ABORTION INJUNCTION VACATED:
Daigle v. Tremblay

A. Anne McLellan

On July 8, 1989 Chantal Daigle left her home in Chibougamau, Québec, with her brother, to drive to Sherbrooke, where she had made an appointment to have an abortion. As she began this trip, the purpose of which was intensely private, she had no idea that she soon would become, for both the pro-and anti-choice movements in Canada, symbolic of all that they believe to be wrong with the present state of the law regarding abortion. In a very few weeks, Chantal Daigle would go from being an unknown 21 year old to "newsmaker of the year"[1].

The "story" of Chantal Daigle is well known to everyone; her pregnancy, her failed relationship with Jean-Guy Tremblay, her decision to terminate her pregnancy, Tremblay's attempts to stop the abortion, the Québec courts' granting Tremblay's request for an injunction[2], her decision to have an abortion, in defiance of the order of the Québec Court of Appeal[3] and, finally, vindication from the Supreme Court of Canada when it allowed her appeal.[4]

This comment will focus primarily upon the decision of the Supreme Court of Canada, the result of which was rendered on August 8, but the reasons for which were released only on November 16, 1989. I will consider what, if anything, this decision adds to our knowledge and understanding of a women's right to choose to terminate her pregnancy, the rights of the foetus and the rights of fathers.

It should be pointed out that this case does not deal, strictly speaking, with "constitutional" issues.[5] The decision of the Supreme Court of Canada is an exercise in statutory interpretation, in particular, the interpretation of the Québec Charter of Rights and Freedoms. The task of the Court was to determine if the phrase "human being", as used in the Québec Charter of Rights and Freedoms, included a foetus. In answering this question, the Supreme Court of Canada relied primarily upon a consideration of the status of the foetus under the Civil Code of Québec.

The Supreme Court of Canada enumerated three arguments which were made by counsel for the Respondent, Jean-Guy Tremblay, to support the injunction: (1) that the foetus had a right to life under the Québec Charter of Rights and Freedoms; (2) that the Appellant, Chantal Daigle, would violate this right by having an abortion; (3) that an injunction was an appropriate remedy by which to protect this right.

Ultimately, the Supreme Court of Canada concluded that it needed to address only the first of these issues, since if there were no substantive rights of the foetus, upon which to base an injunction, it would be vacated. Therefore, two of the issues raised by the Appellant, in response to the Respondent's arguments, were never addressed by the Court; the appropriateness of the remedy of injunction, if the foetus were found to have rights of some sort, and the federalism argument, that an injunction would have the effect of prohibiting abortion, a matter within exclusive federal jurisdiction. The Court, exercising its characteristic judicial restraint[6], simply declared that it would answer no more questions than required to determine the appeal. Based on its decision that there were no substantive rights to justify the issuing of an injunction in the first place, the Court needed to go no further in its deliberations.

The Respondent argued that the substantive rights upon which an injunction could be based were: (1) that the foetus had a right to life, under the Québec Charter of Rights and Freedoms; (2) that the foetus had a right to life under the Canadian Charter of Rights and Freedoms; and (3) that the Respondent, as "potential father"[7], had a right to be heard in respect of decisions regarding his potential child.

It is the first of these three arguments to which the Supreme Court of Canada devotes most of its judgment. The Québec Charter guarantees that, "Every human being has a right to life... he also possesses juridical personality."[8] It should be pointed out that there is no reference in the Québec Charter to the foetus or foetal rights. In addition, the Court found no cases dealing with foetal rights under the Québec Charter.

Counsel for the Respondent made much of the linguistic interpretation of the phrase "human being", seemingly based on something akin to the plain meaning rule. The Respondent argued that "human" was in reference to the human race and that "being" related to the state of being in "existence", and that the foetus was included within both notions.

If this argument seems somewhat mechanistic and one-dimensional, do not be alarmed; the Court viewed it in much the same way. The Court makes it plain that the question which it was asked to resolve is a "legal" one, not a philosophical, theological, scientific or linguistic one,[9] although all might provide some assistance or background in resolving the "legal" issue. Indeed, the asserted linguistic approach would make strangely simple the most contentious of issues, that of the definition of human being. Questions of when life begins, and when a "life form" becomes a human

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being, are deeply divisive and morally difficult issues which cannot be resolved by reference to a dictionary.

Much was made of the differing uses of the words "human being" and "person" in the Québec Charter. It is only to human beings that the right to life is guaranteed. Persons are guaranteed other, and arguably, lesser rights, such as respect for their private life and peaceful enjoyment of their property. Although the Court makes no final decision on this issue, it appears likely that the choice of words was dictated by a desire on the part of the Québec National Assembly to make clear that only natural persons or human beings possess the right to life, while artificial persons, such as corporate entities, might assert and enjoy the other rights guaranteed.

The Supreme Court of Canada quite reasonably concluded that the Québec Charter displayed no clear intent on the issue of who was to be included within the term "human being". Indeed, as the Court pointed out, one would expect that on such a controversial issue, if the National Assembly had intended to include protection for the foetus within this term, they would have explicitly said so.

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Since the language of the Québec Charter displayed no clear intent on the meaning of the phrase "human being", the Court turned to the Civil Code to see if the provisions of the Code, or its interpretation, offered an answer to this definitional problem. The Court involved itself in a lengthy analysis of various provisions of the Code[10] and ultimately concluded that the Code "does not generally accord a foetus legal personality".[11] Indeed, the Court suggested that a foetus is treated as a person under the Civil Code only where it is necessary to do so, in order to protect its interests after it is born.

The Court found further confirmation for its interpretation of the Civil Code in Anglo-Canadian common law, in which it has been recognized generally that, to enjoy rights, a foetus must be born alive and have a separate existence from its mother.[12] It is interesting that in its survey of Canadian law, the Court refers to three recent cases involving foetal protection under provincial child welfare legislation. In two of these cases[13], the Courts found that the foetus was a "child" in need of protection. In the third case, that of Baby R[14], the B.C. Supreme Court concluded that a foetus was not a child, for the purposes of such legislation. This latter case is in line with English authority, which has reached the same conclusion under similar legislation[15]. While the Supreme Court offers no opinion on the merits of these conflicting authorities, it is not unreasonable to suggest that the Court feels some discomfort, and likely disagreement, with the above-noted cases, which interpreted "child" as including the foetus.

After this fairly lengthy exercise in statutory interpretation, the Supreme Court of Canada concluded that for the purposes of the Québec Charter of Rights and Freedoms, the term "human being" did not include a foetus.

The Court quickly dealt with the remaining two substantive rights arguments of the Respondent. The first of these was that the Canadian Charter of Rights and Freedoms provided the foetus with an independent right to life, under s.7. Yet again, the Supreme Court of Canada avoided answering this question.[16] The Supreme Court invoked its decision in Dolphin Delivery[17], in which it concluded that the Charter did not apply to private disputes. It should be remembered that the facts of this case involve Jean Tremblay seeking an injunction against Chantal Daigle, a matter which the Court describes as a private civil dispute. There was no law to which Tremblay could point, nor any government action, which created the asserted violation of s.7. However, there may be an argument involving government "inaction", which the respondent could have invoked. The argument would be that, by not legislating to protect the rights of the foetus, either the Québec National Assembly or the federal Parliament was violating the right to life of the foetus. This raises an issue of major significance in the interpretation of the Charter, that of whether the Charter can be construed as imposing positive obligations upon government to act, in certain circumstances.[18]

The s.7 Charter argument raised by the Respondent was preemptively discarded by the Supreme Court of Canada, on the basis that none of the counsel present chose to offer arguments challenging the correctness of Dolphin Delivery. Hence, the Supreme Court saw it as a "full answer" to the Charter argument. It is interesting to speculate as to whether the Supreme Court is indicating that it would be receptive to arguments, questioning the broad proposition stated in Dolphin Delivery that the Charter does not apply to so-called private disputes.

The Supreme Court of Canada concluded its assessment of the substantive rights arguments by briefly addressing the

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father's rights issue. The Respondent argued that, since he had played an equal part in the conception of the potential child, he should have an equal say in that which happened to it. The Supreme Court found no case law to support this proposition, the practical effect of which would be to provide a "potential father" with a veto over a woman's decision in relation to the foetus which she was carrying.

The Supreme Court of Canada declined to answer many of the interesting Charter questions raised in this appeal. Some of them are: (1) the rights of the foetus, if any, under s.7 of the Canadian Charter of Rights and Freedoms, an issue which the Court has successfully avoided in both this case and Borowski; (2) the balance that must be struck between a woman's right to liberty and security and the rights or interest of the foetus; (3) the rights, if any, of potential fathers; (4) the possibility that the Charter may give rise to positive obligations upon government to act, at least in certain circumstances, to protect guaranteed rights and; (5) the possibility that the Supreme Court will reconsider its decision in Dolphin Delivery, in relation to the application of the Charter to private disputes.

In some ways, this was an easy case for the Supreme Court of Canada. Undoubtedly, it was correct that the Québec National Assembly did not intend to extend protection to a foetus when it used the expression "human being" in s.1 of the Québec Charter. Therefore, if there is no right to life recognized for a foetus, in either Québec human rights legislation or the Civil Code, then the only alternative would appear to be the Canadian Charter of Rights and Freedoms. The Court was able to deny the Charter's application to these facts in three short paragraphs. Further, the right of the "potential father" to assert a claim over his unborn progeny, notwithstanding the objections of the mother, is a claim that has virtually no support in English, Canadian, and American law and hence could be dismissed with even greater speed and certainty.

What do we know at the end of that which the Supreme Court of Canada referred to as the "ordeal" of Chantal Daigle? Simply, that neither the civil law of Québec nor the common law of the other nine provinces, recognizes the right to life of a foetus. In the absence of either provincial or federal law recognizing such a right, a woman's right to seek an abortion seems clear. Fathers' rights, in this context, are viewed as nonexistent. Therefore, we can conclude that, until the federal Parliament, or a provincial legislature, attempts to place new restrictions upon a woman's right to control her body, there will be no further "ordeals", such as that endured by Chantal Daigle.[19]

A. Anne McLellan, Professor of Law, University of Alberta.

1. As described in Chatelaine, January, 1990.
2. An interlocutory injunction was granted against Daigle by Mr. Justice Viens of the Québec Superior Court, on July 17, 1989. An appeal from this decision was heard by the Québec Court of Appeal on July 20, 1989. It rendered its judgment on July 26, and in a 3-2 decision, denied the request of the Appellant to vacate the injunction.
3. In fact, the Québec Court of Appeal upheld the interlocutory injunction issued by Mr. Justice Viens. It stated, in part:
   > ... the Court grants the request for an interlocutory injunction, orders the Respondent to refrain, under threat of legal penalty, from having an abortion or taking recourse voluntarily to any method which directly or indirectly would lead to the death of the foetus which she is presently carrying.
4. During the summer recess, due to the urgency of the matter, five Justices of the Supreme Court of Canada heard the Appellant's application for leave to appeal, on August 1. Leave was granted the same day and the appeal was heard on August 8, before the entire Court.
5. There is a brief reference in the judgment to the inapplicability of the Canadian Charter of Rights and Freedoms. I suppose that if one views provincial human rights legislation as being of a "quasi constitutional" status, then, any interpretation thereof might be described as raising a "constitutional" question.
6. See Morgentaler (No.2), [1988] 1 S.C.R. 30; Borowski v. Canada [1989] 1 S.C.R. 342.
7. The language of "potential father" is that used by the Supreme Court.
8. Section 1 of the Québec Charter of Rights and Freedoms, R.S.Q., c.C-12. In addition, Section 2 of the Québec Charter states: "Every human being whose life is in peril has a right to assistance".
9. The question the Supreme Court had to answer was whether the Québec legislature had accorded the foetus personhood. I think the Court rightly suggests that classifying the foetus for the purpose of a particular law or for scientific or philosophical purposes may be fundamentally different tasks. The Court describes the ascribing of personhood to the foetus, in law, as a fundamentally normative task.
10. In particular, Civil Code of Lower Canada, arts. 18, 338, 345, 608, 771, 838, 945, 2543.
11. Unreported decision of the Supreme Court of Canada, File no. 21553, Nov. 16, 1989, at 23.
12. This view can be contrasted with that of Bernier, J.C.A., of the Québec Court of Appeal, where he states:
    > "He (the foetus) is not an inanimate object nor anyone's property but a living human entity distinct from that of the mother who bears him, ... and who from the outset has the right to life and to the protection of those who conceived him."
13. Re Children's Aid Society of City of Bellevile and T (1987), 590 O.R. (2d) 204 (Ont. Prov. Ct.); Re Children's Aid Society for the District of Kenora and J.L. (1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct).
14. Re Baby R (1988), 15 R.F.L. (3d) 225 (B.C.S.C.).
15. In Re F, [1988] 2 W.L.R. 128 (C.A.).
16. As it did in Borowski, supra, fn.6.
17. R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.
18. See generally, Slattery, Brian, "A Theory of the Charter", (1987) 2 Osgoode H.L.J. 701.
19. Indeed, the reason offered by the Court for continuing the hearing, after Daigle's counsel announced that she had obtained an abortion in defiance of the terms of the interlocutory injunction, was "so that the situation of women in the position in which Ms. Daigle found herself could be clarified". Technically, the issues raised in this appeal became moot upon Daigle obtaining an abortion.