BILL C-43: ABORTION ACT OPINION

SUBMITTED TO

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ON THE STATUS OF WOMEN

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INTRODUCTION

On January 28, 1988, in its decision in the famous *Morgentaler*(1) case, the Supreme Court struck down Canada's abortion law under s. 251 of the *Criminal Code*. The section made abortion a criminal offence in Canada but did not apply to therapeutic abortions where a committee had approved the procedure on the basis of threat to the woman's life or health and where the procedure was performed in an accredited or approved hospital. The Supreme Court held that the requirements for obtaining a therapeutic abortion violated the constitutional guarantee of rights and freedoms for women. The Court accordingly established the right to abortion, at least in cases where the woman's life or health is threatened and sent a clear signal to Parliament that, in order to be constitutional, a statute should not obstruct fair and reasonable access to abortion. However, the Court also suggested that the state can validly restrict the right to abortion on the basis of its interest in protecting the foetus.

As a result, abortion has been legal in Canada since January 28, 1988. Political pressure was immediately brought to bear on the government by pro-life groups to pass new legislation establishing the foetus' right to life from conception. During this period, some commentators referred to a "legal void", a term which, used in this context, necessarily implies that whenever the *Criminal Code* fails to deal with a subject, there is a gap in the law. On the contrary, the criminalization of an act is not the rule but the exception. Once abortion was removed from the *Criminal Code*, it became just one more medical procedure. Pro-choice groups have accordingly treated abortion as a form of health care and demanded measures to ensure access to the service.

The civil injunctions granted in the summer of 1989 in *Dodd* and *Daigle* became a media event. The urgency imposed by the very nature of a pregnancy aroused strong feelings. In both cases, the judgments on appeal upheld the right of access to abortion. As a result, pro-life groups stepped up their efforts to achieve the recriminalization of abortion. Hence Bill C-43.

ANALYSIS

1. Conditions for obtaining a legal abortion

The new Bill recriminalizes abortion. As under the old law, both the act of inducing an abortion and the act of supplying a noxious thing or an instrument, knowing that it is intended to be used or employed to induce an abortion, are prohibited. Note that it is not considered an abortion unless a fertilized ovum has been implanted.

Abortion is not illegal if a medical practitioner is of the opinion that, if the abortion is not induced, the health or life of the woman would be likely to be threatened and if the abortion is induced by or under the direction of the medical practitioner.

The Bill has removed a number of the obstacles identified by the Supreme Court as preventing access to abortion. The requirement of a therapeutic abortion committee, the effect of which was to require the approval of three doctors, has been removed. Henceforth, the opinion of a single doctor is sufficient. Similarly, the requirement that the abortion be

performed in an accredited or approved hospital has been removed. Finally, the Bill defines the terms "opinion", "medical practitioner" and "health". First, the medical practitioner's opinion must be based on generally accepted standards of the medical profession. Second, the medical practitioner must be entitled to practise medicine under the laws of the province in which the abortion is induced. Third, the term "health" includes, for greater certainty, physical, mental and psychological health. Some of the judges in *Morgentaler* (1988) concluded that the term "health", which was not defined in s. 251, was vague and liable to a subjective construction incompatible with the constitutional right to security of the person. Certainly, the definitions are intended to clarify the terms in order to avoid a similar finding by the courts with respect to Bill C-43. Later we shall see the effect of these definitions on the constitutionality of the Bill.

2. Implications in criminal law

The following individuals are liable under the Bill:

- the medical practitioner who induces an abortion without having formed the opinion required under the Act, as well as any person acting under his/her direction with full knowledge of the facts;

- any person who induces an abortion and is not a medical practitioner or is not acting under his/her direction, including the woman herself;

- the medical practitioner who induces an abortion in a province in which he/she is not entitled to practise medicine;

Just as in the related provisions of the *Criminal Code*,(2) not only the person who actually commits the offence but also anyone who aids or abets a person to commit an offence or counsels an offence, as well as anyone who is an accessory, who participates in an attempt or who is party to a conspiracy, is liable. This would include the following individuals:

- the "potential father" who supports or recommends the abortion, knowing that there is no threat to the woman's health;

- the friend who accompanies the woman to the interview with the doctor or stays with her before and after the abortion, knowing that no such threat exists, for example, where the woman has admitted that she plans to put on an act or lie in order to obtain the abortion;

- members of women's collectives who counsel abortion in cases of economic hardship, where this criteria is clearly excluded from the standards set by the medical society of that province.

The documentation from the Department of Justice(3) notes that the Crown would have to prove deliberate intent to commit the crime. Obviously, a woman who wanted to obtain an abortion but was reluctant to say that her life or health was threatened by the pregnancy would have such intent as would a doctor who respected the woman's choice with full knowledge of the facts. We should not delude ourselves by assuming that problems of evidence will render the Bill harmless. We need only recall the recent operation by Quebec police officers masquerading as welfare recipients to catch doctors who signed false disability certificates. Criminal charges resulted from this operation. A similar operation could be conducted to test doctors who performed abortions.

3. Implications in civil law

The fact that the *Criminal Code* contains provisions relating to abortion does not in itself preclude a civil remedy. In fact, a number of such proceedings were initiated while the old s. 251 was still in force.(4) At first sight, the judgment by the Supreme Court in *Daigle*(5) means that such a remedy is uncertain for the time being, even in the common law provinces. In that case, the Court held that a "potential father" has no legal right to determine the fate of the foetus by virtue of his participation in conception and, as a result, has no right to veto the woman's decision to obtain an abortion. As well, the Court ruled that, considering the state of the law today in both Quebec and the common law provinces, the foetus has no rights as a person, within the full meaning of the word.

The Court did not, however, say that a law could not be passed granting the foetus such rights. If we recall that one of the objectives of the Bill is the protection of the foetus, does the Bill not then become a source of recognition of foetal rights? At the very least, would not the foetus have the right to a strict application of the provisions allowing abortion? If a "potential father" wished to prevent the abortion, could he not challenge the opinion of the doctor who approved it, again through an injunction, since the Supreme Court did not reject the merits of that remedy? One can envisage the possibility of such an injunction against one of Dr. Morgentaler's clinics, for example, with the applicant attempting to show that the necessary checks to establish that the woman's life or health was threatened were insufficient, or even that the information obtained was erroneous. The issue would then be whether a threat existed and perhaps the woman would even be required to submit to further examinations.

Another danger of the Bill is its insistence that the health of the pregnant woman must be endangered. A woman who attempts to obtain an abortion for reasons of psychological health could well find herself before the courts the following day to justify her competence to obtain or keep custody of her existing children.

Further, the jurisdiction of the provinces to pass abortion legislation was not settled in *Daigle*. The Court did not deal with the Attorney General of Canada's claim to exclusive federal jurisdiction in the matter. Furthermore, it is clear that the provinces retain their jurisdiction over health matters and, consequently, their jurisdiction to determine which forms of health care

will be reimbursed under the provincial health plan. Could a provincial legislature, for example, enact medical standards limiting the "opinion" of the medical practitioner required by the Bill. Or could a provincial medical society establish such standards so as to be binding on all the doctors of the province?

It is therefore clear that, far from settling the issue of civil litigation, the Bill opens the way for a whole new range of litigation.

CONSTITUTIONALITY

1. Distribution of legislative jurisdiction

Apart from any political constraints, the federal government is not obliged to include provisions on abortion in the *Criminal Code*. It remains to be determined whether it has jurisdiction to enact Bill C-43, taking two factors into account: first, the validity of criminal legislation and, second, the legislative jurisdiction of the provinces established under s. 92(7), (13) and (16) of the Constitution.

The nature of the federal criminal law power was examined in *Morgentaler* (1975)(6) and again in *Morgentaler* (1988).(7) Counsel for Dr. Morgentaler argued that since the purpose of the sections in the *Criminal Code* prohibiting abortion was to protect women's health, these sections had lost their raison d'être, as medical progress had made the procedure safe or, at least, safer. He based his argument on the test of valid criminal law set out by Rand J. in the *Margarine Reference*:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened . . .
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law . . .(8)

The argument was dismissed by Laskin J., who invoked the authority of the federal government to determine ". . . what is not criminal as well as what is".(9) The argument was also dismissed in the more recent case by both the Ontario Court of Appeal(10) and the Supreme Court.(11) *Inter alia*, Beetz J. held that the protection of the foetus is a valid goal of Canadian criminal law. This is also the opinion of the Law Reform Commission of Canada.

The other aspect of the argument related to the encroachment of the federal government on provincial areas of jurisdiction. Again in *Morgentaler* (1975), it was argued that the sections in the *Criminal Code* in fact constituted legislation relating to the establishment of hospitals or to the

regulation of the medical profession or of the practice of medicine. Laskin J. also dismissed this argument, noting that the relationship was ". . . so incidental as to be little short of ephemeral".(12) He did, however, allow that the exercise of the federal criminal law power could be challenged if it was made plain to the Court that:

> the use of the penal sanction was a colourable or evasive means of drawing into the orbit of the federal criminal law measures that did not belong there, either because they were essentially regulatory of matters within exclusive provincial competence or were otherwise within such exclusive competence.(13)

Likewise, Beetz J. recognized in *Morgentaler* (1988) that:

> legislation which in its pith and substance is related to the life or health of pregnant women . . . would be characterized as in relation to one of the provincial heads of power.(14)

In this judgment, the Supreme Court considered the question of the intended purpose of the Act, particularly with regard to the application of s. 1 of the *Canadian Charter of Rights and Freedoms*. While Dickson J. held that the purpose of s. 251 was to protect women's health, Beetz J. stressed that the primary purpose was to protect the foetus. McIntyre J. concurred with the reasons given by the Ontario Court of Appeal, which held that the purpose of the legislation was to strike a balance between the interests of the foetus and that of the mother. The argument based on the distribution of jurisdictions was not accepted by the Court.

The issue of jurisdiction was again raised in *Daigle*. The Quebec courts, basing their decision on the Quebec *Charter* and the *Civil Code*, issued an injunction prohibiting Ms. Daigle from obtaining an abortion. The Attorney General of Canada intervened before the Supreme Court to argue that an injunction based on Quebec law represented an exercise of the federal criminal law power. He argued that only the federal government had the power to prohibit abortion and prescribe penalties. The Attorney General of Quebec also intervened to argue that the Government of Quebec could legislate certain aspects of abortion. The Court did not rule on this question, although it did say that the matter deserved serious study.

In light of these principles, let us now analyse Bill C-43. The federal government does not conceal the fact that it has chosen to recriminalize abortion <u>solely</u> for the purpose of acquiring jurisdiction to regulate abortion on a national basis. The background information from the Department of Justice makes no bones about this:

> The new law comes under the *Criminal Code* because it is only through the criminal law power that Parliament can regulate abortion on a national basis.

> Health is mainly a matter of provincial jurisdiction under the *Constitution*. General federal authority to legislate in the health area falls within the federal government's spending power and the criminal law power. In order to legislate directly to regulate abortion, Parliament has to use the criminal law power.(15)

The Minister offered the same explanation in the parliamentary debates over the Bill.(16) While stressing the desire to protect the foetus, the Minister also suggested that if federalism had granted him some jurisdiction other than criminal with which to do so, he would not have resorted to the criminal law power. Can the mere desire to regulate abortion on a national basis justify the intervention of the federal government? In the *Unemployment Insurance* case,(17) the government argued that a national plan was essential. The Privy Council ruled that the legislation concerned infringed the exclusive provincial authority over property and civil rights and that no state of national emergency could justify it. The **pith and substance** rule applied in this case may also be argued in criminal law. There is no emergency that can justify the recriminalization of abortion. At no time, either in the submissions in *Dodd* and *Daigle* or when the Bill was tabled, did anyone argue an upsurge in or abuse of the abortion procedure by women in Canada.

In light of the foregoing, we believe that Bill C-43 may be impugned from the perspective of the exercise of legislative authority on the grounds that the prohibition and the attendant penal sanction were enacted not for the purpose of criminalizing a behaviour contrary to the public good but for the purpose of promulgating, on a national basis, a regulation relating essentially to health. Thus the Bill infringes the distribution of legislative jurisdiction as it constitutes ". . . a colourable or evasive means of drawing into the orbit of the federal criminal law measures that did not belong there".(17a)

2. Section 7 of the Canadian Charter of Rights and Freedoms(18)

2.1 Women's rights

2.1.1 Right to security of the person

According to the definition in *Morgentaler* (1988), the right to security of the person includes but is not limited to the right to physical integrity. All the majority judges were in agreement that mental and, indeed, psychological well-being were also included. Dickson C.J., with Lamer J. concurring, and Wilson J. went even further, ruling in separate reasons that the right to security of the person also includes the control that a person exercises over his/her physical or mental integrity.

Dickson C.J. stressed a woman's right to exercise her own power to make decisions, bearing in mind her own priorities and aspirations, in the following terms:

> At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations . . . Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person.(19)

Wilson J. was in complete agreement, ruling that the woman is subjected to a direct interference with her physical "person", as she loses her right to personal autonomy in decision-making and consequently loses control over her capacity to reproduce for the benefit of the state. As she stated,

> She (the woman) is truly being treated as a means — a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life.(20)

Note that the construction by Dickson and Wilson JJ. was not supported by the majority of the Court at the time. In fact, apart from the dissenting opinions expressed by McIntyre and La Forest JJ., Beetz J., with the concurrence of Estey J., adopted a more restrictive construction of the protection contemplated by the right to security of the person. According to him, s. 251 only infringed a woman's right to the extent that delays caused by the procedure further threatened her life or health. The mere fact that the right to abortion was subjected to a medical opinion did not represent, in itself, an infringement of the right to security of the person for the woman seeking the abortion.

2.1.2 Right to liberty of the person

Only Wilson J. had an opinion on the infringement of the right to liberty also guaranteed by s. 7 of the Canadian *Charter*. In fact, she made this point the central issue,(21) stating that liberty includes the right to make fundamental personal decisions without state intervention(22) and that a woman's decision to terminate her pregnancy falls within this category of protected decision.(23) She pointed out, *inter alia*, that this was not just a medical decision:

> This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.(24)

2.1.3 Principles of fundamental justice

The protection provided under s. 7 may be circumvented if the infringement of the protected right is in accordance with the principles of fundamental justice. Again in *Morgentaler* (1988), the Chief Justice held that s. 251 disregarded these principles, owing to the unequal access provided to abortion as a result of administrative procedures, specifically the number of medical opinions required. Beetz J. reached the same conclusion, although he noted that Parliament would be justified in requiring a reliable, independent and medically sound opinion concerning the pregnant woman's life or health in order to protect the state's interest in the foetus.(25) He added, however, that the assertion would need to be reevaluated if a right of access to abortion were founded upon the right to "liberty" protected under s. 7.(26)

Dickson J. added that the principles of fundamental justice were also violated by the failure to define "health". He reached this conclusion despite evidence that doctors could refer to the World Health Organization definition.(27) Nor did he accept the argument that doctors sitting on committees were only exercising their professional judgment. Beetz J., on the other hand, held that the word "health", ". . . is not vague but plainly refers to the physical or mental health of the pregnant woman".(28) He noted with interest the decision of the Supreme Court of the United States in *United States v. Vuitch*,(29) in which the Court ruled that the term "health" necessarily included psychological well-being.

Wilson J. was of the opinion that the infringement violated the principles of fundamental justice because the old s. 251 also infringed the right conferred by s. 2(a) of the Canadian *Charter*. In her opinion, a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the Canadian *Charter*, cannot be in accordance with the principles of fundamental justice.(30)

2.1.4 Application

2.1.4(a) decision-making autonomy

The Bill restricts a pregnant woman's autonomy in decision-making in two ways. First, it establishes criteria that limit access to abortion. Second, it subjects the right to obtain an abortion to the consent of a third party.

2.1.4(a)(i) criteria

Like s. 251, the Bill imposes on a woman seeking an abortion criteria that are totally foreign to her own priorities and aspirations. The state raises a right of veto against the woman's decision by enacting criteria restricting her right to abortion at every stage of the pregnancy. The mere fact that criteria are imposed infringes the woman's right to make her own decisions in the context with which she is concerned. In the opinions of Dickson and Wilson JJ., the woman's right to security of her person is violated. In the opinion of Wilson J., the right to liberty is violated. Beetz J. also implies that the right to liberty might be offended.(31) The fact that criteria are imposed from the outset of the pregnancy flies in the face of the position adopted in other free and democratic societies.(32)

Furthermore, the Bill makes no mention of a number of criteria accepted in other free and democratic societies, for example, foetal malformation or the impact of the pregnancy on other family members.(33)

Finally, the Bill makes no provision for abortion in the case of rape or incest. At the very most, the circumstances of the fertilization may be considered in assessing the state of the woman's health. All women live under the threat of violence and the fear of rape. Some, particularly girls, are forced to endure incest. The victims inevitably suffer the consequences of their experience. But the Bill encourages women to remain weak and powerless in the face of such abuses, rather than allowing them to make a decision based on their interior strength and a rejection of violence. The failure to spell out rape and incest as circumstances under which a legal abortion is justified, whatever the state of the woman's health, constitutes an infringement of the security of the female person.

2.1.4(a)(ii) third party consent

As in s. 251, the Bill subjects the right to abortion to the consent of a third party. The fact that the state authorizes one doctor, rather than the four specified under the old system, to make the decision does not change the fact that the doctor may veto the woman's decision. Furthermore, the Bill states that the doctor's "opinion" must be based on "generally accepted standards of the medical profession". There is nothing to prevent provincial governments or even medical societies from decreeing such standards to be binding on all doctors under their jurisdiction. We need only recall the further restrictions imposed by certain provincial governments on the formation of therapeutic abortion committees contemplated under s. 251 or the battles pitching Dr. Morgentaler against certain medical societies. There is nothing farfetched about this hypothesis, which raises the possibility of a veto by other third parties who have no connection with either the woman or the foetus inside her.

American case law offers many examples where the requirement to obtain the consent of a third party in order to obtain an abortion was struck down on the grounds that it violated a woman's right to make her own decisions.(34) A Canadian court overturned an order requiring a pregnant woman to participate in mandatory supervision and counselling.(35) In civil law, the courts have refused to recognize the merits of third party interventions, most often by the "potential father", with the intention of preventing women from obtaining an abortion. In *Daigle*, the Supreme Court noted that the veto right relied on by the respondent Tremblay has never existed and has never been recognized in case law.

This is not to say that the state cannot, under any circumstances, decide that abortion is a medical question and prescribe procedures for access to abortion, including the stipulation that it be performed by or under the direction of a qualified medical practitioner. Thus in *Doe v. Bolton*,(36) along with *Roe v. Wade*,(37) the Supreme Court of the United States upheld the validity of a provision authorizing abortion only where a medical practitioner concluded that the abortion was necessary in his/her best clinical judgment.(38) This means, however, that the state cannot restrict the reasons

for which a woman chooses to have an abortion, by imposing restrictions on the exercise of her doctor's judgment, for example. At most, the state can make provision for a woman to receive medical counselling in order to assist her in making an informed decision. This is the position adopted by the American courts.(39) Not even the recent decision in *Webster v. Reproductive Health Services*(40) invalidates the principle of a woman's autonomy in decision-making up to the stage where the doctor determines that the foetus is viable.

At first glance, we may therefore conclude that the act of restricting the right to abortion to circumstances representing a threat to a woman's life or health and of subjecting her right to abortion to a doctor's opinion related to the evaluation of such criteria constitutes an infringement of the right to security of the person and of the right to liberty protected under s. 7 of the Canadian *Charter*.

2.1.4(b) principles of fundamental justice

The Bill answers in part the objections raised in *Morgentaler* (1988) concerning a conflict between the old abortion law and the principles of fundamental justice. It eliminates both the requirement of committee approval and restrictions on where an abortion may be performed. We do not, however, believe that the Bill fulfils the requirement that it be in accordance with the principles of fundamental justice. First, it does not resolve all the problems related to the definition of "health". Second, it creates a further ambiguity concerning the term "opinion".

2.1.4(b)(i) "health"

The Bill refers to a likely threat to health, defining the latter as follows:

> "health" includes, for greater certainty, physical, mental, and psychological health;

At first glance, one may wonder just how qualified all doctors are to decide on the three aspects of health enumerated above. In addition, and despite the use of the words "for greater certainty", it could be argued that only therapeutic grounds are covered, since only qualified medical practitioners are entitled to assess the risk.(41) Such a construction, which is fully defensible, would be more restrictive than the World Health Organization definition, which refers to the physical, mental and social state of well-being. It is true that a number of decisions have recognized that when a law refers to "health" or requires a doctor to exercise his/her medical judgment, the latter has the right to apply social criteria such as the woman's age and marital status.(42) Notwithstanding the above, the Chief Justice held in *Morgentaler* (1988) that the term "health" in s. 251 created uncertainty, thereby posing an obstacle to access to abortion.

Indeed, would any doctor risk an interpretation that considered other imperatives in a woman's life, for example, her age or ability to support the child? It is specious to talk in terms of "economic health" in an attempt to

bring these factors into the analysis of the word "health".(43) This leads to unequal access to abortion depending on the flexibility of the doctor the woman visits. It is not sufficient for Parliament to enact a deliberately ambiguous definition in order to satisfy the requirements of s. 7. It must answer for all the elements in life that serve to define security of the person. In *Mills v. The Queen*,(44) security of the person for an accused was held by Lamer J. to encompass protection against the following elements:

> . . . stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.(45)

Is not a woman entitled to the same consideration as the accused in a criminal proceeding? The Bill makes no mention of a woman's right to protection against disruption of her family, social life and work. One might respond that, in *Mills*, the state itself was the source of disruption through the judicial process while, in the case of pregnancy, the state is not at issue. It is our position that where no provision is made for full grounds of defence to ensure the security of the person, in all its aspects, the criminalization of abortion constitutes a source of disruption. Thus the definition of "health" given in the Bill remains defective.

2.1.4(b)(ii) <u>"opinion"</u>

The use of the term "opinion" may also be challenged. In our view, there are no "generally accepted standards of the medical profession" dealing with the likely threat to health, or even less so, with the interpretation of "for greater certainty". Are these provincial, Canadian, or international standards?

Anyone who has ever been involved in workers' compensation or medical liability cases can attest to expert medical opinions totally at odds over what constitutes a threat to health. Examples abound in Quebec concerning the construction of legislation providing preventive withdrawal for pregnant women whose working conditions entail physical risks.(46) While a doctor can issue a certificate attesting that the woman's working conditions involve such risks, the certificate may be challenged by another doctor who does not agree that there is a risk.(47) Nevertheless, both base their argument on medical standards. Anyone involved in this area can also attest to the growing difficulty in obtaining medical certificates, and even expert opinions, from doctors who do not want to be called to testify in court. Will doctors continue to be willing to perform abortions? Despite its weaknesses, the procedure under the old law at least had the benefit of protecting the doctor from reprisals, as long as he/she first obtained the committee's approval.

The terms "health" and "opinion" are therefore vague and represent a double blow to the principles of fundamental justice. They do not inform the woman clearly on all the reasons entitling her to an abortion. They do not clearly inform the doctor, who is liable to be charged with the offence, on all the exceptions to the offence. It is not difficult to foresee that, in case

of doubt, doctors will abstain from performing abortions — a chilling effect created both by the criminalization process and by the absence of clear, precise standards on the basis of which a doctor can exculpate himself or herself. It is equally foreseeable that access to abortion will remain unequal, just as it was under the old procedure. Yet the Supreme Court has clearly indicated that a law that restricts the right to a medical procedure, on penalty of criminal prosecution, must not create unequal access to that procedure.

2.2 Doctors' rights

Doctors also have to fear an infringement of their rights under s. 7. They have the right to exercise their profession, in accordance with their ethics and conscience, and to be informed sufficiently on the circumstances involving a risk of criminal charges. The juxtaposition of the terms "health" and "opinion" creates a double ambiguity liable to lead to charges against doctors who give a broad construction to the word "health" but who are accused of not following the "generally accepted standards of the profession".(48)

2.3 Foetal rights

The issue of foetal rights under s. 7 of the Canadian *Charter* has not yet been settled. It was introduced in *Daigle* but the Court applied the rule established in *Dolphin Delivery*(49) and refused to address the issue, as this was a civil action between two private parties. However, the principles relied on in the decision suggest that, with . the current state of the law, s. 7 could not be used by the Supreme Court to grant a claim of separate rights for the foetus.

In *Daigle*, the respondent argued that the foetus has the right to life from the moment of conception, by virtue of the right to life granted to every "human being" under the Quebec *Charter of Human Rights and Freedoms*. The Quebec *Charter* contains provisions referring sometimes to the "person" and sometimes to the "human being". While recognizing that a foetus does not possess full juridical personality, the respondent argued that the provisions giving rights to human beings were wider than those relating specifically to persons and that, consequently, the Quebec *Charter* granted rights to the foetus. The argument was dismissed in a unanimous decision of the Supreme Court. Speaking for the Court, Lamer J. pointed out that the Court was not required to enter the philosophical, theological, metaphysical, biological or linguistic debates in order to determine the legal status of the foetus.(50) He went on to note that the internal logic of the Quebec *Charter* did not justify the proposed interpretation, adding that the Quebec *Charter*, considered as a whole, ". . . does not display any clear intention on the part of its framers to consider the status of a foetus".(51)

Speaking to the arguments based on partial recognition of foetal rights in succession law or civil liability, Lamer J. stressed that these were in fact an exceptional form of recognition that had to be construed in a restrictive manner. In his opinion, the fact that certain rights are spelled out for the foetus confirmed that the foetus was not a juridical person under the Civil

Code.(52) In an analysis of the significance of *Montreal Tramways Co. v. Léveillé*,(53) often relied on in support of the theory of a foetus' right to life, he ruled that the judgment stood more in support of the appellant's position(54) that the foetus had no juridical personality and consequently no right to life.

The Court also made a point of ruling on foetal rights in Anglo-Canadian law. From the historical survey by the Law Reform Commission of Canada on attitudes toward abortion, the Court concluded as follows:

> The authors use this description to argue that the foetus has always been protected to some extent in our law. On the other hand, however, from the historical survey it could be argued that abortion has not generally been considered equivalent to murder in our laws and that, therefore, a foetus has not been viewed as having the rights of a person in the full sense.(55)

The Court detected a consistent position in case law, to wit, that the foetus has no rights in private law.

The arguments relating to s. 7 of the *Canadian Charter* focused on the term "everyone". Although the Court did not settle the issue, we can anticipate that an argument based on the utilization of the term "everyone" rather than "person" will not persuade the Supreme Court that Parliament intended to grant foetal rights. As in the case of the *Quebec Charter*, no definition will confirm such an intention, if it cannot be inferred from the *Charter* taken as a whole. In the absence of any clear intention to include such rights and bearing in mind the context of the case law reviewed in *Daigle*, the Court will have to conclude that protection under s. 7 does not extent to the foetus.

Nor should the Court be persuaded by the arguments that status as a person should now be granted to the foetus, even though it was not when the Canadian *Charter* was enacted. These arguments are based on scientific progress in foetal viability. As Lamer J. noted: "Nor are scientific arguments about the biological status of a foetus determinative in our inquiry."(56) Furthermore, *Morgentaler* (1988), in our opinion, precludes recognition of the right to life from the moment of conception. Indeed, if this were the Court's interpretation, a large part of the analysis based on the security of the mother's person would become superfluous. If a constitutional right to life existed from conception, an infringement of the mother's health could not be a potential limitation on the foetus' right to life. The result, in terms of the old s. 251, is that a defence based on the woman's health would be unconstitutional. Even the dissenting judges in *Morgentaler* (1988) admitted the validity of a provision allowing abortion in order to protect the woman's health.

Further, one of the principal reasons behind the dissenting voices of McIntyre and La Forest JJ. was the concern that it was not for the courts to ". . . manufacture a constitutional right out of whole cloth",(57) which would be the result if the Court ruled that the foetus had the right to life. In the briefs tabled in the Supreme Court in *Borowski*,(58) the parties

objecting to any such recognition established all the repercussions of recognizing a foetus' right to life and, for that matter, its right to security of the person. The foetus could assume complete control of the mother by prohibiting an entire series of activities or by forcing certain activities upon her during the pregnancy. Or, for that matter, why not the right to liberty? Could a foetus claim the right to be removed from its mother's womb? Such results are revolutionary and cannot be based on simple textual arguments.

3. Section 2(a) and freedom of conscience

Wilson J. ruled in *Morgentaler* (1988) that the decision to terminate a pregnancy is a moral issue, a matter of conscience.(59) On the question of the nature of the right to freedom of conscience entrenched in s. 2(a), she was of the opinion that the right relates not only to religious beliefs but also to beliefs dictated by one's conscience, even without religious motivation. In her opinion, when the state enacts a law to criminalize abortion, it endorses one conscientiously held view at the expense of others' freedom of conscience.

4. Sections 15 and 28 and equality rights

Sections 15 and 28 of the Canadian *Charter* entrench women's equality rights. Arguments based on equality, in the context of abortion, were presented before the Supreme Court in *Borowski* and *Daigle*. In both cases, the "Women's Legal Education and Action Fund" (LEAF) obtained leave to intervene for the specific purpose of making such arguments.

Recent judgments of the Supreme Court recognize that groups or subgroups may be disadvantaged by characteristics peculiar to them.(60) Specifically, recent case law under both the Canadian *Charter* and human rights legislation has stressed the disadvantages based on sex that women experience, particularly in the workplace.(61) In *Brooks*, the Court ruled that a working condition that automatically deprived women of wage-insurance benefits for the duration of their pregnancy was discriminatory. The Court assumed that the fact of imposing the costs of pregnancy on women alone was an inequality based on sex. If we consider *Andrews* and *Brooks*, contrary to the prevailing argument in *Bliss*,(62) which was implicitly taken up by the lower courts in *Daigle*, the fact that only women can become pregnant must no longer be treated as a simple biological fact that makes a woman's circumstances incapable of comparison with that of a man.

LEAF argued in *Daigle* that women often have no power over the circumstances under which they become pregnant. They are at a social disadvantage regarding control of access to their body, by virtue of their social upbringing, lack of information, inadequate or ineffective contraceptive technology, social pressure, customs, poverty, imposed economic dependence, sexual coercion and ineffective enforcement of laws prohibiting sexual aggression. Furthermore, women have no power over the social consequences of pregnancy, as they are disadvantaged by both society and the law, owing to their reproductive function. And it is women who have been assigned primary responsibility for child care, whether through custom, social pressure, economic circumstances or inadequate child-care services.

By contrast, men are not trapped by their reproductive capability. No one can force them to impregnate women or to bear children and, generally, society does not force them to spend their lives caring for children, to the exclusion of all other activities. When viewed from the perspective of equality, the injunction against Chantal Daigle represents a man's attempt to control a woman's life by forcing her, through the intervention of the state, to become a mother. Such a result flies in the face of sexual equality. LEAF concludes that, owing to the context described above and also to the unique relationship between a woman and the foetus that she carries, it is up to the woman to decide whether to continue the pregnancy.

This argument may be applied to Bill C-43. In this case it is the state that seeks control over the woman's life, all the more so as the Bill makes no provision for access to abortion in circumstances that are a major source of female sexual inequality, i.e., violence and the family and economic context.

The Court has not yet ruled on the arguments based on equality rights in the case of abortion.

5. Section 1 of the Canadian Charter and "reasonable limits"

Under s. 1, the rights and freedoms guaranteed by the Canadian *Charter* are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. We must therefore determine whether the Bill can be justified under s. 1.

In *Morgentaler* (1988), the Court was of the unanimous opinion that the protection of the foetus is a valid legislative objective and that, in principle, s. 1 may be used to validate a statute weighing the rights of the woman against those of the foetus. However, for Wilson J., the concerns of the state in the protection of the foetus are not pressing and substantial throughout every stage of the pregnancy. She poses the issue in the following terms:

> I think s. 1 of the *Charter* authorizes reasonable limits to be put upon the woman's right having regard to the fact of the developing foetus within her body. The question is: at what point in the pregnancy does the protection of the foetus become such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the foetus to term? At what point does the state's interest in the protection of the foetus become "compelling" and justify state intervention in what is otherwise a matter of purely personal and private concern?(63)

Citing with approval the American decision in *Roe v. Wade*, she concludes that the state's interest in protecting the foetus as a potential life is assessed in terms of the stage of the pregnancy. This means that in weighing the state's interest in legislating restrictions on the right to abortion against a woman's right under s. 7 of the Canadian *Charter*, greater weight must be given to the state's interest in the latter than in the earlier stages of the pregnancy. Section 251, she rules, represents a total denial of,

not simply a restriction on, the woman's right, as it applies to all stages of the pregnancy.

In an obiter, Beetz J. considers the general requirements of s. 1 with respect to an abortion law. He notes that a rule giving a woman's life or health precedence over a foetus' interest is reasonable in a free and democratic society, since this rule is found in the laws of other countries. He notes that certain countries require a greater threat to the woman's health to be present in the latter stages of pregnancy and simply suggests that such a rule respects the acceptable proportionality in s. 1.(64)

While we do not necessarily support the validity of restrictions based on the stage of pregnancy, the fact remains that Bill C-43 makes no distinction in this regard and does not fulfil the conditions stipulated by Wilson J. Since *Morgentaler* (1988), the Supreme Court of the United States has challenged the stage of pregnancy rule established in *Roe v. Wade*. In fact, for a number of years, the Court has been divided on the abortion issue, with the dissenting members recommending that a general rule be applied without regard for the stage of pregnancy.(65) Recently, in *Webster v. Reproductive Health Services et al.*,(66) the majority held that the *Roe v. Wade* rule should be abandoned and that the state has a valid constitutional interest in protecting the life of the foetus at every stage of pregnancy. Note, however, that the legislation concerned only restricted the right to abortion where a doctor determined that the foetus was viable. The majority upheld the decision in *Roe* with respect to the law at issue in this case, which prohibited abortion except where the mother's life was in danger.

With Bill C-43, delays in obtaining an abortion are shorter because administrative impediments such as therapeutic abortion committees and the "accredited or approved hospital" requirement are eliminated. It does not follow, however, that all women in Canada will obtain equal access to abortion. During Dr. Morgentaler's trial, a large part of the evidence concerned regions where access to abortion was difficult, if not impossible. In these regions, the situation is unlikely to change. Even in regions where access is less of a problem, it is offensive to force women to shop for doctors. These elements, combined with the grey areas identified above, suggest that the Bill will not meet the criteria set out in *Oakes* in terms of either proportionality or rational connection.

CONCLUSION

In short, we maintain that Bill C-43 may be impugned by invoking the distribution of legislative jurisdiction on the grounds that the prohibition of abortion is not enacted for the purpose of criminalizing a behaviour contrary to the public good, but for the purpose of promulgating, on a national basis, a regulation relating essentially to health. At this time, the context in no way justifies deeming the medical procedure of abortion to be a matter that jeopardizes the national interest.

Moreover, the Bill may be impugned by invoking the rights and freedoms guaranteed by the Canadian *Charter*. The rights to security of the person and to liberty protected under section 7 are infringed, in that the Bill:

- sets criteria restricting the right to abortion which are unrelated to the priorities and aspirations of the pregnant woman;
- omits criteria found in the laws of other free and democratic societies;
- does not specifically address rape and incest;
- makes the right to an abortion subject to the consent of a third party (medical practitioner) and possibly other third parties (medical societies, provincial governments).

The Bill violates the principles of fundamental justice in that:

- the definition of the term "health" is vague;
- the definition of the term "opinion" is vague;
- the uncertainty as to the scope of the two terms creates a "chilling effect" and jeopardizes access to abortion;
- the Bill infringes rights protected under other sections of the Charter.

Bill C-43 infringes the freedom of conscience of women and physicians and is therefore contrary to paragraph 2(a) of the Canadian *Charter*.

Bill C-43 infringes women's equality rights protected under sections 15 and 28 of the Canadian *Charter*.

Section 1 cannot justify the Bill as:

- the criteria are more restrictive than in other free and democratic societies;
- no distinction is made as to the stage of the pregnancy.

NOTES

1. *R. v. Morgentaler*, [1988] S.C.R. 30.

2. *Criminal Code*: ss. 21(1)(a), (b) and (c), 22, 23, 463, 464 and 465.

3. Justice Information, "New Abortion Legislation — Background Information, November 3, 1989", p. 7.

4. *Dehler v. Ottawa Civic Hospital*, (1979) 25 O.R. (2d) 748 (H.C.J.).

5. *Daigle v. Tremblay*, S.C. Can., November 16, 1989.

6. *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616.

7. *Supra*, note 1.

8. *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1940] S.C.R. 1, pp. 49-50, referred to by Laskin J. in *Morgentaler*, *supra*, note 6, p. 625.

9. *Ibid.*, p. 127.

10. (1985), 52 O.R. (2d) 353, 22 D.L.R. (4th) 641, 22 C.C.C. (3d) 353, 48 C.R. (3d) 1, 17 C.R.R. 223.

11. *Supra*, note 1.

12. *Supra*, note 6, p. 628.

13. *Ibid.*, p. 625.

14. *Supra*, note 1, p. 124.

15. *Supra*, note 3, p. 5.

16. Debates of the House of Commons, November 7, 1989, p. 5640.

17. *A.G. Canada v. A.G. Ontario*, [1937] A.C. 355.

17a. Such reasoning is not necessarily contrary to the position adopted by the Canadian Advisory Council on the Status of Women (CACSW) in other briefs (see CACSW's Meech Lake brief and *infra*, note 18) to the effect that jurisdiction over matters of health is shared. In fact, this argument acknowledges that the provinces have primary jurisdiction over health matters, but that the federal government may intervene, by virtue of its spending power, in matters of national interest. We would argue that the prohibition of abortion does not fall into this category as there is no evidence of any abuse by women in Canada nor of any threat to their health. Thus, abortion must be analysed in the same way as other procedures related to procreation, such as methods of contraception, sterilization, fertility techniques, artificial insemination,

and so on. This argument does not, however, preclude the demand for Canada-wide access to full medical services, for it is in the national interest that women in Canada not be deprived of medical services because of their place of residence.

18. See also Sheilah L. Martin, *Women's Reproductive Health, the Canadian Charter of Rights and Freedoms, and the Canada Health Act* (Ottawa: Canadian Advisory Council on the Status of Women, September 1989).

19. *Supra*, note 1, pp. 56-57.

20. *Id.*, p. 173.

21. *Id.*, p. 165.

22. *Id.*, p. 166.

23. *Id.*, p. 171.

24. *Ibid.*

25. *Id.*, p. 109-110.

26. *Id.*, p. 112.

27. *Id.*, p. 68. The World Health Organization defines "health" not as the absence of disease or disability but rather as a physical, mental and social state of well-being.

28. *Id.*, p. 108.

29. 402 U.S. 62 (1971).

30. *Supra*, note 1, p. 175.

31. *Id.*, p. 112.

32. In the early stages of pregnancy, access to abortion is unconditional or subject to the woman's judgment alone in a number of countries, including France, Austria, Tunisia and the United States (through *Roe v. Wade*, 410 U.S. 1113, upheld in particular in *Thornburgh v. American College of Obst.*, 106 S. Ct. 3169 (1986), p. 2178: "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies").

For a summary of the legislation see: Rebecca Cook and Bernard Dickens, "A Decade of International Change in Abortion Law: 1967-1979", *American Journal of Public Health* (July 1978), Vol. 68, No. 7 and Bartha Maria Knoppers and Isabel Brault, *La loi et l'avortement dans les pays francophones*, Ed. Thémis, 1989.

33. For example, the British law provides the right to abortion in case of threat to the physical or mental health of the woman's other children and in case of substantial risk of foetal malformation. *The Abortion Act*, 1967, c. 87, a. 1.

34. For example, *Akron v. Akron Centre for Reproductive Health*, 462 U.S. 416 (1983) concerning authorization required to obtain an abortion in the case of a minor.

35. *Joe v. Director of Family and Children's Services* (1986), 5 B.C.L.R. (2d) 267 (Y.T.S.C.).

36. 410 U.S. 179 (1971).

37. *Supra*, note 32.

38. "based upon his best clinical judgment".

39. In *Colautti v. Framklin (sic)*, 439 U.S. 379 (1979) and again in *Akron*, *supra*, note 34, the majority affirmed that the state must leave the doctor freedom to exercise his/her medical judgment.

40. No. 88-605, July 3, 1989, U.S. Sup. Ct.

41. This is the opinion of Beetz J. in *Morgentaler*, *supra*, note 1, at p. 109. The opinion is strengthened by the requirement that only the standards of the medical profession set out in the definition of the word "opinion" be followed.

42. *United States v. Vuitch*, *supra*, note 29, *Doe v. Bolton*, *supra*, note 36.

43. How can it be argued that these facts are necessarily included in the analysis of the word "health" when, for example, the British law cited *supra*, note 33, rules that the physical and mental health of the woman and the effect of the pregnancy on the existing children are two separate criteria?

44. [1986] 1 S.C.R. 863, cited by Dickson J. in *Morgentaler*, *supra*, note 1, p. 55.

45. *Id.*, pp. 919-920.

46. *Workplace Health and Safety Act*, R.S.Q., c.-S.2.1, s. 40.

47. *Cité de la santé v. Jocelyne Houle*, [1988] C.A.L.P. 843.

48. In *Colautti*, cited *supra*, note 39, the Supreme Court struck down a standard based upon foetal viability, owing to a double ambiguity.

49. *S.D.G.M.R. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

50. *Supra*, note 5, pp. 19.

51. *Id.*, p. 21.

52. *Id.*, p. 28.

53. [1933] S.C.R. 456.

54. *Supra*, note 5, p. 28.

55. *Id.*, p. 33.

56. *Id.*, p. 19.

57. *Supra*, note 1, p. 141.

58. *Borowski v. A.G. Can.*, No 20411, March 9, 1989, S.C. Can. See the briefs of the Attorney General of Canada and Women's Legal Education and Action Fund (LEAF). See also Janet Gallagher, "Parental Invasions and Interventions: What's Wrong with Fetal Rights", (1987) Harvard W.L.J. 9-58.

59. *Supra*, note 1, pp. 175-179.

60. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

61. A.T.F. V. C.N., [1987] 1 S.C.R. 1114, *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84.

62. *Bliss v. A.G. Can.*, [1979] 1 S.C.R. 183.

63. *Supra*, note 1, p. 181.

64. *Id.*, p. 128.

65. Particularly in *Colautti*, *Akron*, and *Thornburgh* cited *supra*, notes 39, 34 and 32 respectively.

66. *Supra*, note 40.