Abortion Rights Coalition of Canada

Court Decisions and Laws in Canada on Abortion

This document is a compilation of court cases (with summaries and links) and laws related to abortion rights in Canada. It is a working document and will be occasionally updated.

Supreme Court Cases

R v. Morgentaler (1988)

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)

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, Lemay (1991)

Midwives case: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/733/index.do

> http://www.leaf.ca/r-v-sullivan/ 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)

Nova Scotia Medical Services Act. http://canliiconnects.org/en/summaries/32716.

Facts: *Medical Services Act* makes performing abortions outside of hospitals illegal and not covered by health insurance. Act's purpose as found in the preamble was to prevent privatization of certain medical services to maintain high qualities health care services for all Nova Scotians. In 1976, Morgentaler v the Queen judged abortion provisions to be a valid exercise of federal criminal law. In 1988, R v Morgentaler removed abortion regulation from criminal law. Nova Scotia argued that Act fell under section 92(7) of the Constitution Act (hospitals).

Issue: Is Nova Scotia Medical Services Act *ultra vires* as it pertains to criminal law?

The Supreme Court ruled that yes, the Nova Scotia legislation was *ultra vires* (beyond the province's legal authority or power) because it prohibited abortions outside hospitals, which follows more from the federal criminal law on abortion, and not provincial legislation regulating delivery of healthcare.

Winnipeg Child and Family Services (Northwest Area) v. DFG (1997)

3 S.C.R. 925. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1562/index.do

Adapted from http://casebrief.me/casebriefs/winnipeg-child-and-family-services-v-dfg/:

> A woman (DFG) pregnant with her fourth child was addicted to glue sniffing. Previous two children were born with disabilities. Winnipeg Child and Family Services (CFS) sued for custody of the child, noting that glue sniffing may damage the nervous system of the developing fetus. The CFS won at superior court: saw no reason why the power of parens patriae (PP) should not be extended to protect unborn children. Addiction is a mental disorder, which is what gives court jurisdiction. DFG wins at the Manitoba Court of Appeal: held that the existing law of tort and parens patriae did not support the order. Drug abuse is a mental illness, not grounds for PP. Therefore, the issue was injusticiable; deemed more appropriate for legislature.
>
> CFS appealed. Issues: 1. Does a mother have a duty to her unborn child? 2. Does the court have parens patriae jurisdiction over an unborn child? Analysis:
>
> 1. Law of Canada does not recognize the fetus as a legal person possessing rights. Therefore, there is no legal person in whose interests the appellant could act or in whose interests a court order could be made. In terms of tort, no right to sue until child was born. Extending the law of tort would require major changes and involve moral choices and conflicts between fundamental interests and rights. E.g. If foetal action against the woman for lifestyle choices were permitted, women could find themselves incarcerated and treated against their will for conduct alleged to harm foetus -- danger that the proposed order would impede the goal of healthy infants more than it would promote it. Therefore, leave it to the legislature.
>
> 2. Courts do not have parens patriae (PP) jurisdiction over fetuses. Injusticiable? Judicial change to common law principles is confined to incremental changes; no major changes can be made. Extending PP would also entail complexity: Invasion of liberty of woman (where and how she chooses to live). The court cannot make decisions for the fetus without making decisions for the woman.

Dobson (Litigation Guardian of) v. Dobson (1999)

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 employ 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)

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

Please see the subsequent Ontario case R. v. Levkovic (ON: 2014).

Provincial Cases

Borowski v. Attorney General of Canada (SK: 1984)

Dunsmuir, Mollie. 1998. *Abortion: Constitutional and Legal Developments*. www.publications.gc.ca/Collection-R/LoPBdP/CIR/8910-e.htm.

The Saskatchewan Court of Appeal had reviewed the language of the Charter and the history of the fetus at common law, and concluded that the fetus had never been a person or included in the meaning of "everyone" in the Charter. (The Supreme Court declared the case moot because of the Morgentaler decision.)

From the book The Charter of Rights, by Ian Greene, pg 175, including Sask Court of Queen's Bench reasoning for why 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."

Supreme Court appeals for Borowski:

- Dec 1981: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2531/index.do to determine Borowski's standing to bring the case, which the SC granted.
- March 1989 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/421/index.do.
  SC did not rule, saying the case was now moot because of the 1988 R v. Morgentaler. decision, and Borowski no longer had standing.

Baby R / Superintendent of Child Welfare (BC: 1988)

53 D.L.R. (4th) 69 (B.C.S.C.). Legal Education and Action Fund: https://www.leaf.ca/case_summary/re-baby-r-1988/

After a mother 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*.

Please find LEAF's Factum here: www.leaf.ca/wp-content/uploads/2020/10/1988-baby-r.pdf.

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: 1994)

Morgentaler v. New Brunswick (Attorney-General), 117 D.L.R. 753, 1994. **(Not online)**

When Dr. Morgentaler's clinic opened in New Brunswick in 1994, the McKenna government immediately responded by invoking Hatfield's 1985 amendment to the Medical Act 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 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. Morgentaler immediately challenged the constitutionality of the amendment.

Relying on the Supreme Court decision in *R.* v. *Morgentaler* (1993), the New Brunswick Court of Queen's Bench found 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 "with a view to suppressing or punishing what [it] perceived to be the socially undesirable conduct of abortion." The court took into consideration the fact that the amendment dated from a point in time when abortion was considered a criminal offence. 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."

The decision was upheld on appeal to the New Brunswick Court of Appeal, and leave to appeal to the Supreme Court of Canada was denied. Morgentaler's license was reinstated and his clinic

was permitted to remain open. The regulation was removed, but reinstated later into the *Medical Services Payment Act*, minus the punishment for doctors.

Note: *Attorney General of New Brunswick* v. *Morgentaler*, 23 January 1995, unreported (C.A.), affirmed *Morgentaler* v. *New Brunswick* (Attorney-General) (1994), 117 D.L.R. 753.

Ontario (Attorney-General) v. Dieleman (ON: 1994)

117 D.L.R. (4th) 449 (Gen.Div.) O.J. No. 1864, Action No. 93-CQ-36131. Ontario Court of Justice – General Division, Toronto, Canada. Heard January 12-28, 1994. **(Not online)**

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. It 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:

> Pp 406-407: "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."
>
> Pp 420-421: "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."

Maurice Lewis v. Regina (BC: 1996) / R. v. Spratt (BC: 2008)

Supreme Court of British Columbia. *Reasons for Judgment of the Honourable Madam Justice Saunders.* No. CC960120, Vancouver Registry. Heard June 24-27, July 9-10, 1996. http://www.westcoastleaf.org/wp-content/uploads/2014/11/CASES-1996-R-V-LEWIS-Decision.pdf

R. v. Spratt, 2008 BCCA, 340, Court of Appeal for BC: https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca340/2008bcca340.html

Protester Maurice Lewis was initially found not guilty in the first trial concerning the new *Access to Abortion Services Act* in BC (just passed in Sept 1995), which limits protesters outside clinics by creating buffer zones around clinics where they can't be present. The trial judge struck down some parts of the Act as violating protester 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.

Then, protesters Don Spratt and Gordon Watson were arrested in 1998 and convicted under the Act in 2000. They appealed the decision to the BC Court of Appeal, and the previous Maurice Lewis case became part of the Spratt/Watson case. For a full accounting, see: *Convicted anti-abortion protesters challenge clinic access zone (and lose)*, September 2007: http://www.prochoiceactionnetwork-canada.org/articles/bubble-zone-case.html The Spratt/Watson case was the final appeal of the Act – 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 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."

R. v. Drummond (ON: 1996)

143 DLR (4th) 368. **Not online**. More info here: http://www.prochoiceactionnetwork-canada.org/prochoicepress/9697win.shtml#drummond

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 is 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)

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

This case was an application by Dr. Morgentaler for a declaration that a regulation made under the PEI Health Services Payment Act was ultra vires. 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."

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

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

As part of a 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 operated 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 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.

Jane Doe et al. v. Manitoba (2008)

(links below)

In a class-action suit filed in 2001 against the government of Manitoba, two women who had undergone 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 had abortions at the Morgentaler clinic, which they had to pay for. They 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, a procedure that provably must be performed in a timely manner, 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. [1] 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 but the Court suspended the declaration of invalidity for a period of one year, to allow the Government of Manitoba to revise the legislation. Since July 2005, abortions performed in private clinics in Manitoba have been publicly funded.

The government also appealed the decision. It was overruled in 2005 by the Manitoba Court of Appeal because the case was too complex to be decided by a judge alone and needed to go to trial.[2] Leave to appeal to the Supreme Court of Canada was denied, meaning the issue could only be decided in Manitoba as a class-action trial.[3]

In Nov 2005, Manitoba passed a regulation to revise government policy to allow private abortion clinics to receive provincial funding for the procedure.

In 2008, the plaintiffs ("Jane Doe" et al) got permission from the Court of Queen's Bench of Manitoba to launch a new class action suit in order to obtain a declaration from the Manitoba government "that the funding regime under The Health Services Insurance Act for therapeutic abortion services violated their rights under the Charter", as well as for recovery of special, general, aggravated and punitive damages.[4] (No information could be found on the outcome or whether a case was even launched.)

1. Jane Doe 1 v. Manitoba, 2004 MBQB 285, 248 D.L.R. (4th) 547 (Q.B.). Canlii.org
2. Jane Doe 1 v. Manitoba, 2005 MBCA 109, 260 D.L.R. (4th) 149 (C.A.). Canlii.org
3. 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.) Canlii.org
4. Jane Doe 1 and Jane Doe 2 v. Manitoba (The Government of), 2008 MBQB 217 Canlii.org

Morgentaler v. New Brunswick (NB: 2009)

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)

- Jan 10, 2012: Lobo v. Carleton University, 2012 ONSC 254 (Ontario Superior Court of Justice) https://www.canlii.org/en/on/onsc/doc/2012/2012onsc254/2012onsc254.html
- June 29, 2012: Lobo v. Carleton University, 2012 ONCA 498 (Court of Appeal for Ontario) https://www.canlii.org/en/on/onca/doc/2012/2012onca498/2012onca498.html
- July 11, 2012; Lobo v. Carleton University, 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 this article: https://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-9/lobo

> 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)

2013, BCCA 187: http://www.courts.gov.bc.ca/jdb-txt/CA/13/01/2013BCCA0187.htm

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."

News coverage of the decision: http://nationalpost.com/news/canada/abortion-protesters-who-thought-they-found-loophole-in-bubble-zone-law-lose-b-c-appeal

R. v. Levkovic (ON: 2014)

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, 2013 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)

2014 ABQB 190 https://www.canlii.org/en/ab/abqb/doc/2014/2014abqb190/2014abqb190.html

Summary: 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.

Note: It appears that the anti-choice students never took up their right to appeal, possibly because they were no longer U of C students by 2014.

New stories: McLeans, Feb 2, 2009 • CBC, April 19, 2010 • CTV, June 18, 2014

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

2015 BCSC 39. https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc39/2015bcsc39.html

The following is adapted from *Does the Charter Apply to Universities? Pridgen Distinguished in U Vic Case*, Feb 6, 2015 by Linda McKay-Panos: https://ablawg.ca/2015/02/06/5332/

> The British Columbia Supreme Court ruled that the Charter did not apply, and distinguished Pridgen on several grounds … [*Pridgen v University of Calgary,* 2010 ABQB 644]
>
> 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.

Canadian Centre for Bio-Ethical Reform v. City of Grande Prairie (AB: 2016 / 2018)

- 2016 ABQB 734 (Court of Queen's Bench of Alberta). https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb734/2016abqb734.html
- 2018 ABCA 154 (Court of Appeal of Alberta). https://www.canlii.org/en/ab/abca/doc/2018/2018abca154/2018abca154.html

In 2015, the anti-choice Canadian Centre for Bioethical 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 Advertising Code against "Unacceptable Depictions and Portrayals". The Advertising Standards Council itself, in a preliminary Translink decision on this same ad (involving a transit company in Vancouver), had only raised issues with Section 1, Accuracy and Clarity. This means the ad may violate **two** sections of the Code.

The Alberta 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.

Further, the Supreme Court of Canada said in its 2009 *Greater Vancouver Transportation Authority v. Canadian Federation of Students* decision that cities could use the Advertising Code as a guide to limit advertising. The Alberta judge also acknowledged that the Supreme Court

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.”

For further details, see *Failures by City of Peterborough Led to Anti-Choice Ads on Buses*, by Joyce Arthur, March 27, 2017. https://www.arcc-cdac.ca/wp-content/uploads/2020/06/Failures-by-City-Peterborough-led-to-anti-choice-ads.pdf

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. This decision builds on and strengthens existing precedents around restriction of advertising, including supporting use of the *Canadian Code of Advertising Standards*. Besides the lower court’s decision, this ruling also relies extensively on two prior decisions related to advertising:

- Greater Vancouver Transportation Authority v Canadian Federation of Students (2009 SCC 31) / 2 SCR 295)
- Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority (“Translink”) (2017 BCSC 1388)

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)

Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority (BC: 2017 / 2018)

- 2017 BCSC 1388, Supreme Court of BC, http://www.courts.gov.bc.ca/jdb-txt/sc/17/13/2017BCSC1388cor1.htm (Aug 8, 2017)
- 2018 BCCA 344, Court of Appeal for British Columbia https://www.courts.gov.bc.ca/jdb-txt/ca/18/03/2018BCCA0344.htm (Sep 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 text is adapted from this Oct 2 analysis of the 2018 appeal decision: http://blg.com/en/News-And-Publications/Publication_5424:

> 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.

"Truth on the Bus", by Jennifer Taylor, Oct 16: http://canliiconnects.org/en/commentaries/64022. Excerpt:

> "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."

CBC News article, Sept 11, 2018: https://www.cbc.ca/news/canada/british-columbia/court-gives-anti-abortion-group-another-shot-at-placing-ads-on-metro-vancouver-transit-1.4819046

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

2020 ABCA 1, Court of Appeal of Alberta
https://www.canlii.org/en/ab/abca/doc/2020/2020abca1/2020abca1.html

This case is the appeal of two previous cases decided together by the Court of Queen's Bench of Alberta in 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
(These cases and the decision are summarized below.)

The following article gives a summary and analysis of the appeal case, and also describes past precedents in the area of freedom expression on campuses, and whether universities are subject to the Charter:

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.

https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/free-speech-campus-subject-charter-only-alberta

> On January 6, 2020, the Court of Appeal of Alberta held… that the Charter of Rights and Freedoms applies to how universities regulate their students' expression on campus. The court's judgment is only binding in Alberta, but its effects may be felt elsewhere, including in the provinces whose courts have, to date, declined to apply the Charter in these circumstances: Ontario, British Columbia, and Saskatchewan.
>
> The Supreme Court of Canada held nearly three decades ago that universities are not "government" for Charter purposes in carrying out their day-to-day activities.[3] However, the Court left open the possibility that "[t]here may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that government sufficiently partakes in the decision as to make it an act of government".[4]
>
> The Court has subsequently held that: [A]n entity may be found to attract Charter scrutiny with respect to a particular activity that can be ascribed to government…. If the act is truly "governmental" in nature – for example, the implementation of a specific statutory scheme or a government program – the entity performing it will be subject to review under the Charter only in respect of that act, and not its other, private activities.[5]
>
> Until the Court of Appeal of Alberta's judgment in UAlberta Pro-Life, this jurisprudence has been helpful to universities in resisting the application of the Charter to their internal affairs. Courts repeatedly declined to apply the Charter to a university's impugned actions when those actions did not constitute the implementation of government policies or programs by the university.[6]
>
> In UAlberta Pro-Life, the Court of Appeal of Alberta was asked to determine whether the Charter applied to the University of Alberta's handling of a request by a student group to organize an anti-abortion event. The court held that it did.[9]
>
> Before the court were two appeals:
>
> - 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.[10]
> - 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.[11]
>
> The Court of Appeal dismissed the first appeal,[12] but allowed the second.[13] 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.[14]
>
> 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.[15] 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",[16] and thus afforded insufficient protection to the freedom of expression guaranteed in s. 2(b) of the Charter.[17]

Another summary of the decision can be found here, by Dan Michaluk (Jan 8, 2020) https://canliiconnects.org/en/summaries/70067:

> 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 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. In fact, this is the sixth court decision that has endorsed use of the Code by cities. However, 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 and the city's statutory objectives.

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 transgender people. 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 (see link for references)*:* www.arcc-cdac.ca/wp-content/uploads/2020/06/65-abortion-charter-right.pdf

> The 1988 R v Morgentaler decision[1] 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[2] 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."[1]
>
> 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.[3]
>
> 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.[4] Since 1988, all provincial and federal court cases related to abortion[5] 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.[5]

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:
> ……..
> (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.

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) 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.

Court Injunctions and Safe Access Zone Laws 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"

https://www.arcc-cdac.ca/wp-content/uploads/2020/06/Bubble-Zones-Court-Injunctions-in-Canada.pdf

Other Regulation of Abortion

At the following link, **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.

https://www.arcc-cdac.ca/wp-content/uploads/2020/06/61-Canadian-abortion-regulation.pdf

Further Reading

Abortion: Constitutional and Legal Developments. Prepared by Mollie Dunsmuir**.** Law and Government Division. Reviewed 18 August 1998. http://www.publications.gc.ca/Collection-R/LoPBdP/CIR/8910-e.htm

Abortion in Canada: Twenty Years After R. v. Morgentaler. By Karine Richer. Law and Government Division. PRB 08-22E. 24 September 2008. http://www.lop.parl.gc.ca/content/lop/ResearchPublications/prb0822-e.htm

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/

Timeline of Abortion Cases Involving Dr. Morgentaler

Following excerpted from: http://www.morgentaler25years.ca/about-henry-morgentaler/

In 1989, the province of Nova Scotia passed legislation prohibiting the performance of abortions in clinics, in response to Dr. Morgentaler's plans to open a free-standing abortion clinic in Halifax. The Canadian Abortion Rights Action League (CARAL) launched a legal challenge of the Nova Scotia legislation, but were denied standing by the Nova Scotia Supreme Court. Dr. Morgentaler challenged the law by announcing that he had just performed seven abortions at his Halifax clinic. He was immediately charged under the provincial *Medical Services Act*. After seven additional charges were filed, the province obtained an injunction against his performing any more until charges against him had been heard.

In 1990, a Nova Scotia provincial court judge struck down the *Medical Services Act* as unconstitutional and acquitted Dr. Morgentaler of all charges. The court found that abortion law is a matter of federal, not provincial jurisdiction. The Nova Scotia government appealed this decision.

In 1993, the appeal division of the Supreme Court of Nova Scotia upheld the lower court decision in favour of Dr. Morgentaler. The Nova Scotia government appealed to the Supreme Court of Canada, which dismissed the appeal, thereby confirming that the province was improperly trying to legislate in the area of federal criminal law.

In 1994, Dr. Morgentaler opened an abortion clinic in Fredericton, New Brunswick. The NB government invoked its *Medical Services Payment Act,* which prohibited doctors from performing abortions outside an approved medical facility. The NB College of Physicians and Surgeons restricted Dr. Morgentaler's license to practice and he stopped offering abortion services. The New Brunswick Court of Queen's Bench ruled that the province had no right to restrict abortions to hospitals, and that its medical legislation overstepped the legitimate powers of a province. New Brunswick appealed.

In 1997, Dr. Morgentaler challenged a PEI regulation that denied payment under the province's health care plan for an abortion unless it is deemed medically necessary and performed in a hospital. The court ruled in favour of the government.

In 2002, Dr. Morgentaler wrote new federal Minister of Health Anne McLellan, urging her to force Quebec, New Brunswick, Nova Scotia, Manitoba and PEI to fund abortions in clinics. Dr. Morgentaler also announced his plan to sue the Manitoba government for not funding his clinic. Doctors Henry Morgentaler and Claude Paquin, two of the founding members of the Association for Access to Abortion, announced that the Association was filing a motion alleging that the Government of Quebec had intentionally violated the *Health Insurance Act*. The AAA asked the government to reimburse women who had had to pay for an abortion, a claim that amounted to tens of millions of dollars. Dr. Morgentaler announced plans to sue the New Brunswick and Nova Scotia governments for not funding clinic abortions.

In 2003, Dr. Morgentaler sued New Brunswick for its refusal to fund clinic abortions. New Brunswick Justice Minister Brad Green vowed to defend the province's decision not to fund clinic abortions, stating the province was willing to take the issue to the Supreme Court of Canada. Dr. Morgentaler closed his Halifax clinic, stating that women in Nova Scotia could now get appropriate care at the QE II Health Sciences Centre, thanks to a physician providing abortions there whom Dr. Morgentaler had trained.

In 2008, the New Brunswick courts granted Dr. Henry Morgentaler public-interest standing to challenge the constitutional validity of the province's ban on payment for abortions at clinics.

The province had asserted that Morgentaler did not have standing to bring the action but the judge stated that Morgentaler was “a suitable alternative person” to bring an action that women seeking abortions would be reluctant to undertake. The province appealed the court’s decision.

In 2009, the Appeals Court of New Brunswick upheld the lower court’s decision that Dr. Henry Morgentaler can sue the Government of New Brunswick to fund abortions at his clinic in Fredericton.

Overall Timeline of Abortion Cases, Including Funding Issues

Source: Abortion Chronology

- Oct 13, 1983 - In Joe Borowski case, Sask Court rules that fetuses aren't protected under Constitution.
- May 9, 1985 - Midwives Mary Sullivan and Gloria Lemay charged after baby they delivered died from lack of oxygen before emerging completely from birth canal. Oct 86 trial found them guilty of criminal negligence to fetus as a person under Criminal Code. They appealed, BC Court of Appeal threw out conviction in 1988, saying that fetus not person. Supreme Court of Canada clears them on March 21, 1991.
- Jan. 28, 1988 - Supreme Court of Canada in 5-2 decision (led by Chief Justice Brian Dickson) strikes down abortion law as unconstitutional. Law violates section 7 of Charter, infringes woman’s right to life, liberty, and security of person.
- Feb, 1988 - each province announces different public policy on abortion. Sask allows hospital staff to refuse to do abortions. Nova Scotia and New Brunswick implement a no-pay policy for abortions outside approved facilities (hospitals). Newfoundland’s only abortion doctor retires. No abortions in PEI at all (since 1982).
- Mar 8, 1988 – BC Premier Bll VanderZalm’s refusal to fund abortions is overturned in BC court as unconstitutional. (case by BC Civil Liberties Assoc.)
- July, 1988 - Edmonton court grants temporary injunction to man (Randy Mock) trying to stop abortion of former girlfriend. Also grants him right to sue her for breach of verbal contract.
- Oct 3/4, 1988 - Joe Borowski appears before Supreme Court to argue that fetuses should be protected as persons under the Charter. Borowski brings two pickled fetuses to show judges, but his lawyer dissuades him.
- Mar 10, 1989 - Supreme Court refuses to rule on claim of Joe Borowski that fetuses have constitutional guarantee of right to life - case moot.
- July, 1989 - ex-boyfriends in Manitoba (Steve Diamond, July 7), Ontario (Barbara Dodd and Gregory Murphy, July 4), and Quebec (Chantal Daigle and Jean-Guy Tremblay, July 7) try to get injunctions to stop their former girlfriends’ abortions. Injunctions granted in Ontario and Quebec. Ontario injunction set aside July 11. Quebec injunction upheld on July 26.
- May, 1989 - CARAL launches legal challenge of Nova Scotia government’s law against abortion clinics.
- May 5, 1989 - Morgentaler gets 150-metre civil injunction to prohibit protesters outside clinic. One protester charged 2 days later.
- June, 1989 - To stop Morgentaler from opening Halifax clinic, Nova Scotia government introduces *Medical Services Act*, prohibiting abortions outside hospitals.

- July 27, 1989 - Chantal Daigle of Quebec appeals to Supreme Court and meanwhile has a late-term abortion in the States. Campaign Life Coalition funds legal costs of her abusive ex-boyfriend, Jean-Guy Tremblay.
- Aug 8, 1989 - Supreme Court overturns Daigle injunction after emergency sitting. Decides to rule even though justices just learned that Daigle had abortion.
- Oct 17, 1989 - CARAL is denied standing to challenge Nova Scotia law, *Medical Services Act*, which prohibits abortions in clinics.
- Oct 26, 1989 - Morgentaler's Nova Scotia clinic opens in violation of Medical Services Act. M. is charged on Oct 27 after announcing he had performed 7 abortions there. He starts performing abortions again after one week.
- Nov 15, 1989 - Supreme Court releases reasons in Daigle case. Law recognizes no fetal or paternal right to stop an abortion, court rules unanimously. Fetus is not human being and has no right to life.
- April, 1990 - Nova Scotia Appeal Court denies CARAL right to launch its own constitutional challenge because Dr. M's case is already underway.
- Oct 19, 1990 - Nova Scotia judge strikes down Medical Services Act as unconstitutional and acquits Dr. M. of all charges. Campaign Life Coalition vows to stage protest marches outside clinic.
- Mar 21, 1991 - Midwives Gloria Lemay and Mary Sullivan cleared of criminal negligence by Supreme Court of Canada when baby they delivered in May/85 died before exiting completely from birth canal. Court ruled fetus not a person in law with no legal rights until born alive.
- July 5, 1991 - Nova Scotia appeal court upholds decision in favour of Dr. M (against Medical Services Act that prohibits abortion clinics). Gov't appeals and Supreme Court agrees to hear appeal.
- June 12, 1992 - Manitoba court rules that province's refusal to fund clinic abortions is discriminatory. Province appeals.
- Sept 14, 1992 - Dr. M. sues gov't of Newfoundland for refusing to pay clinic abortions. Nfld starts paying partial costs.
- Mar 2, 1993 - Manitoba Court of Appeal rules that doctors must be paid for performing abortions at clinics. Manitoba health minister plans to introduce legislation to prohibit such payment. It passes in the summer.
- Mar 17, 1993 - Morgentaler sues PEI government for not paying for abortions on Island women at Halifax clinic.
- July 27, 1993 - Manitoba passes Health Services Amendment Act, excluding payment for clinic abortions
- Sept 30, 1993 - Supreme Court dismisses appeal by Nova Scotia government (re Medical Services Act that prohibits abortion clinics).
- Jun 28, 1994 - Dr. M. opens clinic in Fredericton, New Brunswick. Province invokes Medical Act prohibiting doctors from performing abortions outside approved medical facility. NB College of Physicians and Surgeons restricts Dr. M's licence.
- Aug 30, 1994 - Ontario court (Dieleman decision) provides injunction for clinics and doctors' homes in 18 locations in Toronto, London, North Bay, Brantford, and Kingston (20m from clinic and 160m from doctor's homes).
- Sept 14, 1994 – New Brunswick Court of Queen's Bench rules that province has no right to restrict abortions to hospitals. NB appeals.
- Jan 6, 1995 - federal Health Minister Diane Marleau gives ultimatum to provinces: they must pay full costs at private clinics providing medically necessary services, or face cuts in federal payments starting Oct. 15.
- Jan 23, 1995 – New Brunswick Court of Appeal upholds lower court ruling against province's attempt no prohibit abortion clinics

- Feb 2, 1995 - PEI Supreme Court rules that province must cover physician fees for clinic abortions.
- Aug 17, 1995 - Supreme Court refuses to hear New Brunswick government appeal of NB court decision that abortions could not be restricted to hospitals.
- Oct, 1995 - Nova Scotia starts paying $130,000 a year in federal penalties for not fully funding clinic abortions (by year 2000 - only $200,000 in penalties deducted)
- Oct 15, 1995 - federal government starts deducting fees charged to patients for private medical services (such as abortion) from transfer money to provinces Jul 22, 2003 - Dr. Henry Morgentaler files Statement of Claim in Fredericton for a lawsuit against New Brunswick. Women in NB are being denied fair access to abortions because the province only pays for abortions in hospitals with approval of two doctors.
- Jan 22, 1996 - Saskatchewan's Council of College of Physicians and Surgeons decide that abortions will continue to be performed only inside hospitals.
- Sept, 1996 - Manitoba Court of Appeal rules that mentally competent persons cannot be forced to undergo treatment. Reverses decision of lower court in Winnipeg Child and Family Services vs. Ms. G, a pregnant drug abuser who WCFS committed against her will to a drug treatment program. WCFS appeals to Supreme Court.
- Dec 23, 1996 - Ontario Court dismisses attempted murder charge against Brenda Drummond, saying fetus is not a person until birth. (May 28, 1996 - Brenda Drummond of Ottawa shoots herself in the vagina and injures near-term fetus; baby recovers).
- Feb 3, 1997 - Brenda Drummond pleads guilty to failing to provide necessities of life to her baby and receives suspended sentence.
- May, 1997 - New Brunswick Court of Appeal upholds decision of lower court allowing Ryan Dobson to sue his mother for injuries he sustained in a car accident as a fetus. Goes to Supreme Court. (Ryan born prematurely with cerebral palsy.)
- Oct. 31, 1997 - Supreme Court rules 7-2 that courts cannot force pregnant women to undergo treatment programs to prevent harm to fetus. (Ms. G case)
- 1999 - funding for Morgentaler clinic in New Brunswick denied by new premier Bernard Lord.
- July 9, 1999 - Supreme Court of Canada rules that Ryan Dobson cannot sue his mother for injuries suffered in womb when his pregnant mother had car accident.
- July 19, 2000 - Morgentaler calls on federal government to clamp down on provinces not funding abortions in clinics.
- Dec 16, 2000 - Dr. Morgentaler puts political pressure on Health Canada and New Brunswick government to fund clinic abortions in NB, PQ, and MB.
- Jan 8, 2001 - Allan Rock, Minister of Health, warns New Brunswick, Manitoba, Quebec, and PEI that they have to pay in full for abortions at private clinics, because they are violating *Canada Health Act*.
- Jan 29, 2001 - meeting held between federal and provincial officials in Fredericton to address New Brunswick's refusal to include Morgentaler clinic under province's health insurance plan.
- early Apr, 2001 - Manitoba Health minister Dave Chomiak cuts off negotiations with Dr. Morgentaler to fund the Winnipeg Morgentaler clinic, presumably because Chomiak is anti-choice and doesn't like Morgentaler.
- June 8, 2001 - Dr. Morgentaler announces plan to sue Manitoba government for not funding his clinic.
- Jul 27, 2001 - Two anonymous women launch class-action suit against the Manitoba government, aiming to strike down as unconstitutional a Manitoba law that prevents government funding for abortions outside of public hospitals. Both women had abortions at the Morgentaler clinic, which they had to pay for.
- Mid Nov, 2001 - Health Minister Allan Rock suggests to provinces a series of non-binding mechanisms for avoiding or resolving disputes before Ottawa restricts funding to provinces violating

Canada Health Act re abortion funding. Proposal calls for 90-day consultation period; if that fails, an independent third party will assess facts.

- Late Jan, 2002 - Henry Morgentaler writes new federal Minister of Health, Anne McLellan, urging her to force Quebec, New Brunswick, Nova Scotia, Manitoba, and PEI to fund abortions in clinics. He also urges clinic to be established in PEI.
- Apr 10 approx, 2002 - Federal Health Minister Anne McLellan writes to Alberta Health Minister Gary Mar (chair of the provincial ministers) to propose a three-member panel to adjudicate disputes over the *Canada Health Act*. One member to be selected by Ottawa, one by the provinces, and the two will select a third by mutual agreement. (All provinces except Quebec accept the arrangement.)
- May 9, 2002 – Health Minister Anne McLellan introduces reproductive technology legislation (Bill C-56). Will allow research on human embryos including leftover fertility clinic embryos, but will ban human cloning, commercial surrogacy, creation of human-animal hybrids, and sex-selection of embryos. The new Assisted Human Reproduction Agency of Canada will regulate use of human reproductive materials.
- Summer, 2002 - Anonymous woman files class-action suit against province of Quebec for failing to fund her abortion at a private clinic. A coalition of four private abortion clinics in Montreal are helping her with suit. They first had to go before a judge to guarantee her anonymity, lost that, appealed, then won.
- Sep 29, 2002 - Dr. Henry Morgentaler announces plans to sue New Brunswick and Nova Scotia governments for not funding abortions at his clinics. Toronto press conference held Oct 1. Dr. M. criticized federal Health Minister Anne McLellan for not using federal funding power to force the provinces into line.
- Oct 2, 2002 - Health Minister Anne MacLellan announces that Canadian government is prepared to withhold payment to New Brunswick if it continues to refuse to fund abortions at clinics. NB province already loses $50,000 in funding from Ottawa annually because it does not fund clinic abortions.
- Oct 23, 2002 - Henry Morgentaler holds press conference in Fredericton to announce he will sue the NB government for not funding abortions at his clinic there.
- Oct 24, 2002 - Henry Morgentaler holds press conference in Halifax to announce he will sue the NS government for not funding the facility fee for abortions at his clinic there. M says NS is "oppressing and victimizing women." M also called on PM Chretien to ensure that all Canadian women have access to fully funded abortions before leaving office next year. CARAL to lend support to NB/NS lawsuits.
- Nov 6, 2002 - Henry Morgentaler sends open letter to Health Minister Anne McLellan mocking her for failing to force provinces to fund abortions.
- Nov 8, 2002 - Henry Morgentaler holds press conference in Toronto in which he accuses Manitoba's health minister of religious bias that has stalled a deal to turn the Winnipeg clinic over to the province.
- Jan 20, 2003 - Dr. Morgentaler announces plans to sue the Manitoba government for not funding abortions at his Winnipeg clinic. He says province is violating the Canada Health Act "and the spirit of the Morgentaler Supreme Court of Canada decision of Jan. 28, 1988."
- Jul 22, 2003 - Dr. Henry Morgentaler files Statement of Claim in Fredericton for a lawsuit against New Brunswick. Women in NB are being denied fair access to abortions because the province only pays for abortions in hospitals with approval of two doctors.
- Aug 19, 2003 - New Brunswick government files statement of defence in Morgentaler suit, saying funding abortions in private clinics would create an "unnecessary financial burden" and that medically necessary, Medicare-funded abortions are provided at several hospitals in the province, and that access would not be "meaningfully enhanced" by extending funding to abortions at the Morgentaler clinic.
- May 13, 2004 - In Manitoba lawsuit by two women who had to pay for their abortions at the Morgentaler clinic in Winnipeg, the lawyer for the province argues in court that women do not have

the right to dictate when and where they can have abortions. The women claim the resulting delays in accessing treatment violate their Charter rights. They are seeking unspecified damages.

- Jul 1, 2004 - After years of discussions between the clinic and various provincial governments, the Winnipeg Regional Health Authority begins to fully fund abortions performed at Jane's Clinic, the Winnipeg abortion clinic formerly owned by Dr. Henry Morgentaler. Vice-president of the WRHA said that Jane's Clinic will ultimately function as the abortion arm of a new and expanded Women's Health Clinic. An interim funding deal was struck with Jane's Clinic while negotiations on expanding the Women's Health Clinic continue.
- Oct 8, 2004 - Federal Health Minister Ujjal Dosanjh launches new talks with the provinces to enforce the Canada Health Act, including NB's refusal to pay for abortions at the Morgentaler clinic in Fredericton, a contravention of the Act. Dosajnh said he's "very concerned" that New Brunswick is consistently ranked among the most difficult provinces for a woman to get an abortion. He said NB has a responsibility to cover the cost of all abortions performed by doctors in the province. "You have right across the country, provinces saying (abortion) is a medically necessary service. And when it's a medically necessary service, whether it's provided in a hospital or a clinic, it must be funded." 602 women paid between $500 and $750 to have an abortion at the Fredericton clinic in 2003.
- Dec 23, 2004 - In Manitoba class-action suit filed by 2 women (Jane Doe's) on behalf of MB women, Judge Jeffrey Oliphant rules that MB government has committed a "gross violation" of women's rights by refusing to fund private abortions. Decision strikes down sections of MB's Health Insurances Act on the grounds they violate the Charter. 1000's of Manitoba women who paid out-of-pocket to terminate their pregnancies may now seek compensation from the province. Oliphant ruling said, "In my view, 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, a procedure that probably must be performed in a timely manner, is a gross violation of the right of women to both liberty and security of the person." Government lawyers had argued during the hearing in May that women do not have the right to dictate when and where they can have therapeutic abortions and claimed there was no substance to the Jane Does' claim.
- Jan 26, 2005 -Federal Health Minister Ujjal Dosanjh announces he will take action to end longstanding dispute with New Brunswick over its refusal to fund abortions at the Fredericton Morgentaler Clinic. Dosanjh had told provincial Health Minister Elvy Robichaud in a private meeting that the Canada Health Act will be enforced. He says if it can't be settled amicably, the dispute avoidance and resolution process will be invoked, and financial penalties may apply from the feds. Dosanjh publicly repeats his threats on Jan 31. He said, "This is about a fundamental issue of a right to choose and the right to choose is meaningless unless you fund abortions adequately and appropriately across the country. There is no exception to that rule."
- Jan 27, 2005 - Manitoba government appeals a court ruling ordering it to pay for abortions in private clinics to protect its right to decide how health-care dollars are spent. Health Minister Tim Sale said the case reaches far beyond the abortion debate. He said the case could be the "death of medicare", ultimately forcing the province to pay private clinics to provide a myriad of health procedures, taking away provincial independence to decide how best to run the health system.
- Apr 14, 2005 - Federal Health Minister Ujjal Dosanjh confirms that the federal government is going ahead with its formal challenge of New Brunswick's strict abortion policies. Dosanjh said he is just "days" from invoking the new federal-provincial dispute avoidance resolution process with New Brunswick to solve the impasse under the *Canada Health Act*. NB Health Minister said he would not bow to threats.
- May 6, 2005 - Dr. Henry Morgentaler sends open letter to NB Premier Bernard Lord offering to end his lawsuit against NB's government if it buys his private clinic and continues offering abortions there. Dr. M's lawsuit was launched in October 2002, to get province to pay for abortions at his Fredericton clinic.
- Jun 27, 2005 - New Brunswick's Health and Wellness Minister Elvy Robichaud says he will defend NB's strict abortion policies before a new 3-member panel aimed at solving federal-provincial disputes over public health care. He told federal health minister Ujjal Dosanjh that NB always wanted to go

directly to that step in the new Dispute Avoidance Resolution process, rather than engage in prior negotiations.

- Sep 28, 2005 - New Brunswick and the federal government are going ahead with an unprecedented three-member panel to settle their dispute over the province's refusal to pay for abortions at the Morgentaler clinic. Federal Health Minister Ujjal Dosanjh said he will "very soon" submit a federal candidate for the new panel process after receiving word that the province is also ready to name its candidate. The two panelists would then have to agree on a third candidate. Under this new Dispute Avoidance Resolution (DAR) process, the panel will have 60 days to hear arguments and render its non-binding ruling.

- Sep 30, 2005 - The Manitoba Court of Appeal overturns a lower court decision (Dec 2004) that forced the government to fund abortions in private clinics (because the province's refusal to pay for their abortions outside of hospital constituted a "gross violation" of the women's rights). The appeal court judge said the matter is too complex to be decided by a judge alone and needed to go to trial. "The charter issues in this case are complex and involve developing areas of law, with important policy implications. Where the law is developing, a full trial record is often important." The case involved two women who paid for abortions at the private Morgentaler Clinic because they felt the wait was too long at a hospital, where the abortions would have been publicly funded.

- Jan 16, 2006 - Dr. Henry Morgentaler testifies in Quebec Superior Court in Montreal that the Quebec government should reimburse women who have abortions in specialized clinics and women's centres. Morgentaler said it’s “criminal” and a “flagrant injustice” for the province to do otherwise. He was testifying as part of a class-action lawsuit filed by the Association for Access to Abortion (a coalition of clinics) in 2002 against the Quebec government. The group wants an end to Quebec's policy of requiring women to pay between $200 and $600 for a timely abortion in a private or non-profit clinic when waiting lists are too long in the public system.

- Feb 23, 2006 - The Supreme Court of Canada refuses to hear an appeal by two women in Manitoba who asked the province to pay for timely abortions outside publicly funded hospitals. The women started a class-action lawsuit against the NDP government in 2001. They contended they had to pay for abortions at a private clinic because the wait for a procedure at a public hospital was eight weeks. The province now pays for abortions at Jane’s Clinic, a non-profit clinic. A Court of Queen's Bench judge ruled in December 2004 that the province's funding system violated the charter rights of the women. They said they turned to a private clinic for the abortions because the long waits for hospital procedures would cause them psychological and medical harm. In September, a Court of Appeal allowed part of Manitoba's challenge to that ruling, and said the case could proceed to trial. Health Minister Tim Sale asked the top court to protect the government's right to decide how health-care dollars are spent, and how long waiting lists are handled. The high court's refusal to hear the case means the issue can only be decided in Manitoba as a class-action trial.

- Aug 18, 2006 - Quebec government is ordered to pay more than $13 million to nearly 45,000 women who had to pay for abortions. Justice Nicole Benard of Quebec Superior Court says the government misinterpreted its own medicare law by paying only a portion of the cost of abortions performed in certain women's health centres and private clinics. The judgment in the class-action lawsuit covers abortions performed between 1999 and 2005. Women who wanted the procedure presented their health insurance card but were then charged between $200 and $300. The Association for Access to Abortion argued in court, among other things, that the extra-billing was unconstitutional, and the Quebec government was acting in bad faith because abortions are covered by the Quebec Health Insurance Act.

- Jan 15, 2007 - A group of pro-choice activists and attorneys led by lawyer Michelle Caron announce they are preparing a lawsuit against the Canadian province of New Brunswick because of its illegal law restricting funding of abortions to hospitals by ob-gyns with the approval of two doctors. The law violates Charter rights to life, liberty and security, and to equal treatment under the law. As a result, only 2 doctors at 2 hospitals perform abortions. Caron told CBC they will launch the suit in the spring if the Jan 31 meeting with the New Brunswick health minister Michael Murphy does not result in a change of policy. Group includes ARCC, NAF, and NB Advisory Council on Status of Women. Caron is a professor at the University of Moncton.

- Mar 13, 2007 – Dr. Henry Morgentaler's lawyers appear before Court of Queen's Bench Justice Judy Clendening, asking the judge to decide if he has standing in the case asks a judge to rule if he has standing to bring his lawsuit challenging the province over its policy not to fund elective abortion procedures at his clinic in Fredericton. Government lawyer John Furey said the rules of court don't allow Morgentaler's lawyers to ask for a ruling on standing. He said that privilege lies solely with the defendant, the provincial government, which can choose to request a ruling on standing at any time. Morgentaler representative Darlene Jamieson said her reading of the rules of court in New Brunswick is the same, but she argued it makes no sense. Leaving the issue of Morgentaler's standing in the case until trial would be a waste of time, she said. The judge seemed receptive to Jamieson's arguments, but had to adjourn the hearing of the motion to May because the government lawyers were "unprepared."

[the listing ends here as data collection ended in April 2007]

Further Legal Precedents that Solidified Right to Abortion (excerpt)

Following is a section from an unpublished article by Joyce Arthur and Sarah Semark (written 2007) arguing that further precedents after Morgentaler (1988) have solidified the right to abortion. Further landmark precedents that can be added to this list, both of which relied on R v. Morgentaler, include:

- Carter v. Canada (Attorney General) [2015] 1 SCR 331: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do?q=Morgentaler
- Canada (Attorney General) v. Bedford [2013] 3 SCR 1101: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do

One of the two judges who dissented in *Morgentaler*, Justice La Forest, had held that only the most vital interests are protected by the Charter and that abortion was not one of them (p.39). But in 1997, he stated in *Godbout v. Longueuil (City*) that s.7 protects one's choice in where to establish one's home.[1] This demonstrates that the scope of protected interests has been greatly widened. If the choice of where to live is of fundamental importance, the decision to give birth to a child must also qualify. Further, La Forest has adopted Wilson's reasoning in subsequent cases. He affirmed Wilson's definition of a s.7 right as including autonomy in making decisions of fundamental personal importance in *B.(R.) v. Children's Aid Society of Metropolitan Toronto* (1995)[2], when he himself stated "…liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."

Right to Liberty

Anti-abortion laws violate a woman's right to liberty. The Supreme Court held in *Blencoe v. British Columbia (Human Rights Commission)* that: "The liberty interest in s.7 *is no longer* restricted to mere freedom from physical restraint," but includes "compulsions or prohibitions [which] affect important and fundamental life choices" (emphasis added).[3] This suggests that liberty is defined far more broadly today than when it was applied in *Morgentaler.* Liberty now focuses on an individual's personal autonomy and ability to freely make decisions that are of fundamental personal importance.[4]

Right to Security of the Person

The right to security of the person clearly entitles a woman to have control over her bodily integrity. The Supreme Court has stated that everyone has the right to decide what is done to one's body.[5] This view was confirmed in *Rodriguez v. British Columbia (Attorney General)* when the court stated:

> "There is no question, then, that personal autonomy, at least with respect to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these."[6]

Right to Equality

Equality rights have been defined broadly by Canada's Supreme Court. In determining whether a person is being discriminated against, it is important to look not only at the legislation that has violated their equality rights by creating a distinction, but also to look at the larger social, political, and legal context.[7] Further, to determine whether someone's equality rights have been violated, it must be established whether the differential treatment has the effect of imposing a burden, obligation, or disadvantage not imposed upon others.[8] Conversely, if the differential treatment deprives an individual of opportunities, benefits, and advantages available to others, it will also be held to violate equality rights.[9] The effect of the legislation determines whether it violates equality rights. If a law consequently imposes obligations, penalties, or restrictive conditions on a person or group of people not imposed on other members of the community, it is discriminatory.[10] This definition of equality rights has been strongly affirmed by the Supreme Court, and in *Rodriguez v. British Columbia (Attorney General)* it was identified as the proper approach to equality rights under the Charter.[11]

Laws prohibiting abortion impose a disadvantage on women not experienced by other members of the community. As Christine Overall has commented, criminalizing abortion amounts to imposing limits on women's autonomy and bodily integrity that are not demanded of any other group of citizens.[12] The larger social, political, and legal context also reveal that child-bearing has a much more profound effect on women's lives than men's. Although men are legally bound to financially support the children they father, women are responsible for the majority of child-rearing in our society. While this duty is not legally imposed, it is an undeniable social reality. In comparison to the health risks of carrying a fetus to term and the life-changing nature of child-rearing, financial contributions are a relatively minor burden. Criminalizing abortion clearly places an obligation and burden on women not required of men.

The rights of the fetus cannot justify the imposition of this burden on women under Canadian law. The Supreme Court has held that a fetus is not a legal person until it is born alive.[13] Because of this finding, the court cannot justify violating a woman's equality rights to accommodate the fetus. Further, in *Dobson (Litigation Guardian of) v. Dobson*, the court ruled that a woman and her fetus are considered one person under the law, which essentially gives a woman absolute rights over her fetus:

> "A pregnant woman and her foetus are physically one, in the sense that she carries her foetus within herself. Virtually every aspect of her behaviour could foreseeably affect her foetus. … 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."[14]

Women's equality rights cannot be curtailed for the welfare of a fetus. In *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.,* the Supreme Court approvingly cited this passage from the Royal Commission on New Reproductive Technologies in its final report, *Proceed with Care* (vol.2 at pp. 952-58): "[Judicial intervention] also ignores basic components of women's fundamental human rights – the right to bodily integrity, the right to equality, privacy, and dignity."[15]

The burden of being forced to carry a fetus to term cannot be justified as a woman's choice. There have been attempts in Canadian law to characterize a woman's pregnancy as a voluntary action, thus arguing that it is not the State that is imposing the burden of carrying the fetus to term, but her own actions. This characterization has been repeatedly rejected by the Supreme Court. *Brooks v. Canada Safeway Ltd.* stated that characterizing pregnancy as a voluntary decision imposes unfair disadvantages on one group of people, from which all of society benefits.[16] *In Dobson (Litigation Guardian of) v. Dobson*, Justice Beverly McLachlin stated:

> "To say women choose pregnancy is no answer. Pregnancy is essentially related to womanhood. It is an inexorable and essential fact of human history that women and only women become pregnant. Women should not be penalized because it is their sex that bears children: *Brooks v. Canada Safeway Ltd*, [1989] 1 S.C.R. 1219. To say that broad legal constraints on the conduct of

> pregnant women do not constitute unequal treatment because women choose to become pregnant is to reinforce inequality by the fiction of deemed consent and the denial of what it is to be a woman."[17]

A woman's equality rights are intrinsically tied to her right to determine whether she will carry a fetus to term. Anti-abortion laws restrict a woman's bodily integrity and autonomy, thus imposing a burden not experienced by any other group of citizens. Anti-abortion laws conform to the Supreme Court's definition of discrimination which violates the Charter. Thus, the prohibition or restriction of abortion is contrary to the constitution.

Right to Privacy

Privacy is not an explicit constitutional right, but is inescapably tied to several rights stated in the Charter. The Supreme Court has recognized that s.7, the "right to life, liberty, and security of the person," includes the right to privacy.[18] The fundamental purpose behind s.8, the right to be secure from unreasonable search and seizure, has been deemed "to protect individuals from unjustified state intrusions upon their privacy."[19] The right to privacy is not restricted to Canadian law, but has been recognized internationally. In *R v. O'Connor,* the Supreme Court referred to Article 17 of the International Covenant on Civil and Political Rights,[20] Article 12 of the Universal Declaration of Human Rights,[21] and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[22]

Restricting the conduct of pregnant women was rejected by the Supreme Court as an unacceptable intrusion into the privacy rights of women.[23] Judicial intervention into women's reproduction has been held to ignore the basic components of women's fundamental human rights, including the right to privacy.[24]

The most sacred realms of privacy must be our family life and sexual life. Private activities such as enjoying sex with those we are attracted to, choosing who to marry, and deciding whether we want children and when are integral to our identities and liberty in a democratic society. The profound effects of reproductive decisions coupled with the taboo nature of sex in our society, requires these decisions to be private. One's autonomy also depends on the ability to make these private decisions without the intervention of third parties.

---

1 *Godbout v. Longueuil (City*). 1997. 3 S.C.R. 844 at para. 66. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1560/index.do

2 *B.(R.) v. Children's Aid Society of Metropolitan Toronto.* 1995. 1 S.C.R. 315 at para. 80. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1220/index.do .

3 Blencoe *v*. British Columbia (Human Rights Commission). 2000. 2 S.C.R. 307. Supra note 23 at para. 49. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1808/index.do

4 *B.(R.) v. Children's Aid Society of Metropolitan Toronto.* 1995. 1 S.C.R. 315 at para.80. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1220/index.dol. And: *Blencoe, supra* note 23 at para. 49.

5 *Ciarlariello v. Schacter.* 1993. 2 S.C.R. 119 at 135. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/996/index.do.

6 *Rodriguez v. British Columbia (Attorney General).* 1993. 3 S.C.R. 519 at para.136. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1054/index.do.

7 *R v. Turpin.* 1989. 1 S.C.R. 1296 at 1331-32. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/458/index.do.

8 *R v. Swain.* 1991. 1 S.C.R. 933 at 992. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/753/index.do .

9 *Ibid.*

10 *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* 1985. 2 S.C.R. 536 at 547. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/101/index.do.

11 *Rodriguez v. British Columbia (Attorney General).* 1993. 3 S.C.R. 519 at 548. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1054/index.do.

12 Claire Farid. 1997. Access to Abortion in Ontario: From Morgentaler 1988 to Savings and Restructuring Act. *5 Health L.J.* 119-145.

13 Tremblay v. Daigle. 1989. 2 S.C.R. 530 at 567. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/515/index.do.

[14] Dobson (Litigation Guardian of) v. Dobson. 1999. 2 S.C.R. 753 at 95/96. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1716/index.do.

[15] *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* 1997. 3 S.C.R. 925 at 37. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1562/index.do.

[16] Brooks vs. Canada Safeway. 1989. 1 S.C.R. 1219 at 1238. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/455/index.do.

[17] *Dobson*, at 800.

[18] *R v. Beare; R v. Higgins.* 1988. 2 S.C.R. 387 at 412. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/374/index.do.

[19] *Hunter et al v. Southam Inc.* 1984. 2 S.C.R. 145 at 160. At: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5274/index.do.

[20] International Covenant on Civil and Political Rights. 999 U.N.T.S. 171. At: http://www1.umn.edu/humanrts/instree/b3ccpr.htm.

[21] Universal Declaration of Human Rights. G.A. Res. 217 A (III), U.N. Doc. A/810. 1948. At: http://hrlibrary.umn.edu/instree/b1udhr.htm.

[22] Convention for the Protection of Human Rights and Fundamental Freedoms. 213 U.N.T.S. 221. 1995. 4 S.C.R. at para. 114. At: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680063765

[23] *Dobson, supra* note 16 at 769.

[24] *Winnipeg, supra* note 17 at para. 37.