Court File No: CE55312902/CLT3957466

COURT OF ONTARIO
(**Superior Court of Justice**)
(**Toronto Region**)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

MARY WAGNER

Appellant

NOTICE OF APPEAL
(*Code*, Section 813)
(Criminal Proceedings Rules, Rule 40, Form 2)

TAKE NOTICE that MARY WAGNER appeals against (a) her conviction and sentence on a single count of Mischief (Interference with Property); (b) her conviction and sentence on four counts of Breach of Probation; (c) the Order denying public funding; (d) the Order denying the Disclosure of Third Party Records; (e) the Order denying the admission of *viva voce* evidence of experts on the Applicant's Constitutional Challenge concerning the constitutional validity of s. 223 of the *Criminal Code*; (f) the Order denying the admission of *viva voce* evidence of experts concerning the construction of s. 37 of the *Criminal Code*; (g) the Probation Order denying the Appellant her

constitutional rights to (i) freedom of speech; (ii) freedom of expression; (iii) freedom of conscience; and (iv) freedom of religion, on all public sidewalks and public areas within 100 meters of places where abortions are performed, and (h) and each conviction and sentence and all Orders and Rulings made by the Honorable Mr. Justice Fergus ODonnell of the Ontario Court of Justice at the North Toronto Courthouse, located at 1000 Finch Avenue West, Toronto, Ontario, on or before Thursday, June 12, 2014.

THE DATES UPON WHICH THE SUMMARY CONVICTION COURT HEARD EVIDENCE ARE AS FOLLOWS:

1) Trial – 3 days of evidence – Friday December 6, 2013 in Courtroom 304; Wednesday, December 11, 2013 in Courtroom 310; Thursday, December 12, 2013 in Courtroom 310.
2) Conviction and Sentencing – 1 day – Thursday, June 12, 2014 in Courtroom 307

THE GROUNDS FOR THIS APPEAL ARE:

1) That the Honorable Justice erred by denying the Appellant her constitutional right to make full answer and defense, contrary to *R. v. Seaboyer*, [1991] 2 S.C.R. 577 and to ss. 7 and 11(d) of the *Charter of Rights and Freedoms* by refusing to permit the Appellant to attack the constitutional validity of s. 223 of the *Criminal Code* which eliminates from the definition of "human being" all living unborn children, and so denied the Appellant her constitutional right by barring the *viva voce* testimony of the Appellant's expert witnesses, who were prepared to testify that a new human being begins at conception and/or fertilization, and that abortion is an assault that kills a living human being.

2) That the Honorable Justice further erred by denying the Appellant her constitutional and statutory rights to rely upon s. 37 of the *Criminal Code*, which permits "every one", including the Appellant, to come to the third party defense and rescue of any human being ("any one") facing imminent assault, and so denied the Appellant her

constitutional and statutory rights by barring the *viva voce* testimony of the Appellant's expert witnesses, who were prepared to testify that a new human being begins at conception and/ or fertilization, and that abortion is an assault that kills a living human being.

3) That the Honorable Justice further erred by deciding that the factual basis of the Appellant's constitutional arguments was a waste of the court's time by ruling that, "no purpose would be served by having an evidentiary hearing on Ms. Wagner's Charter application and that, in the current state of the law, it has no possibility of success," despite the fact that: (a) the constitutionality of s. 223 of the *Criminal Code* was a novel question that had never been previously been decided, and thus the issue was NOT *res judicata*; and (b) *stare decisis* did NOT apply, since there had been no previous construction by any court in Canada as to whether "any one" in s. 37 of the *Criminal Code* includes all living human beings, born and unborn;

4) That the Honorable Justice further erred: (a) by injecting into the legal arguments and proceedings, after proceedings adjourned, by the use of emails to counsel, his idea that the comments of Findlayson J.A. in *R. v. Durette*, [1992] O.J. No. 1044 (ON. C.A.) were applicable to the present case; (b) by misapplying *Durette*, and wrongfully assuming the jurisdiction, authority and discretion to bar the factual foundation of the Appellant's constitutional arguments, and ruled that the Appellant's constitutional arguments were inevitably bound to fail in a higher court, even if there were a factual foundation to that argument and that argument was required to make full answer and defense; and (c) by erroneously thinking he was bound to apply *Durette*, the Honorable Justice pre-judged this present case, by deciding "that in the current state of the law" the Appellant's legal arguments had "no possibility of success", thus (i) giving rise to a reasonable apprehension of bias; and (ii) impeding the legal evolution of the law to adapt to new circumstances, knowledge, and changed societal values and morals.

5) That the Honorable Justice further erred by accepting the Crown's submission that it is beyond the jurisdiction of the courts to question the jurisdiction of Parliament

legally to define "human being" in any manner Parliament sees fit, whether or not Parliament's decision was: (a) made without consideration of any and all relevant scientific evidence; (b) based on discriminatory grounds prohibited under the *Charter of Rights and Freedoms*, such as discrimination on the basis of age, disability, race or gender; (c) for political purposes; (d) to legalize acts that would otherwise be murder as defined by the Criminal Code; or (e) contrary to the rule of law, the supremacy of God, natural law, the unwritten and written Constitution of Canada and international human rights laws against genocide or the killing of unborn children.

6) That the Honorable Justice further erred by ruling that s. 223 of the *Criminal Code* is not *ultra vires* under s. 52 of the *Constitution Act, 1982*.

7) That the Honorable Justice further erred by ruling that s. 223 of the *Criminal Code* does not violate sections 7, 11(d), 15, and 26 of the *Charter of Rights and Freedoms*, and the *Preamble* thereto.

8) That the Honorable Justice further erred by denying the Appellant standing to raise her constitutional challenge to the validity of s. 223 of the *Criminal Code*.

9) That the Honorable Justice further erred by ruling that s. 223 of the *Criminal Code* applied generally throughout the entire *Criminal Code*, and used it to deny unborn human beings the benefit of equal protection as born human beings under s. 37 of the *Criminal Code*, contrary to s. 15 of the *Charter of Rights and Freedoms*, even though s. 223 in its context, is confined to the homicide provisions of the *Criminal Code*.

10) Alternatively, that the Honorable Justice further erred by ruling that s. 223 of the *Criminal Code* applied generally throughout the entire *Criminal Code*, and used it to deny unborn human beings the benefit of equal protection under the law, contrary to s. 15 of the *Charter of Rights and Freedoms*.

11) That the Honorable Justice further erred by denying the production and disclosure of third party records in the possession of the abortion facility, the said records being required to prove that the Appellant was justified in using reasonable force by the use of oral and written words to try to persuade pregnant mothers from killing their unborn children by abortion, and that these unborn children, on the morning of August 15, 2012, (a) were in imminent danger of a fatal assault, and (b) were, as a matter of fact, killed shortly after the appellant failed in her attempt to save their lives.

12) That the Honorable Justice further erred by denying the Appellant the defense of s. 37 of the *Criminal Code*, by ruling: (a) that unborn children did not come within the scope of those human beings eligible to be protected by a third party; (b) that the Appellant did not come within the scope of s. 37 because she was found to be non-violent in that she did not use physical force; (c) that words and attempts to communicate, did not constitute proportional force; and (d) that the unborn children the Appellant was trying to rescue were not under her protection, as they were strangers to her.

13) That the Honorable Justice further erred by denying the Appellant the common law defenses of necessity and the rescue of third parties in need of protection.

14) That the Honorable Justice further erred by denying the Appellant public funding to make full answer and defense in this case, the present case being a constitutional test case of great public importance and national significance.

15) That the Honorable Justice further erred by imposing an unconstitutional sentence upon the appellant: (a) by, in effect, imposing an injunction as a condition of probation; and (b) by banning the Appellant from engaging in all peaceful public sidewalk counseling and informational communication within 100 meters of any abortion clinic in the Province of Ontario, contrary to her constitutional rights of free speech and freedom of expression, freedom of conscience and freedom of religion, as entrenched in s. 2 of the *Charter of Rights and Freedoms.*

16) Such further and other grounds as counsel may advise and this Honorable Court may permit, given that this Notice of Appeal is prepared within 30 day of conviction and sentencing, in the absence of reasons delivered by the trial judge, on all of the issues raised in this case, except for the matter of public funding.

ON THE HEARING OF THIS APPEAL, THE APPELLANT WILL RELY UPON THE FOLLOWING:

1) Transcripts of the entire proceedings, including legal submissions, both oral and written, all evidence at trial and sentencing, opinion letter and CV of Dr. Thorp, the statutory declaration, CV and academic literature of Dr. M. Condic;

2) All exhibits from all proceedings, including the trial and sentencing.

3) Factum, Book of Authorities and Appeal Book.

4) Such further and other materials as counsel may advise and this Honorable Court may permit.

THE RELIEF SOUGHT IS:

1) An Order allowing the appeal against conviction on all counts and a direction that a verdict of acquittal be entered on all counts;

2) An Order that s. 223 of the *Criminal Code* is unconstitutional contrary to s. 52 of the *Constitution Act, 1982*, and the unwritten Constitution of Canada, and is of no force and effect;

3) An Order that the sentence of the Appellant be declared unconstitutional contrary to s. 52 of the *Constitution Act, 1982*, and the unwritten Constitution of Canada, and is of no force and effect;

4) Alternatively, an Order for a new trial, with the direction that the Appellant be permitted to make full answer and defense, and be given standing to make her constitutional attack of s. 223 of the *Criminal Code*, including an Order for the admission of the *viva voce* evidence of Dr. Condic and Dr. Thorp, and such other experts as may be called by the defense, in order to establish the legally required factual record for the constitutional attack.

5) An Order for the production and disclosure to the defense of the Third Party records in the possession and control of the abortion facility, pertaining to patients seen on August 15, 2012;

6) An Order for public funding for two counsel, at any retrial and for any appeal related to this case, at an hourly rate equal to or above that paid to senior outside constitutional counsel retained by the Ministry of the Attorney General for the provision of legal services.

7) An Order pursuant to Rules 3.02 and 2.01 of the *Criminal Proceeding Rules*: (a) for the Superior Court of Ontario to extend the time for the preparation and filing of the factum and other related documents needed for this appeal; (b) to delay the starting of the time clock for the limitation periods, until after the Honorable trial judge, Mr. Justice Fergus ODonnell, has written and delivered all his reasons in writing to counsel and a transcript has been prepared of those reasons, whichever date is later, and (c) to permit a 40 page factum to be filed by the Appellant.

8) Such further and other Orders as counsel may request and as this Honorable Court may permit, given that appellate counsel does not have available at this time all the fully considered reasons of the trial judge, except on the funding issue, for this Notice of Appeal was prepared, in the absence of all the other reasons, in order to meet the time limits imposed by the Rules.

THE APPELLANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPEAL:

1) By service in accordance with Rule 5, through appellant's counsel, Charles I. M. Lugosi, Lugosi Law Firm, 107 Wellington Street, Brantford Ontario, N3T 2 M1, T 519-761-7000; F 519-759-4863 Email: charles@lugosi-law.com

Dated at Brantford, Ontario, this 3rd day of July 2014

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