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PETITIONER'S OBSERVATIONS ON CANADA'S ADDITIONAL INFORMATION

No. P225/04

I. INTRODUCTION

1. Petitioner respectfully submits these observations on Canada's Additional Information dated May 17, 2005. The Commission previously granted an extension of time to submit these observations to the date of October 5, 2005. These Observations address each of the arguments that the Government of Canada set out in "IV. LEGAL ARGUMENT ON ADMISSIBILITY" in the order in which the Government of Canada arranged them.

II. PETITIONER'S RESPONSE TO CANADA'S LEGAL ARGUMENT ON ADMISSIBILITY

A. Canada's claim that Mr. Demers did not file his Petition on time.

2. The Government of Canada submits that Mr. Demers' is out of time to file his Petition. It bases its submission on the erroneous assertion that Mr. Demers did not file his petition with the Commission until January 21, 2005. Mr. Demers received notice on September 26, 2003, that the Supreme Court of Canada had denied his request for appeal on September 25, 2003. His domestic remedies were thus exhausted. Mr. Demers filed his Petition with the Commission within six months of the exhaustion of his domestic remedies.

B. Canada's claim that Petitioner failed to exhaust domestic remedies.

3. The Government of Canada acknowledges that Mr. Demers exhausted all domestic remedies for violations of rights alleged under Article I (right to life of unborn children) of the American Declaration of the Rights and Duties of Man and Article IV (freedom of expression). (Hereinafter, all references to "Articles" are to the American Declaration of the Rights and Duties of Man unless otherwise noted.)

4. However, Canada denies that Mr. Demers exhausted all domestic remedies for violations of Article II (equal protection of law), Article VII (special protection of women during pregnancy), Article XIII (participation in the benefits of scientific discoveries), Article XVII (recognition of persons having rights and obligations), Article XXII (association with others), and Article XXIX (development of personality).

5. Canada's submission is not well-taken. All of the rights named in paragraph 4, immediately above, are subsidiary rights of the two more generally phrased rights of life and freedom of expression. The American Declaration of the Rights and Duties of Man addresses some aspects of human rights with more particularity than does the Canadian

Charter. This general principle of jurisprudence is so well-recognized that Canada itself makes reference to specific rights being subsumed in more general rights in paragraphs 15 and 22 of its Response. The nine-volume "Proceedings at Trial" from Mr. Demers' trial before the Provincial Court of British Columbia, as summarized in his Petition, contains extensive evidence of the violation of each of these subsidiary rights. The Provincial Court admitted extensive evidence of violation of the subsidiary rights as relevant and necessary for determining the scope of the right to life of unborn children and Mr. Demers' right to freedom of expression.

6. Freedom of expression is not recognized and protected simply because of the personal gratification the speaker derives from saying what he thinks. It is protected because a free flow of information and opinions is essential to a free and healthy society. The Supreme Court of Canada itself has recognized this reality. The Chief Justice of the Supreme Court of Canada writing in the case of *Irwin Toy Ltd. V. Quebec (Attorney-General)*, [1989] 1 S.C.R. 927 at 976, 58 D.L.R. (4th) 577 stated that "the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed." It is the pregnant mother, headed into the abortion clinic, who is in greatest immediate need of information relevant to the nature of the child she carries, the consequences to her of going through with an abortion, and offers of alternatives to abortion (Article VII). Many women are unaware of the nature of the unborn child and therefore are not able to participate in the benefits of scientific discoveries in making their decisions (Article XIII). The decision to have an abortion is intensely moral in nature and an expectant mother like all human beings needs to be reminded that as a person with rights she also has obligations (Article XVII). She cannot receive that information at that critical time unless people like Mr. Demers have at least a minimal opportunity to associate with her (Article XXII) for the purpose of communicating with her.

7. No right can be enjoyed unless there is protection of the most fundamental of all rights, the right to life. Mr. Demers has alleged violation of only those subsidiary rights most immediately relevant to unborn children, as developed by the evidence introduced at trial. A great deal of that evidence demonstrated that unborn children are fully human, though in the process of development. This process is violently interrupted long before these children become the adults that they otherwise would. Human life exists along a continuum of development (Article XXIX). As fully human, unborn children are entitled to the same protection of law to which every other human being is entitled (Articles II and XVII). The right to protection of law follows immediately after the right to life as set forth in the American Declaration. The main issue of the proceedings in the Canadian courts was whether unborn children are included in the term "everyone." Canada denied the contention that when chidren are included in the term "everyone" in spite of the totally unrebutted evidence that unborn children are fully human beings. Even the abortion clinic operator admitted that unborn children as fully human beings. A great deal of the scientific evidence introduced at trial came through the testimony of Dr. Marie Peeters of the famed International Lejeune Centres. The Canadian government, including its Supreme Court, has taken the position that scientific evidence is irrelevant to the

question of whether unborn children are to have protection of law. See *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*, [1997] 3 S.C.R. at 925 and *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 at 553, which states that the "task of properly classifying a foetus in law and science are different pursuits." It has therefore denied the right not only of the mother but the child to participate in the benefits of scientific discoveries (Article XIII).

C. Canada's claim that Petitioner failed to identify victims of a violation.

8. The Government of Canada faults Mr. Demers for not identifying by name any specific person or persons other than himself as victims. The record of trial in Mr. Demers' case contains the name and testimony of a minor girl and her mother. It describes the daughter's abortion at the clinic and the misinformation that she received regarding abortions from the abortion clinic, yet Canada faults Mr. Demers for not producing a name. The Government of Canada further asserts in paragraph 20 of its Response that petitions "must be brought by or on behalf of persons who claim to be victims." This is a rather perverse and cynical position to take. Unborn children and dead people are not able to make claims. They are not able to speak or write. Unborn children are quite often given names, but they are usually unofficial names given by grieving mothers who were pressured to do something they did not want to do and find it difficult to forgive themselves for doing what they knew was wrong. Seldom are birth certificates or death certificates issues with the names of a child. Nor are their markers for their graves. The Government of Canada goes even further to hide the identity of the victims, putting men and women in jail who should come close enough to an abortion clinic to engage in even the most polite conversation out of concern for the woman and her child.

9. Canada admits that the Province of British Columbia passed the Access to Abortion Services Act R.S.B.C. 1995, c. 44. It did so to ensure that women would not be deterred from terminating their pregnancies. Canadian officials have been able to pursue this kind of legislation because, as Canada quite readily admits, it removed all protection of law from unborn children by the case of *Morgentaler v. the Queen*, [1988] 1 S.C.R. 30. The deprivation of life of unborn children is no abstract matter. *Morgentaler* involved an abortionist who wanted to pursue his vocation of aborting real children, children carried by real women. British Columbia's Access to Abortion Services Act was not passed to ensure the perpetuation of an abstract right of abortion, and Mr. Demers was not jailed for trying to talk to abstract women. Abortion statistics made public in Canada tally hundreds of thousands of real children. These statistics are published by Statistics Canada at http://www.statcan.ca/Daily/English/040331/d040331c.htm. The victims of the holocausts in Germany, Bosnia, and Ruanda are no less real because most of their names are unknown. The group of unborn children and women victims of abortion are known and identifiable to the government of Canada. If Canada refuses to admit these facts the Commission should exercise its powers to insist upon conducting a factual investigation just as it has in the past regarding human rights abuses in Argentina. IACHR, Report of the Situation of Human Rights in Argentina, O.A.S. Doc. OEA/Ser.L/V/II.49, doc. 19 corr. 1 (1980).

10. The Commission noted in the case of The Human Rights Situation of the Indigenous People in the Americas, OEA/Ser.L/V/II.108, doc. 62 (2000) that it is "usually necessary to identify the victim so that the respective state can investigate and respond to the allegations." *Id*. at section 2.C., 1st paragraph. Persons investigating the disappearance of persons in Argentina did so without proof of the disappearance of particular persons – "I had a 'gut feeling' that some of those people were 'disappeared', and the mission had yet to uncover any of the thousands of people who had been abducted and literally dropped from sight." Thomas Buergenthal, Robert Norris, & Dinah Shelton, *Protecting Human Rights in the Americas: Selected Problems* 179-81 (1986). Identification of particular victims serves no purpose in this case. It does not aid in the investigation or trial of those abuses. No question of fact exists of whether those abuses have been carried out. If the identity of particular victims is necessary, the Commission should exercise its investigative powers under Article 18 of the Statute of the Inter-American Commission on Human Rights and under Article 40 of the Rules of Procedure of the Inter-American Commission on Human Rights. Although the Petition is lodged under Chapter II of the Rules of Procedure of the Inter-American Commission on Human Rights it is also a request under Article 25.1 for the Commission to take "precautionary measures to prevent irreparable harms to persons." It just happens that much of the evidence that forms the basis of the request for precautionary measures arose in the context of Mr. Demers' criminal trial.

11. At every stage of Mr. Demers' legal proceedings the Government of Canada either admitted or failed to contest Mr. Demers' right of standing to assert to rights of unborn children. Canada's own courts and officers of the crown, having repeatedly acknowledged Mr. Demers' suitability as spokesman for that group of individuals, and Canada should not now be allowed to deny that Mr. Demers is an appropriate representative. The Commission itself recognizes the right of representatives to assert the rights of groups. How else would a group of unborn children ever find an advocate? The Commission has held that individuals may serve as representatives of groups of which they are not members. It has also held that large groups consisting of an identifiable membership may be identified may be represented by appropriate individuals. No uncertainty exists as to whether particular individuals are or are not members of the groups for which Mr. Demers asserts rights.

12. Canada cites several cases to back its assertion that the claims in the Petition are abstract in nature. Those cases are distinguishable from the allegations made in Mr. Demers' Petition. This is not a case in which the Petitioner alleges that the mere existence of a law violates his or another's rights. *See, e.g., Emerita Montoya Gonzales v. Costa Rica*, Admissibility, Case 11.553, Report No. 48/96 (October 16, 1996), para. 28. This case does not involve a non-self-executing law that authorities have failed to take measures to implement. *See, e.g., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of 9 December 1994, Inter-Am. Ct. H.R. (Ser. A) No. 14, paras. 42 and 45. Petitioners have been permitted to represent unnamed persons when there is no doubt as to their existence and membership

among a class of individuals whose rights have been allegedly violated. *See, e.g., Haitian Centre for Human Rights et al. v. United States*, Case No 10.675, Report No. 51/96 (March 13, 1997), para 170. The group here is not indeterminate. *See, e.g., Janet Espinoza Feria et al. v. Peru*, Admissibility, Case 12.404, Report No. 51/02 October 10, 2002), para. 21. In the American system for the protection of human rights it is not necessary that the Petitioner have the victim's authorization to bring a complaint. This is not a case brought on behalf of all the people of a particular country. *See, e.g., Elias Santana et al. v. Venezuela*, Admissibility, Petition 453/01, Report No. 92/03 (October 23, 2003), paras. 52 and 54.

13. Canada has not denied that hundreds of thousands of unborn children have been aborted in Canada with the complicity of the government. It has cut off relevant information of this silent holocaust much as did the government of Argentina in the later part of the last century. In Argentina it was virtually certain that thousands of people had been abducted and murdered, but the government imposed an information blackout. Canada is engaged in similar behavior and tries to protect itself from scrutiny by arguing that the allegations of human rights violations in this case are simply abstract in nature. If Canada is not forthcoming, the proper remedy in this case is not dismissal of the Petition but the convening of a fact-finding body to conduct an investigation in Canada.

D. Canada's claim that Petitioner does not establish a violation of rights.

14. Canada incorrectly states that there are no facts stated that show a violation of Article XIII (right to participate in the benefits of scientific discoveries) and Article XXIX (right to fully form and develop personality). The "Proceedings at Trial" as summarized in the Petition are replete with evidence of violations of both rights. The testimony and other evidence of the unborn child's humanity was overwhelming and unrebutted. Yet Canada chose to disregard that evidence at trial and on appeal, claiming that scientific evidence is irrelevant. *See Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)*, [1997] 3 S.C.R. at 925 and *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, at 553. Canada has blocked mothers from receiving the kind of information that is necessary for making informed decisions, and Canada refuses to acknowledge the relevance of science to the protection of the unborn. The fact that a child is denied the right to develop his or her personality when cut off in the womb seems rather clear.

E. Canada's claim that the complaint is manifestly groundless.

15. Canada asserts that the Commission's decision in *Baby Boy v. United States*, Resolution 23/81, Case 2141 (March 6, 1981) makes Mr. Demers' claims in his Petition manifestly groundless as to Articles I, II, VII, XII, XVII, and XXIX. This case is a world apart from *Baby Boy*, though *Baby Boy* is relevant. *Baby Boy* involved a criminal prosecution for manslaughter of one unborn child. The Massachusetts Supreme Judicial Court overruled that decision because there was insufficient evidence of viability of the child. *Baby Boy*. at para. 1. This case involves the intentional killing of hundreds of thousands of unborn children. The Commission noted in *Baby Boy* that the language "in general" was added to Article 4 (right to life) to make exceptions in cases where the

mother's life was in danger and in cases of rape. In other words, in most cases abortion is forbidden (i.e., "in general") it did not unleash a right to unrestricted abortion with a nation state's complicity. *Id*. at para 25. *Baby Boy* was an American, killed in a country that recognized many limitations on abortion following the first trimester of pregnancy. *Id*. at para. 8.c. This case involves Canada, which recognizes no restrictions on abortion whatsoever. In *Baby Boy* there was no governmental complicity in the commission of the abortion. In this case there is ample evidence of the government's complicity in multiple abortions. The Commission decided *Baby Boy* in 1981. Science has not stood still in the intervening 25 years, and there is more evidence to be considered regarding the nature of unborn children. Studies of the effect of abortion on women was limited in 1981. Today there are far more studies of more women with more evidence of long-term effects.

16. In *Baby Boy* the Commission acknowledged that the right to life under Article I of the American Declaration of the Rights and Duties of Man is the same as under Article 4 of the American Convention on Human Rights, though the wording is not identical. *Baby Boy* at para. 30. Unlike the European Convention, the American Convention specifically addresses the rights of unborn children. The IACHR has never addressed the meaning of the right to life of unborn children in a situation such as this where there is massive intentional taking of life with the complicity of a government that stands alone in the Western Hemisphere in offering absolutely no protection to unborn children. Canada cites the European Court of Human Rights case of *Vo v. France* in footnote 23 of its Response for the proposition that the humanity of the child is determined by social consensus. In the Americas the humanity is specifically recognized by treaty. The Americas also reject the positivistic notion that rights are the creation of majority will or of government largess rather than being inalienable and inherent. Article 9 of the Charter of the Organization of American States of which Canada is a party asserts the most fundamental principle of law and right – that might does not make right. "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." This principle applies equally to individuals and nation states. Even if social consensus were the measuring rod of human rights, Canada falls short for it is alone, except for the company of North Korea, Vietnam, and the Peoples' Republic of China, in affording no protection to the unborn child whatsoever.

17. In this case the right to freedom of expression cannot be decided separately from the issue of deciding what is the value of life of unborn children. Canadian law, and law of human rights generally, recognizes a distinction between derogable and nonderogable rights. Speech is a derogable right. It may be restricted in certain circumstances. In determining what protection is given to freedom of expression, freedom of expression is balanced against other values, rights, or interests. This balancing test also requires taking into consideration the value of the speech. The Supreme Court of Canada has itself held that not all speech is of equal value in determining the scope of the right. For example, hate speech and obscenity are not as valuable, and, therefore, not entitled to the same protection as other speech. The Supreme Court of Canada has itself acknowledged this principle. *See Regina v. Keegstra*, [1990] 3 S.C.R. 697, at 762; *Regina v. Butler*, [1992] 1 S.C.R. 452, at 500. The value of Mr. Demers' speech depends upon the corresponding

value of the life of unborn children. If the speech asserts the right to life of a human being whose intentional killing brings great harm to the child and to the mother, the speech is especially valuable. In fact, most human rights documents assert the duty of all to promote and defend human rights. Canada never accorded requisite value to Mr. Demers' speech because it placed no value on the life of unborn children.