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ABORTION: LEGAL ASPECTS

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ABORTION: LEGAL ASPECTS

ISSUE DEFINITION

Under revisions to the abortion law in 1969, Parliament had hoped to resolve, for some time to come at least, the thorny issue of abortion by specifying the circumstances in which therapeutic abortions could legally be carried out in Canada. In a far-reaching judgment rendered on 28 January 1988, however, the Supreme Court of Canada struck down the relevant provisions of the Criminal Code, thus effectively decriminalizing the procurement of abortions throughout the country.

In order to place this landmark decision into context, it is useful to know the legal underpinnings of the abortion controversy. This paper will therefore outline the abortion law as it existed before and after the reform of 1969, and highlight some of the reasons for which the legislation was ruled unconstitutional by the Supreme Court of Canada.

BACKGROUND AND ANALYSIS

A. The Need for Reform

Whether a person is for or against the liberalization of the abortion law, there appears to be a consensus regarding the necessity in certain cases of terminating a pregnancy. Few people oppose the idea of destroying the fetus when, in the opinion of competent members of the medical profession, the pregnancy truly endangers the life of the mother. Nevertheless, before 1969 a medical practitioner who had performed an abortion was not, in any circumstances, exempted from criminal responsibility and could be prosecuted at any time for having committed a criminal offence.

At that time, the Criminal Code contained at most three sections dealing with the termination of a pregnancy: 1°, under section 237 of the former Code, an abortion constituted an offence both for the person performing the abortion and for the person procuring it. This provision in effect comprised the first three subsections of section 287 of the current Code and did not clearly provide for any defence; 2°, under what was formerly section 209 and is now section 238, the act of killing an unborn child constituted a criminal offence. However, this section did not apply to a person who, in good faith, considered it necessary to cause the death of the unborn child to "preserve the life of the mother"; and 3°, section 45 of the former and current Code stipulates that everyone is protected from criminal responsibility who performs a surgical operation upon a person for the benefit of that person, if the operation is performed with reasonable care and skill and it is reasonable to perform the operation, having regard to the state of health of the person and to all circumstances of the case.

The problem with these provisions prior to 1969 was that they had never been subject to a judicial interpretation in Canada. The only relevant decision was the McCready case (1909, 14 C.C.C. 481) in which a superior court judge had implied that it was probably legal to perform an abortion to save the life of a pregnant woman. However, part of this decision was only obiter dictum, that is, a simple comment not creating a legal precedent. Moreover, the decision was limited in value, because it failed to establish whether or not abortions could be performed to preserve the mother's "health", as compared with "saving her life", for, conceivably in some cases, one's "health" could be so undermined as to result in death.

Because valid Canadian precedents were lacking prior to 1969, it was necessary to refer to British jurisprudence. In a famous decision, R. v. Bourne (1938, 3 All E.R. 615), a provision similar to that in the Criminal Code had been interpreted as follows: that an abortion performed in order to preserve the life of the woman was perfectly legal if the medical practitioner performing the operation was, in good faith, of the opinion that the "probable consequence of the continuance of the pregnancy would be to make the woman a physical or mental wreck."

The relevance of this precedent in Canadian law has, however, been contested by several jurists since the revision of the Criminal Code in 1953-54. Canadian legislators amended at that time the wording of section 237 by eliminating the term "illegally". Since Judge MacNaghten, in R. v. Bourne, had largely based his opinion on the argument that use of the word "unlawful" indicated that in some circumstances abortion must be lawful, and the relevant provisions in the English legislation and in the Canadian Criminal Code (s. 209) were otherwise similar, the interpretation of the law remained unclear.

Similarly, the Canadian courts had never had to interpret section 45 in the case of an abortion and few jurists believed that the section would apply in such a case. Because of the decision handed down in 1975 by the Supreme Court in the Morgentaler case (1976, 1 S.C.R. 616), we know today that this provision could have been a defence against an abortion charge.

In fact, section 45 codifies in part a common law rule still applicable in Canadian criminal law which is known as the defence of necessity and which is implicitly preserved at section 8(3) of the Code. This rule exonerates from all criminal responsibility a person who, in a given situation, has no other choice but to transgress the law in order to avoid graver consequences if it were obeyed. With respect to abortion, there were some doubts before 1969 whether the defence of necessity was applicable since no judicial precedent could be invoked.

Once again, the 1975 Morgentaler case settled this issue. The Supreme Court stated that with respect to abortion, the common law defence of necessity could be applied in Canada under two conditions: 1) that the person performing the abortion believed in good faith that an emergency situation existed, i.e., that the continuation of the pregnancy immediately endangered the life or the health of the mother; and 2) that the observance of the law was impossible if the facts were viewed in any reasonable manner.

In short, until 1969, medical practitioners were in an uncomfortable position, to say the least. Whatever their motive for performing an abortion, they were subject to prosecution since abortion was

a criminal offence punishable by imprisonment for life and there was no specific defence. In theory, a practitioner could have been acquitted in various ways, but the absence of any clear legal precedents made the result uncertain.

B. The Changes Brought About by the Reform

Two of the three provisions relating to abortion were amended at the time of the 1969 reform. While section 45 was left intact, the words "in the act of birth" were added to section 209 (now section 238), so that the offence of killing an unborn child covered in this section was no longer applicable to procuring a miscarriage. Amendments were also made to the wording of section 237 (now 287) dealing with the crime of abortion. Most importantly, three new subsections were added describing in what way and in what circumstances members of the medical profession could lawfully perform therapeutic abortions, without any danger of lengthy and difficult criminal proceedings.

In this regard, provision was made under new subsections (4), (5) and (6) of section 287 for a "therapeutic abortion committee" of an "approved or accredited" hospital to examine the case of a person requesting an abortion and to decide whether "the continuation of the pregnancy of such female would or would be likely to endanger her life or health". If the majority of the committee, comprising no less than three qualified medical practitioners, concluded that an abortion was the appropriate measure, a certificate then had to be issued and forwarded to the qualified medical practitioner who would actually perform the operation. This doctor, who could not be a member of the therapeutic abortion committee, would therefore be completely absolved of any criminal responsibility as long as he acted in good faith and the operation was performed in an approved or accredited hospital.

The originality of this procedure was that the decision on the need for a therapeutic abortion would now be vested in a committee composed of several doctors specially designated, rather than in the hands of the attending physician who actually performed the procedure.

In short, Parliament completely replaced judicial control after the fact by medical control before the fact. This was the real change in the law concerning abortion. And even though the number of therapeutic abortions increased significantly after the reform of 1969, it was less because the legal criteria allowing an abortion were liberalized, than because it was decided that the responsibility for applying the legislation would rest with the medical profession. The likely danger to the life or health of the woman, although an uncertain defence in Canada because there were no legal precedents, was in fact the justification recognized in the Bourne decision as well as in the common law defence of necessity and section 45 of the Criminal Code. Parliament did not liberalize the substantive conditions for access to a therapeutic abortion by allowing it either on demand or for various specific reasons, such as fetal deformity, incest or rape, etc. It merely removed the determination from the courts by means of a purely procedural technique which entrusted to an administrative body, in this case a "therapeutic abortion committee", the task of judging a priori whether such an operation was necessary under the traditional criterion of the danger such an operation could present to the life or health of the woman.

C. Dissatisfaction with the 1969 Law

From a legal standpoint, the most interesting criticisms concerned the actual application of the reform measures. Such criticisms were so numerous that the government resolved in 1975 to set up a committee of experts to look into the merits of the concerns which the application of the reform had generated in various circles. The committee tabled its report, better known as the Badgley Report, in February 1977, and it confirmed the fears which many people entertained.

Having conducted investigations in most hospitals throughout Canada, the committee concluded that the recourse provided by the abortion legislation was not equitable across the country. It stressed that women did not have equal access to therapeutic abortions for various reasons, including the numerous provincial directives or regulations governing the establishment of a therapeutic abortion committee in hospitals and the

attitude of the hospital board of directors and the members of the medical profession. In the committee's view, it was not so much the legislation that created social disparities and consequent unevenness in the law's application. Rather, it was Canadians, their health services and the medical profession.

The problems identified by the Badgley committee did not change materially over time. Not all eligible facilities across the country had established therapeutic abortion committees. Of those that had, the policy varied from one centre to the next. In some hospitals, abortion applications were rarely, if ever, granted; in others, they were rarely, if ever, refused. Of the 250 hospitals that had therapeutic abortion committees on January 1, 1985, only 39 of these (or 15.4%) had been responsible for 74.4% of all the therapeutic abortions legally performed in Canada, whereas in some 15% of these, no abortions at all had been carried out. (These are the last figures gathered by Statistics Canada on this question and this category has since been dropped).

The strains under the law were manifesting themselves in a variety of ways. In Prince Edward Island, for example, the only therapeutic abortion committee operating in the province was dismantled in 1986 when the Hospital Board revised its policy on abortion. By contrast, in the province of Quebec, the performance of "illegal" abortions in free-standing clinics, if not openly encouraged, was at least tolerated; as a matter of policy, the government of that province, mindful of the Morgentaler acquittals of the seventies, had decided against prosecuting alleged violators on the ground that no jury would convict.

Spurred on by his victory in Quebec, Dr. Morgentaler opened free-standing clinics in Winnipeg and Toronto in 1983. Charges were duly laid against him and several others in both cities.

Dr. Morgentaler and co-accused stood trial on the Toronto charges in the fall of 1984 and, as had happened in Quebec, the jury returned a verdict of not guilty. On appeal to the Ontario Court of Appeal in 1985, the acquittals were set aside and a new trial was ordered. On further appeal to the Supreme Court of Canada, this judgment was overturned and the acquittals restored. In a ground-breaking decision handed down on

28 January 1988 a majority of the Court held that the abortion provisions under the Criminal Code were unconstitutional as they violated the rights of pregnant women under the Canadian Charter of Rights and Freedoms.

D. The Canadian Charter of Rights and Freedoms

During the passage of the Canadian Charter of Rights and Freedoms in Parliament in 1981 (enacted in 1982), the federal government contended that the Charter was neutral on the abortion question. The Supreme Court of Canada decided otherwise in the case of Morgentaler v. The Queen. In a decisive five-to-two judgment, the Court held that the abortion law contravened a pregnant woman's rights under section 7 of the Charter in a manner that was contrary to the principles of fundamental justice. The judges further held that this breach could not be saved by the reasonable limitation clause under section 1 and they therefore concluded that the law was invalid.

The relevant sections respectively provide:

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 the principles of 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.

Although the majority of the court concluded that the abortion law was unconstitutional, three separate judgments were written in support of this finding. These are but some of the reasons that were given:

- The pregnant woman's right to the security of the person under section 7 is infringed by section 251 [as it was prior to renumbering] of the Criminal Code because under this provision, a woman is forced, by threat of criminal sanction, to carry a fetus to term unless she meets certain criteria that are totally unrelated to her own priorities and aspirations. This constitutes not only a profound interference with her body, it also inflicts considerable emotional stress on

her given that she does not know whether her application for an abortion will ultimately be approved or not; both of these effects conflict with her right to security. Furthermore, the delays incurred in obtaining a therapeutic abortion under the mandatory procedures set out under section 251 [now section 287] result in a higher probability of medical complications and greater risk for the woman, thereby also impairing her right to security.

- The statutory requirements for an abortion under section 251 [now section 287] do not accord with the principles of fundamental justice. They constitute a too-cumbersome mechanism which not only creates uneven access to abortion, but causes significant delays as well. While Parliament may be justified in requiring a reliable, independent and medically sound opinion as to the "life or health" of the pregnant woman in order to protect the state interest in the fetus, certain of the mandatory requirements under the law are manifestly unfair because they are unnecessary in respect of Parliament's objectives in establishing an administrative structure for the performance of abortions and because they result in additional risk to the health of the woman.
- The abortion law cannot be saved under section 1 of the Charter, for the specific means chosen by Parliament are out of proportion to the legislative objective it seeks to achieve.

Apart from the obvious fact that there is no longer an enforceable federal prohibition against abortions in Canada, the full import of the Court's ruling in the Morgentaler case is as yet unknown. The majority of the Court did not rule that women had an unconditional right to abortion under the Charter. On the contrary, it merely concluded that the existing provisions on abortions were such as to impair irretrievably a pregnant woman's section 7 rights. All five Justices comprising the majority acknowledged that the interests of the fetus were deserving of constitutional recognition under section 1. Three expressly stated that a law restricting abortions might yet be consistent with the Charter, for at some point during the pregnancy the state's interest in protecting the fetus might be sufficiently compelling to override the rights that women otherwise have under the Charter. Although the Justices did not indicate when this compelling state interest might crystalize,

Madam Justice Wilson, who wrote the strongest judgment against the existing abortion law, made the following comments:

The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester.

It bears noting that the Court in the Morgentaler case based its decision exclusively on the rights of pregnant women under the Charter; it did not consider what rights, if any, the fetus might also have, since in its view a determination on this question was unnecessary to the disposition of the case.

A ruling by the Supreme Court of Canada on the rights of the fetus was expected in the case of Borowski v. Attorney General of Canada. The case had come to the top court on appeal from the Saskatchewan Court of Appeal which had ruled, upholding the trial court, that there was nothing in the language of the Charter or the historical aspects of the concepts of rights enshrined therein to suggest that the protection of the rights of a fetus to life was an intended purpose of the Charter. Two issues were raised in the appeals; namely a) whether the unborn have the right to life under section 7 of the Charter and b) whether the unborn have the right to the equal protection and equal benefit of the law without discrimination because of age or mental or physical disability, as guaranteed under section 15.

The Borowski case was argued in the Supreme Court of Canada in October 1988 and judgment was rendered on 9 January 1989. The Court ruled unanimously that because section 287 of the Code had been struck down in its decision in the Morgentaler case, there was no law in existence whose validity could be tested on grounds of compliance with the Charter. In other words, the questions put before the Court were moot. Thus, the last judicial word on the substance of Borowski's challenge was spoken by the Saskatchewan Court of Appeal. There can be no doubt that the issue will be litigated again if Parliament adopts a revised law regulating

abortions; no definitive statement on the Charter and fetal rights has been rendered.

There is, however, a case on appeal to the Supreme Court from the British Columbia Court of Appeal that may cast some light on the issue. R. v. Sullivan involves a charge of criminal negligence against two midwives, resulting from a delivery in which the baby was asphyxiated in the birth canal although its head could be seen. The midwives, Ms Sullivan and Ms Lemay, were charged on two counts: (1) criminal negligence causing the death of the baby (s. 203 of the Criminal Code, now s. 220), and (2) criminal negligence causing bodily harm to the mother (s. 204, now s. 221).

The trial judge found Ms Sullivan and Ms Lemay guilty on the first count, following an earlier British Columbia case in which the court found that a fetus in the birth canal was a person within the meaning of s. 203 of the Criminal Code. They were found not guilty on the second count. However, the trial judge added that:

Had I reached the opposite conclusion with respect to the "persons" argument above, then I would have found the accuseds guilty on Count 2, causing bodily harm to the mother because I would have concluded that the child was a part of the mother at the time of its death.

Ms Sullivan and Ms Lemay appealed their conviction on the grounds that the baby had never become a "person" within the meaning of s. 203. The decision of the British Columbia Court of Appeal includes an extensive survey of the history of the common law and Canadian criminal law on the question of when a fetus becomes a person. They note that there are three possible points in the delivery process at which a charge of homicide may first apply: at the point when the fetus begins to live, at the point when it begins to have a life independent of its mother's body, or at the point when it has completely proceeded from her body.

The Court adopted the last of these definitions of when a baby in the act of being born becomes a person. They were strongly influenced by the fact that the first Criminal Code of Canada included, in

a section immediately following the definition of homicide, a definition of when a child becomes a human being:

219. A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether it has breathed or not, and whether the naval string is severed or not. The killing of such a child is homicide when it dies in consequence of injuries received before, during or after birth.

On this basis, the Court reversed the conviction on the first count on the grounds that the baby was not a person. They then substituted a conviction for the acquittal on the charge of causing bodily harm to the mother, on the grounds that a child in the birth canal remains part of the mother. It also found that Parliament had not intended to draw any distinction between "person" and "human being" in the Criminal Code, at least not within the context of when a fetus becomes a person or human being.

The decision of the Supreme Court on this case will go a long way towards clarifying the common law and criminal law status of a mature fetus, but it will not resolve whether the fetus is covered by the word "everyone" in s. 7 of the Charter of Rights and Freedoms. The Charter was not argued in the case, and the British Columbia Court of Appeal specifically noted that it was not necessary to consider it in order to dispose of the issues on appeal. However, a decision as to whether a mature fetus is a "person" or a "human being" could give considerable indication as to whether the Supreme Court is likely to afford it s. 7 Charter rights.

E. The Morgentaler Judgment: The Aftermath

There has been increasing pressure on Parliament to pass a new abortion law, in part because of the diverse policies towards access to abortion which have been developed by the various provinces. The former Minister of Justice, the Honourable R.J. Hnatyshyn, met with his provincial counterparts at an annual meeting of Canada's criminal justice ministers in March 1988. However, no consensus on a new abortion law was reached.

Several provinces (British Columbia, Alberta, Saskatchewan and Nova Scotia) were reported as favouring what has been termed a very restrictive law.

The decision of the Supreme Court in Morgentaler has not made access to abortion uniform across the country. It has simply removed the Criminal Code regulation of the practice. The policies of provincial health ministries and individual hospitals vary from one province to another. Some provinces have tried to limit funding for abortions, and this has resulted in a number of court actions. In March 1988, the British Columbia Cabinet enacted regulations under the Medical Services Act making abortions an uninsured service. The B.C. Civil Liberties Association brought a petition before the Chief Justice of the British Columbia Supreme Court, arguing that the regulations were defective on administrative grounds. The Chief Justice agreed, noting that the Act itself defines "insured services" as "services rendered by a medical practitioner that are medically required except prescribed services." The regulation in question stated that performance of an abortion was not to be considered as services that are medically required. Noting that lawful abortions do, in fact, require medical services, the Chief Justice decided that the Act did not give the Cabinet the power to make a regulation stating, in effect, that the said services were not a "medically required service."

In April 1989, the New Brunswick Court of Queen's Bench overturned that province's policy that an abortion was covered by medicare only if certified as medically necessary by two doctors and performed by a specialist in an accredited hospital. The court held that such a policy would require an order-in-council, which had not been passed, and left open whether such a regulation would be valid when made. In any event, the court held that such a policy could not be applied to a resident temporarily absent from the province, and therefore abortions performed legally outside New Brunswick were covered by medicare. The case had been brought by Dr. Morgentaler after he had been refused medicare payment for several abortions performed in Montreal on New Brunswick women.

Most recently, the Canadian Abortion Rights Action League (CARAL) has challenged Nova Scotian regulations and legislation that limit abortions to hospitals only. In March, the Nova Scotia government passed

regulations under three health-related Acts making abortions performed outside hospitals illegal and excluding them from medicare coverage. This was widely viewed as a response to Dr. Morgentaler's announcement that he would be opening a clinic in Halifax by June. In June, the provincial legislature passed the Act to Restrict Privatization of Medical Services which restricted a range of procedures, including mammography, ultrasound and nuclear medicine, to hospitals. The case first went to court in August 1989, but has been adjourned until the fall because of the complexities of the issue.

At a meeting held in August 1988, the Canadian Medical Association approved a new policy on abortion. Apart from stipulating that abortions should be performed by a licensed physician in a facility that meets approved medical standards, the policy does not set out any specific limitations on the practice. Rather, it states, on the one hand, that the termination of a pregnancy is a medical decision to be made privately between the woman and her physician after a conscientious examination of all other options; on the other hand, it states that after fetal viability is reached (fetal weight of over 500 grams and/or 20 weeks' gestation), an abortion may be indicated under "exceptional circumstances". What constitutes "exceptional circumstances", however, is not defined in the policy.

On 23 February 1989, the Law Reform Commission of Canada released its Working Paper entitled Crimes Against the Foetus. A majority of the commissioners endorsed a recommendation that an abortion be permitted up to the twenty-second week of the pregnancy where a medical practitioner was of the opinion that the physical or psychological health of the mother was threatened. After that point, abortions would be authorized only if two doctors certified that an abortion was necessary to save the life of a mother or to protect her against serious bodily harm. The recommendation was based on the time at which the fetus could begin to survive autonomously, which was established by the majority recommendation as the twenty-second week. A minority of commissioners proposed an alternative approach. During the first 13 weeks, abortions would be permitted simply as a matter of decision between a woman and her doctor.

Following this period until the twenty-second week, medical grounds for the performance of an abortion would have to be shown. Finally, in the final stage of the pregnancy, only the endangerment of the mother's life would justify permitting an abortion.

A minority report was issued by one commissioner. He advocated that Canadian society strengthen the support given to women who wished to continue their pregnancy. In his view, abortions should be permitted only where the continuance of a pregnancy would constitute a genuine and serious threat to the health of the mother.

According to Statistics Canada, of the 63,508 reported therapeutic abortions performed in 1986, 87.8% involved women who were less than 13 weeks pregnant (30.7% under 9 weeks and 57.1% between 9 and 12 weeks). Abortions performed between the 13th and 16th week of pregnancy represented 8.7% of the total (6.2% during the 13th or 14th week and 2.5% during the 15th or 16th). Those performed from the 17th week onward accounted for 3.4% (3% between the 17th and 20th week and 0.4% after the 20th week.)

Data of this kind are likely to figure prominently in any future debate on abortion. However, since the abortion law was struck down in January, the continued collection by Statistics Canada of detailed data on abortion is now in question since the provisions of the Criminal Code relied on to gather the information are no longer operative. Unless a new abortion law or some other legislation expressly sets out the kind of data to be collected, it is doubtful whether meaningful information on abortion in Canada will be available after the publication of that collected for 1987.

F. The Summer of 1989

In mid-1989, the abortion issue again exploded into the front pages of Canada's newspapers, and stayed there throughout a good deal of the summer. First, on 3 July 1989, the United States Supreme Court came down with a decision in the case of Webster v. Reproductive Health Care Services. In upholding a Missouri law that prohibits the use of public funds or facilities for abortions and requires viability testing for all

fetuses of more than 20 weeks, the Court narrowed its landmark 1973 decision, Roe v. Wade. Although the July 1989 decision caused a highly emotional reaction in the United States, and even in Canada, its practical impact is limited. Because of major differences in the constitutions of the two countries and in their judicial approach to the abortion issue, the U.S. decision is unlikely to have any legal impact on Canada, although it does seem to affect public opinion on the issue.

The very next day, 4 July 1989, Mr. Justice John O'Driscoll of the Ontario Supreme Court granted Gregory Murphy an injunction restraining his girlfriend, Barbara Dodd, from having an abortion and the Women's College Hospital from performing one. Neither Ms Dodd nor the hospital appeared at the hearing. Ms Dodd's lawyer later explained that his client, who is seriously hearing-impaired, had been served with notice of the hearing only on the last business day before it took place (a long weekend intervened). On 11 July 1989, Mr. Justice Gibson Gray of the Supreme Court of Ontario set aside the injunction on the grounds that Ms Dodd has not been given sufficient time to prepare for the original hearing, and that Mr. Murphy had deliberately misled the court by stating that he was the father of the child when he knew that might not be so. Ms Dodd immediately had an abortion, but a week later held another press conference, with Mr. Murphy, to announce that she regretted that action. Overall, the main result of these events was to confuse both the legal and emotional environment surrounding abortion.

Meanwhile, a judge of the Manitoba Court of Queen's Bench had ruled against a request by a Winnipeg man for an injunction to prevent his girlfriend from obtaining an abortion. This was in accordance with previous Canadian and British decisions that the father has no personal standing to prevent a legal abortion, and that he cannot claim to represent the fetus because the fetus is not a legal person.

Finally, there was the case of Chantal Daigle. Ms Daigle became pregnant by her live-in boyfriend, Jean-Guy Tremblay, at the end of March 1989. In early July she left him, after an altercation in which the police were called. As she was on her way to a hospital to have an abortion on 8 July 1989, Ms Daigle was informed that Mr. Tremblay had

obtained a temporary injunction prohibiting her from undergoing such a procedure, pending a hearing on 17 July 1989. At that hearing, Superior Court Judge Jacques Viens issued an interlocutory injunction prohibiting an abortion, based largely on Quebec's Charter of Human Rights and Freedoms and the Quebec Civil Code. The Quebec Charter states that "every human being has a right to life, and to personal security" (s. 1) and that "every human being whose life is in peril has a right to assistance" (s. 2). Mr. Justice Viens decided that the fetus was a human being, whose rights under the Charter outweighed Ms Daigle's rights.

Two days later, the Quebec Court of Appeal agreed to hear Ms Daigle's appeal; the appeal itself was argued on 22 July 1989 before a bench of five judges. The court reserved judgment, despite the fact that Quebec hospitals will not perform abortions after the 20th week and Ms Daigle's pregnancy was then in its 20th week.

On 26 July 1989, the Quebec Court of Appeal, in a 3-2 decision, upheld the injunction. All five judges wrote separate decisions. The decisions upholding the injunction relied heavily on Quebec's Civil Code rather than the Quebec Charter and appeared to recognize some form of independent fetal rights and undefined paternal interest. As well, the judgments appeared to take into consideration the fact that the pregnancy was at a relatively late stage. The dissenting judges questioned the appropriateness of using injunctions to prevent abortions, a situation in which the term "balance of convenience" hardly applies, and agreed with previous decisions in other provinces that a fetus has no independent rights.

On 1 August 1989, five judges of the Supreme Court of Canada granted leave to appeal in a highly unusual summer sitting. The time periods provided for in the Supreme Court and Rules were shortened to provide for the hearing the appeal as a matter of urgency, and various other parties were given leave to intervene. The issues argued included whether Mr. Tremblay had a sufficient interest to request an injunction, whether an injunction requiring a woman to continue a pregnancy was an appropriate remedy, and whether a fetus had a right to life under Quebec

law. On 8 August 1989, the Supreme Court heard the appeal and all nine judges unanimously set aside the injunction. No reasons were given at the time, and it is not known when they will be delivered.

During the hearing, Ms. Daigle's lawyer learned that his client had already undergone an abortion and so informed the court. Despite arguments that the issue was now moot, the court continued to hear the appeal. This, together with the court's swift and unanimous decision, suggests that the reasons may well have implications beyond the individual case. It is still quite possible, however, that the Supreme Court's decision could say nothing about abortion or fetal rights generally and be limited to the appropriateness of injunctions in such circumstances, or even to procedural defects in obtaining the specific injunction in question.

PARLIAMENTARY ACTION

A. Government Action

There has been no government action on the abortion issue since the 34th Parliament was called.

During the last Parliament, however, 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 likely have threatened 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.

Very little support was expressed for the remaining proposals. The least favoured of all was a slightly more restrictive version of the government's motion. This proposal would have permitted abortions during the "first trimester" of pregnancy if in the physician's opinion the continuation of the pregnancy would or would be likely to threaten the woman's physical or mental well-being. Beyond this point, abortions would have been lawful only if two 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 or seriously and substantially endanger her health and there was no other commonly accepted medical procedure for effectively treating the health risk. Only 17 members voted for this option, in contrast to the 202 who voted against it.

The most permissive proposal on abortion did not fare much better. It would simply have required that abortions, to be lawful, be performed by a qualified medical practitioner. Only 20 members voted for this option, whereas 198 voted it down.

A further proposal would have permitted an abortion during the early stages (unspecified) of the pregnancy, provided only that the woman, in consultation with her physician, decided that the pregnancy should be terminated. During the subsequent stages of the pregnancy, an abortion would be lawful only under certain conditions, including, after a certain point in time, the opinion of a single physician that the continuation of the pregnancy would or would be likely to endanger the woman's life or seriously endanger her mental and physical health. This proposal, the first to be voted on, was rejected by a vote of 191 to 29.

The sixth proposal was rejected without a recorded vote. This proposal was identical to the government motion in all material respects except that, for the indeterminate term of "during the earlier stages of pregnancy" stipulated in the government motion, the proposal would have prescribed a fixed term of "up to and including the 18th week of pregnancy."

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. During a televised interview on 28 August, however, the Prime Minister of Canada indicated that the government should probably await the decision of the Supreme Court of Canada in the Borowski case before undertaking a major piece of legislation.

The Borowski decision came down in March 1989, but there was little indication of impending legislation when the House recessed for the summer break. On 20 July 1989, however, Prime Minister Mulroney promised legislation in the fall session. At the end of August, he clarified that the legislation was unlikely to be introduced immediately after Parliament resumed, but reconfirmed that it would be during the autumn. Meanwhile, suggestions arose that perhaps the Cabinet or the full caucus might be denied a free vote in an attempt to break the deadlock on the abortion issue.

B. Private Members' Bills

A single Private Member's bill has been tabled since the 34th Parliament began. Bill C-203 (first reading 16 December 1988) is similar in all but one respect to Private Member's Bill C-312, which had been introduced on 25 July 1988 during the last Parliament.

Bill C-203 has two separate parts. Part I would essentially prohibit abortions unless they were medically necessary to preserve the woman's life or to prevent permanent and disabling injury. Several defences would be available, however, most notably that either the woman obtaining the abortion, or the person performing it, reasonably believed that the requirements for a lawful abortion had been complied with. Abortions obtained or performed in contravention of the terms set out under the bill would be punishable by imprisonment for up to two years. In contrast to its predecessor, Bill C-312, this bill would require the court to grant an absolute or conditional discharge to a woman found guilty of obtaining an abortion, unless the court considered that granting a discharge would be contrary to the public interest in the circumstances.

Part II of the bill would in turn require the federal government to hold a conference of First Ministers, no later than one year after the bill's enactment, to consider amending the Charter expressly to protect the life of the unborn. If within two years of the enactment of Part II such an amendment had not been passed, the bill, as enacted, would no longer be of any force or effect.

Apart from Bill C-312 (re-introduced as mentioned above, as Bill C-203), only two other bills were tabled in Parliament between 28 January 1988, when the Supreme Court of Canada struck down the abortion provisions of the Criminal Code, and 1 October 1988, when the 33rd Parliament was dissolved. These were Bill S-16 (first reading 18 May 1988) and Bill C-329 (first reading 26 September 1988). Virtually identical, these bills would have called for a restrictive policy on abortion. They died on the order paper with the dissolution of Parliament.

It also bears mentioning that a motion calling on the government to consider the advisability of amending the Constitution Act, 1982 so as to protect the unborn under section 7 of the Canadian Charter of

Rights and Freedoms was introduced during the last Parliament. This motion, however, was defeated by a vote of 89 to 62 on 2 June 1987.

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.
- 29 September 1975 - The government appointed a sociologist, a doctor and a jurist "to conduct a study to determine whether the procedure provided in the Criminal Code for obtaining therapeutic abortions was operating equitably across Canada." Under these terms of reference, the Badgley Committee, named after its Chairman, was asked only "to make findings on the operation of this law rather than recommendations on the underlying policy."
- 9 February 1977 - The Badgley Committee tabled its report which concluded that the abortion law was not being applied equitably across Canada. However, the Committee added that it was not so much the law that had led to the inequities as the attitude of Canadians toward this delicate subject.
- 2 December 1981 - The final draft of the constitutional Resolution for a Joint Address to Her Majesty on the Constitution of Canada was passed in the House of Commons. Several members voted against the Resolution on the ground that the Charter failed expressly to guarantee the right to life of the fetus.
- 17 April 1982 - The Constitution Act, 1982 received Royal Assent.
- 8 November 1984 - A Toronto jury acquitted Dr. Morgentaler and co-accused on charges of conspiracy to procure a miscarriage.
- 1 October 1985 - The Ontario Court of Appeal set aside the jury acquittal of Dr. Morgentaler and co-accused on the Toronto charges and ordered a new trial.
- 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 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.
- 3 and 4 October 1988 - The case of Borowski v. Attorney General of Canada was argued in the Supreme Court of Canada. Judgment was reserved.
- 9 March 1989 - The Supreme Court of Canada rendered its judgment in Borowski v. Attorney General of Canada, finding unanimously that there is no longer an issue on which to rule as the previous abortion law had been found unconstitutional in Morgentaler.
- 3 July 1989 - The United States Supreme Court delivered its judgment in Webster, upholding the right of Missouri to ban abortions in public hospitals or by public employees, and to require viability tests on fetuses over 20 weeks.
- 4 July 1989 - Ontario Supreme Court Judge John O'Driscoll granted an injunction preventing Barbara Dodd from having an abortion.
- 6 July 1989 - A Winnipeg court refused a man a similar injunction against his pregnant girlfriend.
- 7 July 1989 - Jean-Guy Tremblay was granted a temporary injunction prohibiting Chantal Daigle from proceeding with an abortion.
- 11 July 1989 - Mr. Justice Gibson Gray of the Ontario Supreme Court overturned the injunction against Ms Dodd on the grounds that she was not properly notified.
- 17 July 1989 - Mr. Justice Jacques Viens of the Quebec Superior Court granted a permanent injunction preventing Ms Daigle from obtaining an abortion, deciding that the fetus is protected under the Quebec Charter of Human Rights and Freedoms.
- 20 July 1989 - Five judges of the Quebec Court of Appeal heard Ms Daigle's appeal.

- 26 July 1989 - In a 3-2 decision the Quebec Court of Appeal upheld the injunction against Ms Daigle, relying heavily on Quebec's Civil Code.
- 1 August 1989 - Five judges of the Supreme Court of Canada, in an unusual summer sitting, granted Ms Daigle leave to appeal.
- 8 August 1989 - The full bench of the Supreme Court heard the Daigle appeal. Although informed by Ms Daigle's lawyer that he had just learned that his client had already had an abortion, the court continued to hear the arguments. They delivered a unanimous decision that the injunction was set aside, with reasons to follow.

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