

Court File No. 20411

IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL

B E T W E E N:

JOSEPH BOROWSKI

Appellant
(Plaintiff)

AND:

THE ATTORNEY GENERAL FOR CANADA

Respondent
(Defendant)

AND:

WOMEN'S LEGAL EDUCATION AND ACTION FUND
R.E.A.L. WOMEN OF CANADA
INTERFAITH COALITION ON THE RIGHTS AND
WELL-BEING OF WOMEN AND CHILDREN

Intervenors

FACTUM OF THE WOMEN'S LEGAL
EDUCATION AND ACTION FUND (LEAF)

TORY, TORY, DesLAURIERS & BINNINGTON
P.O. Box 270, Ste. 3200
IBM Tower, Toronto-Dominion Centre
Toronto, Ontario M5K 1N2

Mary Eberts

SOLICITORS FOR THE WOMEN'S LEGAL
EDUCATION AND ACTION FUND (LEAF)

NELLIGAN/POWER
1000 - 77 Metcalfe St.
Ottawa, Ontario
K1P 5L6
Catherine D. Aitken

Ottawa Agents for the
Women's Legal Education
and Action Fund

TO: THE REGISTRAR OF THIS COURT

AND TO: SCHUMIATCHER - FOX
Barristers & Solicitors
2100 Scarth St.
Regina, Saskatchewan
S4P 2H6

Solicitors for the
Appellant

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin St.
Ottawa, Ontario K1N 8C3
E. Van Bommel

Ottawa Agents for the
Appellant

DEPUTY ATTORNEY GENERAL
OF CANADA
The Department of Justice
Ottawa, Ont. K1A 0H8

E. Sojonky
Solicitor for the
Respondent

ANGELA COSTIGAN
Barrister & Solicitor
Ste. 140, 120 Carleton St.
Toronto, Ont. M5A 4K3

Solicitor for the
Intervenor, R.E.A.L. Women
of Canada

GOWLING & HENDERSON
Barristers & Solicitors
160 Elgin St.
Ottawa, Ont. K1N 8C3

Ottawa Agents for the
Intervenor, R.E.A.L.
Women of Canada

CAMPBELL, GODFREY & LEWTAS
Barristers & Solicitors
36th Floor, Toronto-
Dominion Bank Tower
Toronto Dominion Centre
Toronto, Ont. M5K 1C5

Robert W. Staley
Solicitor for the Inter-
venor, Interfaith
Coalition on the Rights
and Well-Being of Women
and Children

BEAMENT, GREEN, YORK,
MANTON
Barristers & Solicitors
14th Flr., 155 Queen St.
Ottawa, Ontario
K1P 6L1

Ottawa Agents for the
Intervenor, Interfaith
Coalition on the Rights
and Well-Being of Women
and Children

I N D E X

	<u>Page No.</u>
PART I - Statement of Facts	1
PART II - Issues	1
PART III - Argument	2
A. Should the Constitutional Questions be Answered?	2
B. The Canadian Charter of Rights and and Freedoms	7
- A Preferred Point of Departure	7
- Women's Rights under the Charter: Generally	9
- Section 7	11
- Section 15	15
- Conclusion	19
PART IV - Nature of Relief Requested	20
TABLE OF AUTHORITIES	i
- Cases	i - ii
- List of Scholarly Authorities	iii - iv

IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL

B E T W E E N:

JOSEPH BOROWSKI

Appellant
(Plaintiff)

- and -

THE ATTORNEY GENERAL FOR CANADA

Respondent
(Defendant)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND
R.E.A.L. WOMEN OF CANADA
INTERFAITH COALITION ON THE RIGHTS AND
WELL-BEING OF WOMEN AND CHILDREN

Intervenors

FACTUM OF THE WOMEN'S LEGAL
EDUCATION AND ACTION FUND (LEAF)

PART I

STATEMENT OF FACTS

1. LEAF agrees with the description of the procedural history of this appeal contained in paragraphs 1 to 7 inclusive of the factum of the Respondent.
2. LEAF submits that the Appellant's claim that the woman and the foetus are separate entities fundamentally distorts reality. It treats the pregnant woman as nothing more than a container for the foetus, an unconnected, unconcerned and invisible life support system. The reality is that the foetus' "small domain" is a woman's womb (Appellant's Factum, paragraph 22); the placenta, dubbed an "external organ of the child", is an internal part of the woman's uterus (paragraph 27); the implantation of the fertilized egg in the "wall of the uterus" (paragraph 17) and the growth and development of the foetus in the "amniotic sac" (paragraph 20) all occur within the body of a woman. The events and processes described by the Appellant are happening to a pregnant woman, they occur within her body, and form part of her experience of pregnancy.
3. The Appellant's snapshot of "intrauterine life" requires a wider lens to reveal that the "uterus" belongs to a woman with constitutionally protected rights. We invite the Court to take judicial notice that the foetus exists within the body of a woman. Medical technologies that can visualize the foetus in utero should not be used to deny the foetus' complete physical dependence on the pregnant woman. They in fact emphasize rather than undermine unity between the treatment and status of the foetus and the treatment and status of the pregnant woman.

PART II

ISSUES

4. The constitutional questions on this appeal are set out in the Respondent's factum at page 6. This Intervenor uses the term

foetus throughout this factum to refer to the zygote, embryo or foetus, rather than "child en ventre sa mère".

5. In addition, this Honourable Court is asked to consider whether these constitutional questions should be answered.

PART III

ARGUMENT

- A. SHOULD THE CONSTITUTIONAL QUESTIONS BE ANSWERED?

6. This Honourable Court granted standing to Mr. Borowski to challenge the validity of legislation, namely section 251 of the Criminal Code. The proceedings in the Courts below make it clear that the validity of section 251 of the Code has been at stake throughout. This Honourable Court has held that section 251 is unconstitutional and void. Accordingly, the basis -- and the only rationale -- for Mr. Borowski's status to sue no longer exists.

Minister of Justice of Canada et al. v. Borowski, [1981] 2 S.C.R. 575, at 598

Borowski v. Attorney General of Canada et al., [1984] 1 W.W.R. 15, at 31 (Sask. Q.B.)

Borowski v. Attorney General of Canada, [1987] 4 W.W.R. 385, at 387, 409 (Sask. C.A.)

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

7. These circumstances evoke the observations of then Chief Justice Laskin (with whom Mr. Justice Lamer concurred) in his dissenting reasons in this Court's original standing decision:

Courts do not normally deal with purely hypothetical matters where no concrete legal issues are involved, where there is no lis that engages their processes or where they are asked to answer questions in the abstract merely to satisfy a person's curiosity or perhaps his or her obsessiveness with a perceived injustice in the existing law. Special legislative

provisions for references to the courts to answer particular questions (which may be of a hypothetical nature) give that authority to governments alone and not to citizens or taxpayers.

[1981] 2 S.C.R. 575, at 579

8. The circumstances of the present appeal also evoke the cautionary words of Chief Justice Dickson in R. v. Morgentaler:

In my opinion, it is neither necessary nor wise in this appeal to explore the broadest implications of s.7 as counsel would wish us to do. I prefer to rest my conclusions on a narrower analysis than that put forward on behalf of the appellants. I do not think it would be appropriate to attempt an all-encompassing explication of so important a provision as s.7 so early in the history of Charter interpretation. The Court should be presented with a wide variety of claims and factual situations before articulating the full range of s.7 rights.

[1988] 1 S.C.R. 30, at 51e-h

9. The absence of a legislative context for the present case has several consequences. It means that there is no government action to attract the operation of the Charter through section 32. There is no specific allegation of any particular violation of Charter rights, and accordingly no opportunity to assess the validity of legislation under section 1 of the Charter.
10. Thus, this case as pursued by the Appellant presents none of the usual opportunities for the careful weighing of interests which characterizes constitutional adjudication. Rather, it boldly seeks to establish new rights: "Borowski seeks to establish the personhood of unborn children."

M. Shumiatcher, "I Set Before You Life and Death," (1986) 24 U.W.O. Law Rev. 1, at 25

11. LEAF submits that this invitation to develop rights for the foetus where none before existed should be refused. To make

new constitutional rights where there is an ample and balanced evidentiary record and a concrete legislative context would itself be a departure from the past practice of this Honourable Court. To do so with regard to an abstract question and with a record generated in the context of only one of the many issues raised by that question would be an even greater novelty. As has been pointed out, "It is not for the courts to manufacture a constitutional right out of whole cloth".

[1988] S.C.R. 30, at 141a-b per McIntyre, J.

12. A decision that the foetus has constitutional protection will have ramifications for matters as diverse - and as factually and morally complex - as in vitro fertilization and embryo transplants, foetal surgery, coerced medical treatment for the mother over her religious objections, and whether a braindead woman should be kept alive to nourish the foetus until its birth, or allowed to die. It could affect settled law in both the civil and criminal areas. The evidentiary record in this appeal simply does not provide the factual basis necessary to inform such a momentous legal decision as a determination that the foetus has constitutional status.
13. Because of the reality of complete foetal dependence on the woman, no direct societal involvement with, or relationship to, a foetus is possible. In all pregnancy-related cases, society's relationship to the foetus must be -- and in fact necessarily is -- mediated by the woman within whose body it is.

Janet Gallagher, "Prenatal Invasions & Interventions: What's Wrong with Fetal Rights", (1987) 10 Harvard Women's L.J. 9, at 13

14. Thus, any creation by this Court of new constitutional rights for the foetus has the potential to place at risk the rights and autonomy of women in a variety of circumstances. A woman's practices with respect to nutrition, contraception and sexual

activity, for example, both before and during pregnancy, her right to refuse (or accept) medical treatment during pregnancy, and allocation of decision-making rights between the pregnant woman and the state when prenatal caretaking conflicts arise, all could be affected.

Edward W. Keyserlingk, "The Unborn Child's Right to Prenatal Care (Part I) and (Part II)," 3 Health Law in Canada 10, 31

W. W. Watters, et al., "Response to Edward W. Keyserlingk's Article: The Unborn Child's Right to Prenatal Care," 4 Health Law in Canada 32

Edward W. Keyserlingk, "Clarifying the Right to Prenatal Care," 4 Health Law in Canada 36

In re A.C., 533 A.2d 611 (D.C.App. 1987)

California v. Stewart, San Diego Judicial District, State of California, February 26, 1987

In the Matter of Jaclyn Jeffery, State of Michigan Court of Appeals 1987

Poole et al. v. Santa Clara County Kaiser Hospital et al., in the Superior Court of the State of California, 1986.

15. This case originally dealt only with abortion. No intervenors were permitted to participate in the trial to adduce evidence or present argument. Appellants' claims are now unlimited by abortion legislation, extending to any issues affecting the potential interests of a foetus. The scientific literature shows disagreement on the circumstances in which medical and other interventions on behalf of a foetus are indicated, and also about their efficacy. Theories contend over the time at which the state should interest itself in the fate of a foetus, and the physiological and philosophical basis upon which such an interest should be based. It would be a regrettable step, in these circumstances, for this Honourable Court to decide a question which has such potential for profound impairment of the rights of women.

Borowski v. Minister of Justice of Canada et al., [1983] 3 W.W.R. 505 (Sask Q.B.)

L. J. Nelson et al., "Compelled Medical Treatment of Pregnant Women," (1988) 259 JAMA 1060, 1061, 1064-65

16. By contrast, a decision of this Honourable Court that the foetus has no rights under sections 7 or 15 of the Charter of Rights and Freedoms would not result in a fundamental change of the status quo. In particular, such a decision would still leave scope for governmental legislation in the interest of the foetus, the possibility recognized in the Morgentaler decision. It would also be consistent with the prior development of the common law and criminal jurisprudence, which take live birth as the starting point for the recognition of rights, even if those rights can in some instances have retrospective application.

Factum of the Respondent, paragraphs 41 to 50

R. v. Sullivan and LeMay, British Columbia Court of Appeal, July 28, 1988, Reasons for Judgment

In re F. (In Utero), [1988] W.L.R. 1288 (C.A.)

17. A decision refusing to recognize new constitutional rights for the foetus would not be tantamount to acknowledging a constitutional right to abortion. The circumstances in which any such right exists, and the constitutional and legal basis for it, would remain to be determined in a future case, building upon the decision of this Honourable Court in R. v. Morgentaler. A decision in this appeal that the foetus has rights under sections 7 or 15 would, however, inhibit the principled exploration of the impact of the Charter's sex equality guarantees upon the abortion issue.

Paragraphs 52 - 56, infra

[1988] 1 S.C.R. 30, 171h-172e

18. It is submitted that the rationale underlying the present legal position of the foetus is a sound one. Human rights should be reserved for persons already born. The time of birth provides a clear and recognizable time at which rights can vest. Unlike the "moment" of conception, which is unknowable, and the point of foetal viability, which varies in every case and depends on the state and availability of medical knowledge and technology, the time of birth can be readily ascertained, remains constant, and marks the beginning of social interaction between human beings.
19. Accordingly, it is submitted that this Court should decline to answer the abstract questions posed in this appeal.
20. In the alternative, it is submitted that the Court should hold that the foetus does not have rights under sections 7 or 15 of the Charter.

B. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A Preferred Point of Departure

21. The Appellant's factum barely mentions the existence, let alone the rights, of the pregnant woman. In this, it exhibits a not atypical characteristic of foetal rights advocates: that of portraying the foetus as an autonomous "space-hero" and the pregnant woman as the "empty space" in which he floats.

R. P. Petchesky, "Fetal Images: The Power of Visual Culture in the Politics of Reproduction," (1987) 13 Feminist Studies 263, 270-1

22. In this view the woman registers as a void insofar as her own rights or even existence are concerned. When foetal rights activists contemplate her impact upon foetal rights, her existence is acknowledged, but viewed as a clear threat. She is seen as separate from her own foetus, and menacing to it, either

by presenting a hostile environment to its development or by actively refusing some proposed medical intervention. She is a force to be either erased or controlled, managed or circumscribed in the interests of the foetus.

Keyserlingk, supra, paragraph 14

23. LEAF, by contrast, submits that the focus of rights concerns during pregnancy must be on the woman. A pregnant woman is a live, independent and autonomous person who is unquestionably intended and entitled to benefit from the Charter's guarantees of constitutionally entrenched rights and freedoms. Personhood is a social and legal judgment, not in itself a biological fact. The legal rights of a woman, who is a person, cannot be sacrificed to a foetus which may or may not become a person.
24. Since 1982, this Honourable Court has recognized the rights of women both inside and outside the Charter context. These decisions affirm a woman's right to be free from sexual harassment, the integrity of a woman's reproductive capacity, and the legitimacy of state action to enhance women's employment opportunities.

E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388

Action Travail des Femmes v. C.N.R., [1987]
1 S.C.R. 1114

Robichaud v. Canada (Treasury Board), [1987]
2 S.C.R. 84

R. v. Chase, [1987] 2 S.C.R. 293

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

25. Madame Justice Wilson recognized in the Morgentaler case that a decision by a woman concerning whether to continue her pregnancy . . . 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.

[1988] S.C.R. 30, at 171g-h

26. Implicit in this statement is an entirely appropriate respect for women's capacity to exercise the moral and ethical responsibility for such grave decisions. LEAF submits that decisions about prenatal caretaking and termination of pregnancy, which inescapably implicate a woman's physical integrity, more properly lie with the woman than with a state- or self-appointed guardian of the foetus.
27. Thus, LEAF submits that the Charter rights of all women can and must be the starting point and standard against which the argument urging creation of constitutional rights for the foetus must be scrutinized.

Women's Rights under the Charter: Generally

28. Section 7 of the Charter provides that 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 15 guarantees that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination on the basis, inter alia, of sex. Section 28 states that the rights referred to in the Charter are guaranteed equally to male and female persons.
29. As this Intervenor has argued before, to require that the sexes be "similarly situated" before their treatment can be subjected to a legal equality mandate is to preclude the most deep, urgent, and pervasive sex inequality from being addressed by the Charter. This argument takes on a special dimension in the context of this case, because there is no comparison in the

lives of men with women's role in reproduction. Only women, and never men, become pregnant, and experience directly and immediately the physiological, social and economic ramifications of pregnancy. Only women directly experience "the childbearing year" each time a human child is produced.

30. Historically, women's role in childbearing has provided an occasion and pretext for women's social and legal disadvantage. Examples include patronizing and cruel obstetrical and gynecological practices; restrictions on pregnant (or married) women's employment on grounds of alleged danger to the foetus, purported incapacity of pregnant women, exclusion from the public domain on alleged grounds of propriety or simply questions of taste; criminalization of birth control technology and information; and refusal to recognize that discrimination based on pregnancy is discrimination based on sex.

"A History of Midwifery in Canada," in Report of the Task Force on the Implementation of Midwifery in Ontario (1987) 218-223

Canadian Air Line Flight Attendants' Association v. Pacific Western Airlines Ltd. (1979), 105 D.L.R.(3d) 477 (B.C.S.C.), affirmed at (1981), 124 D.L.R.(3d) 688 (C.A.)

R. v. Palmer, [1937] 2 D.L.R. 609 (Ont.Mag.Ct.), affirmed at [1937] 3 D.L.R. 493 (C.A.)

Royal Commission on the Status of Women in Canada, Report, para. 206-210, at 277-288

Bliss v. Attorney-General of Canada, [1979] 1 S.C.R. 183.

31. The uniqueness of women's reproductive situation does not justify disadvantaging, hence unequal, treatment by law. Laws cannot alter the reproductive capacities of men and women, but they can and do prescribe the social and legal consequences which attach to them. Biology may dictate that only women can become pregnant, but the legislature and the courts have a full range of options on how to treat pregnant women. One should not

attribute to nature or biology the hardships imposed by man-made law.

32. The Charter of Rights is an instrument intended by its framers to relieve against disadvantage. Accordingly, when viewing the rights of women under sections 7, 15, and 28, LEAF submits that this Honourable Court should recognize that women are entitled to the full amplitude of life, liberty, security of the person, and of equality. Bearing children creates no exceptions from these rights and no burdens upon them; rather, it creates social and legal requirements for their full realization. Section 28 alone, which does not explicitly impose any "similarly situate" requirement and should not be interpreted as doing so, ensures no less.
33. The Appellant argues that sections 7 and 15 should be used to protect the foetus. LEAF submits that sections 7, 15 and 28 of the Charter are important instruments which should be used to overcome the historical and systemic discrimination against women, address women's material inequality and accommodate their biological capacities. Judicial application and interpretation of these sections should not be used in the way the Appellant suggests because the result would be to force women, the traditional caretakers and nurturers of children, to pay for their reproductive capabilities with their rights to life, liberty, and security of the person, equality before and under the law, and the equal benefit and protection of the law.

Section 7

34. The potential invasions of women's life, liberty and security which might be authorized in the name of newly minted rights for the foetus are extensive.
35. Edward Keyserlingk, for example, proposes a right to prenatal care that would include "from conception onwards, claims to

affirmative or positive care, duties, obligations and protections and not only claims to the avoidance of harmful acts . . .". Some elements of the right could be exercised in utero "by means of court-ordered protective mechanisms" which could include granting of injunctions against certain acts being done or decisions taken, appointment of guardians to make certain decisions on behalf of the foetus, allowing a state welfare authority to supervise the mother, and separation of the parents where the interaction between them produces intolerable levels of stress for the foetus.

Keyserlingk, supra, (Pt.I) 12; (Pt.II) 32-34

36. He also envisions the creation of a duty "of a sexually active and fertile woman who is not practising birth control, and who intends to carry to term a child who may be conceived, to take reasonable precautions and preventive measures to protect a foetus which might be conceived."

Keyserlingk, supra, (4 Health Law in Canada) 36

37. In practical terms, such rights in the foetus and duties in the mother could give rise not only to forced caesarians but also to

. . . court orders prohibiting pregnant women from using alcohol, cigarettes, or other possibly harmful substances, forbidding them from continuing to work because of the presence of fetal toxins in the workplace, forcing them to take drugs or accept intrauterine blood transfusions, requiring pregnant anorexic teenagers to be force-fed, forcing women to undergo prenatal screening and diagnostic procedures such as amniocentesis, sonography, or fetoscopy, or mandating that women submit to in utero or extra-uterine surgery for the fetus."

L. J. Nelson et al., "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'," (1986) 37 The Hastings Law Journal 703, 756

38. Isolated cases of forced intervention in prenatal care which have already occurred in the United States and Canada are a

warning of the dangers inherent in curtailing women's liberty and security, sometimes in the name of a medical prognosis later proved unfounded. It is striking that the women subjected to this coercion are often poor, disadvantaged, and members of racial, religious or linguistic minorities, in other words, those least able to assert their rights.

Factum of the Respondent, paragraphs 51 to 55

V. E. B. Kolder et al., "Court-Ordered Obstetrical Interventions," (1987) 316 New England Journal of Medicine 1192, 1193

39. In R. v. Morgentaler, the majority of this Court recognized that a restrictive criminal law prohibition against abortion improperly infringed a pregnant woman's section 7 rights. In LEAF's submission, that decision illuminates the approach to section 7 which should inform this appeal.

40. In Morgentaler, Chief Justice Dickson concluded:

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.

[1988] 1 S.C.R. 30, at 56j-57a

41. Madame Justice Wilson held that a woman's decision to terminate her pregnancy is a part of her liberty and security of the person. She explained how the right to decide to make fundamental personal decisions is a necessary aspect of human dignity, a prerequisite to pursuing one's own conception of a full and rewarding life, and a principle embodied in numerous Charter sections.

[1988] 1 S.C.R. 30, at 171b-d, 173f-174a

42. Madame Justice Wilson further held that a woman's "security of the person" protected in section 7, is infringed when the woman is treated as the "passive recipient of a decision made by others as to whether her body is to be used to nurture a new life."

[1988] 1 S.C.R. 30, at 173h-j

43. She classified the abortion decision as a matter of personal morality and individual conscience within the protection of s.2(a) of the Charter. The criminal prohibition against abortion constituted a substantive breach of the principles of fundamental justice because it endorsed and enforced "one conscientiously-held view at the expense of another."

[1988] 1 S.C.R. 30, at 175i-176b, 179e-i

44. There is no common law principle which supports the appropriation of one person's body, life and person to the affirmative service of another. For example, a judge in the United States has refused to order a woman to undergo a caesarian section after acknowledging that he lacked the right to force her to donate an organ to a child of hers, even if that child were dying.

L. J. Nelson, et al., supra, paragraph 15, at 1065, n.66

McFall v. Shimp, 10 D.&C. 3d 90 (1978)

In Re George 630 S.W.2d 614 (1982)

45. A foetus, as a potential human being, could have no greater claim on the liberty and freedom of a potential rescuer than a fully capacitated and existing human being.

Section 15

46. Taken together, the legislative history and text of sections 15 and 28 of the Charter disclose an intent to promote the equality of women.

"Summary of Conference Resolutions," Appendix VII, in A. Bayefsky and M. Eberts, eds., Equality Rights and The Canadian Charter of Rights and Freedoms (1985), 634-44

N. C. Sheppard, "Equality, Ideology and Oppression," in C. L. M. Boyle et al., Charterwatch: Reflections on Equality (1986) 195, at 221-22

W. S. Tarnopolsky, "The Equality Rights," in W. S. Tarnopolsky and G.-A. Beaudoin, eds., Canadian Charter of Rights and Freedoms (1982), 395 at 423

47. Section 15 explicitly recognizes, especially in subsection 2, that amelioration of disadvantage is an integral part of the equality guarantee. Many of the present-day disadvantages of women arose in association with their capacity for and role in childbearing, and the restrictions placed on women because of a narrow view of their "biological destiny."
48. While pregnancy may be a voluntary condition in the case of individual women, for women as a group pregnancy is not voluntary. For women to bear children is an obvious social imperative.
49. The social context of sex inequality has denied women control over the reproductive uses of their bodies. Women have been socially disadvantaged in controlling sexual access to their bodies because of social learning, lack of information, inadequate or unsafe contraceptive technology, social pressure, custom, poverty and enforced economic dependence, sexual force, and ineffective enforcement of laws against sexual assault. As a result, they often do not control the conditions under which they become pregnant.

50. Similarly, 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 (public or private) have meant that women often do not control the circumstances under which they rear children, hence the impact of those conditions on their own life chances.
51. Men as a group are not comparably disempowered by their reproductive capacities and are not generally required by society to spend their lives caring for children to the comparative preclusion of other life pursuits.
52. Women's reproductive capacity is thus an integral part of women's "equality problem," along a spectrum of situations. Whether or not they actually have children, all women are disadvantaged by societal norms that limit their options in the public domain because of childbearing and childrearing. Women who become pregnant and have children face additional circumscriptions of their role outside the family, because of custom and because society's resources are not usually allocated in a way that would assist women's childbearing and childrearing activities. These circumscriptions affect even those women whose pregnancies and childrearing are voluntary.
53. This inequality has important implications for the interpretation of the Charter's equality guarantees. For women of reproductive age, the guarantee of sex equality should be interpreted so as to reduce or minimize state-sanctioned interference with women's full development as human beings, socially, economically and politically. For women who are pregnant, and carrying the foetus to term, regard for sex equality should prohibit state-sanctioned interference with their physical being and authority to make prenatal caretaking decisions. Women's equality rights should also preclude state

coercion into motherhood: the kind of coercion that results when the state bars women's access to abortion.

54. Forced maternity in this broader sense must be clearly understood as a problem of sex inequality. Access to abortion is necessary as a means for women to survive in their unequal circumstances. 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 choice in ways she cannot control. Women's access to legal abortion is an attempt to ensure that women and men have more equal control of their reproductive capacities, more equal opportunity to 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, legal abortion should be seen as a sex equality issue.

55. The reasons why women choose abortion are numerous, personal and profound. As long as contraceptive devices fail, are risky, or are unavailable there will be many women, who in the course of their lives, 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. The guarantees in ss.15 and 28 require that in all these circumstances the Charter must provide women faced with unwanted pregnancies a secure right to control the number, timing and spacing of their children.

56. Among its other consequences, legal recognition of foetal personhood would undermine the possibility of recognizing an abortion right, depriving women of sex equality in a unique,

unprecedented, and discriminatory manner. First, such a deprivation of reproductive control would further women's historical relegation to social subordination and second class citizenship, a legal position which the Charter's equality provisions propose to eliminate. Second, all direct victims of deprivation of reproductive control through such a recognition would be of one sex: female. Third, women's self-determination and autonomy would be burdened by law in a way that men's are not. Thus, elevation of the constitutional status of the foetus as sought by the Appellant would both indicate and institutionalize sex inequality.

57. Women have traditionally been those primarily concerned with the life, health, welfare, and life possibilities of the foetus and of children. This is in part because what happens to the foetus, happens to the woman. Legal recognition of foetal personhood would effectively grant the foetus (or its guardians) legal rights over the woman's body, when the philosophically and jurisprudentially desirable position is for the state to recognize that the woman must have legal and decision-making rights over her own body and over the foetus.
58. The Court must be careful not to create a time in a woman's life when, because of her unchosen biological capacities, she is outside the constitutional protection of the expansive equality rights entrenched in section 15.

S. Martin, "Persisting Equality Implications of the Bliss Case" in K. Mahoney and S. Martin, eds., Equality and Judicial Neutrality (1987), 195

59. This Honourable Court, in the Morgentaler decision, did not consider the question of abortion in the context of section 15. However, the Court did accept, in varying degrees, that control over her own body, and her reproductive capacity, bear an important relationship to the security, liberty, and integrity of a woman.

60. LEAF submits that for the Court now to create rights for the foetus would curtail the woman's physical integrity, and her right, vis-à-vis the state, to make prenatal caretaking decisions. It would inhibit the further exploration or elaboration of the circumstances in which the woman would be entitled to abortion as of right.
61. Giving Charter rights to foetuses will result in the law imposing burdens on women which are not imposed on men. Historic and systemic patterns of discrimination against women will be allowed to continue and the traditional stereotype of women's role as a function of biological destiny, rather than personal choice, will be perpetuated.

Conclusion

62. If constitutional status is granted to the foetus, the Court would assume the task of reconciling two sets of potentially conflicting section 7 or 15 rights physically located in one body - that of the pregnant woman.
63. The Appellant's argument that some doctors are of the view that there are two "patients" in a medical procedure involving a pregnant woman provides no guidance to a court seeking to accommodate these competing interests. The medical community itself is divided as to whether the "two patients" view is an acceptable one. In practice, implementation of the "two patients" view has produced coerced medical treatment for women. Moreover, the question of whether an entity is a person is a legal and political decision, not a medical one.

L. J. Nelson et al., supra, paragraph 15, 1060-61, 1064-65

64. Acknowledgement that the focus during pregnancy must remain on the woman's constitutional rights does not threaten the state's proper interest in the welfare of the foetus. It does signal how that interest in the foetus may be furthered. Regard for women's life, liberty, security of the person and equality are consistent with pregnancy care that promotes the welfare of both woman and foetus by respecting the value of the woman in her own right. It is also consistent with the idea that the state should fulfil its interest in foetal welfare through legislation and policies that promote maternal welfare, and guarantee women's access to adequate and supportive health, financial, and social resources, while respecting their moral and physical integrity.
65. In a particular legislative context, the issue may arise as to whether a limit on a woman's section 7 or section 15 rights, imposed pursuant to a claim of state interest in the foetus, is reasonable and demonstrably justifiable under section 1. Such an inquiry is properly done in the context of a concrete legislative enactment, and as part of the incremental process of interpreting the Charter of Rights.

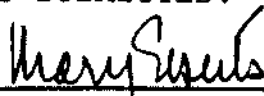
PART IV

NATURE OF RELIEF REQUESTED

66. It is submitted that this Court should decline to answer the abstract questions posed in this appeal.
67. In the alternative, the Court should hold that the foetus does not have rights under section 7 or 15 of the Charter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 14, 1988 . . .



Mary Eberts

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<u>Action Travail des Femmes v. C.N.R.,</u> [1987] 1 S.C.R. 1114	8
<u>Bliss v. Attorney-General of Canada,</u> [1979] 1 S.C.R. 183	10
<u>Borowski v. Attorney General of Canada et al.,</u> [1984] 1 W.W.R. 15 (Sask. Q.B.)	2
<u>Borowski v. Attorney General of Canada,</u> [1987] 4 W.W.R. 385 (Sask. C.A.)	2
<u>Borowski v. Minister of Justice of Canada</u> <u>et al.,</u> [1983] 3 W.W.R. 505 (Sask Q.B.)	6
<u>California v. Stewart,</u> San Diego Judicial District, State of California, February 26, 1987	5
<u>Canadian Air Line Flight Attendants' Association</u> <u>v. Pacific Western Airlines Ltd.</u> (1979), 105 D.L.R. (3d) 477 (B.C.S.C.), Affirmed at (1981), 124 D.L.R. (3d) 688 (C.A.)	10
<u>E. (Mrs.) v. Eve,</u> [1986] 2 S.C.R. 388	8
<u>In re A.C.,</u> 533 A.2d 611 (D.C.App. 1987)	5
<u>In re F. (In Utero),</u> [1988] W.L.R. 1288 (C.A.)	6
<u>In Re George</u> 630 S.W.2d 614 (1982)	14
<u>In the Matter of Jaclyn Jeffery,</u> State of Michigan Court of Appeals 1987	5
<u>McFall v. Shimp,</u> 10 D.&C. 3d 90 (1978)	14
<u>Minister of Justice of Canada et al. v. Borowski,</u> [1981] 2 S.C.R. 575	2, 3
<u>Poole et al. v. Santa Clara County Kaiser</u> <u>Hospital et al.,</u> in the Superior Court of the State of California, 1986.	5
<u>R. v. Chase,</u> [1987] 2 S.C.R. 293	8
<u>R. v. Morgentaler,</u> [1988] 1 S.C.R. 30	2-4, 6, 8, 9, 13, 14
<u>R. v. Palmer,</u> [1937] 2 D.L.R. 609 (Ont.Mag.Ct.), affirmed at [1937] 3 D.L.R. 493 (C.A.)	10

R. v. Sullivan and LeMay, British Columbia Court
of Appeal, July 28, 1988, Reasons for Judgment 6

Robichaud v. Canada (Treasury Board),
[1987] 2 S.C.R. 84 8

List of Scholarly Authorities

	<u>Page</u>
Bayefsky, A. and M. Eberts, eds., "Summary of Conference Resolutions," Appendix VII, in <u>Equality Rights and The Canadian Charter of Rights and Freedoms</u> (1985), 634-44	15
Gallagher, Janet, "Prenatal Invasions & Interventions: What's Wrong with Fetal Rights", (1987) 10 <u>Harvard Women's L.J.</u> 9	4
Keyserlingk, Edward W., "Clarifying the Right to Prenatal Care," 4 <u>Health Law in Canada</u> 36	5, 12
Keyserlingk, Edward W., "The Unborn Child's Right to Prenatal Care (Part I) and (Part II)," 3 <u>Health Law in Canada</u> 10	5, 8, 12
Kolder, V. E. B., <u>et al.</u> , "Court-Ordered Obstetrical Interventions," (1987) 316 <u>New England Journal of Medicine</u> 1192	13
Martin, S., "Persisting Equality Implications of the Bliss Case" in K. Mahoney and S. Martin, ed., <u>Equality and Judicial Neutrality</u> (1987), 195	18
Nelson, L. J., <u>et al.</u> , "Compelled Medical Treatment of Pregnant Women," (1988) 259 <u>JAMA</u> 1060	6, 14, 20
Nelson, L. J., <u>et al.</u> , "Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'," (1986) 37 <u>The Hastings Law Journal</u> 703	12
Petchesky, R. P., "Fetal Images: The Power of Visual Culture in the Politics of Reproduction," (1987) 13 <u>Feminist Studies</u> 263	7
Royal Commission on the Status of Women in Canada, <u>Report</u>	10
Sheppard, N. C., "Equality, Ideology and Oppression," in C. L. M. Boyle <u>et al.</u> , <u>Charterwatch: Reflections on Equality</u> (1986) 195	15
Shumiatcher, M., "I Set Before You Life and Death," (1986) 24 <u>U.W.O. Law Rev.</u> 1	3
Tarnopolsky, W. S.; "The Equality Rights," in W. S. Tarnopolsky and G. A. Beaudoin, eds., <u>Canadian Charter of Rights and Freedoms</u> (1982), 395	15

Task Force on the Implementation of Midwifery in Ontario, <u>Report</u> on "A History of Midwifery in Canada," (1987)	10
Watters, W. W., <u>et al.</u> , "Response to Edward W. Keyserlingk's Article: The Unborn Child's Right to Prenatal Care," 4 <u>Health Law in Canada</u> 32	5