June 2001

Memorandum of Argument for Leave to Appeal of the Appellant James R. Demers, Court of Appeal for Province of British Columbia

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NO. CA026297
VANCOUVER REGISTRY

COURT OF APPEAL

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

BETWEEN:

JAMES ROGER DEMERS

APPELLANT

AND:

REGINA RESPONDENT

MEMORANDUM OF ARGUMENT FOR LEAVE TO APPEAL OF THE APPELLANT

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PART 1 – STATEMENT OF FACTS

COURSE OF PROCEEDINGS

1. Pursuant to s. 5 of the *Access to Abortion Services Act*, R.S.B.C. 1995, c. 44 (the *"Act"*), the *Abortion Services Access Zone Regulation* (the *"Regulation"*) was made. [Authorities Tab (herein after "Tab") 1]. Section 1 and Appendix 1 of the *Regulation* establish an access zone approximately 30 metres surrounding the Everywoman's Health Centre (the "Clinic"). [A.B., Vol. I, p. 3].

2. This is a summary conviction appeal from a decision of the Honourable Mr. Justice Hood dated August 3, 1999. [Tab 10]. Hood J. upheld the decision of His Honour Judge McGivern dated December 19, 1997, convicting the Appellant, James Roger Demers ("Mr. Demers"), of "sidewalk interference" and "protest" contrary to ss. 2(1)(a) and 2 (1)(b) of the *Act*, both being contrary to s. 14 of the *Act* (the charging section). [Tab 11].

FACTS OF THE CASE

3. On December 6, 9, and 10, 1996, on the public sidewalk outside of the Clinic in the access zone, Mr. Demers displayed a sign: "Every human being has the inherent right to life. *United Nations International Covenant on Civil and Political Rights*." On December 11, 1996, Mr. Demers displayed a different sign:

> Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception.
> *Art. 4-1 American Convention of Human Rights.*

4. On December 11, 1996, Mr. Demers was charged with "protest" under ss. 2(1)(b) and 14(2) of the *Act*. He was later charged with "sidewalk interference" under s. 2(1)(a) of the *Act*. The *Act,* s. 1, defines "protest" to include any act of disapproval of abortion and "sidewalk interference" to include informing a person about abortion-related issues.

COURSE OF PROCEEDINGS, Continued

5. The trial commenced on October 20, 1997, before The Honourable Judge H. J. McGivern ("the Trial Judge") in the Provincial Court of British Columbia at Vancouver. Mr. Demers admitted to carrying a sign that disapproved of abortion in the access zone surrounding the Clinic. [Tab 11, transcript at 2-3, ll. 35-4].

6. Mr. Demers was cordial and cooperative when interacting with the police. There was no evidence of any exchange between Mr. Demers and any patients or Clinic personnel entering or exiting the Clinic while he was outside it, nor was there any evidence of anyone being offended or upset by the sign or his presence. [Appeal Book ("A.B."), Vol. I. p. 2, para 7; p. 4, 5].

7. This case is a companion case to *R*. v. *Lewis*, in which the defendant Maurice Lewis was tried and convicted on virtually the same facts as Mr. Demers. In *R*. v. *Lewis,* [1996] 24 B.C.L.R. (3d) 247 (S.C.) [Tab 13], Saunders J. (as she then was) found the impugned sections inconsistent with the freedoms guaranteed by ss. 2(a), (b) and (d) of the *Canadian Charter of Rights and Freedoms* R.S.C. (1982) (the *"Charter"*) [Tab 3], but found the infringements justified under s. 1 of the *Charter*. In doing so, she allowed the Crown's appeal from the judgment of His Honour Judge Cronin (reported at 18 B.C.L.R. (3d) 218 (Prov. Ct.) [Tab 14]). Mr. Lewis died before his appeal to this Court could be heard, and this Court refused to hear the appeal because of mootness and because other cases were proceeding under the *Act*. 153 D.L.R. (4^{th}) 184 (B.C.C.A).

8. The Learned Trial Judge in this case concluded that "everyone" and "every individual," as used in s. 7 and s. 15 of the *Charter*, do not include an unborn child of a woman who chooses to abort her child. [Tab 11, p. 2]. He also held that, if Mr. Demers' rights as guaranteed by s. 2 of the *Charter* were violated by the provisions of the *Act*, he was unable to

distinguish the circumstances of this case from those in *Lewis*, above. [Tab 11, p. 6-7].

9. Counsel initially argued the appeal of the Learned Trial Judge's ruling before Madam Justice Levine in January, 1999. Levine J. recused herself before argument was completed. She ordered that the original exhibits filed in *Lewis* be transferred to form part of the record to the summary appeal matter before her, by consent. [A.B., Vol. IX, p. 1680]. The Court marked the transcript and exhibits from the *Lewis* case as exhibits in the present case.

10. Counsel argued the appeal before Mr. Justice Hood. [Tab 10]. Hood J. found that: "a woman has the absolute right to terminate her pregnancy, and she cannot be deterred by any right of the unborn child because it does not possess any rights until it is born." [Tab 10, p. 18 at para. 37]. He ruled that the term "everyone" in international law does not include the unborn. [Tab 10, p. 25 at paras. 52, 53]. He also ruled that the term "everyone" in s. 7 of the *Charter* does not include the unborn. [Tab 10, p. 42 at para. 87]. Mr. Justice Hood did not expressly address s. 2 of the *Charter* in his reasons, but it is implicit that he too considered himself bound by the decision of Saunders J. in *Lewis*. [Tab 10, p. 3 at para. 3].

BACKGROUND EVIDENCE from *R.* v. *Lewis*

11. Most abortions are done for non-medical reasons. [A.B., Vol. II, p. 213, ll. 12-17; A.B., Vol. III, p. 599, ll. 2-3; A.B., Vol. IV, p. 606, ll. 34-35; p. 656, ll. 40-47]. Many women are coerced into having abortions and do not choose freely; some because they do not have sufficient information. [A.B., Vol. IV, p. 602, ll. 38-43; p. 603, ll. 12-21]. Witnesses who had abortions were not made aware of either pre-abortion or post-abortion counselling. [A.B., Vol. I, p. 76, ll. 7-12; p.77, ll. 23-31; pp. 150-151, ll. 36-15]. Women seeking abortions often feel pressured to have abortions or are "sacrificing themselves" for someone else. [A.B., Vol. V, p. 847, ll. 26-36].

12. Many women are ambivalent whether to have abortions, and are open to

discussion and guidance right up to the last moment. [A.B., Vol. IV, p. 648, ll. 8-20; A.B., Vol. V, p. 847, ll. 37-46]. Clinic Staff admitted that some women who come into the Clinic change their minds. [A.B., Vol. III, pp. 413-414, ll. 45-2; A.B., Vol. IV, pp. 609-610, ll. 45-2]. Many children scheduled to die are alive because of the mother's contact with a pro-life counsellor. [A.B., Vol. V, p. 832, ll. 41-47; pp. 817-820, ll. 27-18].

13. Dr. Marie Peeters gave expert testimony on the early development and humanity of the unborn child. [A.B., Vol. IV, p. 662, ll. 34-39; p. 669, ll. 11-22; p. 662-664, ll. 40-27; A.B., Vol. V, pp. 893, 897, 898-899, 963-966]. No Crown witness denied the rapid development of the unborn child in the womb; nor did any deny that abortion ends the life of a human being. [A.B., Vol. II, p. 223-224, ll. 36-30; pp. 255-256, ll. 17-4]. Abortion service provider, Ms. Joy Thompson, admitted that the fetus is "a human being not yet born." [A.B., Vol. III, p. 447-448, ll. 47-5]. However service providers discounted the humanity of the fetus in their abortion counselling. [A.B., Vol. II, pp. 252, ll. 24-44].

14. Pro-life advocates inform women about abortion and the alternatives, offer emotional and financial support and persuade them not to terminate their pregnancies. [A.B., Vol. I, p.78, ll. 20-26; A.B., Vol. V, p. 807, ll. 28-29]. They give pamphlets accurately depicting and describing the stages of development of the unborn child. [A.B., Vol. IV, p. 668, ll. 42-46]. Women have thanked pro-life advocates for their kindness, and expressed gratitude for offers of help and concern. [A.B., Vol. V, p. 812, ll. 30-39].

15. Psychiatrist R. Philip Ney testified that abortion severely harms women psychologically and emotionally. [A.B., Vol. III, p. 594, ll. 31-39; A.B. Vol. IV, pp. 643-644, ll. 36-11]. Ms. Patricia Hansard, founder of Abortion Recovery Canada testified to the same. [A.B., Vol. V, pp. 844, ll. 35-45; p. 854, ll. 35-44]. The harm is a direct psychological consequence of

deliberately killing their own children. [A.B., Vol. V, p. 859, ll. 16-37].

16. Ms. Joy Davis, former director of six abortion clinics, testified to callous, careless and dehumanizing treatment of women by abortion providers. [A.B., Vol. IV, p. 673, ll.14-21]. The primary goal of abortion counselling was to encourage women to decide for abortion and sign the consent form. [A.B., Vol. IV, pp. 680-682]. The abortion providers' response to pro-life activity was anger because it encouraged women to change their minds. To get rid of the protesters, it was a tactic to lay false complaints to the police, claiming harassment and noise that disturbed the patients. [A.B., Vol. IV, p. 677, ll. 6-39].

17. Clinic counselling is done by individuals with no medical training who say they explain all of the risks of the medical procedure. That delegation is contrary to the guidelines of the Assistant Deputy Minister of Health, S. R. Kenny, in his letter of August 14, 1992. [A.B., Vol. II, pp. 229-231, ll. 47-36; p. 214, ll. 16-45]. The abortion providers do not admit to any significant psychological problems resulting from abortion. [A.B., Vol. III, pp. 409-410, ll. 5-25].

18. The Crown's evidence confirmed that the essential purpose of abortion clinic counselling is to affirm women to go through with an abortion. [A.B., Vol. II, pp. 399-400, ll. 38-24]. Abortion counsellor Ms. Erin Mullan stated, "Women will feel an abortion is a loss," and admitted that the loss was the loss of a human life. [A.B., Vol. II, p. 269, ll. 5-17].

19. Crown witness Dr. R. E. K. Hudson indicated that informing women on the development of unborn children prior to an abortion is inappropriate. [A.B., Vol. III, pp. 532-533, ll. 36-26]. Dr. Hudson has been instrumental in the government's plan to expand abortion services throughout the province. [A.B., Vol. III, p. 504-506].

PART 2 – ERRORS IN JUDGMENT

20. Mr. Justice Hood erred when he ruled that:

(a) unborn children have no right to life under s. 7 of the *Charter*;

(b) the *Act* does not violate the unborn child's right to life;

(c) the sections of the *Act* under which Mr. Demer's was tried and convicted do not violate Mr. Demer's rights to freedom of speech under s. 2 of the Charter.

PART 3 – ARGUMENT

I. INTRODUCTION

A. The Charter

21. 1. All children have a right to life. The people of Canada, in the *Charter* have expressly recognized that right and have promised to protect it. Section 7 of the *Charter* states, "Everyone has the right to life . . . ." The people of Canada, by that same *Charter,* acknowledge what the common law and constitutional law have recognized from time immemorial. Rights are a gift of God; they are not a creation of the state. See *Charter*, Preamble. Thus, certain of these rights are known as "inherent" and "inalienable."

22. 2. The right to life may be forfeited under certain circumstances carefully defined by law. It is well-recognized at law that a person may take the life of another in self-defense, in defense of others, to enforce the law, in execution for crimes, and as acts of war. Thus, the *Charter* recognizes that the right to life may be forfeited only "in accordance with the principles of fundamental justice." *Charter*, s. 7. Principles of fundamental justice never allow the taking of innocent life.

23. 3. The Supreme Court of Canada has set out numerous principles interpreting

Charter rights, though it has not always been consistent in applying those principles. On numerous occasions the Supreme Court of Canada has stated that international law is a source that should be looked to for guidance in interpreting Charter rights. Indeed, it is hard to imagine that those persons enjoying the right to life under international law differ from those persons recognized under Canadian law.

B. International Law

24. 1. This factum focuses on the right to life in international law and its application in Canadian courts. Generally, adjudication of s. 7 *Charter* rights is a three-step process. First, a court must determine whether an act infringes the right to life, liberty or security. Second, it must determine whether any infringement is in accordance with principles of fundamental justice. Third, if not in accordance with principles of fundamental justice, the court must determine whether an act can be saved under s. 1 of the *Charter*.

25, 2. International law informs each of these three steps. First, the international law of human rights uses the term "everyone," and every imaginable equivalent, expressly including unborn children within the protection of law. Second, international law recognizes certain circumstances in which the right to life is forfeited for grave moral breaches. Third, because the right to life is a right from which there is no permissible derogation, it may not be balanced away to promote the interests of the state or other persons.

26. 3. The Crown punished Mr. Demers for displaying a sign quoting a right to life provision of the *American Convention on Human Rights* (1969) ("American Convention"). [Tab 19]. Enforcement of the *Access to Abortion Services Act* entails a violation of Mr. Demers' freedom of speech and the right to life of unborn children.

II. FREEDOM OF SPEECH – Charter Section 2

27. **A. <u>Freedom of Thought, Belief, Opinion and Expression</u>.** This case primarily involves *Charter* ss. 2(a) and 2(b). Mr. Demers' expressed thoughts, beliefs and opinions that unborn children have a right to life. His conduct unquestionably falls within the scope of s. 2(b).

28. **B. <u>Freedom of Conscience and Religion</u>.** There is a duty and a right to speak for those whose rights are being violated. Section 2(a) of the *Charter* protects that right. "Speak up for those who cannot speak for themselves, for the rights of all who are destitute." *Proverbs* 31: 8 [all references to *New International Version*]. "Rescue those being led away to death; hold back those staggering toward slaughter." *Proverbs* 24:11. "But if I say, 'I will not mention him or speak any more in his name,' his word is in my heart like a fire, a fire shut up in my bones." *Jeremiah* 20:9. "The Lord looked and was displeased that there was no justice . . . . [H]e was appalled that there was no one to intervene." *Isaiah* 59: 15b-16a.

29. **C. <u>Setting "Reasonable Limits</u>."** Section 1 of the *Charter* allows reasonable limits on s. 2 rights to freedom of speech and freedom of religion. The Crown failed to meet its burden of proving that its violation of Mr. Demers' s. 2 rights was "demonstrably justified in a free and democratic society." The trial court must weigh the various interests of the Crown, the abortionists, mothers, fathers, siblings, Mr. Demers, society generally, and the unborn child.

III. STANDING

30. **A.** Mr. Demers' s. 2 rights cannot be resolved without deciding the issue of the unborn child's right to life under s. 7. Until a court recognizes the right to life and the legal duty under international law to promote human rights it cannot possibly make a determination as to whether the *Act* sets "reasonable limits' under s. 1.

31. **B.** The legal regime that the *Act* establishes not only withdraws the protection of

law to which all human beings are entitled under law, it precludes private citizens from attempting to dissuade mothers from killing their children.

IV. PRINCIPLES OF INTERPRETATION

32. **A. Mr. Justice Hood's decision.** Mr. Justice Hood, in reliance on the Supreme Court's decision in *Winnipeg Child and Family Services (Northwest Area)* v. *G.(D.F.),* [1997] 3 S.C.R. 925 [Tab 17], ruled that defining "everyone" is not an issue of science, language, religion, social choices or moral values. [Tab 10 at paras. 15, 26]. He wrote that it is a normative task to be accomplished by looking to the common law. [Tab 10 at paras. 75-78]. He wrote that any change in the rights of unborn children must be effected by Parliament. Mr. Justice Hood specifically rejected arguments that the common law protected the unborn child or that international law recognizes the right to life of the unborn. [Tab 10 at para. 89].

33. **B. Supreme Court Cases.** The Canadian Supreme Court has appealed to science, language, religion, and moral values to interpret the *Charter*. It has rejected the notion that *Charter* rights are fixed by common law or that it must defer to Parliament. The Court has given mixed and contradictory rulings. Its rulings have been "yes" and "no."

C. *Sic et Non*

34. 1. Basic to all Western legal discourse are the processes of analysis, synthesis and evaluation. These thought processes have distinguished the advance of all the intellectual disciplines in the West since the eleventh century. Berman, H., *Law and Revolution* (1983) at 131ff. [Tab 36]. The movement to eliminate apparent and real inconsistencies between disparate principles and rules through the mental processes of synthesis and evaluation was given added impetus when Abelard wrote *Sic et Non*. Scholars were compelled to resolve, through analysis and synthesis, apparent inconsistencies that Abelard identified in the Bible. *Ibid*.

35. 2. Gratian harmonized massive and disparate written materials that had accumulated over the centuries through the process of synthesis and evaluation to write the first systematic text on ecclesiastical law. That work became the model for the development of the Civil and Common Law systems. *Ibid*. at 143ff.

36. 3. The common, civil and canon lawyers viewed the law as a comprehensive and logically consistent whole, a *corpus juris*. Sir William Blackstone's *Commentaries on the Laws of England* (1765-1769) is a grand synthesis of the Common Law. The civil and common lawyers realized that only if there is a law of God revealed to man is it possible to evaluate human laws and thereby distinguish truth and falsehood.

D. <u>The New Common Law</u>

37. 1. Oliver Wendell Holmes, Jr. rejected the Blackstonian view of law. Indeed he rejected a 900-year old legal tradition. The essence of this new jurisprudence is captured in the phrase, "[t]he life of the law has not logic: it has been experience." *The Common Law* (1881) at 1. [Tab 39]. The Supreme Court approvingly alluded to this Holmesian jurisprudence in *Dobson (Litigation Guardian of)* v. *Dobson*, [1999] 2 S.C.R. 753 at paras. 35-36 [Tab 5], when it acknowledged that the holding was contrary to logic. Logical inconsistency permeates the rulings on principles of constitutional interpretation. It destroys the ability to synthesize or evaluate.

38. 2. The Court has ruled that the reference to God in the Preamble of the *Charter* does not refer to the God of Christianity. *R*. v. *Big M Drug Mart Ltd.,*[1985] 1 S.C.R. 295 at para. 148 [Tab 9]. This interpretation of God (gods?) as encompassing all religions is untenable. First, it posits the foundation of rights on gods who are unknown and unidentified. Second, it creates a conflict with the Queen's oath of office. [Tab 4]. Since the Court has already

jettisoned logic as a necessary component of law, it has cleared the way to build a jurisprudence of rights on multiple religions which hold mutually exclusive and contradictory claims as to the nature of reality and right and wrong.

E. The Demise of the Rule of Law

39. 1. Roberto Unger asks, "What happens when the positive rules of the state lose all touch with a higher law and come to be seen as nothing more than the outcomes of a power struggle?" *Law in Modern Society* (1976) at 83 [Tab 47]. The answer is: discordant decisions and no worldview to make concordance possible through synthesis and evaluation.

40. 2. "The rights of the unborn is not a moral issue." But the Supreme Court has stated that "[t]his [denial of presumption of innocence] is radically and fundamentally inconsistent with the societal values of human dignity and liberty which we espouse . . . ." *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at para. 61 [Tab 15]. "The truly novel features of the *Constitution Act, 1982* are that it has . . . extended its scope so as to encompass a broader range of values." *Reference Re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 13 [Tab 8]. "The Court must be guided by the values and principles essential to a free and democratic society . . . ." *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at para. 140 [Tab 16].

41. 3. "The rights of the unborn is not an issue of science." But the Supreme Court has stated that an unborn child could not sue its mother because that "posits the anomaly of one part of a legal and physical entity suing itself." *Winnipeg Child,* [1997] 3 S.C.R. at para. 27 [Tab 17]. "Such a legal conception, moreover, is belied by the reality of the physical situation; for practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth." *Ibid.* at para. 29. "The fetus' complete physical existence is dependent on the body of the woman." *Ibid.* at para. 37. See *Dobson* [1999] 2 S.C.R. at paras. 17, 20, 25, 37 [Tab 5].

42. 4. "The rights of the unborn is not an issue of religion." But the Supreme Court stated that "the origins of the demand for such freedoms [of conscience and religion] are to be found in the religious struggles in post-Reformation Europe." *Big M Drug Mart,* [1985] 1 S.C.R. at para. 118 [Tab 9]. "Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures." *Ibid.* at para. 120. "The ecclesiastical authorities, however, had no such problem and legal historians seem to agree that the ecclesiastical influence was largely responsible for moving the focus to the mental element in common law crime . . . ." *Re s. 94(2),* [1985] 2 S.C.R. at para. 112 [Tab 8].

43. 5. "The rights of the unborn is not an issue of language." But the Supreme Court, not surprisingly, has ruled that language is important in constitutional litigation. "In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom . . . ." *Ibid*. at para. 22. "This was followed by a detailed analysis of the language and structure of the section as well as its immediate context within the *Charter*." *Ibid.* at para. 59.

44. 6. "The issue of the rights of the unborn is a normative or legal issue, being determined by looking to the common law which did not afford unborn children any rights." But the Supreme Court has stated that "the *Charter*, as a constitutional document, is fundamentally different from the statutory *Canadian Bill of Rights*, which was interpreted as simply recognizing and declaring existing rights." *Oakes,* [1986] 1 S.C.R. at para. 38 [Tab 15]. "[T]he meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to proclamation of the *Charter*." *Big M Drug Mart,* [1985] 1 S.C.R. at para. 115 [Tab 9]. Even the meaning of the *Charter* is not fixed at the

time of adoption of the *Charter*. Supposedly it is a "living tree" whose meaning can't be frozen in time and whose growth must not be stunted by compliance with its original meaning. *Re s. 94(2),* [1985] 2 S.C.R. at para. 53 [Tab 8].

45. 7. "It is up to Parliament, not the courts, to extend protection to unborn children." But the Supreme Court has stated, "the *Charter* is intended to set a standard upon which present as well as future legislation is to be tested." *Oakes*, [1986] 1 S.C.R. at para. 38 [Tab 15]. "In Canada, we have tempered parliamentary supremacy by entrenching important rights and freedoms in the Constitution." *Ibid.* at para. 39. Unlike the *Charter*, the *Canadian Bill of Rights* "did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament." *Re s. 94(2),* [1985] 2 S.C.R. at para. 55 [Tab 8]. Once a *Charter* violation is identified, the courts have a host of remedies available including "striking down the legislation, severance of the offending sections, striking down or severance with a temporary suspension of the declaration of invalidity, reading down, and reading provisions into the legislation." *Vriend,* [1998] 1 S.C.R. at para. 145 [Tab 16].

V. USE OF INTERNATIONAL LAW

A. General Principles

46. 1. It is a well-recognized principle of Canadian jurisprudence that international law is applicable in domestic courts. Kindred, H., *International Law: Chiefly as Interpreted and Applied in Canada* (4th ed.) (1987) at 204-241 [Tab 41].

47. 2. The Supreme Court in numerous cases has established the precedent of using the international law of human rights to interpret similar provisions of the *Charter*. *Ibid*. at 235-38; Claydon, J. "The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms," 2 *Conn. J. Int'l. L.* 349 (1987) [Tab 38]. *Charter* provisions should be

interpreted as compatible with the more specific provisions of international law.

48. 3. International law recognizes the right to life of the unborn child. It would be illogical to think that such a basic juridical reality as "everyone" could have a different meaning under domestic law from that under international law.

B. Use of International Law to Define Terms

49. 1. First issue. Do terms such as "human being," "person," and "everyone" as used in international law include unborn children? This is a fairly straightforward matter, and involves looking to treaties, customary international law and decisions of international tribunals.

50. 2. Several international documents recognize the right to life of the unborn, and there are none which hold that they do not have a right to life. Although the focus here is on positive international law, this is not to suggest that such fundamental inalienable rights as the right to life are simply the products of positive legal enactments.

C. Use of International Law to Determine Methodology

51. 1. Second Issue. Are there any exceptions to, or limitations on, the right to life of the unborn?

52. 2. There are two basic methodologies for placing limitations on human rights: a rule of law approach and a balancing of interests approach. The rule of law approach holds that a person may forfeit his life if he is guilty of some grave moral breach. Under a balancing approach, the interests of the individual may be weighed against the interests of the state, or the interests of two individuals may be weighed against one another. For example, it may be decided that the unborn child is included within the term "everyone" but that the mother's security interest outweighs the child's right to life.

53. 3. The rule of law approach is most memorably illustrated in the case of *R.* v.

Dudley and Stephens, (1884) 14 Q.B.D. 273 at 286-88 [Tab 12]. Rejecting the necessity defence based on balancing of interests, the Court ruled that it was not okay to kill and eat the innocent cabin boy to even save several lives. Bentham, the father of modern utilitarianism upon which the balancing methodology is based, railed against the common law and its rule of law approach.

VI. RIGHT TO LIFE – DEFINING TERMS

A. International Law

54. 1. Several human rights treaties and other instruments generally recognize the right to life in the broadest and most inclusive language. Several make specific reference to the unborn, and do not make specific reference to any other group. Examples: "every human being" and "person," *American Declaration of the Rights and Duties of Man* (1945) (1965) art. 1]["*American Declaration*"] [Tab 27]; "everyone" and "person," *Universal Declaration of Human Rights* (1948), art. 3 ["*Universal Declaration*"] [Tab 30]; and "every human being," *International Covenant on Civil and Political Rights* (1966) art. 6(1) ["*ICCPR*"] [Tab 25].

55. 2. Several instruments specifically address and protect the unborn.

56. a. *American Convention* states: "For the purposes of this Convention, 'person' means every human being." art. 1(2). [Tab 19]. "Every person has the right to recognition as a person before the law." Art. 3. "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." Art. 4(1). "Capital punishment shall not be . . . applied to pregnant women." Art. 4(5).

57. b. World Medical Association, *Declaration of Geneva* (1948): "I will maintain the utmost respect for human life from the time of conception; even under threat, I will not use my medical knowledge contrary to the laws of humanity." [Tab 28].

58. c. *U.N. Declaration of the Rights of the Child* (1959): "[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Preamble [Tab 31].

59. d. *Convention on the Rights of the Child* (1989): "*Bearing in mind* that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'" Preamble [Tab 22].

60. e. ICCPR: "Sentence of death . . . shall not be carried out on pregnant women." Art. 6(5) [Tab 25].

61. 2. The right to life is a reality that international law can neither create nor destroy. It must simply recognize and articulate that human rights exist independently of, and predate the existence of, positive law. This view is manifest in several of the human rights documents that recognize rights as "inherent" and "inalienable." Examples include "inherent dignity" and "inalienable rights," *Universal Declaration*, Preamble [Tab 30]; and "fundamental human rights stem from the attributes of human beings," *African Charter on Human Rights and Peoples' Rights*, (1981), Preamble [Tab 18].

B. Application of International Law to the Charter

62. 1. Canada follows the adoption or incorporation view (Blackstonian). *Kindred*, at 205 [Tab 41.] Blackstone wrote:

> [S]ince in England no royal power can introduce a new law . . . the law of nations is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law . . . are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.

4 *Commentaries on the Laws of England* 67 (reprint 1979) (1st ed. 1769). [Tab 37].

The adoptionist approach applies only to customary law and not to treaties in Canadian law. The reason for this difference is that treaty making in Canada is purely an executive function.

63. 2. The right to life being a matter of customary law as well as treaty, does not require any legislative implementation.

> The *Charter* and the primary international instruments are components in a universal movement to consecrate and protect rights which in principle existed, although they were not always respected, long before international and domestic legislators decided to put them to paper. The human rights are and always have been the same, it is only their expression by various bodies and governments that manifests inevitable, and usually minor or insignificant, differences. . . . [F]undamental human rights declared in the *Charter* are derived from natural law, and not positive law."

Schabas, *International Human Rights Law and the Canadian Charter* (1991) at 33-34 [Tab 43].

64. 3. The importance of international human rights law in Canadian constitutional jurisprudence is summarized in Chief Justice Dickinson's dissent in *Reference re Public Service Employee Relations Act,* [1987] 1 S.C.R. 313 at para. 59 [Tab 7]:

> Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter.* The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation.

65. 4. *Morgentaler, Smoling and Scott* v. *The Queen,*[1988] 1 S.C.R. 30 at para. 53 [Tab 6] held that it was unnecessary in that case to decide whether the term "everyone" in s. 7 of the *Charter* includes the unborn.

> [T]he Crown conceded that the Court is not called upon in this appeal to evaluate any claim to "foetal rights" or to assess the meaning of "the right to life." . . . [I]t is unnecessary for the purpose of deciding this appeal to evaluate or assess "foetal rights" as an independent constitutional value.

In this case it is necessary to decide whether the unborn have a right to life.

VII. RIGHT TO LIFE – DETERMINING METHODOLOGY

A. International Law

66. 1. It is common to state that no right is absolute, which usually is given to mean that the rights of individuals are somehow "limited" as they come into conflict with other individuals or groups. This problem is noted in the *American Declaration*: "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy." Art. XXVIII [Tab 27].

67. 2. In the context of the abortion debate this is usually portrayed as a conflict between the right of the child and the rights of the mother to family, privacy, security, liberty or health. Examples are: "liberty and security," *American Convention*, art. 7(1) [Tab 19]; "privacy, family, home or correspondence," *ICCPR*, art. 17(1) [Tab 25]; and "to marry and to found a family" *ICCPR*, art. 23(2) [Tab 25].

68. 3. Many of the human rights treaties recognize a fundamental distinction between human rights from which no derogation is permitted and those from which derogation is permitted. The scope of these rights is determined by different methodologies.

69. a. In the case of derogable rights, interests of the individual are weighed against the interests of other individuals or of the group. For example: *Universal Declaration*, art. 29(2) [Tab 30].

70. b. Some treaties suggest that the test for derogation of individual rights that conflict with the state's interest is akin to "compelling state interest" test. Article 4(1) of the *ICCPR* [Tab 25] is typical: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the

extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law . . . ."

71. c. Certain rights, including the right to life, are non-derogable, meaning that they are not subject to limitation of a balancing methodology based on some public emergency. See for example *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) ["*European Convention*"], art. 15(2) [Tab 24]; *American Convention*, art. 27(2) [Tab 19]; *ICCPR*, art. 4(2) [Tab 25].

72. d. The scope of the right to life and other non-derogable rights is delimited by a rule of law methodology allowing the taking of human life only in a very narrow range of circumstances. For example, the *American Convention*, art. 4(2) [Tab 19] specifically recognizes that execution of criminals does not violate the right to life.

73. e. Article 2 of the *European Convention* [Tab 24] gives the most comprehensive rule of law defining the scope of the right to life, its provisions mirroring the common law:

> (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
> (a) in defence of any person from unlawful violence;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Additionally, article 15(2) excepts "deaths resulting from lawful acts of war." [Tab 24].

74 4. Taking human life is justified only by one of these rules and not by a balancing of interests of one person against another or others. "Necessity" does not justify the

intentional taking of innocent life. The value of innocent life simply cannot be measured, and even a threat to the very existence of the nation does not justify killing an innocent person.

75. 5. Rejection of the balancing or necessity approach is a core principle of the *Geneva Conventions of 1949* designed to protect enemy prisoners, wounded and sick and civilians. For example:

76. a. "A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces." U.S. Dept. of the Army, *The Law of Land Warfare* FM 27-10 (1956) at para. 85 [Tab 29].

77. b. "No . . . form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." *Geneva Convention Relative to the Treatment of Prisoners of War (GPW)*, art. 17 [Tab 23].

78. c. Captors must provide living quarters and medical treatment equivalent to that provided to their own troops (e.g., *GPW*, arts. 25, 26, 29, 30 [Tab 23]; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, art. 12) [Tab 21].

79. 6. In short, a soldier may not kill an enemy prisoner even if it costs him his freedom. He must feed, clothe, house and protect the enemy who invaded his country, killed his buddies and threatened his own life and liberty. He is forbidden to weigh his own interests against those of the enemy prisoner.

80. 7. The fact that the right to life is a non-derogable right is not a creation of

positive law; rather, international law recognizes a preexisting reality based on the notion of a higher law to which positive law must conform. The *Vienna Convention on the Law of Treaties*, (1969) art. 53 [Tab 26], states that even treaties are void which conflict with peremptory norms.

81. 8. The same principles that regulate the relations of weak and powerful individuals regulate weak and powerful nations. Might does not make right. The *Charter of the Organization of American States* (1948) [Tab 20] recounts principles of justice existing among nations: "States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law." Art. 9. "The American States condemn war of aggression: victory does not give rights." Art. 3(f). "The right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State." Art. 14.

B. Abortion Cases in International Tribunals

1. *Brueggeman and Scheuten* v. *Germany* (1981) 3 EHRR 244, 12 July 1977 [Tab 33]

82. a. In 1975 the Federal Constitutional Court of Germany struck down a German law that allowed virtually unrestricted access to abortion. The European Commission summarized the German Court as follows: "The life of the child developing in the mother's womb constitutes an independent legal interest [and the Constitution] requires the State to protect and foster it." [Tab 33 at 5, para. 24(1)].

83. b. The German Court said its decision could only be understood in light of Germany's experience under National Socialism. "[T]he Basic Law has erected a value oriented order which places the individual human being and his dignity at the center . . . . [F]undamental to this is the idea that the human being has its own independent value . . . which

demands unconditional respect for the life of every human being, including what appears to be a socially 'worthless' one, and therefore bars the destruction of such life without justifiable reason." Seally, "Abortion Law Reform in Europe" 15 *Tex. Int'l L. J.* 162, 169 (1980) [Tab 44].

84. c. The Court properly recognized the right to life as non-derogable; however, it improperly and inconsistently relied on the necessity or balancing test to allow the abortion of children early in the pregnancy. [Tab 33 at 10, paras. 60-62].

85. d. A new statute (restricting abortion to the first trimester) was attacked by two women in the European Commission on Human Rights as a violation of family and privacy rights under article 8 of the *European Convention*. [Tab 24]. The Commission upheld the German law but attempted to skirt the issue of whether the unborn child is entitled to protection under article 2 of the *European Convention*.

2. *Paton* v. *U.K.* (1981) 3 EHRR 408, 13 May 1980 [Tab 34].

86. a. In a case where a father tried to prevent his wife from aborting their child a British court held that a child has no legal rights until born.

87. b. The European Commission on Human Rights noted that the term "everyone" appears many times in the *European Convention* and "in nearly all these instances the use of the word is such that it can only apply postnatally." [Tab 34 at 5, para 7]. Under its logic, newborns, infants, toddlers, and the comatose and unconscious must also be excepted.

88. c. The Commission also failed to determine whether the term "life" includes the unborn but held that if the unborn child does have a right to life it is subject to certain implied limitations. The Commission erred in treating the right to life as derogable.

3. *"Baby Boy"* Case 2141, Inter-Am. C.H.R., OAS/ser L./V/II. 52 doc. 48, March 6, 1981 [Tab 32].

89. a. A Massachusetts court convicted a doctor of manslaughter for Committing an abortion, but the conviction was reversed. A petition was then submitted to the American Commission on behalf of the child as a violation of its right to life under the *American Declaration*, article I.

90. b. The Commission held that the right to life is the same under article I of The *American Declaration* and article 4 of the *American Convention* [Tab 32 at 13, para. 30] and that the right was binding on all members of the OAS. [Tab 32 at 10, para. 16].

91. c. The Commission held, however, that the unborn child's life was not protected by article 4 of the *American Convention* because of the phrase "in general." The Commission implied that the right to life of the unborn is subject to a balancing test, making it in effect a derogable right. [Tab 32 at 13, para. 31].

4. *United States* v. *Griefelt et al. Trials of War Criminals before the Nuernberg Military Tribunals*, vols IV and V, (Government Printing Office (1946-1949) [Tab 35].

92. a. Nazi defendants were tried for the crime of abortion. The essence of the charges was the failure to extend the protection of law in occupied territories to the unborn and performing and encouraging Eastern workers in Germany to get abortions. [Tab 35 at 11-12].

93. b. The prosecution's theory of the case was that abortion is a crime against the unborn child [Tab 35 at 22, 68, 80] and was a violation of the laws of war and was a crime against humanity as a matter of customary international law. [Tab 35 at 4, 18-20]. Two defendants were convicted of committing the crime of abortion. [Tab 35 at 98-104, 106-107].

C. Application of International Law to the Charter

94. 1. Perhaps the most important use of international law in a domestic legal system is to provide a methodology of legal reasoning. *See* Strossen N. "Recent U.S. and

International Judicial Protection of Individual Rights," 41 *Hastings L.J.* 805, 805-06 (1990) [Tab 46].

95. 2. Human rights law follows the rule of law methodology in defining the scope of the right to life. The relationship between ss. 1 and 7 of the *Charter* must also follow that methodology. International law is in perfect harmony with the common law. The right to life is non-derogable. Innocent people may not be killed in the name of expediency.

96. 3. *Charter,* s. 7 states that the right to "life, liberty and security" can be limited "in accordance with the principles of fundamental justice." Additionally, s. 1 allows "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The key issue is whether the s. 7 right to life may be limited only in accordance with principles of fundamental justice (rule of law methodology) or additionally whether the right to life may be subject to limits under s. 1 (balancing methodology).

97. 4. *Morgentaler* provides an example of the three-step method of constitutional interpretation that the Supreme Court has followed in determining the scope of some s. 7 *Charter* rights.

98. a. Step One. The Court determines whether a particular right or interest has been infringed. In *Morgentaler* the Court decided that a security right of pregnant women was implicated because procedures for reviewing abortion petitions were deficient in s. 251 of the *Criminal Code*. In *Morgentaler* the majority of justices found a *prima facie* case had been made for the violation of security under section 7. *Morgentaler*, [1988] 1 S.C.R. at paras. 14-33, 80-119 [Tab 6].

99. b. Step Two. The Court then determined whether there was any exception to the right that was "in accordance with principles of fundamental justice" and

determined that there was not. *Ibid.* at paras. 34-51, 120-153. The Court found that the procedure in *Morgentaler* resulted in unreasonable delays, inaccessibility, and inconsistent application of standards. The Court found that this resulted in a failure to comply with principles of fundamental justice stating, "the principles of fundamental justice are to be found in the basic tenets of our legal system." *Ibid.* at para. 46.

100. c. Step Three. The court then determined whether the s. 1 standard of "reasonable limits described by law as can be demonstrably justified in a free and democratic society" could save the statute. *Ibid.* at paras. 52-57, 154-171. The standard to be applied in s. 1 is one of proportionality determined by balancing the right of the individual against the interest of the state in limiting that right.

> Section 1 of the *Charter* can potentially be used to "salvage" a legislative provision which breaches s. 7 . . . . A statutory provision which infringes any section of the *Charter* can only be saved under s. 1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" . . . and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society. This second aspect ensures that the legislative means are proportional to the legislative ends . . . .

Morgentaler, [1988] 1 S.C.R. at para. 52 [Tab 6].

101. 5. The right to life as memorialized in s. 7 of the *Charter* is in effect non-derogable; therefore, the language of s. 7 ("principles of fundamental justice") should be taken to demand a rule of law interpretation limiting the scope of that right. The right to life being non-derogable in nature, the method of constitutional interpretation should stop at step two. In other words, the Crown is not permitted to justify a breach of the right to life by an appeal to the s. 1 balancing test.

102. 6. This limitation of constitutional interpretation to a two step process for

some rights is illustrated in the case of *Re Section 94(2),* [1985] 2 S.C.R. at para. 85 [Tab 8]. See also *Big M Drug Mart*, [1985] 1 S.C.R. at para. 84 [Tab 9].

103. a. The statute involved in *Re Section 94(2)* made driving under a suspended license a strict liability offense with a minimum seven-day jail sentence. The Court determined that this was a violation of the s. 7 right to security. The Court then decided that punishing strict liability offenses with jail violated principles of fundamental justice. Justice Lamer stated where these principles are to be found, and he distinguished those principles from those of policymaking in *Re Section 94(2),* [1985] 2 S.C.R. at para. 31 [Tab 8]:

> In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. . . . It [this approach] provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.

104. b. If it is a principle of fundamental justice that the morally blameless may not be punished by imprisonment, then surely it is a principle of fundamental justice that the life of the morally blameless may not be taken.

105. c. The Court granted the possibility that, under s. 1 of the *Charter,* absolute liability offenses might pass muster, "but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like." *Ibid*. at para. 85. In international law, liberty rights would be classified as derogable rights and therefore exceptions may apply in time of emergency. The right to life is non-derogable and not subject to limitation on the basis of expediency. The Court should not look to a s. 1 balancing methodology to deny that right to anyone, including the unborn.

VIII. IMPLICATIONS OF THE PREVAILING JURISPRUDENCE

A. Law as Nothing more than Human Convention

106. 1. King John claimed, "the law is in my mouth." His divine pretensions were decisively rejected at Runnymede in 1215. Henri Bracton, father of the Common Law, wrote, "the king is under God and Law." Wu, J. *The Fountain of Justice* at 71ff. [Tab 48]. "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." Blackstone, 1 *Commentaries* at 41 [Tab 37].

107. 2. The twentieth century returned to King John's delusion, embracing the legal positivism that law is nothing more than the dictates of the state. That philosophy was resoundingly rejected at Nuremberg. The "normative approach" to which Hood J. appealed is legal positivism.

B. Personhood as Nothing more than Human Convention

108. 1. The Attorney-General of England declared, "Parliament is sovereign; it may make *any* laws. It could ordain that all blue-eyed babies be destroyed at birth." Rushdoony, R. J. *Institutes of Biblical Law* (1986) at 512 [Tab 42]. The Canadian Supreme Court states that the *Charter* places limits on Parliament and presumably Parliament could not decree the death of all blue-eyed babies at birth. But why? Because the Supreme Court says so? Because the people say so?

109. 2. What crime is committed if a person intentionally kills an unborn child against the mother's wishes? California has resolved this problem by defining murder to include killing a fetus without the mother's consent. *California Penal Code* s. 187 [Tab 2]. Has California made it murder to kill non-humans? If unborn children are humans can they be

excluded from the protection of law? Can California make it murder to kill dolphins and excusable to kill certain unwanted children after birth?

110. 3. These questions cannot be brushed aside. Peter Singer believes that parents should be given time after a child's birth to determine whether the child should be allowed to live. He believes that some animals, because they function at a high level, should be accorded personhood. He holds his position as professor of bioethics at Princeton University because of his views, not in spite of them. Smith, W. J., *Culture of Death* (2000) at 57ff.; 189ff. [Tab 45].

IX. PRINCIPLES OF INTERPRETATION REVISITED

111. **A. Interpretive principles.** All of the interpretive principles that Mr. Justice Hood refused to apply point toward the right to life of all people. Why do the most vulnerable people get the least protection? There is great inconsistency in the decisions, and the courts have not set a clear standard as to where the laws of logic apply.

112. **B. Moral values.** The fundamental moral value in Christianity is love. In the Bible, love is not vague or amorphous. It is not sentimentality. Christ defined it. "If you love me, you will obey what I command." *John* 14:15. It lays total claim on one's life. "Greater love has no one than this, that he lay down his life for his friends." *John* 15:13. See also 1 *John* 3:16. Abortion is not about privacy or compassion. It is about cowardice and escape from responsibility.

113. **C. Science.** There is extensive evidence in the record of trial that unborn children are biologically distinct individuals from the moment of conception. While claiming that this is not a scientific issue, the courts below justified their holdings in part on a primitive sort of laymen's science that mother and child are one. Holmes noted that "facts kick." Unborn babies

are human beings. That is a fact. Ask any doctor or expectant mother who has been kicked by a fact.

114. **D. <u>Religion</u>.** "[W]hile the Roman law was a deathbed convert to Christianity, the common law was a cradle Christian." Wu at 65 [Tab 48]. The law of the realm treats unborn children as distinct human beings in existence from conception. "For you created my inmost being; you knit me together in my mother's womb." *Psalm* 139:13. "Surely I was sinful at birth, sinful from the time my mother conceived me." *Psalm* 51:5. "May he hear wailing in the morning, a battle cry at noon. For he did not kill me in the womb, with my mother as my grave." *Jeremiah* 20: 16b-17. "When Elizabeth heard Mary's greeting, the baby leaped in her womb . . . . 'As soon as the sound of your greeting reached my ears, the baby in my womb leaped for joy.'" *Luke* 1:41, 44. See House, H. W., "Miscarriage or Premature Birth: Additional Thoughts on Exodus 21:22-25," *Westminster Theological J.* 108 (1978). [Tab 40].

115. **E. <u>Language</u>.** It is difficult to see how language cannot be a central issue. If "human being/person/everyone" is simply a concept that is a creation of human convention, there could be no law. Law is, by its very nature, fixed, uniform and universal. The right to life is the same for all time, it applies equally to everyone regardless of his or her station in life, and it extends to every place on the earth. See, *e.g., Isaiah* 2:3-4; *Psalm* 119:144. Humpty Dumpty was wrong when he said, ". . . a word . . . means just what I choose it to mean – neither more nor less." Alice said that the question is whether you can make words mean different things. ""The question is," said Humpty Dumpty, "which is to be master – that's all."' Carroll, L. *Through the Looking-Glass and What Alice Found There* (1871). The Court is bound by oath to judge in accordance with the law of Christ, not to stand as Pilate did in judgment of Christ and his law. [Tab 4].

116. **F. <u>Common Law</u>.** Hood J. rejected any interpretation of the common law that

recognizes the unborn as having a right to life. Abortion was a serious criminal offense in the common law, it was not a private matter. "Life," said Blackstone, "is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." Blackstone, 1 *Commentaries* at 125. [Tab 37]. The Crown's interpretation of the common law is little more than "the evening dress which the newcomer puts on to make itself presentable according to conventional requirements." Holmes, *Book Notice*, 14 *Am. L. Rev*. 233-34 (1880).

117. **G. <u>Matter for Parliament</u>.** The Courts have set no principle for determining when they will defer to Parliament and when they will not. There are statutes in existence designed to protect the unborn which the Courts have nullified.

118. **H. <u>Majoritarianism</u>.** The Supreme Court of Canada has ruled that it is not bound by the will of the majority. It indicated that some values, such as multiculturalism, are found in the *Charter*. *Big M Drug Mart,* [1985] 1 S.C.R. at para. 140 [Tab 9]. It would be surprising to learn of any culture, race, religion or other group in which expectant mothers did not refer to their unborn children as "my child" or "my baby."

PART 4 – NATURE OF THE ORDER SOUGHT

119. 1. That the conviction be quashed.

120. 2. That the ruling of Mr. Justice Hood denying that the term "everyone" in s. 7 of the *Charter* does not include unborn children be reversed and that the provisions of the *Access to Abortion Services Act* denying protection of the unborn be struck down as contrary to the *Charter*.

All of which is respectfully submitted by

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James R. Demers, Appellant, *pro se*
June ___, 2001