstances of secrecy. The state's ability to effectively investigate suspicious infant deaths is essential to the achievement of this protective goal.

69. As previously discussed, s.243 facilitates the investigation of the offences provided under sections 223(2) (intentionally injuring a child before or during birth thereby causing its death after birth), 233 (infanticide), 238(1) (killing an unborn child during birth) and 242 (neglecting with malicious intent to obtain assistance in child birth). The disposition of a child's dead body with intent to conceal its birth is obstructive of the timely examination of the corpse toward determining whether the child was stillborn or born alive and the cause of death. Such concealment also eliminates the link between the dead child and its mother and/or other persons who might be responsible for causing death. As observed by the Court of Appeal in this case:

The ineluctable effect of such a severance is the elimination of a valuable source of information about the circumstances in which death occurred, thereby whether criminal liability will attach and to whom.⁷⁰

⁶⁷ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at para.69.

⁶⁸ *Report on the Inquiry into Pediatric Forensic Pathology in Ontario (The Goudge Report)*, Vol.1, p.4.

⁶⁹ *Canadian Foundation for Children, Youth and the Law*, *supra*, at para.58

⁷⁰ *Judgment of Court of Appeal*, *supra*, para.110. See also: *Reasons for Judgment of Justice Hill*, *supra*, para.138.

70. Furthermore, concealment of a dead body, as a matter of common sense, supports an inference of possible foul play; as expressed by the trial judge:

... it is not a presumption of foul play but rather not an unreasonable circumstantial inference that the disposition of an infant's body with intent to conceal its birth was done to avoid suspicion for harm occasioned to the child resulting in its death.⁷¹

Deliberate concealment bespeaks the possibility of a homicide offence having been committed and frustrates its timely detection and investigation. Section 243's proscription of such conduct promotes the preservation of essential evidence of serious crimes against the most vulnerable of victims.

(3) The impact of section 243 on individual interests

71. Section 7 liberty interests are engaged by the prospect of imprisonment upon conviction for the offence under s.243. The Appellant claims that s.243 engages further section 7 liberty and security interests based on state interference with "a woman's decision about whether and how to disclose publicly the natural end of a failed pregnancy." The Appellant contends that this "context" materially affects the vagueness analysis by entitling such women to more precise, advanced notice of the boundary between "constitutionally-protected conduct and a criminal offence".⁷²

72. It is not apparent how prohibiting the concealed disposition of a child's dead body interferes with the mother's right to personal autonomy wherein she may make private choices about fundamentally or inherently personal matters which go to the core of her individual dignity and independence.⁷³ This Court has been circumspect about what fundamental personal matters fall within this protected sphere, and has also cautioned, generally, that "such personal autonomy is not synonymous with unconstrained freedom." Thus far, majorities of this Court have only been able to squarely agree on what is *not* protected within this aspect of "liberty" under s.7.⁷⁴ There is no consensus as to the kinds of personal decisions that *are* protected.⁷⁵ The right to security of the

⁷¹ *Reasons for Judgment of Justice Hill, supra*, para.143.

⁷² Appellant's factum, paras.17; 57-62.

⁷³ *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307 at paras.49, 54, 97; *R v. Clay*, [2003] 3 S.C.R. 735 at paras.31-32

⁷⁴ *Blencoe, supra* (freedom from anxiety, stress and stigma due to delay in human rights commission disposing of complaints of sexual harassment not protected under liberty or security of the person); *R. v. Clay*, [2003] 3 S.C.R. 735 at paras.31-32 (recreational marijuana smoking not protected under liberty).

⁷⁵ See, e.g., the decision to terminate a pregnancy - *Morgentaler, Smoling and Scott v. the Queen*, [1988] 1 S.C.R. 30 per Wilson J.; where to live - *Godbout v. Longueil*, [1997] 3 S.C.R. 844 per LaForest J.

person protects against *state-caused* physical suffering and “serious and profound” or prolonged psychological harm.⁷⁶

73. It is questionable whether the *freedom* to dispose, as one pleases, with the products of a miscarriage without criminal law constraint correlates to constitutionally-protected rights. Assuming, however, for the sake of argument that such decisions *do* come within the core of “personal autonomy” protected by section 7, section 243 interferes minimally, if at all, with these personal interests.

74. Section 243 does *not* require a woman to make public disclosure of her failed pregnancy or to report it to the authorities. To the contrary, s.243 does not require that an unsuccessful birth be *reported to anyone*. Compliance with s.243 does not substantially compromise a woman’s personal preference for secrecy about the end of her pregnancy.

75. Nor does the section generally prohibit disposing of the dead body of a child. Rather, the section prohibits only a specific, highly irregular manner of disposal - *i.e.*, deliberately *concealed* disposal. Section 243 does not otherwise hinder a woman’s ability to exercise personal choices about how the remains are dealt with or the extent to which she wishes to involve others in personal rituals. Abandonment of a dead body in circumstances which do not support an inference of

(L’Heureux-Dube and Gonthier concurring); whether to permit medical treatment for one’s child - *B.(R.) v. Children’s Aid Society*, [1995] 1 S.C.R. 315 per La Forest J. (L’Heureux-Dube, Gonthier and McLachlin concurring), *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 per L’Heureux-Dube J. (McLachlin J. and Gonthier concurring); how to educate one’s children - *Jones v. R.*, [1986] 2 S.C.R. 284 per Wilson J.

⁷⁶ *Blencoe, supra*, as noted above; serious state-imposed psychological distress and stigma resulting from state apprehension of a child from parental custody – *New Brunswick v. G. (J.)*, *supra*; psychological and physical suffering caused by state-imposed delays in access to abortions – *R. v. Morgentaler*, *supra*, per Dickson C.J.C. (Lamer J.) at 105-6, per Beetz J. (Estey J.); psychological and physical suffering caused by delays imposed by waiting lists for medical treatment – *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 per McLachlin C.J.C. and Major J. at para. 119, per Binnie and LeBel J.J. at para.205-6; physical pain and psychological distress caused by denying personal autonomy over one’s own physical and psychological integrity, in this case, determining the timing of one’s death – *Rodriguez, supra* per Sopinka J.; stigma and psychological and social stress caused by publishing young offender’s name – *R. v. D.B.*, [2008] 2 S.C.R. 3. per at paras. 84-87; physical and psychological suffering caused by imposing medical treatment on a minor - *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No.30 per Abella J. At paras.100-102.

intention to conceal will not come within the purview of s.243.⁷⁷ In this manner, a stringent *mens rea* requirement operates to further diminish any limiting effect on individual interests.

76. Any “chilling” effect on personal decision-making, flowing from s.243, is subsumed and surpassed by the mandates of provincial regulatory legislation which *does* compel public disclosure of stillbirths. Provincial legislation in all Canadian provinces and territories require notice to be provided of any stillbirth after 20 weeks’ gestation or earlier if the body’s weight exceeds 500 grams. And the cause of the stillbirth must be certified by a medical practitioner or coroner⁷⁸. A practical consequence of these provincial regulatory regimes is that, realistically, ordinary persons will never have to determine whether s.243 applies to a stillbirth.⁷⁹ Therefore, the Appellant’s claim that s.243 impacts adversely on the freedom to make personal decisions is based on theoretical, rather than actual effects. Any contribution made by s.243 to the purported deprivation is rendered nugatory, in practical reality.

77. Personal feelings of loss, shame, guilt or sadness which arise in consequence of a stillbirth or miscarriage are not caused by the operation of s.243. The Appellant’s contention that s.243 exacerbates those psychological stresses is unsupported, posited only as a theoretical possibility that will not typically arise. Indeed, it is difficult to imagine how the inability to conceal the end of a pregnancy might contribute to the emotional upset caused by a miscarriage. Moreover, the Appellant does not challenge s.243’s encroachment on these personal interests in situations where death occurs during or after birth. Such deaths will be no less stressful and traumatic to the expectant mother; and the personal importance of her related decision-making will be no less acute. Yet, the Appellant acknowledges that any interference caused by s.243 with personal autonomy, in such circumstances, accords with the principles of fundamental justice. Implicitly, the Appellant acknowledges that the purported impact of s.243 on the same personal interests is, in many instances, too minimal to prevail over state interests under s.7.

⁷⁷ See, e.g.: *R. v. Nixon* cited in *R. v. Clarke* (1866), 4. F&F 1040; *R. v. Brown* (1870), LR 1 CCR 244; *R. v. Veaty* (1910), 70 JP Jo 352.

⁷⁸ See “Appendix D” for a summary of this legislation. See also: *Reasons for Judgment of Justice Hill, supra*, paras.58-67.

⁷⁹ See Appellant’s factum, para.84. The Appellant also acknowledges (at para.85) that the constitutionality of these provincial statutes is not in issue.

(4) Balancing of interests: The effects of section 243 do not overshoot its purpose

78. The question is whether the woman who is at the outer boundary of the zone of risk posed by s.243 is constitutionally entitled to greater certainty about whether she falls within it. As discussed earlier, that zone of risk, as divined from the section's legislative history, context and common law background, concerns late-term pregnancies. At issue, is the woman who is so far along in her pregnancy that it is unclear to her whether she has suffered a miscarriage or a stillbirth. The Appellant asserts that she is entitled to know with greater precision whether she is subject to the minimal, highly specific hindrance that s.243 places on her ability to deal entirely at will with what *may* be the product of a miscarriage.

79. The late-term focus of s.243 cannot be sharpened to greater specificity without compromising the achievement of its important objectives. As such, to the extent that s.243 limits rights, it does *not* do so “for no reason”. The means used by Parliament in s.243 are not “too sweeping in relation to the objective” or “beyond what is necessary to accomplish that goal”.⁸⁰

80. The objective of s.243 is to facilitate the *investigation* of infant homicides. Investigation may or may not result in a charge which, if laid, may or may not result in a finding of guilt. The state's legitimate interest in investigating the possible commission of serious crime is not diminished by the fact that the circumstances may not ultimately furnish reasonable grounds for belief that an offence was committed or sufficient evidence for proof beyond a reasonable doubt that it was. The fact that an investigation *could* provide evidence of an offence triggers s.243's purpose.

81. If a woman is unsure about whether the late term loss of her pregnancy is a stillbirth, then she *may* be committing an offence under s.243, should she dispose of the fetus with intent to conceal its birth. Greater certainty is not possible without frustrating the section's objective. What the Appellant claims, in effect, is in the nature of a right to advanced notice of the criminal ramifications of specific conduct. There is no *Charter*-enshrined right to know, in advance, that one's conduct comprises a criminal offence. There is no freedom from the prospect of prosecution.

⁸⁰ *Heywood, supra*, paras.48-53

82. Amending section 243 to remove stillbirths from its application⁸¹ would permit offenders to immunize themselves from successful prosecution merely by claiming that a child, whose dead body was concealed, died before birth. As observed by the trial judge, this would amount to “an easy and unacceptable escape for those inclined to eliminate a new-born infant by killing it.”⁸² Putting stillbirths beyond the purview of s.243 defeats the state’s ability to verify that death preceded live birth. Also, s.243 would be rendered unenforceable in many instances, where concealment and delayed discovery of the body foreclose meaningful forensic examination necessary to the Crown’s ability to prove that the child died during or after birth.

D. Section 1 of the Charter

83. In the alternative, if this Court accepts the Appellant’s argument that s.243 infringes s.7 of the *Charter*, then such infringement is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s.1.

84. The Appellant’s position is that s.243 is impermissibly vague in its application to a “child” that dies before birth due to its interference with s.7 liberty and security interests. That position is based on an approach to vagueness that takes account of the law’s impact on personal interests, *without* regard to the importance of the section’s objectives - *i.e.*, without balancing individual and state interests. Accordingly, accepting this approach, the finding of a s.7 infringement will *not* be duplicative and, therefore, determinative of the outcome of a balancing exercise under s.1.

85. The Appellant’s vagueness argument is not based on the purported unintelligibility of s.243. As such, the limitation on s.7 rights claimed by the Appellant meets the “prescribed by law” threshold for consideration under s. 1.

86. The reasons set out above regarding why s.243 is not overly broad, apply to support the conclusion that it’s vagueness, in the manner alleged by the Appellant, is justified under s.1. First, the objective of s.243 is pressing and substantial. It is sufficiently important to warrant overriding a constitutionally protected right. Second, the means chosen by Parliament to achieve that objective are reasonable and demonstrably justified. The means are rationally connected to the important

⁸¹ This is the remedy sought by the Appellant.

⁸² *Reasons for Judgment of Justice Hill, supra*, para.156.

objective of s.243 and they minimally impair the effected s.7 rights. The means used by Parliament in s.243 do not go beyond what is necessary to achieve its objective. There is proportionality between the effects of s.243 (in its “child” before birth application) on the protected *Charter* right and its important objective.⁸³

⁸³ *R v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy Ltd. V. Quebec (Attorney General)*, [1989] 1 S.C.R. 927

PART IV
SUBMISSIONS AS TO COSTS

87. The Respondent makes no submissions concerning costs.

PART V
ORDER REQUESTED

88. The Respondent requests that the judgment of the Court of Appeal be affirmed and the appeal dismissed.

ALL OF WHICH is respectfully submitted by

Date: June 12, 2012

Jamie Klukach
Of Counsel for the Respondent

Gillian Roberts
Of Counsel for the Respondent

PART VI
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PART VII
STATUTORY PROVISIONS

See Appellant's Factum.

Appendix A

Summary of decisions involving vagueness analysis of statutory provisions found to limit constitutional rights of engage s.7 interests.

The following cases provide examples where this court has been called upon to consider the alleged vagueness of a statutory provision which *also* limits a substantive constitutional right, or engages vital liberty interests. This Court has consistently applied a constant standard of vagueness in its analysis.¹

In *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at pp.106-108 four justices (Beetz, Estey, McIntyre, and La Forest JJ.) found that the requirement that a woman's life or "health" was endangered before an abortion could be legal was not so vague as to violate s. 7. No enhanced vagueness test was applied notwithstanding that a differently constituted majority found that the section otherwise violated the *s.7 protection of security of the person*.

In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 Lamer J. (as he then was), at paras.33-42, found that the *Criminal Code* prohibitions against communicating for the purposes of prostitution and keeping a common bawdy house were not so vague as to violate s. 7.. No enhanced vagueness standard was applied notwithstanding that the section was found to violate the *s.2(b) right to freedom of expression* (which was justified under s.1).

In *R. v. Morales*, [1992] 3 S.C.R. 711 the "public interest" ground for denial of bail was found to violate s. 11(e) of the Charter because it authorized detention in terms which were vague and imprecise. No enhanced vagueness standard was applied notwithstanding the obvious liberty interests involved in the *s.2(e) right not to be denied reasonable bail without just cause*.

In *R. v. Lucas*, [1998] 1 S.C.R. 439 a constitutional challenge was brought to the defamatory libel provisions of the *Criminal Code* which included the allegation that they were unconstitutionally vague and thus violated s.7. This Court applied the test from *Nova Scotia Pharmaceuticals*, and not some enhanced vagueness/overbreadth hybrid, notwithstanding that the Court accepted the concession that the sections violated the *s.2(b) right to freedom of expression*.

¹ The same is true where this Court has considered whether a piece of legislation which impinges on a constitutional right is sufficiently clear to be "prescribed by law" and meet the threshold for consideration under s.1. See for example, *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 per Dickson C.J.C. at paras.59-64; In *R. v. Keegstra*, [1990] 3 S.C.R. 697 per Dickson C.J.C. at paras.104-127; In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 per Dickson C.J.C at para.58; In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Butler*, [1992] 1 S.C.R. 452; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson)*, [1996] 3 S.C.R. 480 per LaForest at para.56; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 at paras.77-79.

In *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at paras.67-71, the phrase “not a significant threat to the safety of the public”, a requirement for an absolute discharge after an NCR verdict, was not unconstitutionally vague. The standard test for vagueness was applied notwithstanding that **s.7 physical liberty** was at stake.

In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 76 the terms “danger to the security of Canada” and “terrorism” in deportation provisions were not unconstitutionally vague. No enhanced vagueness standard was applied, notwithstanding that **s.7 liberty, security and possibly life** was at stake.

In *R. v. Hall*, [2002] 3 S.C.R. 309 the tertiary ground for denying bail “where necessary to maintain confidence in the administration of justice” in s.515(10)(c) of the *Criminal Code* is not vague, but the additional phrase “for any other just cause” is vague, and violates s.11(e). As in *Morales, supra*, no enhanced vagueness standard was applied notwithstanding the obvious liberty interests involved in the **s.11(e) right not to be denied reasonable bail without just cause**.

In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 per McLachlin C.J. at paras.15-46, the corrective force defence to a charge of assault of a child by parents and teachers, which requires that force be “reasonable under the circumstances”, is not unconstitutionally vague or overbroad so as to violate s. 7. Notwithstanding the tangible **s.7 security of person** interests at stake, the same test for vagueness was applied.

In *R. v. Tse* [2012] S.C.J 16 the emergency wiretap provisions were found to violate s.8 but were not so vague as to violate s.7. Notwithstanding that **the s.8 right to privacy** was being infringed, the standard test for vagueness applied.

Appendix B

Summary of Reported Concealment Cases

* Indicates that no information is provided about this topic.

Case	Year	Expert Evidence	Gestational Age	Nature of Defence	Verdict and Sentence
<i>Rex v. Elizabeth Cornwall</i> , Russ. & Ry. 335	1817	*	7 months Probably stillborn	*	Not guilty of murder; guilty of concealment.
<i>State v. Joiner</i> , 4 Hawke 350	1826	*	*	Appeal: jury didn't consider evidence that child was born dead.	Not guilty of murder; guilty of concealment. New trial ordered.
<i>Mary Perkin's Case</i> , 1 Lewin 44	1830	*	*	*	[Indictment for concealing birth must show the child was dead, not whether dies before or after birth.]
<i>Rex v. Higley</i> , 4. Car. & P. 365	1830	*	Child born alive	Attempts to prepare for birth.	Not guilty of murder and concealment.
<i>R. v. Poulton</i> , 5 Car. & P. 328	1832	Three doctors: whether child was born alive.	Child breathed but could not say it had fully emerged	*	Not guilty of murder; guilty of concealment.
<i>Rex v. Pulley</i> , 5 Car. & P. 539	1833	*	*	*	Not guilty of murder.
<i>Rex v. Brain</i> , 6 Car. & P. 349	1834	Two surgeons: whether child born alive	*	*	Not guilty of murder; guilty of concealment.
<i>Rev v. Snell</i> , 2 M. & Rob. 42	1837	*	*	Body still in accused's possession, disposal not completed.	Not guilty of concealment.
<i>Rex v. Frances Douglas</i> ,	1836	*	*	Evidence insufficient	Not guilty of murder;

1 Mood. C.C. 480				to leave with jury.	guilty of concealment; Conviction upheld but pardon recommended.
<i>R. v. Crutchley</i> , 7 Car. & P. 814	1837	Surgeon: child breathed and umbilical cord cut,.	*	Child may not have been “wholly produced” when strangled.	Not guilty of murder, guilty of concealment.
<i>R. v. Turner</i> , 8 Car. & P. 755	1839	*	*	No act of disposal after child was dead; concealment unintentional (child fell into privy).	Not guilty of concealment.
<i>R. v. Hopkins</i> , 8 Car. & P. 631	1840	*	Full-term	Insufficient evidence that child belonged to accused.	Not guilty of murder or concealment.
<i>R. v. M’Kenna</i> , 1 Craw & D 399	1840	Doctor: gave evidence accused had recently given birth.	*	No evidence of child’s sex, or disposal and concealment.	Not guilty of concealment - no evidence of disposal.
<i>R. v. Hounsell</i> , 2 M. & Rob. 292	1840	*	*	Indictment didn’t specify manner of concealment.	Not guilty of concealment.
<i>R. v. Ash</i> , 2 M. & Rob. 292	1840	Two doctors: whether child born alive.	*	Concealment only temporary.	Not guilty of concealment.
<i>R. v. Bell</i> , 2 Mood & R. 294	1841	*	*	*Concealment only temporary.	Not guilty of concealment.
<i>R. v. Wright</i> , 9 Car. & P. 754	1841	Surgeon: child died before fully born.	*	*	Not guilty of murder; guilty of concealment
<i>R. v. Goldthrope</i> , 2 Mood. 244	1841	*	*	Concealment only temporary.	Not guilty of murder; guilty of concealment. Conviction affirmed.
<i>Bunion’s Case</i> , Ir Cir	1842	*	*	*Verdict disclosed no	Not guilty of murder;

Rep 719				offence.	guilty of concealment. Conviction overturned, verdict disclosed no offence.
<i>R. v. Derham</i> , 1 Cox. C.C. 56	1843	*	*	No act of disposal; no concealment.	Not guilty of concealment.
<i>R. v. Farnham</i> , 1 Cox. C.C. 349	1845	*	*	Concealment only temporary.	Guilty of concealment. 1 month's imprisonment.
<i>R. v. Coxhead</i> , 1 Car. & K. 623	1845	*	*	Indictment did not state how she endeavoured to conceal birth.	Not guilty of concealment.
<i>R. v. Charlotte and Hester Waterage</i> , 1 Cox C.C. 338	1846	*	Took body after birth to be buried in church yard	Statute only applies to the mother, sister could not be accessory if mother acquitted.	Both accused not guilty of concealment.
<i>R. v. Morris</i> , 2 Cox C.C. 489	1848	Surgeon – no woman could be delivered of it in an upright fashion.	Child dressed in cap and shirt.	Accused only intended to conceal the birth from her father, not world at large.	Not guilty of murder or concealment.
<i>R. v. Bird</i> , 2 Car. & Kir. 817	1849	*	*	Burial by third party.	Guilty of concealment.
<i>R. v. Skelton</i> , 3 Car. & Kir. 119	1850	*	*	Burial by third party.	Guilty of concealment - mother part of common purpose to conceal body.
<i>R. v. Hughes</i> , 4 Cox C.C. 447	1850	*	Child alive	Temporarily left in outhouse.	Not guilty of murder; guilty of concealment
<i>R. v. Berriman</i> , 6 Cox C.C. 388	1854	Surgeon: bones found belonged to	7–9 months	No clear proof child could have lived.	Not guilty of concealment - assume

		child.			that under 7 months child could not have been born alive.
<i>R. v. Perry</i> , Dears CC 471 (C.C.R.)	1855	*	*	Temporary concealment.	Guilty of concealment. Affirmed.
<i>R. v. Gogarty</i> , 7 Cox C.C. 107	1855	*	*	No intent to conceal.	Guilty of concealment.
<i>R. v. Knights</i> , 2 F.&F. 45	1860	*	*	Evidence insufficient to show child born alive.	Not guilty of murder or manslaughter; guilty of concealment. 2 years' imprisonment with hard labour.
<i>R. v. Travers</i> , 4 Nfld. LR 521	1860	*	*	No evidence of disposal or attempt to conceal birth.	Not guilty of concealment.
<i>R. v. Opie</i> , 8 Cox C.C. 332	1860	*	*	No intention to conceal.	Not guilty of concealment.
<i>R. v. Colmer</i> , 9 Cox C.C. 506	1864	*	4–5 months	Fetus not a child within the meaning of offence.	Not guilty of concealment.
<i>R. v. Sleep</i> , 9 Cox C.C. 559	1864	*	*	No evidence of secret disposition.	Not guilty of concealment.
<i>R. v. Hewitt and Smith</i> , 4 F.&F. 1099	1866	“Medical testimony”	<7 months	Not a child within the meaning of the offence.	Not guilty of concealment.
<i>R. v. Nixon</i> , cited in <i>R. v. Clarke</i> (1866), 4. F.&F. 1040	1866	*	*	No concealment because body in open field and possible to see over 5ft wall.	*
<i>R. v. Clarke</i> , 4. F.&F. 1040	1866	*	*	No intent to conceal birth.	Not guilty of concealment.
<i>R. v. May</i> , 10 Cox C.C. 448	1867	Surgeon: child full-grown, born alive.	Full-grown	Child still alive when left in open field.	Conviction for concealment overturned.

<i>R. v. George</i> , 11 Cox C.C. 41	1868	*	Full-grown	Not enough evidence of secret disposal.	Not guilty of concealment.
<i>Maine v. Kirby</i> , 57 Me. 30 (S.C. Maine)	1869	Evidence that child stillborn	*	Child born dead.	Conviction for concealment overturned.
<i>R. v. Cook</i> , 11 Cox C.C. 543	1870	*	*	Insufficient evidence of concealment; merely delay.	Guilty of concealment. 2 months' imprisonment.
<i>R. v. Brown</i> , LR 1 CCR 244	1870	*	*	No secret disposition because yard only surrounded by low wall and body visible.	Conviction for concealment upheld.
<i>R. v. Williams</i> , 11 Cox C.C. 684	1871	*	*	Identity of body not proven.	Not guilty of concealment.
<i>R. v. Bate and Others</i> , 11 Cox C.C. 686	1871	Doctor: child fully developed.	Fully developed.	Confession involuntary; evidence insufficient.	Not guilty of concealment - no evidence mother knew body was disposed of.
<i>R. v. Narden</i> , 12 S.C.R. (NSW) L 160	1873	*	*	No act of disposal.	Not guilty of murder; guilty of concealment. Conviction upheld.
<i>R. v. Bell</i> , IR 8 CL 542	1874	Doctor: date accused gave birth.	*	Body not recovered.	Conviction for concealment overturned.
<i>R. v. Handley</i> , 13 Cox C.C. 79	1874	Child appeared full-term, born alive.	Full-term.	*	Not guilty of murder; guilty of manslaughter. 10 years' penal servitude.
<i>State v. Hill and Blake</i> , 58 N.H. 475 (N.H.S.C.)	1878	*	*	*	Conviction for concealment upheld.
<i>R. v. Pichè</i> , 30 CP U.C.C.R. 409	1879	Doctor: accused had delivered a child recently. Child born alive (hydrostatic test).	*	Evidence not sufficient.	Conviction for concealment upheld.

<i>State v. Ellis; State v. Conner</i> , 43 Ark. 93 (Ark. S.C.)	1884	*	*	Indictment flawed	Acquittal on concealment affirmed.
<i>R. v. Clark</i> , 15 Cox C.C. 171	1883	Doctor: child fully developed.	Fully developed.	Charge disclosed no offence. No act of concealment.	Guilty of nuisance by unlawfully exposing mutilated dead body of child near public highway to. 6 months' imprisonment. Not guilty of concealment.
<i>North Carolina v. Stewart</i> , 93 N.C. 539 (N.C.S.C.)	1885	*	*	Enactment so vague and indefinite as not to create a criminal offence.	Conviction for concealment affirmed.
<i>R. v. Fong Chong</i> , 6 NZLR 374 (C.A.)	1888	Child lived 4–5 days, appearance indicated death by suffocation.	*	Insufficient evidence of identity or concealment.	Conviction for concealment affirmed. 2 years' imprisonment with hard labour.
<i>R. v. Mappin</i> , 6 W.A.R. 161 (C.A.)	1904	*	*	No proof of death; only witness was also an accomplice; no evidence of secret disposition.	Not guilty of murder; guilty of concealment. Conviction affirmed.
<i>McCloud v. Georgia</i> , 122 Ga. 393 (Geo.S.C.)	1905	Physician: whether child born alive.	*	Insufficient evidence child born alive; error in jury charge.	Conviction for concealment affirmed.
<i>R. v. Rosenberg</i> , 70 JP 264	1906	Surgeon: whether child born alive.	*	No secret disposition.	Not guilty of concealment.
<i>R. v. _____</i> , 70 JP 545	1906	Doctor: whether child born alive.	*	Temporary concealment.	Not guilty of murder; not guilty of concealment.
<i>R. v. Kersey</i> , 1 Cr. App.	1908	*	Evidence child	Accused's confession	Not guilty of murder;

Rep. 260 (C.C.A.)			suffocated.	insufficient evidence that child dead when concealed.	guilty of concealment. Aff'd on appeal. 8 months jail with hard labour.
<i>Pennsylvania v. Hessler</i> , 39 Pa. Super. 115 (Superior Court of Pennsylvania)	1909	*	*	Body not concealed.	Conviction for concealment affirmed. 1 year in penitentiary.
<i>R. v. Veaty</i> , 70 JP Jo 352	1910	*	*	Body not concealed bc coal cellar used.	Not guilty of concealment.
<i>R. v. Donohue</i> , VLR 195	1914	*	*	Jury not satisfied child born alive.	Not guilty of murder; guilty of concealment. Aff'd on appeal.
<i>Missouri v. Baker</i> , 297 Mo. 249 (Mo.S.C.)	1923	*	Child born alive.	No evidence mother knew about or participated in burial of child.	Conviction for concealment overturned.
<i>Wilson v. Kentucky</i> , 215 Ky. 759 (Ken.C.A.)	1926	Doctor: whether woman able to do household chores just after childbirth.	Body badly decomposed when found.	No evidence accused gave birth or had opportunity to conceal.	Conviction for concealment overturned; new trial ordered.
<i>Washington v. State</i> , 171 Ark. 357 (Ark.S.C.)	1926	*	*	Insufficient evidence of concealment.	Conviction for concealment overturned; new trial ordered.
<i>R. v. Jacob</i> , SASR 456	1932	*	Admission had child.	Not concealed from the world at large.	Not guilty of concealment.
<i>R. v. Rubletz</i> , 75 C.C.C. 239 (Sask. C.A.)	1940	Pathologist: full-term, breathed, cause of death undetermined.	Full-term; born alive.	Evidence not sufficient	Conviction for murder overturned; new trial ordered.
<i>Bays v. Commonwealth</i> , 289 Ky. 116	1942	*	Born alive	Insufficient evidence of concealment or	Conviction for concealment overturned;

				that child illegitimate.	new trial ordered.
<i>R. v. Davis</i> , SR NSW 263	1942	*	*	*	Not guilty murder and manslaughter; guilty of concealment. Sentence upheld.
<i>Perry v. Commonwealth</i> , 295 Ky. 317	1943	*	Could not tell if born alive.	*	Conviction for concealment affirmed.
<i>Hutsell v. Kentucky</i> , 243 S.W.2d 898	1951	*	Born alive.	Birth not concealed,	Conviction for concealment overturned.
<i>Pennsylvania v. Riley</i> , 88 Pa. D.&C 572	1953	Developmental stage, whether child likely stillborn.	4–5 months or 5 and one-quarter months.	Fetus too young to be capable of survival.	Not guilty of concealment.
<i>R. v. Bryan</i> , 123 C.C.C. 160	1959	*	Child born alive	Section does not apply to the circumstances of this case.	Conviction for concealment overturned.
<i>Weerai v. Samarakoon</i> , LKHC 1 (Sri Lanka)	1960	Judicial medical officer: accused had given birth to full term child.	Full-term	No intent to conceal.	Conviction for concealment overturned.
<i>State v. Heti</i> , PNGLR 173 (Papua New Guinea)	1977	*	About 5 months	Applying Berriman, accused should not have been charged. ⁸	Guilty plea to concealment set aside on appeal.
<i>Pennsylvania v. Gottschall</i> , 273 Pa. Super. 447	1979	*	Born alive.	Mental disorder.	Conviction for concealment overturned.
<i>State v. Torovel</i> , PNGLR 242 (Papua New Guinea)	1982	*	Conceded suff. mature to be body of child	No secret disposition; No intent to conceal birth.	Not guilty of concealment.
<i>State v. Kua</i> , PGNC 20 (Papua New Guinea)	2000	Doctor: child's head fractured, consistent with accused's	Born alive.	*	Guilty plea to concealment. Sentenced to 5 months.

		testimony.			
<i>R. v. Hong</i> , SBHC 33 (Solomon Islands)	2004	*	Born alive.	*	Charged with infanticide; withdrawn and guilty plea to concealment accepted. \$50 fine.
<i>State v. Peter</i> , PGNC 135 (Papua New Guinea)	2005	*	Fully developed	No evidence a child and not a fetus.	Not guilty of concealment.
<i>R. v. Anderwald</i> , 402 A.R. 44 (Q.B.)	2005	*	Born alive.	*	Guilty plea to neglect to obtain assistance (90 days), concealment (40 days concurrent plus probation).
<i>R. v. Field</i> , 29 Cr. App. R. 151	1944	*	*	Indictment disclosed no offence; accused did not dispose of body or aid or abet.	Guilty plea to concealment quashed.
<i>R. v. Smith</i> , 32 C.C.C. (2d) 224 (Nfld.Dist.Ct.)	1976	Pathologist: full-term, had breathed, cause of death asphyxia.	Born alive	Insufficient evidence of disposal or intent to conceal.	Not guilty of infanticide or concealment.
<i>R. v. McKay</i> , O.J. No. 4009 (Ont.Ct.Gen.Div.)	1995	Pathologist, pediatrician, obstetrician. Baby had breathed, COD asphyxia.	*	Insufficient evidence of disposal or intent to conceal.	Not guilty of concealment.
<i>R. v. Wood</i> , O.J. No 5042 (Ont.Ct.Gen.Div.)	1999	Psychiatric assessment of accused. Forensic exam: child had breathed.”	Fully developed – 7lbs	*	Pled guilty to infanticide and concealment - 13 days plus probation.
<i>R. v. Byrne</i> , O.J. No.	1999	Coroner: death	*	*	Committed to trial on

3668 (Ont.C.J.)		occurred shortly before or during birth, anoxia possible cause.			concealment.
<i>R. v. Hopkins</i> , N.I.C.C. 1	2005	Psychiatric assessment of accused.	*	*	Guilty plea to concealment-2 years' probation.
<i>R. v. Morrow</i> , 333 N.B.R. (2d) 342	2008	Psychiatric evidence re: mental disorder.	*	Mental disorder	Pled guilty to concealment.
<i>R. v. Etches</i> , (June 15, 2009), unreported, (Ont.Sup.Ct.)	2009	Pediatric forensic pathologist: child likely stillborn.	Full-term	*	Discharged on infanticide, committed to trial on concealment.
<i>R. v. Miller</i> , N.B.J. No. 340	2009	*	Born alive.	Confession.	Pled guilty to 1 st degree murder and concealment. Life imprisonment for murder, concealment stayed.

Appendix C

The Old Bailey Cases dealing with Child Murder and Concealment

*Little or no information provided in the report.

** No information about this topic provided in the report.

Cases involving guilty pleas are high-lighted in blue.

Case	Year	Expert	Gestational Age	Verdict and Sentence
Unknown	1679	**	**	Guilty of murder-death*
Corbet	1684	**	**	Guilty of murder-death*
Jones, Sinah	1688	Nurse/midwife	**	Guilty of murder-death*
Hornby	1734	Surgeon	Full grown; born alive	Guilty of murder-death
Wilson	1737	Surgeon	Full term	Acquitted of infanticide
Scrogham	1743	Midwife	Cannot say they were at full growth	Coroner's inquisition that children were still-born
Terry	1744	Unspecified expert by coroner	Lungs inflated it breathed	Guilty of murder-death
Usop & Leger	1745	Coroner	Expert1: did not come at full term; Expert 2: full grown	Acquitted of murder
Hope	1746	Midwife	Full term or very nigh	Acquitted of murder
Mussen	1757	Midwife/surgeon	Full time	Guilty of murder-death
Jenkins	1765	Midwife/surgeon	Come to its full birth	Guilty of murder-death
Warner	1770	Midwife	Full time	Acquitted of murder
Harris	1781	Midwife	Full Grown or nearly full grown	Not guilty of murder

Cowley	1781	Surgeon	Appeared to be Full grown	Not guilty of murder
Brean	1788	Surgeon	Appeared to be a full grown child	Not guilty of murder
Miller	1790	Midwife	Appeared to be full grown	Not guilty of murder
Lewis	1793	Surgeon	Very large	Not guilty of murder
Jarvis	1800	Surgeon	Likely born alive	Not guilty of murder
Driscoll	1847	**	**	Guilty of concealing; sentence respited*
Harvey	1801	Asst. to surgeon	Full time child	Not guilty of murder
Smith, Ann	1804	Mother of 10	Not gone above 7 months	Guilty-concealed the birth, but not the murder; confined 1 yr
Dixon	1805	Surgeon	Full grown	Not Guilty of murder, but of concealing the birth; confined 2 yrs.
Connolly	1806	Surgeon	At its full time	Not guilty of murder but guilty of concealing; confined 1 yr and fined 1 shilling
Jones, Mary, Frances	1808	Surgeon	Full mature growth	Not guilty of murder, but of concealing birth; confined 1 yr and fine 1 shilling
Tomlin	1809	Surgeon	At its full time	Not guilty of murder, but of concealing birth; confined 1 yr
Burrows	1812	Surgeon	Full grown; born alive	Not guilty of murder
Penny	1812	Midwife/Surgeon	Full time child	Not guilty of murder
Tewner	1815	Surgeon	Full grown child	Not guilty of murder
Panton	1816	Surgeon	Likely born alive	Not guilty of murder
Wessen	1816	**	Appeared full time	Not guilty of murder*
Perry	1817	Surgeon	Come to maturity	Guilty of murder-death
Wild	1817	Surgeon	Was not born alive; no distortion of features	Not guilty of murder

Cornwall & Thompson	1817	Surgeon	About seven months	Not guilty of murder but guilty of concealing; confined 2 mo
Hyde	1821	Midwife & apothecary	Either stillborn or born alive	Not guilty of murder
Jones & Morrison	1822	Surgeon	Stillborn	Not guilty of murder
Barry	1825	Medical men	**	Not guilty of murder*
Farrell	1829	Surgeon	It breathed	Not guilty of murder, but of concealing birth; confined 1 yr
Barrett	1829	Surgeon	Cannot say if born alive; it was burned	Guilty of concealing birth; confined to 18 mo
Morgan	1830	Surgeon	Full grown	No guilty of murder, but of concealing birth by secretly disposing body, confined 2 yrs
Poulton	1832	Surgeon	Well formed; it breathed	Guilty of concealment; confined 2 yrs
Weeks	1833	Surgeon & apothecary	Well formed; grown child; It breathed	Guilty of concealment; confined 14 day and recommended to mercy
Hale	1836	Surgeon	Healthy; full grown	Not guilty of murder but guilty of concealing; confined 2 yrs
Blacklock	1837	Surgeon	Born alive; died six weeks later	Not guilty of murder
Chandler	1839	**	**	Pled guilty to concealing; confined 9 mo*
Camfield	1839	**	**	Not guilty of concealing*
Wales	1839	**	Newborn	Guilty of infanticide; confined 2 yrs*
Spooner	1840	**	**	Guilty of concealing birth; confined 6 mo*
Burgess	1840	**	**	Pled guilty to concealing birth; judgment respited*
Watford	1840	**	**	Guilty of concealing-mercy by jury; confined 1 yr*
Nye	1840	**	**	Pled guilty to concealing birth; confined 1 yr*
Anscone	1842	Coroner, surgeon	It breathed	Guilty of concealment; confined 18 mo
Frogley	1842	**	**	Not guilty of concealing*
Hunt	1842	**	**	Not guilty of concealing*
Miles	1842	**	**	Not guilty of concealing*
Millgate	1842	Surgeon	Unable to positively dispose the birth had	Guilty of concealment; confined 2 yrs

			been complete before life was extinct	
Hillier	1843	**	**	Guilty of concealing-jury recommended mercy; confined 4 mo*
Rintoull	1843	**	**	Guilty of concealing-jury recommended mercy; confined 4 mo* [“pour” months assumed to mean 4 months]
Griffiths	1843	**	**	Guilty of unlawfully disposing of dead body; confined 3 mo*
Holmes, Ann	1843	**	**	Guilty of concealing birth; judgment respited*
Skinne	1843	**	**	Guilty of concealing birth-jury recommended to mercy; judgment respited*
Cook, Elizabeth	1843	**	**	Pled guilty to concealing; confined 2 mo*
Learwood	1843	**	**	Pled guilty to concealing; confined 2 mo*
Alexander, Jemima	1844	**	**	Not guilty of concealing*
Scales	1844	Surgeon	Full grown child	Not guilty of murder
Willey	1844	**	**	Guilty of concealing; judgment respited*
Hayward	1844	**	**	Guilty of concealing; judgment respited*
Hyland	1844	Surgeon	Full grown child	Guilty of concealing; confined 2 yrs
Cook, Emma	1844	**	Body of a new born child	Guilty of concealment-jury recommended mercy; judgment respited*
Bowerman	1844	Surgeon	Born alive	Guilty of manslaughter; confined 2 yrs
Hainstey	1844	**	**	Not guilty of concealing*
Jones, Sarah	1844	**	**	Not guilty of concealing*
Appleton	1844	**	**	Not guilty of concealing *
Percy	1844	**	**	Guilty of concealing; confined 6 mo*
Rose	1844	**	**	Guilty of concealing-jury recommended mercy; confined 3 mo*
Wheatley	1844	**	**	Guilty of concealing-jury recommended mercy; confined 1 mo*
Goodwin	1844	**	**	Not guilty of concealing*
Fribbins	1845	**	**	Not guilty of concealing*
Holmes, Frances	1845	**	**	Pled guilty to concealing; judgment respited*

Saville	1845	**	**	Not guilty of concealing*
Lawrence	1845	**	**	Not guilty of concealing*
Weir	1845	**	**	Not guilty of concealing*
Smith, Mary	1845	**	**	Guilty of concealing; confined 4 mo*
Body	1845	**	**	Not guilty of concealing*
Day	1846	**	**	Not guilty of concealing*
Gibbs	1846	**	**	Guilty of concealing; confined 3 mo*
Gard	1846	**	**	Guilty of concealing; confined 3 mo*
Thomas	1846	**	**	Not guilty of concealing*
McCarthy	1846	**	**	Guilty of concealing; confined 2 mo*
Nettlefield	1846	**	New**born child	Not guilty of murder but guilty of concealing; confined 1 yr
Tilley	1846	**	**	Not guilty of concealing*
Fisher	1846	**	**	Not guilty of concealing*
Cooper, Sarah	1847	Surgeon	It breathed; likely born alive	Guilty of concealing birth; confined 1 yr
Cornwell	1847	**	It breathed	Guilty of concealing birth; confined 12 mo
Inch	1847	Surgeon	Only bones remained, can't determine	Guilty of concealing-mercy by jury; confined 3 mo
Hewson	1847	Surgeon	Full Grown	Guilty of concealing birth; confined 18 mo
Attwood	1848	**	**	Not guilty of concealing*
Baines	1848	**	**	Not guilty of concealing*
Gartley	1848	**	**	Not guilty of concealing*
Binder	1848	**	**	Guilty of concealing; confined 4 mo*
Freeman	1848	Surgeon to police	Full grown	Guilty of concealing birth; confined 12 mo
Connor	1849	**	**	Pled guilty to concealing; judgment respited*
Osborne	1849	**	**	Guilty of concealing; confined 3 mo*
Ackley	1849	**	**	Not guilty of concealing*
Cooper & Peacock	1849	**	**	Not guilty of concealing*
Rusk	1849	Surgeon	Near seventh month	Guilty of concealing; confined 1 mo

Towers	1849	**	**	Not guilty of concealing*
Hennessey	1849	**	**	Not guilty of concealing*
Wootten	1849	**	**	Guilty of concealing; confined 1 mo*
Grant	1849	**	**	Pled guilty to concealing; confined 2 mo*
Alexander, Mary Ann	1850	**	**	Not guilty of concealing*
Marshall	1850	**	**	Not guilty of concealing*
Frew	1850	**	**	Guilty of concealing-jury recommended mercy; confined 10 days*
Hoar	1850	**	**	Not guilty of murder but guilty of concealing; confined 6 mo*
Horton	1850	**	**	Not guilty of concealing*
Mortimer	1850	**	**	Guilty of concealing; confined 3 mo*
Malony	1851	**	**	Not guilty of concealing*
Collier	1851	**	**	Guilty of concealing-received excellent character; confined 1 mo*
Player	1851	**	New-born child	Not guilty of murder but guilty of concealing; co 12 mo*
Dredge	1852	**	**	Not guilty of concealing*
Dixey	1852	**	**	Not guilty of concealing*
Carnaby	1852	**	**	Guilty of concealing; confined 3 mo*
Whitpan	1852	**	**	Not guilty of murder but guilty of concealing; confined 2 yrs*
Bunn	1852	**	**	Guilty of concealing-jury recommended mercy; judgment respited*
Hatch	1852	**	**	Pled guilty to concealing; confined 1 mo*
Earwalker	1852	**	**	Not guilty of murder*
Steer	1852	Surgeon	It breathed	Guilty of concealing birth; confined 1 yr
Collins	1853	**	**	Not guilty of concealing*
Pullinger	1853	**	**	Not guilty of concealing*
Butler	1853	**	**	Not guilty of concealing*
Carter	1853	**	**	Not guilty of concealing*
Liepman	1853	**	**	Guilty of concealing-jury recommended mercy; judgment respited*
Letts	1853	**	**	Not guilty of concealing*

Richardson	1853	**	**	Pled guilty to concealing; judgment respited*
Widgery	1853	Surgeon	Full grown; born alive	Not guilty of murder
Kedge & Coghlan	1853	**	**	Not guilty of concealing*
Page	1853	**	**	Guilty of concealing; confined 6 mo*
Grover	1854	**	**	Pled guilty to concealing; confined 2 yrs*
Haynes	1854	**	**	Guilty of concealing; confined 1 mo*
Chelwick	1854	**	**	Not guilty of concealing*
Pipkins	1855	Surgeon	Full grown; Alive when throat cut	Guilty of concealing birth, confined 2 yr
Tree	1855	**	**	Guilty of concealing-jury & prosecutor recommended mercy; judgment respited*
Staples	1855	**	**	Pled guilty to concealing; confined 3 mo*
Oxborough	1857	**	**	Guilty of concealing-jury recommended mercy; confined 1 mo*
Higgins	1857	Surgeon	Born alive; Died days after birth	Guilty of manslaughter-mercy by jury; 6 yrs penal servitude
Hogg	1857	**	**	Guilty of concealing-jury recommended mercy; confined 1 mo*
Swift	1860	Doctor	Full grown	Guilty of concealing; confined 1 yr
Gough	1860	**	Body of female child	Guilty of concealing-jury recommended mercy; confined 1 mo*
Reed, Ann	1861	Surgeon	Full grown	Guilty of concealing birth, confined 1 yr
Papworth	1861	Member of College of Surgeons	Full mature growth	Guilty; confined 2 mo
Wesbury	1862	**	**	Pled guilty to concealing; confined 3 mo*
Simms	1862	**	**	Not guilty of murder but guilty of concealing; confined 3 mo*
Martin	1863	**	**	Not guilty of concealing*
Harvey	1863	Surgeon	Apparently full grown	Guilty of trying to conceal birth; confined 9 mo
Jenner	1863	**	**	Pled guilty to concealing; judgment respited*
Pattison	1863	**	**	Pled guilty to concealing; judgment respited*
Thompson	1863	**	**	Guilty of concealing; judgment respited*

Iverson	1864	**	**	Guilty of concealing-jury recommended mercy; confined 6 wks*
Strangeway	1864	Surgeon	It breathed	Guilty of concealing birth, mercy by jury due to her youth, confined 12 mo
Weatherly	1865	**	**	Guilty of concealing-jury recommended mercy; confined 1 mo*
Greaves	1866	**	**	Pled guilty to concealing; confined 1 wk*
Reed, Mary	1868	**	Dead body of female child	Guilty of concealing; judgment respited*
Quinn	1869	**	Newly-born child	Guilty of concealing; judgment respited*
Wright	1871	Surgeons	Large child; never breathed; born dead	Guilty of concealing; judgment respited
Knott	1871	Doctor	It breathed; born alive	Guilty of manslaughter; mercy by jury, 18 mo imprisonment
Shirley	1873	Surgeon	It breathed; likely born alive	Guilty of concealing birth; mercy by jury due to her age & good character, imprisonment 2 yrs
Shott	1877	**	**	Pled guilty to concealing; judgment respited*
Haeding	1877	Surgeon	Full grown	Not guilty of murder or concealing
Bewley	1880	**	**	Pled guilty to concealing; imprisoned 3 wks*
Brown	1883	**	**	Pled guilty to secret disposal; judgment respited*
Farries	1884	**	**	Pled guilty to concealing; judgment respited*
Pearce & Pearce	1886	**	**	Not guilty of concealing*
Gapp & Langridge	1887	**	Did not see the child; woman did not have the appearance of being far advanced in pregnancy	Guilty of concealing; Langridge-6 mo hard labour. Gapp (plead guilty)-judgment respited
Peters	1887	**	**	Pled guilty to concealing; judgment respited*
Ruffles	1888	**	Dead body of male child	Guilty of concealing; judgment respited*
Duncan	1890	**	**	Not guilty of murder but guilty of concealing-jury recommended mercy; imprisoned 18 mo*
Hollocks	1891	**	**	Not guilty of murder, pled guilty to concealing; discharged on recognizance

Jacob	1892	**	**	Pled guilty to concealing; imprisoned 3 days*
Wilkinson	1892	**	**	Pled guilty to concealing; discharged on recognizance*
Gillingham	1892	**	**	Pled guilty to concealing; discharged on recognizance*
Profmann	1892	**	**	Pled guilty to concealing; imprisoned 2 days*
Collins	1893	**	**	Pled guilty to concealing; discharged on recognizance*
Childs	1894	**	**	Pled guilty to concealing; imprisoned 1 day*
Buttivant	1895	**	**	Pled guilty to concealing; discharged on recognizance*
Hancock, Fanny	1895	**	**	Pled guilty to concealing; imprisoned 2 days*
Biddle	1895	**	**	Guilty of concealing-jury recommended mercy; judgment respited*
Winstone	1897	**	**	Not guilty of concealing*
Clark	1897	Doctor	Fully developed	Guilty of concealing birth; 18 mo hard labour
Clayton	1897	**	**	Pled guilty to concealing; imprisoned 1 day*
Goldsack	1900	**	**	Pled guilty to concealing; imprisoned 2 days*
Thorpe	1901	**	**	Pled guilty to concealing; discharged on recognizance*
Ivins	1902	**	**	Pled guilty to concealing; imprisoned 2 days*
Dicker	1902	Medical man	Health; normal; Born alive	Guilty of murder-mercy by jury; discharged on recognizance
Beaumont	1903	Medical Superintendents	Full time; alive	Guilty of manslaughter; 5 yrs prison
Wills	1903	Doctor	At or near full time	Guilty of concealing-mercy by jury; 12 mo hard labour
Hornsell	1903	**	**	Pled guilty to concealing; discharged on recognizance*
Lunn	1904	Doctor	Full time; born alive	Guilty of manslaughter-mercy by jury. Discharged on her own recognizance
Cole	1904	Doctor	Fully developed	Guilty of manslaughter; mercy by jury, 6 mo hard labour
Gravitt	1904	**	Fully developed	Guilty of concealing-mercy by jury; discharged on her own recognizance
Hildebrand	1905	Doctor	Fully developed, full time	Guilty-manslaughter, 1 yr prison
Bridges	1905	Doctor	Well developed; not quite full time; it was practically	Guilty of concealing birth, 6 mo hard labour

Abrahams	1905	Bachelor of Medicine	Full time	Guilty of concealing birth; mercy by jury, 1 mo hard labour
Rosenberg	1906	**	Eight months	Not guilty of concealing
Hancock, Bertha	1906	**	**	Not guilty of murder but pled guilty to concealing; 3 mo hard labour*
Perrett	1906	**	Full born alive	Guilty of concealing birth; 4 mo prison
Ellis	1907	**	**	Not guilty of murder but pled guilty to concealing; 4 mo hard labour*
Day	1907	**	Body of a child	Not guilty of murder but guilty of concealing; imprisoned 3 mo*
Hawkins	1908	Doctor	**	Not guilty of murder but guilty of concealing; released on recognizance*
Betts	1909	Pathologist	Impossible to prove child had separate existence	Not guilty of murder but guilty of concealing; 12 mo hard labour*
Proud	1909	**	Body of a child, had breathed	Not guilty of murder but guilty of concealing; 8 mo hard labour*
Hitchcock & Hitchcock	1909	Doctor	Body of a male child	Female pled guilty to concealing, male not guilty; sentencing postponed*
Murphy	1909	**	**	Pled guilty to concealing; released on recognizance*
Sindall	1910	**	**	Pled guilty to concealing; released on recognizance*
Pollard	1910	**	**	Pled guilty to concealing; released on recognizance*
Hilder	1910	**	**	Pled guilty to concealing; imprisoned 2 days*
Stephenson	1910	Surgeon	Full time	Not guilty of murder or manslaughter
Button	1910	Medical superintendent	It breathed	Guilty for concealing birth, 6 mo prison
Tucker	1911	**	**	Pled guilty to concealing; released on recognizance*
New	1911	**	**	Pled guilty to concealing; released on recognizance*
Eslick	1912	Medical practitioner	Body of male child, had breathed	Not guilty of murder but guilty of concealing; imprisoned 4 mo*
Odlin	1913	**	**	Pled guilty to concealing; released on recognizance*

Appendix D Provincial Legislation Regulating Births and Stillbirths	
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Alberta	<i>Vital Statistics Act, SA 2007, c V-4.1</i>
Birth	s.1(a) - the complete expulsion or extraction from the mother, irrespective of the duration of the pregnancy, of a fetus in which, after expulsion or extraction, there is breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle, whether or not the umbilical cord has been cut or the placenta attached;
Stillbirth	s.1(u) - the complete expulsion or extraction from its birth mother...after at least 20 weeks of pregnancy, or after its having attained a weight of at least 500 grams, of a product of conception in which, after the expulsion or extraction, there is (i) no breathing, (ii) no beating of the heart, (iii) no pulsation of the umbilical cord, and (iv) no unmistakable movement of voluntary muscle;
Report of Birth	The birth of every child born in Alberta must be registered as provided in this Act - see ss. 2-7.
Report of Stillbirth	Every stillbirth that occurs in Alberta must be registered as provided in this Act; notice must be provided as if the stillbirth was both a birth and a death; a physician or medical examiner must certify a cause of death – see ss.19, 33.
B.C.	<i>Vital Statistics Act, R.S.B.C. 1996, c.479</i>
Birth	s.1 - the complete expulsion or extraction from its mother, irrespective of the duration of the pregnancy, of a product of conception in which, after the expulsion or extraction, there is (a) breathing, (b) beating of the heart, (c) pulsation of the umbilical cord, or (d) unmistakable movement of voluntary muscle, whether or not the umbilical cord has been cut or the placenta attached;
Stillbirth	s.1 - 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;
Report of Birth	Duty placed on various people to report birth, including mother - see ss .2, 3.
Report of Stillbirth	A stillbirth must be registered as provided in this Act; medical practitioner or coroner must complete a medical certificate showing the cause of the stillbirth - see s. 11.
Manitoba	<i>Vital Statistics Act, C.C.S.M., c. V60</i>
Birth	s.1 - the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy, of a product of conception in which, after such expulsion or extraction, there is breathing, beating of the heart, pulsation of the umbilical cord, or unmistakable movement of voluntary muscle, whether or not the umbilical cord has been cut or the placenta is attached;
Stillbirth	s.1 - 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;
Report of Birth	The birth of every child born in the province shall be registered as provided herein – see s.3.
Report of Stillbirth	Every stillbirth in the province shall be registered as provided herein; a duly qualified medical practitioner or examiner must certify the cause of the stillbirth – see s.9.
N.B.	<i>Vital Statistics Act, S.N.B. 1979, c. V-3</i>
Birth	s.1 - the complete expulsion or extraction from the mother, irrespective of the duration of the pregnancy, of a fetus in which, after the expulsion or extraction, there is breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle, whether or not the umbilical cord has been cut or the placenta attached;
Stillbirth	s.1 - 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;
Report of Birth	Reporting duties in relations to births – see s.7.
Report of Stillbirth	Reporting duties apply in relation to stillbirths as if they were births – see s.18.
N.F.	<i>Vital Statistics Act, S.N.L. 2009, c.32 V-6.01</i>
Birth	s.2(1)(a) - the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy, of a product of conception in which, after expulsion or extraction, there is breathing, beating of the heart, pulsation of the umbilical cord, or unmistakable movement of voluntary muscle, whether or not the umbilical cord has been cut or the placenta is attached;
Stillbirth	s.2(1)(u) - 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 where (i)the expulsion or extraction occurs after a pregnancy of at least 20 weeks, or (ii)the product of conception weighs 500 grams or more.
Report of Birth	Information about birth shall be provided and birth shall be registered – see ss.4,5,10,11.
Report of Stillbirth	Every stillbirth in the province shall be registered as required by this Act; medical practitioner or nurse must certify cause of stillbirth - see s.14.
N.W.T.	<i>Vital Statistics Act, R.S.N.W.T. 1988, c.V-3</i>
Birth	s.1 - the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy, of a product of conception in which, after the expulsion or extraction, there is breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle, whether or not the umbilical cord has been cut or the placenta is attached;

Stillbirth	s.1 - 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;
Report of Birth	Birth of every child born in Territories shall be registered as provided in Act – see s.2.
Report of Stillbirth	Every stillbirth in the Territories shall be registered as provided in this section; medical practitioner or coroner must certify the cause of the stillbirth – see s. 12.
N.S.	<i>Vital Statistics Act, R.S.N.S. 1989, c.494</i>
Birth	s.2(a) - the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy, of a fetus in which, after such expulsion or extraction, there is breathing, beating of the heart, pulsation of the umbilical cord, or unmistakable movement of voluntary muscle, whether or not the umbilical cord has been cut or the placenta is attached
Stillbirth	s.2(u) - 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;
Report of Birth	Notice must be given of birth, and birth registered – see ss.3, 4.
Report of Stillbirth	Notice must be given of stillbirth, and stillbirth registered; medical practitioner or Chief medical Examiner must certify cause of stillbirth – see s.12.
Nunavut	<i>Vital Statistics Act, R.S.N.W.T. (Nu) 1998, c. V-3¹</i>
Birth	s.1 - the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy, of a product of conception in which, after the expulsion or extraction, there is breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle, whether or not the umbilical cord has been cut or the placenta is attached;
Stillbirth	s.1 - 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;
Report of Birth	Every birth shall be registered in accordance with the Act by a parent, a person standing in the place of a parent, or otherwise any person who has knowledge of the birth of the child – see s. 2.
Report of Stillbirth	Every stillbirth shall be registered by the person who would be responsible for registering the live birth; medical practitioner or coroner must certify the cause of the stillbirth – see s.12.
Ontario	<i>Vital Statistics Act, R.S.O. 1990, c. V.4</i>
Birth	s.1 - the complete expulsion or extraction from its mother of a fetus that did at any

¹ Minor linguistic differences exist between the Nunavut and Northwest Territories Acts.

	time after being completely expelled or extracted from the mother breathe or show any other sign of life, whether or not the umbilical cord was cut or the placenta attached;
Stillbirth	s.1 - 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;
Report of Birth	Mother and/or father shall certify birth – see ss.9, 8.
Report of Stillbirth	Every stillbirth that takes place in Ontario shall be registered in accordance with the regulations - see s.9.1. A medical practitioner or coroner shall certify the cause of stillbirth – see R.R.O. 1990, Reg. 1094, s.20.
P.E.I.	<i>Vital Statistics Act, R.S.P.E.I. 1988, c. V-4.1</i>
Birth	s.1(a) - the expulsion or extraction from its mother of a fetus which, after complete separation from its mother, shows any sign of life;
Stillbirth	s.1(q) - 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;
Report of Birth	Notice shall be given of birth, and birth registered – see ss.2, 3, 7, 8.
Report of Stillbirth	Stillbirth shall be registered; medical practitioner or coroner shall certify the cause of the stillbirth – see s.11.
Quebec	<i>Civil Code of Quebec; Public Health Act, R.S.Q., chapter S-2.2; Regulation respecting the application of the Act respecting medical laboratories, organ and tissue conservation and the disposal of human bodies, R.R.Q., 1981, c. P-35, r. 1; S.Q. 2001, c. 60, s. 149</i>
Childbirth	s.2 (a) <i>Regulation</i> - the expulsion or extraction, from its human mother, of a living product of conception, whatever its weight, or of a non-living product of conception weighing 500 g or more;
Report of Birth or stillbirth	Mother and/or father must make a declaration of live birth, or stillbirth where foetus weighs 500g or over to the registrar of civil status – see art. 113 C.C.Q.
Sask.	<i>Vital Statistics Act, S.S. 2009, c. V-7.21</i>
Live Birth	s.2(1) - the complete expulsion or extraction from the mother, irrespective of the duration of the pregnancy, of a product of conception in which, after the expulsion or extraction, there is breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle, whether or not the umbilical cord is cut or the placenta is attached;
Stillbirth	s.2(1) - 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;
Report of live birth	Duty to register live birth; includes parents – see ss.19, 20, 21, 22, 23, 24, 25, 26.
Report of stillbirth	Duty to register still birth; physician or coroner must certify cause of stillbirth as soon as practicable - see ss.43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56.
Yukon	<i>Vital Statistics Act, R.S.Y. 2002, c.225</i>
Birth	s.1 - the birth of a fetus which, after complete separation from the mother, shows any sign of life;
Stillbirth	s.1 - the complete expulsion or extraction from its mother after at least 20 weeks pregnancy, or after reaching 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;
Report of Birth	Notice shall be given of birth, and birth shall be reported and registered as provided in this Act; those under duty to report and register includes parents – see ss.3-9, 19-24.
Report of Stillbirth	Every stillbirth in the Yukon shall be registered as provided in this Act; medical practitioner or coroner shall certify cause of the stillbirth – see ss.11.