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No. A872582
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: [redacted]

MEMORANDUM OF ARGUMENT
OF
THE WOMENS' LEGAL EDUCATION AND ACTION FUND
(INTERVENOR)

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PART I

FACTS

1. At approximately 3:00 o'clock in the afternoon of May 20, 1987, Ms. R was admitted, at her request, to Grace Hospital in Vancouver to give birth.

2. At approximately 6:00 o'clock, Dr. C. G. Zouves, the obstetrician on call at Grace Hospital, was consulted by the Chief Resident, then on duty, and advised that Ms. R was in labour, that her cervix was partially dilated, and that a limb of the unborn infant surrounded by a bag of amniotic fluid which also contained the umbilical cord, which was pulsating, was presenting in the cervix. The limb was not visible and had not prolapsed from the mother's vagina. The placental membrane was intact.

3. When Dr. Zouves examined Ms. R he found that the cervix had dilated to 5 to 6 centimetres. The patient was having regular uterine contractions. Dr. Zouves testified that when a patient is 5 to 6 centimetres dilated with bulging membranes and having regular uterine contractions, delivery is an inevitability at some point within 12 to 48 hours thereafter.

4. Dr. Zouves testified that over a period of two to three hours he explained to Ms. R "the indication for the

procedure, the alternatives, if there were any, and the possible complications which could occur with either doing the procedure or not doing the procedure". He also stated, "I found the patient rather quiet. It was my impression that she comprehended what was being explained to her and that she was aware of the gravity of the situation as it pertained to her unborn child".

5. He further stated, "Initially she did not consent to operative delivery" and when asked her stated reason, he replied, "The reason she gave was that she had previously delivered vaginally on four occasions and that it was her hope that this baby would be successfully delivered vaginally as had the four previously."

6. Mr. Bulic, a social worker employed by the Ministry of Social Services and Housing, testified that he was called by Dr. Zouves at 7:40 P.M. at the Emergency Services Office of the Ministry in Vancouver and that Dr. Zouves asked if the Ministry had any information about Ms. R. Mr. Bulic testified that Dr. Zouves advised that Ms. R was refusing to have a Cesarean Section for the delivery of her unborn child. Dr. Zouves testified that he told Mr. Bulic that there was a risk that should the membranes rupture, with the stage of dilation being what it was, "that there was no safe way of delivering this infant vaginally and in all likelihood the child would die".

7. Dr. Zouves stated that although he considered it "extremely unlikely" that the baby could turn and present itself in a much more favourable position for a vaginal birth, it was not impossible.

8. At 8:10 P.M. Mr. Bulic spoke with Dr. Zouves again and related to Dr. Zouves certain information about Ms. R which he had obtained from another social worker. During this conversation Dr. Zouves asked Mr. Bulic to contact the Vancouver Mental Health Emergency Services to have a psychiatric social worker and a Vancouver police constable come to Grace Hospital to determine Ms. R's mental state.

9. Dr. Zouves spoke to Mr. Bulic again at 8:20 P.M. and advised Mr. Bulic that the Grace Hospital Psychiatrist did not wish to be involved in assessing the patient. Dr. Zouves' testimony was that he had contacted Dr. Misry, a psychiatrist and that "I described the whole situation to her in detail and the essence of the conversation was that if it was my feeling that the patient was pyschotic or showed any inability to make an adequate decision that there may be grounds for committal, but that this was .... it was felt by Dr. Misry that from what I told her there was no reason to suspect this and as such there was no need for her specifically to see the patient"

10. After his discussion with Dr. Zouves at 8:20 Mr. Bulic attempted to contact the Mental Health Emergency Services vehicle and then conferred with his own immediate superiors at Emergency Services. At 8:50 he again spoke with Dr. Zouves who advised Mr. Bulic that the unborn child was still attached to the umbilical cord. Mr. Bulic testified, "I explained to him (Dr. Zouves) the process of apprehension under the Family & Child Services Act, and asked him if he was referring to this entity, to the fetus, as a child. He said to me, `I am calling it a child'".

11. Dr. Zouves, however, said the following, "I am not aware that I usually call a baby a child, you know, I would call it a fetus or a baby. I am not sure. I may well have used that terminology, but I am not sure." and later he stated, "The term baby and fetus I use personally interchangeably and I don't specifically see a difference." and when asked, "There was no child in existence at the time he said that, is that correct?" replied, "No child had been born as yet".

12. At 9:05 Mr. Bulic again called Dr. Zouves and told Dr. Zouves that the Ministry was apprehending the child and that he was giving verbal consent to care required by the child and he, "made it very clear that we were not consenting to any [illegible] procedures to be performed on Ms. R."

13. Mr. Bulic testified, "The secondhand information that I received from my Supervisor, because I did not speak with Ms. Arnold, was that even if we apprehended, this is going to be a difficult case, that we will be setting a precedent." and later, "We were ... because we are familiar with the fact that this has not happened before in British Columbia, we knew that we were so to speak, acting on a first time basis which is why the discussions took place and the opinions were sought from various people with a great deal of experience in the child welfare field. The significance of the conversation I gather from Leslie Arnold was that we were going to do it, but it was going to be a difficult thing that we were doing. It was going to not be so to speak, routine or normal apprehension, if apprehensions can every be regarded as a routine procedure."

14. Mr. Bulic testified that he then attended at Grace Hospital at 9:18 and that when he arrived he was told that Ms. R was in an isolation room and that Ms. R had given verbal consent at 9:17 to having a Cesarean Section performed on her.

15. Dr. Zouves recollection was, "It was Mr. Bulic's statement to me on arrival that they could give me permission to operate to save the baby, but that they were not giving me permission to operate on the patient herself" and later, "What I am saying in my handwritten note, is that

the Ministry had given me permission to operate on the baby or for the baby. In a surgical situation that may arise they are giving me consent from the baby's point of view. That is what I am saying".

16. Mr. Bulic testified that he was told that Ms. R delivered a healthy baby boy at 10:49 P.M.. The evidence was that the baby weighed 2500 grams, was not suffering from drug or alcohol syndrome based on a cursory examination of the baby at birth, and that the initial examination did not disclose any abnormalities in the infant.

17. The evidence is unclear as to whether or not Ms. R was informed of the apprehension before she gave her verbal consent for a Cesarean Section to be performed on her, or before the surgical procedure was actually performed.

18. The Infant Discharge Summary prepared by the attending and discharging physicians at British Columbia Children's Hospital Special Care Nursery, stated, "After several hours the Superintendent of Family & Child Services (M.S.S.H.) apprehended the baby in utero". The Report also stated, "Apart from initial deep decelerations on external monitoring, which recovered, there was not evidence of fetal distress or chorioamnionitis".

19. A letter from the District Manager of the Social Services & Housing to the Director of Social Services at Grace Hospital dated May 22, 1987, states, "Baby boy R was apprehended on May 20, 1987, under the Family & Child Services Act, section 1, clauses (c) "deprived of necessary care through the disability of his parent" and (d) "deprived of necessary medical attention".

20. In the Discharge Summary of Dr. Zouves, he stated, "While this consent was being obtained, the Emergency Response Team of the Ministry had arrived and their legal opinion was that they were prepared to apprehend this infant in utero if it meant facilitating treatment for a life threatening situation. They made it clear they were not giving permission for surgery on the mother against her will, but merely apprehending the fetus in utero" and later, "As far as I am aware, the consent forms on behalf of the unborn child for treatment were signed by the Ministry at the same time that the patient gave her consent to therapy and the patient was not informed immediately of the apprehension in utero as she was in the process of being wheeled into the O.R. for emergency surgery". His report confirmed the baby was delivered at 10:49.

21. The chart of Ms. R. contains a section entitled "Physician History and Progress Notes". The entry made by Dr. Zouves at 21:15 reads as follows, "Ivan Bulic: Social

Services - The baby is being apprehended before delivery...". A Social Work Report dated May 20, 1987, by Kerry Doyle reads, "Emergency Services notified (M.S.S.H.) by Medical/Nursing Staff re: child protective concerns. Infant apprehended. Patient not informed as medical staff felt it was not appropriate at the time".

22. Ms. R opposed an application for custody by the Ministry of Social Services & Housing on July 13 to 17, 1987, but His Honour Judge Davis, of the Provincial Court of British Columbia committed Baby R to the custody of the Superintendent of Family & Child Services on September 3, 1987.

23. On January 12, 1988, LEAF was granted leave to intervene in these proceedings brought for Judicial Review of the apprehension and of the decision of His Honour Judge Davis, by the Honourable Mr. Justice D. B. Mackinnon, of the B.C. Supreme Court, in Chambers.

24. A Notice under the Constitutional Question Act of British Columbia was served on the Ministry of the Attorney General and on the Attorney General of Canada on Fenriaru 24, 1988.

PART II

ISSUES

1. Does the word "child" in the Family & Child Service Act, S.B.C. 1980, c. 11, as amended include a fetus or unborn child?

2. If the word "child" in the Family & Child Service Act includes fetus or unborn child, does the Act, and in particular, do sections 9 and 10 of the Family & Child Service Act constitute a deprivation of the right to life, liberty and security of a woman or pregnant woman, within the meaning of section 7 of the Charter of Rights and Freedoms, Constitution Act, 1982 or violate the rights of a woman or a pregnant woman to equal protection and equal benefit of the law within the meaning of section 15(1) and the rights guaranteed under section 28 of the Charter of Rights and Freedoms?

3. If an interpretation of the word "child" to include a fetus or unborn child does offend the provisions of sections 7, 15 or 28 of the Charter of Rights and Freedoms, can the Family & Child Services Act be upheld on the basis of section 1, of the Charter?

PART III

ARGUMENT

1. Does the word "child" in the Family & Child Service Act, S.B.C. 1980, c. 11, as amended include a fetus or unborn child?

1. "Child" is defined in the interpretation section of the Family & Child Service Act (hereinafter called "the Act") as follows: "Means a person under 19 years old". "Apprehend" is defined as: "Means to take a child into custody under this Act". "In need of protection", means, "In relation to a child, that he is (a) abused or neglected so that his safety or well being is endangered, (b) abandoned, (c) deprived of necessary care through the death, absence or disability of his parents, (d) deprived of necessary medical attention, or (e) absent from his home in circumstances that endanger his safety or wellbeing;"

2. Section 12 of the Interpretation Act R.S.B.C. 1979, c. 206, provides that:

> "Definitions or interpretation provisions in an enactment, unless the contrary intention appears in the enactment, are applicable to the whole enactment including the section containing a definition or interpretation provision."

3. E.A. Driedger, in the Construction of Statutes states that,

> "Within the statute ... an interpretation section lists words or expressions in dictionary form, and assigns to them the meaning they are to bear in the statute ... By including an appropriate definition, Parliament has reduced the area of doubt or dispute about the meaning of the words. Another function of definitions is to limit the scope of general words ... a separate section [might] state that words and expressions in the statute are to have the same meaning as in some other statute."

It is clear throughout the Act, that the Legislature intended the provisions of the Act to apply only to an independent, living entity having a physical existence separate from its parent; and capable of being in the actual physical custody or care of a person.

4. While it may not be a law, it is a canon of statutory interpretation that a word if capable, bear the same meaning throughout the provisions of an Act. The only interpretation of "child" under the Act which is capable of consistent application throughout the Act, is that child means a child born of its mother, and issued from its mother's body.

5. The provisions of section 9, which deal with the apprehension of a child, make it clear that what is envisioned is the actual taking into custody of the physical body of a child. Similarly, the provisions of section 10,

dealing with custody and guardianship, make it clear that the power of the Superintendent to authorize emergency medical care and treatment presumes that the physical person of a child has been apprehended, i.e. taken into custody.

There is no provision, in the Act, for a notional apprehension or taking of custody such as by telephone.

6. Indeed, if "child" was intended by the Legislature to include fetus or unborn child, the provision of section 4 relating to the provision of emergency medical treatment in the absence of the parent is capable of an absurd effect.

7. "Custody" is defined in Black's Law Dictionary as "The care and keeping of anything; as when an article is said to be `in the custody of the court'"; "Also the detainor of a man's person by virtue of lawful process or authority; actual imprisonment;" and "detention; charge; control; possession".

8. There appears to be little issue that the purported apprehension of Baby R occurred at a time prior to his live birth. Although in his Reasons for Judgment His Honour Judge Davis said;

> "It is clear that this child was in the process of being born and the intervention and redirection of its birth were required for its survival."

He also states,

> "The evidence is that the birth was imminent and it in fact occurred within three hours of the Superintendent making the apprehension."

9. It is further submitted that the evidence of all of the medical personnel involved was that at the time of the apprehension this child was not born, nor in any way emerged from the body of its mother, although one of the baby's feet in the amniotic sac was protruding into the cervix (not the vagina).

On the evidence the only apprehension of the person who is now Baby R occurred at a time prior to his birth.

10. It also seems clear that unless a Cesarean operation on Ms. R can be considered "care" of Baby R or "necessary medical attention" to Baby R, that he was not "in need of protection" at the time the apprehension occurred. Indeed, what evidence there is suggests that the unborn child was not in distress nor deprived of necessary care nor deprived of necessary medical attention at any relevant time. Ms. R, according to the evidence, verbally consented to the performance of a surgical procedure on her body which resulted in the delivery of a healthy baby. There was no care or medical attention anticipated for the person of Baby R or to the body of Baby R until he was in fact born.

11. Current judicial authority in the United Kingdom and in Canada, and for the most part, in the United States of America, is to the effect that an unborn child or fetus is not a "person" and that individual rights are not accorded to an unborn child or fetus, although society may have an interest in preserving the life of a fetus or unborn child once it is viable. As well, the Courts have held that they will accord certain rights or remedies to a child arising out of injuries or actions occurring before its birth, but only if a live birth occurs.

> Dehler v. Ottawa Civic Hospital (1979) 101 D.L.R. (3d) 686
>
> Medhurst v. Medhurst, Queens Way General Hospital and others (1984) 38 R.F.L. (2d) 225
>
> Borowski v. The Attorney-General of Canada and Minister of Finance of Canada [1987] 4 W.W.R. 385 (Sask. C.A.)

12. At page 399 of the latter decision, in which leave to appeal has been granted by the Supreme Court of Canada, the Court stated,

> "In summary there are no cases in Anglo Canadian law giving the foetus quo foetus status; the cases in these various branches of the civil law have, in my view, merely dealt with fully capacitated persons before the Court, giving some effect to matters which had affected them before they attained that status."

13. In Paton v. British Pregnancy Advisory Service Trustees [1979] Q.B. 276, [1978] 2 All E.R. 987 at pages 989 to 990, the Court stated that,

> "... the fetus cannot, in English law, in my view, have any right of its own at least until it is born and has a separate existence from the mother. That permeates the whole of the civil law of this country (I except the criminal law which is now irrelevant), and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia, and I have no doubt, others. Even in the decision of the Supreme Court of the United States of America in Roe v. Wade, 410 U.S. 113 at page 161, where the courts found that the States could regulate and even prohibit abortions after viability, the Court expressly declined to find that the viable fetus was a person."

14. In the two Ontario High Court decisions Dehler and Medhurst the Court held that while the law has recognized fetal life and has accorded the fetus various rights, those rights have always been held contingent upon a legal personality being acquired by the fetus upon its subsequent birth alive and, until then, a fetus is not recognized as included within the legal concept of persons.

15. It may be significant to note that section 206(1) of the Canadian Criminal Code defines a human being, for the purposes of criminal law, as follows:

> "1. A child becomes a human being within the meaning of this Act 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."

16. "Person" is defined in the Interpretation Act, R.S.B.C. 1979 c. 206, as:

> "includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law".

17. Where Legislatures have intended "child" to include unborn child, they have stated so in explicit terms. Thus, in New Brunswick, the definition of "child" in the Child and Family Services and Family Relations Act R.S.N.B., 1980 c. C2.1, s. 1, means:

> "A person actually or apparently under the age of majority, unless otherwise specified or prescribed in this Act or the Regulations, and includes,
>
> a) an unborn child;
> b) a still born child."

18. In the Children of Unmarried Parents Act, R.S.S. 1973, c. 12, s. 2, child is defined as follows: "includes, where the context requires, a child en ventre sa mere." Similarily, the Children of Unmarried Parents Act, R.S.N.S. defines "child" so as to include a child en ventre sa mere as does the Child Welfare Ordanence of the North West Territories, R.O.N.W.T. 1961 (2nd) c. 3, in which "child" is defined as "a child born out of wedlock" and includes "a child en ventre sa mere that is likely to be born out of wedlock". The Childrens Act, S.Y.T., 1984 c. 2 s. 134(1) specifically provides power:

> "Where the Director has reasonable and probable grounds to believe and does believe that a fetus is being subjected to a serious risk of suffering from fetal alcohol syndrome or other congenital injury attributable to the pregnant woman subjecting herself during pregnancy to addictive or intoxicating substances, the Director may apply to a judge for an Order requiring the woman to participate in such reasonable supervision or counselling as the Order specifies in respect of her use of addictive or intoxicating substances."

19. The British Columbia Vital Statistics Act, R.S.B.C. 1979 c. 425 defines "birth" as follows:

> "Means the complete expulsion or extraction from its mother, irrespective of the duration of the pregnancy, of a product of conception in which, after the expulsion or extraction, there is,
>
> a) breathing;
> b) beating of the heart;
> c) pulsation of the umbilical cord; or,
> d) unmistakable movement of voluntary muscle, whether or not the umbilical cord has been cut or the placenta attached."

It is submitted that if the British Columbia Legislature intended the Family & Child Services Act to apply to unborn children they would have stated so in explicit terms.

Charter Implications in Interpretation of the Statute:

20. Section 52 of the Canadian Charter of Rights and Freedoms requires that all legislation be interpreted to conform with the Charter or else be struck down. If two

interpretations of a legislative provision are possible, the court must choose the one which is consistent with the Charter.

R v. Cancoil Termo Corporation & Parkinson (1986) 52 C.R. (3d) 188 (Ont. C.A.).

21. LEAF submits that the assertion made by the Crown here that "child" includes unborn child or fetus has the following effect:

1) If the Crown's interpretation is correct, then the Act must envision that the Superintendent of Family & Child Services could detain or otherwise restrict the liberty of a pregnant woman or, indeed, take a pregnant woman into physical custody so as to effect the apprehension of her unborn child. Similarly, the Superintendent could authorize medical care and treatment including surgery to be performed on the body of a pregnant woman, without her consent, in order to provide medical care and treatment to the fetus.

Such powers, in light of the provisions of sections 7, 15 and 28 of the Charter of Rights and Freedoms would, in our submission clearly violate the rights and freedoms of a pregnant woman and accordingly the provisions of the Charter.

2) On the other hand, if the Family & Child Services Act does not have the effect of permitting the Superintendent of Family & Child Services to apprehend an unborn child by the apprehension of a woman, or permit the authorization of treatment to the unborn child through or to the body of the woman, then the Legislature must be presumed to have enacted meaningless legislation creating a merely theoretical remedy.

1. Section 7 of the Charter reads:

> "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."

Women are clearly persons and thus accorded the protection found in section 7 of the Charter. To date, there is no judicial authority to the effect that an unborn child or fetus is a person or, is accorded protection under the Charter of Rights and Freedoms. That is, of course, the issue facing the Supreme Court of Canada in the Borowski case, supra, expected to be heard in the fall of 1988. However, even if it is ultimately determined that the fetus is a person and is accorded some protection under the Charter of Rights and Freedoms, it is submitted that an interpretation of the Act which permitted the Superintendent to interfere with the freedom of movement or bodily integrity of a pregnant woman, does not accord with the protections offered by sections 7 or 15 of the Charter.

2. If the word "child" in the Family & Child Service Act includes fetus or unborn child, does the Act, and in particular, do sections 9 and 10 of the Family & Child Service Act constitute a deprivation of the right to life, liberty and security of a woman or pregnant woman, within the meaning of section 7 of the Charter of Rights and Freedoms, Constitution Act, 1982 or violate the rights of a woman or a pregnant woman to equal protection and equal benefit of the law within the meaning of section 15(1) and the rights guaranteed under section 28 of the Charter of Rights and Freedoms?

2. The concern of LEAF is that if the Act is interpreted in such a manner as to permit the apprehension and taking into custody of an unborn child and the authorization for medical treatment to an unborn child, the ultimate effect must be that pregnant women may be, in effect, imprisoned during some or all of their pregnancy or required to undergo bodily invasions without their consent, and in circumstances where the mother's health and life may be placed in jeopardy in the interests of her unborn child.

3. No matter how sympathetic the intervenor may be to specific circumstances and no matter how respectful of the interests of the unborn child, it is submitted that the rights of a woman, the mother, cannot be so overridden. As well, as commentators have stated, the fear of detention or imposed treatment may have the opposite effect from what is desired. That is, women with questionable lifestyle or non-conformist views in relation to childbearing and delivery, may avoid obtaining necessary medical care during pregnancy because of fear of compulsion.

4. It is submitted that this discussion is far from being science fiction. In a number of isolated cases in the United States, courts have supported not only the apprehension of unborn children by the apprehension of pregnant women, but also have issued orders which resulted in the forcible detention, sedation and performance of Cesarean Sections on women. These cases are referred to in the following articles:

> "Prenatal Invasions and Interventions: What's Wrong with Fetal Rights" by Janet Gallagher, [1987] Harvard Womens Law Journal, vol. 10., p.9
>
> "Fetal Rights and Maternal Rights: Is There Conflict?" Sandra Rogers, p.456 [1986] Canadian Journal of Women and the Law, Sanda Rodgers, p.456
>
> "The Judge in the Delivery Room: The Emergence of Court Ordered cesareans", Nancy K. Rhoden [1986] 74 California Law Review, p.1951

5. It is ironic to note that in some of the reported and unreported American decisions, in situations where a cesarean was stated to be the only safe method of delivery for the fetus, the mother was subsequently able to delivery vaginally as a result of a change in the position of the fetus or the circumstances of the delivery.

6. We submit that an interpretation of the Act which permits the apprehension of an unborn child must lead, unless it is to be a meaningless procedure, to a violation of the rights of the pregnant woman, the mother, to life,

liberty and security of her person. It is also submitted that to permit a violation of the bodily integrity of pregnant women for the benefit of a third "person", as yet unborn, would be to grant pregnant women a different status and a significantly lesser degree of protection than is guaranteed all other citizens. To deprive the pregnant woman of liberty and security of the person in the circumstances permitted in the Act, would surely not accord with the principles of fundamental justice in light of the absence of procedural and substantive safeguards involved in an apprehension under the Act. Finally, it is submitted, the involuntary detention and imposition of medical treatment cannot be shown to be a "reasonable limit prescribed by law and demonstrably justified in a free and democratic society" within the meaning of section 1 of the Charter.

7. As already stated, there are two purposes for which the Superintendent might wish to apprehend a fetus. The first would be an order to supervise the conduct of the pregnant woman. This would presumably involve some detention or imprisonment of the woman herself, which would have clear implications for her right to liberty. Secondly, the apprehension could occur where a woman has refused to undergo medical treatment which, in the opinion of physicians, would be in the best interests of the fetus, including such things as fetal surgery, a blood transfusion

or a Cesarean Section. In such a case, the requirement that a woman undergo treatment or surgery would impact upon the security of her person. Although, in the case at bar, the evidence is that Ms. R consented to surgery, the natural and virtually inescapable consequence of permitting the apprehension of a fetus is the forcible confinement or battery of the mother.

8. The physical confinement of a pregnant woman against her wishes either to prevent her from engaging in certain conduct considered undesirable for the health of the fetus or to impose treatment upon her to benefit the fetus, establishes a clear deprivation of liberty. However, in R. v. Morgentaler [1981] 1 S.C.R. 30, Madam Justice Wilson also held that requiring a woman to surrender control over her reproductive functions, whether or not it resulted in physical confinement, also constituted a deprivation of liberty. She stated:

> "Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. ... In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance." (p.166)

And later, at p.171:

> "I would conclude, therefore, that the right to liberty contained in section 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives."

In that case, in the context of abortion, Madam Justice Wilson stated at p.167:

> "Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them."

9. A decision by a woman not to provide medical treatment to her fetus or to engage in conduct which endangers the health or life of that fetus, particularly where the fetus is close to term, is a difficult decision and one which is, no doubt, morally unacceptable to many Canadians. Nevertheless, it is fundamentally a decision affecting a woman's personal autonomy and intimately affecting her private life and accordingly, entitled to state recognition.

10. It may be noted, that where an individual is arrested or detained by the state, even where the detention follows the placing of a serious criminal charge, and where the purpose of the detention is to either prevent the accused from escaping prosecution or from re-offending, significant procedural and constitutional safeguards are available. Similarly, where freedom of movement is to be restricted, such as orders made to "keep the peace" or, for example, orders made in the course of divorce proceedings requiring one party to refrain from contacting or visiting the residence of another, a court order or the consent of the party whose liberty who will be affected has been

required. This point will be addressed further when we talk about "except in accordance with the principles of fundamental justice".

Security of the Person

11. The right to bodily integrity has long been accorded the highest degree of protection by the common law. This was affirmed strongly in two recent decisions of the Supreme Court of Canada: E. v. Mrs. E. [1986] 2 S.C.R. 388; and Morgentaler v. The Queen, supra. As Mr. Justice Grey articulated in Union Pacific Railway Company v. Botsford, 141 U.S. 250 at p.251, 1891, quoting from T. Cooley's "A Treatise on the Law of Torts", p.29 (2d. 1888):

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law ... 'the right to one's person may be said to be a right of complete immunity; to be let alone.'"

12. In the Morgentaler decision, five of the seven members of the Supreme Court of Canada found that the limitations on the woman's right to terminate a pregnancy contained in section 251 of the Canadian Criminal Code did violate a woman's interest in the security of her person. Security of the person was held to embrace both the physical and psychological integrity of the individual. Madam Justice Wilson at p.173 of the decision said:

> "State enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity."

13. In that decision, it was determined that while the state may have an interest in fetal life, that interest could not prevail over the mother's right to security of the person where her health or life are affected or endangered. What Madam Justice Wilson stated at p.173 in the context of abortion is applicable here:

> "In essence, what it [section 251] does is to assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise. This is not, in my view, just a matter of interfering with her right to liberty in the sense (already discussed) of her right to personal autonomy in decision-making, it is a direct interference with her physical 'person' as well. She is truly being treated as a means - a means to an end which she does not desire but over which she has no control."

14. J. Gallagher, an American lawyer writing in the Harvard Womens Law Journal, supra, pp.57-58 argues:

> "A competent woman may choose to undergo surgery or therapy for the sake of the fetus. But we cannot exact the gift of life by state power. Until the child is brought forth from the woman's body, our relationship with it must be mediated by her. The alternative adopts a brutally coercive stance toward pregnant women, viewing them as vessels or means to an end which may be denied the bodily integrity and self-determination specific to human dignity."

15. It is significant to note that the right to bodily integrity has, at common law, long been determined to override the state interest in the preservation of the life of another person. Accordingly, the courts have consistently refused and, in our submission, will consistently refuse, to order that persons donate organs, bone marrow or even blood to preserve the health or life of their children, spouses or other relatives. It is ironic that a system of law which would not require a woman, in all likelihood, to undergo a surgical procedure or endanger her own life or health to save or preserve the health or life of her living child, could interpret a statute in such a way as to require her to undergo surgical intervention or medical treatment for the benefit of her as yet unborn child. This issue will be addressed further when we consider section 15 of the Charter.

16. The final point in considering section 7 of the Charter is to determine whether or not, if the mother's right to liberty and security of the person would indeed be violated by the interpretation of the Act which is advanced by the Crown, such a deprivation would be in accordance with the principles of fundamental justice. It is submitted that clearly it would not. The lack of substantive and procedural safeguards in the Act, from the point of view of the woman who would be "apprehended" or required to undergo medical treatment without her consent, is manifest. There

is no opportunity for a hearing or appeal except after the fact, there is no exercise of independent decision-making, there is no opportunity for the woman to offer an explanation or defence of her actions which must be taken into account in making the decision to apprehend, there is no independent weighing of the interests of mother and child, there is no requirement for a warrant, there is no requirement that the Superintendent have reasonable and probable grounds to support his belief that the child is in need of protection. Indeed, the parent has no statutory right to be informed of the apprehension and, in the case at bar, it appears that the mother was not informed until some considerable time after the apprehension had purportedly taken place and long after, by her consent to surgery, she had removed the purported reason for the apprehension.

17. It may be argued that the imposition of medical treatment or surgical intervention on the mother is in the mother's own best interests as well as those of her unborn child. Whether that is so or not and it is somewhat questionable in relation to the imposition of a Cesarean Section, the law has never, it is submitted, imposed treatment on competent persons without their consent even where it was clear, from a medical perspective, that the treatment was in the best interests of the individual.

18. With respect to a Cesarean Section, it is major surgery and as such is associated with higher rates of maternal mortality and morbidity than vaginal delivery. In her article, "The Judge in the Delivery Room: The Emergence of Court Ordered cesareans", supra, Nancy Rhoden reviews the risks associated with Cesarean Sections and the fact that the risk of death from a cesarean is still approximately four times that from vaginal delivery. Certain risks are posed by anaesthesia, whether general or local, up to one-third of cesarean patients experience some type of post-operative infection, complications may compromise future childbearing and cesarean delivery renders subsequent surgical deliveries far more likely.

19. Cesarean Section is a major operative procedure. As such, it is associated with injuries that do not occur in vaginal deliveries. The list of these injuries is long and includes injuries to the ureter, bladder and bowel, injuries to blood vessels and lacerations of the cervix, vagina and broad ligaments. Cesarean Section also increases the risk of postpartum hemorrhage, pulmanary embalism, paralytic ileus, and endometritis, urinary tract infections and other infections. Hysterctomy as a result of hemorrhage or infection occurs after Cesarean Section, and postcesarean infection may compromise future fertility. (Petitti, "Maternal Mortality and Morbidity in Cesarean Section" (1985), 28 Clinical Obstetrics and Gynecology, 763 at p.763)

Section 15 of the Charter

20. If the Act is interpreted so as to permit the apprehension or imposition of medical treatment on a pregnant woman in the interests of her child, it is submitted that pregnant women would be subject to a fundamental inequality in legal treatment.

21. It is interesting to note first of all that in the article "Court Ordered Obstetrical Interventions", May 7, 1987, New England Journal of Medicine, at p.1192, by Kolder, Gallagher and Parsons, they report that among 21 cases in which court orders for Cesarean Sections were sought, 81% of the women involved were black, Asian or Hispanic, 44% were unmarried, and 24% did not speak English as their primary language. All the women were treated in a teaching-hospital clinic or were receiving public assistance. Similarly, Annas in the article "Protecting the Liberty of Pregnant Patients" (1987) 316, New England Journal of Medicine, at p.1213 stated:

> "Almost all the pregnant women involved in the reported physician initiated court actions have been black, Asian or Hispanic, and all were poor. Women from various ethnic backgrounds have profoundly differing religious and personal beliefs about childbirth - beliefs that are often misunderstood or discounted by physicians."

damental inequality, however, which would be

e-imposed apprehension of an unborn child

and the authorization of medical treatment through the body of the mother to benefit that unborn child would be to require women, and specifically pregnant women, to undergo detention, surgery or medical treatment in the interests of someone other than herself. There is no context, it is submitted, in which a man would or could be similarly compelled.

23. The issue of whether or not pregnancy discrimination is discrimination based on sex is presently before the Supreme Court of Canada. A recent decision of the British Columbia Supreme Court held, however, that discrimination on the basis of pregnancy could constitute sex discrimination for the purpose of human rights legislation.

> Century Oils v. Davies and British Columbia Council of Human Rights (1988) 22 B.C.L.R. (2d) 358 (B.C.S.C.)

24. In an American decision, McFall v. Shimp (1978) 10 Pa. D.C. 3d 90, the court refused to order a man to donate bone marrow to his cousin by way of a relatively safe but painful procedure even though he was the only compatible donor. The patient died two weeks after the refusal of the court to order the donation. The court there emphasized there is no legal duty to rescue others and continued at p.91:

> "For a society which respects the rights of one individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for another member, is

> revolting to our hard wrought concepts of jurisprudence."

25. Similarly, in another American decision, In Re George 630 S.W. 2d 614, 1982, the court refused even to disclose to an adopted man suffering from leukemia and in need of a bone marrow transplant the name of his natural father where the father, after being contacted by the court, stated he was unwilling to be tested for compatibility.

26. Thus, it is submitted, if the Act here permits the Superintendent to authorize delivery of medical care to an unborn child through the body of its mother, pregnant women will truly have become subject to obligations and bereft of protections accorded to all other citizens on the basis of both pregnancy and sex.

3. If an interpretation of the word "child" to include a fetus or unborn child does offend the provisions of sections 7, 15 or 28 of the Charter of Rights and Freedoms, can the Family & Child Services Act be upheld on the basis of section 1, of the Charter?

Section 1 of the Charter

27. This leaves us with the question of whether such a deprivation of the right to life, liberty and security of the person or to equal protection and benefit of the law can be demonstrably justified in a free and democratic society. The burden of proof is on the state on a balance of probabilities: R. v. Oakes [1986] 1 S.C.R. 103, and there is a heavy onus where the state seeks to uphold the limitation of

a section 7 right: R. v. Vaillancourt, [1987] 2 S.C.R. 636. The most commonly accepted test for section 1 is set out in Oakes, supra, and is essentially a means/ends analysis. The question is whether the legislation serves an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom: R. v. Big M Drug Mart Ltd. _____<cite>. The objection of the legislation must be pressing and substantial and even where it is shown that the legislation does relate to such an objective, proportionality must be established.

28. While the protection of fetal health is a compelling objective, it is submitted that permitting the apprehension and involuntary medical treatment of pregnant women is not a means which will be effective in achieving the objective and, the impact, already discussed, on the rights of women is completely out of proportion to the potential gains involved.

29. It is submitted that although allowing the state to apprehend a fetus could prevent harm to an unborn child or indeed preserve the life of an unborn child in rare and isolated instances, it is equally probable that an interpretation of the statute which permits the apprehension, detention and involuntary treatment of pregnant women may be counter-productive. Many pregnant women considered by social services personnel to have undesirable lifestyles,

for example, those who have drug or alcohol problems, may merely avoid any medical care or contact with a hospital or the medical profession in an attempt to avoid confinement or forced treatment.

30. As stated in the article "Protecting the Liberty of Pregnant Patients", supra, and in "Court Ordered Obstetrical Interventions", supra:

> "Even from a strictly utilitarian perspective, the marriage of the state and medicine is likely to harm more fetuses than it helps, since many women will quite reasonably avoid physicians altogether during pregnancy if failure to follow medical advice can result in forced treatment, involuntary confinement, or criminal charges. By protecting the liberty of the pregnant patient and the integrity of a voluntary doctor/patient relationship, we not only promote autonomy; we also promote the well-being of the vast majority of fetuses. It may be seen, that counselling, education, financial assistance, and providing access to a range of prenatal and maternal health care services, is more likely to foster a situation which will enable women to make decisions which are in the best interests both of themselves and their unborn children."

31. There is also the factor that medical opinions as to the necessity for a Cesarean Section or other intervention are by no means infallible. In fact, as stated in "Court Ordered Obstetrical Interventions", supra: "The prediction of harm to the fetus was inaccurate in six cases in which court orders were sought for Cesarean Sections ...".

32. It is also submitted that this legislative objective, however valid, could have been achieved in a manner that would be less destructive of the mother's Charter rights. In Morgentaler v. R., supra, the court held that section 251 of the Criminal Code could not meet the proportionality test required under section 1 because it was not sufficiently tailored to the legislative objective and did not impair the woman's right as little as possible. Similarly, the lack of pre-apprehension rights, entitlement to legal representation, a requirement for reasonable grounds before initiating apprehension and the lack of guidelines for balancing the risk to the mother and to the unborn child as well as an independent procedure for weighing or balancing the rights and the risks suggests that the statute is too broad in its terms to be upheld as a reasonable limit.

33. Finally, it is submitted that the violation of the rights of individual pregnant women and women as a group created by the interpretation of the statute in the manner urged by the Crown, would be so serious that the objective cannot justify the means. Nancy Rhoden makes this point eloquently in her article, supra:

> "The conclusion that surgery should be optional is far from ideal. It has the profoundly disturbing implication that some preventable tragedies will occur; some babies who could have thrived will die or suffer devastating damage. One must therefore ask whether this conclusion is ethically supportable. It is. Even if a women is thought to

have a moral obligation to submit to surgery to save her unborn child, no objective third party, not even a court, should presume to perform the subjective and value laden task of weighing surgical risks for the woman. Moreover, although the consequences in an individual case will probably be far better if surgery is performed, the court that mandates surgery is treating the woman solely as a means to the goal of saving the baby. When the judiciary acts in this consequentialist manner it compromises its own integrity, because it can achieve good only by doing evil. It is far better that some tragic private wrongs transpire than that state imposed coercion of pregnant women become part of our legal landscape."