

## **Law and Life - Abortion in Canada**

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This article will review the state of the law relating to abortion in Canada, providing both the historical background and the current legal status of abortion.

### **Historical Background**

The treatment of abortion in legal systems dates back to antiquity. A variety of ancient societies attached legal prohibitions to conduct resulting in the death of an unborn child. This was reflected in a number of codes including the Sumerian Code (2000 B.C.), the Assyrian Code (1500 B.C.), the Hammurabic (1300 B.C.), the Hittite Code (1300 B.C.) and the Persian Code (600 B.C.).

In the Jewish culture up to early Christian times, an abortion performed on a woman was permitted by third parties only when necessary to save the mother's life. Thereafter, the fetus was recognized to be a full human being from the time it was formed, and abortion was penalized by a capital sentence.

In the Christian church, up to 1200 A.D., killing an unborn child was prohibited at any stage of development. From 1200 to 1869 A.D. destruction of the unborn child was regarded as homicide after approximately eight to 12 weeks development when the fetus had been formed or "animated". After 1869, abortion at any stage of development was prohibited and offenders were excommunicated.

At a minimum, it is clear that a component in the prohibition of abortion from these various cultures and faiths related to the notion of the sanctity of human life. It is that notion that all times must remain in the forefront of any issue relating to abortion.

### **The English Common Law**

The intrinsic value and worth of human life has always been one of the main focuses of the English Common Law. As a consequence, innocent human life was always accorded the full protection of the law. This protection was of course also extended to those accused of criminal offences through the procedural and substantive guarantees of the justice system.

In the 13<sup>th</sup> Century, Henry DeBracton considered abortion to be homicide if the fetus was formed or animated. Edward Coke was of the view that abortion was not a crime prior to quickening, was a serious crime after quickening, and was murder if the child was born alive but died soon thereafter. Blackstone in his "Commentaries" was of the view that abortion constituted homicide

on “quickening” of the fetus.

It is noteworthy that the views of these three individuals were formed in a time of significantly less genetic and medical understanding than today. Consequently, the test of whether or not the fetus was “alive” was limited to when “quickening” or “animation” took place, that is the first movements of the fetus perceived by the mother. It is manifestly the case of course, now even from the scientific and medical standpoint, that the unborn child begins life from the moment of conception.

### **English Statutory Provisions**

In 1803, the Miscarriage of Women Act (more commonly known as Lord Ellenborough’s Act)<sup>1</sup> was enacted in England, the first statute to deal with abortion as a criminal offence. It provided that all abortions constituted a criminal offence, punishable by death after quickening, and by a less severe penalty prior to quickening.

In 1837, an amendment to Lord Ellenborough’s Act was passed which eliminated the “quickening” distinction. It provided that all abortions constituted a criminal offence and fixed a maximum penalty of life imprisonment. In 1861, Lord Ellenborough’s Act was incorporated into the provisions of the “Offences Against the Person Act”<sup>2</sup>.

It is interesting to note that recognition of and protection for the life of the unborn child was granted in another area in English criminal law. Beginning in 18<sup>th</sup> Century, executions of women for capital punishment were suspended until the birth of the child. Subsequently, permanent stays of execution were granted, and in 1931 through the Sentence of Death (Expectant Mothers) Act, a pregnant woman convicted of a capital offence would only be sentenced to life imprisonment.

### **Abortion Law in Canada**

Prior to confederation, New Brunswick, Prince Edward Island, Newfoundland, Upper Canada and Nova Scotia enacted legislation with respect to abortion. Initially, New Brunswick and Prince Edward Island prohibited abortion only from the onset of quickening, and not when committed by the pregnant woman herself. Subsequently, the quickening distinction was abolished and abortion was also prohibited by the mother herself.

The criminal law became a matter of federal jurisdiction at the time of confederation. In 1869, the provisions of the British Offences Against the Persons Act were imported virtually verbatim into Canadian law in The Offences Against the Persons Act<sup>3</sup>, penalizing abortion with life imprisonment. In 1892, the first Criminal Code was enacted which apparently provided that a “child” became a human being when the child had fully proceeded out of the body of its mother<sup>4</sup>. The fallacy of declaring an unborn child not to be “human being” is patent. An unborn child is always human and most certainly a “being” though living in a different physical environment

than when birth takes place. The first criminal code provided that causing the death of a child who had not yet become a “human being”, in a manner that constituted the act to be murder if the child was fully born, was an indictable offence punishable by life imprisonment. The code however made available a defence of acting in good faith to preserve the life of the mother. An attempt to procure a woman’s miscarriage was an offence also punishable by life imprisonment.

The abortion law in Canada which established the same penalty for a woman aborting her own child as that for a third party procuring her abortion, remained unchanged until 1969. In 1969, the Criminal Code was amended significantly by the enactment of Section 251. The penalty for a third party procuring the miscarriage continued to be life imprisonment, while the penalty for a mother causing her own abortion was reduced to a maximum term of two years imprisonment. The Act, however, carved out an exception to the offence of procuring a miscarriage by giving a defence both to the third party and to the mother. Section 251(4) and (5) provided that if a duly qualified medical practitioner in an accredited or approved hospital performed an abortion after receiving a certificate resulting from a majority decision of a therapeutic abortion committee certifying that the continuation of the pregnancy endangered the health or life of the mother, a complete defence was established for the physician and the mother.

It soon transpired that therapeutic abortion committees became little more than a “rubber stamp” for requested abortions, few abortions being refused and the definition of endangerment to life and health being extended to make the terms almost meaningless from a practical standpoint. “Health” was taken to include mental and emotional health, and it became a relatively easy proposition for a woman not desiring to continue her pregnancy, to convince a committee that her emotional and psychological well-being would be upset if she were required to complete the full term of the pregnancy.

### **Other Areas of Legal Rights/Protection Extended to the Unborn**

The 1969 amendments to the Code themselves, let alone their elastic application in practice, constituted a very significant change in the abortion law in Canada. The radical nature of the departure is highlighted by other areas of law in which protection of the unborn had been recognized historically. One example has previously been referred to dealing with stays of execution for women convicted of capital crimes. Another example is the common law property inheritance rights accorded to a fetus from conception on. In 1795, the case of *Doe v. Clarke*, 126 Eng. Rep. 617 established that a child living at the time of the decease of the testator, included an infant “en ventre sa mère”. It remains the case in Canadian law today, that provided the child is born alive, it is “in being” from the time of conception for the purpose of inheritance rights.

The unborn have also been afforded legal rights and protection in the case of harm sustained by the child as a result of negligent injury to the mother. The Supreme Court of Canada, in the case of *Montreal Tramways Co. v. Léveill * [1933 S.C.R. 456] granted a right of action to an unborn child injured in utero who was subsequently born alive.

In the United States in the case of *Puhl v. Milwaukee Auto Ins. Co.* (1959 99 N.W. 2d. 163) the Court explicitly stated that the right of compensation to the unborn child for negligently inflicted injury was unaffected by whether or not the child was considered viable at the time of injury, the Court going on to recognize that the unborn child had a separate biological and medical existence from the mother, whether viable outside the womb at the time of injury or not.

### **Medical/Biological Backdrop**

By 1969, when the amendments to the abortion provisions of the Criminal Code took place, medical and biological knowledge clearly demonstrating that the fetus becomes a separate human life from the time of conception had advanced greatly over that in existence in 1869 at the time of the first federal law in Canada prohibiting abortion. Since 1969 that medical and biological knowledge has advanced even more rapidly. The stages of fetal development have been exposed even more clearly through pictures in the womb of the unborn at various stages of development. Furthermore, medical procedures to treat the unborn while in the womb, even involving serious operations such as heart surgery have proliferated, and the child in such circumstances is treated as a “patient” no differently than is the mother - that is, if the child is a “wanted” child. Furthermore, children are able to be sustained increasingly early ages outside the womb should premature delivery be necessary, pushing back the threshold of “viability”.

The biological evidence for the distinctive humanity for the unborn is significant. At the time of conception, the unborn child has its full complement of chromosomes, and therefore has all the genetic material it will require to complete its full biological development. At 17 days, blood cells are formed, and at the twentieth day, the heart and a primitive intestinal system have developed. By the twenty-fourth day, the heart of the unborn child is beating, and by the thirty-third day, the cerebral cortex has formed. When six weeks have passed, the full skeletal system has formed, and at the seven week juncture the child’s reflexes are in operation. By eight weeks, all internal organs are fully formed, digestive juices are being produced and an EEG is able to pick up brain waves. By nine weeks the child is able to make a fist and responds to an object touching its forehead. By the eleventh week the child is able to breathe amniotic fluid, can swallow, digest and urinate, and is able to both sleep and dream.

By the time the mother is aware she is pregnant as much as eight weeks may have passed, since pregnancy is not typically confirmed until two menstrual periods have been missed.

Those in favour of abortion have frequently taken a “chattel” approach, illogically claiming that the unborn child is part of its mother’s body. Even apart from a common sense refutation of such a proposition, biological realities clearly put the lie to this assertion. The distinctness of the unborn child from its mother can be enormous. Consider, for example, that the sex of the child is approximately 50% of the time opposite to that of the mother. It can also, for example, be of a different racial background in part depending on the race of the father. Its blood type can be so different from that of the mother that in the case of the RH factor being present, a medical threat to the child can be posed. Other features of the child can be distinctly different from the mother

including eye and hair color and bodily physique.

### **Henry Morgentaler**

It was against this medical and biological backdrop that the Morgentaler decision was rendered by the Supreme Court of Canada on January 28, 1988, in which it struck down Section 251 of the Criminal Code as unconstitutional, stating that it infringed provisions of the Canadian Charter of Rights and Freedoms.

Morgentaler is an abortionist who openly violated the abortion provisions of the Criminal Code prior to the decision of January 28, 1988. He refused to submit his planned abortions to a therapeutic abortion committee, did not perform abortions at an accredited and approved hospital facility, and did not engage even in the pretense of performing abortions on account of danger to the life or health of the mother. On one occasion, he openly defied the law enforcement and judicial system by performing an abortion on television.

Apart from his blatant disregard for the life of the unborn, Morgentaler's claim to provide safe and professional abortions for women sounded a hollow note on at least one occasion. Following an abortion, standard medical protocol is to examine the tissue of the aborted child for any abnormalities. In this instance, Morgentaler did not do so. As it transpired, the woman had not been pregnant at all, and an examination of the tissue would have revealed a malignancy in the woman which later was found when the woman was diagnosed with cancer.

Morgentaler was frequently charged with contravening Section 251 of the Criminal Code. In a 1973 trial, he was acquitted by a jury in Quebec. In the following year, the Quebec Court of Appeal reversed the acquittal and substituted a conviction. The decision of the Court of Appeal was upheld in 1975 by the Supreme Court of Canada, the Court rejecting the spurious defence of "necessity" and an argument attempting to apply the provisions of Section 45 of the Criminal Code (the so-called "Good Samaritan" defence) to his actions.

### **The Morgentaler Decision**

The Morgentaler decision of 1988<sup>5</sup> resulted from a charge laid against Morgentaler and other abortionists for performing abortions in his Toronto clinic.

In the Morgentaler case, while the defence of necessity was argued by Morgentaler's counsel, one of the main arguments raised was that the requirement in the legislation for women to submit their request for an abortion to therapeutic abortion committees resulted in abortion not being uniformly accessible to women across the country, and as a consequence, infringed their Section 7 Charter rights to life, liberty and security of the person. This argument was in effect hypothetical, given that there was no party to the case claiming that her Charter rights to life, liberty and security of the person had been infringed. No evidence was produced of an

individual having been refused an abortion by a physician, not surprisingly given the fact as previously stated that therapeutic abortion committees had become a “rubber stamp” for abortions. Most abortions were based on sociological reasons, namely the inconvenience of the pregnancy to the mother and its infringement on her lifestyle aspirations. In fact, in the main, abortion was being used as a “second line of defence” means of birth control.

The provisions of Section 251 of the Criminal Code were struck down by a majority decision of five to two. Three different majority judgments were rendered, one by Dickson concurred in by Lamer, another by Beetz concurred in by Estey, and a final judgment by Wilson. The minority decision was written by McIntyre concurred in by La Forest. The defence of necessity was not dealt with in the judgment of the majority whose decision, with the exception of Wilson’s, was based on procedural and administrative issues relating to the provisions of Section 251 and their alleged effect on the Section 7 Charter rights to life, liberty and security of the person. Wilson’s judgment, while likewise based on those issues, went beyond the reasons for decision of the other members of the majority. The case did not deal with the substantive issue of the right to life of the unborn child, except by passing comment in obiter.

### **The Decision of Dickson C.J.**

Dickson’s decision appears to imply a right to abortion for women in the provisions of Section 7 of the Charter. This was the case notwithstanding that the records of the parliamentary debate on the Charter and the minutes of the special Parliamentary Committee on the Constitution showed that the issue of abortion was deliberately excluded from the Charter.

In his decision, Dickson concentrated on an alleged breach of Section 7 security rights by the provisions of Section 251 of the Code. In essence, his argument was that the security of the person was impaired by the requirement of women to carry a child to full term if they did not desire to do so. He described Section 251 as imposing a regime unrelated to the priorities and aspirations of women, thereby interfering with the woman’s body.

Dickson went on to state that the potential delay in the granting of an abortion application by variations in the availability and standards of a therapeutic abortion committee increased the possibility of complications and risk in the pregnancy, and thereby induced “state-imposed psychological stress”. Furthermore, Dickson stated that the use of the words “life and health” in the defence available in Section 251 was too vague and uncertain.

The problems in the reasons for decision of Dickson J. are numerous. First of all, Section 7 of the Charter does not grant the right to an abortion for women, in particular in light of the previous reference herein to the records of the Parliamentary Committee and debate. Secondly, the main purpose of Section 251 of the Code was to protect an unborn child from having its life terminated, but with a defence available to the mother and the abortionist in certain circumstances. The fact of some pregnancies being contrary to the priorities and aspirations of a woman does not convey a right to abortion. In fact, every law in a society, and in particular its criminal law, can or does interfere in some way with the security of a person, and can adversely

impact their priorities and aspirations and result in “psychological stress”. Most certainly, this is the case in the event of an individual convicted of a criminal offence and subject to the resulting penalties.

As indicated previously, no evidence of delay in the granting of an abortion was introduced at any level of Court in the Morgentaler case, and certainly no evidence of delay in the case of a threat to life or health of a woman.

### **The Decision of Beetz J.**

Beetz, in his decision, acknowledged at the outset that the chief object of Section 251 is to afford protection to the fetus, with the protection of the life and the health of the pregnant woman being an ancillary object. He states that the primary object of protection of the fetus involves a pressing and substantial concern for Parliament.

Beetz, however, goes on to state that the means chosen by the provisions of Section 251 to protect the fetus and which limit the woman’s right to protection of her life and health are not “reasonable and demonstrably justified”. While taking a narrower approach than that of Dickson, Beetz also focuses on the issue of Section 7 security rights. He states that certain of the requirements of Section 251 as worded, such as the specific provisions involved in the approval required by a therapeutic abortion committee, could give rise to unfair delays in the granting of an abortion. However, Beetz was of the view that those provisions could be remedied, for example through a revised version of a therapeutic abortion committee. Furthermore, Beetz stated that it was justifiable for the legislation to require that an abortion would be permitted only where the continuance of the pregnancy would threaten the life or health of the mother and for the legislation to require an independent entity such as a therapeutic abortion committee to determine this issue as opposed to it being determined simply by a decision of the mother and the abortionist.

In the end however, Beetz struck down all the provisions of Section 251 as worded, as being unconstitutional. Notwithstanding his somewhat more moderate approach, he goes on to state in his decision that his views with respect to the legitimacy of legislation limiting abortion to circumstances where the life and health of the mother is threatened could be changed in the future in the event that the Court was asked to consider the issue of whether or not a Charter liberty right exists in favour of women being entitled to being the sole arbiters as to whether or not to proceed with an abortion.

As with the decision of Dickson, that of Beetz is, in my view, riddled with problems. He supports his decision by concluding that Section 251 forced women to choose between either committing a crime under the Section in order to obtain timely medical treatment or to obtain inadequate or no treatment at all on the other. Beetz declines to advance any clear evidence to support the alternative of women being left with inadequate treatment or no treatment at all. Furthermore, and again without evidence, he asserts the “**possibility**” that the danger to the life or health of the woman will not be recognized by the therapeutic abortion committee, this after

he has spent considerable time acknowledging the professional qualifications of therapeutic abortion committees. He goes on in his judgment to contradict the apprehensions he raises with respect to the danger to the life or health of a woman seeking an abortion, of delays by acknowledging that overall the delays in having an abortion application processed had been significantly reduced to a period of one to three weeks, and that the process of approving an abortion could generally be accelerated in an emergency.

Beetz based his decision on certain premises that simply did not accord with factual realities. The first is that women who applied for a “therapeutic abortion” did so by and large because of a danger to their life or health. As previously stated, the vast majority of abortions sought was based on convenience, not on a threat to life or health, and were generally granted as a matter of course by therapeutic abortion committees. The second premise by Beetz is a related one, namely that an abortion granted by a therapeutic abortion committee was ipso facto a “therapeutic abortion” in accordance with the provisions of the Code.

Later in his decision, Beetz attempts to make the case for “psychological trauma” experienced by women in their awareness of the risks experienced in the abortion process. He makes this statement notwithstanding a previous statement to the effect that the mortality and complication rates for abortions are “extremely low” and does not go on to explain how psychological trauma could be caused by women’s awareness of a low-risk procedure. In short, Beetz’s decision appears largely based on unsubstantiated premises.

### **The Decision of Wilson J.**

To describe the decision of Justice Wilson as judicially activist would be an understatement. In my view, it crosses over into the political realm, thinly disguised by judicial words. Wilson unabashedly uses her decision as a means to assert the reproductive emancipation of women. In fact, she asserts the likely impossibility of a man understanding the dilemma faced by a woman with an unwelcome pregnancy. In his book, *Morgentaler v. Borowski*, the Charter and the Courts<sup>6</sup>, Professor F.L. Morton comments as follows: “To feminists, this was the new gospel, pure and simple. That it had now received judicial consecration was reason to celebrate. To those who did not espouse this new gospel, it was a breathtaking assertion of raw judicial power.” Furthermore, in commenting on Wilson’s statement that Section 251 established state control over the woman’s capacity to reproduce and therefore undermined her human dignity and self-respect and sense of security, Morton states “These were bold words indeed. The American Supreme Court’s ruling in *Roe v. Wade* seems timid and pale by comparison. Justice Wilson in effect read almost the entire pro-choice perspective on abortion into five words of Section 7, their legislative history notwithstanding. It would be difficult to find a clearer example of non-interpretivist judicial activism”<sup>7</sup>.

In her decision, Wilson starts with the assumption that Section 7 of the Charter established a right to abortion for women. In focusing primarily on the Section 7 liberty right, she finds that Section 251 infringed that right to liberty, along with the Section 7 right to security of the person by limiting a woman’s right to make a choice with abortion. She asserts that the liberty right was

further infringed on the basis of Section 2 of the Charter, which gives a right to freedom of conscience. This reinforced the Section 7 right to abortion in her view.

There is little point, in my view, in analyzing Justice Wilson's decision extensively. The tone of her judgment renders it more nearly a treatise on sociology than a judicial pronouncement. In short, Section 7 of the Charter clearly did not either in its wording nor in the intent of the framers of the Charter, based upon the Parliamentary and committee debates, extend a right to abortion. As stated previously, the evidence is clearly to the contrary. To assert that Section 251 was unconstitutional because it infringed on a right to liberty in Section 7 based on freedom of conscience in Section 2 is to raise an argument that could apply to any law of the land, since it would be a simple matter to apply to almost any law, an argument that it was opposed to someone's conscience.

The fundamental flaw in Justice Wilson's reasoning is perhaps no better revealed than in her reference to the fetus as "potential life from the moment of conception". An elementary knowledge of biology alone would make it evident that the unborn child constitutes "life" not "potential life" from the moment of conception.

### **The Dissent of McIntyre J.**

In his dissent, McIntyre noted that the majority of the Court had rendered its judgment on a purely "hypothetical basis" in applying Section 7 provisions to Section 251 of the Code. He pointed out that the factual background of the case involved doctors charged with violating Section 251 of the Criminal Code, not with a woman claiming to have been denied a therapeutic abortion. McIntyre argued that the Court had, in effect, decided to deal with the abortion issue and the rights of women relating to abortion rather than to deal with the main factual issues.

In dealing with the provisions of Section 7 as applied by the majority, McIntyre noted that Section 7 of the Charter did not contain a right to abortion, that there was no general right to abortion at all in Canada, and that the purpose of Section 251 was to protect the unborn. McIntyre noted that in the debate on the Constitution in Parliament and in the minutes of the Special Parliamentary Committee, abortion rights were deliberately excluded from the Charter. In fact, current Prime Minister Jean Chretien in the Special Parliamentary Committee took the position that Parliament must avoid using words in the Charter that could allow a Court to strike at the abortion legislation in the Criminal Code.

McIntyre observed that the right to security of the person was not equivalent to the right to freedom of state interference with bodily integrity and resultant "stress". He noted that most laws interfere with the bodily integrity of individuals in some way or another, and can result in stress as a consequence.

With respect to the evidence before the Court with respect to such alleged procedural violations of Section 7 such as delays in processing and granting abortion applications, or refusals of same, no substantive proof was provided. Any allegations of that sort came from the "extrinsic

evidence” of reports such as the Badgley Report and the Powell Report on abortion, commissioned respectively by the federal government and the Ontario government, as opposed to evidence given under oath. Again, no evidence had been introduced by a doctor or woman claiming to have had an application for an abortion to a therapeutic abortion committee rejected.

Dealing with the majority’s allegation that the meaning of the word “health” in Section 251(4) was too vague, McIntyre pointed out that this allegation had been put before the Court in argument on behalf of Morgentaler in the 1975 Morgentaler decision, and was unanimously rejected. Now, however, the majority overruled its own 1975 position on the matter.

McIntyre stated that the role of the Court was not to substitute its views for those of Parliament with respect to the provisions of Section 251 in stating the following: “If there is to be a change in the abortion law, it will be for Parliament to make. This is not because Parliament can claim all wisdom and knowledge, but simply because Parliament is elected for that purpose in a free democracy, and, in addition, has the facilities - the exposure to public opinion and information - as well as the political power to make effective its decisions”<sup>8</sup>.

### **The Consequences of Morgentaler for the Unborn**

As a result of *Morgentaler*, Canada remains the only Western nation with no restrictions whatsoever on abortion. Abortion is not illegal at any stage of a child’s development. We are now faced with the cruel reality that partial birth abortions can and do take place, where a fully or nearly fully developed child is partially delivered from the mother and killed by the abortionist piercing its skull with a sharp instrument and extracting its brain from the incision. Partial birth abortions do not constitute homicide in Canada because of the absence of an abortion law on the one hand, and because of the provisions of Section 223 (1) of the Criminal Code on the other which states that a “child” is not a “human being” until it is fully delivered from its mother’s body in a living state.

Notwithstanding that the result in *Morgentaler* was to strike down Section 251 of the Criminal Code, the decision of the majority did not determine that the unborn were not entitled to some right to protection. The majority, in fact, stated that protection of the fetus is a valid state interest. Wilson predictably deviated from the other members of the majority in gratuitously outlining the contents of a future abortion law that could be acceptable to her. Taking a “gestational” approach, she suggested that for the first trimester of development, women would have the exclusive right to determine whether or not to have an abortion, while in some later stage in the pregnancy perhaps “somewhere in the second trimester” some protection to the unborn might be extended. The almost casual arbitrariness of this approach should be evident.

It is noteworthy that in his decision, Justice Beetz stated that the issue of whether or not a fetus is included in the word “everyone” in Section 7 of the Charter had not been raised in argument before the Court and therefore was not decided.

The decision of the Supreme Court in *Morgentaler* put the ball back into the court of Parliament.

While some attempts were made by the government of Brian Mulroney to fashion a law based on a gestational approach, the proposed legislation ultimately was not enacted by Parliament.

### **Beyond Morgentaler**

It is not within the scope of this paper to discuss in detail developments in the law relating to abortion following the Morgentaler decision. They will be dealt with in a subsequent article. By way of brief summary, cases subsequent to *Morgentaler* have dealt with such issues as the right of the biological father to an injunction to restrain the mother from having an abortion<sup>9</sup>, and the entitlement of a child protection agency to an order placing a pregnant mother addicted to glue sniffing in hospital custody for treatment, for the duration of her pregnancy in order to protect her unborn child<sup>10</sup>.

Furthermore, so-called “wrongful birth” actions have been initiated and decided. In such cases, the natural parents of a child have for example, sued physicians for their failure to advise them of genetic testing procedures which would have detected birth defects such as Down’s Syndrome, thus affording them the opportunity of aborting the child rather than carrying it to full term (Morrill v. Mervyn Dudley Krangle et al).

Not only have the rights of the unborn been affected, but “bubble-zone” legislation has been enacted in a number of provinces, which places restrictions on abortion protests within the proximity of an abortion facility, and protesters have been successfully prosecuted pursuant to the legislation. In one of those cases, the BC Court of Appeal pronounced on the issue not dealt with in the Morgentaler case, namely the right of the fetus to protection pursuant to Section 7 of the Charter<sup>11</sup>.

Finally, on July 16, 2003, in New Brunswick, Henry Morgentaler sued the Province of New Brunswick, asserting that its failure to fund abortions in private clinics denies women in that province reasonable access to abortion. Various pro-life organizations are in the process of applying for intervenor status in the proceeding.

### **Roe v. Wade**

For the unborn, there would appear to be more hope South of the border. In the United States, Norman McCorvey, the “Roe” of the Roe v. Wade United States Supreme Court abortion case of 1973, is attempting to have the case reopened. While she was in 1973 a willing participant in her abortion and in a case that overturned abortion protection for children in the United States, she is now opposed to abortion and has accumulated substantial evidence in claiming that factual conditions have changed so as to justify overturning the Roe v. Wade decision. Her initial Court application in Texas was turned down, but she is in the process of appealing that decision, hoping ultimately to bring it before the United States Supreme Court.

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1. (1803) 43 Geo. 111 cap. 58
  2. (1861) 24 and 25 Vic. Cap. 100 ss. 58 and 59
  3. 1869, 32 and 33 Vic. c. 20 ss. 59 and 60
  4. 1892, 55 Vict. c. 29. 272-274
  5. R v. Morgentaler, Smoling and Scott [1988] 1 S.C.R. 30
  6. Morgentaler v. Borowski: Abortion, the Charter, and the Courts. F.L. Morton, McClelland and Stewart Inc., *the Canadian Publishers*, 1992 at page 237
  7. Ibid, page 238
  8. R v. Morgentaler, Smoling and Scott [1988] 1 S.C.R. 30 pages 157 and 158
  9. Tremblay v. Daigle [1989] 2 S.C.R. 530
  10. Winnipeg Child and Family Service v. D.F.G. [1997] 3 S.C.R. 925
  11. R v. Demers - January 17, 2003 Decision of the British Columbia Court of Appeal - CA026297 (BCCA)
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