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Abortion Law In Canada: A Matter of National Concern

Moira McConnell
Dalhousie University

Lorenne Clark
Dalhousie University

Professors Moira McConnell*
Lorenne Clark*

Abortion Law In Canada: A Matter of National Concern

I. *General Observations*

1. *The Present State of the Law*

Canada's newest abortion legislation, embodied in Bill C-43, was defeated in the Senate on January 31st, 1991. The Bill sought to remedy the state of "lawlessness" which has existed respecting abortion ever since the decision reached by the Supreme Court of Canada in *R.* v. *Morgentaler*[1] in January, 1988. However, this determination is incorrect. The law is quite clear: there is no criminal prohibition against abortion in Canada.[2] This follows directly from the Court's holding in the *Morgentaler* decision that the old law, s. 287 (formerly s.251) of the *Criminal Code*,[3] infringed a woman's right to security and liberty of the person under s.7 of the *Charter of Rights and Freedoms*. With the striking down of s.251, Canadian women now have a liberty, or negative right to control their reproductive capacities. What they lack is a claim, or positive right of access to safe, subsidized and efficient abortion facilities. Thus, in our eyes, and in the eyes of two thirds of Canadian women,[4] the only *lacuna* in the existing law is the *absence* of law, which in turn creates an obligation on all Provincial governments to provide such facilities to ensure to all women in Canada equal availability to access to abortion services regardless of their Province of residence. Bill C-43 certainly did not fill this gap. But until it is filled, the "right" to abortion conferred as a consequence of the *Morgentaler* decision is an empty and bitter one to those women living in Prince Edward Island, Newfoundland and in other isolated regions of Canada where no hospitals allow

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*Professors Moira McConnell & Lorenne Clark of Dalhousie Law School. The editorial and research assistance of Professor Christine Boyle and Karen Campbell, a student of law is gratefully acknowledged.

1. *R.* v. *Morgentaler* (1988), 44 D.L.R. (4th) 385 (S.C.C.).

2. Though oddly enough, there is still a prohibition on the sale, display, advertisement, or publication of any advertisement of any means, instrument or drugs intended or represented as a method of ensuring an abortion or miscarriage under s. 163(2)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46, which should have been removed as "consequential" legislation after *Morgentaler*, or at least along with Bill C-43.

3. *Criminal Code*, R.S.C. 1985, c. C-46, s. 287.

4. An Environics poll released in December, 1990, found that 66 percent of Canadians were not in favour of Bill C-43. Halifax, *Mail Star*, December, 1990.

abortions to be performed, or where women must travel great distances to gain access to the available provincial facilities.[5] The defeated Bill C-43 merely recriminalized the exercise of the right of reproductive choice, thus limiting women's right to reproductive control, and did nothing to cure the real problem. It was therefore retrogressive and insupportable.

2. *The Criminalization of Reproductive Choice*

Then Attorney General of Canada, the Hon. Doug Lewis, described abortion as "an issue which has moral, ethical, religious and often very personal meaning for every Canadian ... Abortion is an issue which divides Canadians. There are no neutrals, everyone has an opinion".[6] It remains a matter of grave concern that the Federal Government response to the issue of reproductive choice was once again to criminalize it. This is antithetical to the very role we as a society assign to criminal law. The criminal law should be reserved for regulating behaviour which is generally perceived to be wrongful because it causes harm. In "The Criminal Law in Canadian Society", the now-familiar principle of "restraint" is stressed.

> Restraint should be used in employing the criminal law because the basic nature of criminal law sanctions is punitive and coercive, and, since freedom and humanity are valued so highly, the use of other, non-coercive, less formal and more positive approaches is to be preferred whenever possible and appropriate.[7]

Where there is an admitted division of opinion as to the wrongfulness of the behaviour, it is totally incorrect to describe the practice as "criminal" merely for the sake of constitutional convenience or compromise much less administrative efficiency.[8] Not only does this characterization itself raise constitutional issues both in terms of division of powers and human rights concerns, but it also does *not* represent a "compromise" position. Labelling a practice as criminal except in a specific context is not a compromise. It determines the framework for the debate and prejudges precisely what is at issue. It adopts the assumptions underlying one of the positions in the debate and does so in the name of convenience, uniformity and entitlement. In so doing, this labelling ignores the realities of the situation. Women have always been "free to"

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5. For a collection of personal experiences in the Atlantic region see *Telling Our Secrets: Abortion Stories From Nova Scotia* (Halifax: CARAL, 1990).
6. House of Commons Debates, 7 November 1989, p. 5639-40.
7. Government of Canada Report, 1982, p. 42.
8. See *Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)* (1986), 48 C.R. (3d) 289 (S.C.C.).

make whatever moral and personal decision they wish with respect to whether or not to continue or terminate a pregnancy and they will continue to make that decision in light of their own moral beliefs, leaving aside situations of coercion by parents and/or spouses. But the problem has always been, and remains, one of the ability to implement those choices. The stigmatization of this exercise of control as "criminal behaviour" suggests that this decision is by its very nature, inherently wrong. The decision is only "non-criminal" in two related procedural circumstances: first, where the woman does not try to implement her decision to terminate the pregnancy; and, second, where she can find a qualified medical practitioner who agrees with her decision, or to put it more precisely, a physician who believes that her decision is justified. Consequently, the essentially moral decision of the woman is translated into an alleged "medical" standard in which her choice must reflect a "medically" acceptable reason for terminating a pregnancy. If she is unable to do so, she is faced either with not implementing her moral choice, or with having her decision and her actions construed (and punished) as "criminal".

3. *Constitutional Concerns*

(i) *Division of Powers*

The decision in 1990 to make regulation of reproductive choice once again a criminal matter was based on alleged constitutional constraints. The Attorney General for Canada stated on 7 November:

> We have decided to proceed using the criminal law powers of the federal government. In coming to this conclusion and decision we carefully canvassed all the options there were to address this issue. But only by using the criminal law power, however, can the federal government ensure a national approach to the issue of entitlement of abortion ... The federal government cannot regulate the conduct of individuals in any other way. The federal government cannot directly provide medical services..."[9]

This was also the view expressed by the Department of Justice. While one must applaud the language of the former Attorney General in his reference to the "entitlement" of [sic] abortion, it is hard to see that this is in fact what would have been achieved under the present legislation, a point which will be addressed in more detail below.

In the SCC decision in *Morgentaler,* 1988, Beetz J. suggested that the administrative structure regulating abortion had survived constitutional scrutiny only because it was part of the description of a crime (eg. it was

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9. House of Commons Debates, *supra,* note 6, p. 5640.

the defence) and that the federal government could not validly regulate medical practices.[10] In so doing he relied on the case of *Schneider* v. *The Queen*[11] which challenged a provincial heroin treatment law as infringing the federal government's exclusive jurisdiction over criminal law matters. It will be recalled that health, as such, is not a subject listed under either head of power in the *Constitution Act, 1867.* "Health" is generally regarded as provincial because it is related to property and civil rights. However, it is by no means a foregone conclusion that all health matters must be dealt with by the provincial legislatures. Accepting the characterization of the issue as medical, where the concern is to achieve uniformity and the issue is one which, to repeat the words of the Attorney General of Canada, "... illustrated a clear need for a national position", it would seem an appropriate case for federal non criminal law intervention. It may be that an argument can successfully be made for valid *federal* regulation of reproductive choice as a matter of "national concern" under the Peace Order and Good Government (POGG) power of the federal government. In *Schneider,* Dickson J. (as he was then) commented on the "emergency" aspect of the POGG powers in connection with health, and in particular the national interest aspect.[12] Estey J. commented at p. 475 that:

> In sum "health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending on the circumstances of each case on the nature or scope of the health problem in question.

In the case of *R.* v. *Crown Zellerbach Can. Ltd.*[13] LeDain J. (with the support of Dickson, C.J.C., McIntyre and Wilson, JJ.), summarized the "national concern doctrine of the federal peace, order and good government power", to include the following points as "firmly established":

1. The national concern doctrine is separate and distinct from the national emergency doctrine...;
2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally

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10. Beetz J., discusses the objective of s. 251 (now s. 287) on pp. 452-4 of the decision, *supra,* note 1.
11. (1982), 68 C.C.C. (2d) 449 (S.C.C.).
12. With regard to heroin addiction, the court stated at *supra,* note 11 at p. 466 that:
> [I]t was not disputed that, historically, between 60% and 70% of all known heroin addicts in Canada have resided in the Province of British Columbia. *It is largely a local or provincial problem and not one which has become a matter of national concern,* so as to bring it within the jurisdiction of the Parliament of Canada under the residuary power contained in the opening words of the *B.N.A. Act, 1867* (now *Constitution Act, 1867*)... (emphasis added)

13. (1988), 25 B.C.L.R. (2d) 145 (S.C.C.) at 168-169.

matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intraprovincial aspects of the matter.

Further, at p. 169, LeDain comments that

> ... the "provincial inability" test is one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine. It is because of the inter-relatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment.

It is submitted that the present concern regarding reproductive choice, particularly in the context of the *Charter* issues discussed below, makes it a suitable topic for federal non-criminal regulation under this doctrine. However, any such approach should *not* derogate from the right to reproductive choice presently existing but should be used *only* to fill the previously discussed gap in the existing law. Legislation should be enacted requiring all provinces and territories to provide abortion services in order to make possible the effective exercise of the right to reproductive choice regardless of province of residence. Such legislation should provide that enough facilities be available to ensure safe, easily accessible abortion services to all women within the jurisdiction and that all such services be paid for under existing government health insurance plans. This would then give all Canadian women the positive right they need to ensure their continuing liberty and security of the person in accordance with s.7 of the *Charter.*

(ii) Charter Issues

The proposed legislation was said to have overcome many of the security concerns articulated by some of the judges in the 1988 *Morgentaler* decision. However, these concerns were confined to the need for physical security (broadly interpreted to cover mental health) of the person. The issue of liberty discussed at length by Wilson J., was not addressed in the new legislation nor was the issue of physical security truly considered.

Despite "entitlements" to abortion there is no mechanism for ensuring access to services. Such an "entitlement" would only seem to exist given the present approach if the *Criminal Code* provision was redrafted to provide something to the effect that:

> a medical practitioner, including any person or group of persons administering hospital services, is subject to a penalty (e.g., 2 years imprisonment) for *failing* to provide a woman with an abortion she has sought in a situation where her health is or may be in danger.

And,

> It is an offence for a medical practitioner, or any person or group of persons administering hospital services, to refuse or fail to provide a woman with an abortion in a situation where her health is or may be in danger.

Such an approach, which still involves the same "health standard" (subjective as it is) would more clearly reflect the notion of entitlement suggested by the Attorney General of Canada.

As a *Charter* issue, however, Bill C-43 raised more concerns in terms of equality rights. The practice it criminalized is one which is uniquely female. It reflects a gender based approach to characterizing the behaviour. For example the concern is to balance the individual (the woman) with society's interest in the foetus (the collective). It suggests a dichotomy in which the individual's rights will give way to collective interests in the foetus. The spectre of a "slave" class of childbearers envisaged in Margaret Atwood's *Handmaid's Tale* is not so far removed from this balancing process.

This approach also ignores the underlying issue of the disparity between men and women regarding decision-making control and autonomy over their persons. Only women will be subject to this loss of control and the basis for this distinction or differentiation is their gender. In this sense then women fall within the description of people intended to be protected under Section 15 of the *Charter.* Women are indeed among the most powerless groups in our society and have historically been subject to misogyny and deprivation of rights.[14] One has only to point to the events of 1989 regarding the issuing of injunctions against women at the behest of men asserting a property interest in the foetus, or at the femicidal tragedy of mass slaying of women at the Universite de Montreal to see that the approach to legislation regarding reproductive control must take into account the social context of subordination of, and hatred for women. Numerically women are not a minority but, in terms of the legal system, they are indeed both powerless and victimized by

14. See *Andrews* v. *Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.).

discrimination. Reproductive control is an issue inextricable from the social context in which it arises and one which must be considered in terms of equality, liberty and security of the person.[15]

While an approach to equality which depends on the existence of a male comparison group will not be effective in promoting comprehension of reproductive control as an equality issue, it may be instructive in drawing broad comparisons. Had this legislation been enacted, "healthy" women would have been the only group in Canadian society compelled by threat of criminal sanction to contribute their bodies in order to preserve life. Parents are not so compelled, for instance, to donate blood or organs to their children, who are undoubtedly persons with full constitutional status. The state is not equipped, nor should it try, to regulate such difficult and personal decisions. Rather such choices are left to the persons involved, as they should be in the context of the decision to continue with a pregnancy.

II. *Specific Comments on the Provisions in Bill C-43*

The failure of Bill C-43 is to be applauded, but given the equal division of votes on the matter it is clear that another proposal to criminalize reproductive choice may very well pass. It is instructive therefore, to consider some specific issues with regard to the defeated bill. If the commentary of the Department of Justice is correct,[16] the Bill intended that a woman who knowingly or recklessly (has the *mens rea*) induces or assists in the inducement of her own abortion with or without the direction of a medical practitioner who has not formed a valid opinion regarding the threat to her health, would have been subject to a criminal sanction. Although the standard appeared to be the totally subjective "opinion" of a practitioner, in fact, the definition of an "opinion" was "generally accepted standards of the medical profession". According to the Department of Justice commentary,

> While the health standard would apply throughout the entire pregnancy, Canadian medical practitioners, in accordance with generally accepted standards and principles of the medical profession, rarely perform abortions after viability unless there are serious foetal or maternal complications ... The Bill does not specifically refer to eugenics, rape, incest, socio-economic welfare or other indications for having an abortion, but these factors can be included in the determination of health if their effect was to threaten a woman's health.[17]

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15. See Wilson J.'s rather germaine comments in *Morgentaler, supra,* note 1 beginning at 482.
16. See Minister of Justice, *New Abortion Legislation Background Information* (Ottawa: Department of Justice, 3 November 1989).
17. *Ibid.,* p. 6.

Quite clearly then, little of substance had been altered from the legislation struck down in *Morgentaler* other than an abbreviated administrative structure. Essentially the woman remained at the mercy of the medical practitioner and was ultimately subject to localized standards of morality. In the now unconstitutional provision struck down in *Morgentaler,* the province could control access to abortion by scrutiny of medical certificates and by refusing to set up therapeutic committees and approved hospitals. The same situation potentially existed under the proposed Bill C-43, except that the provinces no longer created administrative hurdles, other than regulation of medical practitioners in terms of clinic location and practice registration. A woman seeking an abortion was still subject to criminal sanction if she did not follow the administrative procedures. She would still have had to travel to other places in Canada to find a sympathetic practitioner. It is notable that under the former *Criminal Code* provisions a "miscarriage" was in theory available at any time during the pregnancy if a number of physicians so agreed that it was necessary to the woman's health or life. This was not altered except that the decision was to rest with one physician who ultimately was to make a determination of the generally accepted practices and standards of his or her colleagues, when assessing whether or not a woman's health was endangered. The only real change other than shortening of the existing prison sentence is that an abortion must actually have been induced in order to constitute the crime. The *Criminal Code* provision included an intent to procure a miscarriage whether or not the woman was pregnant. The proposed Bill C-43 would not have altered this substantially and would still have covered a situation of a person supplying a drug or instrument knowing that it was intended to be used to induce an abortion, whether or not it actually did induce an abortion. Strangely enough this relatively unchanged structure was described by the Department of Justice as providing "a reasonable legal framework for the entitlement of abortion in Canada."[18]

The "entitlement" as drafted clearly would have been open to challenge on the constitutional grounds set out above. In addition, the wording raised a number of questions. For example it was not clear that it was a provision which could deal with "abortion shopping", nor was it clear how the *mens rea* requirement was to operate since presumably the woman could fairly assume that the practitioner was 1) entitled to practice in the province and 2) someone able to assess generally accepted medical standards. If in fact this was "a defence" to the crime as characterized in *Morgentaler* by Dickson C.J.C. then it also must not be

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18. *Ibid.,* p. 4.

"illusory". It was not clear how the proposed Bill as drafted addressed this issue. If indeed the concern is entitlement and uniformity, and is viewed as something that must be addressed by the *Criminal Code* then, rather than legislating a situation which is foreseeably uncertain and unlikely to ensure access to abortion services, it would be preferable to legislate to provide for access to such services. This would then place the onus on those who do not wish to provide this service to defend their decision, rather than burden the woman whose security and liberty interests are jeopardized by the lack of available services. Further, the legislation was undoubtedly of concern to the medical profession which publicly expressed its concern at single practitioners being held responsible for decisions on abortion. Previously, this responsibility, although present, was quite diffuse and collectively shared, indeed as to be anonymous.

III. *Conclusion*

In summary, the proposed Bill C-43 would (a) have attempted to force "healthy" women to bear children against their will by threat of criminal sanction, and (b) constituted a significant failure to ensure that women across Canada had rapid and equitable access to the necessary medical services. Clearly these are indeed matters of national concern and should not be forgotten along with the defeated bill. We must ensure that the inequality inherent in reproductive choices is understood and that criminalization will not be seriously considered again by any government as a solution to this concern.