Court Decisions in Canada on Abortion

This document is a complete compilation of court cases (with summaries and links) related to abortion rights in Canada.

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Abortion Rights Coalition of Canada

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Supreme Court Cases

Morgentaler v. The Queen (1976)

- March 26, 1976. 1 SCR 616
  https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2684/index.do
- The History of Abortion in Canada, Abortion Rights Coalition of Canada, March 2017.

Dr. Henry Morgentaler provided an abortion for a 26-year old woman in his Montreal clinic in contravention of the Criminal Code, which at the time allowed abortions to be done only in hospitals. Morgentaler testified that he did the abortion out of necessity because he was afraid that if he did not do so, the woman "might do something foolish." The issue in the case was whether there is a defence of necessity in Canada.

A majority of the Court (6 to 3) decided that the hospital provision was still valid because the general purpose of the law was to "protect the state interest and the foetus", which was sufficient to invoke the criminal law power under the Constitution. They did not recognize any necessity in providing the abortion. As this case predated the Charter, the court did not understand the impact on women's rights.

Quebec cases: Dr. Morgentaler was prosecuted three times by Quebec during the1970's for providing abortions, but the government failed to secure a conviction at a jury trial. (The cases are not listed separately in this document but described here).

- In 1973, Morgentaler used the defence of necessity, that abortions were necessary for his patients' life or health. The jury acquitted him. However, Quebec's provincial appeal court reversed the acquittal and replaced it with a conviction and a prison term.
- In 1975, a jury in Quebec again found Morgentaler not guilty, even though Morgentaler was already in prison. In 1975, Prime Minister Pierre Trudeau changed the law so that courts could not replace a jury acquittal by a conviction. This is called the Morgentaler Amendment.
- After Morgentaler was released from prison, Quebec again brought a case against him. A jury acquitted him for the third time. When the Parti Québécois was elected in 1976, it announced that it would not prosecute Morgentaler, so the repeated prosecutions came to an end.

It would not be until 1988, after the introduction of the Charter, that Morgentaler successfully challenged the criminal law provisions in R. v. Morgentaler (see pg 4).

Minister of Justice v. Borowski (1981)

- Dec 1, 1981. Minister of Justice (Can.) v. Borowski. 2 SCR 575.
  https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2531/index.do

Joe Borowski was a prominent crusader against abortion from Saskatchewan. Around 1980, he sought a declaration in Saskatchewan's Court of Queen's Bench that sections 251(4),(5),(6) of the Criminal Code allowing abortion were invalid because they infringed the right to human life contrary to the Canadian Bill of Rights. Borowski argued that jurisdiction lay exclusively with the Federal Court and he sought a ruling on a special motion dealing with jurisdiction. This was

rejected by the court and upheld on appeal (Saskatchewan Court of Appeal, 1 W.W.R. 1; [1980], 6 Sask. R. 218).

At the Supreme Court of Canada, the justices considered not only the issue of jurisdiction but also whether Borowski had legal standing for his legal action. The court granted standing on the basis that a person need only to show that they are directly affected by legislation they claim is invalid, or that they have a genuine interest as a citizen in the validity of the legislation and there is no other reasonable way to bring the issue before the Court. On the jurisdiction issue, the court ruled that the Federal Court of Canada did not have exclusive jurisdiction, which allowed the provincial case to go ahead.

The subsequent provincial cases are discussed on page 10.

R. v. Morgentaler (1988)

- Jan 28, 1988. 1 S.C.R. 30.
  http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do

Dr. Henry Morgentaler and two colleagues (Dr. Leslie Frank Smoling and Dr. Robert Scott) set up a clinic in Toronto to perform abortions for women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s.251(4) of the Code (now s.287(4)). The doctors were charged with violating the Code by attempting to procure abortions. The section was deemed unconstitutional at trial, but overturned on appeal.

Dr. Morgentaler had performed illegal abortions in both Ontario and Quebec, prior to and after 1982. He had been arrested multiple times but was almost always acquitted by juries. Morgentaler challenged that the Criminal Code section on abortion violated a women's right to Security of the Person under section 7 of the Charter of Rights and Freedoms.

The court struck down the abortion section from the Code as arbitrary and unconstitutional on Jan 28, 1988, with a ruling of 5-2 in favour, McIntyre and La Forest JJ dissenting.

Chief Justice Dickson said a woman's s.7 rights to security of person were infringed upon by the section, mainly because delays or inability to obtain abortion through the established procedure endangered women’s health. He also said that the mental anguish caused violated the Charter, which was a new idea. Justice Bertha Wilson found that the Code provision also violated women's rights to life, liberty, privacy, and conscience, and concurred with the majority's opinion. The infringement could not be saved by Section 1 of the Charter, because it leads to arbitrary medical standards across the country and harms to women’s health.

- Subsequent court rulings have entrenched the 1988 Morgentaler Decision and broadened its approach to Charter rights.
- The decision has become a cornerstone of human rights jurisprudence in Canada.
- Judges have cited it in dozens of court rulings. (e.g., striking down prostitution laws and anti-assisted suicide laws.)
- All subsequent provincial and federal court cases related to abortion have upheld women’s rights and denied fetal rights.
- The decision represented an important limit on provincial power to restrict abortion services (as that would intrude on federal jurisdiction).

Tremblay v. Daigle (1989)

- Nov 16, 1989. 2 S.C.R. 530.
  https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/515/index.do

An abusive ex-boyfriend, Jean Tremblay, obtained a provincial court injunction from Quebec preventing Chantal Daigle from getting an abortion. The trial judge found that a fetus is a "human being" under the Quebec Charter of Human Rights and Freedoms ("Quebec Charter") and therefore enjoys a "right to life" under section 1. The trial judge concluded this was in harmony with the Quebec Civil Code's recognition of the foetus as a juridical person and ruled that the respondent had the necessary "interest" to request the injunction. The trial judge also concluded, after considering the effect of the injunction on Daigle's rights under section 7 of the Canadian Charter of Rights and Freedoms and section 1 of the Quebec Charter, that the foetus' right to life should prevail. The injunction was upheld by a majority of the Court of Appeal.

Daigle appealed to the Supreme Court, but while waiting for the court decision, obtained an abortion in the U.S. The Supreme Court went ahead and ruled anyway, finding that a fetus has no legal status in Canada as a person, either in Canadian common law or in Quebec civil law. This meant that men cannot acquire injunctions to stop their partners from obtaining abortions in Canada.

R. v. Sullivan (1991)

- March 21, 1991. R. v. Sullivan (and Lemay). R1 SCR 489.
  https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/733/index.do

From LEAF case summary:

> In 1991, LEAF intervened in this Supreme Court of Canada appeal by two midwives who were convicted of criminal negligence causing bodily harm to a birthing mother due to the death of the unborn child. At the trial level, they were convicted of criminal negligence causing death to a person (the fetus). However, on appeal, the B.C. Court of Appeal substituted a conviction of criminal negligence causing bodily harm to the mother.
>
> This case raised the issue of the legal status of the fetus. LEAF's argument sought to both advance women's reproductive freedom and focus on the woman's relationship to her fetus, rather than placing the woman's and her fetus' rights in opposition. In LEAF's view, the harm in this case was to the mother as the fetus cannot be treated as legally autonomous from her as it is "in and of the mother" until fully born.
>
> The Supreme Court found that the fetus was not a person for the purposes of the *Criminal Code* offence of criminal negligence causing death to a person and therefore upheld the midwives' acquittal on that charge.

R v. Morgentaler (Nova Scotia) (1993)

- Sept 30, 1993. 3 SCR 463 (Nova Scotia Medical Services Act)
  https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1053/index.do

Summary from the Supreme Court decision:

> In March 1989, in order to prevent the establishment of free-standing abortion clinics in Halifax, the Nova Scotia government approved regulations prohibiting the performance of an abortion anywhere other than in a place approved as a hospital as well as a regulation denying medical services insurance coverage for abortions performed outside a hospital (the "March regulations"). The government later revoked these regulations and adopted the Medical Services Act and the Medical Services Designation Regulation, which continued the prohibition of the performance of abortions outside hospitals and the denial of health insurance coverage for abortions performed in violation of the prohibition. Despite these actions, the respondent [Dr. Henry Morgentaler] opened his clinic and performed 14 abortions. He was charged with 14 counts of violating the Medical Services Act. The trial judge held that the legislation was ultra vires [by] the province because it was in pith and substance criminal law and acquitted the respondent. This decision was upheld by the Court of Appeal.

The *Medical Services Act* can still be found online although it was struck down. The law prohibited the provision of "designated" medical services outside hospitals, including funding them. The second law, the *Medical Services Designation Regulation* was passed to list the designated services subject to the Act. Although not online, the Supreme Court case listed these services, and abortion was one of nine designated as prohibited and not funded outside hospitals.

However, the court noted that the "central purpose" of the Act and Regulation was not to regulate privatized medical care as the province claimed, but to target abortion and Dr. Morgentaler specifically. Further, the court said this was an attempt by the province to legislate in the area of criminal law, making it *ultra vires* – outside its jurisdiction. It upheld both the Nova Scotia trial case and appeal case in striking down both laws in their entirety.

Winnipeg Child and Family Services v. DFG (1997)

- Oct 31, 1997. Winnipeg Child and Family Services (Northwest Area) v. DFG, 3 S.C.R. 925.
  https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1562/index.do

From LEAF case summary:

> This case concerned the use of state powers to mandate how women live and manage their pregnancies.
>
> D.F.G., a young Indigenous woman, was pregnant. She struggled with an addiction to solvents. Winnipeg Child and Family Services applied for an order placing D.F.G. in the custody of the Director of Child and Family Services, and detaining her in a health centre for treatment until she had given birth. The Manitoba Court of Queen's Bench granted the order. The order was set aside on appeal to the Manitoba Court of Appeal. Winnipeg Child and Family Services appealed to the Supreme Court of Canada.

LEAF argued that the case not only subjected a pregnant woman to an unprecedented, expansive court order designed to control her behaviour during pregnancy. It also once again represented the state objectifying an Indigenous woman to achieve its goals at the expense of her health, personal integrity and dignity. The issues raised by court-ordered interventions into pregnancy had ominous implications for the courts, and far-reaching consequences for all women, and particularly for Indigenous women. These interventions would radically depart from existing precedents, and infringe upon women's equality rights in an unprecedented way.

OUTCOME: A majority of the Supreme Court of Canada dismissed the appeal, once again holding that fetuses were not legal persons and did not possess rights. The court did not have *parens patrie* jurisdiction (meaning jurisdiction over persons unable to protect themselves) over unborn children, and so the courts could not order the detention and treatment of a pregnant woman to prevent harm to the unborn child.

Dobson v. Dobson (1999)

- July 9, 1999. Dobson (Litigation Guardian of) v. Dobson. 2 S.C.R. 753. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1716/index.do

Issue: Should a mother be liable in tort for damages to her child arising from a prenatal negligent act that allegedly injured the fetus in her womb?

Cynthia Dobson was in her 27th week of pregnancy and driving her car when her negligent actions caused a car accident. The foetus was permanently injured, and was born prematurely that day. Her son, Ryan Dobson, suffered physical and mental injuries, including cerebral palsy. His grandfather launched a tort claim for damages against his mother, in order to collect on insurance money. Ryan was successful at the Court of Appeal, which his mother appealed.

The Supreme Court (Cory et al) found the mother should not be held liable in the situation because of the policy implications. They employed the Kamloops test to determine if a duty of care should be owed. It has two parts: Is the relationship between the two parties close enough to create a reasonable duty? Are there any public policy implications that should negate or limit the scope of the duty?

They find that the first part is satisfied; however, the public policy implications negate the duty. They state that there are two main reasons for this: it would violate the privacy and autonomy of women, and it is impossible to judicially define a reasonable standard of conduct for pregnant women. McLachlin, in a concurring judgment, states that another main reason why this duty cannot be imposed is that it would violate pregnant women's rights under the Charter – specifically liberty and equality. They would lose their liberty, and not be treated equally with other women in society.

An important quote from this decision:

> "A pregnant woman and her foetus are **physically one**, in the sense that she carries her foetus within herself. … The physical unity of pregnant woman and foetus means that **the imposition of a duty of care would amount to a profound compromise of her privacy and autonomy**."

R. v. Levkovic (2013)

- May 3, 2013. SCC 25 (CanLII), 2 SCR 204. https://www.canlii.org/en/ca/scc/doc/2013/2013scc25/2013scc25.html

For information, see page 19 for the subsequent Ontario case R. v. Levkovic (ON: 2014).

Federal Court of Appeal Cases

Everywoman's Health Centre v. Minister of National Revenue (1991)

- Nov 26, 1991. Everywoman's Health Centre Society (1988) v. M.N.R (C.A.), 1991 CanLII 13581 (FCA), [1992] 2 FC 52 https://www.canlii.org/en/ca/fca/doc/1991/1991canlii13581/1991canlii13581.html

Everywoman's Health Centre Society in Vancouver BC is a clinic that provides sexual and reproductive health services like pap tests, abortions, contraception, and sexually-transmitted-infection screenings. Shortly after its founding in 1988, the centre applied for charity status under the head "other purposes beneficial to the community," which includes various charitable purposes that do not fall within the other three purposes (religion, poverty, education) but which the courts have recognized as charitable, such as protection of health or advancing the arts.

The Minister of National Revenue (via the CRA) refused to grant charity status to the centre, claiming that "absent clear statements of public policy and absent public consensus on the abortion issue, it cannot be said that the (appellant)'s activities are beneficial to the community in a way the law regards as charitable".

The Federal Court of Appeal held that the centre's true purpose was not political (e.g. "alteration of the law with respect to abortion" or "promoting the pro-choice view"), but rather "dispensation of health care to women who want or need an abortion." Justice Decary concluded the decision by saying: "The controversy that surrounds abortion should not deter us from seeking the true purpose of the clinic, which is to benefit women receiving a legally recognized health care service in a legally constituted clinic".

Human Life International v. Minister of National Revenue (1998)

- March 18, 1998. Human Life International in Canada Inc. v. M.N.R. (C.A.), 1998 CanLII 9053 (FCA), [1998] 3 FC 202 https://www.canlii.org/en/ca/fca/doc/1998/1998canlii9053/1998canlii9053.html

This anti-choice charity was engaging in anti-abortion publicity campaigns under the guise of educating the public. The Minister (via the CRA) audited the group in1989 and again in 1993, finding then that the group's activities could not be justified under either "advancement of education", or "other purposes beneficial to the community". The Minister's letter stated that activities which are designed essentially to sway public opinion on a controversial social issue are not charitable, but political and subsequently revoked their charitable status because "The

organization spent a substantial portion of its resources on activities designed to sway public opinion on controversial social issues." In other words, the group's purpose was too politically focused and not charitable in nature.

Human Life International appealed, but the Federal Court of Canada found that the charity failed to establish that the Minister was wrong on the facts on which revocation was based. The appeal was dismissed and the group lost their charitable status.

Alliance for Life v. Minister of National Revenue (1999)

- May 5, 1999. Alliance for Life v. M.N.R. (C.A.), 8152 (FCA), [1999] 3 FC 504. Federal Court of Appeal. https://www.canlii.org/en/ca/fca/doc/1999/1999canlii8152/1999canlii8152.html

In 1989, the Minister of National Revenue (via the CRA) gave notice to the anti-abortion group Alliance for Life that its charitable status would be revoked because an audit had found that the charity was failing to devote all of its resources to charitable activities. The group did not meet the definition of "charitable organization" under the income Tax Act since most of its activities were viewed either as not being for the advancement of education or as being primarily of a political nature. The group appealed the Minister's decision.

The Federal Court of Appeal upheld the decision by the Minister of National Revenue. The court said that in order to fit within the charity's purpose of "advancement of education," the organization must provide information "in a structured manner that would genuinely advance education," and put learners "in a position to weigh the [group's] viewpoints against opposing viewpoints in making up their minds one way or the other". The Court found Alliance for Life had not met this requirement because they were not "structured in a manner that allowed the public to weigh [their] viewpoints against opposing viewpoints."

The court also said that the bulk of the group's materials was "political" and that its "true mission was more likely that of advocating its strongly held convictions on important social and moral issues in a one-sided manner to the virtual exclusion of any equally strong opposing convictions."

Provincial Cases

Borowski v. Canada (SK: 1984/1987)

Two cases:

- 1984. Borowski v. Canada (Attorney General). Court of Queen's Bench.
- 1987. Borowski v. Canada (Attorney General), (1987) 56 Sask.R. 129 (CA). Saskatchewan Court of Appeal. https://ca.vlex.com/vid/borowski-v-can-g-681514449
- Dunsmuir, Mollie. 1998. *Abortion: Constitutional and Legal Developments*.

The Borowski case is significant because the Appeal court recognized that fetuses are not persons and do not have rights under the law, and were never intended to be included in the word "everyone" in the Charter.

Although Borowski appealed to the Supreme Court of Canada, that court did not make a ruling, stating that the case was now moot because of the 1988 R v. Morgentaler decision, and Borowski no longer had standing (Borowski v. Canada (Attorney General). [1989] 1 SCR 342).

From the book The Charter of Rights, by Ian Greene, pg 175, including Sask Court of Queen's Bench reasoning for why the fetus does not have rights:

In 1984 Borowski failed in his bid to obtain a declaration from the Saskatchewan Court of Queen's Bench that the Criminal Code provisions that allow for abortions in certain circumstances are contrary to the Charter and therefore of no force and effect. His position was that the right to life of the fetus is protected under section 7 of the Charter.

Borowski appealed to the Saskatchewan Court of Appeal. Because section 15 of the Charter was in effect by the time the appeal case was argued, Borowski contended that the abortion law also violated section 15 of the Charter, because it denied the fetus the equal protection of the law. The court rendered its decision on April 30, 1987, and Borowski lost again.

To put the issue in perspective, it is useful to review the reasoning of the Saskatchewan Court of Appeal in dismissing Borowski's claim. The court could find no example of a fetus having the rights of a "person" in any common-law jurisdiction. In several instances, a person had successfully sued for damages caused to him or her while a fetus. However, the fetus had already attained "personhood" by virtue of having been born. No court had ever entertained a suit by a fetus before birth, and a fetus that was not born alive had never been considered to be a "person." Outside the common-law world, only in West Germany did the fetus have the status of a legal person in some respects. However, the court attributed this to West Germany's distinct legal tradition, and especially to the current regime's reaction to the former Nazi regime's flagrant disregard for the fetus. Thus, from a legal perspective, the Charter could not be presumed to have changed the legal definition of "person."

With regard specifically to section 7, the Court of Appeal recalled that in the *B.C. Motor Vehicle* decision (see chapter 5), the Supreme Court had determined that sections 8-14 of the Charter are examples of the kinds of rights protected by section 7. Sections 8-14 protect, for example, the right of "everyone" to be secure against unreasonable search or seizure and not to be arbitrarily detained or imprisoned. Because it is impossible to imagine these rights applying to the fetus, Parliament could not have intended section 7 to apply to the fetus.

The court also noted that a 1981 statement in the House of Commons by Robert Kaplan, the solicitor general, supported the view that the words "everyone" in section 7 and "every individual" in section 15 were not intended to include the fetus. Kaplan declared that the inclusion of these words in the Charter had not shifted "any responsibility away from Parliament to deal with [the abortion] question."

As well, the judges noted that Canadian courts, in interpreting the Canadian Bill of Rights, had rejected the argument that "an unborn person is a human being from the moment of conception, or shortly thereafter, and that abortions result in [denying the fetus] equality before the law."

The Court of Appeal concluded that "the Charter is neutral in relation to abortion; it remains for Parliament, reflecting the will of the Canadian people, to determine without reference to the Charter in what circumstances the termination of pregnancy will be lawful or unlawful."

Baby R, Re (BC: 1988)

- Aug 5, 1988. Baby R, Re (Superintendent of Child Welfare), 1988 CanLII 3132 (BC SC). www.canlii.org/en/bc/bcsc/doc/1988/1988canlii3132/1988canlii3132.html?resultIndex=1
- LEAF case summary

After a woman refused to consent to a caesarian section, the Superintendent of Child Welfare secured an order to apprehend her foetus several hours before its birth. Following the birth, the child ("Baby R") was physically taken into the custody of the Superintendent and placed in a foster home pending the hearing. Baby R's mother opposed the action first in provincial court, and then in the British Columbia Supreme Court.

The main issue was whether an unborn child is a child within the meaning of the *Family and Child Service Act* in order to give the Superintendent jurisdiction to apprehend. Under the *Act*, apprehension proceedings are authorized where a child is "in need of protection". "Child" is defined in the *Act* as "a person under 19 years old". "Person" is not defined. LEAF was granted intervener status and argued that the term "child" in the *Act* does not include a foetus and apprehension of a foetus violates the rights of women protected in sections 7, 15 and 28 of the *Canadian Charter of Rights and Freedoms*.

The British Columbia Supreme Court allowed Baby R's mother's appeal and stated that: "the powers of the Superintendent to apprehend are restricted to living children that have been delivered. Such powers to interfere with the rights of women, if granted and if lawful, must be done by specific legislation and anything less will not do."

Morgentaler v New Brunswick (NB: 1989)

- 13 April 1989. Morgentaler v. New Brunswick (Attorney General) et al., 1989 CanLII 8086, Court of Queen's Bench.
- Not online, but the case is discussed in: *The closure of the Morgentaler Clinic and the rule of law in New Brunswick*, by Jula Hughes, NB Media Coop, April 18, 2014.

Dr. Henry Morgentaler sued the New Brunswick government for reimbursement for three abortions provided to New Brunswick women at his clinic in Quebec. Morgentaler argued that he should be reimbursed under New Brunswick Medicare as the policies restricting abortion access in New Brunswick did not apply to out-of-province services. Those policies included a prohibition on doctors providing abortions outside hospitals.

The court declared the policy to be invalid as it had never been expressly or formally adopted and could not be supported by legal provisions making it professional misconduct for a physician to perform an abortion outside of an approved hospital. It concluded that these provisions had no effect on physicians of other provinces and services performed outside of New Brunswick. Moreover, it ruled that there was no statutory warrant at all for the physician approval and performance requirements of the policy.

Despite the court order, New Brunswick never paid for the procedures done at the Montreal clinic. (See page12 for NB cases in 1993, 1994, and 1995.)

Nova Scotia v. Morgentaler (NS: 1989)

- Nov 3, 1989. Nova Scotia (Attorney General) v. Morgentaler, (1989) 93 N.S.R.(2d) 202 (TD). Nova Scotia Supreme Court. https://ca.vlex.com/vid/n-s-g-v-681078189

The government of Nova Scotia charged that the defendant was performing abortions in his abortion clinic in violation of section 4 of the Nova Scotia *Medical Services Act*, 1989, which prohibited abortions outside hospitals. It sought an interim injunction to prevent the defendant's activities.

The court granted the request for an injunction, stating that there was an overwhelming public interest that provincial laws not be flouted. It rejected the argument that the Supreme Court's 1988 decision in R. v. Morgentaler prohibited provinces from passing laws restricting the performance of abortions to hospitals.

The decision was overturned in 1993 by the Supreme Court of Canada. See page 6.

Morgentaler v. New Brunswick (NB: 1993 to 1995)

Three cases:

- 1993. Morgentaler v. New Brunswick (Attorney-General). Court of Queen's Bench.
- 1994. Morgentaler v. New Brunswick (Attorney-General), 117 D.L.R. 753, 1994. Court of Queen's Bench.
- 1995 (Jan 23). Attorney General of New Brunswick v. Morgentaler, NB Court of Appeal.
- Not online, but the cases are discussed in: *The closure of the Morgentaler Clinic and the rule of law in New Brunswick*, by Jula Hughes, NB Media Coop, April 18, 2014.

After the 1993 Supreme Court decision striking down Nova Scotia's law prohibiting abortions outside hospitals (see page 6), Dr. Morgentaler applied to the New Brunswick Court of Queen's Bench for a declaration of invalidity of the New Brunswick version of the law, which was a 1985 amendment to the Medical Act stating that "physicians could be found guilty of professional misconduct if they were involved in performing an abortion elsewhere than in a hospital approved by the Minister of Health."

The New Brunswick court struck down that law in 1993.

In 1995, a majority of the New Brunswick Court of Appeal upheld the decision, finding the impugned sections of the Act to be unconstitutional as they were beyond the jurisdiction of the New Brunswick legislature, and concluded that the legislature sought to prohibit abortions outside hospitals. The decision stated:

> "The Nova Scotia legislation attempted to mask its true intent, namely, the prohibition of abortions except in certain circumstances, while the New Brunswick legislation openly prohibits the same conduct. That distinction and the fact that the New Brunswick legislation, unlike the Nova Scotia legislation, was enacted before the Supreme Court of Canada struck down the abortion provisions in the Criminal Code of Canada in R. v. Morgentaler, 1988…cannot, in our view, change the true nature of the impugned legislation and its dominant purpose, which is the prohibition of conduct that the Province considers to be socially undesirable."

The court also stated that the creation of the amendment was not in the interest of ensuring the highest quality of care for women in the province, but that it was designed to "prohibit the establishment of free-standing abortion clinics and, particularly, the establishment of such a clinic by Dr. Morgentaler."

Leave to appeal to the Supreme Court of Canada was denied to the NB government, Morgentaler's license was reinstated, and his clinic was allowed to remain open.

Historical addendum: Dr. Morgentaler's clinic opened in New Brunswick in 1994. The McKenna government immediately responded by invoking the 1985 Medical Act amendment prohibiting doctors from providing abortions outside hospitals. The clinic was forced to close on the day it opened, and the law also put pressure on the New Brunswick College of Physicians and Surgeons to suspend Morgentaler's license, which they promptly did.

Also in 1994, the province created regulations that prohibited abortions to be paid by Medicare unless two medical doctors must deem the abortion as medically necessary, and the procedure must be performed in a hospital by a specialist in gynecology or obstetrics. While the two-doctor requirement was repealed by the province's Liberal government in 2014, the payment restriction limiting funded abortions to hospitals continues to this day, and directly led to the closure of Fredericton's Morgentaler Clinic in 2013 and Clinic 554 in 2024.

Ontario v. Dieleman (ON: 1994)

- Aug 30, 1994. Ontario (Attorney-General) v. Dieleman. (ON SC) 117 DLR (4th) 449 — 49 ACWS (3d) 1059 — 24 WCB (2d) 302. Ontario Court of Justice – General Division, Toronto. https://www.canlii.org/en/on/onsc/doc/1994/1994canlii7509/1994canlii7509.html

This case heard evidence around the extent and nature of anti-choice protesting outside clinics in Ontario. The court granted a court injunction to three clinics in Toronto: Scott, Cabbagetown, and Choice In Health. The latter is no longer protected as they have moved to a new location, and Scott has since closed down. The Dieleman injunction also protects four specific hospitals in the province. Although the injunction was meant to be temporary, it is still being used today, even with the 2017 passage of Ontario's *Safe Access to Abortion Services Act* (which does not protect hospitals).

The injunction provides for a 60-foot "no protest" zone, surrounded by a 100-foot "deep zone" of restricted access in which staff and patients have a 10-foot personal zone. It also provides for a 500-feet zone around doctor's homes and a 15-foot zone around doctor's office buildings.

Excerpts from the Court's judgment regarding harm to patients caused by protesters:

> "The evidence at hand supports the government concern for the physiological and psychological health of women patients. The injunction sought seeks, in part, to remove the very close contact between animated right-to-life proponents and vulnerable women patients outside abortion clinics and hospitals immediately before these women are to undergo a serious medical procedure. There can also be no doubt that this moment and this decision constitute one of the most painful and intimate situations a woman can encounter. The risk of physiological complications increases with higher dosages of sedative. While the actual occurrence of such complications is hotly disputed by the defendants, the risk is statistically present and therefore real, at least at this stage of the

proceedings. The abortion procedure at the freestanding clinics is carried out under local anaesthetic and, accordingly, the patient is aware at all times, making her cooperation and relaxation crucial to a successful procedure. It seems reasonable to conclude, on the material before the court, that an increase in the patient's level of anxiety, fear and discomfort increases the danger associated with an otherwise safe procedure and thus increases the risk to the patients' life or health." (pg 406-407)

"A woman who is traumatized by protesters as she approaches an abortion clinic may, as the evidence indicates, remain in this emotional state after she enters the facility to receive medical care. This is particularly likely when the patient realizes she will encounter the protesters upon her departure. Medical staff at these clinics state that protesters leave patients crying and in great distress. This stress complicates counselling, increases the health risks and prolongs recovery times." (pg 420-421)

R. v. Drummond (ON: 1996)

- 1996. 143 D.L.R. (4th) 368, 5 C.R. (5th) 380, 112 C.C.C. (3d) 481. Ontario Provincial Court.
- Not online, but more info here:
  - *Charges dismissed against Drummond*, Pro-Choice Press, Winter 96/97.
  - Fostering Relationships: The State and Pregnancy, by Nathalie Levman. Jan 1999.

Brenda Drummond was acquitted of murder by an Ontario court after shooting a pellet gun into her birth canal two days before her full-term son was born. He was injured, but made a full recovery.

The charge of attempted murder was dismissed by the court on the basis that a fetus is not legally a person and therefore not included in the Criminal Code. However, Drummond was convicted of failing to provide the necessities of life to her born-alive child, as she did not seek medical help for him. The Attorney General of Ontario decided not to appeal the decision.

P.E.I. v. Morgentaler (PE: 1996)

- Sept 13, 1996. P.E.I. (Minister of Health and Social Services) v. Morgentaler, CanLii 3713, Prince Edward Island Supreme Court - Appeal Division (PE SCAD). www.canlii.org/en/pe/pescad/doc/1996/1996canlii3713/1996canlii3713.html?resultIndex=1

This case was an application by Dr. Henry Morgentaler for a declaration that a regulation made under the PEI Health Services Payment Act was ultra vires (beyond the jurisdiction of the province). The regulation in question provided that abortions would be paid for only if performed in a hospital and if found to be medically necessary by the Health and Community Services Agency. The application was granted, as the PEI Supreme Court found the impugned regulation to be beyond the mandate of the Agency.

Under the Act, the legislature conferred on the Agency broad discretion to prescribe which basic health services would be insured and to impose conditions for eligibility. However, it did not authorize the Agency, having determined that abortion is a basic health service, to then exclude some abortions from coverage on grounds that were "extraneous to, inconsistent with, and contradictory to, the objects and purposes of the Act."

Maurice Lewis v. Regina (BC: 1997)

- Oct 14, 1997. R. v. Lewis (M.W.), (1997) 98 B.C.A.C. 96 (CA). BC Court of Appeal. https://ca.vlex.com/vid/r-v-lewis-m-681232541

Maurice Lewis was arrested for violating the *Access to Abortion Services Act* in BC (passed in Sept 1995) by protesting within the zone just outside the Everywoman's Health Centre in Vancouver. He was found not guilty in the first trial, and the trial judge struck down some parts of the Act as violating protesters' freedom of expression. The Crown appealed. In the appeal, Justice Mary Saunders convicted Lewis and upheld the entire Act. Lewis then appealed the decision to the BC Court of Appeal, but died before his appeal could be heard.

Lewis' case became part of a later case for two other protesters arrested under the Act – R. v. Spratt. See page 16.

Jane Doe et al. v. Manitoba (MB: 2004 to 2008)

Four cases:

- Dec 22, 2004. Jane Doe 1 v. Manitoba, 2004 MBQB 285, 248 D.L.R. (4th) 547 (Q.B.) https://www.canlii.org/en/mb/mbqb/doc/2004/2004mbqb285/2004mbqb285.html
- Sept 30, 2005. Jane Doe 1 v. Manitoba, 2005 MBCA 109, 260 D.L.R. (4th) 149 (C.A.). https://www.canlii.org/en/mb/mbca/doc/2005/2005mbca109/2005mbca109.html
- Feb 23, 2006. Jane Doe 1 and Jane Doe 2, on their own behalf, and on behalf of certain pregnant women who are insured persons pursuant to the Health Services Insurance Act, R.S.M. 1987, c. H35, and who require access to therapeutic abortion services v. Government of Manitoba, 2006 CanLII 5401 (S.C.C.) https:/www.canlii.org/en/ca/scc-l/doc/2006/2006canlii5401/2006canlii5401.html
- July 31, 2008. Jane Doe 1 and Jane Doe 2 v. Manitoba (The Government of), 2008 MBQB 217. www.canlii.org/en/mb/mbqb/doc/2008/2008mbqb217/2008mbqb217.html

In a class-action suit filed in 2001 against the government of Manitoba, two women who had abortions at Winnipeg's Morgentaler Clinic (later becoming Jane's clinic) said they had to pay for their own abortions at the non-funded clinic. They aimed to strike down as unconstitutional a Manitoba law that prevented government funding for abortions outside of public hospitals. Both women were told they would have to wait four to eight weeks for a funded hospital abortion.

In December 2004, the Court of Queen's Bench of Manitoba granted summary judgment in favour of the plaintiffs, finding that the legislation violated section 7 of the Charter because legislation that forces women to have to stand in line in an overburdened, publicly-funded health care system and to have to wait for a therapeutic abortion, is a gross violation of the right of women to both liberty and security of the person as guaranteed by s. 7 of the Charter. The judge also said that women who paid for such abortions on their own in the past should be able to obtain refunds.

The Court also found that the legislation violated section 2(*a*) (freedom of conscience) and section 15 (equality rights) of the Charter. The impugned sections of the Act were found to be invalid. Since July 2005, abortions performed in private clinics in Manitoba have been publicly funded. In Nov 2005, Manitoba passed a regulation to revise government policy to allow private abortion clinics to receive provincial funding for the procedure.

Association pour l'accès à l'avortement c. Québec (QC: 2006)

- Aug 17, 2006. Quebec Superior Court. http://tjl.quebec/wp-content/uploads/2015/04/Association-acces-avortement-c.-PG-2006.pdf

As part of a 1999 funding agreement between the Quebec Department of Health and the Federation of General Practitioners of Quebec, fees of doctors practising in private clinics were reduced by 75% after they performed a certain number of abortions. As a result, the clinics where these doctors worked were forced to charge women $200-300 per procedure in order to cover their costs.

The Association pour l'accès à l'avortement brought a class action suit against the Quebec government to recover those fees. The Quebec Superior Court, mindful of the fact that the Department of Health was aware of the situation and that such fees were necessary for the clinics' survival, found that the government had created a system where it was in effect forcing the clinics to contravene the law, which does not allow clinics to charge such fees. The Court granted the application and found that the Government of Quebec must reimburse women who obtained abortions in clinics and paid these extra fees between 1999 and 2006.

R. v. Spratt (BC: 2008)

- Sept 4, 2008. R. v. Spratt, 2008 BCCA, 340, Court of Appeal for BC: https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca340/2008bcca340.html
- Case summary by LEAF.
- *Convicted anti-abortion protesters challenge clinic access zone (and lose),* Pro-Choice Action Network, Sept 2007.

Protesters Don Spratt and Gordon Watson were arrested in 1998 and convicted under BC's *Access to Abortion Services Act* in 2000. They appealed the decision to the BC Court of Appeal. The previous Maurice Lewis v. Regina case (see page 15) then Maurice Lewis v. Regina (BC: 1997)became part of the Spratt/Watson case.

The appeal focused only on whether the Act's admitted infringement of freedom of speech meets the test of Section 1 of the Charter, which states that an infringement of a fundamental right is allowed only if it meets "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The appeal court unanimously upheld the Access to Abortion Services Act on the basis that the legislation infringes only minimally on the constitutionally protected right to freedom of expression, and was justifiable to protect a woman's right to medical services.

When the protesters appealed to the Supreme Court of Canada, it declined to hear the appeal, which means the Act stands as constitutional.

Relevant excerpts from the 1997 Lewis case about harms of protesters to patients:

> Pp 58: "These unsolicited and unwanted encounters immediately outside the clinic between women using the clinic and the pro-life protesters …is [sic] likely to cause, at the lesser end, embarrassment and anger, and at the greater end, psychological

pressure, physical symptoms of anxiety and stress, and generally a departure from the ideal state for medical service of calm and relaxation..."

Pp 75: …they [the protesters' offensive messages] cause real harm to women by generating more distress immediately before the procedure. … [cites the Cozzarelli-Major study conclusion] … Even without Dr. Major's evidence, the evidence from those who work at the clinic, including two administrators and a counsellor, confirms the loss of calm and the increase in generally deleterious effects upon women entering the clinic caused by the presence of protesters and communications from them."

Morgentaler v. New Brunswick (NB: 2009)

- May 21, 2009. NBCA 26. Court of Appeal of New Brunswick. https://www.canlii.org/en/nb/nbca/doc/2009/2009nbca26/2009nbca26.html

Dr. Morgentaler brought an action in 2004 challenging the legality of a regulation under the New Brunswick *Medical Services Payment Act* that excludes abortions performed in non-hospital settings from the statute's definition of "entitled services." Dr. Morgentaler sought a declaration that this regulation not only violates the *Canada Health Act*, but also is unconstitutional in that it violates rights guaranteed by sections 7 and 15 of the Charter.

The province engaged in delaying tactics for several years, challenging Dr. Morgentaler's standing to even bring the case. Finally, the Court agreed in 2009 to grant Dr. Morgentaler public interest standing to bring his legal challenge. The Court found that there was a serious issue to be tried and that, while there were other classes of persons more specifically affected by this regulation, mainly women who have undergone abortions at Dr. Morgentaler's Fredericton Clinic, there are many valid reasons why these women would not or could not bring this challenge and that Dr. Morgentaler was therefore "a suitable alternative person to do so."

However, by then Dr. Morgentaler had exhausted his financial resources, and also due to his advancing age, he decided not to continue with the suit.

Lobo v. Carleton University (ON: 2012)

Three cases:

- Jan 10, 2012: ONSC 254. Ontario Superior Court of Justice. https://www.canlii.org/en/on/onsc/doc/2012/2012onsc254/2012onsc254.html
- June 29, 2012: ONCA 498. Court of Appeal for Ontario. https://www.canlii.org/en/on/onca/doc/2012/2012onca498/2012onca498.html
- July 11, 2012; ONCA 498. Court of Appeal for Ontario. https://www.ontariocourts.ca/decisions/2012/2012ONCA0498.htm

The Court ruled that the Charter did not apply to Carleton University (CU). CU's refusal of Carleton Life Line's request to display its Genocide Awareness Project in an outdoor area of campus was characterized as "book[ing] university space for non-academic extra-curricular use," and thus not subject to the Charter (at para 4). (from https://ablawg.ca/2015/02/06/5332/)

The following is excerpted from an article on the Queens University webpage: https://www.queensu.ca/hreo/initiatives/human-rights-legislation-group/meeting-9-round-including-bullying

> In the fall of 2010, Carleton Lifeline requested permission to display its Genocide Awareness Project in an outdoor location of Carleton University. The University declined to grant permission on the grounds that the graphic images of the exhibit might be "offensive and disturbing" to some members of the community. It did, however, offer the group space in an indoor location. The students protested this decision but the University held firm. Against the University's wishes, Carleton Lifeline went ahead with their exhibit in the outdoor area. The University called the police, which attended the scene and arrested several students for trespass. The charges were later dropped.
>
> Two members of the group subsequently filed a lawsuit against the University. In their statement of claim they "alleged breaches of ss. 2, 9, and 15 of the Charter of Rights and Freedoms ("Charter"); breach of university policies; breach of a fiduciary duty; damage to reputation; wrongful arrest; breach of contract; and claims in negligence both against CU and [...] individually named Defendants".
>
> The University tried twice to have the lawsuit struck down. In a 2011 ruling, the court "dismissed the Defendants' motion in respect of the wrongful arrest claim, struck the claim for breach of fiduciary duty without leave to amend, and struck the remaining claims with leave to amend within 30 days". The students amended their remaining claims in accordance with the court's orders, which the court, in its 2012 ruling, summarized as follows:
>
> > "The amended pleading details the relationship between CU, its employees and the Plaintiffs, as full-time fee paying students; the rights and obligations of the parties as described by reference to CU's internal policies, namely the Human Rights Policies and Procedures ("HRPP") and the Student Rights and Responsibilities Policy ("SRRP"); it quotes verbatim from the first and second paragraphs of the HRPP where CU acknowledges "a legal undertaking and responsibility to prevent discrimination"; the reasonable expectations of the Plaintiffs in relation to the policies; how CU fell short of its obligations; and the harm which flowed, including damage to reputation from CU's use of its authority to engage the police and other measures against the Plaintiffs."(23)
>
> In this decision, the court ruled on the University's application to strike the amended statement of claim "with respect to the Charter claims, the negligence claims both as they relate to CU and the individual Defendants, and the stand alone claims pertaining to the university policies."

R. v. Von Dehn (BC: 2013)

- April 25, 2013, BCCA 187. BC Court of Appeal. http://www.courts.gov.bc.ca/jdb-txt/CA/13/01/2013BCCA0187.htm
- Abortion protesters who thought they found loophole in 'bubble zone' law lose B.C. appeal, by Joseph Brean, National Post, April 29, 2013.

On June 19, 2009, Cecilia "Sissy" Von Dehn and Donald David Spratt, both long-time anti-abortion activists, distributed copies of the Access to Abortion Services Act inside the bubble zone outside Everywoman's Health Centre, an abortion clinic in Vancouver that is protected by the Act. Spratt wore duct tape over his mouth, but sometimes took it off to speak with people. Both wore sandwich boards that read: "CAUTION! YOU CAN BE ARRESTED HERE UNDER BILL 48" and "BE INFORMED! THIS AREA IS A B.C. LEGISLATED ACCESS ("BUBBLE") ZONE! Read "BILL 48²"

They claimed that they were not, in fact, protesting abortion, but rather distributing "neutral information" about the law that bans protesting and "sidewalk interference" within 50 meters of an abortion facility. But the BC Court of Appeal found that the pair went to that location with the purpose of testing the law. Justice John E. Hall dismissed their appeal, saying: "The location is what makes their conduct impermissible." He also upheld the trial judge's decision that their behaviour constituted protest, defined as "any act of disapproval or attempted act of disapproval, with respect to issues related to abortion services."

R. v. Levkovic (ON: 2014)

- Sept 24, 2014. ONCS 5544. https://www.canlii.org/en/on/onsc/doc/2014/2014onsc5544/2014onsc5544.html

The Ontario Superior Court of Justice acquitted the defendant of concealing the body of a child, noting the possibility that she self-induced an abortion. The woman had apparently tried and failed to get a legal abortion in 2005 after being five months pregnant, and may have tried to abort the fetus herself. She wrapped the fetus in a towel and left it in a bag on the balcony of an apartment in Mississauga after the tenants vacated. The remains were of a female delivered "at or near full term". The cause of death could not be determined and it was unknown whether there had been a live birth.

Although the judge (J. Skarica) was stigmatizing and judgmental towards the defendant, he acquitted her because the Supreme Court of Canada had concluded in a previous 2013 decision related to this case "that there can be no conviction pursuant to s. 243 in these circumstances."

That Supreme Court case (R. v. Levkovic SCC 25, [2013] 2 S.C.R. 204) centred on the constitutionality of section 243 of the Criminal Code, which prohibits disposal of a dead body of a child with the intent to conceal its delivery, regardless of whether the child died before, during or after birth. The questions before the court were whether the provision, was "impermissibly vague" in its application to a child dying *before* birth, and whether the provision "infringes rights to liberty and security of person."

Relevant excerpts from the SCC decision (bold added):

> "A plain reading of its text makes clear that s. 243 is focused on the event of birth. The phrase 'before, during or after birth' leaves no room for doubt in this regard. Indeed the parties agree that in its application to a child that died before birth, **s. 243 applies only to stillbirths — not to miscarriages or abortions**." (para 44)
>
> "…s. 243 ultimately serves to protect children born alive and a **subset of children that died before birth**." (para 67)
>
> "In its application to a child that died before birth, s. 243 only captures the delivery of a child that was likely to be born alive." (para 78)
>
> "…s. 243 does not violate s. 7 of the Charter. Section 243 gives women — and men — fair notice that they risk prosecution and conviction if they dispose of the remains of a child born at or near full term with intent to conceal the fact that its mother had been delivered of it. And s. 243 limits with sufficient clarity the discretion of those charged with its enforcement." (para 80)

Wilson v. University of Calgary (AB: 2014)

- April 1, 2014. ABQB 190. https://www.canlii.org/en/ab/abqb/doc/2014/2014abqb190/2014abqb190.html
- New stories: McLeans, Feb 2, 2009 • CBC, April 19, 2010 • CTV, June 18, 2014

The Wilson case has its roots in 2006, when University of Calgary students belonging to the anti-choice Campus Pro-Life (CPL) began displaying graphic signage on campus. In 2006 and 2007, the U of C posted warning signs nearby, stating that the display was extremely graphic but Charter-protected. In 2008, citing safety and security concerns, the U of C notified the students that they must set up their display with signs facing inwards, or risk arrest and expulsion. In 2009, the students defied the requirement and U of C charged them with trespassing. The Crown withdrew the charges before trial, but in 2010, the U of C found the students guilty of non-academic misconduct for failing to comply with the notice requiring them to turn their signs inward.

The students appealed to the Appeal Board, which passed a motion not to accept the students' request for an appeal hearing because none of the grounds of appeal had been proven. The students appealed to the Board of Governors, which delegated its authority to hear the appeal to the Student Discipline Appeal Committee. The Chair of the Committee concluded that the record did not warrant convening the Committee for further consideration of the students' appeal. The students applied for judicial review. The Alberta Court of Queen's Bench (ABQB) allowed the application and ordered the Committee to convene as soon as practical to hear the students' appeal.

Justice Karen Horner found that the university failed in its obligation to consider the Charter interests of the students when making its decision. The judge ordered the Student Discipline Appeal Committee to convene as soon as practical to hear the students' appeal. (It appears that the students never took up their right to appeal, possibly because they were no longer U of C students by 2014.)

BC Civil Liberties Association v University of Victoria (BC: 2015)

- Jan 14, 2015. BCSC 39. British Columbia Supreme Court. https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc39/2015bcsc39.html

This case involved the university prohibiting an anti-choice group from using campus space for its activities. The question in the case was whether universities are subject to the Charter and must therefore respect students' freedom of expression rights. The court ruled that the Charter did not apply, distinguishing the case from a previous Alberta ruling that said the university violated the Charter rights of two students during disciplinary proceedings [Pridgen v University of Calgary, 2010 ABQB 644].

The following is adapted from *Does the Charter Apply to Universities? Pridgen Distinguished in U Vic Case*, Feb 6, 2015 by Linda McKay-Panos:

> Cameron Côté, a former student at the University of Victoria, was on the executive of a student club called Youth Protecting Youth (YPY). He was informed by the President of the Students' Society that the University had prohibited YPY from using campus space because of its prior activities (i.e., anti-abortion activities). The activity proceeded and YPY and Côté were admonished for defying the direction of the president of the Students' Society. Côté and the British Columbia Civil Liberties Association (BCCLA) asked the BC Supreme Court, among other things, for a declaration that any restrictions or regulations placed by the UVic on students who wish to use the school for "expressive purposes" be consistent with the Charter.
>
> In addressing the issue of whether the University policies were subject to the Charter, the BCCLA and Côté relied on Justice Paperny's judgment in Pridgen to support their position that any regulation of speech on University property is subject to Charter scrutiny (at para 137). Recall that Justice Paperny's reasoning was based on the determination that the university was exercising statutory authority and thus was subject to the Charter.
>
> [The following differences from Pridgen were found; summarized:]
>
> - Some judges disagreed with Justice Paperny in Pridgen in terms of the Charter issue, e.g., saying a ruling on the application of the Charter was unnecessary in that case.
> - Côté, unlike the Pridgens, was not subject to any actual discipline by the University.
> - Alberta's legislation differs from the BC University Act, which prohibits the Minister from interfering with certain powers granted to the University and gives the president and senate authority over student discipline.
> - In booking space for student club activities, the University is neither controlled by government, nor performing a specific government policy or program.
> - The decisions made by the University were within the University's "sphere of autonomous operational decision-making" and not subject to the Charter.
>
> Justice Hinkson thereby concluded that the Charter did not apply to the activity of booking space by students (at para 152). He declined to grant the declarations sought by Côté and the BCCLA.

CCBR v. City of Peterborough (ON: 2016)

- Sept 7, 2016. Canadian Centre for Bio-Ethical Reform v City of Peterborough, 2016 ONSC 1972. Divisional Court. https://www.canlii.org/en/on/onscdc/doc/2016/2016onsc1972/2016onsc1972.html

The City of Peterborough had refused to post advertisements from the Canadian Centre for Bio-Ethical Reform (CCBR) that contained offensive images and messages advocating against abortion. The CCBR threatened to sue. Upon advice from its Legal Services department, the City reversed its decision and consented to the ad, seemingly unaware of the many existing legal precedents that limit freedom of expression in ways that are not unconstitutional.

In late 2015, the CCBR sought to have the City's agreement to run the ad entered as a court order – that is, the anti-choice group wanted a guarantee that their ad would run. In its Feb 2016 decision, the Ontario Superior (Divisional) Court had little choice but to accept CCBR's arguments and grant the court order requiring the city to run the ad, because the city didn't even participate in the court case as it had already consented to running the ad.

The Court also declined to make a declaration that the city had infringed the CCBR's Charter rights, because they City had provided no evidence and the absence of an "adversarial context" meant the Court did not have a "full understanding of the statutory objectives being pursued by the Respondent and the ability to analyze whether the Applicant's freedom of expression was being limited as little as possible in all of the circumstances." (para. 25)

An analysis of the case, including the many missteps by the City of Peterborough that led to its unnecessary surrender to the CCBR with no further legal recourse, can be found in ARCC's 2017 report: Failures by City of Peterborough Led to Anti-Choice Ads on Buses.

CCBR v. City of Grande Prairie (AB: 2016/2018)

Two cases:

- Dec 22, 2016. Canadian Centre for Bio-Ethical Reform v Grande Prairie (City), 2016 ABQB 734 (CanLII). Court of Queen's Bench of Alberta. https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb734/2016abqb734.html
- April 25, 2018. ABCA 154. Court of Appeal of Alberta.https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb734/2016abqb734.html https://www.canlii.org/en/ab/abca/doc/2018/2018abca154/2018abca154.html

In 2015, the anti-choice Canadian Centre for Bio-Eethical Reform applied to place an offensive anti-choice ad on the backs of buses in a number of Canadian cities, all of which refused the ad. Several lawsuits or threats of lawsuits against the cities ensued, with Peterborough caving in and allowing the ads.

In Dec 2016, the Court of Queen's Bench of Alberta agreed with the City of Grande Prairie's argument that the ad contravened Section 14 of the *Canadian Code of Advertising Standards* against "Unacceptable Depictions and Portrayals". The judge said the ad would likely cause psychological harm to women who've had or are considering an abortion, as well as cause emotional distress to children, and create a hostile and uncomfortable environment for transit

users and other users of the road. The judge declined to decide whether the CCBR ad was actually hate speech, but seemed sympathetic to the City's argument.

The judge also acknowledged that the Supreme Court in 2009 (*Greater Vancouver Transportation Authority v. Canadian Federation of Students*) said that cities have considerable leeway to maintain a "safe and viable community" and "safe and welcoming transit system" by limiting offensive advertising on its buses. Specifically, the Supreme Court said that Translink's advertising policies "were adopted for the purpose of providing 'a safe, welcoming public transit system' and this is a sufficiently important objective to warrant placing a limit on freedom of expression."

In 2018, the Court of Appeal upheld the lower court's decision, ruling that the City of Grande Prairie's refusal of the CCBR anti-abortion bus ads was reasonable. The decision completely supported the lower court's ruling (2016 ABQB 734), including the potential harms of the ad to women and children:

- "The conclusion that the tendered advertisement would demean, denigrate or disparage women who had procured a miscarriage, and would tend to undermine their human dignity, was well supported by the record." (Para 77)
- "The potential effect that the advertisement would have on children is another factor supporting the reasonableness of the respondents' decision to reject it." (Para 82)

CCBR v. Translink (BC: 2017/2018)

Two cases:

- Aug 8, 2017. Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority [Translink]. BCSC 1388, Supreme Court of BC. http://www.courts.gov.bc.ca/jdb-txt/sc/17/13/2017BCSC1388cor1.htm
- Sept 11, 2018. BCCA 344. Court of Appeal for British Columbia. https://www.courts.gov.bc.ca/jdb-txt/ca/18/03/2018BCCA0344.htm
- Court gives anti-abortion group another shot at placing ads on Metro Vancouver transit, CBC, Sept 11, 2018.

The 2017 court ruling supported the decision of the transit authority (Translink) to refuse to run bus ads by the CCBR (the same ads as in the Grande Prairie decisions described above). Translink argued that the ads contravened their policy, part of which seeks to create a safe and welcoming environment on its buses, as well as the *Canadian Code of Advertising Standards.* The court agreed that the ad could potentially cause psychological harm to children and to women, and therefore, refusal of the advertisement was "neither unreasonable nor was it disproportionate."

The following is adapted from an analysis of the 2018 appeal decision by the BLG Law Firm:

> In *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, (*CCBR v TransLink*), the Court of Appeal for BC unanimously allowed an appeal brought by the Canadian Centre for Bio-Ethical Reform (CCBR), and ordered the South Coast British Columbia Transportation Authority (TransLink) to reconsider its 2015 decision to disallow the anti-abortion group to purchase advertising space on public buses. The Court also quashed TransLink's cross appeal of an

> evidentiary ruling made by the chambers judge, which precluded TransLink from tendering an expert report as evidence in response to the CCBR's judicial review application.
>
> This case serves as a pointed reminder to government decision-makers to provide reasons for their decisions and clearly articulate that consideration was given to balancing the moving party's *Charter* rights with the decision-maker's statutory mandate, as Canadian courts cannot substitute their own justifications for a decision or speculate what findings *may* have been made in the absence of articulated reasons by the decision-maker.

Essentially, the court did not say that Translink had to run the ads. Instead, the court gave Translink another opportunity to review the ads, leaving the agency free to apply additional reasoning to refuse the ads, including the expert report.

Excerpt from Truth on the Bus, by Jennifer Taylor, Oct 16, 2018.

> "The BC decision … was a missed opportunity to consider why the CCBR's freedom of expression should not necessarily extend to false advertising on public transit and, in any event, to conclude that it was outweighed by the harm its proposed campaign would cause. … we need to question, on a normative basis, whether freedom of expression as protected in s. 2(b) of the *Charter* should even extend to content that compares abortion to murder, and people who have abortions to murderers. Leaving all the analytical work for the justification stage puts the onus on transit managers to articulate why distorted images and false statements are not allowed on their vehicles, rather than putting the onus on anti-abortion organizations to prove why they should get to spread these hateful messages to their fellow citizens."

UAlberta Pro-Life v Governors of University of Alberta (AB: 2020)

Two cases:

- Jan 6, 2020. ABCA 1, Court of Appeal of Alberta. https://www.canlii.org/en/ab/abca/doc/2020/2020abca1/2020abca1.html
- Oct 11, 2017. UAlberta Pro-Life v Governors of the University of Alberta, 2017 ABQB 610: www.canlii.org/en/ab/abqb/doc/2017/2017abqb610/2017abqb610.html
  (This case is the appeal of two previous cases decided together by the Court of Queen's Bench of Alberta in 2017.)

Two appeals were before the Court of Appeals. The following is from Free speech on campus is subject to the Charter — but only in Alberta, January 15, 2020, by Atrisha S. Lewis, Adam Goldenberg, and Marco Fimiani:

- The first appeal concerned UAlberta Pro-Life's use of a public space on campus to hold an anti-abortion event in 2015. UAlberta Pro-Life contended that the organizers and attendees of a counter demonstration should have been disciplined. It sought judicial review of the University's decision not to discipline them. The chambers judge rejected the judicial review application, and UAlberta Pro-Life appealed.
- The second appeal related to a request by UAlberta Pro-Life to hold a second anti-abortion event. The University told the group that it would have to defray the cost of

providing security for the event. UAlberta Pro-Life said the cost was prohibitive and, thus, the University's decision denied the group's (and its members') exercise of the freedom of expression. It unsuccessfully sought judicial review, then appealed.

The Court of Appeal dismissed the first appeal but allowed the second. With respect to the first appeal, the Court of Appeal held that, as the complainant in the discipline matter, UAlberta Pro-Life did not have standing to challenge the merits of the University's decision in the absence of procedural unfairness, which UAlberta Pro-Life had failed to establish.

With respect to the second appeal, the Court of Appeal held that "the University's regulation of freedom of expression by students on University grounds should be considered to be a form of governmental action" for the purposes of s. 32 of the Charter. Moreover, the Court of Appeal held that, in dismissing UAlberta Pro-Life's judicial review application, the chambers judge had "applied the wrong test, did not allocate the burden of proof correctly, and adopted misconceptions as to factors to be considered", and thus afforded insufficient protection to the freedom of expression guaranteed in s. 2(b) of the Charter.

Here is a summary of the decision by Dan Michaluk (Jan 8, 2020), Alberta Appellate Court Renders Significant Decision on University Autonomy and Expressive Rights:

"Universities have long been accorded significant leeway in managing their academic and non-academic affairs. The Alberta Court of Appeal's decision is controversial in its recognition that the *Canadian Charter of Rights and Freedoms* governs an Alberta university's control over the use of its space. This decision conflicts with jurisprudence in other jurisdictions and may be challenged… [The decision] raises significant questions about universities' autonomy from government and the appropriate test for Charter application. There is clear jurisprudence from the Court of Appeal for Ontario and the British Columbia Court of Appeal that holds that universities are not directly subject to the Charter in their control of university space."

Lethbridge & District Pro-Life Association v City of Lethbridge (AB: 2020)

- Oct 29, 2020. Lethbridge and District Pro-Life Association v Lethbridge (City), 2020 ABQB 654. Court of Queen's Bench of Alberta. https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb654/2020abqb654.html

The City of Lethbridge lost this case. The anti-choice group (Lethbridge and District Pro-Life Association) had sued the City for refusing five proposed ads for buses and bus benches/shelters. Justice M. David Gates said the city had placed "undue reliance" on the *Canadian Code of Advertising Standards* (the Code), such as by deciding on its own that all five ads contravened the Code despite obtaining an opinion from Ad Standards that three ads would likely contravene the Code, while one would not, and no opinion was given on the fifth ad.

Further, the judge found no evidence that the city had conducted a Charter analysis in order to minimize infringement of the advertiser's freedom of expression. Another key aspect was that

the proposed ads in question were deemed by the judge to be qualitatively different from the ad in the City of Grande Prairie decisions, i.e., not as offensive or graphic.

The City of Lethbridge's use of the Code was central to this case. It is notable, therefore, that Justice Gates did not criticize the Code itself or cities' use of it, only that it cannot be the only consideration. The Lethbridge case emphasizes the critical importance for cities to balance use of the Code with other considerations, including the advertiser's freedom of expression, competing Charter rights of others affected, and the city's statutory objectives.

Guelph and Area Right to Life v. City of Guelph (AB: 2022)

- Jan 26, 2022. ONSC 43. Ontario Superior Court of Justice, Divisional Court. https://www.canlii.org/en/on/onscdc/doc/2022/2022onsc43/2022onsc43.html

The city of Guelph had refused to run three anti-abortion ads on buses because Ad Standards had deemed them inaccurate and/or demeaning to women, under its *Canadian Code of Advertising Standards* (the Code). The anti-choice group claimed their Charter right to freedom of expression was violated.

The court ruled that the City's decision was unreasonable because it failed to do a Charter analysis according to the Doré/Loyola legal framework (in this case, weighing the anti-choice group's freedom of expression rights against the City's statutory objectives and competing Charter rights of women). The city relied only on the Code and Ad Standards decisions, which the court recognized as important and useful, but insufficient. Notably, the court said the city did not have to run the ads. The court remitted the decision back to the city for reconsideration, giving them a chance to again review (and reject) the ads using proper criteria.

While the court affirmed that cites can rely on the Code and Ad Standards decisions, it said cities must go further and consider competing Charter rights, including the advertiser's freedom of expression, and in this case also gender equality rights that may be undermined by ads. In this regard, the court said:

> "The intervenor Abortion Rights Coalition of Canada presented arguments in support of the City's decisions, emphasizing the importance of protecting abortion rights and the deleterious effects of the applicant's advertisements on the rights of women and people capable of pregnancy. There is obviously merit to these arguments. However, as reviewed above, it is not the court's role at this stage to weigh in on an evaluation of the advertisements. Rather, it is first for the City to weigh the issues identified by the Coalition against the applicant's right to freedom of expression." (para 91)

ARPA Canada v. Hamilton (ON: 2023)

- Nov 16, 2023. Association for Reformed Political Action Canada v. Hamilton (City of), 2023 ONSC 6443. https://www.canlii.org/en/on/onscdc/doc/2023/2023onsc6443/2023onsc6443.html

The City of Hamilton refused to run an ad on city buses that was submitted by the anti-choice group Association for Reformed Political Action (ARPA) Canada. The ad opposed sex selection abortion and said: "We're for women's rights", showing four photos of an adult woman, then two girls, and a fetus in utero. The photos were captioned respectively: "Hers. Hers. Hers. And Hers." The ad was deemed to be inaccurate and in likely violation of the *Canadian Code of Advertising Standards* (the Code) after the city sought an opinion from Ad Standards, which said the latter pronoun was factually incorrect because a fetus is not a person under Canadian law.

ARPA sued to have the ad posted, citing a violation of their freedom of expression. Just prior to the hearing, the City of Hamilton conceded that it did not provide adequate reasons. The Court therefore granted ARPA's application for judicial review, quashed the decision of the City, and remitted the matter back for "proper consideration by the City."

In its reasoning, the Divisional court disagreed with much of ARPA's case, for example, declining to declare that the ad was accurate and that fetuses were persons. However, since the City of Hamilton had not undertaken a Doré/Loyola analysis, the court sent the matter back to the city, leaving the city free to once again refuse the ad if it can justify its decision using the Doré/Loyola framework and Section 1 arguments.

The court made no specific statements about the Code, other than noting that the City of Hamilton had relied on it for the initial decision against the ad. Instead, the court pointed back to the Guelph decision (above), which stated that cities cannot rely on the Code alone but must do a Charter balancing exercise. Also, because the Hamilton court declined to interfere in how Ad Standards makes decisions or defines its terms, the decision also underscored that courts do not have (or want) the jurisdiction to overrule Ad Standards' decisions or the Code itself.

Nachbaur v. Black Press Media (BC: 2023)

- Oct 17, 2023. Nachbaur and another v. Black Press Media and others, BC Human Rights Tribunal: 2023 BCHRT 160. https://www.canlii.org/en/bc/bchrt/doc/2023/2023bchrt160/2023bchrt160.html

In November 2018, the *Nelson Star* newspaper (owned by Black Press Media) refused to run an ad from the Nelson Right to Life Society. The Star had recently decided to stop accepting any abortion-related advertisements because of community backlash over a previous anti-choice Halloween ad that depicted a pregnant woman wearing a T-shirt of a baby skeleton below an adult rib cage. Local businesses had threatened to stop advertising and to stop carrying hardcopy issues of the newspaper.

The anti-choice society filed a complaint with the BC Human Rights Tribunal, claiming the paper's refusal was discrimination based on religion in violation of the *BC Human Rights Code*. At the tribunal, the company argued that the decision "to stop printing ads regarding abortion was justified by the local backlash, the impact of such ads on women, and advertising standards

which prohibit ads that are misleading or deceptive, and which demean, denigrate or disparage a group of people."

In the October 2023 decision that dismissed the complaint, Tribunal vice-chair Devyn Cousineau said that the company "…made their decision in order to preserve their business interests and acceptance by the local community, which is rationally connected to their function as a local medium of news and communication which relies on revenue from ad sales." Cousineau noted the local context in which the community's tolerance for anti-choice images was changing. "This was manifest in a controversy around the same time about an anti-abortion street banner, which led the municipal council to end its program of allowing street banners altogether."

The Tribunal's decision strongly validated the newspaper's reliance on the *Canadian Code of Advertising Standards* and highlighted it as a key reason to refuse anti-abortion ads. For example:

> "Finally, it is significant that the Society's Halloween ad, and others that they had submitted before and after the Respondents' decision to stop printing abortion ads, appear to violate the Canadian Code of Advertising Standards. This was raised by one of the readers complaining to the Respondents during the relevant time and was a consideration for the Respondents." (para 28)

Abortion-Related Laws in Canada

The Charter Protects Abortion Rights

While the issue of abortion remains socially contested around Canada, the 1988 Morgentaler case and subsequent case law by the Supreme Court have painted a clear picture: abortion is a Charter right in Canada and any attempt to curtail or restrict this right would be a violation of the Charter rights of women and gender diverse people who can get pregnant. Similarly, the international law perspective mirrors the domestic law perspective in many ways, by protecting the right to abortion through the medium of key international human rights and women's rights instruments.

Following is excerpted from ARCC's position paper #65, Abortion is a Charter Right:

> The 1988 R v Morgentaler decision is often seen as the turning point for abortion rights in Canada, though it did not explicitly find abortion to be a Charter right. The Court decided that the restrictive criminal laws on abortion violated the Charter rights of women, specifically security of the person according to Section 7 of the Charter because the laws negatively impacted their physical and psychological health. Justice Dickson notably said: "forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person."
>
> However, Justice Bertha Wilson wrote a concurrent decision, saying that the rights to life, liberty, conscience, and privacy were also violated by these laws. Based on both majority and concurrent decisions, abortion could be considered a de facto Charter right, as any imposed restriction would violate Charter rights.
>
> A frequent argument is that the specific word "abortion" does not feature in the Charter, and it is therefore not a Charter right. However, Charter rights are enumerated in a broad sense, and judicial interpretation allows for judges to apply Charter rights in new ways to various situations. This results in case law that expands Charter rights, sets precedent for future cases, and ultimately becomes part of Charter law. Since 1988, all provincial and federal court cases related to abortion have upheld women's rights and denied fetal rights on the basis that this would infringe women's Charter rights.
>
> As a result of the Morgentaler decision, many other Supreme Court cases have helped shape the current interpretations of abortion rights. In some decisions, such as those of *Tremblay v Daigle* (1989), *Winnipeg Child and Family Services v. DFG* (1997), and *Dobson v Dobson* (1999), the Court upheld the Charter rights of pregnant women and dismissed fetal rights.
>
> Other cases such as *Brooks v Canada Safeway Ltd* (1989), *Blencoe v. BC Human Rights Commission* (2000), and the later cases of *Canada v Bedford* (2013) and *Carter v. Canada* (2015), recognized and expanded the rights to equality, liberty, personal security, and privacy. These cases have all contributed to strengthening the right to abortion under those Charter rights. In fact, the Morgentaler decision has become a cornerstone of human rights jurisprudence in Canada, having been cited in many other decisions.

New Brunswick Payment Regulation

Only one abortion restriction still stands in Canada: New Brunswick's Regulation 84-20, part of its *Medical Services Payment Act*.

https://www.canlii.org/en/nb/laws/regu/nb-reg-84-20/latest/nb-reg-84-20.html

> The following are deemed not to be entitled services *[among others]*:
>
> - *[Schedule 2, section a.1]* abortion, unless the abortion is performed in a hospital facility approved by the jurisdiction in which the hospital facility is located;

This regulation violates the Canada Health Act, which requires provinces to fund all medically required treatments normally performed by hospitals or doctors. In 1995, the Health Minister required provinces to fully fund all private clinics that perform medically required procedures. Such clinics are effectively defined as "hospitals" under the Act:

- Jan 1995 letter from then-federal Health Minister Diane Marleau, instructing provinces and territories to fund medically required procedures in private clinics.
- Oct 1995 follow-up statement from Marleau, warning provinces that have not yet complied that they will face penalties.

The restriction also violates the *Charter of Rights and Freedoms*, and a lawsuit against the province of New Brunswick is underway, led by the Canadian Civil Liberties Association.

Criminal Code Provisions

- Criminal Code definition of human being:
  http://laws-lois.justice.gc.ca/eng/acts/C-46/section-223.html

> **When child becomes human being**
>
> **223** (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.
>
> (2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

Subsection (2) has been interpreted by the courts to mean immediately before or during birth only (R.v. Sullivan).

Criminal Code Section 251 governing abortion was struck down in its entirety on Jan 28, 1988 (see R. v. Morgentaler case on pg 4). However, this entire section still sat in the Code and was later moved to Section 287. It is one of the "zombie laws" that then-Justice Minister Jody Wilson-Raybould finally moved to repeal in 2017 with Bill C-39.

In addition, two "orphan" clauses related to abortion that were not struck down in 1988 were also put on the chopping block with the subsequent Bill C-51. They prohibited the purchase, supply, sale, or advertisement of abortion drugs or devices. The clauses were essentially

unenforceable due to the abortion law being struck down, but there was still a potential for them to be misused and misapplied (e.g., against those acting in good faith).

Bill C-51 received Royal Assent in December 2018 and while Bill C-39 was abandoned, its "zombie law eradication" provisions were later included in Bill C-75, which received Royal Assent in June 2019.

https://www.robsoncrim.com/single-post/2017/06/14/Time-to-Kill-Canada%E2%80%99s-%E2%80%9CZombie-Laws%E2%80%9D

Safe Access Zone Laws and Court Injunctions Against Protesters

These measures ban or limit protesters outside facilities that provide abortions, abortion providers' homes, and doctors' offices. Six provinces have safe access zone laws – BC, Alberta, Quebec, Ontario, Newfoundland/Labrador, and Nova Scotia.

Please see this document for full information:
Safe Access Zone Laws and Court Injunctions in Canada

Other Regulation of Abortion

ARCC's position paper Canadian Abortion Regulation is a comprehensive list of regulations by governing authorities and professional associations. They include laws, policies, guidelines, codes, etc. that relate to abortion specifically, or that apply to all healthcare generally, including abortion.

Further Reading

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https://publications.gc.ca/collections/collection_2009/bdp-lop/prb/prb0822-e.pdf

Access to Choice: The Legal Framework for Abortion Access in Nova Scotia. By Julianne Stevenson, Jennifer Taylor, and Mary Rolf, on behalf of LEAF Halifax. April 2019.
https://www.leaf.ca/download-the-abortion-access-framework-from-leaf-halifax/

The Case for Repealing Criminal Laws Against Abortion: Lessons from Canada, by Joyce Arthur and Sarah Geleski. Feb 2007. https://www.arcc-cdac.ca/media/repeal-criminal-laws-arthur-geleski-2007.pdf

Timeline of Abortion Cases Involving Dr. Morgentaler. Abortion Rights Coalition of Canada. 2013. http://www.morgentaler25years.ca/about-henry-morgentaler/