IN THE 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

- and -

ATTORNEY GENERAL OF CANADA

Intervener

FACTUM OF THE ATTORNEY GENERAL OF CANADA

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PART I

STATEMENT OF FACTS

1. The Attorney General of Canada intervenes to address the constitutional issues in the Notice of Constitutional Questions.

2. The Attorney General of Canada accepts as correct the facts set out in
20 the Respondent's factum, although not necessarily the emphasis given to them.

3. Most of the evidence called by the Appellants on the constitutional motion at the opening of trial related to the application or administration of the abortion law in Canada; and objection was taken by the Crown and by the Attorney General of Canada to the introduction of evidence generally and in particular to evidence related to the efficiency of the administration of legislation as being irrelevant to the issues before the Court. For the purposes of the issues relating to constitututional validity, the subject of the efficiency of the administration of the legislation is not within the sphere of constitutional review. Consequently most, if not all, evidence called by the Appellants is irrelevant and therefore inadmissible.

4. No witness was called who testified that she had actually sought or received an abortion either under s. 251 of the *Criminal Code* or otherwise. It is submitted that much of the evidence of other witnesses is pure hearsay (sometimes second and third hand) and unrelated to the formation of an expert opinion, and is therefore inadmissible to prove the "facts" alleged.

5. Assuming (without admitting) that there are relevant facts relating to the constitutional issues raised, reference can be made to four areas.

A. <u>OPINION SURVEYS</u>

6. The evidence of opinion surveys indicates that there is a surprising consistency over the years and in different survey groups in the spectrum of opinions on the issue of abortion. Roughly 21 to 23% of people at one end of the spectrum are of the view, on the one hand, that abortion is a matter solely for the decision of the pregnant woman and that any legislation on this subject is an unwarranted interference with a woman's right to deal with her own body, while about 19 to 20% are of the view, on the other hand, that destruction of the living fetus is the killing of human life and tantamount to murder. The remainder of the population (about 60%) are of the view that abortion should be prohibited in some circumstances.

Appeal Case, Vol. 23, Exhibits 39 & 40, Vol. 27, Exhibits 103, 104, 105, 106, 107, 108.

B. ABORTION PROCEDURES

7. There appears to have been a dominant but unfounded belief in medical circles in earlier days that distinguished between first, second and third trimester stages of pregnancy (this approach appears to have shaped the decision of the U.S. Supreme Court in *Roe v. Wade* in 1973); the preferred modern medical view is that pregnancy evolves as a more or less smooth continuum, the only major significant transition point being the point at which the fetus becomes independently viable. This point of viability is not determined by a rigid trimester formula, but is much more dependent upon the particular fetus and the state of neonatal medical technology. Viability was once thought to arise only after 28 weeks' gestation; now, it is not uncommon for fetuses to survive at 24 weeks and even earlier. Medical science will continue to push back the age of fetal viability.

Testimony, Dr. D.A. Grimes, Appeal Case, Vol. 15, pp. 3244 and 3269

Appeal Case, Vol. 19, Exhibit No. 11, pages 277-8

Testimony, Dr. P.G. Stubblefield, Appeal Case, Vol. 2, pp. 339-341

Testimony, Dr. D.H. Carr, Appeal Case, Vol. 6, pp. 1315-17, and 1343-4

Testimony, Dr. J.E. Hodgson, Appeal Case Vol. 10, pp. 2386-9; Vol. 11, pp. 2418-28

See also: *Akron Centre for Reproductive Health, Inc. v. Akron*, 103 Sup. Ct. 2482 (1983)(U.S. Sup. Ct., O'Connor, J. (dissent) esp. at pp. 2504-2507)

8. The complication rate for all legal abortions in Canada at any stage in the pregnancy declined from 3.2% in 1975 to 2.4% in 1982.

Appeal Case, Vol. 26, Exhibit No. 75, page 9 and Table 7 at page 17

9. In 1982, 67.8% of all therapeutic abortions in Canada were ambulatory or day-care abortions; so that the average number of days of hospital care for all abortions in Canada in 1982 was 0.5 days.

Appeal Case, Vol. 26, Exhibit No. 75, page 9 and Table 7 at page 17

10. There has been a marked trend in Canada towards abortions in earlier gestational periods:

	1974	1982
Under 13 weeks	78.8%	86.9%
13 - 16 weeks	14.6%	9.7%
17 weeks or more	6.6%	3.4%
	100.0%	100.0%

Appeal Case, Vol. 22, Exhibit No. 33, Text Table IX, page 25;

Appeal Case, Vol. 26, Exhibit No. 75, Table 7, page 17.

11. Instillation abortions (saline, prostaglandin or urea) are not performed until at least the 16th and usually the 17th gestational week. No woman and no doctor testified to a single specific instance when a pregnant woman was obliged to have an instillation procedure instead of some other abortion procedure because of a delay occasioned by a therapeutic abortion committee or its procedures (much less that any woman suffered actual complications as a result).

12. In fact the evidence of the Appellants' own witnesses is, to the contrary, that therapeutic abortion committees will in a case of genuine urgency move with alacrity.

Testimony, R. Christianson, Appeal Case, Vol. 15, p. 3381; Dr. Lamont, Vol. 4, page 876, line 5-8; Vol. 5, page 1037, line 7-11.

13. It is submitted that one ought not to assume that the few instillation abortions performed by Canadian physicians in hospitals (in 1982, only 5.1% of all abortions) are done by that method for any reason related to the committee process, rather than: (1) in the exercise of medical judgment; (2) by the choice of the pregnant woman; or (3) as a result of the late discovery or acknowledgement of pregnancy.

C. THE BADGLEY REPORT

14. Undoubtedly after the passage of the amendment to s. 251 of the *Code* in 1969, it required a period of several years for hospitals, committees and physicians to consider their position with respect to the new possibility of legal therapeutic abortions and, where so disposed, to develop the new technical skills, administrative structures and application procedures. Although the Badgley Report was published on January 1, 1977, the information in the report was assembled over the preceding 18 months.

15. One of the purposes of the report was to publicize the actual day-to-day administrative aspects of therapeutic abortions with a view to achieving any necessary modifications and improvements; and it is submitted that it is reasonable to infer that changes and improvements in administration have taken place since that time as a direct result of consideration by responsible persons of the constructive criticisms contained in the report.

D. THE PRESENT SYSTEM

16. Several witnesses testified to the pattern of increases in the absolute number of abortions after amendments to abortion legislation, such as occurred in Canada in 1969, following which there was a "plateau" in the number of abortions.

Appeal Case: Dr. Carr, Vol. 6, page 1332-1333; Dr. Tietze, Vol. 7, p. 1616-1617; Dr. Stubblefield, Vol. 2, p. 399-400

17. Canadian statistics show that in the early period after 1969 there was a rapid increase each year in the number of abortions (an absolute increase between 1970 and 1974 of 332%), however in the five years from 1978 to 1982 inclusive the number of abortions remained relatively constant (the total increase from 1979 to 1982 was less than 6½%).

Appeal Case, Vol. 24, Exhibit No. 64, page 55 (the Badgley Report)

Appeal Case, Vol. 26, Exhibit No. 75, Table 4, page 15

18. In 1983, the total number of therapeutic abortions in Canada actually declined to 61,800 (from the 1982 level of 66,319); this was a lower total than in 1978 or any year since. Of these, 96.9% were at 16 gestational weeks or less.

Statistics Canada Bulletin, *1983 Therapeutic Abortions*, released March, 1985; page 1 and Table 3 at page 10

19. In 1982, 1,187 therapeutic abortions were performed at Hamilton Chedoke-McMaster Hospital. In cross-examination Dr. David Carr, the chairman of the therapeutic abortion committee, admitted that of all the applications received by his committee in 1982 "less than a dozen" were ultimately refused by the committee; the reasons for refusal were always communicated to the attending physician and some of those refused then re-submitted and were approved; those refused were "a small number". All those that were refused were refused because a majority of the therapeutic abortion committee was not convinced that "the continuation of the pregnancy would be detrimental to the woman's health".

Appeal Case, Vol. 6, page 1322, 1335-1336; Vol. 27, Exhibit 114

20. Of the other physicians who testified who performed abortions under the *Criminal Code* provisions, all admitted in cross-examination that they had never had an application for a therapeutic abortion on behalf of their patient ultimately refused by a therapeutic abortion committee.

Dr. Diane Sacks, Transcript, Vol. 10, p. 2178, line 18 and page 2280, lines 20-23

Dr. J.A. Lamont, Transcript, Vol. 4, page 872, line 27 to page 874, line 22

Dr. Sheila Cohen, Transcript, Vol. 8, page 1756, line 12 to page 1760, line 6

21. No woman testified that she personally had applied to a therapeutic abortion committee anywhere in Canada and had been refused a certificate under s. 251(4) to which she ought to have been entitled. No physician testified to his personal participation in such an application.

22. In 1982, the Province of Ontario had 99 hospitals with therapeutic abortion committees and 83 of those hospitals actually performed a total of 31,379 therapeutic abortions in 1982, 36 of them performing more than 200 therapeutic abortions in the year. The 17 hospitals with therapeutic abortion committees located in Metropolitan Toronto performed 16,706 therapeutic abortions in 1982. In 1982, there were nine hospitals in Metropolitan Toronto which performed more than 1,000 therapeutic abortions each.

Appeal Case, Vol. 26, Exhibit 75, p. 16, Table 5

Appeal Case, Vol. 27, Exhibit 114

Appeal Case, Vol. 27, Exhibit 98

PART II
POINTS IN ISSUE

23. The Attorney General of Canada intervenes to address the issues in the Notice of Constitutional Questions:

(1) Does s. 251 of the *Code* infringe or deny the rights and freedoms guaranteed by s. 2(a), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms?*

(2) If s. 251 of the *Code* does infringe or deny any of the aforementioned rights or freedoms of the *Charter*, is s. 251 justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982?*

(3) Is s. 251 of the *Code ultra vires* the Parliament of Canada?

(4) Does s. 251 of the *Code* violate s. 96 of the *Constitution Act. 1867?*

(5) Does s. 251 of the *Code* 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?

(6) Do s. 605 and 610(3) of the *Code* infringe or deny the rights and freedoms guaranteed by s. 7, 11(d), 11(f), 11(h) and 24(1) of the *Charter?*

(7) If s. 605 and 610(3) of the *Code* infringe or deny the rights and freedoms guaranteed by s. 7, 11(d), 11(f), 11(h) and 24(1) of the *Charter*, are s. 605 and 610(3) justified by section 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982?*

PART III
ARGUMENT

A. WHAT IS NOT IN ISSUE

24. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 Dickson J. (as he then was) said at page 671:

> "It seems to me to be of importance, at the outset, to indicate what the Court is called upon to decide in this appeal and, equally important, what it has not been called upon to decide. It has not been called upon to decide, or even to enter, the loud and continuous public debate on abortion which has been going on in this country between, at the two extremes, (i) those who would have abortion regarded in law as an act purely personal and private, of concern only to the woman and her physician, in which the state has no legitimate right to interfere, and (ii) those who speak in terms of moral absolutes and, for religious or other reasons, regard an induced abortion and destruction of a foetus, viable or not, as destruction of a human life and tantamount to murder."

It is submitted that, similarly, this Honourable Court in the instant proceedings "has not been called upon to decide, or even to enter the loud and continuous public debate on abortion", but to determine whether the legislation enacted conforms to the legal requirements of the *Constitution*.

B. THE NATURE OF THE LEGISLATION IN SECTION 251 OF THE CRIMINAL CODE

25. It is submitted that in enacting the original blanket prohibition against procuring a miscarriage in 1869, Parliament had as its purpose protection of developing fetal life and protection of the life and health of the pregnant woman (and not as the Appellants argue merely the latter).

Abortion and Infanticide Statutes in England

As to which see: 43 Geo. III, c. 58 (1803); 9 Geo. IV, c. 31 (1828); 7 Wm. IV & 1 Vict., c. 85 (1837); *Offences Against the Person Act, 1861*, 24 & 25 Vict., c. 100; *Infant Life (Preservation) Act*, 1929, 19 & 20 Geo. V, c. 34; *Abortion Act, 1967*, c. 87;

As to the general history of English abortion legislation see: Mohr, J.C., *Abortion in America - The Origins and Evolution of National Policy, 1800-1900* (New York: Oxford University Press, 1978), pp. 24-25; Gavigan, Shelly: "The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion" (1984), 5 Journal of Legal History 20; Horan, D.J., "The Legal Case for the Unborn Child" (1972), with Hilgers, T.W. & Horan, D.J., eds., *Abortion and Social Justice* (Thaxton, Va.: Sun Life, 1980) 105 at p. 125; Byrn, R.M., "An American Tragedy, The Supreme Court on Abortion" (1973), 41 Fordham L. Rev. 807 at p. 824; *Report of the Committee on the Working of the Abortion Act, 1967* (1974), Cmnd. 5579, pp. 190-200.

As to the evolution of the present *Abortion Act, 1967* see: St. John-Stevas, N., *Abortion and the Law: The English Experience*

Pre-Confederation and Canadian Abortion and Infanticide Statutes

As to which see: 4 & 5 Vict., c. 27, s. 13 (1841); *Offences Against the Person Act*, 32-33 Vict., c. 20, s. 60 (1869); *The Criminal Code*, 55-56 Vict. c. 29 (1892); *The Criminal Code*, R.S.C. 1906, c. 146; *The Criminal Code*, R.S.C. 1927, c. 36; *The Criminal Code*, R.S.C. 1953-54, c. 51; *Criminal Code Amendment Act*, S.C. 1968-69, c. 38, s. 18.

As to the evolution of the 1969 *Criminal Law Amendment Act*, see: de Valk, A., *Morality and Law in Canadian Politics: The Abortion Controversy* (1974); *Miscellaneous Debates, House of Commons, Canada* - January 23, 1969, to May 12, 1969, pp. 4717-4722

26. It is further submitted that the blanket criminal prohibition against procuring miscarriage both in British common law and in British statute law (commencing with *Lord Ellenborough's Act* in 1803) was always subject to a common law defence predicated upon the necessity of saving the life of the mother (with life probably being given a broad interpretation).

R. v. Bourne, [1939] 1 K.B. 687 (see also report of same case containing substantial differences in [1938] 3 All E.R. 615); cf. Williams, G., *The Sanctity of Life and the Criminal Law* (1966), pp. 160-163, and footnotes 5 and 6.

27. The blanket prohibitions against procuring a miscarriage now are found in subsections (1) and (2) of section 251 of the *Criminal Code of Canada* (subsection (3) containing related definitions).

C. PARLIAMENT'S PURPOSE IN ENACTING SECTION 251

28. It is submitted that in enacting the 1969 amendments to s. 251 now found in subsections (4) to (7) inclusive, Parliament intended to do nothing more than this: to specify limited exculpatory circumstances in which the criminal penalties of subsections (1) and (2) would not apply.

29. Those circumstances are both limited and at the same time clear and precise, namely: criminal sanctions do not apply to those who can establish that at the time of procuring the miscarriage:

(a) it was performed by a qualified medical practitioner;

(b) a prior written certificate had already been obtained by that medical practitioner from a therapeutic abortion committee, and

(c) it was performed in an accredited or approved hospital;

and if any one of those ingredients is lacking, the criminal prohibitions of subsections (1) and (2) apply.

30. The purposes of Parliament in enacting such amendments were twofold, and are patent on the face of the legislation, namely: (1) to allow relief from criminal sanction where there is a reliable, independent and medically sound judgment that the life or health of the mother would be or would likely be endangered, and (2) to insure that developing fetal life would be protected. The amendments were not enacted solely for the purpose of protecting the life and health of the mother, as argued by the Appellants.

31. Parliament has also made abundantly clear that it is unacceptable to it, as a matter of protection of fetal life, that the decision as to whether or not the life or health of the pregnant woman in fact would be endangered, should be left to the pregnant woman alone, the aborting physician alone, or both. To do so would for practical purposes amount to condoning "abortion on demand", and would in effect have been tantamount to eliminating any standard whatsoever.

32. It is submitted that although

(a) on the one hand, a significant minority of the Canadian people regard abortion as tantamount to murder, and hold this opinion from a deeply felt moral conviction, and

(b) on the other hand, a significant minority of the Canadian people regard the "right" of a woman to decide whether to terminate her pregnancy without any outside interference as an equally cogent moral imperative,

nevertheless Parliament has in the exercise of its plenary criminal law power opted to exculpate from criminal law sanctions, abortions performed only under certain limited and clearly specified circumstances.

D. CHARTER OF RIGHTS AND FREEDOMS

33. It is submitted that although there is no presumption of the validity of legislation when considered against the *Charter*, and the *Charter* now does empower the Courts to test duly enacted legislation against the fundamental rights and freedoms guaranteed by it, nevertheless:

(a) "The interpretation should be a generous [one] ... at the same time it is important not to overshoot the actual purpose of the right or freedom in question but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts."

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 per Dickson, J. at p. 344

(b) "In that process, however, it would be wholly unwarranted, and...quite wrong, to conclude that the decision which Parliament has reached in the matter should be given no weight by the courts";

Re Global Communications Ltd. and Attorney General of Canada (1984), 44 O.R. (2d) 609 (C.A.) per Thorson, J. at pp. 620-621

(c) "Even where [the] Court is asked to pass on the constitutional validity of legislation,...it must resist making the wisdom of impugned legislation the test of constitutionality"; and

Curr v. The Queen, [1972] S.C.R. 889 Laskin, J. at p. 903

(d) such duly enacted legislation ought only to be "judicially dismantled" where there is a clear violation of a right or freedom "...so rooted in the tradition and conscience of our people as to be ranked as fundamental"

Palko v. Connecticut, 302 U.S. 319 (1937) per Cardozo, J. at p. 325

34. Apart from the earlier canon and common law crime of procuring an abortion, and *Lord Ellenborough's Act* of 1803, making the using of means with intent to procure abortion, whether before or after quickening a felony, pre-Confederation legislation against abortion was enacted in United Canada as early as 1841.

In 1869 the federal Parliament enacted the *"Offences Against the Person Act"* which *inter alia* made it a felony to unlawfully administer any means with intent to procure an abortion whether or not the woman was pregnant.

For the next 100 years this absolute criminal statutory prohibiton against abortion (with only minor changes) remained the law of Canada.

In 1969 the *Criminal Law Amendment Act*, was passed, allowing for the limited exculpatory provisions.

35. It is submitted that Parliament was legislating within its constitutional criminal law power in enacting subsections (1) and (2) of s. 251 of the *Code*, and subsequently enacting subsections (4) to (7). In doing so, Parliament had at least two valid, rational objectives:

(a) protection of the developing fetal life against idle, wanton or unnecessary destruction; and

(b) striking a balance between the protection of the fetal life and the quality of life of the pregnant woman to the extent that continuation of her pregnancy is likely to endanger her life or health.

1. Section 7 - "Life, Liberty and Security of the Person"

36. It is submitted that the words "the right to life, liberty and security of the person" form a single right with closely inter-related parts.

See: French version of s. 7 using the singular forms "droit" and "ce droit"

cf. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 per Wilson, J. at pp. 202, 204-205

37. Such ordinary words when used in a basic constitutional document such as the *Charter* should be given their ordinary or natural meaning.

R. v. Therens (1983), 5 C.C.C. (3d) 409 (Sask. C.A.) esp. per Tallis, J.A. at p. 423; appeal dismissed, [1985] 1 S.C.R. 613

Southam Inc. v. Hunter (1983), 3 C.C.C. (3d) 497 per Prouse, J.A. at pp. 502-503 (Alta. C.A.); appeal dismissed, [1984] 2 S.C.R. 145

The Queen v. Big M. Drug Mart Ltd., [1984] 1 W.W.R. 625, (Alta.C.A.) (esp. per Belzil, J. (dissenting) with whom McGillivray, C.J.C. concurred); appeal dismissed, *supra* (S.C.C.)

Minister of Home Affairs et al v. Fisher et al, [1980] A.C. 319 (J.C.P.C.) esp. per Lord Wilberforce at p. 328 speaking of the Bermuda Constitution

Attorney General of Fiji v. Director of Public Preventions, [1983] A.C. 672 per Lord Fisher at pp. 682-683 (P.C.)

38. The right to life, liberty and security of the person, it is submitted, is not an absolute right. Section 7 of the *Charter* expressly contemplates that one may be deprived of that right but only in accordance with the principles of fundamental justice.

Operation Dismantle et al v. The Queen et al, [1985] 1 S.C.R. 441 per Wilson, J. at pp. 487-490

39. It is submitted that the average Canadian would understand the plain, ordinary and natural meaning of the words of s. 7 without technical or legalistic interpretation to relate to death, arrest, detention, physical liberty and security.

40. Section 7 may not be limited to protection against arbitrary arrest and detention. However, it is not necessary for the purpose of this appeal to consider how broad a meaning should be given to "life, liberty and security of the person".

Operation Dismantle Inc. v. The Queen, supra, at p. 490

10 *R. v. Morgentaler,* Appeal Case, Judgment of the Ont. C.A., Vol. 33, p. 6908

41. It is submitted that there is not and there never has been in this country an unqualified "right" to perform an abortion, such as the Appellants now assert, and the claimed "liberty" to perform an abortion has clearly never been "so rooted in the tradition and conscience of our people as to be ranked as fundamental".

R. v. Morgentaler, Appeal Case, Judgment of Ont. C.A., Vol. 33, p. 6908

United States Law as to Abortions

20 42. It is submitted that American legal and constitutional traditions can be inappropriate in construing the *Charter* in a Canadian judicial context.

R. v. Big M. Drug Mart, supra, per Dickson, J. at pp. 329-331

Re Global Communications Ltd. and Attorney General of Canada, supra, per Thorson, J.A. at pp. 624-625

43. In particular, it is submitted that the decisions of the U.S. Supreme Court in the abortion cases, and especially, *Roe v. Wade* and *Doe v. Bolton,* ought not to be followed by reason of the historical, legal and constitutional analysis which appears to have rendered a disservice to the political and judicial machinery of that country.

Berger, R., *Government by Judiciary* (Harvard University Press, 1977)

Noonan, J.T., Jr., *A Private Choice: Abortion in America in the Seventies* (Toronto: Life Cycle Books, 1979)

Cox, A., *The Role of the Supreme Court in Government* (New York: Oxford University Press, 1976)

Bickel, A., *The Morality of Consent* (New Haven: Yale University Press, 1975)

Epstein, R., "Substantive Due Process by Any Other Name: The Abortion Cases", [1973] Supreme Court Review 159

Wellington, H., "Common Law Rules and Constitutional Double Standards" (1973), 83 Yale Law Journal 221

Ely, J.H., "The Wages of Crying Wolf: A Comment on *Roe v. Wade*" (1973), 82 Yale Law Journal 920

Dellapenna, J.W., "Nor Piety Nor Wit: The Supreme Court on Abortion" (1974), 6 Columbia Human Rights Law Review 379

Rice, C.E., "Dred Scott Case of the Twentieth Century" (1973), 10 Houston Law Review 1059

Wardle, L.D., *The Abortion Privacy Doctrine: A Compendium and Critique of Federal Court Abortion Cases* (Buffalo: Williams & Hein & Co., 1980)

44. There is no express right of privacy in the American Constitution. However, the Supreme Court of the United States has recognized such a right is one aspect of the "liberty" protected by the due process clause of the Fourteenth Amendment.

> See *R. v. Morgentaler*, Appeal Case, Judgment of Ont. C.A., Vol. 33 at pp. 6898 to 6902 for a review of the the American "privacy" cases including the Supreme Court abortion decisions

45. Four of the Justices of the Supreme Court of the United States recently have indicated their concern at the extent to which the Court has departed from the limitations expressed in *Roe v. Wade* that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman and rejecting the idea of abortion on demand.

Thornburgh v. American College of Obstetricians & Gynaecologists, 106 S.Ct. 2169 (1986) (Burger, J., White, J., Rehnquist, J. and O'Connor, J. dissenting)

White, J. stated at pages 2194, 2196, 2197-2198:

"...a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so 'fundamental' that restrictions upon it call into play anything more than the most minimal judicial scrutiny.

The Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep discussion of the people themselves over the question of abortion.

Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through general principles they have already incorporated into the Constitution they have adopted. Roe v. Wade implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never - not in 1781, 1791, 1868, or at any time since - done any such thing. I would return the issue to the people by overruling Roe v. Wade."

O'Connor, J. stated at page 2214:

"The State has compelling interests in ensuring maternal health and protecting the potential human life, and these interests exist 'throughout pregnancy' (Akron 462 U.S. at p. 461, O'Connor, J. dissenting). Under this Court's fundamental rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the state has imposed an "undue burden" on the abortion decision."

No General Right of Privacy in Canada

46. It is submitted that there is no general right of privacy in the common law of Canada or of England, merely certain limited and specific legal rights which may be considered as having a privacy aspect.

"... it must be conceded that there is in law no general right to privacy".

Zaduck and the Queen (1979), 46 C.C.C. (3d) 327 at p. 337 (Ont. C.A.)

Malone v. Commissioner of Police, [1979] 2 All E.R. 620 esp. per Megarry, V.C. at pp. 642-644

47. A general right of privacy is not a fundamental freedom or right guaranteed under the *Charter;* nowhere in the *Charter* is a right of privacy mentioned. It is further submitted that there is no general right of privacy incorporated into the phrase "liberty and security of the person" in s. 7 of the *Charter*.

48. The Minutes of the Special Joint Committee on the Constitution of Canada reveal that on at least five occasions requests were made to have the right to privacy included in the *Charter* and these requests were not acceded to.

Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 1st Session, 32nd Parliament (1980-81), Vol. 15: 9; Vol. 19: 28; Vol. 24: 26-27, 37; Vol. 43: 58; Vol. 46: 62-70

49. It is therefore submitted that as Parliament specifically decided not to include such a right in the *Charter*, a right to privacy should not now be read into s. 7.

50. It is submitted that certain aspects of privacy may be involved in a limited number of specific rights under the law. These recognized areas of the law in which what may be considered as aspects of privacy are protected include, for example, the law relating to search and seizure, trespass to land, trespass to chattels, trespass to the person, nuisance, defamation, injurious falsehood, wilful infliction of mental suffering, contracts, passing off and appropriation, breach of confidence and copyright.

51. In addition, the law dealing with surveillance devices, computerized information, access to records and the criminal law all involve aspects of privacy in varying degrees.

Burns, P., "The Law and Privacy: The Canadian Experience" (1976), 54 Can. Bar Rev. 1 at pp. 16-19

Rowan, H., "Privacy and the Law" (1973), Lectures L.S.U.C 259 at p. 261

Re Inquiry into the Confidentiality of Health Records (1979), 24 O.R. (2d) 545 (C.A.)

Several Canadian jurisdictions, in the absence of a general common law right of privacy, have enacted privacy acts, including:

The Privacy Act, R.S.B.C. 1979, c. 336

The Privacy Act, S.M. 1970, c. P-125

The Privacy Act, S.S. 1974, c. 80

Protection of Privacy Act, S.C. 1973-74, c. 50

52. With respect to the submission in paragraph 42 of the Appellants' Factum, it is submitted that the principles developed under common law do not acquire additional content by reason of s. 26 of the *Charter;* if the Appellants' submission were correct, every common law right could be constitutionally enshrined, which result was surely not intended by the terms of s. 26.

Le Groupe des Eleveurs de Volailles et al v. Canadian Chicken Marketing Agency, [1985] 1 F.C. 280 at pp. 323-324 (T.D.)

Re MacAusland & The Queen (1985), 19 C.C.C. (3d) 365 at p. 375 (P.E.I.C.A.)

53. A right elevated to the status of constitutional guarantee is found in s. 8 of the *Charter*, ("Everyone has the right to be secure against unreasonable search or seizure"). It is submitted that this is the only privacy right elevated to the status of a constitutional guarantee.

Southam Inc. v. Hunter, supra

The Principles of Fundamental Justice

54. It is submitted that the expression "principles of fundamental justice" is a qualifier of the right not to be deprived of life, liberty and security of the person, and sets the parameters of that right. Sections 8 to 14 are illustrative of violations of s. 7 and "represent principles which have been recognized by the common law, the international conventions and ... as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law".

Reference re Section 94(2) Motor Vehicle Act, [1985] 2 S.C.R. 486 per Lamer, J. at p. 502-503

55. It is submitted that if this Court should find the concept of "life, liberty and security of the person" broad enough to cover some aspect of the issue of abortion, that "liberty" is not absolute, and s. 7 permits the deprivation of that right provided it is within the principles of fundamental justice.

56. The Court below held that in applying the principles of fundamental justice, the court should only review the substance of legislation in "exceptional" cases where there has been a marked departure from the norm of civil and criminal liability resulting in the infringement of liberty or in some other injustice (for example in absolute liability offences imposing mandatory prison sentences). The provisions of s. 251 of the *Code* do not constitute such an "exceptional case".

R. v. Morgentaler, Appeal Case, Judgment of Ont. C.A., Vol. 33 at pp. 6915-6916

57. Section 251, on its face, does not offend against the natural justice requirements of the "principles of fundamental justice" and, as no specific decision of a committee is being impugned, it is not necessary for this Honourable Court to review the elements of procedural fairness.

58. In the alternative, if this Court determines that a substantive review of the abortion legislation is required by s. 7, it is submitted that consideration should be given to the fact that abortion was considered an offence and crime at common law and was made a statutory offence in England in 1803. This legislation was subsequently adopted and it became a statutory offence in Canada and has remained thus to the present day. The amendments enacted in 1969 merely provided exceptions to the offence in specific circumstances.

59. As Laskin, C.J.C. stated:

> "What is patent on the face of this prohibitory portion of s. 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial."
>
> *Morgentaler v. The Queen* (1975), *supra*, per Laskin, C.J.C. at p. 627

60. It is submitted that any "right" which may exist to an abortion could not be an absolute right to an abortion on request, but would have to be a more limited right in keeping with Canadian traditions which would extend the right of a pregnant woman to terminate pregnancy only in certain restricted circumstances, namely, when it can be established that the life or health of that pregnant woman would be endangered.

61. It is submitted that if some *prima facie* right to an abortion is contained in s. 7 of the *Charter*, that "liberty" cannot be absolute, but can, under the terms of s. 7 itself, be affected by measures which accord with the principles of fundamental justice. Section 251 of the *Code* balances the rights and interests of pregnant women with society's legitimate interest in protecting the unborn.

Miscellaneous Debates, House of Commons, Canada - January 23, 1969 to May 12, 1969, pp. 4717-4722

Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 1st Session, 32nd Parliament (1980-81) Vol. 43: 46-48; Vol. 46: 70-71

House of Commons Debates, Official Report, 2nd Session, 32nd Parliament, Vol. XII (1981), p. 13300

Opinion Polls, Appeal Case, Vol. 23, Exhibits 39 and 40; Vol. 27, Exhibits 103, 104, 105, 106, 107, 108.

Section 1 of the Charter

62. Rights and freedoms under the *Charter* are not absolute, but are always subject to certain qualifications and limits and allow for the protection of other competing interests in a democratic society.

Operation Dismantle v. Queen, *supra*, per Wilson J. at p. 488-489.

Re Federal Republic of Germany & Rauca (1983), 41 O.R. (2d) 225 at p. 241 (C.A.)

R. v. Oakes, [1986] 1 S.C.R. 103 esp. per Dickson, C.J. at p. 136

63. In the alternative only, if this Court should find some *prima facie* right to an abortion found in s. 7 of the *Charter* (which is not admitted), then it is submitted that the limitations upon such right provided by s. 251 of the *Code* intended to protect fetal life in the absence of jeopardy to the life or health of the pregnant woman are reasonable limits prescribed by law which can be demonstrably justified in a free and democratic society.

Reference may be made to abortion legislation in other free and democratic societies, e.g.

Report of the Committee on the Working of the Abortion Act, 1967, (Lane Report) *supra*, at pp. 219-224

Cook, R.J. & Dickens, B.M., "Emerging Issues in Commonwealth Abortion Laws, 1982", Appeal Case, Vol. 24, p. 5043

Abortion Laws: A Survey of Current World Legislation. Geneva: World Health Organization, 1971

France: *Code de la santé publique* (1975), art. 162

64. In West Germany, for example, the Federal Constitutional Court held, in 1975, that an amendment to the criminal law which would have permitted abortion on demand in the first 12 weeks of pregnancy was void as incompatible with the state's constitutional obligation to protect the unborn.

> Jonas, R.E. & Gorby, J.D., (1976), 9 *John Marshall Journal of Practice and Procedure* at pp. 605-684 (translation of the decision)

65. The European Commission of Human Rights, in dismissing a complaint that the restrictions imposed by the West German court resulted in an interference with the right of respect for the private life of the mother guaranteed by Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, held (without finding that the convention protected the unborn) that pregnancy and its termination were not solely a matter of the private life of the pregnant woman, but were a legitimate subject of government regulation.

> *Brüggemann & Scheuten v. Federal Republic of Germany* (1977), 3 E.H.R.R. 244
>
> For a discussion of the approach taken under the European Convention, see Bovius, B., "The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter" (1985), 17 Ottawa L. Rev. 213

66. Section 251 is a rational provision consistent with the traditional positions taken by most other democracies, which balances the rights and interests of pregnant women with society's legitimate interest in protecting the unborn. It is consistent with the position taken by most other democracies.

2. Void for Vagueness?

67. On a reading of s. 251 of the *Code* with its exception, there is no difficulty in determining what is proscribed and what is permitted.

68. This Honourable Court has spoken clearly and unanimously on this question in *Morgentaler* (1975), by saying "Parliament has spoken unmistakenly in clear and unambiguous language", and "Parliament has fixed a manageable standard" under s. 251(4) by leaving the question of whether "the continuation of pregnancy ... would or would be likely to endanger ... life or health" to be determined by medical professionals.

Morgentaler (1975), *supra*, per Laskin, C.J.C. at p. 634

69. It is submitted that this specific question has already been authoritatively decided in 1975 in a decision binding under the principles of *stare decisis* upon all courts in Canada.

Morgentaler, (1975), *supra*

70. The term "procuring the miscarriage" is commonly understood to refer to abortion or termination of pregnancy.

71. The expression "procuring the miscarriage" is located immediately below the heading "Abortion" in s. 251 of the *Code*. The phrase is synonymous with the expression "performing an abortion" and there is no uncertainty in the phrase.

R. v. Stevenson and McLean (1980), 57 C.C.C. (2d) 526 at pp. 529-530 (Ont. C.A.) (use of the heading of a section in interpreting words of the section)

72. This meaning, while perfectly clear, is confirmed by the French language version of the section which uses the French word for "abortion", namely "avortement", in both the heading and the text of s. 251.

Official Languages Act, R.S.C. 1970, c. O-2, s. 8

73. With regard to the allegation that the "void for vagueness" doctrine is included in the "principles of fundamental justice" in s. 7 of the *Charter*, it is submitted that the legal doctrine which requires certainty in a criminal or penal statute is founded upon the principle that the citizen who is seeking to abide by the law should be able to determine with reasonable certainty whether a course of conduct upon which he proposes to embark does or does not constitute an offence under the law.

74. The evidence shows that the Appellants were aware that their actions constituted a violation of the terms of s. 251 of the *Code*.

10 75. The Appellants would have no difficulty in determining whether a particular proposed course of conduct would comply with the requirements of s. 251. They need only know whether the abortion would be performed in an accredited or approved hospital and know whether they had received a copy of the certificate of a therapeutic abortion committee for that hospital as described in s. 251(4)(c).

76. The requirements of s. 251 are clear and certain, and comply with the tests for certainty applied in British and Canadian courts with respect to criminal legislation.

20 *Cotroni v. Quebec Police Commission*, [1976] 1 S.C.R. 219

R. v. Isaacs Gallery Ltd. (1975), 19 C.C.C. (2d) 570 (Ont. C.A.) esp. per Gale, C.J.O. for the Court at pp. 571-2

Shaw v. D.P.P., [1962] A.C. 220 per Lord Reid at 281 (H.L.)

R. v. Pope t (1981), 58 C.C.C. (2d) 505 (Ont. C.A.) see esp. per Zuber, J.A. for the Court at pp. 508-9;

Fawcett Properties v. Buckingham C.C., [1961] A.C. 636 per Lord Denning at p. 676

The Queen v. Rowley, unreported decision of B.C.C.A, September 17, 1986

77. It is submitted that this Honourable Court ought to have regard to the jurisprudence and traditions of Canadian law, and ought not to follow decisions of the American Courts based upon doctrines peculiar to their Constitution and the "due process" clauses (including "substantive" due process) found in their Fifth and Fourteenth Amendments.

but cf. *United States v. Vuitch* 402 U.S. 62 (1971) where a District of Columbia statute making abortions criminal unless they were, *inter alia* "necessary for the preservation of the mother's life or health" was construed by the Court as not presenting a problem of vagueness by reason of the use of the word "health".

3. Equality Rights - Section 15

78. It is submitted that the purpose of s. 15 is to require "that those who are similarly situated be treated similarly".

Re McDonald v. The Queen (1985), 51 O.R. (2d) 745 per Morden, J.A. at p. 765 (C.A.)

79. As a natural biological necessity, a law relating to the procurement of abortions applies only to women. Therefore, the gender-based orientation of s. 251 is not discriminatory on its face.

Bliss v. A.G. Canada, [1979] 1 S.C.R. 183 esp. per Ritchie, J. at p. 190-191

80. Section 15(1), and particularly the word "discrimination", should be interpreted as applying to an unjustified or unjustifiable distinction. Consideration should be given to whether the "distinction" or "inequity" (if one exists) has been created "for a valid Federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive" offensive to the *Charter*.

MacKay v. R., [1980] 2 S.C.R. 370 per McIntyre, J. at pp. 405-406

Re Rebic v. The Queen (1985), 20 C.C.C. (3d) 196 at p. 202-203 (B.C.S.C.); appeal dismissed (1986), 2 B.C.L.R. (2d) 364 (C.A.)

81. It is submitted that where Parliament discerns an issue of public morality relating to pregnancy, s. 15 of the *Charter* cannot be invoked to preclude Parliament in its plenary criminal law power from enacting appropriate legislation to achieve such a valid federal objective merely because pregnancy is of predominant impact upon women. This, it is submitted, was the approach taken by this Honourable Court in 1975.

Morgentaler (1975), *supra*, per Laskin, C.J.C, at pp. 634-6

82. Assuming any uneven administration of s. 251, which the Appellants allege results in discriminatory treatment, this factor should not be dealt with by the Court on a challenge to the legislation under s. 15 of the *Charter* where the legislation itself does not discriminate.

R. v. Swain (1986), 53 O.R. (2d) 609 (C.A.) per Thorson, J.A. at pp. 647-648

83. The Appellants also allege an unconstitutional inequality within the classification of women based on inequality of access to lawful therapeutic abortions. Although it is undoubtedly a goal that every person should have equal access to medical facilities, it is a goal which in practical terms must always remain impossible of attainment: Canada's far-flung geography and vast variety in the distribution of population, coupled with the concentration of medical and hospital facilities and resources in metropolitan centres means that there may be at times an unavoidable unevenness in the availability of medical services in this country.

84. It is submitted that the American judicial tiers of scrutiny in dealing with the equality issue are an unnecessary and perhaps overly rigid scheme in the context of the *Canadian Charter*, which allows each piece of legislation to be considered on its own separate merits and, where it infringes a constitutionally protected right or freedom, allows it to be measured against the general standard of s 1.

Reference also may be made to:

Kurland, P.B., "The Supreme Court 1963 Term. Foreward: 'Equal in Origin and Equal in Title to the Legislative Branches of Government" (1964), 78 Harvard Law Review 143

Tarnopolsky, "An Overview of Section 15 of the Charter" (1983), 61 Canadian Bar Review 246

Gold, "Equality Rights and the Grounds of Discrimination", National Symposium on Equality Rights, University of Ottawa (1985)

Andrews v. Law Society of British Columbia, [1986] 4 W.W.R. 242 at pp. 252-253 (B.C.C.A.)

10 Bayefsky, A.F., "International Law: A Starting Point for Equality Rights," National Symposium on Equality Rights, *supra*, p. 10

European Court of Human Rights, 23 July, 1968, Series A, Vol. 6, pp. 25-36; 13 June, 1979, Series A., Vol. 31, pp. 14-16

Abdulaziz, Cabales and Balkandali v. United Kingdom (1985), 7 E.H.R.R. 471 at pp. 498-503 (European Ct. of Human Rights)

85. It is submitted that if there is any inequality arising out of s. 251 of the *Code* which may *prima facie* touch upon rights guaranteed under s. 15 of the *Charter*, then s. 251 is a limitation within the terms of s. 1 of the

20 *Charter*.

4. Freedom of Conscience and Religion - Section 2(a)

86. Even giving the words "freedom of conscience and religion" their most generous interpretation (as interpreted in *Big M Drug Mart*, *supra*, at pp. 336-7), there is no aspect of s. 251 which infringes that right. It is submitted that the Court below correctly held that there is no religion that has, as part of its tenets or creed, the absolute right to an abortion.

> "As was stated by the trial judge, ... the freedom of religion and conscience clause in the *Charter* was not designed to protect a denomination's policy position on [a secular] issue merely because the underpinnings of that position can be linked to a tenet of that religious group."
>
> *R. v. Morgentaler*, Appeal Case, Judgment of Ont. C.A., Volume 33 at p. 6921

87. Placed in its proper historical context, the concepts of freedom of religion and freedom of conscience became associated to form a single integrated concept of "freedom of conscience and religion" in s. 2(a). This freedom demands that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided they do not violate his or her neighbour's rights.

R. v. Big M. Drug Mart, *supra* at p. 526

88. It is submitted that the "right" to perform an abortion or the right to have an abortion does not come within the ambit of the fundamental freedom of conscience and religion guaranteed to Canadians by s. 2(a) of the *Charter* and consequently s. 251 of the *Code* does not infringe the freedom guaranteed in s. 2(a).

89. Freedom of religion includes the right to observe the essential practices demanded by the tenets of one's religion and, in determining what those essential practices are in any given case, the analysis must proceed in terms of the role that the practices and beliefs assume in the religion of the individual or group concerned.

> *Regina v. Videoflicks Limited et al* (1984), 48 O.R. (2d) 395 per Tarnopolsky, J.A. at p. 420 (C.A.)

90. The evidence in the instant case is that within the religious denominations, there is no unanimity on the issue of abortion, and none of the denominations profess to speak for a unanimous membership. In fact, the evidence of Dr. Hutchinson was that none of the religious denominations under discussion hold an absolute right to abortion as a tenet of their religion.

Evidence of Dr. Hutchinson, Appeal Case, Vol. 13, p. 2555

R. v. Morgentaler, Appeal Case, Judgment of Parker, A.C.J.H.C., Vol. 33 at p. 6871

91. It is submitted that freedom of conscience in s. 2(a) of the *Charter* is not:

"...the mere decision of any individual on any particular occasion to act or not act in a certain way. To warrant constitutional protection, the behaviour or practice in question would have to be based upon a set of beliefs by which one feels bound to conduct most, if not all, of one's voluntary actions."

Regina v. Videoflicks Limited et al supra, at p. 422

cf. *Knudsen v. Norway* (1984), 8 E.H.R.R. 63

There is no evidence of such compelling and conscientious beliefs with respect to having or performing abortions.

92. No woman testified as to her personal religious or conscientious beliefs with respect to her abortion. No physician testified as to his religious or conscientious beliefs with respect to performing an abortion. No representative of the ordained clergy, rabbinate or other acknowledged leader of any denomination in Canada testified as to religious tenets or practices of that denomination with respect to having or performing abortions.

93. The contention of the Appellants appears to be that if any religious group in Canada should entertain the view that a member of its faith should be entitled to act in some matter in accordance solely with his or her "conscience", then it would be beyond the power of Parliament to enact

legislation with respect to that subject matter, since it would thereby infringe "freedom of conscience" under s. 2(a) of the *Charter*. No authority was cited for such a startling proposition, and it is submitted that such a proposition is wrong in principle.

94. This proposal ignores the obvious balancing of interests that Parliament was seeking in enacting s. 251 in pursuit of a valid federal objective under s. 91(27): the balancing of the life and health of the woman against the protection of fetal life. Parliament has determined both to be vital interests.

10 95. A similar balancing of interests of the pregnant woman and the protection of fetal life has been adopted in other free and democratic countries. Even if any infringement of a right under s. 2(a) were found to exist, it would be justifiable as a reasonable limit prescribed by law under s. 1 of the *Charter*.

5. Cruel and Unusual Treatment or Punishment - Section 12

96. It is submitted that the terms of s. 251 do not subject either pregnant women or the medical profession to "cruel and unusual treatment or punishment".

20 *R. v. Morgentaler*, Appeal Case, Judgment of Parker A.C.J.H.C., Vol. 33 at p. 6873

R. v. Morgentaler, Appeal Case, Judgment of Ont. C.A., Vol. 33 at p. 6922

97. Section 12 of the *Charter* represents the constitutional entrenchment of a right that was provided in s. 2(b) of the *Canadian Bill of Rights*, since s. 12 of the *Charter* is in virtually the same words as its forerunner in the *Bill*.

98. This Court in *R. v. Miller and Cockriell* examined the meaning of the expression "cruel and unusual treatment or punishment" in s. 2(b) of the *Canadian Bill of Rights*. Mr. Justice Ritchie speaking for the majority, held that the words "cruel and unusual" are to be read conjunctively and not disjunctively, and that for "punishment or treatment" to offend section 2(b) of the *Bill of Rights*, it must be both cruel and unusual. The word "unusual" was given its ordinary accepted meaning.

R. v. Miller and Cockriell, [1977] 2 S.C.R. 680 at pp. 685-706

99. A discussion of the *Miller and Cockriell* case and its implications with respect to s. 12 of the *Charter* was before the Joint Committee of the Senate and of the House on the Constitution of Canada, 1st session (1980-81). It is submitted that the drafters of s. 12 of the *Charter* intended that the phrase "cruel and unusual treatment or punishment" be given the meaning already afforded that expression by the Supreme Court of Canada.

See *Minutes of Proceedings*, January 28, 1981, Vol. 47, pp. 73-75

100. There is nothing "unusual" about sanctions against abortion in Canadian law, for as Mr. Justice Dickson (as he then was) noted in *Morgentaler v. The Queen* (1975), at page 672:

> "...it may be appropriate to observe that since Confederation, and indeed before, the law of Canada has regarded as criminal, interference with pregnancy, however early it may take place; in 1969 the law was to some extent modified to exclude from criminal sanction abortions for therapeutic reasons carried out in compliance with prescribed conditions."

101. The comments of Laskin, C.J.C. in *Miller and Cockriell* in relation to "cruel and unusual" are pertinent to a consideration of "treatment or punishment" in s. 12, in that he found them to be "interacting expressions colouring each other ... and hence, to be considered together as a compendious expression of a norm".

R. v. Miller and Cockriell, *supra*, at pp. 689-690

102. Moreover this Court has spoken, in any event, with respect to the issue of whether s. 251 infringes the "cruel and unusual treatment or punishment" expression. Laskin C.J.C. in *Morgentaler v. The Queen* (1975), *supra*, at page 631 stated:

> "I am unable to agree that the mere prohibition of abortions save as permitted by sec. 251(4), (5) involves any imposition of treatment, nor can it be said that a physician or other person who runs foul of the abortion law is subjected to cruel or unusual punishment if he is sentenced to a term of imprisonment for his criminal conduct."

103. The test was aptly put by Laskin, C.J.C. in *R. v. Miller* and *Cockriell* at page 688, namely, whether the punishment or treatment impugned "is so excessive as to outrage standards of decency". Section 251 of the *Code* is not excessive, but in truth reflects the balancing of interests and opinion in Canada.

see also: *Re Mitchell and The Queen* (1983), 42 O.R. (2d) 481 per Linden, J. at p. 499-506 (H.C.)

B. GENERAL PRINCIPLES WITH RESPECT TO NON-CHARTER ISSUES

104. There are three arguments on behalf of the Appellants which are independent of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, namely:

(a) alleged unconstitutionality under the division of powers in the *Constitution Act, 1867;*

(b) alleged unconstitutionality on the ground that Parliament has delegated or abdicated its criminal law power; and

(c) alleged unconstitutionality for violation of s. 96 of the *Constitution Act, 1867.*

105. Extrinsic aids of a limited sort are available for certain constitutional purposes with respect to the above arguments.

106. The court may look at certain extrinsic materials such as Parliamentary debates, the proceedings of Parliamentary special committees and international conventions, but may not look at evidence directed towards, either (a) demonstrating the subsequent day-to-day operation or administration of the legislation, or (b) impugning the legislative wisdom or efficacy of the enactment.

Re Anti-Inflation Act, [1976] 2 S.C.R. 373 esp. per Laskin, C.J.C. at pp. 387-391, 423-425

107. It is submitted that with respect to any of the foregoing three arguments, it is clear law that the Court is never called upon to consider the wisdom of legislation as a matter of social policy, but rather must accept such policy determination so long as it is within the proper domain of the legislative branch of government responsive to the electorate in our democratic society.

Morgentaler v. The Queen (1975), *supra* esp. per Laskin, C.J.C. at pp. 627 & 636, and per Dickson, J. (with whose reasons Martland, Pigeon, Ritchie, Beetz and de Grandpre, J.J. agreed) at p. 675

Re Dehler (1979), 25 O.R. (2d) 748 esp. per Robins, J. at p. 755; affirmed (1980), 29 O.R. (2d) 677 (C.A.); leave to appeal refused, [1981] 1 S.C.R. viii

Borowski v. Attorney General of Canada (1983), 4 D.L.R. (4th) 112 at p. 131 (Sask. Q.B.)

Fawcett Properties v. Buckingham C.C., *supra*, esp. per Lord Jenkins at p. 685

108. It is submitted that there is one further rare and narrow purpose for which evidence may be considered by the Court, namely for the purpose of demonstrating that the sole valid federal objective for which Parliament genuinely enacted the impugned legislation is no longer regarded by Parliament as being the objective of the legislation. This rare situation occurred in the *Margarine Reference* case.

Re Validity of Sec. 5(a) of the Dairy Industry Act, [1949] S.C.R. 1 (affirmed [1957], A.C. 179) esp. per Kellock, J. at pp. 56-58

See also *Re Anti-Inflation Act*, *supra*, per Laskin, C.J.C. at p. 427

109. Laskin, C.J.C. in *Morgentaler v. The Queen* (1975), *supra*, at page 627, stated that s. 251 of the *Code* was not enacted for the sole purpose of the protection of the pregnant woman's health but that it:

> "...is patent on the face of the prohibitory portion of s. 251 that Parliament has in its judgement decreed that interference by another... with the ordinary course of conception is socially undesirable conduct subject to punishment."

10

There is no evidence, whatsoever, that Parliament no longer holds that valid federal objective for the impugned legislation.

110. It is submitted that "the wisdom or expediency or likely success of a particular policy expressed in legislation is not subject to judicial review" and consequently evidence adduced by the Appellants directed to that end ought not to be considered by this Honourable Court.

Re Anti-Inflation Act, *supra*, per Laskin, C.J.C. at pp. 424-425

F. IS SECTION 251 ULTRA VIRES PARLIAMENT?

111. It is submitted that Parliament has exclusive authority to legislate in relation to matters of criminal law, which are generally enacted for the purpose of promoting and ensuring public peace, order, security, health and morality.

20

Reference re Validity of Section 5(a) of the Dairy Industry Act, *supra* at pp. 49-50 (S.C.C.)

112. Section 251 has been upheld as a valid exercise of the criminal law power by this Honourable Court.

Morgentaler (1975), *supra*

113. It is therefore submitted that s. 251 of the *Criminal Code* is *intra vires* the Parliament of Canada.

G. DOES SECTION 251 VIOLATE SECTION 96 OF THE CONSTITUTION ACT, 1867

113. It is submitted that s. 251 does not vest judicial power in therapeutic abortion committees nor do those committees exercise any judicial functions.

Reference re Residential Tenancies Act, [1981] 1 S.C.R. 714 per Dickson, J. at pp. 734-736

Carruthers et al. v. Therapeutic Abortion Committees of Lions Gate Hospital et al (1983), 6 D.L.R. (4th) 57 (F.C.A.); leave to appeal to S.C.C. refused February 2, 1984

Re Medhurst and Medhurst (1984), 45 O.R. (2d) 575 (H.C.)

115. Section 251(4) of the *Code* by its terms at most enables a therapeutic abortion committee in the circumstances specified "by certificate in writing" to state "that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health" and it is submitted that in so doing a therapeutic abortion committee does not:

(a) decide guilt or innocence;
(b) impose criminal liability;
(c) determine a *lis inter partes*; or
(d) otherwise exercise the powers of the judges referred to in s. 96.

H. UNCONSTITUTIONAL DELEGATION OR ABDICATION OF CRIMINAL LAW BY PARLIAMENT

116. It is submitted that Parliament may delegate power to regulate a matter within its exclusive legislative authority to a provincially constituted board or to a provincial Minister of the Crown. The delegation of administrative functions to subordinate bodies, whether constituted pursuant to provincial or federal legislation, is not a violation of the constitutional rule against interdelegation.

Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198 at p. 1223

Peralta et al v. Minister of National Resources (1985), 49 O.R. (2d) 705 (C.A.)

Driedger, "The Interaction of Federal and Provincial Laws" (1976), 54 Can. Bar Rev. 695

R. v. Morgentaler, Appeal Case, Judgment of Ont. C.A., Vol. 33 at p. 6929

117. It is submitted that there has been no unconstitutional delegation effected by ss. 251(4), (5) and (6) of the *Code*, nor has there been any abdication by Parliament of its authority to enact criminal law respecting abortions.

10

118. It is submitted that there has been no delegation of any legislative power to a provincial legislature, nor has there been any exercise of federal legislative power by the province. It is submitted that, in certifying its opinion that the continuation of the pregnancy would or would be likely to endanger the life or health of a particular woman, the therapeutic abortion committee is performing an administrative action.

20

Re Medhurst and Medhurst (1984), *supra* at p. 578

119. The definitions in s. 251(6) which refer to persons or bodies constituted under the authority of provincial legislation (for example, "approved hospital", "board", "Minister of Health", "qualified medical practitioner") result in an incorporation by reference for federal purposes of the provincial legislation defining or creating these persons or bodies. Incorporation by reference is not an unconstitutional interdelegation.

R. v. Glibbery, [1963] 1 O.R. 232 (C.A.)

Driedger, "The Interaction of Federal and Provincial Laws", *supra*

120. Section 251(6) constitutes a technique for identification which includes both incorporation by reference and the delegation of administrative responsibility to the Minister of Health.

121. In the alternative, it is submitted that Parliament has properly delegated to the ministers of health a limited subordinate function in approving a hospital in his province for the purpose of this section, that Parliament has defined this function as precisely as the subject matter permits, and that alt ough the discretion of the Minister of Health is unfettered, he is not given any lawmaking power.

10 **I. SECTIONS 605 and 610(3) OF THE CRIMINAL CODE**

122. With regard to the above sections, the Attorney General of Canada agrees with and adopts the submissions of the Respondent on pages 47 to 50 of its factum.

PART IV

ORDER REQUESTED

123. The Attorney General of Canada requests that this Honourable Court give the following answers to the questions stated:

QUESTION 1:

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

ANSWER:

No.

QUESTION 2:

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

ANSWER:

Yes.

QUESTION 3:

Is s. 251 of the *Criminal Code of Canada ultra vires* the Parliament of Canada?

ANSWER:

No.

QUESTION 4:

Does s. 251 of the *Criminal Code of Canada* violate s. 96 of the *Constitution Act, 1867?*

ANSWER:

No.

QUESTION 5:

Does s. 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?

ANSWER:

No.

QUESTION 6:

Do s. 605 and 610(3) of the *Criminal Code* infringe or deny the rights and freedoms guaranteed by s. 7, 11(d), 11(f), 11(h), and 24(1) of the *Canadian Charter of Rights and Freedoms?*

ANSWER:

No.

QUESTION 7:

If s. 605 and 610(3) of the *Criminal Code* infringe or deny the rights and freedoms guaranteed by s. 7, 11(d), 11(f), 11(h) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are s. 605 and 610(3) justified by section 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982?*

ANSWER:

Yes.

ALL OF WHICH is respectfully submitted.

Edward R. Sojonky, Q.C.

Marilyn Doering Steffen

Of Counsel for the Intervener,
The Attorney General of Canada

PART V

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