March 6, 1981

ABORTION LAWS AND THE CHARTER OF RIGHTS

Representations have been made to the government both by proponents of more liberal abortion laws and of more restrictive abortion laws to make changes in the Charter of Rights to ensure either the right of a woman to have an abortion or the right of a foetus to be protected from an abortion.

The position of the government is that the issue of abortion is not one which should be determined by the Constitution but by Parliament. Therefore there are no provisions in the Charter of Rights which can affect present abortion laws in one way or another, or preclude Parliament from enacting laws in the future dealing with the issue.

Arguments have been made by Right to Life groups that the Charter will be used to maintain or even liberalize existing abortion legislation as a constitutionally guaranteed right. These arguments have absolutely no basis in fact.

The first arguments come from Ms. Gwendolyn Landolt, the legal counsel to a group known as Campaign Life.

Ms. Landolt states that the wording in Section 15 of the constitutional Resolution was changed "to prevent foetuses from having protection from the Charter". This is completely inaccurate.

Section 15 deals with equality rights and states that:

(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.

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(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.

Clearly non-discrimination on grounds such as race, national or ethnic origin, colour, religion, sex or age has no relation to foetuses. The reason the word "individual" is used is to ensure that Section 15 does not apply to corporations. When the use of the word "individual" was suggested for Section 15, the question of abortion was never raised as it is not relevant to issues of non-discrimination.

Ms. Landolt was obviously concerned about the recommendation of the Advisory Council on the Status of Women that the word "everyone" in Section 7 of the Charter which states

> 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

be changed to "every person" to ensure an interpretation which would not include the unborn. This recommendation was not accepted by the government. The government believes that the present wording of Section 7 is neutral and does not allow a court to deal with abortion as a constitutional issue. In any case, the right to life in section 7 is not guaranteed in absolute terms for anyone. The latter part of the section makes clear that a life can be deprived as long as it is done in a manner which is procedurally fair.

Ms. Landolt also argues that the effect of Section 15 "will force women into the labour force and inevitably lead to more abortions". Clearly this is not a legal argument and does not require legal comment. However, it might be noted that the equality clause will not invalidate laws which require spousal support of a family, since this is a law based on financial ability and responsibility, and not one based on sex. Increasingly family support laws place the responsibility for support on the basis of financial ability of the spouses quite apart from sex.

She also argues that pro-abortionists will be able to use Section 15 to increase the number of abortion facilities. This argument is based on the premise that the existence of abortion clinics will be constitutionally guaranteed. Their existence is dependent not on the Constitution but on the Criminal Code. If the Criminal Code is ever changed so as to prohibit abortion, no one could even make the argument that the "equal protection clause" would apply so as to require the creation of abortion clinics nor could anyone suggest that the "equal protection clause" could overturn any change in the Criminal Code. In other words, as long as the Constitution Act remains neutral, the issue of abortion remains one related to the Criminal Code. In any case, the "equal protection clause" does not mean that everyone must be treated with exact equality. This has been made clear in recent decisions of the United States Supreme Court holding that a denial of public health funds for abortions while granting them for childbirths did not create improper inequality.

As the U.S. Supreme Court stated, the right to obtain an abortion does not imply any limitation on a State's authority to make a values judgment favoring childbirth over abortion in the allocation of public funds.

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In summary, the constitutional proposals do not affect abortion one way or the other, but leaves to Parliament the decision as to what the law should be.

The second arguments come from a Mr. John Stephens, Q.C., in a memorandum sent to all members of Parliament. He argues that:

1. The only rights and freedoms that will exist in Canada after the Charter becomes law are those presently in existence (Clause 26) and those set out in the Charter.
2. Following precedent, Canadian courts will rule that the Charter gives rights only to persons who have been born.
3. The existing law is that the unborn can assert rights only after birth.
4. The Charter therefore establishes the class of persons to whom the right to life and equality are granted. To extend this class requires a constitutional amendment unless such extension is granted by a governing authority having jurisdiction.

The whole of Mr. Stephens' argument follows from his interpretation of Clause 26 of the Charter. His interpretation of the clause is inaccurate. The clause states as follows:

> "26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights of freedoms that exist in Canada."

The purpose of Clause 26 is to ensure that by guaranteeing certain specific rights in the Charter, the existence of other rights and freedoms that may exist in Canada by common law, statute or the Constitution are not denied. In other words, the Charter does not purport to

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be exhaustive of rights which Canadians may enjoy, nor to limit them to ones in existence at the time the Charter is adopted.

Clause 26 does not elevate "undefined rights" to entrenched rights. Such rights will have whatever status the law in which they may be found provides. Clause 26 does not freeze other rights and freedoms as they are at the time the Charter takes effect. Other rights and freedoms may be created or taken away by statute in the ordinary course of events unless, of course, they are found to be constitutionally based.

For example, the Criminal Code will not be frozen for all time in its present form. What is a crime today may tomorrow be declared by Parliament no longer to be a crime and a new right will thereby be created. But such a right would not be constitutionally protected unless there is an amendment to the Constitution.

Similarly what is permissible today - if it is not a right protected by the Charter of Rights - may be declared by Parliament tomorrow to be criminal. So rights which are not enshrined in the Constitution may be changed.

The circumstances under which an abortion may be obtained without contravening the criminal law are established not by the Constitution but by the Criminal Code. These conditions may be expanded or withdrawn by Parliament at any time regardless of the Charter of Rights, since the "right" to obtain an abortion is contained only in an ordinary statute.

Mr. Stephens uses the Dehler case to prove the point that the law either does not grant rights to the unborn or that it does not permit the exercise of such rights until birth. While this may be the case today, nothing in the Dehler case would prevent Parliament from changing the law tomorrow. Indeed the Court stated:

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"The Court is not entitled, as the plaintiff suggests, to substitute its judgment on the wisdom, policy or values underlying the legislation for that of Parliament. Nor, viewing the law as I do, is it now open for a Court to circumvent or nullify the abortion legislation enacted by Parliament within its constitutional mandate by postulating the existence at any stage of gestation of a new person in law."

It is Mr. Stephens' erroneous interpretation of the effect of Clause 26 that leads him to conclude that the law could in the future only be changed by constitutional amendment. If such were the case, no existing law which creates rights and obligations could be changed other than by constitutional amendment. Such a proposition is untenable and could not possibly be sustained by any court.

Mr. Stephens also argues that a person is already defined by law and is referred to in the Charter where it would receive the same meaning. Therefore any extension of the definition of a person "would purport to extend a class set out in the Charter and is therefore really the subject matter of an amendment to the Charter, requiring a constitutional amendment".

Here again his logic is dubious. The Charter guarantees minimum rights. Parliament cannot take rights away or diminish a "class" referred to in the Charter. But if Parliament wants to create new rights and extend the class it can do so within its legislative jurisdiction. This was made clear by the Supreme Court of Canada in Jones v. Attorney General of Canada (1974) where it was held that Parliament could, in enacting the Official Languages Act, extend the rights to the use of English and French beyond those established by section 133 of the BNA Act.

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However, the extension of the class or of a right by Parliament acting alone does not give constitutional protection to the extended class or right. But it does not mean that new legal rights are not effective. For example, human rights acts in Canada extend non-discrimination protection on grounds not covered by the Charter, eg. marital status and political opinion. Just because these grounds are not in the Charter does not mean that persons will no longer enjoy protection against discrimination on these other grounds.

In summary, Mr. Stephens' two major points are erroneous. The conclusions that follow from his two major points therefore are equally without legal substantiation.

To conclude, neither sections 7, 15 or 26, nor any other provisions of the Charter are reasonably capable of an interpretation that would either enshrine a right to abortion or deny the ability of Parliament to legislate on the matter (either by repealing the present Criminal Code provisions or by modifying them). This is as it should be since abortion is a social and moral issue on which viewpoints are very much divided. Consequently, the Charter should not take a position which constitutionally enshrines either an absolute right to life for the unborn or an absolute right to secure abortions.

As for Mr. Stephens' contention that section 7 could be interpreted as the right to "liberty of the person" has been interpreted in the United States to create a right to privacy and consequently a right to obtain an abortion in qualified circumstances, this overlooks one important difference between the wording of section 7 and the "due process" clause in the United States Bill of Rights.

Section 7 guarantees the right to liberty of the person subject to deprivation thereof in accordance with "the principles of fundamental justice". The 5th and 14th amendments in the U.S. Bill of Rights guarantees the right to liberty subject to deprivation thereof by "due process of law".

Due process of law has been interpreted by the United States Supreme Court as giving substantive as opposed to procedural protection to the right to liberty. Thus, the creation of a substantive right to privacy. However, the wording of section 7 "in accordance with the principles of fundamental justice" means only that the right to liberty cannot be impaired or deprived except by procedures that are fair. Consequently, even if the Canadian courts were to infer a right to privacy under the right to liberty, it is one that could be modified or eliminated by laws that provided for a fair procedure following the rules of natural justice. Thus, the right to abortion (in the unlikely event that it were found to exist under the right to liberty) could be curtailed or denied as long as the procedures were not unfair. However, there would be no substantive right which cannot be abridged because of a "due process" clause.

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