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Memorandum of Argument, Supreme Court of Canada, in re James R. Demers

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IN THE SUPREME COURT OF CANADA
(On application for leave to appeal from the Court of Appeal for the Province of British Columbia)

BETWEEN:

JAMES ROGER DEMERS

Applicant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

OVERVIEW OF THE ISSUES OF PUBLIC IMPORTANCE

1. First, this leave application invites the Court to decide whether the *Access to Abortion Services Act* (the "Act"), which violates Mr. Demers' s. 2 right to freedom of expression, can be saved under s. 1 of the *Canadian Charter of Rights and Freedoms* R.S.C. (1982) (the *"Charter"*).

2. This Court has ruled in previous cases that the value of speech depends at least in part on its content. Mr. Demers' right to freedom of expression against abortion cannot be weighed against competing interests under s. 1 without first identifying those interests and determining their value.

3. In this case competing interests cannot be weighed unless the nature of unborn children as human beings is acknowledged and their value assessed. The courts below erred by failing to expressly acknowledge that unborn children are human beings, and, therefore, the courts never assessed their value.

4. Secondly, this leave application invites the Court to decide the closely related issue of whether unborn children have a right to have their lives protected under s. 7 of the *Charter*. Determination of whether unborn children are human beings for s. 1 purposes is inextricably linked to the determination of their right to life under s. 7 of the *Charter*.

5. Although there are proper bases for treating some human beings or groups of human beings differently from others under the law, the state can never justify denying any human being or group of human beings all protection of law.

6. If the term "everyone" as used in s. 7 of the *Charter* is not interpreted to include every human being then life would be converted into a mere privilege that the state may grant or withhold at will. The language of the international human rights treaties makes no such distinction between human beings entitled to juridical status as persons and human beings not so entitled.

7. Neither the Crown nor any lower court has identified any fundamental principle of justice under the common law or the international law of human rights that would justify the intentional taking of innocent life.

8. A human being may not be deprived of his right to life through a section 1 balancing of interests analysis. The common law and international law are in accord on this principle as well. The necessity defense does not permit the intentional taking of innocent human life. International law identifies the right to life as nonderogable, meaning that innocent life may not be balanced away against other interests even in the event of national emergency.

9. The courts below, in reliance on *Winnipeg Child and Family Services v. G.(D.F.)*, have divorced *Charter* interpretation from language, morals, science, religion, and common law. This so-called "normative approach" is pure legal positivism in which law is reduced to nothing more than the will of the state. The "normative approach" contradicts principles of interpretation that the Supreme Court of Canada has relied upon in numerous other cases.

10. Even if this Court should simply that unborn children are the only class of human beings completely outside the protection of law, it cannot avoid determining their inherent worth for purposes of weighing Mr. Demers' right to free expression against competing interests under s. 1.

HISTORY OF THE PROCEEDINGS

11. The *Abortion Services Access Zone Regulation* (the *"Regulation"*) was made pursuant to s. 5 of the *Access to Abortion Services Act*, R.S.B.C. 1995, c. 44. Section 1 and Appendix 1 of the *Regulation* establish an access zone approximately 30 metres surrounding the Everywoman's Health Centre (the "Clinic").

12. Mr. Demers' trial commenced on October 20, 1997, before The Honourable Judge H. J. McGivern in the Provincial Court of British Columbia at Vancouver. In a decision dated December 19, 1997, Judge McGivern convicted 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).

13. The Honourable Mr. Justice Hood, in the Supreme Court of British Columbia, by a judgment dated August 3, 1999, upheld the decision of Judge McGivern.

14. The Honourable Mr. Justice Low writing for the Court of Appeal for British Columbia dismissed Mr. Demers' appeal in his Reasons for Judgment dated January 17, 2003.

FACTS

15. 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.*

16. 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. Mr. Demers admitted to carrying a sign that disapproved of abortion in the access zone surrounding the Clinic.

17. 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.

18. Most abortions are done for non-medical reasons. Women seeking abortions often feel pressured to have abortions or are "sacrificing themselves" for someone else. Many women are coerced into having abortions and do not choose freely; some because they do not have sufficient information. Witnesses who had abortions were not made aware of the availability of either pre-abortion or post-abortion counseling.

19. Many women are ambivalent about whether to have abortions, and are open to discussion and guidance right up to the last moment. Clinic Staff admitted that some women who come into the Clinic change their minds. Many children scheduled to die are alive because of their mothers' contact with a pro-life counselor.

20. Pro-life advocates inform women about abortion and the alternatives, offer emotional and financial support and try to persuade them not to terminate their pregnancies. They give out pamphlets accurately depicting and describing the stages of development of the unborn child. Women have thanked pro-life advocates for their kindness, and expressed gratitude for offers of help and concern.

21. Dr. Marie Peeters gave expert testimony on the early development and humanity of the unborn child. 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. Abortion service provider, Ms. Joy Thompson, admitted that the fetus is "a human being not yet born." However abortion service providers discounted the humanity of the fetus in their counseling.

22. Crown witness Dr. R. E. K. Hudson indicated that informing women on the development of unborn children prior to an abortion is inappropriate. Dr. Hudson has been instrumental in the government's plan to expand abortion services throughout the province.

23. The Crown's evidence confirmed that the essential purpose of abortion clinic counseling is to affirm women to go through with an abortion. Abortion counselor Ms. Erin Mullan stated,

"Women will feel an abortion is a loss," and admitted that the loss was the loss of a human life.

24. Psychiatrist R. Philip Ney testified that abortion severely harms women psychologically and emotionally. Ms. Patricia Hansard, founder of Abortion Recovery Canada testified to the same. The harm is a direct psychological consequence of deliberately killing one's own children.

THE JUDGMENTS BELOW

(i) The Decision of the Trial Judge in *Regina* v. *Lewis* (January 23, 1996)

25. This case is a companion case to *R*. v. *Lewis*, [1996] 18 B.C.L.R. (3d) 218 (Prov. Ct.)) in which the defendant Maurice Lewis was tried and the charges dismissed on virtually the same evidence as this case. Judge E. J. Cronin, who presided over the trial, ruled that the *Act* violated Mr. Lewis' s. 2 *Charter* rights and could not be saved under a section 1 analysis.

(ii) The Decision of the Supreme Court in *Regina* v. *Lewis* (October 8, 1996)

26. In *R*. v. *Lewis,* [1996] 24 B.C.L.R. (3d) 247 (S.C.), Saunders J. (as she then was) agreed that the impugned sections of the *Act* were inconsistent with the freedoms guaranteed by ss. 2(a), (b) and (d) of the *Charter*, 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. She failed, however, to rule as to whether unborn children are human beings. Because Mr. Lewis did not raise the question of the unborn child's right to life under s. 7 of the *Charter* that issue was not decided. Mr. Lewis died before his appeal to the Court of Appeal for British Columbia could be heard.

(iii) The Decision of the Trial Judge in *Regina* v. *Demers* (December 19, 1997)

27. The Learned Trial Judge, H.J. McGivern, 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. Ct. File No. 14490-02-c at 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*. *Ibid*. at 6-7.

(iv) The Decision of the Supreme Court in *Regina* v. *Demers* (August 3, 1999)

28. Counsel initially argued the appeal 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. The Court marked the transcript and exhibits from the *Lewis* case as exhibits in the present case.

29. Counsel then argued the appeal before Mr. Justice Hood. 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." Docket No. CC980044 at p. 18, para. 37. He ruled that the term "everyone" in international law does not include the unborn. *Ibid*. at 25, paras. 52, 53. He also ruled that the term "everyone" in s. 7 of the *Charter* does not include the unborn. *Ibid*. at p. 42, 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*. *Ibid*. at p. 3, para. 3.

(v) The Decision of the Court of Appeal for British Columbia (January 17, 2003)

30. On January 17, 2003, the Court of Appeal for British Columbia (Low, Huddard, Newberry JJ.A.) dismissed the appeal. R. v. Demers, 2002 BCCA28; Docket No. CA026297. The court implicitly acknowledged that unborn children are human beings when it cited *Morgentaler* for the proposition that "any preference of foetal rights over the rights of the pregnant women . . . is a matter best left to the careful consideration of the legislators." But the Court gave no indication as to what value is to be placed on those lives. The Court of Appeal expressly ruled that the term "everyone" as used in s. 7 of the *Charter* does not include unborn children. *Ibid*. at 9, par. 26.

PART II – POINTS IN ISSUE

31. This leave application raises the following two related issues of public importance:

I. IS AN UNBORN CHILD A HUMAN BEING WHOSE LIFE HAS INHERENT VALUE THAT MUST BE MEASURED WHEN DETERMINING WHETHER THE *ACCESS TO ABORTION SERVICES ACT*, WHICH VIOLATES A SUBJECT'S SECTION 2 *CHARTER* RIGHT TO FREEDOM OF EXPRESSION, CAN BE SAVED UNDER SECTION 1 AS "DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY?"

II. ARE UNBORN CHILDREN THE ONLY CLASS OF HUMAN BEINGS IN CANADA WHO HAVE NO PROTECTION UNDER THE SECTION 7 *CHARTER* DECLARATION THAT "EVERYONE HAS THE RIGHT TO LIFE . . . ."?

PART III – BRIEF OF ARGUMENT

I. IS AN UNBORN CHILD A HUMAN BEING WHOSE LIFE HAS INHERENT VALUE THAT MUST BE MEASURED WHEN DETERMINING WHETHER THE *ACCESS TO ABORTION SERVICES ACT*, WHICH VIOLATES A SUBJECT'S SECTION 2 *CHARTER* RIGHT TO FREEDOM OF EXPRESSION, CAN BE SAVED UNDER SECTION 1 AS "DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY?"

32. The Crown has admitted, and the lower courts acknowledged, that the *Access to Abortion Services Act* violates Mr. Demers' s. 2 *Charter* right to freedom of expression. Therefore, the issue is whether the *Act* can be saved under a section 1 *Charter* analysis by proof that the *Act* is "demonstrably justified in a free and democratic society."

33. The method of analysis for s. 1 is essentially one of balancing competing interests, be they interests of individuals, groups, society or the state:

> [8] The bottom line is this. . . . [T]he courts must nevertheless insist that before the state can override constitutional rights, there must be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement."

RJR – MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199, at 328-29

34. Courts may enlist the methodologies of inductive, deductive and intuitive reasoning to decide s. 1 issues:

> [6] . . . In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role . . . ."

Ibid.

35. In order to weigh the value of freedom of expression against competing interests courts must consider the content of the speech involved. For example, some expression such as hate speech and obscenity is not as valuable as other expression.

R. v. Keegstra, [1990] 3 S.C.R. 697, at 762
R. v. Butler, [1992] 1 S.C.R. 452, at 500

36. Madame Justice Saunders seemed to have recognized the importance of this point but neither she nor the other courts determined whether the unborn child is a human being or what the value of its life is. She wrote:

> [141] Mr. Lewis contends that the truth of his message [that unborn children are human beings], and its motivation by conscience and religion, increases the value of expressive activity which is denied him by the impugned provisions of the *Act*.
>
> *Lewis*, 24 B.C.L.R. at 290

37. In order to weigh competing interests certain factual matters must be determined or truths established. Just as one's right to yell "fire" in a crowed theater depends on the existence of a fire, the right to yell "murder" depends on whether a human being is being killed. In this case Mr. Demers didn't yell. He didn't even speak. He simply held up a sign that quoted an international human rights treaty.

38. None of the courts below answered the critical question of whether an unborn child is a human being, despite the fact that all three methods of legal reasoning that this court articulated in *RJR – MacDonald* bear witness to the fact that unborn children are human beings.

39. First, inductive reasoning. Applicant presented testimony of renowned geneticist, Dr. Marie Peeters, and other scientific evidence from which no other inference can be drawn than unborn children are human beings. There is no evidence in the record of trial from which Madame Justice Saunders could draw the conclusion that unborn children are not human beings. In fact, two of the Crown's own witnesses, admitted abortion providers, acknowledged that unborn children are human beings. The Court of Appeal did not make an express ruling that unborn children are or are not human beings.

40. Second, deductive reasoning. This court in *RJR – MacDonald* recognized that there is such a thing as "established truth" from which legal conclusions are to be drawn. *RJR-MacDonald,* 3 S.C.R. at 328. There are few more fundamental and important truths to establish than the identification of human beings. Several Justices on this Court and in the courts below by implication have acknowledged that unborn children are human beings. From *Morgentaler*

Justice Saunders drew the conclusion "that Parliament could enact more refined legislation to protect the rights of the foetus." Presumably Parliament could not confer the juridical status of personhood on mere body parts.

Lewis, 24 B.C.L.R. at 256

41. Third, intuitive reasoning. If abortion were just a medical procedure then there would be no long-term psychological harm to women resulting from it, and the impact of protests would hardly be troublesome to them. Furthermore, if women did not intuitively know that their unborn children are human beings, abortion providers would not be afraid to fully inform them of the facts.

42. Justice Saunders' most serious error was her failure to address the issue that she herself raised. She failed to rule on the truth or falsity of the assertion that unborn children are human beings of the same value as other human beings.

43. The question of whether an unborn child is a human being is distinct from the question of whether a court or legislature recognizes a child as a person with juridical status. The U.S. Supreme Court implicitly made the distinction between human being and person in *Roe v. Wade*, 410 US 113 at 181 (1973). It avoided answering the question of whether unborn children are alive and simply ruled that unborn children are not persons with juridical status.

44. This Court cannot avoid answering the question of the unborn child's humanity in the context of a section 1 weighing of freedom of expression rights against other interests. Since a section 1 analysis is fundamentally political in nature, as opposed to judicial, the Court must consider the value of the child as a human being for balancing purposes regardless of its status as a juridical person.

45. Assuming for the moment that the Court of Appeal is correct that human beings have no juridical status except that which is granted by the will of the state, surely this Court would not go so far as to hold that human beings have no inherent value or that their only worth is what the state imputes to them.

46. This Court must reaffirm the fact that all human beings have inherent value and make it clear that the worth of human beings does not depend simply upon the decree of the brightest, or the most powerful, or the most educated, or even of the majority. If all valuation is purely subjective, then the entire s. 1 process of balancing competing values is a simply a façade for engaging in interest group politics.

II. ARE UNBORN CHILDREN THE ONLY CLASS OF HUMAN BEINGS IN CANADA WHO HAVE NO PROTECTION UNDER THE SECTION 7 *CHARTER* DECLARATION THAT "EVERYONE HAS THE RIGHT TO LIFE . . . ."?

47. The Supreme Court of Canada has never ruled whether unborn children enjoy any of the protections afforded under the s. 7 of the *Charter*. If they have no protection whatsoever, they would be the only class of human beings thus far identified as completely outside the protection of law. That would place Canada in a very exclusive club of nations.

48. The implication of this Court's decisions in abortion-related cases, and of the lower courts in this case, is that unborn children are human beings, since all have asserted that Parliament may confer rights on the unborn. These decisions further imply that courts may limit an unborn child's right to life by weighing it against non-life-threatening interests of others.

49. It is impossible to reconcile this view, in which human beings have only those rights that states give them, with the common law view that rights are a gift of God, or the international human rights documents that assert the inalienability of rights, or the *Charter*'s Preamble which declares that "Canada is founded on principles that recognize the supremacy of God and the rule of law."

50. The lower courts have relied upon the language of *Winnipeg Child and Family Services (Northwest Area)* v. *G.(D.F.),* [1997] 3 S.C.R. 925 which states that the decision to extend the protection of law to a class of human beings is a "normative" decision. For example, Mr. Justice Hood, in reliance on *Winnipeg*, ruled that defining "everyone" is not an issue of science, language, religion, social choices or moral values. Demers, at 8, 12; paras. 15, 26. He wrote that

it is a normative task to be accomplished by looking to the common law. [*Ibid*. at 35-37; 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. *Ibid.* at 44; para. 89].

51. He ignored the numerous cases in which this Court has relied upon morals, science, religion, values, and even language. Additionally, there are numerous cases in which this Court has ruled that a legislative enactment violates the *Charter* and other cases in which it has ruled that the *Charter* does not simply incorporate common law rights. Here are several examples:

a. Morals: This 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. "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. "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.

b. Science: "The fetus' complete physical existence is dependent on the body of the woman." See *Dobson* [1999] 2 S.C.R. at paras. 17, 20, 25, 37. Even in *Winnipeg Child* this Court relied on a kind of layman's science stating 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. "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.

c. Religion: This Court has ruled that "the origins of the demand for such freedoms [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. "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.

d. Language: This 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.

e. Common law: Even if it were true that the common law did not recognize the right to life of unborn children, this 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. "[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. 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.

f. Deference to Parliament: This 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. "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. 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.

52. The lower courts have extracted from *Winnipeg Child* a philosophy of jurisprudence that makes human will rather than reason the measure of law. This philosophy is contrary to our thousand year-old Western Legal Tradition and is antithetical to the very notions of the rule of law, inalienable rights and constitutionalism.

53. The "normative" interpretive principle set forth in *Winnipeg Child* is inconsistent with so many principles of *Charter* interpretation forwarded by this Court in other opinions that it provides an excellent case study for Critical Legal Studies proponents as they seek to imbue law students with the belief that there is no such thing as a rule of law, there is only a grab bag of inconsistent principles that courts may call upon to justify any particular result that they wish to reach, ensuring that predetermined policy choices are clothed with the specious authority of law.

54. The Crown has taken the position that adjudication of all s. 7 rights, including the right to life, involves a three-step process. In this case those steps would be: (1) determine whether unborn children are included within the term "everyone" and whether their lives have been violated, (2) determine whether that violation is in accordance with principles of fundamental justice, and (3) if not in accordance with fundamental justice, determine whether that violation can be demonstrably justified in a free and democratic society.

55. The Crown advocates the indefensible position that intentionally killing innocent human beings may be justified under s. 1 of the *Charter*.

56. The scope of the right to life should not be determined by use of the same three-step process of analysis as other s. 7 rights. Instead it must be limited to a two-step process that is consistent with the most basic common law and international law principles.

57 Step One: Has the right to life been violated? In this case the issue under step one is whether unborn children fall within the meaning of *everyone*. If they are included in the term "everyone," there is clearly a violation of the right to life.

58. No dichotomy should be made between "human being" and "person afforded juridical status." Although a distinction can be made between human being and juridical personhood, that distinction entails a fundamental rejection of the nature and origin of rights recognized in the common law, customary international law, modern human rights conventions, the *Charter*'s Preamble and even the Queen's Coronation Oath. The human rights conventions in particular make it clear that no human being will be denied protection of law or juridical status as a person.

59. 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]; "everyone" and "person," *Universal Declaration of Human Rights* (1948), art. 3 ["*Universal Declaration*"]; and "every human being," *International Covenant on Civil and Political Rights* (1966) art. 6(1) ["*ICCPR*"].

60. Several instruments specifically address and protect the unborn.

a. *American Convention*: "For the purposes of this Convention, 'person' means every human being." art. 1(2). "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).

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."

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.

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.

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

61. The right to life is a reality that law can neither create nor destroy. The state 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; and "fundamental human rights stem from the attributes of human beings," *African Charter on Human Rights and Peoples' Rights*, (1981), Preamble.

62. **Step Two: Principles of fundamental justice.** The methodology for determining principles of fundamental justice must be distinguished from s. 1 analysis. The methodology for applying principles of fundamental justice involves the application of rules of law and is judicial in nature. The s. 1 balancing analysis for determining limits imposable in a free and democratic society involves a weighing of competing interests and is fundamentally political (legislative) in nature.

63. A judicial approach to determining the scope of the right to life entails making a determination as to whether there is a rule of law that justifies taking life. For example, the life of a person may be taken if he poses an imminent threat of death or serious bodily harm to another. A balancing approach asks whether it is all right to kill and eat the cabin boy in order to

save the lives of three persons or even one person if his life is deemed more valuable. *R. v. Dudley and Stephens*, 14 Q.B.D. 273 at 287-88 (1884).

64. International law rejects the balancing methodology for defining the scope of the right to life, just as the common law rejects it. International law distinguishes between derogable and nonderogable rights. The right to life is a nonderogable right. Therefore innocent life cannot be intentionally taken even in time of national emergency unless someone has committed some grave moral breach as defined by rules of law. Only derogable rights may be altered in the name of expediency. See for example *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) ["*European Convention*"], art. 15(2); *American Convention*, art. 27(2); *ICCPR*, art. 4(2).

65. Article 2 of the *European Convention* gives the most comprehensive rule of law for 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."

66. 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. *Dudley and Stephens*, 14 Q.B.D. at 288.

67. **Step Three: Demonstrably justified in a free and democratic society.** This Court must make it clear that intentionally taking innocent life can never be justified as an act of necessity, that the courts may never go to step three, and that the right to life is nonderogable under the *Charter*.

1

2 **CONCLUSION**

3 68. Lord Bracton stated that it is the law that makes the king, not the king who makes the
4 law. The lower courts have interpreted *Winnipeg Child's* "normative" approach in such a way as
5 to stand this most basic principle of the common law on its head, claiming that there is no law
6 except that which the King makes.

7

8 69. This Court must affirm that human beings have inherent value, that rights are not simply
9 a gift of the state, and that courts must protect innocent life even when it may not seem
10 expedient.

11 70. This Court must reaffirm and apply the sound principles of constitutional interpretation
12 that it has relied on in so many of its opinions and reject the reasoning of *Winnipeg Child* and
13 other related cases which reduce law to nothing more than a triumph of the will.

14

PART IV

No costs were awarded in the lower courts and therefore the applicant does not seek costs of this application.

PART V – ORDER REQUESTED

It is respectfully submitted that the application should be allowed and leave to appeal to this Honourable Court granted to appeal from the decision of the Court of Appeal for British Columbia.

DATED at _____, this ___ day of _____, 2003

_____

James R. Demers, *pro se*