

# Abortion in Canada: Legislative Limbo and the Morgentaler Factor

While abortion remains one of the central policy issues of the late twentieth century, Canada exists without a federal law concerning the premature termination of pregnancy. That such is the case results in many ways from the legal actions of pro-abortion activist Dr. Henry Morgentaler. In 1988, his constitutional challenge brought down the existing legislation. In the federal vacuum, other Canadians struggle to define a new policy.

**Canada's Legislative History • Abortion Becomes Public Debate, the Code is Revised • Section 251 Struck Down • Daigle, Dodd and the Rights of the Father • Bill C-43 • Dr. Henry Morgentaler • Arrested in Montreal, the 1970s • Morgentaler in the 1980s • Morgentaler Battles On: Nova Scotia • Manitoba • RU-486, A New Twist on an Old Debate**

By Lianne Ollerhead

The debate over abortion is seldom without passion. Proponents of Pro-Choice and Pro-Life are spirited in their deep felt belief of the correctness of their cause. The shooting of Dr. David Gunn in Florida this past March, as well as the verbal volleys between protesters on both sides, is testimony to the depth of feeling. But, there exists another side to the abortion question. While often receiving much less press, it is equally, if not more, important than the protests, pickets, marches, and demonstrations of Choice and Life advocates. This is the debate over laws that takes place in the legislature and the judiciary.

It is truly only in the past thirty years that the question of abortion has been up for public debate. However, those years have been packed with struggles between the different branches of Canada's legislative and judicial structures. The question of which group—the federal or provincial governments, the lower courts or the Supreme Court, the legislature or the judiciary—has the final say concerning abortion remains to be answered. The struggle between these loci of power strikes at the heart of the balance of powers in Canada. Is abortion a federal concern or a provincial one? Constitutionally, the federal government maintains jurisdiction over criminal legislation (where abortion has traditionally been addressed) whereas the provinces regulate medical practices. Who will be the final arbiter, the Supreme Court, the provinces or the Houses of Parliament?

The abortion issue finds itself further caught up in the debate over nationalized versus private health care. Often legislation barring access to abortions in private clinics results not from any desire to prevent abortion but from efforts to block the privatization of health services.

At the center of the maelstrom, quite outside court and parliamentary affiliation, stands Dr. Henry Morgentaler. Whether one agrees or disagrees with his pro-abortion stance, Morgentaler remains the most prominent of all the players in the battle to either legalize or criminalize abortion in Canada. His struggles within the court system to defend his private clinics and legalize access to non-hospital abortions have greatly changed the face of Canadian abortion legislation. Since January 28, 1988 Canada has been without a criminal law to regulate access to abortion

and Morgentaler's challenge in the Supreme Court had much to do with it.

## Canada's Legislative History

When Canada inherited British civil and criminal legislation at Confederation in 1867, it also retained laws that made abortions illegal. In 1803, Great Britain had passed a statute outlawing abortion that codified what had been up until then a criminal offense by custom. Abortion was not considered "murder," however, a term that was reserved for the ending of a life already born. The section of the new Code dealing with abortion used the term "unlawfully." Part of the clause read as follows:

...whosoever, with intent to procure the miscarriage of any woman, whether she be or not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing ... shall be guilty of felony...

The use of the term "unlawfully" in this case created an uncertainty over whether there were in fact circumstances when abortion could be lawful.

This uncertainty led to the passing by the British parliament in 1929 of the Infant Life (Preservation) Act which allowed abortions, if performed to save the mother's life. A new Canadian Code included this British Act and it remained in place until it was revised in 1955. At that time, the term "unlawfully" was removed but ambiguities remained. According to some interpretations the absence of the word changed the law to mean that no abortions were permitted for whatever reason.

## Abortion Becomes Public Debate, the Code is Revised

Shortly after the 1955 revision, the abortion issue began to be discussed more publicly. In August, 1959, the Canadian women's magazine *Chatelaine* published one of the first articles in Canadian history that advocated legalized abortions and in doing so sparked a debate that continues to this day. By 1959, the abortion issue was taken up by other publications such as the United Church *Observer* and the Toronto *Globe and Mail*. Within a few years, public discussion came to include the Canadian Bar Association and the Canadian Medical Association who had also begun to address the legalization of abortion.

The federal government officially started to review abortion

legislation in October 1967. A committee, Parliament's Standing Committee on Health and Welfare (SCHW), was struck in June 1967 to consider and report upon three abortion bills put forward privately by members of parliament. The bills were proposed by Ian Wahn (Liberal, St. Paul's), Grace MacInnis (N.D.P., Vancouver-Kingsway), and H.W. Herridge (N.D.P., Kootenay West). Each bill set forth a different set of conditions for legal abortion but all three bills left the decision in the hands of either two doctors or a hospital committee. The consent of the pregnant woman and her husband, if she were married, would also be necessary.

The bill that was finally passed by Parliament most closely resembled Wahn's proposal. His bill sought to clarify the existing law, to create proper safeguards and a uniform procedure for all hospitals in the country, and to make it clear that therapeutic abortions which preserved either the life or the health of the pregnant woman would be legal. The final draft of the bill was passed by the House of Commons on May 14, 1969 and became effective as law on August 28, 1969.

According to the law, section 251 of the Criminal Code, abortion was illegal except under certain conditions. The abortion had to be performed by a qualified physician in an approved hospital; a therapeutic abortion committee of three qualified doctors was required to decide whether or not continued pregnancy would be risky to the woman's life or health; and the doctor who would perform the abortion could not be on that committee.

During the proceedings, a woman was not allowed to meet the hospital committee and had no right to appeal a rejected application for abortion. Moreover, hospitals were not compelled by law to set up abortion committees and many chose not to. As well, section 251 did not explicitly define the term "health." Differing interpretations over whether a continued pregnancy would jeopardize a woman's "health" led to arbitrary applications of the law. The reasons that women were granted abortions varied widely.

The arbitrariness of the law caused dissatisfaction amongst many national groups and renewed parliamentary action. The authors of the Badgley Report (1977)—the summary of the findings of the Committee on the Operation of the Abortion Law (chaired by Robin Badgley) which had been established by the Minister of Justice in 1975—stated that the procedure for obtaining therapeutic abortions was, in practice, illusory for many Canadian women. The committee also found that women faced eight weeks, on average, of bureaucratic delays from the time a doctor was first consulted about a suspected pregnancy until the time a requested abortion was granted. The committee's report, combined with popular discontent, demonstrated that existing abortion legislation was functioning unsatisfactorily. The federal government was repeatedly urged to repeal or reform the law but instead they refused to change the situation.

### **Section 251 Struck Down**

The abortion law, section 251 of the Criminal Code, remained intact until January 28, 1988. On this day the Supreme Court of Canada struck down the existing legislation. The Supreme Court had been deliberating on the issue since October 7, 1986 when they first heard an appeal by Dr. Henry Morgentaler and Dr. Robert Scott of their conviction of conspiracy to procure a miscarriage.

The Court ruled the law unconstitutional, arguing that it vio-

lated Canada's Charter of Rights and Freedoms by usurping a woman's rights to life, liberty and the security of the person. Chief Justice Dickson stated that: "Section 251 clearly interferes with a woman's physical and bodily integrity. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person."

### **Daigle, Dodd and the Rights of the Father**

The 1988 Supreme Court decision was not the final word on the abortion issue in Canada. The Court was soon called upon to make a ruling concerning the rights of a prospective father to prevent an abortion. In July, 1989 the ex-boyfriends of Barbara Dodd, resident of Ontario, and Chantal Daigle, resident of Quebec, attempted to obtain injunctions to stop their former girlfriends' abortions. The injunctions were granted by both provinces, preventing the women from terminating their pregnancies.

Daigle appealed immediately to the Supreme Court when the Quebec Court of Appeal upheld the injunction against her. In Ontario, Dodd's injunction was set aside for technical reasons. Daigle was eighteen weeks pregnant at the time of her appeal. By the time the Court was ready to convene, she would have been twenty-two weeks pregnant. It was announced at the trial that she had gone to the United States for an abortion as it would have been too late to perform one in Canada if she had waited. In spite of this, the Court heard the appeal and decided unanimously to overturn the injunction. The Court found that the law does not recognize a parental right to stop an abortion. It also found that a fetus does not enjoy any rights unless it is born alive.

### **Bill C-43**

November, 1989 proved to be important to the abortion issue for another reason. During that month, the federal government introduced Bill C-43, legislation to recriminalize abortion in Canada. Efforts had already been made by Ottawa in July, 1988 to amend those sections of the Criminal Code pertaining to abortion. At that point, a resolution was introduced to Parliament that contained a broad outline of a new abortion law that was gestational-based—i.e. one that would allow abortion only within a certain period from the time of conception. The 1988 resolution, along with five amendments, was defeated.

Bill C-43 was another attempt to amend the Code. The amendment would have made illegal abortions punishable by up to two years in jail. Abortions would have been legal only if a qualified physician determined that continued pregnancy would be harmful to the pregnant woman's physical, mental, or psychological health. On May 29, 1990 the House of Commons narrowly approved Bill C-43 and sent it on to the Senate for approval. However, the Senate defeated the bill early in 1991.

Since no federal law exists at present pertaining to the premature termination of pregnancy, abortion in Canada sits in limbo. In the legislation vacuum, provincial governments, who have jurisdiction over other medical procedures and regulations, now wield a certain amount of de facto control.

### **Dr. Henry Morgentaler**

Dr. Henry Morgentaler has been found at the centre of the debate over abortion almost from the outset. An advocate of legal and

available abortions, he has been a primary driving force behind the changes in legislation in Canada. As early as 1967, Morgentaler presented a motion to the parliamentary SCHW, urging that the abortion law be repealed. Following the revision of the abortion law in 1969 that made abortion legal under certain conditions, Morgentaler took up the abortion cause full time. He left his general medical practice to become a specialist in abortions and opened an abortion clinic in Montreal.

### Arrested in Montreal, the 1970s

By 1973, the clinic had been raided twice by the Montreal police, and Morgentaler had been charged a total of thirteen times for performing illegal abortions. During the second raid on the clinic (August, 1973) Morgentaler was arrested, charged, and taken to court. During the trial, Morgentaler's lawyers endeavoured unsuccessfully to nullify the abortion law on the grounds that it was unconstitutional. However, in November, the jury did acquit him of the charge. In an appeal by the Quebec Crown (1974), the Quebec Court of Appeal overturned the acquittal and Morgentaler was convicted of performing an illegal abortion (one done in his clinic without the approval of a therapeutic abortion committee). In turn, Morgentaler appealed to the Supreme Court of Canada but had his appeal dismissed.

In 1975, Morgentaler began serving an eighteen month sentence in jail. While in prison, Morgentaler was brought to trial on another count of performing an illegal abortion. Again, he was acquitted by the jury. This second acquittal was taken to the Quebec Court of Appeal but this time the appeal was dismissed.

In response, the Minister of Justice set aside the 1974 conviction, ordered a new trial on that charge, and released Morgentaler from prison. He had served ten months of his sentence. A third jury trial was held in March, 1976 and it resulted in acquittal. Later that year the newly elected Parti Québécois dropped all outstanding charges against Morgentaler, and the Attorney General declared that doctors would not be prosecuted for performing abortions as long as the medical conditions were safe.

### Morgentaler in the 1980s

In the spring of 1983 Morgentaler opened two more clinics—one in Winnipeg, the other in Toronto. Almost immediately, the clinics were raided by the police. As in Quebec, charges were pressed against Morgentaler, in this case for conspiracy to pro-

cure a miscarriage. In the Ontario case, Morgentaler's lawyers began a pre-trial motion, similar to the motion made in 1973, that challenged the constitutional validity of the abortion law. However, the motion was once again dismissed, this time by Justice Parker (July 20, 1984).

The trial began in October 1984, and the jury had acquitted Morgentaler by November 8. One month later, Attorney-General Roy McMurtry appealed the jury's decision to the Ontario Court of Appeal. Between the time of the acquittal and the appeals hearing (April 1985), Dr. Morgentaler had re-opened his clinics in both Toronto and Winnipeg. Once more, he was charged, twice in Toronto and six times in Winnipeg. The total number of outstanding charges in Winnipeg then stood at seven.

The Ontario Court of Appeal released its decision October 1 1985, stating that the acquittal had been set aside and that a new trial would be held. In response, Morgentaler appealed to the Supreme Court of Canada. The Supreme Court hearing began October 7, 1986 and not until well over a year later, on January 28, 1988, did it end, when the Court struck down the abortion law.

### Morgentaler Battles On: Nova Scotia

Morgentaler's legal struggles did not end with the 1988 Supreme Court decision. In March 1989, the province of Nova Scotia passed legislation that banned the performance of abortions in private clinics. Morgentaler had opened a Halifax abortion clinic planned prior to the passing of the legislation. He announced in October, 1989 that he had performed seven abortions at this clinic. Immediately he was charged under the provincial Medical Services Act. One month later Morgentaler was further charged for seven more counts of performing illegal abortions, and was

served with an injunction prohibiting him from performing abortions until all the charges against him had been heard.

Within the year, Nova Scotia's Medical Services Act was struck down by a provincial court judge, and Morgentaler was acquitted of all charges. The court found that laws concerning abortion fall under the jurisdiction of the federal government, not a provincial government. Frustrated by the judge's decision, the government of Nova Scotia appealed to the province's Supreme Court. In July 1991, the latter upheld the lower court's decision—a further victory for Morgentaler. Still not satisfied, the Nova Scotia government then decided to appeal to the Supreme Court of Canada. The appeal was heard in November, 1991 and remains unresolved. A decision is not expected until the end of



*Morgentaler speaks out.*  
[Halifax Daily News]

this year.

The Supreme Court must decide whether or not Nova Scotia passed a law that was properly in the federal government's domain. Morgentaler argues "yes." He believes that it is an illegal attempt by Nova Scotia to recriminalize abortion and feels that the 1989 ban on private clinics was a criminal sanction masked as a health policy.

A representative of the Attorney-General of Nova Scotia, Marian Tyson, has admitted that the initial ban was specifically aimed at Morgentaler in an attempt to keep him out of Nova Scotia. However, she further stated that the primary goal of the ban was to block any privatization of health services. Nova Scotia has banned nine other medical procedures from being performed at private clinics, including liposuction. If non-hospital abortions were allowed, precedent would be set for the provision of other medical services, such as mammograms and CAT-scans, on a fee for service basis. The Nova Scotia administration believes that a move towards increased privatization would result in a rise in the cost of Medicare. Reducing costs, they argue, will regulate in the most efficient way access to medical service.

### Manitoba

Nova Scotia is not the only province in Canada with which Morgentaler remains entangled in legal battles. In April 1992, Morgentaler challenged the Manitoba government's decision to pay for abortions in five provincial hospitals but not for abortions performed in his clinic or in any other clinics. He asked the court to make the government pay, arguing that the government's refusal to foot the bill discriminates against women who prefer clinics.

On June 12, 1992 the Court of Queen's Bench of Manitoba announced a decision in favour of Morgentaler. The Court found that the province's refusal to pay for abortions performed in clinics was discriminatory. In response, the Manitoba provincial government challenged the Court's decision in the province's Court of Appeal, and lost (March, 1993). The Court of Appeal once again ruled that doctors must be paid for performing abortions in clinics as well as in hospitals.

The prospect remains for another appeal by the provincial government, or some amending legislation. Health Minister Donald Orchard stated that the government did not want to pay for the abortion procedure at private clinics, and would likely introduce such legislation. Despite this, Morgentaler was in high spirits about the ruling and indicated the possibility of asking Manitoba to compensate him for the more than two hundred abortions he has performed since 1988.

Morgentaler is also challenging the provincial governments of Prince Edward Island and Newfoundland for refusal to pay for clinic abortions under Medicare. Ontario, Quebec, and British Columbia have already agreed to pay doctors for performing clinic abortions.

### RU-486, A New Twist on an Old Debate

A new aspect to the question of abortion legislation appeared in Canada in the 1990s—the RU-486 abortion pill. Developed in France (where it is widely available) by Dr. Etienne-Emile Baulieu, the pill is used to terminate pregnancies of less than seven weeks. Canadians must now decide whether to introduce such a pill to Canada.

In July, 1992 Ontario Health Minister Frances Lankin

claimed that Canada's health ministers wanted the abortion pill to become available in Canada. Federal Health Minister Benoit Bouchard was asked to contact the manufacturers of the pill and to encourage them to apply for permission to distribute the drug in Canada. To entice the company, Ms. Lankin—covertly indicating that abortion is now a health issue—stated that the federal government could "assure the company that in this country there are no criminal laws ... with respect to abortion and that it is an issue of delivery of health care and that every province is in the business of delivering safe, effective abortions in this country" (*Toronto Globe and Mail*, July 21, 1992). The approval process could take eighteen months to two years before the RU-486 pill would be available for marketing in Canada.

That abortion will remain a central public policy issue well into the twenty-first century is clear. While Canada sits without federal legislation concerning the premature termination of pregnancy, skirmishes continue between governments at the provincial and federal levels, as well as between the judicial structure and the legislative branch, over who has the final say in permitting or restricting access to abortions. Morgentaler, whose fights through the courts have so greatly changed abortion laws in Canada, continues to operate clinics in five provinces.

### Suggestions for Further Reading

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