Citation: ***R. v. Demers*** Date: 20030117
2002 BCCA 28 Docket: CA026297

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

JAMES ROGER DEMERS

APPELLANT

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

J.C. Tuomala	Agent for the Appellant
R. Cutler, L. Mrozinski	Counsel for the Respondent
N. Iyer, A. Zwack, K. Bayne	Counsel for the Intervenor
Place and Dates of Hearing:	Vancouver, British Columbia December 10 and 11, 2002
Place and Date of Judgment:	Vancouver, British Columbia January 17, 2003

Written Reasons by:
The Honourable Mr. Justice Low

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Huddart

Reasons for Judgment of the Honourable Mr. Justice Low:

[1] This is an appeal of an order of Hood J. dismissing a summary conviction appeal from convictions of the appellant, James Demers, by McGivern P.C.J. of the following offences created by s. 2(1) of the ***Access to Abortion Services Act***, R.S.B.C. 1996, c. 1:

> Count 1
> JAMES ROGER DEMERS, between the 5th day of December, 1996, and the 12th day of December, 1996, at or near the City of Vancouver, in the Province of British Columbia, did, while in an access zone, protest, contrary to Section 2(1)(b) and 14(2) of the Access to Abortion Services Act.
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> Count 2
> JAMES ROGER DEMERS, between the 5th day of December, 1996, and the 12th day of December, 1996, at or near the City of Vancouver, in the Province of British Columbia, did, while in an access zone, beset a building in which abortion services are provided, contrary to Section 2(1)(c) and Section 14(2) of the Access to Abortion Services Act.
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> Count 3
> JAMES ROGER DEMERS, between the 5th day of December, 1996, and the 12th day of December, 1996, at or near the City of Vancouver, in the Province of British Columbia, did, while in an access zone, engage in sidewalk interference, contrary to Section 2(1)(a) and Section 14(2) of the Access to Abortion Services Act.

On the hearing of this appeal, we granted leave for Professor J. Tuomala to make submissions as agent for Mr. Demers. Professor Tuomala teaches law at the Thomas Goode Jones Law School at Faulkner University in Montgomery, Alabama, U.S.A. and is licenced to practice law in the State of Ohio.

[2] Mr. Demers does not dispute that he committed the prohibited acts alleged in the charges. He says that the statute, particularly s. 2(1), infringes his right of free

expression under s. 2(b) of the ***Canadian Charter of Rights and Freedoms***. The Crown agrees that s. 2(1) of the statute infringes the right of free expression of Mr. Demers and others, but says that the section is saved by s. 1 of the ***Charter***. The case comes down to a s. 1 analysis but, as argued on behalf of Mr. Demers, includes consideration of s. 7 of the ***Charter*** as an essential part of that analysis.

[3] Section 2(1) of the ***Access to Abortion Services Act*** reads:

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

[4] Sections 2(b), 7 and 1 of the ***Charter*** read:

> 2. Everyone has the following fundamental freedoms:
>
> ...
>
> *(b)* freedom of thought, belief, opinion and expression, including the freedom of the press and other media of communication;
>
> ...
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

> 1. The ***Canadian Charter of Rights and Freedoms*** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[5] Mr. Demers contends that a foetus in the womb of a woman is included in the word "everyone" in s. 7 of the ***Charter***, that his protest conduct was for the purpose of protecting the right to life of foetuses, and that this purpose renders the impugned legislation unconstitutional on a s. 1 balancing analysis.

[6] Mr. Demers holds sincere and strong views against abortion. He wants the law of this country changed to reflect those views. To that end, and to attempt to save the lives of unborn children whose mothers attend at abortion clinics, he wishes to be able to verbally express his views outside such clinics without restrictions. There is no doubt that the statute imposes restrictions that can be justified only under s. 1 of the ***Charter***.

[7] Since the decision of the Supreme Court of Canada in ***Morgentaler v. The Queen***, [1988] 1 S.C.R. 30 abortion has been legal in Canada. Women now have the right to abortion as a medical service. In British Columbia, there has been extensive anti-abortion protest outside abortion clinics, particularly outside Everywoman's Health Centre in Vancouver. Tactics employed by abortion protesters eventually moved the Provincial Legislature to pass the statute. The statute is an attempt to ensure safe access by women to clinics so they can obtain therein the medical service to which they are entitled by law, should they choose so to do. Within prescribed boundaries, the statute makes it unlawful for the conduct set out in s. 2(1) to take place. Section 14(2) makes it an offence to contravene s. 2(1).

[8] Other than a transcript of brief oral evidence given by Mr. Demers, the trial record in Provincial Court consists entirely of an admission of facts. This was because of an earlier case in which Maurice Lewis had been convicted of offences under the statute similar to those faced by Mr. Demers. For the purposes of defining and

addressing the ***Charter*** issues, the facts between the Lewis case and the Demers case are indistinguishable.

[9] Cronin P.C.J. dismissed the charges against Mr. Lewis on the basis that the infringement by the statute of Mr. Lewis' s. 2(b) ***Charter*** rights was not justified under s. 1. On a summary conviction appeal brought by the Crown, Saunders J. (as she then was) overturned the Provincial Court decision: (1996), 24 B.C.L.R. (3d) 247. She found that the infringement of the s. 2(b) rights of Mr. Lewis was saved by s. 1. She allowed the appeal and recorded convictions against Mr. Lewis. Following this decision, Mr. Lewis died and this court, on the basis that the matter was moot, refused to hear an appeal of the order of Saunders J.

[10] Mr. Lewis argued that the statute infringed his rights under ***Charter*** sections 2(a), 2(b) and 2(d). He did not seriously base his ***Charter*** challenge on foetal rights under s. 7.

[11] Mr. Demers based his defence at trial and on the summary conviction appeal on s. 2(b), s. 7 and s. 15(1) of the ***Charter***. He does not pursue the s. 15(1) argument in this court. It seems that it was common ground that both McGivern P.C.J. and Hood J. were bound to follow the decision in the *Lewis* case on the s. 2(b) ***Charter*** issue as framed in that case. Because of that decision, neither party called evidence in Provincial Court on the s. 1 analysis. However, with the consent of both parties, Levine J. (as she then was) made an order on the summary conviction appeal, before the appeal was argued, appending the record in the *Lewis* case to the record in the Demers case. If Mr. Lewis had not died, this court would have considered that record and would have decided the s. 2(b) issue, although on a different basis than now argued on behalf of Mr. Demers.

[12] In the present appeal, the Crown relies on the evidence contained in the *Lewis* record to sustain its argument, apart from the s. 7 consideration, that s. 2(1) of the statute is saved by s. 1 of the ***Charter***. Mr. Demers made no argument in his factum about the justification evidence in the *Lewis* case. In his factum and in the oral hearing, he argued that this court cannot address his s. 2(b) ***Charter*** rights without first deciding the s. 7 foetal-rights issue. However, in response to a question from the court, Professor Tuomala made a brief submission concerning

the effect of the *Lewis* evidence on the s. 1 issue should this court reject the s. 7 argument. I will discuss that submission later in these reasons.

[13] As is already apparent, Mr. Demers casts his argument somewhat differently than did Mr. Lewis. Rather than confining his argument to either s. 7 (the right of the foetus to life) or to s. 2(b) (his own right to freedom of expression), he makes the s. 2(b) argument dependant on the s. 7 argument. He says that because the foetus has a right to life under s. 7, s. 2(1) of the ***Access to Abortion Services Act*** cannot survive the s. 1 analysis that follows the Crown concession that the statute infringes his ***Charter*** right to freedom of expression. He says that the court must declare that a foetus has the right to life under s 7, rule s. 2(1) of the statute to be unconstitutional as a result, and acquit him of the charges. The ruling he wants on s. 7 would have the effect of declaring abortion constitutionally unlawful.

[14] The intervenor argues that any discussion of the constitutionality of the ***Access to Abortion Services Act*** does not engage s. 7 of the ***Charter*** because the statute is concerned only with regulating protest and not with any foetal rights that might exist in law. Both Mr. Demers and the Crown argue to the contrary and I agree with them. There are many cases in which litigants attack the constitutional validity of statutory provisions on the basis that the provisions affect the ***Charter*** rights of third parties. For example, in ***Morgentaler***, supra, the abortion-clinic doctors successfully raised the s. 7 rights of the pregnant mother, not their own ***Charter*** rights. Similarly, in ***R v. Big M Drug Mart Ltd.***, [1985] 1 S.C.R. 295, the corporate retailer successfully argued that the ***Lord's Day (Alberta) Act*** was unconstitutional because it infringed ***Charter*** rights to freedom of conscience and religion. The court held that nobody could be convicted under an unconstitutional law. In my opinion, it is open to Mr. Demers to argue that the statute unduly restricts his freedom of expression because, as he contends, the purpose of his public speech is to protect the rights of those who cannot protect themselves. This is particularly so when it is said that the right to life is involved. The statute is directly related to the abortion issue and that is sufficient to engage s. 7 on the basis argued by Mr. Demers.

[15] On behalf of Mr. Demers, Professor Tuomala bases the s. 7 argument on divine law. He says that God's law dictates that the human foetus is a person with a right to life confirmed by s. 7 of the ***Charter***. It is implicit in this argument that the god referred to is the Christian god. In support of his argument, he refers to the preamble to the ***Charter***: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". He says that this means that certain "inherent" or "inalienable" rights, including foetal rights, are a gift of God, not a state creation. That, he says, cannot be changed by secular law, whether common law or statutory law.

[16] Professor Tuomala drew our attention to specific foreign and international law that he says supports his basic argument. It is apparent to me, however, that the foreign laws referred to do not give the human foetus the constitutional or juridical status of a person. Also, none of the international conventions and declarations referred to go nearly that far. Indeed, the laws and conventions cited avoid stating the basic premise asserted on this appeal. I see no need to discuss this aspect of the argument further.

[17] The current law of this country supports the position of the Crown (and the conclusion reached by McGivern P.C.J. and Hood J.) that a foetus is not included in the word "everyone" in s. 7 of the ***Charter***. The appellant's argument ignores the decisions in ***Borowski v. Attorney General for Canada*** (1987), 39 D.L.R. (4th) 731 (Sask. C.A.); ***Winnipeg Child and Family Services v. D.F.G.***, [1997] 3 S.C.R. 925 and ***Tremblay v. Daigle***, [1989] 2 S.C.R. 530.

[18] The Saskatchewan Court of Appeal addressed the issue directly in ***Borowski***, *supra*. Mr. Borowski challenged the abortion law then in the ***Criminal Code of Canada*** on the basis that it permitted limited abortions thereby infringing on the ***Charter*** s. 7 right of a foetus to life. The court discussed the common law and foreign jurisprudence. It concluded that a foetus is not a person in law and is not included in the ***Charter*** terms "everyone" in s. 7 or "every individual" in s. 15. Against the common law background in which abortion has been lawful to some extent, according the foetus status as a person would be a major departure from legal tradition. To interpret the ***Charter*** in that manner would require clear and unambiguous language within the ***Charter*** itself and no such language is

to be found in the ***Charter***. Further, the use of the term "everyone" in other sections of the ***Charter*** (such as sections 8, 9 and 10) that clearly could not apply to the foetus, illustrates that the use of the term in s. 7 does not include the foetus.

[19] Because the decision in ***Morgentaler***, *supra*, for reasons diametrically opposed to Mr. Borowski's contention, struck down the law Mr. Borowski challenged, the Supreme Court of Canada decided that the ***Borowski*** appeal was moot and that he no longer had status to argue the point: ***Borowski v. Canada (Attorney General)***, [1989] 1 S.C.R. 342. The Supreme Court of Canada has not directly addressed the s. 7 issue argued by Mr. Borowski or by Mr. Demers in the present case.

[20] However, the Supreme Court has dealt with issues of foetal rights and status in other areas of the law. In ***Tremblay v. Daigle***, *supra*, the court considered the legal status of the foetus in the context of the ***Quebec Charter of Human Rights and Freedoms***. The father of an unborn child obtained an interlocutory injunction preventing the mother from having an abortion. The Quebec Court of Appeal upheld the order. The Supreme Court held that the term "human being" in the ***Quebec Charter*** did not include a foetus. Similar to the statement of the law in ***Borowski***, under Anglo-Canadian law a foetus must be born alive to have rights. Under the ***Quebec Civil Code***, the foetus is treated as a person only as a legal fiction where it is necessary to do so to protect its interests after birth. The ***Canadian Charter*** did not have to be considered because the case was a civil dispute between private parties and neither party was challenging a statute on constitutional grounds.

[21] In the more recent case of ***Winnipeg Child & Family Services***, *supra*, a child-welfare agency obtained an order placing in hospital custody a pregnant mother with a history of glue-sniffing that had caused permanent injury to three other children to whom she had given birth. The Manitoba Court of Appeal set aside the order. The Supreme Court dismissed a further appeal. The case turned on the juridical status of the foetus. In that regard, McLachlin J. (as she then was) said the following:

> 11 Before dealing with the cases treating the issue in tort law, I turn to the general proposition that the law of Canada does not

> recognize the unborn child as a legal or juridical person. Once a child is born, alive and viable, the law may recognize that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person. This is a general proposition, applicable to all aspects of the law, including the law of torts.
>
> ...
>
> 15 The position is clear. Neither the common law nor the civil law of Quebec recognizes the unborn child as a legal person possessing rights. This principle applies generally, whether the case falls under the rubric of family law, succession law or tort. Any right or interest the fetus may have remains inchoate and incomplete until the birth of the child.
>
> 16 It follows that under the law as it presently stands, the fetus on whose behalf the agency purported to act in seeking the order for the respondent's detention was not a legal person and possessed no legal rights. If it was not a legal person and possessed no legal rights at the time of the application, then there was no legal person in whose interests the agency could act or in whose interests a court order could be made.
>
> [my emphasis]

[22] The phrase "all aspects of the law" in para. 11 must include ***Charter*** law.

[23] These cases leave no room for this court to entertain the constitutional argument advanced on behalf of Mr. Demers. The courts have made it clear that any preference of foetal rights over the rights of pregnant women as addressed in ***Morgentaler,*** supra, is a matter best left to the careful consideration of the legislators. In this regard, McLachlin J. in ***Winnipeg Child & Family Services,*** *supra,* made the following comments:

> 20 The proposed changes to the law of tort are major, affecting the rights and remedies available in many other areas of tort law. They involve moral choices and would create conflicts between fundamental interests and rights. They

> would have an immediate and drastic impact on the lives of women as well as men who might find themselves incarcerated and treated against their will for conduct alleged to harm others. And, they posses complex ramifications impossible for this Court to fully assess, giving rise to the danger that the proposed order might impede the goal of healthy infants more than it would promote it. In short, these are not the sort of changes which common law courts can or should make. These are the sort of changes which should be left to the legislature.

[24] These comments echo what the court said in ***Tremblay v. Daigle***, *supra* at p. 553:

> The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties --a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.

[25] As noted above, we asked Professor Tuomala to state the appellant's position on the s. 1 analysis in the *Lewis* case should we not accept his submission concerning foetal rights under s. 7. After consideration, the only argument he advanced was that Saunders J. in *Lewis* should have deferred to the findings of fact made at trial by Cronin P.C.J. and upheld his decision.

[26] I find no merit in this submission. The trial judge in *Lewis* did not make any findings of fact with respect to the evidence presented by the Crown to support its position under s. 1. After reviewing some of the evidence presented as to the history of abortion protest locally, he merely stated that "(t)he Crown has not proven on the balance of probability that the impugned Section of the Act meets the proportionality test." Saunders J. did a thorough analysis

of the evidence and the balancing arguments presented by both parties. An appeal court is in just as good a position as the trial court to do this analysis. This is not an area in which ordinary deference with respect to findings of fact is required: see ***RJR-MacDonald Inc. v. Attorney General of Canada***, [1995] 3 S.C.R. 199, at p. 285 to 287 and at p. 333 to 335.

[27] Because the appellant made no further submission with respect to the correctness of the s. 1 analysis in ***Lewis***, I do not propose to comment further on the reasoning in that case. We are not asked to overturn that case except on the narrow basis I have discussed and rejected above. The appellant has otherwise framed his argument in such a way that does not permit us to interfere with the order appealed from.

[28] I would dismiss the appeal.

"The Honourable Mr. Justice Low"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Huddart"