WOMEN'S LEGAL EDUCATION AND ACTION FUND

SUBMISSION TO LEGISLATIVE COMMITTEE OF PARLIAMENT ON BILL C-43, AN ACT RESPECTING ABORTION

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I. INTRODUCTION: WHAT IS LEAF?

The Women's Legal Education and Action Fund is a national organization, whose Board of Directors includes representatives of each province and territory of Canada. LEAF has been active since April 17, 1985, when section 15 (the equality section) of the *Canadian Charter of Rights and Freedoms* came into effect. LEAF's object is to achieve equality for the women of Canada by asserting constitutional and human rights guarantees in court actions, by conducting public education programs regarding equality rights and by making its research and analysis available to governments in the process of law reform.

In numerous cases across the country involving issues of equality for women, LEAF has assisted individual litigants. It has also been granted intervener status[1] by Canadian courts in numerous cases, including twelve in the Supreme Court of Canada.[2] It seems fair to conclude from decisions

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1 Intervener status may be granted when a court considers that submissions made by a public interest group such as LEAF will assist the court in resolving legal issues before it.

2 *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122; *Borowski v. A.G. Canada*, [1989] 1 S.C.R. 342; *Andrews v. Law Society of British Columbia*, [1989] 2 W.W.R. 289 (S.C.C.); *Brooks, Allen and Dixon v. Canada Safeway et al.*, [1989] 4 W.W.R. 193 (S.C.C.); *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Tremblay v. Daigle* (1989), 62 D.L.R. (4th) 634 (S.C.C.); *Re Seaboyer and the Queen; Re Gayme and the Queen* (1987), 61 O.R. (2d) 290 (C.A.), leave to appeal to S.C.C. granted 63 O.R. (2d) x; *R. v. Sullivan and Lemay* (1988), 43 C.C.C. (3d) 65 (B.C.C.A.); (1987), 31 C.C.C. (3d) 62 (B.C.S.C.), leave to appeal to the Supreme Court of Canada granted, [1989] 1

that have been rendered in cases where LEAF has intervened, that LEAF's legal arguments and analysis have been found credible by the Supreme Court of Canada and other courts. Several cases in which LEAF has intervened have involved issues about reproductive choice for women: *Borowski v. A.G. (Canada)*,[3] *Tremblay v. Daigle*,[4] *Re Baby R*,[5] *R. v. Sullivan and Lemay*.[6]

II. BILL C-43, AN ACT RESPECTING ABORTION

A. An Overview

It is LEAF's submission that, if enacted, Bill C-43 would be inconsistent with the constitutionally-guaranteed rights of Canadian women under sections 15, 7 and 28 of the *Canadian Charter of Rights and Freedoms*. Bill C-43 would allow Canadian women's priorities and aspirations in the realm of reproduction to be operative only when they coincide with those of the state. That situation is inconsistent with sections 7 and 28. The Bill would take a step back from, rather than toward, the equality guaranteed in sections 15 and 28. So long as Canadian women remain in their present

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S.C.R. xv; *Re Taylor et al. and Canadian Human Rights Commission et al.* (1987), 37 D.L.R. (4th) 577 (Fed. C.A.) leave to appeal to the S.C.C. granted (1987), 86 N.R. 317n; *R. v. Keegstra*, [1988] 5 W.W.R. 211 (Alta C.A.); *R. v. Andrews and Smith* (1988), 28 O.A.C. 161, leave to appeal to S.C.C. in *Keegstra* and *Andrews and Smith* granted (1989), S.C.N. 115.

3 *Supra*, note 2.

4 *Supra*, note 2.

5 (1988), 15 R.F.L. (3d) 225 (B.C.S.C.); (1987), 9 R.F.L. (3d) 415 (B.C. Prov. Ct)

6 *Supra*, note 2.

position of relative powerlessness in the context of reproduction, abortion will be an essential service. To restrict access to that service is to reinforce existing social inequality. (This point in particular will be developed below in the discussion of the constitutional issues.)

Further, LEAF submits that Bill C-43, in addition to violating the constitutional rights of women, is wrong in principle. Canadian women are full moral agents, capable of making decisions about their own reproductive destiny. The Bill belies this. It also fails to alleviate, and may in fact exacerbate, serious problems with access to safe medical abortions. The issues of principle will be addressed first.

B. Bill C-43 is wrong in principle

LEAF submits that abortion legislation must recognize that women are competent to make responsible choices regarding their reproductive capacities. However, this Bill requires those choices to be dictated by "medical opinion", and further overseen by the state, backed up by its criminal law powers. It does not show respect for women as moral agents. As The Honourable Barbara McDougall, Minister Responsible for the Status of Women, so eloquently stated in July 1988:

> There is no question that [the issue] is a moral issue. The question is, who is to make that moral judgment; the court in its red robes and ermine, the church in its silk robes and rings, or politicians in the green Chamber, people like us, men and women of ideals and principle?...Why are any of us in a position to make this judgment best? Why is the woman who is carrying the child not the person who can make that judgment best? Do we honestly believe that she who has the life within her will make the worse decision than us? A woman is a whole being. She has a body, an intellect, and a soul or spirit, whatever the magic is that makes us a unique

> species.... Why, if the woman is a whole being, cannot her mind, her intellect, her spirit make that same decision? In a free society we expect people to make choices, to exercise judgment, and to bear their responsibilities, sometimes at great personal sacrifice whatever the choice may be. We not only expect people to make choices, we must respect their ability to make those choices....
> [W]e must guard against our own ignorance, our own anecdotal evidence of horror stories we have heard, our inheritance of values from other times, and from all things that make us meddle in other people's ability to judge best....
> The ability to decide, not the right but the ability to decide, and the sensitivity, and the responsibility that is part of what I am, not as a Member of Parliament but as a woman, as part of what every woman is, and as a part of us as Canadians, is to be respected and is to be celebrated.[7]

Further, the mechanism put in place by the legislation is likely to reinforce rather than remedy national and regional disparities in the availability of abortion. This law creates a uniform national standard in only the most formal sense. Precisely because the law says so little, it does nothing to ensure that a uniform standard of what is likely to threaten the "physical, mental or psychological health" of a woman seeking an abortion will actually exist across Canada. There is nothing especially "national" about the federal criminal power that makes laws enacted pursuant to it any more national than laws enacted pursuant to any other federal head of power. In fact, because this is a criminal law, rather than a law which specifies national standards for safe abortion procedures through the mechanism of the *Canada Health Act*, to the extent that it alters the current *status quo*, it makes national uniformity less likely. At the moment, women can only obtain abortions to the extent that doctors are willing to perform

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7 Canada, *House of Commons Debates*, Vol. 129, No. 357-A at 18080 (27 July 1988).

them. The provinces may (to some as yet undetermined extent) affect how and where abortions are performed (and perhaps how they are funded). The new law does not remedy these current disparities in access to abortion; it legitimates them.

Section 287 of the Bill invites disparities in two ways. First, the law attaches the stigma of potentially criminal conduct to abortion in general, which conveys a message to women about even contemplating the procedure. Despite the Supreme Court of Canada's ruling in *Tremblay v. Daigle*, there is nothing to stop anti-choice activists from attempting enforcement of the new provision through the vehicle of private prosecution; nor to prevent personal harassment. Second, by failing to address the critical issues of access (for example, whether abortions must be performed in hospitals or not) and funding, either in the *Criminal Code* or in ancillary amendments to the *Canada Health Act*, the federal government implicitly encourages regional differences in abortion services. By defining the critical "opinion" in ss. 287(2) as an opinion formed in accordance with "generally accepted standards of the medical profession", the law appears to permit the provincial Colleges of Physicians and Surgeons to set their own (stringent or relaxed) standards as to the acceptable method of arriving at the requisite opinion.

As suggested above, much of the chilling effect that contributes to the ineffectiveness of the law in guaranteeing national uniformity flows from the fact that it subjects women seeking abortions, their doctors and other individuals involved to the threat of a criminal prosecution. As far as

women are concerned, liability to prosecution only underscores the disrespect this legislation shows for their moral integrity. Further, because of the provisions respecting parties to offences (ss. 21(1) of the *Criminal Code*), clinic or hospital staff who assist in the procedure knowing that the requisite standard has not been met could potentially be subject to criminal liability. For people potentially subject to criminal prosecutions, it is little comfort that they are unlikely to be charged "as a matter of practice".

The greatest practical harm in this proposed legislation is that it places doctors at risk of criminal prosecution, with potentially disastrous consequences for the availability of safe medical abortions. Section 287 places abortion entirely in the hands of doctors, creates a substantial disincentive for them to perform abortions and provides no offsetting positive encouragement to do so.[8] By requiring the "opinion" to conform to established medical standards, the legislation deliberately precludes a medical practitioner from defending him/herself on the grounds that "I'm a doctor and this is my opinion." We believe the proposed law can only exacerbate regional disparities. If the purpose of the law is to create a national standard, we find it hard to see how it is designed to meet this objective in any real sense.

C. Bill C-43 is inconsistent with the constitutional rights of Canadian women

The proposed legislation, if enacted, would infringe the rights of

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8 By this we mean that there is no provision whereby a doctor can know in advance that criminal liability is precluded.

Canadian women guaranteed in sections 7, 28 and 15 of the *Canadian Charter of Rights and Freedoms.* These infringements stem from the fact that the legislation would criminalize conduct by both medical personnel and women seeking abortions. With respect to prosecutions under s. 287, a woman could be charged with the offence if she (a) participates in an abortion performed on her by someone other than a doctor, or a person supervised by a doctor, (b) if she participates in an abortion performed on her by a doctor whom she knows not to have the opinion required by the section, or (c) if she induces an abortion on herself. Presumably a woman could also be prosecuted for illegally attempting to obtain an abortion if she even tried to obtain an abortion contrary to the legislative criteria.

1. Section 7 and Section 28

Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 28 provides:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

LEAF submits that the proposed legislation would violate the *Charter* rights of women to liberty and security of the person guaranteed to "everyone" under section 7 and "equally to male and female persons" under section 28. We are confident that the arguments relating to violations of the liberty and security of the person rights will be put before this Committee adequately by other interested parties, so that it is not necessary for us to

expose them in any detail. Suffice it to say that in LEAF's view the core problem with the Bill (in light of section 7 and the *Morgentaler* decision of the Supreme Court of Canada)[9] is that the Bill labels as criminal women who seek abortions on the basis of their own priorities and aspirations if those priorities do not coincide with those of a doctor and the state.

Although section 28 of the *Charter* was not referred to explicitly in the *Morgentaler* decision, we believe it underlies the Court's conclusion in that case that the former s. 251 of the *Criminal Code* was unconstitutional. Briefly put, section 28 says that <u>all</u> rights in the *Charter* are guaranteed equally to women and men. That includes the rights to liberty and security of the person in section 7. For section 28 to be a meaningful guarantee, it is not enough that women have the same rights to liberty and security of the person as happen to be required by men. Instead of a male norm for what the rights to liberty and security of the person will mean, section 28 mandates adopting a female <u>and</u> male norm. Thus, women (including pregnant women) must be viewed, centrally, as rights-holders. Insofar as decision-making autonomy for individuals without state interference is a protected value enshrined in our Constitution, it must relate to the decisions women are uniquely required to make, and to live with, including the decision whether to continue a pregnancy to term.

2. <u>Section 15</u>

Section 15 provides:

> Every individual is equal before and under the law and has the right

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

> to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

When pregnancy and abortion are put in their social context it becomes clear that abortion is a sex equality issue. Pregnancy and childbirth are both physical and social phenomena. Physically and socially, women often do not control the conditions under which they become pregnant. Up until the present day, the context of social inequality has denied women meaningful control over the reproductive uses of their bodies. Women have been socially disadvantaged with regard to control of sexual access to their bodies and consequential pregnancies because of socialization, lack of information, inadequate or unsafe contraceptive technology, social pressure, custom, poverty and enforced economic dependence, sexual coercion and the ineffective enforcement of laws against sexual assault.

Nor do women control the social consequences of their pregnancies. Women's role in childbearing has provided a particular occasion and pretext for disadvantaging women, including the exclusion of pregnant women from and stigmatization of pregnant women in society and work. Such consequences are not occasioned by the biology of pregnancy but by law and by society. Further, under conditions of social inequality on the basis of sex, women have been allocated primary responsibility for the intimate care of children. Social custom, pressure, economic circumstances, and lack of adequate day care have meant that women often do not control the

circumstances under which they rear children.[10]

In a world where many individual women have little control over sexual access, pregnancy and child rearing, abortion is one of the few means women have to control their reproductive capacities. We are not asserting that women should have access to abortion because it is an intrinsic good. Rather, we say that it is an essential service as long as women remain in the position of relative powerlessness in the context of reproduction. However difficult an abortion decision may be for an individual woman, it may provide some relief in a life otherwise led in conditions that preclude meaningful choice. As Professor Frances Olsen argues:

> The antiabortion movement puts women into the position of having to fight for something they need rather than want. As an analogy, suppose some group believed that begging and sleeping out of doors or under bridges were immoral. The homeless and their supporters would find themselves having to fight for the right to sleep under bridges and beg in the streets. Instead of simply fighting to end homelessness, advocates would have to divert their attention to protecting the rights of people to live as homeless people.[11]

Access to legal abortion is an attempt to ensure that women have more control of their reproductive capacities, more equal opportunity to

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10 For some recent federal government reports relating to the societal position of women, see *Convention on the Elimination of All Forms of Discrimination Against Women: Second Report of Canada*, (Ottawa, Department of the Secretary of State, 1988); Linda MacLeod, *Battered But Not Beaten: Preventing Wife Battering in Canada*, (Ottawa: Canadian Advisory Council on the Status of Women, 1987); *Special Committee on Pornography and Prostitution: Report*, (Ottawa: Supply and Service Canada, 1985); *Report of the Commission on Equality in Employment*, (Ottawa: Supply and Service Canada, 1985).

11 F. Olsen "Unravelling Compromise" (1989) 103 Harvard Law Review 105 at 123-24.

plan their lives and more equal ability to participate fully in society than if legal abortion did not exist. Because motherhood without choice is a sex equality issue, access to abortion is a sex equality issue.

The Supreme Court of Canada has recently held that disadvantaging women on the basis of pregnancy constitutes sex discrimination. In *Brooks, Allen and Dixon v. Canada Safeway et al.*,[12] the issue was whether discrimination against pregnant women in the context of an employer disability plan constituted sex discrimination. A unanimous Supreme Court of Canada held that it did. The Court implicitly acknowledged that women's ability to reproduce has been used to disadvantage them in this society. Dickson C.J.C. stated:

> That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.(at 212)

While this statement was made in the context of sex discrimination under Human Rights legislation, the Supreme Court of Canada has indicated that discrimination should be given the same meaning in the *Charter*.[13]

What is discrimination? In the leading Supreme Court of Canada

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12 *Supra*, note 2.

13 *Andrews v. the Law Society of British Columbia*, [1989] 2 W.W.R. 289 (S.C.C.), per McIntyre J.

case on section 15, McIntyre J. (for a majority on this issue) stated:

> ...discrimination may be described as a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. (at 308)

McIntyre J. went on to state:

> Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. (at 308)

It is our position that Bill C-43 infringes women's right to equality under s. 15 in several ways.

First, it singles out a medical procedure that only women require and tells women that they may be subject to criminal sanction for even attempting to seek that treatment in circumstances other than those narrowly defined by the legislation. We concede that the performance of an abortion is a medical procedure which, at least at the present time, should be performed under the supervision of a medical practitioner. Legislation requiring medical procedures to be performed or supervised by medical practitioners is widely accepted. However, there is presently no other safe medical procedure for which a criminal sanction is imposed when the patient has requested it and the doctor performs it in a non-negligent manner. Under Bill C-43, even when the abortion is requested by the woman and performed by the doctor, both the doctor and the woman can be dragged into a criminal court to answer for their conduct. That this

situation burdens or disadvantages women (given that only women need to seek abortion) is to "bespeak the obvious" as the Supreme Court of Canada said in the *Brooks* case.

Second, the proposed legislation tells women that they are not competent to make final and binding decisions about their reproductive capacities; those decisions must be approved by doctors and subsequently reviewed by the state. While we concede that abortion may be a medical procedure, we do not concede that the decision to have the abortion is necessarily a medical one. The reasons why women choose abortion are numerous, personal and profound. They may sometimes relate to physical, mental or psychological health as those are defined or understood by the medical profession or by an individual doctor; sometimes not. The reasons women choose abortion stem from the unequal social situation in which women live. As long as contraceptive devices fail, are risky, or are unavailable, and so long as many women do not have the meaningful option of refusing intercourse, there will be many women who, while planning and preparing for other things, will be confronted with the intrusive and immediate reality of an unwanted pregnancy. There will be teenage girls who will only want to finish growing up. There will be single women who cannot carry the emotional, financial and social burdens of being single mothers. There will be married women pregnant either too soon, too late, or too often. There will be families with sufficient numbers or overwhelming problems.

While the legislation in question may not prevent all these women

from having abortions, it puts them under the shadow of being called criminal, and even going to jail, if a doctor does not agree that the abortion is "medically necessary". It also confronts doctors with criminal prosecution if some third party questions his/her judgment on the abortion decision. This threat hanging over the heads of doctors may impede women's access to abortion thus leading to delays and hence increased physical and psychological danger to the woman.

One of the central functions of a criminal sanction, especially imprisonment, is to deter. Assuming that threatened criminal sanctions actually accomplish their purpose, then it is very likely that doctors will be deterred not only from performing abortions that fall outside the legislative criteria, but deterred from performing all abortions. The criteria on which a doctor is to form an opinion are so vague, and variable from province to province, that a doctor might well decide not to take the risk of getting involved with abortion at all.

Another purpose of the criminal sanction is retribution; to label an individual as criminal thus expressing society's outrage at that individual's conduct. Is this really how we want to treat women who, for some personal reasons, may have to confront the painful and difficult abortion decision? The anguish involved in facing an unwanted pregnancy and in making the decision to terminate the pregnancy is substantial. Surely we must not add to that the stigmatization of a possible criminal prosecution, imprisonment and a criminal record. The denial of decision-making authority to women in this area, combined with the criminal sanction, is clearly inconsistent

with the equality mandated by sections 15 and 28.

Third, the Bill can, and probably will, lead to disparities between provinces in terms of access to medical and safe abortions. Such disparities would constitute an infringement of section 15 of the *Charter*. This problem stems from the fact that the medical opinion which is critical to the abortion decision must be made in accordance with "generally accepted standards of the medical profession". While there is much doubt in the medical profession as to what this means, it is clear that these standards could be set by provincial Colleges and thus could vary from province to province. If one province were to set out particularly stringent standards and other provinces did not, we would be telling women in the first province that Canadian criminal law means something different for them than for women in other provinces.

Although the Supreme Court of Canada has held that section 15 does not render unconstitutional all criminal laws which embody or permit regional disparities,[14] it has recognized that section 15 is directed toward the alleviation of disadvantage experienced by those who are members of groups defined by race, religion, sex, disability, and the other enumerated characteristics in section 15, or characteristics analogous to those.[15] Thus, disparities in the criminal law relating to abortion which render women (and their doctors) liable to prosecution in some provinces but not in others, would infringe section 15. The legislation creating such disparities would

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14 *R. v. Turpin* (1989), 69 C.R. (3d) 97 (S.C.C.).

15 *Andrews v. Law Society*, *supra*, note 2.

increase, rather than alleviate, the disadvantage already experienced by Canadian women. As well, there is good reason to predict that the resulting lack of access to abortion in certain parts of the country would impact on the Canadian women who are already most likely to be living in poverty because of regional imbalances in the Canadian economy.

Access to a medical procedure only for those women who can afford to travel to another province is inconsistent with the Canadian approach to health care, and with the values embodied in section 15 of the *Charter.* Where variations in the level of restrictions on access to this medical procedure that only women require are combined with a criminal sanction, section 15 is violated.

III. CONCLUSION

LEAF submits that Bill C-43, if enacted, would infringe or deny Canadian women's rights to equality, security of the person, and liberty as guaranteed in the *Charter.* As well, if enacted, it would further a policy of attempting to control Canadian women in their reproductive choices. While there has been a long history of legal and social control of women's reproductive function (through the State, the Church, the family and the medical profession, historically all male-dominated institutions), this is 1990 and Canadian women legitimately expect that we are entering an era of equality. In this era, creating conditions of economic, social, political and legal equality for women will be the priority. When those conditions are achieved, women are most unlikely to need to seek abortion because they will have much greater control over the conditions in which they become

pregnant. Further, pregnant women and women who are mothers will not be economically disadvantaged by pregnancy or maternity; rather, the societal value of women's reproductive work will be recognized in economic terms.

LEAF, as an organization whose object is the achievement of equality for Canadian women, urges this Committee, and the Parliament of Canada, to refrain from the retrograde step of criminalizing abortion through the passage of Bill C-43.