ABORTION

PROTECTION OF THE UNBORN

In Western Civilization protection for the unborn dates back to:

Sumerian Code of 2000 B.C.
Assyrian Code
Hittite Code
Hammurabic Code 1728 B.C.
Persian Code 600 B.C.

HIPPOCRATIC OATH - 4TH CENTURY

The Hippocratic Oath, sworn by all physicians until recent years, goes back about 2,400 years. It says:

> "I will give no deadly medicine to anyone if asked, nor suggest any such counsel, and in like manner I will not give a woman a pessary to produce abortion. With purity and with holiness I will pass my life and practise my art."

(The oath also covers infanticide and euthanasia)

OPPOSITION TO ABORTION

WORLD RELIGIONS

Opposition to abortion was reflected almost universally by the world's great religions - Hinduism, Islam, and in ancient Vedic spiritual writings in India. Within Judaism from 1200 B.C., there was a strong tradition of opposition to abortion.

CHRISTIANITY

Christianity at the time that it emerged in the Mediterranean area during the first century A.D., strongly upheld the censure of abortion as a major moral principle. This prohibition was one of the distinctive behavioural injunctions of the early Christian church. The Christian community became vocal in the second century and emphatically deplored and condemned abortion at any stage of pregnancy.

MIDDLE AGES - TWENTIETH CENTURY

COMMON LAW

At common law procuring an abortion after "quickening" (when life was felt by the mother) was a misdemeanour.

CRIMINAL LAW

LORD ELLENBOROUGH'S ACT IN 1803
The law of criminal abortion was first codified in England in Lord Ellenborough's 1803. This act made abortion before and after "quickening" a crime. Abortion was a felony after conception and a capital criminal offence after quickening.

THE OFFENCES AGAINST THE PERSON ACT 1837
This act dropped the distinction between women quick or not quick with child because "Quickening is merely a change in the position of the uterus, and is not evidence of animate life coming to the fetus which might justify the greater protection provided by the greater punishment."

OFFENCES AGAINST THE PERSON ACT 1861
This act established a uniform maximum penalty of life imprisonment for abortion, whether before or after quickening, and also provided that the pregnant woman herself, as well as the abortionist, could be held guilty of the offence.

EARLIEST PROHIBITION IN CANADIAN LAW

OFFENCES AGAINST THE PERSON ACT 1869
The earliest statutory prohibition against attempting to procure an abortion is found in this Act. The Act itself is based on Lord Ellenborough's Act of 1803 and the Offences Against the Persons Act of 1861.

THE INFANT LIFE PRESERVATION ACT 1929
This Act established that it was "lawful" to perform abortions to preserve the life of the mother only.

The abortion law in Canada remained substantially the same until the amendments of 1969.

JOHN TURNER AND THE 1969 ABORTION LAW

DEBATE IN THE HOUSE OF COMMONS
The proposed Omnibus Bill was first made public on December 21, 1967. There was a good deal of debate as to whether the Member of Parliament should be allowed to vote on the abortion amendments apart from the rest of the bill, and whether they should be permitted to vote "according to conscience" rather than be pressed to vote along party lines. In the end there was a separate vote on the abortion provisions, in the form of a vote on a motion to delete all references to abortion from the Omnibus Bill. Only two members of the majority Liberal Party voted to delete the abortion provisions from the bill.

It would appear that many legislators were unaware of the ramifications of the new law. The spokesman for the Liberal government, which sponsored the bill, was Justice Minister John Turner. The Liberals held 155 of 264 seats in the House of Commons, and only a handful of Liberals questioned Mr. Turner's interpretation of the proposed law. "The proposed law," Mr. Turner said, "does not authorize the taking of foetal life; it does not promote abortion. It simply removes certain categories of abortion from the present place they have on the list of indictable offenses." Earlier the same day he had said, "The fact is that the present state of law is not clear and one of the overriding purposes of the legislation is to clarify it."(1) Several months later he said, "Also, I should like to draw to the attention of the house the fact that the substance of these amendments does no more than recognize what has actually been happening already in a number of hospitals with respect to therapeutic abortions." (2)

A different interpretation of the new law was made by members of the New Democratic Party, who generally approved of unrestricted legal abortion (with the exception of John Burton, who represented Regina East). The proposition that the new law was a step in that direction voiced by John Gilbert (NDP, Broadview): "In the minds of some honourable members the addition of the word 'health' only brings the law up to date as interpreted by the courts. This may be so but to me it creates a different atmosphere and different attitudes. We are beginning to regard the problem of abortion as a human or social problem rather than as a criminal act."(3)

Mr. Turner rejected a proposed amendment adding a "conscience clause" to protect doctors and hospitals from pressure to do abortions, saying, "Section 237 as amended imposes no duty on the board of a hospital to set up a therapeutic abortion committee; it imposes no duty on any medical partitioner to initiate an application on behalf of a patient."(4)

When the question was asked whether abortions were to be paid for out of "medicare hospitalization", Mr. Turner replied, "Oh, no."

Everyone seemed to agree that the new legislation did not permit abortion for eugenic reasons. Thus, Mr. Turner stated flatly, "The bill has rejected the eugenic, sociological or criminal offense reasons."(5) Mrs. Grace MacInnis (NDP, Vancouver-Kingsway) deplored the fact that the new law would not allow eugenic abortions, saying that it is "the height of irresponsibility for people to bring into today's world children who are deformed."(6)

From "Abortion in Canada: The 1969 Law and Its Aftermath," by C.G. Landolt, in Death Before Birth, eds. E.J. Kremer and E.A. Synan (Griffin House, 1974), pp. 45-46.

Then in 1970 the Ottawa Civic Hospital gets a letter from Turner's Executive Assistant dated August 6, 1970. The letter is greeted not with misgiving but as encouragement to step up abortions. The Hospital's Therapeutic Committee Report says in part:

> Very recently the Minister of Justice has given in writing his definitions of the world health in Section 237 (now 251) of the Criminal Code pertaining to abortion. A copy of this letter is hereby appended. This definitely broadens the indications for therapeutic abortion considerably and we would expect to have an even greater number submitted to the committee by 1972.
>
> Again the vast majority of indications as before are pseudo psychiatric, or perhaps socioeconomic would be a better term, although there continue to be several with organic indications.

The appended letter reads as follows:

Ottawa, August 6, 1970.

Dear..........

Mr. Turner has seen your letter of July 30, 1970, concerning Canada's abortion law, and has asked me to reply.

You are probably aware that the recent amendment to the Criminal Code permits a therapeutic abortion where the life and health of the mother is in danger.

Many groups and persons have been pressing for a further amendment to the law, but Mr. Turner

is on record that he does not wish to contemplate further change until the medical profession and the hospital abortion committees have an adequate opportunity to explore the full latitude of the present definition. Mr. Turner is of the opinion that the word "health" is very broad and may include physical, psychological or social health. He frequently refers to the definition given by the World Health Organization, which is a follows:

> "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

Thanks for writing on this important subject.

Yours sincerely,

Michael Hunter,
Executive Assistant.

In less than 2 ½ years - from March 1968 to August 1970 - the word health no longer has the meaning the Health and Welfare Committee gave it. The 24-member Standing Committee wanted the restrictive definition of "physical and mental health and not the wider definition given to it by the World Health Organization". It recommended the amendment that would read *"or seriously and directly impair the health of the mother"* (my emphasis). But it is now effectively overruled. Not by the Parliament of Canada. No! That would be too blatant. But overruled by a letter sent on the authority of the Minister of Justice John Turner telling the Ottawa Civic Hospital to "explore the full latitude of the present definition" (there was no definition) because Mr. Turner is of the opinion that the World Health Organization's definition is the one to follow. In reality, abortion on demand sanctioned by the then Minister of Justice.

From The New Canadian Ethic: Kill Our Unborn Canadians, by David Dehler, Q.C. (Dehler & Kanda Publishing, 1980), pp. 65-67.

ABORTION IN CANADA

1969 ABORTION LAW - SECTION 251 AMENDMENTS
The abortion law as it stood in the Criminal Code:
- Began with a general prohibition on abortion;
- Then went on to declare when the general prohibitions did not apply;
- Specifically an abortion could be performed by any qualified medical practitioner;
- Only after a hospital abortion committee by a majority of three members on the committee;
- certified in writing;
- that the continuation of pregnancy would be likely to endanger a woman's LIFE or HEALTH.(health was added)

This law was forced through parliament by Prime Minister Pierre Trudeau and Justice Minister John Turner, as part of an Omnibus Bill which include approximately 150 other amendments to laws.

RESULTS
The number of abortions escalated.
These statistics are from Statistics Canada and they exclude "clinic"abortions in Ontario and Quebec

and in the USA.

1970	**11,200**	**1985**	**62,740**
1975	**49,390**	**1989**	**70,779**
1980	**65,855**		

1990	**71,092**	**Hospitals**
	21,443	**Clinics**
	1,573	**Canadians having abortions in the USA**
TOTAL	**94,108**	
1991	**70,277**	**Hospitals**
	23,343	**Clinics**
	1,439	**Canadians having abortions in the USA**
TOTAL	**95,059**	
1992	**70,408**	**Hospitals**
	29,569	**Clinics**
	520	**Canadians having abortions in the USA**
TOTAL	**100,497**	
1993	**72,434**	**Hospitals**
	31,508	**Clinics**
	461	**Canadians having abortions in the USA**
TOTAL	**104,403**	
1994	**71,630**	**Hospitals**
	34,287	**Clinics**
	338	**Canadians having abortions in the USA**
TOTAL	**106,255**	

REASONING

-Some sought the amendments not as a new liberty, but to legalize what was already being done
-Some saw them as a means to combatting “backstreet” abortions
-Some saw them as breaking new ground in social betterment:

> “I think it is time we began to work toward “quality” population in this country. We are beginning to hear about the need for improving the population, and certainly to have children born into a country as a result of rape or incest is not going to be too helpful...Also...If conditions like those of thalidomide babies or congenital diseases are known ahead of time, I do not think it is a good thing for Canada to allow these being into the world..women ought to have far more control over what happens to them when

monstrosities are born...”

(Grace McGinnis MP Vancouver-Kingsway to committee constituted in 1967 to enquire into the need of a new law.)

1978 BOROWSKI CASE IN REGINA

On September 5th, 1978, Borowski initiated in Regina’s Court of Queen’s Bench the claim that Section 251 of the Criminal Code permitting abortion, contradicted the (Diefenbaker inspired) Canadian Bill of Rights.

> “It is hereby recognized and declared that in Canada there have existed and shall continue to exist - without discrimination, the following human rights - the right of the individual to life, liberty, security of person and enjoyment of property - and the right not to be deprived thereof except by due process of law.”

In the preamble to the Bill of Rights it stated that it was the duty of parliament to uphold these right - it did not say that the right to life is to be left to the individual conscience of each Canadian.

1982 SUPREME COURT

In December 1981, the Supreme Court ruled that Joe Borowski was eligible to represent the unborn. Borowski was declared a legitimate challenger of the 1969 abortion law.

1982 THE CHARTER OF RIGHTS AND FREEDOMS

-Pro-Life groups attempted to have the rights of the unborn enshrined in the Charter
- Trudeau and Chretien adamantly refused, insisting that nothing in the Charter would affect the rights of the unborn
- The Morgentaler decision in 1988 showed how wrong they were

1983 BOROWSKI CASE IN REGINA

-Position taken by Borowski that Canada’s present abortion law created “a punishment without a crime and a death sentence without a trial.”
- The Criminal Code section permitting abortion denied Charter rights in at least four specific areas.

SECTION 7 STIPULATES

> “Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

OTHER SECTIONS REFERRED TO;

-cruel and unusual treatment or punishment;
- that parties in the proceedings have the right to an interpreter;
- that every individual has the right to equal protection and equal benefit of the law without discrimination.

<u>THE KEY</u> to the above argument is the idea that the term “everyone” includes the unborn child living within the womb of its mother.

<u>THE QUESTION</u> was whether the judge would hold with this argument and allow evidence to given which would show the humanity of the unborn child.

1987 M-37 THE MITGES MOTION
MP for Grey-Simcoe, Gus Mitges put forward a Private member's motion which sought to amend the Charter of Rights and Freedoms to protect the pre-born child and was deemed a "voteable item." M-37 sought to amend Section 7 of the Charter to read:

> "Everyone including a human fetus or unborn being has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Passage of this motion itself would not have amended the Charter, but would have expressed the will of the House of Commons to do so. Amending legislation to the Constitution Act would then need to have been drafted and passed by Parliament, with the approval of 7 Provinces and 50% of the population. If the Charter had been amended according to the Mitges Motion, the sub-sections of Section 251 of the Criminal Code, which allowed abortion would have been struck down if they were found to be outside of the principles of fundamental justice and not a "reasonable limit" under Section 1 of the Charter. The Mitges Motion was seen as a first step in a long arduous task to explicitly define the rights of the unborn child in Canadian law.

JUNE 2ND1987 MOTION M-37 was defeated by a vote of 89-62. Approximately 60% of the MPs eligible to vote were present in the House at the time of voting.

JANUARY 28TH 1988 SUPREME COURT DECISION
The court used the Morgentaler case to strike down Section 251 of the Criminal Code as unconstitutional. The January 28th decision marked the end of a legal battle which began in November 1984, when a jury acquitted Henry Morgentaler, Leslie Smoling and Robert Scott on charges of procuring illegal abortions at 85, Harbord Street, Toronto. That acquittal was appealed by the Crown and the Ontario Court of Appeal in October 1985 ordered a new trial on the same charges, on the ground that errors in law made the jury trial invalid.

Morgentaler's lawyer, Morris Manning, appealed the decision and appeared before the Supreme Court of Canada in October 1986.

> -His arguments centred on the Constitutional challenges to the 1969 abortion law, arguing that the law violated the 1982 Charter of Rights and Freedoms.
> -He claimed that Section 251 of the Criminal Code, with its requirements that all applications for abortion first be scrutinized by a therapeutic committee caused: "dangerous delays" for pregnant women.
> -He argued that restricting abortions to hospitals created an unfair "equal access" in parts of Canada where hospitals refused to supply such services.

The majority of the Supreme Court justices found Section 251 unconstitutional. They found that the law was unequally applied therefore was unconstitutional. They did not find a right to abortion and said that it was up to parliament to decide when the state's interest in the fetus began.

They Supreme Court would not hear the Borowski appeal, deeming his point moot since the abortion law which he objected too had been struck down. The scientific testimony on the humanity of the unborn child, given during the Regina hearings, was buried.

MAY 24TH 1988 GOVERNMENT MOTION
The federal government presented the House with three options, amendments A,B,C. All three options permitted easy access to abortions. Many members offered amendments to the governments options and 5 were accepted and voted on with the government own. The amendment which was defeated by the narrowest motion was an amendment by Gus Mitges which allowed no abortions except in the case of threat to the life of the mother. This amendment was defeated 118-105.

JUNE 1988 BILL S.16 SENATOR HAIDASZ
This Bill requested that the pre-born be protected by the Criminal Code.

JULY 1989 CHANTAL DAIGLE CASE
In July, the Quebec Appeal Court upheld an injunction requested by Jean-Guy Tremblay prohibiting his girlfriend from aborting their child. She appealed to the Supreme Court of Canada. The Supreme Court learned that Daigle had had an abortion in the US, but decided to rule on the case anyway, overturning the injunction consequently denying fathers any right to protect their unborn children.

NOVEMBER 1989 REASONS
In November 1989, the Supreme Court of Canada made known its reasons for overturning a Quebec Superior Court injunction on August 8th and revealed its continuing anti-life bias. The injunction had prevented Daigle from aborting her 22-week old child. All nine judges ruled that a father has no right to prevent a mother killing their unborn child. They also decided that neither the Quebec Charter nor the Quebec Civil Code provide legal protection for unborn babies.

NOVEMBER 3RD 1989 GOVERNMENT BILL C-43
Bill C-43 made abortion readily available across Canada.

- Although abortion was re-introduced into the Criminal Code, the restrictions imposed were meaningless.
- Abortion became a matter between the woman and the abortionist.
- Abortions could be done for the vaguest reasons.
- Only one doctor would need to approve the abortion.
- Abortion would remain legal throughout the whole of the pregnancy
- Private abortion clinics could be set up.
- Nurses and technicians would be allowed to perform abortions.
- A thirteen year old could obtain an abortion without parental knowledge or consent.
- The bill does not specify who could perform the abortions.

JANUARY 31ST 1991 BILL C-43 WAS DEFEATED
After being passed in the House of Commons the Senate defeated the Bill because the vote was tied.

1991 SULLIVAN LEMAY CASE
Two midwives were charged with criminal negligence after a child during child birth. The Supreme Court ruled, under the Criminal Code of Canada, a child in the process of being born was not a human being.

PRESENT SITUATION IN CANADA
There is no law protected unborn children in Canada.
PRESENT CRIMINAL CODE

Section 233. (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not:

a) it has breathed,

b) it has an independent circulation, or

c) the navel string is severed.

THE LAW & ABORTION

(from "The Law & Abortion: an international study, 1986 revised edition)

ILLEGAL ABORTION: THE CANADIAN EXPERIENCE

... Canada's experience before the law was changed was similar to that of Britain and the United States. From about 1959 to 1969, when there was growing demand for permissive abortion laws, very high estimates of the number of criminal abortions were circulated. For instance, Eleanor Pelrine took Dr. Overstreet's U.S. figures and divided by ten. "On this basis", she wrote, "there would be 100,000 illegal abortions in Canada each year, and a probable three to four hundred deaths. Zealous campaigners for repeal of our abortions laws have put the annual Canadian death total at nearer to two thousand; nevertheless, the difference between three to four hundred deaths and two thousand is one of degree only."(22)

Differences of degree are important if we are trying to estimate the seriousness of a problem and what measures would be appropriate in dealing with it. It has already been seen that there is reason to question very high figures as they apply to the United States; dividing by ten is a questionable way to calculate a Canadian phenomenon in relation to the U.S. There are significant social differences between the two countries. Divorce and homicide rates, for example, are both significantly higher in the United States than in Canada. It is not likely that the U.S. illegal abortion rate was similarly higher.

Canadian maternal mortality rate figures are available: according to the Badgley commission, the number of mothers who were reported to have perished in self-induced or criminal abortions during each year between 1958 and 1969 averaged 12.3.(23) As in Britain, we may suppose that some additional maternal deaths from abortions were misclassified or concealed, but when due allowance has been made there is still no way of reconciling the discrepancy between estimates of three hundred to two thousand per year cited by Pelrine above and the officially documented average of 12.3.

Badgley also estimated that in 1975 there were 46,096 Canadian women living who had *ever* had an illegal abortion.(24) While he acknowledged that this figure may be on the low side, it is nevertheless many times lower than an *annual* estimate of 100,000. Badgley also found that 55,061 may have tried to induce an abortion themselves at some point during their lifetime.(25) The combined total of illegally-induced and self-induced abortions - 101,157 - represents approximately 2% of the female population of childbearing age. Since self-induced abortions often rely on ineffective folk methods, it is probable that a significant percentage of this latter group either were not pregnant or miscarried naturally, so that the total presented cannot be equated with successfully induced abortions. Badgley's findings point to an annual figure well under 10,000 as the combined number illegal and self-induced abortions in Canada, during the years before the law was changed in 1969. By contrast, the number of legally-induced abortions reached a peak of 66,254 in 1982.(26)

As we have seen, the estimates of illegal abortions made in the 1960s were exaggerated in all three countries discussed. This is shown most clearly in Britain, where statistics are most readily available. The social respectability which abortion has gained during the intervening period of permissive laws has, however, produced a high abortion rate that shows no signs of decreasing.

MATERNAL DEATHS FROM ABORTION

In contrast to the shadowy world of illegal abortions, the statistical domain of maternal mortality has long been bathed in the glare of governmental attention. For many decades we have had a reasonably accurate idea of how many women perished each year from all types of abortion - spontaneous, legally induced and illegally induced. A certain coyness of terminology, together with

quirks and changes in classification make it occasionally difficult to isolate illegal abortion deaths from other types of maternal mortality. We must also allow for the probability that mortality from illegal abortion is underestimated in official figures. Fortunately, a British Columbia study of abortion mortality over the fourteen years immediately before legalization (1955-68) provides some reassurance on this score. While official statistics recorded 41 maternal deaths in the province, W.D.S. Thomas established from doctors' reports, a figure of 44. The official figure was lower than the doctors' reports in four years, but *higher* than the doctors' reports in four other years. Combining the maximum annual figures from both sources yields a total of 49 deaths over 14 years, which is 19.5% higher than the official total. The fact that the official statistics were as often higher than the doctors' reports as they were lower suggests random error rather than any systematic attempt to conceal abortion deaths.(27) It is difficult to hide a body,, and doctors and coroners would normally be loath to perjure themselves by falsifying a death certificate. Government figures appear thus to be not all that far from the truth, and at least give us a handle on the magnitude of the phenomenon. The discovery that independently collected figures from Canada, the United Kingdom and the United States, show strikingly similar trends in all three countries over a forty-year period, buttresses one's confidence that the statisticians came close to getting it right.

In graphic form the figures indicate an unmistakable decrease, from the 1940s through the late 1970s, in maternal mortality from abortion. If we allow for the rising female population of childbearing age in all three countries, the decline in the mortality rate is even steeper than the decline in numbers. Yet it would be wrong to infer that the numbers or the rate of induced abortion have also gone down over the past forty-five years. As we have seen, the reverse is true.

If abortions have increased, why has maternal mortality gone down so sharply? The answer is to be found in the improvements in medical care which have produced tumbling maternal mortality rates from almost every cause. More specifically, the discovery of sulfonamides and antibiotics in the 1940s, and their steadily growing use in the 1950s, sharply reduced mortality from infection. Most deaths from abortion - legally or illegally induced - were the result of infection (sepsis).

WOMEN DENIED ABORTION

.....In Canada 203 pregnant women living in maternity homes or served by child welfare agencies were interviewed by the Badgley Commission. More than one out of four (27.4%) said they had considered having an induced abortion but had abandoned the idea because of a lack of accessible facilities or because their applications to hospital therapeutic abortion committees had been held up.(33) This finding provides indirect evidence which points in the same direction as the Swedish and Czech studies: namely that women who find it difficult to obtain a legal abortion rarely turn to an illegal one.

In a study pulling together findings from Sweden, the U.S.A. and New Zealand, it was concluded that a total of 6,298 women refused a legal abortion, between the 1940s and the 1960s, 13.2% sought an illegal one. Most of them had been turned down because the reasons they gave were deemed insufficient by the authorities; therefore there was probably no overwhelming social pressure to seek an abortion elsewhere. Bearing this qualification in mind, it remains striking that such a small percentage actually sought out a clandestine abortionist. Interestingly, a majority, ranging from 58% to 80% were satisfied to have borne their baby.(34) The fact that all the studies agree that a significant proportion of women were deterred by the legal constraints placed on them suggests that the true induced abortion rate is substantially lower under a restrictive law than under a permissive one.

Finding of this sort should be borne in mind by those desiring to predict accurately the effects of restrictive, as opposed to permissive, legislation.

THE CRIMINAL ABORTIONIST IN CANADA

.....As we indicated earlier, Canada did not have severe problems with illegal abortion before the 1969 amendments to Section 251 of the Criminal Code which legalized abortion if the life or health of the mother is in danger. The difficulty with determining the effect of the amendments on illegal abortion is that there is much uncertainty about what precisely they were intended to legalize. There is evidence that abortions were already being done in Canadian hospitals prior to 1969. Thus, many commentators, including a number of physicians and lawyers, sought the amendments not as a new liberty but to legalize what was already being done.(52) Some saw them as a means of combatting backstreet abortion. But others saw them a breaking new ground in social betterment. For instance, Grace MacInnis, M.P. for Vancouver-Kingsway, told the Committee constituted in 1967 to enquire into the need for a new law,"...I think it is time we began to work toward *quality* population in this country. We are beginning to hear about the need for improving population, and certainly to have children born into a country as a result of rape or incest is not going to be too helpful...Also...if conditions like those of thalidomide babies or congenital diseases are known ahead of time, I do not think it is a good thing for Canada to allow these beings to come into the world...women ought to have far more control over what happens when monstrosities are born..."(53) (emphasis added)

Clearly the aims were divergent and in some cases quite ambitious. When the amendment was finally passed in 1969, it allowed abortions to be performed if a majority of members of a therapeutic abortion committee (which must exclude the abortionist) agreed that "the continuation of the pregnancy of (such) female person would or would be likely to endanger her life or health..." But the government of the day rejected all attempts made during the debate in Parliament to clarify legislatively the meaning of the term "health".

In doing this it acted against the recommendations of the Standing Committee of the House appointed to consider the issue. The Committee acknowledged that there has been "a great deal of concern" over the health definition and the Committee's preferred reading that an abortion be granted if continuation of pregnancy "will endanger the life or seriously and directly impair the health of the mother" because it "intended health to mean physical and mental health and not the wider definition given to it by the World Health Organization."(54)

The World Health Organization defines health as "a state of complete physical, mental, emotional, and social well-being and not merely the absence of disease or infirmity."(55) The significance of this definition in relation to abortion practice can be seen from a recent lawsuit in the Supreme Court of British Columbia, brought by barrister George C. Carruthers and Michael S. Whelton against fellow directors of the Lions Gate Hospital and its therapeutic abortion committee. According to the Writ of Summons, the WHO definition was the accepted criteria for determining the validity of an abortion application. In October, November and December 1979, there were 192 applications for abortions, of which 190 were approved. In 1980, 785 cases were presented and 778 approved. In 1981, 799 cases were presented and 799 approved. In the first three months of 1982, 209 cases were presented and 209 cases approved.(57)

However, the federal government has still not, after fifteen years, clarified its position on this question. In 1984, Arthur Pennington, the lawyer for the federal government at the trial of Henry Morgentaler on a charge of illegally procuring abortion stated that one of the purposes of abortion laws was to protect the fetus.

"An obvious purpose (of Section 251) is the protection of the developing human life in the womb. Section 251 does not create in any way the right to have an abortion, nor does it create the right to perform an abortion for a doctor." Ontario Crown Prosecutor Bonnie Wein made the argument more pointedly before the provincial Court of Appeal a year later when she affirmed that the law's purpose was "to protect the state's interest in unborn life."(58)

These comments, while intended to clarify the government's intentions, actually complicate the problem. The federal government of Canada has not attempted to prevent hospitals from carrying out abortions in the manner practised at Lion's Gate Hospital, yet clearly such a policy does not operate to protect the fetus.(59) In Pennington's words, "Parliament has called for an independent and accountable medical certification that the woman (seeking the abortion) meets the medical standard."(60) But in the present state of legal confusion it is hard to know what *is* the medical standard.

Another complication is that the provincial government of Quebec has licensed some local community service centres, known as CLSC's, to do out-patient abortions. Since these centres do not have therapeutic abortion committees, their operations are illegal under the terms of Section 251. However, even this matter is moot because the Quebec government's position apparently is that the federal government made Section 251 unenforceable in Quebec when it passed legislation under Justice Minister Ron Basford which disallowed judges from overturning jury acquittals.(61) This meant that Henry Morgentaler, who had operated a freestanding abortion clinic for a number of years was acquitted on his next court appearance. Although at least one juror had been offered a bribe to vote for Morgentaler's acquittals, the Quebec government decided that it was not worthwhile to prosecute any further.(62) Thus, while Canadian law clearly does not permit freestanding abortion clinics in the style of the United States, it is unclear whether this law will in every case be enforced. In Ontario and Manitoba, Morgentaler is currently being prosecuted for illegal procurement in freestanding abortion clinics that he has attempted to set up. In November 1984 Drs. Morgentaler and Smoling were acquitted in Toronto on a charge of illegally procuring a miscarriage. The crown had appealed the acquittal, alleging that the trail judge failed to rule inadmissible various types of evidence submitted by the defence, and failed to instruct the jury properly. The verdict also provoked controversy because the American jury selection experts employed by Morgentaler before the trial began. These experts later boasted that they had excluded from the jury those segments of the population most likely to be anti-abortion: "churchgoers, housewives, young people and older professionals".(63) The outcome of the Morgentaler cases will determine whether Section 251 is enforceable in any province.

There have been other attempts to set up freestanding abortion clinics. In January 1978, a presentation was made to Ontario Health Minister Dennis Timbrell to set up freestanding clinics that would include a therapeutic abortion committee. Nothing came of this proposal but it appears from the terms of the brief that a permissive position would have been taken by the committee. In Winnipeg in 1979, the Health Sciences Centre offered $100,000 towards the establishment of such a facility, with Planned Parenthood of America agreeing to contribute a further $135,000. This project appears not to have survived either. At the time of writing, the Attorney-General of Ontario is considering a proposal to convert two women's clinics in Toronto into freestanding abortion clinics and classify them as public hospitals under the terms of Section 251 of the Criminal Code.(64)

From what we have seen above, it is difficult to determine the effect of the 1969 amendments on illegal abortion in Canada, because we no longer have a clear definition of what would be illegal.(65) The most that we can say is that outside the province of Quebec, the federal and provincial governments have so far resisted the establishment of freestanding abortion clinics. Concern for the fetus may be one factor, but the pragmatic considerations may be another. American experience has shown that

freestanding abortion clinics may all too easily duplicate the conditions that legislators of fifteen years ago were trying to eliminate.

Given that the extent of legal abortion under the new laws remains difficult to determine, how much can be discovered about the problem of abortion by unqualified practitioners? In-hospital abortions in Canada are unlikely to be done by unqualified practitioners. Nevertheless, some complications appear to be unavoidable even under rigid conditions in a hospital setting.(66)

Despite the claims of Henry Morgentaler, it is difficult to accept that a freestanding clinic, with its more limited facilities, could fare better. The clinic in Montreal, which has operated for a number of years, came under professional attack because Morgentaler's attitude was said by his colleagues to be "primarily directed to protecting his fees". In January 1976, his licence to practise was suspended for one year by the Disciplinary Committee of the Professional Corporation of the Physicians of Quebec.(67)

The committee established that Morgentaler conducted no valid interview with the patient before the abortion; that there was an almost complete lack of case history; the pregnancy or blood tests were not taken or pathological examinations performed; and that there was no follow-up care. Morgentaler himself states that his post-abortion care consists of keeping the patient "under observation for an average of thirty minutes, and having her leave when ambulatory."(68)

It has also been established that Morgentaler re-used polyethylene "vacurettes" on patients even though the manufacturer warns against this practice, since diseases such as viral hepatitis, tetanus, venereal disease, gaseous gangrene, and Herpes II could be transmitted.(69) An instance of the dramas that are sometimes played out behind the walls of the Morgentaler clinic in Toronto was supplied by the testimony of a Honduran woman who was ambivalent about her decision and had the misfortune to change her mind as the operation was beginning. According to her report, the abortionist gave no painkiller before the abortion and he did not respond to her pleas to stop the abortion. When she began screaming an assistant shut her mouth and another forced a sanitary napkin into it.(70) In view of the fact that Morgentaler is considered by many to be a "model" abortionist, it is possible that a proliferation of freestanding abortion clinics in Canada would eventually duplicate American experience, as discussed above. This is not to say that all freestanding clinics violate health and ethical standards, simply that American experience has shown that legalization does not eliminate unqualified and unethical operators: on the contrary, it may make it more difficult for the authorities to deal with them.

Canada's partially restrictive law has so far prevented the worst excesses of brutal exploitation that are known to exist in the U.S. Incidents of the kind culled from the American press are much rarer and more sporadic in Canada. They do continue to exist, however. In Toronto, in 1980, for example, Dr. Dwight Foster was convicted of criminally aborting a 17-years old girl at her home. The unborn child had already reached 6 months gestation, and the physician's botched efforts necessitated a complete hysterectomy for the girl.(71)

There is another drawback to freestanding abortion clinics that was not foreseen when they first opened their doors. It is the painful divisions that they flash onto the screen of our social self-awareness. In the U.S. and Canada clinics has been continually besieged by angry picketers. They have been the target of bombings, burnings and sit-ins. In Toronto a local resident attacked Morgentaler when he opened and there have been repeated arrests for civil disobedience. In July 1985, as tempers became frazzled under the summer sun, a clinic supporter pointed a gun at demonstrators, shouting "I'll blow

your heads off." Local merchants complained of a drastic decline in business and beseeched picketers and clinic to leave the neighbourhood.(72) Intense social antagonism sometimes flaming into violence must now be recognized as one of the inevitable costs of freestanding abortions clinics.

To sum up, it is impossible to say what has happened to "illegal" abortion in Canada because of the inherent ambiguity of the law as it stands. The practice of confining abortions to public hospitals appears largely to have eliminated the problem of the unqualified operator, but it is not certain whether governments will be able to insist on the enforcement of this legal provision in every province. Besides legitimate concern about the medical and ethical standards of privately-run clinics, there is also cause for apprehension about the clashing social values that the existence of such clinics beings nakedly into focus.

SUMMARY OF FINDINGS

Let us now review what has been established to this point.

There is no reliable evidence that illegal abortion rates were ever a high in this century as some authors have asserted. Controlled studies of representative groups of women, such as Lewis-Faning's and Wiehl's, seem to suggest the opposite. Maternal deaths from this cause were also much less numerous than has often been claimed; indeed one authority, Bernard Nathanson, maintains that the figures were often intentionally exaggerated.(73) Moreover, they had been declining steadily for a quarter century before the laws were changed.

When looking at abortion and the law we have found it useful to distinguish between two types: abortions performed contrary to the law and abortions performed by unqualified or unethical persons. The second type may not be "illegal" but most observers believe they are undesirable, and it is this problem that the public associates with "illegal" abortion. The United States Supreme Court dealt with the problem of illegal abortions simply by abolishing the laws against them.(74) In Britain, clandestine abortionists virtually ceased to be prosecuted. In both countries, however, permissive abortion laws were not found to have had the influence most observers hoped for in dealing with the problem of abortions performed by unqualified or unethical practitioners.

In Canada, the vagueness of the law and the haphazard nature of its enforcement make it difficult to determine what is and is not illegal. The problem of unqualified practitioners was never a large one in Canada, and it was dealt with, not by permissive laws as such but by confining abortions to public hospitals. Recent agitation to permit freestanding and privately-owned abortion clinics in Canada could erode this relatively advantageous situation.(75)

CONCLUSIONS

From what we have discovered in this study, we may conclude that:

1) Maternal deaths from abortion declined steadily from 1940 or earlier. The legalization of abortion in the late 1960s had little effect upon a trend that had already been established for over a quarter of a century. It was not legalization but improved treatment of infection that virtually eliminated abortion deaths between 1940 and 1980.
2) Permissive laws do not simply "replace" illegal abortions with legal ones. They produce instead a significant increase in the numbers of induced abortions. The brutalizing and exploitive activities of "back-alley" abortionists also stubbornly persist.
3) Restrictive laws do not necessarily lead to a large-scale, illegal resort to unqualified or unethical practitioners. Indeed in the overwhelming majority of cases, women denied illegal abortions go on to bear their children and most report that they are satisfied to have done so. The amount of

illegal abortion in a given country appears to be the product of numerous factors, including the availability of mean of preventing pregnancy, the attitude of the medical profession, and whether or not social and cultural policy is favourable towards the bearing of children.

4) The prevalence of unqualified practitioners seems to be less related to the degree of permissiveness of the law than to the strict enforcement of hospital standards and the willingness of the authorities to prosecute in cases of non-compliance.

The Law & Abortion: an international study, 1986 revised edition.

ARE ABORTIONS LEGAL IN CANADA AFTER 20 WEEKS GESTATION?

Criminal Code:
Section 251 of the Criminal Code made no reference to a time limit in which abortions may be performed.

The Vital Statistics Act of Ontario:
However, in actual practice doctors, in Ontario, are reluctant to perform abortions over 20 weeks gestation owing to the provincial Vital Statistics Act, RSO, 1970, ch. 483, as amended by RSO, 1971, ch. 98, Sched., par. 35, as amended by RSO 1973. This act states that a medical certificate must be provided for all still-births. (clause 1 of section 14)

Still-Birth:
The definition of "still-birth" according to the Vital Statistics Act of Ontario is as follows:

> "still-birth" means the complete expulsion or extraction from its mother of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more, and where after such expulsion or extraction there is no breathing, beating of the heart, pulsation of the umbilical cord or movement of voluntary muscle. (clause v of section 1)

Medical Certificate:
Either a legally qualified medical practitioner or a coroner must indicate the cause of the still-birth on an appropriate medical certificate and deliver it to the funeral director. (clause 1 & 2 of section 14)

Registration:
The funeral director must forward this medical certificate to the division registrar who validates it with his signature. (Clause 3 & 4 of section 14)

Burial Permit:
The funeral director must now dispose of the body in accordance with the law. (clause 5 of section 14)

Comment:
The fact that such a certificate is required is a clear acknowledgement that abortion (particularly at 20 weeks gestation or beyond) is the taking of a human life. Doctors, who have performed an abortion are reluctant to have to fill out such a death certificate since it is an open recognition that they deliberately took a human life. This is especially the case since the body has to be buried or cremated according to legal procedures, which is required for the disposal of all human bodies. Therefore, it is the provisions of the Vital Statistics Act of Ontario, and not the Criminal Code, which deters doctors, in Ontario, from performing abortions after 20 weeks. In short, although doctors are permitted to perform abortions after 20 weeks, they do not like to do so because of the provisions of the Vital Statistics Act.

Just Words?

In the Vital Statistics Act of Ontario, 1971, the "victim" of still-birth is referred to as a "foetus". In the 1973 amendment, it is referred to as a "product of conception" -- yet they are both the same. In both cases, the law provides for the procedure required to dispose of the "body".

May 17,1988 **TRUE PRO-LIFE BILL IN SENATE**

THE SENATE OF CANADA
BILL S-16
An Act to Amend the Criminal Code

HER MAJESTY, by and with the advice and consent of the Senate and the House of Commons, enacts as follows:

1. Section 251 of the Criminal Code and the heading preceding it are repealed and the following substituted therefor:

"PROTECTION OF THE UNBORN

251. (1) Every one who, with the intent to cause the death of an unborn human being, uses any means to carry out that intent is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every one who, in doing anything or omitting to do anything that is the duty of that person to do, shows wanton or reckless disregard for the life and safety of an unborn human being and therby causes the death of that unborn human being is guilty of an indictable offence and is liable to imprisonment for five years.

(3) Every pregnant female person who, with intent to cause the death of an unborn human being within her, uses any means to carry out that intent is guilty of an indictable offence and liable to imprisonment for two years.

(4) No one is guilty of an offence under subsection (1) if the life of the unborn human being was ended as a result of medical treatment necessary to prevent the death of the mother of the unborn human being or to remedy a condition that, if left untreated, would cause the death of that mother.

(5) In this section "any means" includes
[a] the administration of a drug or any other noxious thing,
[b] the use of an instrument, and
[c] manipulation of any kind

"unborn human being" means a human life from the moment of conception until birth, whether conceived naturally or otherwise."

Unusual as it is for legislation to begin with a Bill placed before the Senate, Bill S-16 would become law if approved by both the Senate and the House.

2nd Session, 34th Parliament
38 Elizabeth II, 1989

THE HOUSE OF COMMONS OF CANADA

BILL C-43

An Act respecting abortion

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

1. Sections 287 and 288 of the *Criminal Code* are repealed and the following substituted therefor:

Inducing abortions

"287. (1) Every person who induces an abortion on a female person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, unless the abortion is induced by or under the direction of a medical practitioner who is of the opinion that, if the abortion were not induced, the health or life of the female person would be likely to be threatened.

Definitions

(2) For the purposes of this section,

"health"

"health" includes, for greater certainty, physical, mental and psychological health;

"medical practitioner"

"medical practitioner", in respect of an abortion induced in a province, means a person who is entitled to practise medicine under the laws of the province;

"opinion"

"opinion" means an opinion formed using generally accepted standards of the medical profession.

Interpretation

(3) For the purposes of this section and section 288, inducing an abortion does not include using a drug, device or other means on a female person that is likely to prevent implantation of a fertilized ovum.

Supplying noxious things

288. Every one who unlawfully supplies of procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to induce an abortion on a female person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

Coming into force

2. This Act shall come into force on a day to be fixed by order of the Governor in Council.

ABORTION AND THE LAW

WHY ARE THERE LAWS? It has been suggested that laws against abortion were enacted solely because of medical hazards to the mother. History shows otherwise.

LAWS PROTECTING THE UNBORN can be traced back to the Sumerian Code of 2000 B.C.; to the Assyrian, Hittite, and Hammurabic Codes of a few centuries later; and to the Persian Code of 600 B.C.

Protection of the fetus from conception to birth was the aim of the 1803 English law after which our Canadian laws were patterned.

THE TRUST OF CONTEMPORARY LAW - - with the single exception of the abortion movement - - - is toward recognition of the unborn child as a person at all stages of his existence. Acknowledgment of his legal rights has been a true evolution of the law in response to the growth of scientific knowledge.

THE COURTS HAVE ESTABLISHED that the fetus:
Can be wrongfully injured.
Can be protected from parental neglect.
Can claim present support from the parent.
Can inherit property or be the beneficiary of a trust.
Can be preferred to the religious liberty of the parent.
Surely, he may be guarded from intentional destruction!

THE RIGHT TO LIFE has been affirmed by: The Canadian Bill of Rights, which states: “It is hereby recognized and declared that in Canada there have existed and shall continue to exist - without discrimination, the following human rights - the right of the individual to life, liberty, security of person and enjoyment of property - and the right not to be deprived therof except by due process of law.”

Shall continue to exist the following rights - and the first one mentioned, the right to life.

Moreover in the preamble it states that it is the duty of Parliament to uphold these rights - it does not say that the right to life is to be left to the individual conscience of each Canadian.

The U.N. Declaration in 1948, signed by Canada, which states - Article #3. “Everyone has the right to life, liberty and security of person” - the right to life is, of course, the first, on which all others depend.

The World Medical Association (of which the C.M.A. is a member) issued a statement of ethics at that time and stated that: “the utmost respect for human life was to be from the moment of conception”.

The United Nations Declaration of the Rights of the Child, 1959; the preamble states in part “Whereas the child, by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection before as well as after birth.”

“The child.....shall be entitled to grow and develop in health. To this end special care and protection shall be provided both to him and his mother, including adequate prenatal and postnatal care.”

ABOLISH ABORTION

"Paramount is the question of morality. Are we justified in taking a human life through capital punishment? Execution does not erase the crime of murder. Rather, it takes away another life. The death penalty is only one more violent reaction to violent action."

- from The Canada that I Want to Build
Liberal Party of Canada Convention 1975

This was part of the background against which the Liberal Party discussed capital punishment at its policy convention last November. This thinking gave rise to the current bill to abolish capital punishment.

The statement assumes that the taking of human life must always be justified and asks whether it can be justified even in the case of convicted murderers. The answer to this by the Liberal Government is "No."

It is difficult to understand how the same Liberal Government was prepared to justify the taking of human life through abortion. Why was the murderer protected when the unborn child would be destroyed?

One might argue that the unborn child is not a human being; but this, even the pro-abortionists admit, is nonsense.

Why are there over 106,000 abortions permitted a year in Canada?

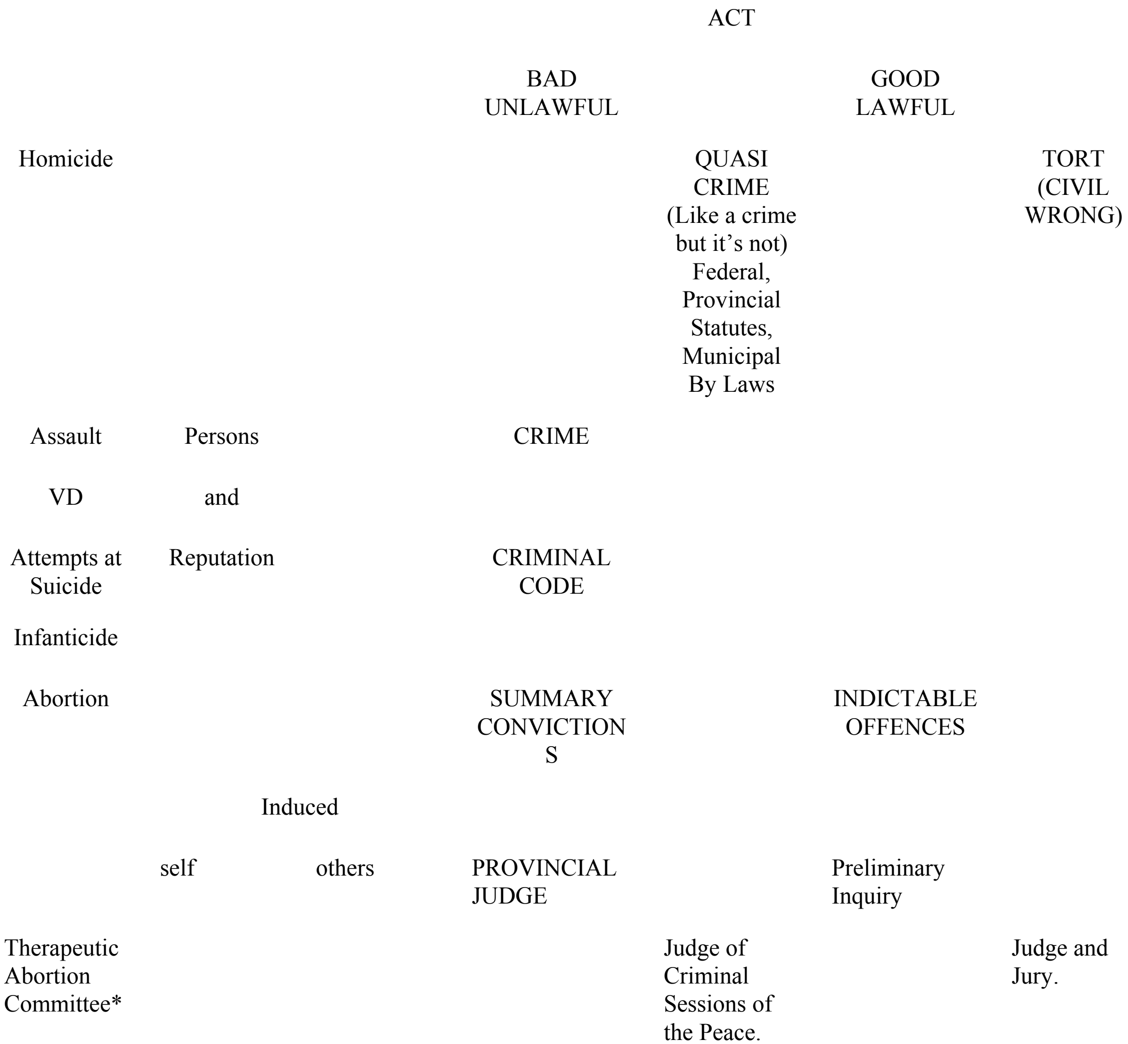
*****

"We should be focussing on the causes of crime and the most effective ways to deal with it."

Attempting to solve social problems through violence is damaging to society and all its members. We should be focusing on the causes which make it difficult for women to bear their children to term and the most effective ways to help them.

ABORTION IS DEATH WITHOUT TRIAL

DIAGRAM OF ABORTION IN CRIMINAL CODE
(under 1969 law)



*Guide: Does continuation of pregnancy endanger life or health of woman.

DIAGRAM OF ABORTION IN CRIMINAL CODE
(under 1969 law)
(continued from page 22)

**Human Being
s206(1)

Child proceeding live through the mother completely whether or not,

① Breathed

② Independent Circulation or

③ Umbilical cord severed.

Conception

Birth

Death

Size of pea.

Eyes, lungs, stomach

Face formed

Squints

4. 8. 12 16 20 40

D&C

Vacuum

Courtesy of

Saline

John Stephens

Hysterotomy

O.C.

BABY TALK

On Tuesday May 24, 1988, the Mulroney Government place a motion before Parliament containing three options to allow abortion in Canada.

- Option "A" was a more liberal law than that of 1969
- Option "B" is abortion on demand
- Option "C" is abortion on demand with some (slight) restrictions in the last months.

All three options were totally pro-abortion and so.....

Amendment "A" is wrongfully labelled "pro-life."

Five reasons why Amendment "A" would have been much worse than the old one.

1. Amendment "A" resembled but was more liberal than the 1969 Legislation struck down by the Supreme Court in January 1988. Under that law over 60,000 unborn children were killed each year- virtually abortion on demand.

2. Amendment "A" would have allowed abortion when either the "life or health" of the mother are threatened.

3. Under Amendment "A" only two doctors (rather than three) needed to approve an abortion.

4. Under Amendment "A" abortions would be done outside hospitals.

5. Under Amendment "A" abortions would have been done for vague reasons such as depression or suicidal tendency.

All three options permitted easy access to abortion.

MP's voting record and what they voted on July 28, 1988

Amendment 1 Mary Collins (Capilano)
A gestational law with no restrictions in the early stages and a life or health in the early stages. It was defeated 191 to 29.

Amendment 2 Ken James (Sarnia)
A gestational law which would place a requirement after the first trimester that there be a substantial threat to health and no alternative treatment. It was defeated 202 to 17.

Amendment 3 Gus Mitges (Grey Simcoe)

No abortions except in the case of a threat to the life of the mother. It was defeated 118 to 105.

Amendment 4 Barbara Sparrow (Calgary South) The Government motion would remain the same except that the "first stages" of pregnancy would be defined as the first 18 weeks. It was defeated without a recorded vote.

Amendment 5 John Bosley (Don Valley West) Abortions would be allowed without any restrictions so long as it was performed by a medical practitioner. Defeated 198 to 20.

The Government's Motion: A gestational law allowing easy access to abortion in early stages of pregnancy and a threat to health in the later stages. It was defeated 147 to 76.

CRIMINAL CODE OF CANADA

REFERENCES TO ABORTION 1969

Section 159
(2) Every one commits an offense who knowingly, without lawful justification or excuse

> [c] offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, or ....

Section 221
(1) Every one who causes the death in the act of birth of a child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and is liable to

imprisonment for life.

(2) This section does not apply to a person who, by means that in good faith he considers necessary to preserve the life of the mother of a child causes the death of such child

Section 251

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

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

(3) In this section, "means" includes
[a] The administration of a drug or other noxious thing,
[b] the use of an instrument, and
[c] manipulation of any kind

(The following were added as amendments when the Omnibus Bill was passed in 1969)

(4) Subsections (1) and (2) do not apply to
[a] a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person or

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

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

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

[d] has caused a copy of such certificate to be given to the qualified medical practitioner

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

> [a] require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him copy of any certificate described in paragraph [c] of subsection (4) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or
>
> [b] require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph [c] of subsection (4), to furnish to him a copy of that certificate, together wish such other information relating to the procuring of the miscarriage as he may require.

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

> [a] “accredited hospital” means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical,

surgical and obstetrical treatment are provided;

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

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

[d] “Minister of Health” means

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

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

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

(iv) in the Yukon Territory and the

Northwest
Territories, the
Minister of
National Health
and Welfare;

[e] " qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated; and

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

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

Section 252

Everyone who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to procure the miscarriage of a female person, whether or not she is pregnant, is guilty of an indictable offence and is liable to imprisonment for two years.

CRIMINAL CODE OF CANADA: Section 45

Everyone is protected from criminal

responsibility for performing a surgical operation upon any person for the benefit of that person if [a] the operation is performed with reasonable care and skill and [b] it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.

NOTE: Henry Morgentaler was acquitted of performing an illegal abortion under the above Section in the Criminal Code.

LAW REFORM COMMISSION OF CANADA
Crimes Against the Foetus 1989

Summary of Recommendations

Reshaping Present Law

1. "Person" in the new Code should be redefined as a corporation, or a human being which has proceeded completely and permanently from its mother's body in a living state and capable of independent survival.

2. There should be no separate provision in the new Code concerning killing in the act of birth.

3. There should be no separate provision in the new Code concerning neglect to obtain assistance during childbirth.

4. There should be no provision in the new Code concerning concealing the body of a child.

5. There should be no provision in the new Code concerning supply of noxious things.

6. There should be a general crime of causing foetal harm or destruction.

7. The general crime of destroying a foetus should not apply to acts done to save the mother's life.

8. The general crime of destroying a foetus should not apply to acts done to protect the mother against serious physical injury.

9. The crime of destroying a foetus should not apply to acts done before the twenty-second week of pregnancy to protect the mother's physical or psychological health *[or to*

acts done before the twelfth week of pregnancy (alternative)].

Proposed New Legislation

10. The following provisions should be enacted:

Definitions

"person" means a corporation, or a human being which has proceeded completely and permanently from its mothers body in a living state and capable of independent survival.

For the purpose of this Title "foetus" means the product of a union in the womb of human sperm cells and egg cells at all stages of its life prior to becoming a person.

A New Foetus title

1. Foetal Destruction or Harm

(1) Everyone commits a crime who

(a) purposely, recklessly or negligently causes destruction or serious harm to a foetus; or

(b) being a pregnant woman, purposely causes destruction or serious harm to her foetus by any act or by failing to make a reasonable provision for assistance in respect of her delivery.

(2) Section 1 applies even though the destruction or harm results after the foetus becomes a person.

Exceptions

2. Medical Treatment

Except in the case of procedures carried out negligently or for the purpose of terminating pregnancy, no criminal liability attaches in respect of destruction or harm caused to a foetus in the course of medical procedures which do not involve risk of destruction or harm disproportionate to the expected benefits and which are applied with the mother's informed consent to herself or to her foetus for therapeutic or diagnostic purposes.

3. Lawful Abortion

No criminal liability attaches to a pregnant woman, a qualified medical practitioner or a person acting under such practitioner's supervision, who with the woman's informed consent causes destruction or serious harm to a foetus by terminating her pregnancy or medically authorized.

(a) before the foetus is capable of independent survival, to protect her physical or psychological health;

(b) to save the woman's life or to protect her against serious physical injury;
or

{c} because the foetus is suffering from a malformation or disability of such severity that medical treatment could not be legally withheld upon its birth.

Medical authorization must be given by a qualified medical partitioner. Medical authorization after the foetus has become capable of independent survival must, where practicable, be given by two such practitioners. [*Alternative*

No criminal liability attaches to a pregnant woman, a qualified medical practitioner or a

person acting under such practitioner's supervision, who with the woman's informed consent causes destruction or serious harm to a foetus by terminating her pregnancy as medically authorized.

(a) at any time before the foetus is twelve weeks old;

(b) before the foetus is capable of independent survival, to protect the woman's physical or psychological health;

{c} to save the woman's life or to protect her against serious injury;

(d) because the foetus is suffering from a malformation or disability of such severity that medical treatment could be legally withheld upon its birth.]

4. Independent Survival

For the purposes of section 3 a foetus is capable of independent survival after it reaches an age of twenty-two weeks as determined by the usual clinical indicators used by the medical profession.

Effect on Present Law

11. The effect of our suggested scheme would be to replace all the present *Code* provisions relating to the foetus by the above short Title. The *Code* sections dropped:

section 206 - definition of human being
section 221 - killing during the act of birth
section 226 - neglecting to obtain assistance in childbirth
section 227 - concealing body of child
section 251 - abortion
section 252 - supply of noxious thing.

March 26, 1991

Supreme Court Decision in Sullivan and Lemay v. The Queen

* The newscasts Canadians repeatedly heard on March 21, 1991, stated, “The Supreme Court has ruled that a foetus is not a person.” What the Court actually stated was, “A foetus is not a human being for the purposes of the [Criminal] Code.”

* In May, 1985, Mary Charlotte Sullivan and Gloria Jean Lemay were charged with criminal negligence causing death to the child of Jewel Voth and with a second charge of criminal negligence causing bodily harm to Jewel Voth. The Supreme Court dismissed the second charge on a legal technicality. The charges were laid after Sullivan and Lemay, acting as midwives, attempted to assist Jewel Voth in giving birth. According to the Court, Mrs. Voth was in labour for 15 hours. The Court stated:

> After five hours of second stage labour the child’s head emerged and no further contractions occurred. Sullivan and Lemay attempted to stimulate further contractions but were unsuccessful. Approximately twenty minutes later, Emergency Services were called and the mother was transported to the hospital. Within two minutes of arrival, an intern delivered the baby using...’a basis delivery technique’.

However, it was too late. The baby was born dead as he had been asphyxiated during the long birth process.

* The Court acquitted Sullivan and Lemay on the first charge of causing the death of the child. The charge had been laid under Section 203 of the Criminal Code which states:

> Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.

Chief Justice Lamer stated that, “The child of Jewel Voth was not a ‘person’ within the meaning...” of Section 203.

* However, on November 16, 1989, the Supreme Court rendered reasons for its decision in the case of Guy Tremblay v. Chantal Daigle, stating that “the task of properly classifying a foetus in law and in science are different pursuits” and that recognizing the preborn child as a human being in law is a “normative task...more appropriately left to the legislature.” (emphasis ours)

* Pro-life groups must continue to insist that Parliament pass a law giving full protection to all preborn children.

* The Right to Life Association of Toronto sent out two 15 second radio clips via Canada News Wire to radio stations across Canada, as well as a national press release, clarifying the ruling, affirming the humanity of the preborn child and identifying Parliament’s responsibility to protect preborn children. Please let us know if you heard one of the radio clips.

Comments on the Court’s Ruling

“Something is seriously wrong when a child whose head is out of the birth canal is not considered to be a person.” Gwen Landolt,

Vice-President of REAL Women

(REAL Women of Canada intervened in the Court case, arguing that the preborn child is a legal person, in opposition to the pro-abortion group, the Legal Education Action Fund (LEAF) which argued that the preborn child is not a legal person until he/she is completely separated from his/her mother. LEAF is the legal arm of the feminist movement and is funded by the federal government.)

"The Supreme Court is guilty once again of copping out by refusing to recognize the humanity of the preborn child." Margaret Purcell, V.P. of Campaign Life

"The decision was made by "lawyers, who had to have their eyes closed and their ears covered, flying in the face of medical knowledge." Dr. Paul Ranalli of Canadian Physicians for life

"[It is] a historic decision because they've said a child is not a person. You've really got to reach this stage of horror before the public will revolt." Angela Costigan, lawyer for REAL Women of Canada

"[The decision] is unjust. There is no reason my baby should have died." Jewel Voth

"We're happy the Supreme Court has once more defined the demarcation line of birth as the beginning of personhood." Jane Holmes, executive co-ordinator of the Canadian Abortion Rights Action League

"The failure of Canadian Law to recognize unborn babies as persons harkens back to the dark ages before 1929 when the highest courts in the land held that women were not persons." Alliance for Life Press Release

"This time, the non-person in question was a baby whose head was already visible in the mother's birth canal. How can a fully formed human foetus...not be a human being? Surely, common sense tells us a baby died here, no matter how powerful the judges who say it was

a non-baby . We sense a growing unease among Canadians that has been building ever since the Supreme Court struck down Canada’s abortion law as unconstitutional in 1988. Toronto Sun Editorial (March 25, 1991)

“The House of Commons must pass a law which explicitly recognizes that, in science, preborn children are human beings.” June Scandiffio, President of Toronto Right to Life.

Right to Life Association of Toronto and Area

The Child in The Womb Not A Person

The conviction of two midwives for criminal negligence causing death should be overturned because the baby that died during a home birth they attended *never actually became an actual person,* lawyer Thomas Berger told the B.C. Court of Appeal.

Mary Charlotte Sullivan and Gloria Jean Lemay were found guilty in October of 1986, given a suspended sentence and placed on probation for three years, with the conditions that they refrain from attending at pregnancies or deliveries and complete 200 hours of community work (PLN, July/Aug 1988)

Lawyer Berger argued, *According to the common law, the baby never became a person. They baby's head appeared, the fetus was alive. But it was stillborn. It was a potential person. It never became an actual person...They baby was at no time a human being.*

The B.C. Court of Appeal overturned the lower court ruling that the Vancouver midwives were guilty of criminal negligence causing the death of a baby boy. The court ruled that a baby is not a person until separated from its mother's body and born alive.

B.C. Health Minister Peter Dueck said he would like the decision appealed. The B.C. Attorney-General's office is reviewing the decision to determine whether or not to appeal it.

Those who wish to deny other human being their rights and privileges, use the same tactics as Lawyer Berger; they simply refuse to recognize them as *persons.* The child in the womb is the modern-day victim of this type of discrimination.

In the past, Native Americans were considered nonpersons in order to provide justification for the appropriation of their land. Slaves were considered to be property, with the US. Dred Scott decision recognizing them as human beings, but denying that they were persons. In Nazi Germany, the Reichsgericht refused to recognize Jews as *persons in the legal sense,* depriving them of all rights and privileges.

It is truly ironic that women are among the strongest advocates of modern-day discrimination. These women have short memories and selective vision in that they fail to recognize that they are imposing the same unfair, oppressive and arbitrary judgements on the child in the womb that were imposed on them just over fifty years ago when the Supreme Court of Canada declared, *Women are not persons...*

Were women not persons until the Privy Council in England declared them to be so? Of course not; they were always persons. Society simply refused to grant them legal recognition. Is the child in the womb a person? Of course! Yet once again personhood is being used as a device to create a class of human beings who may be discriminated against and thereby deprived of their fundamental rights.

More enlightened thinking prevailed in the United States recently. A federal judge ruled that a three-month-old preborn child is protected by the U.S. Constitution.

A Riverside, California woman, punched in the abdomen by a police officer when she was three months pregnant, claimed that her civil rights and those of her preborn child, now 18 months old, had been violated.

The mother was awarded $415,229 in punitive and general damages. Her daughter was not awarded damages because there was no evidence that she had suffered any physical or mental injury due to the assault.

Was the preborn child a person protected by the Constitution when the assault occurred? The judge ruled that the answer to that question was - ***Yes.***

PRO-LIFE NEWS, JULY/AUG.1988.

Woman Faces Trial Following Supreme Court Ruling

In November the Supreme Court of Canada ruled that a Manitoba woman, who served a six-month jail term for wounding a pregnant woman, must fact trial for manslaughter in the death of the victim's baby.

Bernice Daniels, who was six months pregnant, was stabbed in the abdomen at a Winnipeg restaurant in 1981. The stab wound contaminated the amniotic sac, causing premature birth of a baby boy, who lived 19 minutes.

The Supreme Court ruling overturns a Manitoba Court of Appeal's finding that a second trial would constitute double jeopardy - a second trial for the same offence.

The Supreme Court stated in its unanimous decision, *"Society, through the criminal law, requires (Sandra) Prince to answer for both the injury to Bernice Daniels and the death of the child, just as it would require a person who threw a bomb into a crowded space to answer for the multiple injuries and death that might result."*

"One offence contains as an essential ingredient the causing of bodily harm to Bernice Daniels. The other offence requires proof of the death of the Daniel's child. I cannot see how either of these elements can be subsumed into the other," wrote Chief Justice Brian Dickson......

ProLife News, Jan./Feb. 1987

Born at 4 ½ Months

James Gill weighed approximately 1 ½ pounds when he was born in May at an Ottawa hospital. He arrived 4 ½ months early, making him one of the youngest infants to survive a premature birth.

Doctors told Brenda and Jim Gill there was nothing they could do to stop the early labour and that their baby had no chance for survival. Dr. Hardy, of the neonatal unit at Ottawa Civic Hospital, thought there was no possibility of survival for babies born so prematurely. James changed his mind completely.

The Gills were insistent that everything be done to treat their baby boy. Both were optimistic that their infant would survive and continue his growth and development. The growth that normally would have occurred in the womb was observed firsthand by Brenda and Jim. They watched their baby's eyes open and saw the cartilage develop in his ears.

Before James' birth, his father played the piano for him and his mother read stories to him. Tapes of his father's piano playing and of his mother's stories were played for James while he was in his isolette.

Both parents were active in his care while he grew from a 4 ½-month old to a 9-month-old baby. At the time of his scheduled birth - the end of September, James was ready to go home with his parents. All are thriving.

ProLife News, Nov./Dec. 1987

CITY MAN TO BE TRIED FOR STABBING OF FETUS

Attempted murder charged

KATHLEEN ENGMAN
Journal Staff Writer

EDMONTON

In a ground-breaking decision Friday, a judge committed a man to stand trial on a charge of attempted murder of an 8 ½-month-old fetus as it lay in the womb.

Provincial Court Judge P.G. Ketchum committed Sidney Severeight, 25, of Edmonton to stand trial for "attempted murder of a fetus capable of being born alive."

There is no offence in the Criminal Code with the specific wording that Ketchum used in his courtroom Friday.

The charge is in connection with the oct. 31, 1992 stabbing of the abdomen of Colleen Marsden, 17. Her fetus, later delivered by Caesarean section, was dead.

The Supreme Court of Canada ruled in 1991 that the fetus is not a person until it leaves the mother's body alive.

Noting this, Ketchum asked: Does that legal fact mean the child in the womb "is a nothing?"

In any case, under the Criminal Code, the legal rules for attempted offences mean that even if someone were not able to commit the actual offence, he or she can be convicted of attempting it, the judge said.

It would be murderer mistook a corpse for a living body or a rapist attacked a dead body thinking it was alive, the intent would be there, he said.

"This is the pragmatic approach of our criminal law, rooted as it is in the Judeo-Christian tradition," Ketchum said. He said he found enough evidence to commit Severeight to stand trail for attempted murder.

They key purpose of the law is to deter people who want to hurt and endanger others in society, said Ketchum.

There is a ban on publication of the evidence of the case.

Speaking in general, the judge said that in the last 25 years, there have been extraordinary advances in medical technology, allowing doctors to see a fetus in the womb through ultrasound, assess its vital signs and determine that a fetus of 37 to 38 weeks' gestation is viable outside the womb.

Ketchum made the unusual committal following a novel argument from Crown prosecutor Arnold Piragoff. "The issues raised by the Crown involve life and death, medically and legally speaking." Moreover, the issues touch on the areas that are of pressing concern to society as a whole, he said.

Piragoff urged Ketchum to order Severeight to stand trial on attempted murder, saying it is irrelevant whether what was in the womb was a human being, or if murdering a fetus is legally possible. The Criminal Code says a person can be convicted of an indictable offence "whether or not under the circumstances it was possible to commit the offence."

D'Arcy DePoe, Severeight's defence lawyer, says he is considering asking the Court of Queen's Bench to review Ketchum's decision.

When he argued against Piragoff, DePoe called it illogical to charge someone with attempting something that they couldn't legally have done. A fetus isn't a human being under the Criminal Code and therefore couldn't legally have been murdered, DePoe said. If it couldn't have been murdered, how could someone attempt to murder it? he asked.

Severeight was also committed to stand trial for possession of a dangerous weapon, aggravated assault against the would-be mother and uttering death threats against both her and the would-be grandmother.

Criminal lawyer Alex Pringle says the decision is surprising in light of the Supreme Court decision just two years ago.

"This issue is not so much a right-to-life issue as an interpretation of the Criminal Code," he said.

Edwina Podemski, a feminist lawyer who works with Women Against Violence Establishing Support, calls the move very controversial. She predicted that notwithstanding the advanced gestation of the fetus, pro-lifers would seize upon it "particularly since there isn't a law prohibiting abortion."

Edmonton Journal, Mar.13/93

DRIVER'S SENTENCE DOESN'T EASE PARENT'S PAIN

By Bob Brent
TORONTO STAR

Muhammad S. Khan will spend the next 16 months of his life in jail. Tony and Esperanca Carvalho can only think of their son, Matthew who never had a chance to live.

Esperanca was eight months pregnant when the couple's mini-van was struck head-on on Highway 27 after Khan's car veered into oncoming traffic.

The Brampton couple were on their way to buy Esperanca stockings to wear at a baby shower being thrown for her the next day. Khan, of East York, was on his way home from a bar.

The 26-year old expectant mother, her kidneys failing, was rushed to Etobicoke General Hospital. Lying on an operating table, awaiting a Caesarean section that might save her son's life, she heard the fetal heart monitor fall silent.

Hours earlier, she had felt Matthew kicking inside her. Esperanca knew what the silence meant. "You know, but you hope it's not true."

Yesterday, before Khan's sentencing, Esperanca wondered if he will ever understand what she lost that snowing February day in 1990.

Khan, 34, was convicted on charges of dangerous driving causing bodily harm and driving with a blood-alcohol level over the legal limit. He plans to appeal.

"That feeling after the heartbeat stopped, that silence, he'll never know," she said.

"Is it easier to lose someone you had know for a while?" tony Carvalho, 34, wondered yesterday. "You have memories. You keep these. What do I have?"

He and his wife were clear that they did not seek vengeance against Khan. Nothing can bring their son back, they said.

More than anything, after 23 court appearances spanning 2 ½ years, they simply wanted the matter to end.

The test of endurance was of their own making. Before the trial, Crown Attorney Gail Glickman had asked if they would accept Khan's offer to plead guilty to the blood-alcohol charge in exchange for have more serous charges withdrawn.

They refused insisting that justice be done for better or worse. In Esperanca's mind, her son was slain. Legally, the fetus is not recognized as a person. The charges against Khan resulted from the injuries Esperanca received.

Khan was acquitted by Judge C.J. Cannon of the charges of criminal negligence causing bodily harm and impaired driving.

For the Carvalhos, there was no sense of victory. They both said their thoughts were of Khan's young child - who must go without a father during the jail term.

Outside the Etobicoke courtroom, Khan's relatives had no comment.

"He got 16 months," Esperanca said. "I've got a lifetime. It'll never be over."

Toronto Star, August 29/92

Metropolitan Toronto Police

NEWS RELEASE

MANSLAUGHTER CHARGE LAID AFTER TRAFFIC ACCIDENT

On Saturday, March 14, 1992 at about 8:50 PM, a stolen 1978 Pontiac was east bound on Steeles Avenue at a high rate of speed. In the vicinity of Bathurst Street, the driver lost control, crossed the centre line and struck a west bound vehicle. The driver of the stolen vehicle then fled the scene on foot.

The female passenger of the second vehicle was nine months pregnant and was rushed to hospital at which time an emergency Cesarian operation was performed. The baby was placed on life support, but did not survive.

As a result of investigation by officers from the North Traffic Unit and No.32 Division, the driver of the stolen Pontiac was located, arrested and charged on March 15, 1992.

Subsequent medical opinion indicates that the death of the baby was a direct result of the motor vehicle accident.

The driver of the vehicle was re-arrested and additional charges laid.

Apr.20/92

FETUS GET $5,000 FOR POOR HOME LIFE AFTER FATHER INJURED

BY KIRK MAKIN
The Globe and Mail

A Supreme Court of Ontario judge has ruled that a month-old fetus was entitled to damages because a serious accident harmed the quality of care and companionship its father-to-be could offer it.

In what, is apparently the first ruling of its kind, Mr. Justice Alvin Rosenberg used the care-and-companionship section of Ontario's Family Law Act to award $5,000 to the unborn child - who is now a 6-year-old boy named Danny Espinosa.

The plaintiff, Selldon Espinosa of Toronto, was seriously disfigured in 1979 when a faulty oven he was lighting exploded. The family's quality of life degenerated because of Mr. Espinosa's poor psychological recover.

"As a matter of logic, it would seem that an unborn child...has no choice but to be born into a family - in this case, he will not receive the quality of care and companionship that he would have received had the accident not occurred," Judge Rosenberg said in his judgment last month.

"The damages to Danny are similar, possibly more severe, than (those) to his two brothers."

Although no previous decisions were available on this specific issue, successive judges have found that the act, formerly the Family Reform Act, is meant to be interpreted liberally, Judge Rosenberg said....

ARE ABORTIONS LEGAL IN CANADA AFTER 20 WEEKS GESTATION?

Criminal Code:

Section 251 of the Criminal Code makes no reference to a time limit in which abortions may be performed.

The Vital Statistics Act of Ontario:

However, in actual practice doctors, in Ontario, are reluctant to perform abortions over 20 weeks gestation owing to the provincial Vital Statistics Act, RSO, 1970, ch. 483, as amended by RSO, 1971, ch. 98, , Sched., par. 35, as amended by RSO 1973. This act states that a medical certificate must be provided for all still-births. (clause 1 of section 14)

Still-Birth:

The definition of "still-birth" according to the Vital Statistics Act of Ontario is as follows:

> "still-birth" means the complete expulsion or extraction from its mother of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more, and where after such expulsion or extraction there is no breathing, beating of the heart, pulsation of the umbilical cord or movement of voluntary muscle. (Clause v of section 1)

Medical Certificate:

Either a legally qualified medical practitioner or a coroner must indicate the cause of the still-birth on an appropriate medical certificate and deliver it to the funeral director. (clause 1 & 2 of section 14)

Registration:

The funeral director must forward this medical certificate to the division registrar who validates it with his signature. (clause 3 & 4 of section 14)

Burial Permit:

The funeral director must now dispose of the body in accordance with the law. (clause 5 of section 14)

Comment:

The fact that such a certificate is required is a clear acknowledgement that abortion (particularly at 20 weeks gestation or beyond) is the taking of a human life. Doctors, who have performed an abortion, are reluctant to have to fill out such a death certificate since it is an open recognition that they deliberately took a human life. This is especially the case since the body has to be buried or cremated according to legal procedures, which is required for the disposal of all human bodies. Therefore, it is the provisions of the Vital Statistics Act of Ontario, and not the Criminal Code, which deters doctors, in Ontario, from performing abortions after 20 weeks. In short, although doctors are permitted to perform abortions after 20 weeks, they do not like to do so because of the provisions of the Vital Statistics Act.

Just Words?

In the Vital Statistics Act of Ontario, 1971, the "victim" of still-birth is referred to as a "foetus". In the 1973 amendment, it is referred to as a "product of conception" -- yet they are both the same. In both cases the law provides for the procedure required to dispose of the "body".