

February 2007

Petitioner's Observations (February 2007) for the Redress of Violations of Human Rights Guaranteed by The American Declaration of the Rights and Duties of Man, Inter-American Commission on Human Rights

Jeffrey C. Tuomala
Liberty University, jtuomala@liberty.edu

Follow this and additional works at: https://digitalcommons.liberty.edu/lusol_fac_pubs



Part of the [Administrative Law Commons](#), [Civil Procedure Commons](#), [Constitutional Law Commons](#), [International Law Commons](#), [Jurisprudence Commons](#), and the [Legal History Commons](#)

Recommended Citation

Tuomala, Jeffrey C., "Petitioner's Observations (February 2007) for the Redress of Violations of Human Rights Guaranteed by The American Declaration of the Rights and Duties of Man, Inter-American Commission on Human Rights" (2007). *Faculty Publications and Presentations*. 46.
https://digitalcommons.liberty.edu/lusol_fac_pubs/46

This is brought to you for free and open access by the Liberty University School of Law at Scholars Crossing. It has been accepted for inclusion in Faculty Publications and Presentations by an authorized administrator of Scholars Crossing. For more information, please contact scholarlycommunications@liberty.edu.

IN THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

PETITIONER'S OBSERVATIONS (February 2007)

**For the Redress of Violations of Human Rights Guaranteed by
The American Declaration of the Rights and Duties of Man**

No. P225/04

**Inter-American Commission on Human Rights
1889 F Street, N. W.
Washington, D.C. 20006
USA**

PETITIONER:

**James Roger Demers
3310 Blewett Road
Nelson, British Columbia, Canada
V1L 6V6**

**PETITIONER’S OBSERVATIONS ON CANADA’S ADDITIONAL
INFORMATION (February 2007)**

No. P225/04

SUMMARY

Canada has violated James Roger Demers’ right to freedom of expression. In 1996, government officials in British Columbia arrested him, jailed him for seven weeks awaiting trial, and then tried and convicted him for violating the *Access to Abortion Services Act*. The *Act* outlaws even the most peaceful pro-life communication with women in the proximity of abortion clinics and carries a criminal sentence of up to one year in prison and \$10,000 in fines. Mr. Demers exercised his freedom of expression in the most peaceful manner imaginable. He silently held a sign in a public place. The sign simply quoted a portion Article 4 of the *American Convention on Human Rights*. He created no disturbance, trespassed on no one’s property, and harassed no one.

Mr. Demers has not submitted the subject of this complaint to any other international settlement proceeding nor is he aware of any other similar complaint made against Canada pending in any other international settlement proceeding.

PROCEDURAL HISTORY

I. IN THE COURTS OF CANADA

a. Mr. Demers was jailed for more than seven weeks awaiting trial, and then was prosecuted and convicted for violating the *Access to Abortion Services Act* in a trial which commenced on October 20, 1997, in the Provincial Court of British Columbia at Vancouver. Judge McGivern convicted Mr. Demers of “sidewalk interference” and “protest” contrary to the *Act*. Ct. File No. 14490-02-c at 2 (December 19, 1997).

- b. The Honourable Mr. Justice Hood, in the Supreme Court of British Columbia, by a judgment dated August 3, 1999, dismissed Mr. Demers' appeal, upholding the decision of Judge McGivern. Docket No. CC980044 (August 3, 1999).
- c. The Honourable Mr. Justice Low, writing for the Court of Appeal for British Columbia, dismissed Mr. Demers' appeal in his Reasons for Judgment dated January 17, 2003. *Regina v. Demers*, 2002 BCCA28; Docket No. CA026297 (January 17, 2003).
- d. With the Supreme Court of Canada's denial of Mr. Demers' Application for Leave to Appeal all of Mr. Demers' legal remedies afforded by Canadian law were exhausted.

II. BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

- a. Mr. Demers filed a Petition dated March 19, 2004, in the Inter-American Commission on Human Rights against the State of Canada alleging that his rights and the rights of hundreds of thousands of unborn children and their mothers as recognized in the *American Declaration of the Rights and Duties of Man* ("American Declaration") were violated.
- b. Canada filed its "Response of the Government of Canada on the Admissibility of the Petition of James Roger Demers" dated May 17, 2005, with the Inter-American Commission on Human Rights.
- c. Mr. Demers filed "Petitioner's Observations on Canada's Additional Information" dated October 7, 2005, with the Inter-American Commission on Human Rights.
- d. Canada replied to Mr. Demers' additional observations on November 8, 2005.
- e. On October 21, 2006, the Inter-American Commission on Human Rights issued Report No 85/06 on the admissibility of James Demers' Petition (P-225-04). It declared that the Petition, with respect to Article IV of the *American Declaration*, is admissible. It declared that the alleged violations of Articles I, II, VII, XIII, XVII, XXII, XXIX of the *American Declaration* are not admissible.
- f. By communication dated December 2, 2006, Mr. Demers accepted the Commission's offer of assistance in reaching a friendly resolution and requested a 120-day extension of time to submit observations.
- g. By communication dated January 24, 2007, but not received by Mr. Demers until February 1, 2007, the Commission informed Mr. Demers that Canada declined the Commission's offer to place itself at the disposal of the parties. The Commission also requested that Mr. Demers submit additional observations within one month.

III. RELATION OF *REGINA v. LEWIS* and *REGINA v. DEMERS*

The basic factual circumstances leading up to and surrounding Mr. Demers' arrest were not in dispute at trial. At his trial, and at each level of appeal within the Canadian legal system, Mr. Demers argued that the charges should be dismissed because the *Access to Abortion Services Act*, as written, and as applied, violates the fundamental right of freedom of expression. The right to freedom of expression is guaranteed by the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") and by international law, in particular the *American Declaration of the Rights and Duties of Man*.

Most of the factual background relevant to Mr. Demers' case was developed in the case of *Regina v. Lewis*. The testimony and documentary evidence in the *Lewis* case comprise nine volumes. The trial judge in *Regina v. Demers* admitted the record of trial from the *Lewis* case into evidence upon agreement of Mr. Demers and Canada.

Additionally, the British Columbia Supreme Court's decision in *Regina v. Lewis* is extremely important to Mr. Demers' case because it provides the most comprehensive analysis of the freedom of expression issues and because the reasoning in that opinion was relied on, or deferred to, by all of the Canadian courts that addressed the freedom of expression issue in Mr. Demers' case.

STATEMENT OF EVIDENCE

The following summary of the evidence is substantially the same as that submitted in the Petition. Evidence is included only insofar as it is relevant to allegations that Mr. Demers' rights under Article IV of the *American Declaration* have been violated. Additionally, referenced pages from the record of trial are included in an appendix to these observations. The Petitioner

will provide a copy of the entire record of trial upon request of the Commission. To this point, Canada has not contested the accuracy of assertions made regarding the evidence produced at trial.

I. MR. DEMERS' ARREST

On December 6, 9, and 10, 1996, Mr. Demers stood quietly on the public sidewalk, outside Everywoman's Health Centre in Vancouver British Columbia ("Clinic"), holding a sign which simply stated: "Every human being has the inherent right to life. United Nations International Covenant on Civil and Political Rights." He stood blindfolded so as not to be charged with the crime of besetting. On December 11, 1996, at the same place, Mr. Demers stood quietly, this time without a blindfold, holding a different sign:

"EVERY PERSON HAS THE RIGHT TO HAVE HIS LIFE RESPECTED.
THIS RIGHT SHALL BE PROTECTED BY LAW AND, IN GENERAL
FROM THE MOMENT OF CONCEPTION."

ART. 4-1 AMERICAN CONVENTION ON HUMAN RIGHTS

There was no evidence of any verbal or other exchange between Mr. Demers and any customers or Clinic personnel entering or exiting the Clinic. Nor was there any evidence of any customer being offended or upset by the sign or his presence. [Appeal Book ("A.B."), Vol. I, p. 5.] Despite the peacefulness of Mr. Demers' activity, the Clinic reported him to the police. Police came to the Clinic and confronted Mr. Demers, who was described as cordial and cooperative. [A.B., Vol. I, p. 2, para 7; p. 4.]

For these peaceful acts, police arrested and charged Mr. Demers with "protest" under the British Columbia *Access to Abortion Services Act*. They later added a further criminal charge of "sidewalk interference." In relevant part the *Act* states:

Definitions

1. In this Act:

“protest” includes any act of disapproval or attempted act of disapproval, with respect to the issues related to abortion services, by any means, including, without limitation, graphic, verbal or written means;

“sidewalk interference” means

- (a) advising or persuading, or attempting to persuade, a person to refrain from making use of abortion services, or
- (b) informing or attempting to inform a person concerning issues related to abortion services by any means, including, without limitation, graphic, verbal or written means.

Activities restricted in an access zone

2. (1) While in an access zone, a person must not do any of the following:

- (a) engage in sidewalk interference;
- (b) protest;

Under the *Act* “protest” includes any act of disapproval of abortion to include informing a person about abortion-related issues. “Sidewalk interference” includes “attempting to inform a person concerning issues related to abortion services.” Mr. Demers admits holding the signs promoting the protection of all human life. For these actions he was convicted as a criminal.

Mr. Demers was not the only person arrested at the Clinic. Police also arrested Mr. Maurice Lewis who carried a different sign, but who actually spoke to women entering the clinic, encouraging them not to abort their unborn children, and offering them help. There was no evidence of anyone behaving in other than a peaceful and respectful manner. Maurice Lewis was tried first. The *Lewis* trial spanned several weeks. Because the facts of the *Lewis* and *Demers* cases were essentially the same, the parties agreed to adopt the record of trial from the *Lewis* case as the evidence in Mr. Demers’ case. The following section provides a summary of the evidence bearing on this case.

II. THE RECORD OF TRIAL

Most abortions are done for non-medical reasons. [A.B., Vol. II, p. 213, ll. 12-17; A.B.,

Vol. III, pp. 598-599, ll. 45-3; A.B., Vol. IV, p. 606, ll. 29-35.] Women seeking abortions often feel pressured to have abortions or feel that they are “sacrificing themselves” for someone else. [A.B., Vol. V, p. 847, ll. 26-36.] Many women who choose to have an abortion do not choose freely, sometimes because they lack sufficient information. [A.B., Vol. IV, p. 602, ll. 38-43; p. 603, ll. 12-21.] Witnesses at trial who went to the Clinic for abortions were not made aware of the availability of either pre-abortion or post-abortion counseling. [A.B., Vol. I, p. 76, ll. 7-12; pp. 150-151, ll. 36-15.]

Many women are uneasy with their decisions and are open to discussion and guidance right up to the last moment. [A.B., Vol. IV, p. 648, ll. 8-20; A.B., Vol. V, p. 847, ll. 37-46.] Clinic Staff admitted that some women who come into the Clinic change their minds. [A.B., Vol. III, pp. 413-414, ll. 45-2; A.B., Vol. IV, pp. 609-610, ll. 45-2.] Many children scheduled to die are alive because of their mothers’ contact with a pro-life counselor. [A.B., Vol. V, p. 832, ll. 41-47; pp. 817-820, ll. 27-14.]

Pro-life advocates inform women about abortion and the alternatives, offer emotional and financial support, and try to persuade them not to kill their unborn children. [A.B., Vol. I, p. 78, ll. 20-26; A.B., Vol. V, p. 807, ll. 28-29.] They distribute pamphlets depicting and describing the stages of development of the unborn child. [A.B., Vol. IV, p. 668, ll. 42-46.] Women have thanked pro-life advocates for their kindness, and expressed gratitude for offers of help and concern. [A.B., Vol. V, p. 812, ll. 27-36.]

Dr. Marie Peeters of the famed Lejeune Institute for Genetic Research in France gave expert testimony on the early development and humanity of the unborn child. [A.B., Vol. IV, p. 662, ll. 34-39; p. 669, ll. 11-22; pp. 662-664, ll. 40-27; A.B., Vol. V, pp. 893, 897, 898-899, 963-966.] No Crown witness denied the rapid development of the unborn child in the womb, nor did

any deny that abortion ends the life of a human being. [A.B., Vol. II, pp. 223-224, ll. 33-30; pp. 255-256, ll. 17-4.] Abortion service provider Ms. Joy Thompson admitted that the fetus is “a human being not yet born.” [A.B., Vol. III, p. 447-448, ll. 47-5.] However, abortion service providers discounted the humanity of the fetus in their counseling. [A.B., Vol. II, p. 252, ll. 24-44.]

Crown witness Dr. R.E.K. Hudson stated that informing women on the development of unborn children prior to an abortion is inappropriate. [A.B., Vol. III, pp. 532-533, ll. 36-26.] Dr. Hudson had been instrumental in the government’s plan to expand abortion services throughout British Columbia. [A.B., Vol. III, pp. 504-507, ll. 38-5.]

Clinic counseling is done by individuals with no medical training who claim to explain all medical risks. Abortion providers refuse to recognize any significant psychological problems arising from abortion. [A.B., Vol. III, pp. 409-410, ll. 5-25.]

The Crown’s evidence confirmed that the essential purpose of abortion-clinic counseling is to persuade women to go through with an abortion. [A.B., Vol. II, pp. 399-400, ll. 24-25, 39-25.] Abortion counselor Ms. Erin Mullan stated, “Women will feel an abortion is a loss,” and admitted that the loss was the loss of a human life. [A.B., Vol. II, p. 269, ll. 5-17.]

Psychiatrist R. Philip Ney testified that abortion severely harms women psychologically and emotionally. [A.B., Vol. III, p. 594, ll. 31-39; A.B., Vol. IV, pp. 643-644, ll. 36-11.] Ms. Patricia Hansard, founder of Abortion Recovery Canada, testified to the same. [A.B., Vol. V, p. 844, ll. 35-45; p. 854, ll. 34-44.] This harm is a direct psychological consequence of deliberately killing one’s own children. [A.B., Vol. V, p. 859, ll. 16-37.]

Ms. Joy Davis, a former director of six abortion clinics, testified to callous, careless, and dehumanizing treatment of women by abortion providers. [A.B., Vol. IV, p. 673, ll. 14-21.] The

primary goal of abortion counseling was to encourage women to decide for abortion and sign the consent form. [A.B., Vol. IV, pp. 680-682.] The abortion providers' response to pro-life activity was anger because it encouraged women to change their minds. To get rid of the protesters, the providers laid false complaints to police, claiming harassment and noise that disturbed the patients. [A.B., Vol. IV, p. 677, ll. 6-39.]

III. THE BROADER CONTEXT

Historically, Canada, like all countries in the Americas, provided legal protection for unborn children. This began to change in 1969 when the Trudeau government amended the *Canadian Criminal Code* to allow "therapeutic" abortions to preserve the "life or health" of mothers if approved by two doctors. As a result, 11,152 unborn children were legally killed in Canadian hospitals in 1970. That number had increased to 70,023 in 1988. During the period 1970-1988, over one million children were aborted.

In 1988, the Supreme Court of Canada, in the case of *Morgentaler, Smoling and Scott v. Queen* [1988] 1 S.C.R. 753, 148 D.L.R. (4th) 332, struck down Section 251 of the *Canadian Criminal Code*, thereby completely removing all protection of law from unborn children. By 1992, the number of abortions exceeded 100,000 per year. In 1999, there were 142,026 fewer births in Canada than there had been in 1959.

Joyce Arthur of Canada's Prochoice Action Network boasts that Canada stands alone as the "only democratic, industrialized nation in the world with no laws restricting abortion." However, Canada does not find itself totally alone in the community of nations. There are three others – North Korea, China, and Vietnam – which also have no laws protecting unborn children.

“Different Foundations, Diverging Futures: The Abortion Climate – Comparisons Between Canada and the USA,” <http://www.prochoiceactionnetwork-canada.org/difficult.html>.

There are absolutely no restrictions in Canada on killing unborn children. Right up to the moment of birth these children may be killed through the notorious procedure known as partial birth abortion. There are no requirements that even full-term children be anesthetized to alleviate the pain before they are poisoned, burned, or cut into pieces. A child abused through the mother’s drug use, or maimed in the womb, has no cause of action against its parent once it is born. The state refuses to intervene to stop *in utero* abuse. Even a child who is wanted by its mother is not protected by Canadian law against murder. Canada has totally abdicated all duty to afford protection of law.

The Province of British Columbia has not been content with mere failure to protect unborn children. It has gone a step further, passing legislation designed to ensure that expectant mothers do not receive information about the nature of abortion or alternatives to abortion. Pursuant to the *Access to Abortion Services Act*, British Columbia adopted the *Abortion Services Access Zone Regulation*, establishing a 30-metre zone around abortion clinics. The *Act* and *Regulation* criminalize even the most peaceful, polite communication of information regarding abortion to expectant mothers within 30 metres of an abortion center.

ARGUMENT

I. THE CENTRAL ISSUE

Is peacefully and silently holding a sign that quotes Article 4 of the *American Convention on Human Rights* such a threat to the rights of others, the security of all, the general welfare, or the advancement of democracy that it justifies arrest and imprisonment?

II. THE RIGHT TO FREEDOM OF EXPRESSION

Canada has acknowledged that it has infringed Mr. Demers' right to freedom of expression, a fundamental human right that is universally recognized. The *American Declaration* that binds Canada and every other nation of the Organization of American States declares:

Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

American Declaration, Article IV.

Canada itself expressly recognizes the right to freedom of expression in section 2 of the *Canadian Charter*, which states in relevant part:

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

Canada, through its prosecutors and judges, recognized and acknowledged at virtually every stage of Mr. Demers' case that it had infringed Mr. Demers' right to freedom of expression. *Regina v. Demers* [2003] B.C.J. No. 75; 2003 BCCA 28. A human right so fundamental as the right to freedom of expression must be essentially the same under international law as domestic law. By implication, Canada must admit that it has infringed Mr. Demers' right to freedom of expression under the *American Declaration* as well as the *Canadian Charter*. Unquestionably, arrest and imprisonment for peacefully and silently holding a sign quoting Article 4 of the *American Convention on Human Rights* ("American Convention") is an infringement of the right to freedom of expression.

Analysis of the right to freedom of expression does not end with a determination that an infringement of that right has occurred. It must next be determined whether the infringement is

justified under general limiting principles of international law, as stated in the *American Declaration*, or under any particular limits recognized in international law.

III. GENERAL LIMITING PRINCIPLES

The *American Declaration* recognizes that human rights, including the right to freedom of expression, are subject to certain limitations. Article XXVIII of the *American Declaration* states:

The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

Section 1 of the *Canadian Charter* is the counterpart of Article XXVIII of the *American Declaration*. Section 1 states:

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.

Canada, through its prosecutors and judges, at every stage in Mr. Demers' case, took the position that its treatment of Mr. Demers was justified under section 1 of the *Canadian Charter*. Thus, by implication, Canada believes that its conduct is justified under Article XXVIII of the *American Declaration*.

Canada is mistaken. Peacefully and silently holding a sign that quotes Article 4 of the *American Convention* is not a threat to the right of others, the security of all, the general welfare, or the advancement of democracy that justifies arrest and imprisonment. By no stretch of the imagination can any such threat be deemed to exist under the circumstances of this case.

IV. PARTICULAR LIMITING PRINCIPLES

The *American Convention*, though not technically binding on Canada, provides a more particularized exposition of justifiable limitations on the right to freedom of

expression that are generally recognized in the community of nations. Article 13 states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
- b. the protection of national security, public order, or public health or morals.

3. . . .

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Articles 19 and 20 of the *International Covenant on Civil and Political Rights*

("ICCPR"), a treaty to which Canada is a party, recognize essentially the same limitations on the right to freedom of expression as does the *American Convention*. In fact, the *American Convention* incorporates some of the ICCPR language.

Article 19. (1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20. (1) Any propaganda for war shall be prohibited by law.
(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

There is no evidence that Mr. Demers' conduct falls within those particularized limitations on the right to freedom of expression recognized in Article 13 of the *American Convention* or in Articles 19 and 20 of the *ICCPR*. Nor does his conduct fall within other exceptions commonly recognized in domestic legal systems that are reasonably protective of human rights. Mr. Demers' absolutely peaceful, silent, and non-intimidating communication and actions did not constitute sedition, threats, provocation, fighting words, libel, obscenity, profanity, hate speech, breach of confidentiality, disorderly conduct, breach of the peace, or incitement to criminal activity. Mr. Demers trespassed on no one's property. He impeded no one's movement on a street or sidewalk. In short, he exercised his right to freedom of expression at a totally reasonable time and place and in a totally reasonable manner. He was arrested and imprisoned for conveying a simple message – that everyone has a right to life – to people daily involved in taking human life. He conveyed that message at a place in which human life is daily taken. For Canada to argue that a mere recitation of the moral and legal principle that everyone has a right to life is criminal misconduct is to align itself with repressive states.

V. APPLICATION OF GENERAL LIMITING PRINCIPLES

Canada has not justified its infringement of Mr. Demers' right to freedom of expression by resort to some generally recognized particular category of exception such as fighting words, obscenity, libel, or hate speech. In its courts, Canada has justified its infringement of Mr. Demers' rights by an appeal to the general principles of section 1 of the *Canadian Charter*. Section 1 has its counterpart in Article XXVIII of the *American Declaration*. Section 1 and

Article XXVIII may be interpreted as limiting the right to freedom of expression by weighing the value of a given expression against the harms caused by that expression.

There are two distinct but related steps in this weighing process. The first step is to determine whether the expression falls into a category of lower-value or higher-value expression. For example, obscenity and hate speech would be categorized as relatively low value speech as compared to political speech. This is the approach that the Canadian courts have taken in the *Demers* and *Lewis* cases. The second step in the analysis is to determine whether the state is justified in placing limits on that category of speech by weighing the various interests. It is obviously easier for a state to justify restrictions on low-value speech.

In assessing Mr. Demers' right to freedom of expression, the Canadian courts made two fundamental errors. First, they categorized Mr. Demers' expression that everyone has a right to life as low value speech, and if not as low as obscenity and hate speech, certainly lower than political speech. This categorization made it easier for Canada to demonstrate that the restriction on Mr. Demers' speech was reasonable. Second, the Canadian courts fashioned Mr. Demers' case as involving his interests pitted against those of pregnant women, abortion providers, and society generally, thereby setting up a false dichotomy. They virtually ignored the unrebutted evidence of the beneficial nature of pro-life speech for pregnant mothers, and they totally discounted the value of the lives of unborn children that his communications were designed to save.

The right to freedom of expression protects not only the right of the speaker to convey but also the right of the listener to receive valuable information and ideas that may be life-changing or even life-saving. "[T]his freedom requires not only that individuals be free to transmit ideas and information, but also that all people can receive information without interference." Annual

Report of the Inter-American Commission on Human Rights 2002, Ann. Rpt. Inter-Am C.H.R. 1692, OEA/ser. L/V/II.117 doc. 5 rev. 1, footnote 57.

A. Step One – Categorizing the Value Level of Expression

Canada has recognized, as surely every nation must, that not all expression is equally protected. Justice Oliver Wendell Holmes, Jr., phrased this proposition most memorably: “The most stringent protection of free speech would not protect a man in falsely yelling fire in a theatre and causing a panic.” *Schenk v. United States*, 249 U.S. 47, 52 (1919). Such speech would be considered unprotected or of so little value that it would be easily outweighed by other factors, such as the security of the theater-goers. However, if there were a fire in the theater we would consider it a man’s duty to warn others, and we would consider the acts of the man who tried to silence him to be criminal. That speech would be considered quite valuable to the listeners.

1. Under the *American Declaration* Mr. Demers’ Speech Is High-Value Expression

Mr. Demers’ expression falls into the highest category of value because he is promoting a right that is a necessary condition for man to achieve his highest purpose which is spiritual development. The Preamble to the *American Declaration* states, “Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources.” Spiritual development is not attainable without protection of a human being’s physical existence. Protection of the right to life is a necessary condition for achieving this supreme end. Children killed in the womb have limited opportunity for spiritual development.

The right to life begins at conception. That right is not a creation of positive law. It is God-given and expressly recognized in Article 4 of the *American Convention*. The *American*

Declaration also recognizes the right to life although it states that right with less particularity.

Mr. Demers had a right to speak because he had a duty to speak. Rights derive from duties owed to God and duly constituted civil authorities. People have a right to do what is necessary and proper for the performance of their duties. The *American Declaration* places the duty to protect human rights not only upon states but also upon individuals. The Preamble states, “The fulfillment of duty by each individual is a prerequisite to the rights of all.” The *American Declaration* is not an aberration. The preambles to the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”) and the *ICCPR* also assert that individuals, as well as states, have duties: “Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observation of the rights recognized in the present Covenant.” Canada is a party to both conventions. Speech designed to promote the rights of others, and not exercised simply to advance one’s own interests, falls into the category of highest value. Freedom of expression has an especially important role to play in international law. The Preamble to the *Declaration of Principles on Freedom of Expression* singles out the “importance of freedom of expression for the development and protection of human rights.”

It is especially incumbent upon individual citizens to take actions to promote human rights when their government has failed to do so. The Canadian government has utterly abdicated its moral and juridical responsibility to protect the right to life of unborn children and the right of pregnant women to gain access to information necessary to making informed decisions regarding childbirth and abortion. For at least three thousand years, kings in the Hebrew republic and kings in Christian nations have been taught that one of their primary duties is to “Speak up for those who cannot speak for themselves, for the rights of all who are

destitute.” *Proverbs* 31:8 [All biblical citations are to the New International Version.] No one is so unable to speak or so destitute as the babe in the womb. Instead of speaking for the mute, Canada has attempted to mute those speaking in their stead.

Mr. Demers’ duty to speak and his right to freedom of expression are based upon a moral order that preexists the state. The Preamble to the *Declaration of Principles on Freedom of Expression* recognizes the truth that “the right to freedom of expression is not a concession by the States but a fundamental right.” The Principles section of the *Declaration of Principles on Freedom of Expression* states, “Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals.” The Preamble to the *American Declaration* also recognizes that there is a preexisting moral foundation upon which all juridical duties are built: “Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.” For three thousand years, Hebrew and Christian believers have recognized a moral duty that forms the basis for the juridical duty in this case.

Rescue those being led away to death;
hold back those staggering toward slaughter.
If you say, “But we knew nothing about this,”
does not he who weighs the heart perceive it?
Does not he who guards your life know it?
will he not repay each person according to what he has done?

Proverbs 24:11-12.

The Preamble to the *Canadian Charter* itself recognizes the truth that God has established a moral order upon which Canada owes its very existence: “Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law.”

The Queen of England, in whose name her Canadian subjects prosecuted Mr. Demers, is bound by oath to adhere to those duties of a “moral nature” that provide the basis for “duties of a

juridical nature.” The Queen promised under oath at her coronation that she would to the “utmost of her power maintain the laws of God.” *Coronation Oath*. Because the Queen and her Canadian magistrates have so utterly defaulted on their oaths, their moral duties, their domestic legal duties, and their international juridical duties, it is especially critical for individual subjects, like Mr. Demers, to speak for those who have no voice. The Queen at her coronation praised her “Lord and Savior,” yet her Canadian subjects in passing and enforcing the *Access to Abortion Services Act* have used their pens to “curse men, who have been made in God’s likeness. Out of the same mouth come praise and cursing.” *James* 3:9-10. Such should not be.

Just as they refused to recognize that Mr. Demers’ speech was exercised to protect the lives of unborn children, the Canadian courts refused to recognize the political nature of Mr. Demers’ speech. However, this Commission has recognized the high value that is to be placed on political speech.

[I]n the political arena, the threshold of state intervention with respect to freedom of expression is necessarily higher because of the critical role political dialogue plays in a democratic society. The Convention requires that this threshold be raised even higher when the state brings to bear the coercive power of its criminal justice system to curtail freedom of expression. Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence.

Annual Report of the Inter-American Commission on Human Rights 1998, Ann. Rpt. Inter-Am C.H.R. 37, OEA/ser. L/V/II.102 doc. 6 rev., Chapter IV.

It is a generally recognized principle that restrictions on high value speech require that the state impose the least restrictive measures to ensure the protection of compelling state interests.

[T]he legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected.

Inter-American Court of Human Rights, Advisory Opinion OC-5/85, November 13, 1985, paragraph 46, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) Requested by the Government of Costa Rica.

There is no legitimate interest in shielding people from peaceful speech. The *Access to Abortion Services Act* could have easily been drafted and enforced so as to criminalize only threats, incitement to violence, or other unprotected speech.

2. The Canadian Courts Erred by Devaluing Mr. Demers' Expression

In the *Lewis* case, the trial judge ruled that Mr. Lewis' right to freedom of expression had been infringed and that Canada had failed to prove that the infringement was a reasonable limit "demonstrably justified in a free and democratic society" as required under section 1 of the *Canadian Charter*. The trial judge then dismissed the charges. *Regina v. Lewis*, [1996] 18 B.C.L.R. (3d) 218 (Prov. Ct.) (January 23, 1996).

Canada appealed the dismissal to the Supreme Court of British Columbia. Justice Saunders allowed Canada's appeal in the *Lewis* case, holding that, although Mr. Lewis' right to freedom of expression was infringed, the *Access to Abortion Services Act* was a justifiable restriction on the freedom of expression under section 1 of the *Canadian Charter*. Because Mr. Lewis died while his appeal to the Court of Appeal for British Columbia was pending, his case was dismissed as moot. *Regina v. Lewis*, [1996] 24 B.C.L.R. (3d) 247 (S.C.) (October 8, 1996).

The trial court and appellate courts in British Columbia ruled against Mr. Demers' freedom of expression defense to the charges of violating the *Access to Abortion Services Act*. They expressly, or by implication, based their decisions on the same reasoning that Justice Saunders followed in ruling against Mr. Lewis. Therefore, it is Justice Saunders' opinion in

Regina v. Lewis that must be analyzed to demonstrate the faulty reasoning that led to Canada's violation of international law.

The Supreme Court of Canada has recognized the fact that not all expression is of equal value. For example, obscenity and hate speech are low-value speech. *Regina v. Keegstra*, [1990] 3 S.C.R. 697, at 762; *Regina v. Butler*, [1992] 1 S.C.R. 452, at 500. The lower the value of a particular category of speech, the easier it is to justify restrictions on that speech under a section 1 analysis of the *Canadian Charter*. Likewise, certain speech is more valuable. For example, speech designed to search for political truth is high-value speech. *Ross v. New Brunswick School District No. 15* (1996) 133 D.L.R. (4th) 1 (S.C.C.). Restrictions on that speech are more difficult to justify under section 1 of the *Canadian Charter*.

Justice Saunders based her analysis of the right to freedom of expression on this framework of low-value and high-value speech. She made this distinction using the terminology core-value speech and non-core-value speech. Referring to Chief Justice Dickson's opinion in *Regina v. Keegstra*, she wrote "that the content of the message would weigh in the balance, and to the extent that the message did not relate to the core values of freedom of expression, it would be considered less weighty." *Regina v. Lewis* at 290. Justice Sanders then quoted Mr. Justice La Forest's opinion from the *Ross* case:

[T]he "core" values of freedom of expression include "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process".

Regina v. Lewis at 290.

Justice Saunders concluded that Mr. Lewis' expression was not core-value speech or speech of the highest value; therefore, its infringement could be more easily justified.

Considering these issues, I hold that as significant as freedom of expression is and as sincere and impassioned as the views of Mr. Lewis or other protesters are, this case does not present an example of that freedom at its highest value. The expressive activity limited by the impugned subsections is not central to the core values discussed in *Ross*, supra.

Regina v. Lewis at 291.

It is hard to imagine speech more central to the search for political and scientific truth than that in which Mr. Demers was engaged. In fact, as demonstrated above, under the *American Declaration* it is highest-value expression. Such a fundamentally erroneous misclassification discredits the conclusions of the Canadian courts that Mr. Demers' right to freedom of expression was not violated.

B. Step Two – Weighing the Values and Harms of the Expression

Mr. Demers' right to freedom of expression is limited by three factors. First, it is limited by the rights of others. Second, it is limited by the security of all. Third, it is limited by the just demands of the general welfare and the advancement of democracy. *American Declaration*, Article XXVIII. It is difficult to see how the *Access to Abortion Services Act*, as applied in this situation, protects rights of other individuals, be they unborn children, mothers, fathers, abortion providers, or the community. Nor does it promote security, the general welfare, or the advancement of democracy. The rights of others, security, the general welfare, and democracy will be advanced by *not* restricting peaceful expressions that promote the most basic of all human rights.

Canada has portrayed the *Demers* case primarily as a pitting of Mr. Demers' right to freedom of expression against the interest of women in procuring abortions and the interest of abortion clinics in performing abortions. Canada has ignored the mountain of evidence that

women are not properly informed about the nature of abortion, the physical and psychological effects of abortion, and the alternatives to abortion. Canada feigns ignorance of the basic dynamic involved in most abortion decisions – that women are pressured into procuring abortions by boyfriends or relatives. Furthermore, because Canada has refused to place any value on the life of the unborn child, it must necessarily devalue the expression designed to stop the deliberate taking of human life. Nor has Canada taken into account the harm that involvement in such a horrific business has on abortion providers and on the nation that encourages them.

Step one of this analysis, categorizing the value level of expression, is not totally distinct from step two, weighing the values and harms of the expression. There is considerable overlap in the analysis under steps one and two. They both involve, to some degree, a valuation or weighing of interests. However, it is best to address them separately because categorizing the value level of expression determines the weight of countervailing interests necessary to justify an infringement of the right to freedom of expression.

The Canadian courts have recognized that the right to freedom of expression is not protected simply, or even primarily, for purposes of the speaker's self-fulfillment. The right to receive information and ideas is necessarily part of the freedom of expression. In fact, Article IV of the *American Declaration* expressly links the right to freedom of expression with the right to disseminate ideas by any medium of communication, including signs.

In order to weigh various interests, a tribunal must place values on them. The Canadian courts have not only refused to recognize a whole class of human beings as juridical persons, they have refused to acknowledge any value of unborn children whatsoever. As a result, the Canadian courts have rendered it impossible to weigh accurately the competing interests involved in deciding rights to freedom of expression. Even if an unborn child is not recognized as being a

juridical person, its life must have some inherent value that must be considered in weighing competing interest in the context of freedom of expression.

1. Value of the expression to mothers and others

Though not without culpability, women who procure abortions are victims as well. Evidence of this fact was presented at trial and was not contradicted, and it is a fact that is universally known though often denied. The mother is victimized in multiple ways. First, she is usually pressured by others to have an abortion. Second, she bears the burden of a guilt-stricken conscience when she has an abortion. Third, she suffers the risks to future physical well-being. The speech of boyfriends, husbands, and parents pressures her to get an abortion. The speech of the abortion provider distorts information necessary to make an “informed choice.” The failure of government officials to speak bears mute testimony that there is nothing wrong with abortion.

The right to freedom of expression is not protected simply for the benefit of the speaker. Benefits inure to society generally and to other individuals. When Canada’s citizens are denied the right to express certain ideas mothers are denied the benefit of scientific discovery regarding the nature of the life of their children (*American Declaration*, Article XIII) and they are denied association with those who care about the physical, emotional, and spiritual impact that killing their own children will have on them (*American Declaration*, Article XXII). Pregnant women are particularly vulnerable and in need of protection (*American Declaration*, Article VII). In this case there was ample evidence that boyfriends, family members, abortion clinics and the Province of British Columbia joined forces to pressure women and to withhold critical information and support from them. They all had something to gain in taking advantage of these women. Boyfriends continue to have access to sex without responsibility or commitment, family members avoid shame and inconvenience, abortionists profit handsomely, and the state avoids

added social costs, or so it thinks. That is a very powerful alliance of speakers against the interests of young women who may never have studied or given much thought to the matter and the consequences of abortion. Along comes Mr. Demers, with sign in hand, bearing silent testimony that unborn children are human beings whose lives must be protected, just as Article 4 of the *American Convention* states. Canada insists that he must be further silenced so that he cannot be heard at all. He must be put in jail and his livelihood threatened.

Justice Saunders gave a great deal of attention to the history of the legalization of abortion in Canada, the history of the right-to-life movement in Canada, and the perceived threat to the privacy, dignity, and security interests of mothers seeking abortion services. Even if others, in the past, had engaged in pro-life activities that are not protected actions or expressions, there is no reason that Mr. Demers should suffer the consequences. The *Access to Abortion Services Act* on its face proscribes the most peaceful activity and speech imaginable. That law as applied in the Demers' case was used to arrest, convict, and punish Mr. Demers. The *Act* proscribes protest as any act of disapproval of abortion. Additionally, the prohibition against protest in the *Act* forbids only speech designed to protect life. Any speech designed to encourage abortion is protected. The *Act* targets peaceful expression, and it targets speech based on content of which the government disapproves. It is Canada's actions, not Mr. Demers' speech, that imperil democratic values.

By criminalizing peaceful speech, Canada has placed itself in the company of one of the most repressive states in the Western hemisphere. "The persons arrested by the Cuban State were attempting to exercise those rights in a peaceful manner and, therefore, the restrictions to which they were subjected may be deemed to constitute violations of their human rights." Annual Report of the Inter-American Commission on Human Rights 2000, Ann. Rpt. Inter-Am C.H.R.

1354, OEA/ser. L/V/II.111 doc. 20 rev., paragraph 14. Only in extreme situations may speech be criminalized. There was no threat of violence in this situation.

The Commission shares this view, since when due regard is paid to the consequences of criminal sanctions and the inevitably inhibiting effect that they have on freedom of expression, criminalization of any kind of oral or written expression may only be applied in exceptional circumstances, where there is an evident and direct threat of violence.

Annual Report of the Inter-American Commission on Human Rights 2000, Ann. Rpt. Inter-Am C.H.R. 1354, OEA/ser. L/V/II.111 doc. 20 rev., paragraph 37.

Justice Saunders gave considerable attention to the claims that pro-life activities have endangered the security interests of abortion clinics and contributed to the growing shortage of medical personnel who are willing to perform abortions. The interest of medical personnel in violating the ethical principles adopted by the World Medical Association should count for very little in the weighing of interests. That Association adopted the *Declaration of Geneva* in 1948 as a response to the horrors that Nazis doctors visited upon those whose lives they considered to be low value. The Declaration states, “I will maintain the utmost respect for human life from the time of conception; even under threat, I will not use my medical knowledge contrary to the laws of humanity.” Testimony at trial provided evidence that confirms what every person knows – participation in abortion dehumanizes medical personnel as well.

2. Nature of unborn children as it informs the weighing of value

Canada remains alone among democratic nations in its failure to offer any protection whatsoever to unborn children. It has violated and continues to violate the right to life of more than two million human beings. It has failed to protect an entire class of human beings based on birth status. This is in direct violation of the *American Declaration*, which calls upon all people to promote human rights. Canada allows one class of people the absolute discretion to kill

another class of people who are without any protection of law. And Canada wants to prohibit any communication to those persons who are in greatest need of hearing that abortion is a violation of the right to life.

Although there are proper bases for treating some human beings or groups of human beings under law differently from others, the state can never justify denying any human being or group of human beings all protection of law. The language of the international human rights treaties makes no distinction between human beings entitled to juridical status as persons and human beings not so entitled.

Mr. Demers's speech in this situation is of the highest value for purposes of weighing it against other interests. It is both tragic and ironic that Mr. Demers' speech, mute as it was, would be treated with such severity by a government whose duty it is to protect the mute. Canada has treated unborn children as having no value. There is no protection for them under Canadian law whatsoever. Even if unborn children are treated as having no juridical rights, it does not mean that they have no value. The whole point of the speech censored is that unborn children are human beings and should be valued. Certainly speech arguing that the right to life should be afforded to all human beings is of the highest value. Granted, if unborn children are not human beings they may have no more value than a diseased organ that is removed. Speech designed to discourage the removal of diseased organs would have less value than speech designed to protect human beings. If unborn children have no more value than diseased organs Canada must say so. How else can it place a value on the speech involved in this case? The Commission should not give credence to the position that unborn children are not human beings. Just as importantly, it must not give credence to the sentiment that, though these children are human beings, some lives are simply not worth living.

3. A final factor to weigh

A final factor must be considered in the process of weighing the value of interests in this case, and that is the judgment of God. Canada, in the Preamble to its *Charter*, claims that it is a nation under God, and its magistrates serve as agents of a Queen who has sworn to abide by the law of God. Its courtrooms prominently display a seal that declares “*Dieu et Droit.*” Unless solemn pronouncements in constitutional documents mean nothing, oaths mean nothing, and national mottos mean nothing, one would expect these factors to be taken into consideration.

The prophets of the Old and New Testaments were called to speak against many sins, including sexual immorality and the shedding of innocent blood. In the case of abortion these sins are closely linked. Most abortions are the consequence of a problem – pregnancy arising from illicit sexual relations. John the Baptist lost his head because of his witness against King Herod’s illicit sexual relationship with his brother’s wife, Herodias. *Matthew* 14:1-12. Canada has responded to Mr. Demers as it has because his message is as odious to Canada as John’s message had become to Herod. God’s judgment falls on nations, not just individuals. If a nation’s leaders do not enforce the law, God promises to intervene directly. Certainly every person in authority should factor this reality into any calculation or weighing of costs and benefits.

Therefore the Lord, the Lord Almighty,
the Mighty One of Israel, declares:
“Ah, I will get relief from my foes
and avenge myself on my enemies.
I will turn my hand against you;
I will thoroughly purge away your dross
and remove all your impurities.”
I will restore your judges as in days of old,
your counselors as at the beginning.

Isaiah 1:24-26.

Mr. Demers is not a criminal. He was doing exactly what international law calls upon everyone to do – promote and defend human rights.

VI. CONCLUSION

Mr. Demers' speech is of such high value, the risk of an improper impact on other interests so low, and the consequences to him so severe, that this Commission should find that Canada has violated Mr. Demers' right to freedom of expression. The *Access to Abortions Services Act* on its face, and as applied, violates Mr. Demers' right to freedom of expression under international law. The statute prohibits the most peaceful speech. Both the terms "protest" and "sidewalk interference" are misleading as they imply some kind of disorder. "Protest," as defined in the statute, includes any communication of disapproval. "Interference" includes simply informing a person concerning issues about abortion. Certainly this is not the least restrictive means of protecting any legitimate interest.

Additionally, the *Act's* criminalization of "protest" prohibits only speech that expresses any opposition to abortion or that attempts to convince a woman that it is not in her or her unborn child's best interests to go through with an abortion. Those who wish to encourage her to have an abortion are free to do so.

Weighing the competing value of Mr. Demers' speech against any negative consequences may be an imprecise art, but in these circumstances the relative weights admit of no doubt. The Canadian courts have not made any careful analyses of the relative costs and benefits. In fact, the courts in the *Demers* case simply deferred to the judgment made by the Supreme Court of British Columbia in the case of *Regina v. Lewis*.

Before valuing the speech of a man who yells “Fire!” in a crowded theater we must know if there was or was not a fire. If he sounded the alarm that saves men’s lives we should call him a hero, or at least a conscientious citizen, and not a criminal. If Mr. Demers cries out ever so quietly that everyone has a right to life from the moment of conception, we must first know if unborn children have a right to life. If they do, then Mr. Demers should be commended, or at least left alone, and not thrown in jail and treated as a criminal.

RELIEF REQUESTED

It is respectfully requested that the Commission make a finding that the *Access to Abortion Services Act* is, on its face and as enforced against Mr. Demers, an unlawful restriction on the right to freedom of expression. It is further requested that the Commission advise Canada of its moral and legal obligation to compensate Mr. Demers for his unlawful arrest, imprisonment, trial, ten years of legal proceedings, and disparagement of his name.

DATED at _____, this ___ day of _____, 2007

James R. Demers
Petitioner