COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Spratt,***
2008 BCCA 340

Date: 20080904
Dockets: CA029830, CA029841

Docket: CA029830

Between:

Regina

Respondent

And

Donald David Spratt

Appellant

- and -

Docket: CA029841

Between:

Regina

Respondent

And

Gordon Stephen Watson

Appellant

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Low

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Place and Date of Hearing:	Vancouver, British Columbia September 13 & 14, 2007
Place and Date of Judgment:	Vancouver, British Columbia September 4, 2008

Written Reasons by:
The Honourable Madam Justice Ryan

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] In December of 1998 the appellants, Gordon Stephen Watson and Donald David Spratt, were jointly charged on an information laid under the ***Access to Abortion Services Act***, R.S.B.C. 1996, c. 1 (the "***Act***"). The counts read as follows:

> Count 3
>
> Gordon Stephen Watson and Donald David Spratt, on or about the 17th day of December, 1998, at or near the City of Vancouver, in the Province of British Columbia, while in an access zone for 2005 East 44th Avenue, did engage in sidewalk interference, contrary to Section 2(1)(a) of the *Access to Abortion Services Act*.
>
> Count 4
>
> Gordon Stephen Watson and Donald David Spratt, on or about the 17th day of December, 1998, at or near the City of Vancouver, in the Province of British Columbia, while in an access zone for 2005 East 44th Avenue did protest, contrary to Section 2(1)(b) of the *Access to Abortion Services Act.*

[2] Both men were originally charged with two additional offences allegedly committed the day before, on December 16, 1998, but these charges were stayed by the Crown, with notice given to the accused by letter dated May 11, 1999.

[3] The trial of the information took place in Provincial Court over a number of days in May and June of 2000. It culminated in guilty verdicts rendered August 8, 2000.

[4] Appeals were taken from the verdicts under s. 102 of the ***Offence Act***, R.S.B.C. 1996, c. 338, to the Supreme Court of British Columbia. The hearing in

that court took place October 6 to 8, 2001. The appeals were dismissed on May 5, 2002.

[5] The appellants sought leave to appeal to this Court under s. 124 of the ***Offence Act*** on a number of issues. Section 124 limits the grounds of appeal to questions of law alone. On June 29, 2004, Mr. Justice Hall granted the appellants leave to appeal on one ground, that is, whether the sections under which the two appellants were convicted, ss. 2(1)(a) and 2(1)(b) of the ***Act***, are unconstitutional as an infringement of the right to freedom of expression protected by s. 2(b) of the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***").

[6] On May 11, 2006, Madam Justice Newbury granted intervenor status to the Access Coalition which is a coalition of five organizations – the Elizabeth Bagshaw Society, the Everywoman's Health Care Society (1998), the B.C. Pro-Choice Action Network Society, the C.A.R.E. Program, and the Women's Legal Education and Action Fund. On the same day, Madam Justice Newbury granted intervenor status to the Canadian Nurses for Life organization, the B.C. Civil Liberties Association (BCCLA), and the Canadian Religious Freedom Alliance which is a group made up of the Catholic Civil Rights League, the Christian Legal Fellowship, and the Evangelical Fellowship of Canada.

[7] The appeals of Gordon Stephen Watson and Donald David Spratt were heard together. These reasons address both appeals.

The Relevant Legislation

[8] Section 2(1) of the ***Act*** provides:

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

[9] Section 1 of the ***Act*** provides a number of definitions including:

> "access zone" means an access zone established under section 5, 6 or 7;
>
> "protest" includes any act of disapproval or attempted act of disapproval, with respect to issues related to abortion services, by any means, including, without limitation, graphic, verbal or written means;
>
> "sidewalk interference" means
>
> (a) advising or persuading, or attempting to advise or persuade, a person to refrain from making use of abortion services, or
>
> (b) informing or attempting to inform a person concerning issues related to abortion services
>
> by any means, including, without limitation, graphic, verbal or written means.

[10] Section 5 of the ***Act*** provides that the Lieutenant Governor in Council "may establish, by regulation, access zone for a specific facility".

[11] Section 2(b) of the ***Charter*** provides:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[12] Section 1 of the ***Charter*** provides:

> 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.

Factual Background

[13] The Crown proved its case against the two appellants largely by way of written agreed admissions of fact filed as an exhibit at trial. Both Mr. Spratt and Mr. Watson testified. The trial judge made lengthy findings of fact. Since, on the granting of leave, the several trial issues have been limited to one ground of appeal, I will set out only the facts found by the trial judge relevant to the question of whether s. 2(1)(a) and 2(1)(b) of the ***Act*** violate s. 2(b) of the ***Charter*** and whether that violation is justified by s. 1 of the ***Charter***.

[14] At the time of trial, the Everywoman's Health Clinic (operated by the Everywoman's Health Care Society (1998)) was located at 2044 East 44th Avenue in Vancouver. It offered abortion services. At the time the offences were committed, December 17, 1998, the clinic was the subject of an "access zone" established pursuant to the ***Act*** and its regulations. The specific regulation which designated this clinic's access zone contains an appendix with a diagram of the perimeters of the access zone. It was filed as an exhibit at trial and is attached as an appendix to these reasons. In her decision in ***R. v. Lewis*** (1996), 24 B.C.L.R. (3d) 247 (S.C.) ("***Lewis***") Madam Justice Saunders described the access zone around the Everywoman's Health Centre in this way (at para. 53):

> … [It] is irregular in shape … It encompasses a portion of Victoria Drive (the route chosen by about 80% of those travelling to the clinic), East 44th Avenue across from the clinic, East 44th Avenue about 3 ½ lots

> east of the clinic, and the lane immediately adjacent to the clinic. The depth of the access zone varies from about 20 metres (across the street) to 15 metres (down the lane), 9 metres (north on Victoria Drive), 33 metres (south on Victoria Drive), to 35 metres (east on 44th Avenue). The point furthest from the clinic (on the south side of the east corner of the zone) is about 45 metres from the clinic. The vast majority of the zone is within 25 metres of the clinic boundary.

[15] I will return to the size of the access zone later in these reasons.

[16] The trial judge found that Mr. Watson and Mr. Spratt had gone to the clinic together on December 17, 1998. Their purpose was to test the ***Act*** and to that end, they decided to do different things within the access zone. Mr. Spratt had a religious message; Mr. Watson was to address political and health issues.

[17] Both men chose the clinic as a place to carry on their activities because, in Mr. Watson's words, "I wanted to confront customers to the abortion mill." Mr. Spratt said he wanted to relay "[the message of redemption] at the place where the killing is going on …".

[18] The facts relating to Mr. Watson's activities are the following:

> 1. On the date in question Mr. Watson stood for approximately an hour near the main entrance of the clinic well within the access zone. He carried two signs. One was four feet by four feet in size, the other, two feet by four feet. The larger sign bore the words "Abortion is Murder". The smaller sign said, "Unborn Persons Have the Right to Live".
>
> 2. On two occasions, when employees either opened the door to the clinic, or tried to tell Mr. Watson that he was in violation of the access zone,

Mr. Watson attempted to present them printed material. With respect to one employee, Mr. Watson told her that she was doing harm to women and should be aware that abortion increased the risk of breast cancer in women.

3. When Mr. Watson was arrested he presented the police officer with two brochures. The first was entitled, “Caution: If you choose abortion, you could be choosing breast cancer”; the second was entitled, “A Christian Response to Abortion”.

[19] The facts relating to Mr. Spratt’s activities were:

1. He stood for approximately an hour at different places within the access zone some distance from Mr. Watson. He carried a nine foot wooden cross and a paper sign measuring one foot by one foot. The sign bore the words, “You shall not murder”. At different times Mr. Spratt wore the sign around his neck, held it in his hand, or draped it around the cross.

2. Mr. Spratt spoke to two employees as they walked out of the clinic at different times about the love of God, forgiveness of sin and redemption.

The Trial Judgment

[20] In convicting Mr. Watson, the trial judge found that his action of standing within the access zone with the signs he carried was an intentional “act of disapproval” with respect to abortion services. She found too that his communication with the clinic employees was an “act of disapproval”. The trial judge found that these activities constituted “a protest” within the meaning of the ***Act***. The

trial judge went on to find that Mr. Watson intentionally attempted to inform persons, verbally and through his signs and brochures, about issues relating to abortion services while he was in the access zone. The trial judge found that this constituted "sidewalk interference" within the meaning of the ***Act***.

[21] In convicting Mr. Spratt, the trial judge found that his actions of standing in the access zone carrying the cross and the sign was an intentional "act of disapproval" with respect to abortion services, as was his communication with the employees. She concluded that both activities constituted "protest". The trial judge found that Mr. Spratt was attempting to inform the employees he spoke to about his view of the theological issues relating to abortion and that all of his activities constituted "sidewalk interference" within the meaning of the ***Act***.

[22] The appellants raised many issues at trial. With respect to the issues with which we are concerned on this appeal, the trial judge considered that she was bound by the decision in the Supreme Court of British Columbia in ***Lewis***. ***Lewis*** held, among other things, that the sections of the ***Act*** in question violated s. 2(b) of the ***Charter***, but were justified under s. 1 of the ***Charter***.

The Summary Conviction Appeal

[23] The appellants appealed their convictions to the Supreme Court of British Columbia. Madam Justice Koenigsberg dismissed the appeals. She agreed with the disposition of the trial judge on the freedom of expression issue.

Section 2(b) of the *Charter* – Freedom of Expression

[24] The substance of the right of freedom of expression was discussed in ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927, where Chief Justice Dickson, speaking for the majority, said this at 968 – 971:

> … Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306). And as the European Court stated in the *Handyside* case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:
>
> > … is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".
>
> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person

could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(*b*) challenge would proceed.

The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts. While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a ***form*** of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen. As McIntyre J., writing for the majority in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, observed in the course of discussing whether picketing fell within the scope of s. 2(*b*), at p. 588:

> Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from *Charter* protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence.

Indeed, freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure.

The broad, inclusive approach to the protected sphere of free expression here outlined is consonant with that suggested by some leading theorists. Thomas Emerson, in his article entitled "Toward a General Theory of the First Amendment" (1963), 72 *Yale L.J.* 877, notes (at p. 886) that:

> … the theory of freedom of expression involves more than a technique for arriving at better social judgments through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of a new society in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited. It is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, skepticism, reason and initiative, will allow man to realize his full potentialities. It spurns the alternative of a society that is tyrannical, conformist, irrational and stagnant.
>
> [Emphasis added.]

[25] It is axiomatic that some forms of expression are more important than others. As Mr. Justice LeBel explained for the Court in ***R. v. Guignard***, [2002] 1 S.C.R. 472 at para. 20:

> [20] This freedom [of expression] plays a critical role in the development of our society (see *Sharpe*, *supra*, at para. 23). The content of that freedom, which is very broad, includes forms of expression the importance and quality of which may vary. Some forms of expression, such as political speech lie at the very heart of freedom of expression. [Citations omitted.]
>
> [Emphasis added.]

[26] Beliefs about the meaning and value of human life are fundamental to political thought and religious belief. Those beliefs find expression in the debate on abortion. Professor Dworkin has said this about the importance of those convictions to most people:

> [To people who are religious in the traditional way] [t]he connection between their faith and their opinions about abortion is not contingent but constitutive: their convictions about abortion are shadows of more general foundational convictions about why human life itself is important, convictions at work in all aspects of their lives. … People who are not religious in the conventional way also have general, instinctive convictions about whether, why and how any human life – their own, for example – has intrinsic value. No one can lead even a mildly reflective life without expressing such convictions. These convictions surface, for almost everyone, at exactly the same critical moments in life – in decisions about reproduction and death and war.[1]

[27] It follows that the importance of communicating those ideas and beliefs lies at the "very heart of freedom of expression".

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[1] Ronald Dworkin, "Unenumerated Rights: Whether and How *Roe* Should be Overruled" (1992), 59 U. Chi. L. Rev. 381 at 412-13.

[28] It is not surprising, then, that counsel for the Crown conceded that the provisions of the ***Act*** under which the appellants were charged violate s. 2(b) of the ***Charter***. The only issue in the case on appeal is whether those provisions can be justified under s. 1 of the ***Charter***.

Are Subsections 2(1)(a) and (b) of the *Access to Abortion Services Act* Justified Under Section 1 of the *Charter*?

The Test to Apply in Determining Whether the Infringement is Justified

[29] As stated by Chief Justice Dickson in ***R. v. Oakes***, [1986] 1 S.C.R. 103 ("***Oakes***"), at 135, "any section 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms … which are part of the supreme law of Canada". However, he continued (at 136): "It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance."

[30] To satisfy the requirements of s. 1, the government must establish on a balance of probabilities that the infringement of the right is a reasonable limit, prescribed by law, which is demonstrably justified in a free and democratic society. The evidence relied upon by the government must be cogent and persuasive.

[31] ***Oakes*** sets out two central criteria that must be satisfied in determining whether overriding the constitutionally protected right is justified. First, the court examining the issue must consider and articulate the broad legislative intent in implementing the legislation. Next the court must consider whether the legislation is proportionate to that objective.

[32] ***Oakes*** requires that in examining these criteria the court find that: (1) the objective of the limiting measures must be of "sufficient importance" to warrant overriding the constitutionally protected right or freedom (to be of "sufficient importance" the objective must relate to concerns that are "pressing and substantial"); and (2) the means chosen to achieve the objective must be reasonable and demonstrably justified. To satisfy this latter aspect of the test, three components must be addressed: (a) the measures must not be arbitrary, unfair or based on irrational considerations; (b) the means should impair the right or freedom as little as possible; and (c) there must be proportionality between the effects of the measures which are responsible for limiting the ***Charter*** right and the objective of the limit.

[33] As I noted earlier, as a prefatory matter s. 1 of the ***Charter*** requires that a limit be "prescribed by law." I will deal with that question, then move to the ***Oakes*** test.

1. Prescribed by Law

[34] The intervenor, the BCCLA, makes the argument that the ***Act*** is so lacking in an intelligible standard for deciding when and whether to establish an access zone, that the ***Act*** fails to provide the guidance necessary to enable legal debate as to its justification. This argument has been referred to in the case law as the "vagueness" argument. At trial Mr. Spratt's counsel put this argument forward in the form of an attack on the legislation under s. 7 of the ***Charter***. At trial, the argument was that s. 5 of the ***Act*** gave the Lieutenant Governor in Council an untrammelled discretion

to establish access zones on an arbitrary basis. The trial judge dismissed the argument for reasons to which I will refer presently.

[35] It is open to the appellants (and therefore the intervenors) as part of their s. 1 analysis to raise vagueness, or to be more specific, to allege that the impugned legislation creates a standardless sweep. In ***R. v. Nova Scotia Pharmaceutical Society***, [1992] 2 S.C.R. 606 ("***Nova Scotia Pharmaceutical***"), Mr. Justice Gonthier writing for the court summarized the jurisprudence emanating from the Supreme Court of Canada with respect to the vagueness argument. He noted at 626:

> Vagueness can be raised under s. 7 of the *Charter*, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter in limine*, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law." Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test (*Morgentaler*, *Irwin Toy* and the *Prostitution Reference*).

[36] In the case at bar, the BCCLA argues that s. 5 of the ***Act*** is vague in that it fails to give direction to the government as to how to exercise the discretion to establish access zones around medical facilities. Counsel for the BCCLA, Mr. Andrews, argued that s. 5 of the ***Act*** "gives no sufficient indication as to how decisions must be reached, such as factors to be considered, guidelines to employ or determinative elements and therefore provides no sufficient basis for legal debate." In short, the legislation is standardless.

[37] The requirement that the content of a law provide a basis for legal debate was discussed in ***Nova Scotia Pharmaceutical.*** As Mr. Justice Gonthier explained at 639:

> By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

[38] None of the cases provided to this Court by the BCCLA or by the Attorney General deals with a challenge to empowering provisions of an enactment that give the Lieutenant Governor in Council authority to make regulations. Instead the parties refer to cases in which the substantive content of legislation has been attacked for vagueness. For example in ***R. v. Morgentaler*** , [1988] 1 S.C.R. 30 ("***Morgentaler***"), the ***Criminal Code*** provision at issue in that case made the availability of abortions conditional upon the obtaining of a doctor's certificate stating that the life or health of a woman seeking the abortion was in danger. Mr. Justice Beetz (writing for himself and Mr. Justice Estey) held that the standard of "likely danger to health" was not unduly vague. He concluded that since the section of the ***Code*** contemplated that the danger to health would be assessed by a medical practitioner exercising a medical judgement, some measure of flexibility was acceptable. As Beetz J. noted at 107, "Flexibility and vagueness are not synonymous". The observations of Beetz J. were later approved by the Court in ***Nova Scotia Pharmaceutical.***

[39] I am dubious that it is open to the appellants to challenge the empowering section of the ***Act*** on the basis that it is vague. I say this because of the historic common law principles that limit the exercise of governmental discretion. As stated by Gillese J.A. recently in ***Ontario (Minister of Transport) v. Miracle*** (2005), 74 O.R. (3d) 161 (Ont. C.A.) at para. 20:

> … Any exercise of discretion by the Minister … is constrained by the common law principle that discretion may only be exercised in a manner consistent with the purposes and goals of its governing legislation. …

[40] In any event I agree with the trial judge in this case who concluded (at para. 60):

> … The *Act* does give the Lieutenant Governor in Council the authority to establish access zones by regulation and to vary the size of the access zones: see ss. 5 to 7. However, the Lieutenant Governor in Council is clearly *not* given an arbitrary and unlimited power to do so. By the express terms of the *Act*, this power [may] only be exercised "For the purpose of facilitating access to abortion services …". In addition, the discretion granted to the Lieutenant Governor in Council is quite limited, controlled as it is by the purpose of the *Act* (found in the Preamble) and those sections limiting the size of the zones and their location. [Emphasis in original.]

2. Legislative Objective

a. *The Record on Appeal - Legislative Facts*

[41] In the hearing of this appeal, reference was made by the respondent and some of the intervenors to the trial transcript in ***Lewis***.

[42] In fact, the respondent contends that this appeal is, in many respects, an appeal of the ***Lewis*** decision. At trial Mr. Lewis was acquitted of the commission of offences under sections 2(1)(a) and 2(1)(b) of the ***Act***. His acquittal rested on the finding of a provincial court judge that these sections were unconstitutional as they violated the freedoms protected by s. 2 of the ***Charter***. The trial judge concluded that the infringements were not justified under s. 1 of the **Charter**.

[43] On Lewis' appeal to the Supreme Court of British Columbia, the summary conviction appeal judge, Madam Justice Saunders (as she then was), found that the sections of the ***Act*** violated the appellant's right to freedom of conscience and religion, and freedom of expression. She reached no conclusions with respect to the appellant's right to freedom of assembly and association, finding that those rights in Lewis' case were secondary to the limitation on his freedom of expression. Madam Justice Saunders considered the constitutional issue in ***Lewis*** to be foremost, as it has become in this case, an issue of freedom of expression. In ***Lewis***, the respondents conceded that the provisions of the ***Act*** violated the appellant's right to freedom of expression. Madam Justice Saunders found, on the basis of the record put before her, that the infringement was justified under s. 1 of the ***Charter***.

[44] Mr. Lewis passed away before he could prosecute his appeal in this Court.

[45] In the result the appellants and respondent to this appeal agreed to include the transcript of the ***Lewis*** case as part of the record on this appeal. This part of the record contains the "legislative facts" directed to the purpose of the ***Act***. As Mr. Justice Sopinka pointed out in ***Danson v. Ontario (Attorney General)***, [1990] 2 S.C.R. 1086, at 1099:

> … Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements ... .

[46] On this appeal no one challenged the existence or truth of the legislative facts. What was debated was whether those facts justified the legislative response that they did.

b. Historical Context

[47] The events leading to the passage of the ***Act*** in British Columbia are well-known, particularly to anyone who lived in the Province at that time. I will summarize some of them here to provide a context to the legislation. They are more fully set out in the reasons of Madam Justice Saunders in the ***Lewis*** decision.

[48] In 1988, the ***Criminal Code*** prohibited abortion with one exception – the ***Code*** permitted a doctor to perform an abortion in an accredited hospital if the procedure was approved by the institution's therapeutic abortion committee. In ***Morgentaler*** the Supreme Court of Canada struck down those provisions on the basis that they violated s. 7 of the ***Charter*** and could not be saved by s. 1.

[49] Parliament did not enact a new provision relating to abortion. Not being prohibited, it was therefore not an illegal activity in Canada.

[50] Not long after ***Morgentaler*** was decided, two clinics were set up in Vancouver – the Everywoman's Health Centre and the Elizabeth Bagshaw Clinic. Both offered abortion services to women. Both attracted significant protest activity.

[51] After it opened in November of 1988, the Everywoman's Health Centre was the target of large-scale protests organized by a group who identified themselves as "Operation Rescue". The demonstrations were not limited to picketing but were often accompanied by acts of vandalism. Graffiti was sprayed on the exterior walls; the doors of the clinic were bolted shut; protesters locked themselves together outside the clinic and to a cement block in front of the entrance. In January of 1989, for example, the number of protesters was so large that the clinic could not operate.

[52] On January 21, 1989, the Elizabeth Bagshaw Clinic and the Everywoman's Health Centre obtained injunctions in the Supreme Court enjoining anyone with knowledge of the order from, among other things, watching and besetting the employees and the patients of the clinics, impeding access to the clinics causing a nuisance and trespassing.

[53] In spite of the injunctions, the protests continued. After the injunctions were obtained between January and July of 1989, 26 further blockades of the Everywoman's Health Centre occurred. The evidence disclosed that some type of protest activity took place between 30 and 40 percent of the days the Everywoman's Health Centre was open. As Madam Justice Saunders catalogued in her reasons, this included locks being glued and wired shut and graffiti being sprayed on the walls accusing the clinic of being another Auschwitz.

[54] The number of protesters fell between 1990 and 1992, but their ranks inflated on the 28th of each month, a day the protesters mourned as an anniversary of the release of the ***Morgentaler*** decision.

[55] The signs carried by the protesters expressed the view that abortion was murder. They would often contain graphic images. Many of the protesters walked the sidewalk near the entrance to the Everywoman's Health Centre so that they were very close to anyone entering the building. The protesters targeted not only staff of the clinic but also patients.

[56] After June of 1992 protesters were observed taking down licence plate numbers of vehicles arriving at the clinic. Some protesters stood close enough to

the vehicles that it was difficult for anyone to get out of them. Some protesters also carried cameras. Protests included not only picketing but prayer vigils and "sidewalk counselling".

[57] Prayer vigils consisted of protesters kneeling on both sides of the sidewalk or walking in circles near the entrance of the clinics, praying, singing hymns and carrying signs. As Madam Justice Saunders commented of a video of one of the vigils (at para. 28):

> [28] … The sidewalk is of no more than average width and space and passage has been much reduced by the presence of people engaged in a prayer vigil. It is doubtful that a person could walk down the sidewalk when a prayer vigil is underway without touching a person engaged in the prayer vigil. One video in evidence in the trial, recording a vigil on December 28, 1994, revealed a corridor of protesters which would present a barrier to any person needing to pass through, an intimidating gauntlet to persons requiring passage on the sidewalk … .

[58] "Sidewalk counselling" (a term used by the protesters) consists of an effort by those engaged in it to dissuade the women entering the clinic from obtaining an abortion. In the case at bar Mr. Spratt and Mr. Watson also talked to clinic staff. Mr. Watson sought to convince the staff that they were causing harm to their patients; Mr. Spratt spoke of redemption from sin. Generally those engaged in sidewalk counselling at the time that the legislation was passed would hand pamphlets to those entering the clinic and attempt to engage them in conversation. The level of the intensity of the approach was variously described by different witnesses. The trial judge in the ***Lewis*** case summed it up in this way ((1996), 18 B.C.L.R. (3d) 218 (Prov. Ct.) at paras. 21-3):

> [21] The activity consists of protesters standing in the vicinity of the clinic, in a position to speak to a patient about to enter the clinic. If the patient arrives by automobile, the sidewalk counsellor might approach the automobile, stand close to the door, apparently making it difficult for the patient to leave the automobile.
>
> [22] The approach varies: it might be low key, quiet, gentle, trying to demonstrate a concern for the patient, pointing out to her the alternatives to abortion, such as adoption and the offer of financial assistance. In most cases the patient does not wish to speak to the sidewalk counsellor and she is allowed to pass without any attempt to dissuade her. In other instances, the sidewalk counsellor is more persistent, pursues the patient, admonishes the patient, threatens fire and brimstone.
>
> [23] The protesters characterize their conduct as being quiet and gentle. The concern being for the mental and physical health of the patient. The staff of the clinic characterize the conduct of the sidewalk counsellors as being aggressive, interfering and intimidating to the patient.

[59] The pamphlets and other material that the protesters attempted to give to clinic staff and to the patients of the clinic ranged from cards containing information about counselling services and resources available to women choosing to bring their pregnancies to term. There were also pamphlets containing contentious information about abortion procedures and their aftermath.

[60] The evidence disclosed that the actions of the protesters outside the clinic evoked a range of emotions in women attending the clinic. Those emotions extended from mild distress to absolute fear. Clinic employees testified that once women passed the protesters, they often presented as being extremely upset, crying, shaking or anxious. The women expressed fear not only about a violent or traumatic interaction with the protesters, but also about a loss of confidentiality.

[61] A medical consultant with the Ministry of Health testified that the confrontation experienced by the women outside the clinic was deleterious to their health. His

opinion was supported by a study that found that abortion protest activity outside clinics caused patients seeking access stress, depression and psychological harm.

[62] The obvious intent of the protests was to stop abortions, whether it was by persuasion or intimidation and fear.

[63] The Provincial government of the day supported the concept of available abortion services in British Columbia as a valid medical procedure. In 1992 the government provided funding for the Elizabeth Bagshaw Clinic and the Everywoman's Health Center. At the same time, the government created a Task Force to review contraceptive, reproductive and abortion services available throughout the Province. The report of the Task Force in 1994 led the Health Minister to develop a further series of policy and programme services throughout the Province.

[64] It was during this time that violence against abortion providers was perpetrated in the United States and Canada. A Toronto clinic was fire-bombed; a doctor and two receptionists had been shot and killed in the United States. Then, on November 4, 1994, a Vancouver doctor who performed abortions was shot in his home. His injury was serious and almost took his life.

[65] The response of the Attorney General to the shooting was to create the Criminal Harassment Unit to investigate other threats to abortion providers and patients. The Unit reported to the Attorney General in March 1995. In light of reported threats not only in British Columbia but in the rest of the country, the Unit recommended further injunctions or legislation.

[66] The government chose to protect those engaged in abortion services by way of legislation. The ***Act*** was introduced on June 19, 1995. It was enacted on June 30, 1995 and brought into force effective September 18, 1995 (B.C. Reg. 337/95).

c. The Government's Stated Objectives

[67] The debates in the legislature provide insight into the government's objectives. As the Supreme Court of Canada recognized in ***R. v. Morgentaler***, [1993] 3 S.C.R. 463 at 484:

> … Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established. [Citations omitted.] I would adopt the following passage from *Hogg*, *supra*, as an accurate summary of the state of the law on this point (at pp. 15-14 and 15-15):
>
> > In determining the "purpose" of a statute in this special sense, there is no doubt as to the propriety of reference to the state of law before the statute and the defect in the law (the "mischief") which the statute purports to correct. These may be referred to under ordinary rules of statutory interpretation. Until recently, there was doubt about the propriety of reference to parliamentary debates (Hansard) and other sources of the "legislative history" of the statute. The relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that reports of royal commissions and law reform commissions, government

> policy papers and even parliamentary debates are indeed admissible. [Footnotes omitted.]

[68] On second reading the Minister of Health explained the government's intentions (*Hansard*, June 22, 1995, pp. 15977-15978):

> This legislation will ensure that abortion services in British Columbia are provided in an atmosphere of security, respect and privacy. That is an atmosphere that for too long has been lacking as women go to seek legal medical services and as doctors provide them. Instead, the climate has in many cases been one of long-term conflict, which has interfered with access to this legal medical service. Anti-abortion protests are occurring outside providers' homes. Doctors are being threatened, their children are being told their parents are murderers, and women seeking abortion services are separated from their escorts, verbally harassed and chased to their cars.
>
> This act is intended to defuse the tension by putting some distance between the protesters and the people seeking and providing abortion services. The legislation will create access zones around facilities providing abortion services. Access zones will be established around all doctors' offices and homes, and may be set up around the homes of other service providers.
>
> Access to health services is one of the foundations of the Canadian medicare system, and it is my responsibility as a minister to maintain access to services. In the case of access to abortion services, we must ensure that access to choice is a practical reality, not just a legal right. …
>
> ... Physicians who provide abortion services are practising their profession legally. They are providing a legal service, doing so in an ethical manner and serving the women of this province. They should not have to do so in an atmosphere of intimidation or threat. The issue that this government is addressing is one of access to medical service and of the right of doctors and their patients to live and work in an atmosphere free from harassment.
>
> One of the tests of a free society is how it balances the wish of some to protest or oppose or express dissent with the right of others to follow their own course, to make their own choices and ultimately to live their lives free of harassment. This is a fair and democratic society with rights and freedoms and corresponding rights and responsibilities. The right of freedom of speech and expression carries with it some responsibility for what is said and how it is expressed.

[69] In its final form the preamble of the ***Act*** states this:

> WHEREAS all people in British Columbia are entitled to access to health care, including abortion services;
>
> AND WHEREAS all people who use the British Columbia health care system, and who provide services for it, should be treated with courtesy and respect for their dignity and privacy;
>
> THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

[70] In her reasons for judgment, Madam Justice Saunders identified three objectives of the ***Act*** that I will paraphrase. First, she noted, that the evidence before her disclosed that the climate around the abortion clinics was so unpleasant and frightening to those who worked in them that it was discouraging doctors from providing the service; second, that those working in the clinics deserved to be protected and feel protected from the serious threats (acted upon when the Vancouver doctor was shot) that they reasonably feared; and third, that women obtaining abortions were undertaking a procedure involving personal trauma and high anxiety and many became very upset or angry with what happened to them in front of the clinic.

d. Importance of the Objective

[71] Madam Justice Saunders said this about what she saw as the objects of the legislation (at para. 101):

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

[72] I agree with the analysis of Madam Justice Saunders. In sum, the objectives she identified serve the broader purpose of protecting the health and safety of the citizens who worked in and attended clinics providing abortion services. Those concerns constitute a valid state objective.

[73] Mr. Watson and Mr. Spratt violated the provisions of the ***Act*** in 1998, three years after the ***Act*** was passed in 1995. Their position in this Court is that if the ***Act*** was ever justified as a measure of protecting workers and patients from physical violence, that objective is no longer valid *today* as the tenor of the abortion protests has changed significantly over the years.

[74] This argument overlooks the reality that this challenge to the legislation is not in the form of a reference to test the validity of legislation as it stands today. The validity of the legislation has been raised as a defence to the offences with which the two appellants were charged. The question on the appeals must be whether Mr. Watson and Mr. Spratt should be acquitted because at the time they committed the offences, the ***Act*** they violated was unconstitutional.

[75] I agree with the conclusions of Madam Justice Saunders as to the significance of the legislative objectives in this case as they existed at the time that the legislation was passed. The legislation serves a sufficiently important objective to pass the first part of the ***Oakes*** test.

3. Proportionality Test

a. Rational Connection

[76] The legislation provides for a prescribed area within which virtually no protest activity can take place, hostile or benign. It offers distance and therefore protection to the staff and patients of the clinic from the physical threats and emotional upset caused by the actions of the protesters and the proximity of their strong message. The legislation satisfies, in my view, the first part of the proportionality test in that the measures cannot be said to be arbitrary, unfair, or based on irrational considerations.

b. Minimal Impairment

[77] It is under this part of the s. 1 argument that the appellants say the legislature overstepped rational boundaries. They say that the respondent has not demonstrated that their freedom of speech has been impaired as little as possible. Accepting for the sake of argument that the legislature was entitled to put a clamp on *physical* interference with those who were entering the clinic, the appellants say that at a minimum prayer vigils which do not block entry to the clinic, and *non-violent* sidewalk counselling should fall outside the prohibitions. They say that the respondent cannot rely on the fact that their non-violent message may upset patients; their message should upset patients because to take part in an abortion is to take part in murder.

[78] The appellants also say that the place where they make their protests is very important to them. They argue that their activity is an example of the peaceful

communication of information about abortion that they should be entitled to make where their message will have the most practical impact. As counsel for the Canadian Nurses for Life put it:

> The right to freedom of expression must not be relegated to times and places where it is of the least possible relevance to those who have the greatest need for the information expressed. It is neither useful nor democratic to allow freedom of speech "textbook" discussion of alternatives to abortion that do not have a practical impact on the users of abortion services: i.e. those who are in crisis pregnancies and seeking assistance at hospitals and clinics. This information must be available and freely given at the times and places where those in need of such information to make fully informed decisions are found. …

[79] Finally, the appellants say that the size of the access zone around the Everywoman's Health Centre is unnecessarily large. The objectives of the legislation could have been served by something much smaller.

[80] The respondent counters these arguments with four points. First, it says the evidence in this case demonstrated that the line between peaceful protest and virulent or even violent expression against abortion is easily and quickly crossed. To try to characterize each individual approach to every woman entering the clinic is too difficult a calculus when the intent of the legislation is to give unimpeded access to those entering the clinic. Therefore a clear rule against *any* interference is the best way to achieve the ends of the legislation. The respondent refers to the words of the Supreme Court of the United States in ***Hill v. Colorado***, 530 U.S. 703 (2000 United States Supreme Court) where Justice Stevens, delivering the opinion of the Court, said this at 729:

> … The statute seeks to protect those who wish to enter health care facilities, many of whom may be under special physical or emotional

> stress, from close physical approaches by demonstrators. In doing so, the statute takes a prophylactic approach; it forbids all unwelcome demonstrators to come closer than eight feet. We recognize that by doing so, it will sometimes inhibit a demonstrator whose approach in fact would have proved harmless. But the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8-foot boundary. Such individualized characterization of each individual movement is often difficult to make accurately. A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.

[81] I agree with that reasoning.

[82] Second, the respondent says, the unwilling viewer or listener cannot avoid exposure to the protest outside the clinic because they must enter the clinic from the area in which the protests occur. Women entering the clinic should not be hostage to the message the protesters wish to send them. Relying on the comments of Adams J. in ***Ontario (A.G.) v. Dieleman*** (1994) 117 D.L.R. (4th) 449 (Ont. Gen. Div.) (“***Dieleman***”) the respondent says that the right of freedom of expression does not include the right to a captive audience. In ***Dieleman***, Adams J. said this at 723 - 724:

> It has also been held that freedom of expression assumes an ability in the listener *not* to listen but to turn away if that is her wish. The *Charter* does not guarantee an audience and, thus, a constitutional right to listen must embrace a correlative right *not* to listen. In *Committee for the Commonwealth of Canada v. Canada*, supra, at pp. 430-1, L'Heureux-Dubé J., in considering the access of would-be speakers to an airport terminal, dealt with the concern that such access could result in exposing "captive viewers or listeners" to unwanted messages. In this respect, she reproduced and approved the following excerpt from the reasons of Douglas J. in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) at pp. 306-7:

> "[I]f we are to turn a bus or a streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.
>
> "In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. *While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it*. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience." (Emphasis by Adams J.)

The principle behind a constitutional aversion to "captive audiences" is that forced listening "destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms": see Black Jr., "He Cannot Choose but Hear: The Plight of the Captive Auditor" (1953), 53 Columbia L. Rev. 960 at p. 967. Free speech, accordingly, does not include a right to have one's message listened to. In fact, an important justification for permitting people to speak freely is that those to whom the message is offensive may simply "avert their eyes" or walk away. Where this is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question. …

[83] In ***Hill v. Colorado***, *supra*, Justice Stevens said this at 716.

> The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. *Frisby* v *Schultz,* 487 US 474, 487 (1988). Indeed, "[i]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription." *Erznoznik* v *Jacksonville,* 422 US 205, 210-211, n. 6 (1975) (citation and brackets omitted). Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v California,* 403 US 15, 21 (1971).

[84] The appellants argue that the clinic doors are where they find those to whom they wish to give their message, and that this is the last opportunity that they might have to persuade pregnant women that their choice to abort is wrong. That may be so, but I agree with Justices Adams and Stevens – the protesters are not entitled to a captive audience. Those receiving the message should be free to avoid the message if they so choose.

[85] The third point made by the respondent is that made by Madam Justice Saunders in ***Lewis*** at para. 142:

> Lastly, I note that expressive activity concerning abortion is not banned in total by the *Act*. Outside the access zone (maximum 45 metres) citizens may picket, leaflet and otherwise propound their views. …

[86] I agree.

[87] Finally, the respondent answers the issue with respect to the size of the access zone by noting that elected officials must be given a measure of latitude in the section 1 analysis. As Chief Justice McLachlin said in ***Montreal (City) v. 2952-1366 Quebec Inc.***, [2005] 3 S.C.R. 141 at para. 94:

> … in dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude. The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored limit to the exigencies of the problem in a reasonable way. …
>
> [Emphasis added.]

[88] In my view the zone around the Everywoman's Health Centre is reasonably tailored to the location and circumstances of the clinic. As the intervenor, the

Access Coalition notes, the radius of the access zone in question is limited to 30 metres at its widest point. It is not the business of the court to fine-tune the area around the clinic in which protest is banned unless the size of the area can be said to amount to a constitutional impairment. I am not persuaded that it is.

[89] In my view the test of minimal interference is met by this legislation.

c. Proportionality

[90] The final question is one of proportionality. As stated by Dickson C.J. in ***Oakes***, at paras, 70 and 71:

> [70] "… there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". . . [Emphasis in judgment.]
>
> [71] With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.
>
> [Emphasis added.]

[91] The right to express opposition to abortion is a constitutionally protected right. The object of the ***Act*** is to protect vulnerable women and those who provide for their care to have safe, unimpeded access to health care services. The question is whether the degree to which the ***Act*** limits the right of those to demonstrate their opposition to abortion and to seek to persuade women to decide against abortion is disproportionate to the purpose of the ***Act***. The purpose or objective of the ***Act*** is sufficiently important to justify a limitation on the way in which freedom of expression is exercised in an area adjacent to the facilities providing abortion services. The impugned provisions of the **Act** are crafted in such a way that the "deleterious" effects do not outstrip the importance of the objective of the legislation. The objective of the ***Act*** justifies the limited infringement of freedom of expression in the circumstances.

Conclusion

[92] I would dismiss the appeals of Mr. Spratt and Mr. Watson.

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Madam Justice Rowles"

I Agree:

"The Honourable Mr. Justice Low"

APPENDIX