

Ivana Levkovic (appellant) v. Her Majesty the Queen (respondent) and Attorney General of  
Canada and Criminal Lawyers' Association of Ontario (interveners)  
(34229; 2013 SCC 25; 2013 CSC 25)

**Indexed As: R. v. Levkovic (I.)**

Supreme Court of Canada  
McLachlin, C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver, JJ.  
May 3, 2013.

**Summary:**

The accused was charged under s. 243 of the Criminal Code with concealing the dead body of a child. Under the definition of the offence, it had always been immaterial whether the child died before, during or after birth.

The Ontario Superior Court held that the words "died before ... birth" in s. 243 of the Code were unconstitutionally vague. The court severed "before" from the section, leaving it to read in its material part "whether the child died during or after birth". The prosecutor acknowledged that he could not establish either the cause or the time of death. Thus he offered no evidence in support of the allegation in the indictment. The court acquitted the accused. The Crown appealed.

The Ontario Court of Appeal, in a decision reported at 271 O.A.C. 177, allowed the appeal and ordered a new trial. The court held that the trial judge erred in holding in concluding that the "before birth" reference was unconstitutionally vague. The accused appealed.

The Supreme Court of Canada dismissed the appeal.

**Civil Rights - Topic 3107**

Trials - Due process, fundamental justice and fair hearings - Void for vagueness doctrine - Section 243 of the Criminal Code provided that "Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years." - The accused was charged under s. 243 - The trial judge held that the words "died before ... birth" in s. 243 of the Code were unconstitutionally vague - He severed "before" from the section, leaving it to read in its material part "whether the child died during or after birth" - The prosecutor acknowledged that he could not establish either the cause or the time of death - Thus he offered no evidence in support of the allegation in the indictment - The accused was acquitted - The Crown appealed - The Ontario Court of Appeal allowed the appeal and ordered a new trial - The court held that the trial judge erred in concluding that the "before birth" reference was unconstitutionally vague - The accused appealed - She submitted that s. 7 of the Charter held s. 243 to a more exacting standard of precision because it interfered with what in her view was a constitutionally protected personal autonomy and privacy interest: every woman's right not to disclose a naturally failed pregnancy - The Supreme Court of Canada stated that this submission amounted to a

challenge for vagueness in form but overbreadth in substance - A challenge for overbreadth would require the court to balance the impact of s. 243 on the accused's constitutionally protected interests against the impact necessary for s. 243 to achieve its justified legislative objectives - The accused's arguments regarding this balance were rejected by both courts below - Moreover, there was no challenge for overbreadth on this appeal - It was not open to the accused, in characterizing her privacy interest submission as a vagueness challenge, to circumvent this balancing exercise that informed a proper constitutional challenge for overbreadth - See paragraphs 7 to 9 and 32 to 41.

### **Civil Rights - Topic 3107**

Trials - Due process, fundamental justice and fair hearings - Void for vagueness doctrine - Regarding the void for vagueness doctrine, the Supreme Court of Canada stated that "The doctrine against vagueness is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion. Understood in light of its theoretical foundations, the doctrine against vagueness is a critical component of a society grounded in the rule of law" - See paragraph 32.

### **Civil Rights - Topic 3107**

Trials - Due process, fundamental justice and fair hearings - Void for vagueness doctrine - [See **Criminal Law - Topic 1450.7**].

### **Civil Rights - Topic 3107.2**

Trials - Due process, fundamental justice and fair hearings - Overbreadth principle - [See first **Civil Rights - Topic 3107**].

### **Criminal Law - Topic 1450.7**

Concealing dead body of child - Legislation - Interpretation - Section 243 of the Criminal Code provided that "Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years." - The Supreme Court of Canada applied a purposive and contextual approach to the interpretation of s. 243 - The court stated that s. 243 was largely concerned with facilitating the investigation of homicides - In order to do so, s. 243 had to cover potential victims of homicide - The court rejected the submission that s. 243 was impermissibly vague in its application to a child that died before birth - "Any ambiguity as to this element of the offence is resolved in favour of the accused, as it must be, by restricting the pre-birth application of s. 243 to the delivery of a child that would likely have been born alive. By this I mean, here and throughout, a *child that has reached a stage of development where, but for some external event or circumstances, it would likely have been born alive.* ... regarding the fault element of s. 243 in its application to a child that died before birth ... the burden of proof would be on the prosecution to establish the accused's awareness that the child died at a time when it was likely to be born alive. Any doubt in this regard would require an acquittal. In addition, as in cases where the child dies at or after birth, the prosecution must prove that the accused disposed of its body 'with intent to conceal the fact that [the child's] mother has been delivered of it.'" - See paragraphs 13, 16 and 43 to 79.

**Criminal Law - Topic 1450.8**

Concealing dead body of child - Evidence and proof - [See **Criminal Law - Topic 1450.7**].

**Statutes - Topic 501**

Interpretation - General principles - Purpose of legislation - Duty to promote object of statute - [See **Criminal Law - Topic 1450.7**].

**Statutes - Topic 2601**

Interpretation - Interpretation of words and phrases - Modern rules (incl. interpretation by context) - General - [See **Criminal Law - Topic 1450.7**].

**Cases Noticed:**

Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123; 109 N.R. 81; 68 Man.R.(2d) 1, refd to. [para. 2].  
Connally v. General Construction Co. (1926), 269 U.S. 385, refd to. [para. 2, footnote 1].  
Cline v. Frink Dairy Co. (1927), 274 U.S. 445, refd to. [para. 2, footnote 1].  
R. v. Mabior (C.L.) (2012), 434 N.R. 431; 2012 SCC 47, refd to. [para. 3].  
R. v. Berriman (1854), 6 Cox C.C. 388, refd to. [para. 27].  
PHS Community Services Society et al. v. Canada (Attorney General), [2011] 3 S.C.R. 134; 421 N.R. 1; 310 B.C.A.C. 1; 526 W.A.C. 1; 2011 SCC 44, refd to. [para. 29].  
R. v. Nova Scotia Pharmaceutical Society (No. 2), [1992] 2 S.C.R. 606; 139 N.R. 241; 114 N.S.R.(2d) 91; 313 A.P.R. 91, refd to. [para. 32].  
Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76; 315 N.R. 201; 183 O.A.C. 1; 2004 SCC 4, refd to. [para. 32].  
Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031; 183 N.R. 325; 82 O.A.C. 243, refd to. [para. 40].

**Statutes Noticed:**

Criminal Code, R.S.C. 1985, c. C-4, sect. 243 [para. 43].

**Authors and Works Noticed:**

Goudge Report - see Ontario, Report of Inquiry into Pediatric Forensic Pathology in Ontario: Policy and Recommendations.  
Manning, M., and Sankoff, P., Manning, Mewett & Sankoff: Criminal Law (4th Ed. 2009), pp. 75 [para. 34]; 76 [paras. 33, 34].  
Ontario, Report of Inquiry into Pediatric Forensic Pathology in Ontario: Policy and Recommendations (Goudge Report) (2008), vol. 1, p. 4 [para. 68, footnote 2].  
Stuart, D., Canadian Criminal Law: A Treatise (6th Ed. 2011), pp. 20, 21 [para. 33].  
Williams, Glanville, Criminal Law: The General Part (2nd Ed. 1961), pp. 575, 576 [para. 33].

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Robert J. Frater and Richard Kramer, for the intervener, the Attorney General of Canada;  
Marie Henein and Danielle Robitaille, for the intervener, the Criminal Lawyers'  
Association of Ontario.

**Solicitors of Record:**

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Attorney General of Canada, Ottawa, Ontario, for the intervener, the Attorney General of  
Canada;  
Henein & Associates, Toronto, Ontario, for the intervener, the Criminal Lawyers'  
Association of Ontario.

This appeal was heard on October 10, 2012, by McLachlin, C.J.C., LeBel, Fish, Abella,  
Rothstein, Cromwell and Moldaver, JJ., of the Supreme Court of Canada. Fish, J., delivered the  
following reasons for judgment for the court in both official languages on May 3, 2013.

Appeal dismissed.

Editor: Jana A. Andersen

**Civil Rights - Topic 3107**

Trials - Due process, fundamental justice and fair hearings - Void for vagueness doctrine -  
Section 243 of the Criminal Code provided that "Every one who in any manner disposes  
of the dead body of a child, with intent to conceal the fact that its mother has been  
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born alive. By this I mean, here and throughout, a *child that has reached a stage of  
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dies at or after birth, the prosecution must prove that the accused disposed of its body  
'with intent to conceal the fact that [the child's] mother has been delivered of it.'" - See  
paragraphs 13, 16 and 43 to 79.

## **Civil Rights - Topic 3107.2**

Trials - Due process, fundamental justice and fair hearings - Overbreadth principle - [Section 243 of the Criminal Code provided that "Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years." - The accused was charged under s. 243 - The trial judge held that the words "died before ... birth" in s. 243 of the Code were unconstitutionally vague - He severed "before" from the section, leaving it to read in its material part "whether the child died during or after birth" - The prosecutor acknowledged that he could not establish either the cause or the time of death - Thus he offered no evidence in support of the allegation in the indictment - The accused was acquitted - The Crown appealed - The Ontario Court of Appeal allowed the appeal and ordered a new trial - The court held that the trial judge erred in concluding that the "before birth" reference was unconstitutionally vague - The accused appealed - She submitted that s. 7 of the Charter held s. 243 to a more exacting standard of precision because it interfered with what in her view was a constitutionally protected personal autonomy and privacy interest: every woman's right not to disclose a naturally failed pregnancy - The Supreme Court of Canada stated that this submission amounted to a challenge for vagueness in form but overbreadth in substance - A challenge for overbreadth would require the court to balance the impact of s. 243 on the accused's constitutionally protected interests against the impact necessary for s. 243 to achieve its justified legislative objectives - The accused's arguments regarding this balance were rejected by both courts below - Moreover, there was no challenge for overbreadth on this appeal - It was not open to the accused, in characterizing her privacy interest submission as a vagueness challenge, to circumvent this balancing exercise that informed a proper constitutional challenge for overbreadth - See paragraphs 7 to 9 and 32 to 41.

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