

4 **COURT OF APPEAL**

5
6 BETWEEN:

7
8 **GORDON STEPHEN WATSON**

9 Appellant

10 AND:

11 **REGINA**

12 Respondent

13
14 and

15
16 BETWEEN:

17 **DONALD DAVID SPRATT**

18 Appellant

19 AND:

20 **REGINA**

21 Respondent

22
23 and

24
25 **THE ACCESS COALITION (ELIZABETH BAGSHAW SOCIETY, EVERYWOMAN'S**
26 **HEALTH CENTRE SOCIETY (1988), THE B.C. PRO-CHOICE ACTION NETWORK**
27 **SOCIETY, C.A.R.E. PROGRAM AT THE WOMEN'S HEALTH CENTRE OF BRITISH**
28 **COLUMBIA, THE WOMEN'S LEGAL EDUCATION AND ACTION FUND), THE**
29 **CANADIAN NURSES FOR LIFE,**
30 **THE CHRISTIAN LEGAL FELLOWSHIP, THE CATHOLIC CIVIL RIGHTS LEAGUE**
31 **AND THE EVANGELICAL FELLOWSHIP OF CANADA, and**
32 **THE BC CIVIL LIBERTIES ASSOCIATION**

33 Intervenor
34

35
36 **FACTUM OF THE INTERVENOR**
37 **THE ACCESS COALITION**
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PART 1: STATEMENT OF FACTS

1
2 1. The Appellants, Gordon Stephen Watson and Donald David Spratt, were convicted on
3 August 8, 2000 before Howard P.C.J. of breaching ss. 2(1)(a) and (b) of the *Access to Abortion*
4 *Services Act*, R.S.B.C. 1996, c. 1 (the "Act"). Although they have appealed this decision
5 separately, their appeals are being heard together.

6 2. Subsection 2(1) of the *Act* prohibits persons from engaging in certain activities, including
7 interference with or intimidation of doctors, service providers or patients, protesting and
8 besetting in what is defined as an "access zone."

9 3. Under the *Act*, access zones are established by regulation for specific facilities which
10 provide "abortion services." "Abortion services" are defined under s. 1 to include lawful
11 medical services provided for the termination of pregnancy.

12 4. Subsection 5(1) of the *Act* states that an "access zone" includes the parcel on which the
13 facility is located and a prescribed area that extends out a distance not exceeding 50m from the
14 boundaries of the parcel on which the facility is located. Subsection 5(4) states that a regulation
15 may establish access zones with different dimensions for different facilities.

16 5. Access zones are also established by regulation under the *Act* for the residences of
17 doctors and service providers who provide abortion services (s. 6) and for doctors' offices (s. 7).

18 6. The hearing before Howard P.C.J. proceeded on admissions of fact. It was admitted that
19 on December 17, 1998, the Appellants were outside the Everywoman's Health Clinic (the
20 "Clinic") on East 44th Avenue in Vancouver. Both were within the access zone of the Clinic.
21 Mr. Watson had a sign on which was printed "Abortion is Murder." He approached a Clinic
22 employee near the front door of the building and attempted to present her with some printed
23 material, which she refused to accept. He also had some interaction with other employees of the
24 Clinic near the entrance. Mr. Spratt was also within the access zone carrying a cross
25 approximately nine feet in height. He was also carrying a sign similar to that carried by Mr.

1 Watson. He spoke to at least one employee of the Clinic.

2

3 *R. v. Watson*, [2004] B.C.J. No. 1322 at para. 2 (C.A.) (leave to appeal application).

4 7. The Appellants raised a number of positive defences and constitutional challenges, all of
5 which were addressed and dismissed by Howard P.C.J.

6 *R. v. Watson*, [2004] B.C.J. No. 1322 at paras. 2-5 (C.A.) (leave to appeal application).

7 8. In a decision dated May 22, 2002, Madam Justice Koenigsberg dismissed the Appellants'
8 summary conviction appeals from the decision of Howard P.C.J. Koenigsberg J. found that the
9 trial judge had made no error of fact or law.

10 *R. v. Watson*, [2002] B.C.J. No. 1133 (S.C.);
11 *R. v. Watson*, [2004] B.C.J. No. 1322 at para. 5 (C.A.) (leave to appeal application).

12 9. On June 29, 2004, the Honourable Mr. Justice Hall granted leave to the Appellants to
13 appeal the decision of Koenigsberg J. on the sole issue whether the Act infringes s. 2 of the
14 *Canadian Charter of Rights and Freedoms* (the "*Charter*") and, if so, whether the infringement
15 can be justified under s. 1 of the *Charter*.

16 *R. v. Watson*, [2004] B.C.J. No. 1322 at paras. 7-9 (C.A.) (leave to appeal application).

17 10. The Intervenor, the "Access Coalition," is a coalition of five organizations. They are:

18 (a) the Elizabeth Bagshaw Society, which operates the Elizabeth Bagshaw Women's
19 Clinic, a non-profit medical facility that provides abortion and other reproductive services
20 with counselling to women in a safe and confidential atmosphere;

21 (b) Everywoman's Health Centre Society (1988), which operates the Clinic, a non-profit
22 clinic accessible to all women that provides abortion and other reproductive services in a
23 supportive and confidential setting;

1 (c) the B.C. Pro-Choice Action Network Society (previously, the BC Coalition for
2 Abortion Clinics), a non-profit educational and advocacy organization with a broad and
3 diverse membership whose objective is ensuring safe, fully-funded and high-quality
4 reproductive health services, including abortion services;

5 (d) the C.A.R.E. Program, a program of the Children's and Women's Health Centre of
6 British Columbia that provides abortion services, counselling, birth control information
7 and referrals to other community resources for women; and

8 (e) the Women's Legal Education and Action Fund, a national, federally incorporated
9 not-for-profit organization that engages in equality rights litigation, research and public
10 education to secure women's equality rights as guaranteed by the *Charter*.

11 11. The Access Coalition was granted leave to intervene on this appeal on May 11, 2006, by
12 order of the Honourable Madam Justice Newbury. The Access Coalition was granted leave to
13 make written submissions and to apply to the Court to make oral submissions at the hearing of
14 the appeal.

15
16 12. The Record on this appeal includes materials from the trial in *R. v. Lewis*, in addition to
17 the materials from the trial of the Appellants.

18 *R. v. Lewis* (1996), 24 B.C.L.R. (3d) 247 (S.C.).

19 **PART 2: POINTS IN ISSUE**

20 13. The Access Coalition's position with respect to the points in issue is as follows:

21 (a) Whether ss. 2(1)(a) and (b) of the *Act* infringe the rights of the Appellants under
22 ss. 2(b) of the *Charter*.

23 The Access Coalition takes no position on this issue.

24 (b) Whether any infringement of the Appellants' rights by the impugned provisions
25 of the *Act* are justified under s. 1 of the *Charter*.

1 The Access Coalition submits that when the nature and extent of the harm addressed by
2 the *Act* are considered together with the manner in which the *Act* advances the
3 constitutional values of equality, privacy, dignity, liberty and security of the person,
4 values reflected in ss. 7, 15 and 28 of the *Charter*, any infringement of *Charter* rights by
5 the impugned provisions of the *Act* is constitutionally justified under s. 1 of the *Charter*.

6 **PART 3: ARGUMENT**

7 **A. The Section 1 Analysis**

8 14. The Access Coalition submits that, if this Court finds that the impugned provisions of the
9 *Act* infringe s. 2(b) of the *Charter*, any such infringement is demonstrably justified under s. 1.
10 Applying the s. 1 analysis, the Access Coalition submits that:

11 (a) the objective of the legislation is pressing and substantial; and

12 (b) the means chosen by the Legislature are proportional to the objective sought to be
13 achieved, such that the measures adopted are rationally connected to the
14 legislative objective, they impair "as little as possible" the right of freedom in
15 question, and there is a proportionality between the deleterious effects of the
16 measures and the legislative objective, and also between the deleterious and
17 salutary effects of the measures.

18 *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-139;
19 *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at p. 889.

20 15. The Supreme Court of Canada has emphasized that s. 1 is not a rigid or technical
21 provision, but that each stage of the s. 1 analysis requires close attention to context:

22 In essence, context is the indispensable handmaiden to the proper characterization of the
23 objective of the impugned provision, to determining whether that objective is justified,
24 and to weighing whether the means used are sufficiently closely related to the valid
25 objective so as to justify an infringement of a *Charter* right.

26 *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at p. 939.

1 16. In *Thomson Newspapers*, the Supreme Court of Canada identified four contextual factors
 2 relevant to the s. 1 analysis: the vulnerability of the group the legislation seeks to protect, the
 3 group's subjective fears and apprehension of harm, the extent to which the particular harm or the
 4 effectiveness of the remedy is capable of scientific measurement, and the nature of the activity
 5 infringed (the nature of the expression at issue). The Supreme Court has also often considered
 6 the extent to which the legislation advances other *Charter* values as a contextual factor:

7 *Thomson Newspapers, supra*, at pp. 942-943;
 8 *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 756;
 9 *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at pp. 916-917;
 10 *M. v. H.*, [1999] 2 S.C.R. 3, at p. 61;
 11 *Harper v. Canada*, [2004] 1 S.C.R. 827 at pp. 873-879.

12 1. Contextual Factors

13 17. The Access Coalition submits that in the present appeal, all of the contextual factors
 14 identified by the Supreme Court of Canada support a finding that the impugned provisions of the
 15 *Act* are justified under s. 1.

16 18. First, the group the *Act* seeks to protect is a vulnerable group. A certain degree of
 17 vulnerability on the part of the individual needing a medical service is associated with any
 18 pressing need for medical services. When the political and social climate within which abortion
 19 services are currently offered are considered together with the larger context of women's
 20 vulnerability and inequality in relation to reproductive health, it is clear that women seeking
 21 access to abortion services constitute a vulnerable group for the purposes of the s. 1 enquiry. Mr.
 22 Justice Adams eloquently described the vulnerability of women in this context in his decision in
 23 *Dieleman*:

24 "Vulnerability" best describes the situation of the women targeted. The decision
 25 to abort is a profoundly personal one and its complexities pervade the entirety of
 26 that individual's life. To be trapped, by the circumstances prevailing at the free-
 27 standing clinics, in a face-to-face encounter with a hostile stranger justifies
 28 government concern over the unnecessary humiliation and embarrassment
 29 inflicted on these women.

30 *Ontario (Attorney General) v. Dieleman* (1995) 117 D.L.R. (4th) 449, at p. 728.
 31

1 19. Second, it is reasonable to expect that the women described in the passage quoted above
 2 will feel apprehensive and fearful about such encounters. Certain groups of women may
 3 experience greater fears and stresses. For example, women with disabilities, women seeking
 4 abortions because of a pregnancy that has occurred because of a sexual assault, young women,
 5 women who reside in smaller communities, women living in poverty, and First Nations,
 6 immigrant, and refugee women may, because of these characteristics, experience greater
 7 apprehensions about contact with protesters at the threshold of an abortion services facility.
 8 Staff and doctors at such a facility may also experience fear and stress.

9 *Realizing Choice: The Report of British Columbia Task Force on Access to Contraception*
 10 *and Abortion Services*, August 1994, Exhibit 6A (23), A.B., Vols. 7-8, pp. 9-15, 18;
 11 *Lewis, supra*, at p. 281.

12 20. Third, the kinds of harms the *Act* seeks to avert and the efficaciousness of the remedy it
 13 employs are not capable of precise scientific measurement. Courts have recognized in a variety
 14 of contexts that legislative measures that seek to limit expressive activity in order to prevent
 15 specific harms should not be held to a rigorous standard of scientific proof when applying the
 16 proportionality aspect of the s. 1 test.

17 *R. v. Sharpe*, [2001] 1 S.C.R. 45, at p. 96;
 18 *Keegstra, supra*, at p. 776;
 19 *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 504;
 20 *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927, at p. 990;
 21 *Harper, supra* at pp. 874-875.
 22

23 21. Fourth, the nature of the activity prohibited by the *Act* is not of high value. This is not
 24 because the expression of anti-abortion views in general is of low value, as was found with
 25 respect to hate speech in *Keegstra* or obscenity in *Butler*. Rather, it is because anti-abortion
 26 views can be and are expressed at many other locations, and their expression at the locations
 27 prohibited by the *Act* is no more closely tied to the values underlying s. 2(b) of the *Charter* than
 28 expression of those views at other locations. As noted by L'Heureux-Dubé J. in *Committee for*
 29 *Commonwealth of Canada*, the right to freedom of expression does not entail a right to an
 30 audience, particularly where the audience is captive:

31 In asking us to force the system to accept his message as a vindication of his
 32 constitutional rights, the petitioner overlooks the constitutional rights of the
 33 commuters. While petitioner clearly has a right to express his views to those who
 34 wish to listen, he has no right to force his message upon an audience incapable of

1 declining to receive it. In my view the right of the commuters to be free from
 2 forced intrusions on their privacy precludes the city from transforming its vehicles
 3 of public transportation into forums for the dissemination of ideas upon this
 4 captive audience.

5 *Lehman v. Shaker Heights (City)*, 418 U.S. 298 (1974) at pp. 306-07, cited by L'Heureux-Dubé
 6 J. in *Committee for Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at pp. 204-205:
 7 *Keegstra, supra*, at p. 762;
 8 *Butler, supra*, at p. 500;
 9 *Lewis, supra*, at p. 281.

10 22. The Access Coalition submits that a confrontation with a woman seeking legal abortion
 11 services at the threshold of an abortion facility is not an appropriate forum to pursue a larger
 12 “quest for truth” in relation to the issues surrounding abortion. Neither does this location possess
 13 any specific virtue as a marketplace for ideas or as a democratic forum. While the Appellants’
 14 individual self-fulfilment may be enhanced by engaging in anti-abortion activity within an access
 15 zone, it is accomplished at the expense of the listener’s self-fulfilment and equality, as the
 16 location effectively strips her of the opportunity to exercise her right to choose not to hear this
 17 particular message. If self-fulfilment means anything, it must mean the right not to listen.

18 23. The issue in this appeal is not the value of the Appellants’ expression generally, but
 19 whether a restriction on this expression at this place interferes with core freedom of expression
 20 values. The Supreme Court of Canada has recognized that a time, place or manner restriction on
 21 a form of expression is more easily justifiable than a complete ban on such expression under
 22 section 1.

23 *Peterborough (City) v. Ramsden*, [1993] 2 S.C.R. 1084, at pp. 1105-1106;
 24 *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] S.C.J. No. 63 at para. 94.

25 24. The *Act* imposes a time, place and manner restriction, not a complete ban: it only
 26 restricts individuals from expressing anti-abortion views in certain narrowly defined geographic
 27 locations. The legislative prohibition in no way prohibits the message; it is limited to the
 28 locations where the expression is most likely to cause significant harm to others.

29 *Act*, ss. 2-7;
 30 *Everywoman's Access Zone Plan*, Exhibit 2, A.B. Vol. 3, p. 231.

31 25. Fifth, the impugned provisions of the *Act* significantly further other *Charter* values,
 32 namely, the rights of women under ss. 7, 15 and 28.

1 (i) **Section 7 Values**

2 26. By facilitating women's access to lawful abortion services, the *Act* advances the values of
 3 "security of the person" and "liberty" contained in s. 7 of the *Charter*. With respect to security,
 4 the Supreme Court of Canada has held that legislation that creates barriers to access to medical
 5 services, including abortion services, breaches the right to security of the person. By implication,
 6 legislation that reduces barriers to access enhances this constitutional value.

7 *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 56, *per* Dickson, C.J. and Lamer, J.;
 8 p. 106, *per* Beetz and Estey, JJ.; and p. 173, *per* Wilson, J.
 9 *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 at pp. 845-848, *per* McLachlin C.J.,
 10 Major & Bastarache JJ.

11 27. The *Act* enhances women's security of the person by reducing the considerable stress that
 12 anti-abortion activities on the threshold of abortion facilities create for women seeking this
 13 medical service. As Adams J. remarked in *Dieleman, supra*, "there is something fundamentally
 14 disturbing about "capturing" women at the threshold of a medical facility and doing so
 15 immediately before they undergo a serious surgical procedure." The stress arises both from the
 16 confrontation itself and from a woman's understandable uncertainty, in light of the history of
 17 such protest, of how far any individual or group of anti-abortion protestors might go in their
 18 efforts to stop her from having an abortion.

19 *Dieleman, supra*, at p. 728;
 20 C. Cozzarelli and B. Major, "The Effects of Anti-Abortion Demonstrators and Pro-
 21 Choice Escorts on Women's Psychological Responses to Abortion" (1994), 13(4)
 22 *Journal of Social and Clinical Psychology*, 404-429, Exhibit 6A(19), A.B. Vol. 7.

23
 24 28. *The Act* also promotes women's security of the person by reducing the stress anti-abortion
 25 activities cause to abortion service providers. Anti-abortion activities have been a significant
 26 disincentive to physicians and other health care workers to provide this lawful medical service.
 27 To the extent that a woman's priorities and aspirations with respect to the use of her body mean
 28 that she has decided to terminate a pregnancy, the reduced availability of abortion services due to
 29 a lack of service providers will compromise both the psychological and physical components of
 30 her security of the person.

1 The increased likelihood of delay in gaining access to scarce abortion services creates increased
2 risks to the health of women who require those services.

3 *Dieleman, supra*, at pp. 728-29;
4 *Morgentaler, supra*, at pp. 56-63, *per* Dickson C.J.;
5 pp. 101-106, *per* Beetz J.; pp. 171-172, *per* Wilson J;
6 *Lewis, supra*, at pp. 279-280.

7 29. The “liberty” interest in s. 7, has been described as guaranteeing a degree of personal
8 autonomy over important decisions intimately affecting one’s private life, such as the decision
9 to terminate a pregnancy. The *Act* takes positive steps to respect a woman’s fundamentally
10 personal decision to terminate a pregnancy and advances the constitutional value of liberty by
11 ensuring that women who require abortion services as a result of that decision are not “held
12 captive” because of their medical needs by the unsolicited and undesired disapproval of anti-
13 abortion protesters.

14 *Morgentaler, supra*, at pp. 166, 171, *per* Wilson, J.;

15 *Dieleman, supra*, at p. 726;

16 *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at pp. 340-343,
17 *per* Bastarache J.
18

19 **(ii) Section 15 Values**

20

21 30. The *Act* significantly promotes the constitutional equality values underlying s. 15 of the
22 *Charter*. Abortion is a lawful medical procedure which, by its nature, is specific to women. By
23 taking steps to ensure safe and effective access to such services, the *Act* promotes the equality
24 values underlying s. 15 in the particular context of reproductive health care. A law that aims to
25 ameliorate the disadvantage experienced by women with respect to access to lawful medical
26 services related to their reproductive capacities significantly promotes sex equality.

27 *Dieleman, supra*, at p. 727.

28 31. Just as pregnancy discrimination has been held to be a form of sex discrimination, access
29 to reproductive health services required by women is an issue of sex equality. Laws cannot alter
30 the reproductive capacities of men and women, but they can, and do, prescribe the social and
31 legal consequences which attach to them.

32 *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1242.

1 32. Safe, unimpeded and dignified access to lawful abortion services is a necessary
 2 component of sex equality in the context of reproduction. Any legislatively imposed barrier to
 3 access to lawful abortion services would disparately harm women. This harm would be
 4 particularly severe for some women by virtue of their other social characteristics, such as age or
 5 disabilities. By the same token, positive legislative action, such as the *Act*, which facilitates
 6 access to lawful abortion services, is properly regarded as promoting sex equality and should be
 7 accorded a weight commensurate with this fundamental constitutional value. As a unanimous
 8 Supreme Court of Canada held in *Law v. Canada*:

9 The key purpose of section 15 is to prevent the violation of essential human dignity and
 10 freedom through the imposition of disadvantage, stereotyping, or political or social
 11 prejudice, and to promote a society in which all persons enjoy equal recognition at law as
 12 human beings or as members of Canadian society, equally capable and equally deserving
 13 of concern, respect and consideration.

14 *Law v. Canada*, [1999] 1 S.C.R. 497, at p. 529.

15 **(iii) Section 28 Values**

16 33. The *Act* also promotes the constitutional values underlying s. 28 of the *Charter*. Section
 17 28 provides that, notwithstanding anything in the *Charter*, the rights and freedoms therein are
 18 guaranteed to men and women equally. It is a constitutional directive to courts to be attentive to
 19 sex equality concerns when conducting a s. 1 analysis. In the context of access to reproductive
 20 health services, the Access Coalition submits that s. 28 directs courts to apply the *Charter* so as
 21 to ensure that men and women enjoy equivalent levels of respect for their privacy, liberty,
 22 security and dignity, when accessing all lawful medical services.

23 *R. v. Red Hot Video Ltd* (1985), 45 C.R. (3d) 36 at 59 (B.C.C.A.)
 24 leave to appeal refused (1985), 46 C.R. (3d) xxv (S.C.C.);
 25 *R. v. Shearing*, [2002] 3 S.C.R. 33, at pp. 79-80;
 26 *R. v. Osolin*, [1993] 4 S.C.R. 595 at p. 669.
 27

28 **(iv) Privacy**

29 34. In addition to the constitutional values described above, the *Act* promotes the
 30 constitutional value of privacy. Privacy has been held to be a value underlying ss. 7 and 8 of the
 31 *Charter* and, in the context of access to reproductive health services, the Access Coalition

1 submits it is intertwined with the constitutional value of sex equality underlying ss. 15 and 28.
 2 For example, in *R. v. Colarusso*, La Forest J. held that “hospitals have been identified as specific
 3 areas of concern in the protection of privacy, given the vulnerability of persons seeking medical
 4 treatment.” Privacy interests have also been held to be sufficiently compelling to justify
 5 infringements of *Charter* rights.

6 *R. v. Colarusso*, [1994] 1 S.C.R. 20 at p. 53;
 7 *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, at pp. 1363-64, *per* Wilson J;
 8 *R. v. Mills*, [1999] 3 S.C.R. 688, at pp. 721-23;
 9 *Sharpe, supra*, at p. 72.

10 35. The Access Coalition submits that the vulnerabilities and apprehensions of the group
 11 protected by the *Act*, the limited nature of the restriction it imposes on the Appellant's *Charter*-
 12 protected activities, the fact that this is an area in which harms and effects cannot be measured
 13 with scientific precision, and, perhaps most importantly, the very significant constitutional values
 14 promoted by the *Act*, are all contextual factors that must inform each stage of the section 1
 15 analysis. Together, they strongly suggest that this is an area in which the Court should give
 16 considerable latitude to the Legislature's determination of how to balance the constitutional
 17 rights of the Appellants and those of the group protected by the impugned provisions of the *Act*.

18 *RJR MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, at pp. 331-33;
 19 *Irwin Toy, supra*, at p. 993.

20 **2. Legislative Objective**

21 36. Determining whether or not a legislative objective is "pressing and substantial" requires
 22 the court to consider the nature and significance of the harm at which the statute is directed in
 23 light of the extent to which it advances other values in the *Charter*. These values are “significant
 24 indicia of the strength of the objective.”

25 *Keegstra, supra*, at pp. 744, 755.

26 37. In this case, the has set out its objectives explicitly in the Preamble to the *Act*. The
 27 primary objective of the *Act* is to ensure access to health care, including abortion services.
 28 Secondary legislative objectives include respect for the dignity and privacy of both users and
 29 providers of health care services. These secondary objectives are necessary components of any

1 effective entitlement to access to lawful health services, including abortion services. The intent
 2 of the was to realize these objectives in a manner consistent with the rights of anti-abortion
 3 protestors to express their views.

4 *Act*, Preamble;
 5 *Hansard*, 4th sess., 35th Parliament, Province of British Columbia, June 22, 1995, Vol. 21, No.
 6 11, pp. 15977-15978, as quoted in *Lewis, supra*, at p. 267;
 7 *Realizing Choice, supra*, at pp. 2, 31-32;
 8 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at p. 690-91.

9 38. The chose to achieve its objectives by providing for the creation, by regulation, of access
 10 zones around abortion service facilities. This approach allows access zones to be tailored to the
 11 particular locations and circumstances of a facility. The *Act* also creates access zones around the
 12 homes and offices of abortion services providers.

13 *Abortion Services Access Regulation*, B.C. Reg. 337/95, O.C. 1027/95;
 14 *Everywoman's Access Zone Plan, supra*.

15 39. The restrictions on anti-abortion activity contained in the *Act* comprise an integrated and
 16 comprehensive legislative response to a pressing social problem. Courts in British Columbia and
 17 elsewhere in Canada have already identified and attempted to remedy this problem, albeit only in
 18 the piecemeal and incremental manner necessitated by their role as adjudicators of the particular
 19 disputes brought before them. Numerous site-specific injunctions have been granted to restrict
 20 anti-abortion activity in order to safeguard access to this lawful medical service. The granting of
 21 such injunctions reflects a judicial determination that the close proximity of anti-abortion
 22 protestors to the threshold of abortion service facilities poses a sufficiently serious threat of harm
 23 to both users and providers of abortion services to warrant injunctive relief. Courts have also
 24 considered that such injunctions strike a valid and appropriate balance between competing
 25 interests in light of the guarantees contained in the *Charter*.

26 *Everywoman's Health Centre Society (1988) v. Bridges*, [1990] B.C.J. No. 2895 (B.C.C.A.);
 27 *Elizabeth Bagshaw Society v. Bretton et al.* (20 Nov. 1991); (30 Jan. 1992); (29 June 1995)
 28 Vancouver Registry C916855 (B.C.S.C.);
 29 *Canadian Urban Equities Ltd. et al. v. Direct Action for Life et al.* (1990), 68 D.L.R. (4th) 109;
 30 70 D.L.R. (4th) 691 (Alta. QB);
 31 *Assad v. Cambridge Right to Life et al.* (1989), 69 O.R. (2d) 598 (Sup. Ct.);
 32 *Dieleman, supra*.

1 40. The Access Coalition submits that a should be able to act with confidence in addressing,
2 through a carefully crafted and directed regulatory scheme, harms already identified by the
3 courts pursuant to their common law jurisdiction as necessitating a legal remedy at common law.
4 Legislative action is especially appropriate where, as recognized, there is evidence in *Lewis* to
5 show that injunctive relief has not adequately addressed the problem.

6 *Lewis, supra*, at pp. 284-285.

7
8 41. In enacting the *Act*, the was responding to a well-documented, current, and pressing
9 social problem. There is no question that abortion remains a highly volatile and socially divisive
10 issue. In *Lewis*, Saunders J. noted that it was proper for the to consider that there are extremists
11 involved in the abortion debate who, because of the intensity of their belief, will resort to
12 violence. The B.C Task Force on Access to Abortion and Contraceptive Services reported that at
13 every one of its five regional meetings, abortion service users and providers recounted
14 experiences of harassment due to anti-abortion activities. The extent of the harassment was so
15 great as to jeopardize access to abortion services. There is no evidence that the controversy
16 surrounding abortion has diminished.

17 *Realizing Choices, supra*, at pp. 17-18;
18 *Lewis, supra*, at pp. 278-280.

19 42. The evidence in *Lewis* established that anti-abortion activities in front of abortion service
20 facilities are part of a longstanding and well organized campaign to stop abortions from
21 occurring, not only in British Columbia, but across North America. These activities are directed
22 at both providers and users of abortion services. Anti-abortion activities impair access by
23 discouraging doctors and other health care providers from continuing to provide abortion
24 services. In the case of users, anti-abortion activities impair women's privacy and health by
25 compromising the confidentiality of this medical service and increasing the stress associated with
26 obtaining a lawful abortion.

27 *Cozzarelli and Major, supra*;
28 *Lewis, supra*, at pp. 279-280.

29 43. The Access Coalition submits that, in light of the serious and well-recognized harms
30 sought to be addressed by the *Act* and the extent to which it furthers fundamental values

1 underlying ss. 7, 15 and 28 of the *Charter*, both of which form an important part of the context
 2 for the s. 1 analysis, the objective of the *Act* is clearly pressing and substantial. In fact, it is
 3 appropriately characterized as an objective of "utmost importance."

4 *Keegstra, supra*, at p. 758.

5 **3. Proportionality**

6 44. When approaching the proportionality branch of the s. 1 analysis, it must be recognized
 7 that freedom of expression has never been regarded as absolute. The right to express one's views
 8 does not guarantee the right to an audience. Thus, the Access Coalition submits that, when
 9 considering whether the infringement of the Appellant's freedom of expression is proportional to
 10 the *Act's* pressing and substantial objective, care must be taken not to overstate the scope of the
 11 infringement of the Appellant's expressive rights in this case: the right to choose a particular
 12 location at which to speak.

13 *Dieleman, supra*, at p. 723;

14 *Committee for Commonwealth of Canada v. Canada, supra*, at p. 205;

15 *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 463, 467-68.

16 45. The Access Coalition submits that the legislative restriction on anti-abortion activity
 17 within the access zones created by the *Act* (and its regulations) is rationally connected to the
 18 legislative objective of ensuring equal, safe and dignified access to lawful abortion services for
 19 users and providers of those services. In light of the contextual factors and, in particular, the
 20 history of anti-abortion protest activities, the had a "reasoned apprehension of harm" resulting
 21 from anti-abortion activities at clinics and the homes and offices of services providers.

22 *RJR MacDonald, supra*, at p. 333;

23 *Sharpe, supra*, at p. 96;

24 *Lewis, supra*, at pp. 279-283.

25 46. Turning to the minimal impairment requirement, the majority of the Supreme Court of
 26 Canada in *Irwin Toy* formulated the relevant question:

27 Where the mediates between the competing claims of different groups in the
 28 community, it will inevitably be called upon to draw a line marking where one set
 29 of claims legitimately begins and the other fades away without access to complete

1 knowledge as to its precise location. If the Legislature has made a reasonable
 2 assessment as to where the line is most properly drawn, especially if that
 3 assessment involves weighing conflicting scientific evidence and allocating scarce
 4 resources on this basis, it is not for the court to second guess. That would only be
 5 to substitute one estimate for another.

6 *Irwin Toy, supra*, at p. 990;
 7 *Committee for Commonwealth of Canada, supra*, at pp. 247-48.
 8 *R. v. Edwards Books and Arts Ltd.*, [1986] 2 S.C.R. 713 at pp. 781-783

9
 10 47. Most recently, in *Montreal (City)* a majority of the Supreme Court of Canada emphasized
 11 along similar lines the importance of providing a “measure of latitude” to elected officials in the
 12 proportionality analysis in cases dealing with social issues where rights conflict. In that case,
 13 McLachlin C.J. for the majority, stated as follows:

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

19 *Montreal (City), supra*, at para. 94;
 20 *Harper, supra* at pp. 874-875.

21 48. The Access Coalition submits that the Legislature has made just such a “reasonable
 22 assessment” in the *Act*, both with respect to the geographic scope of the area of restricted
 23 expression and with respect to what expression is restricted within access zones.

24 49. Turning first to geographic scope, the *Act* directly establishes access zones and specifies
 25 the size of access zones for doctor’s homes and offices. For abortion services facilities and the
 26 homes of service providers, the *Act* authorizes the establishment of access zones by regulation.

27 *Act*, ss. 4-7

28 50. The *Act* provides clear legislative direction to the Lieutenant Governor-in-Council in
 29 determining the dimensions of access zones by regulation. In particular, s. 5 of the *Act* limits the
 30 size of zones around abortion services facilities to a maximum 50 metre radius. Moreover,
 31 further direction is provided by the Preamble to the *Act*, which states the purpose for which such
 32 regulations are to be made, and through sections 2, 3 and 4 of the *Act*, which elaborate on that

1 purpose by defining the activities prohibited in access zones. Well-established principles of
2 statutory interpretation also guide the creation of access zone regulations. Since the Legislature
3 is presumed to intend to enact laws consistent with the *Charter*, access zone regulations made
4 under the *Act* must take into account *Charter* values such as freedom of expression.

5 *Driedger on the Construction of Statutes*, 3rd ed., pp. 322-327

6 51. An examination of the regulation establishing the access zone around the Clinic
7 demonstrates that it is carefully tailored to the location and circumstances of the Clinic and that it
8 takes into account both the purposes of the *Act* in providing safe, dignified and reasonably
9 private access to a lawful medical service while intruding on the expressive rights of protestors
10 as little as possible. For example, the radius of the Clinic’s access zone is limited to 30 metres at
11 its widest point.

12 *Everywoman’s Access Zone Plan*, *supra*.

13 52. There is no evidence in the record to suggest that access zones around abortion services
14 facilities are excessive, or that the process followed to establish them was not appropriately
15 constrained by the legislative and constitutional criteria referred to above. The foundation of the
16 Appellants’ argument is not that the access zones should have been more limited or should have
17 been established through a different process, it is that they should not exist at all.

18 53. The Access Coalition submits that the *Act* comprises a reasonable assessment of “the
19 competing claims of different groups in the community” and satisfies the minimal impairment
20 requirement. The criteria set out under the *Act* are no less specific in nature than the criteria
21 imposed by the court injunction in *Dieleman*, which were found to pass constitutional muster.
22 The geographical restriction is insignificant in relation to the entire geographical area where such
23 expression may occur. Given the vulnerability of those seeking access to abortion service
24 facilities and the constitutional values promoted through the creation of a safe, dignified, and

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1 reasonably private means of access to these facilities, as well as the other contextual factors, a
2 small geographical restriction is constitutionally justified.

3 *Dieleman, supra*, at pp. 732-739;
4 *R. v. Squires* (1993), 18 C.R. (4th) 22 at p. 58;
5 leave to appeal refused [1993] 3 S.C.R. ix.

6 54. Turning to the scope of the restriction on expression within an access zone, the *Act*
7 essentially prohibits any communication concerning abortion services, physical interference with
8 people seeking access to such services or with service providers, and forms of intimidation.

9 55. The Access Coalition submits that the *Act* also represents a “reasonable assessment” of
10 competing interests with respect to the extent of its restriction on expression within an access
11 zone. The equality, privacy, dignity, liberty and security of the person values underlying ss. 7,
12 15 and 28 of the *Charter* are compromised when women seeking access to lawful abortion
13 services are running the gauntlet of anti-abortion protesters at the threshold of abortion service
14 facilities, questioned—often repeatedly, approached by individuals or groups, given unwanted
15 religious material, or photographed. Where the harm arises from a variety of activities, the
16 Legislature may legitimately restrict the entire range of activities that causes the harm.

17 *Lewis, supra*, pp. 288-292.

18
19 56. The range of activities restricted within access zones closely corresponds to the pressing
20 and substantial objective of the legislation, which is to ensure access to a lawful medical service
21 consonant with respect for the equality, privacy, liberty, security of the person and dignity of
22 those who seek it. Removing any of the restrictions in s. 2 of the *Act* would be inconsistent with
23 this objective. Only a comprehensive restriction of expression relating to abortion within the
24 access zone can provide women seeking abortion services with a reasonable assurance that they
25 can do so without risk of unacceptable affronts to their equality, privacy, liberty, security of the
26 person and dignity.

27 57. For example, the Appellant Spratt questions why “silent disapproval,” including standing
28 in the access zone holding a large wooden cross, is treated the same way under the *Act* as actual
29 tortious interference. The answer lies in the evidence that silent protests, which have included

1 group “vigils” on the threshold of the Clinic, create a climate of fear and intimidation that may
2 deter women from accessing such services; they invade women’s privacy, exposing them to
3 disapproving scrutiny that is not a feature of access to any other lawful medical service.

4 Factum of the Appellant Donald David Spratt, para. 59;
5 *Lewis, supra*, at pp. 282, 287-288.

6 58. Privacy and security underpin the confidential relationship between doctor and patient,
7 and can be indispensable to the patient’s security of the person. In light of the climate of fear that
8 persists regarding this medical service, any manner of sidewalk interference or protest directed at
9 a person seeking access to an abortion facility necessarily represents a serious compromise of her
10 privacy, no matter how peaceful the intent of the protestor. In *Dieleman*, Adams J. concluded
11 that the prohibition of picketing, sidewalk counselling and engaging in any other manner of
12 protest was justified in the face of the *Charter* violations established in that case.

13 *Mills, supra*, at pp. 721-23;
14 *Dieleman, supra*, at pp. 736, 745-7, 749-752.

15 59. By creating access zones around abortion facilities, the *Act* ensures that all persons
16 seeking access to abortion facilities can exercise some control over what information or advice
17 they receive in relation to abortion and, in particular, exercise a meaningful choice not to be the
18 target of unwanted communications about abortion on the threshold of an abortion services
19 facility. Persons such as the Appellants are free to present information and to express their views
20 on abortion by any lawful means in the vicinity of abortion services facilities as long as they
21 remain outside the access zone. Those who wish to receive advice or information from them can
22 approach them there or elsewhere. Nothing in the *Act* restricts the Appellants’ ability to
23 promulgate their views generally and in a wide variety of ways.

24
25 60. In *Committee for Commonwealth of Canada, supra*, McLachlin J. asked, “what does the
26 claimant lose by being denied the opportunity to spread his or her message in the form and at the
27 time and place asserted?” The Access Coalition submits that what the Appellants lose is only the
28 ability to convey their message to a “captive audience:” women who, by virtue of their
29 pregnancies, seek access to a lawful medical service (which includes the abortion procedure and

1 information and counselling from sources a woman chooses to assist in decision making). While
2 the Appellants can express their views anywhere, a woman seeking an abortion has no other
3 options: she must gain access to an abortion service facility to receive a safe and lawful abortion.
4 The disparity in power between speaker and listener in this particular context has already been
5 judicially recognized as a factor which may justify the restriction of *Charter* rights.

6 *Committee for Commonwealth of Canada, supra*, at p. 250;
7 *Dieleman, supra*, at p. 728, quoting *Edmonton Journal, supra*, at p. 601.

8
9 61. Further, the restriction of all abortion-related expressive activity within a narrow
10 geographical area is not only appropriate in light of the circumstances of abortion service users,
11 it is also the only practical approach to the problem of ensuring access. The terms of the
12 prohibition are readily understandable to all concerned, which facilitates even-handed
13 enforcement. Restricting a more limited range of activities within the access zone—for example,
14 permitting a silent protest by a limited number of individuals—would not be effective without
15 constant and highly intrusive police surveillance of activity within the zone. Police officers
16 would have to observe that silence was maintained and that the number of individuals did not
17 grow so large as to constitute intimidation. Such surveillance would be more invasive of the
18 privacy of both abortion service users and anti-abortion protestors. It is submitted that the means
19 chosen in the *Act* is superior to this alternative, even from the perspective of the protestors.

20 62. With respect to the last element of the proportionality assessment, the proportionality of
21 effects, the Access Coalition submits that the deleterious effects of the *Act*, which only curtails
22 the Appellants' anti-abortion activities within, at most, a 50 metre access zone around an
23 abortion service facility and specified zones around homes and offices, are clearly outweighed by
24 its beneficial effects. Both in its objective and its actual effects, the impugned provisions of the
25 *Act* are a measured response to a pressing social issue which has not been, and cannot be,
26 adequately addressed by the more piecemeal alternative of injunctive relief. It promotes
27 underlying constitutional values and protects a vulnerable group. There is evidence that the *Act*
28 has noticeably improved the access, sense of security and privacy of abortion service users and
29 providers. Thus, its salutary effects outweigh its deleterious effects.

30 *Lewis, supra*, at pp. 288-292

1 **C. Conclusion**

2 63. In conclusion, the Access Coalition submits that the *Act* has been carefully tailored to
3 address a pressing legislative objective. In a society that mandates respect for women's
4 reproductive choices, and in which abortion is a lawful medical service, the *Act* represents a vital
5 legislative recognition that women's decisions concerning their reproductive capacities cannot be
6 meaningful without ensuring reasonably secure access to related medical and health services. For
7 these reasons, the Access Coalition submits that the impugned provisions of the *Act* are
8 constitutionally valid, and that these appeals should be dismissed.

9 **PART 4: NATURE OF THE ORDER SOUGHT**

10 64. That sections 2(1)(a) and (b) of the *Access to Abortion Services Act* be found to be
11 constitutionally valid, and that the appeals be dismissed.

12 **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

13 **DATED** at the City of Vancouver in the Province of British Columbia this 8th day of
14 September, 2006.

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Nitya Iyer

Matthew Taylor
Counsel for the Access Coalition

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