

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Levkovic, 2013 SCC 25, [2013] 2 S.C.R. 204 | **Date:** 20130503  **Docket:** 34229 |

Between:

Ivana Levkovic

Appellant

and

Her Majesty The Queen

Respondent

- and -

Attorney General of Canada and

Criminal Lawyers’ Association of Ontario

Interveners

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver JJ.

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| **Reasons for Judgment:**  (paras. 1 to 81) | Fish J. (McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Moldaver JJ. concurring) |

R. *v.* Levkovic, 2013 SCC 25, [2013] 2 S.C.R. 204

Ivana Levkovic Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Canada and

Criminal Lawyers’ Association of Ontario Interveners

**Indexed as: R. *v.*** Levkovic

2013 SCC 25

File No.: 34229.

2012:  October 10; 2013:  May 3.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver JJ.

on appeal from the court of appeal for ontario

*Constitutional law — Charter of Rights —* *Right to liberty — Right to security of person — Fundamental justice — Vagueness — Criminal Code provision prohibiting disposing of dead body of child with intent to conceal its delivery whether child died before, during or after birth — Whether provision is impermissibly vague in its application to child that died before birth — Whether provision infringes rights to liberty and security of person — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C‑46, s. 243.*

*Criminal law — Offences — Concealing body of child — Whether phrase “child [that] died before . . . birth” satisfies requirement of certainty —Criminal Code, R.S.C. 1985, c. C‑46, s. 243.*

While cleaning a recently vacated apartment, a building superintendent discovered on the balcony a bag containing the remains of a human baby. According to the Crown, the remains were of a female delivered “at or near full term”. The cause of death could not be determined and it was unknown whether there had been a live birth. The accused was charged under s. 243 of the *Criminal Code* with concealing the dead body of a child. Before any evidence was called, she challenged the constitutionality of s. 243 on the grounds that the section infringes her right to liberty and security under s. 7 of the *Charter*. The trial judge concluded that the concept of a child that died before birth is unconstitutionally vague because he could not identify the moment on the gestational spectrum when a fetus becomes the body of a child for the purpose of s. 243. He severed the word “before” from s. 243. The Crown did not call evidence and the accused was acquitted. The Court of Appeal allowed an appeal and ordered a new trial on the grounds that the trial judge applied an overly demanding standard of vagueness. The Court of Appeal relied on the “chance of life” standard from *R. v. Berriman* (1854), 6 Cox C.C. 388, to conclude that a fetus becomes a child for the purpose of s. 243 when the fetus has reached a stage when, but for some external event or circumstance, it would likely have been born alive.

*Held*: The appeal should be dismissed.

Impermissibly vague laws mock the rule of law and scorn an ancient and well-established principle of fundamental justice: No one may be convicted or punished for an act or omission that is not clearly prohibited by a valid law. The issue on this appeal is whether s. 243 of the *Criminal Code* satisfies these constitutional requirements.

The risk of incarceration upon conviction clearly engaged the accused’s liberty interest under s. 7 of the *Charter*. It is thus unnecessary to dispose of her submission that s. 243 infringes s. 7 because it interferes with a decision of fundamental personal importance: whether and how to disclose the natural end of a failed pregnancy. Furthermore, the accused’s argument that s. 7 of the *Charter* must hold s. 243 to a heightened standard of precision because it interferes with every woman’s right not to disclose a naturally failed pregnancy raises a challenge for vagueness in form but overbreadth in substance. Given that the accused’s overbreadth arguments were rejected by both courts below and not raised on this appeal, there is no proper basis to revisit the issue here.

In accordance with s. 7 of the *Charter*, in a criminal context, a statutory provision must afford citizens fair notice of the consequences of their conduct and it must limit the discretion of those charged with its enforcement. A provision that fails to satisfy these essential requirements is void for vagueness. This is judicially determined by examination of both the provision’s text and context. Section 243 meets the minimum standard of precision required by the *Charter*. In its application to a child that died before birth, it only captures the disposal of the remains of children that were likely to be born alive. A conviction will only lie where the Crown proves that the child, to the knowledge of the accused, was likely to have been born alive. Section 243 gives fair notice of the risk of prosecution and conviction and limits with sufficient clarity the discretion of those charged with its enforcement. There is thus no need to conduct a s. 1 analysis.

A court can conclude that a law is unconstitutionally vague only after exhausting its interpretive function. This requires considering prior judicial interpretations of the provision, the legislative purpose of the provision, its subject matter and nature, societal values and related legislative provisions. A plain reading of s. 243 makes clear that it is focused on the event of birth. The interpretation of s. 243 is informed by *Berriman*, which sets out that an accused can only be convicted of child concealment if he or she, with intent to conceal its birth, disposed of the body of a child that had reached a point of development where, but for some accidental circumstances it might have been born alive. However, where *Berriman* required that the fetus “*might* have been born alive”, a *likelihood* requirement is to be preferred. A likelihood standard best comports with the late term focus of s. 243 and affords greater certainty in its application. Moreover, a likelihood standard is consistent with the primary purpose of s. 243 in facilitating the investigation of other *Criminal Code* provisions: the homicide provisions that apply only when the victim is a human being which, in the case of a child, requires that the child has completely proceeded, in a living state, from the body of its mother; ss. 238 and 242, both of which focus on the event of birth; and, s. 662(4) which, on a charge of murder or infanticide, permits a conviction under s. 243 where neither murder nor infanticide is made out. Limiting the pre-birth application of s. 243 to fetuses that were likely to have been born alive is consistent with the clear late term focus of these offences.

Section 243 is not vague because an accused is dependent on expert medical evidence to know whether a fetus would likely have been born alive. Medical evidence would be required even if s. 243 provided a detailed description of the precise moment on the gestational spectrum where a miscarriage becomes a still birth.

**Cases Cited**

**Discussed:** *R. v. Berriman* (1854), 6 Cox C.C. 388; **referred to:** *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Connally v. General Construction Co.*, 269 U.S. 385 (1926); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 7.

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 222(1), 223(1), 238, 242, 243, 662(4).

R.R.O. 1990, Reg. 1094, s. 20.

*Vital Statistics Act*, R.S.O. 1990, c. V.4, ss. 1 “still‑birth”, 9.1.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Armstrong and Watt JJ.A.), 2010 ONCA 830, 103 O.R. (3d) 1, 223 C.R.R. (2d) 261, 271 O.A.C. 177, 264 C.C.C. (3d) 423, 81 C.R. (6th) 376, [2010] O.J. No. 5252 (QL), 2010 CarswellOnt 9252, setting aside the acquittal entered by Hill J. (2008), 235 C.C.C. (3d) 417, 178 C.R.R. (2d) 285, 2008 CanLII 48647, [2008] O.J. No. 3746 (QL), 2008 CarswellOnt 5744, and ordering a new trial.  Appeal dismissed.

Jill Copeland, Delmar Doucette, Jessica Orkin and Nicole Rozier, for the appellant.

Jamie Klukach and Gillian Roberts, for the respondent.

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.

The judgment of the Court was delivered by

Fish J. —

I

1. Impermissibly vague laws mock the rule of law and scorn an ancient and well-established principle of fundamental justice: No one may be convicted or punished for an act or omission that is not clearly prohibited by a valid law. That principle is now enshrined in the *Canadian Charter of Rights and Freedoms*. This has been recognized by the Court since its earliest pronouncements on unconstitutional vagueness in the *Charter* era.
2. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, the Court cited with approval two decisions of the Supreme Court of the United States[[1]](#footnote-1) holding that “impermissibly vague laws” violate “the first essential of due process of law” (p. 1151), and continued as follows:

The principles expressed in these two citations are not new to our law. In fact they are based on the ancient Latin maxim *nullum crimen sine lege, nulla poena sine lege* ― that there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards . . . . This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law. [p. 1152]

1. And very recently, speaking for the Court in *R. v. Mabior*, 2012 SCC 47, [2012] S.C.R. 584, Chief Justice McLachlin reaffirmed the governing principle in these terms:

It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done . . . . Condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice. After-the-fact condemnation violates the concept of liberty in s. 7 of the *Canadian Charter of Rights and Freedoms* and has no place in the Canadian legal system. [para. 14]

1. Our concern here is with s. 243 of the *Criminal Code*, R.S.C. 1985, c. C‑46, which is said by the appellant to be impermissibly vague, at least in part. For that reason and to that extent, the appellant submits, s. 243 infringes her right to liberty and security of the person under s. 7 of the *Charter*. She submits as well that this infringement of s. 7 cannot be justified ― or “saved” ― under s. 1 of the *Charter*.
2. Section 243 makes it a crime in Canada to dispose of the dead body of a child with intent to conceal its delivery ― whether the child died *before*, *during*, or *after* birth. The decisive issue on this appeal is whether s. 243 is impermissibly vague in its application to a child that died *before* birth.
3. The trial judge held that it is; the Ontario Court of Appeal held that it is not. With respect for the contrary conclusion of the trial judge, I agree with the Court of Appeal.
4. The appellant argues that s. 7 of the *Charter* must hold s. 243 to a more exacting standard of precision because it interferes with what in her view is a constitutionally protected personal autonomy and privacy interest: every woman’s right not to disclose a naturally failed pregnancy.
5. In fact, however, the appellant’s vagueness challenge does not rest ultimately ― if at all ― on a woman’s constitutionally protected autonomy and privacy interests. On the contrary, the appellant expressly recognizes Parliament’s right to criminalize the concealment by a woman of the fact that she was delivered of a child that died during, after and even *before* birth. More particularly, she concedes that Parliament may “enact legislation which has application to the concealment of a fetus at some stages of development prior to live birth”. Her constitutional challenge relates exclusively to a woman’s “inability to determine the conduct to which s. 243 applies in the context of a child that dies before birth”: A.F., at para. 4.
6. It seems to me that the appellant’s submission regarding a woman’s right not to disclose a naturally failed pregnancy amounts 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 appellant’s constitutionally protected interests against the impact necessary for s. 243 to achieve its justified legislative objectives. The appellant’s arguments regarding this balance were rejected by both courts below. Moreover, there is no challenge for overbreadth on this appeal. And it is not open to the appellant, in characterizing her privacy interest submission as a vagueness challenge, to circumvent this balancing exercise that informs a proper constitutional challenge for overbreadth.
7. There is otherwise no dispute regarding the analytical framework for determining whether a statutory provision is void for vagueness. Nor is there any dispute as to the governing criteria: In a criminal context, the impugned provision must afford citizens fair notice of the consequences of their conduct and limit the discretion of those charged with its enforcement.
8. Whether the provision satisfies these essential requirements will be judicially determined by examination of both its text and context. Normally, in making that determination, the court will first consider the plain meaning of the words used by Parliament to define the essential elements of the offence. In this regard, the requirement of a specific intent, as in this case, will often shed light on the intelligibility of the terms used to describe the prohibited act or omission.
9. I shall later have more to say about these established rules of interpretation. As we shall see, their application here leads me to conclude that s. 243 of the *Criminal Code* is not impermissibly vague in its application to a child that dies before birth. Only that aspect of the provision is in issue on this appeal.
10. 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*.
11. I recognize, of course, that provincial and territorial legislation requires reporting of *all* stillbirths, generally defined as “the complete expulsion or extraction from its mother of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more [without signs of life]”, or words to this effect: see, for example, *Vital Statistics Act*, R.S.O. 1990, c. V.4, s. 1.
12. The unchallenged constitutionality of these provisions may well negate the privacy and autonomy interests claimed by the appellant in this case. And they doubtless provide clear and specific standards for provincial reporting purposes. In my view, however, they cannot be invoked ― by “harmonization”, analogy, or otherwise ― to expand by judicial fiat the meaning of “child [that] died before . . . birth” in s. 243 of the *Criminal Code*. Section 243, an enactment that falls squarely within federal jurisdiction, has a distinct legislative history and creates a crime for different legislative purposes.
13. Finally, a brief word regarding the fault element of s. 243 in its application to a child that died before birth. The Crown concedes, properly in my view, that 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”.
14. For these reasons and the reasons that follow, I would dismiss the appellant’s appeal to this Court, affirm the judgment of the Court of Appeal, and remit the matter for trial.

II

1. By agreement, the appellant’s constitutional challenge to s. 243 was heard and decided by the trial judge before any evidence was called. Accordingly, the facts alleged by the Crown remain to this day unproven and are thus conditionally relevant here as a matter of context only.
2. For present purposes, the following summary will suffice.
3. While cleaning a recently vacated apartment, a building superintendent discovered on the balcony a bag containing the remains of a human baby. Post-mortem examination revealed that the remains were of a female delivered “at or near full term”: R.F., at para. 8. Due to the decomposition of the remains, the cause of death could not be determined and it was unknown whether there had been a live birth.
4. Following media reports of the superintendent’s discovery, Ivana Levkovic, the appellant in this Court, attended at a police station and gave a statement to the police. She gave birth to the baby, she explained, after falling while alone in the apartment. She then placed the baby in a bag, deposited the bag on the balcony, and left the apartment. Nothing in her statement to the police suggests that the baby was alive at birth.
5. Ms. Levkovic was charged with concealing the body of a child under s. 243 of the *Criminal Code*. She pleaded not guilty and, before any evidence was called, challenged the constitutionality of s. 243 on the ground that it is impermissibly vague in its application to a *child that died before birth*. To this extent, she submitted, s. 243 violates s. 7 of the *Charter*.
6. The trial judge granted Ms. Levkovic’s application: (2008), 235 C.C.C. (3d) 417. He concluded that the concept of a child that died before birth is unconstitutionally vague because he could not identify the moment on the gestational spectrum when a fetus becomes the body of a child within the meaning of s. 243.
7. To bring the provision into compliance with s. 7 of the *Charter*, the trial judge severed the word “before” from the text of the provision, thereby limiting its application to children that died either during or after birth.
8. The Crown elected to call no evidence and the trial judge acquitted the appellant.
9. The Court of Appeal allowed an appeal by the Crown, set aside the decision of the trial judge, restored the pre-birth application of s. 243, and ordered a new trial: 2010 ONCA 830, 103 O.R. (3d) 1.
10. The Court of Appeal concluded that the trial judge had erred by applying an overly demanding standard of vagueness and in failing to apply *R. v. Berriman* (1854), 6 Cox C.C. 388 (Surrey Assizes), to his interpretation of s. 243. Relying on *Berriman*, the Court of Appeal held that a fetus becomes a child for the purpose of s. 243 upon reaching a stage in its development when, but for some external event or other circumstances, it would likely have been born alive.
11. Ms. Levkovic now asks this Court to overrule the Court of Appeal and restore her acquittal. She raises two main grounds: (1) that the Court of Appeal erred in conducting an insufficiently contextual vagueness analysis, overlooking the full impact of s. 243 on her *Charter*-protected right toliberty and security; and (2) that the Court of Appeal erred in relying on the *chance of life* standard to uphold the constitutionality of s. 243.

III

1. Plainly, Ms. Levkovic’s prosecution under s. 243 of the *Criminal Code* engages her liberty interest under s. 7 of the *Charter*, given the risk of her incarceration upon conviction: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 87.
2. It is therefore unnecessary at this stage to dispose of the appellant’s submission that s. 243 *also* infringes her liberty and security under s. 7 of the *Charter* because it interferes with a decision of fundamental personal importance: whether and how to disclose the natural end of a failed pregnancy.
3. Accordingly, I now turn instead to consider whether s. 243, though it engages s. 7 of the *Charter*, nevertheless passes constitutional muster because it accords with the principles of fundamental justice.

IV

1. 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: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 626-27; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*,2004 SCC 4, [2004] 1 S.C.R. 76, at para. 16.
2. Since long before the *Charter*, Canadian criminal law has adhered to the principle of certainty: prohibited conduct must be fixed and knowable in advance: M. Manning and P. Sankoff, *Manning,* *Mewett & Sankoff: Criminal Law* (4th ed. 2009), at p. 76. As Glanville Williams explained in *Criminal Law: The General Part* (2nd ed. 1961), at pp. 575-76 (cited in D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at pp. 20-21):

. . . *Nullum crimen sine lege, Nulla poena sine lege* ― that there must be no crime or punishment except in accordance with fixed, predetermined law ― this has been regarded by most thinkers as a self-evident principle of justice ever since the French Revolution. The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for breach of that law is purposeless cruelty. . . .

. . . “Law” for this purpose means a body of fixed rules; and it excludes wide discretion even though that discretion be exercised by independent judges. The principle of legality involves rejecting “criminal equity” as a mode of extending the law.

1. This does not mean that an individual must know with certainty whether a particular course of conduct will ultimately result in a conviction of the crime that prohibits such conduct. What it does mean is that the essential elements of the crime must be ascertainable in advance. If an accused must wait “until a court decides what the contours and parameters of the offence are then the accused is being treated unfairly and contrary to the principles of fundamental justice”: Manning, at pp. 75-76.
2. Individuals are nonetheless expected to refrain from conduct that tests the boundaries of criminal law lest they bear the consequences of the risk they have knowingly assumed: see *Canadian Foundation for Children*, at para. 42. Understandably, the appellant acknowledges that the Constitution contemplates a necessary degree of imprecision in this regard. She submits, however, that such imprecision is unconstitutional if it requires individuals to refrain from constitutionally protected conduct.
3. The appellant argues that s. 243 must explicitly draw a dividing line between miscarriages and stillbirths lest a woman feel compelled by her uncertainty to give up more of her *Charter-*protected privacy than necessary. In effect, the appellant urges the Court to modify the well-established vagueness standard by introducing an additional factor into the vagueness analysis: the potential chilling impact of the impugned provision on *Charter-*protected interests. I would decline this invitation to vary the governing analytical framework established by the Court.
4. The rule against unconstitutional vagueness is primarily intended to assure the intelligibility of the criminal law to those who are subject to its sanctions and to those who are charged with its enforcement. As this Court stated in *Ontario v. Canadian Pacific Ltd.*,[1995] 2 S.C.R. 1031, at para. 82:

In the context of vagueness, proportionality plays no role in the analysis. There is no need to compare the purpose of the law with its effects (as in overbreadth) . . . . A court is required to perform its interpretive function, in order to determine whether an impugned provision provides the basis for legal debate.

1. This does not mean that the impact of s. 243 on a woman’s privacy interests is irrelevant to its constitutionality. However, it is important to maintain the analytical distinction between true vagueness and the additional vagueness concern raised by the appellant. The latter, in my view, is more appropriately considered an aspect of overbreadth and dealt with in that context. As the respondent rightly points out, failing to do so would create a “lopsided” analysis that “takes account of individual interests . . . without equal regard to the law’s objectives”: R.F., at para. 63.
2. As this Court held in *Nova Scotia Pharmaceutical*, “once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the ‘minimal impairment’ stage of s. 1 analysis” (p. 643). Or, in this case, where no *Charter* violation has yet been established and there is therefore no need to consider s. 1, additional precision-based arguments relating to the scope of the provision should be considered in an overbreadth analysis.
3. Where a law meets the minimum standard of precision required by the *Charter*,it may nevertheless by “[g]enerality and imprecision of language . . . fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth”: *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at pp. 94-95.
4. Given that the appellant’s overbreadth arguments were rejected by both courts below and not raised on this appeal, there is no proper basis to revisit the issue here.
5. I turn then to the question at the heart of this appeal: Does s. 243 sufficiently limit enforcement discretion and provide citizens with fair notice of the type of conduct that risks criminal sanction? As mentioned at the outset, I believe that it does.

V

1. Section 243 states:

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

1. A plain reading of its text makes clear that s. 243 is focused on the event of birth. The phrase “before, during or after birth” leaves no room for doubt in this regard. Indeed the parties agree that in its application to a *child that died before birth*, s. 243 applies only to stillbirths ― not to miscarriages or abortions: see A.F., at paras. 3-4.
2. Despite this clear connection to the event of birth, the appellant argues that the word “before” renders s. 243 vague because it does not clearly distinguish a birth from a miscarriage. In other words, a woman may not know whether she has miscarried and is therefore outside the scope of s. 243, or has instead experienced a stillbirth and may therefore be caught by s. 243. From the appellant’s perspective, the transition point between miscarriage and stillbirth is critical. It represents the moment when a fetus becomes a child and therefore delineates the boundary between permissible and criminal conduct: only the concealment of the body of a child is caught by s. 243.
3. Thus, the central vagueness question is whether s. 243 sufficiently identifies the moment on the gestational spectrum when a miscarriage becomes a stillbirth. The answer to this question does not lie entirely and exclusively in the text of s. 243.
4. A court can conclude that a law is unconstitutionally vague only after exhausting its interpretive function. The court “must first develop the full interpretive context surrounding an impugned provision”: *Canadian Pacific*, at paras. 47 and 79.
5. To develop a provision’s “full interpretive context”, this Court has considered: (i) prior judicial interpretations; (ii) the legislative purpose; (iii) the subject matter and nature of the impugned provision; (iv) societal values; and (v) related legislative provisions: *Canadian Pacific*, at paras. 47 and 87.
6. Relevant jurisprudence as to the scope of this offence dates back over 150 years to the English case of *Berriman*. Ms. Berriman was charged with concealing the birth of her child. The police linked Ms. Berriman to the “half calcined” bones of a baby with a gestational age of seven to nine months. Erle J. instructed the jury not to convict if the fetus could have had no “chance of life”:

This offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth, that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself or of its mother, it might have been born alive.  There is no law which compels a woman to proclaim her own want of chastity, and if she had miscarried at a time when the fœtus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probably [*sic*] is that the child would not be born alive. [p. 390]

1. According to this test, an accused could only be convicted of child concealment if he or she, with the intent to conceal its birth, disposed of the body of a child that had reached a point of development where, “but for some accidental circumstances . . . it might have been born alive”.
2. *Berriman* suggests that an unborn child of at least seven months is more likely than not to be born alive. By setting seven months as a guideline ― rather than a bright line ― the court in that case recognized that a child’s chance of being born alive will generally increase along the gestational spectrum but is not necessarily predictable based on the gestational age of the fetus alone.
3. I would in any case hesitate to import into s. 243 a fixed threshold based on gestational age that Parliament has so far chosen to omit.
4. In my view, s. 243 is informed by *Berriman*.
5. However, where Erle J. found it sufficient in *Berriman* that the fetus “*might* have been born alive”, I would adopt a *likelihood* requirement instead. I agree with the Court of Appeal that, for the purposes of s. 243, a fetus becomes a child when the fetus “has reached a stage in its development when, but for some external event or other circumstances, it would *likely* have been born alive” (para. 115 (emphasis added)).
6. This “likelihood” standard best comports with the late term focus of s. 243 and thus affords greater certainty in its application.
7. To support a conviction under s. 243, it must be shown that the “remains” disposed of were the remains of a child. In cases involving death before birth, the burden is therefore on the Crown to prove that the fetus would likely have been born alive.
8. This brings me to another important aspect of a full contextual interpretation of s. 243: its legislative purpose and context.
9. The parties agree that s. 243 is largely concerned with facilitating the investigation of homicides. In order to do so, s. 243 must cover potential victims of homicide.
10. Pursuant to s. 222(1), the homicide provisions of the *Criminal Code* apply only when the victim is a human being. And pursuant to s. 223(1) of the *Code*,a child becomes a human being “when it has completely proceeded, in a living state, from the body of its mother, whether or not (*a*) it has breathed; (*b*) it has an independent circulation; or (*c*) the navel string is severed”.
11. In order to facilitate the investigation of homicides, s. 243 must therefore apply to children that were either born alive or were likely to be born alive and thus capable of satisfying the *Criminal Code* definition of a human being in s. 223(1). As the trial judge reasoned at para. 156:

. . . allowing persons to conduct themselves as though pregnancy terminated in still-birth, and to say so if challenged, all without reliable government certification, amounts to an easy and unacceptable escape for those inclined to eliminate a new-born infant by killing it. Unchecked and unreviewable disposal of a still-born child effectively defeats the state’s ability to verify that death preceded live birth.

1. Accordingly, a *likelihood* approach to s. 243 ― that is, requiring evidence that the child would likely have been born alive ― serves its goal of facilitating the investigation of potential homicides.
2. That said, to fully achieve its purpose, s. 243 must also facilitate the investigation of ss. 238 and 242, which both contemplate the death of a child that has not yet become a human being within the meaning of s. 223(1) of the *Criminal Code*.
3. Section 238 prohibits killing an unborn child in the act of birth and s. 242 proscribes the failure to obtain assistance in childbirth, resulting in permanent injury or death immediately before, during, or a short time after birth.
4. To facilitate the investigation of these offences, the pre-birth application of s. 243 is appropriately limited to fetuses that were likely to have been born alive ― that is children, not fetuses that were miscarried.
5. This *likelihood* approach is also consistent with s. 662(4) of the *Criminal Code*, which, on a charge of murder or infanticide, permits a conviction under s. 243 where neither murder nor infanticide is made out, but the evidence proves the requisite elements of s. 243.
6. When considered in light of s. 662(4), it is clear that the pre-birth application of s. 243 is not intended to reach back beyond the delivery of a child that would likely have been born alive. Rather, its application to a child that died before birth simply ensures that the law can respond to criminal conduct against newly born infants in cases where the evidence does not establish that death occurred post-birth.
7. By facilitating the investigation of the offences discussed above, s. 243 ultimately serves to protect children born alive and a subset of children that died before birth. The parties agree that Parliament can properly legislate with respect to both. As we have seen, the appellant explicitly concedes that Parliament may “enact legislation which has application to the concealment of a fetus at some stages of development prior to live birth”.
8. With regard to newly born children, the importance of s. 243 is clear. As expressed in the *Goudge Report*, vol. 1, at p. 4,[[2]](#footnote-2) society is gravely concerned with investigating offences committed against society’s youngest:

For the community itself, the death of a child in criminally suspicious circumstances is deeply disturbing. Children are the community’s most precious and most defenceless asset. The sense of outrage and the urgent need to understand what happened are overwhelming.

1. Bearing its purposes in mind, the pre-birth application of s. 243 is appropriately limited to fetuses that were likely to have been born alive. In the words of the respondent, the crime of concealment is “limited by the clear late term focus of the offences s. 243 is supporting”: R.F., at para. 50.
2. The appellant argues, however, that even if we describe a *child that died before birth* as a fetus that would likely have been born alive, s. 243 remains vague because an accused is dependent on expert medical evidence to know whether a fetus was, in fact, likely to have been born alive.
3. Indeed, the doctrine against vagueness cannot be satisfied by inaccessible laws. It is not enough for laws to provide guidance to legal experts; laws, as judicially interpreted, must be sufficiently intelligible to guide ordinary citizens on how to conduct themselves within legal boundaries. As McLachlin C.J. explained in *Mabior* (in a passage more fully set out above): “It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act” (para. 14).
4. Nonetheless, reliance on expert evidence is not necessarily fatal to the constitutionality of a provision. Section 243 is by no means the only offence that relies on expert evidence to determine whether an offence was committed. For example, without the benefit of a breathalyser, individuals may not know whether they have consumed an amount of alcohol that would bring them over the legal limit. Similarly, in some murder cases an accused may not know, without expert medical evidence, whether his or her conduct actually caused the victim’s death.
5. Expert evidence cannot serve to define the elements of an offence, but only to help the court determine whether the elements are made out on the facts of a particular charge. In the case of s. 243, expert evidence can thus be relied on to establish as a matter of fact that the disposed-of remains were those of a child that was likely to be born alive ― an essential element of the offence.
6. Even if s. 243 provided a detailed description of the precise moment on the gestational spectrum where a miscarriage becomes a stillbirth, as the appellant suggests it should, medical evidence would often be required in any event. For example, if s. 243 stated that the concealment offence only applies to a child that died before birth where the gestational age is over seven months, what additional certainty would that give a woman who was unsure of the date of conception? In such a case, expert medical evidence regarding gestational age would be required to ascertain whether s. 243 would capture a decision to keep a failed pregnancy private.
7. Similarly, if the word “before” were severed from s. 243, making it only applicable to a child that died during or after birth, a woman remains dependent on medical evidence to determine whether her conduct would fall within s. 243. As the trial judge noted: “A mother may not be in the best position to know whether her new-born is alive or dead . . . .” (para. 83). He went on to explain, at para. 145:

Where a woman who has given birth mistakenly believes the child to be dead and disposes of the body intending to conceal its birth as opposed to notifying the relevant authorities, there is no opportunity to correct the mother’s “mistake” and save the child (see *R. v. Bryan* (1959), 123 C.C.C. 160 (Ont. C.A.) ― mother erroneously believed child to be still-born, disposed of body down garbage chute; baby subsequently dying in incinerator).

1. Accordingly, under the severed version adopted by the trial judge that would apply only to deaths that occur during or after birth, medical evidence would still be required; it would simply relate to the time of death instead of fetal development. Clearly, it is the subject matter, rather than the imprecision of the law, that gives rise to the need for expert medical evidence.
2. Finally, the state’s interest in late-term failed pregnancies is both ascertainable and well established. Stillbirths are highly regulated by provincial and territorial legislation: see R.F., at Appendix D. The regulations in all provinces and territories impose some kind of positive obligation to disclose failed pregnancies where the gestational age is 20 weeks or more or where the fetus weighs 500 grams or more: see, for example, *Vital Statistics Act*, ss. 1 and 9.1; and associated regulations under R.R.O. 1990, Reg. 1094, s. 20.
3. The foregoing contextual and purposive analysis persuades me that s. 243 meets the minimum standard of precision required by the *Charter*.In its application to a *child that died before birth*, s. 243 only captures the delivery of a child that was likely to be born alive.
4. And I recall in this context that a conviction would only lie where the Crown proves that the child, to the knowledge of the accused, would likely have been born alive.

VI

1. For all the foregoing reasons, I have concluded that s. 243 does not violate s. 7 of the *Charter*. Section 243 gives women ― and men ― fair notice that they risk prosecution and conviction if they dispose of the remains of a child born at or near full term with intent to conceal the fact that its mother had been delivered of it. And s. 243 limits with sufficient clarity the discretion of those charged with its enforcement. There is thus no need to conduct a s. 1 analysis.
2. I would therefore dismiss the appeal and affirm the order for a new trial.

*Appeal dismissed.*

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1. *Connally v. General Construction Co.*, 269 U.S. 385 (1926), at p. 391; *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927), at p. 465. [↑](#footnote-ref-1)
2. *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) (the “*Goudge Report*”). [↑](#footnote-ref-2)