

The Borowski Case

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Volume 20, numéro 2, juin 1989

URI : <https://id.erudit.org/iderudit/1058487ar>

DOI : <https://doi.org/10.7202/1058487ar>

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Éditeur(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (imprimé)

2292-2512 (numérique)

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Citer cet article

Shumiatcher, M. C. (1989). The Borowski Case. *Revue générale de droit*, 20(2), 299–324. <https://doi.org/10.7202/1058487ar>

Résumé de l'article

Le cas *Borowski* vient en premier lieu établir le droit de Borowski de représenter l'enfant conçu dans son action visant à faire déclarer que les dispositions du *Code criminel* concernant l'avortement violent la *Charte canadienne des droits et libertés*.

L'auteur, avocat de Borowski, nous fait alors part de ses arguments en faveur des droits de l'enfant conçu : les articles 7 et 15 de la *Charte canadienne* viennent confirmer ses droits en garantissant à « chacun » « le droit à la vie, à la liberté et à la sécurité » et en le protégeant contre toute « discrimination fondée sur les déficiences mentales ou physiques ». Mais, malgré les témoignages d'autorités mondiales dans les domaines de la médecine périnatale, de la néonatalogie, de l'embryologie, de la gynécologie, de la neurochirurgie et de l'avortement, le Tribunal de première instance, invoquant l'article 206 du *Code criminel*, conclut que l'enfant conçu n'est pas un être humain tant qu'il n'est pas sorti vivant du ventre de sa mère. De plus, l'enfant conçu ne peut être compris dans le mot « chacun » de l'article 7 de la *Charte*.

La jurisprudence canadienne et anglaise est alors passée en revue par l'auteur. Il analyse l'impact d'importantes décisions rendues en Espagne, en Allemagne de l'Ouest et aux États-Unis et examine les conséquences de l'arrêt *Morgentaler*.

NOTES, INFORMATIONS ET DOCUMENTS

The Borowski Case*

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ABSTRACT

The Borowski case first establishes Borowski's status and right to represent the unborn in his action to have the provisions of the Criminal Code concerning abortion declared a violation of the Canadian Charter of Rights and Freedoms. The author, Borowski's lawyer, then presents his arguments in favor of the rights of the unborn : Sections 7 and 15 of the Canadian Charter, confirm his rights by guaranteeing the right of "everyone" to "life, liberty and security" and by protecting his against "discrimination based upon mental or physical disabilities". In spite of the testimonies of the world's outstanding authorities in the fields of perinatology, neonatology, embryology, gynecology, neurosurgery and

RÉSUMÉ

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* Ce texte reprend une conférence donnée par l'auteur à la Faculté de droit de l'Université d'Ottawa le 2 novembre 1988, à la demande de l'Association des étudiants de droit civil de l'Outaouais. L'Association tient à remercier le Secrétariat d'État du Canada sans qui la tenue de cette conférence aurait été impossible.

Il est à noter que cette conférence a été prononcée avant que la Cour suprême du Canada ne rende sa décision dans l'affaire *Borowski* le 9 mars 1989 : *Borowski c. P.G. du Canada*, [1989] 1 R.C.S. 342, 3 W.W.R. 97.

abortion, the Trial court, turning to Section 206 of the Criminal Code, concluded that until a child leaves the body of his or her mother in a living state, he or she is not a human being. Moreover, the unborn is not "someone" encompassed in the word "everyone" of Section 7 of the Charter.

English and Canadian jurisprudence is then reviewed by the author. He proceeds to analyze the impact of important decisions rendered in Spain, West-Germany and the United States and examines the consequences of the Morgentaler decision.

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La jurisprudence canadienne et anglaise est alors passée en revue par l'auteur. Il analyse l'impact d'importantes décisions rendues en Espagne, en Allemagne de l'Ouest et aux États-Unis et examine les conséquences de l'arrêt Morgentaler.

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INTRODUCTION

What the Supreme Court of Canada is now considering in *Borowski*,¹ is not abortion. It is the simple right accorded to *everyone*, to live. The *Canadian Charter of Rights and Freedoms*,² by section 7, declares it, and the law of Canada requires it. It is a right that concerns not only the lives of the great and powerful, but also the smallest, weakest and most inarticulate among us. It concerns everyone, for who, among us, has not been a child *en ventre sa mère*? Today, destroying an unborn child presents a fundamental challenge to our perception of human life in light of scientific realities that bring us face to face with the most helpless members of the human family.

Because each of us began life as a foetus, it is little wonder that our right to survive at the most vulnerable time of life is charged with emotion. There are no eyes that can be blinded, no conscience that can be stilled to the facts of life as they were described by the witnesses who testified at the *Borowski* trial in the Court of the Queen's Bench at Regina in 1983.

I. INSEMINATION OF THE CASE

Joe Borowski walked into my office for the first time just 10 years ago and described his outrage and anguish at the destruction (he called it "murder") of some 60 000 unborn Canadian children who, each year, were being destroyed by abortion. "Is there some way to stop the killing?" he asked. After listening to his views, I ventured to suggest that if the *Canadian Bill of Rights*³ was designed to protect human life, then the smallest and youngest members of the human family (no less than the greatest and oldest) ought to find some protection under the *aegis* of that law. The stakes were high enough to try. And so it was that after some months of research and thought, I commenced an action in the Court of Queen's Bench of Saskatchewan for a declaration that the therapeutic abortion provisions of Section 251 of the *Criminal Code*⁴ of Canada were in violation of paragraph 1(a) of John Diefenbaker's *Canadian Bill of Rights*. The words of that section seemed appropriate :

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, religion or sex, the following human rights and fundamental freedoms, namely,

-
1. *Borowski v. Minister of Justice*, (1984) 4 D.L.R. (4th) 112.
 2. *Canadian Charter of Rights and Freedoms Canada Act*, 1982 (U.K.) Chap. 11, Part I of the *Constitution Act*, 1982.
 3. *Canadian Bill of Rights*, 8-9 Eliz. II, Chap. 44 (Canada).
 4. *Criminal Code*, R.S.C. 1970, c. C-34.

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

In 1982, by the time Borowski's case came on for trial, the *Canadian Charter of Rights and Freedoms* had been enacted and declared to be not just another statute, but "the supreme law of Canada". At last, there existed a constitutional document that declared by section 7, that:

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.

The key to save those 60 000 unborn children who died each year might well be that broadest, all-encompassing, universal pronoun, "everyone", *chacun, yeder, todos* — key words in English, French, German and Spanish that came into prominence in at least four countries in which abortion legislation was to be challenged.

Apart from the constitutional and legal questions the case presented, I was convinced that, unusual though Borowski's challenge as a private citizen might be, there did exist authority capable of establishing his status as a concerned and deeply involved citizen. This issue became the first hurdle necessary to overcome if there were to be a trial of any kind. As I expected, the Attorney General of Canada moved to strike out Borowski as a Plaintiff because he lacked the status to sue.

This issue was tried before the Court of Queen's Bench and taken by the Crown on appeal to the Saskatchewan Court of Appeal and on to the Supreme Court of Canada.⁵ Because it was shown that Borowski had diligently sought to convince the Attorneys General of the Provinces and of Canada to bring this question before the courts and throughout had been rebuffed, he was entitled to launch the action in his own name — and, of course, at his own expense. His personal dedication to the cause and his success in raising funds at public meetings and appeals across the country made the financing of this grand venture possible.

The Attorney General next sought to block the action by alleging that it must be brought in the Federal Court of Canada, and not in the Queen's Bench. This issue was also considered by the Supreme Court⁶ and Borowski's right to sue in the courts of his choice was upheld.

Money was a problem — but only a beginning. I was convinced that if Borowski were to succeed, the issues must be researched, organized and established in the manner followed in any other litigation. If a court

5. *Borowski v. The Minister of Justice and The Minister of Finance of Canada*, (1981) 6 Sask. Q.B.; (1981) 6 Sask. R. 218 (Sask. C.A.); [1981] 2 S.C.R. 575.

6. *Ibid.*

were to be convinced that the child *en ventre sa mère* enjoys the right to life under the *Charter*, I would have to present cogent evidence to establish the unborn child as “someone” with the ambit of section 7’s “everyone”. And so I began to scour the world to discover those most learned and knowledgeable in the scientific fields concerned with human life in all its aspects — the fetologists and biologists, the gynecologists and neonatologists, the radiologists, the ethicists and, yes — the abortionists as well.

Of the fifteen witnesses I called at the ten-day trial, nine were qualified as experts: persons like the world-renowned Sir William Liley of Auckland, New Zealand, founder of the new science of perinatology and neonatology (the treatment of the unborn and the newly born child). His accomplishments were without precedent. He was the first physician to use the process of amniocentesis: medical treatment including surgery upon the child *en ventre sa mère*. He was the first to diagnose and treat the unborn where the RH syndrome is present: incompatibility of the blood types of mother and child. Others were Lejeune, Morris, Smyth, Bierne, Eistetter, Nathanson and Brown.

Dr. Liley’s discoveries and perceptions of intra-uterine life are the most significant ever produced. There is not a textbook on the subject that does not begin with Sir William Liley. After he gave his evidence in Regina, he returned home to New Zealand. A few weeks later, he died. His evidence in Borowski’s case is the last chapter of his great legacy to mankind.

Dr. Jérôme Lejeune of the René Descartes Institute of the University of Paris discovered the cause of Down’s Syndrome to be the existence of one extra chromosome in the child. His research signaled the beginning of the science of human genetics.

Dr. Heather Morris is an outstanding gynecologist at the Women’s College Hospital in Toronto. It was founded at a time when women were not allowed to practice in other Toronto hospitals. But all of that changed when women were declared to be “persons” — thanks to a Privy Council decision in 1930.⁷

Dr. Harley Smyth is one of Canada’s great neurosurgeons and an outstanding medical ethicist practicing at the Wellesley Hospital in Toronto. Operating upon the brain of a pregnant woman, he explained that he had two patients, both of whose lives must be protected — mother and child’s — and a separate surgical team monitored the child’s progress on the operating table.

Dr. Patrick Bierne is Canada’s pioneer in the use of ultrasound that allows us to visually observe the life and growth of the unborn child. He brought to the eyes and conscience of the pregnant woman and her family, the living portrait of her unborn child.

7. *Edwards v. A.G. Canada*, [1930] A.C. 124 (P.C.).

Dr. Alfred Eistetter is a prominent Regina obstetrician who has saved the lives of countless unborn children, convincing them that in every pregnancy two lives are to be considered and that both can be brought to term safely and successfully.

Dr. Bernard Nathanson was New York's most active abortionist who, at trial, explained the nature and results of the 50 000 abortions his clinic performed in 18 short months, and how this experience affected his perceptions of intra-uterine life and his ultimate condemnation of abortion on medical and moral groups.

Dr. Donovan Brown, a general practitioner of Regina testified of his experience and practice in dealing with patients who were considering abortion. Encouraging a mother to see the child within her body by ultra sound, he found that this experience moved a mother to protect and preserve her unborn child, and not to destroy it.

The most dramatic evidence led at trial established the individuality, the separateness and the uniqueness of the human qualities and characteristics of the unborn child, who, if allowed to live, in the natural course of things, grows and develops to the full extent of his or her latent endowments, from infancy to adulthood and on to a ripened old age.

Dr. Lejeune testified that immediately upon fertilization, the nature and the unique genetic qualities each of us has as an individual human being are determined. At that moment of fertilization, all things are fixed : the color of one's eyes, the hair, the skin, the form of the nose and ears, the strength of the person and all other characteristics :

[...] Every quality which makes an individual recognizable, as he will later be called Peter or Margaret or Mary [...] are entirely spelled out in its own personal genetic constitution.⁸

Dr. Lejeune described the uniqueness and individuality of everyone's genetic endowment, saying :

We are uniform individuals and we owe our individuality essentially to this particular genetic endowment we have been granted at the moment of conception.⁹

We know that each individual has a very neat beginning which is exactly the moment at which the whole sufficient and necessary genetic information to define himself, has been gathered together [...] [We] know that [conception] is the only moment at which information coming from father, and information

8. Appeal Book, 1988 *Borowski* (Supreme Court of Canada) Volume II, p. 287, 11. 30-33 (Lejeune).

9. *Id.*, p. 293, ii. 11-14.

coming from mother are united together; and we know that after this fecundation has taken place, there is no other input of genetic information.¹⁰

In the *Human Life Review*, Lejeune wrote :

As soon as the 23 paternally derived chromosomes are united through fertilization with 23 maternal ones, the full genetic information necessary and sufficient to express all of the unborn qualities of the new individual, is gathered. Exactly as the introduction of a minicassette inside a tape recorder will allow the restitution of the symphony, the new being begins to express himself as soon as he has been conceived [...].¹¹

He pointed out that the chromosomes are the tables of the law of life. When they have been gathered within one ovum and one sperm, there comes into existence a new being bearing every nuance of a unique human constitution :

What is bewildering is the minuteness of the scripture. It is hard to believe, although [it is] beyond any possible doubt, that the whole genetic information necessary and sufficient to build our body and even our brain [the most powerful problem-solving device] [...] could be so epitomized that its material substratum can fit neatly on the point of a needle!¹²

Even more impressive, during the maturation of the reproductive cells, the genetic information is reshuffled in so many ways, that each conceptus receives an entirely original combination which has never occurred before and will never occur again. Each human being is unique. Each is irreplaceable. This is not merely a moral truism, it is a genetic fact, one that conveys to a cynical century the inherent worth of the tiniest and the youngest member of the human family in the most vulnerable stages of its life.

Dr. Liley described the exponential growth of that child from the first cell that comes into being upon fertilization. It is now established beyond all doubt that in every human's life time, there are 45 generations of cell divisions. These produce the 30 trillion cells that make up every adult. Eight of these divisions will have occurred upon implantation of the fertilized ovum in the wall of the uterus. Thirty divisions, or 2/3 of the 45 generations of cell divisions that encompass the total development of an individual's life will have taken place within 8 weeks after fertilization. Forty-one of the 45 divisions will have been completed before birth. More than 90 percent of the development of the human adult is completed by birth. Dr. Liley summarized the significance of this phenomenal growth :

[...] In developmental terms we spend ninety percent of our life *in utero* and indeed the die is very far cast as to the type of person we are going to be — physically, our intellectual capacities, and all manner of body functions

10. *Id.* p. 293, 11. 11-14.

11. *Human Life Review*, 1981, Vol. VII, N° 3, pp. 60-64.

12. *Ibid.*

[...] Of course, it underpins the importance [...] of perinatal medicine, the medicine of the unborn child, since events going wrong during that dramatic period of development can then cast a shadow so far into our chronological future.¹³

Dr. Liley explained life to be a continuum from fertilization until death. In the earliest stages, life is measured in hours, then weeks, in months and then years, and finally, in decades. At every stage, it is, and remains, from beginning to end, the same life, by whatever name it may be described — whether a zygote, an embryo, a foetus, a baby, a child, an infant, a toddler, a teenager, an adult or a geriatric.

Dr. Harley Smyth of Toronto one of the world's great brain surgeons and one of its outstanding medical ethicists was asked when a human being comes into existence. He said :

I don't think there has been any difficulty here or elsewhere or in the literature establishing the humanity of the unborn offspring of man. I don't think there's any difficulty establishing its individuality. I don't think there's any difficulty in establishing its genetic foundations as a totally unique item of human life. I don't think there's any difficulty even in contemplating all the new data on perinatology and the ultra-sound studies of a twenty-one millimetre foetus; there's no difficulty in recognizing the human face of the unborn offspring of man. *The difficulty seems to arise in acknowledging the human claim that the unborn child has upon our care. The difficulty therefore cannot be said to be scientific or the have any foundation in confusion or uncertainty or ambiguity of biological data. This difficulty seems to be one of recognizing the claim of that individual upon our care.*¹⁴

Describing the individual's development, Dr. Liley said that at 6 weeks the child's body is complete. The arms, legs, fingers, toes, and head are entirely formed and the child is seen to be distinctly human. Ultra-sound film of examinations entered at Trial showed the heartbeat and the major parts of the body of the child *en ventre sa mère*, all the while moving gracefully within its amniotic sac.

At 8 weeks, about the earliest time abortions are performed, the child is a fully functioning human being. All of his or her organs and body systems are in place. They only require maturation, a process that will continue for 13 or 14 more weeks. At 8 weeks, the child's features are so clear, one can see even the creases on the child's open hand. The fingerprints are visible under a microscope, the unique and irrefutable identification of every human being that forensic medicine has long recognized in the criminal law. As everyone knows, there are no two fingerprints that are, or ever will be the same. And over the whole of one's life, they will never change.

13. Appeal Book, 1988 *Borowski* (Supreme Court of Canada) Volume I, p. 205, 11. 31-39.

14. *Id.*, Volume III, p. 485, 1.49; p. 486, 1.16.

By 9 weeks, a child is very active and gracefully rolls about in its small domain. The child can make a fist and be seen sucking a thumb. All the child's movements have graphically been portrayed on ultrasound, and all of this was observed on a screen, by the judges at trial, on appeal, and in the Supreme Court of Canada.

II. FINDINGS OF THE TRIAL JUDGE

On October 13, 1983 Mr. Justice Matheson delivered his judgment with findings of fact, all supported by the evidence led on Borowski's behalf, none rebutted or questioned by the Attorney General. He called no witnesses to contradict Borowski's evidence — because none exists. Those findings of fact at trial are binding upon all succeeding courts — including the Supreme Court of Canada.

Justice Matheson reviewed much of the evidence before him, and finally held as fact,

First, [...] modern biological and genetic studies have verified that the foetus is genetically a separate entity from the time of conception or shortly thereafter;¹⁵

Secondly, advances in medical procedures have made it possible for a foetus to be treated separate from its mother and, although not sufficiently developed for normal birth, to survive separate from its mother;¹⁶

Thirdly, [P]ermitting a pregnant woman to terminate her pregnancy automatically results in the termination of the foetal life, which, it seems quite clear, is an existence separate and apart from that of the pregnant woman, even although the foetal life may not be maintainable during the early stages of pregnancy, independently of the pregnant woman;¹⁷

Fourthly, [...] a consideration of the factors which might result in a therapeutic abortion being performed, necessarily entails a consideration of the fact that if an abortion is deemed justified the end result cannot be therapeutic for both the pregnant woman and the foetus [...].¹⁸

Having made these crucial findings of fact, the learned Judge did not go on to consider whether section 7 of the *Charter* which guarantees the right to life to "everyone" protects the child *en ventre sa mère*. He did not ask whether the child is a part of, or encompassed by the term "everyone" and thus endowed by the *Constitution* with the right to life. This, one would have expected the learned Judge to have done because the *Constitution Act, 1982* clearly states that the *Charter* constitutes "the supreme law of Canada". But instead of applying the

15. *Id.*, p. 623, 11. 24–26; *Borowski v. Minister of Justice, supra*, note 1, p. 124.

16. *Id.*, p. 623, 11. 26–29; *Id.*, p. 124.

17. *Id.*, p. 627, 11. 32–37; *Id.*, p. 128.

18. *Id.*, p. 627, 11. 38–42; *Id., supra*, note 1, p. 128.

Constitution, Mr. Justice Matheson, for guidance, turned backward, to section 206 of the *Criminal Code* which states (for purposes of the homicide sections) :

206. A child becomes a human being within the meaning of this *Act* [the *Criminal Code*] when it has completely proceeded in a living state from the body of its mother, whether or not :

- (a) It has breathed,
- (b) It has an independent circulation, or
- (c) The navel string is severed.¹⁹

These three relatively simplistic tests may have served in an earlier era when the nature of intra-uterine life had not been fully explored. But they are clumsy and inappropriate standards to apply after ultra-sound has opened a window into the habitat of the unborn so he may be observed and examined and diagnosed, and when necessary, medically treated like everyone else.

In the result, the learned trial judge did not consider whether, on behalf of the unborn child, we may invoke “the supreme law” of the *Charter’s* section 7 that accords to “everyone” the right to life and the right not be deprived of life save in accordance with the principles of fundamental justice. Instead (presumably for all purposes) he held that no matter how fully developed a child might be, his or her life is not protected by section 7 of the *Charter* unless that child has “completely proceeded in a living state from the body of its mother”.

Had the question the learned trial Judge was required to answer been the applicability of section 206 of the *Criminal Code*, his conclusion would be valid. But the question being whether section 7 of the *Canadian Charter of Rights and Freedoms* protects the life of “everyone”, including the child *en ventre sa mère*, the Court’s response was a sad and simple *non-sequitur*.

III. STATUS OF THE CHILD UNDER THE CRIMINAL LAW

The early common law treated any act which resulted in the death of an unborn child after “quickening” as a crime.

A woman was “quick with child” if she could feel the child moving within her womb. “Quick”, in this context, means “alive or living or endowed with life [...]”.²⁰ At trial, Sir William Liley explained the historic meaning of “quick” :

Q. I asked you about the word quickening because it is a word that has a very ancient origin I believe. Where does it come from?

19. *Criminal Code, supra*, note 4, now section 223.

20. *Oxford English Dictionary*, London, Oxford University Press, 1933, Vol. VIII, p. 51.

A. *It is an Anglo-Saxon word, sir, "cwic" which means living and we use it in the sense of quicken the dead or cutting your nails to the quick. And of course the first perception of fetal movement was, in popular ignorance, attributed to the baby coming to life at that moment.*²¹

It is important to understand that up to the end of the 18th century, "quicken" was seen to signal the beginning of life. The common law protected life from the moment it came into existence, and that was "quicken". Quicken was life.

Capital punishment may have been cruel, but it did recognize the unborn child to be a human being separate and apart from the mother, deserving of protection long before the *Canadian Charter of Rights and Freedoms* came into being.²²

Prior to the abolition of capital punishment in Canada in 1974, subsection 597(1) of the *Criminal Code* stated :

597(1). A female person who is sentenced to death may move in arrest of execution on the ground that she is pregnant.

Under the Codes of 1906 and 1927 an examination could be made, not by medical practitioners, but by a jury *de ventre inspiciendo* to examine a female prisoner to determine whether she were "quick with child" and make a true report to the Court. If it were found that the condemned prisoner was, indeed, pregnant, a motion was made for a postponement of the execution of the mother until the child was born. Condemned to death, the mother's life was worthless. But the child being innocent, was protected, and that child's life was preserved, — long before the *Charter* declared that "everyone has the right to life".

The purpose of the law was not to afford comfort or succor to the convicted mother, but to protect the unique life of the innocent child within her. To the mother's sin, no child was condemned to answer. Even though a woman was condemned as a felon deserving of no mercy, the life of her unborn child was protected because no reasonable person would suggest that the unborn child, whether a part of its mother's body or a being separate and apart from its matter, was to be treated as a felon and condemned to death.

IV. PROTECTION OF THE UNBORN

From 1802 until 1969 abortion, without exception, was a criminal offence in Canada. Before the *Charter*, the criminal law mirrored

21. Appeal Book, 1988 *Borowski* (Supreme Court of Canada) Volume I, p. 184, 11. 41-47.

22. It is a view that some contemporary Canadian jurist seem to have abandoned : *R. v. Marsh*, [1983] 2 C.C.C. (3d) 1 (B.C. Cty): decision rendered in 1979.

a vast array of society's values and protected the rights of its members, including the right to life, liberty and security of the person; and these laws protected the right to life of both mother and child.

V. PROPERTY RIGHTS

A. THE COMMON LAW

The common law was mindful not only of the life of the child *en ventre sa mère*. It also protected the unborn child's right to an interest in property; and so developed sophisticated rules to preserve the property of a child prior to birth. The *Earl of Bedford's Case*²³ was among the first to enunciate the legal position of the child *en ventre sa mère*. By the end of the 16th century it was a well established principle of the common law that an unborn child may enjoy lawful rights and interests in property.

The question of the "personhood" of the child *en ventre sa mère* was debated as early as 1678. In *Hyde v. Seymour* the Attorney General asserted that the child *en ventre sa mère* "is not properly a person".²⁴ But by 1805 in *Thelluson v. Woodford*, the Attorney General was able to say: "such (unborn) children are considered by law as *in being* for a variety of purposes. [...] They are entitled to the privileges of all persons [...]".²⁵ In that same case the rights of the unborn were described by the Court of Appeal as follows:

The next objection is, that, supposing, he meant a child *en ventre sa mère*, and had expressly said so, yet the limitation is void. Such a child has been considered as a non-entity. Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the *Statute of Distributions*. (22 & 23 Ch. 11. c. 10) He may take by devise. He may be entitled under a charge of raising portions. He may have an injunction; and he may have a guardian. Some other cases put this beyond all doubt.²⁶

B. THE CIVIL CODE

In the days of Justinian, long before the common law came into existence the principle was recognized that "The unborn child shall be deemed to be born whenever its interest require it".

23. *Earl of Bedford's Case*, 77 E.R. 421.

24. *Hyde v. Seymour*, 22 E.R. 1046, p. 1046.

25. *Thelluson v. Woodford*, 32 E.R. 1030, p. 1037 (H.L.).

26. *Id.*, 31 E.R. 117, p. 163 (C.A.).

*Montreal Tramways Co. v. Léveillé*²⁷ decided only 55 years ago became the beacon of the *Civil Code* that common law jurisdictions then followed to accord rights to the unborn. It declared that :

An unborn child is taken care of, just as much as if it were in existence, in any case in which the child's own advantage comes in question.²⁸

The simple facts were that Mrs. Léveillé, while a passenger in a Montreal street car, fell and was injured as a result of the motorman's negligence. Unbeknown to the operator Mrs. Léveillé was pregnant. The child born to her some months later was found to have a club foot, the result of the injury. The child, through its guardian, sued for damages, and succeeded, even though at the time of the injury, the child was living *en ventre sa mère* and at the time of the injury inflicted upon him, had not "completely proceeded in a living state from the body of its mother" as described in section 206 of the *Criminal Code*.

The principle of the civil law was discussed in detail in *Montreal Tramways*. That decision was a monumental one, far in advance of any judgment therefore delivered in the common law world. The underlying principles of both the civil law and the common law happily converged in this case in the Supreme Court of Canada, and Mr. Justice Lamont, a Saskatchewan French-Canadian lawyer who was elevated from the Queen's Bench to the Supreme Court of Canada drew upon the experience of both legal systems to come to a far-sighted and compassionate result. The child was entitled to redress for the injury inflicted upon his feet while still in his mother's womb.

The significance of the case is two-fold : *First*, the Court considered the great advances in medical science and shaped both the common law of torts and the civil law of delict to assure the recovery of damages for personal injuries sustained by such child within the mother's body where proof has been presented of the cause of the injury. *Secondly*, the court granted a remedy which was theretofore unknown. Speaking for the court with prophetic insight, Mr. Justice Lamont said :

If a child after birth has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefore. To my mind, it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.²⁹

27. *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456.

28. *Id.*, pp. 460-461.

29. *Id.*, pp. 464-465.

Here, the Supreme Court of Canada made an historic leap unto a level of perception, the result of which accorded to countless children injured before birth, the benefit of a remedy that has continued to bring succor to children and their parents in lands scattered across the whole of the civilized world.

Montreal Tramways and the “*infans conceptus*” rule it represents are clear acknowledgement that the child *en ventre sa mère* is no chimera. Like its parents and their forbears, everyone whose living state is recognizable as that of a member of the human family, the life of the child *en ventre sa mère* is embraced and protected by section 7 of the *Charter*.

In *Montreal Tramways*, the *Civil Code* was invoked in aid of the principle that the conceived, but unborn child enjoys the advantage of juridical personality, subject only to the suspensive condition of being born viable. Article 345 of the *Code Civil* states :

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 for such administration.³⁰

Of Article 345, Professor Jean-Louis Baudouin has commented :

*As of the moment of conception, the child possesses, as a matter of fact, the whole series of civil rights [...] Naturally, it being impossible for him to exercise his rights, the law which intends to protect those who cannot act, names for him a curator (curateur au ventre) who exercises them in his place.*³¹

Thus the conceived child enjoys the advantages of juridical personality, subject to the condition of being born alive and viable. The *Civil Code* also recognizes and grants protection of patrimonial rights to the unborn. Such child is specifically permitted to inherit, to receive gifts and to have his or her interests protected by a curator. There is, and there can be only purpose for these provisions : the protection of the life and well-being of the unborn child whose personhood the law recognizes and proclaims. The *Code* did not conjure up some mythological creature to which it artfully and arbitrarily accorded a series of legal rights with the object of capriciously investing it with human attributes. It was the unique nature and unmistakable qualities of the unborn child that demanded a response that legal recognition as a member of the human family alone could provide.

In the civil law, there exists two schools of thought on the subject : the theory of “the resolutive condition” and the theory of “the suspensive condition” to the recognition of personhood.

30. *Civil Code*, article 345; also articles 608, 771 and 838.

31. J.-L. BAUDOUIN, *Les obligations*, 2nd ed., Cowansville, Les Éditions Yvon Blais Inc., 1983; free translation (emphasis added).

The civil law's traditional interpretation regards the rights of a conceived child to be subject to a suspensive condition that the child be born alive and viable. But this position is not universally held. A number of Québec civil law authorities are of opinion that the rights of the conceived child are subject to a resolutive condition : that their rights arise immediately upon conception, and that they end only if the child is *not* born viable or dies prior to birth.³²

Professor Keyserlingk discusses the nature of the child's rights under the civil law :

Happily, a doctrinal solution to this logical impasse has recently been proposed, one which is relatively simple, but has far-reaching implications. The proposal was made by Kouri, and is to the effect that the unborn child should be considered as a subject of rights on the *resolutive* condition of *not* being born alive and viable, rather than as at present, on the *suspensive* condition of being born alive and viable. Though proposed by Kouri for the Civil law context, in our view it is equally applicable in the Common law context. The advantage for the unborn child of such a shift is obvious and important. Obligations or duties to the unborn child (including those of respecting its inviolability and providing prenatal care and protection) could now come into play immediately on conception. The suspensive condition approach makes the *granting* of legal personality and rights dependant upon the realization of future condition (live future and viable birth). But the *resolutive* condition approach would allow legal personality and rights to be *granted* at conception, but *lost* in the event a future condition is realized (not being born alive and viable).³³

VI. THE CONSTITUTION, COMMON AND CIVIL LAW

It is common ground that the civil law and the common law both recognize the existence, value and humanity of the child prior to birth. Whatever theory may seem most attractive, it is clear that *both* depend for their relevance upon an acceptance of the principle that the unborn are protected by the omnibus phraseology of section 7 of the *Charter* that accords the right to life to "everyone".

If that principle requires buttressing, section 15 of the *Charter* stands tall, steady and ready to be invoked in defence of the unborn child. Compared with a mature, educated, self-reliant adult, it is obvious that the child *en ventre sa mère* is at a serious disadvantage. Such child is very young (less than one year of age) and hence weaker than a normal adult.

32. Robert P. KOURI, "Réflexions sur le statut juridique du foetus", (1980-1981) 15 *R.J.T.* 193 ; and E.W. KEYSERLINGK, "The Right of the Unborn Child to Prenatal Care — the Civil Perspective", (1982-1983) 13 *R.D.U.S.* 49.

33. E.W. KEYSERLINGK, *The Unborn Child's Right to Prenatal Care*, Montreal, Quebec Research Centre of Private and Comparative Law, McGill Legal Studies, 1984, p. 102 (emphases added).

The unborn lack physical and mental capacities that older children enjoy. Compared with their elders the unborn suffer from their limited mental and physical abilities.

It is to the redress of these disabilities that section 15 of the *Charter* is directed :

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

To deny to the child *en ventre sa mère* the right to life — the prime right upon which all other rights depend — flies not only in the face of section 7 of the *Charter*; it violates the rights that section 15 accords to those whose need for the protection of the *Constitution* is greatest : the very young and the very old, and those who are disadvantaged because of physical or mental disabilities.

It is at this point that young and old join hands in their claim to life : the young against the threat of death by abortion; the old against euthanasia.

Thus, “affirmative action” may be undertaken under section 15 to advantage the deprived when their claim to the rights accorded by the *Charter* to “everyone” can be made manifest only by recognizing that the smallest, the weakest, the youngest, the oldest and the least articulate among us are entitled to recognition as members of the human family, all endowed with the inalienable right to live.

VII. COMPARATIVE LAW

Canada is not the only place in which the rights of the unborn have been the subject of Constitutional adjudication. The highest Constitutional Courts of at least three other free and democratic societies (West Germany, Spain and the United States of America) have considered the status of the child *en ventre sa mère* under their respective Constitutions.

The *American Decisions*. — First, the 1973 American decision of *Roe v. Wade*.³⁴ An unmarried pregnant woman challenged the criminal abortion statute of the State of Texas. The Act prohibited abortion except where necessary to save the mother’s life. She alleged the law violated her “right to privacy” which included her right to have an

34. *Roe v. Wade*, [1963] 410 U.S. 113.

abortion — as though it were murder to kill another human being on the street but lawful to kill another in the privacy of one's home! The Supreme Court of the United States considered whether an unborn child is a "person" guaranteed the right to life by the 14th Amendment of the *United States Constitution*. It states :

14. [...] nor shall any state deprive any person of life, liberty or property without due process of the law".

Based upon the word, "person" in the American *Constitution*, and the concept of abortion in American society in the 19th century, the court held that "a person" did not include a child *en ventre sa mère*.³⁵

In *Roe v. Wade*, the United States Supreme Court disclaimed any intention to resolve the question as to when human life begins. It simply held that a woman has the right to an abortion without state interference at any time up to the point that the unborn child is "viable". After "viability", the Court declared the state has authority to protect "fetal life".

Blackmun, J. wrote :

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer.³⁶

Assuming that, in 1963, when *Roe v. Wade* was decided, there existed in the minds of the Supreme Court Justices some doubt as to when life begins, that doubt has now been fully resolved by the phenomenal discoveries of science during the decade that followed the American decision. This knowledge stimulated new scientific perceptions that have established that a new human comes into being long before "quickenings". As for the viability of a new life in the place in which nature intended it to reside, a child *en ventre sa mère* no less than child when born, will grow and develop in timely sequence, into a child capable to move into the new environment ordained by the nature of things provided its life is not disturbed or aborted by unnatural forces hostile to its normal growth. There is now no doubt as to when each human life begins. That definitive fact emerged from the evidence produced in *Borowski's case*. It was determined and clearly declared by Mr. Justice Matheson in the Saskatchewan Court of Queen's Bench. Unfortunately, that learned judge erred in failing to apply section 7 of the *Charter* to the irrebutted and irrebutable facts of human life adduced at trial as our definitive constitutional document and the supreme law of Canada required him to do.

35. *Id.*, pp. 156–168.

36. *Id.*, p. 159 (emphasis added).

The Supreme Court of the United States in *Roe v. Wade* avoided the crucial questions of fact that Mr. Justice Matheson considered and accepted, because those facts were never established in the evidence brought before the American Court in that case.

The *West German decision*. — The federal Constitutional Court of West Germany did address the issue directly in 1975. It wrote a moving and persuasive judgment in a *Constitutional Reference* upon certain proposed amendments to the penal law which would have legalized all abortions performed within the first 12 weeks of pregnancy without consideration or protection of the unborn child's interests.³⁷ The question was whether the Constitutional amendment would violate the "right to life" guaranteed by the *Basic Law of the Federal Republic of Germany*, article 2, paragraph 2, sentence 1 of which declares as simply and directly as section 7 of the *Canadian Charter of Rights and Freedoms* that : "*Jeder hat das Recht auf Leben*" (Everyone has the right to life).

The West German Court held that the proposed amendment would infringe the unborn child's right to life and was therefore invalid. It considered the factual and medical background along with the evidence establishing the existence and the individuality of the unborn child in classic, universal language :

Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception (nidation, individuation).

The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time, a rather long time after birth. Therefore, the protection of Article 2, Paragraph 2, Sentence 1, of the *Basic Law* cannot be limited either to the "completed" human being after birth or to the child about to be born which is independently capable of living. *The right to life is guaranteed to everyone who "lives"; no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life. "Everyone" in the sense of Article 2, Paragraph 2, Sentence 1, of the Basic Law is "everyone living"; expressed in another way : every life possessing human individuality; "everyone" also includes the yet unborn human being.*³⁸

In answer to the objection that "everyone" normally denotes a "completed person", the Court wrote :

[...] It should be emphasized that, in any case, the sense and purpose of this provision of the Basic Law require that *the protection of life should be*

37. *West German Reference*, The Constitutional Court of the Federal Republic of Germany (February 25, 1975) (translated); J.D. GORBY, R.E. JONAS, "West German Abortion Decision : A Contrast to *Roe v. Wade*, (1976) 9 *John Marshall Journal of Practice and Procedure* 605.

38. *Id.*, p. 638 (emphasis added).

*extended to the life developing itself. The security of human existence against encroachments by the state could be incomplete if it did not also embrace the prior step of "completed life", unborn life.*³⁹

The West German Decision reflects the knowledge of our age. And assuredly, it accords more harmoniously with the principles of the *Canadian Charter of Rights and Freedoms* than does the American decision of *Roe v. Wade*, and for several reasons :

First, the West German Court asked whether unborn children should be protected under the aegis of the *Basic Law of the Federal Republic of Germany*. The judges regarded the answer as self-evident : the unborn child is guaranteed the right to life.

Secondly, the Court considered the nature of the right to life and decided that it must be granted to *everyone living*. The nature of the right itself determined who may claim it. Unless the right itself were specifically limited, the right should be shared by all who might benefit from it.

Thirdly, the Court approached the question by applying the same principles that the Supreme Court of Canada enunciated in interpreting the *Canadian Charter of Rights and Freedoms* in *R. v. Big M. Drug Mart Ltd.*,⁴⁰ wherein Dickson, C.J.R., declared that a Court must examine the purpose of the right and why, in light of its social, philosophical and historical contexts, it is a right to be protected.

The facts of human life from its inception, and throughout the whole of its growth from conception to birth and thereafter to maturation and to death are of universal application and affect "everyone". There are no exceptions and there is no escape.

The West German Decision was followed by the *Spanish Constitutional Court* in 1985. It held that a child *en ventre sa mère* is guaranteed the right to life by the *Constitution of Spain* which, like Section 7 of the *Canadian Charter* and Article 2, paragraph 2 of the *Constitution of West Germany*, states : *Todos tienen derecho a la vida* (All have the right to life).

The Spanish Constitutional Court held that human life is the central value of a society. The unborn child's life is a reality distinct from the mother. Therefore, the "one to be born" must be considered by society as a separate and distinct "legal good" that the *Constitution* and the law protect. Amendments to the abortion law which permitted unrestricted access to abortion were therefore struck down.

Professor Richard Smith summarized the reasons of the Spanish Court's decision in the *American Journal of Comparative Law*,

39. *Id.*, p. 638 (emphasis added).

40. [1985] 1 S.C.R. 295, p. 344.

Within this value order, life is not just any value, according to the Spanish court, but is a "superior value", a "fundamental value" and a "central value". The Court reaches this conclusion by noting that life is a presupposition for all other rights, and by reflecting upon the placement of the right to life at the head of the list of constitutional protections. The unborn are taken to "embody" this value, both because the framers of the Constitution apparently intended the unborn to be protected by the right to life clause of that document, and because of the fact, noted by the Court, that human life is a "reality from the beginning of gestation."⁴¹

A. THE CONSCIENCE OF CANADIANS

The deep concern for human life that is expressed in the West German and in the Spanish decisions finds its counterpart in the conscience and philosophy of the Canadian people. A deep concern for the life and well-being of the weak and the disadvantaged is reflected not only in Section 7, but also in section 15 of the *Charter*. These are the significant hallmarks of a caring and compassionate society. They bespeak values that lie deep in the rich humus of Canadian society. These values must find expression in the limbs and leaves and in the fruit of the growing tree that was planted in our land as a constitution and a symbol to support not death, but life.

There are examples a-plenty of this design : sections 16 to 22 of the *Charter* protect those who are able to express themselves in only one of Canada's official languages. Section 23 of the *Charter* protects minority language rights. Section 29 of the *Charter* preserves the constitutional right to denominational, separate and dissentient education, thus protecting religious communities, their philosophies and their faith. Canada's multicultural character is protected by section 27 of the *Charter*. Section 35 of the *Constitution Act*, 1981 specifically recognizes and affirms the aspirations of the aboriginal people of Canada.

These values stand in sharp contrast to the individualistic aspirations of American society which have been much influenced by a *Constitution* born 200 years ago out of a spirit of revolution when every individual was moved to assert his own paramountcy in the scheme of things, by carving his personal image in the stone and steel of the nation.

Inherent differences exist between Canadian and American societies. While Americans have valued most highly their independence, we Canadians have placed a yet higher value upon our *interdependence*. This we hold in common with the free and democratic societies of Europe

41. *The Spanish Decision* as summarized in R. STITH, "New constitutional and Penal Theory in Spanish Abortion law", (1987) 35 *American Journal of Comparative Law* 513, pp. 523-524.

whose people have long injected the magic of their energy and originality into Canada's eclectic Mosaic.

That is why we can be better served by the spirit and substance of the Spanish and West German judicial decisions on the rights of the unborn than by judgments of the Supreme Court of the United States.⁴²

VIII. MORGENTALER v. THE QUEEN: ITS EFFECT

The Supreme Court's decision in *Morgentaler*,⁴³ delivered on January 28, 1988, struck down the whole of Section 251 of the *Criminal Code* with the result that from that day forward there has existed in Canada no legal restraints upon abortion. The issues considered in *Morgentaler* are not the same as those in *Borowski*.

But they are relevant to the questions the Supreme Court had to consider in *Borowski*.

The Supreme Court substantially supported *Borowski's* thesis that the child *en ventre sa mère* is not without rights.

A. THE CHARTER'S PROTECTION OF THE UNBORN

The Supreme Court of Canada recognized the purpose of the law's prohibition of abortion to be the protection of the life of the child *en ventre sa mère*. It also recognized such protection to be a valid constitutional and governmental objective. Mr. Justice Beetz wrote :

The primary objective of s. 251 of the *Criminal Code* is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective. The primary objective does relate to concerns which are pressing and substantial in a free and democratic society and which, pursuant to s. 1 of the *Charter* justify reasonable limits to be put on a woman's right.⁴⁴

He then asked :

Does the objective of protecting the foetus in s. 251 relate to concerns which are pressing and substantial in a free and democratic society? The answer to the first step in the *Oakes* test is yes. I am of the view that the protection of the

42. M.A. GLENDON, *Abortion and Divorce in Western Law*, Cambridge, Harvard University Press, 1987; the author examines the legal response to abortion regulation in Western Europe and the United States in light of the over-all social policy of each society toward children. The Canadian response more closely parallels the European experience than the American pattern.

43. *Morgentaler v. The Queen*, [1988] 1 S.C.R. 30 and (1988) 37 C.C.C. (3d) 449.

44. *Id.*, p. 82 and p. 485.

foetus is and, as the Court of Appeal observed, always has been, a valid objective in Canadian criminal law.⁴⁵

Madame Justice Wilson described the objective of the abortion law :

In my view, the primary objective of the impugned legislation must be seen as the protection of the foetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman's s. 7 right is the protection of the foetus. I think this is a perfectly valid legislative objective.⁴⁶

Mr. Justice McIntyre in assessing section 251 of the *Criminal Code*, stated,

[...] the provision [s. 251] is aimed at protecting the interests of the unborn child and only lifts the criminal sanction where an abortion is necessary to protect the life or health of the mother.⁴⁷

Parliament's view that abortion is, in its nature, "socially undesirable conduct" is not new. Parliament's policy, as expressed by s. 251 of the *Code*, is consistent with that which has governed Canadian criminal law since Confederation and before.⁴⁸

And the learned Judge stated :

The historical review of the legal approach in Canada taken from the judgment of the Court of Appeal serves, as well, to cast light on the underlying philosophies of our society and establishes that there has never been a general right to abortion in Canada. There has always been clear recognition of a public interest in the protection of the unborn and there has been no evidence or indication of any general acceptance of the concept of abortion at will in our society.⁴⁹

These statements are consonant with the historic protection that the law has accorded to the unborn. Thus it is clear, section 7 of the *Charter* does not invoke new or novel concepts into the common law or the civil law. It enunciates and strengthens historic principles that have always existed. They are an acknowledgment of the unborn child's worth and value. They are also an affirmation of the unborn child's existence at law, and such child's claim to the protection of the *Constitution*.

B. BALANCE AND PROPORTIONALITY

In *Morgentaler*, the Court discussed the mother's right to security of her person when balanced against the interests of the child *en*

45. *Id.*, p. 124 and p. 518.

46. *Id.*, p. 181 and p. 562.

47. *Id.*, p. 134 and p. 526.

48. *Id.*, p. 136 and p. 527.

49. *Id.*, p. 146 and p. 535.

ventre sa mère. The majority discussed the concepts of balance and proportionality in the context of the application of Section 1 of the *Charter*, as a saving provision.

Chief Justice Dickson wrote :

I have no difficulty in concluding that the objective of s. 251 as a whole, namely, to balance the competing interests identified by Parliament, is sufficiently important to meet the requirements of the first step in the Oakes inquiry under s. 1. I think the protection of the interests of pregnant women is a valid governmental objective, where life and health can be jeopardized by criminal sanctions. Like Beetz and Wilson, JJ., I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests with the lives and health of women a major factor, is clearly an important governmental objective. As the Court of Appeal stated, "the contemporary view [is] that abortion is not always socially undesirable behavior."⁵⁰

In discussing balance and proportionality Mr. Justice Beetz stated that Parliament was justified in requiring a reliable, independent, medically sound opinion in order to protect the state interests in the unborn.⁵¹ He discussed the standard adopted by s. 251 of the *Criminal Code* that requires a balancing of the rights of mother and child. He wrote :

Parliament decided that it was necessary to ascertain this from a medical point of view before the law would allow the interest of the pregnant woman to indeed take precedence over that of the foetus and permit an abortion to be performed without criminal sanction.

I do not believe it to be unreasonable to seek independent medical confirmation of the threat to the woman's life or health *when such an important and distinct interest (the child's) hangs in the balance.*⁵²

In *Morgentaler*, the Supreme Court of Canada adopted a broad and expansive approach in interpreting the *Charter*. Any balancing of interests between mother and child suggest that the value of each of them can and must be weighed. Both are human lives of value. The mother is entitled to constitutional protection, and she unquestionably is fully protected by section 7 of the *Charter*. The child's interests are sufficiently compelling that the mother's interests must be balanced against the child's. Both are recognized legal entities. Both are constitutionally protected interests.

What is significant in *Morgentaler* is simply this : that if a balancing of the interests of mother and child is necessary, then, assuredly, the unborn child is "someone" within the meaning of "everyone" accorded the "right to life" under section 7 of the *Charter*.

50. *Id.*, p. 75 and p. 480 (emphasis added).

51. *Id.*, p. 110 and p. 507.

52. *Id.*, pp. 111-112 and p. 508 (emphasis added).

What is unsatisfactory in the *Morgentaler* decision is the Supreme Court's failure to acknowledge the claim of the child *en ventre sa mère* to membership in the human family.

Like natives, women and black people, children yet unborn, from time to time, in many parts of the world, have been denied the right to life. Happily, a retrospective view of history presents a chronicle of the gradual irreversible assertion of the principles of equality to which all members of the human family, young and old, male and female, strong and weak, black and white and yellow and red may all make their claim as rightful heirs to life.

The winds of change are today evident in the United States. *Roe v. Wade* is tottering. It has been criticized by a growing number of jurists. Justice Blackmun recently predicted the reversal of *Roe v. Wade*. *The New York Times* of September 14, 1988, reported :

Justice Harry A. Blackmun, who wrote the 1973 decision overturning restrictive anti-abortion laws, indicated that the decision could turn on how faithful new Justice Anthony M. Kennedy is to the doctrine that courts do not disturb settled points of law.

The next question is, "Will *Roe v. Wade* go down the drain?" Justice Blackmun, 79, told a class of first-year law students at the University of Arkansas. "I think there's a very distinct possibility that it will, this term. You can count the votes."⁵³

In fifteen years, human perceptions in the United States have sharpened. Human violence is recognized and condemned wherever it may appear.

It would be ironical if, at the very time the United States jettisons the principles of *Roe*, Canada should adopt them.

C. COMPASSION AND OBLIGATION : ELEMENTS OF THE LAW

The treatment accorded to the weak, the disabled, the very old and the very young reflects the compassion and the sense of obligation of a society. A primitive society that possesses little knowledge of the nature of prenatal life cannot be expected to accord to the unborn who are unseen and unheard, the care and concern that are bestowed upon children once they are born.

But a highly civilized country, enriched by scientific knowledge that is capable of seeing and understanding and caring for the unborn as fully as it nurtures its more mature members, can not go about the business of killing the unborn as a matter of convenience. Neither can the civilized condone such a policy by claiming some higher freedom or some

53. *The New York Times*, September 14, 1988, p. A-24.

greater value that justifies tipping the scales of justice against the weak, the inarticulate, the friendless and the poor.

The claim of the child to occupy its mother's body for some 270 days in order that it may continue to live for many years thereafter, and the mother's claim for privacy and her right to demand that child's evacuation must find a balance. In our advanced society, it is both the mother and the unborn child within her who are deserving of consideration. Even more, they deserve that understanding and compassion of which Chief Justice Dickson spoke when he addressed the Faculty of Law's 1986 Convocation at the University of Toronto. On that occasion, the learned Justice said :

I deeply believe that general rules and principles are essential to the rationality and effectiveness of the legal system. Their ethical and moral force lies in their message of universality of treatment, their aid to legal certainty and their educative role in shaping responsible and disciplined human conduct in accordance with community standards.

There is [...] [an] [...] element of balancing that is required. It is the balance which must be struck between the rights and liberties which all Canadians value and the obligations or responsibilities which are the foundation for the proper exercise of those rights and liberties. It is common now for individuals to assert their rights and liberties; indeed, the *Canadian Charter of Rights and Freedoms* is a powerful and visible support for such assertions. But we all must recognize that there is another side of the coin : that we must have and manifest the qualities of discipline, responsibility and a sense of obligation — in short, we must retain a profound respect for the rights of others.

Take compassion, my focus for today — compassion is not some extra-legal factor magnanimously acknowledged by benevolent legal decision-makers. Rather, compassion is part and parcel of the nature and content of that which we call "law". Indeed, in my experience, compassion is often a key component giving direction to legal rules. It is the sparkle which shines through in a winning argument. It is, to use George Eliot's words, that "wide fellow feeling with all that is human". I believe it not only integral to justice through law, but as well, essential to a fulfilling, noble and committed life.⁵⁴

In his evidence at trial, Dr. Harley Smyth, the eminent neurosurgeon, dramatically discussed the medical profession's 3 000-year-old caring and compassion for the unborn child :

Q. What is the medical doctor's view generally held as to who is member of the human race, who is a *Homo Sapien*? A. Well, here I think we are referring to a tradition that is three millennia in age. There's a long standing cultural and professional tradition, and doctors, I think have always retained the view that there is no separation of personality and physique, that there is no just separation of soul and body to use older terms; that it is the integrated whole that we are and always have been, that has been the object

54. *Nexus*, University of Toronto, Faculty of Law Alumni Newsletter, Winter, 1987, pp. 10-11.

of the physician's care, and in that measure, physicians have remained classical moralists in that sense, although we are inarticulate moralists. We have held to a tradition which has stated something about human life. The Declaration of Geneva which may be said to be an updated and contemporary revision of that — of those principles contemplates the duty of the doctor to protect human life from the time of its conception until death.⁵⁵

Human perceptions, scientific knowledge that confirms those perceptions, mankind's sense of self—preservation, of our sense of morality, the common law, the civil law, the natural instincts of compassion, — that “wide fellow feeling with all that is human” — all of these move us to the irresistible conclusion that the child *en ventre sa mère*, as the youngest, the weakest, the most inarticulate member of the human family, cannot be denied the seminal right to life that section 7 of the *Charter* accords to *everyone*.

Otherwise what the youngest are denied today will be denied to the oldest and most inarticulate among us tomorrow.

55. Appeal Book, 1988, *Borowski* (Supreme Court of Canada) Vol. III, p. 482, 11.24–44.