

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

IVANA LEVKOVIC

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

ATTORNEY GENERAL OF CANADA

Intervener

**FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF CANADA
(Pursuant to Rules 61(4) and 37 of the *Rules of the Supreme Court of Canada*)**

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PART I – OVERVIEW and STATEMENT OF FACTS

Overview

1. Section 243 of the *Criminal Code* makes it an offence to dispose of the body of a dead child, with intent to conceal the fact that the child has been delivered, regardless of whether the child died before, during or after birth. There is no dispute amongst the parties that s. 243 furthers a laudable goal - to preserve evidence in order to investigate suspicious infant deaths. The parties also agree that this legitimate purpose entitles Parliament to enact legislation that applies to the concealment of the body of a child who dies prior to birth.

2. In *R. v. Nova Scotia Pharmaceutical Society*,¹ this Court set out a practical, case-specific test to be applied whenever legislation is measured against any *Charter*-protected right on the basis of vagueness. According to this test, a law will be found to be unconstitutionally vague when it so lacks in precision that it fails to give sufficient guidance for legal debate. This test has proven to be an effective mechanism for both legislators and citizens alike to understand the level of particularity required of Canadian laws. This Court has applied the *Nova Scotia Pharmaceutical* test in many subsequent cases, in a wide variety of factual circumstances, and in the context of numerous *Charter* protected rights. It is a fair and workable test.

3. The appellant argues the wording of s. 243 is impermissibly vague in the way it describes a child who dies “before” birth, not because it fails the constitutional test developed by this Court, but because it fails to meet some unidentified higher standard. The appellant invites this Court to discard the understandable parameters of *Nova Scotia Pharmaceutical* in favour of a variable legal test that is itself vague. This Court should decline the invitation. The appellant’s approach injects less – not more – certainty into statutory interpretation.

¹ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606

4. Section 243 sufficiently delineates an area of risk. The section is directed at the disposal of a dead “body”, temporally connected to the act of “birth”, with the specific intent to conceal “delivery”. These words are intelligible. Courts can draw meaning from them.

5. Read as a whole, taking into consideration both its purpose and legislative context, s. 243 gives fair notice about the prohibited conduct to citizens wishing to conduct themselves responsibly and imposes appropriate limitations on the discretion of law enforcement. It is therefore consistent with the principles of fundamental justice.

Statement of Facts

6. The Attorney General of Canada takes no position on the facts as set out by the parties.

PART II – ISSUES

7. The Attorney General of Canada intervenes to address the following constitutional issues:

- a. In its application to a “child” that dies before birth, does s. 243 of the *Criminal Code* infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
- b. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

8. The answer to (a) is “no”. Both on its face, and interpreted contextually with other provisions in the *Criminal Code* relating to infant children, s. 243 provides sufficient guidance for legal debate regarding what is meant by a child that dies “before” birth, consistent with s. 7 of the *Charter*. While the provision engages the liberty interests of persons accused under this section, it does so in the context of fulfilling an important societal interest in investigating the deaths of newborns. Any potential deprivation is in accordance with the principles of fundamental justice.

9. Should this Court conclude that it is necessary to reach the second question, the same, important societal interests that inform the s. 7 analysis lead to the conclusion that any limit imposed on s. 7 by s. 243 of the *Code* is a justifiable limit prescribed by law.

PART III – ARGUMENT

Section 243 of the Criminal Code

10. Section 243 states:

243 Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

243 Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque, de quelque manière, fait disparaître le cadavre d'un enfant dans l'intention de cacher le fait que sa mère lui a donné naissance, que l'enfant soit mort avant, pendant ou après la naissance.

11. The gravamen of the offence is the disposal of the dead body of a child who has been delivered. This must be accompanied by a specific intent to conceal the fact that the child was born, not to conceal the pregnancy itself.²

12. There are certain aspects of s. 243 not in dispute before this Court:

- The legitimate purpose of s. 243 is to facilitate state investigation of infant deaths where the body of a child is disposed of in a manner intended to conceal its birth;³
- Unchecked and unreviewable disposal of a still-born child amounts to an easy and unacceptable escape for those inclined to eliminate a new-born infant by killing it;⁴
- The terms “birth” and “delivered” in s. 243 do not include miscarriage or the compelled expulsion or extraction of an embryo or foetus from its mother at any stage of gestation.⁵

² *Reasons for Judgment of Hill J., para. 127, Appellant's Record, Vol. 1, p. 62*

³ *Appellant's factum, para. 4; Reasons for Judgment of Hill J., para. 151, Appellant's Record, Vol. 1, p. 69; Reasons for Judgment of the Court of Appeal, para. 108, Appellant's Record, Vol. I, p. 126*

⁴ *Appellant's factum, para. 4; Reasons for Judgment of Hill J., para. 156, Appellant's Record, Vol. 1, p. 70. See also: Reasons for Judgment of the Court of Appeal, paras. 109-110, Appellant's Record, Vol. I, p. 126*

13. Section 243 serves to protect children. The trial judge in this case detailed the ongoing societal concerns advanced by s. 243:

The death of new-born infants and the circumstances relating thereto are, on any account, pressing societal concerns. Determining the time and cause of infant death is important to the investigation of whether criminal liability attaches to the loss of life. This has been so throughout the history of the concealment crime. Regrettably, homicide (*per* s. 222 of the *Code* including murder, manslaughter or infanticide) of babies, including maternal neonaticide (causing death within 24 hours of birth), is not unknown.⁶

14. This Court has acknowledged that protecting children from harm is of fundamental importance to our society because they are vulnerable and cannot exercise their rights independently, particularly at a young age. This societal interest is only bolstered by the unfortunate reality that the family does not always provide a safe environment for children:

It must also be recognized that children are vulnerable and depend on their parents or other caregivers for the necessities of life, as well as for their physical, emotional and intellectual development and well-being. Thus, protecting children from harm has become a universally accepted goal: see the Convention on the Rights of the Child, Can. T.S. 1992 No. 3, now ratified by 191 states, including Canada.⁷

15. Section 243 undoubtedly engages liberty rights under s. 7 of the *Charter* for those who may be prosecuted. The only issue in this case is whether any potential deprivation of the s. 7 interest is in accordance with the principles of fundamental justice.

Principles of fundamental justice

16. This Court has recognized that the principles of fundamental justice are concerned not only with the interest of the person claiming a s. 7 right, but with the protection of society.⁸

In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, the

⁵ *Appellant's factum*, para. 3; *Reasons for Judgment of Hill J.*, paras. 123, 125, Appellant's Record, Vol. 1, p. 60

⁶ *Reasons for Judgment of Hill J.*, para. 140, Appellant's Record, Vol. 1, p. 66

⁷ *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 at para. 73

⁸ *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at p. 152

Chief Justice summarized the approach to the principles of fundamental justice in the following terms:

Jurisprudence on s. 7 has established that a ‘principle of fundamental justice’ must fulfill three criteria: *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 113. First, it must be a legal principle. This serves two purposes. First, it ‘provides meaningful content for the s. 7 guarantee’; second, it avoids the ‘adjudication of policy matters’: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Second, there must be sufficient consensus that the alleged principle is ‘vital or fundamental to our societal notion of justice’: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.⁹ [Emphasis added]

17. Section 243 of the *Criminal Code* presents an example of a reasonably clear law that includes the need for a guilty mind. It is a law that is consistent with the principles of fundamental justice.

The Test for Vagueness

18. The threshold for finding a law unconstitutionally vague is relatively high. In *Nova Scotia Pharmaceutical*, this Court defined the standard as being whether the legislation is “intelligible”.¹⁰

19. Writing for the Court, Justice Gonthier recognized that “[l]egal rules only provide a framework, a guide as to how one may behave...”. Certainty is only achieved in individual cases where the law is actualized by a competent authority.¹¹ All that is required to provide

⁹ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 8

¹⁰ *Nova Scotia Pharmaceutical*, *supra*, at p. 632

¹¹ *Nova Scotia Pharmaceutical*, *supra*, at p. 638

both fair notice to the citizen and the necessary limitation on law enforcement discretion is that a law sufficiently delineate some area of risk that can fuel legal debate. Laws cannot hope to do more, unless they are directed at individual instances.¹²

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.

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. ...¹³ [Emphasis added]

20. “The substantive aspect of fair notice is... a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society”.¹⁴

21. The fact that a particular legislative term is open to varying interpretations by the courts does not make it impermissibly vague. Flexibility and vagueness are not synonymous. The issue is whether the impugned provision can or has been given sensible meaning by the courts.¹⁵ As this Court noted in *R. v. Morales*, “[t]o require absolute precision would be to create an impossible constitutional standard”.¹⁶

¹² *Nova Scotia Pharmaceutical, supra*, at pp. 639-640

¹³ *Nova Scotia Pharmaceutical, supra*, at p. 639

¹⁴ *Nova Scotia Pharmaceutical, supra*, at p. 634

¹⁵ *Reference re s. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1157

¹⁶ *R. v. Morales*, [1992] 3 S.C.R. 711, at p. 729

The Application of the *Nova Scotia Pharmaceutical* test

22. Since 1992, this Court has applied the vagueness test from *Nova Scotia Pharmaceutical* on twenty-five occasions in a variety of factual and legal circumstances,¹⁷ most recently in 2012.¹⁸ Many of these circumstances touch upon pivotal freedoms and rights protected under the *Charter*:

- When considering the bodily integrity of children, the words “reasonable under the circumstances” are not vague in defining what level of physical force is justified by parents and teachers in section 43 of the *Criminal Code: Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76.
- In the context of denying pre-conviction liberty, the term, “where necessary to maintain confidence in the administration of justice” in s. 510(1)(c) of the *Criminal Code* is not vague: *R. v. Hall*, [2002] 3 S.C.R. 309.
- In respect of potential deportation to face torture, the terms, “danger to the security of Canada” and “terrorism” are not vague: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.
- In the context of the fundamental freedom of expression protected under s. 2(b) of the *Charter*, the term, “obscenity” in s. 163(8) of the *Criminal Code* (incorporated into the *Customs Regulations*) is not vague: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.
- When considering the possibility of indefinite incarceration of a mentally ill accused, the phrase, “significant threat to the safety of the public” in s. 672.54 of the *Criminal Code* provides sufficient precision for legal debate and is not vague: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625.
- In the context of parents’ supervision over their children’s spiritual development, the criterion of the child’s best interests set out in Article 30 of the *Civil Code of Lower Canada* is not vague: *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141.

23. Most recently in *R. v. Tse*, this Court applied *Nova Scotia Pharmaceutical* in the context of the unauthorized interception of private communications and unanimously concluded the terms “the urgency of the situation”, “reasonable diligence”, “unlawful act” and “serious

¹⁷ For a full list of this Court’s application of the vagueness test from *Nova Scotia Pharmaceutical*, see: Schedule A to Part VI

¹⁸ *R. v. Tse*, 2012 SCC 16

harm” in s. 184.4 of the *Criminal Code* are not vague.¹⁹ The Court reiterated that “enactments are not expected to ‘predict the legal consequences of any given course of conduct in advance’ ([*Nova Scotia Pharmaceutical*,] p. 639). Rather, they are to provide meaningful guidance about the circumstances in which they can be applied.”²⁰ Section 243 provides such guidance.

24. *Canadian Foundation for Children, Youth and the Law* is particularly instructive since that case concerned, as this one does, provisions dealing with the scope of criminal liability. At issue was section 43 of the *Criminal Code*, which provides an exemption from criminal liability for assault under s. 265 for parents, teachers and persons standing in the place of parents. However, it does so in the most general of terms. It allows those individuals to use force by way of correction, “if the force does not exceed what is reasonable under the circumstances”.²¹

25. The Foundation argued that these words were impermissibly vague because they did not give sufficient notice as to what conduct is prohibited, nor did they adequately constrain discretion in enforcement. The words “reasonable under the circumstances” are admittedly broad. “Reasonable” is a word that appears 305 times in the *Criminal Code* alone. As the Chief Justice stated, “the criminal law is thick with the notion of ‘reasonableness’”.²² The “circumstances” that parents and teachers may find themselves in are virtually limitless.

26. Notwithstanding the generality of its words, s. 43 was found not to be vague. This Court arrived at that conclusion, taking into consideration the various limiting factors of the provision, such as: (1) the fact that the exemption relates only to the simple, non-consensual

¹⁹ *R. v. Tse*, 2012 SCC 16

²⁰ *R. v. Tse*, *supra*, at para. 30

²¹ *Criminal Code*, s. 43

²² *Canadian Foundation for Children, Youth and the Law*, *supra*, at para. 27

use of force that does not result in the prospect of bodily harm, consistent with Canada's international treaty obligations;²³ and (2) substantial consensus on what is considered reasonable corrective discipline. As the Chief Justice acknowledged, "the criminal law often uses the concept of reasonableness to accommodate evolving mores and avoid successive 'fine tuning' amendments."²⁴

The Application of Accepted Principles of Statutory Interpretation

27. Several well-established principles of statutory interpretation have application in giving meaning to s.243:

- The words of a statute should be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the intention of Parliament;²⁵
- Courts should assume that the legislature means what it says;²⁶
- A functional reading is often more appropriate to statutory construction than a slavishly literal one;²⁷
- Non-technical words should be given their plain, ordinary and common usage meaning;²⁸
- The English and French versions of a statute are equally authoritative;²⁹ and
- If a statutory provision is capable of an interpretation that is constitutional and one that is not, then the courts should choose the construction that conforms with the *Charter*.³⁰

28. Using these tools, s. 243 delineates an area of risk that can fuel legal debate, enabling courts to give meaning to the time period before, during or after birth. The provision does not set a time limit on the term "before" birth. Neither does it specifically delineate a time limit "after" birth. Such specificity is not required according to the law.

²³ *Canadian Foundation for Children, Youth and the Law, supra*, at para. 30

²⁴ *Canadian Foundation for Children, Youth and the Law, supra*, at para. 36

²⁵ *Canadian Foundation for Children, Youth and the Law, supra*, at para. 20

²⁶ *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 11

²⁷ *R. v. Ogg-Moss*, [1984] 2 S.C.R. 173, at p. 182

²⁸ *Reference re s. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, at p. 1158

²⁹ *Official Languages Act*, s.13

³⁰ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078

29. The most commonly used principle of statutory interpretation requires that we consider all of the words of section 243 to assess whether it provides sufficient guidance as to the proscribed conduct. The section deals with the disposal of “the dead body of a child”, with the specific intent to hide the fact the child had been born. The appellant has attempted at each step in these proceedings to limit the focus of the courts’ attention to the age of the “child”. However, the only relevant temporal factor referred to in the provision, “...whether the child died before, during or after birth...”, is related to the act of birth, not the age of the child.

30. The appellant’s assertion that “there is no way of telling from the text of the provision whether it applies to the entire period from conception to full term”³¹ fails to give effect to the section as a whole. Section 243 focuses narrowly on a time period proximate to the act of birth. Nothing about the words of the section evinces an intention to operate indefinitely backward from the point of birth; nor, for that matter does it operate in an open-ended fashion forward. The phrase “before, during or after birth” is connected to the mother’s act of delivery on a plain reading of all the words.

31. Equally informative is the purpose of the section. It is not disputed that the overriding objective of s. 243 is to ensure that infants not be killed and secretly disposed of by those responsible.³² By proscribing conduct that might frustrate the investigation of suspicious deaths of infants, s. 243 allows authorities to determine whether a homicide – the death of a human being³³ - has occurred.

32. While the term “child” is not defined in the *Criminal Code*, the term “human being” is. According to s. 223(1) of the *Criminal Code*, a child becomes a human being that point in

³¹ *Appellant’s factum*, para. 31

³² *Appellant’s factum*, para. 4; *Reasons for Judgment of Hill J.*, para. 153, Appellant’s Record, Vol. 1, p.

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³³ *Criminal Code*, s. 222

childbirth where it has completely proceeded in a living state from the body of its mother.³⁴

Pursuant to s. 223(2), a person commits homicide when s/he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.³⁵

33. Section 243 is therefore necessarily concerned with deaths that occur in close proximity to that point in time when the criminal law recognizes that a child becomes a human being and when the death may be a homicide. Once a child becomes a human being, other provisions of the *Criminal Code* may apply to deal with infant children death.

34. Defining “homicide” in this way affects other provisions of the Criminal Code dealing with conduct in and around the time of birth. For example, s. 238 of the *Code* makes it an offence for anyone to cause the death of a child *during* the act of birth before it has become a human being.³⁶ Section 233 of the *Code* makes it an offence (“infanticide”) for a woman to cause the death of her “newly born child”,³⁷ a term defined in s. 2 of the *Code* only as “a person under the age of one year”.³⁸ Section 242 makes it an offence to fail to seek reasonable assistance when the child is about to be delivered with the intent of ensuring the child does not live.³⁹

35. These provisions operate to cover a continuum of time that begins shortly before birth and ends when a child reaches the age of one year. They pursue the important societal goal of protecting the most vulnerable members of society. When section 243 is read together with them, it highlights both the specific purpose of s. 243, and the contribution of s. 243 to the larger goal of the *Criminal Code*. Section 243 is necessarily concerned with deaths that occur

³⁴ *Criminal Code*, s. 223(1)

³⁵ *Criminal Code*, s. 223(2)

³⁶ *Criminal Code*, s. 238

³⁷ *Criminal Code*, s. 233

³⁸ *Criminal Code*, s. 2

³⁹ *Criminal Code*, s. 242

in close proximity to that point in time when the criminal law recognizes that a child becomes a human being and when the death may be a homicide.

36. Section 243 is further limited in its application by virtue of two additional elements that must be proven before criminal liability is triggered. First, there must be the disposal of a dead body. Secondly, that disposal must be with the specific intent to conceal the fact that a birth occurred.

37. The appellant suggests that Parliament should have drawn a brighter line by further defining “child...before birth” based on gestational age or other defined criteria.⁴⁰ But no such line is required. In *Canadian Foundation for Children, Youth and the Law*, the Chief Justice acknowledged that:

[41] The fact that borderline cases may be anticipated is not fatal. As Gonthier J. stated in *Nova Scotia Pharmaceutical, supra*, at p. 639, ‘it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective’.⁴¹ [Emphasis added]

38. Reading the words of s. 243 in their entirety and contextually with other provisions dealing with infant mortality, the phrase “...whether the child died before, during or after birth...” sufficiently delineates an area of risk to be captured under s. 243. The word “before”, like the word “after”, is logically and closely connected in time to the period during birth and connected to its legislative purpose of investigating whether a homicide has occurred. Section 243 says to both the citizen and law enforcement alike that, where birth occurs, resulting in a dead body, that body should not be summarily disposed of secretly regardless of whether the child was born dead or died shortly after it was born.

⁴⁰ *Appellant’s factum, para. 39*

⁴¹ *Canadian Foundation for Children, Youth and the Law, supra*, at para. 41

Other Countries Address the Same Problem in the Same Way

39. Language similar to s. 243 is used in eight Commonwealth jurisdictions to address the important societal goals of investigating infant deaths and prosecuting individuals who intentionally cause them.⁴² All of them prohibit the concealment of the dead body of a child who dies “before” birth. One such example is the U.K.’s *Offences Against the Person Act 1861*:

Concealing the birth of a child

60. If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years...⁴³

40. Of those eight Commonwealth jurisdictions, only Tasmania has attempted to more fully elaborate the meaning of the word “before”. Section 166(2) of Tasmania’s *Criminal Code Act 1924* provides that the criminal sanction is to apply only where the child has reached a state of maturity that “in the ordinary course of nature render it probable that such child would live”:

Concealment of birth

166 (1) Any person who, when a woman is delivered of a child, by any secret disposition of the dead body of the child, whether the child died before, at, or after, its birth, endeavours to conceal the birth thereof, is guilty of a crime.

(2) The provisions of this section shall not apply to a case in which the child has not reached such a stage of maturity as would in the ordinary course of nature render it probable that such child would live.⁴⁴

⁴² See, for example: *Crimes Act 1900*, s. 85 (New South Wales, Australia); *Criminal Law Consolidation Act 1935*, s. 83 (South Australia); *Criminal Code Act 1899*, s. 314 (Queensland, Australia); *Criminal Code Act Compilation Act 1913*, s. 291 (Western Australia); *Crimes Act 1961*, s. 181 (New Zealand); *General Law Amendment Act*, s. 113, as amen. By *Judicial Matters Amendment Act*, s. 1 (South Africa); *Criminal Code Act 1924*, s. 166 (Tasmania)

⁴³ *Offences Against the Person Act*, 1861 (UK), 24 and 25 Vict., c.100, s. 60

⁴⁴ *Criminal Code Act 1924* (Tasmania), s. 166

41. Tasmania's legislative approach is similar to the common law test set out in *R. v. Berriman*,⁴⁵ referred to in both courts below, to the extent that they both provide additional clarity to the sphere of impugned conduct. Tasmania articulates that in terms of the viability of the child. *Berriman* does so in terms of describing a point in time when a child might have been born alive but for some accidental circumstances or disease. Both may be seen as attempting to give further effect to the statute's purpose, that being the investigation of a death that may be a homicide.

42. Neither Tasmania's approach, nor the Commonwealth jurisdictions that are informed by the common law – including Canada - provide an exacting standard. However, an exacting standard is not required by the *Charter* in order to provide the necessary guidance to citizens, the police and the courts. Section 243 provides the necessary level of guidance to the citizen in defining a sphere of risk. That same sphere of risk guides the exercise of police discretion and provides courts the necessary flexibility to consider the factual context in each case.

43. The appellant implicitly acknowledges that s. 243 is not vague, as the test is currently articulated. What the appellant proposes is to replace the current test with an ill-defined set of variable tests, dependant in large part on the *Charter* right at issue.⁴⁶

44. This Court should decline the appellant's invitation. Childbirth involves an admittedly important sphere of personal integrity and autonomy. However, so too does the corporal punishment of one's children,⁴⁷ parental decisions concerning the spiritual lives of their children,⁴⁸ bodily integrity in the face of potential torture,⁴⁹ and the expression of one's

⁴⁵ *R. v. Berriman* (1854), 6 Cox C.C. 388

⁴⁶ *Appellant's factum, paras. 57-62*

⁴⁷ *Canadian Foundation for Children, Youth and the Law, supra*

⁴⁸ *P. (D.) v. S. (C.), supra*

⁴⁹ *Suresh v. Canada (Minister of Citizenship and Immigration), supra*

personal thoughts, beliefs and aspirations.⁵⁰ In each of the foregoing cases, the *Nova Scotia Pharmaceutical* test allowed for due consideration of the protected interest. There is no reason to believe that a series of specialized tests will be any more effective.

45. Section 243 engages delicate issues. It is precisely *because* it does that courts must have the flexibility to do justice in individual cases.

46. The presence of some chronological cut off point – measured either backwards from the time of birth or forwards from the time of conception - would not enhance the guidance provided by s. 243. Its only impact would be to invite further constitutional challenges under s. 7. In other words, the allegedly vague present version would be replaced by a potentially arbitrary “bright line” version. The appellant alludes to such constitutional challenges waiting in the wings should such a chronological time be added.⁵¹

47. The appellant’s assertion that s.243 requires a woman to “accept state intrusion to avoid criminal liability”⁵² is also erroneous. The provision carries no such obligation. All s. 243 does is proscribe those present at the delivery of a stillborn child from disposing of the dead body with the specific intention to hide the birth. A reasonably prudent person ought to advise someone – a medical professional – but there is no obligation to tell the police. To the extent there exists a positive obligation to tell someone about a stillbirth, this arises out of provincial/territorial regulatory legislation,⁵³ not the *Criminal Code*.

⁵⁰ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, *supra*; *R. v. Zundel*, [1992] 2 S.C.R. 731

⁵¹ *Appellant’s factum*, para. 94 and footnote 126

⁵² *Appellant’s factum*, para. 80

⁵³ For example, see: *Vital Statistics Act*, R.S.O. 1990, c. V. 4, ss. 19.1 requires that the Registrar General be notified of a stillbirth, defined as being at least 20 weeks or 500g. Similar requirements appear in all Canadian jurisdictions save for Newfoundland and Quebec. Each jurisdiction that has legislated in this area has applied the identical 20 weeks/500g threshold for reporting.

48. It is consistent with the principles of fundamental justice to impose this modicum of responsibility on citizens – not to secretly dispose of the body - in circumstances where death occurs. Individuals are entitled to their liberty. They are also expected to behave in a manner that respects the dignity of the dead child. This Court conducted a similar exercise when it balanced the bodily integrity of children against the rights of parents and educators to use “reasonable” force. Concluding that the exemption from criminal sanction in s. 43 of the *Criminal Code* was sufficiently precise by providing guidance with respect to conduct - as opposed to “direction” - the Chief Justice stated:

[42] Section 43 achieves this objective. It sets real boundaries and delineates a risk zone for criminal sanction. The prudent parent or teacher will refrain from conduct that approaches those boundaries, while law enforcement officers and judges will proceed with them in mind. It does not violate the principle of fundamental justice that laws must not be vague or arbitrary.⁵⁴ [Emphasis added]

49. Section 243 proscribes the secret disposal of a dead body that is delivered. The reasonably prudent person faced with a dead body following birth will refrain from surreptitiously disposing of that body. Given the legitimacy of the State’s purpose in investigating infant deaths, this is not too much for the law to ask of its citizens.

Section 1

50. Assuming it is necessary to reach the second constitutional question, the legislative objectives of s. 243 – protecting the most vulnerable and investigating their deaths in suspicious circumstances - are significantly pressing and substantial. The impugned provision has the requisite link between the criminally prohibited conduct and the harms it is meant to address. Requiring as it does only that someone present at the birth of a dead child refrain

⁵⁴ *Canadian Foundation for Children, Youth and the Law, supra*, at para. 42

from disposing of the body with the intent to conceal its birth, s. 243 minimally impairs the applicant's rights.

51. Finally, for the reasons set out above, s. 243 sufficiently delineates a risk zone for criminal sanction such that it is a limit prescribed by law.

Conclusion

52. Section 243 provides persons faced with the dead body of a child at birth with sufficient guidance. It is informed by an important purpose -- ensuring that the authorities can determine whether a homicide has occurred. It is informed by the language of the section, which has a narrow temporal focus. And it is informed by its relationship to related provisions of the *Criminal Code* that share the important legislative goal of investigating and prosecuting homicide. It does not improperly interfere with any *Charter*-protected rights; it simply demands that when a birth occurs, no one should dispose of the body and attempt to hide the fact that a birth occurred.

PART IV - COSTS

53. No costs should be ordered for or against the Attorney General.

PART V – ORDER REQUESTED

54. The intervener, the Attorney General of Canada, respectfully requests that the constitutional questions stated by the Chief Justice in her Order of January 10, 2012 be answered as follows:

Question 1: No

Question 2: Not necessary to answer but if answered, the answer is yes

55. The Attorney General of Canada requests ten minutes for oral submissions at the hearing of the within appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 21st day of June, 2012



Robert J. Frater



Richard Kramer

Counsel for the intervener,
Attorney General of Canada

PART VI – AUTHORITIES

<u>Cases Cited</u>	<u>Intervener's Factum Para. #</u>
<i>Canadian Foundation for Children, Youth and the Law</i> , [2004] 1 S.C.R. 76	16, 22, 24-26, 27, 37, 44, 48
<i>Cunningham v. Canada</i> , [1993] 2 S.C.R. 143	16
<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> , [2000] 2 S.C.R. 1120	22, 44
<i>P.(D.) v. S. (C.)</i> , [1993] 4 S.C.R. 141	22, 44
<i>R. v. Berriman</i> (1854), 6 Cox C.C. 388	41
<i>R. v. Canadian Pacific Ltd.</i> , [1995] 2 S.C.R. 1031	27
<i>R. v. Hall</i> , [2002] 3 S.C.R. 309	22
<i>R. v. Morales</i> , [1992] 3 S.C.R. 711	22
<i>R. v. Nova Scotia Pharmaceutical Society</i> , [1992] 2 S.C.R. 606	2, 3, 18, 22, 23
<i>R. v. Ogg-Moss</i> , [1984] 2 S.C.R. 173	27
<i>R. v. Tse</i> , 2012 SCC 16	22, 23
<i>R. v. Zundel</i> , [1992] 2 S.C.R. 731	22
<i>Reference re s. 193 and 195.1(1)(c) of the Criminal Code (Man.)</i> , [1990] 1 S.C.R. 1123	27
<i>Slaight Communications Inc. v. Davidson</i> , [1989] 1 S.C.R. 1038	27
<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , [2002] 1 S.C.R. 3	22, 44
<i>Winko v. British Columbia (Forensic Psychiatric Institute)</i> , [1999] 2 S.C.R. 625	22
<i>Winnipeg Child and Family Services v. K.L.W.</i> , [2000] 2 S.C.R. 519	14

	<u>SCHEDULE A – Cases applying Nova Scotia Pharmaceutical</u>	Intervener's Factum Para. #
1	<i>R. v. Tse</i> , 2012 SCC 16	22
2	<i>Canada (Attorney General) v. JTI – Macdonald Corp.</i> , [2007] 2 S.C.R. 610	22
3	<i>R. v. Demers</i> , [2004] 2 S.C.R. 489	22
4	<i>Application under s. 83.28 of the Criminal Code (Re)</i> , [2004] 2 S.C.R. 248	22
5	<i>Harper v. Canada (Attorney General)</i> , [2004] 1 S.C.R. 827	22
6	<i>Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)</i> , [2004] 1 S.C.R. 76	22
7	<i>R. v. Clay</i> , [2003] 3 S.C.R. 735	22
8	<i>R. v. Hall</i> , [2002] 3 S.C.R. 309	22
9	<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , [2002] 1 S.C.R. 3	22
10	<i>Free World Trust v. Electro Sante Inc.</i> , [2000] 2 S.C.R. 1024	22
11	<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> , [2000] 2 S.C.R. 1120	22
12	<i>Winko v. British Columbia (Forensic Psychiatric Institute)</i> , [1999] 2 S.C.R. 625	22
13	<i>R. v. Lucas</i> , [1998] 1 S.C.R. 439	22
14	<i>R. v. Hinchey</i> , [1996] 3 S.C.R. 1128	22
15	<i>Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada</i> , [1996] 3 S.C.R. 854	22
16	<i>R. v. Van der Peet</i> , [1996] 2 S.C.R. 507	22
17	<i>Canadian Broadcasting Co. v. New Brunswick (Attorney General) (Re R. v. Carson)</i> , [1996] 3 S.C.R. 480	22
18	<i>Ruffo v. Quebec (Conseil de la magistrature)</i> , [1995] 4 S.C.R. 267	22
19	<i>Ontario v. Canadian Pacific Ltd.</i> , [1995] 2 S.C.R. 1031	22
20	<i>R. v. Heywood</i> , [1994] 3 S.C.R. 761	22
21	<i>R. v. Finta</i> , [1994] 1 S.C.R. 701	22
22	<i>P(D) v. S(C)</i> , [1993] 4 S.C.R. 141	22
23	<i>Young v. Young</i> , [1993] 4 S.C.R. 3	22
24	<i>R. v. Morales</i> , [1992] 3 S.C.R. 711	22
25	<i>R. v. Zundel</i> , [1992] 2 S.C.R. 731	22

PART VII – STATUTES / REGULATIONS / RULES

Criminal Code, 1985 R.S.C. c. C-46 as amen., ss. 223, 233, 238, 242, 243

223. (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not

- (a) it has breathed;
- (b) it has an independent circulation; or
- (c) the navel string is severed.

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

233. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

238. (1) Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and liable to imprisonment for life.

242. A female person who, being pregnant and about to be delivered, with intent that the child shall not live or with intent to conceal the birth of the child, fails to make provision for reasonable assistance in respect of her delivery is, if the child is permanently injured as a result thereof or dies immediately before, during or in a short time after birth, as a result thereof, guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

223. (1) Un enfant devient un être humain au sens de la présente loi lorsqu'il est complètement sorti, vivant, du sein de sa mère :

- a) qu'il ait respiré ou non;
- b) qu'il ait ou non une circulation indépendante;
- c) que le cordon ombilical soit coupé ou non.

(2) Commet un homicide quiconque cause à un enfant, avant ou pendant sa naissance, des blessures qui entraînent sa mort après qu'il est devenu un être humain.

233. Une personne du sexe féminin commet un infanticide lorsque, par un acte ou une omission volontaire, elle cause la mort de son enfant nouveau-né, si au moment de l'acte ou de l'omission elle n'est pas complètement remise d'avoir donné naissance à l'enfant et si, de ce fait ou par suite de la lactation consécutive à la naissance de l'enfant, son esprit est alors déséquilibré.

238. (1) Est coupable d'un acte criminel et passible de l'emprisonnement à perpétuité toute personne qui, au cours de la mise au monde, cause la mort d'un enfant qui n'est pas devenu un être humain, de telle manière que, si l'enfant était un être humain, cette personne serait coupable de meurtre.

242. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans une personne du sexe féminin qui, étant enceinte et sur le point d'accoucher, avec l'intention d'empêcher l'enfant de vivre ou dans le dessein de cacher sa naissance, néglige de prendre des dispositions en vue d'une aide raisonnable pour son accouchement, si l'enfant subit, par là, une lésion permanente ou si, par là, il meurt immédiatement avant, pendant ou peu de temps après sa naissance.

243. Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

243. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque, de quelque manière, fait disparaître le cadavre d'un enfant dans l'intention de cacher le fait que sa mère lui a donné naissance, que l'enfant soit mort avant, pendant ou après la naissance.

Canadian Charter of Rights and Freedoms, Being Part I of the Constitution Act, 1982, ss. 1, 7

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

1 La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Official Languages Act, 1985 R.S.C. c. C-31 (4th Supp.), s. 13

13 Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement or other matter referred to in this Part that is made, enacted, printed, published or tabled in both official languages shall be made, enacted, printed, published or tabled simultaneously in both languages, and both language versions are equally authoritative.

13 Tous les textes qui sont établis, imprimés, publiés ou déposés sous le régime de la présente partie dans les deux langues officielles le sont simultanément, les deux versions ayant également force de loi ou même valeur.

Offences Against the Person Act 1861 (UK), 24 and 25 Vict, c 100, s. 60**Concealing the birth of a child**

60. If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years,...

Crimes Act 1900 (NSW), s. 85 (New South Wales, Australia)**Concealment of birth**

85(1). Whosoever by any disposition of the dead body of a child, whether the child died before or after or during its birth, wilfully conceals or attempts to conceal the birth of the child, shall be liable to imprisonment for two years.

Criminal Law Consolidation Act 1935, (SA), s. 83 (South Australia)**Concealment of birth**

83(1). Any person who, by any secret disposition of the dead body of a child, whether the child died before, at or after its birth, endeavours to conceal the birth of the child shall be guilty of an offence and liable to be imprisoned for a term not exceeding three years.

Criminal Code Act 1899 (Qld), s. 314 (Queensland, Australia)**Concealing the birth of children**

314. Any person who, when a woman is delivered of a child, endeavours, by any secret disposition of the dead body of the child, to conceal the birth, whether the child died before, at, or after, its birth, is guilty of a misdemeanour, and is liable to imprisonment for 2 years.

Criminal Code Act Compilation Act 1913 (WA), s. 291 (Western Australia)**Concealing birth of children**

291. Any person who, when a woman is delivered of a child endeavours, by any secret disposition of the dead body of the child, to conceal its birth, whether the child died before, at, or after its birth, is guilty of a crime, and is liable to imprisonment for 2 years.

Crimes Act 1961, (NZ), s. 181 (New Zealand)**Concealing dead body of child**

181. Every one is liable to imprisonment for a term not exceeding 2 years who disposes of the dead body of any child in any manner with intent to conceal the fact of its birth, whether the child died before, or during, or after birth.

Judicial Matters Amendment Act 2008, (S Afr), No. 66 of 2008, s. 113 (South Africa)

Concealment of birth of newly born child

113. Any person who, without a lawful burial order, disposes of the body of any newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

Criminal Code Act 1924 (Tas), s. 166

Concealment of birth

166 (1) Any person who, when a woman is delivered of a child, by any secret disposition of the dead body of the child, whether the child died before, at, or after, its birth, endeavours to conceal the birth thereof, is guilty of a crime.

(2) The provisions of this section shall not apply to a case in which the child has not reached such a stage of maturity as would in the ordinary course of nature render it probable that such child would live.