Court File No. 25508

SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Manitoba)

B E T W E E N

WINNIPEG CHILD AND FAMILY SERVICES (NORTHWEST AREA)

Appellant
(Applicant)

and

G.(D.F.)

Respondent
(Respondent)

and

ALLIANCE FOR LIFE, ATTORNEY GENERAL OF MANITOBA, CANADIAN ABORTION RIGHTS ACTION LEAGUE, CANADIAN CIVIL LIBERTIES ASSOCIATION, THE CATHOLIC GROUP FOR HEALTH, JUSTICE AND LIFE, THE EVANGELICAL FELLOWSHIP OF CANADA AND THE CHRISTIAN MEDICAL AND DENTAL SOCIETY, GOVERNMENT OF YUKON, L'ASSOCIATION DES CENTRES JEUNESSES DU QUEBEC, SOUTHEAST CHILD AND FAMILY SERVICES AND WEST REGION AND FAMILY SERVICES and WOMEN'S LEGAL EDUCATION AND ACTION FUND

Interveners

FACTUM OF THE INTERVENOR, WOMEN'S LEGAL EDUCATION AND ACTION FUND

WOMEN'S LEGAL EDUCATION & ACTION FUND
415 Yonge Street, Suite 1800
Toronto, ON M5B 2E7

Sheilah Martin
Tel: (403)265-6500

Sharon McIvor
Tel: (250)378-6112

Solicitors for the Intervenor
Women's Legal Education and Action Fund

SCOTT & AYLEN
Barristers & Solicitors
Suite 1000

60 Queen Street West
Ottawa, ON
K1P 5Y7

Ottawa Agent for the Women's
Legal Education and Action Fund

TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

AND TO:

WOLCH, PINX, TAPPER, SCURFIELD
Barristers and Solicitors
1000-330 St. Mary Avenue
Winnipeg, Manitoba, R3C 3Z5

Tel. (204)949-1700
Fax (204)947-1593

Heather S. Leonoff, Q.C.
Counsel for the Appellant

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario, K2P 0A2

Tel. (613)236-9665
Fax (613)233-4195

Robert E. Houston, Q.C.
Ottawa Agents

PHILLIPS, AIELLO, BONI
Barristers and Solicitors
2nd Flr., 668 Corydon Ave.
Winnipeg, Manitoba, R3M 0X7

Tel. (204)949-7700
Fax (204)452-0922

David Phillips
Counsel for the Respondent

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario, K2P 0A2

Tel. (613)236-9665
Fax (613)233-4195

Robert E. Houston, Q.C.
Ottawa Agents

ALLIANCE FOR LIFE
410 Carlton on the Park
120 Carlton Street
Toronto, Ontario, M5A 4K2

Tel. (416)922-8611
Fax (416)922-1963

Angela Costigan
Counsel for the Intervener, Alliance for Life

GOWLING, STRATHY, HENDERSON
Barristers and Solicitors
2600-160 Elgin Street
Ottawa, Ontario, L1P 1C3

Tel. (613)232-1781
Fax (613)563-9869

Brian A. Crane, Q.C.
Ottawa Agents

EBERTS, SYMES, STREET & CORBETT
Barristers and Solicitors
9 Price Street, Suite 200
Toronto, Ontario, M4W 1Z4

Tel. (416)920-3030
Fax (416)920-3033

Beth Symes, Lucy McSweeney
Counsel for the Intervener, Canadian Abortion Rights Action League

OSLER, HOSKIN & HARCOURT
Barristers and Solicitors
50 O'Connor Street, Suite 1500
Ottawa, Ontario, K1P 6L2

Tel. (613)787-1004
Fax (613)235-2867

Patricia Wilson
Ottawa Agents

TORY, TORY, DesLAURIERS & BINNINGTON
Barristers and Solicitors
Suite 3000, Box 270
Toronto, Ontario, M5K 1N2

Tel. (416)865-7317
Fax (416)865-7380

John B. Laskin
Counsel for the Intervener, Canadian Civil Liberties Association

LANG, MICHENER
Barristers and Solicitors
Suite 300, 50 O'Connor Street
Ottawa, Ontario, K1P 6L2

Tel. (613)232-7171
Fax (613)231-3191

Eugene Meehan
Ottawa Agents

BARNES, SAMMON
Barristers and Solicitors
200 Elgin Street, Suite 400
Ottawa, Ontario, K2P 1L5

Tel. (613)594-8000
Fax (613)235-7578

BARNES, SAMMON
Barristers and Solicitors
200 Elgin Street, Suite 400
Ottawa, Ontario, K2P 1L5

Tel. (613)594-8000
Fax (613)235-7578

W.J. Sammon
Counsel for the Intervener, The Catholic Group for Health, Justice and Life

W.J. Sammon
Ottawa Agents

STIKEMAN, ELLIOTT
Barristers and Solicitors
Suite 5400, Box 85, Commerce Court West
Toronto, Ontario, M5L 1B9

Tel. (416)869-5602
Fax (416)947-0866

STIKEMAN, ELLIOTT
Barristers and Solicitors
Suite 914, 50 O'Connor Street
Ottawa, Ontario, K1P 6L2

Tel. (613)234-4555
Fax (613)230-8877

David M. Brown
Counsel for the Intevener, The Evangelical Fellowship of Canada and the Christian Medical and Dental Society

Mirko Bibic
Ottawa Agents

GOVERMENT OF YUKON
Office of the Deputy Minister
P.O.Box 2703
Whitehorse, Yukon, Y1A 2C6

Tel. (403)667-5412
Fax (403)393-6379

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario, K2P 0A2

Tel. (613)236-9665
Fax (613)235-4430

Thomas Ullyett
Counsel for the Intervener, Government of Yukon

Robert E. Houston, Q.C.
Ottawa Agents

COUSINEAU, PRIMEAU & ASSOCIES
Barristers and Solicitors
5800 St-Dennis, Bureau 1102
Montreal, Quebec, H2S 3L5

Tel. (514)948-6569
Fax (514)948-6582

NOEL et BETHIAUME
Barristers and Solicitors
111 Champlain
Hull, Quebec, J8X 3R1

Tel. (819)771-7393
Fax (819)771-5397

Hugues Letouneau
Counsel for the Intervener, L'Association Des Centres Jeunesse Du Quebec

Pierre Landry
Ottawa Agents

MYERS, WEINBERG, KUSSIN, WEINSTEIN & BRYK
Barristers and Solicitors
724-240 Graham Avenue
Winnipeg, Manitoba, R3C 0J7

Tel. (204)942-0501
Fax (204)956-0625

Jeffrey F. Harris
Counsel for the Intervener, Southeast Child and Family Services and West Region Child and Family Services

GOWLING, STRATHY, HENDERSON
Barristers and Solicitors
2600-160 Elgin Street
Ottawa, Ontario, L1P 1C3

Tel. (613)232-1781
Fax (613)563-9869

Henry S. Brown, Q.C.
Ottawa Agents

ATTORNEY GENERAL OF MANITOBA

GOWLING, STRATHY, HENDERSON
Barristers and Solicitors
2600-160 Elgin Street
Ottawa, Ontario, L1P 1C3

Henry S. Brown, Q.C.
Ottawa Agents

INDEX

I - STATEMENT OF FACTS

1. At the time of the most recent court order to confine D.F.G., she was a 22 year old aboriginal woman disabled by an addiction to solvents, poor, with three children already taken away by the Appellant, Winnipeg Child and Family Services ("C.F.S."/ "The Appellant"). She was first apprehended by C.F.S. in 1991, when she was sixteen years old and pregnant.

Affidavit of Marian Clement, sworn July 31, 1996
Case on Appeal at 32,33

2. A Winnipeg Social Services Department employee deposes that D.F.G. has "consistently refused all offers of service and she has consistently abused solvents throughout four pregnancies." The limited evidence available shows that D.F.G. sought and obtained treatment in 1991, 1994 and 1995 and that during this pregnancy she requested treatment before the end of the first trimester. She was told that St. Norbert, the request facility, did not have a bed for her and that there was a waiting list, generally of several months duration.

Transcript of Proceedings of August 3, 1996
Case on Appeal at 49,59,70

Excerpts from medical records - Exhibit 1
Case on Appeal at 80,85

3. The evidence indicated that D.F.G. went days without eating and smoked half a pack of cigarettes a day for many years.

Transcript of Proceedings of August 3, 1996
Case on Appeal at 68

Excerpts from medical records - Exhibit 1
Case on Appeal at 80

4. Two psychiatrists found that D.F.G. was fully competent and that she did not suffer from a mental disorder. The psychiatrist appointed under court order noted that she was most emphatic in refusing any form of psychiatric treatment, saying, "I'm not mental". In addition, she denied suicidal impulses at the time of the interview but acknowledged having felt like killing herself at some points during the court proceedings.

Report of Dr. Michael Eleff
Case on Appeal at 90,91

5. Despite this contrary evidence and even though the Agency's Statement of Claim does not mention the *Mental Health Act*, Mr. Justice Schulman found that D.F.G. suffered from a mental disorder and gave this as the first basis for his order; his second basis was said to be under the *parens patriae* jurisdiction. The precise terms of his order were as follows:

> THIS COURT ORDERS pursuant to the *parens patriae* jurisdiction of the Court of Queen's Bench that:
>
> a. The Respondent be committed to the custody of the Director of Child and Family Services;
>
> b. The Director of Child and Family Services will have the power to direct a course of medical and therapeutic treatment for the Respondent and to sign any consents necessary to effect such treatment.
>
> c. This Order remains in effect until the further order of the Court or until the Respondent's pregnancy is terminated or the birth of the child, which is expected on or about December 1, 1996, whichever event occurs first.
>
> *Interim Order of the Honourable Mr. Justice Schulman*, August 6, 1996
> Case on Appeal at 97

6. As explained in the Respondent's Factum, the hasty process did not allow for the full or adequate canvassing of relevant information.

Respondent's Factum, paras. 55-62

II - STATEMENT OF ISSUES

7. The Appellant is asking this Court to create a coercive regime under which judges would mandate how women conduct their lives and manage their pregnancies. Such a position requires radical departures from well established legal principle - departures which would infringe women's constitutional rights to equality and their equal right to life, liberty and security of the person. LEAF submits that there is no period in any woman's life when she is outside the protection of the *Charter*'s entrenched guarantees. In addition, the use of coercive powers to achieve positive health results has been thoroughly, consistently and appropriately criticized: the appropriate state focus is on maternal health, and force cannot achieve what the Appellant claims are its professed goals.

III - ARGUMENT

A. THESE ISSUES MUST BE ANALYZED AGAINST THE HISTORICAL AND CONTINUING INEQUALITY SUFFERED BY ABORIGINAL WOMEN

8. The significant feature of the case at bar, which must critically inform this Court's analysis, is not only that a pregnant women was subjected to an unprecedented, expansive court order designed to control her behaviour during pregnancy. It is also that an aboriginal woman has once again been objectified by a state intent on achieving its professed goals at the expense of her health, personal integrity and dignity. Therefore, LEAF submits that the following social and historical context is crucial.

9. Courts have acknowledged that aboriginal women face racial and sexual discrimination. *Native Women's Association of Canada, et al.* v. *Canada*, [1995] 1 C.N.L.R. 47 at 72 (S.C.C.)

10. Since their first contact with Euro-Canadians, aboriginal women have been treated as

discardable elements of aboriginal society. European "economic and cultural expansion was especially destructive" and undermined their role as equal partners in tribal society. The following quote, incorporated into the Report of the Aboriginal Justice Inquiry of Manitoba, is a powerful indictment of the systematic devaluing of aboriginal women:

> [The colonial portrayal of Indian women as] the squaw is one of the most degraded, most despised and most dehumanized anywhere in the world. The "squaw" is the female counterpart to the Indian male "savage" and as such she has no human face; she is lustful, immoral, unfeeling and dirty. Such grotesque dehumanization has rendered all Native women and girls vulnerable to gross physical, psychological and sexual violence... I believe that there is a direct relationship between these horrible racist/ sexist stereotypes and violence against Native women and girls.

A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Province of Manitoba, 1991) at 477 and 479

11. Aboriginal women have been stereotyped as "bad mothers" according to Western social constructions and norms. This has led to their punishment, including the loss of their children to welfare agencies. "First Nations women...do not always meet the dominant cultural and middle class expectations that constitute the ideology of motherhood."

M. Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's L.J. 306

Racine v. *Woods*, [1983] 2 S.C.R. 173

12. The use of alcohol, drugs or solvents has been a determining factor in finding aboriginal women to be "bad mothers" and, therefore, not deserving of the custody of their natural children.

Racine v. *Woods*, *supra*

13. Indian mothers have rarely been allowed to mother their children, losing them first to residential schools and then to the child welfare system. For years, Native children were seized by the Government and placed in Indian residential schools across the country. These schools eventually closed in the 1960s. However, in Manitoba,

> the child welfare system took its place. It could continue to remove Indian children from their parents, devalue Native customs and traditions in the process, but still act "in the best

> interests of the child." Those who hold to this view argue that the Sixties Scoop [the placement of aboriginal children with white families] was not coincidental; it was a consequence of fewer Indian children being sent to residential schools and of the child welfare system emerging as the new method of colonization.
>
> *Report of the Aboriginal Justice Inquiry of Manitoba*, supra, at 520

B. THIS COURT SHOULD NOT CREATE A NEW REGIME TO CONTROL PREGNANT WOMEN

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14. The issues raised by court-ordered interventions into pregnancy have ominous implications for the courts, far reaching consequences for all women, and special significance for aboriginal women. The state's desire to create a new regime under which it could take D.F.G. and other pregnant women into custody, confine and physically restrain them, dictate their conduct and mandate their course of medical treatment must be seen as a recent example of its long standing attempt to control women's sexual and reproductive lives. For aboriginal women in particular, the use of coercive powers against them is viewed as the next phase in government control over their mothering.

20

15. Those who seek to control the conduct of pregnant women invoke various means, from new criminal penalties; novel tort liabilities; the introduction or use of child protection powers to apprehend a fetus in utero; the forced medical treatment of the pregnant women, to the mechanism used here, of trying to obtain court orders by claiming a radically extended *parens patriae* jurisdiction.

> E.W. Keyserlingk, "The Unborn Child's Right To Prenatal Care (Part I)" (1982) 3 Health L. Can. 10
>
> E.W. Keyserlingk, "Clarifying The Right To Prenatal Care: A Reply To A Response"
30 (1983) 4 Health L. Can. 35
>
> J.A. Robertson, "Procreative Liberty and The Control of Conception, Pregnancy, and Childbirth" (1983) 69 Virg. L. Rev. 405
>
> J.A. Robertson, "Fetal Abuse" (1989) 75 A.B.A.J. 38

16. Court orders would be sought whenever the state or any other authorized agent fears that the fetus may be in jeopardy. Already there have been calls for controls if the woman has an unhealthy lifestyle, takes drugs, drinks alcohol, smokes cigarettes, experiences stress during pregnancy, suffers from an inadequate diet, is exposed to infectious disease, refuses to undergo surgery for the benefit of the fetus or is exposed to workplace hazards. Even though the range of targeted behaviours affect all women, such orders are likely to be sought against those women who are most disadvantaged.

E.W. Keyserlingk, "The Unborn Child's Right To Prenatal Care," *supra*

17. Court orders would involve compulsion, prior restraint, restrictions and limitations, post-birth sanctions and pre-birth seizures, would span the entire biological process of pro-creation from sexual intercourse through birth and could occur anytime between puberty and menopause. Courts would be asked to grant injunctions against certain acts being done or decisions being taken; to appoint guardians for the fetus; and to supervise orders where the fetus is permitted to remain where it is but legal custody is granted to a child welfare service. The court would tell women which procedures could be either lawfully undertaken or imposed, including mandatory medication, blood transfusions, surgical interventions, the force feeding of anorexic women and court ordered caesarean sections.

E.W. Keyserlingk, "Clarifying The Right To Prenatal Care: A Reply To A Response," *supra*, at 36

E.W. Keyserlingk, "The Unborn Child's Right To Prenatal Care (Part I)" *supra*, at 12, 32

18. The Appellant, itself a creation of statute, does not ask this Court to interpret the act, under which the Appellant derives its authority, to include pregnant women and fetuses under the term "child"; yet the Appellant seeks to exert the same powers it exercises in relation to children who have already been born. In *Baby R. Re.*, Mr. Justice MacDonnell of the British Columbia Supreme Court firmly closed the door to this type of argument when he held that a fetus was not a "child" within the relevant child protection act and that the superintendent in that case had no

jurisdiction to make a pre-birth apprehension order forcing an unconsenting woman to undergo a caesarean section. He stated:

> [The] powers of the superintendent to apprehend are restricted to living children that have been delivered. Were it otherwise, then the state would be able to confine a mother to await her delivery of the child being apprehended. For the apprehension of a child to be effective there must be a measure of control over the body of the mother. Should it be lawful in this case to apprehend an unborn child hours before birth, then it would logically follow that an apprehension could take place a month or more before term. Such powers to interfere with the rights of women, if granted and if lawful, must be done by specific legislation and anything less will not do.

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Baby R., Re. (1988), 15 R.F.L. (B.C.S.C.) 225 at 237

19. In this case, C.F.S. seeks to extend its jurisdiction in an even more indirect manner by making its claim solely under the court's *parens patriae* jurisdiction. For the same reasons recognized by MacDonnell J., but more so, the judiciary should decline this new common law jurisdiction and refuse to impose new, unique and unequal legal duties on pregnant women. The courts are ill equipped to supervise every aspect of a woman's daily life, to regulate behaviours which may otherwise be legal and to engage in what would amount to the systematic regulation of pregnant women.

20 *Watkin* v. *Olafson,* [1989] 2 S.C.R. 750 at 760, 761
Appellant's Book of Authorities, Vol. II, Tab 14

N. Rhoden, "The Judge in the Delivery Room: The Emergence of Court-Ordered Caesareans" (1986) 74 Cal. L. Rev. 1951

Note, "Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of 'Fetal Abuse'" (1988) 101 Harv. L. Rev. 994

20. In addition, courts are obliged to act in a way which conforms with the guarantees in the

30 *Canadian Charter of Rights and Freedoms.*

R. v. *Swain*, [1991] 1 S.C.R. 933

Dagenais v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835

Slaight Communications Inc. v. *Davidson*, [1989] 1 S.C.R. 1038

Hill v. *The Church of Scientology*, [1995] 2 S.C.R. 1130

C. COURT ORDERS DIRECTING PREGNANT WOMEN WOULD REQUIRE MANY RADICAL DEPARTURES FROM EXISTING PRECEDENTS, EACH OF WHICH WOULD INFRINGE WOMEN'S CONSTITUTIONALLY ENTRENCHED EQUALITY RIGHTS

21. The Appellant would like this Court to believe that the types of interventions and court orders it proposes would merely extend the law in small, incremental and necessary ways. C.F.S. proposes a regime which it claims would be procedurally fair, and used only in exceptional circumstances and in the clearest of cases. However, this is not the case: the radical nature of the infringements and departures it invites cannot be sheltered by gentle language, shifting categories or the pretense of reasonableness and balance. The Appellant is forced to contort and move between various legal principles in different areas of law because it cannot find support in any and its position grossly underestimates women's constitutional rights. To accept the Appellant's argument would require this Court to ignore equality rights and make radical changes in the law regarding: the time at which legal rights vest, the proper application of the *parens patriae* jurisdiction, the established right to refuse medical treatment and the fundamental principles of tort law. LEAF submits that the Manitoba Court of Appeal was correct when it determined that such orders were unavailable and inappropriate.

Decision of the Manitoba Court of Appeal
Case on Appeal at 123-137

22. Established case law is clear: the fetus is not a "person" in law while it remains part of the mother. In *Daigle* v. *Tremblay* this Court decided that an unborn fetus had no separate legal rights under the *Quebec Charter*, the civil law or the common law.

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

R. v. *Sullivan*, [1991] 1 S.C.R. 489 at 502-503

23. LEAF submits that any change from the historically recognized and recently reaffirmed

rule that legal rights vest at birth would be ill-advised because only at birth does the live infant become individuated and capable of entering into the type of social relationships with others which are the proper province of law.

M. A. Warren, "The Moral Significance of Birth" in Holmes and Purdy, Eds., *Feminist Perspectives in Medical Ethics* (Bloomington: Indiana University Press, 1992) 198 at 207

24. Second, and more significant, the acceptance of birth as the defining moment of legal personhood is the only position which is consistent with, let alone protective of, women's equality rights. If the bright line test that legal rights vest at birth is abandoned, this Court would need to weigh two full sets of allegedly competing rights which exist within the one body of the pregnant woman. This type of rights-based analysis would transform what was once within the woman's domain into a new, adversarial and unwarranted form of maternal-fetal conflict.

S. Rodgers, "Fetal Rights and Maternal Rights: Is There a Conflict?" (1986) 1 C.J.W.L. 456

J. Gallagher, "Prenatal Invasions and Interventions: What's Wrong with Fetal Rights" (1987) 10 Harv. W.L.J. 9
Appellant's Book of Authorities, Vol. III, Tab 20

D.E. Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection" (1980) 95 Yale L. J. 599
Appellant's Book of Authorities, Vol. III, Tab 24

25. That legal rights vest at birth must apply in all cases. The fetus does not obtain any further rights if the woman has decided to carry the pregnancy to term. Consent to the continued pregnancy, if it exists, does not translate any moral obligation a woman may have towards her fetus into an irrevocable conferral of legally enforceable fetal rights, to be used against her to mandate her conduct. The woman's decision not to abort is in no sense a forfeiture of her rights, an estoppel by conduct or a private grant of legal status. Individuals are not free to contract out of human rights protections and for inviolability to be secondary to *volens* in tort there must be proof that the person has abandoned legal claims and not just assumed factual risks.

Insurance Corp. Of British Columbia v. *Heerspink et al.*, [1982] 2 S.C.R. 145

Dube v. *Labar*, [1986] 1 S.C.R. 649

F, In Re.(in utero), [1988] W.L.R. 1288 (Eng. C.A.)

26. The Manitoba Court of Appeal was correct when it observed that there is a difference between the scope of the *parens patriae* jurisdiction and those who can claim under it. The court's *parens patriae* power over minors only begins following the child's birth. It does not give the court jurisdiction over the pregnant woman. The court can only exercise its *parens patriae* jurisdiction over an adult where there is a finding of mental incompetence and then only for the benefit of the patient.

Decision of the Manitoba Court of Appeal, supra, at 127

10 *F, In Re. (in utero)*, supra

27. The Appellant does not explain how court orders like that of Schulman J. can co-exist with the long standing common law rule that any unconsented touching is a battery.

Reibl v. *Hughes*, [1980] 2 S.C.R. 880

28. This deficiency is all the more fundamental because the right of a mentally competent person to refuse any type of medical treatment was elevated to constitutional status by the Ontario Court of Appeal:

> The common law right to bodily integrity and personal autonomy is so entrenched in the
> 20 traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s.7. Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.

Fleming v. *Reid* (1991), 82 D.L.R. (4th) 298 at 312 (Ont.C.A.)

29. LEAF submits that consent to medical treatment is not only encompassed in a pregnant
30 woman's equal right to "security of the person", but that pregnant women are constitutionally entitled to the equal benefit and protection of these laws.

Rodriguez v. *B.C. (A.G.)*, [1993] 3 S.C.R. 519 at 588-589
Appellant's Book of Authorities, Vol. II, Tab 12

30. The right to refuse medical treatment, even during pregnancy, exists for all forms of treatment, even if it is absolutely guaranteed to benefit the pregnant woman, the fetus or anyone else. Such a cornerstone right should not be denied to women in any case, let alone in circumstances where causation and projected outcomes are complex, interrelated and largely unknown. In *Re. A*, Justice Steinberg refused to grant an order under the *parens patriae* power forcing a pregnant woman to undergo medical procedures.

A, Re. (1990), 28 R.F.L. (3d) 288 at 298 (Ont. U.F.C.)

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31. Any finding that a pregnant woman owes a duty of care to the fetus she carries would involve a radical shift in tort theory and a fundamental reformulation of tort remedies. The loose use of duty of care language should not allow the state to control the conduct of the pregnant women in an immediate and prospective sense without proof of causation or actual harm, where the scope of potential liability is exceptionally broad and where there are strong policy reasons why the unique relationship between a woman and her fetus does not create a legal duty of care. Suits taken by children against third parties for damage caused *in utero* reinforce a woman's bodily integrity by providing an additional deterrent to negligent intrusions on her body and should not be used as precedent for obligations which would detract from that integrity and infringe her
20 equality.

Watt v. *Rama*, [1972] V.R. 353 (S.C.)

Duval et al. v. *Seguin*, [1972] 1 O.R. 482

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

J. Kahn, "Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus-Is this a Mother's Crime?" (1987-88) 53 Brooklyn L. Rev. 807

30 D.E. Johnsen, "A New Threat to Pregnant Women's Autonomy" (1987) Hasting Centre R. 33

D. THIS COERCIVE REGIME WOULD INFRINGE WOMEN'S CONSTITUTIONAL RIGHTS IN AN UNPRECEDENTED WAY

32. This Court is being asked to create a new and sex-specific form of legal liability which would infringe women's constitutional rights in unjustifiable ways. The Appellant mentions women's right to privacy and autonomy as the last of four reasons cited against a coercive regime and downplays the number and nature of the rights at stake. The Appellant's factum never mentions the constitutionally entrenched equality rights of women: a frank admission that there is no place for women's equality rights in the coercive regime it advances. The *Charter* rights of women are, however, much more important: they are more numerous, broader in scope, deeper in content and must be used as the prism through which this Court determines whether it should create new legal liabilities for pregnant women.

33. The *Charter of Rights* is an instrument intended by its framers to relieve against disadvantage. Accordingly, LEAF submits that when applying sections 15, 28, and 7, this Honourable Court should recognize that all women, including aboriginal women who suffer poverty and addiction, are entitled to the full amplitude of life, liberty, security of the person, and equality. Bearing children creates no exceptions to these rights for women and no burdens upon them; there is no period in any woman's life when she is outside the protection of *Charter* guarantees.

34. Court orders mandating the conduct of women during pregnancy would infringe substantive equality rights in at least two principal ways. First, such invasions would qualify as sex discrimination because they create the type of sex-specific burden which reinforces limiting cultural stereotypes and further entrenches existing inequalities. Second, as this case illustrates, these state powers will likely be used with disparate impact against women who are also disadvantaged by race, poverty, addiction, national original or language, characteristics also protected under section 15.

M. Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a

Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law" (1994) II Rev. of Constitutional Studies 76

35. Sections 15 and 28 of the *Charter* establish sex equality as a pre-eminent constitutional value. The attainment of substantive equality for women, as for other persons protected under section 15, requires close attention to the historical and social contexts which have operated to oppress them. This attention is especially important in any discussion of women's role in procreation, because there exists a powerful temptation to see women's "difference" solely in terms of biology, thus determined, and therefore justifying unequal treatment.

36. LEAF submits that the proper approach to analyzing women's reproductive equality is to move the focus from biological difference to a recognition that procreation is socially gendered and that pregnancies occur within a context of sex inequality. The coercive powers sought by the Appellant during pregnancy originate and would be applied within this context of social inequality.

37. Historically, and in many ways continuing today, women's role in childbearing has provided the main pretext for women's social and legal disadvantage. Examples include patronizing and cruel obstetrical and gynecological practices; restrictions on pregnant (or married) women's employment on grounds of alleged danger to the fetus; purported incapacity of pregnant women; exclusion from the public domain; criminalization of birth control technology and information; and criminal prohibitions on abortion. In the past, and perhaps even on the facts of this case, women were often valued only when pregnant and even then the fetus was valued more.

38. The social context of inequality has also denied women control over the reproductive uses of their bodies, because of social learning, lack of information, inadequate or unsafe contraceptive technology, social pressure, custom, poverty and enforced economic dependence, sexual force and ineffective enforcement of laws against sexual assault. As a result, women often do not control the conditions under which they become pregnant. The Appellant would extend this inequality to a loss of control by women over the terms under which they remain pregnant and deliver their

children.

39. The statement in paragraph 54 of the Appellant's factum that "the biological reality is that any attempt to protect the fetus throughout court intervention, must entail a restriction on the rights of the mother," amounts to a biologically-determined argument for discrimination. Such a conclusion cannot be supported on any purposive or rational analysis of equality. If the Appellant's argument is correct, then an immutable characteristic - the ability to become pregnant - justifies imposing disadvantageous treatment in law. It is precisely this type of reasoning which was so criticized following the decision in *A.G. Can.* v. *Bliss*.

A.G. Can. v. *Bliss*, [1979] 1 S.C.R. 183

Brooks v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219

40. This Court is not precluded from finding sex inequality when a court imposes special burdens on women as the sex which physically reproduces the species.

R. v. *Hess and Nguyen*, [1990] 2 S.C.R. 906

41. What the Appellant asks this Court to do, whether implicitly or by design, is to create a coercive regime under which pregnant women - on pain of serious consequences to their liberty, physical integrity and equality - will be subject to greater burdens than men and non-pregnant women, *because* they are pregnant. LEAF submits that this amounts to a demand for state-imposed sex discrimination.

W. Black & L. Smith, "The Equality Rights" in E. Mendes & G. A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed. (Toronto: Carswell, 1996) 14-1 at 14-70

42. This Court has properly recognized the extent and significance of the social disadvantage experienced by women in the context of reproduction, and in particular has held that disadvantaging women on the basis of pregnancy is discrimination on the basis of sex. LEAF asks this Court to uphold this jurisprudence and to recognize its application to the case at bar.

Brooks v. *Canada Safeway Ltd.*, *supra*

Symes v. *Canada*, [1993] 4 S.C.R. 695

43. In a sex-equal society, to which the *Charter* compels us, the mere fact that women become pregnant cannot be the excuse and justification for their disadvantageous treatment in law. Rather, women's procreative functions must be seen as an aspect of their basic humanity, worthy of "equal concern, respect and consideration". Respect for pregnant women's sex equality prohibits state-sanctioned interference with their physical being and their authority to make prenatal caretaking decisions. Women's equality precludes the coercion that results when the state manages women's pregnancies by court order.

Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143

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44. Substantive equality also demands an approach inclusive of all perspectives to ensure that the impact of the law is neither less beneficial nor more burdensome to disadvantaged groups. As the Chief Justice stated in *Rodriguez*:

> [T]o promote the objective of the more equal society, s.15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.

Rodriguez v. *B.C. (A.G.)*, *supra*

20 45. American studies show that in contrast to the general distribution of all caesarean sections performed, caesarean sections performed pursuant to court order are disproportionately directed to low-income and minority women. One study indicated that 88% of cases where court ordered obstetrical procedures were sought involved Black, Hispanic or Asian women. Forty-four percent were unmarried, and 24% did not speak English as their primary language. All the women were treated in a teaching-hospital clinic or were receiving public assistance.

> I.J. Chasnoff, H.J. Landress, & M.E. Barrett, "The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida" (1990) 322 New England J. Medicine 1202

30 J.A. Daniels, "Court-Ordered Cesareans: A Growing Concern for Indigent Women" (1988) Clearinghouse Rev. 1064

V.E.B. Kolder et. al., "Court-Ordered Obstetrical Interventions" (1987) 316 New Eng. J. Med. 1192
Appellant's Book of Authorities, Vol. III, Tab 25

D. Roberts, "Punishing Drug Addicts Who Have Babies: Women of Colour, Equality, and The Right of Privacy" (1991) 104 Harv. L. Rev. 1491

46. The same pattern of selective identification on the basis of multiple disadvantage has already emerged in Canada. It is to be expected that C.F.S. would watch their "clients" more closely and aboriginal women are therefore much more likely to lose their children to child welfare agencies than are non-aboriginal women.

S. Rodgers, "Juridical Interference with Gestation and Birth" in Royal Commission on New Reproductive Technologies, *Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood (Vol. 4)* (Ottawa: Ministry of Supply and Services Canada, 1993) 1

T.B. Dawson, "*Re Baby R.*: A Comment on Fetal Apprehension" (1990) C.J.W.L. 265

A.McGillivray, "Therapies of Freedom: The Colonization of Aboriginal Childhood" in A. McGillivray, ed., *Governing Childhood* (Dartmouth Press: Aldershoot, 1996) 135

47. Not only will certain women be more readily identified as requiring regulation, even the choice of activity targeted for intervention will likely have class and race implications.

P. Jos et al., "The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale" (1995) 23 J. of Law, Medicine & Ethics 120

Kaweionnehta Human Resource Group, *First Nations and Inuit Community Youth Solvent Abuse Survey and Study*, October, 1993

48. In applying all parts of section 15 this Court has repeatedly noted that the use of improper stereotypes infringes equality rights and fosters discrimination. In *E. (Mrs.)* v. *Eve* this Court refused to use its discretion under the *parens patriae* jurisdiction over mentally incompetent adults to authorize a sterilization procedure for non-therapeutic purposes. Mr. Justice La Forest warned that decisions involving "the deprivation of a basic human right, namely the right of a women to reproduce" should not be taken on the basis of stereotypes which treat certain people as less than

human.

E. (Mrs.) v. *Eve*, [1986] 2 S.C.R. 388 at 431

49. Similarly, in *Stallman* v. *Youngquist*, the Supreme Court of Illinois recognized the invidious role social constructions and stereotypes would play if a court imposed a broad duty of care on pregnant women in tort law owed to the fetuses they carry. The individual woman would be deprived of an individualized standard for her conduct, subordinating constitutional rights to accountability based on the social norms set for the "reasonable" woman. The absence of any clear objective standard of due care during pregnancy would create the danger that "prejudicial and stereotypical beliefs about the reproductive abilities of women" might improperly affect determinations about liability. In addition, disparities in wealth, education and access to health services would be additional barriers to the formulation and application of any fair standard.

Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.R. 2d 355 (1988)

50. Historical biases continue to operate at many levels in a case of this kind. At its worst, individuals are assigned to a group and then special categories of socially constructed difference are invoked in an attempt to explain prejudicial treatment and justify force. The result is to further devalue the rights of already marginalized people. It is this thought process which leads some people to equate a pregnant woman's refusal to follow the orders of doctors or social workers with mental incompetence. In this case, the devaluation resulted in D.F.G. feeling so powerless and alienated during the court proceedings that she contemplated suicide. If pregnant women have been historically and socially devalued, an aboriginal woman who is solvent addicted and poor has been marginalized to the point where some people redefine coercion and force as help and care.

Reasons for Decision of the Honourable Mr. Justice Schulman
Case on Appeal at 109

51. Section 15 of the *Charter* is required because inequalities exist. The Appellant's justification for state control over this pregnant woman ignores the historical, social, systemic and multiple forms of discrimination she has suffered. C.F.S. tries to focus on D.F.G.'s individual

behaviour in isolation, and then only incompletely and selectively, and tries to create the sentiment that because D.F.G. refused to help herself then the state must do something to her. However, an equality rights analysis means that her social context, group affiliation and various sources of disadvantage must be considered. In stark contrast to the purpose of section 15, the regime proposed by the Appellant invites coercive intervention based on indicia of inequality. Factors such as race, poverty and addiction cannot excuse or hide discrimination on the basis of pregnancy, especially because they often exist in combination and compound the inequality. Equality rights are not to be withheld on the basis of the disadvantage against which they are intended to protect.

52. It may be suggested that intervention in aboriginal women's pregnancies are justified under an aboriginal world view. LEAF cautions this Court to not formulate any separate but unequal rule for aboriginal women based on such a claim. There is insufficient evidence to establish a single aboriginal worldview. There is an abundance of literature which suggests that a First Nations worldview is not one of force and coercion, but one of balance. A mother and child are not dealt with separately as two individuals with opposing rights, but as equal members of a community. There exist other views that, traditionally, women were valued for their contribution to the fetus and child:

> The structure of First Nation's society is based on cooperation and consensus. When difficulties arise within a community, the community responds by attempting to bring the person who is the source of the difficulty back into the community.
>
> P. A. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 C.J.W.L. 1 at 6

53. The value of aboriginal women to their communities has been re-emphasized in a recent national report. The Royal Commission on Aboriginal Peoples wrote that aboriginal people themselves felt a need to restore "traditional Aboriginal values of respect for women and children and reintegration of women into family, community and nation decision making."

> Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights From The Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of

Supply and Services Canada, 1996) at 68

54. Manitoba Aboriginal Child Care Agencies are not agencies developed and directed by aboriginal communities, and cannot be looked upon to express a universal aboriginal worldview.

> [T]he Provincial governments hold legal power over the Child and Welfare system... First Nations child care agencies are responsible to the Director of Child and Family Services. The final authority is the Provincial Minister of Child and Family Services...
>
> *Report of the First Nations Child and Family Task Force* (Winnipeg: First Nations Child and Family Task Force, 1993) at 30

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> A.McGillivray, "Therapies of Freedom: The Colonization of Aboriginal Childhood," *supra*

55. Any focus on community and responsibility cannot be translated into a cultural licence for coercion against pregnant aboriginal women, either generally or in a particular case. Such state action would be premised upon racist attitudes which perpetuate demeaning stereotypes of aboriginal women.

56. While historical and contemporary legal treatment of aboriginal women has meant that
20 Canadian laws treat them unequally compared to other Canadian women, state mandated coercion and confinement of aboriginal women for forced treatment during pregnancy to protect the fetus is no less offensive than mandating such treatment for non-aboriginal women.

57. Finally, LEAF submits that section 35(4) of the *Constitution Act, 1982* provides that any conflict between sex equality rights and aboriginal culture must be resolved in favour of sex equality rights.

> *Sawridge Band* v. *Canada*, [1995] 4 C.N.L.R. 121 [F.C.T.D.]

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E. WOMEN'S EQUAL RIGHT TO LIFE, LIBERTY AND SECURITY OF THE PERSON

58. The Appellant admits that the restraints sought to be imposed on D.F.G. breach her liberty and security interests and interfere with her autonomy and privacy. Women's bodies, as well as their rights, are at stake when the state takes reproductive control away from women and gives it to someone else. Section 28 of the *Charter* requires that women receive equal section 7 rights, meaning that this Court is required to consider how the whole person is more than the maternal body and that the state's intrusions would be directed against socially disadvantaged women.

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59. The procedures outlined by the Appellant do not come close to the safeguards required by the principles of fundamental justice.

F. THE LEGAL PRINCIPLES WHICH THE APPELLANT ASKS THIS COURT TO CREATE CANNOT BE SAVED UNDER SECTION 1 OF THE CHARTER

60. Given that the Appellant admits that its proposed scheme will *prima facie* offend the
20 *Charter* - although the Appellant fails to recognize the full extent of the rights violations - the Appellant has failed to discharge the burden of proof imposed by section 1 of the *Charter*. LEAF submits that the Appellant has not and cannot establish that the coercive regime it advocates is a reasonable and justifiable limit, prescribed by law, acceptable in a free and democratic society.

(1) Overview

61. A common law rule which offends the *Charter* will not be afforded the same degree of
30 deference under section 1 as will a statutory provision:

> In cases where legislative provisions have been challenged under s.52(1) of the *Constitution Act, 1982*, this Court has been cognizant of the fact that such provisions are enacted by an elected body which must respond to the competing interests of different groups in society and which must always consider the polycentric aspects of any given

> course of action. For this reason, the Court has indicated that Parliament need not always choose the absolutely least intrusive means which impair the *Charter* rights as little as is reasonably possible. However, as was indicated above, in cases where a common law, judge made rule is challenged under the *Charter*, there is no room for judicial deference.

There should be even less willingness to entertain the Appellant's request to depart from established common law rules to establish a new regime which denies women's section 15 entitlements.

R. v. *Swain*, *supra*, at 983.

62. The Appellant argues that the state has a pressing and substantial interest in fetal health such that women can be forced to refrain from activities which the court believes have no substantial value to her well being or right of self-determination and which have the potential to cause grave and irreparable harm to the fetus. LEAF submits that every aspect of the Appellant's proposed scheme is fundamentally flawed: it is wrong in principle, unworkable in practice, irrational, disproportionate, overbroad and vague.

63. There is no principled way to decide what conduct will trigger the extraordinary powers sought by the Appellant. The tests proposed by the Appellant are internally inconsistent and would cover a vast array of women's daily behaviour. The suggested procedural safeguards are wholly inadequate given the extent of the rights deprivation.

(2) The Appellant has not Properly Established that the Objective is Pressing and Substantial

64. LEAF agrees that promoting the health of women and their fetuses is a valid state objective. However, the Appellant has not properly established this objective.

65. The Appellant continues to set up the false dichotomy of its maternal-fetal conflict model when it tells this Court that the state has a separate interest in the fetus and that this Court must select between the lesser of two evils. During a pregnancy which will not result in abortion, LEAF

submits that the state's interest needs to be in relation to maternal health.

66. The Appellant attempts to rely on dicta from *R.* v. *Morgentaler* to show that the state has an interest in fetal life. The particular comments cited were made in the context of an infringement of section 7 of the *Charter*, and in relation to a woman's decision to terminate a pregnancy, a situation in which a choice is required. However, LEAF submits that other considerations apply when the interest asserted relates to the different matter of fetal health, especially since such an interest would require the court to scrutinize and potentially control every aspect of a woman's daily life for nine months, and perhaps even longer.

Appellant's Factum, para. 57

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67. It is difficult to accept C.F.S.'s professed objective of healthy children when the multifaceted nature of the problem is not appreciated and appropriate treatment and educational programs are unavailable. C.F.S. should not be able to argue that coercion against individual women is now necessary because the government of Manitoba has failed in its duty to provide adequate services.

(3) The Appellant's Coercive Regime is Not Rationally Connected to the Professed Goal of Healthy Fetal Outcomes

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68. Assuming the Appellant had properly established a pressing and substantial state objective, the Appellant's course of action is not carefully designed to meet this objective. There is no evidence that, prior to seeking coercive powers by filing the statement of claim in the instant case, the Appellant undertook any form of community consultation on the utility of judicial interventions or engaged in any systematic planning. As explained fully by the Intervener Women's Health Rights Coalition ("the Coalition"), the Appellant is wrong when it asserts that the only way to improve maternal health is by force, either generally or in this case.

30 69. To the contrary, the regime proposed by C.F.S. is irrational because there is no fit between

the coercive means and the partial ends: the goal of healthy babies cannot be achieved by selective force. LEAF adopts the Coalition's argument that the overwhelming weight of authority among the helping professions is that coercive or mandatory orders for treatment of pregnant addicts are ill-advised and will not improve maternal health and fetal outcomes. Women will not seek medical care and the trust required in the patient-doctor relationship will be undermined by inter-agency reporting. The effects will be most acute for those women whose lives are already subject to forms of state control and intervention and who fear further incursions. The number of women who have such fears will increase exponentially if the state is granted the exceptional powers it seeks. Coercive interventions may result in isolated cases in some improved fetal well-being; however, the overall impact of coercive orders will be the exact opposite of what they were purportedly designed to achieve.

> The Center for Reproductive Law and Policy, "Punishing Women for their Behaviour During Pregnancy: An Approach That Undermines Women's Health and Children's Interests" (New York: New York Center for Reproductive Law and Policy, 1996)
>
> L. Gostin, "Waging a War on Drug Users: An Alternative Public Health Vision" (1990) 18 Law, Medicine, & Health Care 385

70. C.F.S. has supplied little or no evidence proving what harm it believes is attributable to particular conduct. Even when dealing with substances, the use of alcohol is equated with the use of solvents. There is also a weak attempt to separate both of these from smoking and poor nutrition. Given the importance of basic nutrition to maternal and fetal health and the known harms of smoking, there is no reason why such behaviours are not also caught by the test C.F.S. proposes.

71. Finally, the absence of a rational connection is evidenced by the lack of treatment and services for pregnant women. Courts will be asked to confine pregnant women to places of safety which, for the most part, do not exist.

(4) Far From Meeting the Standard of Minimal Impairment, the Appellant's Coercive Regime Mandates Serious Violations of Sections 7 and 15 of the Charter

72. Far from being a minimal impairment, the detention of a woman for the purpose of modifying her lifestyle is the most intrusive means of trying to influence her conduct.

73. A law will offend section 1 by reason of overbreadth or vagueness if its means are broader than necessary to attain the objective, with the result that, in some applications, the law is arbitrary or disproportionate.

10 *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606

R. v. *Morales*, [1992] 3 S.C.R. 711

R. v. *Heywood*, [1994] 3 S.C.R. 761

74. The powers sought by C.F.S. are overbroad, disproportionate and arbitrary. Despite the Appellant's professed desire to limit the scope and application of its test, the test allows the state to intervene in exceptionally broad circumstances:

20 • If the aim is to avoid potential harm to the fetus, a woman could be detained for the purpose of forced medical intervention designed for the benefit of the fetus;

• If the aim is to avoid potential harm to the fetus, a woman could be detained for smoking;

• If the aim is to avoid potential harm to the fetus, a woman could be scrutinized regarding such decisions as whether to seek genetic testing or follow genetic counselling, or whether to continue working where there may be exposure to chemicals or other hazards;

• If the aim is to avoid potential harm to the fetus, women will necessarily detained whose
30 circumstances include poor nutrition, or who are perceived by health care professionals to not comply with doctors' orders during pregnancy.

S. Rodgers, "Judicial Interference with Gestation and Birth", *supra*

K. Moss, "Substance Abuse During Pregnancy" (1990) 13 Harv.W.L.J. 278

L. J. Nelson et. al., "Compelled Medical Treatment of Pregnant Women: Life, Liberty, and Law in Conflict" (1988) 259 J.A.M.A. 1061

75. The test proposed by the Appellant is also vague. The discretion to be conferred on judges would not clarify or limit these irrational and overbroad powers: they envisage a constitutionally impermissible "standardless sweep". Although the comments below were made in relation to section 7 of the *Charter*, LEAF submits that they are also relevant to a section 1 inquiry:

> I am also unable to accept the submission of the intervenor the Attorney General for Ontario that the doctrine of vagueness should not apply to s. 515(10)(b) because it does not authorize arbitrary practices by law enforcement officials but rather merely authorizes judicial discretion. A standardless sweep does not become acceptable simply because it results from the whims of judges and justices of the Peace rather than the whims of law enforcement officials. Cloaking whims in judicial robes is not sufficient to satisfy the principles of fundamental justice.

R. v. *Morales*, *supra* at 729

76. C.F.S. did not provide sufficient medical evidence to support its bid for such an invasive judicial order. In such hasty proceedings, courts may be invited to defer inappropriately to certain medical opinions. Doctors will be asked to form their opinion with similar speed; their testimony will often be untested by cross-examination and unchallenged to the extent that there is insufficient time for the respondent woman to present contrary medical research. Medical opinion may also be coloured by physicians' personal beliefs or a desire to avert any potential legal liability.

77. There are limits to modern knowledge and medical diagnosis. If this case had occurred twenty-five years ago the facts may have been these:

> J., a diabetic, refused her DES treatment, prescribed as especially important in the prevention of miscarriage among diabetics. Further, although she was eleven pounds overweight at the time of the conception she refused to limit her weight gain over the course of her pregnancy to under thirteen pounds. She compounded the problem by not

taking the diuretic prescribed and twice refused to show up for scheduled X-rays, citing an irrational distrust of medication and radiation.

B. K. Rothman, "When A Pregnant Woman Endangers Her Fetus: Commentary" (1986) 16:1 Hastings Center Report 25

(5) There is no Proportionality Between the Proposed Regime and the Rights Violations which will Result; In Fact the Regime will Impact Disproportionately upon Women who are Most Disadvantaged

78. Judicial orders will most likely be sought and enforced in a highly discriminatory and selective manner. Broad powers will be threatened against many, but primarily invoked against those who are most powerless to resist state sanctioned force. Such powers are disproportionate in two ways: they capture too wide a range of conduct; and they adversely impact on members of a particular group.

79. For all of the above reasons, coercive interventions have been thoroughly, consistently and appropriately criticized. The Royal Commission on New Reproductive Technologies, after extensive research and public consultation, concluded in the strongest of terms that there should be no judicial intervention into pregnancy. The Assembly of Manitoba Chiefs and the Aboriginal Nurses Association focus on education and treatment; they do not list judicial intervention as an option even in extreme cases. As the Coalition has submitted, a submission which LEAF adopts, the proper approach to improved maternal-fetal health is to attack the underlying social causes of addiction and to use appropriate treatment approaches.

Royal Commission on New Reproductive Technologies, *Proceed With Care* (Ottawa: Ministry of Supply and Services Canada, 1993) at 954-1143
Appellant's Book of Authorities, Vol. III, Tab 29

Committee on Alcohol & Pregnancy, "Assembly of Manitoba Chiefs Announces Action Plan" (1996) 2 Manitoba F.A.S. News 1

Aboriginal Nurses Association of Canada, *It Takes a Community: Resources for Community-Based Prevention of Fetal Alcohol Syndrome and Fetal Alcohol Effects* (Ottawa, 1997)

80. The tests proposed by the Appellant cannot be saved under section 1 of the *Charter*, and LEAF submits that no amount of modification would render them constitutionally acceptable.

G. CONCLUSION

81. The result of the Appellant's actions is to privatize fault and punish women. Pregnant women will be held personally responsible for systemic problems. Instead of the state doing something real about fetal health and drug and alcohol abuse, particular women could be blamed, controlled and held liable. Social problems could then be explained as the failure of the private, individual woman.

> L. Ikemoto, "The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, The Practice of Defaulting to Science, and the Interventionist Mindset of Law" (1992) 53 Ohio State L.J. 1205

82. This Court should not create a time in a woman's life when she is outside the protection of the *Charter*. All women, especially those who suffer additional disadvantage whether by way of long standing oppression, poverty or addiction, should be able to turn to the courts for protection against state sanctioned discrimination. The coercive regime advanced by the Appellant would have this Court participate in an unprecedented rights violation by creating new ways to control women and deprive them of their constitutional entitlements. Force and inequality will not improve the health of women and their fetuses.

IV - ORDER SOUGHT

83. LEAF requests that this Court dismiss this appeal and affirm the judgment of the Manitoba Court of Appeal as the only legal result which respects the equality rights of women in Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Jennifer Short for S Martin
Sheilah Martin

J Pilon for S McIvor
Sharon McIvor

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Court File No. 25508

WINNIPEG CHILD AND FAMILY SERVICES
Appellant
(Applicant)

- and -

G. (D. F.)
Respondent
(Respondent)

SUPREME COURT OF CANADA
On Appeal from the Court of Appeal for Manitoba

FACTUM OF THE INTERVENOR
WOMEN'S LEGAL EDUCATION AND ACTION FUND

Women's Legal Education and Action Fund
415 Yonge Street, Suite 1800
Toronto, ON M5B 2E7

Tel: (416)595-7170 ext. 228
Fax: (416)595-7191

Sheilah Martin
Tel: (403)265-6500

Sharon McIvor
Tel: (250)378-6112

Solicitor for the Women's Legal Education and Action Fund