Tremblay *v.* Daigle, [1989] 2 S.C.R. 530

Chantal Daigle *Appellant*

v.

Jean-Guy Tremblay *Respondent*

and

The Attorney General of Canada,
the Attorney General of Quebec,
the Canadian Abortion Rights Action League (CARAL),
the Women's Legal Education and Action
Fund (LEAF), the Canadian Civil Liberties
Association, the Campaign Life Coalition,
the Canadian Physicians for Life,
the Association des médecins du Québec pour
le respect de la vie, and the REAL Women of Canada *Interveners*

indexed as: tremblay *v.* daigle

File No.: 21553.

1989: August 8 [*].

Present: Dickson C.J. and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

on appeal from the court of appeal for quebec

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[*]Reasons delivered November 16, 1989.

Injunction -- Injunction against abortion -- Foetal rights -- Father's rights -- Unmarried woman seeking abortion -- Father of unborn child granted an interlocutory injunction to stop abortion -- Whether injunction should have been granted -- Whether foetus has a right to life under Quebec legislation -- Whether potential father has a right to veto the mother's decision to have an abortion -- Code of Civil Procedure, R.S.Q., c. C-25, art. 752.

Civil rights -- Provincial human rights legislation -- Right to life -- Father of unborn child obtaining an injunction to prevent mother from having an abortion -- Whether foetus a "human being" under the Quebec Charter of Human Rights and Freedoms -- Charter of Human Rights and Freedoms, R.S.Q., c. C-12, preamble, ss. 1, 2.

Civil law -- Legal status of unborn child -- Father of unborn child obtaining an injunction to prevent mother from having an abortion -- Whether foetus recognized as a juridical person under the Civil Code -- Civil Code of Lower Canada, arts. 18, 338, 345, 608, 771, 838, 945, 2543.

Constitutional law -- Charter of Rights -- Application -- Injunction -- Father of unborn child seeking an injunction to prevent mother from having an abortion -- No state action involved -- Whether Canadian Charter of Rights and Freedoms can be invoked to support the injunction.

The parties ended their relationship after five months of cohabitation. The appellant was 18 weeks pregnant at the time of the separation and decided to terminate her pregnancy. The respondent, the father of the unborn child, obtained an interlocutory injunction from the Superior Court preventing her from having the abortion. The trial judge found that a foetus is a "human being" under the Quebec *Charter of Human Rights and Freedoms* and therefore enjoys a "right to life" under s. 1. This conclusion, he added, was in harmony with the *Civil Code*'s recognition of the foetus as a juridical person. He then ruled that the respondent had the necessary "interest"

to request the injunction. The trial judge concluded, after considering the effect of the injunction on the appellant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* and s. 1 of the Quebec *Charter*, that the foetus' right to life should prevail in the present case. The injunction was upheld by a majority of the Court of Appeal.

Held: The appeal should be allowed.

The injunction must be set aside because the substantive rights which are alleged to support it -- the rights accorded to a foetus or a potential father -- do not exist.

A foetus is not included within the term "human being" in the Quebec *Charter* and, therefore, does not enjoy the right to life conferred by s. 1. The Quebec *Charter*, considered as a whole, does not display any clear intention on the part of its framers to consider the status of a foetus. It is framed in very general terms and makes no reference to the foetus or foetal rights, nor does it include any definition of the term "human being" or "person". This lack of an intention to deal with a foetus's status is, in itself, a strong reason for not finding foetal rights under the Quebec *Charter*. If the legislature had wished to accord a foetus the right to life, it is unlikely that it would have left the protection of this right in such an uncertain state. As this case demonstrates, a foetus' alleged right to life will be protected only at the discretionary request of third parties.

The difficult issue of whether a foetus is a legal person cannot be settled by a purely linguistic argument that the plain meaning of the term "human being" includes foetuses. Like a purely scientific argument, a purely linguistic argument attempts to settle a legal debate by non-legal means. What is required are substantive legal reasons which support a conclusion that the term "human being" has a particular meaning. As for the differing usage of the terms "human being" and "person" in the Quebec *Charter*, it does not lead to the conclusion that a foetus is included

within the term "human being". The more plausible explanation is that different terms were used in order to distinguish between physical and moral persons.

A consideration of the status of the foetus under the *Civil Code* supports the conclusion that a foetus is not a "human being" under the Quebec *Charter*. The provisions of the Code providing for the appointment of a curator for an unborn child and the provisions granting patrimonial interests to such child do not implicitly recognize that a foetus is a juridical person. Articles 338 and 345, like art. 945, simply provide a mechanism whereby the interests of the foetus described elsewhere in the Code can be protected. They do not accord the foetus any additional rights or interests. In addition, the realization of the patrimonial interests of the foetus under arts. 608, 771, 838 and 2543 of the Code is subject to a suspensive condition that the foetus be born alive and viable. The recognition of the foetus' juridical personality is only a "fiction of the civil law" which is utilized in order to protect the future interests of the foetus. In view of the treatment of the foetus in the remainder of the Code, the term "human being" in art. 18 of the Code, which provides that "Every human being possesses juridical personality", cannot be construed as including foetuses. The *Civil Code*, therefore, does not generally accord a foetus legal personality. A foetus is treated as a person only where it is necessary to do so in order to protect its interests after it is born.

While Anglo-Canadian law is not determinative in establishing the meaning to be given to general terms in the Quebec *Charter*, it is instructive to consider the legal status of a foetus in that body of jurisprudence. In Anglo-Canadian law, a foetus must be born alive to enjoy rights. In light of the treatment of foetal rights in civil law and, in addition, the consistency to be found in the common law jurisdictions, it would be wrong to interpret the vague provisions of the Quebec *Charter* as conferring legal personhood upon the foetus.

The Canadian *Charter* cannot be invoked in this case to support the injunction. This is a civil action between two private parties and there is no state action which is being impugned. The respondent pointed to no "law" of any sort which he can claim is infringing his rights or anyone else's rights. The issue as to whether s. 7 of the Canadian *Charter* could be used to ground an affirmative claim to protection by the state was not raised. This Court should generally avoid making any unnecessary constitutional pronouncement.

Finally, there is nothing in the Quebec legislation or case law, to support the argument that the father's interest in a foetus he helped create gives him the right to veto a woman's decisions in respect of the foetus she is carrying. The lack of legal basis is fatal to this argument.

Cases Cited

Referred to: *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, aff'g on other grounds (1987), 33 C.C.C. (3d) 402; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456; *Allard v. Monette* (1927), 66 C.S. 291; *Lavoie v. Cité de Rivière-du-Loup*, [1955] C.S. 452; *Langlois v. Meunier*, [1973] C.S. 301; *Assurance-automobile -- 9*, [1984] C.A.S. 489; *Paton v. British Pregnancy Advisory Service Trustees*, [1979] Q.B. 276; *C. v. S.*, [1987] 1 All E.R. 1230; *Attorney-General v. T* (1983), 46 A.L.R. 275; *F. v. F.*, Fam. Ct. Australia, July 12, 1989 (Lindenmayer J.), unreported; *Dehler v. Ottawa Civic Hospital* (1979), 101 D.L.R. (3d) 686 (Ont. H.C.), aff'd (1980), 117 D.L.R. (3d) 512 (Ont. C.A.); *Medhurst v. Medhurst* (1984), 9 D.L.R. (4th) 252; *Diamond v. Hirsch*, Man. Q.B., July 6, 1989 (Hirschfield J.), unreported; *Duval v. Seguin*, [1972] 2 O.R. 686; *Steeves v. Fitzsimmons* (1975), 66 D.L.R. (3d) 203; *Earl of Bedford's Case* (1587), 7 Co. Rep. 7b, 77 E.R. 421; *Thellusson v. Woodford* (1805), 11 Ves. Jun. 112, 32 E.R. 1030; *Elliot v. Lord Joicey*, [1935] A.C. 209; *K. v. K.*, [1933] 3 W.W.R. 351; *Solowan v. Solowan*

(1953), 8 W.W.R. 288; *Re Baby R* (1988), 15 R.F.L. (3d) 225; *Re Children's Aid Society of the City of Belleville and T* (1987), 59 O.R. (2d) 204; *Re Children's Aid Society for the District of Kenora and J.L.* (1981), 134 D.L.R. (3d) 249; *Re F (in utero)*, [1988] 2 W.L.R. 1288; *Paton v. United Kingdom*, (1980), 3 E.H.R.R. 408; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Whalley v. Whalley* (1981), 122 D.L.R. (3d) 717; *Mock v. Brandanburg* (1988), 61 Alta. L.R. (2d) 235; *Doe v. Doe*, 314 N.E.2d 128 (1974); *Jones v. Smith*, 278 So.2d 239 (1973); *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, preamble, ss. 1 [repl. 1982, c. 61, s. 1], 2, 3, 4, 5, 6, 7, 8, 9, 9.1 [ad. 1982, c. 61, s. 2].

Civil Code of Lower Canada, arts. 18, 338, 345, 608, 771, 772, 838, 945, 2543.

Code of Civil Procedure, R.S.Q., c. C-25, art. 752.

Authors Cited

Baudouin, Jean-Louis et Yvon Renaud. *Code civil annoté*, vol. 1. Montréal: Wilson & Lafleur, 1989.

Canada. Law Reform Commission. *Crimes Against the Foetus* (Working Paper 58). Ottawa: Law Reform Commission, 1989.

Delaporte J. B. et P. N. Riffé-Caubray. *Les pandectes françaises*, t. 6. Paris: Riffé-Caubray, 1804.

Garant, Patrice. "Fundamental Rights and Fundamental Justice". In *The Canadian Charter of Rights and Freedoms*, 2nd ed. Edited by Gérald-A. Beaudoin and Ed Ratushny. Toronto: Carswells, 1989.

Keyserlingk, Edward W. "A Right of the Unborn Child to Prenatal Care -- The Civil Law Perspective" (1982), 13 *R.D.U.S.* 49.

Keyserlingk, Edward W. *The Unborn Child's Right to Prenatal Care: A Comparative Law Perspective*. Montréal: Quebec Research Centre of Private & Comparative Law, 1983.

Knoppers, Bartha Maria. *Conception artificielle et responsabilité médicale: une étude de droit comparé*. Cowansville: Yvon Blais Inc., 1986.

Kouri, Robert P. "Réflexions sur le statut juridique du f{oe}tus" (1980-81), 15 *R.J.T.* 193.

Lorimier de, Charles Chamilly et Charles Albert Vilbon. *La bibliothèque du Code civil de la Province de Québec*, t. 3. Montréal: Presses à vapeur de la Minerve, 1874.

Mayrand, Albert. *L'inviolabilité de la personne humaine*. Montréal: Wilson & Lafleur, 1975.

Rivet, Michèle. "The Legal Position of the Unborn Child in Canada (Civil Law)". In *Proceedings of the Thirteenth International Symposium on Comparative Law* (held in Ottawa (Canada) October 3-4, 1975). Ottawa: University of Ottawa Press, 1978.

APPEAL from a judgment of the Quebec Court of Appeal, [1989] R.J.Q. 1735, 59 D.L.R. (4th) 609, affirming a judgment of the Superior Court, [1989] R.J.Q. 1980. Appeal allowed.

Daniel Bédard, *Ginette Beattey* and *Robert Décary*, *Q.C.*, for the appellant.

Henri Kélada, for the respondent.

Bernard Laprade, *Edward Sojonky*, *Q.C.*, and *René LeBlanc*, for the intervener the Attorney General of Canada.

Jean Bouchard and *Alain Gingras*, for the intervener the Attorney General of Quebec.

Clayton C. Ruby and *Dan Brodsky*, for the intervener the Canadian Abortion Rights Action League (CARAL).

Suzanne P. Boivin, *Lucie Lamarche*, *Guy Cournoyer* and *Michelle Boivin*, for the intervener the Women's Legal Education and Action Fund (LEAF).

John B. Laskin, for the intervener the Canadian Civil Liberties Association.

Edward L. Greenspan, *Q.C.*, for the intervener the Campaign Life Coalition.

John P. Nelligan, *Q.C.*, for the interveners the Canadian Physicians for Life and the Association des médecins du Québec pour le respect de la vie.

Angela M. Costigan and *Karla Gower*, for the intervener REAL Women of Canada.

//*The Court*//

The following is the judgment delivered by

THE COURT -- The issue in this appeal is the validity of an interlocutory injunction prohibiting Chantal Daigle from having an abortion. The injunction was granted at the request of Ms. Daigle's former boyfriend, Jean-Guy Tremblay. Because of the urgency and importance of the case, Ms. Daigle being some 21 weeks pregnant at the time, the Court agreed to hear the application for leave to appeal, and then heard the appeal itself, on short notice during the Court's summer recess. According to the medical evidence, generally no hospital centre in the province of Quebec would permit a voluntary abortion after 20 weeks of pregnancy; patients would be required to go to the United States if they wished to terminate a pregnancy after 20 weeks, each week adding to the surgical risk. A decision in the appeal was delivered from the bench on the day of the hearing, August 8, 1989. The Court was unanimous in the view that the appeal should be allowed. It was also stated that the reasons for the decision would be rendered at a later date. The following are those reasons.

I - Facts and Procedural History

The factual record in this appeal consists solely of the affidavits of the parties and the affidavit of Claude Poulin, a doctor from Sherbrooke, Quebec.

Chantal Daigle, age 21 years, and Jean-Guy Tremblay, age 25 years, began to see one another near the end of November, 1988 and commenced having sexual relations toward the end of December of that year. In January of 1989 Mr. Tremblay proposed marriage to Ms. Daigle. At the same time, he requested that she cease using contraceptives. Ms. Daigle was reluctant to do so, but at Mr. Tremblay's insistence she agreed to cease using contraceptive pills. The parties began to live together at the beginning of February, 1989, and arrangements were made for their marriage to take place on July 29, 1989. In March of this year Ms. Daigle was informed by her doctor that she was pregnant. The paternity of Mr. Tremblay is not questioned.

Shortly after commencing cohabitation the parties' relationship began to deteriorate. In her affidavit Ms. Daigle alleges that Mr. Tremblay became dominant, jealous and possessive and that he abused her physically. The factum of the appellant reads:

> [TRANSLATION] Even though he knew the appellant was pregnant, he pushed her on to the floor, threatening to "bring her into line once and for all".

In May of 1989, as a result of this change in their relationship, Ms. Daigle says she began to contemplate having an abortion and ending her relationship with Mr. Tremblay. On July 1, the relationship deteriorated further. Ms. Daigle alleges that Mr. Tremblay, during a quarrel, seized her by the throat, and that she found refuge with the landlord, who had to call the police. Ms.

Daigle left Mr. Tremblay, and on July 4 she arranged to have an abortion in Sherbrooke, Quebec. Her reasons for seeking an abortion are set out in her affidavit:

> [TRANSLATION] 31. My decision is freely taken, it was taken without duress, threats or promises from anyone whatsoever and after much reflexion;
>
> 32. I do not wish to have Jean-Guy Tremblay's child;
>
> 33. I do not wish to have a child at the present time in light of my age, my social situation as a single person and my moral values as I want to provide for a child in a serene stable family environment in which there is no violence;
>
> 34. I do not want any contact whatsoever with Jean-Guy Tremblay;
>
> 35. I believe that to carry this pregnancy to term would cause me irreparable psychological and moral harm in the future;
>
> 36. In my view, Jean-Guy Tremblay has no reason or interest in the present case except in order to maintain his hold on me.

On July 7, 1989 Mr. Tremblay, invoking the provisions of art. 752 of the *Code of Civil Procedure*, R.S.Q., c. C-25, brought an application for a provisional injunction restraining Ms. Daigle from proceeding with the abortion. The application was granted on the same day by Richard J. of the Quebec Superior Court. On July 8, while in transit to Sherbrooke, Ms. Daigle heard of the injunction and did not carry through with the abortion.

The provisional injunction was valid until July 17, 1989, on which date Mr. Tremblay brought an application for an interlocutory injunction before Viens J. of the Quebec Superior Court. In his affidavit, Mr. Tremblay gave the following reason for seeking to prevent the abortion:

> [TRANSLATION] 12. The order for an interlocutory injunction is necessary to prevent an abortion by respondent that would cause serious and irreparable harm both to me and to the human being carried by respondent;

He further stated that Ms. Daigle was in good health and that the pregnancy was progressing normally. The affidavit submitted by Dr. Claude Poulin stated that Ms. Daigle would be approximately 20 weeks pregnant as of July 20, 1989.

Viens J. granted the injunction on July 17: [1989] R.J.Q. 1980. The relevant part of his order reads as follows:

> [TRANSLATION] ORDERS the respondent to abstain, under pain of all legal penalties, from undergoing an abortion or voluntarily having recourse to any method which, directly or indirectly, may result in the death of the foetus that she is carrying at the present time;

Ms. Daigle applied for leave to appeal this order to the Court of Appeal of Quebec. This application was granted by Chouinard J.A. on July 19. Her further application for a suspension of the interlocutory injunction pending the Court of Appeal decision was refused. On July 20 the Court of Appeal heard the appeal and, on July 26, the court delivered its majority judgment upholding the injunction: [1989] R.J.Q. 1735, 59 D.L.R. (4th) 609 (hereinafter cited to D.L.R.) The appellant immediately applied for leave to appeal to this Court, which application was heard and granted by a panel of five judges of the Court on August 1. The appeal was heard on August 8 before the entire Court.

Despite the short notice, intervener status was granted to a number of interested parties. The Canadian Civil Liberties Association (CCLA), the Canadian Abortion Rights Action League (CARAL), the Women's Legal Education and Action Fund (LEAF), and the Attorney General of Canada argued on behalf of allowing the appeal. REAL Women of Canada, the Campaign Life Coalition, and the Canadian Physicians for Life and the Association des médecins du Québec pour le respect de la vie, supported the respondent. The Attorney General of Quebec

intervened to argue in support of the government of Quebec's power to legislate with respect to certain aspects of abortion, but, as we understand his argument, he did not take an explicit position on whether or not the appeal should be allowed.

The hearing before this Court was interrupted just after the lunch recess by Mr. Bédard, counsel for Ms. Daigle, who informed the Court that he had just learned that his client had had an abortion. Mr. Bédard stated that he was informed of this fact after the adjournment by a representative of the Attorney General of Quebec, and that he had subsequently confirmed that it was true. He was unable to offer any information as to when or under what circumstances the abortion occurred. Mr. Bédard did indicate that because of the continued importance of a decision in this appeal for his client and for other women in Quebec and Canada that he wished to continue. The Court then took a recess before hearing arguments from the parties and the interveners on whether or not the appeal should continue. After hearing these arguments, the Court decided that the appeal should continue. As indicated earlier, the Court delivered a unanimous judgment at the end of the hearing allowing the appeal and stating that the reasons for the decision would be rendered at a later date.

II - Relevant Legislation

Reference will be made later in these reasons to the several relevant sections of the *Civil Code of Lower Canada* and it is not necessary to repeat them here.

The *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, reads in part as follows:

> WHEREAS every human being possesses intrinsic rights and freedoms designed to ensure his protection and development;

Whereas all human beings are equal in worth and dignity, and are entitled to equal protection of the law;

Whereas respect for the dignity of the human being and recognition of his rights and freedoms constitute the foundation of justice and peace;

Whereas the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being;

Whereas it is expedient to solemnly declare the fundamental human rights and freedoms in a Charter, so that they may be guaranteed by the collective will and better protected against any violation;

Therefore, Her Majesty, with the advice and consent of the National Assembly of Québec, enacts as follows:

PART I

HUMAN RIGHTS AND FREEDOMS

CHAPTER I

FUNDAMENTAL FREEDOMS AND RIGHTS

1. Every human being has a right to life, and to personal security, inviolability and freedom.

He also possesses juridical personality.

2. Every human being whose life is in peril has a right to assistance.

Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

4. Every person has a right to the safeguard of his dignity, honour and reputation.

5. Every person has a right to respect for his private life.

6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

7. A person's home is inviolable.

8. No one may enter upon the property of another or take anything therefrom without his express or implied consent.

9. Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

The tribunal must, *ex officio*, ensure that professional secrecy is respected.

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

Section 7 of the *Canadian Charter of Rights and Freedoms* reads as follows:

7. 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.

III - Judgments of the Courts of Quebec

Superior Court

In arriving at his conclusion that an interlocutory injunction was justified, Viens J. first considered the legal status of the foetus. In this regard, he examined the *Canadian Charter of Rights and Freedoms*, the Quebec *Charter of Human Rights and Freedoms* and the *Civil Code*. With respect to the Canadian *Charter*, he held that, in light of the Saskatchewan Court of Appeal's decision in *Borowski v. Attorney General of Canada* (1987), 33 C.C.C. (3d) 402 (Sask. C.A.), aff'd on other grounds, [1989] 1 S.C.R. 342, the applicant could not rely on the argument that a foetus has a right to "life, liberty and security" under s. 7 of the Canadian *Charter*. Viens J. then turned to the Quebec *Charter*. He noted that Professor Bartha Maria Knoppers in her work entitled

Conception artificielle et responsabilité médicale: une étude de droit comparé (1986), at p. 182, wrote:

> [TRANSLATION] . . . the rights of every human being, guaranteed by sections 1 and 2 of the Quebec Charter, to life, to security, inviolability and freedom of the person, and to aid when life is endangered, must be interpreted according to the law of Quebec.

Under the Quebec *Charter*, Viens J. found that a foetus is an "*être humain*", in English, "human being", and therefore enjoys a "right to life" under s. 1 as well as a "right to assistance" under s. 2. Viens J. held that the fact that the term "*être humain*" is used in the preamble and in ss. 1 and 2 of the Quebec *Charter*, while the term "*personne*", in English "person", is used in the subsequent provisions, is significant and leads to the conclusion that a foetus should be included in the former term. He further held that this interpretation is supported by a consideration of the status of the foetus under the *Civil Code*. Viens J. referred to arts. 338 and 345 (dealing with the appointment of curators), art. 608 (dealing with inheritance rights), and arts. 771, 838 and 945 (dealing with *inter vivos* gifts and wills), and said they show that a foetus is recognized as a juridical person under the *Civil Code*.

Viens J. then turned to consider whether the applicant had the necessary "interest" to request the injunction. He concluded that the applicant had a sufficient interest, both on his own and on behalf of the foetus.

Finally, Viens J. considered the effect of an injunction on Ms. Daigle's rights under s. 7 of the Canadian *Charter* and s. 1 of the Quebec *Charter*. After discussing her reasons for seeking an abortion, he acknowledged that she would be inconvenienced by the injunction, but held that the foetus' right to life should prevail in this situation. He added that even if his conclusions about the applicant's right to an injunction or the foetus' right to life were in doubt, the balance of

convenience was clearly in favour of the applicant because denying the injunction would result in the loss of a life.

Court of Appeal

Each of the five judges in the Court of Appeal who heard the appeal wrote a judgment: LeBel, Nichols and Bernier JJ.A., for the majority, argued for dismissing the appeal while Tourigny and Chouinard JJ.A. argued for allowing it. LeBel J.A.'s reasoning was similar to that of Viens J. in the Superior Court. He first held that because the judgment of this Court in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 ("*Morgentaler (No. 2)*"), did not state that women have an absolute right to have an abortion, and, further, because the *Morgentaler (No. 2)* judgment did not consider the question of foetal rights, the court was not precluded from finding that foetal rights were conferred by provincial legislation. LeBel J.A. then discussed the Quebec *Charter* and concluded that it is difficult to deny that a foetus, and, in particular, a foetus at this stage in its development, is a "human being" and thus protected under the Quebec *Charter*. He added that this conclusion is in harmony with the *Civil Code*'s recognition of the foetus as a partial juridical person. In this regard, LeBel J.A. referred to the same articles of the Code mentioned by Viens J., emphasizing the significance of art. 338.

LeBel J.A. acknowledged that the recognition of foetal rights leads to a conflict between these rights and the rights of pregnant women guaranteed under s. 7 of the Canadian *Charter*. After reciting the reasons for which the appellant desired an abortion, and noting the stage of development of the foetus, LeBel J.A. concluded that in this case the balance of convenience clearly favoured the rights of the foetus. In closing, LeBel J.A. said that while an injunction might be a draconian remedy it is a necessary one, and, furthermore, it is one which the respondent, as the potential father, had the necessary legal interest to request.

Nichols J.A. came to the same conclusion, although he disagreed with LeBel J.A.'s interpretation of the Quebec *Charter*. He found that neither the Quebec nor the Canadian *Charter* recognizes foetal rights, stating (at p. 615):

> [TRANSLATION] I have difficulty convincing myself that the Canadian or Quebec Charter recognize fundamental rights in the foetus. On this point, I would be more disposed to agree with the appellant.

adding:

> [TRANSLATION] But the absence of constitutional guarantees in favour of the foetus do not translate into a total negation of its rights nor an unrestricted exercise of liberty.

Nichols J.A. held that foetal rights are recognized by custom and, implicitly, by our laws. In support of this argument, he referred to the review in the Law Reform Commission's Working Paper 58, *Crimes Against the Foetus* (1989), of the history of legal restrictions on abortion. Nichols J.A. stated that the framers of the *Civil Code* assumed that foetal rights exist and, therefore, found it unnecessary to give such rights explicit recognition in the Code. Nichols J.A. held that foetal rights were implicitly recognized in the articles which protect various legal interests of a foetus: [TRANSLATION] "They have also been recognized by custom and implicitly consecrated in our laws" (p. 618). He found that the only right of the appellant at issue in this case was her right to liberty, a right which is not absolute. Like LeBel J.A., Nichols J.A. went on to conclude that in the specific circumstances of this case, the foetus' right to life outweighed this right and therefore the injunction should be upheld.

Bernier J.A. came to the same conclusion as LeBel J.A., but, again, for different reasons. He began by noting that a woman's right to an abortion, if it exists, is not absolute and it was

therefore necessary to consider the civil status of the foetus. In examining the status of a foetus, Bernier J.A. did not take a position on LeBel J.A.'s finding that a foetus is a person under the Quebec *Charter*. He said (at pp. 613-14):

> [TRANSLATION] Given the conclusion that I have arrived at, I do not believe that it is necessary to rule on the application of the provisions of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, as amended. I have certain reservations in this regard with giving a broad interpretation to the terms "human being" and "person" in ss. 1 and 2 of this Charter. The term "person" is not restricted in any manner, and one could conclude from that that in private law, anyone, without any family ties, a pure stranger could, as a result of s. 2 of this Charter, have the legal interest required in order to intrude into the private life of a couple.

Nor did he discuss the provisions of the *Civil Code*. Instead, he argued that a foetus has a "natural right" to be carried to term and that this right can only be overridden for a just reason. He stated (at p. 613):

> [TRANSLATION] I am therefore of the opinion that the child conceived but not yet born, regardless of the stage of the pregnancy, possesses a civil status. In principle, he is entitled to be carried to term. He cannot be deprived of his natural right to life without cause which is just, sufficient, and acceptable in a free and democratic society.

On the facts of this case, he agreed with Nichols and LeBel JJ.A. that the appellant's reasons for wanting an abortion were not serious enough and, therefore, the right of the foetus must prevail.

Tourigny J.A. dissented, on the ground that the injunction could not be upheld because the foetal rights asserted by Viens J. do not exist. With respect to the Quebec *Charter*, Tourigny J.A. said that the foetus is not a person and, therefore, the Quebec *Charter* cannot confer rights upon it. She added that in respect of this issue the Quebec *Charter* and Canadian *Charter* are the same and therefore she could rely on the Saskatchewan Court of Appeal's judgment in *Borowski*, *supra*, which decided that a foetus is not a person under the Canadian *Charter*. As for the distinction

between "human being" and "person" in the Quebec *Charter*, Tourigny J.A. said that at most this was meant to distinguish between physical and moral persons. She then stated that there was nothing in the *Civil Code* which would lead to a different conclusion. The articles referred to by Viens J. do not create foetal rights: rather, they conserve rights for future children. Tourigny J.A. added that Viens J.'s decision that a foetus is a person would have the effect of totally denying a woman's right to an abortion which was contrary to this Court's decision in *Morgentaler (No. 2)*. Such a denial was something which, in her view, could only be accomplished by specific legislation, and not through judicial interpretation of general legislation.

Tourigny J.A. stated (at p. 642):

> [TRANSLATION] I therefore cannot, with respect, share the view of the judge of first instance that a human being can be anything other that a physical person. The judge of first instance moreover agreed that "it would be difficult to include the human foetus in the expression person . . .".
>
> In my view, the foetus is not a *person* and cannot enjoy rights accorded to persons by the Charter. The interpretation of this word cannot be different depending on whether the Quebec Charter or the Canadian Charter is concerned, and I believe the decision of the Saskatchewan Court of Appeal in *Borowski v. Can. (A.-G.)* . . . on the protection of the rights of the foetus under the Canadian Charter is well-founded.
>
> Secondly, the judge of first instance found in the provisions of the *Civil Code of Lower Canada*, support for his interpretation of the Quebec Charter. He held that the *Civil Code of Lower Canada* gave rights to the child conceived but not yet born.
>
> With respect, I am not of this opinion. What the *Civil Code of Lower Canada* provides are rights which a child when born not only alive but viable, may enjoy. They are essentially conservatory measures which, pending birth, will protect the interests of the child who is born alive and viable.

Tourigny J.A. concluded (at p. 643):

> [TRANSLATION] In this context, I am of the view that the judgment of first instance is not founded in law and that in the absence of precise legislation on this issue, the

> general provisions of Quebec laws cannot be interpreted as restricting and, even more importantly, preventing the application of rights guaranteed by the Canadian Constitution.
>
> . . .
>
> I must point out, however, that I am not going so far as to say that it is impossible for the legislator to impose an infringement which might be justified within the framework of a free and democratic society should he adopt specific legislative provisions on this question. This is not in issue in this case which rather concerns the interpretation of the existing provisions which would give to the foetus "a right to life as of the date of its conception", as mentioned by the judge of first instance.

Chouinard J.A. agreed with Tourigny J.A. His reasons were similar, although he did make a few additional comments. He explicitly stated that he disagreed with Viens J.'s balancing of the rights of the foetus and the appellant. Chouinard J.A. did acknowledge that at a certain stage in its development a foetus may have rights in respect of which the legislature may legislate. He held, however, that such rights cannot be inferred from general legislation such as the Quebec *Charter* or the *Civil Code*. He said (at p. 621):

> [TRANSLATION] Nor do I share his [the trial judge] interpretation of the Quebec *Charter of Human Rights and Freedoms*, . . . in particular the terms of its preamble concerning the ideas of "human being" or of "person", as well as the patrimonial or other non "substantive" rights found in the *Civil Code of Lower Canada* relating to rights of an unborn child on the condition that it be born alive and viable. For my part, I cannot find a serious issue of law in favour of the respondent in the present state of our legislation.

Chouinard J.A. added (at pp. 622 and 621):

> [TRANSLATION] However, I consider that in the present state of our law, such limit does not exist. Neither a certain interpretation of the Quebec *Charter of Human Rights and Freedoms* nor the recognition of certain rights which are mostly patrimonial in nature, in the unborn child (conditional upon his birth and viability) appear to me to form a real basis for the respondent's right in the present case so as to be able to oppose the fundamental right of the appellant set out in s. 7 of the *Canadian Charter of Rights and Freedoms*, as interpreted in the *Morgentaler* case.
>
> . . .

> There is no doubt that the importance of the right to life of the foetus, at least as of a certain stage of development, may be recognized by the legislature and even given precedence over the right of the mother to deal with her body in the absence of sufficiently serious reasons yet to be determined.

In closing, Chouinard J.A. said that he would not discuss the legal interest of the respondent but added that, without undertaking a serious study of the matter, an injunction seemed inappropriate in a private dispute where the fundamental rights of the parties are at issue.

IV - Analysis

This appeal raises a number of issues, not all of which need be addressed in this judgment. Before turning to the particular issues which will be discussed, it may be helpful to describe in brief the contentions of the parties.

The position of the respondent, and the interveners who argued on his behalf, can be summarized as follows:

(1) under Quebec law a foetus has a right to life, and, in addition, a potential father has a right of veto with respect to a decision to abort his "potential progeny";

(2) the appellant would infringe each of these rights by having an abortion;

(3) an injunction is an appropriate remedy by which these rights can be protected.

The position of the appellant and the interveners who argued in her support may be summarized as presenting the following three arguments for setting aside the injunction:

(1) the substantive rights which are alleged to support the injunction do not exist;

(2) regardless of the Court's position on the above argument, an injunction is an inappropriate remedy in this case;

(3) the injunction amounts to an improper encroachment of provincial law into the federal power over criminal law.

The thesis of the first of the three arguments set out immediately above is that the respondent lacks the substantive rights on which an injunction could possibly be founded. The right which the respondent relies upon is, primarily, an alleged right to life for a foetus. This right is said to exist by virtue of the fact that a foetus is a person. There is also some argument, although it is mostly found in the judgments below and in the arguments of certain interveners, to the effect that a potential father has an independent right on his own behalf to veto any decision to abort his potential progeny. In response to this position, the appellant and the interveners who argued on her behalf argue, first, that there is no basis in law to support an assertion of foetal rights or "father's" rights. This is their main response. Their second response is that regardless of the rights the respondent may claim on his behalf or on behalf of the foetus, these rights cannot outweigh a woman's right to control her own body. This response relies on the long-standing legal principle that a person may not be compelled to use his or her body at the service of another person, even if the other person's life is in danger. It is alleged that compelling a woman to carry a foetus to term would entail a novel and fundamental abrogation of this principle. This response, it should be noted, is not always easy to distinguish from the previous assertion that foetal rights or "father's" rights do not exist at all. It is often argued that the very reason the law should not recognize either foetal rights or "father's" rights is that such recognition would ignore the rights of women and would justify forcing women to carry a foetus to term. We appreciate

that the arguments about the rights of a foetus, and whether such rights could override a woman's rights, may blend. The two arguments, however, can be separated and it is often useful to separate them. For reasons which will become apparent, these two aspects of the "substantive rights" argument will be separated in this judgment.

The second of the three general arguments for allowing the appeal does not turn on the rights accorded to a foetus or a potential father. It alleges that whatever such rights might be, an injunction is an inappropriate remedy to protect them. This argument is made from three different perspectives. First, it is argued that ordering an injunction in this case amounts to ordering specific performance of a personal service contract, something the courts will rarely do. Second, it is argued that an interlocutory injunction is inappropriate because it is meant to preserve the *status quo* -- something which is impossible in this case -- and because the evidentiary limitations of an interlocutory injunction make it unsuited to the sort of issue presented by this case. The third perspective from which the remedy of an injunction is criticized relies on the decision of this Court in *Morgentaler (No. 2)*, *supra*. In *Morgentaler (No. 2)*, the majority judgments said that s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, the former therapeutic abortion provision, was contrary to s. 7 of the Canadian *Charter* because, *inter alia*, it had the effect of causing unnecessary delays to a woman's exercise of her rights, and because it subjected the realization of those rights to arbitrary and unpredictable requirements. As applied to this appeal, the argument is that an injunction -- which can only be realized through the initiative of a third party and through a court procedure -- is at least as arbitrary, unpredictable and time-consuming *vis-à-vis* a woman's exercise of her rights as the law struck down in *Morgentaler (No. 2)*. It is submitted that granting the foetus the right to life from the moment of conception sets up a potential conflict with the rights of women to personal dignity, bodily integrity and autonomy expressed in *Morgentaler (No. 2)* and leads to an inevitable clash with the rights of a woman who seeks an abortion.

The third and final of the general arguments for allowing the appeal -- the federalism argument -- is only discussed by the Attorneys General of Canada and Quebec. The Attorney General of Canada argues that the injunction issued in this case effectively amounts to a prohibition, with sanctions, of abortion. Counsel refers to the first *Morgentaler* decision of this Court (*Morgentaler v. The Queen*, [1976] 1 S.C.R. 616) in arguing that such a prohibition, founded as it was on Quebec legislation, amounts to an exercise of the federal criminal law power.

Each of the above three arguments appears to be deserving of serious consideration. For the appellant to succeed, however, it is only necessary for the Court to accept one of these arguments. In our view the fundamental question in this appeal -- and the one upon which this judgment will be focussed -- is raised by the first of the arguments discussed above. It is the question of whether the substantive rights exist upon which the injunction could be founded. The conclusion we reach on this question will make it unnecessary to deal with the other arguments for allowing the appeal and we refrain from taking a position on them.

The question of substantive rights is fundamental for several reasons. First, by addressing this question the Court is compelled to consider the basic issue of whose rights might be infringed, and to what extent, by allowing or not allowing the appellant to seek an abortion. This issue is not only of great importance, it is also logically prior to, and determinative of, the issue as to the appropriate remedy. Second, if this question is not addressed then, assuming one of the appellant's other two arguments is accepted, it will remain unclear whether another woman in the position of Ms. Daigle could be placed in a similar predicament through the use of a different legal procedure. In order to try to ensure that another woman is not put through an ordeal such as that experienced by Ms. Daigle it is important for this Court to give the guidance it can. This can only be accomplished if the question of substantive rights is addressed.

The Substantive Rights Underlying the Injunction

Three different arguments are made by the respondent and the interveners who argued on his behalf in respect of what possible legal rights the injunction could be founded upon:

(1) the foetus has a right to life under the Quebec *Charter* and the *Civil Code*;

(2) the foetus has a right to life under the Canadian *Charter*;

(3) the respondent, as the potential father, has a right in respect of decisions concerning his potential progeny.

Each of these arguments will be considered in turn.

(1) <u>Foetal Rights Under the Quebec *Charter* and the *Civil Code*</u>

The respondent argues that a foetus is a "person" who has a "right to life" under the Quebec *Charter* and the *Civil Code*. The significance of the *Civil Code* in the respondent's argument appears to be two-fold. First, the status of a foetus under the *Civil Code* is relevant as an interpretive aid in determining the status of a foetus under the Quebec *Charter*. Second, even if a foetus is not a person under the Quebec *Charter*, it is argued that the *Civil Code* can itself provide an independent foundation for an injunction.

The first of the above approaches was taken by Viens J. in the Superior Court, and by LeBel J.A. in the Court of Appeal, and it appears to be the primary approach adopted by the respondent. The second approach was taken by Nichols J.A. of the Court of Appeal. This judgment will

begin with an interpretation of the Quebec *Charter*, since this will necessarily entail a consideration of the *Civil Code*. The conclusion reached with respect to the *Civil Code* as an interpretive aid to the Quebec *Charter* -- that the *Civil Code* does not view a foetus as a person -- disposes of the argument that the *Civil Code* on its own could sustain the injunction.

Before beginning the discussion of the Quebec *Charter*, a few words should be said concerning the respondent's standing to request an injunction on behalf of the foetus. In so far as Mr. Tremblay argues for the injunction on the basis of the alleged rights of the foetus it is clear that he must be acting as a representative of the foetus. Some arguments were made concerning whether Mr. Tremblay should have standing in this respect; that is, whether he should be able to argue that the rights of another person are in danger of being infringed. In view of how this appeal will be decided this is not a crucial issue, but we note that if the respondent's allegations of foetal rights were accepted it would seem that he would be an appropriate person to assert such rights. As the potential father of the foetus in question Mr. Tremblay would appear to have as much interest in the foetus and as much right to speak on its behalf as anyone, save the appellant.

(a) *The Quebec Charter of Human Rights and Freedoms*

The relevant sections of the Quebec *Charter* are ss. 1 and 2, which, it will be recalled, read as follows:

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.
>
> He also possesses juridical personality.
>
> **2.** Every human being whose life is in peril has a right to assistance.

> Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

The respondent's argument is that a foetus is an "*être humain*", in English "human being", and therefore has a right to life and a right to assistance when its life is in peril. In examining this argument it should be emphasized at the outset that the argument must be viewed in the context of the legislation in question. The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties -- a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.

We will begin with an examination of the text of the Quebec *Charter* before turning to a consideration of other sources which may be relevant in interpreting the Quebec *Charter*. No cases dealing with the issue of foetal rights under the Quebec *Charter* have been brought to our attention. The *Charter* is framed in very general terms. It makes no reference to the foetus or foetal rights, nor does it include any definition of the term "human being". The respondent, however, makes two arguments which are based on the text of the *Charter*. The first argument is that a foetus simply is a human being in the plain meaning of the term. The respondent advanced this argument with reference to the *Civil Code*, but it applies equally well to his discussion of the Quebec *Charter*. His contention is that the word "human" is in reference to the

"human race", of which the foetus is a part, and the word "being" signifies "existing", which a foetus certainly does. Thus, the respondent concludes, a foetus is a human being.

This argument is not persuasive. A linguistic analysis cannot settle the difficult and controversial question of whether a foetus was intended by the National Assembly of Quebec to be a person under s. 1. What is required are substantive legal reasons which support a conclusion that the term "human being" has such and such a meaning. If the answer were as simple as the respondent contends, the question would not be before the Court nor would it be the subject of such intense debate in our society generally. The meaning of the term "human being" is a highly controversial issue, to say the least, and it cannot be settled by linguistic fiat. A purely linguistic argument suffers from the same flaw as a purely scientific argument: it attempts to settle a legal debate by non-legal means; in this case by resorting to the purported "dictionary" meaning of the term "human being".

The respondent's second textual argument is that the differing usage of the terms "human being" and "person" in the *Charter* supports the conclusion that a foetus is included within the term "human being". This argument relies on the fact that the preamble and ss. 1 and 2 the *Charter* refer to "human beings", while the subsequent sections refer to "persons". The respondent says this distinction is significant, arguing that the term "human being" is wider than the term "person" and that, therefore, it is meant to include within its scope a wider class of "beings", namely, foetuses.

We cannot agree. It is not clear that there is any logic to be attached to the differing use of the terms "person" and "human being". First, the title of the *Charter* in French is "*Charte des droits et libertés <u>de la personne</u>*" (emphasis added); however, according to the respondent's argument, the *Charter* guarantees rights to beings which are not in fact persons. Second, the fourth

paragraph in the preamble, reads: "Whereas the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being" (emphasis added). According to the respondent's argument the term "human person" does not include foetuses. But why would foetuses be excluded from the concerns of this paragraph? A foetus would appear to be a paradigmatic example of a being whose alleged rights would be inseparable from the rights of others, and in particular, from the rights of the woman carrying the foetus.

If there is any logic to the differing use of these two terms, then it would appear to be that suggested by Tourigny J.A.: different terms were used in order to distinguish between physical and moral persons. Tourigny J.A. argued that the term "human being" may signify the legislator's intention to exclude artificial persons, such as corporations, from benefitting from the rights and freedoms granted therein. This seems to be a far more plausible explanation than that offered by the respondent.

In our view the Quebec *Charter*, considered as a whole, does not display any clear intention on the part of its framers to consider the status of a foetus. This is most evident in the fact that the *Charter* lacks any definition of "human being" or "person". For her part, the appellant argues that this lack of an intention to deal with a foetus' status is, in itself, a strong reason for not finding foetal rights under the *Charter*. There is force in this argument. One can ask why the Quebec legislature, if it had intended to accord a foetus the right to life, would have left the protection of this right in such an uncertain state. As this case demonstrates, even if the respondent's arguments are accepted it will only be at the discretionary request of third parties, such as Mr. Tremblay, that a foetus' alleged right to life will be protected under the Quebec *Charter*. If the legislature had wished to grant foetuses the right to life, then it seems unlikely that it would have left the protection of this right to such happenstance.

After considering the generality of the terms used in the Quebec *Charter*, Professor Michèle Rivet (now a judge of the Tribunal de la jeunesse and a member of the Law Reform Commission of Canada) in her article "The Legal Position of the Unborn Child in Canada (Civil Law)", in *Proceedings of the Thirteenth International Symposium on Comparative Law* (1978), 73, reached a similar conclusion (at p. 76):

> [TRANSLATION] We would have liked the legislature to indicate the scope of these terms, and in particular to indicate in s. 1 [of the Quebec *Charter*] where this right to life begins. Here again nothing has been said. Accordingly, we are forced to acknowledge, as we did earlier, that in the absence of a specific provision legal personality is acquired at birth when the foetus becomes a human being. [Emphasis added.]

As should be evident, however, these arguments based on the "vagueness" of the Quebec *Charter* turn to some extent on assumptions about the legal background against which the *Charter* exists. This legal background is the topic we will consider next.

(b) *The Civil Code*

The civil law of Quebec, as set out in its *Civil Code*, is the primary "background" source which should be referred to in interpreting the meaning of general terms in Quebec's *Charter*.

The respondent argues that a foetus is recognized as a human being under the *Civil Code*. His argument rests on two propositions: (1) that art. 18 directly recognizes that a foetus is a human being; and (2) that a variety of other articles in the Code indirectly recognize that a foetus is a "juridical person", and, since juridical persons are either natural persons, i.e., human beings, or artificial persons, a foetus is a human being.

Article 18, which was introduced in 1971, is a general provision which uses language similar to s. 1 of the Quebec *Charter*. This similarity in language makes its interpretation particularly relevant to an interpretation of the Quebec *Charter*. Article 18 reads:

> **18.** Every human being possesses juridical personality.
>
> Whether citizen or alien, he has the full enjoyment of civil rights, except as otherwise expressly provided by law.

On the basis of the words in this article the respondent first makes the linguistic argument which we discussed in respect of the Quebec *Charter*; i.e., that the term "human being", in its plain meaning, includes foetuses. The response we offered earlier -- that such a linguistic argument cannot settle the difficult issue of whether a foetus is a legal person -- is equally applicable in the context of the *Civil Code*. The words contained in art. 18 do little more than set out in general terms a guarantee to all human beings of the rights contained elsewhere in the Code. This interpretation is supported by the fact that the article was only introduced in 1971, and without any accompanying changes in the Code. In order to tell whether art. 18 is meant to encompass foetuses it is necessary to consider the treatment of foetuses in the remainder of the Code. If the Code generally treats a foetus as a juridical person then the respondent can argue that a foetus is a human being under art. 18 and should also be viewed as such under the Quebec *Charter*.

This brings us to the second of the respondent's arguments: that a variety of articles in the Code implicitly recognize that a foetus is a human being. The respondent says that in arts. 338, 345, 608, 771, 838, 945 and 2543 there is an implicit recognition that a foetus has juridical personality. These articles can be grouped into two categories: 338 and 345 deal with the

appointment of curators, while 608, 771, 838, 945 and 2543 deal with patrimonial interests. Articles 338 and 345, which we will consider first, read as follows:

> **338.** The persons to whom curators are given are:
>
> 1. Judicially emancipated minors;
>
> 2. Interdicted persons;
>
> 3. Children conceived but not yet born.

> **345.** The curator to a child conceived but not yet born, is bound to act for such child whenever its interests require it; he has until its birth the administration of the property which is to belong to it, and afterwards he is bound to render an account of such administration.

The respondent's argument is that because these articles treat foetuses like other entities which are indisputably human beings (minors and interdicted persons) with respect to the appointment and duties of curators that they thereby recognize the foetus as a human being. In our view, however, these articles simply provide a mechanism whereby the interests described elsewhere in the Code can be protected: they do not accord the foetus any additional rights or interests. This interpretation is supported by the fact that there do not appear to have been any cases which have allowed a curator to act in respect of any extra-patrimonial interests of a foetus (see E. W. Keyserlingk, "A Right of the Unborn Child to Prenatal Care -- The Civil Law Perspective" (1982), 13 *R.D.U.S.* 49, at p. 61). It also accords with the explanation for the parallel provisions in France given in de Lorimier and Vilbon's *Bibliothèque du Code civil de la Province de Québec* (1874), tome 3. At page 126 the authors refer to Pothier for an explanation of the parallel articles:

> [TRANSLATION] As the child to be born has not yet been born, he cannot have a tutor, as they are mainly given to govern the person of a minor, and so it follows that there

cannot be a tutor when there is not yet a minor person in existence. Nonetheless, as the child to be born is already regarded as born whenever his interests are in question, *qui in utero est, pro jam nato habetur, quoties de ejus commodis agitur*, and it is in the interest of the posthumous being, if he is born, that the property which is to belong to him when he is born shall be administered until that time arrives, he must be treated as born, not in that a tutor should be appointed, since there is not yet any person to be governed, but that a curator should be appointed for him to administer the property that will one day belong to him. Such a curator, known in law as a curator *in ventro*, is thus appointed because the Roman jurisconsults *in doctrina stoicorum* regarded a child still in his mother's womb as *pars viscerum matris*.

The other articles of the *Civil Code* which the respondent relies upon read as follows:

608. In order to inherit, it is necessary to be civilly in existence at the moment when the succession devolves; thus, the following are incapable of inheriting:

1. Persons who are not yet conceived;

2. Infants who are not viable when born.

771. The capacity to give or to receive *inter vivos* is to be considered relatively to the time of the gift. It must exist at each period, with the donor and with the donee, when the gift and the acceptance are effected by different acts.

It suffices that the donee be conceived at the time of the gift or when it takes effect in his favor, provided he be afterwards born viable.

838. The capacity to receive by will is considered relatively to the time of the death of the testator; in legacies the effect of which remain suspended after the death of the testator, whether in consequence of a condition, or in the case of a legacy to children not yet born, or of a substitution, this capacity is considered relatively to the time at which the right comes into effect.

Persons benefited by a will need not be in existence at the time of such will, nor be absolutely described or identified therein. It is sufficient that at the time of the death of the testator they be in existence, or that they be then conceived and subsequently born viable, and be clearly known to be the persons intended by the testator. Even in the case of suspended legacies, already referred to in this article, it suffices that the legatee be alive, or conceived, subject to the condition of being afterwards born viable, and that he prove to be the person indicated, at the time the legacy takes effect in his favor.

945. All substitutes, born and unborn, are represented in all inventories and partitions by a curator to the substitution, appointed in the manner established as regards tutors.

All persons who are competent to demand the appointment of a tutor to a minor of the same family may also demand the nomination of a curator to the substitution.

The curator to the substitution attends to the interest of such substitutes and represents them in all cases in which his intervention is requisite or proper.

The intervention of the curator is specially required in the cases provided for in article 947, but not with respect to the revenues belonging to the institute.

The curator may intervene specially to take cognizance of all deeds, documents, titles and proceedings, concerning the property of the substitution, their investment, their deposit in a bank or their withdrawal.

The institute who neglects to demand this nomination of a curator may be declared to have forfeited in favor of the substitutes the benefit of the disposition.

2543. It is not necessary that the contemplated person exist at the time of his designation or that he be then expressly determined. It is sufficient that at the time the right originates in his favour he exist or be conceived and be born viable, and be recognized as the person contemplated.

The respondent's argument is that because these articles protect various economic interests of a foetus they also implicitly recognize that a foetus is a juridical person. He refers to the oft-quoted principle that "a foetus will be considered born wherever this is in its interest" and asks what greater interest could a foetus have than an interest in living? A similar proposition was advanced by Nichols J.A. in the Court of Appeal, when he stated that because the *Civil Code* protects economic interests of a foetus it must also be assumed to protect the most fundamental interest of the foetus, its right to life. Certain authors have also argued that it would be illogical for the law to recognize economic interests of a foetus without also recognizing a right to life (e.g., R. P. Kouri, "Réflexions sur le statut juridique du foetus" (1980-81), 15 *R.J.T.* 193). The respondent acknowledges that the realization of the patrimonial interests of the foetus is conditional upon it being born alive and viable, but he contends that this is a "resolutory"

condition rather than a "suspensive" one. In other words, the respondent argues, the foetus always possesses the rights accorded to it by these sections: it is only because of its condition that it must wait until birth to realize these rights.

Extrapolating from different articles in order to reveal an unstated premise in the *Civil Code* is an established and indeed necessary method of exegesis. In this case, however, it does not support the proposed conclusion. In our view, the respondent's argument ignores the words of the articles and the way in which the courts have interpreted them. The recognition of the foetus' juridical personality has always been, as this Court stated in *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456, a "fiction of the civil law" which is utilized in order to protect the future interests of the foetus. This is equally true in Quebec civil law. Articles 608, 771, 838, and 2543 explicitly state that unless the foetus is born alive and viable it will not be granted the rights recognized therein. If the foetus is not born alive and viable then the interests referred to in these articles disappear, as if the foetus did not exist at all. In short, the condition that the foetus be born alive and viable is a "suspensive" condition. The remaining article, 945, is of little help to the respondent. It deals with the duties of curators as regards "substitutions" and has the same significance as arts. 338 and 345, that is, it does not create any rights, but merely deals with the administration of existing rights.

This interpretation is supported by the explanation, given by the authors of the *Pandectes françaises* (1804), tome 6, at p. 168, of the consequences in French law that result if a child who stands to inherit is not born alive and viable:

> [TRANSLATION] If he dies before birth he is deemed never to have existed, with the result that as he has never held property he may not transmit it. He does not fulfil the degree, and the estate is open in the next degree, as if there had never been question of a child *qui mortui nascuntur neque nati, neque procreati videntur quia nunquam liberi appellari potuerunt.*

A similar view was expressed by the Quebec Superior Court in the case of *Allard v. Monette* (1927), 66 C.S. 291, dealing with the situation of an heir to a succession, where the heir is conceived but not yet born. The court held that if the heir is not born alive and viable then the succession passes not to the foetus' heirs but to the other heirs of the deceased.

It is also worth mentioning that arts. 338, 345, 608, 771, 838, 945 and 2543 can be explained in terms of the interests of the donors, legators, and deceased person whom the articles protect. The articles ensure that the wishes of these parties are respected -- a concern which has nothing to do with the status of the donee, legatee or heir. It is interesting to note in this respect that art. 772 allows for gifts to children who are not yet even conceived:

> **772.** The favor given to contracts of marriage renders valid the gifts therein made to the children to be born of the intended marriage.
>
> It is not necessary that the substitute should be in existence at the time of the gift by which the substitution is created.

To summarize: the various articles referred to by the respondent do not support his argument: rather, they provide grounds for the opposite conclusion, that a foetus is not a juridical person under the *Civil Code*. This conclusion is consistent with the few cases which have considered the status of the foetus under the *Civil Code*. Most of these cases are concerned with pre-natal injuries. The respondent relies heavily on the leading decision of *Montreal Tramways*, *supra*, where this Court allowed a suit to be brought under art. 1053 of the *Civil Code* on behalf of a child born with club feet. The deformity was allegedly caused by an accident which occurred during the pregnancy. The following quote from p. 463 of the judgment of Lamont J. is offered by the respondent in support of its position:

> To the Company's contention that an unborn child being merely a part of its mother had no separate existence and, therefore, could not maintain an action under article 1053 C.C., the answer, in my opinion, is that, although the child was not actually born at the time the Company by its fault created the conditions which brought about the deformity of its feet, yet, under the civil law, it is deemed to be so if for its advantage. Therefore when it was subsequently born alive and viable it was clothed with all the rights of action which it would have had if actually in existence at the date of the accident. The wrongful act of the Company produced its damage on the birth of the child and the right of action was then complete.

In our view this quotation supports the appellant's position. Notice, first, that it would not have been necessary for Lamont J. to say that a foetus is "deemed" to have civil rights if a foetus actually enjoyed such rights. Second, in stating that a foetus is granted those rights "it would have had if actually in existence at the date of the accident", Lamont J. is accepting that a foetus does not exist as a juridical person. Third, in the last line of the quotation Lamont J. states that the damage occurred and the rights were realized "on the birth of the child". It is also worth reiterating that it is in this judgment that Lamont J. speaks of deeming a foetus to be a person as a "fiction of the civil law". Thus, while this decision does recognize the possibility of a claim for pre-natal injuries, it does not recognize a foetus as a juridical person.

A number of Quebec decisions have considered the status of the foetus in cases where a negligent act has caused a miscarriage or an undesired abortion. The conclusion in each of these cases has been that a foetus is not a person. In *Lavoie v. Cité de Rivière-du-Loup*, [1955] C.S. 452, at p. 457, Lacroix J. refused a mother's claim on behalf of a foetus because [TRANSLATION] "Since she did not reach the end of her pregnancy, there was really no child". In *Langlois v. Meunier*, [1973] C.S. 301, Vallerand J. said, at p. 305, that [TRANSLATION] "This unborn child is most certainly not a person and the civil law principles concerning death cannot apply to it". And in *Assurance-automobile -- 9*, [1984] C.A.S. 489, at p. 491, the Commission des affaires sociales of Quebec stated: [TRANSLATION] "[T]he Commission, in accordance with its earlier decisions cited above (*Assurance-automobile*, AA-10362 and *Assurance-automobile -- 25*) must

conclude that the stillborn child is not a "person" and hence could not be a "victim" within the meaning of section 47 of the *Automobile Insurance Act*". The Commission's interpretation of s. 47 was based on their conclusion that the *Civil Code* does not recognize a foetus as a person.

For all of the foregoing reasons we conclude that the articles of the *Civil Code* referred to by the respondent do not generally recognize that a foetus is a juridical person. A foetus is treated as a person only where it is necessary to do so in order to protect its interests after it is born. We note that a similar conclusion was reached by Professor Keyserlingk, a co-ordinator of the Law Reform Commission's paper, *Crimes Against the Foetus*, op. cit., and an advocate of foetal rights. In a publication entitled *The Unborn Child's Right to Prenatal Care: A Comparative Law Perspective* (1983), he writes at p. 16:

> The emphasis of the Civil Code on patrimonial rights of the unborn and the suspensive condition of viable birth do not manifest an effective or explicit concern for the person and well-being of the unborn child as such and while still unborn. The available anticipatory mechanism of curatorship to the womb, and the acknowledged patrimonial rights, for all practical purposes only constitute protections of the unborn child's property in anticipation of birth.

This conclusion -- that none of the articles discussed above recognizes a foetus as a juridical person -- can be applied to the task of interpreting the general terms used in art. 18 of the *Civil Code*, as discussed earlier. This application leads directly to the conclusion that the term "human being" in art. 18 was not meant to include foetuses. We appreciate that some authors disagree with this conclusion (e.g., A. Mayrand, *L'inviolabilité de la personne humaine* (1975)), but note that it is supported by a number of academic commentators. Professor Rivet states in her article, loc. cit., at pp. 74-75:

> [TRANSLATION] Unfortunately, the Quebec legislature has not seen fit to indicate what is meant by "human being", and the preliminary work of the Civil Code Revision Office provides little further clarification.
>
> . . .
>
> This article [art. 18] gives us no indication as to the time when legal personality begins, and in the absence of any other provision we are accordingly forced to recognize that the civil law rules, which have not been amended by this new article, are still those which have traditionally been recognized: legal personality begins at birth and ends at death, and analysing the legal status of the unborn child is in civil law certainly not the same thing as analysing the legal status of the human being. [Emphasis added.]

Professor Keyserlingk reaches a similar conclusion in his article "A Right of the Unborn Child to Prenatal Care -- The Civil Law Perspective", loc. cit., where he states at p. 62 that "There is no evidence whatsoever that those actual or proposed articles [18 and 19] were intended to include the unborn child within the meaning of `human being'". And, finally, we note that Baudouin (now a Justice of the Court of Appeal of Quebec) and Renaud, in a comment on art. 18 in their *Code civil annoté* (1989), vol. 1, say, at p. 39:

> [TRANSLATION] For the newborn to be considered a human being he must be born alive and viable, that is, he must have an existence completely independent from that of his mother.

Other authors have reached a similar conclusion. (For example, P. Garant, "Fundamental Rights and Fundamental Justice", in Beaudoin and Ratushny eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 331, at pp. 337-38:

> Article 18 of the *Civil Code* provides that "every human being possesses juridical personality"; section 1 of the Québec *Charter of Human Rights and Freedoms* is to the same effect. Neither the *Civil Code* nor the Quebec legislature has indicated precisely when legal personality begins; the cases indicate that it is with birth: . . . .)

Thus the overall conclusion to this discussion of the *Civil Code* is that the Code does not generally accord a foetus legal personality. We note that this conclusion answers the argument mentioned in the introduction to this section to the effect that regardless of the status of the foetus under the Quebec *Charter* the injunction could be sustained under the *Civil Code* alone.

(c) *Foetal Rights in Anglo-Canadian Law*

While Anglo-Canadian law is not determinative in establishing the meaning to be given to general terms in the Quebec *Charter* it is instructive to consider the legal status of a foetus in that body of jurisprudence. It is useful to do so as well to avoid the repetition of the appellant's experience in the common law provinces.

The Law Reform Commission paper, *Crimes Against the Foetus*, op. cit., at pp. 6-8, provides a summary of the legal treatment of abortion in Anglo-Canadian law:

> Equally profound are the changes found in the common law tradition. In the thirteenth century Bracton considered all abortion homicide. In the seventeenth century Coke considered it no crime prior to quickening, a serious crime after quickening and murder if the aborted child was born alive and died soon after. In 1803 Lord Ellenborough's Act made all abortions criminal, punishing abortions after quickening with death and abortions prior to quickening with a lesser penalty. In 1837 the distinction as to quickening was dropped and capital punishment for abortion was abandoned. In 1939 case law recognized a limited defence of necessity to preserve the mother's life. Finally, in 1967 the British Parliament allowed medical abortions where continued pregnancy would involve risk to the life or physical or mental health of the pregnant woman or her existing children or where there is a substantial risk that the child born would suffer from such physical or mental abnormalities as to be seriously handicapped.
>
> Meanwhile, some evidence of common law respect for the foetus can be found in the law relating to capital punishment. In the eighteenth century, executions of women in a state of pregnancy were suspended until the termination of the pregnancy, usually by birth of the child. Later it became the practice to order a permanent stay of execution. Later still, in 1931, Parliament passed the Sentence of Death (Expectant Mothers) Act to provide that where a woman convicted of a capital offence is found by the trial jury to be pregnant, she should be sentenced not to death but to imprisonment for life. This was the position until the abolition, therefore, of the death penalty in 1965.

III. Canadian Law and the Foetus

Pre-confederation Canada largely followed England's example. In 1810 New Brunswick passed a law modelled on Lord Ellenborough's Act prohibiting abortion, though not by the pregnant woman herself. In 1836 Prince Edward Island did the same. In 1837 Newfoundland adopted English criminal law and with it English abortion law. In 1841 Upper Canada in its *Offences against the Person Act* prohibited abortion without distinction as to quickening. In 1842 New Brunswick too abolished the quickening distinction.

Until this time criminalization only affected the abortionist. In 1849, however, New Brunswick criminalized abortion by the pregnant woman herself. In 1851 Nova Scotia followed suit, and provided in 1864 that the offence could be prosecuted whether the woman was pregnant or not.

At Confederation, criminal law was brought under federal jurisdiction. Accordingly, in 1869 Parliament consolidated the criminal law applicable to all the provinces and adopted abortion provisions identical with those obtaining in New Brunswick, with a penalty of life imprisonment. Finally in 1892 the first *Criminal Code* was enacted. The 1892 *Code* contained various provisions concerning birth related offences. Among others were sections 271-272. Sub-section 271(1) made it an indictable offence subject to life imprisonment to cause the death of a child not yet a human being, in such manner that it would have been murder if such child had been born -- a provision which was added possibly to clarify that late destruction of the foetus, while not technically procuring a miscarriage and therefore abortion, was nonetheless criminal. This provision was subject to a defence of acting in good faith to preserve the life of the mother (sub-section 271(2)). Section 272 made it a crime punishable with life imprisonment to attempt to procure a woman's miscarriage whether or not she was with child, and the good faith defence was not available.

In 1969 the abortion provisions were significantly amended. These changes occurred at a time when abortion reforms were taking place in England, the United States and other western countries and when the thalidomide tragedy threw doubt in the minds of many on the appropriateness of forcing continuation of pregnancies in the face of anticipated gross foetal abnormalities. The amendment, contained in sub-sections 251(4-5) created a therapeutic exception to the general abortion provision and a committee structure to implement this exception. This amendment, and indeed the whole abortion section, section 251, was struck down by the Supreme Court of Canada in 1988.

The authors use this description to argue that the foetus has always been protected to some extent in our law. On the other hand, however, from this historical survey it could be argued that abortion has not generally been considered equivalent to murder in our laws and that, therefore, a foetus has not been viewed as having the rights of a person in the full sense.

A number of Anglo-Canadian courts have considered the status of a foetus in cases which are similar to the present appeal. These courts have consistently reached the conclusion that to enjoy rights, a foetus must be born alive. In the leading British case of *Paton v. British Pregnancy Advisory Service Trustees*, [1979] Q.B. 276, Baker P. refused a request for an injunction from the husband of a pregnant woman who intended to obtain an abortion and made the following comments, at p. 279:

> The first question is whether this plaintiff has a right at all. The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant), and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia and, I have no doubt, in others.
>
> For a long time there was great controversy whether after birth a child could have a right of action in respect of pre-natal injury. The Law Commission considered that and produced a Working Paper No. 47 in 1973, followed by a Final Report (Law Commission Report, No. 60 (Cmnd. 5709)), but it was universally accepted, and has since been accepted, that in order to have a right the foetus must be born and be a child. There was only one known possible exception which is referred to in the Working Paper at p. 3, an American case, *White v. Yup* (1969) 458 P. 2d 617 -- where a wrongful "death" of an 8-month-old viable foetus, stillborn as a consequence of injury, led an American court to allow a cause of action, but there can be no doubt, in my view, that in England and Wales the foetus has no right of action, no right at all, until birth. The succession cases have been mentioned. There is no difference. From conception the child may have succession rights by what has been called a "fictional construction" but the child must be subsequently born alive: see *per* Lord Russell of Killowen in *Elliot v. Lord Joicey* [1935] A.C. 209, 333. [Emphasis added.]

This decision was affirmed by the Court of Queen's Bench and the Court of Appeal in England in *C. v. S.*, [1987] 1 All E.R. 1230. A similar conclusion was reached by the High Court of Australia in *Attorney-General v. T* (1983), 46 A.L.R. 275, and by the Family Court of Australia in *F. v. F.*, July 12, 1989 (Lindenmayer J.), unreported. On appeal to the European Commission of Human Rights, the Commission found the decision compatible with the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 (1950); see *Paton v. United Kingdom* (1980), 3 E.H.R.R. 408.

In Canada, the *Paton* decision has been followed in two Ontario cases. In *Dehler v. Ottawa Civic Hospital* (1979), 101 D.L.R. (3d) 686 (Ont. H.C.), aff'd (1980), 117 D.L.R. (3d) 512 (Ont. C.A.), a plaintiff sought an injunction on behalf of unborn persons to prevent a hospital from performing abortions on the ground that, *inter alia*, a foetus has a right to life. The Ontario High Court concluded at p. 699 that "the law has selected birth as the point at which the foetus becomes a person with full and independent rights". The *Dehler* decision was affirmed in a case with similar facts, *Medhurst v. Medhurst* (1984), 9 D.L.R. (4th) 252, where the Ontario High Court specifically stated that the law did not consider a foetus as a person. A similar conclusion was also reached in the Manitoba case of *Diamond v. Hirsch*, Man. Q.B., July 6, 1989 (Hirschfield J.), unreported.

The treatment of a foetus in tort law, property law and family law reveals a similar situation as found under the *Civil Code*, namely, that the foetus has no rights in private law. In the field of tort, it is in fact the Quebec case of *Montreal Tramways*, *supra*, which is most often relied upon for authority in other jurisdictions in Canada (see, e.g.: *Duval v. Seguin*, [1972] 2 O.R. 686 (H.C.); *Steeves v. Fitzsimmons* (1975), 66 D.L.R. (3d) 203 (Ont. H.C.)) As stated earlier, the *Montreal Tramways* decision does not recognize foetuses as legal persons. In the field of property law, Anglo-Canadian law, like Quebec law, has allowed a foetus to be a beneficiary of a will or a donation but it has only protected a foetus' interests where the foetus has been born alive and viable (see: *Earl of Bedford's Case* (1587), 7 Co. Rep. 7b, 77 E.R. 421; *Thellusson v. Woodford* (1805), 11 Ves. Jun. 112, 32 E.R. 1030; and *Elliot v. Lord Joicey*, [1935] A.C. 209). In family law, a foetus appears to receive some protection, but, as elsewhere in the law, the rights take effect and are perfected by birth (see: *K. v. K.*, [1933] 3 W.W.R. 351 (Man. K.B.); and *Solowan v. Solowan* (1953), 8 W.W.R. 288 (Alta. S.C.))

The issue of foetal protection under provincial child welfare legislation has been discussed in three recent court decisions: *Re Baby R* (1988), 15 R.F.L. (3d) 225 (B.C.S.C.), *Re Children's Aid Society of City of Belleville and T* (1987), 59 O.R. (2d) 204 (Ont. Prov. Ct. (Fam. Div.)), and *Re Children's Aid Society for the District of Kenora and J.L.* (1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct. (Fam. Div.)) In the *Belleville* and *Kenora* cases the courts found that each of the foetuses in question was a "child" in need of protection under the *Child and Family Services Act, 1984* and the *Child Welfare Act*, respectively. However, this position is to be contrasted with the approach taken by the British Columbia Supreme Court in *Baby R*, where an opposite conclusion was reached in respect of the term "child" in the British Columbia *Family and Child Service Act*. The position in England supports the conclusion of Macdonell J. in *Baby R.* In *Re F (in utero)*, [1988] 2 W.L.R. 1288, a prominent case before the English Court of Appeal, it was held that a foetus did not have, at any stage of its development, a separate existence from its mother, and therefore the court could not extend its wardship jurisdiction to a foetus.

To conclude: in light of this treatment of foetal rights in civil law and, in addition, the consistency to be found in the common law jurisdictions, it would be wrong to interpret the vague provisions of the Quebec *Charter* as conferring legal personhood upon the foetus.

This concludes the discussion of the appellant's "substantive rights" argument in so far as it is based upon Quebec legislation. It should be noted that because of the way we have decided the question of "foetal rights", it was unnecessary to consider the second aspect of the "substantive rights" argument; i.e., the claim that even if foetal rights do exist they could not justify compelling a woman to carry a foetus to term.

(2) The *Canadian Charter of Rights and Freedoms*

While the primary argument advanced in support of the injunction was founded upon Quebec law, the respondent and certain of the interveners also suggested that the Canadian *Charter* might provide an independent basis on which to sustain the injunction.

This argument rests on the assertion that a foetus is included within the term "everyone" as used in s. 7 of the Canadian *Charter* and, therefore, it has a right to "life, liberty and security of the person". Section 7, repeated here, reads:

> **7.** 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.

In our view, it is not necessary in the context of the present appeal to address this issue. This is a civil action between two private parties. For the Canadian *Charter* to be invoked there must be some sort of state action which is being impugned (see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342). The argument which alleges that the *Charter* can, on its own, support the injunction at issue fails to impugn any state action. The respondent pointed to no "law" of any sort which he can claim is infringing his rights or anyone else's rights. The issue as to whether s. 7 could be used to ground an affirmative claim to protection by the state was not raised. Neither the respondent nor any of the interveners who referred to the Canadian *Charter* as a possible basis for the injunction challenged the correctness of *Dolphin Delivery* or offered any basis upon which it could be distinguished and, accordingly, it provides a full answer to the *Charter* argument.

As we have indicated, the Court decided in its discretion to continue the hearing of this appeal although it was moot, in order to resolve the important legal issue raised so that the situation of women in the position in which Ms. Daigle found herself could be clarified. It would, however,

be quite a different matter to explore further legal issues which need not be examined in order to achieve that objective. The jurisprudence of this Court indicates that unnecessary constitutional pronouncement should be avoided: *Morgentaler (No. 2)*, *supra*, at p. 51; *Borowski*, *supra*; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.), at p. 339; *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, at p. 915.

(3) "Father's" Rights

The argument based upon "father's rights" (more accurately referred to as "potential father's rights") is the third and final basis on which the substantive rights necessary to support the impugned injunction might be founded. This argument would appear to be based on the proposition that the potential father's contribution to the act of conception gives him an equal say in what happens to the foetus. Little emphasis was put on this argument in the appeal. It was alluded to by several of the parties in an indirect fashion, although it does appear to have been accepted by both Viens J. in the Superior Court and LeBel J.A. in the Court of Appeal.

There does not appear to be any jurisprudential basis for this argument. No court in Quebec or elsewhere has ever accepted the argument that a father's interest in a foetus which he helped create could support a right to veto a woman's decisions in respect of the foetus she is carrying. A number of cases in various jurisdictions outside of Quebec have considered this argument and explicitly rejected it: *Paton v. British Pregnancy Advisory Service Trustees*, *supra*; *Medhurst v. Medhurst*, *supra*; *Whalley v. Whalley* (1981), 122 D.L.R. (3d) 717 (B.C.S.C.); *Mock v. Brandanburg* (1988), 61 Alta. L.R. (2d) 235 (Q.B.); *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1974); *Jones v. Smith*, 278 So.2d 339 (Fla. Dist. Ct. App. 1973). We have been unable to find a single decision in Quebec or elsewhere which would support the allegation of "father's rights" necessary to support this injunction. There is nothing in the *Civil Code* or any legislation in Quebec which could be

used to support the argument. This lack of a legal basis is fatal to the argument about "father's rights".

V - Conclusion

The conclusion to the foregoing discussion is that the foundation of substantive rights on which the injunction could possibly be founded is lacking. It is unnecessary to go any further in order to decide that this appeal should succeed. We therefore conclude that the appeal should be allowed. As stated in the Court's original decision, there will be no order as to costs in the appeal.

Appeal allowed.

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