Legislative Developments

THE NEW ABORTION LEGISLATION

Sheilah L. Martin

1. Introduction

Bill C-43 seeks to establish a new Criminal Code (C.C.) abortion offence, following the Supreme Court of Canada invalidation of s.251 C.C. on the grounds it improperly infringed women's Charter rights. The proposed legislation makes it an indictable offence to "induce an abortion" unless "induced by or under the direction of a medical practitioner who is of the opinion that if the abortion were not induced, the health or life of the female person would be likely to be threatened". The Bill contains certain important definitions; "health" includes physical, mental and psychological health; a "medical practitioner" is left to provincial authorities to define; and "opinion means an opinion formed using generally accepted standards of the medical profession.

A constitutional challenge to Bill C-43 based on the argument that it is in pith and substance legislation in relation to health and therefore within provincial jurisdiction, or that Bill C-43 improperly delegates federal powers to the provinces, probably will be rejected because similar claims made in relation to previous abortion legislation have failed. The most likely constitutional challenges to Bill C-43 will be based on the Canadian Charter of Rights and Freedoms. Charter challenges can be expected to focus on two main issues: first, does the fetus have separate constitutional rights which Parliament has failed to respect by making certain abortions lawful; and second, does Bill C-43 infringe the Charter rights of women?

2. Does Bill C-43 Infringe the Constitutional Rights of the Fetus?

The constitutional status of the fetus under the Charter has never been specifically addressed by the Supreme Court. By the time the issue was heard in Borowski v. A.G. Canada[1], the abortion legislation under attack had already been invalidated in Morgentaler, Smoling et al. v. The Queen[2]. In the absence of a legal or factual context the Supreme Court held that the question of whether a fetus was an "everyone" with a right to life under s.7 of the Charter became moot and was too abstract to be pursued by a private citizen. Although the substantive question was not addressed in Borowski, the combination of dicta in Morgentaler and the reasoning in Daigle v. Tremblay[3] suggest a judicial preference for treating the legal status of the fetus as a question of a public "interest" rather than granting separate and independent Charter "rights" to the fetus. In Morgentaler, the majority stated that Parliament has a legitimate interest in the protection of fetal life, but they did not comment on when it arises or how far it extends. In a per curium unanimous judgment in Daigle v. Tremblay the Supreme Court held that the right to life conferred on "human beings" under the Quebec Charter of Human Rights and Freedoms was not intended to include a fetus. The Court affirmed that legal rights only vest at birth, under both the civil law, which was in issue, and the common law of other provinces, which was not. Birth has always been seen as the identifiable time when the physical individuation of the child from its mother makes rational and social concepts, like legal or constitutional rights, meaningful. Since the Supreme Court has stated that the Quebec Charter and the Canadian Charter should be construed in a similar fashion[4], it is unlikely the term "everyone" in s.7 under the Charter will be interpreted to include a fetus, although the Court did not expressly rule on this point. If a fetus had separate constitutional rights exercisable against the state the Court would be called upon to balance two complete and competing sets of constitutional rights within one body (that of the pregnant woman) and address the thorny issue of who can speak for the fetus. By allowing a Parliamentary interest in the protection of fetal life the Court may follow the accepted Charter paradigm under which the state interest asserted by way of government action (the protection of fetal life) must not unreasonably and unjustifiably infringe recognized constitutional rights (the Charter rights of Canadian women). This emerging, yet implicit, preference may make it extremely difficult to successfully challenge Bill C-43 on the ground it infringes the Charter rights of fetuses.

3. Does Bill C-43 Infringe the Constitutional Rights of Women?

Whether Bill C-43 infringes the Charter rights of women is less certain. The federal government obviously hoped constitutionally valid legislation would result if Bill C-43 was carefully tailored to cure some of the procedural defects of s.251 C.C. specifically outlined by certain justices in Morgentaler. Even assuming the soundness of this strategy, Bill C-43 may not be sufficiently different from s.251 C.C. to pass constitutional muster.

A. Bill C-43 and s.251 C.C.

The old s.251 C.C. established two separate indictable offences. The offence of unlawfully performing an abortion could be committed whether or not the woman was pregnant and carried a maximum sentence of life imprisonment, whereas the offence of unlawfully having an abortion could only be committed by the woman if she was pregnant and carried a maximum penalty of two years imprisonment. Bill C-43 establishes a singular offence of "inducing" an abortion and sets the penalty at a two year maximum. Because it is

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awkward to refer to a woman inducing an abortion on herself there was some initial speculation that the new prohibition was directed solely towards medical personnel, but the explanatory notes provided by the Department of Justice and the natural meaning of the term "everyone" confirm that the pregnant woman can also be charged. Under Bill C-43 the Crown must establish that the women was pregnant before the offence can be committed, making the prohibition difficult to enforce and removing the procedural advantage conferred upon the Crown by s.251(1) C.C..

Both are Criminal Code prohibitions but they take different forms. Section 251 operated by way of a general prohibition against either performing or having an abortion and provided a statutory defence or exception for therapeutic abortions. Chief Justice Dickson in Morgentaler found s.251 constitutionally offensive because the unfair operation of the therapeutic abortion system meant that the defence established by Parliament was illusory. The same type of analysis could not be applied to Bill C-43 because the new Bill does not operate by way of prohibition and exemption, but attempts to draw lines between lawful and unlawful conduct. This may make it difficult to argue that a woman has a statutory right to an abortion if her physical, mental and psychological health is threatened by the continued pregnancy.

Despite these and other notable differences, there are major similarities between Bill C-43 and the invalidated s.251 C.C.. Bill C-43 repeats the regulatory model of s.251 C.C. because it criminalizes certain abortions throughout the pregnancy and it bases illegality on the reasons why a woman seeks to terminate her pregnancy (these reasons are often called "indications"). The government chose not to explicitly tie the legality of abortions to the stage of the pregnancy at which it is sought. This gestational age alternative was suggested by two judges in Morgentaler and underlies American constitutional jurisprudence on abortion. But the incorporation of the accepted standards of medical practitioners into the legal standard of when an abortion is lawful may indirectly affect the legality of late-term abortion. Current medical practice generally limits the availability of post-viability abortions to the late discovery of fetal abnormalities or circumstances involving a serious threat to the life or health of the woman (Statistics Canada reports that in 1987, 99.7 of abortions took place within the first twenty weeks of pregnancy).

B. The Principles of Fundamental Justice

There are two important consequences of an indications-based regulatory model: the state usually establishes an administrative structure to police compliance while the imposed decision-making standard and ultimate decision-making authority is taken from the woman and given to someone else. Under both Bill C-43 and s.251 C.C. the medical profession decides when a woman is sufficiently ill to qualify for a legal abortion. While the apparatus established to externally review the legality of a woman's abortion is less complex under Bill C-43 than the therapeutic abortion committee system , it is no guarantee that it accords with the principles of fundamental justice or qualifies as a reasonable and demonstrably justified limitation on a woman's Charter rights.

Under s.251(4) C.C. a pregnant woman was obliged to apply to the "therapeutic abortion committee" of an "accredited or approved hospital" to obtain a certificate legalizing the abortion. A "committee" was comprised of three or more qualified physicians who could not, by law, be physicians who performed any abortions. A certificate could only be granted where a majority of committee members believed the continuation of the pregnancy would, or would be likely, to endanger the pregnant woman's "life or health". The term "life or health" was not defined in the statute with the result that different committees adopted working definitions of varying breadth. Individual committees were also free to establish their own procedures.

> **"Bill C-43 does nothing to promote or provide equitable and non-arbitrary access to lawful abortion because it leaves the matter entirely in the hands of the medical profession."**

In Morgentaler, Chief Justice Dickson and Justice Beetz explained how this committee system operated outside the procedural aspects of the principles of fundamental justice in s.7 because the statutory requirements created unnecessary delays and restricted access to abortion in an unfair and arbitrary manner. For example, the statutory requirement of applying to a committee of an "approved" or "accredited" hospital, requiring at least three physician to authorize and one to perform an abortion, reduced access to lawful abortions because it meant that a significant percentage of Canadian hospitals did not, by law, even qualify to have a therapeutic abortion committee. Because s.251 C.C. authorized, but did not require, the establishment of therapeutic abortion committees many hospitals chose not to establish a committee or did not require it to function. The burdens imposed on Canadian women as a result of limited and delayed access were presented to the Court as part of a full evidentiary record which explained how the committee system functioned in practice.

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By comparison, the one medical practitioner requirement of Bill C-43 does not appear as onerous or arbitrary as the layers of regulation imposed by s.251 C.C. There is no committee requirement; the one practitioner who must form the necessary opinion need not be a physician - for example, a province could authorize midwives to perform abortions; the practitioner can be a practitioner who performs abortions and can in fact perform the abortion in issue; abortions are lawful as long as they are performed under the "direction" of the authorized medical practitioner, which would extend to such things as women taking oral abortifacients under prescription or where an assistant performed a surgical procedure; there is no federal restriction requiring "approved" or "accredited" facilities; and abortion approvals are not tied to the facility where the abortion will be performed. But simply removing the obvious delay-generating impediments of s.251 C.C. many not suffice to have Bill C-43 withstand constitutional challenge.

A review of the procedural elements of the principles of fundamental justice will raise questions concerning the extent to which recriminalization will stigmatize abortion and have a limiting and chilling effect on its availability. Just like s.251(4) C.C., Bill C-43 does nothing to promote or provide equitable and non-arbitrary access to lawful abortion because it leaves the matter of access to lawful abortion entirely in the hands of the medical profession. While Bill C-43 defines the decision-making standard of "life and health" --- in an obvious response to Chief Justice Dickson's concern in Morgentaler that the same term in s.251 C.C. was too vague --- it is difficult to see how the qualifiers of "physical, mental and psychological" add a sufficient degree of certainty. The vagueness of the term "opinion" is also problematic because it infers the existence of an objective and customary medical standard on abortion which probably does not exist. In addition, Bill C-43 will also test the substantive context of the principles of fundamental justice because a state-imposed third party review on rights as fundamental as security and liberty of the person may be seen as inherently unreasonable.

C. The Validity of the Federal Government's Assumptions

Perhaps the fatal flaw of Bill c-43 is the government's assumption that constitutional abortion legislation can be achieved simply by responding to the Morgentaler decision. The government's legislative response has been a highly selective one - picking and choosing various elements from among the three different concurring majority judgments and selecting the evils to be remedied. While one must sympathize with the difficulty of outlining the ratio of the Morgentaler case from its various judgments, the process adopted by the federal government is far from trustworthy. Most justices limited their comments to the defects in s.251.C.C. and provided little guidance on the overall extent of Parliament's ability to legislate on abortion (in sharp contrast to the strictures of the trimester system enunciated by the U.S. Supreme Court in Roe v. Wade). There is always some risk attempting to infer what will work from what didn't, but that risk is increased when the judicial comments were cautious and intended to go no further than strictly necessary to invalidate the legislation. Morgentaler was also the first Charter case on women's reproductive rights to reach the Supreme Court and only one of a limited number of pivotal decisions on s.7. By contrast, the United States Supreme Court has been faced with over twenty-five abortion-related cases since its landmark decision in 1973 in Roe v. Wade and the contours of a woman's right in the abortion context have yet to be stated with precision.

For many reasons, it is unrealistic and unwise to act as if the Morgentaler case provides a comprehensive analysis. Although many sections of the Charter were invoked in argument against s.251 C.C., the focus of two of the majority judgments was confined to a woman's "security of the person" under s.7 (which protects life, liberty and security of the person). It would be a grave error to view their comments as establishing a code of women's rights on abortion or as precluding a constitutional challenge based on other Charter rights.

"Bill C-43 clearly threatens women's liberty interest under s.7 and freedom of conscience under s.2."

In this regard, Bill C-43 clearly threatens women's liberty interest under s.7 and freedom of conscience under s.2 as defined by Justice Wilson in Morgentaler. She concluded that the right to choose to terminate a pregnancy is based on individual autonomy and private decision-making as well as security of the person. In addition, she explained that the criminal law prohibition against abortion endorsed "one conscientiously held view at the expense of another" and therefore operated as an improper state interference with a woman's freedom of conscience.

Section 28 mandates that women must be accorded the equal right to security of the person, liberty and freedom of conscience as men and precludes the invocation of biological difference as the pretext for selectively placing burdens on women's rights.

The Supreme Court's recent recognition of pregnancy discrimination as sex based under the Manitoba Human Rights Code in Canada Safeway v. Brooks[5], and its rejection of the similarly situate equality standard for s.15 of the

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The betting is now running the other way. Newfoundland, Manitoba and New Brunswick (in order of strength) have supported the need to make changes or create a parallel Accord to eliminate the possibility of weakening the equality rights. In Ottawa, Québec, and some other provinces, the stonewall against change (even minor change to rectify the error in omitting reference to section 28 in section 16 of the Accord) is still in place. Of course, so was the Berlin Wall until it suddenly came down.

From another direction, the British Columbia government has begun an initiative to deal with the Accord's amendments in stages, and to recognize each province (and territory?) as a "distinct society". Without having had the opportunity to read the proposal aside from newspaper commentary, I would venture the comment that it could lead to two possibilities, both of which seem unacceptable;

(1) Any doubt about the potential effect of the "distinct society" clause on equality rights outside Québec would be eliminated. Each and every province and territory would have available the alleged need to preserve distinctly British Columbian/Albertan/whatever values, mores, ways of life, as an argument against claims of violations of equality rights. The matrimonial property issue, for example, could be played out in every province and territory in the way described above,

(2) the "distinct society" clause would become quite meaningless in terms of what it was designed to accomplish -- it may be as meaningless to say that each province or territory is a distinct society as it would be to say that everyone equally has the right to equality. If you are trying to move from inequality to equality, you don't get there by adding the same amount to each side of the balance. Instead, you right the balance by adding to the side that has been lacking. To fulfil Québec's aspirations for distinct recognition within Canada, you cannot say "Yes, yes, all provinces and territories are distinct, including you."

Based upon the newspaper commentary, the British Columbia agenda has "equality rights" set down for the third stage -- which would be around 1993. It is difficult to know what this envisions. The point is not that women want the Meech Lake Accord to improve upon what is already in the Charter -- they just don't want it to make things worse. If that point is understood, there is little sense in putting the issue on the agenda for the somewhat distant future, long after the deed has been done.

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Charter in Andrews v. Law Society of British Columbia[6], also invites an analysis of women-specific legal prohibitions in equality terms. In fact, equality rights analysis promises to be an important part of a distinctly Canadian approach to women's rights in reproduction-related matters. While the application of a woman's rights may become more complex if she is pregnant, any accommodation or balancing with Parliament's interest in fetal life should be done at the s.1 stage and not constructed as an inherent limitation on a woman's vested and inalienable Charter rights.

4. Conclusion

If Bill C-43 becomes law there may not be the race to the courts which many people anticipate. Proponents of constitutional rights for the fetus may be discouraged by the Supreme Court's decision in Daigle v. Tremblay. As well, groups advocating that women's constitutional rights apply in the abortion context may wish to wait and see how the legislation works in practice - to build the evidentiary record which will be so necessary to support claims that the law operates outside the principles of fundamental justice (s.7), places a disadvantageous and unequal burden on women (s.15), or is an improper fit between legislative means and ends (s.1).

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1. [1989] 1 S.C.R. 342.
2. [1988] 2 S.C.R. 1
3. Unreported, Supreme Court of Canada, No. 21533, November 16, 1989.
4. Ford v. Attorney-General of Québec (1988), 54 D.L.R. (4th) 577.
5. [1989] 1 S.C.R. 1219.
6. [1989] 2 S.C.R. 143.

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1. The Canadian Security Intelligence Service Act, RSC 1985, c.C-23, ("CSIS Act").
2. See Canada, Commission of Inquiry Concerning Certain Activities of the RCMP (the "McDonald Commission"), Freedom and Security Under the Law, Second Report and Certain RCMP Activities and the Question of Governmental Knowledge, Third Report (Ottawa: Supply and Services, 1981).
3. While some of the most intrusive techniques of surveillance require judicial authorization, judges determine whether the circumstances fall within the statutory criteria for permissible surveillance, not whether they believe there is a genuine threat to Canada's security.
4. While there is subsequent exemption for "lawful advocacy, dissent or protest" in section 2 of the CSIS Act, it is unclear whether the exemption would prevent CSIS from monitoring such lawful activities as fundraising or commercial negotiations.
5. Security Intelligence Review Committee, Annual Report, 1988-1989 (Ottawa: Supply and Services, 1989) p. 34.
6. Ibid. p. 32.
7. Ibid. p. 34.
8. McDonald Commission, Freedom and Security Under the Law, Second Report, Vol. 1, pp. 414-415, 432.
9. Ibid. p. 433.
10. Ibid. p. 43.