SCC File No. 39402

IN THE SUPREME COURT OF CANADA
(On Application for Leave to Appeal from the Court of Appeal for Ontario)

B E T W E E N:

MARY WAGNER

Applicant

- and -

HER MAJESTY THE QUEEN

Respondent

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

(Pursuant to s.40 of the *Supreme Court Act,* R.S.C. 1985, c.S-26)

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TABLE OF CONTENTS

Tab Number **Page Number**

1. Respondent's Memorandum of Argument

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RESPONDENT'S MEMORANDUM OF ARGUMENT

PART I: OVERVIEW

A. The issue

1. The Applicant seeks leave under s. 40 of the *Supreme Court Act* to appeal the Ontario Court of Appeal's refusal to grant leave to appeal in a summary conviction appeal, which was dismissed without reasons. The Applicant seeks to have this Court consider the question whether a *foetus* is a human being within the meaning of section 7 of the *Charter*.

B. Overview

2. The Applicant was convicted of mischief (interference with private property) and breach of probation for disrupting the operations of an abortion clinic and speaking to women there, contrary to the terms of two prior probation orders that required her to keep the peace and be of good behaviour, prohibited the applicant from being on the premises of any abortion provider in Ontario, and prohibited her from communicating with any person in such premises.

3. The Applicant did not deny committing the offences. She testified that she had gone to an abortion clinic intending to disrupt operations and speak to women at the clinic who were planning to have an abortion. She believed she was "called to protect unborn children" and wanted the law in Canada to change and for abortion to be illegal. She agreed that she was breaching a court order by attending inside the clinic but maintained that protecting human life

took precedence over court orders. She also agreed that she had other options and could have done many other things than what she did that day. She also said that if convicted, she would likely repeat her actions and go back to another abortion clinic.

4. This application does not satisfy the test for leave under s. 40 as it does not raise a genuine and serious question of law of sufficient "public importance" to warrant granting leave to appeal. The arguments lack merit and raise issues that have been long settled by this Court and upon which there is no disagreement between provincial appellate courts, and the Applicant offers no new evidence. The application also suffers from being a collateral attack on the probation orders, which were not appealed or reviewed.

C. Statement of facts

5. The Applicant is an anti–abortion activist who, contrary to the terms of her probation orders, on August 15, 2012 entered an abortion clinic waiting room and was found talking to patients in an effort to dissuade them from having abortions. The clinic was on private property and locked, with public access controlled through a buzzer and video monitoring service and had two waiting rooms. A two-waiting room system and controlled access to the clinic was implemented to protect patients from anti-abortion protesters. The Applicant offered the waiting patients roses and pamphlets, including one that contained graphic images of aborted fetuses, causing the patients to become visibly upset.

6. Patients were marshalled into the larger of the two locked waiting rooms and the Applicant attempted to gain access to them. When the Applicant refused repeated requests to leave the clinic, the police were called. The Applicant was removed by staff into the hallway of the building where she set up pamphlets, again attempting to dissuade patients from entering the clinic and from committing "murder". She also told the staff they were killing babies and should find another job. Ultimately, she was arrested by the police and charged with mischief (interference with private property) and breach of probation.

7. The Applicant did not deny having committed the offences and testified that she had gone to the clinic with the intention of disrupting operations and speaking to women at the clinic who were planning to have an abortion. She gained access by following behind a couple who was entering the clinic. She believed she was called to protect unborn children and wanted the law in Canada to change and for abortion to be illegal. She had done this before and has been convicted and incarcerated in relation to anti-abortion protest activities including breaching "bubble zones"

outside abortion clinics. She agreed that she was breaching a court order by attending inside the clinic but maintained that protecting human life took precedence over court orders. She also agreed that she had other options and could have done many other things than what she did that day. She also said that if convicted, she would likely repeat her actions and go back to another abortion clinic.

8. The Applicant attempted to defend the charges and relied on the following defences: 1) acting in the defence of others under s. 37 of the *Criminal Code* (since repealed and replaced by s. 34), 2) the defence of necessity, 3) mistake of fact and 4) a claim that s. 223 of the *Code* was unconstitutional. In her testimony she agreed that she was using the case "as a vehicle – a test case" to challenge s. 223, which excludes unborn children from the definition of "human being".

9. The Applicant was convicted on February 12, 2015 in the Ontario Court of Justice by Justice ODonnell of all summary conviction charges and her summary conviction appeal before Justice Dunnet was dismissed on December 22, 2016. The Ontario Court of Appeal dismissed her in-writing leave to appeal application on September 14, 2020 without reasons.[1]

PART II: STATEMENT OF QUESTIONS IN ISSUE

A. Who should fit within the legal definition of "human being"?

10. In order to attempt to satisfy the leave requirements the Applicant styles this as a "test case" about "the scope of Parliament's authority to determine who should fit within the legal definition of 'human being' and determine whether the words 'any one' (in the *Criminal Code* and legislation across Canada) or "everyone" and "every individual" (in the *Charter* context) includes a foetus."[2]

11. This issue does not raise a pure question of law alone. The Applicant "invites this court to accept the uncontested evidence of the Applicant's experts that a new and unique human being comes into existence at the moment of its conception"[3] when this evidence was carefully reviewed by the trial judge and found to add nothing new to the debate. The Applicant does not argue that the trial judge or summary conviction appeal court judge misapprehended evidence.

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[1] ***Application Record, Tab 2A - R. v. Wagner*** 2015 ONCJ 66 (Trial Decision) ¶1, 7-33; ***Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶1, 4-11; ***Tab 2C - R. v. Wagner***, endorsement of the ONCA, September 14, 2020.

[2] ***Application Record, Tab 3 -*** Applicant's Memorandum of Argument, ¶5.

[3] ***Application Record, Tab 3 -*** Applicant's Memorandum of Argument, ¶23.

12. This issue is not a question of public importance. The issue is well-settled by this Court, by provincial appellate courts, and by international courts and tribunals; there is no conflict between the provincial appellate courts on this issue. There is no new legal issue being raised in this application and there has been no change in the evidence or circumstances that would justify reopening the question. Indeed, the Applicant conceded before the Summary Conviction Appeal Court that this Court has already determined that the foetus is not a "person."[4]

B. Was the Applicant denied the right to furnish evidence in support of a defence under the *Criminal Code* based on its implications for abortion in Canada?

13. The question whether the Applicant was denied the right to furnish evidence, as further set out below in the two sub-issues, does not raise a question of public importance, nor any unresolved legal issues or conflicts between the provincial appellate courts.

1) The Applicant's right to a fair and impartial trial was not violated by the denial of a viva voce evidentiary hearing.

14. The Applicant was not denied an evidentiary hearing. The courts below took her expert evidence at face value and determined that further *viva voce* evidence was not required for the following two main reasons:

a. The legal issue raised by the Applicant has been determined many times, before other courts in Canada and around the world, and no new legal issue was now being raised; and

b. The trial judge was entitled to find that "the science has not changed in 25 years, such that there has been no significant change in the circumstances or evidence which would warrant the courts assumption of jurisdiction over the status of the foetus".

The trial judge's decision not to hear *viva voce* evidence, when "a full-fledged inquiry might lead no-where," and where the Applicant's arguments had no possibility of success, was well-within with the scope of his recognized powers as a trial judge to regulate the trial process.

2) The Applicant was not wrongfully deprived of her defence under s. 37(1) of the Criminal Code.

15. The Applicant cannot satisfy the requirements for self-defence which requires:

a. that the accused or **anyone under her protection** has been unlawfully assaulted;

b. that the **accused has used force** to defend herself or anyone under her protection; and

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[4] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶18.

> c. that the **accused has used no more force** than was necessary to prevent the assault from continuing. [emphasis added]

An unborn foetus is not "under her protection" (she had no pre-existing relationship to any of them or their mothers) and the Applicant did not apply "force" by speaking to the women seeking an abortion. An unborn foetus is also not "anyone."

PART III – STATEMENT OF ARGUMENT

A. The test for a leave application under s. 40 of the Supreme Court Act.

16. The Applicant seeks a third appeal in a summary conviction appeal matter, having been denied leave to appeal in the Ontario Court of Appeal, without reasons. The Applicant may only appeal the dismissal of leave to appeal in a summary conviction matter by seeking leave through section 40 of the *Supreme Court Act*.[5] (Section 691 of the *Criminal* Code provides a right of appeal to this Court only in respect of indictable matters.) Section 40 provides a right of appeal, with leave, from a final order of a provincial court of appeal, on a question of law alone or of jurisdiction, and stipulates that leave shall only be granted where the issue is of such public importance that it ought to be decided by this Court.[6]

17. The rights of appeal in summary conviction appeal matters narrow at each level of appeal and therefore a further appeal to this Court should not be broader than the court below. The Ontario Court of Appeal noted that a second level appeal from a summary conviction appeal decision to the Court of Appeal is considered "exceptional" and requires that the proposed question of law be "significant to the administration of justice in the province, beyond the specific case", and that the appeal be based on strong grounds. Moreover, the Ontario Court of Appeal observed that "summary conviction proceedings are intended to be expeditious."[7]

> [26] There is no sensible criminal law policy that would justify more extensive rights of appeal in relatively minor criminal matters than those available in the most serious criminal cases. As the relevant provisions of the *Criminal Code* indicate, this court's role in the appellate process in summary conviction proceedings is similar to the role played by the Supreme Court of Canada in appellate proceedings in indictable matters. Both the parallel statutory provisions and policy dictate that this court should, in [page649] exercising its discretion to grant a second appeal in a summary conviction proceeding, adopt

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[5] Section 40, *Supreme Court Act*, (R.S.C., 1985, c. S-26)
[6] ***R. v. Shea*** 2010 SCC 26.
[7] ***R. v. R.R.*** 2008 ONCA 497, ¶24, 27, 30-32 & 37; ***R. v. Smits*** 2012 ONCA 524, ¶27-28.

> a similar approach to that taken by the Supreme Court of Canada on applications for leave to appeal in indictable offences. **Furthermore, summary proceedings are intended to be expeditious. Routinely granting a second full appeal on the merits from the trial decision hardly furthers that goal**.
>
> [27] The requirement that the applicant obtain leave to appeal in s. 839 provides the mechanism whereby this court can control its summary conviction appeal docket. **Access to this court for a second appeal should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal**. [emphasis added]

18. It is the Respondent's position that this application fails to satisfy the requirements of s. 40. The Applicant's arguments are not pure questions of law alone; the Applicant is asking this Court to reassess the evidence offered at trial. The grounds also lack merit and they do not raise questions of such public importance that they ought to be decided by this Court, as further set out below. All of the issues raised have been long settled; this appeal is not so exceptional as to warrant a third appeal. Lastly, granting a third level of appeal to his Court does not further the goal that summary conviction proceedings are to be expeditious.

B. Who should fit within the legal definition of "human being"?

1) Unborn foetuses are not human beings for the purposes of criminal law.

19. All of the Applicant's arguments hinge on the definition of a "human being", and more particularly require that, for the purposes of the Canadian criminal law, the definition of a "human being" includes an unborn foetus. Her argument is built upon an assumption that her expert evidence is correct, and that it necessarily determines this issue. She invites this Court, in her ¶23 to take a different view of the evidence than the trial judge had, and "to accept the uncontested evidence of the Applicant's experts that a new and unique human being comes into existence at the moment of its conception."

20. This not a pure question of law. The Applicant overlooks the trial judge's findings of fact, which he made after carefully reviewing all of the Applicant's expert evidence and having accepted it at face value. The trial judge concluded that the Applicant did not offer evidence that was new or that reflected a change in circumstances such that further *viva voce* evidence was required, nor that would have permitted the trial judge to reopen this constitutional question. The SCAJ did not err in her review of the trial judge's analysis nor did the Ontario Court of Appeal err in its analysis of the SCAJ. The SCAJ observed that:

a. The trial judge correctly described the Applicant's efforts to adduce "new evidence"

> at trial as having "'at best [paid] lip service' to the question of how scientific knowledge had sufficiently changed since the 1980s to justify revisiting the Supreme Court's decisions" and that "when he examined what the experts said in the materials, the trial judge found it 'remarkably similar to the science reflected in the materials from the 1980s and even earlier – including the science described in the factums of the parties advocating for positions similar to the appellants in *Borowski* and *Tremblay*."

b. The SCAJ agreed that the evidence provided no support for the finding sought by the Applicant: that the foetus has rights under section 7 of the *Charter* or falls within the meaning of "anyone" in section 37 of the *Criminal Code*.[8]

21. The Applicant also has built her arguments on the assumption that her expert scientific evidence must be determinative of the legal question. But this Court has already held otherwise: the status of a foetus in law is a normative question and not a purely scientific classification. A child is only a person once it is born.[9]

22. Moreover, this issue has been well-settled for some time. The trial judge made the following observations, while reviewing a number of the relevant decisions:

> **79** The issue of abortion rights and foetal rights is one of the most divisive issues in society. The controversy was particularly prominent in the last quarter of the last century. Indeed, in Canada it would surely rank among the most prominent social or political issues of that time. Coincidentally, one of the other great political issues in Canada at the time gave rise to the *Charter of Rights*, which has become the latest tool in the hands of the pro-choice and pro-life camps. Advocates on both sides of the issue have had resort to the court to seek to advance their positions. It was in light of that long history of jurisprudence that I asked the Crown and defence to address the issue of whether or not I should enter into a full-blown evidentiary hearing on the *Charter* issues. ....
>
> **100** On reviewing the authorities referred to above, it seems inescapable to me that the Crown comes to this constitutional contest armed with a quiver full of highly relevant and extremely authoritative decisions addressing the issue of foetal rights generally through the closing decades of the last century and the early years of this century. Whether or not those decisions address the issue of foetal rights under s. 7 of the *Charter* directly, those authorities nonetheless do not bode well for Ms. Wagner's position.[10]

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[8] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶ 38-64 & 85

[9] ***Winnipeg Child and Family Services (Northwest Area) v. D.F.G.***, [1997] 3 S.C.R. 925, ¶12 ***Tremblay v. Daigle***, [1989] 2 S.C.R. 530, ¶38

[10] ***Application Record, Tab 2A - R. v. Wagner*** 2015 ONCJ 66 (Trial Decision) ¶70 & 100.

23. As the trial judge and the SCAJ correctly observed, the following relevant principles have already been determined by this Court and by other appellate courts in this country:

a. The term "everyone" in the *Charter* does not extend to foetuses: "It was not the purpose of either s. 7 or s. 15 of the *Charter* to protect the rights of a foetus to life". The foetus may acquire other rights in Anglo-Canadian law, but those rights only crystallize once the foetus is born alive.[11]

b. The criminal *prohibition* of abortion, in s. 251 of the *Criminal Code* violated s. 7 of the *Charter* and was deemed to be of no force or effect. This Court commented that while parliament likely has the right to impose restrictions on abortion, it is not the courts' job to "solve the abortion issue." This Court declined to evaluate any claim to "foetal rights".[12]

c. The status of a foetus in law under the Quebec Charter and the Civil Code is a fundamentally "normative task", rather than a scientific classification. The drafters of the Quebec Charter did not intend to create foetal rights. A "human being" or "person" under the Quebec Charter does not include a foetus.[13]

d. Canada does not recognize the unborn child as a legal or juridical person (neither at common law nor in the civil law of Quebec.) The only right recognized is that of the born person. It is open to parliament to legislate rights for unborn children, but the issue is not one of biological or spiritual status but of legal status.[14]

e. A foetus is not included in the word "everyone" in s. 7 of the *Charter,* and the governing cases leave no room for the court to entertain the Appellant's constitutional argument in favour of his right to protected expression permitting him to protest outside an abortion clinic.[15]

24. Other international courts and tribunals have made the same findings:

a. The unborn are not included within the definition of "person" as used in the Fourteenth Amendment of the Constitution of the United States. "The law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations when the

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[11] ***Borowski v. Canada (Attorney General)***, 1987 CanLII 4890 (Sask C.A.), ¶63-65) (appeal to the SCC dismissed for mootness [1989] S.C.J. No. 14).
[12] ***R. v. Morgentaler***, [1988] 1 S.C.R. 30, ¶3, 23, 35, 55, 58, 64 & 189).
[13] ***Tremblay v. Daigle***, [1989] 2 S.C.R. 530, ¶38.
[14] ***Winnipeg Child and Family Services (Northwest Area) v. D.F.G.***, [1997] 3 S.C.R. 925, ¶11-16.
[15] ***R. v. Demers,*** [2003] B.C.J. No. 75 (CA), ¶17, 23 & 24).

rights are contingent on live birth." [16]

b. The foetus cannot, in English law, have any right of its own at least until it is born and has a separate existence from the mother. [17]

c. The foetus as "no absolute right to life". [18]

2) Section 223(1) of the Criminal Code is constitutionally compliant.

25. The Applicant's arguments about unconstitutionality are built upon a series of assumptions. In her ¶25 the Applicant assumes "the truth of the opinion of the Applicant's uncontradicted experts": that every "individual" (who is protected by s. 15 of the *Charter)* means a natural "human being." The Applicant therefore assumes that the meaning of "human being" includes every unborn child. Finally, the Applicant reasons based on these assumptions, that to the extent that s. 233(1) excludes every individual, it cannot be considered constitutionally compliant under s. 15(1) of the Charter. [19]

26. These "assumptions" are without any support in the evidence or in law. As noted above, the trial judge made a finding of fact that the science has not changed appreciably over the last 25 years. The SCAJ also rejected the Applicant's argument that Parliament is "bound by the scientific evidence defining human being", and if it were otherwise that there is "no constitutional limit to what Parliament will do when it comes to matters of life and death." As the SCAJ noted, this reliance on science to the exclusion of all other considerations ignores the fact that "we live in a constitutional democracy and that we are protected against arbitrary legislation by the democratic process and our courts ability to review legislation for constitutionality." It also ignores the pronouncements by this Court that these questions are fundamentally normative rather than purely scientific. [20]

3) Section 7 of the Charter is not violated by s. 223(1) of the Criminal Code.

27. The Applicant's argument under section 7 again depends on her factual assumptions that

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[16] ***Roe v. Wade*** (1973), 410 U.S. 113 (U.S.S.C.), pages 37-38 & 40)

[17] ***England - Paton v. United Kingdom; Paton v. Trustees of BPAS***, [1978] 2 All E.R. 987 (Q.B.D.), p. 989-990.)

[18] ***European Human Rights Tribunal Paton v. United Kingdom*** (1980), 3 E.H.R.R. 408.)

[19] Applicant's Memorandum of Argument, C25.

[20] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶42-44; ***Tremblay v. Daigle***, [1989] 2 S.C.R. 530, ¶38; ***British Columbia v. Imperial Tobacco Canada Ltd,*** 2005 SCC 49, ¶62, 66, 67.

underpin her definition of "human being" and extends it to "everyone." The argument suffers from the same problems as already have been identified.

4) Section 1 of the Charter does not arise.

28. Neither the trial or summary conviction appeal court addressed this question as it was not necessary.

C. Was the Applicant denied the right to furnish evidence in support of a defence under the *Criminal Code* based on its implications for abortion in Canada?

1) Viva voce evidence was not required to determine the admissibility of expert evidence.

29. The Applicant was not denied an evidentiary hearing. The trial court considered at face value the expert evidence the Applicant tendered and simply decided further *viva voce* evidence was not required in order to determine the issues. The SCAJ upheld that conclusion, noting:

> [50] However, [the trial judge] considered that it would be neither desirable nor appropriate to enter into "a full-fledged evidentiary hearing that might lead nowhere," especially if the appellant was asking that he overturn the Supreme Court "in circumstances where there has been no material intervening change in the law or the relevant science or other facts."[21]

30. The SCAJ upheld the trial judge's ruling that a full evidentiary hearing was not necessary, for the following two main reasons:

a. The legal issue raised by the Applicant has been raised many times before other courts and there was no new legal issue raised; and

b. The trial judge was entitled to find that, taking the applicant's expert evidence at face value, "the science has not changed in 25 years, such that there has been no significant change in the circumstances or evidence which would warrant the courts assumption of jurisdiction over the status of the foetus".[22]

31. The Applicant does not now argue, nor did she before the Ontario Court of Appeal, that either the SCAJ or the trial judge misapprehended the evidence in any way.[23]

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[21] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶50

[22] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶45 – 85, and especially 74 – 76.

[23] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶78-80

32. The decision whether to permit *viva voce* evidence to be called at a trial is part of the trial court's inherent jurisdiction to control its own process. A trial court's case management powers include the power to exclude evidence that is irrelevant, immaterial or otherwise inadmissible. It is also well-recognized that a trial judge may require an "offer of proof" before a *voir dire* is embarked upon, to determine whether the evidence is relevant and whether the time required to hear the evidence is necessary, thereby ensuring a trial is run effectively and that judicial resources are used constructively.[24]

33. The trial judge's decision in this case not to hear *viva voce* evidence was well within these inherent powers to regulate the trial process. The trial judge asked for an "offer of proof" concerning the evidence of the proposed experts and, for the purposes of determining the relevance of the evidence, took the expert evidence at face value. The trial judge asked counsel to address the key question: had the science materially changed since the Supreme Court of Canada abortion cases were decided? The trial judge had an ample foundation for his findings of fact and conclusions that there had been no material change in the science, which were upheld by the SCAJ:

a. ***Trial Judge***: "a full-fledged inquiry might lead no-where," the "proposed evidence 'falls far, far short of, fundamentally [shifting] the parameters of the debate", the proposed evidence "fails to demonstrate a *material* change in scientific knowledge that is capable of changing the legal status of the foetus", and finally:

> **105** However, what is material for these purposes is not what [the experts] say, rather how what they say is materially different from the scientific understanding of twenty-five years ago. That is what I asked counsel to address in the material to be filed. It goes without saying that science and technology generally have advanced in tens of thousands of ways, since the 1970s and 1980s, but that was not the question. I did not need anyone's assistance to figure that out. One fundamental requirement for *all* evidence in the trial is that it be material; that fundamental requirement was no less operative in terms of my request of Ms. Wagner's counsel, namely that the proposed evidence demonstrate how the relevant science has changed *materially* in the intervening decades. While the science and technology available to specialists in the field of human foetal development have undoubtedly advanced by leaps and bounds in a quarter-century, it does not appear to me that the science underlying the fundamental assertion by Ms. Wagner that human life

[24] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶46-48' ***R. v. Pires and Lising***, 2005 SCC 66, ¶33-35; ***R. v. Felderhof,*** [2003] O.J. No. 4819 (C.A.),¶40 & 57; ***R. v. Kutynec***, [1992] O.J. No. 347 (C.A.); ***R. v. Durette,*** [1992] O.J. No. 1044 (C.A.)

> begins at conception has been shown in the material tendered to have altered in any material fashion.
>
> **106** I have been careful to challenge myself as to whether my various educational and intellectual limitations with respect to the various "-ologies" may lie at the root of my conclusion, but am satisfied that it is not so. The concepts in play here are not such that one has to be in line for a Nobel Prize in embryology to make sense of the material presented. The unfortunate fact for Ms. Wagner in relation to the material presented to me is that the 1980s were not some kind of medico-legal dark ages out of which we have now been elevated into a post-2000 renaissance of discovery. When I look at what Drs. Condie and Thorp say, it strikes me as remarkably similar to the science reflected in materials from the 1980s and even earlier.

b. ***SCAJ:*** The SCAJ agreed with the trial judge that there was no need for a full evidentiary hearing, noting:

> **80** Indeed, the appellant's description of her proposed evidence on this appeal supports the trial judge's conclusion that, given the existing appellate case law on the issue, this evidence could not have assisted her. The appellant does not suggest that the experts would have been prepared to testify about the kind of material change in the science that could make a difference in this case. This lends support to the trial judge's suggestion that "it appears… in light of the foregoing that no such credible medical or scientific evidence likely exists."[25]

2) The Applicant was not wrongfully deprived of her defence under s. 37(1) of the Criminal Code.

34. The legal principles of self defence are well-settled. Self defence, under the former section 37 has both subjective and objective components. If the Crown disproves beyond a reasonable doubt any one of the elements of self defence, the defence is unavailable to an accused. This defence requires:

a. that the accused or **someone under her protection** has been unlawfully assaulted;

b. that the **accused has used force** to defend herself or someone else; and

c. that the **accused has used no more force than was necessary** to prevent the assault were prevented from continuing.[26] [emphasis added]

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[25] ***Application Record, Tab 2A - R. v. Wagner*** 2015 ONCJ 66 (Trial Decision) ¶75, 76, 101-111, 126; ***Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶80 & 85; ***R. v. Felderhof,*** [2003] O.J. No. 4819 (C.A.), ¶57.

[26] ***R. v. Grant***, 2016 ONCA 639, ¶85-87.

35. In this case the SCAJ upheld the trial judge's conclusions that, even assuming for the sake of argument that a foetus was "anyone" or "someone" and an abortion would be an "assault," the defence in s. 37 was not available to the Applicant for two reasons:

a. The foetuses at the clinic were not "under the protection" of the Applicant; and

b. The Applicant did not apply "force" when she spoke to the women in the clinic.[27]

i. The unborn foetuses were not "under the protection" of the Applicant.

36. The SCAJ upheld the trial judge's conclusion that the interpretation of the words "under her protection" could not be so broad as to allow everyone to rescue anyone. That would make the defence meaningless and available to virtually anyone. The SCAJ correctly observed that, in each case in the governing case law, the accused who was able to rely on the defence had a pre-existing relationship with the person being protected, such as: a father-like relationship, a former boyfriend, people who co-habit, and one bouncer at a bar being under the protection of another bouncer at the same bar.[28]

37. The SCAJ correctly held that the Applicant's claim to having a "calling" to intervene to protect a foetus did not give her an entitlement or legal duty under section 37 to protect that foetus. The Applicant "had no relationship whatsoever" with any of the women at the abortion clinic, and accordingly, the foetuses were not under her protection.[29]

ii. The Applicant did not apply "force."

38. An assault is the intentional application of "force". "Mere words" cannot constitute conduct amounting to an assault; the words must amount to a threatening act or gesture. By the same token, mere touching without consent and even without a minimum level of violence may constitute "force." As the trial judge noted, there are at least 18 provisions in the Code which all use the term "force", and which appear to "refer to an act of violence or constraint or something

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[27] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶115-146.

[28] ***Application Record, Tab 2A - R. v. Wagner*** 2015 ONCJ 66 (Trial Decision) ¶47-48; ***Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶124-132; ***R. v. Foley,*** [2000] O.J. No. 5204 (SC), ¶56-62; ***R. v. Tracey,*** [2008], O.J. No. 2465 (SC), ¶92-95; ***R. v. Webers***, [1994] O.J. No. 2767 (Gen Div.), ¶49; ***R. v. Bloxom***, [2009] O.J. No. 1933 (OCJ), ¶58

[29] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶132.

similar".[30]

39. The SCAJ upheld the trial judge's rejection of the Applicant's argument that the word "force" should be construed broadly to include what she described in her argument as her "fighting words" and "verbal assault" that were accompanied by a graphic image of an aborted child. The SCAJ observed that this argument was in fact contradicted by the Applicant's own evidence that her actions were anything but violent or forceful. She had testified: "if somebody has indicated that, 'I don't want to talk to you,' if they have said that, or – then I – I don't continue dialoguing with them."[31]

iii. An unborn foetus is not "anyone" or "someone."

40. Even though this was not necessary to dispose of the summary conviction appeal, the SCAJ also concluded that "someone" in s. 37 does not include an unborn child. Anyone or someone means the same thing as "person"; the two terms are used interchangeably in the *Criminal Code* and are consistent with the French version of s. 37. A "person" does not include an unborn child.[32]

iv. Alternatively, self-defence under s. 34 of the Code is not available to this Applicant.

41. The SCAJ also rejected the Applicant's argument that the trial judge erred by considering the availability of self defence under the new section 34. The SCAJ noted that it was the Applicant's original position at trial that she should have the benefit of whichever self-defence provision better served her, and then later changed her position and argued that she was not relying on the new section 34. The SCAJ observed that the trial judge was correct to consider any available defence, whether or not it was relied on by the accused. Ultimately the trial judge

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[30] ***R. v. Judge***, (1957), 118 C.C.C. (3d) 410 (Ont. CA); ***R. v. Byrne***, [1968] B.C.J. No. 106 (CA), ¶6-14;
see also ***R. v. Toth***, [1991] B.C.J. No. 506 (CA), p. 13 of the pdf copy; ***R. v. A.Z.,*** [2000] O.J. No. 4080 (CA), ¶6; ***Application Record, Tab 2A - R. v. Wagner*** 2015 ONCJ 66 (Trial Decision) ¶39-43

[31] ***Application Record, Tab 2A - R. v. Wagner*** 2015 ONCJ 66 (Trial Decision) ¶37-46; ***Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶133-138; ***Transcript December 12, 2013***, p. 50-51

[32] ***Application Record, Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶117-123; ***R v Manning***, [1994] BCJ No 1732 (Prov. Ct.), ¶15-19; See also the cases cited in the section dealing with the constitutionality of s. 223

found that self defence was not available to the Applicant under either of the two provisions.[33]

42. The trial judge concluded that the Applicant was disentitled to self-defence under the new s. 34 provision as her conduct was not reasonable, having regard to the following two factors mandated by s. 34(2):

a. there were other means available to the Applicant to respond to the potential use of force (abortion), including raising a legal challenge to abortion by way of an application to Superior Court; and

b. the Applicant knew that the threat of force she was responding to (abortion) was lawful at the time.[34]

D. Additional issue: This application is an impermissible collateral attack on the probation orders.

43. If the Applicant wanted to challenge the terms of her probation orders, she should have appealed those terms, either seeking to have them varied or set aside. She did not do so.[35] Instead she deliberately and flagrantly flouted the probation orders simply because she disagreed with them. Her application for leave to appeal can be dismissed on this basis alone.

44. A court order must be treated as final and must be obeyed unless it is been set aside on appeal or lawfully quashed. This applies even where the Applicant is attempting to make a constitutional challenge to the enforcement of that order and to an allegation that she had disobeyed it. As this Court held in *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, and which was applied by the Ontario Court of Appeal in *Domm:*[36]

> If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.

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[33] ***Application Record, Tab 2A - R. v. Wagner*** 2015 ONCJ 66 (Trial Decision) ¶34; ***Tab 2B - R v. Wagner*** 2016 ONSC 8078 (Summary Conviction Appeal decision), ¶105-112.

[34] ***Application Record, Tab 2A - R. v. Wagner*** 2015 ONCJ 66 (Trial Decision) ¶52-58.

[35] The Applicant had appealed the custodial portion of her sentence that had been imposed by Clements J. but she did not seek to set aside or vary the terms of the 3-year probation order that is at issue on this appeal: ***R. v. Wagner,*** 2012 ONSC 5461, ¶1-2 (sentence appeal decision of Campbell J.); ***Application Record, Tab 2A - R. v. Wagner*** 2015 ONCJ 66 (Trial Decision) ¶137-144

[36] ***R. v. Domm***, [1996] O.J. No. 4300 (CA), ¶24; lv. to appeal to the SCC refused [1997] S.C.C.A. No. 78.

45. The purpose of the rule against collateral attacks is to maintain respect for the administration of justice and to avoid the uncertainty caused by persons acting on their own subjective assessment of the validity of an order. As Justice Doherty in *Domm* observed: "If those [court] orders can be disobeyed and then challenged when proceedings are taken in respect of the breach, the authority of the court is reduced to little more than a mirage."[37]

46. By way of example, an accused person's attempt to challenge the validity of a similar order prohibiting abortion protests (an injunction), in defence of a charge of breach of that order, was rejected by the Ontario Court of Appeal as an impermissible collateral attack in the case of *Gibbons*.[38]

PART IV – COSTS

47. Costs should not be ordered in this criminal matter.

PART V – ORDER SOUGHT

48. The Respondent requests that the application for leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of December 2020 by,

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Susan L. Reid
of Counsel for the Respondent

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[37] ***R. v. Domm***, [1996] O.J. No. 4300 (CA), ¶11-17, 23-26, 29, 31 34, 39, 44-45; lv. to appeal to the SCC refused [1997] S.C.C.A. No. 78; ***R. v. Litchfield*** (1993), 86 CCC (3d) 97, ¶14-15 (SCC) ***R v. Oliveira***, [2009] O.J. No. 1002 (CA), ¶25; ***R. v. J.S.,*** [2007] O.J. No. 4049 (SC), ¶15 and 17

[38] ***R. v. Gibbons,*** 2015 ONCA 47, ¶9; upholding 2013 ONSC 1403, ¶33-36.

PART VI – TABLE OF AUTHORITIES

Authorities Referred to	Para #
Borowski v. Canada (Attorney General), 1987 CanLII 4890 (Sask C.A.), (appeal to the SCC dismissed for mootness [1989] S.C.J. No. 14)	23
British Columbia v. Imperial Tobacco Canada Ltd, 2005 SCC 49	26
England - Paton v. United Kingdom; Paton v. Trustees of BPAS, [1978] 2 All E.R. 987 (Q.B.D.), p. 989-990.)	24
European Human Rights Tribunal Paton v. United Kingdom (1980), 3 E.H.R.R. 408.)	24
R. v. A.Z., [2000] O.J. No. 4080 (CA)	38
R. v. Bloxom, [2009] O.J. No. 1933 (OCJ)	36
R. v. Byrne, [1968] B.C.J. No. 106 (CA)	38
R. v. Demers, [2003] B.C.J. No. 75 (CA)	23
R. v. Domm, [1996] O.J. No. 4300 (CA); lv. to appeal to the SCC refused [1997] S.C.C.A. No. 78.	44, 45
R. v. Durette, [1992] O.J. No. 1044 (C.A.)	32
R. v. Felderhof, [2003] O.J. No. 4819 (C.A.)	32, 33
R. v. Foley, [2000] O.J. No. 5204 (SC)	36
R. v. Grant, 2016 ONCA 639	34
R. v. Gibbons, 2015 ONCA 47, upholding 2013 ONSC 1403	46

PART VII – RELEVANT LEGISLATIVE PROVISIONS

***Criminal Code*, R.S.C. 1985, c. C-46, s. 223**

SCC File No. 39402

IN THE SUPREME COURT OF CANADA
(On Application for Leave to Appeal from the Court of Appeal for Ontario)

BETWEEN:

MARY WAGNER

Applicant/Appellant

-and-

HER MAJESTY THE QUEEN

Respondent/Respondent

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

(Pursuant to s.40 of the *Supreme Court Act,* R.S.C. 1985, c.S-26)

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