State of Abortion Law in Canada

THE 1988 MORGENTALER DECISION
(See the Morgentaler decision at
http://canlii.org/en/ca/scc/doc/1988/1988canlii90/1988canlii90.html)
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The 1988 Morgentaler Decision of the Supreme Court of Canada abolished hospital therapeutic abortion committees by striking down Clause 251 of the Criminal Code (which instituted these committees) because the committees were deemed to infringe upon the right to the security of the person enshrined in Clause 7 of the Canadian Charter of Rights and Freedoms. The way these committees threatened the security of the person was that they unduly delayed, through the multiple exams they entailed, access to abortion, in this way causing a real threat to the security of the woman, because late-term abortion is relatively more dangerous than earlier on in pregnancy. To reach such a conclusion, the Supreme Court based itself, for the most part, on the testimony of Mr. Morgentaler, in his book of 1982, "Abortion and Contraception". Indeed, four of the seven judges, namely justices Beetz, Estey, Dickson and Lamer, quote the increased risk of morbidity and mortality following late-term, legally-induced abortion, as the basis for the Morgentaler Decision.

With Clause 251 of the Criminal code in this way abolished, all that remains since 1988 are clauses 223 and 238, stipulating that abortion is legal in Canada for any reason and at any point of pregnancy until the moment of birth. This being said, five of the seven judges, namely justices Beetz, Estey, McIntyre, La Forest and Wilson, enjoin Parliament, in the Morgentaler Decision, to adopt a law limiting abortion: "Parliament must define at what stage of gestation the right to life of the child must prevail." The judges do not propose any criteria for this, but most countries have made limits correspond to the point where the risks of abortion become too important for the woman, at twelve weeks gestation, which also corresponds to the moment when the preborn child starts feeling pain through his or her nervous system (it is not impossible that he or she felt pain prior to that point, but it would be through his or her hormones along with the hypothalamus gland, which is but a theory, a theory that remains to be proven, but which has not been invalidated either). Other countries have set this moment at the point of viability of the child, that is, the stage when the unborn child could survive outside his or her mother's body, with temporary respiratory assistance, which today corresponds to twenty weeks gestation.

So, there is no "legal void" concerning abortion in Canada. There is a law in place that allows for abortion up to the moment of birth, and for any reason. What is missing, compared to other countries, are restrictions, as recommended by the Supreme Court, that would take into account the dangerousness of abortion for the woman as well as the humanity of the unborn child. Of course, science has established that the unborn child is a complete and fully alive human being from the moment of conception. Of course abortion is a violent act, both against the woman and the child, with all the negative consequences this holds for the woman as well as society. Despite this, it has now been twenty-five years that abortion on demand is performed in Canada, and it was also performed consistently in the nineteen years prior, i.e. since the Omnibus Bill of 1969, which instituted hospital therapeutic committees and extended the acceptability of abortion beyond the aim of preserving the *life* of the mother,

which was legal in Canada since 1929, to the aim of preserving also the *health* of the woman, be it physical or psychological.

In such circumstances, would it be too much to ask that better support be instituted for women faced with pregnancies that are difficult to assume and who would welcome such support, either for adoption (open, semi-open or closed) or for keeping their child? Could one legitimately dream that governments deem relevant to invest at least as much in pregnancy and adoption support as they do in abortion? Would this not be more equitable for women, and would this not make the ever-cherished notion of "choice" ring truer? Because at the present time, choice is not a reality in the public world in Canada. Only one choice is financed by the State, and it is abortion. In Quebec, there exists a certain allocation for pregnancy support, but only for beneficiaries of Social Security, and only from the twentieth week on. Also, would an allocation for adoption support for the *biological* parent, under the Quebec Parental Insurance Program, not be equitable, as the Program already has such an allocation for the *adoptive* parent?

Abortion has been performed in Canada in a more generalized way since 1969, so for close to forty-five years now (as opposed to just "twenty-five"). At an average of 80,000 abortions per year since 1988, this yields 2 million abortions, and at an average of 50,000 abortions per year since 1969, this yields 2.2 million abortion counts. One can clearly see that pregnancy that is difficult to assume is an issue that is nothing short of "major", and that, according to statistics, continues to grow. Also, the multiple consequences of abortion for the woman, including, for example, sterility (in two to five percent of cases) have a not-so- insignificant bearing on the very future of the country, when one out of six couples now has difficulty conceiving, and depopulation threatens more and more the economy and the very stability of the country.

Let us add that the Morgentaler Decision was not unanimous.

Contrary to urban legend, the Morgentaler Decision did no "establish a right to abortion". Only two of the seven judges, namely justices Dickson and Lamer, pleaded in favour of an "unlimited right to abortion".

Inversely, an equivalent number of judges, namely justices McIntyre and La Forest, were "**dissenting**" with regards to the Morgentaler Decision, stating that "there is no such thing as an 'historic right to abortion' and such a right is unjustifiable, except to preserve the health or life of the woman." [Today, it is an established medical fact that abortion is never necessary to save the health or life of a woman. A Caesarian at viability can be one solution. The removal of an organ in which an ectopic pregnancy is developing can be another (however, more and more ectopic pregnancies are brought to delivery via C-section)].