

COMMENT

Abortion and section 7 of the Charter: proposing a constitutionally valid foetal protection law*

K. Mark McCourt and Daniel J. Love

I. INTRODUCTION

ABORTION CAN BE DEFINED AS the deliberate causing of death of a foetus, either by killing it directly or by causing its expulsion from the womb before it is viable. Throughout the history of Canada, abortion has been regulated by criminal statute. In 1969, the Criminal Code was amended to provide that an abortion could be permitted under certain circumstances, but that it generally was illegal to "procure a miscarriage." The law was very controversial and was attacked as being a violation of the Charter of Rights and Freedoms by "pro-choice" advocates like Henry Morgentaler and by "pro-life" advocates like Joseph Borowski.

On 28 January 1988, the Supreme Court of Canada in *R. v. Morgentaler*¹ struck down the abortion provision in the Criminal Code, holding that s. 251 violated a woman's security of the person in disagreement with the principles of fundamental justice. The court declined to rule whether or not the exculpatory clause in s. 251 violated a foetus's right to life; the issue was thus left open. The court listened to Joseph Borowski's case in early October 1988, but, because the law to which Borowski objects, was no longer in existence, the court may decide not to rule on his case.²

Since *Morgentaler*, Canada has been left without an abortion law. It is the goal of this paper to show that there is a need for a new abortion law and that "abortion on demand" violates s. 7 of the Charter of Rights and Freedoms, which states:

* The authors submitted this article in January 1989. – The Editor.

1 [1988] 1 S.C.R. 30.

2 [Again, the reader is reminded that, having submitted their article in January 1989, the authors ought not be blamed for any failure to incorporate here more recent and related developments. – The Editor.]

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.³

In Part Two, we consider whether a foetus should be included in the term "everyone" in s. 7. It is our contention that the right to life of a foetus should be regarded as constitutionally entrenched and that it is imperative that Parliament enact criminal legislation to protect the lives of foeti.

In Part Three, we consider whether it is possible to resolve the conflict between the rights of the mother and the rights of the foetus. It is our conclusion that a politically and constitutionally acceptable foetal-protection law can be instituted that "reflects the fundamental value and inherent worth of human life, and which achieves a balance between the right of a woman to liberty and security of her person and the responsibility of society to protect the unborn."⁴ We firmly believe that the legislation proposed in this paper achieves this balance.

II. ARE FOETUSES INCLUDED IN THE CONCEPT OF "EVERYONE" IN S. 7?

IT IS SUBMITTED THAT, although this is a legal question, one look beyond jurisprudence to medical and philosophical disciplines. No broader term than "everyone" or "*chacun*" exists in our official languages to describe mankind. The unborn should be considered as part of that broad concept in the medical, philosophical, and legal sense so that they will be guaranteed protection under s. 7 of the Charter.

A. In medical terms, the foetus is a human being

"The Canadian Medical Association is opposed to abortion on demand or its use as a birth control method, emphasizing the importance of counselling services, family planning facilities and services, and access to contraceptive information."⁵

Why is the C.M.A. against abortion on demand? Done correctly, an abortion is a relatively safe procedure. In May 1973, having been charged twice in Quebec with the performing of illegal abortions, Morgentaler demonstrated his vacuum aspiration technique on national television to show how safe it is.⁶ What reason, then, could the C.M.A.

3 *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 7.

4 "Text of abortion motion," *Globe and Mail* (27 July 1988) 4.

5 "C.M.A. Policy Summary" (1985) 133 *C. Med. Assoc. J.* 318a.

6 G. Sharpe, *The Law and Medicine in Canada* (Toronto: Butterworths, 1987) 343.

have to feel that a woman should be denied the freedom to remove from her body a piece of human tissue?

Suppose that abortion is something more serious than excising a piece of flesh from a woman's body. What if that piece of flesh actually is a human being who is put to death in an abortion: "if human it is, then abortion is not just a minor surgical excision. It is the taking of an individual human life."⁷ And if that is true, one can understand why an association duty-bound to the protection of human life could not support abortion on demand.

Is the foetus a human being, albeit a tiny human being? To answer this question, one must examine the medical facts of the foetus. If a foetus is as a matter of irrefutable medical fact a human being, it becomes hard to understand why it should not have the most fundamental human right that "everyone" has under the Charter; that is, the right to life.

Borowski's lawyer was Morris C. Shumiatcher. He believes that, in order to prove that a foetus is a human being, it is necessary to bring evidence on the matter from such medical experts as leading embryologists, foetologists, neurologists, gynaecologists, radiologists, medical ethicists, and general medical practitioners. When the Borowski case came to trial, Shumiatcher called a number of expert witnesses. First, there was Sir William Liley, the founder of perinatal medicine. Liley developed the procedure of amniocentesis, which permits the diagnosis and treatment of diseases of unborn children. Liley was the first physician to transfuse benign blood to an "Rh baby"⁸ while the baby was still a foetus. "These achievements marked the first time an unborn child was treated as a patient separate and apart from the mother for a medical condition distinct from the mother's. It was for his outstanding work in these fields that he was twice knighted."⁹ Secondly, Borowski's counsel called Dr Jerome Lejeune, who is widely considered the world's top human geneticist, having discovered Down's Syndrome in the 1950's.¹⁰ Thirdly, there was Dr Harley Smyth, a Rhodes Scholar and one of Canada's best neurosurgeons: "When he performs brain surgery upon a pregnant woman he insists that a second surgeon and a second anaesthetist attend throughout to protect the life of the unborn child, to assure that no conflict of interest will prejudice either of them."¹¹ Dr Patrick Beirne also testified, being the principal pioneer

7 M. Shumiatcher, "I Set Before You Life and Death: Abortion: Borowski and the Constitution" (1987) 24 U.W.O.L. Rev. 1 at 5.

8 An "Rh baby" is one whose mother's blood type is sensitized against it.

9 Shumiatcher, *supra*, note 7 at 5.

10 *Ibid.*

11 Shumiatcher, *supra*, note 7 at 6.

of ultrasound in Canada and the Head of the Department of Obstetrics and Gynaecology at St. Michael's Hospital in Toronto.¹² Other expert witnesses brought forth included a member of a therapeutic abortion committee, a former abortionist, and a radiologist with substantial experience in the use of ultrasound to diagnose the condition of the unborn. The evidence given by these experts was indeed illuminating.

Liley and Beirne testified as to how, due to scientific advances, "the fetus has acquired the status of a patient who should be given the same care by the physician that we have long given the pregnant woman."¹³ Liley pictured life as a continuum from fertilization until death: "at every stage, our life is and remains, from beginning to end, the same life, by whatever name it may be described – whether a zygote, an embryo, a fetus, a baby, a child, an infant, a toddler, a teenager, an adult, or a geriatric."¹⁴

Dr Lejeune concurred, stating that, at the moment of conception, every quality that makes an individual recognizable – colour of eyes, hair, skin, for instance – are set in that individual's own personal genetic constitution. Some who support abortion on demand suggest that the unborn child simply is a part of the mother. This clearly is untrue, because mother and child will often have different blood types, different colour of eyes, hair and skin, and most markedly, be of a different gender.

At trial, counsel for the applicant questioned Liley on whether or not a child simply is a part of a mother's body. Dr Liley answered that the foetus and the pregnant woman, its mother, are separate and distinct individuals whose tissues are in contact:

Q: I was always under the impression that the umbilical cord was the great connection between the mother and the baby. Is that true?

A: No, sir. The umbilical cord simply connects the baby to its own organ, granted, an extracorporeal organ...The cord connects the baby, not to its mother, but to its own organ, the placenta.¹⁵

As further evidenced that the foetus is a human being distinct from its mother, Liley noted that, in the case of an "Rh baby," there is an ill child in the body of a perfectly healthy pregnant mother: "often women were quite incredulous to learn," said Dr Liley, "that their baby was seriously ill, seeing they felt so well themselves."¹⁶

12 Shumiatcher, *supra*, note 7 at 7.

13 *Ibid.*

14 *Ibid.*

15 Shumiatcher, *supra*, note 7 at 10.

16 Shumiatcher, *supra*, note 7 at 11.

Liley avowed that a foetus has sensory perception. A foetus has taste perception, as shown by its behaviour when a sweetner or bitter flavor is injected into the amniotic fluid. The foetus will drink more when the sweetner is added and less if the bitter flavor is added. If light is flashed in the uterus, a foetus will move and turn away, showing light perception. A sudden sound will similarly startle the unborn child, showing sound perception. Incredibly, a first trimester foetus experiences pain if pricked by a needle or if subjected to the injection of a cold or hypertonic solution into its environment. Liley also noted that an unborn child may, at sixteen weeks' gestation, begin a habit that it might not break for years; that is, it may suck its thumb.¹⁷

In discovering whether the foetus is a human being, it is necessary to research in some medical detail the anatomy of a foetus. In doing so, we relied primarily on medical texts that concentrated upon foetal medicine and foetal anatomy and histology. A brief synopsis of the information gathered from these sources is helpful to shed light on the question at hand. For the purposes of this paper, a capsule analysis of the anatomy of only a first-trimester foetus is presented. The following overview is based primarily on Beck's *Obstetrics and Fetal Medicine*,¹⁸ Tarnesby's *Abortion Explained*,¹⁹ and Valdes-Dapena's *Histology of the Fetus and the Newborn*.²⁰

A foetus at twenty-three days already has a forebrain and a heart, although, at this time, it bears no physical resemblance to the baby that it will become. At this stage, according to abortionist Peter Tarnesby, a woman will have the first suspicions that she is pregnant.²¹ In the fourth week of gestation, the heart has begun to beat. Partitioning of the heart begins about the middle of the fourth week and is virtually complete by the end of the fifth week.²² Fetal heart sounds can be heard in the first trimester through the Doppler ultrasound technique, the heart tones indicating a pulse of about 135 beats per minute. Oxygen-rich blood goes to the heart, brain, and upper extremities, while relatively oxygen-poor blood is sent to the unborn child's lower extremities.²³

In early embryonic life, the spinal cord is present, occupying the entire length of the vertebral canal, and the spinal nerves pass away from

17 Shumiatcher, *supra*, note 7 at 13.

18 A.C. Beck, *Obstetrics and Fetal Medicine* (Baltimore: Waverly Press, 1977).

19 H. P. Tarnesby, *Abortion Explained* (London: Sphere Books, 1969).

20 M.A. Valdes-Dapena, *Histology of the Fetus and the Newborn* (Toronto: W.B. Saunders, 1979).

21 Tarnesby, *supra*, note 19 at 69.

22 Valdes-Dapena, *supra*, note 20 at 3.

23 Beck, *supra*, note 18 at 20 and 37.

it at right angles. We see the earliest manifestation of the respiratory tree at three weeks gestation; the epiglottis, larynx, trachea, and bronchii. In the fourth week of gestation, the central nervous system, skeleton, lungs, esophagus, and mouth begin to appear.²⁴

"Early in the development of the embryo, a transverse section through the forebrain reveals thick lateral walls connected by thin floor and roof plates."²⁵ By the fifth and sixth weeks of gestation, the forebrain is very complex, and the pallium consists of a thin cortex, an intermediate mantle, and a thick inner ependymal layer.²⁶ According to Liley and Smyth in testimony during the *Borowski* case before the Saskatchewan Court of Queen's Bench, actual brain activity starts at five to seven weeks following conception.²⁷

In the fourth week, a foetus has a tongue. Salivary glands begin to develop during the sixth and seventh weeks; and taste buds, by the eight week.²⁸ The stomach first manifests itself at about four weeks, and, within the first trimester, a foetus will orally consume nutrients that will be sent into its stomach.²⁹

The extremities of the foetus are fairly well developed in the fifth through seventh weeks. The external genitals have made their appearance, and the sex glands are differentiated into male or female gonads.³⁰ By the eighth week, centres of ossification are evident throughout the fetal skeleton. "The fingers and toes are well differentiated and show well developed nails at their extremities."³¹ At this point, the foetus has a completely human shape. It looks like a very tiny baby only three centimetres in length with eyes, nose, mouth, ears, arms and legs, hands and feet, and fingers and toes. This is at *eight weeks after conception*, well within the first trimester.

In the *Borowski* trial, William Liley presented a slide of an eight-week-old foetus after suction curettage, which is the most commonly employed method of procuring a miscarriage. He described what the slide showed:

I thought it might be of interest to see just what a baby of that maturity looks like after it has been through a suction curettage. There are all of the components of a baby still but in a macabre jig-saw puzzle, and in the debris in the suction bottle one can recognize one pigmented eye, a fragment of brain to the left. One can find all four

24 Valdes-Dapena, *supra*, note 20 at 31, 193, 287-88, 309, and 537.

25 Valdes-Dapena, *supra*, note 20 at 533.

26 Valdes-Dapena, *supra*, note 20 at 533-535.

27 Shumiatcher, *supra*, note 7 at 13.

28 Valdes-Dapena, *supra*, note 20 at 168 and 183.

29 Beck, *supra*, note 18 at 37; Valdes-Dapena, *supra*, note 20 at 207.

30 Beck, *supra*, note 18 at 18; Valdes-Dapena, *supra*, note 20 at 397.

31 Beck, *supra*, note 18 at 19.

limbs dismantled, a rib cage, an eviscerated torso, the abdominal viscera have all become detached and are just a slurry, and a short segment of cord.³²

B. Philosophically, a foetus is a person

What is a person? "The first step in coming to terms with the concept of a person is to disentangle it from a concept with which it is thoroughly intertwined in most of our minds, that of a human being."³³ Although it may be so that all persons are human beings, it is not necessarily true that all human beings are persons. Therefore, even if one grants that a foetus is, in medical terms, a human being, this might not be sufficient to prove that a foetus is deserving of basic human rights. The case for the foetus would become even stronger if it could be shown that, in philosophical terms, a foetus is a person.

In his book *Engineered Death: Abortion, Suicide, Euthanasia and Senecide*, John Hayden Woods remarked, "It is small wonder that the moral status of foeticide proves a somewhat unyielding question, since it is a question anchored to the deep and difficult metaphysical notion of personhood."³⁴ Indeed, grasping the notion of personhood is difficult if one believes that the concept goes beyond morphological factors. Jane English writes that "there are psychological factors: sentience, perception, having a concept of self and of one's own interests and desires, the ability to use tools, the ability to use language or symbol systems, the ability to joke, to be angry, to doubt."³⁵

There seems to be a basic agreement among most philosophers who have considered the question that the characteristics of a person that give him the right to life come down to the constitutive potential for certain levels of rational consciousness, self-awareness, intelligence, sentience, and similar brain functions, thus distinguishing the person from non-persons. The human foetus possesses, from the moment of conception, a unique genetic endowment that provides that, given normal foetal health, it will reach a fully realized human rational awareness.

There is, however, no single, specific set of necessary and sufficient conditions that conclusively constitute personhood. It suffices that we grasp a basic understanding of what it is that makes post-natal individ-

32 Shumiatcher, *supra*, note 7 at 20.

33 J. Feinberg, "Abortion," in T. Regan, ed., *Matters of Life and Death* (Philadelphia: Temple University Press, 1980) 185.

34 J.H. Woods, *Engineered Death: Abortion, Suicide, Euthanasia, and Senecide* (Ottawa: University of Ottawa Press) 1978 at 41.

35 Jane English, "Abortion and the Concept of a Person," in S. Gorovitz *et al.*, eds, *Moral Problems in Medicine*, 2d ed., (Englewood Cliffs, NJ: Prentice-Hall, 1983) 324.

uals persons, and then determine whether the human foetus lacks any of those characteristics to a morally significant degree.

One of the more intriguing studies in this area is a work by A.S. Moraczewski called "Human Personhood: A Study in Person-Alized Biology."³⁶ It provides a very persuasive bioethical view of human personhood as "embodied intelligent freedom". Moraczewski defines a person as one "being *radically* capable of rational thought and of electing among alternatives without an inherent universal coercion. To have a *radical* capability means the power in question need not be actually exercised here and now," such as with persons asleep, unconscious, comatose, or yet developed such as a young child.³⁷ In this view, the person is something biological and material, but also something more. Being biologically human is a necessary component of a person, but it is not sufficient. Why is it insufficient? "Human biology," states Moraczewski, "is closely similar to that of the higher primates. Indeed, in many regards the entire living world has much affinity to human biology. We can conclude that personhood transcends the merely biological because of the many things that humans can do which other animals, including the higher primates, are not able to do, even in a rudimentary fashion."³⁸

Some of the things that humans can do that differentiate them from other organisms are their ability to record their history, conjecture about the future, recognize good and evil, be radically technological, and have the unique ability to communicate though syntactical language. Moraczewski concludes:

To be a human person, then, requires first of all that an individual has the appropriate biological makeup, namely, a human genome. Secondly, the individual must be a true organism with the radical capability – given the appropriate environmental support and the absence of disease or trauma – of being or developing into an adult human being which manifests clearly those characteristics which people commonly associate with the human person: rationality, self-awareness, the power to love and to relate, etc. This radical capability is not something which is gradually acquired over time. Rather, it is inherent from the beginning and its presence is known because the human organism will normally develop into an adult human... Unlike knowledge or physical strength which are acquired, a human person is a person *ab initio* and remains such through the vicissitudes of life, disease, trauma, and senility until the death of the individual.³⁹

36 A.S. Moraczewski, "Human Personhood: A Study in Person-Alized Biology," in H.T. Engelhardt and S.F. Spicker, eds, *Abortion and the Status of the Fetus* (Dordrecht, Holland: D. Reidel, 1983) at 301.

37 Moraczewski, *supra*, note 36 at 302.

38 Moraczewski, *supra*, note 36 at 302-303.

39 Moraczewski, *supra*, note 36 at 303-304.

Some argue that a foetus is not a person, but a potential person. If this is so, we must establish whether or not there is a morally significant difference between a person and a potential person. Let us assume for the moment that a foetus is a potential person. It would seem that a potential person cannot be said to have the rights of persons. But are things as they seem? What difference between a potential person and an actual person is relevant enough to allow the unrestricted killing of one and not the other? We submit there is no such difference. If the possession of a certain property, personhood, is a valid argument for homicidal restraint, surely the argument that possession of that property is imminent is also grounds for restraint. Potential persons, if there is such a thing, are beings whose personhood is imminent. Thus it is submitted that, by killing a potential person, one deprives that being of the fulfillment of rights which are imminent, rights which, but for one's tampering, the being would have had.

John Woods states that if foeticide is tolerated on the grounds that a foetus, as a potential person, is not yet in possession of the right to life, it is wrongly tolerated. "Plainly enough, to abrogate a right is not the same as to deny it. In abrogating a man's rights, you cancel what he already has; in denying a man his rights you prevent him from their attainment. But whether you abrogate a man's rights or deny him his rights, you have done a violence to his rights; you have violated them." Says Woods, "insofar as abrogation and denial are both a violation of rights, they can be said to be morally equivalent. Thus if infanticide abrogates a being's right to life, and foeticide denies a being the right to life, they are both violations of his right to life."⁴⁰

If a foetus is a potential person, killing it still violates its right to life. We submit that a foetus is an actual person, not a potential person. As Moraczewski points out, an individual can be a person without being capable, here and now, of exercising activities which pertain to human personhood. At conception, a foetus is an actual person even though the manifestation of personhood components have yet to be actualized. The foetus is continually and gradually growing towards the stage where such components and capabilities can be increasingly exercised. The actualization of that personhood takes place smoothly through a developmental spectrum. The specification of any one stage of a being's natural unfolding as marking a radical change from one kind of being to another is to risk making an arbitrary decision.

The human person, while not precisely definable, is nonetheless recognizable and perceivable in its existence. "By a gradual process of biological, psychological, and social development, personhood becomes

40 Woods, *supra*, note 34 at 57.

more and more manifest, but that development and its direction are only possible because there is already present within the organism a person-rooted drive to full human life."⁴¹

A foetus is a person, or at the very least, a potential person, the difference being of little or no moral significance. However, if there is any doubt, it is submitted that the foetus should be given the benefit of the doubt. Philosophically, the presumption should be that a foetus indeed is a person. The burden of disproving this should lie with the opponent of this view, for which is the greater mistake: to prohibit foeticide even though the foetus is a non-person, or to allow foeticide even though the foetus is a person? The consequence of one mistake is that we prohibit non-murder; the other, that we permit murder.⁴² Which is the graver error?

C. Legally, a foetus is an entity worthy of protection under the law

Unarguably one of the leaders in the fight for official recognition of the foetus's legal right to life is a former Manitoba government cabinet minister, Joseph Borowski. His fight began ten years ago in the Saskatchewan Court of Queen's Bench and has culminated in a case that the Supreme Court of Canada heard in October 1988. The latter was Borowski's second case before the Supreme Court, the first being the judgment that granted him standing to bring the issue before the judiciary.

The issue of standing decided in his favour late in 1981 by the Supreme Court,⁴³ Borowski had to bring the issue right back to square one – the Saskatchewan Court of Queen's Bench. Matheson J. delivered the judgment in that case, making the following significant findings of fact:

1. Modern biological and genetic studies have verified that the foetus is genetically a separate entity from the time of conception or shortly thereafter.⁴⁴
2. Advances in medical procedures have made it possible for a foetus to be treated separately from its mother and, although not sufficiently developed for normal birth, to survive separate from its mother.⁴⁵
3. Even though the foetal life may not be maintainable during the early stages of pregnancy independently of the pregnant woman, permitting a pregnant woman to terminate her pregnancy automatically results in the termination of the foetal life

41 Moraczewski, *supra*, note 36 at 309.

42 We are not using "murder" in its legal sense, but rather in its ethical sense, meaning the deliberate killing of a person.

43 [1981] 2 S.C.R. 575.

44 (1984) 29 Sask. R. 16 at 25 (Q.B.).

45 *Ibid.*

that, it clearly seems, is an existence separate and apart from that of the pregnant woman.⁴⁶

4. A consideration of the factors that may result in a therapeutic abortion being performed, necessarily entails a consideration of the fact that if an abortion is deemed justified, the end result cannot be therapeutic for both the pregnant woman and the foetus.⁴⁷

Despite these findings, the learned trial judge ruled against Borowski. Reasoned Matheson J.,

Although rapid advances in medical science may make it socially desirable that some legal status be extended to foetuses [*sic*], irrespective of ultimate viability, it is the prerogative of Parliament, and not the courts, to enact whatever legislation may be considered appropriate to extend to the unborn any or all legal rights possessed by living persons. Because there is no existing basis in law which justifies a conclusion that foetuses are legal persons, and therefore within the scope of "everyone" utilized in the Charter, the claim of the plaintiff must be dismissed.⁴⁸

It was the view of the trial judge that a foetus does not have a right to life under s. 7 of the Charter, because, in his opinion, it was not the intent of those who drafted the section that the foetus be included in "everyone". As proof of this, he cited the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*.⁴⁹ As well, the judge felt that the abortion issue was not a matter for the courts to decide. He stated, "how foreign to our constitutional traditions, to our constitutional law and to our conceptions of judicial review was any interference by a court with the substantive content of legislation."⁵⁰ Indeed, legal scholars, such as Timothy Christian, felt that substantive review would be "a radical departure from the Anglo-Canadian tradition."⁵¹

Borowski appealed his case to the Saskatchewan Court of Appeal, which heard argument on 16 to 18 December 1985. It was on the second day of the appeal that the Supreme Court of Canada delivered its judgment in the case of *Re s.94(2) of the B.C. Motor Vehicle Act*.⁵² This case was very significant to *Borowski* because of two main rulings. First, the Supreme Court noted that a number of courts had placed emphasis on the *Minutes of Proceedings and Evidence of the Special Joint Committee of*

46 *Supra*, note 44 at 28.

47 *Ibid.*

48 *Supra*, note 44 at 30.

49 *Supra*, note 44 at 27.

50 *Supra*, note 48 at 21.

51 T.J. Christian, "Section 7 of the Charter of Rights and Freedoms: Constraints on State Action" (1984) 22 *Alta. L. Rev.* 222 at 246.

52 [1985] 2 S.C.R. 486.

the Senate and the House of Commons on the Constitution of Canada to interpret s. 7. In regard to this, Lamer J. said, "in view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight."⁵³ With that as a basis, the Supreme Court secondly ruled that the meaning to be given to s. 7 is "that it is not restricted to matters of procedure but extends to substantive law and... the courts are therefore called upon, in construing the provisions of s.7 of the Charter, to have regard to the content of legislation."⁵⁴ Therefore, two points that had gone against Borowski in his trial had been answered by the Supreme Court completely and directly in his favour. This dulled the argument of the Attorney-General of Canada, but would it be enough to win Borowski his appeal?

The Saskatchewan Court of Appeal handed down its judgment on 30 April 1987. Speaking for the Court, Gerwing J.A. stated that "to deprive a person of his life is the most radical deprivation of rights and the most flagrant violation, absent adherence to the fundamental principles of justice, of the values and traditions of our society."⁵⁵ Therefore, if a foetus were held to be a legal person, it would be implied within the meaning of "everyone" and would have a right to life that unrestricted abortion flagrantly violates. Gerwing J.A. considered the availability of abortion in the Anglo-Canadian tradition when deciding whether the right to life in s. 7 ought to be deemed to include the foetus. She noted that:

Until 1969 the law in Canada relation to abortion had changed little since 1892 and generally provided that it was an indictable offence, for which one could be sentenced to imprisonment for life, to procure the miscarriage of any woman, and that it was an indictable offence, also with a maximum penalty of life imprisonment, to cause the death of any child, which had not become a human being, in such a manner that the perpetrator would have been guilty of murder if the child had been born.⁵⁶

It would seem obvious that the law considered the killing of an unborn child to be an offence of the magnitude of murder. Based on that, it would seem clear that a foetus should be deemed to have a right to life, given this very strict duty upon others not to kill it. However, Gerwing J.A. managed to avoid this conclusion, stating immediately after outlining the history of abortion law that is above quoted:

53 *Supra*, note 52 at 513.

54 N. Finklestein, ed., *Laskin's Canadian Constitutional Law*, 5th ed. (Toronto: Carswell, 1986) 1182.

55 *Borowski v. Attorney-General of Canada*, (1987) 33 C.C.C. (3d) 402 at 411 (Sask. C.A.).

56 *Supra*, note 54 at 412.

A consideration of the historic treatment of the foetus shows that at various stages our society has permitted abortion at various stages of foetal development and for various reasons. Such treatment is not consistent with recognition of its status historically as a person, or as an entity to be included within "everyone."⁵⁷

With respect to Gerwing J.A., it is submitted that her conclusion is wholly unconvincing. One could just as easily make the statement that "a consideration of the historic treatment of adult males shows that at various stages our society has permitted the killing of adult males for various reasons." While this statement would as a matter of fact be true (the various reasons being war, punishment for capital crimes, and self-defence), surely it would not follow that "such treatment is not consistent with recognition of adult males as persons, or as entities to be included within "everyone."

Gerwing J.A. also looked for guidance as to a consideration of the treatment of the issue outside of Anglo-Canadian law, particularly looking to the United States.⁵⁸ While it may be tempting to follow blindly the American courts in their reasoning on the issue, this would ignore the Canadian Supreme Court's warning in *Re B.C. Motor Vehicle Act*: "We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions."⁵⁹

Gerwing J.A. went on to cite the *Re B.C. Motor Vehicle Act* case, noting that legislative history regarding the adoption of the Charter is of little weight. She then, in apparent disregard, went into great detail outlining statements made in 1980 by the Acting Justice Minister Robert Kaplan during debates on the meaning of "everyone" in section 7. "While there is little use in such material generally," stated Gerwing J.A., "I am of the view it should be referred to in this matter."⁶⁰

Apart from Kaplan's opinion, Gerwing J.A. used another traditional tool of statutory interpretation, the comparing and contrasting of "everyone" in s. 7 with its use in other sections of the Charter, an interpretive tactic first used by Henry Morgentaler's lawyer when he sought to demonstrate that "everyone" does not encompass the foetus. In his book *Rights, Freedoms, and the Courts*, Manning writes:

The meaning of the word "everyone" in the section might be revealed by asking whether a foetus could claim any of the other rights guaranteed where those rights are guaranteed to "everyone" as opposed to rights guaranteed a "person,"

57 *Ibid.*

58 *Supra*, note 54 at 416.

59 *Supra*, note 52 at 498.

60 *Supra*, note 55 at 425.

"individual," or "citizen." If this analysis is applied to the Charter the court must reach the conclusion that "everyone" refers to only post-natal beings. This can be seen by the fact that a foetus cannot claim a right against arbitrary detention or imprisonment. Nor can a foetus be arrested or detained upon which a duty arises to inform a foetus of its right to retain and instruct counsel pursuant to s.10(b).⁶¹

Manning's argument is not at all persuasive, because a corporation can neither be arbitrarily arrested nor imprisoned; however, the Supreme Court has held in cases such as *Hunter v. Southam*⁶² and *R. v. Big M Drug Mart*⁶³ that "everyone" in the Charter does indeed include corporations. In *Hunter v. Southam*, Cavanagh J. of the Alberta Court of Queen's Bench interpreted "everyone" in s. 8 of the Charter to include "all entities that are capable of enjoying the benefit of security against unreasonable search."⁶⁴ It is submitted that this is a sensible interpretation and that, consequently, a logical interpretation of "everyone" in s. 7 would include all entities capable of enjoying the right to life, liberty, or security of the person. "Or" rather than "and" is used because, as Wilson J. said for the Supreme Court of Canada in *Singh v. Minister of Immigration*, "it is not suggested that there must be a deprivation of all three of these elements before an individual is deprived of his 'right' under s. 7."⁶⁵ It is submitted that a foetus is an entity capable of enjoying the right to life and should, therefore, be included within the protection of s. 7.

However, Gerwing J.A. was hesitant to afford to the foetus the benefit of a liberal interpretation of the Charter. "I must conclude that the historic treatment of the foetus at Anglo-Canadian law has not been as a person or part of "everyone" and that if such status were now to be accorded it would be novel."⁶⁶ It is submitted that the foetus has historically been afforded much the same protection as has been afforded to post-natal beings. The penalty for killing a foetus has been imprisonment for life. La Fondation pour la Vie noted in its factum in the *Morgentaler* case⁶⁷ that other sections in the Criminal Code have offered protection for the foetus. For example,

61 M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Edmond-Montgomery, 1983) 238.

62 [1984] 2 S.C.R. 145.

63 [1985] 1 S.C.R. 295.

64 (1982) 20 Alta. L.R. (2d) 144 at 152.

65 [1985] 1 S.C.R. 177 at 204.

66 *Supra*, note 55 at 413.

67 La Fondation pour la Vie, "Factum of the Intervenant" [hereinafter "Factum"], *Morgentaler v. R.* (1975) 53 D.L.R. (3d) 161 (S.C.C.).

s. 597 of the Criminal Code, providing for the arrest of execution of a female person who is pregnant, regardless of the phase of pregnancy, is a clear indication of the recognition by the Legislator of the individuality of the unborn child and his right to live.⁶⁸

"It is not contended," the factum concludes, "that the right to life of an unborn child is absolute. However, it is contended that the interpretation of a statutory provision affecting this right must be approached with a view to implementing, to the extent possible, the high protection given to life generally by Canadian law."⁶⁹

Clearly, ample protection in Canadian law has been afforded the foetus. Gerwing J.A., however, is correct when she notes that nowhere in the law has a foetus actually and expressly been ruled to be part of "everyone." If such a status were now expressly accorded to it by the courts, it would, indeed, be novel.

On 29 July 1989, Borowski was granted leave to appeal to the Supreme Court of Canada, and his appeal was heard in early October 1988. The Supreme Court reserved judgment. It is of interest to note that this is not the first time a word such as "everyone" in a constitutional context has had to be interpreted by the Supreme Court of Canada. In 1928, the Supreme Court decided *Re The Meaning of the Word "Persons" in s. 24 of the British North America Act, 1867*,⁷⁰ where s. 24 states that "the Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate."⁷¹ It is submitted that the Supreme Court there looked at the matter in much the same way the Saskatchewan courts had looked at the *Borowski* case. In the s. 24 reference case, Anglin C.J. stated that, in considering the matter, the court cannot be concerned with the desirability or undesirability of affording the group in question the status of personhood. The duty is to construe to the best of the court's ability the relevant constitutional provisions and upon that construction to base the answer.⁷² In deciding whether the petitioning group were "persons" within s. 24, the Anglin looked to the historical treatment of that group in law, the intent of the legislature in drafting the section, and other sections in the Act where "persons" had been used. The court noted that nowhere in law had the group in question been granted the status of "persons." Duff J. said that, as proof of this statement, "a series of decisions and

68 "Factum," *supra*, note 67 at 4.

69 "Factum," *supra*, note 67 at 7.

70 [1928] S.C.R. 276.

71 *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s. 24.

72 *Supra*, note 70 at 281-2.

judgements, from 1868 to 1922, delivered by English judges of the highest authority are adduced."⁷³ Mignault J. writes that

the word "persons" is obviously a word of uncertain import. Sometimes it includes corporations as well as natural persons; sometimes it is restricted to the latter; and sometimes again it comprises merely certain natural persons determined by sex or otherwise. The grave constitutional change which is involved in the contention submitted on behalf of the petitioners is not to be brought by inferences drawn from expressions of such doubtful import, but should rest upon an unequivocal statement of the intention of [Parliament]....⁷⁴

Therefore, the Supreme Court came to the unanimous decision that women were not included within the meaning of the "persons" as set out in s. 24. It can be seen that the Supreme Court's reasoning in coming to this conclusion was remarkably similar to the reasoning used by the Saskatchewan courts in deciding whether foeti are part of "everyone" in s. 7.

Just as the *Borowski* case was appealed to the Supreme Court of Canada, so too s. 24 "persons" reference was also appealed to the Judicial Committee of the Privy Council in one of the more famous constitutional cases in Canada's history, *Edwards v. A.G. Canada*.⁷⁵ The question was, "Did the Supreme Court err in ruling unanimously that the word 'persons' in s. 24 of the British North America Act, 1867, does not include females?"

Lord Sankey gave judgment for the Board. He noted that "the decision was that the Supreme Court was unanimously of opinion that the word "persons" did not include female persons, and that women are not eligible to be summoned to the Senate."⁷⁶ His Lordship gave consideration to the Supreme Court's view, looking at the history of the section in question and the cases that supported the exclusion of women from within the meaning of "persons." He stated that

customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared. The appeal to history therefore in this particular matter is not conclusive.⁷⁷

Lord Sankey continued:

⁷³ *Supra*, note 71 at 292-3.

⁷⁴ *Supra*, note 70 at 303.

⁷⁵ [1930] A.C. 124 (P.C.).

⁷⁶ *Supra*, note 75 at 127.

⁷⁷ *Supra*, note 75 at 134.

Over and above that, their Lordships do not think it right to apply rigidly to Canada of today the decisions and the reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, in different stages of development.⁷⁸

Evidently, Lord Sankey disagreed with the Supreme Court's reliance upon the history of the law on the matter. He believed that, in dealing with the interpretation of the word "persons" in a constitutional context, it did not suffice to rely upon historical treatment of the issue. He wrote that "the *British North America Act* planted a living tree capable of growth and expansion within its natural limits. The object of the *Act* was to grant a Constitution to Canada."⁷⁹ Judicial interpretation, he proclaimed, should not "cut down the provisions of the [*Constitution*] *Act* by a narrow and technical construction, but rather give it a large and liberal interpretation."⁸⁰ In light of this approach to the interpretation of constitutional sections, Lord Sankey commented, "the word 'person,' as above mentioned, may include members of both sexes, and to those who ask why the word should include females the obvious answer is why should it not? In these circumstances the burden is upon those who deny that the word includes women to make out their case."⁸¹ Lord Sankey concluded his judgment by saying that, if Parliament meant to exclude women from "persons" in s. 24, they should have done so expressly. As they did not, it was the unanimous decision of the Privy Council that women should be included as "persons" within s. 24.⁸²

It is submitted that in deciding whether or not a foetus should be included as part of "everyone" in s. 7 of the Charter, the Supreme Court in *Borowski v A.G. Canada* can take the narrow, traditionalist route that they took sixty years ago in the "persons" reference case, or they can embark on a progressive, liberal route of interpretation as the Privy Council did in *Edwards v. Attorney-General of Canada*.

D. Conclusion

The foetus is an entity worthy of protection under s. 7 of the Charter. A foetus should be held to be included within the meaning of "everyone" in s. 7. When Gerwing J.A. says in *Borowski* that the appeal to history in this particular matter tends to show that treatment of the foetus as part of "everyone" would be novel, this should not be conclusive of the is-

78 *Supra*, note 75 at 134-5.

79 *Supra*, note 75 at 136.

80 *Ibid.*

81 *Supra*, note 75 at 138.

82 *Supra*, note 75 at 141-142.

sue. Past considerations of the status of the foetus should not be rigidly applied to the interpretive question. If the Charter is to be a "living tree, capable of growth," terms such as "everyone" must be given a large and liberal interpretation. As Cavanagh J. stated in *Hunter v. Southam*, "everyone" should be interpreted widely enough so that Charter can grant its rights to all entities capable of enjoying them – and that would include the foetus. To those who ask why the foetus should be included in the word "everyone," the obvious reply is, why not?

If Parliament wanted to exclude the foetus from those having a right to life in s. 7, they should have done so expressly. They did not. Medically, the unborn child is a human being. Philosophically, the unborn child is a person. Legally, he is an entity worthy of protection under the law. The unborn child is part of "everyone" in s. 7 of the Charter and has a constitutionally entrenched right to life. If the Supreme Court delivers a judgment in *Borowski v. A.G. Canada*, this is what it should hold, and this is the premise upon which Parliament should construct a new foetal-protection law.

II. THE CONFLICT BETWEEN THE RIGHTS OF THE MOTHER AND THE RIGHTS OF THE FOETUS

THE STARTING PREMISE HAS BEEN THAT the foetus is a person. The suggestion has not been that the foetus be granted all those rights associated with an adult, but rather the argument extends only to those fundamental rights guaranteed by s. 7 of the Charter. Thus, simply put, the argument is confined to the contention that the foetus is a person for the purposes of s. 7 of the Charter. Once it has been established that the foetus is a person for the purposes of the Charter, it is clear that such a living being is guaranteed the right to life, subject to denial only in accordance with the principles of fundamental justice. There are those that argue that the right to life is of such a basic nature that it can never be denied, even in accordance with the principles of fundamental justice. For the purposes of the argument at this stage, let us assume that both the right to life and the right to security of the person are absolute.

It follows from these principles that any abortion would be a deprivation of the right to life as guaranteed by s. 7. Following our assumption that such a right is absolute, this statement is a necessary inference. Clearly, this is a s. 7 violation.

Similarly, we can see that a denial of a right to abortion will violate the mother's right to security of the person, also guaranteed by s. 7. The

Supreme Court announced this principle in the *Morgentaler* decision.⁸³

It quickly becomes apparent that Parliament is in a situation where they are "damned if they do and damned if they do not." Any law prohibiting abortion, would violate the mother's right to security of the person. Conversely, any abortion would involve a breach of the foetus' right to life. Once a foetal right to life has been established, any action or inaction by Parliament will therefore necessarily violate either the mother's right to security of the person as established in *Morgentaler*, or the foetus' right to life. Resolution of this conflict between foetal and women's rights must come under the balancing provisions of s. 1 of the Charter.

A. Section 1 analysis

The proper application of s. 1 was discussed by the Supreme Court in the now famous case of *R. v. Oakes*.⁸⁴ In that decision, Dickson C.J. said that s. 1 serves two purposes. Its first purpose is to guarantee constitutionally the rights and freedoms set out in the Charter. The second purpose is to provide an exclusive means of justifying the application of those rights.⁸⁵ In essence, s. 1 of the Charter can "potentially be used to salvage a legislative provision which breaches s. 7."⁸⁶

The s. 1 inquiry into justification must begin with the premise that the alleged violation has a substantial impact or interference with a right or freedom.⁸⁷ The onus to show that there was a violation of a right is on the complainant; however, once proven, the onus shifts to the other party to try and justify the legislation on the balance of probabilities.

The first step in the analysis was most succinctly set out in *R. v. Big M Drug Mart*,⁸⁸ where the Court held that it is necessary to look first at the objective that the legislation is designed to achieve. The objective must be of sufficient importance to warrant the overriding of the constitutionally protected right or freedom in question. It must be of pressing and substantial concern. The second aspect of the analysis, as discussed in *R. v. Oakes*, involves an examination of the legislation to see if the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society.⁸⁹ This

83 *Supra*, note 1.

84 [1986] 1 S.C.R. 103.

85 *Supra*, note 84 at 135.

86 *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 520.

87 *Supra*, note 83 at 135.

88 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 352.

89 *Supra*, note 84 at 139.

second element of the analysis calls for a proportionality test and may be broken down into three further sub-tests. The first requires that the means adopted must be rationally connected to the objective, not arbitrary or unclear. The second sub-test requires that the means chosen should impair as little as possible the right in question. The final sub-test requires that there be a proportionality between the effects of the measures responsible for limiting the Charter right or freedom in question and the objective that has been identified to be of sufficient importance. Let us apply the foregoing analysis to the conflict between foetal and women's rights.

B. Objective of the legislation

As discussed earlier, any legislative attempt to deal with the abortion issue must necessarily violate s. 7: either the foetus' right to life or the mother's right to security of the person, must necessarily be violated. This invokes the s. 1 analysis to determine whether the legislation may be saved, the first step of which is to study the objective of the legislation to determine if it is of sufficient importance to override the opposing right. It must be of pressing and substantial concern. Clearly in the context of abortion, the opposing objectives will be related to the health and well-being of the foetus on one hand and to the health and well-being of the mother on the other. It is also possible to consider a situation where the objective will be a combination of these two interests. It goes without saying that, where the right to life of a person is in jeopardy, the matter must be of a pressing and substantial nature. Equally pressing and substantial would be a mother's right to security of the person. Undoubtedly, the health and well-being of either the foetus or the mother is of sufficient importance to pass the first stage of the s. 1 analysis and allow us to move to the second step. It seems equally clear that, even on a cursory examination of the issues involved, any attempt to legislate abortion in this context would pass this step in the s. 1 analysis.

C. Reasonable and demonstrably justified means

The second aspect of the s. 1 analysis demands that the means chosen to override the right or freedom are reasonable and demonstrably justified in a free and democratic society. The "free and democratic" aspect of s. 1 ensures that there is respect for inherent dignity of the human person, an accommodation of a wide variety of beliefs, a respect for cultural and group identity, faith in political and social institutions that enhance the participation of individuals or groups in society, and a

commitment to social justice and equality.⁹⁰ To achieve such goals involves a three-part proportionality test.

The first part of the proportionality test requires that the means chosen to regulate the activity be rationally connected to the objective. They cannot be arbitrary or unclear. This requires any valid legislation regarding abortion to be designed very carefully. Not only must it be clear exactly what is and is not permissible, but also the legislation must be in the pursuit and spirit of the objective.⁹¹ Anything less will fail this test. Legislation attempting to regulate abortion either in favour of the foetus or the mother may pass the test if its procedures and substance are rational. This section will not resolve the conflict between the rights of the mother and the foetus.

The second part of the proportionality test demands that the means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question.⁹² This addresses the issue of whether or not there are less intrusive and alternate means of achieving the same objective.⁹³ Obviously, in relation to the abortion issue, the consequences upon the rights of either the foetus or mother are serious. It is the responsibility of the legislature to uphold and respect the rights of both classes as much as possible while pursuing the government's objective. Again, this portion of the s. 1 analysis will not resolve the conflict between the right of the mother and the foetus.

The third aspect of the proportionality test requires that there be a proportionality between the effects of the measures that are responsible for limiting the particular Charter right or freedom, and the objective that has been identified as sufficiently important. This involves a balancing of the interests of society as represented by the legislation and of those of the individuals or groups that are affected.⁹⁴ This part of the analysis addresses itself to an evaluation of the consequences of the legislation upon the complainant. It appears that the court will go back to the right infringed and find that, although the limitation is not arbitrary, it is possible that the consequences upon the right in question are too detrimental to one party. It is on this aspect of the constitutional analysis of abortion legislation that the conflict between foetal rights and maternal rights will be decided, assuming that the legislation has otherwise been properly enacted. Let us now enter into a consideration of the competing interests that would be before the courts as an attempt to resolve the conflict between the two competing interests.

90 *Supra*, note 84 at 136.

91 *Supra*, note 92 at 139.

92 *Supra*, note 88.

93 *Edwards Books and Art v. The Queen*, [1986] 2 S.C.R. 713.

94 *Supra*, note 84 at 139-40.

In *Roe v. Wade*,⁹⁵ the Supreme Court of the United States identified the competing interests in the abortion issue. It said that "the State does have an important and legitimated interest in preserving and protecting the health of the pregnant woman... and that it has still another important and legitimate interest in protecting the potentiality of human life. The interests are separate and distinct."⁹⁶ The Court of Queen's Bench in Saskatchewan also identified the competing interests, but did so in more poignant form. There, the Court stated that "whether expressly considered in each instance or not, a consideration of the factors which might result in a therapeutic abortion being performed necessarily entails a consideration of the fact that if an abortion is deemed justified the end result cannot be therapeutic for both the pregnant woman and the foetus..."⁹⁷

It has been contended that the right to security of the person includes the right to control the uses of one's own body within very wide limits.⁹⁸ The pregnant woman's right to do as she pleases with her body would allow her to refuse a foetus the protection and nourishment of her womb. This is a legitimate concern. It is further contended by some that abortion laws affect a woman's equality in society:

Only women can suffer the great intrusions of such laws, for only women have the ability to bear children. Fetal rights laws would not only infringe on constitutionally protected liberty and privacy rights of individual women, they would also serve to disadvantage women as women by further stigmatizing and penalizing them on the basis of the very characteristic that historically has been used to perpetuate a system of sex inequality.⁹⁹

It has also been said that abortion allows women the opportunity to participate full in society and thus is an element of human dignity and respect. "The inability of women to control their fertility contributes to their inferior status by perpetuating traditional role differentiation between the sexes and by forcing women to assume the responsibility of childbearing and childrearing."¹⁰⁰ It is argued that the woman must be able to plan a morally coherent life, which is not possible when a

95 (1973) 410 U.S. 113.

96 *Supra*, note 95 at 162.

97 *Borowski v. Attorney-General of Canada*, [1984] 1 W.W.R. 15 at 33 (Sask. Q.B.).

98 Feinberg, *supra*, note 33 at 203.

99 D.E. Johnsen, "The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection" (1986) 95 Yale L. Rev. 599 at 620.

100 M.A. Matteo, "Governmental Abortion Policies and the Right to Privacy: Rights of the Individual and the Rights of the Unborn." (1985) 11 Brooklyn J. Int'n L. 103 at 125.

mother is forced to endure the trauma of an unwanted pregnancy to its natural conclusion.¹⁰¹ These too are legitimate concerns. In either situation, reasonable women holding this view regard the mother's right to abort as a necessary evil.

The rights claimed by the mother are opposed by claims for foetal rights. The right that "pro-life" advocates say the foetus possesses is simply stated. The foetus has the right to life. In *Borowski*, the Court said that "the 'right to life' is so clear with respect to autonomous human beings that not much need be said of its purpose and to deprive a person of his life is the most radical deprivation of rights...."¹⁰² The right to life is the most basic right held by people. Once it is determined that the foetus is a person for the purposes of the Charter, he is afforded such basic protection.

The conflict between foetal and women's rights, both considered absolute at this stage of the argument, must come down to a balancing of the relative importance of each respective right. The Saskatchewan Court of Appeal identified the right to life as being so clear that not much explanation was necessary, but judicial discussion of the right to security of the person since the proclamation of the Charter reveals no such clarity. Even recognizing the importance of each groups' rights, the conflict is still evident. If one must take a stand on this debate, and it is submitted that this is a necessary step, the only answer possible is that the right to life must dominate. The dominance of the right to life comes from both a moral and logical perspective. It seems clear that, when confronted with the decision to choose either to preserve a person's life or the dignity and autonomy of a person by respecting their right to security of the person, common decency demands that life be paramount. Moreover, beyond any moral considerations, there are logical reasons for this position. The right to life must be more basic than the right to security of the person, because, without the former, there would be no place for security of the person. The higher and more civilized ideals of individual autonomy and dignity lose all meaning when one's most basic and primal right to life is in jeopardy. Indeed, the right to life is the most fundamental right afforded to persons in our society.

This conclusion does not, however, solve the problem, because the controversy becomes more complex when it is the mother's right to life that opposes the foetus' right to life. The Court demonstrated this in *Borowski* when it was stated that

101 M. Bolton, "Responsible Women and Abortion Decisions," in S. Gorovitz *et al.*, eds, *Moral Problems in Medicine*, 2d ed. (Englewood Cliffs, NJ: Prentice-Hall, 1983) 336.

102 *Supra*, note 55.

Although there may be a justifiable moral distinction between terminating a pregnancy for the purposes of preserving the life of a pregnant woman and for the purpose of preserving her health, if a foetus possesses the same legal rights as does the pregnant woman the rights are no less violated if radiation therapy is prescribed for cancer of the uterus than if an abortion is authorized to preserve the mental health of the pregnant woman.¹⁰³

To resolve this conflict it is necessary to review one of the opening statements that the right to life was to be considered absolute.

D. Principles of fundamental justice

For the purposes of argument, the foregoing discussion was based upon the premise that the right to life was of such importance that it could never be denied, even in accordance with the principles of fundamental justice as set out in s. 7 of the Charter. While this position may be taken by some commentators, it clearly cannot stand on a practical level. It becomes obvious that in some situations the foetus' right to life will not be confronted simply by the mother's right to security of the person, but by the woman's own right to life. A conflict of this nature necessitates a withdrawal from the position that the foetal right to life is absolute.

Indeed, no individual rights in our society are absolute. John Stuart Mill recognized this principle, stating

Acts, of whatever kind, which without justifiable cause do harm to others may be, and in the more important cases absolutely require to be controlled by the unfavourable sentiments, and when needful by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgement in things which concern himself, the same reasons which show that opinion should be free to prove also that he should be allowed, without molestation to carry his opinions into practice at his own cost.¹⁰⁴

The right to life was definitely not absolute prior to enactment of the Charter, nor is it now. The law envisages several situations where it is permissible to deny a person his right to life. The most obvious example is death resulting from acts of self-defence. Another classic example is death inflicted during a time of war. Presumably it would even be within the competence of Parliament to enact legislation prescribing the death penalty for certain criminal offences. The purpose of

¹⁰³ *Supra*, note 97 at 32.

¹⁰⁴ J.S. Mill, *On Liberty* (Indianapolis: Hackett, 1975) 53.

these examples is to illustrate that the right to life, like the right to security of the person, is not absolute but rather is subject to limitations.

The position that it would be inappropriate and unrealistic to tender any argument suggesting that the foetus' right to life is absolute, renders much more important the discussion in the third part of the proportionality test under the s. 1 analysis. If the rights of the foetus are absolute, the resolution of the conflict between foetal and women's rights would be purely academic. However, the debate now takes on real force. The conclusion that the foetus' right to life must take precedence over the mother's right to security of the person, has substantial impact on the nature and range of legislative possibilities. It thus is possible to preserve the foetus' right to life by rendering abortion illegal, recognizing that such a right is not absolute; exceptions must be carved to respect a woman's right to security of the person and her own right to life. These exceptions will violate the foetus' right to life, but they will be valid if they preserve the principles of fundamental justice that s. 7 of the Charter demands.

"Principles of fundamental justice" were discussed by the Supreme Court in *Re B.C. Motor Vehicle Act*.¹⁰⁵ The Court defined principles of fundamental justice as being founded upon the basic tenets of our justice system. They are in the inherent domain of the judiciary as guardians of the justice system.¹⁰⁶ It is still unclear exactly what these principles of fundamental justice are, but it is known that such principles relate to basic ideals of justice and fairness. Such ideals are not confined to procedural matters, but instead extend into the substantive nature of the legislation. Thus, any legislative attempt to deny the foetus his right to life must not only be procedurally fair, but also substantively fair. Only then would a denial of the right be fair. The same remarks are also applicable to any legislative attempt to deny to the mother her right to security of the person. Let us consider a draft statute that purports to treat fairly the parties involved.

E. Proposed draft abortion legislation

The need for some uniform regulation of abortion in Canada is readily apparent. The *Morgentaler* decision led to anarchy in the abortion field. Each province is dealing with the problem much as they choose, yet each is reluctant to take a firm stand because of the resultant political fallout from such a move. This fact exemplifies a further problem that faces legislators; that is, not only must the legislation drafted be capable of passing a constitutional test, but it must also be palatable to the

105 *Supra*, note 86.

106 *Supra*, note 86 at 503.

members of the assembly. Clearly, this is a difficult task, yet it is far from impossible.

It is submitted that the following draft legislation would pass both the constitutional and political tests. Parliament would have the jurisdiction to pass and enforce this legislation under its criminal law power as stated in *Morgentaler*. Moreover, the proposed law represents a rational viewpoint that recognizes the rights of the foetus, while remaining sympathetic to the rights of the mother, impairing the rights of each class as little as possible. It also closely corresponds to public opinion on the issue as documented in the Badgley Report.¹⁰⁷

The proposed legislation would provide:

1. Everyone who, without authorization, intentionally procures, or attempts to procure, the miscarriage of a female person is guilty of an indictable offence and is liable to imprisonment for life.
2. Every pregnant person who intentionally procures, or attempts to procure, her own miscarriage or allows an unauthorized person to procure her miscarriage is guilty of an indictable offence and is liable to imprisonment for two years.
3. An abortion shall be authorized if, and only if, it is performed in an approved institution after being determined by a therapeutic abortion committee that
 - a. the pregnancy of the female person is a serious threat to her physical or mental health, or
 - b. the foetus is seriously and incurably deformed or diseased.
4. A foetus that is viable at the time of abortion shall not be destroyed upon removal from the mother, but shall be cared for where possible, and shall be deemed a ward of the Province in which the abortion procedure is performed.
5. An "approved institution" for the purposes of sub-section 3 will include all hospitals, clinics or any other facility having the staffing and equipment to perform such procedures safely, as determined and licenced by the province.
6. A "therapeutic abortion committee" for the purposes of sub-section 3 shall be composed of three medical practitioners appointed by the province, and shall be established on the basis of 1 committee for every X number of individuals.
7. Upon hearing an application for abortion, the therapeutic abortion committee shall give notice of its decision to the applicant within 7 days.
8. "Threat to her physical or mental health" for the purposes of sub-section 3 shall be defined as... (To be decided upon advice of committee).

¹⁰⁷ *Report on the Committee on the Operation of the Abortion Law* (Ottawa: Minister of Supply and Services, 1977) at 459-60.

9. "Seriously and incurably deformed or diseased" for the purposes of sub-section 3 shall be defined as ... (To be decided upon advice of committee).

1. Procedural fairness

The objective of this legislation is the protection of the foetus' right to life. It also has the ancillary objective of protecting the life and health of the mother. This objective was deemed to be an acceptable objective by the majority of the Supreme Court in *Morgentaler*.¹⁰⁸ The former s. 251 of the Criminal Code had a similar objective, but it ran into major constitutional difficulties on grounds of procedural fairness. Wilson J. said that

in my view, the primary objective of the impugned legislation must be seen as the protection of the foetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman's s.7 right is the protection of the foetus. I think this is a perfectly valid legislative objective.¹⁰⁹

Dickson C.J. and Lamer J. held that s. 251 violated the principles of fundamental justice, one of which being that, when Parliament created a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory.¹¹⁰ The consequences of the procedure outlined in the former s. 251 resulted in illusory defence. The fact that a therapeutic abortion could only be performed in an accredited hospital after approval was given by a therapeutic abortion committee consisting of at least four doctors, rendered abortions impossible in many areas of the country. Beetz and Estey JJ. also had difficulties with the procedural fairness of s. 251. They pointed to similar problems in the composition of the therapeutic abortion committee and the requirement that all abortions be performed in an approved or accredited hospital as defined in the Criminal Code.¹¹¹ Additionally, Beetz and Estey JJ. were very concerned about the delays that the s. 251 requirements caused.

The draft legislation has attempted to solve the problems relating to the composition of the therapeutic abortion committee and also those related to the requirement that therapeutic abortions only be performed in designated hospitals. These stipulations were manifestly unfair in that there was not equal access to abortion in all areas of the country. It is submitted that the proposed legislation successfully achieves fairness in this context. The composition of the therapeutic

108 *Supra*, note 1.

109 *Supra*, note 1 at 81.

110 *Supra*, note 1 at 70.

111 *Supra*, note 1 at 91-106.

abortion committee has been substantially altered. This proposed legislation would demand that committees be established on the basis of population; that is, the establishment of one committee for every so many people, the numbers to be established at a later date after further study and then to be inserted into the Criminal Code. In addition, the committees need only have three doctors sitting, any of which or all of whom could practice lawful abortions in their private practice, which was something prohibited in the old s. 251, the fact of which Beetz and Estey JJ identified as unfair. The problem of availability should all but disappear, although some minor problems may still exist in outlying areas, but this is natural consequence of the geography of Canada. Beetz and Estey JJ. recognized this in *Morgentaler* when they discussed the delays that the required procedures caused. They stated that Parliament is justified in requiring a reliable and medically sound opinion as to the merits of an abortion in any particular set of circumstances and that any statutory mechanism will inevitably result in some delay.

The other major difficulty apparent in the previous abortion legislation was the absence of any guidance as to the definition and magnitude of the threat to the mother's health necessary to warrant an abortion. Dickson C.J. and Lamer J. held that the administrative system established failed to provide adequate standards for therapeutic abortion committees to determine when a therapeutic abortion should, as a matter of law, be granted.¹¹² The word "health" was vague, and no adequate guidelines were established for the committees. The result of this omission was that, in some areas of the country, it was almost impossible for a woman to get an abortion, while in other areas a woman with the same problems would always be granted an abortion. The draft legislation presented above attempts to rectify these inequalities. While the present authors do not have the medical expertise nor an intimate familiarity with the further information necessary to define adequate national standards, it is submitted that it would be possible to determine national standards upon further study by experts. These standards could then be incorporated into the Criminal Code as matters relating to the criminal law power of the federal government, though they may incidentally touch on provincial heads of power. It is further submitted that these national standards need not define exactly what constitutes a threat to the "physical or mental health" of the woman, which would itself be a refinement on the vagueness of the previous statutory provisions, but could stand as minimum standards. The responsibility for "fine tuning" the abortion provisions could be delegated to the provinces to reflect the cir-

112 *Supra*, note 1 at 68.

cumstances of the particular provinces. These provisions would have the effect of maintaining a national *status quo* in relation to abortion, with only minor details being left to individual provinces.

The changes incorporated into the proposed legislation address all the important issues identified by the Supreme Court in the *Morgentaler* decision. The draft modifies the procedural difficulties apparent in the former s. 251, replacing them with processes and definitions that are cognizant of the need for equality and fairness. It moreover remains sympathetic to the necessary dominance of the foetus' right to life, yet respects the mother's right to security of the person whenever possible.

2. *Substantive fairness*

As the Supreme Court held in *Re B.C. Motor Vehicle Act*,¹¹³ the rights guaranteed in s. 7 do not limit review simply to procedural issues, but also extends it to substantive review.¹¹⁴ Perhaps the most controversial aspect of the draft legislation is the nature of the exceptions contained in section 3. The section was discussed above in a procedural context, but it is equally important to discuss it in a substantive context. It is here very clear that exceptions of this kind must not be arbitrary, but that they must instead be based upon logical and defensible reasoning. The provision allowing abortions where the mental or physical health of the mother is threatened, is certainly founded in logic. While society may be able to force a woman to give up some of her freedom to decide whether to give birth, society may not force a woman to give up her life. In situations where the health of the woman is seriously threatened, whether the threat is to her mental or physical well-being, the wishes of the mother must prevail. What will constitute a serious threat to the mental or physical health of the person will have to be decided at a later date by those acquainted with the issues and medical considerations. It is clear that this body must produce an adequate standard for therapeutic abortion committees to determine when an abortion should be granted as a matter of law.¹¹⁵ Similarly, the provisions relating to pregnancies that involve serious abnormalities in the foetus, are also based on logic. Severe abnormalities in the foetus would also warrant abortion. If the foetus is so horribly deformed as to make the enjoyment of life impossible, the only humane response to the mother, foetus, and the society that, as whole, will be forced to support that child, is to authorize an abortion. A definition of what degree of abnormality would warrant authorization, must again be left to fur-

113 *Supra*, note 86.

114 *Supra*, note 86 at 513.

115 *Supra*, note 1 at 74-5.

ther study by experts. That such definition is possible is evidenced by the British experience with similar legislation.¹¹⁶

The requirement that all authorized abortions take place in an approved institution allows the province to regulate the health and safety conditions wherever such procedures are performed. This provision should greatly extend the number of facilities available for pregnant women and, together with the stipulation that a therapeutic abortion committee would sit on a per capita basis, should alleviate most problems of access previously experienced by women in Canada.

The cumulative effect of all these procedural and substantive changes to the old legislation will render the present proposed legislation constitutionally valid.

IV. CONCLUSION

IT IS OUR ARGUMENT THAT THE FOETUS IS A PERSON for the purposes of s. 7 of the Charter of Rights and, as such, is afforded the right to life. While recognizing the importance of the rights of the mother, we submit that the conflict between the competing interests can be resolved within the proportionality test that the courts have implied in s. 1. The result of this analysis must be that the foetus' right to life must prevail over all maternal rights, except in certain circumstances. Furthermore, it is both necessary and possible to legislate successfully in the area of abortion. The proposed legislation here presented serves as an example of just that: a substantively and procedurally fair statute that is sympathetic to both the rights of the mother and to those of the foetus, but that addresses the political concerns of Parliament's members; and, any attempt by Parliament to legislate abortion must carefully consider these aspects of the issue if that attempt is to be successful.

116 *Supra*, note 19 at 20-1.