Court of Appeal File No. CA29830

COURT OF APPEAL

ON APPEAL FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE KOENIGSBERG OF THE SUPREME COURT OF BRITISH COLUMBIA PRONOUNCED THE 22ND DAY OF MAY, 2002

BETWEEN:

REGINA

RESPONDENT

AND:

DONALD DAVID SPRATT

APPELLANT

FACTUM OF THE CANADIAN RELIGIOUS FREEDOM ALLIANCE

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CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

The Canadian Religious Freedom Alliance adopts the Chronology of the Appellant Mr. Spratt.

OPENING STATEMENT

1. This case is about the constitutionality of sections 2(1)(a) and 2(1)(b) of the *Access to Abortion Services Act*, R.S.B.C. 1996, c. 1 (the "Act"), which prohibit "sidewalk interference" and "protest" in an "access zone." In *R. v. Lewis* (1996), 24 B.C.L.R. (3d) 247 (S.C.), the same provisions were found to violate freedom of conscience and religion and freedom of expression, but were found to be justified under s. 1 of the *Charter*. An appeal to this Court was dismissed as abated because of the death of Mr. Lewis: *R. v. Lewis* (14 October 1997), Vancouver Registry, CA022485 (B.C.C.A.). Until now, the *Lewis* decision has not been reviewed by this Court, although a section 7 *Charter* argument was considered in *R. v. Demers*, [2003] B.C.J. No. 75 (Q.L.), 2003 BCCA 28, , leave to appeal to S.C.C. refused (2003), 106 C.R.R. (2d) 376.

2. The Appellants, Spratt and Watson, were also charged under sections 2(1)(a) and (b) of the Act and challenged the constitutionality of those provisions. The Learned Trial Judge considered herself bound by *Lewis* (A.B. Vol.11, pp. 1941, para. 54), as did the Learned Summary Conviction Appeal Judge (A.B. Vol. 11, p. 1988, para. 16). Mr. Justice Hall granted the Appellants leave to appeal the question whether the provisions of the Act infringe freedom of expression and can be saved by section 1 of the *Charter* (A.B. Vol. 11, pp. 2000-1).

3. The Canadian Religious Freedom Alliance (the "CRFA") consists of the Catholic Civil Rights League, the Christian Legal Fellowship, and the Evangelical Fellowship of Canada. It is the CRFA's position that the definitions of "protest" and "sidewalk interference" and sections 2(1)(a) and 2(1)(b) of the Act are not reasonable and demonstrably justified in a free and democratic society. The fundamental freedoms of both protesters and women attending abortion clinics are not minimally impaired.

PART 1—STATEMENT OF FACTS

The Act

1. In section 1 of the Act, "protest" is defined as including "any act of disapproval or attempted act of disapproval, with respect to issues related to abortion services, by any means, including, without limitation, graphic, verbal or written means." "Sidewalk interference" is defined as:

> (a) advising or persuading or attempting to advise or persuade, a person to refrain from making use of abortion services, or
>
> (b) informing or attempting to inform a person concerning issues related to abortion services
>
> by any means, including, without limitation, graphic, verbal or written means.

2. Section 2(1)(a) prohibits engaging in sidewalk interference in an access zone, and section 2(1)(b) prohibits protest in an access zone. Access zones are established under sections 5, 6 and 7 of the Act. In addition to the prohibitions in sections 2(1)(a) and (b), section 2(1)(c), (d) and (e) of the Act prohibit besetting, physical interference, and intimidation, respectively. It is not an offence to engage in the activities covered by section 2(1)(a) if one is a "service provider", doctor providing abortion services, or a "patient" (s. 2(3)). Section 3 prohibits photographing or recording doctors, service providers or patients in an access zone for the purpose of dissuading them from providing or using abortion services. Section 4 prohibits threatening, besetting or harassment of clinic workers and is not limited to an access zone.

3. An access zone was established for the Everywoman's Health Centre pursuant to section 5 of the Act (A.B. Vol. 1, Ex. 13). The depth of the access zone around the abortion clinic on East 44th Avenue varies from 20 meters to 15 meters to 9 meters to 33 meters to 35 meters (*Lewis* (S.C.) at para. 53).

Findings of Cronin P.C.J. in R. v. Lewis

4. The trial decision in *R. v. Lewis* (1996), 18 B.C.L.R. (3d) 218 (Prov. Ct.), held that sections 2(1)(a) and (b) of the Act infringed fundamental freedoms and could not be saved by section 1 of the *Charter*. Cronin P.C.J. found that the impugned sections did not meet the

proportionality test (para. 53).

Findings of Madam Justice Saunders in R. v. Lewis

5. Madam Justice Saunders allowed the Crown's appeal from the decision of Cronin P.C.J. She found that sections 2(1)(a) and (b) of the Act did infringe the freedom of conscience and religion and freedom of expression of Mr. Lewis and other protestors, with the central issue being whether the infringement of freedom of expression reflected in sections 2(1)(a) and (b) of the Act is justifiable under s. 1 of the *Charter* (para. 68-71). It was unnecessary in Madam Justice Saunders' view to deal with freedom of assembly and freedom of association separately (para. 73 and 76). She held that the Act was saved by section 1.

Findings of the Learned Trial Judge in R. v. Spratt and R. v. Watson

6. Howard P.C.J. found that the following conduct by Watson amounted to "protest":

(a) carrying signs containing the messages "Abortion is Murder" and "Unborn Persons Have the Right to Live"; and

(b) approaching clinic employees to say that abortion is murder, that they were doing harm to women, and that abortion increases the risk of breast cancer (Reasons, A.B. Vol. 11, para. 28).

7. Spratt was compelled by his religious beliefs to protest the Act, viewing it as evil as abortion itself (Reasons, A.B. Vol. 11, para. 21). Spratt's "protest" consisted of carrying a nine-foot cross with a sign saying "You Shall Not Murder" and speaking about God's forgiveness and repentance for sin (Reasons, A.B. Vol. 11, para. 31).

8. Howard, P.C.J. also found both Spratt and Watson to have engaged in "sidewalk interference" (Reasons, A.B. Vol. 11, para. 28 and 32). She held that whether there were any patients who saw Spratt's sign or changed their minds because of the sign was irrelevant (para. 32).

PART 2— ERRORS IN JUDGMENT

9. The Crown concedes that sections 2(1)(a) and 2(1)(b) of the Act infringe freedom of expression in section 2(b) of the *Charter*. The central question is whether the infringement of freedom of expression can be justified under section 1 of the *Charter* as reasonable and demonstrably justified in a free and democratic society.

10. As noted above, the Learned Trial Judge and the Learned Summary Conviction Appeal Judge in the case at bar considered themselves bound by the decision of the Supreme Court in *R. v. Lewis*, where Saunders J. (as she then was) held that the infringements were justified.

11. The issue on appeal is therefore whether the Learned Summary Conviction Appeal Judge in *R. v. Lewis* erred in finding that the infringements of fundamental freedoms are justified. In particular, did she err in finding:

(a) that the expressive activity limited by sections 2(1)(a) and (b) of the Act is not central to the core values of freedom of expression and applying a correspondingly lower standard to her review of the infringements (para. 140 and 143);

(b) that the only choice for women using the clinics who wished to avoid protestors' messages would be to shun the medical service sought, suggesting an impairment of access that is not substantiated by the evidence (para. 106); and

(c) the Act and the access zone imposed under the Act to be in the range of least intrusive legislative responses to achieve the objective (para. 126)?

PART 3—ARGUMENT

12. A concession by the Crown that provisions limit freedom of expression does not eliminate the need to consider the nature and scope of the infringement in determining whether or not it is justified: *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 at para. 32. The interpretation of the impugned provisions is a necessary precondition to the determination of constitutionality (*Sharpe*, para. 32). I therefore address the nature of the infringement before turning to the test for justification under s. 1 of the *Charter*.

A. Nature and Scope of Infringement

13. The breadth of conduct prohibited by the impugned provisions, the absolute nature of the prohibition on expression, and the fact that the provisions infringe expression of the highest value all point to a strict approach to justification of the infringement.

14. The exceedingly broad definitions of "protest" and "sidewalk interference", which apply within an access zone, bear repeating. In section 1 of the Act, "protest" is defined as including "any act of disapproval or attempted act of disapproval, with respect to issues related to abortion services, by any means, including, without limitation, graphic, verbal or written means." "Sidewalk interference" is defined as:

> (a) advising or persuading or attempting to advise or persuade, a person to refrain from making use of abortion services, or
>
> (b) informing or attempting to inform a person concerning issues related to abortion services
>
> by any means, including, without limitation, graphic, verbal or written means.

15. Because besetting, intimidation, physical interference, graphic recording, threatening and harassment are all prohibited by other provisions in the Act, sections 2(1)(a) and (b) of the Act must be intended to apply to more innocuous activity, such as leafleting.

16. The access zone in issue here is a public street and sidewalk around an abortion clinic. Under section 5(2) of the Act, an access zone may extend up to 50 meters from the boundary of the parcel on which the abortion facility is located. The expansive size of the access zone

precludes the opportunity for interpersonal contact between protesters and women attending at the Clinic.

17. Under section 2(3) of the Act, it is a defence to charges under section 2(1) if the person is a "service provider", a doctor who provides abortion services or a "patient." Thus, the restrictions in sections 2(1)(a) and (b) prohibit protest and sidewalk interference by abortion protesters but leave those providing abortion services (and presumably profiting from those services) as the sole providers of information and advice to "patients." This is a content-based restriction on expression, which requires that the infringement on constitutionally guaranteed freedoms be more carefully scrutinized.

18. In *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62, the Court was asked to clarify the test in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, regarding the proper approach to the issue of expression on public property. The clarified approach appears at paras. 73-80 in the reasons of McLachlin C.J. and Deschamps J. for the majority. At para. 81 they noted: "Streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted." There is nothing to suggest that permitting conduct that falls within the definitions of protest and sidewalk interference in an access zone would subvert the values underlying the protection of freedom of expression, namely (1) democratic discourse, (2) truth finding, and (3) self-fulfillment (para. 74).

19. In *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 976, Dickson C.J.C. identified the interests underlying both the importance and rationale for the protection of freedom of expression:

> (1) seeking and attaining the truth is an inherently good activity;
>
> (2) participation in social and political decision making is to be fostered and encouraged; and
>
> (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment <u>not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed</u>.
>
> (Emphasis added)

20. The fundamental freedoms enumerated in section 2 of the *Charter* need to be understood in light of both their interrelationship to each other (e.g., freedom of conscience and religion and freedom of thought, belief, opinion and expression) and our relational nature. Our rights of conscience and expression become meaningful only in relation to others. Rights are not held by autonomous, isolated individuals immune from any contact with others but by individuals who are inherently interpersonal. Interaction and relationships with other people are essential to the development of the human person in our search for truth, justice and the greater good of society. It is important to recognize the relational nature of rights, particularly where, as here, the government has curtailed the ability of both protesters and women who have an interest in being exposed to their expression from engaging with one another.

> Jennifer Nedelsky, "Reconceiving Rights as Relationship," in J. Hart and A.W. Bauman (eds.), *Explorations in Difference: Law, Culture and Politics* (University of Toronto Press, 1996), pp. 66-88.

21. Sections 2(1)(a) and (b) of the Act not only infringe the freedom of expression of protesters. They also infringe the freedom of thought, belief, opinion and expression of women seeking abortions. These rights are reciprocal. Individuals are free to express themselves alone or in a group in an attempt to persuade others with a view to changing their thoughts, beliefs, opinions, religions or consciences, and individuals are free to accept or dismiss the expressions, thoughts, beliefs and opinions of others (including those which are religious or conscientiously held). To attain true self-fulfillment and community, individuals need to be able to interact with other members of society.

22. At para. 135 of her reasons in *Lewis*, Madam Justice Saunders quoted from *Irwin Toy* for the proposition that freedom of expression applies not only to matters we regard as inoffensive but also to those that offend, shock or disturb the State or any sector of the population. With the greatest respect, her finding that the impugned provisions were saved under section 1 is based on a failure to apply that proposition.

23. In order to assess the infringements, it is necessary to consider what conduct is captured by the definitions of "protest" and "sidewalk interference." The conduct captured by sections

2(1)(a) and (b) includes:

(a) standing with a sandwich board sign that has an image of Our Lady of Guadalupe and the words "Our Lady of Guadalupe, Patroness of the Unborn, Please Help us Stop Abortion" (*Lewis*);

(b) standing blindfolded with a sign that says "Every human being has the inherent right to life. United Nations International Covenant on Civil and Political Rights" or a sign that says "Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception. Art. 4-1, American Convention on Human Rights" (*Demers*);

(c) signs that say "Abortion is Murder" (*Lewis, Spratt* and *Watson*), "Abortion Hurts Women," "Unborn Persons have the Right to Live" (*Watson*), "You Shall Not Murder" (*Spratt*);

(d) handing out roses;

(e) handing out leaflets containing information about:

  (i) abortion procedures;

  (ii) the need for staff to account for foetal arms and legs to ensure no tissue is left in the womb after the procedure;

  (iii) evidence of foetuses experiencing pain;

  (iv) research regarding the health effects of abortion on women; or

  (v) medical malpractice or negligence by service providers;

(f) praying either silently or aloud;

(g) holding or posting any sign that suggests disapproval of abortion, including a sign that tells people attending a clinic that additional information or help is available outside an access zone;

(h) holding or posting any sign with an image of a foetus or baby, for example, showing that a 10-week old foetus already has feet and 10 toes;

(i) holding or posting signs, placards or sandwich boards or leaflets that say things like:

  (i) "It's not just a pregnancy. It's a person.";

  (ii) "Choose life. Call 1-###-###-#### for help."; or

  (iii) "You're not alone."

(j) speaking about sin, forgiveness and repentance; and

(k) peaceful leafleting with pamphlets such as those at A.B. Vol. 1, Ex. 5-6; A.B. Vol. 7, Ex. 6A-7 (listed as various publications, this includes a pamphlet entitled "The First Nine Months" that shows the stages of foetal development), 6A-14, 6A-15, 6A-17 (particularly pp. 1174-1183, which is a publication entitled "When You Were Formed in Secret", explaining foetal development), 6A-22; A.B. Vol. 11, Ex. 75, pp. 1906-7; and A.B. Vol. 11, Ex. 78, pp. 1911-12.

24. The apparently uncontradicted evidence at trial in *Lewis* was that the pamphlets given by protesters to women outside the Clinic accurately depict and describe the stages of development of the unborn child (Evidence of Dr. Peeters, A.B. Vol. 6, p. 893, ll. 42-46). Many women are ambivalent whether to have abortions right up to the last moment and are open to dissuasion and guidance up to the last minute (Evidence of Dr. Ney, A.B. Vol. 6, p. 873, ll. 8-13; Evidence of Hansard, A.B. Vol. 7, p. 1072, ll. 37-46). This evidence is not reflected in para. 141 of the Learned Summary Conviction Appeal Judge's reasons in *Lewis*.

25. As Madam Justice Koenigsberg, the Learned Summary Conviction Appeal Judge in the present case, observed at para. 11:

> The ability of Canadian society to tolerate the fullest expression on this subject is of the highest importance. Thus, the fundamental right of the appellants to freedom of expression in communicating their beliefs on the issue engaged by abortion is expression of the highest value. It follows that any limitation on that expression must be scrupulously justified.
>
> (Emphasis added)

26. Not only is the conduct captured incredibly broad and related to expression of the highest value, the infringement of expression in the access zone is absolute. Although Madam Justice Saunders appeared to recognize the completeness of the prohibition on expression at para. 120 of her reasons, at para. 142 she took the view that expressive activity was not banned in total. With respect, that approach was in error.

27. In *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006

SCC 6, the wearing of a kirpan was only banned at the school, but that is where the student wished to wear it. Telling him that he could put it on when he left for the day was not an answer. The majority characterized the school's prohibition of the kirpan as an absolute prohibition (para. 2, 54).

B. Pressing and Substantial Objective

28. The preamble to the Act cites courtesy, dignity and privacy as the interests that the legislation seeks to protect. The Supreme Court of Canada has identified the inherent dignity of the human person as one of the values underlying the *Charter*: *R. v. Oakes*, [1986] 1 S.C.R. 103, at para. 64. The Supreme Court of Canada has turned to those underlying values identified in *Oakes* as guides when assessing *Charter* violations: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 77. Dignity also plays a central role in the equality analysis under section 15 of the *Charter*: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

29. An underlying value or principle of the *Charter* such as the inherent dignity of the human person must be interpreted in a way that lends coherence to the interpretation of the *Charter* rights for which it forms the foundation. For example, the understanding of dignity in section 15 of the *Charter* should not lead to a result that is inconsistent with recognition and protection of the dignity of people exercising their freedom of conscience and religion or freedom of expression under section 2 of the *Charter*.

30. Many people may not care about or believe that a decision to terminate a foetus has any moral consequences. The reality is that it is a human life and we purport to want to protect human life and promote respect for human dignity. Silencing opposition to or disapproval of abortion at the clinic door is antithetical to respect for human dignity.

31. Saunders J. (as she then was) held that the objectives of the Act were "equal access to abortion services, enhanced privacy and dignity for women making use of the services and improved climate and security for service providers" (para. 101).

32. The dignity of women requires that they be able to decide for themselves what

communications they wish to receive. Sections 2(1)(a) and (b) of the Act give full range to abortion service providers who are profiting from the activity to counsel and encourage abortion as much as they wish. Protesters, conversely, are under a cone of silence. That dichotomy is not respectful of women's dignity and ability to think for themselves and be informed about important decisions that they are making. Women seeking or considering abortion services have constitutional freedom of thought, belief, opinion and expression, too.

33. It is not only the objective of the legislation as a whole but the objective of the impugned provisions that must be given particular attention in determining whether the objective is pressing and substantial. The objective of the legislation here is to prevent obstacles to access and violations of personal security.

C. Rational Connection

34. The absolute bans on any form of attempted disapproval of abortion and on information relating to abortion services (except for service providers) in sections 2(1)(a) and (b) of the Act are not rationally connected to the objective of access and personal security.

35. With the greatest respect, the Learned Summary Conviction Appeal Judge in *Lewis* made no effort to identify conduct that was captured by sections 2(1)(a) and (b) but that was not rationally connected to the objective. In my submission, none of the conduct described in paragraph 23 above is rationally connected to the legislative objective.

36. In *Multani*, the School Board argued that allowing the kirpan to be worn entailed the risk that it could be used for violent purposes, could lead to a proliferation of weapons at the school, and that its presence could have a negative impact on the school environment (para. 55). These concerns are similar to the rationale relied upon in *Lewis* to justify the infringements. But Madam Justice Charron for the majority in *Multani* said at para 67: "I agree that it is not necessary to wait for harm to be done before acting, but the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified." Given the evidence on the record before the Court, the arguments for an absolute prohibition failed.

37. In the case at bar, one of the clinic employees, Lisa Redekop, testified that from her perspective the Act did not prevent people from kneeling and silently praying or reading the Bible while outside the Clinic. "To use her words, 'They do it every day.' This is not a problem for the Clinic and they do not call the police when this occurs." (Reasons of Howard, P.C.J., A.B. Vol. 11, p. 1927, para. 14). That evidence indicates that sections 2(1)(a) and (b) of the Act, which despite Ms. Redekop's views, prohibit silent prayer, are not rationally connected to the objective of reasonable and secure access.

D. Minimal Impairment

38. Do sections 2(1)(a) and (b) of the Act impair the right of free expression only minimally? To paraphrase McLachlin C.J. in *Sharpe*, if the law is drafted in a way that unnecessarily catches expression or conduct that has little or nothing to do with providing reasonable access and security, then the justification for overriding freedom of expression is absent (para. 95). She continued at para. 96:

> [I]t is not necessary to show that [the Legislature] has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account.

39. In *MacMillan Bloedel v. Simpson*, [1996] 2 S.C.R. 1048, McLachlin J. (as she then was) said at para. 13:

> In a society that prizes both the right to express dissent and the maintenance of private rights, a way to reconcile both interests must be found. One of the ways this can be done is through court orders like the one at issue in this case. The task of the courts is to find a way to protect the legitimate exercise of lawful private rights while preserving maximum scope for the lawful exercise of the right of expression and protest.
>
> (Emphasis added)

40. Sections 2(1)(a) and (b) of the Act are not within the range of least intrusive means of achieving the objective either geographically (in the size of the access zone) or in the scope of expression that is prohibited.

41. In finding that the breadth of the prohibition was within the range of reasonable alternatives, Saunders J. (as she then was) said the evidence establishes that even non-violent, passive expressions of disapproval captured by the Act are contrary to the well-being, privacy and dignity of those using the clinics' services (para. 130). Respectfully, the evidence did not support that conclusion. (See discussion of proportionality below.)

42. Koenigsberg J. held that it could not be the purpose of the Act to prevent anyone from advising any person seeking assistance in an abortion clinic that something unlawful is taking place there (para. 24). That qualification indicates the overbreadth of sections 2(1)(a) and (b).

43. The legislation could be less damaging to freedom of expression in a number of ways. For example, s. 2 of the Act could create defences for peaceful prayer, offers of information, and approaches to initiate discussion so long as it is not clear that the recipient does not want the communication. Alternatively, the definitions of "sidewalk interference" and "protest" could be narrowed to exclude unobjectionable conduct. Another option, one that is evident in American laws, would be to make the access zone smaller so as to preserve the personal space of women using the Clinic while still allowing for the possibility of interpersonal contact with protesters.

44. Certainly harassment, intimidation, besetting, and physical interference are all inappropriate and properly proscribed – by other sections of the Act. There may be particular individuals who should be subjected to differing levels of restraint on an individual basis. But the bottom line is that a balancing of rights and freedoms is necessary and that sections 2(1)(a) and (b) of the Act do not even attempt to balance; they unashamedly trample.

45. In *Hill v. Colorado*, 530 U.S. 703 (2000), a majority of the United States Supreme Court upheld a Colorado statute that made it unlawful for any person within 100 feet of a health care facility's entrance to "knowingly approach" within 8 feet of another person, without that person's consent, in order to pass a leaflet or handbill to, display a sign to, or engage in oral protest, education or counselling with that person. The restrictions on speech were found to be constitutional. The majority noted that the 8-foot zone should not have any adverse impact on the readers' ability to read demonstrators' signs. There was no limit on the number of speakers or the noise level. Importantly, the 8-foot zone allowed the speaker to communicate at a normal

conversational distance and to remain in one place while other individuals pass within 8 feet. The Court expressed concern with the burden on the distribution of handbills but noted that the statute did not prevent a leafletter from standing near the path of oncoming pedestrians and proffering material which pedestrians could accept or decline. The fact that the statutory prohibition was content neutral (unlike the Act here) was a significant factor in preserving its constitutionality. This approach respects the ability of women attending at clinics to make their own decisions about what information they wish to receive and to whom they want to speak.

46. The fact that no other jurisdiction in Canada has seen fit to enact similar legislation indicates that the impugned provisions are not necessary to protect the interests of women seeking abortions: the provisions do not impair freedom of religion and freedom of expression as little as possible. Even the province-wide injunction considered in *Ontario (A.G.) v. Dieleman* (1994), 117 D.L.R. (4th) 449 (Ont.Ct. (Gen.Div.)), made allowance for prayer vigils.

47. Madam Justice Saunders noted that the Act "could be called a legislated injunction" (para. 1). That is a telling observation because concern for the protection of fundamental freedoms has lead to a more nuanced approach to injunctions since *Lewis* and *Dieleman* were decided. In *Provincial Rental Housing Corp. v. Hall* (2005), 41 B.C.L.R. (4th) 291, 2005 BCCA 36, this Court has approved of language in interim injunctions to protect peaceful assembly on public streets and to keep the onus of justifying the injunction and the attendant infringement of fundamental freedoms on the party seeking to impose them (para. 18-20, 58-9, and 61-2).

48. Notably, constitutional protection for consumer leafleting has been reinvigorated by the Supreme Court of Canada's decision in *United Food and Commercial Workers, Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083. In that case, the Court was concerned with the peaceful distribution of leaflets which did not interfere with employees or the delivery of supplies or impede public access.

49. The importance of leafleting as a means of expression is highlighted at some length in para. 28 of *KMart*. The Court drew a distinction between conventional picketing that impedes access to picketed sites and consumer leafleting (para. 38). Leafleting that seeks through informed and rational discourse to persuade members of the public to take a certain course of

action is the very essence of freedom of expression (para. 43). As Cory J. noted: "Although the enterprise which is the subject of the leaflet may experience some loss of revenue, that may very well result from the public being informed and persuaded by the leaflets not to support the enterprise" (at para. 43). He reviewed the American authorities (para. 51-54) before concluding that conventional picketing can and should be distinguished from many forms of leafleting (para. 55). Permissible leafleting is elaborated in more detail at paragraphs 56 and 58 of the Court's reasons. Notably, the conduct that would make leafleting impermissible, such as coercion, intimidation, or impeding access or egress, is conducted that is prohibited by provisions in the *Access to Abortion Services Act* other than the protest and sidewalk interference provisions in issue here. In other words, precious little conduct is left to be prohibited by sections 2(1)(a) and (b) of the Act other than permissible leafleting.

50. In addressing the question of minimal impairment in *KMart*, Cory J. said at para. 65:

> Admittedly, the legislature must be given a broad discretion in its efforts to reach a sensible balance between the interests of the parties involved. However, that balancing must take into account the interests of all parties. In enacting a complete ban on persuasive activity at neutral sites, the legislature might have been concerned with the balance of power between labour and management and the protection of the public in not being unfairly confronted or intimidated by picketing activity. However, the public's interest in the dissemination of accurate information by lawful means has been overlooked. It has been held that the consumer's interest in receiving the information could be one of the reasons for striking down restrictions on freedom of expression.
>
> (Emphasis added)

51. Similarly to the present case, it was argued in *KMart* that the mere presence of union members at the site for the purpose of leafleting is threatening or intimidating for customers. The Court rejected that argument in no uncertain terms:

> The suggestion that today's consumers will be intimidated by the mere sight of a few individuals distributing leaflets at the entrance to a shopping mall is not convincing. The image of an oversensitive consumer cannot be the standard by which to assess the constitutionality of the activity. (para. 73)

Cory J. quoted from the reasons of Bastarache J. in *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877, at para. 101 and 128: "Canadian voters must be presumed to have a certain

degree of maturity and intelligence . . . the government cannot take the most uninformed and naïve voter as the standard by which constitutionality is assessed."

52. Nor should the Court take the most "vulnerable" woman seeking an abortion as the standard by which constitutionality is assessed. The women seeking abortions are the same people who as consumers in the marketplace are entitled to make informed choices and they are voters who are presumed to have a degree of maturity and intelligence. They do not lose those qualities when they are making what may be one of the most difficult choices of their lives. If freedom of thought, belief, opinion and expression is to be more than a platitude, then women considering abortions should be permitted to make up their own minds with as much information as possible.

53. Like the *KMart* case, the evidence here simply does not meet the Crown's burden to demonstrate that a partial ban on expression (such as would remain if sections 2(1)(a) and (b) were struck from the Act) would be less effective in achieving the legislative objective. The legislative restriction here, like that in *KMart*, is the type of blanket prohibition that the Supreme Court of Canada has indicated will contravene the *Charter*. At para. 77 of *KMart*, Cory J. quoted with approval from the reasons of McLachlin J. (as she then was) in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at para. 163: "As this Court has observed before, it will be more difficult to justify a complete ban on a form of expression then a partial ban . . . A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis when the government can show that <u>only</u> a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established." (Emphasis added)

54. In fact, the evidence of Ms. Redekop regarding prayer vigils in the case at bar indicates that a partial ban would be just as effective as a total ban. As a result, the Crown has not met its burden to show that freedom of expression is impaired as little as necessary.

E. Deleterious Effects Outweigh the Benefits

55. With respect, the Learned Summary Conviction Appeal Judge in *Lewis* overstated the harm to women as a result of protest and sidewalk interference. Women who are under stress still have their faculties of communication and reason. They can decide to avert their eyes or refuse to accept a proffered pamphlet. There was evidence before the Court in *Lewis* that in the only survey done to see if there was a relationship between the presence of protesters and depression following an abortion, 31 percent of the women surveyed reported that they were not upset at all by the demonstrators (Evidence of Dr. Major, A.B. Vol. 6, p. 943, ll. 9-11).

56. There is no evidence of anybody being denied access to an abortion clinic because of conduct that falls within the definitions of "protest" and "sidewalk interference." Requiring that full and balanced information be provided to women seeking abortions would be more respectful of women's dignity and autonomy.

57. The evidence in *Lewis* indicated that many women are coerced into having abortions and do not choose freely, partly because they do not have sufficient information (Evidence of Dr. Ney, A.B. Vol. 6, p. 827, ll. 38-43; p. 828, ll. 12-21). One witness ("C.") who had an abortion was not made aware of either pre-abortion or post-abortion counselling (Evidence of L. Lei, A.B. Vol. 3, p. 302, ll. 7-12, p. 303, ll.23-31; Evidence of "C.", A.B. Vol. 3, pp. 372-383).

58. There was evidence before Cronin P.C.J. that protesters engaged in sidewalk counselling seek to inform women about abortion itself and alternatives to abortion, offer emotional and financial support and persuade them not to terminate their pregnancies (Evidence of L. Lei, A.B. Vol. 3, p. 304, ll. 20-26; Evidence of C. Moore, A.B. Vol. 7, p. 1032, ll. 28-29; Evidence of R. Brown, A.B. Vol. 7, p. 1057, ll. 41-43).

59. At the time of the trial in *Lewis*, the evidence was that the number of abortions annually was increasing even prior to the legislation. There is no evidence of the number of abortions or abortion providers since 1996 and whether those numbers are increasing or decreasing. There was evidence at trial in *Lewis* of at least 69 children who were born as a result of their mothers' interaction with a sidewalk counsellor (Evidence of L. Lei, A.B. Vol. 3, p. 304, ll. 20-26;

Evidence of C. Moore, A.B. Vol. 7, p. 1042, ll. 27-47; p. 1043, ll. 3-9; Evidence of R. Brown, A.B. Vol. 7, p. 1057, ll. 41-3). This included a woman who was HIV positive and who learned from speaking with a sidewalk counsellor who was also a nurse that her baby was not necessarily HIV positive (Evidence of C. Moore, A.B. Vol. 7, p. 1031, ll. 25-41).

60. As Dickson J. (as he then was) put it: "It is to state the obvious to say that pregnancy is of fundamental importance to our society. Indeed, its importance makes description difficult.": *Brooks v. Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219 at para. 28. And: "It cannot be disputed that everyone in society benefits from procreation." (para. 29).

61. The deleterious effects of the trampling of fundamental freedoms of both protesters and women using the clinics far outweigh the somewhat tenuous benefits of sections 2(1)(a) and (b) of the Act. The interests of the women using the clinics and making difficult choices, often without adequate information, are more pressing than the interests of the service providers and clinic workers, who should not be deciding for them.

62. In summary, it is the position of the CRFA that sections 2(1)(a) and (b) of the Act are not rationally connected to the objective of reasonable and secure access. The impairment of freedom of expression is not minimal, nor is it proportional. Consequently sections 2(1)(a) and (b) are not reasonable and demonstrably justifiable in a free and democratic society.

PART 4—NATURE OF ORDER SOUGHT

63. For the reasons set out above, the CRFA asks that the appeal be allowed, that sections 2(1)(a) and (b) and the definitions of "protest" and "sidewalk interference" in the Act be declared of no force and effect pursuant to section 52 of the *Constitution Act, 1982*, and that the decision in *R. v. Lewis* (1996), 24 B.C.L.R. (3d) 247, be overturned.

All of which is respectfully submitted this 8th day of September, 2006.

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LIST OF AUTHORITIES

Statutes

Other