SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Ontario)

B E T W E E N:

DR. HENRY MORGENTALER
DR. LESLIE FRANK SMOLING
DR. ROBERT SCOTT

Appellants

-and-

HER MAJESTY THE QUEEN

Respondent

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PART I

THE FACTS

1. Doctors Morgentaler, Smoling and Scott were charged on July 5, 1983, with conspiracy to procure the miscarriage of female persons contrary to sections 251(1) and 423(1)(d) of the Criminal Code of Canada. At the outset of the trial, counsel for the accused moved to quash the indictment on constitutional grounds relating to the division of legislative powers and rights guaranteed by the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms. Viva voce and documentary evidence was presented as a factual foundation for legal argument. The Attorney General of Ontario adduced no evidence. The intervenant, the Attorney General of Canada, presented three witnesses to prove documents.

2. Following 63 days of evidence and argument, the trial judge denied the motion to quash the indictment. Counsel for the accused attempted to appeal the ruling, but the appeal was quashed by the Ontario Court of Appeal. The trial continued before a jury, and the accused were found not guilty.

3. The Ontario Court of Appeal allowed the Crown appeal from the acquittal and dismissed the accuseds' cross-appeal on the constitutional issues and dismissed arguments that the Crown appeal raised no question of law alone and, further, dismissed the argument that s. 605 of the Criminal Code is inconsistent with ss. 7 and 11 of the Charter. A new trial was ordered, and the accused appealed to the Supreme Court of Canada. The Chief Justice stated a number of constitutional questions arising on the appeal. (Vol. 1, pp. 49-63)

A. EVIDENCE RELATING TO THE CONSTITUTIONAL VALIDITY OF SECTION 251 OF THE CRIMINAL CODE

4. The Appellants rely on all the evidence adduced, both at the motion to quash brought at the outset of the trial (herein referred to as the "pre-trial" motion) and at trial, for purposes of the constitutional issues. The evidence adduced by the Appellants was uncontradicted. The witnesses are world leaders in their fields, and/or have ongoing, first-hand contact with the actual operative effect and impact of s. 251 of the Criminal Code. The evidence established that abortion is a common, accepted and very safe

medical procedure in Canada which is chosen by hundreds of thousands of Canadian women following a private, personal, conscientious decision. Further, the evidence established that section 251 of the Criminal Code, in requiring abortion to be performed in hospitals following approval by a therapeutic abortion committee has, inter alia, the following effects:

i) abortion services are provided unequally across Canada, and abortions are not available to all women desiring them;

ii) the hospital and committee requirements interfere with a woman's deeply personal decision to have an abortion, disrupt the physician-patient relationship, cause delay and therefore danger, and are medically unnecessary;

iii) the hospital and committee requirements cause unnecessary and cruel mental and physical anguish to women wishing to have an abortion.

5. Evidence established that approximately 65,000 Canadian women have abortions in hospitals each year. Additionally, in Quebec approximately 13,000 abortions are performed in public and private clinics and doctor's offices without committee approval. Several thousand more Canadian women are forced to travel to the United States for the procedure each year due to limited or no access to the procedure because of the hospital and committee requirements.

6. Abortion is a very safe medical procedure. However, any delay in obtaining the procedure increases risk to life and health. A simple procedure known as D & E, used in the United States from 12 to 16 weeks gestation, is often not available in Canadian hospitals, causing many women to wait from their 12th to 17th week when they must undergo a more dangerous, cruel, traumatic, lengthy and painful instillation procedure.

7. The evidence established that abortions can be performed as safely, if not more safely, in clinics than in hospitals, and that there is no reason for restricting the procedure to hospitals. Indeed, hospitals were described as unsatisfactory places for abortions due to all the other demands on a hospital and the bureaucratic obstacles in them. Evidence also established that hospitals could not meet the demand for the procedure and that free-standing clinics (clinics not part of hospitals) are necessary. Additionally, the committee requirement is "contra-indicated medically" as it serves no purpose and interferes with a woman's decision to have the procedure, and interferes with her relationship with her physician.

8. The hospital and committee requirements limit access to abortion and cause delay and denial. Section 251(4) of the Criminal Code is given a variety of interpretations due to the vagueness of the term "health", and access to the procedure is unequal. Standards applied by committees are arbitrary, capricious, and not based on medical grounds. Many women have no access to a hospital with a therapeutic abortion committee.

9. Specific examples of inadequate and unequal access to abortion causing delay and denial and forcing women to leave their community of residence and, in many cases, to leave the country to obtain the procedure, were presented by witnesses from Toronto, Buffalo, Ottawa-Hull, Hamilton, Montreal and Duluth, Minnesota.

10. The delay caused by the hospital and committee requirements causes physical and psychological harm to women. Any delay increases risk, and women are forced to undergo the instillation procedure described as cruel and outmoded. Women experience stress from the delay and uncertainty arising from the committee and hospital requirements. Some become suicidal. This impact is especially invidious on teenagers. Evidence established that women denied abortions lead less satisfactory lives (as do their unwanted children) than women who obtain the procedure and have children at a time when they are desired.

11. Evidence also established that s. 251 of the Criminal Code is not enforced in Quebec where private and government community health clinics meet the need for abortions in safe, comforting surroundings, with little or no delay. The clinics are regularly inspected by the government and are safer than hospitals.

12. The abortion decision was described as a personal, private decision which is made by a woman and her doctor. Women with unwanted pregnancies were described as desparate, frightened and threatened. Counselling is important in making the decision and calming fears. The hospital and committee requirements interfere with this decision, limit the effectiveness of counselling and greatly increase anxiety and suffering.

13. The abortion decision was also described as a fundamental moral and religious issue which, according to several major religions, is to be made by the individual woman following counselling. By removing the

abortion decision from the woman, s. 251 thereby violates religious and conscientious beliefs and principles, and the ability to manifest them.

B. EVIDENCE RELATING TO THE DEFENCE OF NECESSITY

14. At trial, uncontradicted evidence of an emergency situation was presented. Women faced with unwanted pregnancies are in a state of crisis. They are anxious, desparate, frightened and threatened by their situation. Some become suicidal. Many women encounter delay and denial in the system which puts their physical and mental health in danger. Access to abortion is inadequate and inequitable and many women are forced to travel (often to the United States and Quebec) to obtain the procedure.

15. The anxiety and suffering of women denied the procedure, or delayed in obtaining it, thereby putting their health in danger, and the fact that many women must leave their community of residence to obtain the procedure safely and without delay, was evidence that the Appellants' actions were involuntary. There was evidence that the Appellants felt morally compelled to open the clinic to provide a needed medical service when normal human instincts cried out for action. The hospital and committee system was described as "bad, bad medicine" and a terrible way to deliver health care. It causes suffering, humiliation and indignity and punishes women, in some cases by forcing them to bear unwanted children.

16. Evidence of extensive but unsuccessful lobbying to change the law was presented. Representatives of the Canadian Council on Hospital Accreditation and the Ontario Ministry of Health demonstrated complete indifference and ignorance regarding abortion services, and stated that they would not approve or accredit the clinic under s. 251 of the Criminal Code. They further stated that they did not want the reponsibilities thrust on them by the Criminal Code. In addition, consent forms seized from the clinic (Ex. 8, 33, 34) established that women were unable to obtain abortions in hospitals within a reasonable period of time. Therefore, compliance with s. 251 was impossible and the Appellants had no legal way out.

17. Clinics are as safe, or safer places to perform abortions than hospitals. Delay is minimized and clinics meet a demand which cannot be met by hospitals. Clinics are more desirable places for women to have the

procedure because of the counselling available and the sympathetic surroundings found in them. The Quebec experience demonstrated this most clearly. Women who obtain abortions quickly in clinics avoid psychological and physical suffering and have control over their lives. Also, women who have had abortions tend to be better contraceptors afterwards. Accordingly, the Appellants' actions caused less harm than if the law had been obeyed, as the law itself does nothing but cause harm.

PART II

POINTS IN ISSUE

18. Constitutional Validity of s. 605 of the Criminal Code: Did the Court of Appeal err in law in hearing the appeal by failing to find s. 605 of the Criminal Code inconsistent with ss. 7, 11(d), 11(f), and 11(h) of the Canadian Charter of Rights and Freedoms?

19. Constitutional Validity of s. 251 of the Criminal Code:

(a) Does section 251 of the Criminal Code of Canada infringe or deny the rights and freedoms guaranteed by sections 2(a), 7, 12, 15, 27 and 28 of the Canadian Charter of Rights and Freedoms?

(b) If section 251 of the Criminal Code of Canada infringes or denies the rights and freedoms guaranteed by sections 2(a), 7, 12, 15, 27 and 28 of the Canadian Charter of Rights and Freedoms, is section 251 justified by section 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

(c) Is section 251 of the Criminal Code of Canada ultra vires the Parliament of Canada?

(d) Does section 251 of the Criminal Code of Canada violate section 96 of the Constitution Act, 1867?

(e) Does section 251 of the Criminal Code of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so has the Federal Government abdicated its authority in this area?

20. Defence of Necessity: Did the Court of Appeal err in law in finding that the defence of necessity was not applicable, and in finding that the learned trial judge erred in charging the jury on the defence of necessity, and that such errors constituted a question of law alone?

21. Jury Address: Did the Court of Appeal err in finding that the jury did not have a right to ignore the law, and that defence counsel telling them they had such a right constituted a question of law alone?

22. Costs: Did the Court of Appeal err in law in failing to find s. 610(3) of the Criminal Code inconsistent with ss. 7, 11(d), 11(f) and 11(h) of the Canadian Charter of Rights and Freedoms and in failing to find that s. 24(1) of the Charter gives the Court the power to award costs and in failing to so award costs to the Appellants in this case?

PART III

ARGUMENT

A. INVALIDITY OF SECTION 605 OF THE CRIMINAL CODE

23. It is respectfully submitted that s. 605(1)(a) of the Criminal Code is contrary to ss. 7, 11(d), 11(f) and 11(h) of the Canadian Charter of Rights and Freedoms and is not justified by section 1 of the Charter and therefore is inconsistent with s. 52 of the Constitution Act, 1982 and of no force and effect.

(i) Section 7

24. The protection against double jeopardy is one of the "basic tenets of our legal system" and a principle of fundamental justice: Re B.C. Motor Vehicle Act, [1982] 2 S.C.R. 486 at 502-3; Charter, s. 11(h). An appeal from an acquittal deprives an accused of his or her liberty and security of the person, and subjects him or her to "'overlong subjection to the vexations and vicissitudes of a pending criminal accusation'...[which] include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors": Mills v. The Queen, unreported, June 26, 1986, per Lamer J. dissenting at pp. 75-76. Such an appeal compels an accused "to live in a continuing state of anxiety and insecurity,...enhancing the possibility that even though innocent he may be found guilty": Green v. U.S., 355 U.S. 184 (1957) at 187-8.

25. As members of this Court have stated, "the right of appeal given to the Crown [is]...a striking departure from fundamental principles of security for the individual" (Cullen v. The King [1949] S.C.R. 658 per Rand J. dissenting at pp. 665-6), and is "clearly a fundamental departure from common law principles": Morgentaler v. The Queen, [1976] 1 S.C.R. 616 at p. 669, per Pigeon J. (hereafter referred to as "Morgentaler 1975").

Accordingly, adopting the same analysis as in Re B.C. Motor Vehicle Act, at 512-520, s. 605 of the Criminal Code is contrary to s. 7 of the Charter. See also: Friedland, Double Jeopardy (1969) at p. 294; Benton v. Maryland, 395 U.S. 784 at 795-6 (1969); R. v. Burns (No. 1) (1901), 4 C.C.C. 323 at 327-8 (Ont. C.A.); R. v. Karn (1903), 6 C.C.C. 479 at 484 (Ont. C.A.); Hansard, Commons (1892), p. 4267; Rex v. Munroe (1939), 73 C.C.C. 357 at 359-361 per Martin C.J.B.C.

26. The concept of res judicata may also be regarded as a principle of fundamental justice which, when linked with the bis vexari principle, should also bar Crown appeals from acquittals pursuant to s. 7 of the Charter. As this Court held in Grdic v. The Queen, [1985] 1 S.C.R. 810 at 825, res judicata means "that any issue the resolution of which had to be in favour of the accused as a prerequisite to the acquittal, is irrevocably deemed to have been found conclusively in favour of the accused." See also Wilson J. dissenting at p. 821; Duhamel v. The Queen, [1984] 2 S.C.R. 555 at 561-562; Kienapple v. The Queen, [1975] 1 S.C.R. 729 at 752; R. v. Riddle, [1980] 1 S.C.R. 380 at 398; Spencer Bower and Turner, The Doctrine of Res Judicta (1969) at pp. 143-144.

(ii) Sections 11(d), (f), (h) and 13

27. It is submitted that the analysis applied by this Court to s. 11(d) of the Charter in R. v. Oakes, [1986] 1 S.C.R. 103, is equally applicable to s. 11(h). Section 11(h) protects individuals against successive or repetitive prosecutions. It is "a hallowed principle lying at the very heart of criminal law": Oakes at p. 119. Its violation has grave ramifications on an accused which Rand J., dissenting, described as "the supreme invasion of the rights of an individual": Cullen at p. 668. See also: Green v. U.S. at pp. 187-8; United States Constitution, 5th Amendment; International Covenant on Civil and Political Rights, 1966, Art. 14(7); Blackstone, 4 Commentaries 335.

28. It is submitted that "finally acquitted" means following a verdict of not guilty based on some or all of the evidence. This is consistent with this Court's interpretation of when an accused is in jeopardy ("until final determination of the matter by rendering of the verdict": Riddle at p. 398) and properly recognizes the special importance of an acquittal and the

rationale of the double jeopardy principle. It is also consistent with other judgments of this Court (e.g., R. v. Jewitt, [1985] 2 S.C.R. 128 at 147-148) and the rule against state and Crown appeals in the United States and England. See: Double Jeopardy, at pp. 279-281 and 294-299; Benton v. Maryland, supra. While American law does permit state appeals from pretrial rulings and dismissals unrelated to factual guilt or innocence, the Supreme Court has steadfastly held that an acquittal, or ruling of the judge in the accused's favour on "some or all of the factual elements of the offence charged", is immune from government appeal: U.S. v. Scott, 437 U.S. 82 (1978) at 97-99; Sanabria v. U.S., 437 U.S. 54 (1978); Arizona v. Washington, 434 U.S. 497 at 503 (1978); Smalis v. Pennsylvania, 106 S. Ct. 1745 at 1748 (1986); Del Buono, "The Right to Appeal in Indictable Cases: A Legislative History" (1979), 16 Alta. L. Rev. 446.

29. It is submitted that to interpret "finally acquitted" as meaning following appeals would render s. 11(h) meaningless. It would result in acquittals being treated the same way as convictions and would do violence to common law principles. It would deny the meaning of s. 52 of the Constitution Act, 1982 and be contrary to principles enunciated by this Court in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357 at 366-7 and Hunter v. Southam, [1984] 2 S.C.R. 145 at 155-6, as s. 11(h) would be defined by whatever procedural legislation is adopted by Parliament. See also: Smalis v. Pennsylvania, at p. 1749, and Double Jeopardy at 279, distinguishing acquittals from convictions; Re Burrows and The Queen (1983), 150 D.L.R. (3d) 317 at 328-331 (Man. C.A., lv. to appeal refused, [1983] 1 S.C.R. vi); R. v. Misra (1985), 39 Sask. R. 7 (Sask. Q.B.).

30. Regard should also be had to the right to the benefit of trial by jury in s. 11(f) of the Charter, which is diminished by an appeal from an acquittal. It cannot be known why a jury acquits an accused, no matter what "legal" error may have been made by a trial judge. To permit appellate review of jury acquittals denies this benefit by allowing judges to second-guess and usurp the power of juries. "Courts have always resisted inquiring into a jury's thought processes" and "through this deference the jury brings to the criminal process, in addition to the collective judgment

of the community, an element of needed finality": U.S. v. Powell, 105 S. Ct. 471 at 478 (1984). See also: R. v. Hill, unreported, S.C.C., April 24, 1986, at pp. 22 and 27 ("collective good sense" of the jury); R. v. Bryant (1984), 42 C.R. (3d) 312 at 327-9 (Ont. C.A.); Devlin, Trial By Jury (1956) at pp. 75, 164; Duncan v. Louisiana, 391 U.S. 145 at 149 (1969); Arizona v. Washington at 503; Brett and Waller, Criminal Law (4th ed., 1978) at pp. 49-50.

31. Regard should also be had to s. 11(d) of the Charter. A verdict of acquittal is a finding that the prosecution has not proved its case beyond a reasonable doubt, and fairness to an accused demands that "an acquittal is the equivalent to a finding of innocence": Double Jeopardy, at p. 129, quoted in Grdic at 825. However, an appeal from an acquittal denies this; it forces an accused to respond to a charge, and is contrary of the presumption of innocence: Woolmington v. D.P.P., [1935] A.C. 462 at 481-2 (H.L.); Oakes at pp. 120-121; R. v. Appleby, [1972] S.C.R. 303 at 317 per Laskin J.

32. Additionally, it is submitted that the concept of 'continuing' jeopardy was rejected by this Court in Dubois v. The Queen, [1985] 2 S.C.R. 350, where it held that retrials ordered by appellate courts are "other proceedings" within the meaning of s. 13 of the Charter. See also Kepner v. U.S., 195 U.S. 100 (1904), and Benton v. Maryland, supra.

(iii) Section 1

33. It is submitted that s. 605 of the Criminal Code is not justified under s. 1 of the Charter. There is no evidence that justifies such grave violations of Charter rights meeting any of the tests enunciated by this Court in Oakes at pp. 135-140. See also: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 352; R. v. Robson (1984), 41 C.R. (3d) 68 at 78 (B.C.S.C., affd. (1985), 45 C.R. (3d) 68 (B.C.C.A.)). On the contrary, the section denies the benefit of trial by jury, is contrary to the presumption of innocence and in conflict with the fundamental principle of double jeopardy. It puts an onerous burden on an accused, forcing him or her to suffer ongoing prosecution because of state error, perhaps resulting in an unjustified finding of guilt: Double Jeopardy, pp. 295-9. Section 605 is overly broad (compare, e.g., Criminal Justice Act, 1972, (U.K.) c. 71). It

makes no distinction between "final" verdicts based on evidence and dismissals or acquittals which do not involve any consideration of the guilt or innocence of the accused. (See U.S. cases and Double Jeopardy at pp. 298-99) Nor does s. 605, in being limited to questions of law alone, provide adequate protection as the words have been given a broad meaning: Double Jeopardy, p. 281, n. 3. Furthermore, s. 605 is contrary to the law in other free and democratic societies. See, e.g., Brett and Waller, Criminal Law at pp. 55-56 for the positions in Australia and New Zealand.

(iv) Judgment in the Court Below

34. It is submitted that the Ontario Court of Appeal erred in law in that (at Appeal Case, Vol. 3, pp. 6930-40):

(a) the Court failed to consider whether s. 605 violated s. 7 of the Charter;
(b) the Court failed to consider the purpose of s. 11(h) and the related rights in ss. 11(d) and 11(f);
(c) the Court failed to consider the fundamental nature of the rules against double jeopardy;
(d) the Court adopted a 'frozen law' approach in interpreting s. 11(h) in a narrow way having regard only to law as it existed at the time the Charter was enacted, which emasculates and denies the purpose of the Charter;
(e) the Court erred in misinterpreting and misapplying the American law by applying cases dealing with final convictions to the meaning of "finally acquitted" (see, e.g., Smalis at pp. 1748-9);
(f) the Court erred in interpreting "two influential commentators" to have dismissed the idea that section 11(h) did not preclude appeals from acquittals when they were, at best, ambiguous on this point (Friedland, A Century of Criminal Justice (1984) at p. 228 and Hogg, Constitutional Law of Canada (2nd ed., 1985) at p. 777);
(g) the Court erred in law in failing to give proper weight to the fundamental rights in ss. 7 and 11 and the invidious effect of s. 605 on such rights, and in failing to consider and give proper weight to the numerous policy reasons to bar appeals from acquittals, especially in the absence of any evidence to justify s. 605 of the Criminal Code.

B. INVALIDITY OF SECTION 251 OF THE CRIMINAL CODE

(i) SECTION 7: LIFE, LIBERTY AND SECURITY OF THE PERSON AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

35. It is respectfully submitted that s. 251 of the Criminal Code is contrary to s. 7 of the Charter and is not justified by s. 1 and is therefore of no force and effect.

36. The rights to life, liberty, and security of the person are fundamental in our system of justice and basic to the enjoyment of all other rights and freedoms. Their deprivation "has the most severe consequences upon an individual": R. v. Caddedu (1982), 40 O.R. (2d), 128 (H.C.) at 139, quoted in Re B.C. Motor Vehicle Act at p 501. These rights are expressed in "broad, affirmative language" in the Charter: supra. See also: Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 205-6 per Wilson J.; Blackstone, 1 Commentaries 124-138. Compare: U.S. Constitution, 14th Amendment; European Convention for the Protection of Human Rights and Freedoms (1948), Art. 5; Universal Declaration of Human Rights, Art. 3; International Covenant, 1966, Art. 9. The meaning and purpose of these rights must therefore be broad, "to enhance the vitality, volitional autonomy and physical well-being of citizens...leaving ...persons free from unwarranted constraint by the State, and thus to enhance the degree of freedom in our society": R. v. Neale (1985), 20 C.C.C. (3d) 415 (Alta. Q.B.) at 431.

(a) The Right to Liberty

37. It is submitted that regard should be had to the broad meaning of liberty found by the United States Supreme Court: Singh at p. 205 quoting from Board of Regents v. Roth, 408 U.S. 564 at 572 (1972). See also: Meyer v. Nebraska, 262 U.S. 380 at 399 (1923); Bolling v. Sharpe, 347 U.S. 497 at 499 (1954); National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 at 646 (1949); Poe v. Ullman, 367 U.S. 497 at 543 (1961). The Supreme Court of the United States has held that liberty includes the right of parents to direct and control the upbringing of their children (Pierce v. Society of Sisters, 268 U.S. 510 at 534-5 (1925)) and held in Palko v. Connecticut, 302 U.S. 319 at 327 (1937), that the "domain of liberty" includes "liberty of the mind as well as liberty of action." The Court has struck down laws requiring sterilization of habitual criminals (Skinner v. Oklahoma, 316 U.S. 535 at 541 (1942)), laws forbidding the use of contraceptives (Griswold v. Connecticut, 381 U.S. 479 at 482-4, 494-8 (1965), and Eisenstadt v. Baird, 405 U.S. 438 at 453 (1972)), and prohibitions on racial intermarriage: Loving v. Virginia, 388 U.S. 1 (1967).

38. In Griswold, Goldberg J., concurring, noted at p. 497 that "liberty" must include marital privacy and the right to determine family size for, if it did not, then, "if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married parents is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid." As Brennan J. stated in Eisenstadt at p. 453: "If the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

39. The United States Supreme Court followed this line of cases in Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), holding at p. 154 that "this right of privacy...in the Fourteenth Amendment's concept of personal liberty...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court noted at p. 141 the "substantially broader right to terminate a pregnancy" which existed at common law and through much of the nineteenth century and, at p. 154, the grave effects of a prohibition on a woman's right to choose to terminate her pregnancy. In Doe v. Bolton, the Court struck down requirements in Georgia that all abortions be performed in accredited hospitals after approval by a committee as unjustified and "unduly restrictive of the patient's rights and needs" (pp. 195-198). Such requirements were also found to "unduly infringe on the physician's right to practice." (pp. 199-200 and pp. 214-222 per Douglas J.)

40. The U.S. Supreme Court has consistently reaffirmed its rulings in Roe and Doe in striking down requirements that second trimester abortions be performed in hospitals, and restrictions and impositions such as arbitrary and inflexible waiting periods and reporting requirements: City of Akron v. Akron Centre for Reproductive Health, 103 S. Ct. 2481 (1983); Harris v. McRae, 448 U.S. 297 (1980); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Carey v. Population Services International, 431 U.S. 678 (1977); Planned Parenthood v. Ashcroft, 103 S. Ct. 2317 (1983). In Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986), the Court reaffirmed Roe and Doe with only two of four dissenters disagreeing with those holdings, and they were the same two

Justices (White and Rehnquist JJ.) who dissented in those cases. Blackmun, J. for the majority stated at pp. 2184-5:

> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government....That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision - with the guidance of her physician and within the limits specified in Roe - whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

For a rigorous criticism of Justice White's dissent see the concurring judgment of Justice Stevens at 2187-90.

41. The Charter also creates and protects zones of privacy and recognizes the right to be let alone: Hunter, p. 159; Re B.C. Motor Vehicle Act, pp. 502-3. See also: R. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd., [1980] 2 W.L.R. 15 at 59 per Lord Scarman; R. v. Rao (1984), 9 D.L.R. (4th) 542 (Ont. C.A.). The right of privacy may also be found in other aspects of Canadian law, such as tort law, which is based on the right to be let alone. See, e.g.: Motherwell v. Motherwell (1976), 73 D.L.R. (3rd) 62 (Alta. C.A.); Saccone v. Orr (1981), 34 O.R. (2d) 317 (Ont. C.A.); The Privacy Act, S.C. 1980-81-82-83, c. 111, Sch. II; and the Criminal Code provisions dealing with publication bans (e.g. ss. 467, 442, 246.6). See also Argyll v. Argyll, [1965] 1 All E.R. 611 (Ch); Albert v. Strange (1849), 41 E.R. 1171; Krouse v. Chrysler Corp. (1971), 25 D.L.R. (3d) 49 (Ont. H.C.); (1973), 40 D.L.R. (3d) 15 (Ont. C.A.); Re Southam Inc. and The Queen, (1983), 41 O.R. (2d) 113 (Ont. C.A.).

42. It is submitted that the Charter reaffirms the existing right to privacy in s. 26 and strengthens it through many of the specific rights and freedoms in the Charter in ss. 2 and 6 -12. See, e.g. Big M Drug Mart Ltd. at 346, and at 348 quoting from Saumur v. City of Quebec, [1953] 2 S.C.R. 299 at 329. See also R. v. Biron, [1976] 2 S.C.R. 56 at 64, per Laskin C.J.C., dissenting (Spence and Dickson JJ. concurring).

43. Similar "liberty" values to those expressed in the American cases have been articulated in Charter cases such as Big M Drug Mart Ltd. (at 336-7), Neale (at 422-3), Oakes (at 136), R. v. Robson (1985), 19 D.L.R.

(4th) 112 at 114-5 (B.C.C.A.), and Re Mia and Medical Sevices Commission of B.C. (1985), 17 D.L.R. (4th) 385 at 441-6 (B.C.S.C.). Therefore, the same broad approach to liberty taken in the United States should be adopted under the Charter. To do so, it is submitted, would do no violence to the language of the Charter, or to any other competing interests. "Liberty" has the same meaning historically in the two countries, and the values sought to be preserved by the Charter - "the unremitting protection of individual rights and liberties" - are the same as those protected under the American Bill of Rights. Additionally, a broad notion of liberty was known to the drafters of the Charter and such an interpretation is consistent with the principles of interpretation established by this Court in Skapinker at pp. 366-7 and Hunter at pp. 155-6.

44. Accordingly, it is submitted that the right to liberty includes the right to be let alone, and this includes the right to be let alone in making fundamental decisions such as whether to marry, divorce, bear children and, conversely, the right not to bear children, which includes the right to decide to terminate an unwanted pregnancy. Such decisions are deeply personal, private decisions about how one wishes to lead one's life and are fundamental to one's control over one's own body and the ability to lead one's life free from interference.

45. Alternatively, even on a narrow interpretation of liberty, it is submitted that one's liberty is denied when government prevents action and takes control of a person. Even in this narrow sense, a woman's liberty is denied when she becomes pregnant because the government takes hold of her and controls whether she may act to terminate her pregnancy.

(b) The Right to Security of the Person

46. It is submitted that the right to security of the person is an explicit right to control one's body and to make fundamental decisions about one's life. It is as deeply established in our society as liberty and relates directly to the physical security, dignity and integrity of the individual. See: Blackstone, 1 Commentaries 129; Miller, "The Forest of Due Process of Law" in Pennock and Chapman eds., Due Process (N.Y.U. Press, 1977), p. 7; Whyte, "Fundamental Justice: The Scope and Application of

Section 7 of the Charter" (1983), 13 Man. L.J. 445 at 472-475; Charter s. 12; Tribe, American Constitutional Law (1978) at 893-6.

47. In Mills v. The Queen (unreported, June 26, 1986), Lamer J., dissenting (Dickson C.J.C. concurring), noted that "security of the person" in the narrow context of s. 11(b) is "not restricted to physical integrity" but "encompasses protection against 'overlong subjection to the vexations and vicissitudes of a pending criminal accusation'", which include "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction" (pp. 75-76, emphasis added). See also: Singh, per Wilson J. at 207; Ogg-Moss v. The Queen, [1984] 2 S.C.R. 173 at 183; Big M Drug Mart Ltd. and Saumur v. City of Quebec, supra; R. v. Videoflicks (1984), 48 O.R. (2d) 395 (Ont. C.A., app. to S.C.C. res'd.); and preambles to the Canadian Bill of Rights and the International Covenant.

(c) Life, Liberty and Security of the Person

48. It is submitted that the right to "life, liberty and security of the person", taken as a whole, involves the right to control one's life and is a protection of individual autonomy. The right to "life" is meaningless without the right to control one's life - the right to make fundamental personal decisions about how one wants to live - and is not simply a right to live only as the State commands. The right to "liberty", in either the broad terms found in American law, or on a more narrow reading, is a related protection against government intrusions on personal autonomy and freedom of action. Similarly, the right to "security of the person", even if simply seen as a more specific protection against bodily intrusion and violations of one's dignity and integrity, also relates to personal autonomy and control over one's actions. See: Singh, p. 205; Re B.C. Motor Vehicle Act, p. 500; R. v. Videoflicks, p. 433.

49. It is therefore submitted that the right to life, liberty and security of the person includes the right to make fundamental personal decisions about one's life such as decisions about occupation, religion, association, marriage, divorce, whether and when to bear children, or to

decide not to bear children. Such choices are fundamental in our society, even though they are not explicitly contained in the Charter. As Dickson C.J.C. stated in Big M Drug Mart Ltd., at p. 346: "The ability of each citizen to make free and informed decisions is the absolute pre-requisite for the legitimacy, acceptability, and efficacy of our system of self-government." (emphasis added)

50. Reproductive freedom, it is submitted, is at the core of personal freedom and personal decision-making. Its protection is an important part of the right of liberty, privacy and security of the person. See, e.g., Roe v. Wade at pp. 169-171 per Stewart J., Doe v. Bolton at pp. 210-215 per Douglas J., Carey v. Population Services at pp. 684-685 and, more recently Thornburgh at 2184-5 per Blackmun J., for a recognition of the importance of protecting personal decisions. To deny the existence of a right to reproductive freedom in s. 7 of the Charter would mean that government could legislate at will in this area, conceivably banning abortion altogether (and contraceptives, for that matter) or, conversely, compelling abortion as a means of population control (see Goldberg J. in Griswold at 497 and Stevens J. in Thornburgh at p. 2188 n. 6). Therefore, pregnancy alone cannot justify state interference with s. 7 rights. See also: Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade" (1985), 63 N.C.L. Rev. 375 at 383; Tribe, American Constitutional Law (1978) at pp. 886-933, esp. 933; Tribe, "The Supreme Court 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law" (1973), 87 Harv. L. Rev. 1, 40; Chemerinsky, "Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy" (1982), 31 Buff. L. Rev. 107 at 127, 142; Regan, "Rewriting Roe v. Wade" (1979), 77 Mich. L. Rev. 1569; Craven, "Personhood: The Right to Be Let Alone", [1976] Duke L. J. 699 at 706.

51. It is therefore submitted that s. 251 of the Criminal Code violates the rights to life, liberty and security of the person, in that:

i) it violates and deprives women of their right of privacy over such a private matter as whether or not to bear children;

ii) it violates women's security of the person by depriving them of control over their own bodies, thereby infringing upon their dignity and integrity;

iii) it deprives women of control over their lives by denying them the right to make such a fundamental personal decision affecting one's life as whether to bear children or not.

52. The uncontradicted and overwhelming evidence before this Court demonstrates that women, no matter what their background, regard the right to control their bodies and their lives, and the right to decide whether or not to terminate a pregnancy, as fundamental. Hundreds of thousands of Canadian women have obtained "legal" and "illegal" abortions in the past seventeen years. Many of those who have been unable to obtain abortions through s. 251, or within a reasonable time under s. 251, having made this important decision about their lives will effectuate it at great cost. The detrimental effects on women denied the choice to terminate their pregnancy illustrates most pointedly the devastating impact s. 251 of the Criminal Code has on s. 7 rights.

(d) Principles of Fundamental Justice

53. While principles of fundamental justice "qualify" the right to life, liberty and security of the person, and do not necessarily constitute a separate right, it is submitted that the principles should provide at least as much protection as the qualifiers in ss. 8 and 9 of the Charter ("unreasonable" and "arbitrary") and should also be comparable to the standards in s. 1, since s. 7 speaks in terms of deprivations of rights while s. 1 only deals with limitations. See: Re B.C. Motor Vehicle Act, pp. 499, 503, 512-518, and Wilson J., concurring at 523-4; Oakes at 135-40; R. v. Robson, at 116-7. Such "objective and manageable standards" may be found in the "invaluable keys" in ss. 8-14 of the Charter: Curr v. The Queen, [1972] S.C.R. 889 at 899, quoted in Re B.C. Motor Vehicle Act at 499. Guidance may also be found in American law (e.g., Palko v. Connecticut at 325: "so rooted in the traditions and conscience of our people as to be ranked fundamental" and which is "of the very essence of a scheme of ordered liberty") and such standards are not foreign to Anglo-Canadian law: Bonham's Case (1610), 8 Co. Rep. 107 per Lord Coke at 118a; Rand, "Except by Due Process of Law" (1961), 2 Q.H.L.J. 171 at 190; R.L. Crain Inc. v. Couture (1983), 10 C.C.C. (3d) 119 (Sask. Q.B.).

54. It is submitted that the judgment of McIntyre J. in MacKay v. The Queen, [1980] 2 S.C.R. 370 at 407-408 (Dickson J. concurring), sets out a "principle of fundamental justice" in determining whether equality before

appropriate test in Manninen's submission

the law is violated under the Canadian Bill of Rights, which should be adopted under s. 7, although a stricter level of scrutiny should be applied similar to the test under s. 1 stated in Oakes at pp. 136-140. See also: Doe v. Bolton at 216 per Douglas J.; Big M Drug Mart Ltd. at pp. 343-4.

(e) Purpose of Section 251 of the Criminal Code

55. It is submitted that the purpose of s. 251 of the Criminal Code is to protect the health of women. The section is permissive and applies to all women, "whether or not she is pregnant": Morgentaler 1975, per Dickson J. at 672. No mention is made of potential life, nor is there any indication that any purpose of the section is to protect potential life. Indeed, where Parliament has intended to protect potential human life in the Criminal Code it has used clear language: Criminal Code, ss. 206, 221, 226, An examination of the legislative history of s. 251 confirms this point:

> Lord Ellenborough's Act, 43 Geo. III, c. 58 (1803) (U.K.)
> Offences Against the Person Act, 24-25 Vict., c. 100 (1861) (U.K.)
> Offences Against the Person Act, 32-33 Vict., c. 20 (1869), (Can. s. 60)
> Criminal Code of Canada, S.C. 1892, c. 29, ss. 271-273
> Criminal Code of Canada, R.S.C. 1927, c. 36, dd. 303-305
> Criminal Code of Canada, S.C., 1953-4, c. 51, s. 237-238
> Criminal Code of Canada, R.S.C. 1970, c. C-34, s. 251
> Compare: Infant Life Preservation Act, 1929, c. 34, s. 1, (U.K.)

56. Similarly, in other countries where there is to be a balancing between the protection of women's health and the protection of potential life, the legislation speaks clearly. See, e.g., Colautti v. Franklin, 439 U.S. 379 (1979) at 390-400; Corkey v. Edwards, 322 F. Supp. 1248 (1971) at 1249; 63, Cook and Dickens, "Emerging Issues in Commonwealth Abortion Laws, 1982", p. 16, Table II. For a history of abortion laws, including the departure from the permissive approach to abortion at common law and under statutes in the early nineteenth century for the purpose of protecting women's health, see: Roe v. Wade at pp.130-141; People v. Belous, 458 P. 2d 194, 200 (1969); Means, "The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality" (1968), 14 N.Y.L.F. 411; Mohr, Abortion in America: The Origins and Evolution of National Policy 1800-1900 (New York: Oxford U.P., 1978) esp. ch. 1 and 2; Law, "Rethinking Sex and the Constitution" (1984), 132 U. Penn. L. Rev. 955 at 1014 n. 218 and authorities cited therein; Maksymiuk, "The Abortion Laws" (1975), 39 Sask. L. Rev. 259.

57. The uncontradicted evidence supports this position, based on the number of abortions performed in Canada since 1969, the safety of the procedure, and the disappearance of "back room" and "kitchen-table" abortions. Abortion, therefore, has always existed in Canada and is deeply rooted in the conscience of the country, and the prohibitions have been to protect women's health.

58. It is submitted that the judgment of Laskin C.J.C. in Morgentaler 1975 at pp. 626-7 on this point should not be followed. It dealt only with whether s. 251 was a valid exercise of federal criminal law power, was made prior to the Charter and without the evidence now before this Court that hundreds of thousands of Canadian women do not regard termination of their unwanted pregnancy as "socially undesirable conduct". Additionally, Laskin C.J.C.'s judgment did not form any part of the majority judgment and the late Chief Justice noted that "perhaps the matter would have different face if there was here the kind of material that moved the Courts in the Margarine reference": Morgentaler 1975 at p. 626. See also Big M Drug Mart Ltd., at pp. 331, 335.

(f) Effect of Section 251 of the Criminal Code

59. It is submitted that s. 251 of the Criminal Code has the following effects, all of which violate s. 7 of the Charter:

a) it is prohibitive, making abortion a crime, therefore restricting a woman's decision to terminate an unwanted pregnancy;
b) the fundamental personal decision to terminate a pregnancy is not made by the woman in consultation with her physician, but by a therapeutic abortion committee;
c) it requires that abortions be performed only in approved or accredited hospitals, thereby further restricting a woman's ability to choose to terminate her pregnancy and manifest that decision;
d) the hospital and committee requirements are unnecessary, serve no purpose, are applied arbitrarily and capriciously, cause harm to women and are "contra-indicated medically";
e) it unnecessarily inteferes with the physician - patient relationship, thereby depriving doctors of their s. 7 right to practice their profession free of unwarranted and burdensome restrictions: Doe v. Bolton, at ppl 199-200; Meyer v. Nebraska at p. 399; Bolling v. Sharpe at p. 499; Singh at p. 205; Robson at pp. 112-117.

Therefore, just as mandatory imprisonment was unnecessary and contrary to the principles of fundamental justice in Re B.C. Motor Vehicle Act, so too are the hospital and committee requirements in s. 251 of the Criminal Code unnecessary and contrary to s. 7 of the Charter.

(g) Section 1

60. It is submitted that, if s. 1 applies to s. 7 at all, it should only do so in circumstances where there is an overwhelming need for such a provision: Re B.C. Motor Vehicle Act, at pp. 523-4 per Wilson J.; R. v. Robson (1984) 41 C.R. (3d) 68 at 78 (B.C.S.C.); Soenen v. Thomas (1983), 8 C.C.C. (3d) 224 at 233-35 (Alta. Q.B.). No evidence, let alone cogent evidence, was presented by the state to meet its burden under s. 1, such as public interest, administrative expedience, or that there is some emergency which justifies s. 251. The state cannot meet any of the tests in Oakes, at pp. 136-140. See also: Big M Drug Mart Ltd. at p. 352; Black v. Law Society of Alberta (unreported, March 4, 1986, Alta. C.A.) per Kerans J.A. at pp. 34-35; Singh at pp. 218-219 per Wilson J.

(h) Judgment in the the Court Below

61. It is submitted that the Ontario Court of Appeal erred in the following ways:

(i) it treated the judgment of Laskin C.J.C. in Morgentaler 1975 as if it were the majority judgment of this Court;

(ii) it failed to consider any of the uncontradicted evidence before the Court establishing that termination of a pregnancy is an important value in contemporary Canadian society;

(iii) it misperceived its role under the Charter in finding that it is up to Parliament to determine whether a woman should have a right to terminate her pregnancy and in agreeing with the statement of Dickson J. in Morgentaler 1975 at p. 671 that "the values we must accept for the purposes of this appeal are those expressed by Parliament" (Vol. 33, p. 6891 l. 10 to l. 25);

(iv) it failed to underake a purposive analysis of s. 7 and adopted a frozen law approach in concluding that "no broad right of privacy similar to the American right existed in Canadian law" when the Charter was proclaimed and that, having regard to the statutory restrictions on abortion in Canada for over 100 years, "a woman's only right to an abortion at the time when the Charter came into force would accordingly appear to be that given to her by s-s. (4) of s. 251" (Vol. 33, p. 6907 l. 20 to p. 6908 l. 23);

(v) it adopted an unprincipled position that "substantive" review should only be undertaken in "exceptional cases" and that this is not such a case (see Brown v. Board of Education (Brown II), 349 U.S. 294, 300 (1955) and Dworkin, The Forum of Principle (Harvard U.P., 1985), pp. 67-71) (Vol. 33 p. 6915 l. 40 to l. 50);

(vi) it ignored the evidence that the hospital and committee requirements are unnecessary, arbitrary, capricious, unfair and cause harm;

(vii) it failed to consider the invidious effect of s. 251 on the physician - patient relationship;

(viii) it speculated in the absence of any evidence and in spite of evidence to the contrary that "s. 251 appears to be an attempt to balance the interests of the foetus with those of the mother", and ignored evidence that the law has effects which protect neither interest. (Vol. 33, p. 6929 l. 13)

(ii) VOID FOR VAGUENESS, OVERBREADTH, AND THE PRINCIPLES OF FUNDAMENTAL JUSTICE

(a) The Doctrines of Vagueness and Overbreadth

62. It is submitted that the principle that laws must be clear and certain in their meaning is a principle of fundamental justice. The rule against vague statutes is a "basic tenet" of our legal system. It is a necessary part of the rule of law and the prevention of arbitrary power. Such values are expressed in the preamble to the Charter and in various provisions of ss. 8-14 which are "invaluable keys" to the meaning of the principles of fundamental justice in s. 7: Re B.C. Motor Vehicle Act, at pp. 503, 512.

63. The principle of certainty in legislation is found in criminal law where liberty of the subject is affected: Frey v. Fedoruk, [1950] S.C.R. 517 at 525-530; Shaw v. D.P.P., [1962] A.C. 220 at 281 per Lord Reid; Marcotte v. Dep. A.-G. Can, [1976] 1 S.C.R. 108 at 115; Cotroni v. Quebec Police Commission and Brunet, [1978] 1 S.C.R. 1048 at 1058. The principle is also found in subordinate legislation such as municipal by-laws, and cases have recognized the special importance of certainty in by-laws when Charter rights are affected: Montreal v. Arcade Amusements, [1985] 1 S.C.R. 368 at 399-403; Re Information Retailers Association and Metropolitan Toronto (1985), 52 O.R. (2d) 449 at 467-8 (Ont. C.A.); Re Hamilton Independent Variety and City of Hamilton (1983), 143 D.L.R. (3d) 498 at 505-508 (Ont. C.A.); Re Weir and The Queen (1979), 26 O.R. (2d) 326 at 339-41 (Div. Ct.).

64. In the United States, the rule against vagueness has developed as a principle of criminal and constitutional law, focusing on actual notice to citizens, unfettered discretion and arbitrary enforcement, and the requirement of at least minimal guidelines in legislation to prevent discriminatory application of laws and to reduce the effects a law may have on rights and freedoms. The U.S. Courts have also adopted the related doctrine of overbreadth, where a statute unnecessarily reaches a substantial amount of constitutionally protected conduct. See: Grayned v. City of Rockford, 408 U.S. 104 at 108-15 (1972); Kolender v. Lawson, 103 S. Ct. 1855 at 1858-9 (1983); Village of Hoffman Estates v. Flipside, 455 U.S. 489 at 495-500 (1982); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961); Bagett v. Bullitt, 377 U.S. 360, 372 (1964); Saia v. New York, 334 U.S. 558, 559-60 (1948); U.S. v. Harris, 347 U.S. 612 (1954); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); U.S. v. Robel, 389 U.S. 258, 275 (1967).

65. It is submitted that the rule against vagueness and overbreadth should be adopted as a constitutional principle in s. 7 of the Charter. It prevents arbitrary and discriminatory application of laws and requires laws impacting on fundamental rights to be narrowly drafted. Like subordinate municipal legislation, all legislation is now subject to the Charter. See: Re B.C. Motor Vehicle Act at pp. 503, 520; Oakes at pp. 139-140; Hunter at p. 169; Re Information Retailers at pp. 471-2; Re Weir and The Queen at p. 340.

66. In addition to the comments of this Court requiring certainty in the context of the Charter (references above), the principle of "void for vagueness" has been explicitly adopted in a number of lower courts. See, e.g.: Re Education Act (Ont.) and Minority Language Rights (1984), 47 O.R. (2d) 1 at pp. 30-31 (C.A.); Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983), 41 O.R. (2d) 583 (Div. Ct.) affd. (1984), 45 O.R. (2d) 80n (C.A.) at p. 82; Re Luscher and Dep. Min., Rev. Can. (1985), 17 D.L.R. (4th) 503 (F.C.A.) at 506. See also: R. v. Robson (1985), 19 D.L.R. (4th) 112 (B.C.C.A.); Re D & H Holdings Ltd. and City of Vancouver (1985), 21 D.L.R. (4th) 230 (B.C.S.C.) at 237; R. v. Duguay

(1985), 50 O.R. (2d) 375 (C.A.); The Sunday Times v. The United Kingdom (1979), 2 E.H.R.R. 245 at 271 (Euro. Ct. of H.R.); Silver v. United Kingdom (1983), 5 E.H.R.R. 347 at 372 (Euro. Ct. of H.R.).

67. It is submitted that s. 251(4) is unconstitutionally vague and overly broad in its impact on the rights of women desiring an abortion and in its impact on physicians endeavouring to exercise their right to practice medicine in the best interests of their patients. The standard in s. 251(4) is applied inconsistently, arbitrarily and capriciously and given a variety of meanings. It "impermissibly delegates basic policy matters" (Grayned, p. 108-9) to committees and "lacks a definition proportionate to its aim which would give those governed by it and those who administer it a reasonable opportunity to know what is covered by it and to act accordingly": Re Information Retailers at p. 472 (emphasis added); R. v. Robson at 114-115; Re Mia and Medical Services Commission (1985), 17 D.L.R. (4th) 385 at 411-417 (B.C.S.C.); Re D & H Holdings Ltd. at 235-6.

68. The uncontradicted evidence now before this Court, and which was not before this Court in Morgentaler 1975, establishes that s. 251(4) is not "clear and unambiguous" (Dickson J. at 675) nor has Parliament "fixed a manageable standard" (Laskin C.J.C. at 634). Additionally the often narrow interpretation of s. 251(4) distinguishes this case from U.S. v. Vuitch, 402 U.S. 62 (1971), which upheld a similar provision in the District of Columbia on the basis that health had been given a broad and consistent meaning; see also Doe v. Bolton per Douglas J. at 216-217 and per Burger C.J. at 208-209. Reference should be made to People v. Belous, 458 P. 2d 194 (1969, Cal. S. Ct., cert. denied, 397 U.S. 915 (1970)), Roe v. Wade, 314 F. Supp. 1217, 1223, (N.D. Tex., 1970), and U.S. v. Vuitch, 305 F. Supp. 1032, 1034 (D.D.C., 1969), which found abortion statutes similar to s. 251 void for vagueness. See also: Tribe, "The Supreme Court 1972 Term" at p. 40. And compare: s. 1(4) of the Abortion Act 1967 (U.K.), which defines health with particularity, unlike s. 251(4); See Cook and Dickens, at pp. 16-17.

69. Additionally, it is submitted that the term "miscarriage" in s. 251 is unclear, undefined and impermissibly vague. Compare s. 159 of the

Criminal Code and see: Brahams, "The Morning-After Pill: Contraception or Abortion", [1983] New L. J. 413; U.K. Parliamentary Debates (Hansard), House of Commons, Vol. 42 (May 10, 1983), pp. 238-9; Cook and Dickens, pp. 16-17.

(b) Judgment in the Court Below

70. It is submitted that the Court of Appeal (at Vol. 33, pp. 6917-6919) erred in limiting its decision to whether the Appellants knew that their conduct was proscribed and failed to consider the impact of the law on protected rights and freedoms. It erred in applying Flipside because the U.S. Supreme Court did say (in the same paragraph quoted by the Court of Appeal) that an accused may complain of overbreadth as applied to others. In any event, the position of the Court below is inconsistent with this court's view enunciated in Re B.C. Motor Vehicle Act, at pp. 313-314, that "no one can be convicted of an offence under an unconstitutional law." See also Doe v. Bolton at 208-209 per Burger C.J. and Tribe, American Constitutional Law at pp. 719-20.

71. The Court further erred in stating (at Vol. 33, p. 6918 l. 15) that "Counsel was unable to give the Court any authority for holding a statute void for uncertainty" when several cases were in fact cited in support of this position and the Court of Appeal itself had declared laws void on this ground in both Re Education Act (Ont.) and the Ontario Board of Censors case, supra. The Court also erred in failing to consider any of the uncontradicted evidence which showed that the statements of Dickson J. and Laskin C.J.C. in Morgentaler 1975 should be reconsidered.

(iii) EQUALITY RIGHTS: SECTIONS 15 AND 28

(a) Purpose and Scope of s. 15

72. It is submitted that the broad purpose of s. 15 of the Charter is to specifically recognize and actively promote equal application of laws and equal treatment by the State. Through equality of treatment, individuals will have equal opportunities, and feel a higher degree of self-worth and freedom in society. As Dickson C.J.C. recently stated, "the concept of equality, especially equality of opportunity, lies at the heart of Canadian values": May 30, 1986, University of British Columbia, p. 8 (emphasis added).

73. Section 15 is a very broad provision, broader than equality guarantees found in other human rights documents, and is intended to cover all possible interactions between citizens and government. Compare: Canadian Bill of Rights, s. 1(b); U.S. Constitution, 14th Amendment; European Convention, Art. 14; International Covenant, Arts. 2 and 26. See generally regarding the purpose of equality rights: Kask v. Shimizu, unreported, April 11, 1986, Alta Q.B. at pp. 6-7; Re McDonald and The Queen (1985) 51 O.R. (2d) 745 at 765 (Ont. C.A.); Re Education Act (1986), 53 O.R. (2d) 513 at 554 per Howland C.J.O. and Robins J.A. dissenting; Big M Drug Mart Ltd. at p. 336; Oakes at p. 136; Thornburgh at pp. 2184-5; R. v. Drybones, [1970] S.C.R. 282 at 306; Athabasca Tribal Council v. Amaco Canada Petroleum Co. Ltd. et al. [1981] 1 S.C.R. 699 at 711; Tarnopolsky, "The Equality Rights", in Tarnopolsky and Beaudoin, eds., The Canada Charter of Rights and Freedoms: Commentary (1982), 395 at 396; Karst, "Equal Citizenship under the Fourteenth Amendment" (1978), 91 Harv. L. Rev. 1 at 39 (hereafter cited as Karst); Dworkin, Taking Rights Seriously (Harvard, U.P., 1978) at p. 227; Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980), 18 O.H.L.J. 336 at 360.

74. This Court held in Drybones, at p. 297, that "equality before the law...means at least that no individual or group of individuals is to be treated more harshly than another under that law." See also A.-G. Can. v. Lavell, [1974] S.C.R. 1349 at 1366 per Ritchie, J. and at 1387 per Laskin J. dissenting. As the Charter protects both equality before and equality under the law, it requires equal application and administration of laws by courts, and by all government bodies and officials acting under any law. Moreover, equality under the law requires that laws treat persons equally - that laws do not distinguish unequally between persons and that they do not have such an effect. See: Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 S.C.L.R. 131 at 136 (hereafter cited as Gold); Bayefsky, "Defining Equality Rights", in Bayefsky and Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (1985) at 3-12, (hereafter cited as Bayefsky); Hogg, Constitutional Law of Canada (2nd ed., 1985) at 798 (hereinafter cited as Hogg); and see Regan, "Rewriting Roe v. Wade" (1979), 77 Mich. L. Rev. 1569 at 1621.

75. It is submitted that the right to equal protection of the law is a protection against laws which burden people unequally or which deny equality of opportunity. It requires that persons be protected equally by law - subject to the same restrictions as others and no more. See, e.g.: International Covenant, Art. 26; Bayefsky, p. 13; Gold, pp. 139-141. The right to equal protection in the United States, though complicated by the development of different levels of scrutiny ("suspect classifications"), which is avoided under the Charter by virtue of s. 15 ("without discrimination") and s. 1 (Oakes, pp. 135-140; Hogg, pp. 799-801), has been applied to promote equality of opportunity by overturning laws which purport to be protective but, in fact, perpetuate stereotypes and restrictive roles and burden groups and individuals. See: Brown v. Board of Education, 347 U.S. 483 (1954); Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 at 684-687 (1973); Stanton v. Stanton, 421 U.S. 7 at 14-15 (1975). Reference may also be made to: Tribe, American Constitutional Law (1978), pp. 1063-66; Freedman, "Sex Equality, Sex Differences, and the Supreme Court", 92 Yale L.J. 913 (1983) at 914 n. 5 on the harmful effects of sex stereotyping and at 965-6 on the importance of bringing a woman's perspective to sex equality issues; MacKinnon, Sexual Harassment of Working Women (Yale U.P., 1979) at 116-117; Craig v. Boren, 429 U.S. 190, 198-200 (1976); Orr v. Orr, 440 U.S. 268, 279-283 (1979); Miss. Univ. for Women v. Hogan, 102 S. Ct. 3331, 3336 (1982).

76. It is submitted that the equal protection values in American cases are equally applicable under the Charter: Gold, pp. 142-145; Bayefsky, pp. 14-18. More particularly, it is submitted that "dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination": Geduldig v. Aiello, 417 U.S. 484 at 501 per Brennan J. dissenting.

77. The right to equal benefit of the law may be analyzed in a way similar to equal protection. Just as equal protection requires protective or burdensome (restrictive) laws to apply equally to all, equal benefit of the law requires that benefits granted to one class be granted to others (subject to the achievement of goals under s. 15(2) and justifiable limits

in s. 1). If a law provides entitlement to a benefit, then the conditions of entitlement must be equal and equally applied. Not only must restrictive laws be equal, but also exceptions to restrictive laws which benefit people must be equal and equally applied and administered. See: Bayefsky, pp. 21-25; Gold, pp. 135-136; Hogg, p. 700; Bliss v. A.-G. Can., [1979] 1 S.C.R. 183 at 191; Hough, "Equality Provision in the Charter" in The Charter of Rights: Law Practice Revolutionized (1982), p. 306 at 319-20.

78. The inclusion of the words "without discrimination" further broadens the scope of s. 15(1). It requires that equality rights apply to "every individual...without discrimination", and are not simply applicable to discrimination on the specific grounds stated in s. 15(1) (emphasis added). Compare, e.g.: Art. 14 of the European Convention; Art. 26 of the International Covenant; and the Quebec Charter, R.S.Q. 1977, c. C-12, s. 10; and compare the French version of the Charter using the open-ended "notamment". Accordingly, where a law draws a distinction between individuals or groups, or has such an effect, it is inconsistent with the equality rights, and, subject to s. 15(2) and s. 1, is of no force and effect. See Hogg, pp. 800-801; Gold, p. 147; Kask v. Shimizu, p. 13; Big M Drug Mart Ltd., p. 331.

(b) Purpose and Effect of Section 251 of the Criminal Code

(i) Equal Protection Argument: Discrimination Based on Sex

79. The purpose of s. 251, it has been argued (see above paras. 55-58), is to protect women. On its face, s. 251 makes a sex-based distinction. It purports to protect women, but not men, and therefore does not equally protect, but rather discriminates on the basis of sex, constituting a prima facie breach of s. 15(1). However, the breach of the right to equal protection goes further: the uncontradicted evidence established that, rather than protecting women, s. 251 has the effect of harming them by compelling an enormous sacrifice of women's physical and personal autonomy, by perpetuating the traditional stereotypes of women as incapable of moral and practical decision-making and of women's "maternal destiny", thereby denying women a status equal to men, and by harming women

physically and psychologically. The "protective" committee and hospital requirements in s. 251(4) degrade and humiliate women and are medically unnecessary (indeed "contra-indicated"). Delays which result from the operation of s. 251(4) harm and endanger women, and some women are forced to endure an unwanted pregnancy and raise an unwanted child.

80. By restricting abortion, women are denied control over their bodies by the State, which profoundly affects their right to plan their lives, denying them equality of opportunity. Pregnant women confront "problems more numerous and more severe than any faced by her male partner. She alone endures the medical risks of pregnancy or abortion. She suffers disproportionately the social, educational and emotional consequences of pregnancy": Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) per Stewart J. at 479 and 471; Thornburgh, pp. 2184-5; Union Pacific Rlwy. Co v. Botsford, 141 U.S. 250, 251 (1891). By singling out abortion from all other medical procedures, s. 251 perpetuates the notion that women are "presumed to suffer from an inherent handicap or [are] innately inferior" and thereby limits the role of women in society: Miss. Univ. for Women v. Hogan, at p. 3336. See also: Muller v. Oregon, 208 U.S. 412 at 421-2 (1908); Bradwell v. State, 16 Wall. 130, 141, 83 U.S. 130, 141 (1873); Frontiero at 684-5.

81. It is submitted that the state, and not nature, discriminates against women under s. 251. A "biological fact" approach (see, e.g., Geduldig and Bliss v. A.-G. Can., at p. 191) to justify s. 251 is offensive to equality principles, and ignores the fact that "when the state bars pregnant women from doing work they are able to do or denies women access to reproductive health services, the state, as well as nature, denies women equality": Law, "Rethinking Sex and the Constitution" (1984), 132 U. Penn. L. Rev. 955 at 1008 and at 983 (hereafter cited as Law). See also Segal, "Sexual Equality, The Equal Protection Clause and the ERA" (1984), 33 Buff. L. Rev. 85 at 129, n. 247.

82. It is submitted, however, that biological differences should not be ignored but, rather, taken into consideration as "the interests of true equality may well require differentiation in treatment": Big M Drug Mart Ltd. at p. 347. Since pregnancy, and unwanted pregnancy in particular, is a

burden specific to women, laws restricting abortion have a devastating sex-specific impact. Laws restricting women's control over their bodies further burdens women and "support[s] the dominance of men and subservience of women and are fundamentally inconsistent with constitutional ideals of individual worth and equality of opportunity": Law, p. 962. Rather, laws should only take account of biological differences for legitimate purposes, such as the necessity of granting women maternity leave as a benefit. Burdens based on biology, however, violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility": Frontiero at 686-7 per Brennan J.

83. It is therefore submitted that s. 251 of the Criminal Code is inconsistent with s. 15(1) of the Charter. It discriminates on the basis of sex by denying women equal protection of the law. The uncontradicted evidence indicates that s. 251 does not protect but in fact causes harm to women. It perpetuates and exacerbates disadvantages women have experienced, and continue to experience in society, and, "in practical effect, put women not on a pedestal, but in a cage": Frontiero v. Richardson, at p. 684. See also: Karst at pp. 57-58; Law, passim, esp. at 957-963, 969, 983, 1014 n. 18 and 1028; Tribe, "The Supreme Court 1972 Term, Foreword" at pp. 40-41; Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade", supra.

(ii) Equal Protection and Equal Benefit: Discrimination Between Women

84. It is submitted that the operation of s. 251 of the Criminal Code violates the "right to the equal protection and equal benefit of the law" because it is applied and administered unequally. The uncontradicted evidence indicated that the availability of abortion services permitted under s. 251(4) of the Criminal Code, and the application of s. 251(4) by hospitals and therapeutic abortion committees, varies widely. As a "protective" law, s. 251(4) protects some women but not others; as a law which provides a "benefit" by permitting pregnancy terminations, women are entitled to, and obtain, this benefit unequally.

85. The evidence established that the operation of s. 251 harms women rather than protects them. However, such harm is unequal. Access to

equally before or under s. 251. This was emphasized in the Badgley Report at p. 26. As s. 251 restricts abortion, it has the effect of causing uequal access. While there is often unequal access to medical services in Canada, it is the law which causes and exacerbates inequality of access to abortion and therefore is subject to Charter scrutiny. It is up to Parliament, should it enter the field, to ensure that its laws are applied and administered equally. In this case Parliament has entered the field and s. 251, on its face and in its effect, breaches s. 15(1).

(c) Section 1

89. The violations of s. 15 by s. 251 cannot be justified under s. 1 of the Charter. Not only is there no evidence, let alone cogent evidence, to meet any of the tests in Oakes, all the evidence establishes the contrary. Nor can the standards in MacKay v. The Queen, at pp. 407-408 per McIntyre J., be satisfied. Indeed, the argument stated above, that biological differences may require, at times, unequal treatment to achieve the purpose of s. 15(1), is not compelling in this case but, rather, is indicative of why laws controlling women's reproductive systems are especially offensive to equality principles: see Law, p. 1007.

90. Even if the objective of s. 251 is "pressing and substantial", it is applied arbitrarily and unequally. It sweeps broadly over women's rights and treats abortion differently from all other medical procedures, thereby affecting the rights of both women and doctors, treating the latter unequally by restricting the medical judgment of those physicians who perform abortions. See: Friendship Medical Centre Ltd. v. Chicago Bd. of Health, 505 F. 2d 1141, 1153 (7th Cir., 1974; cert. denied, 420 U.S. 996); Doe v. Bolton at 199; Word v. Poelker, 495 F. 2d 1349, 1351 (8th Cir., 1974).

91. It is submitted that because s. 251 is gender-based and has a devastating sex-specific impact, an especially rigorous burden should be placed on the state to uphold the provision under s. 1. Reference should be made to Art. 12 of the Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 December 1979, declared in force for Canada 10 January 1982, U.N. Doc. A/RES/34/180 (1979) (reprinted in Bayefsky at p. 620), which states: "States Parties shall take all

appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." [emphasis added]

(d) Section 28

92. Section 28 of the Charter demonstrates the fundamental importance of guaranteeing sex equality since it applies "nothwithstanding anything in this Charter". It is therefore submitted that this Court should have regard to the value in s. 28 when considering each of the Charter arguments put forward by the Appellants - and not simply those under s. 15. Moreover, since s. 28 is not limited by s. 1, it is submitted that any limitations on rights which are justifiable under s. 1 must apply equally to men and women: Eberts, "Sex-Based Discrimination and the Charter", in Bayefsky and Eberts, eds., Equality Rights and the Canadian Charter of Rights and Freedoms (1985), pp. 215-6. Accordingly, the restrictions in s. 251 on women's fundamental right to control their bodies and on their right and freedom to decide how to live their lives, not only violate equality rights in s. 15 but also, through operation of s. 28, if upheld under s. 1 would require similar restrictions on rights of males to control their own bodies, reproductive organs and lives.

(e) Judgment in the Court Below

93. It is submitted that the Court of Appeal erred in the following ways:

(i) it applied the judgment of Laskin C.J.C. in Morgentaler 1975 when the late Chief Justice did not have the evidence which is present in this case that there is, indeed, inequality before the law (Vol. 33, pp. 6923-6925);

(ii) it failed to consider the broad wording of s. 15 - much broader than s. 1(b) of the Canadian Bill of Rights - and misperceived the argument of the Appellants in thinking that it was obligated "to carry out the administration of the section" (p. 6926 l. 10);

(iii) it failed to examine the effect of the legislation and ignored the uncontradicted evidence of inequality in the application and impact of s. 251 other than noting, ironically, that "it may be that on the facts of individual cases the established inequality or discriminatory treatment could be such as to render the section inoperative in those cases" (p. 6926 l. 10);

(iv) it erred in finding "no discrimination or inequality on the face of the legislation" when it specifically applies to women. (p. 6926 l. 18) To say that nature creates inequality between the sexes does not by itself justify gender-based laws, especially when such laws compound inequality (p. 6925 l. 38);

(v) the Court of Appeal erred in justifying the law on the grounds that there is an "obvious balancing of interests" by Parliament "in pursuit of a valid federal objective" (p. 6926 l. 22) when there was no evidence of such a "balancing of interests" (indeed it is submitted that such a finding was purely speculative and is contrary to the evidence of the effect of s. 251(4)), and in taking such an approach the Court ignored the devastating sex-specific impact of the provision in contravention of Charter rights, and failed to give appropriate protection to such rights, contrary to the judgment of this Court in Oakes.

(iv) FREEDOM OF CONSCIENCE AND RELIGION: SECTION 2(a)

(a) Purpose of s. 2(a)

94. It is submitted that freedom of conscience and religion in s. 2(a) of the Charter includes the freedom of individuals to make fundamental personal, private decisions about how one wishes to live - whether the decision is based on religious beliefs or based on the individual's conscientious beliefs - and to manifest those decisions: Big M Drug Mart Ltd. at pp. 336-7 and 346-7; R. v. Videoflicks (1984), 48 O.R. (2d) 395 at 421-3 (C.A.). Indeed, the United States Supreme Court has held that freedom of religion in the First Amendment also protects sincerely held decisions of conscience: U.S. v. Seeger, 380 U.S. 163, 185 (1965); Welsh v. United States, 398 U.S. 333, 340 (1970); U.S. v. Ballard, 322 U.S. 78, 86 (1944); Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 at 715-718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

95. It is submitted that, while American decisions on freedom of religion are helpful, freedom of conscience in the First Amendment has developed from religious liberty and thus is intimately linked to religious standards. Section 2(a) of the Charter, on the other hand, includes the specific freedom of conscience and therefore freedom of conscience should be given a broad, liberal interpretation, emphasizing the importance of "individual conscience and individual judgment": Big M Drug Mart, at p. 346. See also: International Covenant, Art. 18.

abortion services varies in Canada, as do delays in obtaining the procedure. Some women are forced to travel to obtain an abortion, others are not, and still others cannot obtain the procedure at all. This fundamental medical service is generally more available to women with economic assets than those without such resources, making the inequality even more offensive. All of these inequities are a result of the operation of s. 251, which singles out abortion from all other medical procedures and makes it the subject of criminal sanction.

86. It is submitted that s-s. (4) of s. 251, which Laskin C.J.C. characterized as "a dispensing provision, or as establishing a forum and a formula for lawful abortions which must be followed on pain of criminality" (Morgentaler 1975 at p. 636), is a benefit permitting abortions to be done lawfully. A lifting of a restrictive (protective) law in s. 251(1) by operation of s-s. (4) has provided a benefit to many Canadian women. This benefit must be applied in an equal and non-discriminatory way. However, s. 251 has the effect of discriminating against individual women in particular, and all women as a class, by denying equality of treatment and equality of opportunity. Similarly situated women - women with unwanted pregnancies desiring abortions - are not treated similarly.

(iii) Denial of Equality Before and Under the Law

87. It is submitted that s. 251 also violates equality before and under the law because it is applied and administered unequally by hospitals and therapeutic abortion committees. Committees acting as "courts" under s-s. (4) of s. 251 do not treat women equally before the law: Drybones, supra. Since committees act under government authority, and do not treat women equally, equality under the law is also violated: A.-G. Que. v. Blaikie, [1972] 2 S.C.R. 1016 at 1028. It is therefore submitted that the judgment of Laskin C.J.C. in Morgentaler 1975, at pp. 634-6 relating to equality before the law in s. 1(b) of the Canadian Bill of Rights, and relied upon in the Court below, must be reconsidered in light of the Charter, since this Court has held that it must look not just at the purpose but at the effect of the legislation: Big M Drug Mart Ltd., at p. 331.

88. The uncontradicted evidence before this Court (which was not before this Court ten years ago) establishes that women are not treated

(b) Effect of s. 251 of the Criminal Code

96. It is submitted that in its effect s. 251 interferes with freedom of conscience and religion. The uncontradicted evidence was that for some religions, the decision to have an abortion is a fundamental personal decision made conscientiously by the individual woman, in consultation with her advisors. Abortion is a highly personal decision, inevitably intertwined with religious and moral considerations. Evidence established that the abortion decision is made conscientiously having regard to a woman's sincerely held views of how she wishes to live, and the freedom to make the decision is central "both to basic beliefs about human worth and dignity and to a free and democratic political system": Big M Drug Mart at p. 346. See also Thornburgh at 2189-90 per Stevens J.; Law, "Rethinking Sex and the Constitution" at pp. 1017-19.

97. It is submitted that s. 251 of the Criminal Code compels a violation of freedom of conscience and religion because the decision to terminate one's pregnancy is removed from the woman and made by a committee when her religious and conscientious beliefs and tenets are to the effect that the decision is, and should be, her own. Regardless of the committee's ultimate decision, s. 251 conditions the benefit of obtaining a desired abortion upon committee approval which is contrary to s. 2(a) freedoms, and thereby prevents the making of a free decision and infringes on the freedom to "manifest whatever beliefs and opinions his or her conscience dictates ...": Big M Drug Mart at p. 346.

(c) Section 1

98. Since the fundamental freedoms in s. 2(a) are the "sine qua non of the political tradition underlying the Charter" (Big M Drug Mart at p. 346), any limitation on s. 2(a) must be subject to rigourous scrutiny. As the United States Supreme Court has stated, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion": Wisconsin v. Yoder, at 215; see also Chabot v. School Commissioners of Lamorandiere (1957), 12 D.L.R. (2d) 796 at 802, 807 (Que. C.A.).

99. There is no evidence of a compelling government objective for s. 251 of the Criminal Code that justifies a violation of s. 2(a). As this Court stated in Big M Drug Mart at p. 337: "Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience." None of these criteria apply to justify s. 251. Indeed, s. 251 is harmful to women's health, physically and psychologically.

100. There is no evidence of a "pressing substantial" concern that requires the criminal prohibition on abortion or committee approval of abortions, or the restricting of the procedure to hospitals, or that justifies the removal of such a deeply personal decision, contrary to the "human worth and dignity" of women: Oakes, pp. 135-40; Big M Drug Mart, p. 352. The measures adopted by Parliament are arbitrary, unfair and based on irrational considerations. The committee and hospital requirements are unnecessary, achieve no possible objective of s. 251 and can be and are applied arbitrarily and unfairly. The ability to exercise one's conscience in choosing whether or not to terminate a pregnancy is completely denied. Such effects are, having regard to the uncontradicted facts, very disproportionate to any legitimate government objective. Accordingly, the infringements on s. 2(a) freedoms by s. 251 cannot be justified under s. 1 of the Charter. See also: Black v. Law Society of Alberta (unreported, March 4, 1986; Alta. C.A.) at pp. 31-57 per Kerans J.A.

(d) Judgment in the Court Below

101. The Ontario Court of Appeal erred in failing to apply a broad, purposive approach to s. 2(a), and erred in failing to consider the uncontradicted evidence that the requirements in s. 251 have the effect of violating women's s. 2(a) freedoms. (Vol. 33, pp. 6919-6921) The balancing of interests by Parliament which the Court found in s. 251 (and which the Appellants submit is incorrect and utterly without foundation on the record before it) must be considered under s. 1 and should not have been considered as part of, or as limiting the scope of, s. 2 of the Charter.

(v) CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT: SECTION 12

(a) Purpose and Scope of s. 12

102. It is submitted that the purpose of s. 12 of the Charter is to protect individuals from being subjected to punishment or treatment which is cruel in the sense that it departs from community standards of decency and unusual in the sense that it is selective, arbitrary, discriminatory or unusually severe. The wording of s. 12 is broad. It is not limited to persons charged with an offence, as is s. 11. It states that no one shall be subjected to unusual treatment or punishment, which distinguishes it from the English Bill of Rights, 1689, 1 Wm & M. c. 2, and the Eighth Amendment to the United States Constitution. The Canadian Bill of Rights uses the terms "impose" and "authorize" rather than "subjected." Article 5 of the Universal Declaration of Human Rights, on the other hand, provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

103. It is submitted that the underlying basis of s. 12 is "nothing less than the dignity of man" and that it "must draw meaning from the evolving standards of decency that mark the progress of a maturing society": Trop v. Dulles, 356 U.S. 186 at 100-101 (1958). See also: Furman v. Georgia, 408 U.S. 238 at 242-295; Solem v. Helm, 103 S. Ct. 3001 at 3006-10 (1983); Tribe, American Constitutional Law at 893. In the Canadian context see: Miller and Cockriell v. The Queen (1975), 24 C.C.C. (2d) 401 at 464-469 (B.C.C.A.) per McIntyre J.A. (as he then was); [1977] 2 S.C.R. 680 at 690-693 per Laskin C.J.C.; Soenen v. Director of Edmonton Remand Centre (1983), 35 C.R. (3d) 206 at 210-211 (Alta. Q.B.); Re Mitchell and The Queen (1983), 42 O.R. (2d) 481 at 500 (H.C.). The emphasis on human dignity is also found in other human rights documents: European Convention, Art. 3 ("degrading treatment"); Universal Declaration of Human Rights, Art. 5 ("degrading treatment"). See also: Tarnopolsky, "Just Desserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance" (1979), 10 Ottawa L. Rev. 1 at 28-34; R. v. Smith (1983), 35 C.R. (3d) 256 (B.C. Co. Ct.); Manson, "Fresh Approaches to Defining Cruel and Unusual Treatment or Punishment" (1983), 35 C.R. (3d) 262-268.

(b) Effect of Section 251 of the Criminal Code

104. Section 251, in making abortion the subject of criminal sanction, punishes women for becoming pregnant. It treats pregnant women as a "diseased thing" and deprives women of their dignity: Furman, pp. 271-4. Section 251 denies women the freedom to decide how to live their lives and of control over their bodies. It discriminates against women and is applied arbitrarily. The general offence is rarely, if ever, charged, as more then 65,000 women each year obtain abortions in Canada. Therefore, a criminal sanction for performing a safe abortion is cruel, excessive, unnecessary and a departure from the "evolving standards of decency that mark the progress of a maturing society": Trop v. Dulles at p. 101. It also arbitrarily and without justification subjects physicians who may perform abortions outside hospitals without committee approval as a result of their best medical judgment to criminal sanction, which is unusual, excessive and unnecessary, and unlike any other procedure.

105. The uncontradicted evidence established that the hospital and committee requirements subject women to excessive psychological and physical suffering, and subject women to the indignity of obtaining approval for a deeply personal act. The requirements cause delays in obtaining the procedure, thereby subjecting women to instillation procedures which are cruel and outdated, and are much more dangerous and harmful than dilatation abortion. Women are forced to have abortions in unsuitable surroundings in hospitals, and many must travel long distances to obtain abortions. Some women are punished by the law by being forced to bear unwanted children, unalterably affecting their lives. Therefore, having regard to the effects on women's health - both physical and mental - and women's dignity, s. 251 shocks community standards of decency and is without redeeming social value.

(c) Section 1

106. It is submitted that s. 1 does not apply to justify violations of s. 12. A balancing has already taken place under s. 12 in determining whether the treatment in s. 251 is "cruel and unusual", and it would be inappropriate to subject it to a second balancing against government interests under s. 1: Re B.C. Motor Vehicle Act, at pp. 523-4; Soenen v. Director of Edmonton Remand Centre, at pp. 217-19. If, however, s. 1 is

considered by this Court, there is no evidence, let alone cogent evidence, to justify a violation of s. 12, especially in light of this Court's judgment in Oakes that s. 1 - in particular the words "free and democratic society" - evokes values and principles which include "respect for the inherent dignity of the human person."

(d) Judgment in the Court Below

107. The Ontario Court of Appeal erred by failing to consider the uncontradicted evidence that s. 251 subjects women to cruel and unusual treatment. It erred in adopting the position of Laskin C.J.C. in Morgentaler 1975, at p. 631, who had no facts before him, who dealt only with the Canadian Bill of Rights, and whose judgment was not part of the majority judgment. The recourse to s. 251(4) is not "predicated on the consent of women"; all women desiring abortions are subjected to this law and to its effects. Women do not "consent" to the effects of s. 251. (Vol. 33, p. 6922)

(vi) SECTION 91(27) OF THE CONSTITUTION ACT, 1867

(a) Present Scope and Effect of s. 251

108. It is submitted that s. 251 of the Criminal Code is ultra vires the Parliament of Canada as it can no longer be justified under s. 91(27) of the Constitution Act, 1867: Reference re s. 5(a) of the Dairy Industry Act, [1949] S.C.R. 1, affd. [1951] A.C. 179 (the "Margarine Reference"), per Rand J. at pp. 49-50. The legislative history of the Criminal Code shows that its purpose is the protection of women's health: see above, paras. 55-58. This purpose is demonstrated by the large number of abortions performed in hospitals following approval by a therapeutic abortion committee when a woman's life or health is likely to be endangered by continuing her pregnancy. Therefore, especially through s.-s. (4), the purpose of s. 251 is the permitting of abortions in medically safe surroundings for the protection and benefit of women.

109. Accordingly, s. 251 is colourable legislation which in pith and substance relates to ss. 92(7), 92(13) and 92(16) of the Constitution Act, 1867: Schneider v. The Queen, [1982] 2 S.C.R. 112 at 114, per Laskin

C.J.C., and at 137-138 per Dickson J. It is submitted that an examination of the pith and substance of s. 251 of the Criminal Code yields a similar result and finding to that made in Schneider. The dominant characteristic and effect of s. 251 is the treatment of women with unwanted pregnancies, and is not the punishment of a form of conduct which has "some evil or injurious or undesirable effect upon the public." In purporting to regulate access to safer abortions, s. 251 directly impinges on provincial jurisdiction over health, hospitals and the regulation of the medical profession: Schneider; Constitution Act, 1867, ss. 92(7), (13) and (16); Labatt Breweries v. A.-G. Can., [1980] 1 S.C.R. 914; Lafferty v. Lincoln (1907), 38 S.C.R. 620; Cowen v. A.-G. B.C., [1941] S.C.R. 321. Reference may also be made to The Public Hospitals Act, R.S.O. 1980, c. 410, O. Reg. 865, s. 1(a).

110. It is submitted that the judgment of Laskin C.J.C. in Morgentaler 1975 should not be followed on this point. The evidence now before this Court was not before Laskin C.J.C.; indeed, he stated at p. 626 that "perhaps the matter would have a different face if there was here the kind of material that moved the Courts in the Margarine Reference." Nor is there evidence before this Court to justify s. 251 on the basis of any emergency or other legitimate ground: Labatt, per Estey J. at p. 934. Rather, the uncontradicted evidence demonstrates that the compelling rationale for s. 251 of the Criminal Code confining abortions to hospitals and requiring women to subject their cases to therapeutic abortion committees no longer exists. Abortions can be performed as safely, if not more safely, in free-standing clinics, and therapeutic abortion committees are unnecessary and "contra-indicated medically."

111. It is further submitted that Laskin C.J.C.'s additional justification of s. 251 as something which Parliament, "in the exercise of its plenary criminal power", declared that interference "with the ordinary course of conception is socially undesirable conduct", cannot be upheld. Parliament's power to legislate in relation to criminal law is not unlimited. "Prohibitions are not enacted in a vacuum", and in examining the evil to which the law is directed, the court is to consider evidence of the consequences of the legislation: Margarine Reference, at pp. 49-51; A.-G. B.C. v. A.-G. Can., [1937] A.C. 368 at 375-376; Mann v. The Queen, [1966]

S.C.R. 238 at 250. There must, it is submitted, be some "typically criminal public purpose": Hogg, Constitutional Law of Canada (2nd ed., 1985) at p. 400. See also Boggs v. The Queen, [1981] 1 S.C.R. 49 at 59-62; Mewett, "The Proper Scope and Function of the Criminal Law" (1960-61), 3 Crim. L.Q. 371 at 387.

112. Abortion is not "socially undesirable conduct"; indeed for over half a million Canadian women since 1969 it is considered, if unfortunate, a desirable course of action. Having regard to s. 251 as a whole - both on its face and in its effect - it is submitted that Parliament has decreed that abortion is not "socially undesirable" if done in the medically safe surroundings of a hospital following approval by a thereapeutic abortion committee. The evidence demonstrates that the restrictions in s-s.(4) simply interfere with the provision of a needed medical service and cause harm. The legislation, therefore, causes rather than prevents undesirable conduct, and is not proper criminal law.

113. There is no evidence that the conduct of thousands of Canadian women who have abortions in clinics in the Province of Quebec, without committee approval, is regarded as "socially undesirable." Indeed, the failure to prosecute physicians and women in the Province of Quebec is indicative of the fact that those responsible for enforcing the criminal law do not regard abortion as "immoral" or "socially undesirable", or that the performing of abortions outside a hospital endangers women: A.-G. Can. v. C.N. Transportation, [1983] 2 S.C.R. 206; R. v. Wetmore, [1983] 2 S.C.R. 284.

114. It is therefore submitted that, having regard to all the uncontradicted evidence, s. 251 of the Criminal Code cannot be upheld as valid criminal law as it bears no relation to "public peace, order, security, health [or] morality" which can justify such sanctions.

(b) Judgment in the Court Below

115. The Court of Appeal erred in following the judgment of Laskin C.J.C. in Morgentaler 1975, when the evidence demonstrates that s. 251 is in fact legislation with respect to health. The Court also erred in finding (at Vol. 33, p. 6929, l. 15) that s. 251 "appears to be an attempt to

balance the interests of the fetus with those of the mother" when there was no evidence of such a purpose, and all the evidence of the consequences of s. 251 (as well as the legislative history of the section) demonstrates that the purpose is to protect women's health. Additionally, the Court erred in finding that s.251 "serves wider ends ... which fall properly within the criminal law power as defined by Rand J.", when all of the uncontradicted evidence indicated that it does not. (p. 6929, l. 20)

(vii) UNCONSTITUTIONAL DELEGATION AND ABDICATION OF CRIMINAL LAW BY PARLIAMENT

(a) Grant of Legislative Power to the Committees

116. It is submitted that s-s. (4), (5) and (6) of s. 251 improperly delegate legislative powers relating to criminal law and procedure to the provinces: A.-G. N.S. v. A.-G. Canada, [1951] S.C.R. 31 at 36, quoting Lord Watson in C.P.R. v. Corporation of the Parish of Notre Dame de Bonsecours, [1899] A.C. 367. See also Rand J. at pp. 49-50 and, more recently, McEvoy v. A.-G. N.B. et al., [1983] 1 S.C.R. 704 at 720. Subsections (4), (5) and (6) improperly delegate powers over criminal law and procedure to provincial Ministers of Health by giving them the power to approve hospitals which can perform abortions exempt from criminal liability: see, e.g., Public Hospitals Act, R.S.O. 1980, c. 410, ss. 1(c), (e); O. Regs. 863, 865. Similarly, there is improper delegation to therapeutic abortion committees of the power to decide when and when not to apply the criminal law. The committees may set up their own criteria and procedure under s. 251 - thus establishing both substantive criminal law and criminal procedure.

117. Although Parliament may delegate its authority to subordinate bodies responsible to it, or incorporate existing bodies into its legislative scheme, by delegating authority to provincial Ministers not responsible to Parliament provincial jurisdiction is enlarged to include matters within s. 91(27) of the Constitution Act, 1867: A.-G. N.S. v. A.-G. Can., supra. The purported delegation of authority to therapeutic abortion committees is distinguishable from permissible referential incorporation. The committees derive their existence and power solely from federal law and, therefore, cannot be justified as being within provincial competence: P.E.I.

Marketing Board v. H.B. Willis, [1952] S.C.R. 392; King v. Walton (1906), 11 C.C.C. 204 (Ont. C.A.); Re Brinklow (1953), 105 C.C.C. 203 (Ont. C.A.); R. v. Fialka (1953), 106 C.C.C. 197 (Ont. C.A.).

118. Such delegation amounts to legislative rather than administrative delegation. The uncontradicted evidence establishes that committees set up rules and procedures under s-s. (4) which vary across the country, and are vague and arbitrary. The committees establish their own criteria in deciding who will be exempt from the rigours of the criminal law, thereby themselves defining the scope of criminal law and not merely making rules consequential or collateral to the operation of the section.

119. It is submitted that Parliament has completely abdicated its authority over criminal law matters to the therapeutic abortion committees and Ministers of Health based on a vague and arbitrary standard. It has delegated so broadly as to permit untrammelled discretion: A.-G. Can. v. Brent, [1956] S.C.R. 318 at 321; Brant Dairy Co. Ltd. v. Milk Com'n of Ont., [1973] S.C.R. 131 at 146; Canadian Institute of Public Real Estate v. City of Toronto, [1979] 2 S.C.R. 2 at 9. Section 251 is not limited to what is necessary "for the purpose of carrying legislative enactments into operation", but delegates a decision-making power on a broad, vague basis: A.-G. N.S. v. A.-G. Can., at pp. 42-3; R. v. Joy Oil Co. Ltd. (1963), 41 D.L.R. (2d) 291, 293-4 (Ont. C.A.); Re Minto Construction Ltd. and Township of Gloucester (1979), 23 O.R. (2d) 634, 639-40 (Ont. C.A.). The evidence shows that the operation of the subsection is entirely up to the provinces, in both its scope and procedure. Indeed, s. 251(4) purports to delegate authority to bodies which may not, and need not, exist, thereby constituting complete abdication of its legislative power.

(b) Judgment in the Court Below

120. The Court of Appeal erred in finding that there was no delegation or abdication of the criminal law to the provinces. In particular, the Court erred in stating that s. 251 "refers to persons or bodies constituted under competent provincial legislation" when therapeutic abortion committees are not created by any provincial legislation. The egregious and

fundamental nature of this error is particularly significant as the Court of Appeal had held that s. 251 related to criminal law and not to health. In light of such a holding such committees could not be created under provincial law. (Vol. 33, p. 6929)

(viii) SECTION 96 OF THE CONSTITUTION ACT, 1867

(a) Judicial Function of the Committees

121. It is submitted that s. 251(4) of the Criminal Code vests in therapeutic abortion committees a judicial function which was exercised by county, district and superior court judges in 1867, and that this is the sole function of the committees: Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714 at 734. Power to determine criminal liability for performing abortions in 1867 was exercised by federally appointed judges: Offences Against the Person Act, 24-25 Vict., c. 100 s. 58 (U.K.); Offences Against the Person Act, 32-33 Vict., c. 20 (1869), s. 60. Similarly, s-s. (4) of s. 251 permits therapeutic abortion committees to determine whether a person who performs or undergoes an abortion is subject to criminal liability. Without s-s. (4), the issue would be resolved by judge and jury: R. v. Bourne, [1939] 1 K.B. 687. The power of therapeutic abortion committees, therefore, is "broadly conformable to jurisdiction formerly exercised by s. 96 courts": Re Residential Tenancies Act at p. 734.

122. Therapeutic abortion committees exercise a judicial function by purporting to apply legal standards to individuals. The committee judges an individual's desire to have an abortion against the standard set out in s. 251(4). It is a "suit between parties ... between Crown and subject", and it is the duty of the committee to "decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings": Labour Relations Board of Saskatchewan v. John East Iron Works Ltd., [1949] A.C. 134 at 149, quoted in Re Residential Tenancies Act at p. 730 and in A.-G. Que. v. Udeco Inc., [1984] 2 S.C.R. 502 at 510, and see pp. 512-513. The committee determines whether a person is exempted from, or accorded a defence to, a criminal charge punishable by life imprisonment. (Compare, e.g., Criminal Code, s. 221(2).) The decision made under s. 251(4) is the sole and central function of a therapeutic abortion committee; it cannot be regarded as merely subsidiary or ancillary to any other function of the committee, as the committee has no other function.

(b) Judgment in the Court Below

123. It is submitted that the Court of Appeal erred in finding that this argument "was difficult to follow" because it dealt with a federal law, when this Court has recently declared that federal legislation may conflict with s. 96: McEvoy v. A.-G. N.B. et al., at p. 720. (Vol. 33, p. 6930) This case is similar to McEvoy in that Parliament is conferring s.96 jurisdiction on committees set up in provincial institutions and answerable only to provincial governments. Secondly, the Court erred in stating that "there was no material to suggest that the function performed by a therapeutic abortion committee conformed broadly to any function exercised by a s. 96 judge in 1867", when this is patent on the face of the legislation and is supported by the evidence. Thirdly, the Court of Appeal erred in finding that "no judicial function is being exercised by such committees" and that they "simply do not fall within the tests" in Re Residential Tenancies Act. (p. 6930)

C. THE DEFENCE OF NECESSITY

(i) No Question of Law Alone

124. It is submitted that a Crown appeal from an acquittal on the ground that the trial judge erred in leaving the defence of necessity to the jury does not raise a question of law alone as required under s. 605(1) of the Criminal Code. Furthermore, a Crown appeal on the ground that the trial judge erred in leaving certain evidence with the jury, and in failing to instruct the jury on other evidence, does not raise a question of law alone. Questions of law alone have been narrowly interpreted in part because of the extraordinary power of the Crown to appeal from an acquittal: Gauthier v. The King, [1931] S.C.R. 416; Rex v. Boak, [1925] 525 at 528-9; Rex v. Ashcroft (1942), 78 C.C.C. 316 (B.C.C.A.); Rex v. Turner (1938), 70 C.C.C. 404 (B.C.C.A.); Friedland, Double Jeopardy (1968) at pp. 279-85.

125. It is submitted that "absent a shifting of the burden of proof upon the accused there is always some evidence upon which to make a finding of fact favourable to the accused, and such a finding, if in error, is an error of fact" (emphasis added): Schuldt v. The Queen, [1985] 2 S.C.R. 592 at 610, and at 604. See also: Sunbeam Corp. (Can.) Ltd. v. The Queen, [1969] S.C.R. 221 at 235-8; Lampard v. The Queen, [1969] S.C.R. 373 at

380-1. Accordingly, as there is no statutory or other onus on the accused to prove the defence of necessity ("One who pleads necessity bears no such burden": Perka v. the Queen, [1984] 2 S.C.R. 232 at 258), by alleging no evidence of the defence in its appeal from the Appellants' acquittal the Crown did not raise a question of law alone, and the Court of Appeal lacked jurisdiction to hear the issue. Indeed, by alleging no evidence of the defence on the appeal, the Crown was in effect alleging that there was no evidence upon which a jury could acquit the accused, thereby placing an onus on the accused to show the Court of Appeal (and now this Court) that there was some evidence, contrary to "one of the cardinal principles of the criminal law" (Lampard at p. 381) and ss. 7 and 11(d) of the Charter: Oakes at p. 119; Re B.C. Motor Vehicle Act at p. 512.

(ii) Evidence of the Defence of Necessity

126. Alternatively, it is submitted that there was some evidence of each of the elements of the defence of necessity upon which the learned trial judge was justified in leaving the defence to the jury. There is in the record "evidence potentially enabling a reasonable jury acting judicially to find" the defence of necessity applicable: Parnerkar v. The Queen, [1974] S.C.R. 449 at 454. No matter how weak the defence may be, the trial judge is required to put it to the jury where there is some evidence "apt to convey a sense of reality" to it: Kelsey v. The Queen, [1953] 1 S.C.R. 220 at 226. See also: Pappajohn v. The Queen, [1980] 2 S.C.R. 120 at 127; Morgentaler, 1975, at 659. Uncontradicted evidence of each of the essential elements of the defence of necessity as specified in Perka at pp. 249-252 was raised by the Appellants. The evidence clearly demonstrated that:

(a) a situation existed in Ontario and in Canada generally concerning women who, faced with unwanted pregnancies, were in a state of emergency as they were subject to risks to their life and health caused by delays in obtaining, and denial of access to, safe abortion procedures, which constituted a situation "of clear and imminent peril" to them;

(b) the situation in Ontario was such that, owing to the delays and obstacles inherent in the system, and caused by the law, the refusal of politicians to solve the problems, and the risk to health which resulted, an emergent situation existed with "peril ... so pressing that normal human instincts

[cried] out for action [making] a counsel of patience unreasonable";

(c) the accused honestly and reasonably believed there was an emergency and therefore felt morally compelled as physicians to respond to it, and their actions could be regarded as normatively or truly involuntary;

(d) there was "no legal way out" for the accused having regard to the evidence of previous lobbying efforts to change the law and unsuccessful efforts to improve the system and work within the confines of the Criminal Code, as well as evidence that for many Canadian women compliance with s. 251 of the Criminal Code is impossible, forcing many to leave the country, such that the accused had no real choice in the sense of any "reasonable legal alternative to disobeying the law";

(e) the actions of the accused in agreeing to provide a needed medical service did not inflict greater harm in order to avert the existing evil, but rather provided better access to safer abortion procedures than was available, thereby lessening the physical and mental harm to women who voluntarily sought to terminate their pregnancies.

127. It is submitted that there is more evidence of the defence of necessity in this case than in Morgentaler 1975 or in R. v. Morgentaler (1976), 27 C.C.C. (2d) 81 (Que. C.A., lv. to app. refused, March 16, 1976), where the Quebec Court of Appeal held that the trial judge erred in failing to leave the defence to the jury. Furthermore, the application of the defence of necessity is best left to the jury to determine on the facts of each case. The defence is one in which the court exercises compassion for "illegal" conduct by excusing it "because of the perceived injustice" of punishing the act in the circumstances, where the certainty and rigidity which may result from strict judicial control is undesirable. "Involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure": Perka at pp. 250, 259 (emphasis added). In Morgentaler 1975, Laskin C.J.C. stated at p. 654-5 that it was for the jury to determine whether "there could be no effective resort to s. 251(4) to cope with the emergency." See also: Brett and Waller, Criminal Law (4th ed., 1978) at 26-28, 48-50; Fletcher, Rethinking Criminal Law (1978) at pp. 552-579.

128. Additionally, determining whether to leave the issue to the jury is "uniquely the function of the trial judge": R. v. Bullmer, Illingworth and Laybourn (1983), 10 C.C.C. (3d) 256 at 264 (B.C.C.A., appeal to S.C.C.

pending). An appellate court should be slow to interfere with a trial judge's conclusion, especially where it favours the accused. It is therefore submitted that the trial judge correctly left the defence of necessity to the jury and, in any event, that this ground of appeal raises nothing more than a question as to the sufficiency of the evidence, which is not a question of law alone.

(iii) Charge to the Jury on the Defence of Necessity

129. The learned trial judge correctly instructed the jury on the scope, meaning and application of the defence of necessity by reading from and referring to the judgment of this Court in Perka. In particular, the trial judge's penultimate remarks to the jury drew from and summarized the Perka judgment (Case: Vol. 20, p. 4072 l. 5 to p. 4075 l. 18).

(iv) Failure of Crown Counsel to Object

130. The failure of Crown counsel to object to evidence of the defence of necessity prior to the charge to the jury, must weigh heavily against the Crown on an appeal from an acquittal. The Crown is attempting to place the accused on trial a second time and, as in any appeal from an acquittal, it cannot be known whether the error alleged caused or led the jury to acquit. Such a "delinquency on the part of crown counsel" should not cause "such an intolerable burden on the accused as necessarily follows": Cullen v. The King, [1949] S.C.R. 658 at 669 per Rand, J., dissenting. (See Case, Vol. 17, p. 3767 l. 27 to l. 30, and Vol. 18, p. 3950 l. 20 to l. 23)

(v) Judgment in the Court Below

131. The Court of Appeal erred in weighing the evidence in order to determine whether there was any evidence of the defence of necessity. The trial judge made findings of fact and drew inferences from the facts which cannot be questioned on a Crown appeal from an acquittal. As the onus of proof is on the Crown throughout, and there is no onus on the accused in establishing the defence of necessity, whether there is some evidence of the defence is not a question of law alone and the Court of Appeal erred in considering the issue. (Vol. 33, p. 6940 to p. 6959)

132. Additionally, and alternatively, the Court failed to consider evidence which was presented on each of the elements of the defence but concentrated only on evidence of the unfairness of the law and the Appellants' dissatisfaction with the law. It substituted its own view of the evidence, thereby placing itself in the role of a finder of fact and found, contrary to the trial judge, that there was no evidence of the defence of necessity. The Court of Appeal further erred in assuming that the Appellants' actions were "premised on dissatisfaction with the law." (p. 6959 l. 13) The evidence established that the Appellants were responding to a factual situation which amounted to an emergency. Whether it was caused by the law or some other factor is irrelevant. The Court of Appeal therefore erred in stating that "it is not the law which can create an emergency giving rise to a defence of necessity" when the evidence demonstrated that the effect of the law created a factual emergency. (p. 6959 l. 18)

133. The Court of Appeal also erred in holding that "although the trial judge accurately and carefully instructed the jury as to the legal test of the defence of necessity, he erred in instructing the jury as to how the test could be met on the evidence before them." (p. 6960 l. 7 to l. 10) In considering the application of the evidence to the defence the Court of Appeal, in second-guessing the trial judge, considered issues of fact or, at best, mixed fact and law, which it was not open to do on a Crown appeal from an acquittal.

D. DEFENCE COUNSEL'S JURY ADDRESS

(i) No Question of Law Alone

134. It is submitted that an allegedly inflammatory address by defence counsel does not constitute a question of law alone which could be considered on an appeal from an acquittal. Furthermore, the purported failure of the trial judge to disabuse the minds of the jurors of the allegedly improper remarks of defence counsel does not raise a question of law alone, as it is relevant only to the general fairness of the trial which is, at most, a question of mixed fact and law.

135. Just as a repetitive and improper cross-examination of an accused by Crown counsel does not raise a question of law alone, a closing address

by defence counsel similarly raises issues of mixed fact and law: Fanjoy v. The Queen, [1985] 2 S.C.R. at 238-9. While a trial judge may, as a matter of law, endeavour to limit a cross-examination or closing address by making legal rulings, the decision to intervene in counsel's address, and to correct it, is discretionary and rests on many considerations: R. v. Darwin (1973), 13 C.C.C. (2d) 432 at 437 (B.C.C.A.); R. v. Morgentaler at 96.

136. It is submitted that there is a distinction between closing addresses by Crown counsel which may raise questions of law alone, and addresses by defence counsel which do not. Indeed, in Pisani v. The Queen, [1971] S.C.R. 738 at 741, this Court stated that "there can be no unyielding general rule that an inflammatory or other improper address to the jury by Crown counsel is per se conclusive of the fact there has been an unfair trial." Additionally, the trial judge may correct and "erase the effects of Crown counsel's remarks." See also: Boucher v. The Queen, [1955] S.C.R. 16.

137. In the case at bar, defence counsel's purportedly improper remarks to the jury did not relate to extraneous evidence or his personal opinion of the guilt or innocence of the accused. Nor did he refer to the possible punishment under s. 251. Defence counsel simply made statements regarding the law and the role of the jury which, if incorrect (and it is submitted they were not), were adequately and forcefully corrected by the trial judge who told the jurors that they were bound by their oath to accept the law from the judge and that the jurors were not to nullify the law on the basis of their own personal standard of what is right or wrong. (See Appeal Case, Vol. 18, p. 3849 l. 26 to p. 3852 l. 17) That such comments were not regarded as prejudicing the trial is demonstrated by Crown counsel's failure to object to the remarks, or to request a mistrial: Lewis v. The Queen, [1979] 2 S.C.R. 821 at 840; Cullen v. The King, at 669. Additionally, the failure of the trial judge to recharge the jury on this point, despite objection by defence counsel (Vol. 18, p. 3989 l. 18 to p. 3945 l. 27), left the jury with a forceful direction which was favourable to the Crown rather than prejudicial to it: R. v. Gratton (1985), 18 C.C.C. (3d) 462 at 470-71 (Ont. C.A.).

(ii) Propriety of Address to the Jury

138. Alternatively, it is submitted that defence counsel's address was not inflammatory or improper. Defence counsel told the jurors that they were to take the law from the trial judge (Vol. 17, p. 3704 l. 17 and p. 3743 l. 5 to l. 10). He did not at any time urge the jury to disregard the trial judge. Nothing was so interpreted by either the trial judge or Crown counsel. Defence counsel addressed the jurors on their role and powers in the criminal justice system. He made reference to the effects of the law insofar as the evidence supported the accused.

139. It has always been a fundamental right of juries to bring in the decision they believe is right and just, based on the facts and the evidence: Devlin, Trial by Jury (1956) at p. 84; Woolmington v. D.P.P., [1935] A.C. 462 at 480 per Lord Sankey L.C. Juries act as the conscience of the community, reflecting community sentiments and instilling equity into the law. The jury is "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law": Law Reform Commission of Canada, Working Paper 27, "The Jury in Criminal Trials" 1980 at pp. 5-17. See also: R. v. Hill (S.C.C., unreported, April 24, 1986 at pp. 22, 27, "the collective good sense" of the jury); Duncan v. Louisiana, 391 U.S. 145 at 151-155 (1968); U.S. v. Powell, 105 S. Ct. 417 at 478 (1984); R. v. Bryant (1984), 42 C.R. (3d) 312 at 327 per Blair J.A.; Devlin, The Enforcement of Morals (1965) at p. 21.

140. The fundamental importance of juries in the criminal justice system has been recognized in s. 11(f) of the Charter, which protects the right to the benefit of a jury trial. One of the benefits of a jury is its ability to ignore and "nullify" the law. Indeed, Roscoe Pound described "jury lawlessness" as "the great corrective" in the administration of law. See, e.g.: Scheflin, "Jury Nullification: The Right to Say No" (1972), 45 S.Cal. L. Rev. 168 at 182; U.S. v. Adams, 126 F. 2d 774 (2nd Cir., 1942) per Judge L. Hand at 775-76; Horning v. District of Columbia, 254 U.S. 135 (1920) at 138 per Holmes J.; U.S. v. Spock, 416 F. 2d 165, 182 (1st Cir., 1969).

141. By informing the jury of its powers an accused obtains the full benefit of a jury trial. A jury thereby properly performs its historic

function as a "little parliament" giving legitimacy to the administration of justice by tempering (and changing, as in England in the nineteenth century) the harshness of the criminal law, and acting as a safety valve against government oppression: Devlin, Trial by Jury, p. 164; U.S. v. Dougherty, 473 F. 2d 113 (D.C. Cir., 1972) per Bazelon C.J., dissenting at pp. 1141-2; Scheflin, "Jury Nullification", p. 180 n. 44. See also: Bushell's Case (1670), Howell's St. Tr. 999, 89 E.R. 2; R. v. Shipley (1784), 9 Dougl. 73, 99 E.R. 774 at 824 per Lord Mansfield and Willes J.

142. There is no evidence to suggest that informing a jury of its power to not apply the law will in any way impair the administration of justice. Therefore there is nothing to justify such a limitation of the accused's right to the benefit of trial by jury: U.S. v. Dougherty, per Bazelon C.J., at pp. 1138-1144; Scheflin and Van Dyke, "Jury Nullification: Contours of a Controversy" (1980), 43:4 Law and Contemp. Probs 51, at p. 85; I.A. Horowitz, "The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials" (1985), 9 Law and Human Behaviour 25; Hans and Vidmar, Judging the Jury (New York: Plenum Press, 1986) at pp. 155-160, esp. pp. 158-9.

(iii) Judgment in the Court Below

143. The Court of Appeal erred in stating that the jury "has no right not to apply the law that the trial judge has instructed them to apply." (Vol. 33, p. 6964 l. 42) Moreover, the Court below erred in following the American cases of U.S. v. Moylan, 417 F. 2d 1002 (1969), and Sparf and Hansen v. U.S., 156 U.S. 51 (1895), that the jury ought not to be told of this right because "it would seriously weaken the system which our community relies upon for a true verdict..." (p. 6965 l. 10) The Appellants submit that this ignores the underlying values and importance of the jury system.

144. The Court also erred in finding that the trial judge did not, and could not, adequately correct the purported error of defence counsel when the learned trial judge "specifically told the jury that they could not ignore the law and do what they wanted", and that "it was wrong for Mr. Manning to say that in reaching their verdict they should have regard to the consequences of their verdict." (p. 6964 l. 10) Moreover, to find that it

was "unrealistic" (p. 6965 l. 50) to suggest that it was possible for the trial judge to correct defence counsel's address is to consider the issue of general fairness at the trial, which is not a question of law alone, and is purely speculation by the Court which is contradicted by the trial judge's charge and the fact that Crown counsel did not object to defence counsel's address: R. v. Lukas (1962), 33 C.R. 403, 407 (Ont. C.A.). The Court also erred in finding that defence counsel's address, by itself, constituted an error of law alone, when Boucher v. The Queen and Pisani v. The Queen are distinguishable from this case.

145. It is submitted that other aspects of defence counsel's address found to be improper by the Court of Appeal dealt with evidence properly admitted relating to defences raised by the Appellants, and such remarks do not raise a question of law alone.

E. NO SUBSTANTIAL WRONG OR MISCARRIAGE OF JUSTICE

146. It is submitted that even if there were legal errors made at the trial, no substantial wrong or miscarriage of justice occurred. While there is no longer a specific provision in the Criminal Code for using this criteria in appeals from acquittals, it "may be given an analogical application" to protect the accused, and to give him or her the benefit of an acquittal and to place the accused on an equal footing with the Crown: Gaysek v. The Queen, [1971] S.C.R. 888 per Laskin J., dissenting, at 899; Vezeau v. The Queen, [1977] 2 S.C.R. 277 at 282 per Dickson J., dissenting; Criminal Code, s. 613(1)(b)(iii); Double Jeopardy at p. 303; Charter s. 15.

147. In particular, the following errors were made at trial which were prejudicial to the Appellants and which greatly favoured the Crown:

(i) the trial judge commented on the failure of two of the accused to testify contrary to s. 4(5) of the Canada Evidence Act, R.S.C. 1970, c. E-10 (Appeal Case, Vol. 19 p. 4031 l. 17 to l. 22);
(ii) the trial judge did not put the case for the defence adequately to the jury in that, while he reviewed the evidence, he failed to marshall and analyze it to show how it supported the defence and he failed to point out to the jury evidence in favour

of the defence, and he failed to direct the jury to weaknesses and discrepancies in the Crown's case (R. v. Miller and Cockriell (1975), 24 C.C.C. (2d) 401 at 429-431 (B.C.C.A.); R. v. Vallieres (1973), 15 C.C.C. (2d) 241 at 268-270 (Que. C.A.));
(iii) the trial judge failed to correct the inflammatory closing address to the jury by Crown counsel in which the Crown counsel referred to facts and theories which were not in evidence and presented the jury with an in terrorem argument that a verdict of acquittal would cause people to take the law into their own hands and burn buildings, and the trial judge compounded and gave these errors greater force in his charge and re-charge (Appeal Case, Vol. 17, p. 3748 l. 7 to p. 3759 l. 20; Objection at Vol. 17, p. 3763 l. 33 to p. 3765 l. 4; Charge to Jury, Vol. 18, p. 3852 l. 18 to p. 3853 l. 10; Objection to Charge, Vol. 18, p. 3857 l. 24 to p. 3859 l. 1; Boucher v. The Queen, [1955] S.C.R. 16; R. v. Pisani, [1971] S.C.R. 738 at 740; R. v. Labarre (1978), 45 C.C.C. (2d) 171 at 175-176 (Que. C.A.); R. v. Taylor (1979), 46 C.C.C. (2d) 105 (N.S.S.C. - A.D.); R. v. Gratton (1985), 18 C.C.C. (3d) 462 at 470-471 (Ont. C.A.));
(iv) the trial judge failed to display a sense of impartiality and a position of strict neutrality in his charge to the jury (R. v. Cavanagh and Donaldson (1976), 33 C.C.C. (2d) 134 at 140-143 (Ont. C.A.));
(v) the trial judge erred in law in placing a burden of proof on the accused to fit within the exceptions in s. 251 of the Criminal Code contrary to s. 11(d) of the Charter (R. v. Oakes, supra).

F. TEST ON A CROWN APPEAL

148. The Court of Appeal erred in finding "that there has been no trial according to law" and in ordering a new trial as a result. For a new trial to be ordered following an acquittal, the Crown must establish "with a substantial degree of certainty" that on a new trial the verdict would probably be different: Vezeau v. The Queen, per Dickson J., dissenting, at p. 282. In light of the entrenchment of the Charter - in particular sections 7, 11(d), 11(f) and 11(h) - and in light of the extraordinary power of the Crown to appeal from an acquittal, it is submitted that the majority decision of this Court in Vezeau ought to be reconsidered: Double Jeopardy, at p. 301. See also: Oakes at p. 120; Cullen v. The King, per Rand J., dissenting at pp. 668-669.

149. In Vallance v. The Queen (1961), 35 A.L.J.R. 182 at 185, Dixon C.J. asked whether the error was "on the whole case a probable explanation of the verdict of the jury." This test was described by Professor Friedland

as "a far preferable approach" to that taken in Canada as "Dixon C.J. adopts the proper attitude to new trials following Crown appeals": Double Jeopardy at p. 303. It is submitted that this test should be adopted as the appropriate standard on a Crown appeal (should Crown appeals be permitted at all).

10 150. The Crown has not met the onus suggested, nor has it met the more relaxed test in Vezeau. Indeed, there is no reasonable prospect that on a new trial the Attorney General will be in any different or better position to obtain a conviction: Rex. v. Ivall (1949), 94 C.C.C. 388 (Ont. C.A.).

G. COSTS: INVALIDITY OF SECTION 610(3) OF THE CRIMINAL CODE AND APPLICATION OF SECTION 24(1) OF THE CHARTER

20 151. It is submitted that s. 610(3) of the Criminal Code, which prohibits the awarding of costs in appeals involving indictable offences, is inconsistent with ss. 7, 11(d), 11(f), 11(h) and 15 of the Charter. As Crown appeals are permitted under s. 605 of the Criminal Code, proceedings following acquittals at least impair an accused's right to liberty and deprive him or her of the right to security of the person: Singh at p. 207 per Wilson J.; Mills at p. 75, per Lamer J., dissenting. Section 610(3) 30 of the Criminal Code further impairs and deprives this right by preventing an accused from recovering from the Crown the cost of the onerous burden placed on the accused to defend himself as a result of alleged state errors (i.e., errors by the trial judge or Crown attorney which give rise to a question of law alone), thereby "enhancing the possibility that even though innocent he may be found guilty": Green v. U.S., at pp. 187-8 [emphasis added]; Cullen v. The King at pp. 668-9, per Rand J. dissenting.

40 152. The right to be presumed innocent is weakened when an accused is forced to incur expenses to uphold a finding of innocence. The benefit of a jury trial is infringed, and where the purpose of the appeal is to obtain a new trial s. 11(h) rights are infringed which may lead to even greater expense thus realizing the concerns expressed in Green v. U.S. and Cullen.

153. Section 610(3) is not in accordance with the principles of fundamental justice. It fails to recognize the fundamental departure from common law principles that an appeal from an acquittal involves and the values at stake on such an appeal. There is no rationale or legitimate objective to be served by such an absolute and all-encompassing ban on the recovery of costs from the State on an appeal launched by the State. The section infringes several aspects of s. 11 of the Charter which are "illustrative" of the principles of fundamental justice: Re B.C. Motor Vehicle Act at p. 512.

154. Section 610(3) is also inconsistent with s. 15(1) of the Charter. It treats appeals in indictable matters differently, without any justification, than appeals in summary conviction matters in which costs may be awarded: Criminal Code, s. 758. This distinction is especially invidious because for many offences the decision whether to proceed summarily or by indictment is in the discretion of the prosecutor: R. v. Oulette, [1980] 1 S.C.R. 568 at 578.

155. Inequality in awarding costs in criminal cases also exists on appeals to this Court. In summary conviction appeals the Crown is occasionally granted leave to appeal provided it undertakes to pay the respondent's costs: R. v. Verrette, [1978] 2 S.C.R. 838 at 851; R. v. Biron, [1976] 2 S.C.R. 56 at 58 per Laskin C.J.C. dissenting. Similarly this Court has granted the Crown leave to appeal and awarded costs in any event to the accused in indictable offences such as The Queen v. Oakes (17550, March 21, 1983), The Queen v. Ancio (16832, December 22, 1981), and The Queen v. Terrence (16296, December 2, 1980). Therefore, this Court awards costs to an accused where the Crown is the appellant. It is submitted that costs should also be awarded when the accused is appealing from the overturning of an acquittal. In both instances, the appeal comes to this Court as a result of a Crown appeal. Additionally, appellate courts should be permitted to award costs against the Crown in criminal cases in order to secure for individuals "the full benefit of the Charter's protection": Big M Drug Mart at p. 344. See also: R. v. Oakes (1983), 2 C.C.C. (3d) 339 at 364 (Ont. C.A.); Griffin v. Illinois, 351 U.S. 12, 17-20.

156. Section 610(3) is not justified under s. 1 of the Charter. It serves no objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (Big M Drug Mart at p. 352) which relates "to concerns which are pressing and substantial" in our society. It is an absolute prohibition and is disproportionate to any possible justifiable objective: Oakes, pp. 138-139. Moreover, s. 610(3) may have the effect of preventing, rather than enhancing, "the participation of individuals and groups in society": Oakes, p. 136. An acquittal at trial may be a hollow victory for an accused if he is financially destroyed in the process. Compare: Criminal Justice Act, 1972, (U.K.) s. 36(5); Tasmania, Criminal Code Act, 1924, s. 414(1).

157. It is submitted that this Court should award the Appellants their costs on a solicitor and client basis in this Court and the Courts below as an appropriate and just remedy under s. 24(1) of the Charter. The Court of Appeal erred in finding that it did not have the power to award costs and "in any event ... would not be disposed to award costs in this case." This case was the subject of a Crown appeal to the Court of Appeal, and the important legal issues in it were the explicit justification for the appeal, as the Attorney-General for Ontario stated on December 4, 1984: Legislature of Ontario Debates, 1984, Vol. 5, pp. 4615-4619.

158. This Court and the Court of Appeal are courts of competent jurisdiction when dealing with appeals and therefore have the power to award costs on appeals under s. 24(1), which is broad in its remedial scope and is not limited to pre-existing remedies. Additionally, this Court has fashioned new remedies not provided in statutes where necessary: Nicholson v. Haldimand Norfolk Police Commissioners Board, [1979] 1 S.C.R. 311; Singh, supra. See also: Supreme Court Act, R.S.C. 1970, c. S-19, s. 49; R. v. Volpi (unreported, June 18, 1985, Ont. H.C.); Reid and Burns, "The Power to Award Costs in Criminal Cases or How Juridical Illusions Remain Illusions None the Less" (1981-82), 24 Crim. L. Q. 455).

PART IV

ORDER REQUESTED

159. It is respectfully submitted that the appeal should be allowed and ss. 605, 610(3) and 251 of the Criminal Code be declared of no force and effect. Alternatively, it is submitted that the Crown appeal from the acquittal raises no question of law alone and that the appeal should be allowed and the acquittals restored.

160. It is further respectfully requested that solicitor and client costs be awarded to the Appellants for the appeal to this Court and for the costs incurred in the Court below in any event of the result of this appeal.

ALL of which is respectfully submitted at Toronto, this 12th day of September 1986.

MORRIS MANNING, Q.C.
of Counsel for the Appellants

PART V

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