

# SUI GENERIS: THE LEGAL NATURE OF THE FOETUS IN CANADA

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*In this article, the author assesses the effect of a number of decisions of the Supreme Court of Canada in which, to a greater or lesser extent, the status of the foetus has been in issue. She suggests that a number of propositions may be drawn from these cases, but that the Supreme Court may be reluctant to enter fully into the debate. The cases seem, however, to reflect the view that the foetus is an entity distinct from other forms of human life, and that any legal protection of it needs express legislative enactment.*

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*Dans cet article l'auteur examine le résultat d'un certain nombre de décisions de la Cour suprême du Canada touchant plus ou moins au statut du foetus. Elle suggère qu'on peut tirer plusieurs conclusions de ces décisions mais que la Cour suprême n'est peut-être pas prête à s'engager à fond dans le débat. Les décisions semblent aller dans le sens de l'opinion selon laquelle le foetus est un être différent des autres formes de vie humaine et ne peut recevoir protection de la loi que par une disposition législative spéciale.*

## Introduction

In January 1988 the Supreme Court of Canada<sup>1</sup> declared that the provisions of the Criminal Code<sup>2</sup> regulating abortion were contrary to section 7 of the Canadian Charter of Rights and Freedoms.<sup>3</sup> The provisions were "struck down" as unconstitutional and abortion was no longer a criminal act in Canada.

On January 31, 1991, Bill C-43, which would have recriminalized abortion, was defeated by a 43-43 vote in the Senate. Given the difficulty encountered in reaching this level of legislative process it seems unlikely that the federal government will attempt to pass any further criminal legislation, at least in the foreseeable future. But there continues to be activity in the courts over the question of reproductive control. Indeed, there have been several very important and difficult cases, the latest of

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<sup>1</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, (1988), 44 D.L.R. (4th) 385 (S.C.C.).

<sup>2</sup> Criminal Code, R.S.C. 1985, c. C-46, s. 287 (formerly s. 251).

<sup>3</sup> Constitution Act, 1982.

which, *R. v. Sullivan*,<sup>4</sup> decided by the Supreme Court of Canada on March 21, 1991, purportedly held that "a foetus is not a person" (to quote loosely the media representation).

There is obviously a plethora of issues raised by the cases relating to control of reproductive choices, including questions about the constitutional division of powers, the role of the state, the status of foetal existence, equality, liberty and numerous moral, legal and scientific concerns. According to the Supreme Court of Canada, however, the task of the law in this matter is "fundamentally normative",<sup>5</sup> which, again to take the language of the court, seems to mean that "[m]etaphysical arguments may be relevant but they are not the primary focus of inquiry".<sup>6</sup> Nor is science of much help since "[t]he task of properly classifying a foetus in law and in science are different pursuits",<sup>7</sup> nor, again in the words of the court, is the matter one of broad social, political, moral or economic choice.<sup>8</sup> (These are for the Legislature). Nor is the matter one to be decided on the basis of "linguistic fiat":<sup>9</sup> rather what we have is a legal task. This legal task the court seems to see as a process of recognizing rights and duties, the implication being that somehow law and language are discrete as is the definitional project.

This article will outline several of the cases that have arisen in relation to reproductive choices between 1988 and 1991, and will conclude with a list of propositions drawn from this case law regarding the legal nature of the foetus and the role of the law in determining its status.<sup>10</sup> The exercise is also one of imagination since it appears that the Supreme Court of Canada has concluded that a foetus is not a human being or a person

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<sup>4</sup> (1991), 122 N.R. 166, 55 B.C.L.R. (2d) 1 (S.C.C.).

<sup>5</sup> *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, at p. 553, (1989), 62 D.L.R. (4th) 634, at p. 650.

<sup>6</sup> *Ibid.*, at pp. 552 (S.C.R.), 650 (D.L.R.).

<sup>7</sup> *Ibid.*, at pp. 553 (S.C.R.), 650 (D.L.R.).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> While this analysis will focus on the determination of the status of the foetus, clearly this is not the only, nor in my view is it the appropriate, way to characterize the matter. Ultimately the issue is one of decision-making control. Criminalization and regulation of reproductive choices denies moral competence to women and implicitly classifies an activity that women are chiefly involved in as morally abhorrent or criminal. Further the issue is, probably irretrievably, increasingly cast as foetus versus carrier with foetus being equated to a collective interest which in turn is pitted against individual interests. Neil MacCormick has also focused on this by arguing that a determinative issue in connection with "rights" discussions is "who counts?", although in the final result he resorts to what might be called an adversarial model of analysis: N. MacCormick, *Of Self-Determination and Other Things* (1990), 15 *Bulletin of the Australian Society of Legal Philosophy* 1, at p. 6.

or a part of a women or a juridical person, although it may also be all of the foregoing.

### I. *The Cases*

The cases generally divide (with some overlap since the agenda and the players are common) into two streams. First, there are the cases that deal expressly with abortion, access to abortion services and constitutional jurisdiction. These cases for the most part have one key actor, Dr. Henry Morgentaler, who has been providing abortion services in "private" medical clinics for a number of years. While focusing on termination of the pregnancy, the cases implicitly deal with status of the foetus issues. The second line of cases involve various actors, but essentially focus on the status of the foetus and attempt to force some legal recognition of its status. Ultimately, the two streams of case law will merge with the conclusions in each to be taken into account in determining the scope of control over reproductive choices.

Most of the cases are procedurally complex, narrowly decided and highly overstated in result by the media. To a large extent, the procedural complexity has allowed the courts to decide cases of potentially broad principle on very narrow grounds. It is important however that the determination of procedural matters not be seen as distinct from the overall decision-making process. This is really to emphasize no more than the point that the division between substance and procedure is suspect.

#### A. *Abortion Access Cases*

Historically, access to abortion has been regulated in Canada by the federal government as a criminal law matter: abortion was a crime. Health by contrast is not a constitutionally designated head of power for either level of government, although hospitals and property and civil rights in the province are matters for the provincial governments. The provision of a medical service such as "therapeutic" abortion (when it was permissible), although seemingly a health matter, was regulated under the federal government's criminal law power as a "defence" to the crime of abortion.<sup>11</sup>

In 1988 the Supreme Court of Canada declared in *R. v. Morgentaler*<sup>12</sup> that the administrative procedures, which, if followed, afforded a defence to the crime of abortion, were contrary to section 7 of the Canadian Charter of Rights and Freedoms in that they violated the woman's right to security of the person because they were unreasonably cumbersome, and resulted

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<sup>11</sup> I have argued elsewhere that abortion services could be regulated in Canada as a matter of "national concern" under its "Peace, Order, and good Government" jurisdiction by the federal government without resort to criminal law power: see M. McConnell and L. Clark, *Abortion Law in Canada: A Matter of National Concern* (1991), 14 *Dalhousie Law Journal* 81.

<sup>12</sup> *Supra*, footnote 1.

in delays which could endanger a woman's physical security. Further, this defence was not uniformly available to all women in Canada because of requirements relating to hospital designation. Because these administrative procedures were not severable from the prohibition on abortion the entire provision, including the general prohibition on abortion, was struck down. Wilson J. also characterized the issue as one of liberty with respect to decision-making and as a substantive right to control over one's person.

This decision was frequently described as creating a vacuum, there being no "law" in Canada on abortion. This general perception was incorrect in that there was existing law. The state of law after 1988 was, and is, quite simply that abortion is legal, or to put it more negatively, obtaining an abortion in Canada is *not* a criminal activity. Whether or not this situation necessarily created a positive "right" to abortion services is a matter of debate.

In the latter half of 1989 a Mr. Borowski obtained standing to bring a case before the Supreme Court of Canada, arguing that the foetus had a "right to life".<sup>13</sup> Since the law which he was challenging, the Criminal Code provision giving restricted access to abortion, had been struck down before his case was heard, the Supreme Court of Canada decided not to deal with the case as he had framed it and declared it moot in the circumstances. The court also chose not to respond to an argument that "law" or acts of government could be acts of omission as well as commission.

Since then, aside from the federal Bill C-43, most of the activity has been provincial. The most notable cases are based in Nova Scotia where Dr. Morgentaler has set up a clinic to provide the now lawful abortion services. Shortly after he had set up the clinic the provincial government passed regulations to the effect that it was not permissible to provide abortion (and several other services) in other than a specified hospital.<sup>14</sup> Ostensibly these regulations were to govern the provisions of standardized medical services and were not specifically designated to regulate abortion. Dr. Morgentaler was charged with numerous breaches of this legislation and was potentially subject to a massive fine. In court he argued that the legislation was contrary to the Charter of Rights and Freedoms and, further, that it was *ultra vires* the provincial government in that, to the extent that it dealt with abortion, it trenched on the criminal law power of the federal government. In October 1990, the Nova Scotia Supreme Court decided that the regulations were "in pith and substance" aimed at the regulation of abortion, traditionally a criminal law matter, and were therefore *ultra*

<sup>13</sup> *Borowski v. Canada (Attorney-General)*, [1989] 1 S.C.R. 342, (1989), 57 D.L.R. (4th) 231.

<sup>14</sup> Medical Services Act, S.N.S. 1989, c. 9 and Regulation 152/89.

vires the provincial government.<sup>15</sup> The judge expressly refrained from going further and dealing with the Charter arguments.

The unfortunate result of this case is that, as seems to be the situation with all the case law in the area, it is a "no win" situation for women. In the short term there is a removal of an impediment to access to abortion, but the cost of this removal is a further entrenchment of the idea that somehow abortion is inherently criminal. Thus, even in the absence of any criminal law regulating abortion, it is still an area of criminal law jurisdiction. In addition, this case is illustrative of the general response to abortion in North America, indirect but very effective *de facto* control of women's decision-making through control of access and fiscal designation.

### B. *Status of the Foetus Cases*

The other line of cases dealing with the status of the foetus are more diverse. The first two to be considered involved civil action by men seeking and obtaining injunctions preventing women from aborting the foetus on the basis that, as the natural fathers,<sup>16</sup> they had an interest which should be recognized in the continued existence of the foetus. The cases took place in Ontario and Quebec and involved different people, Barbara Dodd,<sup>17</sup> and Chantal Daigle,<sup>18</sup> but were otherwise substantially the same in terms of the facts. The *Daigle* case is perhaps of greater legal significance because it resulted in a decision of the Supreme Court of Canada reversing the determination of the Quebec courts.

The Quebec Superior Court,<sup>19</sup> in issuing an injunction in the *Daigle* case, concluded that a foetus was a "human being" under the Quebec Charter of Rights and Freedoms,<sup>20</sup> and consequently was entitled to protection of its right to life. The court also concluded that the foetus possessed juridical personality under this statute, that the father had sufficient legal standing to bring the case and that, even under the Canadian Charter of Rights and Freedoms, the foetal interest would outweigh the woman's

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<sup>15</sup> *R. v. Morgentaler*, October 1990, N.S. Supreme Court, Kennedy J.P.C. The case was heard on appeal on May 16, 1991. In the interim, the province of Nova Scotia refused to pay through the medicare system for the services provided by Dr. Morgentaler. The decision of the trial judge was upheld by a majority (4/1) ruling of the Court of Appeal on July 5, 1991. As of August, 1991 no decision has been made by the Province as to whether to appeal to the Supreme Court of Canada.

<sup>16</sup> It is recognized that terms such as motherhood and fatherhood are social and relational roles and that a more accurate designation of status, at least at the pre-birth stage of the enterprise, should be along the lines of sperm provider.

<sup>17</sup> *Murphy v. Dodd* (1989), 63 D.L.R. (4th) 515, 70 O.R. (2d) 681 (Ont. H.C.).

<sup>18</sup> *Tremblay v. Daigle*, *supra*, footnote 5.

<sup>19</sup> [1989] R.J.Q. 1980 (Que. S.C.).

<sup>20</sup> R.S.Q., c. C-12.

interest in liberty. A majority of the Quebec Court of Appeal<sup>21</sup> agreed in the result, although there were reasons advanced in addition to the textual analysis adopted by the Superior Court.

The case went before an emergency hearing of the Supreme Court of Canada, at which time Ms. Daigle was in the twenty-first week of pregnancy. During the hearing it was announced that she had disobeyed the injunction and obtained an abortion outside Canada. The Supreme Court of Canada decided to continue to hear argument on the matter and determined that the injunction should not have issued. Reasons were delivered at a later date. The Supreme Court of Canada concluded in its unanimous reasons that the matter could be considered from three points of departure:

(1) the status of the foetus;

(2) procedural concerns relating to the appropriateness of an injunction in these circumstances. The issue on this point was that injunctions are not normally available for contracts of personal service, and further that the purpose of an interim injunction is usually to maintain the *status quo*, a situation inherently unavailable in the case of pregnancy; and

(3) the "rights" of the father independently of a foetal interest.

The court decided that, given the importance of the issue and the need for guidance for other courts, the matter should be dealt with as a determination of the status of the foetus. This laudable objective was immediately narrowed when the court declared its task to be, as described in the introduction to this article, a legal rather than moral task. Essentially the court concluded that the rights asserted to obtain the injunction did not exist. Thus a foetus was not a "human being" under the Quebec Charter of Rights (that is, it was not the owner of a right to life or holder of juridical personality) since there was no explicit protection accorded to the foetus in the statute. The textual analysis adopted by the Quebec Superior Court, which gave substantive weight to the use of the terms "human being" in the Quebec Charter, was not accepted, and the view of the dissent in the Quebec Court of Appeal, which held that the distinction merely referred to the difference between physical and juridical entities, found favour. Similarly, the protection of foetal interests in the Quebec Code of Civil Procedure was conditional on birth and viability. The Canadian Charter of Rights and Freedoms was held to be not applicable in the circumstances since there was no law or state action being challenged.<sup>22</sup>

<sup>21</sup> [1989] R.J.Q. 1735, 59 D.L.R. (4th) 609 (Que. C.A.). For example, one judge did not accept the textual interpretation of the Quebec Charter but argued that the foetus had a natural right to life which did not need express recognition.

<sup>22</sup> This analysis is based upon the court's view that "law" includes common law but does not include judicial decisions in a "private context": *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174. Thus the action of a court in issuing an injunction, even when enforced by state authority in the form of contempt of court proceedings, does not constitute state action.

Further, the Supreme Court of Canada expressly noted that it was not considering the question of affirmative rights under the Charter.

The most recent case on the status of the foetus, *R. v. Sullivan*<sup>23</sup> is procedurally convoluted. The case involved the death of a foetus in the birth canal. Two women, Ms. LeMay and Ms. Sullivan, were acting as midwives for the delivery. Neither was very experienced and there was evidence to indicate that the death was at least in part a result of negligence. They were charged under two Criminal Code<sup>24</sup> provisions, section 203, criminal negligence causing death to a "person", and section 204, criminal negligence causing bodily harm to a "person". Section 206 of the Criminal Code stated that a child became a "human being" once it had fully proceeded from the body of the woman, whether it was breathing or not. Homicide under section 206 occurred when someone injured a child during birth and it died once it had become a "human being". This case, then, was the case which many believed would require the courts to identify the status of a foetus.

At trial<sup>25</sup> it was found that the two women were guilty, under section 203, of causing death to a person, the foetus being a "person" under that section. The trial judge acquitted them on the charge under section 204, causing bodily harm to a person, in this case the woman, although the judge commented that had she not concluded that the foetus was a "person", she would have convicted them under section 204. Presumably, then, in her view the foetus was either a person or a part of the woman. On appeal against the conviction under section 203 only, the British Columbia Court of Appeal reversed the conviction and substituted instead a conviction under section 204.<sup>26</sup>

The case before the Supreme Court of Canada reflected this procedural muddle. In fact, the case before the court was actually two cases: (1) *Sullivan and LeMay v. The Queen* which was an appeal against the section 204 conviction on the basis that the Court of Appeal lacked jurisdiction to substitute a conviction in the absence of an appeal by the Crown where the offences were different; and (2) *R. v. Sullivan and LeMay* which was an appeal by the Crown on the reversal of the conviction under section 203. There were two intervenors, R.E.A.L. Women and L.E.A.F., representing either extreme of the abortion debate. (I recognize that this polarization of the positions is oversimplified.)

The Supreme Court of Canada upheld the British Columbia Court of Appeal reversal of conviction under section 203 because, in its view, the court had been correct in concluding that no distinction was intended

<sup>23</sup> *Supra*, footnote 4.

<sup>24</sup> R.S.C. 1970, c. C-34. The charges were laid under this legislation and the sections referred to in the text are to it and not to the Criminal Code, R.S.C. 1985, c. C-46.

<sup>25</sup> (1986), 31 C.C.C. (3d) 62, 55 C.R. (3d) 48 (B.C.S.C.).

<sup>26</sup> (1989), 43 C.C.C. (3d) 65, 65 C.R. (3d) 256 (B.C.C.A.).

by use of the terms "person" and "human being" and, accordingly, as set out in section 206, a foetus was not a person under the Criminal Code until it had completely issued from the woman. With respect to the appeal by Sullivan and LeMay, the court held (L'Heureux-Dubé J. dissenting) that the Court of Appeal did not have jurisdiction to disturb an acquittal unless there was an appeal by the Crown or the case fell with the *Kienapple*<sup>27</sup> principle, that is the offences were the same. According to the Supreme Court of Canada, the offences set out in sections 203 and 204 differed in that there was insufficient legal nexus between them, the acquittal on section 204 at trial had not been predicated on the conviction under section 203 and, potentially, the trial judge could logically have convicted under both sections 203 and 204. In the words of Lamer C.J.C.:<sup>28</sup>

It would not have been illogical to find that bodily harm was done to Jewel Voth through the death of the foetus which was inside and connected to her body and, at the same time, to find that the foetus was a person who could be the victim of criminal negligence causing death.

In summary, then, the Supreme Court of Canada held on legislative and historical reasons that the foetus was not a person under the Criminal Code until fully emerged from the birth canal, and that this conclusion did not necessarily mean that harm to it while in the birth canal was bodily harm to a woman. The latter point is less clear because the court did no more than rule out the jurisdictional point.

## II. Propositions

Based upon the foregoing cases the following propositions are advanced regarding the views of the Supreme Court of Canada on the legal nature of the foetus and the process of determining the status of the foetus.<sup>29</sup>

1. It is not a human being under the Quebec Charter of Rights and Freedoms;
2. It is not a human being or a person under the Criminal Code of Canada;
3. It may be but is not necessarily part of a woman;
4. It is the bearer of rights and duties but is not necessarily a juridical person;
5. Legal and scientific determinations differ regarding the foetus;
6. It does not appear to have a "natural right to life" in the sense of an inherent right absent express legislative recognition;
7. Abortion is not a crime in Canada;

<sup>27</sup> [1975] 1 S.C.R. 729, (1974), 44 D.L.R. (3d) 351.

<sup>28</sup> *Supra*, footnote 4, at pp. 186 (N.R.), 13 (B.C.L.R.).

<sup>29</sup> The fact that some of the case law is drawn from a civil law system adds a further level of complexity.



8. Regulation of abortion would still seem to be a matter of criminal power under the Constitution of Canada, and therefore it may be inherently criminal;
9. A woman has the right to security of the person, including physical and mental security in the context of abortion;
10. A woman's right to security of the person may not include the right to make decisions about her physical person;
11. It is not clear whether regulation of the decision to terminate a pregnancy, particularly through the criminal law, is an infringement on a woman's liberty and equality;
12. It would appear that court ordered and enforced injunctions are not state action for purposes of the Charter;
13. The failure to legislate or act affirmatively to protect an interest may not constitute an act of state or law that can be challenged under the Charter of Rights and Freedoms.<sup>30</sup>

It would seem then that increasingly the debate is focused on determining the status of the foetus.<sup>31</sup> The Supreme Court of Canada clearly does not wish to enter into this debate and is retreating, perhaps rightly so, into narrow legalistic decisions. However, implicitly the cases do seem to reflect a view that the foetus is an entity distinct from other forms of human life and is a form which requires express inclusion in legislation for protection.

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<sup>30</sup> *Supra*, footnote 22.

<sup>31</sup> Other difficult issues are also raised. For example, in the context of surrogate parenting, the issue of whether the relationship is contractual and enforceable by injunction seems related. In this context the view of the Supreme Court of Canada that solicitation for prostitution is commercial free speech appears relevant since, presumably, this is envisaged as a service/contract relationship also. An even more difficult issue relates to the use of foetal tissue for Parkinson's disease. Since the utility of the tissue derives from the fact that it is genetically distinct, the lack of relevance of scientific determination to the legal inquiry posited by the court seems questionable.