Her Majesty The Queen
Appellant

v.

Henry Morgentaler
Respondent

and

The Attorney General of Canada,
the Attorney General for New Brunswick,
REAL Women of Canada and the
Canadian Abortion Rights Action League
Interveners

Indexed as: R. *v.* Morgentaler
Citation: [1993] 3 S.C.R. 463
File No.: 22578.

4 February 1993; 30 September 1993

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

The judgment of the Court was delivered by

SOPINKA J. --

Introduction

The question in this appeal is whether the Nova Scotia *Medical Services Act*, R.S.N.S. 1989, c. 281, and the regulation made under the Act, N.S. Reg. 152/89, are *ultra vires* the province of Nova Scotia on the ground that they are in pith and substance criminal law. The Act and regulation make it an offence to perform an abortion outside a hospital.

Between October 26 and November 2, 1989, the respondent performed 14 abortions at his clinic in Halifax. He was charged with 14 counts of violating the *Medical Services Act*. He was acquitted at trial after the trial judge held that the legislation under which he was charged was beyond the province's legislative authority to enact because it was in pith and substance criminal law. This decision was upheld by the Nova Scotia Court of Appeal. The Crown appeals from the Court of Appeal's decision with leave of this Court.

Facts and Legislation

In January 1988, this Court ruled that the *Criminal Code* provisions relating to abortion were unconstitutional because they violated women's *Charter* guarantee of security of

the person: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (*Morgentaler (1988)*). At the same time the Court reaffirmed its earlier decision that the provisions were a valid exercise of the federal criminal law power: *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (*Morgentaler (1975)*). The 1988 decision meant that abortion was no longer regulated by the criminal law. It was no longer an offence to obtain or perform an abortion in a clinic such as those run by the respondent. A year later, in January 1989, it was rumoured in Nova Scotia that the respondent intended to establish a free-standing abortion clinic in Halifax. Subsequently, the respondent publicly confirmed his intention to do so.

On March 16, 1989, the Nova Scotia government took action to prevent Dr. Morgentaler from realizing his intention. The Governor in Council approved two identical regulations, one under the *Health Act*, R.S.N.S. 1989, c. 195 (N.S. Reg. 33/89), and one under the *Hospitals Act*, R.S.N.S. 1989, c. 208 (N.S. Reg. 34/89), which prohibited the performance of an abortion anywhere other than in a place approved as a hospital under the *Hospitals Act*. At the same time it made a regulation (N.S. Reg. 32/89) pursuant to the *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, denying medical services insurance coverage for abortions performed outside a hospital. These regulations are referred to collectively as the "March regulations".

On May 8, 1989, one of the interveners in the present case, the Canadian Abortion Rights Action League (CARAL), launched a court challenge to the constitutionality of the March regulations. The matter was set for hearing on June 22, 1989. The case was adjourned and ultimately dismissed for lack of standing, primarily because the same issues would be determined in the present case: *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General)* (1990), 96 N.S.R. (2d) 284 (A.D.), aff'g (1989), 93 N.S.R. (2d) 197 (T.D.), leave to appeal refused, [1990] 2 S.C.R. v.

CARAL's court challenge to the March regulations was still outstanding on June 6, 1989, when the Minister of Health and Fitness introduced the *Medical Services Act* for first reading. The Act progressed rapidly through the legislature. It received third reading and Royal Assent on June 15, the last day of the legislative session. The relevant portions of the Act are as follows:

> **2** The purpose of this Act is to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians.
>
> **3** In this Act,
>
> (a) "designated medical service" means a medical service designated pursuant to the regulations;
>
> ...
>
> **4** No person shall perform or assist in the performance of a designated medical service other than in a hospital approved as a hospital pursuant to the *Hospitals Act*.
>
> **5** Notwithstanding the *Health Services and Insurance Act*, a person who performs or for whom is performed a medical service contrary to this Act is not entitled to reimbursement pursuant to that Act.

6 (1) Every person who contravenes this Act is guilty of an offence and liable upon summary conviction to a fine of not less than ten thousand dollars nor more than fifty thousand dollars.

...

7 Notwithstanding any other provision of this Act, where designated medical services are being performed contrary to this Act, the Minister may, at any time, apply to a judge of the Supreme Court for an injunction, and the judge may make any order that in the opinion of the judge the case requires.

8 (1) The Governor in Council, on the recommendation of the Minister, may make regulations

(a) after consultation by the Minister with the Medical Society of Nova Scotia, designating a medical service for the purpose of this Act;

...

The Medical Society was consulted after the passage of the Act, and a list of medical services was finalized. On July 20, 1989, the *Medical Services Designation Regulation*, N.S. Reg. 152/89, was made, designating the following medical services for the purposes of the Act:

(a)Arthroscopy
(b)Colonoscopy (which, for greater certainty, does not include flexible sigmoidoscopy)
(c)Upper Gastro-Intestinal Endoscopy
(d)Abortion, including a therapeutic abortion, but not including emergency services related to a spontaneous abortion or related to complications arising from a previously performed abortion
(e)Lithotripsy
(f)Liposuction
(g)Nuclear Medicine
(h)Installation or Removal of Intraocular Lenses
(i)Eletromyography, including Nerve Conduction Studies

The March regulations were revoked on the same day by N.S. Regs. 149-151/89. Item (d) of the new regulation continued the March regulations' prohibition of the performance of abortions outside hospitals. Section 5 of the Act continued the denial of health insurance coverage for abortions performed in violation of the prohibition.

Despite these actions, Dr. Morgentaler opened his clinic in Halifax as predicted. At first the clinic only provided counselling and referrals to Dr. Morgentaler's Montreal clinic. On October 26, 1989, however, Dr. Morgentaler defied the Nova Scotia legislation by performing seven abortions. He announced that he had done so at a press conference later that day. Several days later he performed seven more abortions. He was charged with 14 counts of unlawfully performing a designated medical service, to wit, an abortion, other than in a hospital approved as such under the*Hospitals Act*, contrary to s. 6 of the *Medical Services Act*. Dr. Morgentaler publicly announced his resolve to continue his activities in contravention of the Act, and on November 6, 1989 the government of Nova Scotia obtained an interim injunction under s. 7 of

the Act to restrain him from further violations of the Act pending the resolution of the charges and the constitutional challenge in court: *Nova Scotia (Attorney General) v. Morgentaler*, (1989), 64 D.L.R. (4th) 297 (N.S.S.C.T.D.), aff'd, (1990), 69 D.L.R. (4th) 559 (N.S.S.C.A.D.), leave to appeal refused [1990]2 S.C.R. ix.

When the case proceeded to trial in June 1990, Dr. Morgentaler did not dispute that he had performed the abortions as alleged. He argued, instead, that the Act and the regulation were inconsistent with the Constitution of Canada and consequently of no force or effect, on the grounds that they violate women's *Charter* rights to security of the person and equality and that they are an unlawful encroachment on the federal Parliament's exclusive criminal law jurisdiction. He also argued that the regulation was an abuse of discretion by the provincial cabinet and therefore in excess of its jurisdiction.

Judgments Below

A. *Provincial Court of Nova Scotia*, (1990), 99 N.S.R. (2d) 293

Kennedy Prov. Ct. J. decided to address the distribution of powers issue first and having done so, found it unnecessary to go any farther. He concluded that "the prohibition and regulation of abortion has been and remains criminal law in this country" and held, at p. 295:

> It would seem, therefore, that if the prohibition or regulation of abortion is criminal law and if Parliament, as part of its proper exercise of its exclusive criminal law-making power, may determine what is not criminal as well as what is criminal, then by restricting the performance of therapeutic abortions to hospitals the Province of Nova Scotia has trespassed into an area of Federal Government competence.

He held that he could properly look beyond the four corners of the legislation to consider extrinsic evidence of the legislative history in determining the pith and substance of the legislation. He found that the Nova Scotia government had notice in January 1989 of Dr. Morgentaler's intention to open an abortion clinic in Halifax. He reviewed the chronology of events that followed and held that it was reasonable to infer that the government believed that the *Medical Services Act* and regulation accomplished the same purpose as the March regulations. He observed that the provincial government had created a Royal Commission on Health Care Issues in 1987, with a mandate to recommend health care policy, and that the Act was passed before the Commission had rendered its report even though the Throne Speech of February 23, 1989 indicated that the government was awaiting the report. Kennedy Prov. Ct. J. also noted that the Medical Society was not consulted until after the Act was passed and that even then, according to the then president of the Society, the restriction of abortion was not negotiable.

Kennedy Prov. Ct. J. held evidence of statements and speeches made in the legislature during debates to be relevant and admissible. He found that the Health Minister had openly stated the government's policy to stop free-standing abortion clinics, in particular Dr. Morgentaler's, that this sentiment permeated the debates on both sides of the Assembly, and that Dr. Morgentaler was an acknowledged "mischief" against which the legislation was directed. He also considered relevant, though not determinative, the substantial penalties imposed by the Act (s. 6(1)).

He concluded that the Act and regulation were in pith and substance criminal law, "made primarily to control and restrict abortions within the province" and "to keep free-standing abortion clinics, and in the specific, Dr. Morgentaler out of Nova Scotia" (at p. 302). The province's privatization concerns, while real, were incidental to the paramount purpose of the legislation. Given this conclusion, Kennedy Prov. Ct. J. acquitted the respondent. He refrained from dealing with the *Charter* issues unless directed by an appeal court to do so.

B. *Nova Scotia Supreme Court, Appeal Division* (1991), 104 N.S.R. (2d) 361

(1)Freeman J.A., Clarke C.J.N.S. and Hart and Chipman JJ.A. concurring

Freeman J.A. held, at p. 363, that while the province had the legislative power to pass a law in the present form, the question was whether it was colourable criminal law, i.e.:

> ... whether the province properly used [its] powers and created a law within the provincial competence, or whether it improperly attempted to use federal powers to pass a law that, regardless of its form, is actually a criminal law.

He held that both purpose and effect are relevant to characterizing the "matter" in relation to which a law is enacted. He found that the legislation effectively duplicated s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 287), the section struck down by this Court in *Morgentaler (1988)*, *supra*. On the other hand, he also held that the effect of the Act was to prevent privatization, and since legislative effects alone were inconclusive, he examined purpose in more depth. He held that the legislative debates were admissible and relevant to the background and purpose of the legislation. They demonstrated that the government's intent in making the March regulations and introducing the Act was to prevent the establishment of Morgentaler clinics in Nova Scotia, and that the members of both sides of the House understood this as the paramount purpose of the legislation.

Freeman J.A. conceded that a credible case could be made out for the provincial objective of stamping out privatization of health care services, but disagreed that this was the primary target of the legislation. Six factors pointed in the other direction (at pp. 376-77), and they are worth repeating in full:

1. Privatization of medical services had not been enunciated as a government objective prior to the introduction of the *Medical Services Act*. It was not mentioned in the Throne Speech on February 23, 1989. The Throne Speech did say that a Royal Commission Report was being awaited. The order-in-council establishing the Royal Commission made no reference to privatization.

2. The "March regulations" were obviously aimed at Morgentaler clinics. Hon. David Nantes, Health Minister, made that clear when he announced them to the legislature .... The *Medical Services Act* was presented to the legislature following a court challenge to the March regulations. It was introduced on June 6, 1989, and passed, with the appearance of last-minute haste, the day the House closed on June 15, 1989. The March regulations were encompassed by the *Medical Services Act* and its regulation. They were revoked, no longer necessary, on July 20, 1989, the day the regulation was passed under the *Medical Services Act*.

3. In explaining the desirability of avoiding the pitfalls of privatization, the Crown relied heavily on economic considerations. The report of the Royal Commission on Health Costs was being awaited, as the Throne Speech noted. In passing the *Medical Services Act* on June 15, 1989, the legislature elected to do so without the benefit of observations or recommendations by the Royal Commission....

4. The Crown's evidence as to the official policy of the government of Nova Scotia on the privatization issue was given by Mr. Malcom [a senior bureaucrat].... The Minister of Health or other cabinet Ministers could have given the best evidence as to the real purpose of the*Medical Services Act*. While Mr. Nantes emphasized privatization in moving second reading of the *Medical Services Act*, his remarks to the house about the abortion clinics left little doubt about the government's objectives for the *Act*.

5. The Department of Health had been engaged in discussions with the Medical Society of Nova Scotia to have more health care services delivered outside of hospitals. The Medical Society was not consulted about the *Act* prior to its introduction. The evidence suggests the*Act* runs counter to the direction of the talks.

6. Under s. 35 of the *Health Services and Insurance Act* the penalty for a violation of either the *Act* or regulations made under it is a maximum fine of $100 for a first offence and $200 for a subsequent offence. Under the *Hospitals Act* the maximum fine is $500. The*Medical Services Act* provides for a minimum fine of $10,000 and a maximum fine of $50,000. The Crown's explanation for the substantial penalties under the *Medical Services Act* is noteworthy:

"Penalties are a means of enforcing compliance with provincial laws.... Where a person is determined to carry on a lucrative business, as is Dr. Morgentaler, who charged an average of $350 per procedure (Admission of Facts), and who anticipates being open for business in Halifax two days per week, (Transcript, p. 1165) at 15 procedures per day, or approximately $10,000 for two days work, if the penalty was not substantial, it would not ensure compliance with the law. In this case a penalty of $10,000 represents approximately two days work for Dr. Morgentaler." [Freeman J.A.'s emphasis.]

Freeman J.A. concluded as follows, at p. 378:

> In summary, there is little in the evidence of the purpose of the *Medical Services Act* to suggest that its primary thrust was privatization, and a great deal that shows it was primarily intended to prohibit Morgentaler abortion clinics. It will be recalled that the effect was somewhat equivocal: it impacted upon private abortion clinics in the same manner as s. 251 of the *Criminal Code*, but it also had the effect of preventing privatization. When the purpose and effect of the *Act* are considered together, against the background of all the relevant circumstances, the conclusion is inescapable.
>
> The *Medical Services Act* is in its pith and substance criminal law, as Judge Kennedy found it to be. As such, it is beyond the jurisdiction of the government of Nova Scotia; it must be struck down.

(2) Jones J.A., dissenting

In Jones J.A.'s view, the issue was "simply whether the province has the power to regulate how and where medical services may be performed in the province" (at p. 378). He referred to the provinces' general jurisdiction over health matters including the non-criminal aspects of abortion, and after considering the terms of the *Medical Services Act*, he concluded, at p. 383:

> In the absence of federal legislation the province has a legitimate interest in the performance of abortions in doctors' offices where that practice is objectionable to the public. Obviously that was the view of the Legislature. In my view the pith and substance of the *Act* is simply the regulation of where these medical services can be performed. I see no difference in principle between such legislation and legislation requiring the treatment of aids patients or battered children in hospitals. Those are matters within the power of the provinces to legislate in relation to public health. That being so it is not open to this Court to review the reasons for the legislation.

He considered the "colourability" doctrine inapplicable since here the province was empowered to deal with the subject, and "[l]egislation is not open to review on the issue of colourability where a legislature is clearly acting within its powers" (at pp. 384-85). He would have allowed the appeal and ordered the trial to continue.

Issues

On February 18, 1992, the Chief Justice stated the following constitutional questions:

1. Is the *Medical Services Act*, R.S.N.S. 1989, c. 281, *ultra vires* the Legislature of the Province of Nova Scotia on the ground that the Act is legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

2. Is the *Medical Services Designation Regulation*, N.S. Reg. 152/89, made on the 20th day of July, 1989, pursuant to s. 8 of the *Medical Services Act*, R.S.N.S. 1989, c. 281, *ultra vires* the Lieutenant Governor in Council on the ground the Regulation was made pursuant to legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

It is important to keep in mind that the question before us is limited to the distribution of powers. The impact of the *Canadian Charter of Rights and Freedoms* on legislation of this kind, while an important subject, is not in issue here. A holding that this legislation relates to a matter within the legislative competence of one or the other level of government does not mean that such legislation would either survive or fail the scrutiny of the *Charter*.

Moreover, even for purposes of the distribution of powers the issues are limited in this case: the criminal law power is the only federal head of power in issue. This is the basis on which the case has proceeded since the trial, and is reflected in the terms of the constitutional questions. Although the argument has been made elsewhere that abortion falls properly under the federal government's residual power to legislate for peace, order and good government (see,

e.g., M. McConnell and L. Clark, "Abortion Law in Canada: A Matter of National Concern" (1991), 14 *Dalhousie L.J.* 81), that argument cannot be entertained here because of the way in which the issues were framed. Hence the intervener CARAL was not allowed to present argument on this issue in this case: *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (motion in chambers). The only issues are whether the legislation is within the competence of the province under s. 92 of the *Constitution Act, 1867*, or whether it is in relation to the criminal law and thus within the exclusive competence of Parliament under s. 91(27).

Analysis

A. *General*

The appellant argued that the *Medical Services Act* and the regulation are valid provincial legislation enacted pursuant to the province's legislative authority over hospitals, health, the medical profession and the practice of medicine. It relies particularly on heads (7), (13), and (16) of s. 92 of the *Constitution Act, 1867*, which give the province exclusive legislative authority over:

92. ...

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

...

13. Property and Civil Rights in the Province.

...

16. Generally all Matters of a merely local or private Nature in the Province.

The ground on which the legislation is challenged is head (27) of s. 91, which reserves "The Criminal Law ..." to Parliament. On the basis of the analysis that follows I conclude that the *Medical Services Act* and *Medical Services Designation Regulation* are criminal law in pith and substance and consequently *ultra vires* the province of Nova Scotia. The appeal must therefore be dismissed.

In my opinion, the Act and *Medical Services Designation Regulation* must be considered together for the purposes of constitutional characterization. The Act is in general terms, and only by N.S. Reg. 152/89 were its terms given specific meaning by attachment to particular medical services. The history of the Act, including its consideration in the House of Assembly and its connection to the earlier March regulations, shows that it was always considered in light of the medical services to which it would apply, and it was almost always discussed with particular reference to one of them, namely abortion. The Act and the list of services eventually embodied in the regulation were intertwined from the start.

The situation is similar to that in *Texada Mines Ltd. v. Attorney-General of British Columbia*, [1960] S.C.R. 713, in which British Columbia enacted legislation providing for a tax to be imposed in respect of a mineral or minerals found in a "producing area". The rate of tax, the minerals subject to it and the producing area in which it would apply were all left to be

designated. Regulations were made designating a certain area as a "producing area", designating iron as the only mineral subject to the tax and setting the rate of tax. This Court considered the statute together with the regulations for the purposes of constitutional characterization, and found (after referring also to related statutes, the legislative history and background including the province's historical efforts to encourage iron smelting in the province by means of what were effectively export taxes, the nature of the iron ore market, and the deterrent effect of the tax) that the statute was an *ultra vires* attempt to encourage the establishment of an iron ore smelter by imposing a prohibitive export tax. The regulations gave concrete meaning and content to the statute and were indispensable to its classification for constitutional purposes.

In similar fashion, the statute and regulation are considered together in the following analysis. I will refer to them both together as "the legislation". Together, in my opinion, they constitute an indivisible attempt by the province to legislate in the area of criminal law.

B. *Classification of Laws*

(1) "What's the `Matter'?"

Classification of a law for purposes of federalism involves first identifying the "matter" of the law and then assigning it to one of the "classes of subjects" in respect to which the federal and provincial governments have legislative authority under ss. 91 and 92 of the *Constitution Act, 1867*. This process of classification is "an interlocking one, in which the British North America Act and the challenged legislation react on one another and fix each other's meaning": B. Laskin, "Tests for the Validity of Legislation: What's the `Matter'?" (1955), 11 *U.T.L.J.* 114, at p. 127. Courts apply considerations of policy along with legal principle; the task requires "a nice balance of legal skill, respect for established rules, and plain common sense. It is not and never can be an exact science": F. R. Scott, *Civil Liberties and Canadian Federalism* (1959), at p. 26.

A law's "matter" is its leading feature or true character, often described as its pith and substance: *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), at p. 587; see also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286. There is no single test for a law's pith and substance. The approach must be flexible and a technical, formalistic approach is to be avoided. See Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 1, at p. 15-13. While both the purpose and effect of the law are relevant considerations in the process of characterization (see, e.g., *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.) (the *Alberta Bank Taxation Reference*), at p. 130; *Starr v. Houlden*, [1990] 1 S.C.R. 1366, at pp. 1389, 1392), it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity. Rand J. put it this way in *Switzman v. Elbling*, [1957] S.C.R. 285, at pp. 302-3:

> The detailed distribution made by ss. 91 and 92 places limits to direct and immediate purposes of provincial action.... The settled principle that calls for a determination of the "real character", the "pith and substance", of what purports to be enacted and whether it is "colourable" or is intended to effect its ostensible object, means that the true nature of the legislative act, its substance in purpose, must lie within s. 92 or some other endowment of provincial power.

See also *Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238; *Canadian Indemnity Co. v. Attorney-General of British Columbia*, [1977] 2 S.C.R. 504, at p. 512; *R. v.*

Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at pp. 354-55, 357-58; and *R. v. Edwards Books and Art Ltd.*, [1986] 2S.C.R. 713, at pp. 744-45, 747 and 751 (Dickson C.J.), at p. 788 (Beetz J.), and at p. 807 (Wilson J.).

(2) Purpose and Effect

(a) *"Legal Effect" or Strict Legal Operation*

Evidence of the "effect" of legislation can be relevant in two ways: to establish "legal effect" and to establish "practical effect". The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. "Legal effect" or "strict legal operation" refers to how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is determined from the terms of the legislation itself. See Hogg, *supra*, at pp. 15-13 and 15-15. Legal effect is often a good indicator of the purpose of the legislation (see, e.g., *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.) (the *Alberta Bill of Rights case*), and *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 326, Rand J.)), but is relevant in constitutional characterization even when it is not fully intended or appreciated by the enacting body. Thus in *Starr v. Houlden*, *supra*, the terms of reference of the Patricia Starr inquiry were held to duplicate the purposes and functions of a police investigation and preliminary inquiry into criminal allegations against specific individuals, which are criminal law matters, even though the province may not have intended that result.

The analysis of pith and substance is not, however, restricted to the four corners of the legislation (see, e.g., *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at pp. 388-89). Thus the court "will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve", its background and the circumstances surrounding its enactment (Hogg, *supra*, at p. 15-13) and, in appropriate cases, will consider evidence of the second form of "effect", the actual or predicted practical effect of the legislation in operation (*Alberta Bank Taxation Reference, supra*, at p. 130). The ultimate long-term, practical effect of the legislation will in some cases be irrelevant. See *Reference re Anti-Inflation Act*, *supra*, at p. 389.

(b)*The Use of Extrinsic Materials*

In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable: *Reference re Residential Tenancies Act, 1979*, [1981] 1 S.C.R.714, at p. 723, *per* Dickson J. This clearly includes related legislation (such as, in this case, the March regulations and the former s. 251 of the*Criminal Code*), and evidence of the "mischief" at which the legislation is directed: *Alberta Bank Taxation Reference, supra*, at pp. 130-33. It also includes legislative history, in the sense of the events that occurred during drafting and enactment; as Ritchie J., concurring in *Reference re Anti-Inflation Act*, *supra*, wrote at p. 437, it is "not only permissible but essential" to consider the material the legislature had before it when the statute was enacted.

The former exclusionary rule regarding evidence of legislative history has gradually been relaxed (*Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at pp. 317-19), but until recently the courts have balked at admitting evidence of legislative debates and speeches. Such evidence was described by Dickson J. in *Reference re Residential*

Tenancies Act, 1979, supra, at p. 721 as "inadmissible as having little evidential weight", and was excluded in *Reference re Upper Churchill Water Rights Reversion Act, supra*, at p. 319, and *Attorney General of Canada v. Reader's Digest Association (Canada) Ltd.*, [1961] S.C.R. 775. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established. See *Reference re Anti-Inflation Act, supra*, at p. 470, *per* Beetz J. (dissenting); *R. v. Edwards Books and Art Ltd.*, *supra*, at p. 749; *Starr v. Houlden, supra*, at pp. 1375-76, 1404 (distribution of powers); *R. v. Whyte*, [1988] 2S.C.R. 3, at pp. 24-25; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 983-84 (*Charter*); and *R. v. Mercure*, [1988] 1 S.C.R. 234, at pp. 249-251 (language rights). I would adopt the following passage from Hogg, *supra*, as an accurate summary of the state of the law on this point (at pp. 15-14 and 15-15):

> In determining the "purpose" of a statute in this special sense, there is no doubt as to the propriety of reference to the state of law before the statute and the defect in the law (the "mischief") which the statute purports to correct. These may be referred to under ordinary rules of statutory interpretation. Until recently, there was doubt about the propriety of reference to parliamentary debates (Hansard) and other sources of the "legislative history" of the statute. The relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that reports of royal commissions and law reform commissions, government policy papers and even parliamentary debates are indeed admissible. [Footnotes omitted.]

I would therefore hold, as did Freeman J.A. in the Court of Appeal, that the excerpts from Hansard were properly admitted by the trial judge in this case. In a nutshell, this evidence demonstrates that members of all parties in the House understood the central feature of the proposed law to be prohibition of Dr. Morgentaler's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics *per se*. I will return to the evidence below.

(c) *Practical Effect*

In the present case the Attorney General of Nova Scotia submits that the evidence shows that the future administration of the Act will not result in a restriction on abortion services; the respondent submits the opposite. This raises the question of the relevance of evidence of practical effect. I have noted that the legal effect of the terms of legislation is always relevant. Barring material amendments, it does not change over time. The practical effect of legislation, on the other hand, has a less secure status in constitutional analysis. Practical effect consists of the actual or predicted results of the legislation's operation and administration (see, e.g., *Saumur*, *supra*). Courts are often asked to adjudicate the constitutionality of legislation which is not yet in force or which, as here, has only been in force

a short time. In such cases any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation.

In the *Anti-Inflation Act* reference, *supra*, Laskin C.J. was willing to admit evidence of the circumstances in which the legislation was passed (at p. 391), but did not admit evidence of its predicted operation and effect, finding that "no general principle of admissibility or inadmissibility can or ought to be propounded by this Court" (at p. 389). The difficulty with practical effect is that whereas in one context practical effect may reveal the true purpose of the legislation (see *Saumur*, *supra*), in another context it may be incidental and entirely irrelevant even though it is drastic (*Attorney-General for Saskatchewan v. Attorney-General for Canada*, [1949] A.C. 110 (P.C.), *Canadian Indemnity Co. v. Attorney-General of British Columbia, supra*, *Whitbread v. Walley*, *supra*, at p. 1286); and in yet another context provincial and federal enactments with the same practical impact may both stand if the matter to which they relate has two "aspects" of roughly equivalent importance, one within federal and the other within provincial competence (*Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at p. 130; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749).

In the majority of cases the only relevance of practical effect is to demonstrate an *ultra vires* purpose by revealing a serious impact upon a matter outside the enacting body's legislative authority and thus either contradicting an appearance of *intra vires* or confirming an impression of *ultra vires*. It was in light of the difficult status of practical effect (particularly as exemplified in *Walter v. Attorney General of Alberta*, [1969] S.C.R. 383, wherein provincial legislation banning communal landholding was held *intra vires* even though the legislation drastically infringed the Hutterite community's religious freedom) that Wilson J., concurring in *R. v. Big M Drug Mart Ltd., supra*, held that legislative purpose is the focal point in distribution of powers analysis. One of the issues in that case was whether the *Lord's Day Act*, R.S.C. 1970, c. L-13, was enacted pursuant to Parliament's criminal law power. Dickson J. (as he then was), writing for the majority, held that the Act was valid criminal law because its purpose was to compel religious observance of a Sunday sabbath (at p. 352), and emphasized that his conclusion depended on the identification of the purpose of the Act (at p. 355). Wilson J. held, in a passage not in conflict with Dickson J.'s approach to division of powers, that the pith and substance of legislation is determined through "an examination of the primary legislative purpose with a view to distinguishing the central thrust of the enactment from its merely incidental effects" (at p. 357). She concluded, at p. 358, that:

> Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance.

If, however, pith and substance can be determined without reference to evidence of practical effect, the absence of evidence that the legislation has a practical effect in line with this characterization will not displace the conclusion as to the legislation's invalidity. In such a case, "evidence as to the likely effect of legislation would not add anything useful to the task of characterization, but would merely bear on the wisdom or efficacy of the statute. In those cases the evidence is not relevant" (Hogg, *supra*, at p. 15-16). See also *Reference re Anti-Inflation Act, supra*, at pp. 424-25. Such evidence will not change the legislation's "matter", and only goes to the effectiveness of the statute to fulfil its object. The court is not concerned with the wisdom of a statute, and the government surely cannot justify legislation already determined to be *ultra vires* by arguing that it will not realize its aim or objective. Moreover, as I have said,

legislation is often considered before experience has shown its actual impact, and prediction of future impact is necessarily short-term. I would adapt what La Forest J. said in another context (*R. v. Edwards Books and Art Ltd., supra*, at p. 803) to this situation: "[i]t is undesirable that an Act be found constitutional today and unconstitutional tomorrow" simply because of the absence of conclusive evidence as to future impact or the possibility of a change in practical effect.

(3) Scope of the Applicable Heads of Power

The issue we face in the present case is whether Nova Scotia has, by the present legislation, regulated the place for delivery of a medical service with a view to controlling the quality and nature of its health care delivery system, or has attempted to prohibit the performance of abortions outside hospitals with a view to suppressing or punishing what it perceives to be the socially undesirable conduct of abortion. The former would place the legislation within provincial competence; the latter would make it criminal law.

(a) *The Criminal Law*

Section 91(27) of the *Constitution Act, 1867* gives the federal Parliament exclusive legislative jurisdiction over criminal law in the widest sense of the term: *Attorney General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524 (P.C.), at p. 529. In *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.), at p. 324, the Judicial Committee took this to include any act prohibited with penal consequences, but this interpretation was too generous and the missing ingredient was supplied by Rand J. in his classic formulation of the scope of the tests for criminal law in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the *Margarine Reference*), at pp. 49-50:

> ...we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> ...
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law....

The presence or absence of a criminal public purpose or object is thus pivotal: see *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497, at pp. 508-9; *Goodyear Tire and Rubber Co. of Canada v. The Queen*, [1956] S.C.R. 303, at p. 313; and *Boggs v. The Queen*, [1981] 1 S.C.R. 49. This is not contradicted by the decision in *Starr v. Houlden, supra*. In that case the province of Ontario established a commission of inquiry to investigate and find whether Patricia Starr and Tridel Corporation had, in their dealings with public officials, conferred benefits, advantages or rewards of any kind on any public official. The terms of reference specified individuals by name and used language virtually indistinguishable from that of s. 121(*b*) of the *Criminal Code*. Lamer J. (as he then was), speaking for the majority, held the inquiry *ultra vires*, at p. 1402:

> ...it is the combined and cumulative effect of the names together with the incorporation of the *Criminal Code* offence that renders this inquiry *ultra vires* the province. The

> terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel Criminal Code provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a *prima facie* case against the named individuals sufficient to commit those individuals to trial for the offence in s. 121 of the *Code*. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry....

Lamer J. found the circumstances surrounding the establishment of the inquiry and the legal effect of its terms of reference to be overpowering and determinative of the inquiry's criminal character. That the province may not have intended to usurp the criminal process of an investigation and preliminary inquiry into specific offences by named individuals was irrelevant. That does not mean, however, that the purpose or object of the inquiry was irrelevant. It was simply a case in which the legal effect of the terms of reference was paramount in establishing a criminal public purpose within Rand J.'s tests. In sum, Lamer J. found that the inquiry offended the principle that the province cannot use an inquiry "for the purpose of gathering sufficient evidence to lay charges or to gather sufficient evidence to establish a *prima facie* case" (at pp. 1411-12).

(b) *Provincial Health Jurisdiction*

The provinces have general legislative jurisdiction over hospitals by virtue of s. 92(7) of the Constitution Act, 1867, and over the medical profession and the practice of medicine by virtue of ss. 92(13) and (16). Section 92(16) also gives them general jurisdiction over health matters within the province: *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 137. The *Schneider* case gives an indication of the watershed between valid health legislation and criminal law. In that case, British Columbia's *Heroin Treatment Act* was held to be *intra vires* because its object was not to punish narcotics addicts, but to treat their addiction and ensure their safety and security. Narcotic addiction was targeted not as a public evil but as a "physiological condition necessitating both medical and social intervention" (at p. 138). Accordingly, if the central concern of the present legislation were medical treatment of unwanted pregnancies and the safety and security of the pregnant woman, not the restriction of abortion services with a view to safeguarding the public interest or interdicting a public harm, the legislation would arguably be valid health law enacted pursuant to the province's general health jurisdiction.

In addition, there is no dispute that the heads of s. 92 invoked by the appellant confer on the provinces jurisdiction over health care in the province generally, including matters of cost and efficiency, the nature of the health care delivery system, and privatization of the provision of medical services.

(c) *The Regulation of Abortion*

In the U.K. and Canada, the prohibition of abortion with penal consequences has long been considered a subject for the criminal law. As early as the mid-nineteenth century, with the adoption of legislation imitating *Lord Ellenborough's Act* (U.K.), 43 Geo. 3, c. 58, through the time of Confederation and up to the 1969 amendments to the Criminal Code which introduced the relieving portion of s. 251 (*Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 18), the criminal law in Canada prohibited abortions with penal consequences; before the

introduction of the relieving portion of s. 251 there was no such thing as a non-criminal abortion. As Dickson J. (as he then was) said in *Morgentaler (1975), supra*, at p. 672, "since Confederation, and indeed before, the law of Canada has regarded as criminal, interference with pregnancy, however early it may take place...."

Section 251 of the *Criminal Code* was a valid exercise of the criminal law power. Why? In *Morgentaler (1975), supra*, Dr. Morgentaler argued that s. 251 was an encroachment on provincial legislative power in relation to hospitals and the regulation of the profession of medicine and the practice of medicine, but this argument was dismissed unanimously from the bench without hearing from the Crown. Laskin C.J., who dissented as to the result, was the only judge who gave reasons for the Court's rejection of the argument that s. 251 was legislation for the protection of a pregnant woman's health (at p. 626):

> This, however, is to attribute to Parliament a particular, indeed exclusive concern under s. 251 with health, to the exclusion of any other purpose that would make it a valid exercise of the criminal law power.

He held, on the contrary, at p. 627, that s. 251 was well within Rand J.'s tests for criminal law in the *Margarine Reference, supra*, because:

> 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.

The presence of the dispensing provisions in s. 251 was explained on the basis that "Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation" (at p. 627). Finally, in so far as s. 251 had "any relationship to the establishment of hospitals or the regulation of the medical profession or the practice thereof," Laskin C.J. held this relationship to be "so incidental as to be little short of ephemeral" (at p. 628).

In *Morgentaler (1988), supra*, this Court unanimously reaffirmed the holding that s. 251 was valid criminal law for purposes of the distribution of powers. Beetz J. (with whom Estey J. concurred), at pp. 82 and 122-23, and Wilson J., at p. 181, held that while s. 251 had as an ancillary objective the protection of the life or health of pregnant women, its principal objective was the protection of the state interest in the foetus. (I would note that although in this case the objective of the legislation was also discussed in the context of the *Charter*, a statute's "objective" for *Charter* purposes necessarily reflects its "purpose" for distribution of powers purposes: *R. v. Big M Drug Mart Ltd., supra*, at pp. 353, 361-62.) Beetz J. held, at pp. 128-29, that this made it a valid exercise of the criminal law power. On the other hand, Dickson C.J. (Lamer J., as he then was, concurring), at p. 75, and McIntyre J. (dissenting, La Forest J. concurring), at pp. 135 and 156, held that the objective of the section was to balance the interests of the foetus and the pregnant woman. McIntyre J. held, at p. 156, that this objective made the section a valid exercise of the criminal law power. Dickson C.J. and Wilson J. did not give reasons for finding the section *intra vires*.

The two *Morgentaler* decisions focus attention on the purpose or concern of abortion legislation to determine if it is truly criminal law: Is the performance or procurement of abortion prohibited as socially undesirable conduct? Is protecting the state interest in the foetus or

balancing the interests of the foetus against those of women seeking abortions a primary objective of the legislation? Is the protection of the woman's health only an ancillary concern? And are other provincial concerns such as the establishment of hospitals or the regulation of the medical profession or the practice thereof merely incidental?

It is not necessary for the purposes of this appeal to attempt to delineate the scope of provincial jurisdiction to regulate the performance of abortions. Suffice it to say that any provincial jurisdiction to regulate the delivery of abortion services must be solidly anchored in one of the provincial heads of power which give the provinces jurisdiction to legislate in relation to such matters as health, hospitals, the practice of medicine and health care policy.

C. *Application of the Principles to the Case at Bar*

An examination of the terms and legal effect of the *Medical Services Act* and the *Medical Services Designation Regulation*, their history and purpose and the circumstances surrounding their enactment leads to the conclusion that the legislation's central purpose and dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished. Although the evidence of the legislation's practical effect is equivocal, it is not necessary to establish that its immediate or future practical impact will actually be to restrict access to abortions in order to sustain this conclusion.

(1) Legal Effect: the Four Corners of the Legislation

Starting with the terms of the legislation, the *Medical Services Act* makes it an offence subject to significant fines (s. 6) to perform abortions or other services designated by the *Medical Services Designation Regulation* outside a hospital approved as such under the *Hospitals Act*(s. 4). It is impossible to tell from the legislation itself whether this amounts to a total prohibition of abortion (which all parties concede would be *ultra vires* the province), since extrinsic evidence is necessary to establish that abortions are available in Nova Scotia hospitals. The Act also denies public health insurance coverage for the performer and recipient of such services (s. 5), and provides for injunctive relief against violations of its terms (s. 7). It is entitled "An Act to Restrict the Privatization of Medical Services", and its purpose is expressed to be the prohibition of the privatization of certain medical services in order to maintain a single high-quality health care delivery system in the province (s. 2). The allegation of *ultra vires* and the decisions in the courts below focused on the offence provisions of the legislation. No argument was directed toward the "de-insurance" section in this Court (s. 5). Although the "de-insurance" and injunction provisions clearly enhance the practical clout of the prohibition, they do not require independent consideration in the context of this case. It is sufficient for the purposes of characterizing this legislation to concentrate on the prohibition of the performance of a designated service outside a hospital. It is apparent from the combined effect of the offence and the regulation that one purpose of the legislation is to prohibit the establishment of free-standing abortion clinics.

The majority in the Court of Appeal conceded that the province had the legislative authority to pass a law in the present form. I acknowledge that the legislation has the legal effect of preventing privatization by prohibiting the private (i.e., outside a hospital) provision of the designated services. But the legislation expressly prohibits the performance of abortions in certain circumstances with penal consequences, a subject, as I have said, traditionally regarded as part of the criminal law. In *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, a majority of this Court held provincial legislation creating an offence of arbitrary arrest or detention and a right to

relief in the form of *habeas corpus* to be suspect on its face since arbitrary arrest or detention and the availability of *habeas corpus* in such circumstances have been dealt with by Parliament in the criminal law "almost since the advent of Confederation" (at p. 240). Likewise, one of the reasons behind this Court's invalidation of a municipal by-law prohibiting street prostitution in *Westendorp v. The Queen*, [1983] 1 S.C.R. 43, was that conduct relating to prostitution has long been regarded as criminal. The present legislation, prohibiting traditionally criminal conduct, is therefore of questionable validity on its face: cf.*Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 80, *per* Estey J. (concurring in the result).

This conclusion makes it unnecessary to invoke the "colourability doctrine", but since it figured prominently in the courts below and in argument before us, I will address it briefly. The respondent attacks the legislation on the basis that it is colourable criminal law. The "colourability doctrine" in the distribution of powers is invoked when a law looks as though it deals with a matter within jurisdiction, but in essence is addressed to a matter outside jurisdiction: *Starr v. Houlden, supra*, at p. 1403; *Reference re Upper Churchill Water Rights Reversion Act, supra*, at p. 332;*Ladore v. Bennett*, [1939] A.C. 468 (P.C.), at p. 482. There is no need to invoke the doctrine in this case because while the Act states in its title and s. 2 that its aim is to prohibit the privatization of medical services, there are doubts about the legislation's *vires* on its face due to the fact that it appears to occupy ground historically occupied by the criminal law. Moreover the ordinary approach to pith and substance entitles the Court to look beyond the terms of the legislation. As Rand J. declared in the *Margarine Reference, supra*, at p. 48, a statement of purpose is at most "a fact to be taken into account, the weight to be given to it depending on all the circumstances".

In any event, the colourability doctrine really just restates the basic rule, applicable in this case as much as any other, that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation to determine what the legislature is really doing:

> [t]he legislative bodies cannot, by statutory recitals, settle the classification of their own statutes for purposes of the distribution of powers.... Selection of the aspect that matters is the exclusive prerogative of the court, and the so-called doctrine of colourability is simply an instance of this rule....

See W. R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" (1965), reprinted in Lederman,*Continuing Canadian Constitutional Dilemmas* (1981), 266, at p. 282; see also A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19*U.T.L.J.* 487, at p. 494; *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337; and *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42, at p. 76. Under either the basic approach to pith and substance or the "colourability doctrine", therefore, we need to look beyond the four corners of the legislation to see what it is really about. As stated by Laskin C.J. in*Potash*, *supra*, at p. 76, "[i]t is nothing new for this Court, or indeed, for any Court in this country seized of a constitutional issue, to go behind the words used by a Legislature and to see what it is that it is doing".

(2)Beyond the Four Corners

(a)*Duplication of Criminal Code Provisions*

Once the legal effect of legislation is ascertained, it can be compared with that of any relevant legislation passed by the other level of government. The majority of the Court of Appeal found that the present legislation effectively duplicated s. 251 (now s. 287) of the *Criminal Code*. Freeman J.A. held, at pp. 367 and 371-72, that:

> Using s. 251 as a starting point, even a cursory examination discloses that the *Medical Services Act* has an impact and effect on abortions in private clinics virtually indistinguishable from that of s. 251.
>
> ...
>
> If a distinction exists, it is a philosophical one too subtle to alter the outcome. Under either piece of legislation, a doctor who performed an abortion in a private clinic might find a policeman in the waiting room. He or she could be convicted on precisely the same evidence under either enactment.

Provincial legislation has been held invalid when it employs language "virtually indistinguishable" from that found in the *Criminal Code*: *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at p. 699; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board), supra*, at pp. 70-71 and 80; and *Starr v. Houlden, supra*, at pp. 1402 and 1405-6. However, even when the legal effect of federal and provincial legislation is virtually identical this does not necessarily determine validity, since the provinces can enact provisions with the same legal effect as federal legislation provided this is done in pursuit of a provincial head of power: *O'Grady v. Sparling*, [1960]S.C.R. 804; *Smith v. The Queen*, [1960] S.C.R. 776; *Stephens v. The Queen*, [1960] S.C.R.823; *R. v. Chiasson* (1982), 39 N.B.R. (2d) 631 (C.A.), at p. 636, aff'd [1984] 1 S.C.R. 266. The duplication of *Criminal Code* language may raise an inference that the province has stepped into the realm of the criminal law; the more exact the reproduction, the stronger the inference that this is the dominant purpose of the enactment.

The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law (*Reference re Freedom of Informed Choice (Abortions) Act*, (1985), 44 Sask. R. 104 (C.A.)) or to fill perceived defects or gaps therein (*Scowby v. Glendinning, supra*, at p. 238). The legal effect of s. 251 and the present legislation, each taken as a whole, is quite different: among other things, s. 251 made it an offence for a woman to obtain an abortion, and prescribed the burdensome "therapeutic abortion committee" system and the "life or health" criterion for a legal abortion, none of which are present in the Act and regulation; and the present legislation prohibits other services besides abortion and directly concerns public health insurance coverage. Freeman J.A. was clearly right, however, that in so far as it prohibits abortion clinics the legal effect of the medical services legislation is completely embraced by s. 251 and, had the latter provision not been struck down, the present legislation would have been redundant in that respect. Section 251 is now, of course, inoperative. The absence of operative federal legislation does not enlarge provincial jurisdiction, though. It simply means that if the provincial legislation is found to be *intra vires*, no problem of paramountcy arises.

In my opinion the overlap of legal effects between the now defunct criminal provision and the Nova Scotia legislation is capable of supporting an inference that the legislation was designed to serve a criminal law purpose. It is a piece in the puzzle which along with the other evidence may demonstrate the true purpose of the legislation.

(b)*Background and Surrounding Circumstances*

The events leading up to and including the enactment of the Act and regulation do not support the appellant's assertions that the pith and substance of the legislation relate to provincial jurisdiction over health. On the contrary, they strengthen the inference that the impugned Act and regulation were designed to serve a criminal law purpose.

(i) The Course of Events

It is clear that the catalyst for government action was the rumour and later announcement of Dr. Morgentaler's intention to open his clinic. The Crown concedes this. The respondent was clearly, as the trial judge concluded, a "mischief" against which the legislation was directed. The government knew of Dr. Morgentaler's intention to open a clinic by some time in January 1989. It responded with the March regulations, which prohibited abortions outside hospitals and "de-insured" such services. The direct and exclusive aim of this action was to stop the Morgentaler clinic and no one disputes that. The Minister of Health made this clear upon announcing the regulations:

... Cabinet has today approved two new regulations relating to the provision of abortion services.

> As all members know, it is not the policy of this government to endorse or support in any way the provision of these services through free-standing clinics or other facilities which do not fall within the category of an approved hospital.

(Nova Scotia, House of Assembly, *Debates and Proceedings* (March 16, 1989), at p. 1008.)

The March regulations singled out abortion, and the Morgentaler clinic in particular.

In May 1989, the March regulations were challenged in court by CARAL on the ground that they were unconstitutional: see *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General), supra*. Shortly before the date when that action was first to come on for hearing (June 22, 1989), and days before the close of the legislative session, the government introduced and rushed the Act through the House of Assembly. It was introduced on June 6 and received third and final reading and royal assent on June 15. The legislation was enacted in what can only be considered great haste. The Act, considered along with the services that were proposed to be designated, accomplished all the purposes of the March regulations. Yet instead of singling out abortion, it took the form of a general "floating" prohibition of the performance of medical services other than in a hospital, which would crystallize upon the designation of several services among which abortion was to be found. On July 20, 1989, the Executive Council made the *Medical Services Designation Regulation* and simultaneously revoked the March Regulations. I am in complete agreement with Freeman J.A.'s characterization of the course of events, at pp. 376-77, which I reproduce again here for convenience:

> 2. The "March regulations" were obviously aimed at Morgentaler clinics. Hon. David Nantes, Health Minister, made that clear when he announced them to the legislature .... The *Medical Services Act* was presented to the legislature following a court challenge to the March regulations. It was introduced on June 6, 1989, and passed, with the appearance of last-minute haste, the day the House closed on June 15,

1989. The March regulations were encompassed by the *Medical Services Act* and its regulation. They were revoked, no longer necessary, on July 20, 1989, the day the regulation was passed under the *Medical Services Act*.

Neither the timing nor the overlap of subject matter can be viewed as coincidental. It is reasonable to infer, as did the trial judge, that the government believed that the new legislation would accomplish the purpose of the March regulations, and intended it to do so. The March regulations were the first response to Dr. Morgentaler's announcement, and the subsequent legislation was the continuation and consolidation of that response. Together they constituted a hastily devised plan aimed directly at ridding the province of Dr. Morgentaler and his proposed clinic. The course of events suggests that this purpose was the principal purpose of the legislation and contributes to the impression that privatization and quality assurance were only incidental concerns at best.

(ii) Hansard

I have reviewed the evidence of the legislative debates on the *Medical Services Act*, and have concluded that they give a clear picture of what the members of the House, both government and opposition, saw as being in issue. Both the trial judge and Freeman J.A. referred extensively to excerpts from Hansard. The following passage from the trial judge's reasons, at pp. 300-301, fairly captures the flavour of the proceedings:

> During the debate at the time of second reading on June 12, 1989, the Opposition Health Critic, Sandra Jolly, says at page 4678:
>
> "... It is a dilemma that is both complex and emotional and the Liberal caucus of Nova Scotia agrees with the Minister of Health and Fitness that the Morgentaler clinic should not be set up in this province. I want to make that point very clear. (Applause)
>
> "The Liberal caucus is of the opinion that it is unnecessary for the clinic to come to Nova Scotia, so in that part of the bill, we do agree with the current government. We are in agreement and we have stated that right from the very beginning, that we do not feel that the clinic is required here. What concerns me is that the government has very hurriedly put together this legislation, and what they are doing is not only trying to work at keeping the Morgentaler clinic out, but we really do see it as a regression or a step backwards in regard to medical services for the people of Nova Scotia."
>
> The Opposition critic went on at length expressing concerns about the broad implications of the Bill.
>
> When the Minister of Health had a chance to respond, he states: (at page 4716):
>
> "I heard the most weak-kneed, weak-hearted support for the question of the control of free-standing abortion clinics that I heard yet in this entire session of the Legislature. It was always the Liberal caucus that has this position, we have this position. Well, I am going to make mine personal and say I, as the Minister of Health and I, as an MLA, am not supportive of free-standing abortion clinics." (Applause)

On June 5, 1989, the day before the proposed *Act* was introduced in First Reading, the Minister of Health and Fitness, in discussions concerning the budget estimates for the Department of Health said at p. 785:

"... we have adopted a policy as government that we are not going to be supportive [of free-standing abortion clinics] and we will do everything in our effort to stop them. That is what we have said and that is what we are doing, if we need more steps, if we have to take more steps, we are going to take them. I am going to be carrying out that policy at the direction of my government and I am going to be supportive of that policy."

Freeman J.A. made reference, among others, to the following excerpts, at pp. 375-76:

Paul MacEwan, member for Cape Breton Nova, said:

"So certainly, you know, if this government wants to pose as being the great champion of those that want to keep Mr. Morgentaler out of Nova Scotia, let it be noted that it was the very last thing that they thought of before they adjourned the House for the year....

"Now we are led to believe that this is a bill that is not really just to restrict the privatization of medical services, whatever that is, but it is a bill to make it impossible or to make it unlikely I suppose that the abortion clinic that Morgentaler wants to establish can be set up ..."

Following the remarks by members of opposition parties Mr. Nantes spoke again:

"I do not think you can play both sides of this issue. You cannot criticize the health care system and say, we do it all wrong and talk about clinics and all that sort of thing without coming out on this particular element. Do you support or do you not support a free-standing abortion clinic? I want you to know that not only can I speak personally, but also, I think we represent the consensus and overwhelming view of this side of the legislature. (Applause)

"I think I am even prepared to go a little further and say that I do think it represents the majority view of quite a number of members on the other side of the house, also." (Applause)

The Hansard evidence demonstrates both that the prohibition of Dr. Morgentaler's clinic was the central concern of the members of the legislature who spoke, and that there was a common and emphatically expressed opposition to free-standing abortion clinics *per se*. The Morgentaler clinic was viewed, it appears, as a public evil which should be eliminated. The concerns to which the appellant submits the legislation is primarily directed -- privatization, cost and quality of health care, and a policy of preventing a two-tier system of access to medical services -- were conspicuously absent throughout most of the legislative proceedings. They were emphasized by the Minister, Mr. Nantes, on moving second reading of the bill on June 12, 1989. This does not, however, in my view, detract significantly from the overall impression left by the debates.

Of course, one must be mindful of the limited use to which such evidence can be put, as I discussed earlier. To quote Kennedy Prov. Ct. J., at first instance, at p. 301:

> I recognize that it would be folly for a court to conclude that everything that is said in a political forum has meaning in relation to the characterization of the legislation produced by that body.

Nonetheless, I see no reason to interfere with Freeman J.A.'s assessment of the tone of the proceedings, at p. 367:

> One need not look beyond the pages of Hansard ... to realize the sense of moral outrage of representatives in the House of Assembly engendered by the prospect of Morgentaler clinics in Nova Scotia. Moral considerations attach not only to the performance of abortions, but to where they are performed and under what circumstances.

The appellant argues that even if the object of the legislation was to suppress free-standing abortion clinics on grounds of public morals, this is not fatal to provincial jurisdiction. Although there has been some recognition of a provincial "morality" power, it is clear that the exercise of such a power must be firmly anchored in an independent provincial head of power: *Rio Hotel Ltd. v. New Brunswick, supra*, at pp. 71-80; *Attorney General for Canada and Dupond v. City of Montreal*, [1978] 2 S.C.R. 770; R. Pepin, "Le pouvoir des provinces canadiennes de légiférer sur la moralité publique" (1988), 19 *R.G.D.* 865; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 364.

While legislation which authorizes the establishment and enforcement of a local standard of morality does not *ipso facto* "invade the field of criminal law" (see *Nova Scotia Board of Censors v. McNeil*, *supra*, at pp. 691-92), it cannot be denied that interdiction of conduct in the interest of public morals was and remains one of the classic ends of the criminal law, as established in the *Margarine Reference, supra*, at p. 50: see *Westendorp v. The Queen*, *supra*, and *Johnson v. Attorney General of Alberta*, [1954] S.C.R. 127, at pp. 148-49.

As Wilson J. recognized in *Morgentaler (1988), supra*, at p. 171, a woman's decision to have an abortion is "profound[ly] social and ethical;" indeed it is "essentially a moral decision" (cf. M.L. McConnell, "`Even by Commonsense Morality': *Morgentaler, Borowski* and the Constitution of Canada" (1989), 68 *Can. Bar Rev.* 765, at p. 766) and it seems clear to me that the present legislation, whose primary purpose is to prohibit abortions except in certain circumstances, treats of a moral issue.

In view of the foregoing, there is a strong inference that the purpose of the legislation and its true nature relate to a matter within the federal head of power in respect of criminal law. In order to determine whether this is its dominant purpose or characteristic, it is necessary to compare the above indicia of federal subject matter with indications of provincial objectives.

(iii) Searching for Provincial Objectives

At trial the appellant presented evidence that the Act's objectives were to prevent privatization and the consequent development of a two-tier system of medical service delivery, to ensure the delivery of high-quality health care, and to rationalize the delivery of medical

services so as to avoid duplication and reduce public costs. The principal Crown witness on these points, John Malcom, the Health Department Administrator, testified that Nova Scotia's health care system evolved around the public hospital and that there have never been private, "for-profit" medical clinics in the province. He said that Nova Scotia has a policy of equal access to health care services, and that duplication of health care services creates a two-tier system. Moreover, his evidence was that rationalization of health care services was the most cost-effective approach.

It may be that this evidence represented the policy of the government of Nova Scotia at one time. The respondent correctly pointed out, however, that this evidence was not established at trial to have been the basis for the impugned legislation. Indeed, Kennedy Prov. Ct. J. considered the evidence and found that any privatization concerns were "incidental to the paramount purpose of the legislation" (at p. 302). I see no good reason to question this finding.

First, as to the health and safety of women and the argument that the in-hospital requirement was enacted because of a concern over quality assurance, there is no evidence in the record to indicate that abortions performed in clinics like Dr. Morgentaler's pose any danger to the health of women. Counsel conceded that the quality of medical service in free-standing abortion clinics is comparable to that available in hospitals. I also note that in *Morgentaler (1988)*, *supra*, Beetz J. held that studies, experience and expert evidence established that abortions can safely be performed in clinics and that the in-hospital requirement was no longer justified from a medical point of view. Since the appellant agrees that the quality of medical service in clinics is comparable to that in hospitals, the argument that the legislation was directed at quality assurance and women's health and safety is deprived of any force.

Second, the government did not express concerns about privatization in relation to this legislation or the March regulations until the Act was moved for second reading. Again, I would adopt Freeman J.A.'s statement of the relevant facts, at pp. 376-77:

1. Privatization of medical services had not been enunciated as a government objective prior to the introduction of the *Medical Services Act*. It was not mentioned in the Throne Speech on February 23, 1989. The Throne Speech did say that a Royal Commission Report was being awaited. The order-in-council establishing the Royal Commission made no reference to privatization.

...

3. In explaining the desirability of avoiding the pitfalls of privatization, the Crown relied heavily on economic considerations. The report of the Royal Commission on Health Costs was being awaited, as the Throne Speech noted. In passing the *Medical Services Act* on June 15, 1989, the legislature elected to do so without the benefit of observations or recommendations by the Royal Commission....

On February 23, 1989, just three weeks before the adoption of the March regulations, the Throne Speech was delivered. Although it discussed health care policy, it made no mention of a policy with respect to privatization. As Freeman J.A. observes, it did refer to the Royal Commission on Health Care, which had been established in 1987 to undertake a thorough examination of the province's health care system. The Throne Speech indicated that the government was awaiting the Commission's report.

That report was delivered in December 1989. Its recommendations were inconsistent with a policy of opposing privatization. It recommended, *inter alia*, moving as many services as possible out of hospitals and minimizing the length of hospital stays, in order to reduce public health care costs. It stated, in part, that while institutions should continue to be the focal points of health care delivery in Nova Scotia:

> ... there is increasing understanding that many health care services can be provided safely and appropriately outside of institutional settings.

John Malcom, the Crown health care policy expert, testified, on cross-examination, that the directions enunciated in the report were consistent with the approach the Department of Health had been taking. The Throne Speech of 1990, delivered two months after the report, discussed the report, and again -- understandably, in light of the Commission's recommendations -- made no mention of a policy of opposing the private delivery of health care services.

Third, it is significant that there is no evidence of any prior study or consultation regarding the cost-effectiveness or quality of medical services delivered in private clinics. Again, Freeman J.A.'s words, at p. 377, are apropos and I repeat them for convenience:

> 5. The Department of Health had been engaged in discussions with the Medical Society of Nova Scotia to have more health care services delivered outside of hospitals. The Medical Society was not consulted about the *Act* prior to its introduction. The evidence suggests the *Act* runs counter to the direction of the talks.

The Medical Society was not consulted until after the legislation was introduced, and then only to discuss the services to be designated. This would not be particularly significant on its own, but, according to the evidence of Dr. Vincent Audain, who was the president of the Medical Society at the relevant time, the Medical Society had been engaged in discussions with government toward moving more health care services outside hospitals. Dr. Audain learned of the Act through a telephone message the day the bill was introduced. He testified that the Society was perturbed by this unexpected action and suspected that the motive behind it was the "abortion issue". The Society passed a resolution, which it communicated to the government, condemning the legislation on the basis that it would have a negative impact on the delivery of medical care, would add to the cost of hospital care and conflict with emerging technological advances in medicine. The legislation was seen to contradict the government's stated policy goals of moving more services outside hospitals. Furthermore, according to Dr. Audain, when the Medical Society was consulted in June 1989 as to the medical services to be designated, the restriction of abortion was non-negotiable.

Although the Crown's expert witness, Mr. Malcom, testified as to the adequacy of access to abortion in Nova Scotia, no studies or consultation on the delivery of, access to, or cost-effectiveness of abortion services in hospitals or clinics were conducted, and the Crown relied at trial on dated statistical evidence as to the adequacy of existing facilities. The appellant argued, on the basis of Mr. Malcom's opinion evidence, that quality assurance is best ensured through the Canadian Council on Hospital Accreditation. There is no evidence, however, that the government had inquired into either the quality of services provided in hospitals *vis-à-vis* clinics or the existence of standards for the delivery of abortion services.

The appellant refers to a meeting of the House of Assembly's Committee on Community Services at the abortion unit of the Victoria General Hospital ("VGH"), in Halifax,

on May 30, 1989, as evidence of prior consultation. Eighty-three per cent of all abortions performed in Nova Scotia are performed at this hospital. The topic of the meeting was the VGH's termination of pregnancy unit. The Committee met with the head of the gynaecology department, the head of the abortion unit and the charge nurse of the ambulatory care unit. The head of the abortion unit said that in his view Nova Scotia adequately met its own abortion needs and a Morgentaler clinic was unnecessary; however, he also said that such a clinic would serve all the Atlantic provinces. The three guests generally praised the efficiency and safety of existing abortion services, although it was revealed that average delays at the VGH were from a week to ten days, the medical staff willing to perform abortions at the hospital had fallen from ten to five, the quarters were cramped, and the greatest concern was a lack of information and counselling for both patients and doctors. Little hard data was provided. The meeting, indeed, seems to have provided more of a political platform for the expression of the views of the politicians on the committee than a forum for consultation and fact-finding regarding the issues the legislation was purported to address.

The lack of prior study or consultation is not raised to show that the province acted indiscreetly or ineffectually in pursuing provincial objectives, but rather to indicate that the evidence simply does not support the submission that these provincial objectives were the basis for the legislative action in question.

Another factor I consider relevant is that the "cost-effectiveness" rationale appears to be divorced from reality. Dr. Morgentaler's clinic will not represent a direct increase in the cost to the province of the provision of health care services. The parties dispute the actual cost of abortion services in and out of hospitals, but I do not propose to enter into that argument. In response to questions from the bench, appellant's counsel agreed that the fee paid to the respondent in respect of abortion services would be the same as that provided to a doctor who performed an abortion in a hospital. Consequently the establishment of an abortion clinic would not result in an increased direct cost to the province in the form of doctors' fees. The appellant's argument, as developed through Mr. Malcom's evidence, was that the duplication of services would lower the number of abortions performed in hospitals and eventually lead to an increase in the cost per procedure. The evidence did not establish, however, that the erosion in the number of abortions performed in hospitals would be great enough to have this effect.

A fifth consideration is the list of designated medical services itself. There is no apparent link between the different services. The only common denominator suggested by the appellant is that the government anticipated that these services might be attractive to private facilities. The appellant argued at trial and maintained before us, however, that the government's policy was to oppose the performance of any and all surgical procedures outside hospital. If that were the case, one might wonder why the Act did not prohibit the performance of surgical procedures generally outside a hospital. Designating nine apparently unrelated procedures does not accomplish this purpose.

If the means employed by a legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose masks the legislation's true purpose. In *Westendorp v. The Queen, supra*, Laskin C.J. held that it was specious to regard a by-law which prohibited street prostitution as relating to control of the streets, since if that were its true purpose, "it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do" (at p. 51). Here, one would expect that if the province's policy were to prohibit

the performance of any surgical procedures outside hospitals, the legislation would have simply done so.

Finally, although I put little weight on this factor, I agree with both courts below that the relatively severe penalties provided for by the Act are relevant to its constitutional characterization. Section 6(1) of the Act prescribes fines of $10,000 to $50,000 for each infraction of the Act. Kennedy Prov. Ct. J. and Freeman J.A. considered the relative severity of the fines as one indication that the fines were not simply measures to enforce a regulatory scheme, but penalties to punish abortion clinics as inherently wrong. Of course, s. 92(15) of the *Constitution Act, 1867* allows the provinces to impose punishment to enforce valid provincial law, and the mere addition of penal sanctions to an otherwise valid provincial legislative scheme does not make the legislation criminal law: *Smith v. The Queen*, *supra*, at p. 800; *Nova Scotia Board of Censors v. McNeil, supra*, at p. 697; *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, at p. 965. However, the unusual severity of penalties may be taken into account in characterizing legislation: *Westendorp v. The Queen*, *supra*, at p. 51.

D. *Conclusion*

(1) Pith and Substance

This legislation deals, by its terms, with a subject historically considered to be part of the criminal law -- the prohibition of the performance of abortions with penal consequences. It is thus suspect on its face. Its legal effect partially reproduces that of the now defunct s. 251 of the *Criminal Code*, in so far as both precluded the establishment and operation of free-standing abortion clinics. Its legislative history, the course of events leading up to the Act's passage and the making of N.S. Reg. 152/89, the Hansard excerpts and the absence of evidence that privatization and the cost and quality of health care services were anything more than incidental concerns, lead to the conclusion that the *Medical Services Act* and the *Medical Services Designation Regulation* were aimed primarily at suppressing the perceived public harm or evil of abortion clinics. The legislation meets the tests set out in the *Margarine Reference*, *supra*, and of *Morgentaler (1975)* and *Morgentaler (1988)*, *supra*. The primary objective of the legislation was to prohibit abortions outside hospitals as socially undesirable conduct, and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary. This legislation involves the regulation of the place where an abortion may be obtained, not from the viewpoint of health care policy, but from the viewpoint of public wrongs or crimes, to echo Cannon J.'s words in *Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 144 (appeal dismissed as moot in *Alberta Bank Taxation Reference, supra*, at pp. 127-28):

> I agree with the submission of the Attorney-General for Canada that this bill deals with the regulation of the press of Alberta, not from the viewpoint of private wrongs or civil injuries resulting from any alleged infringement or privation of civil rights which belong to individuals, considered as individuals but from the viewpoint of public wrongs or crimes, i.e., involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity. [Emphasis added.]

Paraphrasing what Lamer J. said in *Starr v. Houlden, supra*, at p. 1405: I find unpersuasive the argument that this legislation is solidly anchored in s. 92(7), (13) or (16) of the *Constitution Act, 1867*. There is nothing on the surface of the legislation or in the

background facts leading up to its enactment to convince me that it is designed to protect the integrity of Nova Scotia's health care system by preventing the emergence of a two-tiered system of delivery, to ensure the delivery of high-quality health care, or to rationalize the delivery of medical services so as to avoid duplication and reduce public health care costs. Any such objectives are clearly incidental to the central feature of the legislation, which is the prohibition of abortions outside hospitals as socially undesirable conduct subject to punishment.

(2) Practical Effect

This legislation will certainly restrict abortion in the sense that it makes abortions unavailable in any place other than hospitals. But will it lead to a practical restriction of access to abortion in Nova Scotia? Will the present hospital system be able and willing to accommodate all the women who desire to terminate a pregnancy, given among other things that the hospital in which 83 percent of all abortions are performed has lost half of its medical staff willing to perform the procedure? These are questions that the trial judge did not answer, and on which the parties are resolutely divided. Women may not wish to have an abortion in a hospital for any number of legitimate reasons. Clearly restrictions as to place can have the effect of restricting abortions in practice, and indeed it was the operation of s. 251 of the *Criminal Code* in restricting abortions to certain hospitals that contributed largely to its demise. One of the reasons that the former s. 251 of the *Criminal Code* was struck down in *Morgentaler (1988)*, *supra*, was that the in-hospital requirement in that section led to unacceptable delays, undue stress and trauma, and a severe practical restriction of access to abortion services. Several years of experience under s. 251 showed that the combined decisions and actions of individual anti-abortion hospital boards could render access to legal abortion non-existent in large areas of the country. Something similar may occur in Nova Scotia but that is something we have no way of predicting. One of the effects of the legislation is consolidation of abortions in the hands of the provincial government, largely in one provincially controlled institution. This renders free access to abortion vulnerable to administrative erosion.

Having applied the ordinary tests as to the matter of the present legislation, I am able to conclude that the legislation was an *ultra vires*invasion of the field of criminal law. I am able to reach this conclusion without predicting the ultimate practical effect of this legislation, and it is consequently unnecessary to adjudicate the intractable dispute between the parties as to whether this legislation will, in fact, restrict access to abortion in Nova Scotia. The appellant's evidence that the legislation will not have the practical effect of restricting abortions is simply evidence that the legislation will not actually accomplish what it set out to do. In view of my conclusion as to the pith and substance of the legislation, I am not concerned with whether the legislation is effective and such evidence can no more be used to validate *ultra vires* legislation than to invalidate *intra vires* legislation, as was held in *Reference re Anti-Inflation Act*, *supra*.

(3) Severance

Severance is infrequently applied in distribution of powers cases. The general rule is that severance is available where the remaining good part can survive independently and would have been enacted by itself (see the *Alberta Bill of Rights case, supra*, at p. 518). Here there is no "remaining good part", since the foregoing analysis has shown that the pith and substance of the entire legislation taken together, Act and regulation alike, is criminal law. As Hogg says, "[f]or constitutional purposes the statute is one law, and it will stand or fall as a whole" (*supra*, at p. 15-21); the same reasoning applies where, as here, two pieces of legislation are intertwined parts of a single legislative plan or scheme (see *Attorney General for Ontario v. Reciprocal*

Insurers, *supra*, and *Alberta Bank Taxation Reference*, *supra*), two separate provisions or enactments "are so interconnected that they must be read together as expressing a single legislative purpose" (*Switzman v. Elbling, supra*, at p. 315, *per* Nolan J.), or the regulations "are so intertwined with the authorizing statute as to stamp it with their character" (*Central Canada Potash Co. v. Saskatchewan, supra*, at p. 64).

As a result, the Act and regulation are *ultra vires* in their entirety.

(4) Disposition

For the foregoing reasons, I would answer the constitutional questions as follows:

1. Is the *Medical Services Act*, R.S.N.S. 1989, c. 281, *ultra vires* the Legislature of the Province of Nova Scotia on the ground that the Act is legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

Answer: Yes.

2. Is the *Medical Services Designation Regulation*, N.S. Reg. 152/89, made on the 20th day of July, 1989, pursuant to s. 8 of the *Medical Services Act*, R.S.N.S. 1989, c. 281, *ultra vires* the Lieutenant Governor in Council on the ground the Regulation was made pursuant to legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

Answer: Yes.

The appeal is therefore dismissed. I would award the respondent his costs of the appeal on a party and party scale.

Appeal dismissed with costs.