Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada *Intervener*

INDEXED AS: R. *v.* MORGENTALER

File No.: 19556.

1986: October 7, 8, 9, 10; 1988: January 28.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and La Forest JJ.

APPEAL from a judgment of the Ontario Court of Appeal (1985), 52 O.R. (2d) 353, 22 D.L.R. (4th) 641, 22 C.C.C. (3d) 353, 48 C.R. (3d) 1, 17 C.R.R. 223, setting aside an acquittal found by Parker A.C.J.H.C. sitting with jury (1984), 47 O.R. (2d) 353, 12 D.L.R. (4th) 502, 14 C.C.C. (3d) 258, 41 C.R. (3d) 193, 11 C.R.R. 116. Appeal allowed and acquittals restored, McIntyre and La Forest JJ. dissenting. The first constitutional question should be answered in the affirmative as regards s. 7 and the second in the negative as regards s. 7. The third, fourth and fifth constitutional questions should be answered in the negative. The sixth constitutional question should be answered in the negative with respect to s. 605 of the *Criminal Code* and should not be answered as regards s. 610(3). The seventh constitutional question should not be answered.

Morris Manning, Q.C., and *Paul B. Schabas*, for the appellants.

Bonnie J. Wien and *W. James Blacklock*, for the respondent.

Edward R. Sojonky, Q.C., and *Marilyn Doering Steffen*, for the intervener.

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The judgment of Dickson C.J. and Lamer J. was delivered by

THE CHIEF JUSTICE--The principal issue raised by this appeal is whether the abortion provisions of the *Criminal Code*, R.S.C. 1970, c. C-34, infringe the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as formulated in s. 7 of the *Canadian Charter of Rights and Freedoms*. The appellants, Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott, have raised thirteen distinct grounds of appeal. During oral submissions, however, it became apparent that the primary focus of the case was upon the s. 7 argument. It is submitted by the appellants that s. 251 of the *Criminal Code* contravenes s. 7 of the *Canadian Charter of Rights and Freedoms* and that s. 251 should be struck down. Counsel for the Crown admitted during the course of her submissions that s. 7 of the *Charter* was indeed "the key" to the entire appeal. As for the remaining grounds of appeal, only a few brief comments are necessary. First of all, I agree with the disposition made by the Court of Appeal of the non-*Charter* issues, many of which have already been adequately dealt with in earlier cases by this Court. I am also of the view that the arguments concerning the alleged invalidity of s. 605 under ss. 7 and 11 of the *Charter* are unfounded. In view of my resolution of the s. 7 issue, it will not be necessary for me to address the appellants' other *Charter* arguments and I expressly refrain from commenting upon their merits.

During argument before this Court, counsel for the Crown emphasized repeatedly that it is not the role of the judiciary in Canada to evaluate the wisdom of legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 671, [hereinafter ``*Morgentaler (1975)*"] I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains

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true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to the abortion question. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights); *The Abortion Decision of the Federal Constitutional Court -- First Senate -- of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c. 87 (U.K.)

But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler (1975)*, at p. 671, that:

> The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued

by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*. As Justice McIntyre states in his reasons for judgment, at p. 138, "the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*." It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

I

The Court stated the following constitutional questions:

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1. Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

2. If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

3. Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?

4. Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?

5. Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

6. Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?

7. If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*) 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

The Attorney General of Canada intervened to support the respondent Crown.

II

Relevant Statutory and Constitutional Provisions

Criminal Code

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, "means" includes

(*a*) the administration of a drug or other noxious thing,

(*b*) the use of an instrument, and

(*c*) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

(*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (*a*) for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(*d*) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

(*a*) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(*c*) issued, by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(*b*) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(*c*), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation

in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(*a*) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,

(*a*.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,
(*b*) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(*c*) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(*d*) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

The Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject

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only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

III

Procedural History

The three appellants are all duly qualified medical practitioners who together set up a clinic in Toronto to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s. 251(4). The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances.

Indictments were preferred against the appellants charging that they conspired with each other between November 1982 and July 1983 with intent to procure the miscarriage of female persons, using an induced suction technique to carry out that intent, contrary to s. 423(1)(*d*) and s. 251(1) of the *Criminal Code*.

Counsel for the appellants moved to quash the indictment or to stay the proceedings before pleas were entered on the grounds that s. 251 of the *Criminal Code* was *ultra vires* the Parliament of Canada, infringed ss. 2(*a*), 7 and 12 of the *Charter*, and was inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. The trial judge, Parker A.C.J.H.C., dismissed the motion, and an appeal to the Ontario Court of Appeal was

dismissed. The trial proceeded before Parker A.C.J.H.C. and a jury, and the three accused were acquitted. The Crown appealed the acquittal to the Court of

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Appeal and the appellants filed a cross-appeal. The Court of Appeal allowed the appeal, set aside the verdict of acquittal and ordered a new trial. The Court held that the cross-appeal related to issues already raised in the appeal, and the issues were therefore examined as part of the appeal.

IV

Section 7 of the *Charter*

In his submissions, counsel for the appellants argued that the Court should recognize a very wide ambit for the rights protected under s. 7 of the *Charter*. Basing his argument largely on American constitutional theories and authorities, Mr. Manning submitted that the right to "life, liberty and security of the person" is a wide-ranging right to control one's own life and to promote one's individual autonomy. The right would therefore include a right to privacy and a right to make unfettered decisions about one's own life.

In my opinion, it is neither necessary nor wise in this appeal to explore the broadest implications of s. 7 as counsel would wish us to do. I prefer to rest my conclusions on a narrower analysis than that put forward on behalf of the appellants. I do not think it would be appropriate to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of *Charter* interpretation. The Court should be presented with a wide variety of claims and factual situations before articulating the full range of s. 7 rights. I will therefore limit my comments to some interpretive principles already set down by the Court and to an analysis of only two aspects of s. 7, the right to "security of the person" and "the principles of fundamental justice".

A. *Interpreting s. 7*

The goal of *Charter* interpretation is to secure for all people "the full benefit of the *Charter*'s protection": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. To attain that goal, this

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Court has held consistently that the proper technique for the interpretation of *Charter* provisions is to pursue a "purposive" analysis of the right guaranteed. A right recognized in the *Charter* is "to be understood, in other words, in the light of the interests it was meant to protect": *R. v. Big M Drug Mart Ltd.,* at p. 344. (See also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; and *R. v. Therens*, [1985] 1 S.C.R. 613.)

In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 204, Justice Wilson emphasized that there are three distinct elements to the s. 7 right, that

"life, liberty, and security of the person" are independent interests, each of which must be given independent significance by the Court (p. 205). This interpretation was adopted by a majority of the Court, *per* Justice Lamer, in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500. It is therefore possible to treat only one aspect of the first part of s. 7 before determining whether any infringement of that interest accords with the principles of fundamental justice. (See *Singh, Re B.C. Motor Vehicle Act*, and *R. v. Jones*, [1986] 2 S.C.R. 284.)

With respect to the second part of s. 7, in early academic commentary one of the principal concerns was whether the reference to "principles of fundamental justice" enables the courts to review the substance of legislation. (See, e.g., Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983), 13 *Man. L.J.* 455, and Garant, "Fundamental Freedoms and Natural Justice" in W. S. Tarnopolsky and G.-A. Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (1982).) In *Re B.C. Motor Vehicle Act*, Lamer J. noted at p. 497 that any attempt to draw a sharp line between procedure and substance would be ill-conceived. He suggested further that it would not be beneficial in Canada to allow a debate which is rooted in United States constitutional dilemmas to shape our interpretation of s. 7 (p. 498):

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We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions.

Lamer J. went on to hold that the principles of fundamental justice referred to in s. 7 can relate both to procedure and to substance, depending upon the circumstances presented before the Court.

I have no doubt that s. 7 does impose upon courts the duty to review the substance of legislation once it has been determined that the legislation infringes an individual's right to "life, liberty and security of the person". The section states clearly that those interests may only be impaired if the principles of fundamental justice are respected. Lamer J. emphasized, however, that the courts should avoid "adjudication of the merits of public policy" (p. 499). In the present case, I do not believe that it is necessary for the Court to tread the fine line between substantive review and the adjudication of public policy. As in the *Singh* case, it will be sufficient to investigate whether or not the impugned legislative provisions meet the procedural standards of fundamental justice. First it is necessary to determine whether s. 251 of the *Criminal Code* impairs the security of the person.

B. *Security of the Person*

The law has long recognized that the human body ought to be protected from interference by others. At common law, for example, any medical procedure carried out on a person without that person's consent is an assault. Only in emergency circumstances does the law allow others to make decisions of this nature. Similarly, art. 19 of the *Civil*

Code of Lower Canada provides that "The human person is inviolable" and that "No person may cause harm to the person of another without his consent or without being authorized by law to do so". "Security of the person", in other words, is not a value alien to our legal landscape. With the advent of the *Charter*, security of the person has been elevated to the status of a constitutional norm. This is not to say that the various forms of

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protection accorded to the human body by the common and civil law occupy a similar status. "Security of the person" must be given content in a manner sensitive to its constitutional position. The above examples are simply illustrative of our respect for individual physical integrity. (See R. Macdonald, "Procedural Due Process in Canadian Constitutional Law", 39 *U. Fla. L. Rev.* 217 (1987), at p. 248.) Nor is it to say that the state can never impair personal security interests. There may well be valid reasons for interfering with security of the person. It is to say, however, that if the state does interfere with security of the person, the *Charter* requires such interference to conform with the principles of fundamental justice.

The appellants submitted that the "security of the person" protected by the *Charter* is an explicit right to control one's body and to make fundamental decisions about one's life. The Crown contended that "security of the person" is a more circumscribed interest and that, like all of the elements of s. 7, it at most relates to the concept of physical control, simply protecting the individual's interest in his or her bodily integrity.

Canadian courts have already had occasion to address the scope of the interest protected under the rubric of "security of the person". In *R. v. Caddedu* (1982), 40 O.R. (2d) 128, at p. 139, the Ontario High Court emphasized that the right to security of the person, like each aspect of s. 7, is a basic right, the deprivation of which has severe consequences for an individual. This characterization was approved by this Court in *Re B.C. Motor Vehicle Act*, at p. 501. The Ontario Court of Appeal has held that the right to life, liberty and security of the person "would appear to relate to one's physical or mental integrity and one's control over these..." (*R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395, at p. 433.)

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That conclusion is consonant with the holding of Lamer J. in *Mills v. The Queen*, [1986] 1 S.C.R. 863. In *Mills*, Lamer J. was the only judge of this Court to treat the right to security of the person in any detail. Although the right arose in the context of s. 11(*b*) of the *Charter*, Lamer J. stressed the close connection between the specific rights in ss. 8 to 14 and the more generally applicable rights expressed in s. 7. Lamer J. held, at pp. 919-20, that even in the specific context of s. 11(*b*):

. . . security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" . . . These include stigmatization of the accused, loss of privacy,

stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

If state-imposed psychological trauma infringes security of the person in the rather circumscribed case of s. 11(*b*), it should be relevant to the general case of s. 7 where the right is expressed in broader terms. (See Whyte, *supra*, p. 39).

I note also that the Court has held in other contexts that the psychological effect of state action is relevant in assessing whether or not a *Charter* right has been infringed. In *R. v. Therens*, at p. 644, Justice Le Dain held that "The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary" for the purposes of defining "detention" in s. 10 of the *Charter*. A majority of the Court accepted the conclusions of Le Dain J. on this issue.

It may well be that constitutional protection of the above interests is specific to, and is only triggered by, the invocation of our system of criminal justice. It must not be forgotten, however, that s. 251 of the *Code*, subject to subs. (4), makes it an indictable offence for a person to procure the

miscarriage and provides a maximum sentence of two years in the case of the woman herself, and a maximum sentence of life imprisonment in the case of another person. Like Beetz J., I do not find it necessary to decide how s. 7 would apply in other cases.

The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.

I wish to reiterate that finding a violation of security of the person does not end the s. 7 inquiry. Parliament could choose to infringe security of the person if it did so in a manner consistent with the principles of fundamental justice. The present discussion should therefore be seen as a threshold inquiry and the conclusions do not dispose definitively of all the issues relevant to s. 7. With that caution, I have no difficulty in concluding that the encyclopedic factual submissions addressed to us by counsel in the present appeal establish beyond any doubt that s. 251 of the *Criminal Code* is *prima facie* a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not wish to continue with a pregnancy.

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts

emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless

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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. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice.

Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s. 251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s. 251 creates additional glaring breaches of security of the person. The evidence indicates that s. 251 causes a certain amount of delay for women who are successful in meeting its criteria. In the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being.

More specifically, in 1977, the *Report of the Committee on the Operation of the Abortion Law* (the Badgley Report) revealed that the average delay between a pregnant woman's first contact with a physician and a subsequent therapeutic abortion was eight weeks (p. 146). Although the situation appears to have improved since 1977, the extent of the improvement is not clear. The intervener, the Attorney General of Canada, submitted that the average delay in Ontario between the first visit to a physician and a therapeutic abortion was now between one and three weeks. Yet the respondent Crown admitted in a supplementary factum filed on November 27, 1986 with the permission of the Court that (p. 3):

. . . the evidence discloses that some women may find it very difficult to obtain an abortion: by necessity, abortion services are limited, since hospitals have budgetary, time, space and staff constraints as well as many medical responsibilities. As a result of these problems a woman may have to apply to several hospitals.

If forced to apply to several different therapeutic abortion committees, there can be no doubt that a woman will experience serious delay in obtaining a

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therapeutic abortion. In her *Report on Therapeu- tic Abortion Services in Ontario* (the Powell Report), Dr. Marion Powell emphasized that (p. 7):

The entire process [of obtaining an abortion] was found to be protracted with women requiring three to seven contacts with health professionals . . . .

Revealing the full extent of this problem, Dr. Augustin Roy, the President of the Corporation professionnelle des médecins du Québec, testified that studies showed that in

Quebec the waiting time for a therapeutic abortion in hospital varied between one and six weeks.

These periods of delay may not seem unduly long, but in the case of abortion, the implications of any delay, according to the evidence, are potentially devastating. The first factor to consider is that different medical techniques are employed to perform abortions at different stages of pregnancy. The testimony of expert doctors at trial indicated that in the first twelve weeks of pregnancy, the relatively safe and simple suction dilation and curettage method of abortion is typically used in North America. From the thirteenth to the sixteenth week, the more dangerous dilation and evacuation procedure is performed, although much less often in Canada than in the United States. From the sixteenth week of pregnancy, the instillation method is commonly employed in Canada. This method requires the intra-amniotic introduction of prostaglandin, urea, or a saline solution, which causes a woman to go into labour, giving birth to a foetus which is usually dead, but not invariably so. The uncontroverted evidence showed that each method of abortion progressively increases risks to the woman. (See, e.g., Tyler, et al., "Second Trimester Induced Abortion in the United States", in Garry S. Berger, William Brenner and Louis Keith, eds., *Second-Trimester Abortion: Perspectives After a Decade of Experience*.)

The second consideration is that even within the periods appropriate to each method of abortion, the evidence indicated that the earlier the abortion was performed, the fewer the complications and the lower the risk of mortality. For example, a study emanating from the Centre for Disease Control in Atlanta confirmed that "D & E [dilation and evacuation] procedures performed at 13 to 15 weeks' gestation were nearly 3 times safer than those performed at 16 weeks or later". (Cates and Grimes, "Deaths from Second Trimester Abortion by Dilation and Evacuation: Causes, Prevention, Facilities" (1981), 58 *Obstetrics and Gynecology* 401, at p. 401. See also the Powell Report, at p. 36.) The Court was advised that because of their perceptions of risk, Canadian doctors often refuse to use the dilation and evacuation procedure from the thirteenth to sixteenth weeks and instead wait until they consider it appropriate to use the instillation technique. Even more revealing were the overall mortality statistics evaluated by Drs. Cates and Grimes. They concluded from their study of the relevant data that:
Anything that contributes to delay in performing abortions increases the complication rates by 15 to 30%, and the chance of dying by 50% for each week of delay.

These statistics indicate clearly that even if the average delay caused by s. 251 *per arguendo* is of only a couple of weeks' duration, the effects upon any particular woman can be serious and, occasionally, fatal.

It is no doubt true that the overall complication and mortality rates for women who undergo abortions are very low, but the increasing risks caused by delay are so clearly established that I have no difficulty in concluding that the delay in obtaining therapeutic abortions caused by the mandatory procedures of s. 251 is an infringement of the purely physical aspect of the individual's right to security of the person. I should stress that the

marked contrast between the relative speed with which abortions can be obtained at the government-sponsored community clinics in Quebec and in hospitals under the s. 251 procedure was

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established at trial. The evidence indicated that at the government-sponsored clinics in Quebec, the maximum delay was less than a week. One must conclude, and perhaps underline, that the delay experienced by many women seeking a therapeutic abortion, be it of one, two, four, or six weeks' duration, is caused in large measure by the requirements of s. 251 itself.

The above physical interference caused by the delays created by s. 251, involving a clear risk of damage to the physical well-being of a woman, is sufficient, in my view, to warrant inquiring whether s. 251 comports with the principles of fundamental justice. However, there is yet another infringement of security of the person. It is clear from the evidence that s. 251 harms the psychological integrity of women seeking abortions. A 1985 report of the Canadian Medical Association, discussed in the Powell Report, at p. 15, emphasized that the procedure involved in s. 251, with the concomitant delays, greatly increases the stress levels of patients and that this can lead to more physical complications associated with abortion. A specialist in fertility control, Dr. Henry David, was qualified as an expert witness at trial on the psychological impact upon women of delay in the process of obtaining an abortion. He testified that his own studies had demonstrated that there is increased psychological stress imposed upon women who are forced to wait for abortions, and that this stress is compounded by the uncertainty whether or not a therapeutic abortion committee will actually grant approval.

Perhaps the most powerful testimony regarding the psychological impact upon women caused by the delay inherent in s. 251 procedures was offered at trial by Dr. Jane Hodgson, the Medical Director of the Women's Health Center in Duluth, Minnesota. She was called to testify as to her experiences with Canadian women who had come to the Women's Health Center for abortions. Her testimony was extensive, but the flavour may be gleaned from the following short excerpts:

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May I add one other thing that I think is very vital, and that is that many of these [Canadian] women come down because they know they will be delayed in getting, first, permission, then delayed in getting a hospital bed, or getting into the hospital, and so they know they will have to have saline [instillation] procedures. And some of them have been through this, and others know what it is about, and they will do almost anything to avoid having a saline procedure.

And of course, that is -- I consider that a very cruel type of medical care and will do anything to help them to avoid this type of treatment.

...

The cost, the time consumed, the medical risks, the mental anguish -- all of this is cruelty, in this day and age, because it's [the instillation procedure] an obsolete procedure that is essentially disappearing in the United States.

I have already noted that the instillation procedure requires a woman actually to experience labour and to suffer through the birth of a foetus that is usually but not always dead. Statistics from 1982 indicated that 33.4 per cent of second trimester abortions in Ontario were done by instillation, and the Powell Report revealed, at p. 36, that even in 1986 there persisted a high incidence of second trimester abortions in Ontario. The psychological injury caused by delay in obtaining abortions, much of which must be attributed to the procedures set out in s. 251, constitutes an additional infringement of the right to security of the person.

In its supplementary factum and in oral submissions, the Crown argued that evidence of what could be termed "administrative inefficiency" is not relevant to the evaluation of legislation for the purposes of s. 7 of the *Charter*. The Crown argued that only evidence regarding the purpose of legislation is relevant. The assumption, of course, is that any impairment to the physical or psychological interests of individuals caused by s. 251 of the *Criminal Code* does not amount to an infringement of security of the person because the injury is caused by practical difficulties and is not intended by the legislator.

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The submission is faulty on two counts. First, as a practical matter it is not possible in the case of s. 251 to erect a rigid barrier between the purposes of the section and the administrative procedures established to carry those purposes into effect. For example, although it may be true that Parliament did not enact s. 251 intending to create delays in obtaining therapeutic abortions, the evidence demonstrates that the system established by the section for obtaining a therapeutic abortion certificate inevitably does create significant delays. It is not possible to say that delay results only from administrative constraints, such as limited budgets or a lack of qualified persons to sit on therapeutic abortion committees. Delay results from the cumbersome operating requirements of s. 251 itself. (See, by way of analogy, *R. v. Therens*, *per* Le Dain J., at p. 645.) Although the mandate given to the courts under the *Charter* does not, generally speaking, enable the judiciary to provide remedies for administrative inefficiencies, when denial of a right as basic as security of the person is infringed by the procedure and administrative structures created by the law itself, the courts are empowered to act.

Secondly, were it nevertheless possible in this case to dissociate purpose and administration, this Court has already held as a matter of law that purpose is not the only appropriate criterion in evaluating the constitutionality of legislation under the *Charter*. In *R. v. Big M Drug Mart Ltd.*, at p. 331, the Court stated that:

. . . both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.

Even if the purpose of legislation is unobjectionable, the administrative procedures created by law to bring that purpose into operation may produce unconstitutional effects, and the legislation should then be struck down. It is important to note that, in speaking of the effects of legislation, the Court in *R. v. Big M Drug Mart Ltd*. was still referring to effects that can invalidate legislation under s. 52 of the *Constitution Act, 1982* and not to individual effects that might lead a court to provide a

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personal remedy under s. 24(1) of the *Charter*. In the present case, the appellants are complaining of the general effects of s. 251. If section 251 of the *Criminal Code* does indeed breach s. 7 of the *Charter* through its general effects, that can be sufficient to invalidate the legislation under s. 52. As an aside, I should note that the appellants have standing to challenge an unconstitutional law if they are liable to conviction for an offence under that law even though the unconstitutional effects are not directed at the appellants *per se*: *R. v. Big M Drug Mart Ltd.*, at p. 313. The standing of the appellants was not challenged by the Crown.

In summary, s. 251 is a law which forces women to carry a foetus to term contrary to their own priorities and aspirations and which imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria. It must, therefore, be determined whether that infringement is accomplished in accordance with the principles of fundamental justice, thereby saving s. 251 under the second part of s. 7.

C. *The Principles of Fundamental Justice*

Although the "principles of fundamental justice" referred to in s. 7 have both a substantive and a procedural component (*Re B.C. Motor Vehicle Act*, at p. 499), I have already indicated that it is not necessary in this appeal to evaluate the substantive content of s. 251 of the *Criminal Code*. My discussion will therefore be limited to various aspects of the administrative structure and procedure set down in s. 251 for access to therapeutic abortions.

In outline, s. 251 operates in the following manner. Subsection (1) creates an indictable offence for any person to use any means with the intent "to procure the miscarriage of a female person". Subsection (2) establishes a parallel indictable offence for any pregnant woman to use or to permit any means to be used with the intent "to procure her own miscarriage". The "means" referred to in subss. (1) and (2) are defined in subs. (3) as the administration of a drug or "other noxious thing", the use of an instrument, and

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"manipulation of any kind". The crucial provision for the purposes of the present appeal

is subs. (4) which states that the offences created in subss. (1) and (2) "do not apply" in certain circumstances. The Ontario Court of Appeal in the proceedings below characterized s. 251(4) as an "exculpatory provision" ((1985), 52 O.R. (2d) 353, at p. 365). In *Morgentaler (1975)*, at p. 673, a majority of this Court held that the effect of s. 251(4) was to afford "a complete answer and defence to those who respect its terms".

The procedure surrounding the defence is rather complex. A pregnant woman who desires to have an abortion must apply to the "therapeutic abortion committee" of an "accredited or approved hospital". Such a committee is empowered to issue a certificate in writing stating that in the opinion of a majority of the committee, the continuation of the pregnancy would be likely to endanger the pregnant woman's life or health. Once a copy of the certificate is given to a qualified medical practitioner who is not a member of the therapeutic abortion committee, he or she is permitted to perform an abortion on the pregnant woman and both the doctor and the woman are freed from any criminal liability.

A number of definitions are provided in subs. (6) which have a bearing on the disposition of this appeal. An "accredited hospital" is described as a hospital accredited by the Canadian Council on Hospital Accreditation "in which diagnostic services and medical, surgical and obstetrical treatment" are provided. An "approved hospital" is a hospital "approved for the purposes of this section by the Minister of Health" of a province. A "therapeutic abortion committee" must be "comprised of not less than three members each of whom is a qualified medical practitioner" who is appointed by a hospital's administrative board. Interestingly, the term "health" is not defined for the purposes of s. 251, so it would appear that the therapeutic abortion committees are free to develop their own theories as to when a potential impairment of a woman's "health" would justify the granting of a therapeutic abortion certificate.

As is so often the case in matters of interpretation, however, the straightforward reading of this statutory scheme is not fully revealing. In order to understand the true nature and scope of s. 251, it is necessary to investigate the practical operation of the provisions. The Court has been provided with a myriad of factual submissions in this area. One of the most useful sources of information is the Badgley Report. The Committee on the Operation of the Abortion Law was established by Orders-in-Council P.C. 1975-2305, -2306, and -2307 of September 29, 1975 and its terms of reference instructed it to "conduct a study to determine whether the procedure provided in the Criminal Code for obtaining therapeutic abortions is operating equitably across Canada". Statistics were provided to the Committee by Statistics Canada and the Committee conducted its own research, meeting with officials of the departments of the provincial attorneys general and of health, and visiting 140 hospitals throughout Canada. The Committee also commissioned national hospital, hospital staff, physician, and patient surveys. The overall conclusion of the Committee was that "The procedures set out for the operation of the Abortion Law are not working equitably across Canada" (p. 17). Of course, that conclusion does not lead to the necessary inference that s. 251 procedures

violate the principles of fundamental justice. Unfair functioning of the law could be caused by external forces which do not relate to the law itself.

The Badgley Report contains a wealth of detailed information which demonstrates, however, that many of the most serious problems with the functioning of s. 251 are created by procedural and administrative requirements established in the law. For example, the Badgley Committee noted, at p. 84, that:

. . . the Abortion Law implicitly establishes a minimum requirement of three qualified physicians to serve on a therapeutic abortion committee, plus a qualified medical practitioner who is not a member of the therapeutic abortion committee, to perform the procedure.

The Committee went on to make the following observation at p. 102:

Of the 1,348 civilian hospitals in operation in 1976, at least 331 hospitals had less than four physicians on their medical staff. In terms of the distribution of physicians, 24.6 percent of hospitals in Canada did not have a medical staff which was large enough to establish a therapeutic abortion committee and to perform the abortion procedure.

In other words, the seemingly neutral requirement of s. 251(4) that at least four physicians be available to authorize and to perform an abortion meant in practice that abortions would be absolutely unavailable in almost one quarter of all hospitals in Canada.

Other administrative and procedural requirements of s. 251(4) reduce the availability of therapeutic abortions even further. For the purposes of s. 251, therapeutic abortions can only be performed in "accredited" or "approved" hospitals. As noted above, an "approved" hospital is one which a provincial minister of health has designated as such for the purpose of performing therapeutic abortions. The minister is under no obligation to grant any such approval. Furthermore, an "accredited" hospital must not only be accredited by the Canadian Council on Hospital Accreditation, it must also provide specified services. Many Canadian hospitals do not provide all of the required services, thereby being automatically disqualified from undertaking therapeutic abortions. The Badgley Report stressed the remarkable limitations created by these requirements, especially when linked with the four-physician rule discussed above (p. 105):

Of the total of 1,348 non-military hospitals in Canada in 1976, 789 hospitals, or 58.5 percent, were ineligible in terms of their major treatment functions, the size of their medical staff, or their type of facility to establish therapeutic abortion committees.

Moreover, even if a hospital is eligible to create a therapeutic abortion committee, there is no requirement in s. 251 that the hospital need do so. The Badgley Committee discovered that in 1976, of the 559 general hospitals which met the

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procedural requirements of s. 251, only 271 hospitals in Canada, or only 20.1 per cent of the total, had actually established a therapeutic abortion committee (p. 105).

Even though the Badgley Report was issued ten years ago, the relevant statistics do not appear to be out of date. Indeed, Statistics Canada reported that in 1982 the number of hospitals with therapeutic abortion committees had actually fallen to 261. (*Basic Facts on Therapeutic Abortions, Canada: 1982* (1983).) Even more recent data exists for Ontario. In the Powell Report, it was noted that in 1986 only 54 per cent of accredited acute care hospitals in the province had therapeutic abortion committees. In five counties there were no committees at all (p. 24). Of the 95 hospitals with committees, 12 did not do any abortions in 1986 (p. 24).

The Powell Report reveals another serious difficulty with s. 251 procedures. The requirement that therapeutic abortions be performed only in "accredited" or "approved" hospitals effectively means that the practical availability of the exculpatory provisions of subs. (4) may be heavily restricted, even denied, through provincial regulation. In Ontario, for example, the provincial government promulgated O. Reg. 248/70 under *The Public Hospitals Act*, R.S.O. 1960, c. 322, now R.R.O. 1980, Reg. 865. This regulation provides that therapeutic abortion committees can only be established where there are ten or more members on the active medical staff (Powell Report, at p. 13). A minister of health is not prevented from imposing harsher restrictions. During argument, it was noted that it would even be possible for a provincial government, exercising its legislative authority over public hospitals, to distribute funding for treatment facilities in such a way that no hospital would meet the procedural requirements of s. 251(4). Because of the administrative structure established in s. 251(4) and the related definitions, the "defence" created in the section could be completely wiped out.

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A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. Subsection (4) states simply that a therapeutic abortion committee may grant a certificate when it determines that a continuation of a pregnancy would be likely to endanger the "life or health" of the pregnant woman. It was noted above that "health" is not defined for the purposes of the section. The Crown admitted in its supplementary factum that the medical witnesses at trial testified uniformly that the "health" standard was ambiguous, but the Crown derives comfort from the fact that "the medical witnesses were unanimous in their approval of the broad World Health Organization definition of health". The World Health Organization

defines "health" not merely as the absence of disease or infirmity, but as a state of physical, mental and social well-being.

I do not understand how the mere existence of a workable definition of "health" can make the use of the word in s. 251(4) any less ambiguous when that definition is nowhere referred to in the section. There is no evidence that therapeutic abortion committees are commonly applying the World Health Organization definition. Indeed, the Badgley Report indicates that the situation is quite the contrary (p. 20):

There has been no sustained or firm effort in Canada to develop an explicit and operational definition of health, or to apply such a concept directly to the operation of induced abortion. In the absence of such a definition, each physician and each hospital reaches an individual decision on this matter. How the concept of health is variably defined leads to considerable inequity in the distribution and the accessibility of the abortion procedure.

Various expert doctors testified at trial that therapeutic abortion committees apply widely differing definitions of health. For some committees, psychological health is a justification for therapeutic abortion; for others it is not. Some committees routinely refuse abortions to married women

unless they are in physical danger, while for other committees it is possible for a married woman to show that she would suffer psychological harm if she continued with a pregnancy, thereby justifying an abortion. It is not typically possible for women to know in advance what standard of health will be applied by any given committee. Parker A.C.J.H.C., at p. 377, found clear evidence that s. 251(4) provided no adequate guidelines for therapeutic abortion committees charged with determining when an abortion should legally be available:

The [Badgley] report, and other evidence adduced in support of this motion, indicates that each therapeutic abortion committee is free to establish its own guidelines and many committees apply arbitrary requirements. Some committees refuse to approve applications for second abortions unless the patient consents to sterilization, others require psychiatric assessment, and others do not grant approval to married women.

It is no answer to say that "health" is a medical term and that doctors who sit on therapeutic abortion committees must simply exercise their professional judgment. A therapeutic abortion committee is a strange hybrid, part medical committee and part legal committee. Again, in the words of Parker A.C.J.H.C., at p. 381:

Given the consequences of the issuing or refusing to issue a certificate, I have some difficulty in reducing the committee's powers to merely that of stating its opinion as to the likelihood of the continuation of the pregnancy endangering the applicant's life or health. The decision of the committee has a very real effect on access to abortion for the

pregnant female applicant, and the potential criminal liability of both the applicant and the physician who performs the operation.

When the decision of the therapeutic abortion committee is so directly laden with legal consequences, the absence of any clear legal standard to be applied by the committee in reaching its decision is a serious procedural flaw.

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The combined effect of all of these problems with the procedure stipulated in s. 251 for access to therapeutic abortions is a failure to comply with the principles of fundamental justice. In *Re B.C. Motor Vehicle Act*, Lamer J. held, at p. 503, that "the principles of fundamental justice are to be found in the basic tenets of our legal system". One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory. The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

Consider then the case of a pregnant married woman who wishes to apply for a therapeutic abortion certificate because she fears that her psychological health would be impaired seriously if she carried the foetus to term. The uncontroverted evidence reveals that there are many areas in Canada where such a woman would simply not have access to a therapeutic abortion. She may live in an area where no hospital has four doctors; no therapeutic abortion committee can be created. Equally, she may live in a place where the treatment functions of the nearby hospitals do not satisfy the definition of "accredited hospital" in s. 251(6). Or she may live in a province where the provincial government has imposed such stringent requirements on hospitals seeking to create therapeutic abortion committees that no hospital can qualify. Alternatively, our hypothetical woman may confront a therapeutic abortion committee in her local hospital which defines "health" in purely physical terms or which refuses to countenance abortions for married women. In each of these cases, it is the administrative structures and procedures established by s. 251 itself that would in

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practice prevent the woman from gaining the benefit of the defence held out to her in s. 251(4).

The facts indicate that many women do indeed confront these problems. Doctors from the Chedoke-McMaster Hospital in Hamilton testified that they received telephone calls from women throughout Ontario who had applied for therapeutic abortions at local hospitals and been refused. At one point, 80 per cent of abortion patients at Chedoke-McMaster were from outside Hamilton, and the hospital was forced to restrict access for

women from outside its catchment area. The Powell Report revealed that in over 50 per cent of Ontario counties in 1986, the majority of women obtaining abortions had the procedure away from their place of residence (p. 7). Even more telling is the fact that "a minimum of 5000 Ontario women obtain abortions each year in freestanding clinics in Canada and the United States" (p. 7).

The Crown argues in its supplementary factum that women who face difficulties in obtaining abortions at home can simply travel elsewhere in Canada to procure a therapeutic abortion. That submission would not be especially troubling if the difficulties facing women were not in large measure created by the procedural requirements of s. 251 itself. If women were seeking anonymity outside their home town or were simply confronting the reality that it is often difficult to obtain medical services in rural areas, it might be appropriate to say "let them travel". But the evidence establishes convincingly that it is the law itself which in many ways prevents access to local therapeutic abortion facilities. The enormous emotional and financial burden placed upon women who must travel long distances from home to obtain an abortion is a burden created in many instances by Parliament. Moreover, it is not accurate to say to women who would seem to qualify under s. 251(4) that they can get a therapeutic abortion as long as

they are willing to travel. Ms. Carolyn Egan, administrative co-ordinator of the Birth Control and Venereal Disease Centre of Toronto, testified that many hospitals in Toronto had been forced to establish arbitrary abortion quotas, and that some Toronto hospitals restricted access to women inside the geographical area the hospitals were designated to serve. A woman from outside Toronto could run into serious difficulties attempting to procure a therapeutic abortion in that city. As noted above, the situation in Hamilton is now comparable to that in Toronto, because of the geographic restrictions imposed at the Chedoke-McMaster Hospital. Meanwhile, of course, days and weeks may pass and a woman may ultimately be forced to undergo a more dangerous abortion procedure. Or she may become desperate and choose to travel even further afield, to Quebec or to the United States, to obtain an abortion in a free-standing clinic.

A majority of this Court held in *R. v. Jones*, at p. 304, *per* La Forest J., that:

> The provinces must be given room to make choices regarding the type of administrative structure that will suit their needs unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice. [Emphasis in original.]

Similarly, Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability. But if that structure is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice", that structure must be struck down. In the present case, the structure -- the system regulating access to therapeutic abortions -- is manifestly unfair. It contains so many potential barriers to its

own operation that the defence it creates will in many circumstances be practically unavailable to women

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who would *prima facie* qualify for the defence, or at least would force such women to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available.

I conclude that the procedures created in s. 251 of the *Criminal Code* for obtaining a therapeutic abortion do not comport with the principles of fundamental justice. It is not necessary to determine whether s. 7 also contains a substantive content leading to the conclusion that, in some circumstances at least, the deprivation of a pregnant woman's right to security of the person can never comport with fundamental justice. Simply put, assuming Parliament can act, it must do so properly. For the reasons given earlier, the deprivation of security of the person caused by s. 251 as a whole is not in accordance with the second clause of s. 7. It remains to be seen whether s. 251 can be justified for the purposes of s. 1 of the *Charter*.
V

Section 1 Analysis

Section 1 of the *Charter* can potentially be used to "salvage" a legislative provision which breaches s. 7: *Re B.C. Motor Vehicle Act*, *per* Lamer J., at p. 520. The principles governing the necessary analysis under s. 1 were set down in *R. v. Big M Drug Mart Ltd.,* and, more precisely, in *R. v. Oakes*, [1986] 1 S.C.R. 103. A statutory provision which infringes any section of the *Charter* can only be saved under s. 1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M Drug Mart Ltd.*, at p. 352) and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society. This second aspect ensures that the legislative means are proportional to the legislative ends (*Oakes*, at pp. 139-40). In *Oakes*, at p. 139, the Court referred to three considerations which are typically useful in assessing the

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proportionality of means to ends. First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as little as possible the right or freedom under consideration. Third, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

The appellants contended that the sole purpose of s. 251 of the *Criminal Code* is to protect the life and health of pregnant women. The respondent Crown submitted that s. 251 seeks to protect not only the life and health of pregnant women, but also the interests of the foetus. On the other hand, the Crown conceded that the Court is not called upon in

this appeal to evaluate any claim to "foetal rights" or to assess the meaning of "the right to life". I expressly refrain from so doing. In my view, it is unnecessary for the purpose of deciding this appeal to evaluate or assess "foetal rights" as an independent constitutional value. Nor are we required to measure the full extent of the state's interest in establishing criteria unrelated to the pregnant woman's own priorities and aspirations. What we must do is evaluate the particular balance struck by Parliament in s. 251, as it relates to the priorities and aspirations of pregnant women and the government's interests in the protection of the foetus.

Section 251 provides that foetal interests are not to be protected where the "life or health" of the woman is threatened. Thus, Parliament itself has expressly stated in s. 251 that the "life or health" of pregnant women is paramount. The procedures of s. 251(4) are clearly related to the pregnant woman's "life or health" for that is the very phrase used by the subsection. As McIntyre J. states in his reasons (at p. 155), the aim of s. 251(4) is "to restrict abortion to cases where the continuation of the pregnancy would, or would likely, be injurious

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to the life or health of the woman concerned, not to provide unrestricted access to abortion." I have no difficulty in concluding that the objective of s. 251 as a whole, namely, to balance the competing interests identified by Parliament, is sufficiently important to meet the requirements of the first step in the *Oakes* inquiry under s. 1. I think the protection of the interests of pregnant women is a valid governmental objective, where life and health can be jeopardized by criminal sanctions. Like Beetz and Wilson JJ., I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective. As the Court of Appeal stated at p. 366, "the contemporary view [is] that abortion is not always socially undesirable behavior."

I am equally convinced, however, that the means chosen to advance the legislative objectives of s. 251 do not satisfy any of the three elements of the proportionality component of *R. v. Oakes*. The evidence has led me to conclude that the infringement of the security of the person of pregnant women caused by s. 251 is not accomplished in accordance with the principles of fundamental justice. It has been demonstrated that the procedures and administrative structures created by s. 251 are often arbitrary and unfair. The procedures established to implement the policy of s. 251 impair s. 7 rights far more than is necessary because they hold out an illusory defence to many women who would *prima facie* qualify under the exculpatory provisions of s. 251(4). In other words, many women whom Parliament professes not to wish to subject to criminal liability will nevertheless be forced by the practical unavailability of the supposed defence to risk liability or to suffer other harm such as a traumatic late abortion caused by the delay inherent in the s. 251 system. Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved. Indeed, to the

extent that s. 251(4) is designed to protect the life and health of women, the procedures it establishes may actually defeat that objective. The administrative structures of s. 251(4) are so cumbersome that women whose health is endangered by pregnancy may not be able to gain a therapeutic abortion, at least without great trauma, expense and inconvenience.

I conclude, therefore, that the cumbersome structure of subs. (4) not only unduly subordinates the s. 7 rights of pregnant women but may also defeat the value Parliament itself has established as paramount, namely, the life and health of the pregnant woman. As I have noted, counsel for the Crown did contend that one purpose of the procedures required by subs. (4) is to protect the interests of the foetus. State protection of foetal interests may well be deserving of constitutional recognition under s. 1. Still, there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion.

Section 251 of the *Criminal Code* cannot be saved, therefore, under s. 1 of the *Charter*.

VI

Defence Counsel's Address to the Jury

In his concluding remarks to the jury at the trial of the appellants, defence counsel asserted:

The judge will tell you what the law is. He will tell you about the ingredients of the offence, what the Crown has to prove, what the defences may be or may not be, and you must take the law from him. But I submit to you that it is up to you and you alone to apply the law to this evidence and you have a right to say it shouldn't be applied.

The burden of his argument was that the jury should not apply s. 251 if they thought that it was a bad law, and that, in refusing to apply the law, they could send a signal to Parliament that the law should be changed. Although my disposition of the appeal makes it unnecessary, strictly speaking, to review Mr. Manning's argument before the jury, I find the argument so troubling that I feel compelled to comment.

It has long been settled in Anglo-Canadian criminal law that in a trial before judge and jury, the judge's role is to state the law and the jury's role is to apply that law to the facts of the case. In *Joshua v. The Queen*, [1955] A.C. 121 (P.C.), at p. 130, Lord Oaksey enunciated the principle succinctly:

It is a general principle of British law that on a trial by jury it is for the judge to direct the jury on the law and in so far as he thinks necessary on the facts, but the jury, whilst they must take the law from the judge, are the sole judges on the facts.

The jury is one of the great protectors of the citizen because it is composed of twelve persons who collectively express the common sense of the community. But the jury members are not expert in the law, and for that reason they must be guided by the judge on questions of law.

The contrary principle contended for by Mr. Manning, that a jury may be encouraged to ignore a law it does not like, could lead to gross inequities. One accused could be convicted by a jury who supported the existing law, while another person indicted for the same offence could be acquitted by a jury who, with reformist zeal, wished to express disapproval of the same law. Moreover, a jury could decide that although the law pointed to a conviction, the jury would simply refuse to apply the law to an accused for whom it had sympathy. Alternatively, a jury who feels antipathy towards an accused might convict despite a law which points to acquittal. To give a harsh but I think telling example, a jury fueled by the passions of racism could be told that they need not apply the law against murder to a white man who had killed a black man. Such a possibility need only be stated to reveal the potentially frightening implications of

Mr. Manning's assertions. The dangerous argument that a jury may be encouraged to disregard the law was castigated as long ago as 1784 by Lord Mansfield in a criminal libel case, *R. v. Shipley* (1784), 4 Dougl. 73, 99 E.R. 774, at p. 824:

So the jury who usurp the judicature of law, though they happen to be right, are themselves wrong, because they are right by chance only, and have not taken the constitutional way of deciding the question. It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences.

To be free is to live under a government by law . . . . Miserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or, which is the same thing, no certain administration of law, to protect individuals, or to guard the State.

...

In opposition to this, what is contended for? -- That the law shall be, in every particular cause, what any twelve men, who shall happen to be the jury, shall be inclined to think; liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town, where thousands, more or less, are concerned in the publication of newspapers, paragraphs, and pamphlets. Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.

I can only add my support to that eloquent statement of principle.

It is no doubt true that juries have a *de facto* power to disregard the law as stated to the jury by the judge. We cannot enter the jury room. The jury is never called upon to explain the reasons which lie behind a verdict. It may even be true that in some limited circumstances the private decision of a jury to refuse to apply the law will constitute, in the words of a Law Reform Commission of Canada working paper, "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law" (Law Reform Commission of Canada, Working Paper 27, *The Jury in Criminal Trials* (1980)). But recognizing this reality is a far cry from suggesting that

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counsel may encourage a jury to ignore a law they do not support or to tell a jury that it has a right to do so. The difference between accepting the reality of *de facto* discretion in applying the law and elevating such discretion to the level of a right was stated clearly by the United States Court of Appeals, District of Columbia Circuit, in *United States v. Dougherty*, 473 F.2d 1113 (1972), *per* Leventhal J., at p. 1134:

The jury system has worked out reasonably well overall, providing "play in the joints" that imparts flexibility and avoid[s] undue rigidity. An equilibrium has evolved -- an often marvelous balance -- with the jury acting as a "safety valve" for exceptional cases, without being a wildcat or runaway institution. There is reason to believe that the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not expressly delineate a jury charter to carve out its own rules of law.

To accept Mr. Manning's argument that defence counsel should be able to encourage juries to ignore the law would be to disturb the "marvelous balance" of our system of criminal trials before a judge and jury. Such a disturbance would be irresponsible. I agree with the trial judge and with the Court of Appeal that Mr. Manning was quite simply wrong to say to the jury that if they did not like the law they need not enforce it. He should not have done so.

VII

Conclusion

Section 251 of the *Criminal Code* infringes the right to security of the person of many pregnant women. The procedures and administrative structures established in the section to provide for therapeutic abortions do not comply with the principles of fundamental justice. Section 7 of the *Charter* is infringed and that infringement cannot be saved under s. 1.

In oral argument, counsel for the Crown submitted that if the Court were to hold that procedural aspects of s. 251 infringed the *Charter*, only the procedures set out in the section should be struck

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down, that is subss. (4) and (5). After being pressed with questions from the bench, Ms. Wein conceded that the whole of s. 251 should fall if it infringed s. 7. Mr. Blacklock for the Attorney General of Canada took the same position. This was a wise approach, for in *Morgentaler (1975)*, at p. 676, the Court held that "s. 251 contains a comprehensive code on the subject of abortions, unitary and complete within itself". Having found that this "comprehensive code" infringes the *Charter*, it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section. The appeal should therefore be allowed and s. 251 as a whole struck down under s. 52(1) of the *Constitution Act, 1982*.

The first constitutional question is therefore answered in the affirmative as regards s. 7 of the *Charter* only. The second question, as regards s. 7 of the *Charter* only, is answered in the negative. Questions 3, 4 and 5 are answered in the negative. I answer question 6 in the manner proposed by Beetz J. It is not necessary to answer question 7.

The reasons of Beetz and Estey JJ. were delivered by

R. *v.* MORGENTALER *Beetz J.*

R. *c.* MORGENTALER *Le juge Beetz*

BEETZ J.--I have had the advantage of reading the reasons for judgment written by the Chief Justice, as well as the reasons written by Justice McIntyre and Justice Wilson.

I agree with the Chief Justice and Wilson J. that this case finds its resolution in the answers to the first two constitutional questions stated by the Chief Justice in so far as those questions relate to s. 7 and s. 1 of the *Canadian Charter of Rights and Freedoms*. Although the greatest part of my reasons is devoted to responding to the first two constitutional questions, I consider it necessary to answer the sixth constitutional question concerning the validity of s. 605(1)(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34, under the *Charter* in order to establish the Crown's right to appeal the verdict of acquittal in this case. Finally, I have decided that it is appropriate to address the appellants' arguments pertaining to s. 91(27) and s. 96 of the

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Constitution Act, 1867, as well as the argument that s. 251 of the *Criminal Code* is in effect an unconstitutional delegation of legislative power.

Like the Chief Justice and Wilson J., I would allow the appeal and answer the first constitutional question in the affirmative and the second constitutional question in the

negative. This however is a result which I reach for reasons which differ from those of the Chief Justice and those of Wilson J.

I find it convenient to outline at the outset the steps which lead me to this result:

I -- Before the advent of the *Charter*, Parliament recognized, in adopting s. 251(4)(*c*) of the *Criminal Code*, that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health". In my view, this standard in s. 251(4) became entrenched at least as a minimum when the "right to life, liberty and security of the person" was enshrined in the *Canadian Charter of Rights and Freedoms* at s. 7.

II -- "Security of the person" within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated.

III -- According to the evidence, the procedural requirements of s. 251 of the *Criminal Code* significantly delay pregnant women's access to medical treatment resulting in an additional danger to their health, thereby depriving them of their right to security of the person.

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IV -- The deprivation referred to in the preceding proposition does not accord with the principles of fundamental justice. While Parliament is justified in requiring a reliable, independent and medically sound opinion as to the "life or health" of the pregnant woman in order to protect the state interest in the foetus, and while any such statutory mechanism will inevitably result in some delay, certain of the procedural requirements of s. 251 of the *Criminal Code* are nevertheless manifestly unfair. These requirements are manifestly unfair in that they are unnecessary in respect of Parliament's objectives in establishing the administrative structure and that they result in additional risks to the health of pregnant women.

V -- The primary objective of s. 251 of the *Criminal Code* is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective. The primary objective does relate to concerns which are pressing and substantial in a free and democratic society and which, pursuant to s. 1 of the *Charter*, justify reasonable limits to be put on a woman's right. However, rules unnecessary in respect of the primary and ancillary objectives which they are designed to serve, such as some of the rules contained in s. 251, cannot be said to be rationally connected to these objectives under s. 1 of the *Charter*. Consequently, s. 251 does not constitute a reasonable limit to the security of the person.

It is not necessary to decide whether there is a proportionality between the effects of s. 251 and the objective of protecting the foetus, nor is it necessary to answer the question concerning the circumstances in which there is a proportionality between the effects of s. 251 which limit the right of pregnant women to security of the person and the objective of the protection of the foetus. But I feel bound to observe that the objective of protecting the foetus would not justify the severity of the breach of pregnant women's right to security of the person which would result if the exculpatory provision of s. 251 was completely removed from the *Criminal Code*. However, a rule that would require a higher degree of danger to health in the

latter months of pregnancy, as opposed to the early months, for an abortion to be lawful, could pos- sibly achieve a proportionality which would be acceptable under s. 1 of the *Charter*.

I -- Section 251 of the *Criminal Code*

Section 251 of the *Criminal Code* provides:

251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.
(3) In this section, "means" includes

(*a*) the administration of a drug or other noxious thing,

(*b*) the use of an instrument, and

(*c*) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

(*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

(*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (*a*) for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,

(*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and

(*d*) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

(*a*) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(*c*) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(*b*) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(*c*), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(*a*) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,

(*a*.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,
(*b*) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(*c*) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(*d*) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

Subsection (1) defines the indictable offence committed when a person uses any means for the purpose of carrying out his or her intention of procuring the miscarriage of a female person. Subsection (2) states that a pregnant woman who uses any means or permits any means to be used for the purpose of procuring her own miscarriage is guilty of an indictable offence with a lesser maximum penalty. Subsection (3) defines the expression "means" for s. 251.

Subsection (4), when read in conjunction with subss. (5), (6) and (7), outlines the circumstances in which an abortion can be lawfully performed. For the purposes of this appeal in which the existence of a constitutional right of access to abortion and the extent of that right is in issue, it is of special importance to understand the circumstances in which Parliament decriminalized abortion and thereby rendered it available without criminal sanction under ordinary law. Indeed, before the advent of the *Charter*, Parliament recognized that the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including the interest of the state in the protection of the foetus, when the continuation of the pregnancy would or would be likely to endanger the pregnant woman's life or health. Access to lawful abortion under the *Criminal Code*, albeit in limited circumstances, exists independently of any right which may or may not be founded upon the *Charter*.

As its opening words make plain, subs. (4) is an exculpatory provision: subss. (1) and (2), which

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indicate when conduct related to procuring a miscarriage is an indictable offence, "do not apply" when the terms of subs. (4) are respected. Until section 18 of the *Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, added subss. (4), (5), (6) and (7), there was no statutory exception to the crime of abortion. In the case at bar, the Ontario Court of Appeal (1985), 52 O.R. (2d) 353, explained the historical significance of the adoption in 1969 of these exculpatory provisions in the following terms, at p. 366:

By defining criminal conduct more narrowly, these amendments reflected the contemporary view that abortion is not always socially undesirable behaviour.

Access to abortion without risk of criminal penalty under the *Criminal Code* is expressed by Parliament in subss. (4), (5), (6) and (7) of s. 251 as relieving provisions in respect of the indictable offences defined at s. 251(1) and (2). According to Laskin C.J. (dissenting) in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 [hereinafter "*Morgentaler (1975)*"], these relieving provisions "simply permit a person to make conduct lawful which would otherwise be unlawful" (at p. 631). In the same case, Pigeon J. said that in 1969 "an explicit and specific definition was made of the circumstances under which an abortion could lawfully be performed" (at p. 660).

What is important, for our purposes, in considering subs. (4) is not, of course, the name we give to the exculpatory rule but the rule itself: Parliament has recognized that circumstances exist in which an abortion can be procured lawfully. The Court of Appeal observed, *supra*, at p. 378:

A woman's only right to an abortion at the time the Charter came into force would accordingly appear to be that given to her by s-s. (4) of s. 251.

Given that it appears in a criminal law statute, s. 251(4) cannot be said to create a "right", much less a constitutional right, but it does represent an exception decreed by Parliament pursuant to what the Court of Appeal aptly called "the

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contemporary view that abortion is not always socially undesirable behaviour". Examining the content of the rule by which Parliament decriminalizes abortion is the most appropriate first step in considering the validity of s. 251 as against the constitutional right to abortion alleged by the appellants in argument.

By enacting subss. (4), (5), (6) and (7) of s. 251 in 1969, Parliament endeavoured to decriminalize abortion in one circumstance, described in substantive terms in s. 251(4)(*c*): when the continuation of the pregnancy of the woman would or would be likely to endanger her life or health. This is the crux of the exception. This is the

circumstance in which Parliament decided to allow women to procure a miscarriage without criminal sanction either for themselves or for their doctors. Laskin C.J. referred to this "would or would be likely to endanger her life or health" element in s. 251(4)(*c*) as the "standard in s. 251(4)" in *Morgentaler (1975)*, *supra*, at p. 629.

The remaining provisions of subss. (4), (5), (6) and (7) of s. 251 are designed to ascertain whether the standard has been met in a given case. To employ the expression of the Attorney General of Canada who intervened in this case in defence of s. 251, these provisions were designed, in part, "to allow relief from criminal sanction where there is a reliable, independent and medically sound judgment that the life or health of the mother would be or would likely be endangered...." Section 251(4)(*a*) requires, for example, that a therapeutic abortion committee give its opinion in writing that the standard has been met. The committee is comprised of not less than three qualified medical practitioners appointed by the board of the hospital where the treatment would take place. The qualified medical practitioner who would perform the abortion may not be a member of a therapeutic abortion committee for any hospital. The opinion must be that of the majority of the members of the committee and must be made by certificate in writing and given to the practitioner who,

according to s. 251(4)(*a*), must be in "good faith" and, consequently, have no reason to believe that the standard in s. 251(4)(*c*) has not been met. The Minister of Health of the province in which the certificate was issued may by order require the therapeutic abortion committee to furnish him with a copy of the certificate. Other aspects of s. 251(4) are designed to ensure the safety of the abortion itself after the standard has been met and after the certificate to this effect has been issued enabling the woman to have a lawful abortion. These include the requirements that the practitioner be properly qualified and that the abortion be carried out in an accredited or approved hospital.

Overall, the procedure set forth at s. 251(4) is in place to ensure that the standard of the exception -- that the continuation of the pregnancy would or would be likely to endanger the pregnant woman's health -- is met before Parliament will allow an abortion to be performed without punishment. Parliament will protect the life and health of the pregnant woman by allowing her access to an abortion when it has been established, through the means selected by Parliament, that her life or health would or would likely be in danger if her pregnancy continued. The other provisions in s. 251(4), though necessary for an abortion to be lawful, were enacted to ensure that the standard was met and that, once met, the lawful abortion would be performed safely. These other rules are a means to an end and not an end unto themselves. As a whole, subss. (4), (5), (6) and (7) of s. 251 seek to make therapeutic abortions lawful and available but also to ensure that the excuse of therapy will not be abused and that lawful abortions be safe.

That abortions are recognized as lawful by Parliament based on a specific standard under its ordinary laws is important, I think, to a proper understanding of the existence of a right of access to abortion founded on rights guaranteed by s. 7 of the *Charter*. The

constitutional right does not have its source in the *Criminal Code*, but, in my view, the content of the standard in s. 251(4) that Parliament recognized in the *Criminal Law*

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Amendment Act, 1968-69 was for all intents and purposes entrenched at least as a minimum in 1982 when a distinct right in s. 7 became part of Canadian constitutional law.

II -- The Right to Security of the Person in s. 7 of the *Charter*

Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

I share the view first expressed by Wilson J. in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 205, and confirmed by Lamer J. in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500, that "it is incumbent upon this Court to give meaning to each of the elements, life, liberty and security of the person, which make up the `right' contained in s. 7." The full ambit of this constitutionally protected right will only be revealed over time. Consequently, the minimum content which I attribute to s. 7 does not preclude, or for that matter assure, the finding of a wider constitutional right when the courts will be faced with this or other issues in other contexts. As we shall see, the content of the "security of the person" element of the s. 7 right is sufficient in itself to invalidate s. 251 of the *Criminal Code* and consequently dispose of the appeal.

In discussing the content of the right protected by s. 7 of the *Charter* in the case at bar, the Ontario Court of Appeal wrote, at pp. 377-78, that "it would place too narrow an interpretation on s. 7 to limit it to protection against arbitrary arrest and detention". It will be seen from what follows that I agree with this view. Indeed the natural meaning of "life, liberty and security of the person" belies this limited view of the scope of s. 7. As Estey J. observed in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at p. 377, examining the "Legal Rights" heading which introduces ss. 7 to 14 of the *Charter* is at best one step in the constitutional interpretation process and is not necessarily of controlling importance. I

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am mindful, however, that it is in the criminal law context that "security of the person" and the alleged violation of s. 7 arise in this case. Enjoying "security of the person" free from criminal sanction is central to understanding the violation of the *Charter* right which I describe herein. It is not necessary to decide whether s. 7 would apply in other circumstances.

A pregnant woman's person cannot be said to be secure if, when her life or health is in danger, she is faced with a rule of criminal law which precludes her from obtaining effective and timely medical treatment.

Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.

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This interpretation of s. 7 of the *Charter* is sufficient to measure the content of s. 251 of the *Criminal Code* against that of the *Charter* in order to dispose of this appeal. While I agree with McIntyre J. that a breach of a right to security must be "based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection", I am of the view that the protection of life or health is an interest of sufficient importance in this regard. Under the *Criminal Code*, the only way in which a pregnant woman can legally secure an abortion when the continuation of the pregnancy would or would be likely to endanger her life or health is to comply with the procedure set forth in s. 251(4). Where the continued pregnancy does constitute a danger to life or health, the pregnant woman faces a choice: (1) she can endeavour to follow the s. 251(4) procedure, which, as we shall see, creates an additional medical risk given its inherent delays and the possibility that the danger will not be recognized by the state-imposed therapeutic abortion committee; or (2) she can secure medical treatment without respecting s. 251(4) and subject herself to criminal sanction under s. 251(2).

III -- Delays Caused by s. 251 Procedure in Violation of Security of the Person

This chapter requires a review of the evidence, part of which is to be found in two reports, the *Report of the Committee on the Operation of the Abortion Law* (the "Badgley Report"), and the *Report on Therapeutic Abortion Services in Ontario* (the "Powell Report").

The Badgley Report (1977) was written by a committee appointed by the Privy Council with a mandate to conduct a study to determine whether the procedure provided in the *Criminal Code* for obtaining therapeutic abortions is operating equitably across Canada and to make findings on the operation of this law rather than recommendations on the underlying policy: Badgley Report, at p. 27.

The Powell Report (1987) is a study commissioned by the Ministry of Health with terms of

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reference limited to a review of access to therapeutic abortion services in Ontario. Like those for the Badgley Report, these terms did not include the mandate for an evaluation of the underlying policy of the *Criminal Code*: Powell Report, Appendix 1.

I propose to consider first the delays caused by the s. 251 procedure and then the consequences of the delays.

1. *Delays Caused by the s. 251 Procedure*

The evidence reveals that the actual workings of s. 251(4) are the source of certain delays which create an additional medical risk for many pregnant women whose medical condition already meets the standard of s. 251(4)(*c*). Stated simply, when pregnant women suffer from a condition which represents a danger to their life or health, their efforts to conform to the procedure set forth for obtaining lawful abortions in the *Criminal Code* often create an additional risk to their health. They may have to choose between bearing the burden of these risks by accepting delayed medical treatment, and committing a crime by seeking timely medical treatment outside s. 251(4). Given that the procedure in s. 251(4) is the source of this additional risk, it constitutes a violation of the pregnant woman's security of the person. I shall first endeavour to show that these delays have their origin in s. 251. I will then cite evidence that these procedural delays create an additional risk to the health of pregnant women.

While only administrative inefficiencies that are caused by the rules in s. 251 are relevant to the evaluation of the constitutionality of the legislation under s. 7 of the *Charter*, the evidence which relates to the availability of therapeutic abortions under the *Criminal Code* reveals three sorts of delay, all of which can be traced to the requirements of s. 251 itself: (1) the absence of hospitals with therapeutic abortion committees in many parts of Canada; (2) the quotas which some hospitals with committees impose on the number of

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therapeutic abortions which they perform and (3) the committee requirement itself each create delays for pregnant women who seek timely and effective medical treatment.

(1) Lack of Hospitals with Therapeutic Abortion Committees

Hospitals with therapeutic abortion committees are completely lacking in many parts of Canada, forcing women to go elsewhere and suffer delays in order to gain access to hospitals in which they may obtain therapeutic abortions free from criminal sanction. The requirements which hospitals must meet under s. 251 are responsible for this absence of eligible hospitals. Often, the absence of hospitals can be traced to the prerequisites which hospitals must meet under s. 251(6). In other cases, the absence is caused by the refusal of certain hospital boards to appoint committees in hospitals which would otherwise qualify under the law, as is their prerogative under s. 251(6). I shall consider each of these in turn.

The effect of certain definitions in s. 251(6), when read in conjunction with s. 251(4), is to cause an absence of hospitals in which therapeutic abortions can legally be performed. A "therapeutic abortion committee" for any hospital means, according to s. 251(6), a committee comprised of not less than three physicians from which the physician who performs the abortion is excluded under s. 251(4). As the Chief Justice observed, the combined effect of these two provisions is to require at least four physicians at the hospital so that the therapeutic abortion can be lawfully authorized and performed. The four-physician requirement obviously precludes therapeutic abortions from being performed in hospitals where four doctors are not available.

Moreover, the requirement in s. 251(4) that lawful abortions can only be performed in "accredited" or "approved" hospitals also has the effect of

contributing to the absence of hospitals, in some parts of Canada, in which lawful abortions are available. Section 251(6) defines "accredited hospital" as a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided. Not only are some hospitals unable to qualify because they do not provide all these services, but some hospitals also fail to meet the Council's accreditation requirements.

Alternatively, therapeutic abortions may be performed in hospitals "approved" by the Ministers of Health in the province, and standards to be met for approval vary considerably from province to province. The Badgley Report, at pp. 91 *et seq.*, noted this variation in 1977. In Newfoundland, for example, the Department of Health guidelines required hospitals seeking approval to establish therapeutic abortion committees to have a minimum of six members of the medical staff willing to co-operate with or recognize the existence of a therapeutic abortion committee, the presence of a gynaecologist on the medical staff, and 100 beds or more in the hospital, even though many abortions are done on an out-patient basis. Thus, of 46 public general hospitals in the province in 1976, 35 were excluded by these provincial criteria, leaving only 11 hospitals qualified to establish therapeutic abortion committees, with no obligation to do so. In Saskatchewan, where provincial regulations included a requirement of a rated bed capacity of 50 beds or more, 110 of 133 general hospitals were ineligible to establish a therapeutic abortion committee. In Ontario, where the provincial regulations included a requirement of 10 or more members on a hospital's active medical staff, 51 of 205 general hospitals were

ineligible to establish committees. The *Criminal Code*, under the "approved" hospital requirement, not only allows for an unequal distribution of hospitals across Canada, but also permits provincial authorities to set standards which appear at times largely irrelevant to the performance of therapeutic abortions.

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Thus, the requirements of s. 251 seriously limit the number of hospitals which are eligible to perform lawful abortions, causing an absence or a serious lack of therapeutic abortion facilities in many parts of the country. The conclusions of the Badgley Report are startling (at p. 105):

Of the total of 1,348 non-military hospitals in Canada in 1976, 789 hospitals, or 58.5 percent, were ineligible in terms of their major treatment functions, the size of their medial staff, or their type of facility to establish therapeutic abortion committees.

The rules in s. 251(4) limiting the number of eligible hospitals means that a significant proportion of Canada's population is not served by hospitals in which therapeutic abortions can lawfully be performed. The Badgley Report, at p. 109, concluded in 1977 that 39.3 per cent of the total female population of Canada was not served by eligible hospitals. As we have already seen, the absence of eligible hospitals in some parts of Canada compels many pregnant women to leave their own communities to seek medical treatment in a place where an eligible hospital is available to admit them as patients. A pregnant woman in these circumstances will inevitably incur a delay in obtaining a therapeutic abortion.

The lack of hospitals with therapeutic abortion committees is made more serious by the refusal of certain hospital boards to appoint therapeutic abortion committees in hospitals which would otherwise qualify under the *Criminal Code*. Given that therapeutic abortions can only be performed in eligible hospitals and that the committee certifying the abortion must come from that hospital, this effectively contributes to the inaccessibility of the treatment. Nothing in the *Criminal Code* obliges the board of an eligible hospital to appoint therapeutic abortion committees. Indeed, a board is entitled to refuse to appoint a therapeutic abortion committee in a hospital that would otherwise qualify to perform abortions and boards often do so in Canada. Given that the decision to appoint a committee is, in part, one of conscience and, in

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some cases, one which affects religious beliefs, a law cannot force a board to appoint a committee any more than it could force a physician to perform an abortion. The defect in the law is not that it does not force boards to appoint committees, but that it grants exclusive authority to those boards to make such appointments.

In "Abortion and the Just Society" (1970), 5 *R.J.T.* 27, at p. 36, lawyer Natalie Fochs Isaacs correctly anticipated the effect of the exclusive authority of hospital boards in establishing committees:

S. 237 [now s. 251] sets out the requirement of the certification of therapeutic abortion by a therapeutic abortion committee prior to its performance. But the section does not require any hospital to set up such a committee. Given the undesirability of forcing any hospital to do so, the restriction of legal abortions to this type of preliminary certification fails nevertheless to provide for alternative methods of prior medical consultation among those staff members of any hospital opposed to the creation of the committee required, who themselves approve of therapeutic abortions. The new legislation in this manner also places the prospective petitioner for the operation at the mercy of the institutional policy of what may be the only hospital available in her community. [Footnotes omitted.]

The Badgley Report, at p. 93, again documented the reduction of the number of hospitals with therapeutic abortion committees due to the refusal of boards of hospitals which would otherwise qualify under the law to appoint committees. In Newfoundland, 6 of the 11 hospitals which were otherwise qualified to perform therapeutic abortions did in fact appoint committees so that only 6 of a total of 46 general hospitals were eligible to perform therapeutic abortions under the *Criminal Code*. In Quebec, 31 of 128 general hospitals appointed therapeutic abortion committees. In Saskatchewan, 10 of 133 general hospitals appointed committees. In Manitoba, 8 of 78 general hospitals appointed committees. Overall, the Badgley Report, *supra*, at p. 105, concluded in the following terms:

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In terms of all civilian hospitals (1,348) in Canada in 1976, 20.1 percent had established a therapeutic abortion committee. If only those general hospitals which met hospital practices and provincial requirements and were not exempt in terms of their special treatment facilities are considered, then of these 559 hospitals, 271 hospitals, or 48.5 percent, had established therapeutic abortion committees, while 288 hospitals, or 51.5 percent, did not have these committees.

According to the Powell Report, a comparable fraction of hospitals had established therapeutic abortion committees in Ontario: "out of 176 accredited acute care hospitals, 95 (54%) had therapeutic abortion committees" (at p. 24). The figures reported by the Badgley Committee in 1977 were confirmed in a recent Statistics Canada report according to which the total number of hospitals with therapeutic abortion committees fell across the country from 271 in 1976 to 250 in 1985 (*Therapeutic abortions, 1985* (1986), at p. 12).

For the purposes of the case at bar, it is important to reiterate that the absence of hospitals with therapeutic abortion committees in many parts of Canada is caused by the following requirements of the law:

(a) that a total of four physicians in the hospital must participate in the authorization and performance of the therapeutic abortion;

(b) that the hospital must be "approved" or "accredited"; and

(c) that only the board of the hospital is entitled to appoint a therapeutic abortion committee.

Finally, it is worth noting that 18 per cent of the hospitals that did have therapeutic abortion committees in 1984 performed no therapeutic abortions (*Therapeutic abortions, 1985*, *supra*, at p. 38). Dr. Augustin Roy, the President of the Corporation professionnelle des médecins du Québec, testified at trial that of the 30 hospitals with therapeutic abortion committees in Quebec, "only about fourteen or fifteen of these hospitals are operational, because many of them, say half of

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them, have a committee but they don't do any abortions. It is a committee on paper."

A hospital with a dormant committee is no more useful to a pregnant woman seeking a therapeutic abortion than a hospital without a committee or no hospital at all. The delay suffered by a pregnant woman because her local hospital has a dormant committee is perhaps more the result of internal hospital policy than of s. 251 of the *Criminal Code*, but s. 251 is at least indirectly the cause of the delay in requiring an opinion from the therapeutic abortion committee of that hospital before a lawful abortion can be performed there.

(2) Delays Caused by Quotas

Delays result not only from the absence or inactivity of therapeutic abortion committees. The evidence discloses that some hospitals with committees impose quotas on the number of therapeutic abortions which they perform while others place quotas on patients depending on their place of residence. The evidence at trial confirmed that these quotas, initially observed in the Badgley Report, at pp. 258 *et seq.*, have been retained in many Canadian hospitals and that they often delay timely medical treatment for pregnant women seeking therapeutic abortions. It is true, of course, that these quotas are set by internal hospital policy and not by the terms of the law itself. It is also true that quotas may be necessary given hospitals' limited resources and the significant demands placed on those resources by pregnant women seeking abortions, some of whom may not qualify for therapeutic abortions in respect of the standard of s. 251(4). There is evidence, however, of quotas in absolute numbers of abortions performed and quotas based on the place of residence which can affect women who otherwise qualify for lawful abortions under s. 251(4)(*c*). Indeed the Badgley Committee reported in 1977, at p. 259, that:

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Two out of five hospitals (38.2 per cent) considered only applications from women who were considered to reside with the hospital's usual service catchment area. Residential requirements and patient quotas were more often adopted in the Maritimes (43.8 per cent) and Quebec (66.7 per cent) than among hospitals elsewhere where about a third followed this practice. Where the proportion of the hospitals with committees having these residency or quota requirements was higher in a province or a region, there were proportionately more women who went to the United States to obtain induced abortions.

These quotas are inevitable given that s. 251 requires that therapeutic abortions be performed only in eligible hospitals and that there is a lack of hospitals with committees in some parts of the country. The quotas cannot, therefore, be said to reflect simple administrative or budgetary constraints. In this respect, the s. 251 procedure is again the source of delays in medical treatment.

(3) Delays Caused by the Committee Requirement

The committee requirement itself contributes to a delay in securing treatment. The law requires the therapeutic abortion committee to certify that the standard of s. 251(4) has been met before a therapeutic abortion can proceed lawfully. As I shall endeavour to explain in my consideration of s. 251 and the principles of fundamental justice, I believe that the state interest in the protection of the foetus justifies the requirement that the standard of s. 251(4) be ascertained by independent medical opinion. This being the case, some delay will always be incurred whatever system is put in place to ensure that the standard has been met. However, at this stage of my analysis, I seek only to establish that a delay has in fact been caused by the present requirements of the *Criminal Code.*

The time needed to convene the committee in the hospital, for the pregnant woman's file to come before the committee, for her application to be evaluated by whatever means the committee may choose and for the certificate to be issued to the

qualified medical practitioner together create some delay for obtaining treatment. The Badgley Report, at p. 146, identified an average interval of 8.0 weeks until the induced abortion operation was done after the pregnant woman's initial visit to her physician. Some of this delay is attributable to the absence of committees and hospital quotas which I have outlined above. It is difficult to isolate with precision the fraction of the delay attributable to the committee requirement taken by itself. It is relevant as one part of the overall delay which pregnant women must endure to obtain a therapeutic abortion.

In spite of evidence that the overall delay has been reduced, as will be seen shortly, the committee requirement continues to add to the delay. In 1987, the Powell Report, at p. 27, identified as one problem the number of committee members who must certify that the s. 251(4) standard has been met:

The number of members on the TAC [therapeutic abortion committee] ranges from three to five although up to seven members sit on some committees. When five or seven members have been appointed and no quorum is stated, a majority of the committee (three to five) must be present and three must approve each abortion. This has caused problems in several of the hospitals contacted, where it was not possible for an adequate number of members to be present and the meeting had to be rescheduled. Thus precious time was lost and the abortion delayed to a more advanced gestational age.

Furthermore, the delays caused by the committee requirements necessarily impact upon the pregnant woman who seeks to become a patient of the hospital for which the committee has been appointed. Section 251(4) states in part that it is "the therapeutic abortion committee for that accredited or approved hospital" which must issue the certificate [emphasis added]. This precludes a committee from one hospital from authorizing abortions which take place at other hospitals. Eliminating such a requirement would have the effect of shortening the delays without forcing reluctant hospital boards or hospital staff to participate.

2. *Consequences of the Delays*

The delays which a pregnant woman may have to suffer as a result of the requirements of s. 251(4) must undermine the security of her person in order that there be a violation of this element of s. 7 of the *Charter*. As I said earlier, s. 7 cannot be invoked simply because a woman's pregnancy amounts to a medically dangerous condition. If, however, the delays occasioned by s. 251(4) of the *Criminal Code* result in an additional danger to the pregnant woman's health, then the state has intervened and this intervention constitutes a violation of that woman's security of the person. By creating this additional risk, s. 251 prevents access to effective and timely medical treatment for the continued pregnancy which would or would be likely to endanger her life or health. If an effective and timely therapeutic abortion may only be obtained by committing a crime, then s. 251 violates the pregnant woman's right to security of the person.

The evidence reveals that the delays caused by s. 251(4) result in at least three broad types of additional medical risks. The risk of post-operative complications increases with delay. Secondly, there is a risk that the pregnant woman require a more dangerous means of procuring a miscarriage because of the delay. Finally, since a pregnant woman knows her life or health is in danger, the delay created by the s. 251(4) procedure may result in an additional psychological trauma. I shall explain each of the additional risks in turn.

The Chief Justice outlined the different techniques employed to perform abortions at different stages of pregnancy and the increasing risk attached to each method as gestational age advances. As he also noted, the evidence showed that within the periods appropriate to each method of abortion, the earlier the abortion was performed, the lower the risk of complication. Evidence introduced at trial confirms findings in the Badgley

Report, at pp. 308 *et seq.*, and the Powell Report, at p. 23, that the earlier an abortion is performed, the less chance a woman has of

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experiencing a post-operative complication, whatever abortion technique is used. The respondent agrees with this proposition but cites the low complication rate across Canada and the negligible mortality rate reported since 1974 as evidence that abortion under the current system is very safe. According to *Therapeutic abortions, 1985*, *supra*, at p. 20, no Canadian women have died as a result of therapeutic abortion since 1979. One such death took place in 1974 and another in 1979.

It should be noted, however, that reported complication rates for any given abortion technique are generally limited to certain post-operative physical complications and do not include data on psychological complications inherent to those techniques. Furthermore, the psychological trauma that women suffer before the operation is not reflected in reported figures. This is equally true for any physical complications associated with the pregnant woman's initially dangerous condition which may arise during the delay before the therapeutic abortion.

However low the post-operative complication rate may appear, it increases as gestational age advances. In other words, with each passing week of pregnancy, even in the very early stages, the risk to health that an abortion represents increases. *Therapeutic abortions, 1982* confirms this. The complication rate for abortions performed under nine weeks was 0.7 per cent. This increased to 1.0 per cent in the 9 to 12 week gestation period. A complication rate of 8.5 per cent was reported for the 13 to 16 week gestation period. The complication rate for the 17 to 20 week gestation period was higher still, reported as 22 per cent (*Therapeutic abortions, 1982* (1984), at p. 111). Ontario statistics cited in the Powell Report confirm these national figures for that province. Data from 1976, 1981 and 1984 confirm the relation between abortion complications and gestational age in Ontario. In terms of absolute numbers, there were twice as many reported complications for women with gestational age 13 weeks and above compared to gestational age under 13 weeks. The rate expressed

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as a percentage of total reported therapeutic abortions performed ("per 100 gestational age specific abortions") was ten times higher for the group of women with gestational age 13 weeks and above (see Powell Report, at p. 23 and Table 4).

The procedure set forth in s. 251(4) of the *Criminal Code* often causes, as we have seen, significant delays in obtaining therapeutic abortions. Delay increases the risk of post-operative complications. Section 251(4) thereby violates a pregnant woman's security of the person.

As I have already observed, the evidence indicates that the different techniques employed to perform abortions in Canada at different stages of pregnancy progressively

increase risks to the woman. Expert testimony established that the suction dilation and curettage method generally used in the first twelve weeks is the safest technique. The dilation and evacuation method used from the thirteenth to the sixteenth week is relatively more dangerous. From the sixteenth week of pregnancy, an even more dangerous instillation method may be used. This method involves the introduction of prostaglandin, urea or saline solution which causes the woman to go into labour, giving birth to a foetus which is usually dead but not invariably so. Although the number of abortions done by the instillation technique amounts to only 4.5 per cent of the total number of therapeutic abortions performed in Canada, saline, urea or prostaglandin instillation is nevertheless used for 85.6 per cent of therapeutic abortions for women at least 16 weeks pregnant (*Therapeutic abortions, 1985*, *supra*, at pp. 18-19). It has been shown that the complication rate increases dramatically with the use of the instillation procedure (ibid., at p. 50). In addition, psychological trauma resulting from induced labour and the birth of the foetus is a very real consideration which is not included in

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post- operative statistics. It is in the pregnant woman's utmost interest that the delay for obtaining a therapeutic abortion be as short as possible so that the risks associated with more dangerous abortion techniques can be avoided.

Women are aware of the increased risk associated with the later stage abortion techniques. They are also aware of the more traumatic circumstances in which these techniques, particularly the instillation methods, are carried out. It is thus not only the risk of post-operative complications that increases progressively with each method. Women are aware of the increased risk well before the operation is performed. Experts testified at trial that awareness of the increased post-operative risk and of the added trauma associated with the later-stage methods create an increased psychological risk to health distinct from the increased physical risk. There is a world of difference, from the psychological point of view of the patient, between a reputedly safe technique of abortion performed under local anaesthetic requiring only a few hours in a hospital and an abortion procedure with a substantially higher complication rate performed under general anaesthetic requiring a longer period of hospitalization, and involving the trauma of induced labour and the delivery of a dead foetus. When the delays caused by s. 251(4) require a woman to undergo a saline procedure abortion, for example, the psychological trauma associated with that procedure amounts to an additional risk to health attributable to the *Criminal Code*. More generally, the delay that a pregnant woman must endure before she receives treatment of any kind results in psychological trauma. To force a woman, under threat of criminal sanction, to wait for medical treatment when she knows that her pregnancy represents a danger to her life or health is a violation of her right to security of the person. As was stated in *Collin v. Lussier*, [1983] 1 F.C. 218, at p. 239 (later reversed on appeal,

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[1985] 1 F.C. 124, but cited with approval on this point by Wilson J. in *Singh v. Minister of Employment and Immigration*, *supra*, at p. 208):

. . . such detention, by increasing the applicant's anxiety as to his state of health, is likely to make his illness worse and, by depriving him of access to adequate medical care, it is in fact an impairment of the security of his person.

The psychological trauma that a pregnant woman suffers as a result of the delay shows that the procedure established by the *Criminal Code* violates the security of her person.

I have observed three instances in which s. 251 of the *Criminal Code* results in delays for women who qualify for therapeutic abortions in respect of the standard of s. 251(4)(*c*). This being said, the overall delay appears to have been reduced from the 8.0 weeks observed by the Badgley Committee in 1977. Evidence indicates that where a hospital with a committee is in place in a region, as in the case of Toronto, pregnant women can obtain therapeutic abortions within one to three weeks from their initial contact with a physician. Experts testified at trial that these delays are longer in some parts of the country, particularly in Quebec, but that overall delays have, on balance, been reduced. Furthermore, therapeutic abortion committees generally can speed up the certification process in an emergency situation, particularly when the pregnant woman's gestational age requires immediate medical attention. In spite of the reduction, however, these delays continue to result in an additional risk to the health of these women. The risk of post-operative complications increases with each passing week of delay. There is a heightened physical and psychological risk associated with later stage pregnancy techniques for abortion. Finally, psychological trauma increases with delay. The delays mean therefore that the state has intervened in such a manner as to create an additional risk to health, and

consequently this intervention constitutes a violation of the woman's security of the person.

IV -- The Principles of Fundamental Justice

I turn now to a consideration of the manner in which pregnant women are deprived of their right to security of the person by s. 251. Section 7 of the *Charter* states that everyone has the right not to be deprived of security of the person except in accordance with the principles of fundamental justice. As I will endeavour to demonstrate, s. 251(4) does not accord with the principles of fundamental justice.

I am of the view, however, that certain elements of the procedure for obtaining a therapeutic abortion which counsel for the appellants argued could not be saved by the second part of s. 7 are in fact in accordance with the principles of fundamental justice. The expression of the standard in s. 251(4)(*c*), and the requirement for some independent medical opinion to ascertain that the standard has been met as well as the consequential necessity of some period of delay to ascertain the standard are not in breach of s. 7 of the *Charter*.

Counsel for the appellants argued that the expression of the standard in s. 251(4)(*c*) is so imprecise that it offends the principles of fundamental justice. He submits that pregnant women are arbitrarily deprived of their s. 7 right by reason of the different meanings that can be given to the word "health" in s. 251(4)(*c*) by therapeutic abortion committees.

I agree with McIntyre J. and the Ontario Court of Appeal that the expression "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health" found in s. 251(4)(*c*) does provide, as a matter of law, a sufficiently precise standard by which therapeutic abortion committees can determine when therapeutic abortions should be granted.

As the Court of Appeal said, *supra*, at p. 388:

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In this case . . . from a reading of s. 251 with its exceptions, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus, it is for the courts to say what meaning the statute will bear.

Laskin C.J. held in *Morgentaler (1975)*, at p. 634, that s. 251(4)(*c*) was not so vague so as to constitute a violation of "security of the person" without due process of law under s. 1(*a*) of the *Canadian Bill of Rights*:

It is enough to say that Parliament has fixed a manageable standard because it is addressed to a professional panel, the members of which would be expected to bring a practised judgment to the question whether "the continuation of the pregnancy . . . would or would be likely to endanger . . . life or health." Moreover, I am of the view that Parliament would assign such an exercise of judgment to a professional group without colliding with any imperatives called for by due process of law under s. 1 (*a*).

I agree with Laskin C.J. that the standard is manageable because it is addressed to a panel of doctors exercising medical judgment on a medical question. This being the case, the standard must necessarily be flexible. Flexibility and vagueness are not synonymous. Parliament has set a medical standard to be determined over a limited range of circumstances. With the greatest of respect, I cannot agree with the view that the therapeutic abortion committee is a "strange hybrid, part medical committee and part legal committee" as the Chief Justice characterizes it (at p. 69). In section 251(4) Parliament has only given the committee the authority to make a medical determination regarding the pregnant woman's life or health. The committee is not called upon to evaluate the sufficiency of the state interest in the foetus as against the woman's health. This evaluation of the state interest is a question of law already decided by Parliament in its formulation of s. 251(4). Evidence has been submitted that many committees fail to apply the standard set by Parliament by requiring the consent of the pregnant woman's

spouse, by refusing to authorize second abortions or by refusing all abortions to married women. In

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so far as these and other requirements fall outside s. 251(4)(*c*), they constitute an unfounded interpretation of the plain terms of the *Criminal Code*. These patent excesses of authority do not, however, mean that the standard of s. 251 is vague.

The wording of s. 251(4)(*c*) limits the authority of the committee. The word "health" is not vague but plainly refers to the physical or mental health of the pregnant woman. I note with interest the decision of the Supreme Court of the United States in *United States v. Vuitch*, 402 U.S. 62 (1971), in which a District of Columbia statute outlawing abortions except when they were "necessary for the preservation of the mother's life or health" was at issue. It was argued that the word "health" was so imprecise and had so uncertain a meaning that the statute offended the Due Process Clause of the United States Constitution. Mindful of the differences between the Due Process Clause and the principles of fundamental justice in s. 7 of the *Charter*, I nevertheless believe the following extract, at p. 72, of the majority opinion delivered by Black J. to be instructive:

> . . . the general usage and modern understanding of the word "health" . . . includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being ... sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.

The standard is further circumscribed by the word "endanger". Not only must the continuation of the pregnancy affect the woman's life or health, it must endanger life or health, so that a committee that authorizes an abortion when this element is not present or fails to authorize it when it is present exceeds its authority. Finally, the expression "would or would be likely" eliminates any requirement that the danger to life or health be

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certain or immediate at the time the certificate is issued.

The presence of the exculpatory provision in the *Criminal Code* and the wording of the standard itself point to the parameters of s. 251(4). The required standard of threat to life or health must necessarily be lesser than that required under the common law defence of necessity, otherwise s. 251(4) would be superfluous. It is proper to infer, on the other hand, that s. 251(4) must be interpreted as relating solely to therapeutic grounds since only qualified medical practitioners are entitled to evaluate the threat to life or health.

Not only is the standard expressed in s. 251(4)(*c*) sufficiently precise to permit therapeutic abortion committees to determine when therapeu- tic abortions should be

granted, but the crime of procuring a miscarriage is expressed with sufficient clarity for those subject to its terms so as not to offend the principles of fundamental justice. In this respect, counsel for the respondent correctly observed in his written argument that ". . . s. 251 presents no degree of uncertainty or vagueness as to potential criminal liability: anyone charged with an offence would know whether prohibited conduct was being undertaken and whether an exemption certificate had been received. Equally, any official entrusted with enforcing this section would know whether an offence had been committed." Police officers are not called upon by the section to define "health" but, in respect of the medical justification for a therapeutic abortion, they must ensure that a certificate in writing has been duly issued.

Just as the expression of the standard in s. 251(4)(*c*) does not offend the principles of fundamental justice, the requirement that an independent medical opinion be obtained for a therapeutic abortion to be lawful also cannot be said to constitute a violation of these principles when considered in the context of pregnant women's right to security of the person.

In *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 304, La Forest J. explained that the legislator must be

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accorded a certain latitude to make choices regarding the type of administrative structure that will suit its needs unless the use of such structure is in itself "so manifestly unfair, having regard to the decisions it is called upon to make [emphasis added], as to violate the principles of fundamental justice". An administrative structure made up of unnecessary rules, which result in an additional risk to the health of pregnant women, is manifestly unfair and does not conform to the principles of fundamental justice. Section 251(4), taken as a whole, does not accord with the principles of fundamental justice in that certain of the procedural requirements of s. 251 create unnecessary delays. As will be seen, some of these requirements are manifestly unfair because they have no connection whatsoever with Parliament's objectives in establishing the administrative structure in s. 251(4). Although connected to Parliament's objectives, other rules in s. 251(4) are manifestly unfair because they are not necessary to assure that the objectives are met.

As I noted in my analysis of s. 251(4), by requiring that a committee state that the medical standard has been met for the criminal sanction to be lifted, Parliament seeks to assure that there is a reliable, independent and medically sound opinion that the continuation of the pregnancy would or would be likely to endanger the woman's life or health. Whatever the failings of the current system, I believe that the purpose pursuant to which it was adopted does not offend the principles of fundamental justice. As I shall endeavour to explain, the current mechanism in the *Criminal Code* does not accord with the principles of fundamental justice. This does not preclude, in my view, Parliament from adopting another system, free of the failings of s. 251(4), in order to ascertain that the life or health of the pregnant woman is in danger, by way of a reliable, independent and medically sound opinion.

Parliament is justified in requiring a reliable, independent and medically sound opinion in order to protect the state interest in the foetus. This is

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undoubtedly the objective of a rule which requires an independent verification of the practising physician's opinion that the life or health of the pregnant woman is in danger. It cannot be said to be simply a mechanism designed to protect the health of the pregnant woman. While this latter objective clearly explains the requirement that the practising physician be a "qualified medical practitioner" and that the abortion take place in a safe place, it cannot explain the necessary intercession of an in-hospital committee of three physicians from which is excluded the practising physician.

While a second medical opinion is very often seen as necessary in medical circles when difficult questions as to a patient's life or health are at issue, the independent opinion called for by the *Criminal Code* has a different purpose. Parliament requires this independent opinion because it is not only the woman's interest that is at stake in a decision to authorize an abortion. The Ontario Court of Appeal alluded to this at p. 378 when it stated that "One cannot overlook the fact that the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate". The presence of the foetus accounts for this complexity. By requiring an independent medical opinion that the pregnant woman's life or health is in fact endangered, Parliament seeks to ensure that, in any given case, only therapeutic reasons will justify the decision to abort. The amendments to the *Criminal Code* in 1969 amounted to a recognition by Parliament, as I have said, that the interest in the life or health of the pregnant woman takes precedence over the interest of the state in the protection of the foetus when the continuation of the pregnancy would or would be likely to endanger the pregnant woman's life or health. Parliament decided that it was necessary to ascertain this from a medical point of view before the law would allow the interest of the pregnant woman to indeed take precedence over that of the foetus and permit an abortion to be performed without criminal sanction.

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I do not believe it to be unreasonable to seek independent medical confirmation of the threat to the woman's life or health when such an important and distinct interest hangs in the balance. I note with interest that in a number of foreign jurisdictions, laws which decriminalize abortions require an opinion as to the state of health of the woman independent from the opinion of her own physician. The Crown, in its book of authorities, cited the following statutes which included such a mechanism: United Kingdom, *Abortion Act, 1967*, 1967, c. 87, s. 1(1)(*a*); Australian Northern Territory, *Criminal Law Consolidation Act and Ordinance*, s. 79 A(3)(a); South Australia, *Criminal Law Consolidation Act*, 1935-1975, s. 82a(1)(*a*); Federal Republic of Germany, *Criminal Code*, as amended by the *Fifteenth Criminal Law Amendment Act* (1976), s. 219; Israel, *Penal Law*, 5737-1977 (as amended), s. 315; New Zealand, *Crimes Act 1961*, as amended by the *Crimes Amendment Act 1977* and the *Crimes Amendment Act 1978*, s. 187A(4);

Code pénal suisse, art. 120(1). This said, the practising physician must, according to s. 251(4)(*a*), be in "good faith" and, consequently, have no reason to believe that the standard in s. 251(4)(*c*) has not been met. The practising physician is, however, properly excluded from the body giving the independent opinion. I believe that Parliament is justified in requiring what is no doubt an extraordinary medical practice in its regulation of the criminal law of abortion in accordance with the various interests at stake.

The assertion that an independent medical opinion, distinct from that of the pregnant woman and her practising physician, does not offend the principles of fundamental justice would need to be reevaluated if a right of access to abortion is founded upon the right to "liberty" in s. 7 of the *Charter*. I am of the view that there would still be circumstances in which the state interest in the protection of the foetus would require an independent medical opinion as to the danger to the life or health of the pregnant woman. Assuming without deciding that a right of access to abortion can be founded upon the right to

"liberty", there would be a point in time at which the state interest in the foetus would become compel- ling. From this point in time, Parliament would be entitled to limit abortions to those required for therapeutic reasons and therefore require an independent opinion as to the health exception. The case law reveals a substantial difference of opinion as to the state interest in the protection of the foetus as against the pregnant woman's right to liberty. Wilson J., for example, in her discussion of s. 1 of the *Charter* in the case at bar, notes the following, at p. 183:

The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester.

This view as to when the state interest becomes compelling may be compared with that of O'Connor J. of the United States Supreme Court in her dissenting opinion in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), at pp. 460-61:

In *Roe* [*Roe* v. *Wade* 410 U.S. 113 (1973)], the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," *id*., at 159, the Court chose the point of viability -- when the foetus is *capable* of life independent of its mother -- to permit the complete proscription of abortion. The choice of viability as the point at which state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.

As I indicated at the outset of my reasons, it is nevertheless possible to resolve this appeal without attempting to delineate the right to "liberty" in s.

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7 of the *Charter*. The violation of the right to "security of the person" and the relevant principles of fundamental justice are sufficient to invalidate s. 251 of the *Criminal Code*.

Some delay is inevitable in connection with any system which purports to limit to therapeutic reasons the grounds upon which an abortion can be performed lawfully. Any statutory mechanism for ensuring an independent confirmation as to the state of the woman's life or health, adopted pursuant to the objective of assuring the protection of the foetus, will inevitably result in a delay which would exceed whatever delay would be encountered if an independent opinion was not required. Furthermore, rules promoting the safety of abortions designed to protect the interest of the pregnant woman will also cause some unavoidable delay. It is only in so far as the administrative structure creates delays which are unnecessary that the structure can be considered to violate the principles of fundamental justice. Indeed, an examination of the delays caused by certain of the procedural requirements in s. 251(4) reveals that they are unnecessary, given Parliament's objectives in establishing the administrative structure. I note parenthetically that it is not sufficient to argue that the structure would operate in a fair manner but for the applications from women who do not qualify in respect of the standard in s. 251(4)(*c*). A fair structure, put in place to decide between those women who qualify for a therapeutic abortion and those who do not, should be designed with a view to efficiently meeting the demands which it must necessarily serve.

One such example of a rule which is unnecessary is the requirement in s. 251(4) that therapeu- tic abortions must take place in an eligible hospital to be lawful. I have observed that s. 251(4) directs that therapeutic abortions take place in accredited or approved hospitals, with at least four physicians, and that, because of the lack of such hospitals in many parts of Canada, this often causes delay for women seeking treatment. As I noted earlier, this requirement was plainly adopted to assure the safety of the abortion procedure

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generally, and particularly the safety of the pregnant woman, after the standard of s. 251(4) has been met and after the certificate to this effect has been issued enabling the woman to have a lawful abortion. The objective in respect of which the in- hospital rule was adopted is safety and not the state interest in the protection of the foetus. As the rule stands in s. 251(4), however, no exception is currently possible. The evidence discloses that there is no justification for the requirement that all therapeutic abortions take place in hospitals eligible under the *Criminal Code*. In this sense, the delays which result from the hospital requirement are unnecessary and, consequently, in this respect, the administrative structure for therapeutic abortions is manifestly unfair and offends the principles of fundamental justice.

Experts testified at trial that the principal justification for the in-hospital rule is the problem of post-operative complications. There are of course instances in which the danger to life or health observed by the therapeutic abortion committee will constitute sufficient grounds for the procedure to take place in a hospital. There are other instances in which the circumstances of the procedure itself requires that it be performed in hospital, such as certain abortions performed at an advanced gestational age or cases in which the patient is particularly vulnerable to what might otherwise be a simple procedure.

In many cases, however, there is no medical justification that the therapeutic abortion take place in a hospital. Experts testified at trial, that many first trimester therapeutic abortions may be safely performed in specialized clinics outside of hospitals because the possible complications can be handled, and in some cases better handled, by the facilities of a specialized clinic. The parties submitted statistics comparing complication rates for in-hospital abortions and those performed in non-hospital facilities. These statistics are of limited value for our purposes because, not surprisingly,

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the higher reported rates in hospitals are due in part to the fact that the more dangerous cases are treated in hospital. What is more revealing, however, are statistics which show that a high percentage of therapeutic abortions performed in Canada are performed on an out-patient basis:

The average length of stay in hospitals per therapeutic abortion case was less than a day in 1985. This average includes 46,567 cases or 76.9 per cent of 60,518 therapeutic abortion cases for women, for whom the pregnancy terminations took place on an outpatient (day care) basis. The per cent of outpatient therapeutic abortions increased to 76.9% in 1985 from 59.7% in 1981 and 34.9% in 1975. [*Therapeutic abortions, 1985*, *supra*, at p. 20.]

The substantial increase in the percentage of abortions performed on an out-patient basis since 1975 underscores the view that the in-hospital requirement, which may have been justified when it was first adopted, has become exorbitant. One suspects that the number of out-patient abortions would be even higher if the *Criminal Code* did not prevent women in many parts of Canada from obtaining timely and effective treatment by requiring them to travel to places where eligible hospital facilities were available. Furthermore, these figures do not include out-patient abortions which may have qualified as therapeutic under the standard in s. 251(4)(*c*) which were performed on Canadian women in the United States and in clinics currently operating in Canada outside the s. 251(4) exception. Citing the Canadian abortion law's in-hospital requirement as a legislative standard which is difficult to satisfy, Rebecca J. Cook and Bernard M. Dickens observe that "Rigid statutory formulae may not improve . . . distribution of services but may obstruct appropriate response to health needs": *Abortion Laws in Commonwealth Countries* (1979), at p. 28.

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In the Powell Report, several recommendations were made as to options for abortion service delivery in Ontario. In support of these recommendations, the Report included the following, at pp. 21 and 35:

When many countries legalized abortion, hospitals were viewed as the appropriate providers of safe abortion services. Since then, studies have demonstrated that abortions can be performed safely in other types of facilities, (Tietze & Henshaw, 1986). The complication rate for all abortions performed in nonhospital facilities, is no higher than for those which take place in hospitals (Grimes et al., 1981).

...

Hospitals are often hard pressed to find time in the busy operating room schedules to fit in abortion procedures. In most hospitals, abortions are not viewed as a priority for scheduling. Gynaecologists must fit abortions into their allotted time in operating rooms. Although abortions can be performed in minor procedure rooms with no jeopardy to the patient, this is an unusual practice.

The presence of legislation in other jurisdictions permitting certain abortions to be performed outside of hospitals is especially revealing as to the safety of the procedure in those circumstances and of the necessity to provide alternative means given the limited resources of hospitals. In the Powell Report, it was observed, at p. 21, that:

In a number of European countries, including the Netherlands, Poland and West Germany, approximately half of the abortions are performed in non-hospital facilities. In France in 1982, 53 percent of abortions were performed in 90 "centres d'interruption volontaire de grossesse" which were administered by hospitals but were in practice separate abortion clinics. The French government ordered all public hospitals that could not meet the demand for abortions to provide such clinics.

Particularly striking is the United States experience in respect of the in-hospital rule. The Powell Report noted that 82 per cent of abortions performed in the United States in 1982 were done outside of hospitals (at p. 22). Experts confirmed

this finding at trial. Dr. Christopher Tietze, a recognized expert on abortion, explained at trial that in 1981 all out-of-hospital abortion clinics in the United States performed abortions up to 10 weeks gestational age, 90 per cent of clinics performed abortions up to 12 weeks, 50 per cent of clinics up to 14 weeks and 20 per cent accepted patients up to 16 weeks. Although the legal basis upon which women assert a constitutional right of access to abortion is different in the United States than that which I find in the case at bar, the American experience as to the inappropriateness of a universal in-hospital requirement remains relevant.

The Powell Report proposed a number of projects as alternatives to the in-hospital rule for therapeutic abortions. Each proposal is designed to be "under the jurisdiction of a hospital board or several hospital boards with approval for abortion services provided through hospital therapeutic abortion committee mechanisms" (at p. 37). One such proposal is for the establishment of comprehensive women's health care clinics which would provide first trimester abortions, referrals to hospitals for second trimester abortions and post-abortion counselling. Regional centres for therapeutic abortion clinics affiliated with but not necessarily located in a hospital are also proposed in the Report, which goes on to emphasize that first trimester ambulatory abortions are those most appropriate for a non-hospital setting.

The Badgley Committee also made a series of proposals designed to reduce the number and type of complications associated with therapeutic abortions. These included a proposal, at p. 322, for "concentrating the performance of the abortion procedure into specialized units with a full range of the required equipment and facilities and staffed by experienced and specially trained nurses and medical personnel".

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Whatever the eventual solution may be, it is plain that the in-hospital requirement is not justified in all cases. Although the protection of health of the woman is the objective which the in-hospital rule is intended to serve, the requirement that all therapeutic abortions be performed in eligible hospitals is unnecessary to meet that objective in all cases. In this sense, the rule is manifestly unfair and offends the principles of fundamental justice. I appreciate that the precise nature of the administrative solution may be complicated by the constitutional division of powers between Parliament and the provinces. There is no doubt that Parliament could allow the criminal law exception to operate in all hospitals, for example, though the provinces retain the power to establish these hospitals under s. 92(7) of the *Constitution Act, 1867*. On the other hand, if Parliament decided to allow therapeutic abortions to be performed in provincially licensed clinics, it is possible that both Parliament and the provinces would be called upon to collaborate in the implementation of the plan.

An objection can also be raised in respect of the requirement that the committee come from the accredited or approved hospital in which the abortion is to be performed. It is difficult to see a connection between this requirement and any of the practical purposes for which s. 251(4) was enacted. It cannot be said to have been adopted in order to promote the safety of therapeutic abortions or the safety of the pregnant woman. Nor is the rule designed to preserve the state interest in the foetus. The integrity of the independent medical opinion is no better served by a committee within the hospital than a committee from outside the hospital as long as the practising physician remains excluded in both circumstances as part of a proper state participation in the choice of the procedure necessary to secure an independent opinion.
In a recent unpublished paper entitled *Options for Abortion Policy Reform: A Consultation Document* (1986), at p. 74, the Fetal Status Working Group, (Edward W. Keyserlingk, Director), Protection of Life Project of the Law Reform

Commission of Canada confirmed the view that the requirement that abortion committees be limited to hospitals is unnecessary:

> Restricting the existence of these committees to hospitals appears to be one of the reasons for delays and inequitable access. There appears to be no compelling medical reason why committees should not be attached to clinics which are equipped and licensed to provide this procedure.

The Law Reform Commission's Working Group raises the possibility of regional abortion committees to replace the current rule (*supra*, at p. 76). The Powell Report proposals include a model whereby a central therapeutic abortion committee could serve several hospitals (*supra*, at p. 38).

Whatever solution is finally retained, it is plain that the requirement that the therapeutic abortion committee come from the hospital in which the abortion will be performed serves no real purpose. The risk resulting from the delay caused by s. 251(4) in this respect is unnecessary. Consequently, this requirement violates the principles of fundamental justice.

Other aspects of the committee requirement in s. 251(4) add to the manifest unfairness of the administrative structure. These include requirements which are at best only tenuously connected to the purpose of obtaining independent confirmation that the standard in s. 251(4)(*c*) has been met and which do not usefully contribute to the realization of that purpose. Hospital boards are entitled to appoint committees made up of three or more qualified medical practitioners. As I observed earlier, if more than three members are appointed, precious time can be lost when quorum cannot be established because members are absent. Whatever the number of members necessary to arrive at an independent appreciation of the state of the woman's life or health may in fact be, this number should be kept to a minimum to avoid unnecessary delays which, as I have explained, result in increased risk to women. Allowing a board to increase the number of members above a statutory

minimum of three members does not add to the integrity of the independent opinion. This aspect of the current rule is unnecessary and, since it can result in increased risks, offends the principles of fundamental justice.

Similarly, the exclusion of all physicians who practise therapeutic abortions from the committees is exorbitant. This rule was no doubt included in s. 251(4) to promote the independence of the therapeutic abortion committees' appreciation of the standard. As I have said, the exclusion of the practising physician, although it diverges from usual medical practice, is appropriate in the criminal context to ensure the independent opinion with respect to the life or health of that physician's patient. The exclusion of all physicians who perform therapeutic abortions from committees, even when they have no

connection with the patient in question, is not only unnecessary but potentially counterproductive. There are no reasonable grounds to suspect bias from a physician who has no connection with the patient simply because, in the course of his or her medical practice, he or she performs lawful abortions. Furthermore, physicians who perform therapeutic abortions have useful expertise which would add to the precision and the integrity of the independent opinion itself. Some state control is appropriate to ensure the independence of the opinion. However, this rule as it now stands is excessive and can increase the risk of delay because fewer physicians are qualified to serve on the committees.

The foregoing analysis of the administrative structure of s. 251(4) is by no means a complete catalogue of all the current systems' strengths and failings. It demonstrates, however, that the administrative structure put in place by Parliament has enough shortcomings so that s. 251(4), when considered as a whole, violates the principles of fundamental justice. These shortcomings stem from rules which are not necessary to the purposes for which s. 251(4) was established. These

unnecessary rules, because they impose delays which result in an additional risk to women's health, are manifestly unfair.

V -- Section 1 of the *Charter*

I agree with the view that s. 1 of the *Charter* can be used to save a legislative provision which breaches s. 7 in the manner which s. 251 of the *Criminal Code* violates s. 7 in this case. Section 1 states:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Chief Justice provided an analysis of s. 1 in *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 138-39, which is appropriate for the purposes of addressing s. 1 in the case at bar. Those seeking to uphold s. 251 of the *Criminal Code* must demonstrate the following:

(1) the objective which s. 251 is designed to serve must "relate to concerns which are pressing and substantial"; and

(2) "once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves a `form of proportionality test'."

I shall consider each of these two criteria which must be met if the limit on the s. 7 right is to be found reasonable.

(1) *The Objective of s. 251*

I agree with Wilson J.'s characterization of s. 251, explained in the following terms, at p. 181:

In my view, the primary objective of the impugned legislation must be seen as the protection of the foetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman's s. 7 right is the protection of the foetus.

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The primary objective of the protection of the foetus is the main objective relevant to the analysis of s. 251 under the first test of *Oakes*. With the greatest respect, I believe the Chief Justice incorrectly identifies (at p. 75) the objective of balancing foetal interests and those of pregnant women, "with the lives and health of women a major factor", as "sufficiently important to meet the requirements of the first step in the *Oakes* inquiry under s. 1".

The focus in *Oakes* is the objective "which the measures responsible for a limit on a *Charter* right or freedom are designed to serve" (*supra,* at p. 138). In the context of the criminal law of abortion, the objective, which the measures in s. 251 responsible for a limit on the s. 7 *Charter* right are designed to serve, is the protection of the foetus. The narrow aim of s. 251(4) should not be confused with the primary objective of s. 251 as a whole. Given that s. 251 is a "comprehensive code", to use the expression of the Chief Justice, it is inappropriate, in my view, to focus on the exculpatory provision alone as the statement of Parliament's objective in establishing the crime. (See *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 751, in which the Court unanimously held that an exemption must be read in light of the affirmative provision to which it relates.) The ancillary objective of protecting the life or health of the pregnant woman, whether viewed alone or balanced against the protection of the foetus, is not the primary objective which the measures responsible for a limit on the constitutional right to security of the person were put in place to achieve.

This balance cannot be considered as Parliament's objective in establishing the crime nor in maintaining this activity as a crime following the amendments to the *Criminal Code* in 1969. Section 251(4) only applies in specified circumstances. When the life or health of a pregnant woman is not in danger and she seeks an abortion on the basis of her own non-medical "priorities and aspirations", it is plain that the rules in s. 251

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precluding her from obtaining a lawful abortion have as their sole objective the protection of the foetus.

Furthermore, as federal legislation in respect of Parliament's jurisdiction over the criminal law in s. 91(27) of the *Constitution Act, 1867*, s. 251 cannot be said to have as its sole or principal objective, as the appellants argue, the protection of the life or health of pregnant women. Legislation which in its pith and substance is related to the life or health of pregnant women, depending of course on its precise terms, would be characterized as in relation to one of the provincial heads of power (see *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 137, *per* Dickson J., as he then was). The exculpatory provision in s. 251(4) cannot stand on its own as a valid exercise of Parliament's criminal law power.

Does the objective of protecting the foetus in s. 251 relate to concerns which are pressing and substantial in a free and democratic society? The answer to the first step of the *Oakes* test is yes. I am of the view that the protection of the foetus is and, as the Court of Appeal observed, always has been, a valid objective in Canadian criminal law. I have already elaborated on this objective in my discussion of the principles of fundamental justice. I think s. 1 of the *Charter* authorizes reasonable limits to be put on a woman's right having regard to the state interest in the protection of the foetus.

(2) *Proportionality*

I turn now to the second test in *Oakes*. The Crown must show that the means chosen in s. 251 are reasonable and demonstrably justified. In *Oakes*, *supra*, at p. 139, the Chief Justice outlined three components of the proportionality test:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little

as possible" the right or freedom in question: *R. v. Big M. Drug Mart Ltd., ...* at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

For the purposes of the first component of proportionality, I observe that it was necessary, in my discussion of s. 251(4) and the principles of fundamental justice, to explain my view that certain of the rules governing access to therapeutic abortions free from criminal sanction are unnecessary in respect of the objectives which s. 251 is designed to serve. A rule which is unnecessary in respect of Parliament's objectives cannot be said to be "rationally connected" thereto or to be "carefully designed to achieve the objective in question". Furthermore, not only are some of the rules in s. 251 unnecessary to the primary objective of the protection of the foetus and the ancillary objective of the protection of the pregnant woman's life or health, but their practical effect is to undermine the health of the woman which Parliament purports to consider so important. Consequently, s. 251 does not meet the proportionality test in *Oakes*.

There is no saving s. 251 by simply severing the offending portions of s. 251(4). The current rule expressed in s. 251, which articulates both Parliament's principal and ancillary objectives, cannot stand without the exception in s. 251(4). The violation of pregnant women's security of the person would be greater, not lesser, if s. 251(4) was severed leaving the remaining subsections of s. 251 as they are in the *Criminal Code*.

Given my conclusion in respect of the first component of the proportionality test, it is not necessary to address the questions as to whether the means in s. 251 "impair as little as possible" the s. 7 *Charter* right and whether there is a proportionality between the effects of s. 251 and the objective of protecting the foetus. Thus, I am not required to answer the difficult question concerning the

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circumstances in which there is a proportionality between the effects of s. 251 which limit the right of pregnant women to security of the person and the objective of the protection of the foetus. I do feel bound, however, to comment upon the balance which Parliament sought to achieve between the interest in the protection of the foetus and the interest in the life or health of the pregnant woman in adopting the amendments to the *Criminal Code* in 1969.

In *Oakes*, *supra*, at p. 140, the Chief Justice further explained the third component of the proportionality test in the following terms:

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [Emphasis added.]

The objective of protecting the foetus would not justify, in my view, the severity of the breach of pregnant women's right to security which would result if the exculpatory provision was completely removed from the *Criminal Code*.

The gist of s. 251(4) is, as I have said, that the objective of protecting the foetus is not of sufficient importance to defeat the interest in protecting pregnant women from pregnancies which represent a danger to life or health. I take this parliamentary enactment in 1969 as an indication that, in a free and democratic society, it would be unreasonable to limit the pregnant woman's right to security of the person by a rule prohibiting abortions in all circumstances when her life or health would or would likely be in danger. This decision of the Canadian Parliament to the effect that the life or health of the pregnant woman takes precedence over the state interest in the foetus is also reflected in legislation in other free and democratic societies.

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In *Emerging Issues in Commonwealth Abortion Laws, 1982* (1983), *passim*, submitted as an exhibit at trial, Rebecca J. Cook and Bernard M. Dickens report that, on the basis of the law in force as of November 1, 1982, the United Kingdom, New Zealand and Australia Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, and Victoria, among other Commonwealth jurisdictions, include risk to the pregnant woman's life, physical health and mental health as legal grounds for abortion. The Crown and the Attorney General of Canada, in their books of authorities, cited statutes from these and other jurisdictions which indicate that a danger to the life or health of the pregnant woman takes precedence over the state interest in the foetus: the United Kingdom, *Abortion Act, 1967*, 1967, c. 87, s. 1(1)(*a*); Australian Northern Territory, *Criminal Law Consolidation Act and Ordinance*, s. 79 A(3)(a); South Australia, *Criminal Law Consolidation Act*, 1935-1975, s. 82a(1)(*a*)(*i*); Federal Republic of Germany, *Criminal Code*, as amended by the *Fifteenth Criminal Law Amendment Act* (1976), s. 218a(1); Israel, *Penal Law*, 5737-1977 (as amended), art. 316(*a*)(4); New Zealand, *Crimes Act 1961*, as amended by the *Crimes Amendment Act 1977* and the *Crimes Amendment Act 1978*, s. 187A(1)(a); and France, *Code pénal*, art. 317 and *Code de la santé publique*, art. 162-1 and 162-12. This substantiates the view that the legislative decision in Canada that the life or health of the woman takes precedence over the state interest in the foetus is in accordance with s. 1 of the *Charter*.

I note that the laws in some of these foreign jurisdictions, unlike s. 251 of the *Criminal Code*, require a higher standard of danger to health in the latter months of pregnancy, as opposed to the early months, for an abortion to be lawful. Would such a rule, if it was adopted in Canada, constitute a reasonable limit on the right to security of the person under s. 1 of the *Charter*? As I have said, given the actual wording of s. 251, pursuant to which the standard necessary for a lawful abortion does not vary according to the stage of pregnancy,

this Court is not required to consider this question under s. 1 of the *Charter*. It is possible that a future enactment by Parliament along the lines of the laws adopted in these jurisdictions could achieve a proportionality which is acceptable under s. 1. As I have stated, however, I am of the view that the objective of protecting the foetus would not justify the complete removal of the exculpatory provisions from the *Criminal Code*.

Finally, I wish to stress that we have not been asked to decide nor is it necessary, given my own conclusion that s. 251 contains rules unnecessary to the protection of the foetus, to decide whether a foetus is included in the word "everyone" in s. 7 so as to have a right to "life, liberty and security of the person" under the *Charter*.

VI -- Other Grounds for Appeal

Counsel for the appellants raised several other grounds for appeal before this Court. The argument concerning the alleged invalidity of s. 605(1)(*a*) of the *Criminal Code* is the only *Charter* argument, apart from that pertaining to s. 7, which must be addressed. If the Crown had no right of appeal, the appellants would necessarily succeed on this sole ground as this Court would be required to quash the decision of the Court of Appeal.

Although, as a result of my answers to the first and second constitutional questions, I am not required to respond to the other arguments to dispose of this appeal, I believe that it is appropriate to answer the non-*Charter* issues.

Section 91(27) of the *Constitution Act, 1867*

I agree with McIntyre J. and the Court of Appeal that there is no merit in the argument that s. 251 is *ultra vires* of Parliament. In *Morgentaler (1975)*, *supra*, this Court unanimously held that s. 251 is not colourable provincial legislation in relation to health but that it constitutes a proper exercise of Parliament's criminal law power pursuant to s. 91(27) of the *Constitution Act, 1867*. I agree. Indeed, as I have decided, s. 251 cannot be said to be simply a mechanism designed to protect

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the life or health of the pregnant woman. While this ancillary objective explains, in part, certain of the requirements of the exculpatory provision in s. 251(4), it does not represent the principal objective of s. 251 as a whole, which is to protect the state interest in the foetus. Parliament established the indictable offence of procuring a miscarriage, defined in s. 251(1) and s. 251(2), pursuant to this primary objective. I consider this a valid exercise of the criminal law power.

Section 96 of the *Constitution Act, 1867*

I agree with McIntyre J. that s. 251 does not give judicial powers to therapeutic abortion committees which were exercised by county, district and superior courts at the time of Confederation. As I have observed, in s. 251(4) Parliament has only given the committee the authority to make a medical determination regarding the pregnant woman's life or health. The panel of doctors exercises medical judgment on a medical question and performs no s. 96 judicial function. There is no merit in this argument.

Unlawful Delegation and Abdication of the Criminal Law Power

For the reasons given by McIntyre J., I agree that s. 251 does not constitute an unlawful delegation of federal legislative power nor does it represent an abdication of the criminal law power by Parliament.

Section 605(1)(*a*) of the *Criminal Code*

For the reasons given by McIntyre J., I agree that there is no merit in this argument.

Section 610(3) of the *Criminal Code*

Counsel for the appellants argued that s. 610(3) of the *Criminal Code*, which prohibits the awarding of costs in appeals involving indictable offences, violates ss. 7, 11(*d*), (*f*),

(*h*) and 15 of the *Charter*. He also argued that this Court had the power to award costs on appeals under s. 24(1) of the *Charter*. It is unnecessary to decide whether or

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not s. 610(3) of the *Criminal Code* violates a *Charter* right. I agree with the Court of Appeal that, whatever this Court's power to award costs in appeals such as this one, costs should not be awarded in this case.

*66

With regard to defence counsel's address to the jury at trial, I associate myself completely with the comments made by the Chief Justice. In his address, Mr. Manning wrongly chose not to respect the very distinct roles the trial judge and the jury play in our system of criminal justice. In *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at p. 836, McIntyre J., in a different context, stated:

No authority need be cited for the proposition that in a jury trial all questions of law are for the judge alone and, of equal importance, all questions of fact are for the jury alone. The distinction is of fundamental importance. It should be preserved so long as it is considered right to continue the use of the jury in criminal law.

The defence submission was, as the Court of Appeal stated, "a direct attack on the role and authority of the trial judge and a serious misstatement to the jury as to its duty and right in carrying out its oath" (*supra*, at p. 434). I am of the view that these strongly-stated observations are required for the benefit of counsel who in other proceedings may be tempted to follow this unacceptable practice.

Conclusion

The constitutional questions should be answered as follows:

1. Question:

Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

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Answer:

The first constitutional question is answered in the affirmative in respect of the right of a pregnant woman to "security of the person" in s. 7 of the *Charter*.

2. Question:

If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:

In respect of the violation of the right of a pregnant woman to "security of the person" in s. 7 caused by s. 251 of the *Criminal Code*, s. 251 is not justified by s. 1 of the *Charter*.

3. Question:
Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?

Answer:

No, in the sense that s. 251 is within the proper jurisdiction of Parliament on the basis of s. 91(27) of the *Constitution Act, 1867*.

4. Question:

Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?

Answer:

No.

5. Question:

Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

Answer:

No.

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6. Question:
Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?

Answer:

With respect to s. 605, the answer is no. Whether or not s. 610(3) of the *Criminal Code* violates a *Charter* right, I agree with the Court of Appeal that, whatever this Court's power to award costs in appeals such as this one, costs should not be awarded in this case.

7. Question:

If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:

Given the answer to question 6, this question does not call for an answer.

On the basis of my answers to the first two constitutional questions, I would allow the appeal.

The reasons of McIntyre and La Forest JJ. were delivered by

MCINTYRE J. (dissenting)--I have read the reasons for judgment prepared by my colleagues, the Chief Justice and Justices Beetz and Wilson. I agree that the principal issue which arises is whether s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, contravenes s. 7 of the *Canadian Charter of Rights and Freedoms*. I will make some comments later on other issues put forward by the appellants. The Chief Justice has set out the constitutional questions and the relevant statutory provisions, as well as the facts and procedural history. He has considered the scope of s. 7 of the *Charter* and, having found that it has been offended, he would allow the appeal. I am unable to

agree with his reasons or his disposition of the appeal. I find myself in broad general agreement with the reasons of the Court of Appeal, and I would dismiss the appeal on that basis and for reasons that I will endeavour to set forth.

Section 251 of the *Criminal Code*

I would say at the outset that it may be thought that this case does not raise the *Charter* issues which were argued and which have been addressed in the reasons of my

colleagues. The charge here is one of conspiracy to breach the provisions of s. 251 of the *Criminal Code*. There is no doubt, and it has never been questioned, that the appellants adopted a course which was clearly in defiance of the provisions of the *Code* and it is difficult to see where any infringement of their rights, under s. 7 of the *Charter*, could have occurred. There is no female person involved in the case who has been denied a therapeutic abortion and, as a result, the whole argument on the right to security of the person, under s. 7 of the *Charter*, has been on a hypothetical basis. The case, however, was addressed by all the parties on that basis and the Court has accepted that position.

Section 251(1) and (2) of the *Criminal Code* make it an indictable offence for a person to use any means to procure the miscarriage of a female person and prescribe on conviction a maximum sentence of two years' imprisonment, in the case of the woman herself, and a maximum sentence of life imprisonment in the case of another person. Parliament has decreed that procuring a non-therapeutic abortion is a crime deserving of severe punishment. Subsection (4) provides that subss. (1) and (2) shall not apply where an abortion is performed in accordance with paras. (*a*), (*b*), (*c*) and (*d*) of subs. (4). These paragraphs provide that a qualified medical practitioner may perform an abortion, and a pregnant woman may permit an abortion, in an accredited or an approved hospital where the therapeutic abortion committee for the hospital (defined in subs. (6)) has given its certificate in writing, stating that in its opinion the continuation of the woman's pregnancy would or

would be likely to endanger her life or health. The certificate may be given to a qualified medical practitioner only after the committee, by a majority of its members and at a meeting where the woman's case has been reviewed, has authorized the giving of the certificate. Subsection (5) empowers the Minister of Health of a province to require a therapeutic abortion committee to furnish copies of certificates issued by the committee and such other information relating to the issuing of the certificate as he may require, and gives the Minister power to require similar information from a medical practitioner who has procured an abortion. Subsection (6) is the definitional section. It is clear from the foregoing that abortion is prohibited and that subs. (4) provides relieving provisions allowing an abortion in certain limited circumstances. It cannot be said that s. 251 of the *Criminal Code* confers any general right to have or to procure an abortion. On the contrary, the provision is aimed at protecting the interests of the unborn child and only lifts the criminal sanction where an abortion is necessary to protect the life or health of the mother.

In considering the constitutionality of s. 251 of the *Criminal Code*, it is first necessary to understand the background of this litigation and some of the problems which it raises. Section 251 of the *Code* has been denounced as ill-conceived and inadequate by those at one extreme of the abortion debate and as immoral and unacceptable by those at the opposite extreme. There are those, like the appellants, who assert that on moral and ethical grounds there is a simple solution to the problem: the inherent "right of women to control their own bodies" requires the repeal of s. 251 in favour of the principle of "abortion on demand". Opposing this view are those who contend with equal vigour, and

also on moral and ethical grounds, for a clear and simple solution: the inherent "right to life of the unborn child" requires the repeal of s. 251(4), (5), (6) and (7) in order to leave an absolute ban on abortions. The battle lines so drawn are firmly held and the attitudes of the opposing parties

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admit of no compromise. From the submission of the Attorney General of Canada (set out in his factum at paragraph 6), however, it may appear that a majority in Canada do not see the issue in such black and white terms. Paragraph 6 is in these words:

The evidence of opinion surveys indicates that there is a surprising consistency over the years and in different survey groups in the spectrum of opinions on the issue of abortion. Roughly 21 to 23% of people at one end of the spectrum are of the view, on the one hand, that abortion is a matter solely for the decision of the pregnant woman and that any legislation on this subject is an unwarranted interference with a woman's right to deal with her own body, while about 19 to 20% are of the view, on the other hand, that destruction of the living fetus is the killing of human life and tantamount to murder. The remainder of the population (about 60%) are of the view that abortion should be prohibited in some circumstances.

Parliament has heeded neither extreme. Instead, an attempt has been made to balance the competing interests of the unborn child and the pregnant woman. Where the provisions of s. 251(4) are met, the abortion may be performed without legal sanction. Where they are not, abortion is deemed to be socially undesirable and is punished as a crime. In *Morgentaler v. The Queen,* [1976] 1 S.C.R. 616 [hereinafter *Morgentaler (1975)*], Laskin C.J. said (in dissent, but not on this point), at p. 627:

What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial. I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation.

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Parliament's view that abortion is, in its nature, "socially undesirable conduct" is not new. Parliament's policy, as expressed by s. 251 of the *Code*, is consistent with that which has governed Canadian criminal law since Confederation and before: see Dickson J. (as he then was) in *Morgentaler (1975), supra*, at p. 672, and the reasons of the Ontario Court of Appeal in this case: (1985), 52 O.R. (2d) 353, at pp. 364-66. It is against this background that I turn to the question of judicial review in light of the *Charter*.

Scope of Judicial Review under the *Charter*

Before the adoption of the *Charter*, there was little question of the limits of judicial review of the criminal law. For all practical purposes it was limited to a determination of whether the impugned enactment dealt with a subject which could fall within the criminal law power in s. 91(27) of the *Constitution Act, 1867*. There was no doubt of the power of Parliament to say what was and what was not criminal and to prohibit criminal conduct with penal sanctions, although from 1960 onwards legislation was subject to review under the *Canadian Bill of Rights*: see *Morgentaler (1975)*, *supra*. The adoption of the *Charter* brought a significant change. The power of judicial review of legislation acquired greater scope but, in my view, that scope is not unlimited and should be carefully confined to that which is ordained by the *Charter*. I am well aware that there will be disagreement about what was ordained by the *Charter* and, of course, a measure of interpretation of the *Charter* will be required in order to give substance and reality to its provisions. But the courts must not, in the guise of interpretation, postulate rights and freedoms which do not have a firm and a reasonably identifiable base in the *Charter*. In his reasons, the Chief Justice refers to the problem. He says, at pp. 45-46:

During argument before this Court, counsel for the Crown emphasized repeatedly that it is not the role of the judiciary in Canada to evaluate the wisdom of

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legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 671, (hereinafter ``*Morgentaler (1975)*'') I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to the abortion question. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights); *The Abortion Decision of the Federal Constitutional Court -- First Senate -- of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c. 87 (U.K.)

But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler* (*1975*), at p. 671, that:

The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued

by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms* . . . . It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

While I differ with the Chief Justice in the disposition of this appeal, I would accept his words, referred to above, which describe the role of the Court, but I would suggest that in "ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*" the courts must confine

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themselves to such democratic values as are clearly found and expressed in the *Charter* and refrain from imposing or creating other values not so based.

It follows, then, in my view, that the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*. While this may appear to be self-evident, the distinction is of vital importance. If a particular interpretation enjoys no support, express or reasonably implied, from the *Charter,* then the Court is without power to clothe such an interpretation with constitutional status. It is not for the Court to substitute its own views on the merits of a given question for those of Parliament. The Court must consider not what is, in its view, the best solution to the problems posed; its role is confined to deciding whether the solution enacted by Parliament offends the *Charter*. If it does, the provision must be struck down or declared inoperative, and Parliament may then enact such different provisions as it may decide. I adopt the words of Holmes J., which were referred to in *Ferguson v. Skrupka*, 372 U.S. 726 (1963), at pp. 729-30:

There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner* v. *New York*, 198 U.S. 45 (1905), outlawing "yellow dog" contracts, *Coppage* v. *Kansas*, 236 U.S. 1 (1915), setting minimum wages for women, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said:

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"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such

prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain".

And in an earlier case he had emphasized that, "The criterion of constitutionality is not whether we believe the law to be for the public good."

The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Holmes J. wrote in 1927, but his words have retained their force in American jurisprudence: see *New Orleans v. Dukes,* 427 U.S. 297 (1976), at p. 304, *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981), at p. 469, and *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), at pp. 504-5. In my view, although written in the American context, the principle stated is equally applicable in Canada.

It is essential that this principle be maintained in a constitutional democracy. The Court must not resolve an issue such as that of abortion on the basis of how many judges may favour "pro-choice" or "pro-life". To do so would be contrary to sound principle and the rule of law affirmed in the preamble to the *Charter* which must mean that no discretion, including a judicial discretion, can be unlimited. But there is a problem, for the Court must clothe the general expression of rights and freedoms contained in the *Charter* with real substance and vitality. How can the courts go about this task without imposing at least some of their views and predilections upon the law? This question has been the subject of much discussion and comment. Many theories have been postulated but

few have had direct reference to the problem in the Canadian context. In my view, this Court has offered guidance in this matter. In such cases as *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145, at pp. 155-56, and *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, at p. 344, it has enjoined what has been termed a "purposive approach" in applying the *Charter* and its provisions. I take this to mean that the Courts should interpret the *Charter* in a manner calculated to give effect to its provisions, not to the idiosyncratic view of the judge who is writing. This approach marks out the limits of appropriate *Charter* adjudication. It confines the content of *Charter* guaranteed rights and freedoms to the purposes given expression in the *Charter*. Consequently, while the courts must continue to give a fair, large and liberal construction to the *Charter* provisions, this approach prevents the Court from abandoning its traditional adjudicatory function in order to formulate its own conclusions on questions of public policy, a step which this Court has said on numerous occasions it must not take. That *Charter* interpretation is to be purposive necessarily implies the converse: it is not to be "non-purposive". A court is not entitled to define a right in a manner unrelated to the interest which the right in question was meant to protect. I endeavoured to formulate an approach to the problem in

Reference Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, in these words, at p. 394:

It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society.

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The approach, as I understand it, does not mean that judges may not make some policy choices when confronted with competing conceptions of the extent of rights or freedoms. Difficult choices must be made and the personal views of judges will unavoidably be engaged from time to time. The decisions made by judges, however, and the interpretations that they advance or accept must be plausibly inferable from something in the *Charter*. It is not for the courts to manufacture a constitutional right out of whole cloth. I conclude on this question by citing and adopting the following words, although spoken in dissent, from the judgment of Harlan J. in *Reynolds v. Sims*, 377 U.S. 533 (1964), which, in my view, while stemming from the American experience, are equally applicable in a consideration of the Canadian position. Harlan J. commented, at pp. 624-25, on the:

. . . current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

The Right to Abortion and s. 7 of the *Charter*

The judgment of my colleague, Wilson J., is based upon the proposition that a pregnant woman

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has a right, under s. 7 of the *Charter*, to have an abortion. The same concept underlies the

judgment of the Chief Justice. He reached the conclusion that a law which forces a woman to carry a foetus to term, unless certain criteria are met which are unrelated to her own priorities and aspirations, impairs the security of her person. That, in his view, is the effect of s. 251 of the *Criminal Code*. He has not said in specific terms that the pregnant woman has the right to an abortion, whether therapeutic or otherwise. In my view, however, his whole position depends for its validity upon that proposition and that interference with the right constitutes an infringement of her right to security of the person. It is said that a law which forces a woman to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations interferes with security of her person. If compelling a woman to complete her pregnancy interferes with security of her person, it can only be because the concept of security of her person includes a right not to be compelled to carry the child to completion of her pregnancy. This, then, is simply to say that she has a right to have an abortion. It follows, then, that if no such right can be shown, it cannot be said that security of her person has been infringed by state action or otherwise.

All laws, it must be noted, have the potential for interference with individual priorities and aspirations. In fact, the very purpose of most legislation is to cause such interference. It is only when such legislation goes beyond interfering with priorities and aspirations, and abridges rights, that courts may intervene. If a law prohibited membership in a lawful association it would be unconstitutional, not because it would interfere with priorities and aspirations, but because of its interference with the guaranteed right of freedom of association under s. 2(*d*) of the *Charter*. Compliance with the *Income Tax Act* has, no doubt, frequently interfered with priorities and aspirations. The taxing provisions are not, however, on that basis unconstitutional, because the ordinary taxpayer enjoys no right to be tax free. Other illustrations may be found. In my view, it is clear that before it could be concluded that any enactment infringed the concept of security of the person, it would have to infringe

some underlying right included in or protected by the concept. For the appellants to succeed here, then, they must show more than an interference with priorities and aspirations; they must show the infringement of a right which is included in the concept of security of the person.

The proposition that women enjoy a constitutional right to have an abortion is devoid of support in the language of s. 7 of the *Charter* or any other section. While some human rights documents, such as the *American Convention on Human Rights, 1969* (Article 4(1)), expressly address the question of abortion, the *Charter* is entirely silent on the point. It may be of some significance that the *Charter* uses specific language in dealing with other topics, such as voting rights, religion, expression and such controversial matters as mobility rights, language rights and minority rights, but remains silent on the question of abortion which, at the time the *Charter* was under consideration, was as much a subject of public controversy as it is today. Furthermore, it would appear that the history of the constitutional text of the *Charter* affords no support for the appellants' proposition. A reference to the Minutes of the Special Joint Committee of Senate and

House of Commons on the Constitution of Canada (Proceedings 32nd. Parl., Sess. 1 (1981), vol. 46, p. 43) reveals the following exchange:

Mr. Crombie: . . . And I ask you then finally, what effect will the inclusion of the due process clause have on the question of marriage, procreation, or the parental care of children?

...

Mr. Chrétien: The point, Mr. Crombie, that it is important to understand the difference is that we pass legislation here on abortion, criminal code, and we pass legislation on capital punishment; parliament [*sic*] has the authority to do that, and the court at this moment, because we do not have the due process of law written there, cannot go and see whether we made the right decision or the wrong decision in Parliament.

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If you write down the words, "due process of law" here, the advice I am receiving is the court could go behind our decision and say that their decision on abortion was not the right one, their decision on capital punishment was not the right one, and it is a danger, according to legal advice I am receiving, that it will very much limit the scope of the power of legislation by the Parliament and we do not want that; and it is why we do not want the words "due process of law". These are the two main examples that we should keep in mind.

You can keep speculating on all the things that have never been touched, but these are two very sensitive areas that we have to cope with as legislators and my view is that Parliament has decided a certain law on abortion and a certain law on capital punishment, and it should prevail and we do not want the courts to say that the judgment of Parliament was wrong in using the constitution.

This passage, of course, revolves around the second and not the first limb of s. 7, but it offers no support for the suggestion that it was intended to bring the question of abortion into the *Charter*.

It cannot be said that the history, traditions and underlying philosophies of our society would support the proposition that a right to abortion could be implied in the *Charter*. The history of the legal approach to this question, reflective of public policy, was conveniently canvassed in the Ontario Court of Appeal in this case in these terms, at pp. 364-66:

History of the law of abortion

The history of the law of abortion is of some importance. At common law procuring an abortion before quickening was not a criminal offence. Quickening occurred when the

pregnant woman could feel the foetus move in her womb. It was a misdemeanour to procure an abortion after quickening: *Blackstone's Commentaries on the Laws of England*, Book 1, pp. 129-30. The law of criminal abortion was first codified in England in *Lord Ellenborough's Act,* 1803 (U.K.), c. 58. That Act made procuring an abortion of a quick foetus a capital offence and provided lesser penalties for abortion before quickening. After the *Offences Against the Person Act,* 1861 (U.K.), c. 100, s. 58, no differentiation in penalty was made in England on the basis of the stage of foetal development. The offence was a felony and the

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maximum penalty life imprisonment. The *Infant Life (Preservation) Act*, 1929 (U.K.), c. 34, gave greater protection to a viable foetus by creating the offence of child destruction where a child capable of being born alive was caused to die except in good faith to preserve the life of the mother. In *R. v. Bourne*, [1939] 1 K.B. 687, the prohibition against abortion both at common law and by statute was held to be subject to the common law defence based upon the necessity of saving the mother's life.

The earliest statutory prohibition in Canada against attempting to procure an abortion is to be found in "An Act respecting Offences against the Person", 1869 (Can.), c. 20, ss. 59 and 60. The Act was based on *Lord Ellenborough's Act* and the *Offences Against the Person Act, 1861*. The provisions relating to abortion were included in the Canadian *Criminal Code* in 1892 (1892 (Can.), c. 29, ss. 272 to 274), and with slight changes were included in the Codes of 1906 (R.S.C. 1906, c. 146, ss. 303 to 306); 1927 (R.S.C. 1927, c. 36, ss. 303 to 306) and 1954 (1953-54 (Can.), c. 51, ss. 237 and 238).

Section 251(1) made it clear that Parliament regarded procuring an abortion as a very serious crime for which there was a maximum sentence of imprisonment for life.

In 1969, Parliament alleviated the situation by the addition to s. 251 of s-ss (4), (5), (6) and (7) as exculpatory provisions by 1968-69, c. 38, s. 18. These subsections provided that it was not a criminal act to procure an abortion where the continuation of the pregnancy would or would be likely to endanger the life or health of a female person. As can be seen, in order to come within the exceptions to s. 251(1) and (2),

(a) the majority of the members of a therapeutic abortion committee comprising not less than three qualified medical practitioners of an accredited or approved hospital had to certify in writing after reviewing the case at a meeting that in the opinion of the majority the continuation of the pregnancy would or would be likely to endanger the life or health of a female person;

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(b) the abortion had to be performed in an accredited or approved hospital by a medical practitioner to whom the certificate was given who was not a member of the committee.

By defining criminal conduct more narrowly, these amendments reflected the contemporary view that abortion is not always socially undesirable behaviour.

As the Court of Appeal said, the amendments to the *Criminal Code* which imported s. 251 are indicative of a changing view on this question, but it is not possible to erect upon the words of s. 251 a constitutional right to abortion.

The historical review of the legal approach in Canada taken from the judgment of the Court of Appeal serves, as well, to cast light on the underlying philosophies of our society and establishes that there has never been a general right to abortion in Canada. There has always been clear recognition of a public interest in the protection of the unborn and there has been no evidence or indication of any general acceptance of the concept of abortion at will in our society. It is to be observed as well that at the time of adoption of the *Charter* the sole provision for an abortion in Canadian law was that to be found in s. 251 of the *Criminal Code*. It follows then, in my view, that the interpretive approach to the *Charter*, which has been accepted in this Court, affords no support for the entrenchment of a constitutional right of abortion.

As to an asserted right to be free from any state interference with bodily integrity and serious state-imposed psychological stress, I would say that to be accepted, as a constitutional right, it would have to be based on something more than the mere imposition, by the State, of such stress and anxiety. It must, surely, be evident that many forms of government action deemed to be reasonable, and even necessary in our society, will cause stress and anxiety to many, while at the same time being acceptable exercises of government power in pursuit of socially desirable goals. The very facts of life in a modern society would preclude the entrenchment of such a constitutional right. Governmental action for the due governance and

administration of society can rarely please everyone. It is hard to imagine a governmental policy or initiative which will not create significant stress or anxiety for some and, frequently, for many members of the community. Governments must have the power to expropriate land, to zone land, to regulate its use and the rights and conditions of its occupation. The exercise of these powers is frequently the cause of serious stress and anxiety. In the interests of public health and welfare, governments must have and exercise the power to regulate, control -- and even suppress -- aspects of the manufacture, sale and distribution of alcohol and drugs and other dangerous substances. Stress and anxiety resulting from the exercise of such powers cannot be a basis for denying them to the authorities. At the present time there is great pressure on governments to restrict -- and even forbid -- the use of tobacco. Government action in this field will produce much stress and anxiety among smokers and growers of tobacco, but it cannot be said that this will render unconstitutional control and regulatory measures adopted by governments. Other illustrations abound to make the point.

To invade the s. 7 right of security of the person, there would have to be more than state-imposed stress or strain. A breach of the right would have to be based upon an

infringement of some interest which would be of such nature and such importance as to warrant constitutional protection. This, it would seem to me, would be limited to cases where the state-action complained of, in addition to imposing stress and strain, also infringed another right, freedom or interest which was deserving of protection under the concept of security of the person. For the reasons outlined above, the right to have an abortion -- given the language, structure and history of the *Charter* and given the history, traditions and underlying philosophies of our society -- is not such an

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interest. Any right to an abortion will remain circumscribed by the terms of s. 251 of the *Criminal Code*. I refer to the following passage from the judgment of the court below, at p. 378:

One cannot overlook the fact that the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate. We agree with Parker A.C.J.H.C. in the court below that, bearing in mind the statutory prohibition against abortion in Canada which has existed for over 100 years, it could not be said that there is a right to procure an abortion so deeply rooted in our traditions and way of life as to be fundamental. A woman's only right to an abortion at the time the Charter came into force would accordingly appear to be that given to her by s-s. (4) of s. 251.

I would only add that even if a general right to have an abortion could be found under s. 7 of the *Charter*, it is by no means clear from the evidence the extent to which such a right could be said to be infringed by the requirements of s. 251 of the *Code*. In the nature of things that is difficult to determine. The mere fact of pregnancy, let alone an unwanted pregnancy, gives rise to stress. The evidence reveals that much of the anguish associated with abortion is inherent and unavoidable and that there is really no psychologically painless way to cope with an unwanted pregnancy.

It is for these reasons I would conclude, that save for the provisions of the *Criminal Code*, which permit abortion where the life or health of the woman is at risk, no right of abortion can be found in Canadian law, custom or tradition, and that the *Charter*, including s. 7, creates no further right. Accordingly, it is my view that s. 251 of the *Code* does not in its terms violate s. 7 of the *Charter*. Even accepting the assumption that the concept of security of the person would extend to vitiating a law which would require a woman to carry a child to the completion of her pregnancy at the risk of her life or health, it must be observed that this is not our case. As has been pointed out,

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s. 251 of the *Code* already provides for abortion in such circumstances.

Procedural Fairness

I now turn to the appellant's argument regarding the procedural fairness of s. 251 of the *Criminal Code*. The basis of the argument is that the exemption provisions of subs. (4) are such as to render illusory or practically illusory any defence arising from the subsection for many women who seek abortions. It is pointed out that therapeutic abortions are available only in accredited or approved hospitals, that hospitals so accredited or approved may or may not appoint abortion committees, and that "health" is defined in vague terms which afford no clear guide to its meaning. Statistically, it was said that abortions could be lawfully performed in only twenty per cent of all hospitals in Canada. Because abortions are not generally available to all women who seek them, the argument goes, the defence is illusory, or practically so, and the section therefore fails to comport with the principles of fundamental justice.

Precise evidence on the questions raised is, of course, difficult to obtain and subject to subjective interpretation depending upon the views of those adducing it. Much evidence was led at trial based largely on the Ontario experience. Additional material in the form of articles, reports and studies was adduced, from which the Court was invited to conclude that access to abortion is not evenly provided across the country and that this could be the source of much dissatisfaction. While I recognize that in constitutional cases a greater latitude has been allowed concerning the reception of such material, I would prefer to place principal reliance upon the evidence given under oath in court in my considerations of the factual matters. Evidence was adduced from the chairman of a therapeutic abortion committee at a hospital in Hamilton, where in 1982 eleven hundred and eighty-seven abortions were performed, who testified that of all applications received by his committee in that year

less than a dozen were ultimately refused. Refusal in each case was based upon the fact that a majority of the committee was not convinced that "the continuation of the pregnancy would be detrimental to the woman's health". All physicians who performed abortions under the *Criminal Code* provisions admitted in cross-examination that they had never had an application for a therapeutic abortion on behalf of the patient ultimately refused by an abortion committee. No woman testified that she personally had applied for an abortion anywhere in Canada and had been refused, and no physician testified to his participation in such an application. In 1982, the province of Ontario had ninety-nine hospitals with abortion committees. In that year in Ontario, hospitals performed 31,379 abortions and thirty-six of those hospitals performed more than two hundred in one year. There were seventeen hospitals with abortion committees in metropolitan Toronto and they performed 16,706 abortions in 1982, nine of them performing more than one thousand abortions each. In 1982 all ten provinces and both territories had at least one hospital with an abortion committee. The evidence was not as clear as to the situation in rural or more remote areas. It would be reasonable to assume that access to abortion would have been more difficult outside of the principal inhabited areas. This situation, however, is common to the delivery of all health-care services. Significantly, the testimony and exhibits entered at trial reflect that even in the more permissive abortion regime in the United States there is a similar problem of access. Ten years after the decision in *Roe v. Wade*, 410 U.S. 113 (1973), only slight gains in access had been made

in rural areas. It is also worth noting that the evidence adduced at trial, comparing the respective abortion regimes in Canada and the United States, reveals other significant parallels. For example, there is a close parallel in the two countries concerning such matters as the stage in the pregnancy at which abortions are performed and the procedures used to perform abortions at the respective stages. There is also a high degree of similarity in the two countries regarding the percentages and methods of abortion performed in the crucial early second trimester. In both countries, it

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appears that many of the problems that have arisen in relation to abortion reflect the more general reality that medical services are subject to budgetary, time, space and staff constraints. With abortion, in particular, matters are further complicated by the fact that many physicians regard abortions as unethical and refuse to perform them. In all, the extent to which the statutory procedure contributes to the problems connected with procuring an abortion is anything but clear. Accordingly, even if one accepts that it would be contrary to the principles of fundamental justice for Parliament to make available a defence which, by reason of its terms, is illusory or practically so, it cannot, in my view, be said that s. 251 of the *Code* has had that effect.

It would seem to me that a defence created by Parliament could only be said to be illusory or practically so when the defence is not available in the circumstances in which it is held out as being available. The very nature of the test assumes, of course, that it is for Parliament to define the defence and, in so doing, to designate the terms and conditions upon which it may be available. The Chief Justice has said in his reasons, at p. 70:

The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is

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not warranted when the conditions of the defence are met.

From this comment, I would suggest it is apparent that the Court's role is not to second-guess Parliament's policy choice as to how broad or how narrow the defence should be. The determination of when "the disapprobation of society is not warranted" is in Parliament's hands. The Court's role when the enactment is attacked on the basis that the defence is illusory is to determine whether the defence is available in the circumstances in which it was intended to apply. Parliament has set out the conditions, in s. 251(4), under which a therapeutic abortion may be obtained, free from criminal sanction. It is patent on the face of the legislation that the defence is circumscribed and narrow. It is clear that this was the Parliamentary intent and it was expressed with precision. I am not able to accept the contention that the defence has been held out to be generally available. It is, on the contrary, carefully tailored and limited to special

circumstances. Therapeutic abortions may be performed only in certain hospitals and in accordance with certain specified provisions. It could only be classed as illusory or practically so if it could be found that it does not provide lawful access to abortions in circumstances described in the section. No such finding should be made upon the material before this Court. The evidence will not support the proposition that significant numbers of those who meet the conditions imposed in s. 251 of the *Criminal Code* are denied abortions.

It is evident that what the appellants advocate is not the therapeutic abortion referred to in s. 251 of the *Code*. Their clinic was called into being because of the perceived inadequacies of s. 251. They propose and seek to justify "abortion on demand". The defence in s. 251(4) was not

intended to meet the views of the appellants and provide a defence at large which would effectively repeal the operative subsections of s. 251. Some feel strongly that s. 251 is not adequate in today's society. Be that as it may, it does not follow that the defence provisions of s. 251(4) are illusory. They represent the legislative choice on this question and, as noted, it has not been shown that therapeutic abortions have not been available in cases contemplated by the provision.

It was further argued that the defence in s. 251(4) is procedurally unfair in that it fails to provide an adequate standard of "health" to guide the abortion committees which are charged with the responsibility for approving or disapproving applications for abortions. It is argued that the meaning of the word "health" in s. 251(4) is so vague as to render the sub-section unconstitutional. This argument was, in my view, dealt with fully and effectively in the Court of Appeal. I accept and adopt the following passage from the judgment of that court, at pp. 387-88:

Counsel for the respondent in his attack on s. 251 also argued that the section was void for "vagueness". The argument under this head was that the concepts of "health" and "miscarriage" in s. 251(4) yield an arbitrary application being so vague and uncertain that it is difficult to understand what conduct is proscribed. It is fundamental justice that a person charged with an offence should know with sufficient particularity the nature of the offence alleged.

There was a far-ranging discussion by the respondents' counsel on the concept of "health" and the meaning of the term "miscarriage"; the way in which courts deal with the "vagueness" in the interpretation of municipal by-laws, and an extensive examination of American authorities.

In this case, however, from a reading of s. 251 with its exception, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus, it is for the courts to say what meaning the statute will bear. Counsel was unable to give the Court any authority for holding a statute void for uncertainty. In any event, there is no doubt the respondents

knew that the acts they proposed and carried out were in breach of the section. The fact that they did not approve of the law in this regard does not make it "uncertain". They could have no doubt but that the procuring of a miscarriage which they proposed (and we agree with the trial judge that the phrase "procuring a miscarriage" is synonymous with "performing an abortion"), could only be carried out in an accredited or approved hospital after the securing of the required certificate in writing from the therapeutic abortion committee of that hospital.

Finally, this Court has dealt with the matter. Dickson J. (as he then was), speaking for the majority in *Morgentaler (1975)*, *supra*, in concluding a discussion of s. 251(4) of the *Criminal Code*, said, at p. 675:
Whether one agrees with the Canadian legislation or not is quite beside the point. Parliament has spoken unmistakably in clear and unambiguous language.

In the same case, Laskin C.J., while dissenting on other grounds, said at p. 634:

The contention under point 2 is equally untenable as an attempt to limit the substance of legislation in a situation which does not admit of it. In submitting that the standard upon which therapeutic abortion committees must act is uncertain and subjective, counsel who make the submission cannot find nourishment for it even in *Doe v. Bolton*. There it was held that the prohibition of abortion by a physician except when "based upon his best clinical judgment that an abortion is necessary" did not prescribe a standard so vague as to be constitutionally vulnerable. *A fortiori*, under the approach taken here to substantive due process, the argument of uncertainty and subjectivity fails. It is enough to say that Parliament has fixed a manageable standard because it is addressed to a professional panel, the members of which would be expected to bring a practised judgment to the question whether "the continuation of the pregnancy . . . would or would be likely to endanger . . . life or health".

In my opinion, then, the contention that the defence provided in s. 251(4) of the *Criminal Code* is illusory cannot be supported. From evidence adduced by the appellants, it may be said that

many women seeking abortions have been unable to get them in Canada because s. 251(4) fails to respond to this need. This cannot serve as an argument supporting the claim that subs. (4) is procedurally unfair. Section 251(4) was designed to meet specific circumstances. Its aim is to restrict abortion to cases where the continuation of the pregnancy would, or would likely, be injurious to the life or health of the woman concerned, not to provide unrestricted access to abortion. It was to meet this requirement that Parliament provided for the administrative procedures to invoke the defence in subs. (4). This machinery was considered adequate to deal with the type of abortion Parliament had envisaged. When, however, as the evidence would indicate, many more would seek abortions on a basis far wider than that contemplated by Parliament, any system would

come under stress and possibly fail. It is not without significance that many of the appellants' clients did not meet the standard set or did not seek to invoke it and that is why their clinic took them in. What has confronted the scheme has been a flood of demands for abortions, some of which could meet the tests of s. 251(4) and many which could not. In so far as it may be said that the administrative scheme of the Act has operated inefficiently, a proposition which may be highly questionable, it is caused principally by forces external to the statute, the external circumstances being a general demand for abortion irrespective of the provisions of s. 251. It is not open to a court, in my view, to strike down a statutory provision on this basis.

The appellants in this Court raised other arguments, most of which, in my view, may be briefly dealt with.

Section 605 of the *Criminal Code*

It was contended that s. 605(1)(*a*), giving the Crown a right of appeal against an acquittal in a trial court on any ground involving a question of law alone offended ss. 7 and 11(*d*), (*f*) and (*h*) of the *Charter*. Reliance was placed primarily on s.

11(*h*). There is a simple answer to this argument. The words of s. 11(*h*), "if finally acquitted" and "if finally found guilty", must be construed to mean after the appellate procedures have been completed, otherwise there would be no point or meaning in the word "finally". There is no merit in this ground. I would dispose of this question for the reasons given by the Court of Appeal.

Section 251 of the *Criminal Code* -- Violation of s. 15 of the *Charter*

I find no merit in the argument advanced under this heading to the effect that the equality rights of women are infringed by s. 251 of the *Criminal Code* and on this issue again I would adopt the reasons of the Ontario Court of Appeal found at (1985), 52 O.R. (2d) 353, at pp. 392-97.

Section 251 of the *Criminal Code* and s. 2(*a*) of the *Charter*

I am unable to find any abridgement of freedom of conscience and religion in s. 251 of the *Criminal Code*. I agree with, and on this ground of appeal I would adopt, the reasons for judgment of the Ontario Court of Appeal: *supra*, at pp. 389-91.

Section 251 of the *Criminal Code* and s. 12 of the *Charter* -- Cruel and Unusual Punishment

I would reject this argument and again adopt without variation or addition the reasons of the Ontario Court of Appeal: *supra*, at p. 392.

Section 91(27) *Constitution Act, 1867* (*ultra vires*)

It was submitted on this issue that s. 251 was *ultra vires* of Parliament and could no longer be supported under the criminal power because it was colourable legislation in pith and substance, legislation for the protection of health and, therefore, within provincial competence. There is, in my view, no merit in this argument and I again adopt the reasons of the Ontario Court of Appeal: *supra*, at pp. 397-99.

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Section 96 *Constitution Act, 1867*

The essence of this argument was that s. 251 of the *Criminal Code* purported to give powers to therapeutic abortion committees exercised by county, district and superior courts at the time of Confederation. There is no merit in this argument. I adopt the reasons of the Ontario Court of Appeal: *supra*, at p. 400.

Wrongful Interdelegation of Powers

I would dispose of this argument which was to the effect that s. 251 delegated powers relating to criminal law to the provinces generally, as did the Court of Appeal in their reasons: *supra*, at p. 399. I do not wish, however, to say anything about *Re Peralta and The Queen in Right of Ontario* (1985), 49 O.R. (2d) 705, which is relied upon by that court and is currently on appeal to this Court.

Defence of Necessity

This ground of appeal must also fail. There is no evidence whatever in the record that could support the defence.

Counsel's Address

In his reasons for judgment, the Chief Justice referred to defence counsel's address to the jury at trial, in which he had told the jury that they need not apply s. 251 of the *Criminal Code* if they thought it was bad law. I would associate myself with what the Chief Justice has said on this question. I am in full agreement with him that counsel was wrong in addressing the jury as he did and I would add that such practice, if commonly adopted, would undermine and place at risk the whole jury system.

Conclusion

Before leaving this case, I wish to make it clear that I express no opinion on the question of whether, or upon what conditions, there should be a right for a pregnant woman to have an abortion free of legal sanction. No valid constitutional objection to s.

251 of the *Criminal Code* has, in my view, been raised and, consequently, if there is to be a change

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in the law concerning this question it will be for Parliament to make. Questions of public policy touching on this controversial and divisive matter must be resolved by the elected Parliament. It does not fall within the proper jurisdiction of the courts. Parliamentary action on this matter is subject to judicial review but, in my view, nothing in the *Canadian Charter of Rights and Freedoms* gives the Court the power or duty to displace Parliament in this matter involving, as it does, general matters of public policy.

I would adopt as clearly expressive of the proper approach to be taken by the courts in dealing with *Charter* issues the words of Taylor J., of the Supreme Court of British Columbia, in the case of *Harrison v. University of British Columbia,* [1986] 6 W.W.R. 7. The facts of that case concerned the question of a mandatory retirement provision for employees of the University of British Columbia. The question of discrimination under s. 15 was raised. In dealing with the question of the purpose and constitutional effect of the *Charter*, Taylor J., at p. 11, after noting that the *Charter* functions assigned to the courts do not "allocate to the courts the responsibility for designing, initiating or directing social or economic policy", continued:

It is, of course, true that the function of the courts has been extended. In many cases in which the meaning or proper application of the Charter is in doubt the courts must decide whether or not a legislative, administrative or other act complained of requires constitutional sanction, and such decisions may well have social or economic consequences. As has been emphasized by Lamer J. in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 496-97, [1986] 1 W.W.R. 481 (sub nom. *Ref. re S. 94(2) of Motor Vehicle Act*), 69 B.C.L.R. 145, 48 C.R. (3d) 289, 36 M.V.R. 240, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 63 N.R. 266, this imposes on the courts a new and onerous duty. In carrying out that task, however, the courts can be concerned with social or economic implications only to the extent that they assist in answering the question whether or not the right claimed is one entitled to constitutional protection. The rights to which the

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Charter grants protection are those fundamental to the free and democratic society.

This approach is applicable to the abortion question. The solution to this question in this country must be left to Parliament. It is for Parliament to pronounce on and to direct social policy. This is not because Parliament can claim all wisdom and knowledge but simply because Parliament is elected for that purpose in a free democracy and, in addition, has the facilities -- the exposure to public opinion and information -- as well as the political power to make effective its decisions. I refer with full approval to a further comment by Taylor J., *supra*, at p. 12:

The present case may serve, perhaps, to emphasize that the courts lack both the exposure to public opinion required in order to discharge the essentially "political" task of weighing social or economic interests and deciding between them, and also the ability to gather the information they would need for that task. When it has run its course the litigation may also have served to demonstrate -- if demonstration be needed -- that the judicial system of necessity lacks the capacity of parliamentary bodies to act promptly when economic or social considerations indicate that a change in the law is desirable and, of equal importance, to react promptly when results show either that a change made for that purpose has not achieved its objective or that the objective is no longer desirable.

For all of these reasons, I would dismiss the appeal. I would answer the constitutional questions as follows:

1. Question:

Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?

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Answer:

No.

2. Question:

If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(*a*), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:
No answer is required.

3. Question:

Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?

Answer:

No.

4. Question:

Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?

Answer:

No.

5. Question:

Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?

Answer:

No.

6. Question:

Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*?

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Answer:

With respect to s. 605, the answer is No. As to s. 610(3), I adopt the reasons of the Court of Appeal and say that no costs should be awarded.

7. Question:

If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(*d*), 11(*f*), 11(*h*) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer:

No answer is required.

The following are the reasons delivered by

WILSON J.--At the heart of this appeal is the question whether a pregnant woman can, as a constitutional matter, be compelled by law to carry the foetus to term. The legislature has proceeded on the basis that she can be so compelled and, indeed, has made it a criminal offence punishable by imprisonment under s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, for her or her physician to terminate the pregnancy unless the procedural requirements of the section are complied with.

My colleagues, the Chief Justice and Justice Beetz, have attacked those requirements in reasons which I have had the privilege of reading. They have found that the requirements do not comport with the principles of fundamental justice in the procedural sense and have concluded that, since they cannot be severed from the provisions creating the substantive offence, the whole of s. 251 must fall.

With all due respect, I think that the Court must tackle the primary issue first. A consideration as to whether or not the procedural requirements for obtaining or performing an abortion comport with fundamental justice is purely academic if such requirements cannot as a constitutional matter be imposed at all. If a pregnant

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woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, a review of the procedural requirements by which she may be compelled to do so seems pointless. Moreover, it would, in my opinion, be an exercise in futility for the legislature to expend its time and energy in attempting to remedy the defects in the procedural requirements unless it has some assurance that this process will, at the end of the day, result in the creation of a valid criminal offence. I turn, therefore, to what I believe is the central issue that must be addressed.

1. The Right of Access to Abortion

Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

I agree with the Chief Justice that we are not called upon in this case to delineate the full content of the right to life, liberty and security of the person. This would be an impossible task because we cannot envisage all the contexts in which such a right might be asserted. What we are asked to do, I believe, is define the content of the right in the context of the legislation under attack. Does section 251 of the *Criminal Code* which limits the pregnant woman's access to abortion violate her right to life, liberty and security of the person within the meaning of s. 7?

Leaving aside for the moment the implications of the section for the foetus and addressing only the s. 7 right of the pregnant woman, it seems to me that we can say with a fair degree of confidence that a legislative scheme for the obtaining of an abortion

which exposes the pregnant woman to a threat to her security of the person would violate her right under s. 7. Indeed, we have already stated in *Singh v. Minister of Employment and Immigration,* [1985] 1 S.C.R. 177, that security of the person even on the purely physical level must encompass freedom from the threat of physical punishment or suffering as well as freedom from the actual punishment or suffering itself. In other words, the fact of exposure is enough to violate security of the person. I agree with the Chief Justice and Beetz J. who, for differing reasons,

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find that pregnant women are exposed to a threat to their physical and psychological security under the legislative scheme set up in s. 251 and, since these are aspects of their security of the person, their s. 7 right is accordingly violated. But this, of course, does not answer the question whether even the ideal legislative scheme, assuming that it is one which poses no threat to the physical and psychological security of the person of the pregnant woman, would be valid under s. 7. I say this for two reasons: (1) because s. 7 encompasses more than the right to security of the person; it speaks also of the right to liberty, and (2) because security of the person may encompass more than physical and psychological security; this we have yet to decide.

It seems to me, therefore, that to commence the analysis with the premise that the s. 7 right encompasses only a right to physical and psychological security and to fail to deal with the right to liberty in the context of "life, liberty and security of the person" begs the central issue in the case. If either the right to liberty or the right to security of the person or a combination of both confers on the pregnant woman the right to decide for herself (with the guidance of her physician) whether or not to have an abortion, then we have to examine the legislative scheme not only from the point of view of fundamental justice in the procedural sense but in the substantive sense as well. I think, therefore, that we must answer the question: what is meant by the right to liberty in the context of the abortion issue? Does it, as Mr. Manning suggests, give the pregnant woman control over decisions affecting her own body? If not, does her right to security of the person give her such control? I turn first to the right to liberty.

(a) *The Right to Liberty*

In order to ascertain the content of the right to liberty we must, as Dickson C.J. stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, commence with an analysis of the purpose of the right. Quoting from the Chief Justice at p. 344:

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. . . the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as

the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.

We are invited, therefore, to consider the purpose of the *Charter* in general and of the right to liberty in particular.

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. Professor Neil MacCormick, Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh, in his work entitled *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), speaks of liberty as "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life" (p. 39). He says at p. 41:

To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a

human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

Dickson C.J. in *R. v. Big M Drug Mart Ltd.* makes the same point at p. 346:

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the

Canadian Charter of Rights and Freedoms as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

It was further amplified in Dickson C.J.'s discussion of *Charter* interpretation in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the

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ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh,* is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

This view is consistent with the position I took in the case of *R. v. Jones*, [1986] 2 S.C.R. 284. One issue raised in that case was whether the right to liberty in s. 7 of the *Charter* included a parent's right to bring up his children in accordance with his conscientious beliefs. In concluding that it did I stated at pp. 318-19:

I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his

own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to

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do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it". He added:

Each is the proper guardian of his own health, whether bodily *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.

Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

This conception of the proper ambit of the right to liberty under our *Charter* is consistent with the American jurisprudence on the subject. While care must undoubtedly be taken to avoid a mechanical application of concepts developed in different cultural and constitutional contexts, I would respectfully agree with the observation of my colleague, Estey J., in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, at pp. 366-67:

With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.

The courts in the United States have had almost two hundred years experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts.

As early as the 1920's the American Supreme Court employed the Fifth and Fourteenth Amendments to the American Constitution to give parents a degree of choice in the education of their children. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court struck down a law prohibiting the teaching of any subject in a language other than English. In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), an Oregon statute requiring all "normal children" to attend public school and thus prohibiting private school attendance was held to be unconstitutional. The Court in *Pierce* at pp. 534-35 characterized the interest being infringed

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as "the liberty of parents and guardians to direct the upbringing and education of children under their control".

The sanctity of the family was underlined by the decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the Supreme Court invalidated a state law authorizing the sterilization of individuals convicted of two or more crimes involving moral turpitude. While the law was struck down on the basis that it violated the equal protection clause of the Fourteenth Amendment, the Court had this to say of the interest at stake: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race" (at p. 541).

Later the Supreme Court was asked to determine the constitutionality of a Connecticut statute forbidding the use of contraceptives by married couples. In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the majority held this statute to be invalid. The judges writing for the majority used various constitutional routes to arrive at this conclusion but the common denominator seems to have been a profound concern over the invasion of the marital home required for the enforcement of the law. *Griswold* was interpreted by the Supreme Court in the later case of *Eisenstadt v. Baird,* 405 U.S. 438 (1972), where the majority stated at p. 453:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make up. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

In *Eisenstadt* the Court struck down a Massachusetts law that prohibited the distribution of any

drug for the purposes of contraception to unmarried persons on the ground that it violated the equal protection clause.

The equal protection clause was also used by the Supreme Court in *Loving v. Virginia,* 388 U.S. 1 (1967), to strike down legislation that purported to forbid inter-racial marriage. The Court tied its decision to the previous line of cases that protected basic choices relating to family life. It stated at p. 12: ``The freedom to marry has long been recognized as one of the `vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the `basic civil rights of man,' fundamental to our very existence and survival . . . . [The] freedom to marry . . . resides with the individual . . . ." Thus, by a process of accretion the scope of the right of individuals to make fundamental decisions affecting their private lives was elaborated in the United States on a case by case basis. The parameters of the fence were being progressively defined.

For our purposes the most interesting development in this area of American law are the decisions of the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and its sister

case *Doe v. Bolton*, 410 U.S. 179 (1973). In *Roe v. Wade* the Court held that a pregnant woman has the right to decide whether or not to terminate her pregnancy. This conclusion, the majority stated, was mandated by the body of existing law ensuring that the state would not be allowed to interfere with certain fundamental personal decisions such as education, child-rearing, procreation, marriage and contraception. The Court concluded that the right to privacy found in the Fourteenth Amendment guarantee of liberty ``. . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (p. 153).

This right was not, however, to be taken as absolute. At some point the legitimate state interests in the protection of health, proper medical standards, and pre-natal life would justify its qualification. Lawrence H. Tribe, Professor of Law at Harvard University, in his work entitled

American Constitutional Law (1978), conveniently summarizes the limits the Court found to be inherent in the woman's right. I quote from pp. 924-25:

Specifically, the Court held that, because the woman's right to decide whether or not to end a pregnancy is fundamental, only a compelling interest can justify state regulation impinging in any way upon that right. During the first trimester of pregnancy, when abortion is less hazardous in terms of the woman's life than carrying the child to term would be, the state may require only that the abortion be performed by a licensed physician; no further regulations peculiar to abortion as such are compellingly justified in that period.

After the first trimester, the compelling state interest in the mother's health permits it to adopt reasonable regulations in order to promote safe abortions -- but requiring abortions to be performed in hospitals, or only after approval of another doctor or committee in addition to the woman's physician, is impermissible, as is requiring that the abortion procedure employ a technique that, however preferable from a medical perspective, is not widely available.

Once the fetus is viable, in the sense that it is capable of survival outside the uterus with artificial aid, the state interest in preserving the fetus becomes compelling, and the state may thus proscribe its premature removal (i.e., its abortion) except to preserve the mother's life or health.

The decision in *Roe v. Wade* was re-affirmed by the Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983), and again, though by a bare majority, in *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986). In *Thornburgh,* Blackmun J., speaking for the majority, identifies the core value which the American courts have found to inhere in the concept of liberty. He states at pp. 2184-85:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government . . . . [citations omitted] That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a

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woman's decision -- with the guidance of her physician and within the limits specified in *Roe* -- whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

In my opinion, the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian *Charter.* Indeed, as the Chief Justice pointed out in *R. v. Big M Drug Mart Ltd.,* beliefs about human worth and dignity "are the *sine qua non* of the political tradition underlying the *Charter*". I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has

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pointed out in her essay on "International Law and Human Rights: the Case of Women's Rights", in *Human Rights: From Rhetoric to Reality* (1986), the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-82). It has <u>not</u> been a struggle

to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.

Given then that the right to liberty guaranteed by s. 7 of the *Charter* gives a woman the right to decide for herself whether or not to terminate her pregnancy, does s. 251 of the *Criminal Code* violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee. Furthermore, as the Chief Justice correctly points out, at p. 56, the committee bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations". The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.

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(b) *The Right to Security of the Person*

Section 7 of the *Charter* also guarantees everyone the right to security of the person. Does this, as Mr. Manning suggests, extend to the right of control over one's own body?

I agree with the Chief Justice and with Beetz J. that the right to "security of the person" under s. 7 of the *Charter* protects both the physical and psychological integrity of the individual. State enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity. Lamer J. held in *Mills v. The Queen*, [1986] 1 S.C.R. 863, that the right to security of the person entitled a person to be protected against psychological trauma as well -- in that case the psychological trauma resulting from delays in the trial process under s. 11(*b*) of the *Charter*. He found that psychological trauma could take the form of "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction". I agree with my colleague and I think that his comments are very germane to the instant case because, as the Chief Justice and Beetz J. point out, the present legislative scheme for the obtaining of an abortion clearly subjects pregnant women to considerable emotional stress as well as to unnecessary physical risk. I believe, however, that the flaw in the present legislative scheme goes much deeper than that. In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not, in my view, just a matter of interfering with her right to liberty in the sense (already discussed) of her right to personal autonomy in decision-making, it

is a direct interference with her physical "person" as well. She is truly being treated as a means -- a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this

position have any sense of security with respect to her person? I believe that s. 251 of the *Criminal Code* deprives the pregnant woman of her right to security of the person as well as her right to liberty.

2. The Scope of the Right under s. 7

I turn now to a consideration of the degree of personal autonomy the pregnant woman has under s. 7 of the *Charter* when faced with a decision whether or not to have an abortion or, to put it into the legislative context, the degree to which the legislature can deny the pregnant woman access to abortion without violating her s. 7 right. This involves a consideration of the extent to which the legislature can "deprive" her of it under the second part of s. 7 and the extent to which it can put "limits" on it under s. 1.

(a) *The Principles of Fundamental Justice*

Does section 251 deprive women of their right to liberty and to security of the person "in accordance with the principles of fundamental justice"? I agree with Lamer J. who stated in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 513, that the principles of fundamental justice "cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7". In the same judgment Lamer J. also stated at p. 503:

In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the

s. 7 guarantee all the while avoiding adjudication of policy matters.

While Lamer J. draws mainly upon ss. 8 to 14 of the *Charter* to give substantive content to the principles of fundamental justice, he does not preclude, but seems rather to encourage, the idea that recourse may be had to other rights guaranteed by the *Charter* for the same purpose. The question, therefore, is whether the deprivation of the s. 7 right is in accordance not only with procedural fairness (and I agree with the Chief Justice and

Beetz J. for the reasons they give that it is not) but also with the fundamental rights and freedoms laid down elsewhere in the *Charter*.

This approach to s. 7 is supported by comments made by La Forest J. in *R. v. Lyons*, [1987] 2 S.C.R. 309. He urged that the rights enshrined in the *Charter* should not be read in isolation. Rather, he states at p. 326:

. . . the *Charter* protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136), and the particularization of rights and freedoms contained in the *Charter* thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole and, in particular, of the content of the other specific rights and freedoms it embodies.

I believe, therefore, that a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the *Charter* cannot be in accordance with the principles of fundamental justice.

In my view, the deprivation of the s. 7 right with which we are concerned in this case offends s. 2(*a*) of the *Charter*. I say this because I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of

conscience. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state? I believe, for the reasons I gave in discussing the right to liberty, that in a free and democratic society it must be the conscience of the individual. Indeed, s. 2(*a*) makes it clear that this freedom belongs to "everyone", i.e., to each of us individually. I quote the section for convenience:

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

In *R. v. Big M Drug Mart Ltd., supra,* Dickson C.J. made some very insightful comments about the nature of the right enshrined in s. 2(*a*) of the *Charter* at pp. 345-47:

Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendent religion, came to voice opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate non-conforming

beliefs. The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(*a*) of our *Charter*, the single integrated concept of "freedom of conscience and religion".

What unites enunciated freedoms in the American First Amendment, in s. 2(*a*) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam Inc.*, *supra*, the purpose of the *Charter* was identified, at p. 155, as "the unremitting protection of individual rights and liberties". It is easy to see the relationship between respect

for individual conscience and the valuation of human dignity that motivates such unremitting protection.

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if

any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(*a*) might otherwise prohibit. [Emphasis added.]

The Chief Justice sees religious belief and practice as the paradigmatic example of conscien- tiously-held beliefs and manifestations and as such

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protected by the *Charter*. But I do not think he is saying that a personal morality which is not founded in religion is outside the protection of s. 2(*a*). Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(*a*). In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that ``Canada is founded upon principles that recognize the supremacy of God . . . ." But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society.

As is pointed out by Professor Cyril E. M. Joad, then Head of the Department of Philosophy and Psychology at Birkbeck College, University of London, in *Guide to the Philosophy of Morals and Politics* (1938), the role of the state in a democracy is to establish the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life. He states at p. 801:

For the welfare of the state is nothing apart from the good of the citizens who compose it. It is no doubt true that a State whose citizens are compelled to go right is more efficient than one whose citizens are free to go wrong. But what then? To sacrifice freedom in the interests of efficiency, is to sacrifice what confers upon human beings their humanity. It is no doubt easy to govern a flock of sheep; but there is no credit in the governing, and, if the sheep were born as men, no virtue in the sheep.

Professor Joad further emphasizes at p. 803 that individuals in a democratic society can never be treated "merely as means to ends beyond themselves" because:

To the right of the individual to be treated as an end, which entails his right to the full development and expression of his personality, all other rights and claims must, the democrat holds, be subordinated. I do not know how this principle is to be defended any more than I can frame a defence for the principles of democracy and liberty.

Professor Joad stresses that the essence of a democracy is its recognition of the fact that the state is made for man and not man for the state (p. 805). He firmly rejects the notion that science

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provides a basis for subordinating the individual to the state. He says at pp. 805-6:

Human beings, it is said, are important only in so far as they fit into a biological scheme or assist in the furtherance of the evolutionary process. Thus each generation of

women must accept as its sole function the production of children who will constitute the next generation who, in their turn, will devote their lives and sacrifice their inclinations to the task of producing a further generation, and so on *ad infinitum.* This is the doctrine of eternal sacrifice -- "jam yesterday, jam tomorrow, but never jam today". For, it may be asked, to what end should generations be produced, unless the individuals who compose them are valued in and for themselves, are, in fact, ends in themselves? There is no escape from the doctrine of the perpetual recurrence of generations who have value only in so far as they produce more generations, the perpetual subordination of citizens who have value only in so far as they promote the interests of the State to which they are subordinated, except in the individualist doctrine, which is also the Christian doctrine, that the individual is an end in himself.

It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning. Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their "essential humanity". Can this comport with fundamental justice? Was Blackmun J. not correct when he said in *Thornburgh, supra,* at p. 2185:

A woman's right to make that choice freely is fundamental. Any other result . . . would protect inadequately

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a central part of the sphere of liberty that our law guarantees equally to all.

Legislation which violates freedom of conscience in this manner cannot, in my view, be in accordance with the principles of fundamental justice within the meaning of s. 7.

(b) *Section 1 of the Charter*

The majority of this Court held in *Re B.C. Motor Vehicle Act*, *supra*, that a deprivation of the s. 7 right in violation of the principles of fundamental justice in the substantive sense could nevertheless constitute a reasonable limit under s. 1 and be justified in a free and democratic society. It is necessary therefore to consider whether s. 251 of the *Criminal Code* can be saved under s. 1. The section provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section received judicial scrutiny by this Court in *R. v. Oakes*, *supra.* Dickson C.J., speaking for the majority, set out two criteria which must be met if the limit is to be found reasonable: (1) the objective which the legislation is designed to achieve must relate to concerns which are pressing and substantial; and (2) the means chosen must be proportional to the objective sought to be achieved. The Chief Justice identified three important components of proportionality at p. 139:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

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Does section 251 meet this test?

In my view, the primary objective of the impugned legislation must be seen as the protection of the foetus. It undoubtedly has other ancillary objectives, such as the protection of the life and health of pregnant women, but I believe that the main objective advanced to justify a restriction on the pregnant woman's s. 7 right is the protection of the foetus. I think this is a perfectly valid legislative objective.

Miss Wein submitted on behalf of the Crown that the Court of Appeal was correct in concluding at p. 378 that "the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate". I agree. I think s. 1 of the *Charter* authorizes reasonable limits to be put upon the woman's right having regard to the fact of the developing foetus within her body. The question is: at what point in the pregnancy does the protection of the foetus become such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the foetus to term? At what point does the state's interest in the protection of the foetus become "compelling" and justify state intervention in what is otherwise a matter of purely personal and private concern?

In *Roe v. Wade*, *supra*, the United States Supreme Court held that the state's interest became compelling when the foetus became viable, i.e., when it could exist outside the body of the mother. As Miss Wein pointed out, no particular justification was advanced by the Court for the selection of viability as the relevant criterion. The Court expressly avoided the question as to when human life begins. Blackmun J. stated at p. 159:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at

any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

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He referred, therefore, to the developing foetus as "potential life" and to the state's interest as "the protection of potential life".

Miss Wein submitted that it was likewise not necessary for the Court in this case to decide when human life begins although she acknowledged that the value to be placed on "potential life" was significant in assessing the importance of the legislative objective sought to be achieved by s. 251. It would be my view, and I think it is consistent with the position taken by the United States Supreme Court in *Roe v. Wade*, that the value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place in between these two extremes and, in my opinion, this progression has a direct bearing on the value of the foetus as potential life. It is a fact of human experience that a miscarriage or spontaneous abortion of the foetus at six months is attended by far greater sorrow and sense of loss than a miscarriage or spontaneous abortion at six days or even six weeks. This is not, of course, to deny that the foetus is potential life from the moment of conception. Indeed, I agree with the observation of O'Connor J., dissenting in *City of Akron v. Akron Center for Reproductive Health, Inc., supra,* at p. 461, (referred to by my colleague Beetz J. in his reasons, at p. 113) that the foetus is potential life from the moment of conception. It is simply to say that in balancing the state's interest in the protection of the foetus as potential life under s. 1 of the *Charter* against the right of the pregnant woman under s. 7 greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier. The foetus should accordingly, for purposes of s. 1, be viewed in differential and developmental terms: see L. W. Sumner, Professor of Philosophy at the University of Toronto, *Abortion and Moral Theory* (1981), pp. 125-28.

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As Professor Sumner points out, both traditional approaches to abortion, the so-called "liberal" and "conservative" approaches, fail to take account of the essentially developmental nature of the gestation process. A developmental view of the foetus, on the other hand, supports a permissive approach to abortion in the early stages of pregnancy and a restrictive approach in the later stages. In the early stages the woman's autonomy would be absolute; her decision, reached in consultation with her physician, not to carry the foetus to term would be conclusive. The state would have no business inquiring into her reasons. Her reasons for having an abortion would, however, be the proper subject of inquiry at the later stages of her pregnancy when the state's compelling interest in the protection of the foetus would justify it in prescribing conditions. The precise point in the development of the foetus at which the state's interest in its protection

becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester. Indeed, according to Professor Sumner (p. 159), a differential abortion policy with a time limit in the second trimester is already in operation in the United States, Great Britain, France, Italy, Sweden, the Soviet Union, China, India, Japan and most of the countries of Eastern Europe although the time limits vary in these countries from the beginning to the end of the second trimester (cf. Stephen L. Isaacs, "Reproductive Rights 1983: An International Survey" (1982-83), 14 *Columbia Human Rights Law Rev.* 311, with respect to France and Italy).

Section 251 of the *Criminal Code* takes the decision away from the woman at all stages of her pregnancy. It is a complete denial of the woman's constitutionally protected right under s. 7, not merely a limitation on it. It cannot, in my opinion, meet the proportionality test in *Oakes*. It is not sufficiently tailored to the legislative objective and does not impair the woman's right "as little as possible". It cannot be saved under s. 1. Accordingly, even if the section were to be amended to

remedy the purely procedural defects in the legislative scheme referred to by the Chief Justice and Beetz J. it would, in my opinion, still not be constitutionally valid.

One final word. I wish to emphasize that in these reasons I have dealt with the existence of the developing foetus merely as a factor to be considered in assessing the importance of the legislative objective under s. 1 of the *Charter*. I have not dealt with the entirely separate question whether a foetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section. The Crown did not argue it and it is not necessary to decide it in order to dispose of the issues on this appeal.

3. Disposition

I would allow the appeal. I would strike down s. 251 of the *Criminal Code* as having no force or effect under s. 52(1) of the *Constitution Act, 1982*. I would answer the first constitutional question in the affirmative as regards s. 7 of the *Charter* and the second constitutional question in the negative. I would answer questions 3, 4 and 5 in the negative and question 6 in the manner proposed by Beetz J. It is not necessary to answer question 7.

I endorse the Chief Justice's critical comments on Mr. Manning's concluding remarks to the jury.

Appeal allowed, MCINTYRE *and* LA FOREST JJ. *dissenting. The first constitutional question should be answered in the affirmative as regards s. 7 only and the second in the negative as regards s. 7 only. The third, fourth and fifth constitutional questions should be answered in the negative. The sixth constitutional question should be answered in the*

negative with respect to s. 605 of the Criminal Code and should not be answered as regards s. 610(3). The seventh constitutional question should not be answered.

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