Date of Release: October 8, 1996 No. CC960120
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

REGINA

APPELLANT

AND:

MAURICE LEWIS

RESPONDENT

AND:

THE ELIZABETH BAGSHAW SOCIETY, EVERYWOMAN'S HEALTH CENTRE SOCIETY (1988), THE B.C. COALITION OF ABORTION CLINICS, THE B.C. WOMEN'S C.A.R.E. PROGRAM and THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENORS

AND:

THE ARCHDIOCESE OF VANCOUVER RESPECT FOR LIFE OFFICE, THE PRO-LIFE SOCIETY OF BRITISH COLUMBIA, CAMPAIGN LIFE COALITION OF BRITISH COLUMBIA, FEMINISTS FOR LIFE and CANADIAN PHYSICIANS FOR LIFE

INTERVENORS

REASONS FOR JUDGMENT

OF

THE HONOURABLE

MADAM JUSTICE SAUNDERS

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I.T. Benson For Life Office et al

Heard at Vancouver: June 24, 25, 26 & 27 and July 9 & 10, 1996

1 In 1995, the British Columbia Legislature enacted the *Access to Abortion Services Act*, S.B.C. 1995, c.35. The *Act*, in general terms, creates access zones, colloquially called "bubble zones", around the homes and offices of doctors who provide abortion services and permits the establishment by Regulation of access zones around facilities at which abortions are performed and the residences of persons who facilitate the provision of abortion services. Such an access zone was created, by Regulation, around the Everywoman's Health Centre at 2005 East 44th Avenue, Vancouver, British Columbia. Under the *Act* all protest activity within an access zone is prohibited. It could be called a legislated injunction.

2 In September 1995 charges were laid against Maurice Lewis of protesting against abortion and engaging in sidewalk interference within the Everywoman's Health Centre access zone contrary to the *Act*. In January 1996 the charges were dismissed by the Provincial Court of British Columbia, Vancouver, on the basis that the two subsections of the *Act* under which Mr. Lewis was charged, which prohibit protest and sidewalk interference activities, were contrary to s.2 of the *Canadian Charter of Rights and Freedoms*: ***R. v. Lewis*** (1996), 18 B.C.L.R. (3d) 218 (Prov.Ct.).

3 The Crown appeals the trial decision, contending that any infringement by the legislation of s.2 *Charter* freedoms is saved by s.1 of the *Charter*.

4 At the hearing of the appeal the appellant and respondent were joined by intervenors, one set speaking in favour of the appellant's position and the other speaking in favour of the respondent's position. These I shall refer to as they referred to themselves in the hearing, the Clinic Intervenors and the C.A.R.E. Coalition. The Clinic Intervenors, in the terminology used by the parties, are on the pro-choice side of the abortion debate and the C.A.R.E. Coalition are on the pro-life side of the debate.

5 It is acknowledged by all that the impugned provisions of the *Act* infringe freedom of expression. Whether freedom of peaceful assembly, association and conscience and religion are also infringed is in issue. This appeal, then, engages issues of the extent of infringement by the impugned provisions of the *Act* upon freedoms protected by s.2 of the *Charter* and the justification for the legislation when viewed in the context of those infringements.

I. THE STORY

6 Abortion is a subject matter which deeply divides public opinion. Reasonable people disagree on the extent, if any, to which society should make abortion services available to women. With intensity and variety, members of the public maintain different understandings of the creation of life, the rights of women, the scope of individual freedoms and the inter-relationship of individuals within the community.

7 The legal history of abortion in Canada is described by Mr. Justice Adams in ***Ontario (Attorney General) v. Dieleman*** (1994), 117 D.L.R. (4th) 449, 20 O.R. (3d) 229 (Ont.Ct.(Gen.Div.)) at pp.463-489 as part of his extensive analysis of an application by the Ontario government for an injunction restricting protest activity around abortion facilities and the homes and offices of abortion service providers. For this case it is sufficient to start the legal history in 1969. In that year the Parliament of Canada reformed the statute law which prohibited abortion, adding portions to s.251 of the *Criminal Code* to permit a doctor to perform an abortion in an accredited hospital if approved by the therapeutic abortion facility of an accredited hospital. This amendment did not result in consistently available provision of therapeutic abortion across Canada: ***Dieleman*** p.468, citing the *Report of the Committee on the Operation of the Abortion Law, 1977* (the *"Badgley Report"*).

8 In 1988 the Supreme Court of Canada set the provision of abortion services on a new footing with the lighthouse decision, ***R. v. Morgentaler***, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, finding the prohibition on abortion contained in s.251 of the *Criminal Code* to be contrary to s.7 of the *Charter of Rights and Freedoms*. Since that decision abortion has not been illegal in Canada.

a) The *Morgentaler, 1988* Decision

9 In ***Morgentaler, 1988*** the abortion provisions in s.251 of the *Criminal Code* were challenged by three doctors who had established a free-standing abortion clinic (a facility separate from an accredited hospital). They contended that the law unjustifiably infringed a woman's right under s.7 of the *Charter of Rights and Freedoms* to life, liberty and security of the person.

10 On January 28, 1988, the Supreme Court of Canada declared the abortion provisions of the *Criminal Code* unconstitutional as infringing the s.7 rights of women. The decision focused on the law's resulting uneven access to abortion services across Canada, to the detriment of the health of those to whom the medical service was not available in a sufficiently

timely way. The majority decision is expressed in three different opinions. All three majority opinions agreed that s.251 of the *Criminal Code* infringed a woman's right to security of the person and that the process whereby she was deprived of her rights was not in accordance with fundamental justice. While all three majority opinions recognized that the state had an interest in protecting the foetus which would justify some limitation on individual rights to abortion at some point in the pregnancy, they all concluded that the provisions of s.251 of the *Criminal Code* created greater infringement of a woman's right to security of the person than was required to achieve the state objective and that the scheme was not reasonable.

11 Chief Justice Dickson, Mr. Justice Lamer (as he was) concurring, found that the law interfered with a woman's bodily integrity in a physical and emotional sense by requiring her to "carry a foetus to term contrary to her own priorities and aspirations" (p.63) and, thus, was a violation of her security of the person.

12 In his full discussion of the right to security of the person Chief Justice Dickson stated at p.53:

> The law has long recognized that the human body ought to be protected from interference by others. ... "Security of the person", in other words, is not a value alien to our legal landscape. With the advent of the *Charter*, security of the person has been

elevated to the status of a constitutional norm. This is not to say that the various forms of protection accorded to the human body by the common and civil law occupy a similar status. "Security of the person" must be given content in a manner sensitive to its constitutional position.

13 At pp.56-57 Chief Justice Dickson observed:

The case-law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.

... I have no difficulty in concluding that the encyclopedic factual submissions addressed to us by counsel in the present appeal establish beyond any doubt that s.251 of the *Criminal Code* is *prima facie* a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not wish to continue with a pregnancy.

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. ... Forcing a woman, by threat of criminal sanction, to carry a

> foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice.
>
> Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s.251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s.251 creates additional glaring breaches of security of the person. The evidence indicates that s.251 causes a certain amount of delay for women who are successful in meeting its criteria. In the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being.
>
> (emphasis added)

14 Chief Justice Dickson then went on to consider the practical effects of the scheme upon the physical and psychological health of women and, considering that one of the stated purposes of s.251 was to protect the interests of women, concluded at p.76 that the means chosen:

> ... not only unduly subordinates the s.7 rights of pregnant women but may also defeat the value Parliament itself has established as paramount, namely, the life and health of the pregnant woman. As I have noted, counsel for the Crown did contend that one purpose of the procedures required by subs.(4) is to protect the interests of the foetus. State protection of foetal interests may well be deserving of constitutional recognition under s.1. Still, there can be no escape from the

> fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion.

15 Mr. Justice Beetz, Mr. Justice Estey concurring, was of the view that s.251 violated a woman's s.7 right to security of the person by creating an administrative scheme replete with potential delays and difficulties of access to the procedure, which may result in additional risks to the woman. He recognized that the state had an interest in protecting the foetus, which interest increased as the pregnancy advanced. Then, reviewing the effect of the infringement of a woman's s.7 right of security of the person under the scheme which included increased risk of post-operative complications and increased psychological trauma, and the procedures provided for accessing abortion service, he concluded the scheme was contrary to the principles of fundamental justice and thus failed the *Charter* test.

16 Madam Justice Wilson likewise was of the view that the legislation was unconstitutional, although for broader reasons than the other four judges of the majority. She was of the view that s.251 violated both the woman's right to liberty and her right to security of the person. The right to liberty, she found, was infringed in that s.251 denied to a woman the right to make a fundamental personal decision and gave that decision to a

committee. The right to security of the person was infringed by direct interference with her physical person. Madam Justice Wilson further was of the view that the deprivation of the s.7 right infringed a woman's freedom of religion and conscience by enforcement of one conscientiously held view (expressed in the legislation) in preference to another (the woman's). While she agreed that at some stage in the pregnancy the state had an interest in protecting the rights of the foetus, she held that the scheme in s.251 was disproportional to the infringement of the woman's rights, and not in general pursuance of a sufficiently compelling state interest to justify the intervention.

17 The ***Morgentaler, 1988*** decision, while unclear as to the extent to which Parliament may limit access to the abortion procedure:

l. confirmed a woman's *prima facie* right to abortion, restriction of which would violate security of the person and require justification under section 1 of the *Charter*;

2. gave weight to the value of equitableness of access to abortion service;

3. left the law without criminal sanction for participation in abortion, but recognized that Parliament could enact more refined legislation to protect the rights of the foetus; and,

4. opened the way for facilities outside of accredited hospitals to provide this service.

18 Following the ***Morgentaler, 1988*** decision, the Parliament of Canada considered, but did not enact, further legislation criminalizing abortion services in a more limited fashion. The result is that in Canada, today, abortion services are not restricted by prohibition in the *Criminal Code*.

b) Protest Activity Subsequent to *Morgentaler, 1988*

19 The ***Morgentaler, 1988*** decision had two immediate effects in British Columbia: two free-standing abortion clinics were established in Vancouver: the Everywoman's Health Centre and the Elizabeth Bagshaw Clinic; and protest against abortion became louder and more highly visible. The protest was unprecedented both in its substance and style and was focused predominantly on and around these new abortion clinics.

20 While the Elizabeth Bagshaw Clinic attracted considerable protest, sufficient to cause injunction proceedings and enforcement action to be taken, the loudest and most intense protest activity centered on the Everywoman's Health Centre. The Everywoman's Health Centre opened in November 1988. It immediately was assailed by abortion protesters. Starting in November 1988, a protest group identified as "Operation Rescue" organized a series of large scale blockades outside the clinic, often so large that access to the clinic was interrupted. From the early months of protest the doors to the clinic were occasionally wired and door handles were locked together with kryptonite, preventing access. People locked themselves together with kryptonite outside the clinic, and to a cement block in front of the door. Graffiti was placed on walls of the clinic. Protesters carried signs with harsh messages and strong language.

21 On January 21, 1989 the blockades at Everywoman's Health Centre culminated in a massive demonstration in which the great number of protesters effectively prevented the clinic from operating. On that day Everywoman's Health Centre obtained an interim injunction prohibiting persons from blocking access to the clinic. The injunction enjoined persons as follows:

> THIS COURT ORDERS that ... anyone who has knowledge of this Order cease, desist and be restrained from:

(a) watching or besetting or causing to be watched or beset the premises, the employees, agents and patients of the Plaintiff Everywoman's Health Centre Society (1988) ... or impeding, interfering, blocking or obstructing or attempting to impede, interfere, block or obstruct ingress or egress to or from the said premises of the Plaintiffs by any means whatsoever;

(b) disturbing, interrupting or attempting to disturb or interrupt the functioning of the clinic operated by the Plaintiff ...

(c) unlawfully conspiring to injure the Plaintiff Everywoman's Health Centre Society (1988) ... by supporting, encouraging, condoning or engaging in activities intended to have the effect of disturbing, interrupting, restricting or limiting the services of the Plaintiffs ...

(d) wrongfully and without lawful authority inducing, counselling or procuring a breach or breaches of a contract or contracts and attempting to interfere with the performance of a contract or contracts between the Plaintiffs and other persons;

(e) trespassing at the said premises of the Plaintiff ...

(f) intimidating or attempting to intimidate or unlawfully threatening to interfere with the freedom of the Plaintiffs, their employees, agents, patients and suppliers from carrying on their business at the premises of the Plaintiffs;

(g) causing a nuisance within or near the said premises of the Plaintiffs.

The injunction obtained by the Elizabeth Bagshaw Clinic is in similar terms.

22 Notwithstanding the injunction obtained by the Everywoman's Health Centre, large scale protest continued until July 1989. In all there were 26 blockades outside the clinic. Until 1990 there was protest activity on 30% to 40% of the days. There were numerous instances of locks being glued and wired shut, use of hardware and use of locks and chains, all of which made entry to the clinic difficult. Administrators of the clinic asked the police to enforce the injunction, but learned the police considered only the last portion of paragraph (a) and all of paragraph (e) of the injunction to be enforceable without further clarification. During this period a considerable amount of the activity was directed to the facility itself, apparently trying to close it or make it inaccessible to service providers and service seekers. Graffiti placed on walls of the clinic included "UNWANTED CHILDREN MURDERED HERE", "AUSCHWITZ (AGAIN)", and "[NAME OF CLINIC EMPLOYEE] IS A WHORE".

23 The protest activity diminished from approximately 1990 to mid-1992, although it did not vanish completely. During this interval the number of protesters was low, except on the 28th of each month when protesters appeared to commemorate the ***Morgentaler, 1988*** decision. When protesters attended outside the

clinic they carried hand-made signs with messages such as "SAY NO TO ABORTION", "THE ISSUE IS NOT WOMEN'S RIGHTS, IT'S LIFE OR DEATH", "ONLY ONE OF THE PEOPLE THAT ENTER THIS ABORTION WILL COME OUT ALIVE" and "FREEDOM OF CHOICE" with an enlarged picture of a fetal head. The protesters often walked on the sidewalk in front of the clinic, very near to the building entrance, so that a person entering the clinic would need to pass very closely to protesters.

24 In June 1992 picketing of the clinic again became more regular, and continued until passage of the *Act*. Protests from approximately June 1992 to August 1995 regularly occurred three times a week, Monday and Wednesday afternoons and Friday mornings, in addition to the 28th of each month. Protesters on occasion picketed the clinic around the clock. Picketing on Saturday was common. From the perspective of the clinic's staff, protest activity after about June 1992 appeared to focus on the people entering the clinic, whereas initial protest in 1988 had focused on the facility itself.

25 After about June 1992, the following forms of protest were observed regularly, but not continuously: picketing, pamphleting, sidewalk counselling and prayer vigils. In addition some protesters made a record of license plate numbers of vehicles arriving in front of the clinic, some protesters carried

cameras which clinic workers feared captured the image of some of the persons entering the clinic and on occasion protesters stood close to car doors making exit from the car for people wishing to enter the clinic difficult.

26 Signage - The signage worn or carried by protesters from mid-1992 until the *Act*'s passage always expressed disapproval of abortion and was generally in language which was loud and condemnatory. Many of the signs appeared to be manufactured, a difference noted by clinic workers from the earlier pre-1992 period when they appeared to be handmade. The print on the signs was emphatic, often in red. Wording on signs included:

ABORTION HURTS WOMEN

ABORTION KILLS CHILDREN

ABORTION KILLS BABIES

STOP CHILD KILLING NOW

DON'T GIVE YOUR CHILD
TO THIS KILLING CENTER

DON'T GIVE THIS
KILLING CENTER
YOUR BABY

Less condemnatory was the sign seen frequently outside the clinic and worn by Mr. Lewis when he was arrested:

OUR LADY OF
GUADALUPE
PATRON OF THE UNBORN
(image of the Lady of Guadalupe)
PLEASE HELP US
STOP
ABORTION

Signs were usually worn by persons engaged in sidewalk counselling, and often worn by persons participating in prayer vigils or simply general protest against the abortion services provided in the clinic.

27 Sidewalk Counselling - This activity has generally been performed alone or with at most three other persons. When more than one person has protested, the protesters have usually located themselves at each end of the clinic building. Protesters have generally worn signs, with or without an enlarged picture of a foetus, expressing disapproval of abortion or offering help. A person engaged in sidewalk counselling typically has stood or walked slowly on the public sidewalk handing out pamphlets to persons likely to enter the Everywoman's Health Centre. The sidewalk counsellors have attempted to converse with persons likely to enter the clinic. It has been clear early in the conversation, if not immediately evident from the sign worn, that the protester opposes abortion and was seeking to convince the subject(s) that abortion was a wrong or bad choice. While evidence was tendered by protesters that they never persisted if a person said he or she did not wish to engage

in a conversation, evidence was tendered by clinic workers that they witnessed on countless occasions protesters persisting with the communication after the overture had been rejected and following the person to the entrance of the clinic. Sidewalk counselling has usually involved handing out pamphlets. The intensity of the attempted communication has varied, depending on the protester, but the communication has often included the charge that the person who is entering the clinic and thus thought to be seeking an abortion, was a murderer or baby-killer. The learned trial judge described sidewalk counselling in these terms in his decision at pp.223-24:

> The activity consists of protesters standing in the vicinity of the clinic, in a position to speak to a patient about to enter the clinic. If the patient arrives by automobile, the sidewalk counsellor might approach the automobile, stand close to the door, apparently making it difficult for the patient to leave the automobile.
>
> The approach varies: it might be low-key, quiet, gentle, trying to demonstrate a concern for the patient, pointing out to her the alternatives to abortion, such as adoption and the offer of financial assistance. In most cases the patient does not wish to speak to the sidewalk counsellor and she is allowed to pass without any attempt to dissuade her. In other instances, the sidewalk counsellor is more persistent, pursues the patient, admonishes the patient, threatens fire and brimstone.
>
> The protesters, characterize their conduct as being quiet and gentle. The concern being for the mental and physical health of the patient. The staff of the clinic

> characterize the conduct of the sidewalk counsellors as being aggressive, interfering and intimidating to the patient.

28 Prayer Vigils - Prayer vigils have occurred regularly and on the 28th of each month. They have also occurred on other days. Participants in prayer vigils have gathered, carrying signs of protest, lining both sides of the sidewalk near the entrance of the clinic and praying or walking in a circle, close to the building and entrance. The vigil has been directed to abhorrence of abortion and the "rescue" of women from its practice. When participants have lined the sidewalk, one group has had its back to the clinic wall and the other has stood near the curb. The sidewalk is of no more than average width and space and passage has been much reduced by the presence of people engaged in a prayer vigil. It is doubtful that a person could walk down the sidewalk when a prayer vigil is underway without touching a person engaged in the prayer vigil. One video in evidence in the trial, recording a vigil on December 28, 1994, revealed a corridor of protesters which would present a barrier to any person needing to pass through, an intimidating gauntlet to persons requiring passage on the sidewalk. Prayer vigil was described by the trial judge in these terms at p.224:

> This activity may occur several times during the week. It always occurs on Fridays, and on the 28th day of each month, being the anniversary of the Morgentaler decision. A

> special day is the 28th day of December, that being the Feast of the Slaughter of the Innocence.
>
> It varies from a single prayer on a weekday to thirty or forty prayers on the 28th day of each month. As stated, the 28th of December is a special day and the prayer vigil involves a large number of persons. Exhibit 79, a video of the prayer vigil on the 28th of December, 1994, displays a large number of protesters, some with their backs to the clinic, others in a parallel position on the opposite side of the sidewalk, praying, reciting psalms, singing hymns and displaying signs.

It has not been uncommon for a person taking part in a prayer vigil to leave the vigil and engage in sidewalk counselling with a person approaching the clinic. There has been occasion when the sounds of the prayer vigil reached into the interior of the clinic.

29 The Pamphlets - The pamphlets which have been provided to persons entering the clinic are varied. They range from small business cards regarding abortion recovery, to larger information cards concerning pro-life resources throughout the city, to pamphlets which purport to describe abortion. The latter range from relatively factual, to exaggerated and shocking. Many of them contain pictures of foetuses aborted at later stages than occurs in British Columbia, and in particular than occurs at the two free-standing clinics which perform abortions only in the first trimester of a pregnancy. Some contain enlarged pictures

of aborted foetuses, giving a misleading impression of the amount of tissue removed from a woman in an abortion procedure. Some pamphlets declare that psychological after-effects of abortion are common and refer to post-abortion syndrome. Post-abortion syndrome is the name of a hypothesized psychological malady that is not universally accepted by the medical profession; for example, in 1987 former Surgeon-General of the United States of America, C.E. Koop "expressed doubts about the existence of Post Abortion Stress Syndrome": H. Kunins & A. Rosenfield, *Abortion: A Legal and Public Health Perspective* (1991) 12 Annu. Rev. Publ. Health 361 at 376.

30 Activity Towards Clinic Workers - In addition to the activity directed towards apparent clients of the clinic, those working in the clinic have been the subject of protest activity. It has not been uncommon for persons working in the clinic to have abusive comment directed to them. The present clinical administrator testified that comments of an intimidating nature, hostile and angry, were directed towards her. On one occasion a protester shoved the head of a Barbie-style doll in her face and yelled, "Is this what the babies look like after you finish ripping them apart?" Another clinic worker has been told that she will go to hell or rot in hell, that she is a baby-killer and a murderer, and that she is a sinner.

31 In addition to the protest activity by persons attending outside the clinic, the clinic has received threatening messages by telephone. The pro-life advocates point out that the messages might have been made by persons on the pro-choice side of the debate wishing to discredit the pro-life position. This is possible, but nevertheless the result, in combination with the expressed anger of some of the protesters and recent violent incidents in Canada and the United States, is increased fears for personal safety.

32 Although much of the protest activity has been described as peaceful, in my view that is a mischaracterization. Peace connotes harmony. There is, on the evidence tendered at trial, no harmony here between protesters and those entering the clinic. At its most benign the protest activity could be described as non-violent.

33 I have described in some detail the protest activity outside the Everywoman's Health Clinic. Similar sidewalk counselling has continued to occur outside the Elizabeth Bagshaw Clinic notwithstanding the injunction, although, it appears from the record at trial, not with the same intensity as at the Everywoman's Health Centre.

34 In response to the protest activity, the clinic has a high security level. It does not have windows. Entrance is through one door only, a double "persontrap" arrangement with bars on the exterior door. The Elizabeth Bagshaw Clinic, likewise, has a trap-style entrance for security reasons.

35 Apart from protest activity outside the Everywoman's Health Centre on the public sidewalk and street, those entering the clinic face signs condemning abortion which are placed on private property known as the Gianna House, located immediately across the lane from the clinic. Gianna House serves as a gathering place for protesters intending to protest outside the clinic, and is a site to which persons desiring counselling may be referred. This property and signage, even without the protesters on the public street, reminds those entering the clinic of the strong pro-life lobby.

c) The *Access to Abortion Services Act*

36 The *Access to Abortion Services Act* was passed by the British Columbia Legislature in 1995. In its preamble it invokes the objective of access to health care and the qualities of dignity and privacy in these terms:

> WHEREAS all people in British Columbia are entitled to access to health care, including abortion services;
>
> AND WHEREAS all people who use the British Columbia health care system, and who provide services for it, should be treated with courtesy and with respect for their dignity and privacy;

37 Section 5 of the *Act* permits the Lieutenant Governor in Council to establish an access zone for a facility at which abortion services are provided, not exceeding 50 metres from the boundaries of the parcel on which the facility is located. An access zone may not include private property outside of the parcel on which the facility is located. Access zones under this section may be of different dimensions: they are tailor-made for the facility and circumstances. Section 6 creates access zones that extend 160 metres from the boundaries of the parcel on which the residence of a doctor who provides abortion services is located. Section 6 also permits the Lieutenant Governor in Council to establish an access zone around the home of a non-

doctor abortion service provider. Section 7 creates an access zone that extends 10 metres (expandable to 20 metres by the Lieutenant Governor in Council) from the boundaries of the parcel on which the office of a doctor who provides abortion services is located.

38 Section 2(1) spells out the activity prohibited in an access zone. It provides:

> 2.(1) While in an access zone, a person must not do any of the following:
>
> (a) engage in sidewalk interference;
>
> (b) protest;
>
> (c) beset;
>
> (d) physically interfere with or attempt to interfere with a service provider, a doctor who provides abortion services or a patient;
>
> (e) intimidate or attempt to intimidate a service provider, a doctor who provides abortion services or a patient.

39 Sidewalk interference, the prohibited activity in s.2(1)(a), is defined in s.1:

> "sidewalk interference" means
>
> (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.

40 Protest, the prohibited activity in s.2(1)(b), is defined in s.1:

"protest" includes 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;

41 Sections 3 and 4 prohibit other activity in an access zone:

3. A person must not photograph, film, videotape, sketch or in any other way graphically record a doctor who provides abortion services, service provider, or patient while the doctor, service provider, or patient is in an access zone, for the purpose of dissuading that person from providing, facilitating the provision of, or using abortion services.

4.(1) A person must not do any of the following for the purpose of dissuading another person from providing or facilitating the provision of abortion services:

> (a) repeatedly approach, accompany or follow the other person, or a person known to the other person;
>
> (b) beset;
>
> (c) engage in threatening conduct directed at the other person or a person known to the other person.
>
> (2) A person must not repeatedly communicate by telephone, facsimile or electronic means with another person without their consent for the purpose of dissuading a service provider or doctor who provides abortion services from beginning or continuing to provide, or to facilitate the provision of, abortion services.

42 Notice of the location of an access zone is a condition for conviction under s.8. Section 11 provides that a constable may arrest, without a warrant, a person for commission of an offence under the *Act* and s.14 makes it an offence to contravene sections 2(1), 3 or 4 of the *Act*.

d) The Legislative History

43 Evidence of the legislative history was given by Dr. Hudson, medical consultant to the Ministry of Health since 1990, and the legislative debates are available to elucidate the stated purpose of the legislation. The present government has supported the concept of available abortion services in British Columbia

and, as reflected in the *Act*, pursued pro-choice policies. Dr. Hudson recounted the announcement of the Minister of Health in 1992 that funding would be provided for the two free-standing abortion clinics in British Columbia, and the creation in 1992, by the Minister, of a Task Force to review the issues which had arisen around access to contraceptive, reproductive health care and abortion services.

44 The Task Force, formed of persons open-minded to the provision of contraception and abortion services, held regional hearings across the province. They assembled and reviewed information submitted concerning the provision of contraceptive, reproductive and abortion services, and presented a report to the Minister in August 1994. As part of the report the Task Force identified areas of British Columbia in which the number of persons providing abortion services had decreased significantly and areas in which there was no local facility which would provide abortion services. The Task Force reviewed barriers, identified by presenters, to obtaining free access to abortion services, and reviewed the experience of access to abortion services in other jurisdictions. As in the ***Morgentaler, 1988*** case, it was apparent that for some women in British Columbia, timely access to abortion was illusory because of service limitations associated with the geography of the province and the expense of travel.

45 Following receipt of the Task Force's report, the Minister of Health instructed his staff to develop a series of policy and program options.

46 Early in the morning of November 4, 1994, Dr. Romalis was shot in his home in Vancouver, British Columbia. His wound was massive, his life nearly ended. Dr. Romalis had provided abortion services at a clinic and it was widely considered that he was shot by a person opposed to abortion. This prevalent view that Dr. Romalis was probably shot by a person opposed to abortion was recognized by the trial judge. The shooting of Dr. Romalis brought home to British Columbia's abortion providers the fears of violence raised by earlier well-publicized shootings in the United States of a doctor and two abortion clinic receptionists, and the bombing of a clinic in Toronto.

47 Shortly after the shooting of Dr. Romalis, the Cabinet requested legislative and legal options to enhance the security of the health care providers who provide abortion services. A tri-ministry legislative group representing the Ministries of Health, Women's Equality, and the Attorney General was formed to consider appropriate legislative and legal options. About this time, the Attorney General requested the Criminal Harassment Unit, a police investigative unit, to review issues surrounding harassment of abortion providers and patients. The report of the

Criminal Harassment Unit was provided to the Attorney General in March 1995. It apparently contains information of threats made to abortion service providers in British Columbia. Although it forms part of the legislative history and was referred to in the legislative debates, it was not admitted into evidence at trial on the basis that hearsay evidence of threats should not be received by the court.

48 The legislative group received information from across Canada, including information concerning the injunction application which led to the ***Dieleman*** decision, and an incident in Halifax, evidence of which also was not admitted at trial. The group received copies of the Canadian Medical Association Journals in March 1995 in which the reaction of the medical community to the shooting of Dr. Romalis was expressed. These documents, too, were not admitted into evidence at trial. The options identified by the legislative group included seeking broad injunctions, enforcement of existing injunctions, and legislation.

49 The government proceeded by legislation and introduced the *Act* on June 19, 1995.

50 Under the reasoning of ***R. v. Morgentaler***, [1993] 3 S.C.R. 463, 107 D.L.R. (4th) 537, evidence of the legislative

history is admissible in determining the constitutional validity of a statute, as it aids in determining the background and purpose of the statute.

51 The purpose of the *Act* was stated by the Minister of Health in the legislative debates (British Columbia, *Debates of the Legislative Assembly*, Vol.21, No.7 (19 June 1995)) at p.15668:

> This bill ensures that women have access to reproductive health services in an atmosphere of privacy and dignity. It allows for the creation of access zones around facilities providing abortion, where people using or providing abortion services may not be harassed, neither physically nor verbally, on the issue of abortion. Access zones are also established around the homes and offices of physicians providing abortion services, and may also be established around homes of other service providers. Abortion is a legal medical service, and access to medical services is one of the foundations of medicare. We do not tolerate disruption of access in any sphere of the health care system, and we will not tolerate it here.
>
> The bill defines the parameters of access zones and defines behaviours that may not be carried out within those zones. I believe that by creating distance in volatile situations, a great deal of tension will be defused. Our intention is to protect access to this legal medical service and ensure that health care providers work and live in a respectful atmosphere.

52 At second reading explanation for the *Act* was fuller. The Minister expressed his intention in these words (British Columbia, *Debates of the Legislative Assembly*, Vol.21, No.11 (22 June 1995)) at pp.15977-78:

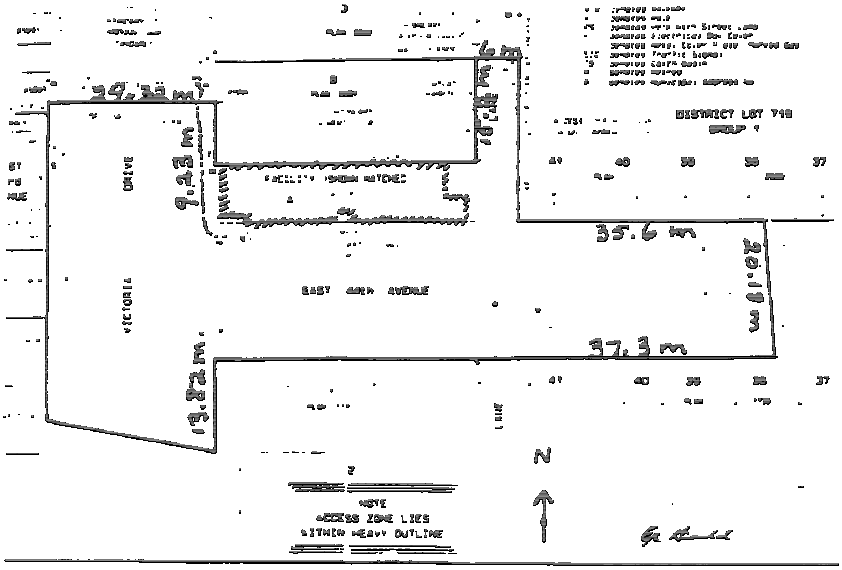
> This legislation will ensure that abortion services in British Columbia are provided in an atmosphere of security, respect and privacy. That is an atmosphere that for too long has been lacking as women go to seek legal medical services and as doctors provide them. Instead, the climate has in many cases been one of long-term conflict, which has interfered with access to this legal medical service. Anti-abortion protests are occurring outside providers' homes. Doctors are being threatened, their children are being told their parents are murderers, and women seeking abortion services are separated from their escorts, verbally harassed and chased to their cars.
>
> This act is intended to defuse the tension by putting some distance between the protesters and the people seeking and providing abortion services. The legislation will create access zones around facilities providing abortion services. Access zones will be established around all doctors' offices and homes, and may be set up around the homes of other service providers.
>
> Access to health services is one of the foundations of the Canadian medicare system, and it is my responsibility as a minister to maintain access to services. In the case of access to abortion services, we must ensure that access to choice is a practical reality, not just a legal right.
>
> ... Physicians who provide abortion services are practising their profession legally. They are providing a legal service, doing so in an ethical manner and serving the women of

> this province. They should not have to do so in an atmosphere of intimidation or threat. The issue that this government is addressing is one of access to medical service and of the right of doctors and their patients to live and work in an atmosphere free from harassment.
>
> One of the tests of a free society is how it balances the wish of some to protest or oppose or express dissent with the right of others to follow their own course, to make their own choices and ultimately to live their lives free of harassment. This is a fair and democratic society with rights and freedoms and corresponding rights and responsibilities. The right of freedom of speech and expression carries with it some responsibility for what is said and how it is expressed.

e) The Everywoman's Health Centre Access Zone

53 The first access zone around a facility was created for the Everywoman's Health Centre. As shown in Figure 1, it is irregular in shape:

Figure 1



It encompasses a portion of Victoria Drive (the route chosen by about 80% of those travelling to the clinic), East 44th Avenue across from the clinic, East 44th Avenue about 3½ lots east of the clinic, and the lane immediately adjacent to the clinic. The depth of the access zone varies from about 20 metres (across the street), to 15 metres (down the lane), 9 metres (north on Victoria Drive), 33 metres (south on Victoria Drive), to 35 metres (east on 44th Avenue). The point furthest from the clinic (on the south side of the east corner of the zone) is about 45 metres from the clinic. The vast majority of the zone is within 25 metres of the clinic boundary.

f)The Charge against Mr. Lewis

54 Mr. Lewis is a person known to workers of the Everywoman's Health Centre as a pro-life advocate who has often protested abortion by engaging in sidewalk counselling and general protest activities outside the clinic. On September 22, 1995 Mr. Lewis intentionally proceeded to walk within the access area wearing a sandwich board bearing an image centred on the board. Above the image were the words:

OUR LADY OF
GUADALUPE
PATRON OF THE UNBORN

Below the image were the words:

PLEASE HELP US
STOP
ABORTION

The words "STOP ABORTION" were in large print.

55 Mr. Lewis was arrested for breaching ss.2(1)(a) and 2(1)(b) of the *Act*, the sections prohibiting sidewalk interference and protest within an access zone.

56 The facts of Mr. Lewis' incursion into the zone were admitted. All that was in issue at the trial was the constitutionality of subsections 2(1)(a) and 2(1)(b) of the *Act*.

g) The Trial Decision

57 At trial s.2(1)(a) and s.2(1)(b) of the *Act* were declared to be unconstitutional as infringing freedom of expression, freedom of association and freedom of conscience and religion, and were not saved by s.1 of the *Charter*. After reviewing the evidence, the trial judge held that the objective of the *Act* is pressing and substantial and that the means are rationally connected to the objective, although not proportional, saying at pp.227-28:

These definitions [of sidewalk interference and protest in s.1 of the *Act*] do not allow any exception. The result is to suppress all protest activity within the access zone. Any form of peaceful protest is an offence.

The Crown submits that sidewalk counselling is not in keeping with the function of the clinic; that sidewalk counselling is an affront to the dignity of the patient; that it is an invasion of the privacy of the patient; that the patient has the right not to listen, that the patient is a captive audience; and that she is unable to avoid the sidewalk counsellor; that the access zone is justified to protect those interests.

If the Act stopped there, the Court would agree that it is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

On the evidence, the objective of the Act is far less pressing and substantial in 1996 than it was in 1990. The Injunction has, with some isolated exceptions, successfully eliminated the more aggressive forms of protests outside the clinic.

The Act does not allow any exception. It eliminates all peaceful protests and any form of communication or attempted communication regarding abortion within the access zone. It is not an answer to the violation of the Section 2 rights of the protesters to say that they're free to protest elsewhere.

The Crown has not proven on the balance of probability that the impugned Section of the Act meets the proportionality test.

II. THE LAW AND ITS APPLICATION TO THE CASE

a) Section 2 of the *Charter*

i) Freedom of Conscience and Religion - Section 2(a) of the *Charter*

58 At trial, the court held that the *Act* infringed the s.2(a) freedom of conscience and religion by preventing the expression, within an access zone, of deeply held views on abortion. The Crown appeals this conclusion, contending that Mr. Lewis' freedom to express views that he sincerely holds by conviction and religion, does not encompass the freedom to express those views within an access zone, and it challenges the sincerity of Mr. Lewis' professed need, created by conscience and religion, to communicate those views within an access zone.

59 Section 2(a) most often has been discussed in the context of freedom of religion. In ***R. v. Big M Drug Mart Ltd.***, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, Mr. Justice Dickson (as he was) confirmed that freedom of religion encompasses more than the holding of religious beliefs, in these terms at p.336:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the

> right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice **or by teaching and dissemination**. But the concept means more than that.
>
> (emphasis added)

Thus, freedom of conduct or action to manifest religious beliefs is encompassed within freedom of religion.

60 The Crown says that Mr. Lewis' religious beliefs do not require him to engage in abortion protest activity within the limited area of the Everywoman's Health Centre access zone. Mr. Justice Adams, in ***Dieleman***, considered that the court may be required to enquire generally into the question of whether the individual's religion requires or encourages the protest activity. Crown adopts this position and asks the court to consider that the religion of Mr. Lewis does not require this protest, as evidenced by the relatively few people of his religion who engage in the protest activity.

61 The recent decision of ***Ross v. New Brunswick School District No. 15*** (1996), 133 D.L.R. (4th) 1 (S.C.C.), was decided after ***Dieleman***. In it Mr. Justice La Forest, writing for the court, said at p.28:

> ... In *R. v. Jones* (1986), 31 D.L.R. (4th) 569, 28 C.C.C. (3d) 513, [1986] 2 S.C.R. 284, I stated that, assuming the sincerity of an asserted religious belief, it was not open to the court to question its validity. It was sufficient to trigger constitutional scrutiny if the effect of the impugned act or provision interfered with an individual's religious activities or convictions.

On this reasoning, I consider that on the assumption Mr. Lewis is sincere, this court should not enquire into the validity of his conscientiously held view.

62 Mr. Justice La Forest, however, observed that the freedom of religion and conscience is not unlimited, at p.29:

> ... Indeed, this court has affirmed that freedom of religion ensures that every individual must be free to hold and to manifest without state interference those beliefs and opinions dictated by one's conscience. This freedom is not unlimited, however, and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others. Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.

Generally, the issue of competing rights referred to by Mr. Justice La Forest in this passage must be decided by a s.1 analysis although the thoroughness of the s.1 analysis will depend on the

context of the case: ***Ross***, p.29, c.f. ***R. v. Reed*** (1994), 24 C.R.R. (2d) 163, 91 C.C.C. (3d) 481 (B.C.C.A.).

63 In this case ss.2(1)(a) and (b) of the *Access to Abortion Services Act* would prohibit Mr. Lewis from expressing within an access zone his sincerely held views, based on **his** understanding of morality and **his** religious faith, that abortion is not justifiable. It would prevent his participation in prayer vigils with others outside the clinic during which disapproval of abortion is expressed and it would prevent his attendance in the access zone with the sandwich board he wore at the time of arrest which referred to "OUR LADY OF GUADALUPE".

64 The trial judge heard the testimony of Mr. Lewis. Relying upon his assessment that Mr. Lewis was sincere, and upon my own review of the evidence, I conclude that Mr. Lewis was in the access zone with his sandwich board because of his conscience and his religious beliefs. While his religion does not compel the vast majority of his religion to do the same, it is enough that he sincerely held the views and believed his actions in protesting within the access zone on September 22, 1995 to be in furtherance of God's will.

65 In these circumstances the impugned provisions of the *Act* infringe Mr. Lewis' freedom of conscience and religion by limiting

his ability to manifest his conscientiously held, religiously-based views at the place he considers most effective for their communication. It is therefore necessary to consider the impact of the impugned provisions, ss.2(1)(a) and (b) of the *Act,* upon Mr. Lewis' freedom of conscience and religion, in comparison to the objective of those provisions of the *Act* and the good to which they are directed; it is necessary to consider s.1 of the *Charter*.

66 In the course of submissions on freedom of conscience and religion, counsel for the C.A.R.E. Coalition advanced the position that the impugned provisions of the *Act* infringed not only Mr. Lewis' freedom but also the freedom of conscience and religion of those entering the clinic, who were deprived by the *Act* of the opportunity to communicate with protesters immediately outside the clinic.

67 In my view this argument is essentially a submission on freedom of expression. It addresses one of the values given significant weight by the courts) the value of the marketplace of ideas. In the context of this case one cannot say that those entering the clinic have been deprived of their freedom to hold views, express views or manifest their conscientiously and religiously held views.

68 I find that the infringement of freedom of conscience and religion created by ss.2(1)(a) and (b) of the *Access to Abortion Services Act* is upon the freedom of Mr. Lewis and other protesters.

ii) Freedom of Expression - Section 2(b) of the *Charter*

69 Crown concedes, and it is clear, that the *Act* infringes the freedom of expression of Mr. Lewis and other protesters by prohibiting all expressions of disapproval of the provision of abortion services and preventing sidewalk counselling, within an access zone.

70 The C.A.R.E. Coalition submitted that the impugned provisions also infringe the freedom of expression of people entering the clinic by limiting their ability to receive communications within an access zone. The value of communication to the receiver is, in my view, adequately recognized within the discussion of the s.1 justification for infringing the protesters' freedom of expression. A separate analysis is not required.

71 The central issue is whether the infringement of freedom of expression reflected in s.2(1)(a) and s.2(1)(b) of the *Act* is reasonably justified in a free and democratic society, in the circumstances of this case.

iii) Freedom of Assembly - Section 2(c) of the *Charter*

72 Counsel for Mr. Lewis and the C.A.R.E. Coalition contend that the *Act* violates freedom of assembly. This issue was not raised at the trial, and is not listed on the *Constitutional Questions Act* notice.

73 In any case, freedom of assembly is a form of freedom of expression, addressing itself to larger forms of expression and the concept of strength in numbers. In my view the answer under s.1 of the *Charter* to the freedom of expression issue is also an answer to any issue of freedom of assembly; it is not necessary to deal with freedom of assembly in a separate discussion.

iv) Freedom of Association - Section 2(d) of the *Charter*

74 Although the Crown has conceded that the *Act* infringes freedom of association, the Clinic Intervenors contend that the *Act* does not limit or prevent association.

75 Two types of association are arguably infringed by the *Act*: association amongst protesters in the access zone, and association of protesters with those seeking to enter the clinic.

76 Although it was argued that the *Act* limits association amongst protesters and between protesters and those entering the clinic, its essential character is to enjoin protesters, individually and in groups, from expressing disapproval on abortion issues within the access zone. Any arguable limitation on freedom of association is secondary to the limitation of freedom of expression.

77 The constitutional issue is, foremost, an issue of freedom of expression.

b) Section 1 of the *Charter*

i) The Test

78 In ***R.J.R. MacDonald Inc. v. Attorney General of Canada***, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, Mr. Justice La Forest takes us back to the language of s.1 of the *Charter*. At p.270 he states:

> The appropriate "test" to be applied in a s.1 analysis is that found in s.1 itself.

79 The question for this court is whether the infringement of the s.2 rights by the impugned provisions of the *Access to*

Abortion Services Act is a reasonable limit which can be demonstrably justified in a free and democratic society. The seminal decision is ***R. v. Oakes***, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, in which s.1 was described as engaging essentially two enquiries: firstly, whether the objective served by the impugned measures is sufficiently important to warrant overriding the *Charter* freedom; and, secondly, whether the measures are reasonable and demonstrably justified. The first enquiry asks whether the objective served relates to pressing and substantial concerns. The second enquiry asks whether the measures are proportional, that is, whether they are fair and reasonably connected to their objective, whether they impair the freedom as little as possible and whether the deleterious effects of the measure are proportional to the salutary effect of the law. Further, the onus is upon the Crown to prove the s.1 justification on a balance of probabilities: ***Oakes***, p.137.

80 The principles described in ***Oakes*** were applied in the ***R.J.R. MacDonald Inc.*** case by Madam Justice McLachlin, with this additional comment at pp.328-29:

> [6] This said, there is merit in reminding ourselves of the words chosen by those who framed and agreed upon s.l of the *Charter*. First, to be saved under s.1 the party defending the law (here the Attorney General of Canada) must show that the law which violates the right or freedom guaranteed by the *Charter* is "reasonable". In other words,

the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.

[7] Second, to meet its burden under s.l of the *Charter*, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

[8] The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, **the courts must nevertheless insist** that before the state can override constitutional rights, **there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement**. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

(emphasis added)

81 During submissions counsel for the respondent and the C.A.R.E. Coalition contended that the Crown must prove that harm had occurred to the women entering the Everywoman's Health Clinic or to the service providers as a result of protest activity in the access zone which is now prohibited, and that the Crown had not done so. In my view this is an unnecessarily negative approach to the s.1 enquiry. I adopt the approach of Madam Justice McLachlin above: "there [must] be a reasoned demonstration of the **good** which the law may achieve in relation to the seriousness of the infringement". Of course, the good to be achieved may be the elimination of harm or avoidance of harm.

82 The question of the scope of the Crown's burden of proof is particularly germane to the outcome of this case. Because of the Crown's privacy concerns on behalf of those women using the services of Everywoman's Health Centre, the Crown did not call women who had used the clinic's services to testify that protest activity at the clinic caused them anxiety, stress or anger, in the short or long term, or that their physical, emotional or psychological well-being was deleteriously affected by the experience of entering the clinic while protest activity or sidewalk counselling was occurring near the entrance, with the exception of one former employee of the clinic who attended for an

abortion. That woman is said by the respondent to be unrepresentative of the experience or response of the clinic's clients. One woman who frequently attended an office in the same building occupied by the Elizabeth Bagshaw Clinic testified that the protest activity outside the building caused her stress, even though she was not attending the clinic. She described the negative experience of being approached by a sidewalk counsellor mistaking her for a client of the clinic, and being pressed with pamphlets and urged to converse. The only other evidence of the effect of the protest activity upon persons entering an abortion clinic was in the form of the observations of clinic workers or volunteers of the Everywoman's Health Centre as to the responses to the protest activity of persons entering the clinic. The trial court curtailed most evidence of statements made by clients to these workers by ruling it inadmissible hearsay.

83 Likewise because of the Crown's security concerns on behalf of those providing services, it did not call abortion service providers to testify as to threats made or security concerns they held. The first hand evidence of security concerns of service providers or threats was limited to tapes of threats made by telephone; one instance caught by video film of Mr. Watson, now convicted of assault, engaging in inappropriate activity outside the clinic; and expressions of concern about personal

security made by the employees of the clinic who testified. This latter evidence was said by the respondent to be self-serving.

84 Evidence was adduced by the Crown that the pool of service providers was shrinking and aging. This shrinkage is attributed, at least in part, to the climate of fear which has grown over the last few years. Evidence sought to be tendered by the Crown through a doctor employed by the Ministry of Health, as to statements made by persons who had received threats or were fearful for their personal security, was held to be inadmissible hearsay. Also held to be inadmissible hearsay was the written report of the Criminal Harassment Unit to the Attorney General on security issues concerning provision of abortion services, received by the government before the *Act* was introduced in the legislature.

85 Since direct evidence on the effect of the protest on women seeking to use the clinic and the effect of the protest upon abortion service providers was next to impossible to obtain without serious intrusion into privacy and personal security interests of possible witnesses, and since much hearsay evidence was ruled inadmissible, the Crown has faced a difficult task in meeting its burden of proof. The admonition of the Supreme Court of Canada in ***R.J.R. MacDonald***, that legislation need not meet the standard of scientific proof, takes on additional force in these circumstances.

86 How much deference should be given to the legislature, particularly where issues of proof are difficult for the very reasons the legislature professed to enact the legislation: the protection of vulnerable persons from violation of their privacy and security of their person? Madam Justice McLachlin addressed the issue of deference in ***R.J.R. MacDonald*** at pp.331-32:

> ... It is established that the deference accorded to Parliament or the legislatures may vary with the social context in which the limitation on rights is imposed. For example, it has been suggested that greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state: *Irwin Toy, supra*, at pp. 993-94; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 at p.521. However, such distinctions may not always be easy to apply. ... I accept that the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament's choice. The difficulty of devising legislative solutions to social problems which may be only incompletely understood may also affect the degree of deference that the courts accord to Parliament or the Legislature.
>
> As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially,

whether Parliament's choice falls within the limiting framework of the Constitution.

ii) Legislative Objective

87 In order to withstand *Charter* scrutiny where an *Act* violates a freedom under s.2, the objective of the impugned measures must be of sufficient importance or, to put it another way, it must be sufficiently pressing and substantial so as to justify the violation.

88 The question is asked: is it the objective of the *Act* which must be pressing and substantial, or the objective of the impugned subsections? For example, in assessing the objective of a provision of the *Criminal Code*, the court reviews the objective of the section itself, not the general objective of the *Code*.

89 In this case the *Act* is directed to a single issue, access to abortion services. Three geographic areas are identified as potentially requiring protection from protest activity: the area around abortion service facilities; the area around offices of abortion service providers; and the area around the homes of abortion service providers. In this case, as the statute is not one of broad application, the objective measured must be the objective of the *Act* as a whole and the provisions relating to abortion service facilities in particular. I consider that it is not useful to look only at the objective of the two impugned subsections, for their objective is inextricable from the objective

of the *Act*. The two subsections are more usefully considered under the second question: are they are rationally connected to the objective.

90 The objective of the *Access to Abortion Services Act*, as stated in its name, in its preamble, and in the debates in the legislature, is to facilitate access to abortion services. This *Act* has been framed by the government as a response to the issue of equitable access to health services, specifically abortion services. The respondent and C.A.R.E. Coalition say that the government's objective is to increase access to abortion and point to the pro-choice stance of the government. They say the pro-choice position of the government undermines the announced intention of the legislation and clouds the legitimacy of the *Act*.

91 It is clear that the government promulgating the *Act* openly holds a pro-choice policy stance. It is equally clear that the *Act* is not content neutral in its infringement of freedom of expression. However, those facts do not fatally taint the legislation as they might do in the United States of America, which does not have the equivalent of s.1 of the *Charter* to allow a balancing of rights. While the policy position of the government is a factor to consider in assessing the true objective of the *Act* and in determining whether that objective is of sufficient

importance to warrant the intrusion on s.2 freedoms, it does not determine that issue.

92 Equitability and facilitation of access to health services is a valid legislative objective. The ***Morgentaler, 1988*** decision was decided, in part, on the inequitable application of the impugned provision, then s.251(4) of the *Criminal Code*. Funding for the provincial health care plan under the *Canada Health Act*, R.S.C. 1985, c.C-6, requires provision of health care to be universal and accessible: ***B.C. Civil Liberties Assn. v. British Columbia (Attorney General)*** (1988), 49 D.L.R. (4th) 493, [1988] 4 W.W.R. 100, 24 B.C.L.R. (2d) 189 (S.C.). As abortion has been accepted by the court in ***Morgentaler, 1988*** as a medical service, it follows that the government has an obligation to provide generally equal access to this controversial service.

93 In pursuance of its obligation to provide generally equal health care, the government established the Task Force to enquire into contraceptive, reproductive health care and abortion service in the province.

94 The enquiry of the Task Force disclosed a diminishing number of service providers and limitation on access to this medical service. I accept the rationale for creating the Task Force, and consider that its report was properly considered by the

government when it planned its response to the identified shortcomings of the medical system.

95 In addition to the report of the Task Force which identified the access issues, the government had ample evidence of the continuing protests outside the two free-standing clinics in the province as well as anecdotal evidence of the distressing effect upon women of encounters with protesters. Although the respondent contests the conclusion that the protest activity causes deleterious effects on women attending the clinic and persons working in the clinic, the evidence is sufficient to identify a concern for those persons' well-being, in addition to concerns for their privacy and dignity.

96 The recent shooting of Dr. Romalis, the well-publicized shootings in the United States of persons associated with the provision of abortion services, and the threats made to those working in abortion services in the province, including some made to personnel employed by the Everywoman's Health Centre, combined to create a climate of fear about the provision of abortion services. This, too, was a proper consideration. The government's measured response to this fear focused on its duty to ensure that such a climate does not interfere with access to the medical services which the government is required to provide.

97 The legislature reasonably identified three barriers to access to abortion services: concern that the pool of service providers will further shrink so that many women in British Columbia may not be able, practically, to access the service; concern that the protest activity impedes access to the clinic by creating a climate of harassment and fear; and concern that the protest activity causes distress and resulting harm to the service users.

98 Further, in my view, the legislature reasonably identified substantial issues concerning the invasion of privacy of the women seeking to avail themselves of the health care provided at the clinic. Evidence of protesters photographing persons at the entrance to the clinic and recording license plate numbers of vehicles parking in the passenger zone in front of the clinic door, illustrates the legitimate and serious privacy concerns women may have upon entering the clinic.

99 Privacy concerns on behalf of those entering the clinic are shown by the evidence to be firmly rooted in the common behaviour of protesters. One witness called on behalf of Mr. Lewis agreed, for example, that sidewalk counselling would "hopefully be upsetting" to a woman entering the clinic for abortion services. Another agreed that sometimes she has made women seeking entrance to the clinic angry. Witnesses who work or volunteer at the clinic

testified that they have seen women hurry past the protesters, turn away from them, refuse discussion, or become tremulous, tearful and angry. The protesters have spoken to those entering the clinic knowing that they are likely entering the clinic for a medical procedure involving personal trauma and high anxiety, and likely wishing anonymity. That such women may be deterred by the presence of protesters is apparent from evidence given by clinic workers of persons with appointments that have cancelled appointments on days when protesters are present and re-set them to days when they were not, and evidence that women have called seeking an escort to support them entering the clinic.

100 It is no answer to say, as was said in court, that by selecting this clinic a woman accepts a loss of privacy because everyone knows the nature of the premises. It is the protesters who approach the women, drawing attention to them when they enter the clinic. Mr. Justice Adams, in ***Dieleman***, pp.678-688, discusses the invasive effect of protest activity upon the privacy of women seeking to avail themselves of abortion services, and the accompanying deterioration in dignity. While a tort of invasion of privacy may not yet be recognized, the value of privacy and the benefit of good manners and respect for others is well recognized by the many learned authors he cites.

101 I have no doubt that the objective of equal access to abortion services, enhanced privacy and dignity for women making use of the services and improved climate and security for service providers is a sufficiently important objective to pass the first "***Oakes***" test.

102 I conclude that the objective of the *Act* is both pressing and substantial.

iii) Rational Connection

103 The second question on a s.1 *Charter* analysis is whether there is a nexus between the legislative objective and the legislative scheme; that is, whether there is a rational connection between the objective of facilitating access to abortion services in an atmosphere of security, respect and privacy and the establishment of this "no-protest" area.

104 Two subsections are impugned: the prohibition against sidewalk interference and the prohibition against protest, within the access zone.

105 On the evidence provided by clinic workers, many women entering the clinic are distressed by the protest activity. They are distressed by strangers delivering uninvited and disturbing

messages within disturbing proximity. The messages delivered run the gamut from gentle to brutal. By the description of those employed at the clinic or who assist as volunteers, the messages include allegations of murder and immorality. As the Supreme Court of Canada has noted, the word "murder" carries with it the stigma of the worst crime: ***R. v. Martineau***, [1990] 2 S.C.R. 633, 6 W.W.R. 97. The leaflets handed out contain some factual material, some opinion, and some exaggeration, particularly when considered in the context of services provided at the clinic. For example, some pictures are enlarged, creating or exaggerating shock value. Some pictures are of foetuses aborted in the third trimester and are unrepresentative of procedures performed at the clinic. Such material and pictures can only be presented to shock. As candidly admitted by Mr. Lewis through his counsel, his protest activity is designed to engage the conscience of women entering the clinic in an effort to change the decision to have an abortion and with the expectation of creating guilt if the abortion is performed.

106 The leaflets filed in evidence, pictures of signs and placards, and reported oral communication by protesters, all establish an intense negative message that is bound to distress many women seeking to avail themselves of the clinic's services. The use of shock, the creation of distress and the triggering of conscience are not inherently of negative worth and are not necessarily to be discouraged. They are, in fact, often the very

tools of conversation. However, the uninvited use of such tools on an audience that effectively has no choice, no realistic option to ignore the message, and no means of avoiding the message except to shun the medical service sought, is to be discouraged.

107 These unsolicited and unwanted encounters immediately outside the clinic between women using the clinic and the pro-life protesters, when in most cases the woman is entering the clinic for an anxious medical service, is contrary to the dignity of the woman. Further, it is likely to cause, at the lesser end, embarrassment and anger and, at the greater end, psychological pressure, physical symptoms of anxiety and stress, and generally a departure from the ideal state for medical service of calm and relaxation.

108 It is not enough that the *Act* in its entirety is rationally connected to the objective of the *Act*, the impugned sections in particular must bear this close nexus. I have described activity referred to by protesters as sidewalk counselling. This activity corresponds with the statutory definition of "sidewalk interference" prohibited by s.2(1)(a) of the *Act*. On the evidence, this activity is unsolicited. It provokes rejection by women approaching the clinic, as evidenced by their hurrying through the protest zone, aversion of head and eyes from the proffered information or outright refusal of information.

It often creates physical symptoms of anxiety or distress. It clearly invades the privacy of women and those escorting them. Evidence establishes that women remain in the clinic longer when protesters are outside, and some try to "out wait" the protesters before leaving. Section 2(1)(a) of the *Act* has a sufficiently close nexus to the *Act*'s objective to meet this second "***Oakes***" test.

109 Section 2(1)(b) of the *Act* prohibits all protest activity including, for example, simply silently carrying a sign disapproving of abortion. This section attracted the greatest criticism by the respondent and C.A.R.E. Coalition. Anyone familiar with the urban landscape is familiar with those persons who stand mute, holding a religious pamphlet which espouses their religious views. The respondent and C.A.R.E. Coalition invoke this common experience, correctly saying a person, mute but with a pamphlet which speaks against abortion, is banned from an access area.

110 The history of the abortion clinics and the protest surrounding them differs in character from the experience around department stores or urban corners where the silent proselytizer stands. The *Act* here addresses facilities with a history of protest and a track record of discomfited clients and workers. The rationale advanced to justify the impugned provisions is based on

history of the protest, the evidence of harm to women from any protest, the concept of privacy and dignity, and the negative environment created for abortion service providers by the on-going protest. The history at this clinic includes the recording of license plates, an odious event for a law-abiding citizen to endure. Women have been pressed to accept unsolicited pamphlets. Harsh and condemnatory messages communicated by sign, pamphlet and orally, have been delivered with resulting stress to an audience which can only avoid the message by declining the medical service provided by the clinic. In these circumstances, s.2(1)(b) is rationally connected to the *Act*'s objective and meets the second "***Oakes***" test.

111 The respondent contends that the legislative debate shows that the *Act* was intended to improve the safety of abortion service providers and that the two provisions in question would not eliminate the risk of serious harm such as was suffered by Dr. Romalis. It is true that the impugned provisions would not prevent such a wicked event, and there is already ample law in Canada prohibiting shooting, threatening and attempted murder. Prohibiting sidewalk interference and protest within the access zone is not an effective solution to the risk of grave physical harm.

112 This does not mean, however, that the provisions are not rationally connected to the objective of the *Act*. Dr. Hudson discussed the dwindling number of abortion service providers. Ms. Thompson testified she left the clinic's employment largely to escape the stress of the continual protests outside the clinic, the continual insults and harsh language, and the climate of fear and anxiety. Others employed or volunteering at the clinic testified that the environment around the clinic was stressful. One compared it to a war zone. Those working in any lawful medical facility are entitled to a workplace free of harassment and a continual security alert.

113 Service providers at the clinic testified they felt much safer for themselves and their patients after the access zone was created. They testified that the creation of the access zone instilled a sense of peace within the zone, surrounding the clinic with an area in which the hostilities which accompanied the protest were absent. This greater sense of calm, although not the key objective, was one effect sought to be accomplished by the legislation.

114 In my view the Crown has established a rational connection between the objective of the *Act* and the legislative scheme revealed in the impugned sections.

iv) Minimal Impairment

115 As part of establishing that the sections of the *Act* which are impugned are reasonable and demonstrably justified in a free and democratic society, the Crown must establish on a balance of probabilities that the provisions impair the freedoms as little as possible: ***Oakes***, *supra,* at p.139. Yet that test is not absolute. In ***R. v. Chaulk***, [1990] 3 S.C.R. 1303, [1991] 2 W.W.R. 385, Mr. Justice Lamer states at p.1341-43:

> Parliament is not required to search out and to adopt the absolutely least intrusive means of attaining its objective. Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively.
>
> ... it is not the role of this Court to second-guess the wisdom of policy choices made by Parliament. In enacting s.16(4), Parliament may not have chosen the absolutely least intrusive means of meeting its objective, but it has chosen from a range of means which impair s.11(d) as little as is reasonably possible. Within this range of means it is virtually impossible to know, let alone be sure, which means violate the *Charter* rights the least.

116 The concept of a range of acceptable responses was applied by Madam Justice McLachlin in ***Committee for the Commonwealth of Canada v. Canada***, [1991] 1 S.C.R. 139 at 248, 77

D.L.R. (4th) 385, and in ***R.J.R. MacDonald***, *supra*, where at 276, Mr. Justice La Forest referred to the following excerpt from ***Irwin Toy v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927 at 993, 58 D.L.R. (4th) 577:

> ... in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.
>
> Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.
>
> ... In other cases, however, rather than mediating between different groups, government is best characterized as the singular antagonist of the individual whose right has been infringed.

117 In this case the government has acted to separate different groups, to establish a buffer zone between them. While the government's policy preference is to ensure access to abortion and its actions have been on the pro-choice side of the debate, that lack of neutrality on the underlying issue does not place it in the position of "singular antagonist to the individual". The role played by the legislature in passing this *Act* was to select

one of several alternatives in an attempt to facilitate unimpeded access to abortion services and to protect the security and privacy interests of the women using the clinic's services.

118 The alternatives considered included greater enforcement of the existing injunction, seeking a comprehensive injunction as was obtained in the ***Dieleman*** case, or enactment of "bubble zone" legislation. As between these alternatives, the first relies upon private action on a piecemeal basis to address what was perceived by the government as, and found by the Task Force to be, a broad-based issue of access to health care. The issue could legitimately be seen as an issue of public interest) the populace's entitlement to reasonably equitable provision of health services. Further, the injunctions in place at the two clinics, while curtailing activity which was in the nature of criminal conduct, actions of trespass and interference with property rights, did not successfully protect the women using the clinics from the burden of negative, angry and harassing communications delivered on the very threshold of the health care facility.

119 The option of a broad injunction was available. The court in ***Dieleman*** created 60 foot "no-protest" zones around two free-standing clinics, both in semi-detached premises, and a 30 foot "no-protest" zone around a clinic in a medical arts building, in which all protest is prohibited during "business" hours. The 60

foot "no-protest" zones are surrounded by a 100 foot deep zone and the 30 foot "no-protest" zone is surrounded by a 130 foot deep zone, the larger zones being areas of restricted access in which each person has a 10 foot personal zone. All three clinics, then, are surrounded by areas of restricted expression which are 160 feet deep. The court also created 500 foot deep "no-protest" zones around doctors' residences and 25 foot zones around buildings with doctors' offices. While some may argue injunctive relief has the benefit of permitting a defendant to argue its application specifically to her or him, it is effected only as interlocutory relief, it is a creation of courts who are not elected representatives, it takes the issue of repeal away from the political arena of public debate, it will become stale and it may be difficult for members of the public to locate. There is an example in British Columbia of a "quiet zone injunction" in ***Attorney General of British Columbia v. Couillard*** (1984), 11 D.L.R. (4th) 567, 59 B.C.L.R. 102 (S.C.) wherein Chief Justice McEachern prohibited street prostitution in the West End of Vancouver. While few would argue that knowledge of that injunction is not notorious in the community it was directed towards, few also would argue that it is as visible or accessible as a statute enacted by a legislature. Given the safeguarding role of the court in checking excesses of legislative action, one cannot deny the advantage of addressing issues such as the one before the court through legislation by duly elected representatives conversant with the

public debate, accessible to lobby groups and individuals and accountable through the election process.

120 The real question on the issue of minimal impairment is whether a complete prohibition on expressions of disapproval of abortion within an access zone less than 50 metres, impairs the freedoms infringed as little as possible.

121 In considering this question one must bear in mind the objective of the *Act*; that is, the question is whether the impairment caused by the impugned provisions is the least possible to achieve the objective. This issue of minimal impairment does not engage a discussion of the relative value of the objective, which is a factor considered in the discussion of proportionality.

122 No issue was taken by the respondent as to the size of the "bubble zone", his position being that no restriction on his expression of pro-life views and arguments was warranted in the circumstances and that he challenged only ss.2(1)(a) and 2(1)(b) of the *Act*, not the section establishing the maximum size of an access zone around an abortion facility or the Regulation establishing the zone around the Everywoman's Health Centre. For the C.A.R.E. Coalition it was acknowledged that some small zone, for example 10 feet, may be sustainable. In the context of the *Act*, I do not think that one can discuss ss.2(1)(a) and 2(1)(b) without also

discussing the size of the zone they apply to. This court should consider both the size of the zone and the prohibited conduct in weighing the legislation to determine if it creates minimal impairment.

123 Freedom of expression may be impaired geographically, by time and by manner. The zones carved out by this legislation are geographic. Section 2(1)(a) and (b) of the *Act* bans all manner of anti-abortion or pro-life protest and sidewalk counselling within the zone. In ***Dieleman*** the impairment of freedoms was defined by geography, time and manner of communication. For example, the ban on protest was absolute in the inner zone around abortion clinics and was relaxed in the larger zone surrounding the inner zone.

124 A similar approach was taken in the trial decision, overturned in part on appeal, in ***Madsen v. Women's Health Centre, Inc.***, 129 L.Ed. (2d) 593, 114 S.Ct. 2516 (1994). In the ***Madsen*** case the trial court granted an injunction preventing congregating, picketing, patrolling, demonstrating or entering (apart from specified exemptions) within 36 feet of the clinic property and prohibiting a person from physically approaching, within 300 feet of the clinic, any person seeking clinic services except where that person indicated a desire to communicate. The Supreme Court of the United States upheld the injunction preventing congregating, picketing, patrolling, demonstrating or entering within 36 feet of

the clinic property and struck down the prohibition on physically approaching, within 300 feet of the clinic, any person seeking clinic services except where that person indicated a desire to communicate.

125 In the case before me the access zone, at its greatest, extends about 45 metres from the property. The boundaries of much of it are less than 30 metres away from the property, and the vast majority of the zone is within 25 metres of the property. The zone encompasses, generally, an area near the corner of Victoria Drive and 44th Avenue, east along 44th Avenue to the clinic and past it. The clinic is roughly midpoint in the east-west direction of the access zone. The zone encompasses both sides and sidewalks along 44th Avenue. There is, beyond this zone, no larger zone of restricted communication as was ordered in ***Dieleman***.

126 I consider the *Act*, and the access zone imposed under the *Act*, to be in the range of least intrusive legislative responses to achieve the objective.

127 The size of the area, considering the location of the clinic, is reasonable to provide a quiet space with privacy and dignity for the users of the clinic, as contemplated by the legislation. A reduction in the length of the zone to something in the range of 20 metres (as in ***Dieleman***) would not significantly

enhance the expression of the protesters, the objective of which is to address the women as near as possible to the clinic doors. While the legislature could have created a smaller protest-free zone within a larger limited-protest zone, that choice would undoubtedly be more difficult to enforce and may well create confusion. In some aspects, such a two-tiered scheme, by creating a greater area of restricted expression, represents a greater intrusion into the freedoms protected by s.2 of the *Charter* than does the *Act*.

128 The *Act* is an attempt to create a buffer between two groups, those seeking to provide and use a medical service on one hand, and those opposed in principal to provision of the service on the other. As Madam Justice McLachlin stated in ***R.J.R. MacDonald***, *supra*, at p.342:

> The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ...

129 I conclude that, geographically, the *Act* is within the reasonable range of alternatives.

130 Is the breadth of prohibition in the impugned provisions of the *Act* also within that range of reasonable alternatives? To put it another way, is the manner of impairment of s.2 freedoms within the range of reasonable alternatives? In my view it is. While non-violent, even passive, expression of disapproval is captured by this *Act*, the evidence establishes that such activity, in the context of the well-known history of vigorous protest and the vulnerable nature of many of those who enter the clinic, is contrary to the well-being, privacy and dignity of those using the clinics' services.

131 Creation of a zone immediately before entry to these medical facilities, in which persons using the services will be free from the barrage of negative messages, is a reasonable legislative response to the issues posed by the history of protest at the free-standing clinics. Recognizing the limited options to procure this service which are available to women, I conclude that the legislature has acted in a fashion which meets the minimal impairment test.

v) Proportionality

132 The final test is one of proportionality: does the objective of the legislation outweigh the deleterious effects of the *Act* upon those who, like Mr. Lewis, wish to demonstrate their

opposition to abortion and seek to persuade women to decide against abortion?

133 I have concluded that both freedom of conscience and religion and freedom of expression are infringed by the impugned provisions of the *Act*. The infringement of freedom of religion is effected by limitation of a person's ability to express or disseminate conscientiously or religiously held views against abortion. In this sense the substantial freedom limited by the impugned provisions is freedom of expression. In this s.1 *Charter* discussion, I have focused my comment on freedom of expression, recognizing that the particular views which are curtailed in their expression relate to freedom of conscience and religion and impact on the protesters' ability to protest with each other in a proscribed area.

134 Freedom of expression has high value in a democracy. Its importance is reflected in writings from courts of all levels and all western democracies. In Canada the numerous cases on freedom of expression decided by the Supreme Court of Canada affirm the key role of freedom of expression in a democratic society. In the United States of America the primacy of the *First Amendment* has long been conceded. The high value of expression is not a creation of the *Charter*, it was recognized long before the *Charter* was conceived. In ***Saumur v. The City of Quebec***, [1953] 2 S.C.R. 299 at

329, 4 D.L.R. 641, Mr. Justice Rand termed it one of the "original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order". Mr. Justice Cory said in ***R. v. Kopyto*** (1987), 47 D.L.R. (4th) 213 at 216, 62 O.R. (2d) 449 (Ont.C.A.):

> The very lifeblood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened.

135 In ***Irwin Toy Ltd.***, *supra*, Chief Justice Dickson stated at pp.968-969:

> ... Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p.327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, [1957] S.C.R.

> 285, at p.306). And as the European Court stated in the *Handyside* case, Eur. Court H.R., decision of 29 April 1976, Series A No.24, at p.23, freedom of expression:
>
> > *... is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"*.

136 In ***Edmonton Journal v. Alberta (Attorney General)***, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, Mr. Justice Cory stated at p.1336:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. ... It seems that the rights enshrined in s.2(b) should therefore only be restricted in the clearest of circumstances.

137 The courts recognize that the freedom of expression benefits both the listener and the speaker, as shown in ***Ford v. Quebec (Attorney General)***, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, and ***R. v. Keegstra***, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1. It is accepted that freedom of expression is most strong in public places. Yet in ***Committee for the Commonwealth of Canada***, *supra*, Chief Justice Lamer said at pp.156-57:

> A person who is in a public place for the purpose of expressing himself must respect the functions of the place and cannot in any way invoke his or her freedom of expression so as to interfere with those functions.

Though this statement was made in the context of a s.2 analysis, it is relevant also to a s.1 *Charter* analysis:

138 The issue of choice to hear is of significant importance, from the perspective of the listener. In ***Lehman v. City of Shaker Heights***, 418 U.S. 298 at 306-7, 41 L.Ed.2d 770, 94 S.Ct. 2714 (1974), Mr. Justice Douglas observed:

> [I]f we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.
>
> ... *While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it*. ...

139 In ***Committee for the Commonwealth of Canada***, *supra*, Madam Justice L'Heureux Dubé, citing ***Lehman***, acknowledged that there are circumstances in which a person cannot escape the message and freedom of expression may be limited. When a person is "captive", much of the value of freedom of expression is lost: ***Dieleman***, *supra,* p.724.

140 In ***Keegstra***, Chief Justice Dickson observed that the content of the message would weigh in the balance, and to the extent that the message did not relate to the core values of freedom of expression, it would be considered less weighty. In ***Ross,*** *supra*, Mr. Justice La Forest noted that when the form of expression lies further from the core values of freedom of expression, a lower standard has been applied saying at p.35:

> In my reasons in *R.J.R. MacDonald, supra* , I stated that the "core" values of freedom of expression include "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process". (p.280).

141 Mr. Lewis contends that the truth of his message, and its motivation by conscience and religion, increases the value of the expressive activity which is denied him by the impugned provisions of the *Act*. Without engaging the debate of the rights and wrongs of abortion, and accepting that Mr. Lewis holds deep convictions that abortion is not a moral act, is contrary to the will of God and is harmful to women, I observe that, on the evidence the message of some protesters and leaflets contains some exaggeration and misrepresentation. Further, the evidence establishes that the messages are often offensive in tone and content, and would be considered offensive by a reasonable audience in the position of a person entering the clinic for medical services. As such, they

cause real harm to women by generating more distress immediately before the procedure. Dr. Major, who has reported on the only study done (the "*Cozzarelli-Major* Study") enquiring into the effects of protest on clients of an abortion clinic, has concluded that women experience psychological post-abortion negative effects in proportion to the level of protest activity. Even without Dr. Major's evidence, the evidence from those who work at the clinic, including two administrators and a counsellor, confirms the loss of calm and the increase in generally deleterious effects upon women entering the clinic caused by the presence of protesters and communications from them.

142 Lastly, I note that expressive activity concerning abortion is not banned in total by the *Act*. Outside the access zone (maximum 45 metres) citizens may picket, leaflet and otherwise propound their views. What is denied them is access to persons entering the clinic immediately in front of the entrance where they can be readily identified. This very aspect of ready identification and this element of captivity to the protesters' message, desired by the protesters, is part of the motivation for the *Act*'s passage. The respondent and C.A.R.E. Coalition argue this lack of ability to identify and target these specific women effectively prohibits their entire protest. Yet it is this identification, targeting and captivity that creates the most harm.

143 Considering these issues, I hold that as significant as freedom of expression is and as sincere and impassioned as the views of Mr. Lewis or other protesters are, this case does not present an example of that freedom at its highest value. The expressive activity limited by the impugned subsections is not central to the core values discussed in ***Ross***, *supra*.

144 On the other side of the scale is the objective of the *Act*. The ***Morgentaler, 1988*** case recognized that the abortion procedure is a medical service and acknowledged that impediments to access to abortion infringed a woman's rights under section 7 of the *Charter*. Parliament has not enacted limitations on that right. Today women in Canada are entitled by law to have access to abortion services.

145 Medical services are a personal matter, private and confidential between the patient and health care provider. While a certain degree of confidentiality is lost by creation of a stand-alone clinic, such a clinic is responsive to the limitation of this service in hospitals. Privacy for those using the facility should be impaired as little as reasonably possible. Outside this clinic license plate numbers have been gathered and persons entering the clinic have been photographed. While the latter practice is prohibited by sections not challenged in these proceedings, the former is not. Both practices, carried on in the

past, entail an invasion of privacy interests. Not the least of the privacy interests adversely affected by the protest activity is a loss of repose from unwanted intrusion.

146 The adverse effects of the negative and harsh messages delivered just before a person enters the clinic intrudes upon a woman's person by affecting her health, in even a temporary fashion. Such turmoil outside a medical facility, created to affect a group of health care users, is incompatible with the character and function of a medical facility and the public areas surrounding it.

147 The objective of reducing the tension and negative environment created by this protest, for those persons employed by the clinic, also has significant value.

148 Health care has fundamental value in our society. A woman's right to access health care without unnecessary loss of privacy and dignity is no more than the right of every Canadian to access health care.

149 In my view the objective of the legislation outweighs the infringement of section 2 of the *Charter*. Under section 1 of the *Charter*, I find that the *Access to Abortion Services Act* is demonstrably justified in a free and democratic society.

150 The appeal is allowed. There being no defence to the charge other than the *Charter* argument, a conviction shall be entered. The matter is remitted to the trial judge for sentencing.

"M.E. SAUNDERS J."

October 8, 1996
Vancouver, B.C.