

**ABORTION IN CANADA:
TWENTY YEARS AFTER *R. v. MORGENTALER***

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INTRODUCTION

On 1 July 2008, Her Excellency the Right Honourable Michaëlle Jean, Governor General of Canada, announced the latest appointments to the Order of Canada. Although there were 75 names on the list released that day, only 1 of those names, that of Henry Morgentaler, was the topic of numerous editorials and public debates in the weeks following the announcement. Officially, Henry Morgentaler is being honoured for “his commitment to increased health care options for women, his determined efforts to influence Canadian public policy and his leadership in humanist and civil liberties organizations.”⁽¹⁾ While such endeavours would not, at first glance, appear to be such as to create a storm of controversy, what the official citation did not mention was that Dr. Morgentaler’s contribution in the field of health care for women has taken the form of a fight for women’s reproductive rights spanning four decades that has had a profound impact on abortion policies in Canada.

The turning point in Dr. Morgentaler’s fight for greater access to abortion for all Canadian women occurred in 1988, when the Supreme Court of Canada, in the case of *R. v. Morgentaler*,⁽²⁾ found the abortion provisions in the *Criminal Code*⁽³⁾ to be unconstitutional. Even though 20 years have now passed and Canadian women retain access to abortion without any legal restrictions, the decriminalization of abortion in Canada tells only part of the story. As the recent controversy over Dr. Morgentaler’s appointment to the Order of Canada illustrates, the debate over abortion is still alive and well in Canada.

* This paper is intended to both update and complement an existing paper on the issue of abortion by Mollie Dunsmuir, *Abortion: Constitutional and Legal Developments*, CIR 89-10E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 August 1998.

- (1) Governor General of Canada, Official website, “Governor General Announces New Appointments to the Order of Canada,” 1 July 2008, <http://www.gg.ca/media/doc.asp?lang=e&DocID=5447>.
- (2) [1988] 1 S.C.R. 30.
- (3) R.S.C. 1985, c. C-46.

The purpose of this paper is to look briefly at the 1988 *Morgentaler* decision that decriminalized abortion and to offer an overview of how the situation has evolved in Canada since then. It focuses on two key issues that have come to dominate the contemporary debate: access to abortion services and the rights of the “unborn child.”

THE 1988 *MORGENTALER* DECISION AND PARLIAMENT’S RESPONSE

A. *R. v. Morgentaler*

In 1983, doctors Henry Morgentaler, Leslie Frank Smoling and Robert Scott were charged with unlawfully procuring miscarriages in their Toronto clinic, in violation of section 251 of the *Criminal Code*, which made the procurement of a miscarriage an indictable offence unless performed by a doctor, in a hospital, and previously approved by a therapeutic abortion committee consisting of at least three doctors.⁽⁴⁾ While a number of legal arguments were made by both sides, the Court’s decision essentially turned on the constitutionality of section 251, specifically whether it violated section 7 of the *Canadian Charter of Rights and Freedoms*,⁽⁵⁾ and whether such a violation could be justified under section 1 of the Charter.⁽⁶⁾ In the *Morgentaler* decision, there were three separate opinions written by the majority, and one dissenting opinion. Essentially, the majority agreed on the following: 1) section 251 of the *Criminal Code* infringed a woman’s right to security of the person, and the process by which a woman was deprived of that right was not in accord with fundamental justice (section 7 of the Charter); and 2) the state’s interest in protecting the foetus was legitimate, but the right to security of the person of a pregnant woman was infringed more than was required to achieve the objective of protecting the foetus (section 1 of the Charter).

In the first majority decision, then Chief Justice Dickson and then Justice Lamer found that state interference with bodily integrity and serious state-imposed psychological stress resulting from the requirements of section 251 constituted a breach of security of the person protected by section 7 of the Charter. They were concerned both with the problems associated with the procedural requirements for obtaining a therapeutic abortion, which led to long delays in

(4) While the Supreme Court in *R. v. Morgentaler* struck down section 251 (now section 287) for violating the Constitution, this section remains part of the *Criminal Code*, which underwent its last official revision in 1985, before the *Morgentaler* decision. However, having been declared unconstitutional, this section is of no legal effect.

(5) Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

(6) See Appendix A for the text of section 251 of the *Criminal Code* and sections 1 and 7 of the *Canadian Charter of Rights and Freedoms*.

obtaining an abortion and higher probability of complications, and with the broader issue of forcing a woman, against her will, to carry a foetus to term. Chief Justice Dickson wrote:

Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice.⁽⁷⁾

Having found a violation of section 7 of the Charter, they then concluded that it could not be saved by section 1, since the procedures and administrative structures in place were unfair and arbitrary, they impaired section 7 more than was necessary to advance the legislative objective, and the limitations upon the rights of pregnant women were out of proportion to the objective sought to be achieved.

In the second majority opinion, then justices Beetz and Estey also found a violation of security of the person under section 7 of the Charter that could not be justified by section 1. They focused their judgment on the procedural requirements of section 251 of the *Criminal Code* and the danger that significant delays in obtaining an abortion could pose to the health of pregnant women. The main problems with the procedure for obtaining an abortion within the confines of section 251, as identified by Justice Beetz, were the lack of hospitals with therapeutic abortion committees, the delays caused by quotas on the number of therapeutic abortions that some hospitals could perform, and the delays caused by the committee process.

The broadest interpretation of a right to abortion came from then Justice Wilson, who found that section 251 of the *Criminal Code* violated not only a woman's right to security of the person, but also her right to liberty under section 7 of the Charter. Justice Wilson wrote:

... the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.

... In essence, what [the legislative scheme] does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. ... She

(7) *Morgentaler* (1988), para. 22.

is truly being treated as a means – a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life.⁽⁸⁾

Justice Wilson also found that the legislative scheme violated a woman’s freedom of conscience, stating:

... in a free and democratic society “freedom of conscience and religion” should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. ... [F]or the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another.⁽⁹⁾

However, a pregnant woman’s right to an abortion was not absolute, as Justice Wilson also advocated an approach that would balance the pregnant woman’s rights with the state’s interest in protecting the foetus, based on the stage of development of the foetus.

Finally, then justices McIntyre and Laforest, in their dissenting opinion, found that section 251 did not violate the Charter in any way, as they argued that there was no such thing as a constitutional right to have an abortion. They also noted that any inefficiency in the administrative scheme which might endanger the lives of women was caused principally by forces external to the statute, and that this was not a sufficient basis to strike down the provision.

B. Bill C-43 – An Act Respecting Abortion

A close reading of the *Morgentaler* decision suggests that the intention of the majority of the Court was not to remove all limits on access to abortion services, but to ensure that whatever limits were put in place did not unduly violate a pregnant woman’s rights under the Charter. Following that decision, Bill C-43 was introduced by the Progressive Conservative government of then prime minister Brian Mulroney, as an attempt to re-criminalize abortion. Under Bill C-43, a person inducing an abortion was guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, unless it was done “by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health

(8) Ibid., para. 238, 243.

or life of the female person would likely be threatened.” The bill thus replaced the opinion of the therapeutic abortion committee by that of one physician. Health was defined in this context as including “physical, mental and psychological health.” The bill was adopted by the House of Commons but defeated in the Senate following a tie vote at third reading on 31 January 1991. No abortion legislation was passed by subsequent Parliaments, although some private Members’ bills have been introduced that relate to the issue of abortion in various ways.

THE ACCESSIBILITY OF ABORTION SERVICES

Canadian women face limited and increasingly unequal access to abortion services – even though most legal barriers to such services have been removed.⁽¹⁰⁾

The reality of current access to abortion services in Canada, ... is located in a gap formed between legal declarations of rights and the extent of health services provisions. ... access to abortion services has been in decline since the early 1990s due to shrinking health-care services, numbers of providers and some legal constraints that typically cover facilities’ funding.⁽¹¹⁾

A. A Question of Competing Jurisdictions

Central to the notion of access to abortion services is the question of who is responsible for providing and regulating such services. If the issue is the prohibition of abortion through criminal sanction, then Parliament has jurisdiction under section 91(27) of the *Constitution Act, 1867*.⁽¹²⁾ If the issue is the regulation of abortion as a medical procedure, then the provincial legislatures have jurisdiction, by virtue of their jurisdiction over hospitals⁽¹³⁾ and over the medical profession and the practice of medicine.⁽¹⁴⁾ However, it must be noted that Parliament does retain jurisdiction over certain health-related matters beyond situations

(9) Ibid., para. 251.

(10) Howard A. Palley, “Canadian Abortion Policy: National Policy and the Impact of Federalism and Political Implementation on Access to Services,” *Publius: The Journal of Federalism*, Vol. 36, No. 4, 2006, p. 569.

(11) Melissa Haussman, *Abortion Politics in North America*, Lynne Rienner Publishers, Boulder, Colorado, 2005, p. 1.

(12) (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

(13) Ibid., section 92(7).

(14) Ibid., section 92(13) (property and civil rights in the province) and section 92(16) (matters of a local and private nature in the province). In *Schneider v. The Queen*, [1982] 2 S.C.R. 112, the Supreme Court found that section 92(16), matters of a local and private nature in the province, gives provincial legislatures general jurisdiction over health matters within the province.

involving criminal matters, in particular during national emergencies, or through its jurisdiction over Aboriginal people, the military, and federal penitentiaries.⁽¹⁵⁾ Parliament can also rely on the federal spending power⁽¹⁶⁾ to assert some degree of control over areas such as health care that would otherwise fall solely within provincial jurisdiction. The federal spending power in Canada has been defined as “the power of Parliament to make payments to people or institutions or governments for purposes on which it [Parliament] does not necessarily have the power to legislate.”⁽¹⁷⁾ The exercise of this power has taken the form of grants to provincial governments, the creation of shared-cost programs, and direct spending in areas of provincial jurisdiction.

The adoption of the *Canada Health Act*,⁽¹⁸⁾ with which the provinces must comply in order to receive federal grants in the form of the Canada Health Transfer, is one of the best-known examples of the use of the federal spending power. The purpose of the *Canada Health Act*, as set out in section 4, is “to establish criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made.” These include five program criteria, often referred to as the “national principles,” which are: (a) public administration; (b) comprehensiveness; (c) universality; (d) portability; and (e) accessibility.⁽¹⁹⁾ Specific provisions are also made in the Act to restrict the use of extra-billing and user charges for services covered under provincial health care insurance plans. The Act also states that where a province fails to comply with the five criteria or the conditions relating to user charges and extra-billing, a portion of the federal cash contribution to the province for a fiscal year can be withheld. These requirements have led one author to comment that “the functioning of health-care service delivery in Canada is characterized by a competition between national fiscal power and the formal constitutional responsibility of the provinces to provide for health care.”⁽²⁰⁾

Essentially, the provinces are required under the Act to provide free access to medically necessary health services in order to receive the full federal contribution. While an

(15) Ibid., sections 91(24), 91(7) and 91(28).

(16) For more on the federal spending power, see: Karine Richer, *The Federal Spending Power*, PRB 07-36E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 13 November 2007.

(17) Pierre Elliott Trudeau, *Federal-Provincial Grants and the Spending Power of Parliament*, Government of Canada, Ottawa, 1969, p. 4.

(18) R.S.C. 1985, c. C-6. For more on the *Canada Health Act*, see: Odette Madore, *The Canada Health Act: Overview and Options*, CIR 94-4E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 May 2005.

(19) See sections 7-12 of the *Canada Health Act* for more details.

(20) Palley (2006), p. 566.

abortion must be performed by a medical doctor, there remains some disagreement as to whether abortion is a “medically necessary” procedure. Abortion has been declared to be a medically necessary procedure by all provincial and territorial colleges of physicians and surgeons, a position also supported by advocacy groups such as Canadians for Choice and the Abortion Rights Coalition of Canada (ARCC). Other organizations disagree with this assessment. For example, LifeCanada, an organization with the stated mandate of promoting the “sanctity of all human life from fertilization to natural death through public education,” opposes public financing of abortion. As stated on its website: “Abortion is almost never done to save a woman’s life. Pregnancy is not a disease and yet, our taxes pay for most abortions, whether they are done in a hospital or in a private, for-profit clinic ..., simply because women ask for them.”⁽²¹⁾

In the past, the federal government has indicated that abortion services constitute medically necessary services under the Act.⁽²²⁾ However, not all provincial governments have shared this interpretation. Moreover, some have openly defied the requirements of the *Canada Health Act*, leading one author to refer to the provision of abortion services as an example of “uncooperative federalism.”⁽²³⁾ Examples of this include: the failure to provide any abortion service in provincial hospitals; placing abortion on the excluded list with regards to reciprocal billing agreements between provinces; and refusing to reimburse women who obtain abortions through private clinics.⁽²⁴⁾ Moreover, measures by the federal government to ensure compliance with the *Canada Health Act* in the provision of abortion services have been very limited.

To conclude, one can say that a consequence of the division of powers has been to provide Canadian women with unequal access to abortion services, based on their province of residence. As one author notes, in the past 20 years Canadians have tolerated “the ambiguity present in having no national standards and allowing larger degrees of subnational variation”; and while such ambiguity may be beneficial in certain policy areas, “there are no ways to frame it as a positive choice for women regarding abortion access.”⁽²⁵⁾

(21) LifeCanada, “Defunded Abortions: What Our Tax Dollars Pay For,” <http://www.lifecanada.org/html/defunded%20abortion/index.html>.

(22) Palley (2006), p. 565.

(23) *Ibid.*, pp. 566–567, 583.

(24) *Ibid.*, p. 573.

(25) Haussman (2005), p. 101.

B. The Post-1988 Jurisprudence

Once the criminal prohibition on abortion was removed, judicial scrutiny shifted to provincial regulations regarding access to abortion services and the inclusion of such services as part of provincial medical insurance schemes. This section of the paper offers a brief overview of selected cases that have touched on these issues.

1. *R. v. Morgentaler*⁽²⁶⁾

In March 1989, in order to prevent the establishment of free-standing abortion clinics in Halifax, the Nova Scotia government approved regulations under the *Medical Services Act* that prohibited the performance of an abortion anywhere other than in a place approved as a hospital, and denied medical services insurance coverage for abortions performed outside a hospital. Dr. Morgentaler nonetheless established a clinic in Halifax and performed 14 abortions between 26 October and 2 November 1989, for which he was charged with 14 counts of violating the *Medical Services Act*. He was acquitted at trial after the Court held that the legislation under which he was charged was beyond the province's legislative authority to enact because it was in essence criminal law. This decision was upheld by the Nova Scotia Court of Appeal and the Supreme Court of Canada, which found that the primary objective of the legislation was "to prohibit abortions outside hospitals as socially undesirable conduct," since it involved regulating the place where an abortion could be performed "not from the viewpoint of health care policy, but from the viewpoint of public wrongs or crimes."⁽²⁷⁾

2. *Morgentaler v. New Brunswick (1994)*⁽²⁸⁾

Dr. Morgentaler attacked the validity of provisions of the New Brunswick *Medical Act*, enacted shortly after he announced his intention to establish a free-standing abortion clinic in New Brunswick, that characterized the performance of an abortion outside a hospital as an act of professional misconduct. Relying on the Supreme Court decision in *R. v. Morgentaler* (1993), the New Brunswick Court of Queen's Bench found the impugned sections of the Act to be beyond the jurisdiction of the New Brunswick legislature, and concluded that the legislature sought to prohibit abortions outside hospitals "with a view to suppressing or punishing what [it] perceived to be the socially undesirable conduct of abortion."⁽²⁹⁾

(26) [1993] 3 S.C.R. 463.

(27) *Ibid.*, para. 78.

(28) [1994] N.B.J. No. 342, 117 D.L.R. (4th) 753.

(29) *Ibid.*, para. 44. This decision was upheld on appeal to the New Brunswick Court of Appeal, and leave to appeal to the Supreme Court of Canada was denied.

3. *Morgentaler v. Prince Edward Island*⁽³⁰⁾

This case was an application by Dr. Morgentaler for a declaration that a regulation made under the PEI *Health Services Payment Act* was *ultra vires*. The regulation in question provided that abortions would be paid for only if performed in a hospital and if found to be medically necessary by the Health and Community Services Agency. The application was granted, as the PEI Supreme Court found the impugned regulation to be beyond the mandate of the Agency. Under the Act, the legislature conferred on the Agency broad discretion to prescribe which basic health services would be insured and to impose conditions for eligibility. However, it did not authorize the Agency, having determined that abortion is a basic health service, to then exclude some abortions from coverage on grounds that were “extraneous to, inconsistent with, and contradictory to, the objects and purposes of the Act.”⁽³¹⁾ This decision was subsequently overturned by the Court of Appeal and access to abortion for PEI women remains limited, as will be discussed in the next section of the paper.

4. *Doe et al. v. The Government of Manitoba*⁽³²⁾

The two plaintiffs in this case chose to undergo an abortion at the Morgentaler Clinic in Winnipeg, because of long delays in obtaining a publicly funded abortion through the local hospital. The fee charged by the clinic could not be reimbursed under the *Health Services Insurance Act*. The plaintiffs then challenged the legislation on the ground that it violated the *Canadian Charter of Rights and Freedoms*. The Manitoba Court of Queen’s Bench granted summary judgment in favour of the plaintiffs, finding that the legislation violated section 7 of the Charter because

legislation that forces women to have to stand in line in an overburdened, publicly-funded health care system and to have to wait for a therapeutic abortion, a procedure that provably must be performed in a timely manner, is a gross violation of the right of women to both liberty and security of the person as guaranteed by s. 7 of the Charter.⁽³³⁾

(30) [1995] P.E.I.J. No. 20, 122 D.L.R. (4th) 728.

(31) *Ibid.*, para. 82.

(32) 2004 MBQB 285, [2004] M.J. No. 456.

(33) *Ibid.*, para. 78.

The Court also found that the legislation violated section 2(a) (freedom of conscience) and section 15 (equality rights) of the Charter. The impugned sections of the Act were found to be invalid but the Court suspended the declaration of invalidity for a period of one year, to allow the Government of Manitoba to revise the legislation. Since July 2005, abortions performed in private clinics in Manitoba have been publicly funded.

5. *Association pour l'accès à l'avortement c. Québec*⁽³⁴⁾

As part of a funding agreement between the Quebec Department of Health and the Federation of General Practitioners of Quebec, fees of doctors practising in private clinics were reduced by 75% after they performed a certain number of abortions. As a result, the clinics where these doctors operated were forced to charge women \$200-300 per procedure in order to cover their costs. The Association pour l'accès à l'avortement brought a class action against the Quebec government to recover those fees. The Quebec Superior Court, mindful of the fact that the Department of Health was aware of the situation and that such fees were necessary for the clinics' survival, found that the government had created a system where it was in effect forcing the clinics to contravene the law, which does not allow clinics to charge such fees. The Court granted the application and found that the Government of Quebec must reimburse women who obtained abortions in clinics and paid these extra fees between 1999 and 2006.

6. *Morgentaler v. New Brunswick* (2008)

In this latest case, Dr. Morgentaler brought an action challenging the legality of a regulation under the New Brunswick *Medical Services Payment Act* that excludes abortions performed in non-hospital settings from the statute's definition of "entitled services." Dr. Morgentaler is seeking a declaration that this regulation not only violates the *Canada Health Act*, but also is unconstitutional in that it violates rights guaranteed by sections 7 and 15 of the Charter. Even though this case was started more than four years ago, it has yet to proceed on the merits. In the latest procedural decision in the case,⁽³⁵⁾ the Court agreed to exercise its inherent jurisdiction to grant Dr. Morgentaler public interest standing to bring forth this legal challenge. The Court found that there was a serious issue to be tried and that, while there were other classes of persons more specifically affected by this regulation, mainly women who have undergone

(34) 2006 QCCS 4694, [2006] R.J.Q. 1938.

(35) *Morgentaler v. New Brunswick*, 2008 NBQB 258, [2008] N.B.J. No. 279.

abortions at Dr. Morgentaler's Fredericton Clinic, there are many valid reasons why these women would not or could not bring this challenge and that Dr. Morgentaler was therefore "a suitable alternative person to do so."⁽³⁶⁾

C. Barriers to Access Across Canada: The 2006 Canadians for Choice Report

1. Key Findings of the Report

The court challenges discussed above have clearly contributed to increasing access to abortion services for women in a number of provinces. However, according to Canadians for Choice, a non-profit organization with the stated mission of ensuring reproductive choice for all Canadians, there remains much work to be done to ensure full access to abortion services across Canada. Researched between January 2006 and August 2006, *Reality Check: A Close Look at Accessing Abortion Services in Canadian Hospitals* is its report on the accessibility of hospital abortion services in Canada.⁽³⁷⁾ Although Canadians for Choice makes no claim to neutrality on the issue, its comprehensive study on access to abortion across Canada is referred to in this paper because it appears to be a unique source of this type of information.

The author of the study found that only one in six hospitals in Canada was currently offering abortion services, and that those hospitals were "poorly" distributed across Canada: the majority were located in urban areas, within 150 kilometres of the US border. Furthermore, she found that the process that a woman had to go through in order to obtain an abortion varied greatly across provinces and territories, while wait-times (as long as 6 weeks), gestational limits (ranging from 10 to 22 weeks), and the availability of counselling also varied drastically from one hospital to the next.⁽³⁸⁾ In summarizing the study's findings, the author often spoke in terms of "barriers" that prevented women across the country from accessing abortion services. She noted that "[m]any of the barriers exist despite the fact that abortion is generally a simple procedure and that any hospital with an obstetrics ward can be equipped to conduct the procedure."⁽³⁹⁾ Some of the key barriers identified were: the costs involved, particularly when women were required to travel outside their area of residence or to turn to

(36) Ibid., para. 26.

(37) Jessica Shaw, *Reality Check: A Close Look at Accessing Abortion Services in Canadian Hospitals*, Canadians for Choice, Ottawa, 2006, pp. 1, 4.

(38) Ibid., p. 1.

(39) Ibid., p. 2.

private clinics; difficulty in obtaining information from hospital staff or referrals from doctors; and the presence of pro-life organizations that present themselves as “crisis pregnancy centres.”⁽⁴⁰⁾

2. Variations in Access Across Provinces

While the report was critical of abortion policies in every province and territory, some provinces were identified as having particularly restrictive policies, including Prince Edward Island and New Brunswick. Currently, Prince Edward Island is the only Canadian province where it is impossible to obtain an abortion, forcing women to travel to Nova Scotia in most cases. While the cost of an out-of-province abortion is covered through Prince Edward Island’s medical insurance scheme, this coverage applies only if the abortion is performed in a hospital and if the woman has been referred by a PEI doctor who is willing both to deem her abortion medically necessary and to request that the procedure be funded by the Department of Health and Social Services.⁽⁴¹⁾ As for New Brunswick, to be covered by provincial health insurance, an abortion must be performed before 12 weeks’ gestation, in a hospital, by a gynaecologist, and be approved by two physicians, who must certify in writing that the abortion is “medically necessary.” Should women choose to go outside the province for abortion services, there are no reciprocal billing arrangements in place to cover their costs. Alternatively, women may choose to have an abortion performed at the Morgentaler Clinic in Fredericton, where medical referrals are not needed; but in this case they must cover the costs themselves, since the New Brunswick government does not pay for abortions performed outside of hospitals.⁽⁴²⁾ As discussed in the previous section of this paper, this particular policy is being challenged before the New Brunswick Court of Queen’s Bench by Dr. Morgentaler.

The report did have some positive things to say about selected abortion policies in some provinces. One example is British Columbia, which has the best access rates for hospitals of all the provinces.⁽⁴³⁾ In 1995, British Columbia also adopted the *Access to Abortion Services Act*,⁽⁴⁴⁾ which sets out “access zones” around facilities providing abortion services, doctors’

(40) Ibid., pp. 39–46.

(41) Ibid., p. 32.

(42) Ibid., pp. 23–25.

(43) Ibid., pp. 19–20.

(44) R.S.B.C. 1996, c. 1.

offices and the homes of abortion providers, making it illegal for anyone within these zones to interfere with, photograph, harass or intimidate patients or service providers.⁽⁴⁵⁾ This legislation was challenged before the courts by two pro-life protesters alleging that the law infringed on their Charter-protected freedom of expression. In a unanimous ruling released in September 2008, the British Columbia Court of Appeal upheld the legislation, stating that while the right to protest against abortion was constitutionally protected, the limits imposed by the Act were justifiable under section 1 of the Charter. The Court stated that the objective of the Act, namely “to protect vulnerable women and those who provide for their care to have safe, unimpeded access to health care services” was “sufficiently important to justify a limitation on the way in which freedom of expression is exercised in an area adjacent to the facilities providing abortion services.”⁽⁴⁶⁾ The province of Quebec was also cited in the *Canadians for Choice* report as a “model of how abortion services should be offered in the rest of Canada,” particularly in the area of pre-abortion and post-abortion care and counselling. The report noted that Quebec has the highest percentage of hospitals in Canada that offer abortion services on a self-referral basis, leading to shorter wait-times.⁽⁴⁷⁾

While abortion rights and access to abortion services in Canada have improved in the last few decades, this report demonstrates that women continue to face barriers to access, particularly in some parts of the country.

THE RIGHTS OF THE “UNBORN CHILD”

Central to [the abortion] debate of course is the struggle between the rights of the foetus and the rights of the pregnant woman, with an understanding that an increase in the rights of the former will often lead to a decrease in the rights of the latter.⁽⁴⁸⁾

(45) *Ibid.*, sections 2, 3, 4.

(46) *R. v. Watson*, 2008 BCCA 340, [2008] B.C.J. No. 1669, para. 91.

(47) *Shaw* (2006), pp. 33–35.

(48) Howard Minkoff and Lynn M. Paltrow, “The Rights of ‘Unborn Children’ and the Value of Pregnant Women,” *Hastings Center Report*, Vol. 36, No. 2, 2006, p. 26.

A. A Question of Balancing Rights

The decriminalization of abortion in Canada, while allowing more women to obtain, and more doctors to perform, abortions without fear of legal sanctions, did not settle the issue of what rights, if any, were to be granted to the foetus or unborn child. For many opponents of abortion, the issue is a moral or religious one, resting on the belief that life begins at conception and that abortion amounts to taking a life. Based on this premise, the right of the pregnant woman to control her body cannot take precedence over the right to life of the unborn child. However, under Canadian law as it is now, a foetus is not considered to be a “legal” person and therefore has no rights until it is “born alive.” This rule, as explained briefly by Justice McLachlin (as she then was) in *Winnipeg Child and Family Services (Northwest Area) v. (G.) D.F.*, is that “[o]nce a child is born, alive and viable, the law may recognize that its existence began before birth for certain limited purposes. But the only right recognized is that of the born person.”⁽⁴⁹⁾

Consequently, when Canadian courts have dealt with the issue of foetal rights in the past, they have had to look at the question from a legal viewpoint, as opposed to a philosophical or theological perspective. As stated in 1989 by the Supreme Court of Canada in *Tremblay v. Daigle*, discussed below:

Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties – a matter which falls outside the concerns of scientific classification. In short, this Court’s task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.⁽⁵⁰⁾

In later cases, the Supreme Court of Canada has again reiterated that the issue of foetal rights is one that must be decided by the legislatures, not the courts. For instance, in *Winnipeg Child and Family Services*, Justice McLachlin wrote: “If Parliament or the legislatures wish to legislate legal rights for unborn children or other protective measures, that is open to them, subject to any

(49) *Winnipeg Child and Family Services(Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925, para. 11.

(50) *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, para. 38.

limitations imposed by the Constitution of Canada.”⁽⁵¹⁾ While the federal government has yet to respond to the Court’s invitation by tabling legislation on this issue in Parliament, some individual parliamentarians have attempted to do so through the introduction of private Members’ bills, as will be discussed below.

The lack of federal legislative activity in this area in Canada can be contrasted with the situation in the United States, where in 2004 President George W. Bush signed into law the *Unborn Victims of Violence Act*. That Act makes it a separate federal offence to bring about the death or bodily injury of a “child in utero” while committing certain crimes, and recognizes everything from a zygote to a foetus as an independent “victim” with legal rights distinct from the woman who has been harmed. A number of similar legislative measures, known as “unborn victims of violence laws” or “foetal homicide laws,” have been introduced in various US states. As well, in 2002, the Department of Health and Human Services adopted new regulations expanding the definition of “child” in the State Children’s Health Insurance Program “so that a State may elect to make individuals in the period between conception and birth eligible for coverage.”⁽⁵²⁾ While this paper is not intended to compare Canadian policies on abortion with those of other countries, one cannot ignore the potential influence that the existence of US legislation on various aspects of foetal right may have on the abortion debate in Canada.⁽⁵³⁾

B. The Post-1988 Jurisprudence

Even though the Supreme Court of Canada, in the 1988 *Morgentaler* decision, recognized as legitimate the state’s interest in protecting the foetus, it did not pronounce itself directly on the legal status of the foetus. Since then, a number of legal challenges have sought to entrench legal rights for the foetus and raised arguments that a foetus should be considered a person under the law. This section of the paper offers a brief overview of key decisions by the Supreme Court of Canada in the past two decades that touched on issues related to the legal status of the foetus.

(51) *Winnipeg Child and Family Services*, para. 12.

(52) Minkoff and Paltrow (2006), p. 26.

(53) See for example Lynn Paltrow, Executive Director, National Advocates for Pregnant Women (a New York-based organization), “Lessons from the U.S. Experience with Unborn Victims of Violence Laws,” 2008, <http://www.arcc-cdac.ca/action/LessonsfromUS.pdf>.

1. *Borowski v. Canada*⁽⁵⁴⁾

In this legal challenge, which was launched before the Supreme Court issued its decision in the *Morgentaler* case, the appellant challenged then section 251 of the *Criminal Code* on the grounds that permitting abortion, even within the confine of this provision, contravened the rights to life, security and equality of the foetus, who, as a person, was protected by sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Both the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal ruled that the foetus was not protected under sections 7 and 15 of the Charter. The Supreme Court denied the appeal on the ground that it was moot since then section 251 had already been struck down by the Court in *Morgentaler*, and it refused to use its discretion to rule on the merits of the case.

2. *Tremblay v. Daigle*⁽⁵⁵⁾

A pregnant woman who had recently ended a relationship chose to have an abortion, but before she could proceed, the father of the unborn child obtained an interlocutory injunction from the Quebec Superior Court preventing her from having it. The trial judge found that a foetus was a "human being" under the Quebec *Charter of Human Rights and Freedoms*⁽⁵⁶⁾ and therefore enjoyed a "right to life" under section 1 of the Quebec Charter. The injunction was upheld by a majority of the Quebec Court of Appeal. Leave was granted to appeal to the Supreme Court of Canada but, on the day of the hearing, counsel for the appellant informed the Court that his client had gone to the United States to obtain an abortion. While the case had technically become moot, the Court still decided to pronounce on its merits in light of the importance of the issue. A unanimous Court set aside the injunction: it found that a foetus was not included within the term "human being" in the Quebec Charter as there was no evidence that the Quebec National Assembly intended it to be included, and that, therefore, a foetus did not enjoy the right to life conferred by section 1 of the Quebec Charter.

(54) [1989] 1 S.C.R. 342.

(55) [1989] 2 S.C.R. 530.

(56) R.S.Q. c. C-12.

Looking at the broader civil law, the Court noted that a foetus is treated as a person only in very limited cases “to protect its interests after it is born” and that the “condition that the foetus be born alive and viable is a ‘suspensive’ condition.”⁽⁵⁷⁾ Also, the Court addressed the issue of the prospective father’s rights in this situation, noting that no court has ever accepted the argument that “the potential father’s contribution to the act of conception gives him an equal say in what happens to the foetus” such that he could veto a woman’s decision with regard to the foetus she is carrying.⁽⁵⁸⁾

3. *R. v. Sullivan*⁽⁵⁹⁾

In this case, two midwives were convicted at trial of criminal negligence causing the death of a child, when an unborn child they were attempting to deliver died while still in the birth canal. At issue was whether the child in question, never having been fully “born alive,” was a person within the meaning of the criminal negligence provision of the *Criminal Code*. The Court found that the term “person” within this provision was synonymous with the term “human being” also used in the *Criminal Code*, which, at the time, clearly stated that the child must be born alive to be considered a human being within the context of the *Criminal Code*.

4. *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*⁽⁶⁰⁾

A woman known as D.F.G. was pregnant with her fourth child and addicted to glue sniffing, which can potentially damage the nervous system of the developing foetus. As a result of this long-standing addiction, two of her previous children had been born permanently disabled and were wards of the state. On a motion by Winnipeg Child and Family Services, the Manitoba Court of Queen’s Bench ordered that D.F.G. be placed in the custody of the Director of Child and Family Services and detained in a health centre for treatment until the birth of her child – a decision later overturned by the Court of Appeal. By the time the case was heard by the Supreme Court of Canada, she had completed her treatment and given birth to her child, so the factual issues had become moot; but the importance of the legal question remained. A majority of the Supreme Court upheld the decision of the Court of Appeal, finding that under the law, a

(57) [1989] 2 S.C.R. 530, para. 54, 61.

(58) *Ibid.*, para. 78–79.

(59) [1991] 1 S.C.R. 489.

(60) [1997] 3 S.C.R. 925.

foetus is not recognized as a legal person possessing right, and thus there was no legal person in whose interest a court order could be made. Until it is born alive, a foetus is considered to be one with its mother, as noted by Justice McLachlin (as she then was), writing for the majority:

Before birth the mother and unborn child are one in the sense that “[t]he ‘life’ of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman” ... It is only after birth that the fetus assumes a separate personality. Accordingly, the law has always treated the mother and unborn child as one. To sue a pregnant woman on behalf of her unborn fetus therefore posits the anomaly of one part of a legal and physical entity suing itself.⁽⁶¹⁾

Furthermore, the majority of the Supreme Court rejected the argument that the *parens patriae* jurisdiction of courts, which can allow the judiciary to supersede the authority of parents and make decisions in the best interest of a child, could extend to unborn children. There was also a strong concern on the part of the majority that the changes required to be made to tort law or to the *parens patriae* jurisdiction in order to deal with the protection of an unborn child in such a way, were beyond the power of the Court and should be left in the hands of the legislature.

The dissent in this case was written by then Justice Major, who argued that the “born alive” rule was antiquated, as it was rooted in rudimentary medical knowledge that has been overtaken by modern science. Justice Major also argued that the courts should be able to exercise *parens patriae* jurisdiction over unborn children “when there is a reasonable probability of [the mother’s] conduct causing serious and irreparable harm to the foetus within her.” While he recognized the woman’s right to terminate the pregnancy, he argued that once she has made the decision to pursue the pregnancy, then the state has an interest in trying to ensure that the child would be born healthy. As written by Justice Major:

While the granting of this type of remedy may interfere with the mother’s liberty interests, in my view, those interests must bend when faced with a situation where devastating harm and a life of suffering can so easily be prevented. In any event, this interference is always subject to the mother’s right to end it by deciding to have an abortion.⁽⁶²⁾

(61) Ibid., para. 27.

(62) Ibid., para. 93.

5. *Dobson (Litigation Guardian of) v. Dobson*⁽⁶³⁾

A pregnant woman was involved in a car accident that caused prenatal injuries to her unborn child, resulting in permanent mental and physical impairment. The child, through his grandfather acting as litigation guardian, brought an action in damages against his mother alleging that the collision was caused by her negligent driving. At issue in this case was whether a mother should be liable in tort for damages to her born-alive child arising from a prenatal negligent act. The focus of the Court's decision was on whether a duty of care should be imposed upon a pregnant woman in such a situation. The majority of the Court found that no such duty of care should attach, in light of public policy considerations relating primarily to the privacy and autonomy rights of women, and the difficulties inherent in articulating a judicial standard of conduct for pregnant women. Then Justice Cory, writing for the majority, referred to the decision of the majority in *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, and noted that the imposition of a duty of care upon a pregnant woman towards her unborn child "would require judicial scrutiny into every aspect of that woman's behaviour during pregnancy" and thus "would involve severe intrusions into the bodily integrity, privacy and autonomous decision-making of that woman."⁽⁶⁴⁾ The majority of the Court recognized the "unique" relationship between an expectant mother and her unborn child, and the danger of imposing "additional burdens" on pregnant women and interfering with that relationship.⁽⁶⁵⁾ The majority also acknowledged that the lower courts, in recognizing a duty of care, had sought to provide children born with injuries sustained before birth due to their mother's negligent driving with the possibility of recovering (i.e., obtaining payment) under the mother's liability insurance policy. Once again, however, it found that such a goal, while laudable, was best left in the hands of the legislatures.

Writing in dissent, then Justice Major argued that the defendant in this case was already under a legal obligation to drive carefully, and owed a duty of care to any passenger in the car and to other motorists. In other words, "she was not legally free to operate a motor vehicle without due care." Therefore, Justice Major found that imposing a duty of care on a pregnant woman towards her unborn child would be justified in these circumstances and would not be any more onerous than the existing duty of care that was already owed to a third party.

(63) [1999] 2 S.C.R. 753.

(64) *Ibid.*, para 31.

(65) *Ibid.*, para 77.

C. Parliamentary Action: Recent Private Members' Bills

1. Private Members' Bills Introduced in the 39th Parliament

While there is currently no federal legislation relating to the issue of abortion, some parliamentarians have recently attempted to fill this legislative void. In the 39th Parliament alone, four private Members' bills were introduced that touched directly or indirectly on the issue of abortion and/or the rights of the unborn child. Only one bill, however – Bill C-484 – passed second reading and was referred to committee for further study. (It subsequently died on the *Order Paper* with the dissolution of Parliament in September 2008.)

Bill C-338, An Act to amend the *Criminal Code* (procuring a miscarriage after twenty weeks of gestation), essentially called for the re-criminalization of abortions performed after the 20th week of gestation, with very limited exemptions to protect the life of the pregnant woman.

Bill C-484, An Act to amend the *Criminal Code* (injuring or causing the death of an unborn child while committing an offence), was introduced by former Member of Parliament Ken Epp.⁽⁶⁶⁾ Bill C-484 would have made it an indictable offence for someone to directly or indirectly cause the death of, or injury to, “a child during birth or at any stage of development before birth while committing or attempting to commit an offence against the mother of the child.” The bill also stated clearly that it “is not a defence to a charge under this section that the child is not a human being.” However, the bill did allow for certain important exemptions, stating that it did not apply to:

- (a) conduct relating to the lawful termination of the pregnancy of the mother of the child to which the mother has consented;
- (b) an act or omission that a person acting in good faith considers necessary to preserve the life of the mother of the child or the life of the child; or
- (c) any act or omission by the mother of the child.

Bill C-537, An Act to amend the *Criminal Code* (protection of conscience rights in the health care profession), was intended to protect the right of health care practitioners and others to refuse to participate in a medical procedure that offends a tenet of their religious belief “that human life is inviolable,” without fear of reprisal or other discrimination on the part of

(66) The text of this bill can be found in Appendix B.

health care employers, professional associations or educators. What brought this particular bill into the realm of abortion law was its definition of “human life,” which was taken to mean “the human organism at any stage of development, beginning at fertilization or creation.”

Finally, Bill C-543, An Act to amend the *Criminal Code* (abuse of pregnant women), sought to amend the *Criminal Code* sentencing provisions by adding pregnancy as an aggravating circumstance for the purpose of sentencing. While there was no mention of “unborn child” or “foetus” in this particular bill, there remained some concerns that it could nonetheless contribute to changing the legal status of the foetus.

2. Reaction to Recent Legislative Proposals

While all of the above bills received the support of various groups from the outset, the debate surrounding them escalated once a number of pro-choice and medical organizations, as well as columnists in various newspapers, began to express their views publicly. This section of the paper reviews some of the criticism levelled at the various bills, particularly Bill C-484, as well as some of their supporters’ responses.

In an open letter to Stephen Harper, Stéphane Dion, Gilles Duceppe and Jack Layton that was published in a number of Quebec newspapers, Dr. Yves Lamontagne, the head of the Collège des médecins du Québec, argued against all four of these private Members’ bills, stating that the adoption of any of them as drafted could lay the groundwork for a re-criminalization of abortion. He also criticized what he described as an attempt to re-criminalize abortion without real public debate.⁽⁶⁷⁾ Joyce Arthur, coordinator of the Abortion Rights Coalition of Canada, has also been a vocal opponent of all of these bills. On the subject of Bill C-338, she wrote that this bill tried to solve a problem that did not in fact exist, stating that “[o]nly 0.3% of abortions occur after 20 weeks gestation, almost all because of serious fetal or maternal health problems.” Furthermore, she noted that 90% of abortions occur within the first trimester and that “[o]ne reason that some women need second-trimester abortions is because they were unable to access first-trimester abortions.” Accordingly, the solution she proposed was to expand access to abortion services in the first trimester.⁽⁶⁸⁾ She objected to Bill C-537 on

(67) Yves Lamontagne, “Lettre ouverte aux chefs de partis fédéraux – Contre toute criminalisation de l’avortement,” *Le Devoir*, 3 June 2008.

(68) Joyce Arthur, “Liberal MP Paul Steckle introduces bill to ban abortions after 20 weeks,” ARCC, 4 October 2008, http://www.arcc-cdac.ca/action/bill_c338.html.

the grounds that it “exempts medical personnel from the duty to practice medicine,” that it “exempts physicians from ethical obligations towards patients,” violating in the process several sections of the Canadian Medical Association Code of Ethics, and that it is redundant since “most medical codes of ethics already allow health professionals to opt out, provided they inform and refer patients appropriately.”⁽⁶⁹⁾

Most of the criticism, however, has been focused on Bill C-484. The Federation of Medical Women of Canada urged its members to take action against this bill.⁽⁷⁰⁾ The Fédération des médecins spécialistes du Québec, which circulated a petition opposing Bill C-484, stated that endorsing the bill “would be equivalent to reopening an unwanted debate with an unpredictable outcome, yet with all the attendant consequences for medical practice” and concluded that if it passes, “it could have serious repercussions on the practice of medicine.”⁽⁷¹⁾ Then, in August 2008, the Canadian Medical Association, Canada’s largest doctors’ group, voted to oppose Bill C-484, fearing that it could limit women’s access to abortion and criminalize doctors who assist them.⁽⁷²⁾ Joyce Arthur, from ARCC, also raised objections to this bill, arguing that it would do nothing to protect pregnant women, which is the bill’s stated intention. She wrote that “[p]regnant women being assaulted or killed is largely a domestic violence issue, and the rights of fetuses should not take precedence over the rights of the woman.” She expressed concerns based on the experience to date with the foetal homicide laws in the United States, which have led to prosecution of pregnant women. She also argued that the granting of legal right to the foetus, separate from the rights of pregnant women, was a slippery slope that could lead to seriously restricting the rights of pregnant women in the future.⁽⁷³⁾

While the bill’s opponents have been particularly vocal, it was applauded by religious groups and a number of organizations such as LifeCanada, the Canada Family Action Coalition, and the Catholic Organization for Life and Family (COLF), all of which encouraged

(69) Joyce Arthur, “Arguments Against Bill C-537, ‘Protection of Conscience Rights in the Health Care Profession,’” ARCC, 6 May 2008, <http://www.arcc-cdac.ca/action/c-537.html>.

(70) Federation of Medical Women of Canada, “Honour FMWC’s past heroes for reproductive choice and help defeat Bill C484”. (This document is no longer available on the Federation’s site.)

(71) Fédération des médecins spécialistes du Québec, “FMSQ Considers Bill C-484 May Eliminate Decades of Social Consensus and Jurisprudence,” Press release, 15 April 2008, <http://www.fmsq.org/e/centredepresse/communiqués/coms/20080415.html>.

(72) Christina Spencer, “Docs condemn unborn crime bill,” *Ottawa Sun*, 21 August 2008, p. 23.

(73) Joyce Arthur, “The Case Against a ‘Fetal Homicide’ Law,” ARCC, 6 March 2008, http://www.arcc-cdac.ca/fetal_homicide_law.html.

their members to support Bill C-484. In a letter to COLF members, the organization's chairman wrote that Bill C-484 was a "welcome development because it recognizes, at least in the case of violent assault against the mother, the human dignity of the unborn child and the value of human life."⁽⁷⁴⁾ The bill passed second reading in the House of Commons by a vote of 147 to 132. Responding to criticism of it, Mr. Epp stated that:

Bill C-484 has not been designed, intended, nor can it be interpreted to restrict the actions of the mother of the unborn child or result in her criminal prosecution for her decisions in regard to that unborn child. It is strictly and explicitly aimed at third-parties who criminally attack a pregnant woman and in the process, harm or kill her unborn baby.⁽⁷⁵⁾

Mr. Epp also relied on the results of past polls showing a majority of Canadians, including a majority of women, would support a law making it a separate crime to kill an unborn child during an attack on a pregnant woman.⁽⁷⁶⁾ Mr. Epp rejected any comparison between his bill and the foetal homicide statutes in the United States, noting that the US examples relied upon by his opponents to discredit Bill C-484 were either legislation "worded sufficiently differently from C-484 as to not provide the protections noted in the Canadian bill" or "evidence that the protection of the mother from prosecution clearly stated in legislation successfully prevented prosecution of improperly laid charges."⁽⁷⁷⁾

With the dissolution of Parliament on 7 September 2008, the legislative slate has been wiped clean and, in order to proceed further, any or all of the above private Members' bills would have to be reintroduced in the next Parliament. While dissolution renders the issues raised temporarily moot, the strong reactions to these bills suggest that the discussion remains relevant. Clearly, the debate over foetal rights and how these rights relate to a woman's right to choose to terminate a pregnancy is not over in Canada and is likely to resurface, either through court challenges or through legislative proposals.

(74) Catholic Organization for Life and Family, "Letter Concerning Bill C-484," 17 April 2008, http://www.colf.ca/mamboshop/index.php?option=com_content&task=view&id=167&Itemid=335&lang=enc.

(75) Ken Epp, "Claims that US 'fetal homicide / unborn victims of violence' laws target pregnant women: A Smoke-screen to attempt to discredit Bill C-484," 5 May 2008.

(76) Environics poll commissioned by LifeCanada, October 2007, <http://www.lifecanada.org/html/resources/polling/2007PollReport.pdf>; Angus Reid Strategies poll, March 2008, http://angusreidstrategies.com/uploads/pages/pdfs/2008.03.13_Unborn.pdf.

(77) Epp (2008).

CONCLUSION: ABORTION IN CANADA TODAY

According to the latest data released by Statistics Canada in *Women in Canada: A Gender-based Statistical Report (Fifth Edition)*, not only is the number of abortions being performed in hospitals, as opposed to private clinics, decreasing, but the total number of abortions performed in Canada has also been decreasing. From a total of 106,418 induced abortions performed in both hospitals and clinics in 2001, there was a decrease in each of the following years, down to 96,815 in 2005, the most recent year for which data are available.⁽⁷⁸⁾ While it might be tempting to dismiss the drop in the number of abortions as a manifestation of a lower number of pregnancies, the ratio of induced abortions per 100 live births has also been decreasing, from 31.9 in 2001 to 28.3 in 2005.

One interpretation of these statistics could be that with increased access to contraception, there are fewer unwanted pregnancies, and thus less need for women to turn to abortion as a solution. Then again, it could be that the restrictive access policies in some provinces and the public campaigns by pro-life organizations have had a statistically significant impact on women's decisions about whether or not to terminate their pregnancies. At this time, no conclusion can be drawn on this issue; but it is certain that abortion will remain a controversial topic in Canada for years to come.

(78) Statistics Canada, *Women in Canada: A Gender-based Statistical Report (Fifth Edition)*, Ottawa, 2006. See Appendix C for detailed tables of statistics.

APPENDIX A

**LEGISLATIVE PROVISIONS RELEVANT
TO THE 1988 *MORGENTALER* DECISION**

APPENDIX A

LEGISLATIVE PROVISIONS RELEVANT TO THE *MORGENTALER* DECISION

Criminal Code⁽¹⁾

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, “means” includes

(a) the administration of a drug or other noxious thing,

(b) the use of an instrument, and

(c) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

(a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(d) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

(a) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(c) issued, by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(b) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(c), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(1) R.S.C. 1970, c. C-34.

(6) For the purposes of subsections (4) and (5) and this subsection

“accredited hospital” means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

“approved hospital” means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

“board” means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

“Minister of Health” means

(a) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,

(a.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,

(b) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(c) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(d) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

“qualified medical practitioner” means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

“therapeutic abortion committee” for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

Canadian Charter of Rights and Freedoms

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.

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.

APPENDIX B

BILL C-484

C-484

Second Session, Thirty-ninth Parliament,
56 Elizabeth II, 2007

HOUSE OF COMMONS OF CANADA

BILL C-484

An Act to amend the Criminal Code (injuring or causing the
death of an unborn child while committing an offence)

FIRST READING, NOVEMBER 21, 2007

C-484

Deuxième session, trente-neuvième législature,
56 Elizabeth II, 2007

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-484

Loi modifiant le Code criminel (blesser ou causer la mort d'un
enfant non encore né au cours de la perpétration d'une
infraction)

PREMIÈRE LECTURE LE 21 NOVEMBRE 2007

MR. EPP

M. EPP

SUMMARY

This enactment amends the *Criminal Code* by making it an offence to injure, cause the death of or attempt to cause the death of a child before or during its birth while committing or attempting to commit an offence against the mother.

SOMMAIRE

Le texte modifie le *Code criminel* en érigeant en infraction le fait de blesser un enfant ou de causer — ou tenter de causer — sa mort avant ou pendant sa naissance en perpétrant ou en tentant de perpétrer une infraction à l'égard de sa mère.

Also available on the Parliament of Canada Web Site at the following address:
<http://www.parl.gc.ca>

Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante:
<http://www.parl.gc.ca>

2nd Session, 39th Parliament,
56 Elizabeth II, 2007

2^e session, 39^e législature,
56 Elizabeth II, 2007

HOUSE OF COMMONS OF CANADA

CHAMBRE DES COMMUNES DU CANADA

BILL C-484

PROJET DE LOI C-484

An Act to amend the Criminal Code (injuring or causing the death of an unborn child while committing an offence)

Loi modifiant le Code criminel (blesser ou causer la mort d'un enfant non encore né au cours de la perpétration d'une infraction)

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Unborn Victims of Crime Act*.

1. *Loi sur les enfants non encore nés victimes d'actes criminels*.

Titre abrégé
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R.S., c. C-46

CRIMINAL CODE

CODE CRIMINEL

L.R., ch. C-46

2. Section 238 of the *Criminal Code* is amended by adding the following after subsection (2):

2. L'article 238 du *Code criminel* est modifié par adjonction, après le paragraphe (2), de ce qui suit :

Saving

(3) This section does not apply to a person to whom section 238.1 applies.

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(3) Le présent article ne s'applique pas à la personne visée par l'article 238.1.

Réserve
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3. The Act is amended by adding the following after section 238:

3. La même loi est modifiée par adjonction, après l'article 238, de ce qui suit :

Causing the death of an unborn child while committing an offence

238.1 (1) Every person who, directly or indirectly, causes the death of a child during birth or at any stage of development before birth while committing or attempting to commit an offence against the mother of the child, who the person knows or ought to know is pregnant,

238.1 (1) La personne qui cause directement ou indirectement la mort d'un enfant, pendant sa naissance ou à toute étape de son développement intra-utérin, en perpétrant ou en tentant de perpétrer une infraction à l'égard de la mère—qu'elle sait ou devrait savoir être enceinte—est coupable :

Causer la mort d'un enfant non encore né en perpétrant une infraction

(a) is guilty of an indictable offence and liable to imprisonment for life and to a minimum punishment of imprisonment for a term of 10 years if the person

a) soit d'un acte criminel et passible de 20 l'emprisonnement à perpétuité, la peine minimale étant de dix ans, si elle a l'intention de causer :

(i) means to cause the child's death, or

(i) soit la mort de l'enfant,

	(ii) means to cause injury to the child or mother that the person knows is likely to cause the child's death, and is reckless as to whether death ensues or not;	(ii) soit des blessures à l'enfant ou à la mère qu'elle sait être de nature à causer la mort de l'enfant, et qu'il lui est indifférent que la mort s'ensuive ou non;	
	(b) is guilty of an indictable offence and liable to imprisonment for life if paragraph (a) does not apply but the person shows wanton or reckless disregard for the life or safety of the child; or	b) soit d'un acte criminel et passible de l'emprisonnement à perpétuité si l'alinéa a) n'est pas applicable mais que la personne montre une insouciance déréglée ou téméraire à l'égard de la vie ou de la sécurité de l'enfant;	5 5 10
	(c) is, in any other case,	c) soit, dans tous les autres cas :	10
	(i) guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years, or	(i) d'un acte criminel et passible d'un emprisonnement maximal de dix ans,	
	(ii) guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding 18 months.	(ii) d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.	15
Reduced offence	(2) An offence that would otherwise be an offence under paragraph (1)(a) may be reduced to an offence under paragraph (1)(b) if the person who committed the offence did so in the heat of passion caused by sudden provocation within the meaning of section 232.	(2) Une infraction qui constituerait par ailleurs une infraction établie à l'alinéa (1)a) peut être réduite à celle établie à l'alinéa (1)b) si la personne qui a commis l'acte criminel a agi ainsi dans un accès de colère causé par une provocation soudaine, au sens de l'article 232.	Infraction réduite 20
Attempt to cause the death of an unborn child while committing an offence	(3) Every person who attempts by any means to commit an offence under paragraph (1)(a) is guilty of an indictable offence and liable to imprisonment for life.	(3) La personne qui, par quelque moyen, tente de perpétrer l'infraction prévue à l'alinéa (1)a) est coupable d'un acte criminel passible de l'emprisonnement à perpétuité.	Tenter de causer la mort d'un enfant non encore né en perpétrant une infraction 25
Injuring an unborn child while committing an offence	(4) Every person who, directly or indirectly, causes injury to a child during birth or at any stage of development before birth while committing or attempting to commit an offence against the mother, who the person knows or ought to know is pregnant,	(4) La personne qui cause directement ou indirectement des blessures à un enfant, pendant sa naissance ou à toute étape de son développement intra-utérin, en perpétrant ou en tentant de perpétrer une infraction à l'égard de la mère—qu'elle sait ou devrait savoir être enceinte—est coupable :	Blesser un enfant non encore né en perpétrant une infraction 30
	(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years; or	a) soit d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans;	35
	(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding 18 months.	b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.	40
Exclusion of defence	(5) It is not a defence to a charge under this section that the child is not a human being.	(5) Ne constitue pas un moyen de défense contre une accusation fondée sur le présent article le fait que l'enfant n'est pas un être humain.	Exclusion d'un moyen de défense 40

Separate offence	(6) An offence referred to in this section committed against a child is not included in any offence committed against the mother of the child.	(6) L'infraction visée au présent article perpétrée à l'encontre d'un enfant n'est pas incluse dans une infraction perpétrée à l'encontre de la mère de l'enfant.	Infraction distincte
Termination of pregnancy and acts in good faith excluded	<p>(7) For greater certainty, this section does not apply in respect of</p> <p>(a) conduct relating to the lawful termination of the pregnancy of the mother of the child to which the mother has consented;</p> <p>(b) an act or omission that a person acting in good faith considers necessary to preserve the life of the mother of the child or the life of the child; or</p> <p>(c) any act or omission by the mother of the child.</p>	<p>(7) Il est entendu que le présent article ne vise pas :</p> <p>a) un acte posé relativement à une interruption légale de la grossesse de la mère de l'enfant avec le consentement de celle-ci;</p> <p>b) un acte ou une omission qu'une personne agissant de bonne foi considère nécessaire pour préserver la vie de la mère de l'enfant ou la vie de l'enfant;</p> <p>c) un acte ou une omission commis par la mère de l'enfant.</p>	5 Exclusions — interruption de grossesse et actes commis de bonne foi
	4. Section 743.6 of the Act is amended by adding the following after subsection (1.2):	4. L'article 743.6 de la même loi est modifié par adjonction, après le paragraphe (1.2), de ce qui suit :	
Power of court to delay parole	<p>743.6 (1.3) Notwithstanding section 120 of the <i>Corrections and Conditional Release Act</i>, where an offender receives a sentence of imprisonment, including a sentence of imprisonment for life, on conviction for an offence under paragraph 238.1(1)(a), the court shall order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less, unless the court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence and the objectives of specific and general deterrence would be adequately served by a period of parole ineligibility determined in accordance with the <i>Corrections and Conditional Release Act</i>.</p>	<p>743.6 (1.3) Par dérogation à l'article 120 de la <i>Loi sur le système correctionnel et la mise en liberté sous condition</i>, le tribunal est tenu, sauf s'il est convaincu, compte tenu des circonstances de l'infraction et du caractère et des particularités du délinquant, que la réprobation de la société à l'égard de l'infraction commise et l'effet dissuasif de l'ordonnance auraient la portée voulue si la période d'inadmissibilité était déterminée conformément à cette loi, d'ordonner que le délinquant condamné à une peine d'emprisonnement — y compris une peine d'emprisonnement à perpétuité — pour une infraction prévue à l'alinéa 238.1(1)a) purge, avant d'être admissible à la libération conditionnelle totale, la moitié de sa peine jusqu'à concurrence de dix ans.</p>	20 Pouvoir judiciaire de retarder la libération conditionnelle

APPENDIX C

LATEST STATISTICS ON ABORTION IN CANADA

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LATEST STATISTICS ON ABORTION IN CANADA

Induced Abortions (Hospitals and Clinics) by Age Group

	2001	2002	2003	2004	2005
	Number of induced abortions				
All ages^{1,2,3,4}	106,418	105,154	103,768	100,039	96,815
Age unknown	33	17	14	5	2
Under 15	412	337	302	304	284
15 to 19	19,968	19,007	17,656	16,938	16,065
20 to 24	32,730	32,371	32,662	31,467	30,359
25 to 29	22,012	22,189	22,236	21,662	21,419
30 to 34	16,243	15,981	15,734	15,089	14,450
35 to 39	10,977	11,022	10,821	10,206	9,973
40 and older ²	4,043	4,230	4,343	4,368	4,263
	Rate per 1,000 women				
All ages^{3,4,5}	15.2	14.9	14.7	14.1	13.7
Under 15 ⁶	2.1	1.7	1.5	1.4	1.3
15 to 19	19.4	18.4	17.1	16.3	15.3
20 to 24	31.7	30.8	30.5	28.9	27.7
25 to 29	21.6	21.5	21.3	20.3	19.7
30 to 34	14.6	14.4	14.2	13.7	13.1
35 to 39	8.4	8.6	8.8	8.5	8.5
40 and older ⁷	3.0	3.2	3.2	3.2	3.1

Note: Data users should be aware of certain limitations to the Therapeutic Abortion Survey. There are recognized issues concerning coverage, increased submission of aggregate counts instead of detailed records, and an increased reliance on age estimation.

1. Total includes cases with age not specified. Excludes abortions performed on non-Canadian residents.
2. Includes abortions performed on women aged 45 years and older.
3. In 2004, data for Manitoba include only abortions performed in hospitals.
4. For 2002 and 2003, Nunavut residents are excluded due to incomplete reporting.
5. Rates based on women aged 14 to 44 years. Includes abortions to women aged 13 years and under and 45 years and older. Includes cases with age not specified.
6. Rates based on women aged 14 years.
7. Rates based on women aged 40 to 44 years. Includes abortions to women aged 45 years and older.

Sources: Statistics Canada, CANSIM, Table 106-9034 and Catalogue No. 82-223-X; Canadian Institute for Health Information.

Last modified: 2008-05-21.

Induced Abortions (Hospitals and Clinics) per 100 Live Births

	2001	2002	2003	2004	2005
	Ratio per 100 live births				
Canada^{1,2,3}	31.9	32.1	31.0	29.7	28.3
Newfoundland and Labrador	18.7	17.5	19.3	20.1	19.6
Prince Edward Island	12.6	9.8	9.7	10.3	9.4
Nova Scotia	21.2	21.1	22.3	21.8	22.2
New Brunswick	14.3	14.8	13.3	13.2	13.7
Quebec	42.2	42.6	41.7	41.3	38.3
Ontario	29.5	29.7	28.0	26.5	25.1
Manitoba ¹	24.1	23.5	26.3	19.3	15.8
Saskatchewan	15.5	15.4	15.3	15.8	15.2
Alberta	28.2	27.7	26.8	27.2	25.8
British Columbia	39.2	39.9	38.3	34.9	35.4
Yukon Territory	35.5	36.9	38.5	x	43.8
Northwest Territories	46.7	38.6	36.4	37.4	x
Nunavut ²	20.8	x	x
<p>x: suppressed to meet the confidentiality requirements of the Statistics Act</p> <p>..: not available for a specific period of time.</p> <p>Note: Data users should be aware of certain limitations to the Therapeutic Abortion Survey. There are recognized issues concerning coverage, increased submission of aggregate counts instead of detailed records, and an increased reliance on age estimation.</p> <ol style="list-style-type: none"> 1. In 2004, data for Manitoba include only abortions performed in hospitals. 2. For 2002 and 2003, Nunavut residents are excluded due to incomplete reporting. 3. Includes cases of unknown area of residence and, prior to 2004, abortions performed on Canadian residents in the United States. <p>Sources: Statistics Canada, CANSIM, Table 106-9013 and Catalogue No. 82-223-X; Canadian Institute for Health Information.</p>					