NO. 21553

SUPREME COURT OF CANADA
(On appeal from a judgment of the Court of Appeal
of the Province of Quebec)

BETWEEN:

CHANTAL DAIGLE,

APPELLANT (Respondent)

-AND-

JEAN-GUY TREMBLAY,

RESPONDENT (Applicant)

-AND-

WOMEN'S LEGAL EDUCATION AND
ACTION FUND (LEAF)

Intervenor

MEMORANDUM OF FACTS AND LAW SUBMITTED BY THE INTERVENOR, THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

PART I - FACTUM

1. The facts in this appeal are fully covered in the exhibits filed by the appellant in support of her motion for leave to appeal and are not contested; except that the Women's Legal Education and Action Fund will claim below that the lower courts neglected to take into account certain proven facts when weighing the rights of the appellant.

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PART II - ISSUES

A- The decisions of the lower courts erred in creating new fundamental rights, that is the right to life of the foetus and the right to procreation of the putative father.

B- The fundamental rights of the pregnant woman by virtue of the Canadian and Quebec Charters.

C- The injunction is not an appropriate recourse in this case and constitutes an infringement of women's fundamental rights.

PART III- ARGUMENT

A - The decisions of the lower courts erred in creating new fundamental rights, that is the right to life of the foetus and the right to procreation of the putative father.

3. The Honourable Mr. Justice Viens concluded that the foetus is a human being within the meaning of the Quebec Charter of Human Rights and Freedoms, and on that basis enjoys the rights laid down in sections 1 and 2 of the Charter.
Reasons of the Honourable Mr. Justice Viens, p. 20.

4. The Honourable Mr. Justice Bernier of the Court of Appeal ruled that the conceived but unborn child must not be deprived of the natural right to life, has the right to life and to the protection of those responsible for the conception of the foetus, has civil status and, from conception, has the right to be carried to term.
Reasons of the Honourable Mr. Justice Bernier, pp. 4-5.

5. The Honourable Mr. Justice Bernier did not refer to any text to back up his affirmations and expressly stated that he did not believe he should pronounce on the provisions of the Quebec Charter.
Reasons of the Honourable Mr. Justice Bernier, p. 6.

6. The Honourable Mr. Justice Nichols decided that the patrimonial rights provided for in the Civil Code presuppose the fundamental right to life. He affirmed that the right has been recognized by custom and is implicitly sanctioned by law.
Reasons of the Honourable Mr. Justice Nichols, pp. 8-11.

7. The Honourable Mr. Justice reached this conclusion even though he recognized the absence of a constitutional guarantee in favour of the foetus, under both the Canadian and the Quebec Charters.

Reasons of the Honourable Mr. Justice Nichols, p. 4.

8. He even said that it would have been preferable for the rights of the foetus to be specifically covered but this omission did not constitute a negation of such rights.
Reasons of the Honourable Mr. Justice Nichols, p. 9.

9. The Honourable Mr. Justice nevertheless granted the foetus constitutional protection since the rights just recognized were in opposition to those expressly guaranteed to women.
Reasons of the Honourable Mr. Justice Nichols, pp. 10-11.

10. The Honourable Mr. Justice Lebel ruled that the foetus, at the stage of development it has reached in this case, appears to be both human and a being within the meaning of the Quebec Charter.
Reasons of the Honourable Mr. Justice Lebel, pp. 23.

11. After analyzing the provisions of the Civil Code, the Honourable Mr. Justice concluded that the foetus has a juridical personality separate from that of the pregnant woman and that this personality gives it the right to development and life.
Reasons of the Honourable Mr. Justice Lebel, p. 25.

12. Although he admitted that the juridical personality of the foetus expressly recognized by the legislators is incomplete, the Honourable Mr. Justice Lebel ranked the rights stemming from the partial personality among the rights expressly recognized by the Charter. He actually proceeded to weigh the rights of the pregnant woman and those of the foetus as if the two enjoyed the same constitutional protection.
Reasons of the Honourable Mr. Justice Lebel, p. 34.

13. We submit that, when adopting the Charter of Human Rights and Freedoms in 1975, the Quebec legislators expressly included all the fundamental rights then recognized by law, as

indicated in section 51 of the Charter, which reads as follows:

"51. The Charter shall not be so interpreted as to extend, limit or amend the scope of a provision of law..."

14. When the Charter was enacted, the Quebec legislators could not be ignorant of the jurisprudence, in both Civil Law and Common Law, to the effect that the foetus is not a person or a human being with a juridical personality, and that birth alone actualizes the potential rights of a foetus.

In Civil Law:

- Articles 17.11, 18 and 608 of the Civil Code
- Section 61.16 of the Interpretation Act (R.S.Q., c. I-16)
- Allard v. Monette (1928) 66 C.S. 291, 302-303.
- Lavoie v. Cité de Riviere du Loup [1955] C.S. 452, 457
- Julien v. J.E. Roy Inc. [975] C.S. 401
- Montreal Tramways Co. v. Leveille [1933] SCR 456

In Common Law:

- K. v K. [19331 3 W.W.R. 351 (Court of King's Bench, Manitoba)
- Solowan v. Solowan (1953) 8 W.W.R. 288 (Supreme Court of Alberta)
- Roe v. Wade 410 U.S. 113 (1973)

In view of these authorities, we submit that the legislators would have expressed themselves more explicitly if they had wished to include the foetus under the protection of the Quebec Charter.

16. We submit that the Honourable Mr. Justice Viens and the Honourable Mr. Justice Lebel erred in including the foetus in their interpretation of the expression "human being. The legislators' intention was not unobtrusively to extend the term "person" to the foetus but simply to distinguish between natural persons and artificial persons or legal entities. This was the thrust of the clarification made by the then Minister of Justice, Jerome Choquette, when he said at the Parliamentary Committee hearings:

> "You will note that, in some sections, you must understand that, when the Charter refers to a human being, it means a flesh and blood human being. When it refers to a person, it may refer to either a human being or a legal entity." (Translation of an excerpt from the Journal des debats, Commissions parlementaires, 3rd session, 30th Legislature, 1975, pp. B-2 1 2-2 1 3)

17. We respectfully submit that the Honourable Mr. Justice Lebel erred when he concluded that there had been an evolution of the law to include a posteriori the foetus in the expression "human being". In our opinion, the authorities do not support this affirmation.

In Civil Law:

- Beaudoin and Renaud, Code civil annote, Vol. 1, 1989:

  > "A newborn, to be considered a human being, must be born living and viable, that is, have a life entirely independent from that of the mother." (translation)

- Madeleine Caron, "Le Code civil quebécois, instrument du protection des droits et libertes de la personne?" Revue du Barreau canadien, Vol. 56, No. 2, June 1978, p. 197
- Edith Deleury, Naissance et mort de la personne humaine ou les confrontations de la medecine et le droit, (1976) 17 Cahiers de droit 265
- Assurance-Automobile 9 [1984] C.A.S. 489, 491

- Monique Ouellette, Droit des personnes et de la famille, 3rd Ed., Montreal, Themis, pp. 27-31

In Common Law:

- Dehler v. Ottawa Civic Hospital (1979) 101 B.L.R. (3d) 686, 695 (Ontario High Court), continued to (1980) 290 C.R. (2d) 677 (Ontario Court of Appeal)
- Baby R 15 R.F.L. (3d) 225
- Re F [1988] 2 All E. R. 193 (C.A.)
- R. v. Sullivan (1989) 65 C.R. (3d) 256-273

18. We submit that it is erroneous in law to deduce the existence of fundamental rights not expressly guaranteed by the Charter from the statement of specific patrimonial rights as provided for in the Civil Code.

19. We submit that the Honourable Mr. Justice Bernier and the Honourable Mr. Justice Lebel transformed the suspensive condition attached to the patrimonial rights of the foetus into a source of fundamental rights in its favour.

20. We submit that the interpretation given the relevant provisions of the Civil Code by the Honourable Mr. Justice Viens and the Honourable Mr. Justice Lebel is contrary to section 51 of the Quebec Charter by extending the scope of the rights mentioned therein.

21. We submit that the exercise of rights guaranteed by the Charter must be limited only by the exercise of other rights guaranteed by the Charter. Since the rights of the pregnant woman are guaranteed, the lower court justices erred in limiting them.

22. The Honourable Mr. Justice Viens, the Honourable Mr. Justice Lebel and the Honourable Mr. Justice Bernier recognized the interest of the respondent in seeking an injunction as the puta-

tive father of the foetus. They based their decisions respectively on the interest of the respondent in protecting his progeniture, his relationship of filiation and the fruits of conception. Reasons of the Honourable Justices Viens (p. 24), Lebel (p. 37), Bernier (p. 6).

23. We respectfully submit that the recognition, in this case, of the interest of the father as progenitor is equivalent to recognizing that he has a fundamental right to procreation, which does not exist in Quebec law.

24. We submit that the above reasoning applies to such a right.

B. The fundamental rights of the pregnant woman by virtue of the Canadian and Quebec Charters.

25. The new rights created by the appeal judgment are incompatible with the rights granted to women by sections 1, 3, 4, 5, and 10 of the Charter of Human Rights and Freedoms of Quebec and sections 7 and 15 of the Canadian Charter of Rights and Freedoms.

26. The Quebec Charter of Human Rights and Freedoms provides that women are the possessors of the right to life, personal security, inviolability, and freedom (section I); of the fundamental freedoms, including freedom of conscience, freedom of religion, and freedom of opinion (section 2); of the right to the safeguard of their dignity, honour, and reputation (section 4); of the right to respect for their private life (section 5); and of the right to full and equal exercise of their human rights and freedoms without distinction based on sex or pregnancy (section 10).

27. Analysis of the scope of the rights and freedoms guaranteed by the Quebec Charter must be made in the light of precedents established by virtue of the Canadian Charter, in view of the goals of the two Charters.

Andrews v. Law Society of British Columbia [1989] SCR 143, p 175 (McIntyre, J.)

28. In Andrews v. Law Society, this Court, in terms wholly consistent with the Quebec Charter, recognized that the promotion of the rights of specific disadvantaged groups and subgroups is consistent with, indeed helps define, Charter-based equality. This Court explicitly rejected the need for such groups first to be "similarly situated" with comparable groups.

29. The text of section 15 of the Charter, together with its legislative history, reveals an intent to promote the equality of women and eliminate disadvantages based on sex.

30. In Andrews, this Court also explicitly recognized that the purpose of the Charter's equality guarantees is to promote and advance the equality of disadvantaged groups.

31. As previously submitted by LEAF to this Court, women are a socially disadvantaged group, having been subjected to a distinctive second class social and legal status including enforced poverty, educational deprivation, physical and sexual assault, sex- based denigration and exclusion, objectification and stigmatization, and deprivation of reproductive control.

32. In the abortion context, Madam Justice Wilson has expressed herself eloquently on this subject. Her analysis properly places reproductive issues in the context of sexual equality and requires that they be examined in the light of the equality of the sexes guaranteed under section 15, to eliminate the discrimination that exploits women's role as mothers.
R. v Morgentaler [1988] I SCR 30, p. 172

33. Women often do not control the conditions under which they become pregnant. Up to the present day, the context of social inequality has denied women control over the reproductive uses of their bodies. Women have been socially disadvantaged in regard to control of sexual access because of the particular socialization they receive, lack inadequate or unsafe contraceptive technology, social pressure, to their bodies of information, 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 women's disadvantagement, including the exclusion of pregnant women from and stigmatization of women in society and work. Such consequences are not occasioned by the biology of pregnancy but by law and society. In this case, the appellant's situation typifies these disadvantages in a number of ways, including the pressure to abandon birth control and the violent nature of the relationship.

34. 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, hence the impact of these conditions on their own life chances.

35. Men as a group are not comparably disempowered by their reproductive capacities — no one forces them to impregnate women or to bear children — and they are not generally required by society to spend their lives caring for children to the comparative preclusion of other life pursuits. In this case, the Honourable Mr. Justice Bernier specifically remarks upon the absence of an undertaking from Mr. Tremblay to take custody of the infant if the mother decides not to, or is physically or financially unable to do so. This is not to suggest that Miss Daigle's rights would be satisfied if he were.
Reasons of the Honourable Mr. Justice Bernier, p. 3.

36. In sex equality terms, this case presents an attempt by a man to control the life of a woman by forcing her, through government intervention, to become a mother. The uncontradicted evidence concerning the respondent shows this: "She made the point that the applicant had no interest in the case other than to maintain control over her."

37. A woman's relation to the foetus is unique and inseparable: what happens to it, happens to her. He who controls it, controls her, as this case makes abundantly clear. Indeed, this case is an example of an attempt to control the woman through controlling the foetus. Several justices misconstrue this case as a conflict between the mother and the foetus. It is a conflict between a woman and a man over that woman's body, life, and relation to her foetus.
Reasons of the Honourable Justices Bernier (pp. 5-6), Nichols (p. 12), Lebel (p. 11).

38. The Court of Appeal seeks to equate the man's relationship to the foetus with the woman's relationship to the foetus. The two cannot be equated — biologically, socially, or spiritually. The Court of Appeal creates a fictional equality in law where none exists in fact, equating in essence the presence of ejaculated sperm (which could as well come from incest or rape) resulting in impregnation with the nine-month experience of gestation and birth. It leaves the child hers by default while ignoring entirely the effect upon her or the foetus, specifically her concerns that her child should not be raised (nor should she continue her life) in a context of violence.
Reasons of the Honourable Justices Lebel (p. 35), Nichols (p. 12), Viens (pp. 6-7).

39. The court below recognizes the distinction between the sexes in their relation to the foetus, but attributes that distinction wholly to nature.
Reasons of the Honourable Mr. Justice Viens, p. 24.
This logic is identical to the approach to pregnancy taken in Bliss, which was expressly repudiated by this Court in Brooks.
Bliss v A.G. of Canada [1979] 1 SCR 183
Brooks v. Canada Safeway Ltd., unreported decision of the Supreme Court of Canada, May 4, 1989

40. Sex equality is not promoted when the state supports the coerced reproductive use of a woman by a man. This is an ultimate state-enforced example, to adopt the words of Madam Justice Wilson, of "being treated as a means — a means to an end which she does not desire

but over which she has no control."
R. v Morgentaler [1988] I SCR 30, pp. 173-174

41. The Court of Appeal has stated that this is a matter of private law: "The question before this Court is about the right of the father to prevent the mother from terminating her pregnancy, a question at quite another level, namely that of private law." On the contrary, this is not, and cannot be, a "private" matter. If this man can go to court to force this woman to bear a child, the door is open for other men to do the same to other women they can get pregnant, by rule of law. This is a public matter of the status of the sexes.
Reasons of the Honourable Mr. Justice Bernier, p. 4.

42. It is the woman who has the primary concern and interest in the life, health, welfare and life possibilities of her foetus. The primacy of the woman's interest, and its defining place in the relation, has been recognized in contexts apart from the sex equality one, in which it is mandatory.
Paton v. Trustees of B.P.A.S. [1979] 1 Q.B. 276
Mack v. Brandenburg (1988) 61 Alta. L.R. 236 (Q.B.)
Danforth (father cannot be delegated authority over abortion that the constitution forbids to the state)

43. It is sex discrimination, prohibited by the Charters, for a court to do what a legislature is constitutionally prohibited from doing: disadvantage women by law. As this Court stated in Andrews, discrimination is that which, "based on grounds relating to personal characteristics of the individual or group has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others." Because pregnancy can be experienced only by women, any forced pregnancy will always deprive and impact on one sex only. This is surely as great a sex inequality as is imposing the costs of pregnancy on one sex only, recognized by this Court in Brooks. Just as no man will ever become pregnant, no man will ever need an abortion, hence be in a position to be denied one by law. Leaving aside the

parameters of possible legislation in this area, issues not raised in this case, the conclusion is inescapable that because only women can be disadvantaged, for a reason unique to their sex, through state-mandated restrictions on abortion in the present posture, deprivation of abortion as accomplished in this case violates women's constitutional right to sex equality.
Andrews v. Law Society of British Columbia [1989] SCR 143, p. 174 (McIntyre, J.)
Brooks v Canada Safeway Ltd., unreported decision of the Supreme Court of Canada, May 4, 1989

44. Maternity imposed by a court is a deprivation of Charter-based sex equality. Access to abortion is a necessary 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 — for example, rearing a child in an abusive relationship. Women's access to legal abortion is a remedial 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 — a spectre clearly raised by this case.

45. This Court has defined discrimination to include that which "withholds or limits access to opportunities, benefits, and advantages available to other members of society."
Andrews v. Law Society of British Columbia [1989] SCR 143, p. 174

C. The injunction is not an appropriate recourse in this case and constitutes an infringement of women's fundamental rights.

46. LEAF accepts and adopts the arguments of CARAL in paragraphs 4 to 18 of its brief as intervenor.

47. In addition, LEAF maintains that the injunction procedure constitutes an infringement of the fundamental rights of women.

Time Frame

48. The recourse to an injunction necessarily causes additional delay in access to abortion. This delay can have the effect of endangering the woman's physical and psychological health. In this case, the appellant was about to have an abortion on July 8, at which time she was approximately 17 weeks pregnant, when she was informed that an injunction had been obtained ex parte to prevent her from having it. In the meantime, she had to appear before a justice of the Quebec Superior Court on July 17, before the Quebec Court of Appeal on July 20, and before this Court on August 8. The procedure has already caused a delay of at least 31 days, and it is not over yet.

49. The Canadian judicial system is not in a position to hear a series of new cases on abortion, most of which require rapid processing and are likely to raise difficult questions of fact.

Access

50. The injunction procedure creates problems of access to abortion even more insurmountable than those imposed by this Court in Morgentaler. The woman will have to be represented before the Court. For many women, this requirement presents a considerable financial obstacle to access to abortion. The urgent nature of the procedure obliges the woman to quickly find an attorney who will agree to represent her. The availability of attorneys varies considerably depending on the time of year and the locality.

51. Another serious obstacle to access to abortion is the public nature of the judicial process. A woman who does not want the publicity surrounding the judicial process may well exercise self-censorship and fail to follow up on her wish to have an abortion, for reasons entirely extraneous to the exercise of her fundamental rights. The injunction procedure exposes intimate, personal questions to public view, thereby constituting an infringement of the reasonable expectation of the right to privacy provided for in section 5 of the Quebec Charter.

Criteria

52. Under former section 251 of the Criminal Code, the criterion according to which an abortion might be obtained and which was supposed to guide the review of the therapeutic abortion committee was as follows: the pregnancy of the person of the female sex endangers or could endanger her life or health.

53. Two justices of this Court decided, in Morgentaler, that the criterion of health laid down by former section 251 of the Criminal Code was unconstitutional because it was vague and lent itself to a variety of interpretations by therapeutic abortion committees. The evidence offered in this case revealed that definitions of health varied considerably from one committee to another.

R. v. Morgentaler [1988] 1 SCR 30, pp. 67-69 (Dickson, J.)

54. The judgment of the Quebec Court of Appeal, far from remedying the problem of vague criteria, presented a list of new, equally vague criteria which open the way to violation of women's sex equality rights.

55. The criteria set forth in the appeal judgment are as follows:

i. whether the pregnancy was desired;

ii. the requirement of seeking serious or reasonable motives for the exercise of fundamental rights;

iii. whether the foetus was normal;

iv. the mother's state of health;

v. the Court's right to consider the reasonableness of the motives of concern about damage to physical and psychological health alleged by the mother;

vi. the viability of the foetus or the stage of pregnancy.

56. The administering of a test of reasonableness by the lower courts demonstrates that criteria

that are shaky from the point of view of jurisprudence are capable of being interpreted in a manner detrimental to women by reflecting stereotypes or attributing little importance to their concerns.

57. In addition, the Superior Court and two justices of the Court of Appeal concluded that the pregnancy was "voluntary" or "desired" despite evidence brought by the appellant that she had stopped using contraceptives at the request of the respondent.
Reasons of the Honourable Justices Viens (pp. 5, 8), Lebel (p. 3), Bernier (p. 6), Nichols (p. 11).

58. Finally, the lower courts completely ignored the uncontested evidence that the appellant had left the respondent because of violence on his part and because she wanted an abortion to avoid being forced to continue her association with the respondent, an association that would have become unavoidable under the conditions of parenthood created by the birth of a child: she did not want to bring up a child in a violent atmosphere. In fact, the justices penalized the appellant for breaking off the relationship.
Reasons of the Honourable Justices Viens (pp. 3,5,6), Bernier (p. 6), Lebel (p. 35).

59. In an analogous manner, the Court of Appeal adopted a restrictive interpretation of the concept of health, considering only the physical health of the appellant, and concluded that her health, like that of the foetus, was in no way deficient.
Reasons of the Honourable Justices Bernier (p. 6), Nichols (p. 1 1), Lebel (p. 35).
This definition of health is more restrictive than the definition recommended by the Honourable Mr. Justice Beetz and concurred in by the Honourable Mr. Justice Estey in Morgentaler, namely, that the term health, far from being vague, clearly means the mental or physical health of the pregnant woman.
R. v. Morgentaler [1988] I SCR 30, p. 108

60. Section 251 of the Criminal Code, a legislative standard meant to define the circumstances of

legal access to abortion, was repealed following the decision of this Court in Morgentaler. The Court of Appeal, calling the current situation a legal void, proceeded to fill the void by decreeing standards of jurisprudence whose purpose was to limit the right to abortion. We respectfully submit that this is a misuse of judiciary power and that the Court's approach ignores the standards established by this Court for justifying restrictions on constitutional rights.

61. In Morgentaler, this Court clearly recognized that restrictions on the right to abortion are protected by section 7 of the Canadian Charter. Any limitations of rights guaranteed by section 7 of the Canadian Charter or its equivalent in the Quebec Charter must accord with (I) the principles of fundamental justice and (2) section I of the Canadian Charter.

62. Access to abortion is also protected by sections 1, 3, 4, 5, and 10 of the Quebec Charter. Any limitation of the rights and freedoms guaranteed therein must be (1) provided for by law according to section 9.1 of the Charter, and (2) justified by the public interest and not only the private interests of another party, according to this same section 9.1.

63. Section 9.1 of the Quebec Charter is a standard equivalent to section I of the Canadian Charter.

Ford v. A. G. of Quebec 11988] 2 SCR 712

64. The limitations on the right to abortion created by the Court of Appeal fail to accord with both section I of the Canadian Charter and section 9.1 of the Quebec Charter.

65. Fundamental to the establishment of the reasonableness of limits under section 1 of the Canadian Charter is the establishment of a pressing and substantial state interest in limiting the right.

R. v Morgentaler [1988] I SCR 30, p. 180 (Wilson, J.)

66. The Court of Appeal articulates no state interest in issuing this injunction. On the contrary, it claims that the dispute is a private matter.

67. Moreover, any reliance on the father's interest to support a limitation would run counter to the holding of this Court in Oakes with respect to the interpretation of section 1.

68. To meet constitutional scrutiny, limits under section I of the Canadian Charter must be prescribed by a law that is precise and clearly articulated.

69. The limitations imposed by the Court of Appeal do not meet any of these standards, for reasons outlined in section C of this factum.

70. In addition, this Court should be particularly slow to uphold limits which would further disadvantage an already disadvantaged group.

71. Limitations generated ad hoc, and with a significant possibility of error, are particularly unacceptable in abortion situations where an interlocutory injunction is the functional equivalent of a permanent injunction.
Reasons of the Honourable Justices Viens (p. 4), Bernier (p. 2), Lebel (p. 11).

72. Calculating the stage of pregnancy to limit access to abortion by including the weeks elapsed following a Court order forbidding the interruption of the pregnancy is tantamount to using the delay caused by the judicial process as an intrinsic limitation on the rights guaranteed by the Charters. Such proceedings are likely to bring the administration of justice into disrepute (section 24 of the Canadian Charter).

PART IV - NATURE OF THE DECISION SOUGHT

We respectfully submit that the appeal of the appellant be allowed and the injunction quashed.

Montreal, this 3rd day of August 1989

GOYETTE, COSSETTE, LEFEBVRE ET BOIVIN

Attorneys for the intervenor LEAF