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ABORTION: CONSTITUTIONAL AND LEGAL DEVELOPMENTS

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ISSUE DEFINITION

Abortion is a subject that has troubled Canadian society for some time. Because it involves deeply held, and widely varying, viewpoints about individual rights, societal responsibilities, moral norms and the role of women in society, abortion is a divisive and potentially disruptive issue. In early 1988, the *Criminal Code* provisions governing abortion procedures were struck down by the Supreme Court of Canada. A new abortion bill (Bill C-43) was introduced in Parliament late in 1989 in the hope that compromise legislation would resolve the abortion debate at the federal level. The bill was defeated in the Senate by an unprecedented tied vote in January 1991.

BACKGROUND AND ANALYSIS

A. Jurisdiction over Health Issues

There has been considerable debate over the limits of federal responsibility for, or jurisdiction over, abortion. Because abortion requires a medical procedure, it is a health issue. To the extent that it is desirable to prohibit abortions, or establish the conditions under which they cannot be performed, jurisdiction will lie with the federal government, because prohibition of an action for health or moral reasons is constitutionally associated with criminalization. To the extent that it is desirable to regulate abortions, or the conditions under which they can be performed, jurisdiction will lie with the government that has the right or duty to regulate such health issues.

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The *Constitution Act, 1867* does not specifically assign "health" issues to one or the other level of government. Federal control over health is most often exercised as part of the specific federal power over "criminal law ... including the procedure in criminal matters" (section 91(27)). The *Narcotics Control Act* and the criminal penalties in the *Food and Drugs Act* are examples of the federal power to criminalize and punish conduct dangerous to health or to society.

Other aspects of federal jurisdiction may also apply to health-related issues, although the boundaries are generally less clear than in the case of the criminal law. If a national emergency arose, such as an epidemic, the peace, order and good government power might well allow federal action. A serious problem that attained a national dimension, such as air pollution, might similarly give the federal government the authority to enact health-related legislation. As well, the federal government can regulate health matters in areas already under its specific jurisdiction, such as penitentiaries or the military.

Finally, there is the "federal spending power." This is the term normally used when a national social program is formally underwritten by the federal government, notwithstanding that the object of the program is within provincial jurisdiction. To the extent that the federal government has the funds available, it can influence provincial priorities and set national standards by offering federal funding for programs which are within provincial jurisdiction.

The *Canada Health Act* is one of the best-known examples of use of the spending power. In return for compliance with certain broad principles with respect to health care, the federal government makes *per capita* payments to the provinces. This does not, however, give the federal government the right to regulate provincial health care directly. There is considerable debate as to how far the federal government could go in enforcing national standards, or in imposing stricter conditions, before it would interfere with provincial jurisdiction.

Provincial jurisdiction over health issues is more straightforward. The establishment, maintenance and management of hospitals is specifically placed under provincial authority by section 92(7) of the *Constitution Act, 1867*. The courts have given the provinces extensive jurisdiction over public health as a local and private matter under section 92(16). The regulation of the health professions, like that of other professions, comes within the provincial power over property and civil rights within the province, or section 92(13). Given this, the Federal Court of Appeal in 1983 found that "the general subject of the performing of abortions is also a provincial matter subject to any prohibitions of the criminal law."

B. History

Throughout history, attitudes towards abortion have been influenced by religious beliefs, social mores, and attitudes towards women and the family. Recently, they have increasingly been affected by technological advances as well, including both simpler and safer abortion techniques and improved techniques for understanding fetal development.

Historically, our abortion law is modelled on the English approach. Until the nineteenth century, abortion was a common-law offence and was criminal only if it occurred after "quickening." This was consistent with classical approaches and probably had the additional virtue of minimizing the evidentiary problems in proving pregnancy. The actual time of quickening or being "quick with child," has always been an arbitrary one, but it is usually taken to be when the mother herself feels or thinks she feels movement (this can vary from the sixteenth to the twentieth week) or when somebody examining her can feel or see some movement.

The law on criminal abortion was first codified in England in 1803, when the abortion of a quick fetus became a capital offence, while abortions performed prior to quickening incurred lesser penalties. In 1837, the distinction as to quickening was dropped, together with the death penalty. In 1861, the still current *Offences Against the Person Act* was passed, making clear for the first time that a women procuring her own abortion was also guilty of a crime.

The first Canadian criminal law on abortion was passed in 1869. It incorporated pre-Confederation provincial statutes, and provided for a penalty of life imprisonment for the person procuring the miscarriage. While such statutes reflected societal and religious objectives of protecting the fetus, they were also influenced by concerns about the mother's health. Nineteenth century abortions were medically dangerous and, in a less regulated society with little concept of health care programs, often performed by non-physicians.

Because the 1861 British legislation prohibiting abortion made no provisions for the mother's life or health, it was increasingly challenged by the medical and legal communities. In 1938, the British Medical Association set up a special committee to consider the medical aspects of abortion. It recommended that the law be revised to allow for some therapeutic abortions.

Also in 1938, a British doctor, Dr. Aleck Bourne, reported to the authorities that he had, with the consent of her parents and for no fee, terminated the pregnancy of a 14 year-old girl violently raped by four soldiers. A test case ensued. In the *Bourne* case, in his instructions to the jury, Mr. Justice Macnaghten said that an abortion could be performed in good faith to protect the

life and health of the mother, and that no clear distinction could be made between a threat to life and a threat to health. The *Bourne* defence was subsequently adopted by most common-law jurisdictions, and would probably have been applicable in Canada prior to the 1969 abortion law.

As abortion gradually became decriminalized, in the 1960s and after, the first legal regimes dealt with indicators, the presence of which would permit an abortion. This approach has been described as "indication-regulation." Generally, the indicators for abortion broke down into five categories: danger to life; danger to health (physical or mental); eugenic (fetal distress); criminological or juridical (rape and incest); and socio-economic. Various countries decided that various indicators were sufficient for a legal abortion, but the continuum of indicators is usually taken to be somewhat as follows:

- no indicator acceptable (abortion totally prohibited);
- threat to the life of the woman;
- threat to the physical health of the woman;
- rape or incest;
- fetal deformity;
- threat to the mental or psychological health of the woman;
- social or economic hardship;
- no indicator necessary (abortion on request).

In 1973, the Supreme Court of the United States delivered its judgment in *Roe* v. *Wade*. The Court held that, while the fetus was not a "person" entitled to independent constitutional protection, the state did have an interest in protecting potential life. It said that during the first trimester, when abortion is less hazardous to a woman's health than carrying a child to term, the state could only require that a licensed physician perform the medical procedure. During the second trimester, the state had a compelling interest in protecting the mother's health, and could regulate her access to abortion procedures in her own interest. (It is this concept of the right of the state to protect maternal health that has generated some of the fiercest legal battles in the past decade or two in the United States.) During the third trimester, the Court ruled that the interest of the state in preserving the fetus became compelling. This argument is largely based on the premise that at this point the fetus becomes viable, but the logic has not gone unchallenged by either the pro-choice or the anti-abortion movement.

Approaches to abortion law were greatly influenced by the thalidomide tragedy of the 1960s, and most modern abortion law is based on indication-regulation, time-regulation (as approved in *Roe* v. *Wade*), or a combination of the two. Where time-regulation is concerned, the

importance of the state concern in protecting the fetus normally increases dramatically as the chance of independent existence for the fetus increases. Viability, however, is a concern only when considering the balance between the interest of the state in protecting the fetus and the rights of the mother. Neither the pro-life nor the pro-choice movement considers viability to be an issue in terms of protecting independent fetal rights.

Viability, in any case, is a medical and not a legal concept. The British courts recently dealt with this issue in *C.* v. *S.*, a case in which the putative father attempted to stop his female companion, who was 18-21 weeks pregnant, from having an abortion. British law prohibits the destruction of "the life of a child capable of being born alive," and the Court of Appeal found as follows:

> At the [18th to 21st week] the cardiac muscle is contracting and primitive circulation is developing. Thus the fetus could be said to demonstrate real and discernible signs of life. On the other hand, the fetus, even if it is then delivered by hysterotomy, would be incapable of breathing either naturally or with the aid of a ventilator. It is not a case of fetus requiring a stimulus or assistance. It cannot and will never be able to breathe.

The Canadian Medical Association defines an induced abortion as the active termination of a pregnancy before fetal viability: "According to current medical knowledge, viability is dependent on fetal weight, degree of development and length of gestation; extrauterine viability may be possible if the fetus weighs over 500 [grams] or is past 20 weeks gestation, or both."

C. The 1969 Law

In 1969, Parliament amended the *Criminal Code* in a number of important respects, including specifying in section 287 (then section 237) when an abortion could be legally performed. The existing section, which made it an offence to procure the miscarriage of a pregnant female, was retained, but a number of new subsections were added. The most important, subsection (4), stated that the criminal sanctions against abortion would not apply to a doctor performing an abortion or a female obtaining one if the abortion had been previously approved by the therapeutic abortion committee of an accredited or approved hospital, and was also carried out in an accredited or

approved hospital. A therapeutic abortion committee had to comprise at least three doctors, none of whom could at the same time perform abortions.

The therapeutic abortion committee was required to certify in writing that, in the opinion of a majority of its members, the continuation of the pregnancy would or would be likely to endanger the life or health of the female. No further definition of "health" was given, and there was even some uncertainty as to whether or not the word included mental or psychological health. Instead of defining the circumstances in which an abortion was permissible, Parliament stated that abortion was legal if a therapeutic abortion committee said it was legal.

In short, in 1969 Parliament replaced judicial control after the fact with medical control before the fact. Given *Bourne*, an abortion performed to save the life of the mother or to prevent a serious threat to her health would probably have been defensible before 1969. Indeed, the decision of the Supreme Court in the first *Morgentaler* case in 1975 seemed to suggest as much. The Court held that Dr. Morgentaler could not use the *Bourne*, or necessity, defence because the existence of therapeutic abortion committees meant that only in the most exceptional circumstances would it be necessary to breach the *Criminal Code* to protect the mother. Having such committees, which could give prior approval for abortions, meant that doctors who performed abortions need not run the risk of a criminal charge; however, it also meant that they could not substitute their own judgment for that of the committee, except in cases of emergency.

As the law came into effect, it became evident that the interpretation of the words "would or would be likely to endanger [the] life or health" of a pregnant female varied widely across the country. Additionally, the uneven distribution of hospitals with therapeutic abortion committees gave rise to concerns as to whether legal abortions were equally available to women in various parts of the country. Even if four separate doctors could be found who felt that a female's health was endangered, a legal abortion could not be performed in the absence of a therapeutic abortion committee appointed by an accredited or approved hospital.

Consequently, in 1975 a Committee on the Operation of the Abortion Law was appointed "to conduct a study to determine whether the procedure provided in the *Criminal Code* for obtaining therapeutic abortions [was] operating equitably across Canada" and to make recommendations "on the operation of this law rather than recommendations on the underlying policy."

D. The Badgley Committee

The Committee, known as the Badgley Committee after its Chair, reported in January 1977. It found, quite simply, that "the procedures set out for the operation of Abortion Law are not working equitably across Canada." In large part, this was because the intent of the law was neither clear nor agreed upon, although the procedures set out in the law were specific. The debate over abortion had not been resolved but had, to some extent, been shifted from the criminal law to local communities and the medical profession.

The procedure for obtaining a legal abortion under the 1969 law depended entirely upon access to a therapeutic abortion committee at an accredited or approved hospital. In turn, access to a therapeutic abortion committee depended upon the distribution of eligible hospitals, the location of hospitals with therapeutic abortion committees, the use of residency and patient quota requirements, and the distribution of obstetrician-gynaecologists within and among provinces. Sharp regional disparities in all of these factors meant the *Criminal Code* procedure for obtaining a legal therapeutic abortion was in practice illusory for many Canadian women.

The Committee found that there was much concern among physicians about the definition of health, and little uniformity as to how the concept was interpreted. The definition of the World Health Organization was recognized by the Government of Canada, several provincial governments and the Canadian Medical Association. It stated: "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." The Committee concluded that, in the absence of other formally endorsed statements, this definition could be "considered one basis for the interpretation of the word `health' in the Abortion Law."

There was also considerable variance across the country in the way the issue of "consent" was handled. The age at which a young, unmarried female is deemed capable of giving consent to medical care and treatment is within provincial jurisdiction, and the Committee found that uncertainties in provincial laws had been allowed to affect the hospitals' consent requirements for carrying out abortions. In provinces where the age of consent to other medical procedures was lower than the age of majority, for example, a substantial number of hospitals required a woman to have reached the age of majority in order to consent to having an abortion. The Committee also noted that although there was no known legal requirement for the consent of the father to a therapeutic abortion, more than two-thirds of the hospitals it surveyed which carried out abortions required the consent of the husband.

The issue of consent is an interesting example of the constitutional problem with respect to abortions. The federal government, using the criminal law power, had legislated that abortions approved by a therapeutic abortion committee would not be subject to the *Criminal Code* prohibition against abortions. Prior approval by such a committee would be an absolute defence to any criminal charge. The standard set was danger to the mother's life or health.

If a therapeutic abortion committee, having formed the opinion that the life or health of the female was or was likely to be endangered by the pregnancy, further required that the parents of an unmarried minor or the husband of the woman should consent to the procedure, it would be denying a woman access to a legal abortion for reasons unrelated to the *Criminal Code*. The constitutional issue is not so much that abortions were unevenly available across the country, but that there was unequal access to a criminal defence. This inequality in the application of the criminal law, moreover, was brought about to some extent by differences in provincial health regulation standards.

The Badgley Committee also inquired whether hospital employees were required to participate in therapeutic abortion procedures regardless of their personal views. It found that this was normally dealt with as an employer-employee issue, rather than as an issue of conscience. The general policy of hospitals was that, within designated job categories, employees were expected to accept the general duties assigned to them. In particular, "according to widespread custom and the prevailing policies of hospitals, it was not considered to be a nurse's prerogative to `pick and choose' patients with whom she or he [would or would not] work." The Committee concluded that some hospital employment procedures relating to the abortion procedure might not be in compliance with provincial human rights codes prohibiting discrimination on the grounds of creed.

The Committee underlined that "the options are few concerning induced abortion ... The critical social choices are between two sensitive issues, induced abortion and family planning." In the Committee's opinion, effective family planning practices could sharply reduce the chances of unwanted conception and, hence, the number of abortions.

E. The *Charter of Rights and Freedoms* and the *Morgentaler* Decision

In 1982, the *Charter of Rights and Freedoms* came into effect, and in 1983 Dr. Henry Morgentaler (together with two other doctors) was charged with unlawfully procuring miscarriages in his Toronto clinic. By the time the case reached the Supreme Court, the numerous

legal issues had been effectively reduced to whether the abortion provisions of the *Criminal Code* infringed in an unjustified way a woman's right to "life, liberty and security of the person" guaranteed by section 7 of the Charter.

The relevant sections of the Charter read:

> Section 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 fundamental justice.
>
> Section 1: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

When a court decides that legislation violates a Charter right, such as the right to security of the person, it then looks to section 1 to see whether the violation is a reasonable limit demonstrably justified in a free and democratic society. This involves two steps: first, the court addresses the issue of whether the legislative purpose or objective is of sufficient importance to warrant overriding a constitutionally protected right or freedom; second, the court assesses whether the means employed are proportional to the objective and whether they are reasonable.

The *Morgentaler* decision is difficult to summarize because the majority wrote three different decisions. All, however, agreed that:

- section 287 (then 251) of the *Criminal Code* infringed a woman's right to security of the person;
- the process by which a woman was deprived of that right was not in accord with fundamental justice;
- the state interest in protecting the fetus was sufficiently important to justify limiting individual Charter rights at some point; and
- the right to security of the person of a pregnant woman was infringed more than was required to achieve the objective of protecting the fetus, and the means were not reasonable.

At the risk of oversimplifying, the Court found that the legislation interfered with the security of the person of a woman in limiting, by criminal law, her effective and timely access to medical services when her life or health was endangered. This criminalization was not in accordance with fundamental justice. For all the reasons noted by the Badgley Committee and

testified to by numerous experts, access to the certificate of a therapeutic abortion committee, which provided a valid defence to criminal charges, was not equally available across the country. In addition, the procedure set out in the *Criminal Code* could cause extensive delays, which further endangered the woman's life or health, and it was fundamentally unjust to require a woman to impair her health in order to remain within the law.

A point worth noting is that the decision was founded upon the rights of pregnant women, although the defendants were all physicians. This was because the Court held that the physicians had standing to challenge the constitutionality of the abortion law, under which they were liable for conviction, whether or not the constitutional argument advanced directly affected them. If procuring a miscarriage had been an offence only for the doctor, and not for the woman involved, the *Morgentaler* decision might have been worded quite differently.

The three majority decisions were written by Chief Justice Dickson, Mr. Justice Beetz, and Madam Justice Wilson. Though the decisions came to the same conclusion, their logic differed noticeably. The Chief Justice found that the abortion law infringed women's security of the person by forcing them "to carry a foetus to term contrary to their own priorities and aspirations," as well as causing delays which increased the physical and psychological trauma involved. Since the therapeutic abortion committees were "a strange hybrid, part medical committee and part legal committee," it was no help to say that "health" was a medical term. He felt that the term "health" was insufficiently defined in the *Criminal Code*. A clear legal standard was necessary when the committee's decision had such direct legal consequences.

Beetz J. held that Parliament had recognized, in adopting the 1969 abortion law, that the interest in the life or health of the pregnant woman took precedence over the interest in preventing abortions. The standard in the 1969 abortion law became entrenched as a minimum when section 7 of the Charter was enacted:

> The gist of section 251(4) is, as I have said, that the objective of protecting the foetus is not of sufficient importance to defeat the interest in protecting pregnant women from pregnancies which represent a danger to life or health.

Beetz J. found the expression "would or would be likely to endanger her life or health" sufficiently precise, as a matter of law. He also held, as did Wilson J., that "the primary objective of the impugned legislation must be seen as the protection of the fetus," whereas the Chief Justice had identified the objective as balancing fetal interests with those of pregnant women.

Wilson J. agreed that the 1969 abortion law exposed pregnant women to a threat to their physical and psychological security. She noted, however, that security of the person might involve more than physical or psychological security, and she based her judgment as much on the right to liberty as the right to security of the person. "Liberty in a free and democratic society," she found, "does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them."

According to Wilson J., the right to liberty contained in section 7 "guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives," including the decision to terminate a pregnancy. It should be noted, however, that the state is required only to respect such decisions, or to refrain from interfering with them, not to approve or facilitate them.

Wilson J. also found that the 1969 abortion law was not in accordance with the principles of fundamental justice, but her reasoning differed from that of the rest of the majority. She held that deciding whether or not to terminate a pregnancy was "essentially a moral decision, a matter of conscience." To criminalize such a decision was, she decided, a violation of freedom of conscience, which is protected by section 2(a) of the Charter. Therefore, it could not be in accordance with fundamental justice.

Wilson J. agreed, however, that legislation putting reasonable limits on a pregnant woman's rights under sections 7 or 2(a) could be justified under section 1 of the Charter for the objective of protecting the fetus. While recognizing that a fetus is potential life from the moment of conception, she felt that "in balancing the state's interest in the protection of the fetus as potential life under s. 1 of the Charter against the right of the pregnant woman under section 7, greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier." As an example of the shifting balance between the interest of the state in the fetus and the interest of the pregnant female as the pregnancy advanced, she noted that a spontaneous abortion or miscarriage at six months causes "far greater sorrow and sense of loss" than does one at six days or six weeks.

Beetz J. did not find it necessary to decide whether the 1969 abortion law violated a pregnant woman's right to liberty, as well as her right to security of the person. "Assuming without deciding that a right of access to abortion can be founded upon the right to `liberty'," he found that there would still be a point in time at which "the state interest in the foetus would become compelling."

All of the majority decisions specifically noted that the Court had not been asked to decide whether a fetus is included in the word "everyone" in section 7 of the Charter and would therefore have an independent right to "life, liberty and security of the person."

F. Protecting the Fetus: *Borowski* and *Daigle*

The question of possible fetal rights under the Charter was addressed in *Borowski* v. *Attorney General of Canada*. Mr. Borowski argued that section 7 of the *Canadian Charter of Rights and Freedoms* gives a fetus an independent right to life because the word "everyone" includes the fetus, and that the 1969 abortion law therefore violated fetal rights by allowing legal abortions. Independent fetal rights are very different as a legal concept from the societal right to protect the fetus recognized in *Morgentaler*.

In the *Borowski* case, the Saskatchewan Court of Appeal examined the history of the fetus at common law, and the language of the Charter. Concluding that the fetus had never been a person or part of "everyone" at Anglo-Canadian law, the Court decided that, had Parliament wished to effect such a major departure from tradition as creating fetal rights, it would have used very clear and unambiguous language. The decision was appealed to the Supreme Court but was not heard until October 1988, after the *Morgentaler* decision had already invalidated the relevant section of the *Criminal Code*. The question raised by Mr. Borowski as to the constitutionality of that section was therefore moot.

During the summer of 1989, several men in Ontario, Manitoba and Quebec took their former female companions to court, asking for an injunction against a planned abortion. In Ontario and Manitoba, the women involved were able to obtain abortions, but in Quebec three of the five judges in the Court of Appeal upheld an injunction against Ms. Chantal Daigle. The Court wrote five different decisions, and the majority relied on both the *Civil Code* and the Quebec *Charter of Human Rights and Freedoms*.

In an unusual summer hearing, the full bench of the Supreme Court of Canada heard the appeal on 8 August 1989 and unanimously set aside the injunction. The reasons were delivered on 16 November 1989. The Court noted that there were three separate arguments for setting aside the injunction:

- the substantive rights alleged to support the injunction, whether fetal rights or "father's" rights, either do not exist or cannot outweigh a woman's right to control her own body;

- an injunction is an inappropriate remedy where abortions are concerned for technical, practical and constitutional reasons; and

- in the case of Ms. Daigle, the injunction effectively amounted to a prohibition, or an improper exercise of the federal criminal law power.

The Court decided the case on the first argument, both because the issue of substantive rights was the fundamental one and because deciding the case on either of the narrower grounds would have "left it unclear whether another woman in the position of Ms. Daigle could be placed in a similar predicament through the use of a different legal procedure." The Court also held, however, that all three arguments appeared to deserve serious consideration, and this could have implications for future abortion decisions.

The Court found that a fetus is not a person or a "human being" under the Quebec Charter. The *Civil Code* does not generally recognize that a fetus is a juridical person, although it is sometimes treated similarly to a person where necessary to protect its interests after birth or to conserve property which will accrue to it after birth. Therefore, had the Quebec legislature wished to grant fetuses the right to life, it would not have used language so uncertain or vague.

Anglo-Canadian law is not determinative in interpreting the Quebec Charter, but the Court also looked at how fetal rights had been dealt with in Anglo-Canadian law in part "to avoid the repetition of the appellant's experience in the common law provinces." Common-law courts have consistently reached the conclusion that, to enjoy rights, a fetus must be born alive. The Court cited a 1988 English case, *In re F. (in utero)*, which held that a fetus did not have, at any stage of its development, a separate existence from its mother, and therefore could not be subject to a wardship order.

The Court dealt very briefly with the issue of "father's rights," noting that no court in Quebec or elsewhere has ever accepted the argument that "a father's interest in a fetus which he helped create could support a right to veto a woman's personal decisions in respect of the fetus she is carrying."

Again, the Court declined to decide whether a fetus is included within the term "everyone" as used in section 7 of the Canadian Charter, and therefore has a right to "life, liberty and security of the person." *Tremblay* v. *Daigle* was a civil suit between two private parties, and the Charter applies only to state actions; however, the Court did find that neither the *Civil Code* nor the common law afforded juridical rights to the fetus, and therefore the Quebec legislature would likely have used clear language had it intended to effect such a fundamental change in the status of the

fetus. It is difficult to see how the same logic would not apply to the interpretation of "everyone" in the Canadian Charter.

Almost as interesting as what the Court did decide was its phrasing of the issues it was not deciding. The Court refrained from taking a position on whether an injunction could ever be an appropriate remedy when an abortion was at issue, and on whether provincial legislation could result in a prohibition of some abortions without being an unconstitutional exercise of the federal criminal law power.

In addition, the Court concluded its analysis of the substantive rights issue as follows:

> It should be noted that because of the way we have decided the question of "foetal rights," it was unnecessary to consider the second aspect of the "substantive rights" argument, i.e., the claim that even if foetal rights do exist, they could not justify compelling a woman to carry a foetus to term.

The argument referred to was based on "the long-standing legal principle that a person may not be compelled to use his or her body at the service of another person, even if the other person's life is in danger." This seems to be a separate argument from a pregnant woman's right to security of the person under the Charter, and it is one that could play a role in future decisions.

G. Provincial Jurisdiction over Abortion

Following the *Morgentaler* decision in early 1988, some provinces attempted to limit funding for abortions. In March 1988, the British Columbia Cabinet enacted a regulation under the *Medical Service Act*, making abortions an uninsured service unless performed in a hospital when a significant threat existed to the pregnant woman's life.

The British Columbia Civil Liberties Association challenged the regulation, and it was declared invalid by the British Columbia Supreme Court on a somewhat technical ground. The Cabinet had declared that abortion services, other than when a significant threat existed to the pregnant woman's life, were not medically required services and were therefore not insured. The Chief Justice of the Supreme Court took "judicial notice of the fact that, if there is to be a lawful abortion, such a procedure requires medical services." Therefore,

> the legislature did not authorize the Cabinet by regulation to provide that services rendered by a medical practitioner that are medically required are to be considered as services that are not medically required.

The Court suggested that it might well have been open to Cabinet to declare that abortion was not an insured service despite the fact that it was a medically necessary one. This, however, could have brought British Columbia into conflict with the language of the *Canada Health Act*, which would have created a separate set of problems.

In June 1989, the Nova Scotia legislature passed the *Act to Restrict Privatization of Medical Services* (called the *Medical Services Act*), which proposed a range of medical procedures, to be set by regulation, that could be performed only in hospitals. The stated purpose of the Act was "to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians." One of the procedures restricted to hospitals under the subsequent regulations was abortion. As well as stating that medical services performed contrary to the Act were not reimbursable by the provincial health program, the Act provided for a fine of from $10,000 to $50,000 to be levied against persons contravening the Act.

Although the Nova Scotia *Medical Services Act* regulations covered other procedures as well as abortion, it was widely considered that the timing of the legislation was influenced by Dr. Morgentaler's public announcements that he intended to establish an abortion clinic in Halifax. The Canadian Abortion Rights Action League (CARAL) tried to challenge the legislation as being beyond provincial jurisdiction, as well as violating sections 7, 15 (equality rights), and 28 (sexual equality) of the Charter. On 13 October 1989, the Nova Scotia Trial Division found that CARAL did not have sufficient standing to bring an action, and the Court of Appeal upheld the decision in March 1990.

On 26 October 1989, Dr. Morgentaler announced at a press conference that he had performed seven abortions at his Halifax clinic that day. On 27 October 1989, an information was sworn charging Dr. Morgentaler with seven counts of performing unlawful abortions contrary to the *Medical Services Act*. Dr. Morgentaler announced his intention of continuing to perform abortions. The province applied for an injunction restraining Dr. Morgentaler from further violations of the *Medical Services Act*.

On 6 November 1989, the injunction was granted. Mr. Justice Richard of the Supreme Court Trial Division looked closely at the argument that the provincial legislation violated the principles laid down by the Supreme Court in *Morgentaler*:

> [O]ne must not lose sight of the fact that *Morgentaler 1988* was a constitutional challenge of a section of the *Criminal Code*. The present application concerns a provincial statute purportedly regulating the manner in which certain medical services can be administered within the province. There was no question raised as to the constitutional competence of the legislature of Nova Scotia to regulate matters respecting the delivery of health care services...
>
> Given all of the above considerations, I am left with a review of legislation which is proper on its face and which is within the competence of the legislature to enact. Whether it is constitutional is, as previously stated, a question for another forum.

Richard J. granted the injunction on the grounds that, on the evidence, there was no evidence that a private abortion clinic was essential to the health and well-being of at least some of the citizens of the province, or a compelling need that was not otherwise being filled. The overwhelming public interest, therefore, was to see that provincial laws were not flouted. This decision was also upheld by the Nova Scotia Court of Appeal in March 1990.

The trial on the charge itself was held in June and July 1990 before Judge Joseph Kennedy of the Provincial Court. On 19 October 1990, Judge Kennedy found that the *Medical Services Act* and the regulations made pursuant to it were criminal law, and thus beyond the jurisdiction of the province and were therefore invalid legislation. More specifically, he found that the law was made primarily to control and restrict abortions within the province. Although he accepted that the province did have real concerns about the privatization of medical services, he found those concerns to be incidental to the paramount purpose of preventing free-standing abortion clinics within the province.

Because he found that the prohibition and regulation of abortion has been and remains criminal law in Canada, Judge Kennedy did not come to any decision on the defendant's arguments that the legislation violated a woman's right to security of the person and liberty under section 7 of the Charter, and to equality under section 15 of the Charter.

On 5 July 1991, the Nova Scotia Court of Appeal affirmed Judge Kennedy's decision. The Court held that the Act could have been a valid exercise of provincial power, or "in

pith and substance ... an exercise of the exclusive provincial jurisdiction in relation to hospitals or in the unassigned field of health." However, a study of the debates in the Nova Scotia legislature, together with the other evidence, confirmed that the primary purpose was to prohibit Dr. Morgentaler from operating private abortion clinics rather than to regulate private clinics within the health field more generally.

Leave to appeal to the Supreme Court of Canada was granted and, on 30 September 1993, the Court delivered a unanimous judgment. In a complex decision that summarized the interpretive principles applicable to division of power cases, particularly those dealing with the federal criminal law power, the Court struck down both the legislation itself and the regulations under it.

The Court concurred that the province's jurisdiction over such matters as health, hospitals, the practice of medicine and health care policy included the right to: protect the integrity of its health care system by preventing the emergence of a two-tiered system of delivery; ensure the delivery of high quality health care; and rationalize the delivery of medical services so as to avoid duplication and reduce public health care costs.

However, the Court also found that abortion legislation, or at least the prohibition of abortion with penal consequences, was historically considered to be part of the criminal law. Provincial legislation prohibiting abortions and imposing penal consequences is therefore suspect on its face. To regulate the delivery of abortion services validly, the Nova Scotia legislation would have to have been solidly anchored in health care policy. Instead, when the Court looked at the background and surrounding circumstances, including Hansard for the period when the legislation was debated, health care concerns were conspicuously absent.

Moreover, the apparent purpose of the legislation was within the scope of the federal jurisdiction over criminal law. Quoting from earlier decisions, the Court adopted the following test for the scope of the criminal law power:

> ... we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> ...
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace,

> order, security, health, morality; these are the ordinary though not exclusive ends served by that law ...

The Court firmly stated that the presence or absence of a criminal public purpose or object is pivotal to the validity of provincial legislation on abortion. The Nova Scotia legislation was invalid because "the primary objective of the legislation was to prohibit abortions outside hospitals as socially undesirable conduct, and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary."

Finally, the Court noted that its decision was based on a division of powers analysis, and did not include the impact of the *Canadian Charter of Rights and Freedoms*. The decision that such legislation was within federal, and not provincial, jurisdiction did not mean that it would either survive or fail scrutiny under the Charter.

In 1985, while abortion was still dealt with under the *Criminal Code*, New Brunswick enacted amendments to its *Medical Act* providing that physicians could be found guilty of professional misconduct if they were involved in performing an abortion elsewhere than in a hospital approved by the Minister of Health, and providing for the disciplining of physicians in such circumstances. The amendments appeared to be a direct result of a request by Dr. Morgentaler that he be allowed to establish a free-standing clinic in New Brunswick.

In June 1994, almost ten years later, Dr. Morgentaler performed five abortions at a clinic he had recently established in Fredericton. On the same day, the Minister of Health made a complaint to the Council of the College of Physicians and Surgeons, under the 1985 amendments, asking the council to prohibit Dr. Morgentaler from performing future abortions. On 5 July, the council imposed the requested restriction on Dr. Morgentaler's licence and appointed a board of inquiry. The hearing of the board was delayed, pending a court decision on the constitutionality of the relevant 1985 *Medical Act* amendments.

In September 1994, the Court of Queen's Bench found the amendments unconstitutional. Taking into consideration all the relevant factors, including the fact that the amendments dated from a point in time when abortion was covered by the *Criminal Code*, the judge followed the reasoning in the Nova Scotia case. He concluded that, although the legislation was placed in the context of regulating physicians, its only purpose had been to prohibit the establishment of free-standing abortion clinics and, in particular, the establishment of such a clinic by Dr. Morgentaler. In January 1995, two out of three judges of the New Brunswick Court of Appeal confirmed the lower court decision in a remarkably short judgment. They adopted the statement of Sopinka J., writing for a unanimous court, that provincial legislation whose primary

purpose is to prohibit abortions except in certain circumstances is an encroachment on the federal criminal law power.

The Prince Edward Island Supreme Court, Appeal Division, on 13 September 1996 upheld a regulation that limited public funding of abortions to those that were performed "in a hospital when the condition of the patient is such that the service is determined by the [Health and Community Services] Agency to be medically required." Although this means that health care coverage for abortions in Prince Edward Island is more restrictive than in most provinces, it is consistent with previous cases. A province can limit coverage for abortions by regulation, provided there is authority in the governing Act to make such a regulation. If the governing legislation clearly conveys such authority, as did the Prince Edward Island *Health Services Act*, then regulatory restrictions on coverage will be valid.

H. Other Issues

In August 1991, the Federal Court of Canada upheld a ruling that a taxpayer could not withhold $50 in taxes to protest government funding of abortions. The Court found that the preamble to the Charter, stating that "Canada is founded upon principles that recognize the supremacy of God," goes no further than preventing Canada from becoming officially atheistic. Moreover, any possible violation of the taxpayer's freedom of conscience and religion was justified under the Charter because, like other taxpayers, he was under a legal compulsion to pay income tax. The state was not compelling him to support tax-funded abortions, but only to pay his taxes like everyone else.

In November 1991, the Federal Court of Appeal held that a free-standing abortion clinic operated on a charitable basis with no intention of making a profit was a valid charity within the meaning of the *Income Tax Act*. The clinic's activities could not be contrary to public policy where no clear public policy existed; consequently the Court allowed an appeal against the Minister of National Revenue's refusal to grant the clinic charitable status.

Courts in at least two provinces have upheld the right of young pregnant teenagers (aged 13 and 16) to obtain an abortion over their parents' objections where the child had sufficient intelligence and understanding to make up her own mind.

In 1994, the Attorney-General of Ontario applied for injunctions against anti-abortion protest activity near 23 locations, on the grounds that such activity constituted a public nuisance. The locations included the homes and offices of physicians who provided abortion

services as well as specific hospitals and abortion clinics. The court found that the physiological, psychological and privacy interests of women about to undergo an abortion constitute objectives of sufficient importance to warrant overriding a constitutionnally protected right or freedom such as freedom of expression. The evidence of focused residential picketing constituted a *prima facie* case of watching and besetting, as well as a public and private nuisance. The majority of the injunction requests were granted, although on varying terms depending upon the specific circumstances.

In 1995, the British Columbia government passed an *Access to Abortion Services Act*, following a history of protests at abortion clinics and the shooting, and serious wounding, of a doctor providing services at an abortion clinic. The Act permitted the creation of an access zone around abortion clinics and service providers' homes within which sidewalk interference and protesting would be prohibited. In late 1996, the British Columbia Supreme Court held that the Act, although it clearly infringed the freedom of expression and religion of the accused, was justified under section 1 of the Charter. The court found that, because the messages of the protesters could contain exaggeration and misrepresentation, and were offensive in tone and comment, they were not central to the core values of freedom of expression. On the other hand, the objective of the legislation, ensuring access to health care, is a fundamental value in our society.

PARLIAMENTARY ACTION

A. Government Action

During the 33rd Parliament, the government had tabled a motion for debate and a vote in the House of Commons so as to seek the guidance of Parliament on framing the new law. Under the terms of this motion, an abortion would have been lawful during the earlier stages of pregnancy if, in the opinion of a licensed physician, the continuation of the pregnancy would or would have been likely to threaten the woman's physical or mental well-being. During the subsequent stages of pregnancy, an abortion would have been lawful only if certain further conditions were satisfied, including the finding of two physicians that the continuation of the pregnancy would or would have been likely to endanger the woman's life or seriously endanger her health. What constitutes the "earlier" and "subsequent" stages of the pregnancy was not defined under the proposal, nor were the "further conditions" under which an abortion could lawfully have been procured during the subsequent stages of the pregnancy.

Debate on the government abortion motion began in the House of Commons on 26 July and ended with a free vote on 28 July 1988. By then, 21 amending proposals had been

submitted by individual members, only five of which were retained for a vote by the Speaker. None of the proposals, including that of the government, was adopted.

Of the six proposals considered by the House, the one that received the most votes contained the most restrictive policy on abortion. This proposal would have permitted abortion only if two or more independent licensed physicians had in good faith and on reasonable grounds stated that in their opinion the continuation of the pregnancy would or would be likely to endanger the woman's life. This amendment was defeated by a vote of 118 to 105. Significantly, no women members voted in favour of this proposal.

Next in line in terms of support was the government's motion. It was defeated by a vote of 147 to 76. Even less support was expressed for the remaining proposals.

In the wake of the inconclusive vote on abortion in the House of Commons, the government stated that it would assess its options, but it left open the question of when it might introduce a new abortion law.

On 3 November 1989, the Minister of Justice introduced in the House of Commons Bill C-43, An Act respecting abortion. If Bill C-43 had been approved by both the House of Commons and the Senate, it would have been a criminal offence to induce an abortion on a woman unless it was done by, or under the direction of, a physician who considered that the woman's life or health was otherwise likely to be threatened. "Health" was defined as including physical, mental and psychological health.

Bill C-43 was referred to a Legislative Committee on 28 November 1989. The Committee heard from over 50 witnesses, coming from all parts of Canada. Most witnesses represented either a pro-choice or a pro-life viewpoint. The former argued that abortion should not be in the *Criminal Code*, while the latter argued that Bill C-43 did not provide sufficient protection for the fetus. Pro-choice groups argued that the *Canada Health Act* should be used to ensure access to abortion services. On the whole, only a small minority of witnesses were prepared to suggest or discuss amendments consistent with the principle of the bill.

One notable exception was the Canadian Medical Association (CMA), which argued forcefully that private individuals should not be allowed to initiate prosecutions under Bill C-43 without the consent of the Attorney-General of the province. Private prosecution of the physician performing the abortion was not an issue under the old legislation, because an abortion was legal if previously approved by the therapeutic abortion committee. The Canadian Medical Association felt that Bill C-43, which provided no such protection to the individual physician, opened the door to legal harassment by pro-life groups or individuals. An amendment based on the CMA argument was proposed by members of the Committee, but did not pass.

Another amendment given consideration would have made it an offence to discriminate against any health care worker who refused to participate in an abortion for reasons of conscience. While there was general agreement among both the witnesses and the Committee members that no health care worker who conscientiously objected to abortions should be required to participate in such procedures, the majority view was that a "conscience clause" was properly a human rights or labour relations issue within provincial jurisdiction.

On 6 April 1990, the Committee reported C-43 back to the House of Commons without amendment. Third reading debate began on 22 May 1990 and, on 23 May 1990, the House rejected all proposed amendments to Bill C-43 by a significant majority. Most of the proposed amendments would have limited the conditions under which an abortion could be obtained.

On 29 May 1990, the House of Commons passed Bill C-43 on third reading by a vote of 140 to 131. Although Cabinet Ministers were required to support the bill, it was a free vote for all other Members.

On 31 January 1991, the Senate voted on Bill C-43. As with the House of Commons, it was a free vote except for members of the Cabinet (Senator Murray). Of 86 senators present, 43 voted for the bill and 43 voted against it. Under the Rules of the Senate, a tied vote is deemed to be a negative vote; therefore Bill C-43 was defeated.

Various Private Members' bills designed to restrict access to abortions were introduced in both the 34th and 35th Parliaments, but none passed second reading.

CHRONOLOGY

27 June 1969 -	Bill C-150 (the existing abortion law) received Royal Assent after its adoption by the House of Commons on 14 May 1969 and by the Senate on 12 June 1969.
9 February 1977 -	The Badgley Committee tabled its report, which concluded that the abortion law was not being applied equitably across Canada.
17 April 1982 -	The *Constitution Act, 1982* received Royal Assent.
30 April 1987 -	In the case of *Borowski* v. *Attorney General of Canada*, the Saskatchewan Court of Appeal ruled that the fetus is not covered under sections 7 and 15 of the Charter.
28 January 1988 -	The Supreme Court of Canada, in a 5 to 2 majority judgment, ruled in the *Morgentaler* case that section 287 (then section 251) of the

Criminal Code contravened the rights of pregnant women under the Charter and was therefore of no force or effect.

28 July 1988 - After a two-day debate, the House of Commons voted down six proposals on abortion, including the government motion.

9 March 1989 - The Supreme Court of Canada rendered its judgment in *Borowski* v. *Attorney General of Canada*, finding unanimously that there was no longer an issue on which to rule as the previous abortion law had been found unconstitutional in *Morgentaler*.

26 July 1989 - In a 3-2 decision, the Quebec Court of Appeal upheld an injunction preventing Ms. Chantal Daigle from obtaining an abortion. The decision relied heavily on Quebec's Civil Code.

8 August 1989 - The full bench of the Supreme Court heard the Daigle appeal. Although informed by Ms. Daigle's lawyer that his client had already had an abortion, the Court continued to hear the arguments. It delivered a unanimous decision that the injunction be set aside, with reasons to follow.

27 October 1989 - Dr. Morgentaler was charged in Halifax with performing unlawful abortions, contrary to the *Medical Services Act* of Nova Scotia.

3 November 1989 - The Minister of Justice introduced into the House of Commons Bill C-43, *An Act respecting abortion.*

16 November 1989 - The Supreme Court of Canada delivered its reasons in *Tremblay* v. *Daigle*. The Court found that neither civil law nor common law recognizes the fetus as a "juridical person"; therefore, it cannot be presumed that the Quebec *Charter of Human Rights and Freedoms* confers legal personhood upon the fetus.

29 May 1990 - Bill C-43 passed third reading in the House of Commons, unamended.

19 October 1990 - The *Medical Services Act* of Nova Scotia and regulations under it, which prohibit the performance of certain medical services, including therapeutic abortions, outside of hospitals, was struck down.

31 January 1991 - Bill C-43 was defeated in the Senate by a tied vote.

5 July 1991 - The Nova Scotia Court of Appeal affirmed the Provincial Court decision of 19 October 1990 regarding the *Medical Services Act*.

30 September 1993 - The Supreme Court of Canada affirmed the unconstitutionality of the *Nova Scotia Medical Service Act* and regulations.

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